IS DIYA A FORM OF CLEMENCY?

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ABSTRACT

Under Islamic Sharia Law, diya is the payment of "blood money" to compensate for death or injury caused by a serious offense against a person and to provide the perpetrator relief from retaliation in kind. The question of whether diya in a murder case constitutes a form of clemency or pardon — that is, a final non-judicial relief against a death sentence, commonly granted by the executive — is an important issue that has not been sufficiently addressed by scholars of Islamic Law or by scholars of capital punishment. In this Article, I argue that while diya may bear many conceptual similarities to clemency and pardon as understood in secular common law systems, diya should not be exclusively considered through this lens for the purposes of the interpretation of international human rights law and for the future

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empirical study of Islamic law. The clemency literature may begin to help secular scholars understand diya, but as I argue, the practice of diya constitutes an amalgamation of civil and criminal law — a sui generis institution of Islamic Sharia law.

Introduction

Diya is the payment of "blood money" to a victim or a victim's family in order to compensate for death or injury caused by a serious offense against the person and also to provide the perpetrator relief from retaliation in kind under Islamic Sharia law.[1] The question of whether *diya* in a murder case constitutes a form of clemency or pardon — that is, a final non-judicial relief against a death sentence, commonly granted by the executive[2] — is an important issue that has not been sufficiently addressed by scholars of Islamic Law or by scholars of capital punishment.

In the only English-language article directly addressing the subject, published in 1998, Mary Carter Duncan opined that the *diya* practice in Saudi Arabia was indeed a form of pardon, in compliance with international law.[3] Duncan specifically argued that "[t]he fact that the ultimate decision to pardon the convicted lies in the hands of the victim's family rather than the Saudi governmental authorities is not in violation of international law, which merely requires that the condemned have the right to seek a pardon."[4] Likewise, Amnesty International and two scholars Leslie Sebba and Alison M. Madden have asserted that the power to grant

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[1] *See* Elizabeth Peiffer, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, 11 Wm. & Mary J. Women & L. 507, 517-18, 533 (2005) ("The right of the family to demand harm is mitigated by the possibility that family members can accept payment, or *diya*, for their loss instead of requiring punishment.").

[2] Austin Sarat, Mercy on Trial: What It Means To Stop an Execution 19 (2005); Leslie Sebba, *Clemency in Perspective*, *in* Criminology in Perspective: Essays in Honour of Israel Drapkin 230 (Simha F. Landau & Leslie Sebba eds., 1977). For the complete definitions of "clemency" and "pardon," see *infra* Section III.

[3] *See* Mary C. Duncan, *Playing by Their Rules: The Death Penalty and Foreigners in Saudi Arabia*, 27 Ga. J. Int'l & Comp. L. 231, 247 (1998) (citing the International Covenant on Civil and Political Rights, G.A. Res. 2200, GAOR 21, Supp. No. 16, U.N. Doc. A/6316, Dec. 16, 1966, in force March 23, 1976). Roger Hood is apparently the only author who has considered whether *diya* has actually "replaced" commutation in those jurisdictions in which it is utilized. *See* Roger Hood, The Death Penalty: A Worldwide Perspective 167 (3d ed. 2002). Note here that I have relied exclusively on English-language sources in drafting this article; as such, my inability to read Arabic or other languages of *diya*-administering jurisdictions may be considered a methodological weakness.

[4] Duncan, *supra* note 3, at 47.

clemency or pardon exists in nearly every jurisdiction in the world, presumably including those jurisdictions where *diya* is practiced.[5]

If Duncan is correct about *diya* as a form of pardon that properly observes fundamental human rights, it raises a number of concerns. This position not only opens a loophole in the structural and political mechanisms of clemency or pardon, reallocating the pardoning power to individuals who are not held to the same high standards of governmental bodies, but also provides an affirmative defense for countries, like Saudi Arabia, to argue that their individual *diya* practices are compliant with human rights standards.

If Duncan's characterization of *diya* as pardon is incorrect, there are two principal implications in the academic study of this topic and in international human rights law. First, if *diya* is not a form of clemency or pardon, then scholars considering further empirical studies of the phenomenon would not only be able to rely on the existing academic literature on clemency and pardons as the theoretical paradigm through which to interpret their observations. Adding a different theoretical paradigm, namely one centered on restorative justice or victims' rights,[6] may be more suitable to accurately understand this feature of Islamic criminal justice.

Second, as alluded to earlier, countries whose criminal justice systems provide a means to avoid the death sentence exclusively through their *diya* practice, but not through executive clemency, may be contravening Article 6(4) of the International Covenant on Civil and Political Rights (hereinafter ICCPR), which mandates signatories to guarantee the right of prisoners sentenced to death to seek "pardon or commutation" of the death sentence.[7] As I will show below, Article 6(4) may feasibly apply to all states, regardless of whether they are parties to the treaty.[8]

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[5] *See* ANTI-DEATH PENALTY ASIA NETWORK, WHEN JUSTICE FAILS: THOUSANDS EXECUTED IN ASIA AFTER UNFAIR TRIALS 31 (2011), http://www.amnesty.nl/sites/default/files/public/asa010232011en_1.pdf [hereinafter ADPAN] (relying on Amnesty International report). *See also* Leslie Sebba, *The Pardoning Power - A World Survey*, 68 J. CRIM. L. & CRIMINOLOGY 83, 84 (1977); Alison M. Madden, *Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum*, 4 HASTINGS WOMEN'S L.J. 1, 52 (1993). However, these articles may have been suggesting that the power to pardon exists *in some way, shape or form* in nearly every country of the world, rather than suggesting that the power of *executive* pardon exists within every country of the world, for all possible capital crimes.

[6] *See* discussion *infra* Section V.

[7] International Covenant on Civil and Political Rights, art. 6(4), Dec. 16, 1966, 1057 U.N.T.S. 407. ("Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence may be granted in all cases.") [hereinafter ICCPR].

[8] *See infra* note 115. As will be discussed below, Article 6(4) may be passed into customary international law, which would in effect become an international obligation on all states.

In this Article, I argue that the characterization of *diya* as pardon is incorrect, as shown through a doctrinal analysis of the similarities and differences between *diya*, on one hand, and clemency and pardon, on the other. While *diya* may bear many similar characteristics to clemency and pardon as understood in secular common law legal systems, particularly in terms of the effects of a reduced punishment, *diya* should not exclusively be considered through this lens for the purposes of the interpretation of international human rights law as well as for the future empirical study of Islamic law. The differences in the kinds of participants involved in the *diya* practice as well as the structural nuances in the process require a closer, more careful examination. The clemency literature may begin to help secular scholars understand *diya*, but as I argue, the practice of *diya* clearly constitutes an amalgamation of civil and criminal law[9] — that is, a *sui generis* institution of Islamic Sharia law.

The Article proceeds as follows: Part I provides a background on *diya*, briefly discussing the pre-Islamic history of *diya* as well as its position within classical Islamic law. Part II summarizes the contemporary practices of *diya* and the trends in several countries that have incorporated Sharia law. Part III explains the doctrines of clemency and pardon, providing definitions for the ambit of synonymous terms. Part IV briefly summarizes the decision-making procedures behind clemency and pardon. Then comparing the two doctrines, Part V clarifies the similarities and (fatal) differences between *diya* and clemency. This Article then concludes by exploring the implications in human rights law and academic discourse, and also offers a more appropriate alternative for analyzing *diya* in future academic studies.

I. Background on *Diya*

As discussed above, *diya* (also spelled *diyya, diyah,* or the plural form *diyat*) is the payment of "blood money" to the victim or victim's family of a violent crime. For the purpose of this analysis, it is important to first understand the history of *diya* and its development under Islamic law.

A. *Diya as a Pre-Islamic Tribal Tradition*

Diya is a pre-Islamic tribal custom that has been integrated into classical Islamic Sharia law.[10] During the ancient times of pre-Islamic Arabia, the relations between tribesmen were characterized as "hostile," and the main reason for this hostility was due to the practice or exercise of "*personal revenge* for homicide . . . [which] was taken not only against the

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[9] *See* discussion and accompanying text *infra* note 77.

[10] Adrien Katherine Wing, *Custom, Religion and Rights: The Future Legal Status of Palestinian Women*, 35 Harv. Int'l L.J. 149, 154 (1994) (citing Mohammad Hashim Kamali, Principles of Islamic Jurisprudence 285 (1991)).

culprit, but also against the culprit's tribesmen."[11] *Diya*, which often came in the form of payment with chattel,[12] emerged as the peaceful alternative to tribes' acts of revenge.[13] The paternal relatives of the murderer were obligated to pay *diya* to the heirs of the murdered member of the other tribe; if they could not or did not pay, then "the relatives of the victims [were] entitled to vengeance."[14] In those specific instances, however, *diya* "was often paid by the entire tribe from a special fund,"[15] and thus, through the tribe's support, "the murderer was exempted from criminal prosecution even if his relatives were unable to provide compensation for murder."[16]

The rationale behind *diya* was rooted in both fear and administrative difficulties. As one scholar observed, "entire clans and tribes could perish in a blood feud: the killing of one man entailed the killing of another in retaliation, so that one could not estimate the number of potential victims."[17] In light of the merits of *diya* — of both preventing inter-tribal warfare and unifying various tribes — *diya* was integrated into Islam.[18] The Koran specifically provides that: "Never should a believer kill a believer; except by mistake, and whoever kills a believer by mistake it is ordained that he should free a believing slave, and pay *blood money* to the deceased's family, unless they remit it freely."[19] As such, *diya* is men-

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[11] FARRUKH B. HAKEEM ET AL., POLICING MUSLIM COMMUNITIES 14 (2012).

[12] M.J.L. HARDY, BLOOD FEUDS AND THE PAYMENT OF BLOOD MONEY IN THE MIDDLE EAST 37 (1963).

[13] HAKEEM ET AL., *supra* note 11, at 14.

[14] Renat I. Bekkin, *Islamic Insurance: National Features and Legal Regulations*, 21 ARAB L. Q. 3, 3-4, 13 (2007).

[15] *See id.* A renowned scholar in the field, Joseph Schact, described the details of the *diya* tribal practices: "In most cases it is not the culprit himself but his '*dkila* who must pay the blood-money. The payment is made in three yearly installments, with the provision that each member of the '*dkila* has to pay not more than 3 or 4 *dirhams* altogether. If the amount is less than one-twentieth of the blood-money, not the '*dkila* but the culprit himself must pay. The '*dkila* consists of those who, as members of the Muslim army, have their names inscribed in the list (*diwan*) and receive pay, provided the culprit belongs to them; alternatively, of the male members of his tribe (if their numbers are not sufficient, the nearest related tribes are included); alternatively, of the fellow workers in his craft or his confederates; and the '*dkila* of the client, both in the sense of a manumitted slave and of a convert to Islam, is his patron and the '*dkila* of his patron. This institution has its roots in the pre-Islamic customary law of the Bedouins, where the culprit could be ransomed from retaliation by his tribe, and the inclusion of confederates and of clientship seems to be ancient Arabian too." JOSEPH SCHACT, AN INTRODUCTION TO ISLAMIC LAW 186 (Oxford University Press, 1964).

[16] Bekkin, *supra* note 14, at 13.

[17] *Id.* ("By providing protection to one of its members, the tribe not only guaranteed his safety but also provided the relatives of the victim with his debt.").

[18] *Id.*

[19] *Id.* (citing Koran 4:92) (emphasis added).

tioned throughout Islamic jurisprudence, but it is principally regulated by Islamic criminal law.[20]

B. *Diya in Classical Islamic Law*

As an initial matter, I must provide an overview of the structure of the Islamic legal system, which starkly differs from common law and civil law systems.[21] Under the Islamic system, the Sharia is the code of conduct for Muslims, governing both private and public spheres, and the Sharia is "neither subject to development through a hierarchy of judicial decisions nor developed primarily by written law" but is based on "divine revelation."[22] The main sources of Islamic law are the Koran,[23] the most important; the *Sunna* (sayings and practice of the Prophet);[24] the *ijma* (consensus of Muslim jurists); and the *qiyas* (juristic analogy).[25] Additional supplementary sources include *istihsan* (equity), *maslaha mursalah* (consideration of public interest) and *urf* (custom and usage).[26]

While the principles of Sharia criminal law share some similarities with those underlying secular common law, namely that the accused is presumed innocent until proven guilty and that the standard of proof is beyond a reasonable doubt,[27] the structure of the Islamic criminal legal system greatly differs from the common law criminal systems, in which substantive law, evidentiary law, and sentencing law are largely independently developed, as separate legal doctrines.[28]

Under Islamic criminal law, "the definition of crimes, their proof and the punishments that are available are intimately related," and "[t]he most important determinant of the legal rules that govern an Islamic

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[20] *Id.*

[21] *See* Hossein Esmaeili & Jeremy Gans, *Islamic Law Across Cultural Borders: the Involvement of Western Nationals in Saudi Murder Trials*, 28 DENV. J. INT'L L. & POL'Y 145, 146-47 (2000).

[22] *Id.* at 147 (citing RENE DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 456 (John E. C. Brierley trans., 3d ed. 1985)).

[23] HAKEEM ET AL., *supra* note 11, at 12. The Koran is considered to be the word of God, containing about thirty equal parts, into 110 chapters and 6241 verses. *Id.*

[24] Azizah al-Hibri extensively described aspects of the Prophet's personality and character to include *clemency*, as well as piety, veracity, justice, liberty, humility, charm, excellent judgment, happy memory, cheerful temper and inoffensive behavior towards his friends. Azizah Y. al-Hibri, *Islamic and American Constitutional Law; Borrowing Possibilities or a History of Borrowing*, 1 U. PA. J. CONST. L. 492, 500 n.43 (1999). However, the term clemency in this analysis has a particular political meaning. *See infra* Section IV.

[25] Esmaeili & Gans, *supra* note 21, at 147-48 (citing Farooq Hassan, *The Sources of Islamic Law*, 76 PROC. OF ANN. MEETING - AM. SOC. OF INT'L L. 65 (1982)).

[26] *Id.* (citing MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE CHS. 12-14 (1991)).

[27] Duncan, *supra* note 3, at 238-39.

[28] Esmaeili & Gans, *supra* note 21, at 152.

criminal trial is the type of punishment under consideration."[29] Classical Islamic jurisprudence has three broad categories of crimes based on the types of available punishments, the last of which is the main focus of this Article: *hudud, tazir,* and *qisas.*[30]

First, *hudud* involves fixed punishments for crimes of theft, robbery, apostasy, alcohol consumption, unlawful sexual intercourse and false allegations of unlawful sexual intercourse.[31] These crimes are considered threats to Islam, as set by the Koran or *Sunna*,[32] and hence, forgiveness by the victim or by the ruler is disallowed.[33] For these crimes, forgiveness can only come from God.[34] Considered the most serious of the three categories of crimes,[35] punishment for *hudud* is "the right of Allah"[36] and thus cannot be altered.[37] As such, the *diya* practice does not apply in the context of *hudud*, even in the case of crimes warranting capital punishment.[38]

Second, *tazir* involves discretionary punishment for crimes of embezzlement, perjury, sodomy, usury, breach of trust, abuse, bribery, and other similar transgressions against God.[39] No punishment is specifically prescribed for such crimes in the Koran or *Sunna*, and thus, Sharia judges and authorities usually have discretion over the punishment.[40]

Third, *qisas*, which is the focus of this Article, means "retaliation in kind,"[41] and it covers criminal acts of corporal violence, such as murders

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[29] *Id.*

[30] MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 73 (Vaughan Lowe ed., 2005); William A. Schabas, *Islam and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 223, 231-32 (2000) [hereinafter Schabas, *Islam*].

[31] BADERIN, *supra* note 30, at 145.

[32] Susan C. Hascall, *Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?,* 4 BERK. J. MIDDLE E. & ISLAMIC L. 35, 55 (2011).

[33] Mutaz M. Qafisheh, *Restorative Justice in the Islamic Penal Law: A Contribution to the Global System,* 7(1) INT'L J. CRIM. JUST. SCI. 487, 491 (2012).

[34] *See id. See also* Mashood A. Baderin, *Effective Legal Representation in "Shari'ah" Courts as a Means of Addressing Human Rights Concerns in the Islamic Criminal Justice System of Muslim States,* 11 Y.B. OF ISLAMIC & MIDDLE E. L. ONLINE 135, 145 (2005); Evan Gottesman, *The Reemergence of Qisas and Diyat in Pakistan*, 23 COLUM. HUM. RTS. L. REV. 433, 444 (1991).

[35] Hascall, *supra* note 32, at 54 (citing NAGATY SANAD, THE THEORY OF CRIME AND CRIMINAL RESPONSIBILITY IN ISLAMIC LAW: SHARI'A 35, 55 (1991)).

[36] *Id.* (citing A.Q. OUDAH SHAHEED, CRIMINAL LAW OF ISLAM 86 (S. Zakir Aijaz trans., Adam Publishers & Distributors 2010)).

[37] *See id.*

[38] *See* LUQMAN ZAKARIYAH, LEGAL MAXIMS IN ISLAMIC CRIMINAL LAW: THEORY AND APPLICATIONS 99 (2015).

[39] Hascall, *supra* note 32, at 55.

[40] BADERIN, *supra* note 30, at 73.

[41] Hascall, *supra* note 32, at 56 n.93 ("[T]he term *qisas* comes from the Arabic word *assa*, which can mean either 'he cut it,' or 'he followed his track in pursuit.'").

or intentional killings, non-fatal bodily injuries,[42] and unintentional killings.[43] *Qisas* can be divided into two types: (1) homicides and (2) bodily wounds or injuries. Unlike *qisas* for homicide, *qisas* for bodily injuries is not clearly prescribed by the Koran or Hadith, and thus the punishment can vary — usually involving *diya* or *kaffara* (penance).[44] In bodily injury cases, the victim or the victim's family may pardon the culprit, which is considered "the best solution according to the [Koran] 2:178."[45]

In the context of intentional killings, or murder, which is the primary focus here, there are two types of available punishments: (1) the death penalty, imposed by Sharia courts as a form of atonement[46] and carried out by the state rather than the victim;[47] or (2) the payment of *diya*, if insisted by the victim's family, which relieves the murderer of the retaliatory punishment of death, though he or she still faces the possibility of serving a prison sentence in some jurisdictions.[48]

In the latter case, the family of the victim that forgoes revenge gains in standing and in the afterlife,[49] and receives monetary compensation for the family's loss. *Diya*, as a pecuniary response to murder, is generally supported by the state,[50] and it is comparable to a settlement in a wrongful death tort action, precluding the aggrieved party from fully enforcing their civil right in court.[51]

The actual amount of *diya* is set under classical Sharia law doctrine as the value of "a hundred camels" for a free Muslim male, a value which is reduced if the victim was a woman, a non-Muslim, or a slave, under the

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[42] Ahmad Abd al-Aziz al-Alfi, *Punishment in Islamic Criminal Law, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 230 (M. Cherif Bassiouni ed., 1982).

[43] Mahmoud Cherif Bassiouni, *Quesas Crimes, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 205-06 (M. Cherif Bassiouni ed., 1982); Sukvir Gossal, *Human Rights and the Death Penalty: A Comparative Analysis of International and Islamic Law*, 12(1) COV. L.J. 16, 22 (2007).

[44] HAKEEM ET AL., *supra* note 11, 15-17.

[45] Bekkin, *supra* note 14, at 14 n. 34.

[46] *See generally* ANN BLACK ET AL., MODERN PERSPECTIVES ON ISLAMIC LAW (2013); *see also* Khaled Abou El Fadl, *The Death Penalty, Mercy, and Islam: A Call for Retrospection*, *in* RELIGION AND THE DEATH PENALTY (Erik C. Owens et al. eds., 2004); CHAWKAT MOUCARRY, THE SEARCH FOR FORGIVENESS: PARDON AND PUNISHMENT IN ISLAM AND CHRISTIANITY (2004); Robert Postawko, *Towards an Islamic Critique of Capital Punishment*, 1 UCLA J. ISLAMIC & NEAR E.L. 269 (2002); William A. Schabas, *Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court*, 2 J. INT'L CRIM. JUST. 1082 (2004) [hereinafter Schabas, *Twins*].

[47] al-Alfi, *supra* note 42, at 232.

[48] *See infra* Section II(B) and accompanying text.

[49] Gossal, *supra* note 43, at 20; Peiffer, *supra* note 1, at 517, 536.

[50] Bassiouni, *supra* note 43, at 209.

[51] MATHIAS ROWE, ISLAMIC LAW IN PAST AND PRESENT 140 (2015).

different schools of Islamic legal thought:[52] *Hanafi, Maliki, Shafi'i, Hanbali* and *Shia*.[53] All five schools prescribe that a woman's blood price should be half that of a man's, though they vary on the value of a non-Muslim.[54] The final sum in settlement can be paid by the perpetrator himself, his heirs or family, or the perpetrator's neighbors or tribe.[55] As such, similar to the pre-Islamic times of warring tribes, the principle of *diya* continues to "embod[y] a concept of collective responsibility"[56] in intentional homicide cases, involving the victim's family, the perpetrator, and the state.

II. The Contemporary Practice of *Diya*

At this point, I must also make a distinction between *diya* as a pre-Islamic tribal tradition,[57] *diya* in classical Islamic law jurisprudence, and *diya* as a practice in modern Islamic criminal justice systems. To do so, I will briefly discuss the relevant countries that have incorporated Sharia criminal law including the *diya* practice, and then I will examine the current trends of *diya* practices in these areas.

A. *The Relevant Countries*

As opposed to the historical application of *diya*, my primary interest is the practical application of *diya* in the thirteen present-day jurisdictions of the Middle East, Africa and South Asia that are active retentionists of the death penalty: Iran, Saudi Arabia, Yemen, United Arab Emirates, Kuwait, Bahrain, Sudan, northern Nigeria, Somalia, Libya, Afghanistan,

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[52] Hakeem et al., *supra* note 11, at 8. ("There were different schools of thought and each school was based on the writings of scholars dealing with different aspects of Islamic criminal law . . . different interpretation of the Quran and Hadith, views of good and evil, and the varied socioeconomic and political circumstances.").

[53] Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century 50-52 (2006); Noreen Malone, *How does blood money work?*, Slate (Sept. 18, 2015), http://www.slate.com/articles/news_and_politics/explainer/2009/03/how_does_blood_money_work.html.

[54] Hanafites and Hanbalites hold that a non-Muslim's blood price should be the same as that of a Muslim, whereas for the Malikites, a non-Muslim's price is one-half and for the Shafi'ites one-third, with the Shiites, setting an even lower threshold. *See* Peters, *supra* note 53, at 51.

[55] Bassiouni, *supra* note 43, at 207; Qafisheh, *supra* note 33, at 489. For an example of multiple *diya* claims being paid by a charity, see *Charity Group Pays Diya to Victim's Family*, Emirates 24/7 News (Sept. 18, 2015, 9:38 PM), http://www.emirates247.com/news/emirates/charity-group-pays-diya-to-victim-s-family-2014-08-05-1.558507.

[56] Bassiouni, *supra* note 43, at 207.

[57] *See* Siti Zubaidah Ismail, *The Modern Interpretation of the Diyat Formula for the Quantum of Damages: The Case of Homicide and Personal Injuries*, 26 Arab L.Q. 361, 364-67 (2012).

Pakistan, and Jordan.[58] Of these countries, Saudi Arabia, Pakistan and Iran are the three Muslim countries that employ *diya* and perform the greatest number of executions.[59]

All thirteen of these jurisdictions use the death penalty as a judicial punishment for murder but concurrently provide the murderer the option to pay *diya* to the victim's next of kin to escape execution.[60] Given the vast geographical spread of these societies, and their respective political and economic conditions and cultural norms, the modern law of *diya* is complex. The modern law of *diya* also results from the interplay between tribal traditions, classical Islamic jurisprudence and the colonial influences evident in each of the jurisdictions listed.[61] Thus, an appreciation of classical Sharia law doctrine is only the first step to a complete understanding of how *diya* is practiced today.[62]

B. *Trends in Modern Diya Practice*

An examination of the countries' current practices indicates that the right to *diya* payment for *qisas* crimes remains with the victim's heirs — that is, the victim's family is still the right-holder, who can insist on choos-

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[58] For the most recent list of countries that still exercise the death penalty, see Simon Rogers & Mona Chalabi, *Death penalty statistics, country by country*, THE GUARDIAN (Sept. 18, 2015), http://www.theguardian.com/news/datablog/2011/mar/29/death-penalty-countries-world (relying on data from Amnesty International); *see also* Ismail, *supra* note 57, at 377-78 (discussing Saudi Arabia, Kuwait, Pakistan, Sudan, Jordan, and Palestine); *see generally* DEATH PENALTY WORLDWIDE, http://www.deathpenaltyworldwide.org. Although in several of these countries the internationally-recognized government does not control large swathes of territory due to a present state of civil war or insurrection (Yemen, northern Nigeria, Somalia, Afghanistan, and Libya), this fact does not bear on a largely doctrinal study of *diya* laws.

[59] Ghassem Ghassemi, *Criminal Punishment in Islamic Societies: Empirical Study of Attitudes to Criminal Sentencing in Iran*, 15 EUR. J. CRIM. POL'Y RES. 159, 164 (2009).

[60] In the case of an indigent defendant, the payment may be made by the defendant's supporters, such as a family member, the perpetrator's tribe, the wider community or even the perpetrator's home government in the case of a foreign national. *See* al-Alfi, *supra* note 42, at 230; Malone, *supra* note 53; Nesrine Malik, *Paralysis or Blood Money? Skewed Justice in Saudi Arabia*, THE GUARDIAN (Apr. 5, 2013).

[61] Ian Cunnison, *Blood Money, Vengeance and Joint Responsibility: The Baggara Case*, *in* ESSAYS IN SUDAN ETHNOGRAPHY 110 (Ian Cunnison & Wendy James eds., 1972); Hascall, *supra* note 32, at 61; Ismail, *supra* note 57, at 364.

[62] In several countries, including those where *diya* is a part of the state criminal law (Pakistan, Jordan) and those where it is not (Iraq, Egypt), informal *diya* settlements are nonetheless arranged between members of Bedouin and other minority tribes to preclude the reporting or effective prosecution of the crime, and thus its prosecution by the state. *See* Cunnison, *supra* note 61, at 108; Gottesman, *supra* note 34, at 457; Malone, *supra* note 53.

ing *diya* over execution.[63] However, the State may still encourage such actions as well.[64]

Looking at the various State practices in greater detail, the amount of *diya* is evidently no longer confined to "a hundred camels" as set by the classical Sharia doctrine, but can be set in a number of different ways. The *diya* amount can be set by the Sharia judge, which is a practice used in Saudi Arabia, Pakistan, and UAE.[65] Within this practice, the degree of judicial authority over the price, and the considerations behind setting a price also vary per jurisdiction.[66] For instance, Saudi Arabia's supreme judicial authority tripled the *diya* price for a male Muslim in Saudi Arabia and set it to around $106,666 for premeditated murder in 2011.[67] The judicial system of the UAE set the equivalent *diya* price to $54,450, and an UAE judge stated that the compensation amount depends on the lawyers' demonstration to the judge "the extent of the damages."[68] For judges in Pakistan, some of the considerations in setting a price include the "seriousness of the crime, the intent of the offender, the financial status of the victim, and the status and resources of the offender."[69]

Another practice of setting the *diya* price is through negotiation between the perpetrator and the victim's heirs.[70] For instance, in Pakistan, the Qisas and Diyat Law now provides the legal heirs of the deceased the right to make a compromise with the offender, even at the last moment before execution of sentence.[71] Iran also provides this right to a victim's family members, which in practice may have contributed to

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[63] Hascall, *supra* note 32, at 60.

[64] BADERIN, *supra* note 30, at 73.

[65] *See* Bassiouni, *supra* note 43; Gottesman, *supra* note 34, at 445, 448-49; AMNESTY INTERNATIONAL, PAKISTAN: INTRODUCTION OF NEW FORMS OF CRUEL PUNISHMENT 4, AI-Index ASA 33/03/91 (NGO Report, March 1991).

[66] *See* BADERIN, *supra* note 30, at 140-41.

[67] *Saudi Arabia Triples Blood Money to SR300,000*, EMIRATES 24/7 NEWS (Sept. 11, 2011), http://www.emirates247.com/news/region/saudi-arabia-triples-blood-money-to-sr300-000-2011-09-11-1.417796.

[68] Shireena Al Nowais, *UAE's Compensation system is more reasonable than those in the West, says expert*, THE NATIONAL (Nov. 16, 2014), http://www.thenational.ae/uae/courts/uaes-compensation-system-is-more-reasonable-than-those-in-the-west-says-expert.

[69] *See* Gottesman, *supra* note 34, at 445.

[70] *Id.* at 434, 441-42, 450; Guoping Jiang et al., *Community Involvement in Crime Prevention and Judicial Process: The Experience of Saudi Arabia*, 8 BRIT. J. CMTY. JUST. 49, 50 (2010); Qafisheh, *supra* note 33, at 491.

[71] *See* Waseem Ahmad Shah, *Pros and Cons of Qisas and Diyat Law*, DAWN (Sept. 16, 2013), http://www.dawn.com/news/1043236/. Legal heirs of the deceased have the right under Section 309 and 310. *See also* Gottesman, *supra* note 34, at 448-49 (for Pakistan).

the sparing of 358 Iranians from execution in 2013.[72] The government also can negotiate on behalf of the perpetrator, a practice used in the UAE.[73] Alternatively, a mediator can negotiate the amount.[74]

In combination with the methods described above, the *diya* price can also be subject to a statutory minimum or maximum.[75] For instance, in Saudi Arabia, the statutory minimum payment for a Muslim man is around $26,000 and a non-Muslim about half of that amount.[76] In Iran, the *diya* is capped at $62,500 for a Muslim man in 2012.[77]

Although it is a practice with no classical Sharia Law backing, certain jurisdictions also impose a sentence of imprisonment on the perpetrator after the *diya* settlement.[78] For instance, in Saudi Arabia, the usual punishment after a *diya* payment is a prison term of five years or less.[79] In Pakistan, the maximum sentence of imprisonment is fourteen years, or ten years for "honor killings"; however, neither provision is often used, resulting in many perpetrators walking free after the settlement.[80] In Iran, Article 612 of the 1996 Islamic Penal Code allows for three to ten years' imprisonment — effectively becoming a *tazir* punishment in such circumstances.[81] Certain northern Nigerian states have imposed substituted punishments of one hundred lashes and a year of imprisonment.[82]

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[72] Agence France Presse, Tehra, *Iran: 'Blood money' saved 358 from death penalty,* Al Arabiya News (Apr. 28, 2014), http://english.alarabiya.net/en/News/middle-east/2014/04/28/-Blood-money-saved-358-from-death-penalty-Iran.html.

[73] U.S. Dep't of State, Bureau of Democracy, H.R., & Lab., United Arab Emirates 2013 Human Rights Report: 8-9 (2014), http://www.state.gov/j/drl/rls/hrrpt/2013/nea/220380.htm.

[74] Malone, *supra* note 53.

[75] Ebrahim Ghodsi, *Murder in the Criminal Law of Iran and Islam*, 68 J. Crim. L. 160, 164 n.11 (2004) (for Iran); Qafisheh, *supra* note 33, at 490.

[76] *See* Malone, *supra* note 53 (for Saudi Arabia, Iran).

[77] Arzoo Osanloo, *When Blood Has Spilled: Gender, Honor, and Compensation in Iranian Criminal Sanctioning*, 35 PoLAR 308, 317 n.18 (2012).

[78] *See* Gottesman, *supra* note 34, at 442.

[79] *See* Duncan, *supra* note 3, at 239; John Daniszewski, *Judging the Divine Law of Islam*, L.A. Times (Jan. 31, 1997), http://articles.latimes.com/1997-01-31/news/mn-24054_1_divine-law.

[80] Moeen H. Cheema, *Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law*, 60 Am. J. Comp. L. 875, 900 (2012).

[81] *Islamic Penal Code of the Islamic Republic of Itan – Book Five*, Iran Hum. Rts. Documentation Ctr. (July 18, 2013), http://iranhrdc.org/english/human-rights-documents/iranian-codes/1000000351-islamic-penal-code-of-the-islamic-republic-of-iran-book-five.html.

[82] *See* J.N. Matson, *The Common Law Abroad: English and Indigenous Laws in the British Commonwealth*, 42 Int'l & Comp. L.Q. 753, 775 (1993); *see also* Gunnar J. Weimann, *Judicial Practice in Islamic Criminal Law in Nigeria*, 14 Islamic L. & Soc'y 240, 249 (2007) (asserting that such substituted punishments would only be enforced in cases of *Afw*, rather than where *diya* was paid).

In the UAE, the equivalent *tazir* penalty is a minimum of three years and a maximum of seven years imprisonment.[83]

In the vast majority of modern cases where the perpetrator is spared execution, the *diya* continues to be paid; though, importantly, it is also possible for the heirs of the victim to refuse to accept *diya* and instead remit the offender's punishment as a compassionate act of religious charity, known as *afw*.[84] The consequences of accepting the payment or granting *afw* by the victim's next of kin are that the perpetrator will either walk free or serve a term of imprisonment in lieu of retaliation, as described above.[85] Otherwise, if neither *diya* nor *afw* is accepted, then the murderer can be executed by hanging, as in Iran, Afghanistan, Pakistan, Sudan, Nigeria, Jordan; beheading, as in Saudi Arabia; or firing squad, as in Yemen, the UAE, Afghanistan, Nigeria, Kuwait, Bahrain, Somalia, Libya.[86]

Both *diya* and *afw* are acts by the victim's heirs that prevent retaliatory punishment from being carried out by the state.[87] However, Islamic law scholars are divided over whether *all* grants of *diya* first incorporate *afw*. Viewing the process as two separate acts — forgiveness, followed by payment — casts the payment as a form of *compensation* or restitution, rather than as a criminal punishment, such as a fine.[88] However, scholars such as M. Cherif Bassiouni, Ghaouti Benmelha, Gunnar J. Weimann and Evan Gottesman instead view *diya* solely as a punitive measure, a form of deterrence for future crimes.[89]

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[83] *See United Arab Emirates – Retentionist,* HANDS OFF CAIN (2015), http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=23&nome=united%20arab%20emirates (last visited Sept. 14, 2015).

[84] *See* Duncan, *supra* note 3, at 239 & n.36; Gottesman, *supra* note 34, at 434; Qafisheh, *supra* note 33, at 494; Ben Hubbard, *Saudi Justice: Harsh but Able to Spare the Sword*, N.Y. TIMES (Mar. 22, 2015), http://www.nytimes.com/2015/03/23/world/middleeast/a-murder-a-death-sentence-and-the-unpredictable-nature-of-saudi-justice.html?_r=0.

[85] *See* al-Alfi, *supra* note 42, at 227; Bassiouni, *supra* note 43, at 209; Gottesman, *supra* note 34, at 451.

[86] *See* Gottesman, *supra* note 34, at 442, 451; Shah, *supra* note 71 (for Pakistan). *See generally* DEATH PENALTY WORLDWIDE, *supra* note 58.

[87] *See* Gottesman, *supra* note 34, at 442.

[88] *See* M.J.L HARDY, BLOOD FEUDS AND THE PAYMENT OF BLOOD MONEY IN THE MIDDLE EAST 46 (1963); *see also* al-Alfi, *supra* note 42, at 230. The fact that *diya* is primarily compensatory, rather than punitive, explains why different sums were traditionally payable for men and women and slaves and non-slaves, as a measure of lost economic output in the early Islamic era. *See* Mohsen Rahami, *Islamic Restorative Traditions and Their Reflections in the Post Revolutionary Criminal Justice System of Iran*, 15 EUR. J. CRIME CRIM. L. & CRIM. JUST. 227, 243 (2007).

[89] *See* Ghaouti Benmelha, *Ta'azir Crimes, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM 224 (Mahmoud C. Bassiouni ed., 1982); Bassiouni, *supra* note 43, at 206; Gottesman, *supra* note 34, at 447; Gunnar J. Weimann, *Judicial Practice in Islamic Criminal Law in Nigeria*, 14 ISLAMIC L. & SOC'Y 240, 254 (2007).

The conceptual difference between *afw* and *diya*, as forgiveness versus compensation, has some significance for the way academics think about *diya*, as distinct from secular notions of clemency and pardons. I explore this area in further detail below. Specifically, I consider the scope and substance of academic literature regarding the nature of clemency and pardon grants, and how these are understood in secular legal systems.

III. Defining "Clemency" and "Pardon" Grants

In death penalty jurisdictions, once a defendant is sentenced to death, his or her last remaining procedural outlet is a grant of clemency or pardon from the executive.[90] To help define the terms "clemency" and "pardon," I will first provide a brief history of the concepts and then explain the current varieties within the ambit of clemency.

A. *A Brief Background to the Clemency Power*

The clemency power originates from the sovereign power of absolute monarchs to remit punishment,[91] and it can be traced back to Roman times.[92] The concept formally developed in England through the King and his exercise of granting clemency, which "endear[ed] the sovereign to his subjects, and contribute[ed] . . . to root in their hearts that filial affection, and personal loyalty, which [were] the sure establishment of a prince."[93] Parliament officially recognized but simultaneously limited the clemency power by enacting the 1700 Act of Settlement.[94] In light of the English clemency practices, the drafters of the U.S. Constitution also vested in the President the power to grant reprieves and pardons.[95]

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[90] *See* Sarat, *supra* note 2, at 19; Sebba, *supra* note 2, at 230. In this section, I do not consider clemency or pardons granted in order to lessen a sentence of imprisonment (which is possible through executive action), but rather the conversion of a death sentence to something less than death.

[91] *See* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 Tex. L. Rev. 569, 589 (1991). David Garland describes sovereignty as the "claimed capacity to rule a territory in the face of competition and resistance from external and internal enemies." *See also* David Garland, *The Limits of the Sovereign State*, 36 Brit. J. Criminology 445, 448 (1996).

[92] Kobil, *supra* note 91, at 584 ("The judicious use of clemency was an effective means of quelling discord among the subjugated inhabitants of the Roman Empire. The Roman practice of disciplining mutinous troops through decimation — the killing of every tenth soldier — rather than executing an entire army of wrongdoers, is another example of using clemency in a politically expedient fashion, maintaining discipline while preserving resources that could prove useful to the state."). For a philosophical history of punishment and pardon, see Kathleen Dean Moore, Pardons: Justice, Mercy, and the Public Interest (1989).

[93] Kobil, *supra* note 91, at 584.

[94] *Id.*

[95] *Id.*

Throughout its history, clemency has been considered "an extraordinary remedy that [could] be extended for virtually any reason, whenever mercy, expediency, or personal whim dictated."[96] Though more nuanced now, the clemency power continues to subsist in modern constitutional monarchies and republics.[97] Nearly every retentionist state worldwide contains a provision for a grant of clemency or pardon in capital cases, including many of the jurisdictions that also practice *diya*.[98]

B. *Types of Clemency*

Under modern American usage, the term "clemency" denotes the conversion of a death sentence into a sentence of imprisonment, while a "pardon" or "unconditional pardon," which also removes the death sentence, grants an unconditional release from prison,[99] sometimes accompanied by a complete erasure of criminal responsibility[100] as well as a restoration of certain privileges.[101]

"Clemency" is sometimes viewed as synonymous for "all manifestations of mercy"[102] or leniency. To avoid the terminological confusion suggested by scholar Daniel T. Kobil,[103] and to view "clemency" and "pardon" in a broader context, it is important to note that throughout the relevant literature, a variety of terms for "leniency" are commonly used in the same context. This variety reflects the broad array of nuanced

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[96] *Id.* at 578-79. Also, Kobil notes that "[h]istorically, the grounds for dispensing clemency have been limited only by the ingenuity of the human imagination. . . . For instance, pardons have been granted to condemned criminals where they have held fast to the bridle, saddle, or other part of the horse carrying certain clerics or royalty into a particular city for the first time; where a woman has run naked three times through the town or around the prison where the prisoner awaited execution; and where the prisoner has earned clemency by executing her fellow prisoners." *Id.* at 578 n.52.

[97] *See generally id.*

[98] ADPAN, *supra* note 5, at 31; Madden, *supra* note 5; Sebba, *supra* note 2.

[99] RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 838 (2d ed. 2001); LOUIS J. PALMER, JR., ENCYCLOPEDIA OF CAPITAL PUNISHMENT IN THE UNITED STATES 110 (2001).

[100] Elkan Abramowitz & David Paget, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 138 (1964); James R. Acker & Charles S. Lanier, *May God – Or the Governor – Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36:3 CRIM. L. BULL. 200, 204-05 (2000); James R. Acker et al., *Merciful Justice: Lessons from 50 Years of New York Death Penalty Commutations*, 35(2) CRIM. JUSTICE. REV. 183, 184 (2010).

[101] Kobil, *supra* note 91, at 577 n.42 (relief of the legal consequences of an offense may include restoration of certain privileges, e.g. to vote or to testify competently).

[102] *Id.* at 575.

[103] Kobil notes that the rarity of pardons in modern death penalty cases often causes a great deal of terminological confusion between pardons and clemency grants. *Id*. at 532.

powers that an executive decision-maker has in its decision to reduce, substitute or abrogate a criminal punishment.

Within the wide range of scholarly and legal discourse on capital punishment and clemency, there are many other kinds of leniency in addition to the ones above, each with its own subtleties: *commutation*, *amnesty*, *conditional pardon*, *reprieve* and *mercy*,[104] which I will discuss below.

Commutation essentially has the same meaning as I have ascribed to "clemency" above.[105] That is, commutation "substitutes a milder punishment for one imposed by the court," but it does not relieve a defendant of all of the legal consequences of a criminal offense.[106] It is important to note that commutation is the preferred term of the ICCPR for the substitution of a death sentence with a sentence of imprisonment.[107] Thus, commutation is largely considered in the same way as clemency for this analysis here.

Reprieve or *respite* means a temporary postponement or stay of execution, usually granted in order to have a pending legal issue resolved,[108] or to enable further investigation of the case.[109] Given the specified time period of the stay, a reprieve or respite cannot be equated with clemency or pardon as a permanent alteration of sentence. In the U.S., for instance, reprieve has been granted to "allow a pregnant woman sentenced to death an opportunity to give birth to her child."[110] As such, reprieve and respite are distinct concepts, and thus, these concepts do not directly pertain to the analysis of *diya*, clemency, and pardon here.

Amnesty is a sentence commutation or abrogation made for the benefit of an entire group of people, often granted by legislation or executive decree.[111] Although not completely erased, the crime of the defendants is "overlooked" like an unconditional pardon "because that course of action benefits the public welfare more than punishment would."[112] In

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[104] *See id.* at 575-76 (listing five types of leniency recognized under American law: pardon, amnesty, commutation, remission of fines, and reprieve).

[105] Daniel T. Kobil, *The Evolving Role of Clemency in Capital Cases, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 532 (James R. Acker et al. eds., 1998); Acker et al., *supra* note 100, at 184.

[106] Kobil, *supra* note 91, at 575.

[107] ICCPR, *supra* note 7.

[108] *See* CATHLEEN BURNETT, JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES 14 (2002); Acker et al., *supra* note 100, at 184; Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. J. C.L. & C.R. 191 (2003).

[109] *See* BURNETT, *supra* note 108, at 178; Acker et al., *supra* note 100.

[110] Kobil, *supra* note 91, at 579 n.47.

[111] GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 296 (3d ed. 2006).

[112] Kobil, *supra* note 91, at 576.

the U.S., amnesty tends to be granted for political offenses, such as treason, rebellion, or civil disorder.[113]

Conditional Pardon is a release from prison or from a death sentence on the condition of a performance or nonperformance of a particular duty specified by the executive, such as serving in the armed forces or some other form of public service.[114]

Mercy is an overarching term relating to the exercise of leniency in the criminal justice system; it characterizes "any act or judgment, private or official, whether an initial determination or remedial, where less is exacted than is owed or deserved."[115] However, the notion of "mercy" is often used in the context of clemency or pardon decisions made for the benefit of the decision-maker, or in the name of charity or compassion, where there appears to be no retributive justification for the pardon.[116]

The unconditional pardon and subsequent release from prison of a convict previously condemned to death was once the most common form of executive leniency in capital cases.[117] However, considering the advent of long-term imprisonment and rehabilitative punishments,[118] combined with the development of additional layers of post-conviction judicial review, an executive order for leniency now more often comes in the form of clemency.[119] The typical case involves a substitution of the sentence of death with a term of imprisonment — such as a twenty-year sentence or life in prison without the possibility of parole.[120] In the modern context, an unconditional pardon is extremely rare for a prisoner sen-

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[113] *Id.* at n.47.

[114] *See* Linda Ross Meyer, *The Merciful State, in* FORGIVENESS, MERCY, AND CLEMENCY 74 (Austin Sarat & Nasser Hussain eds., 2007) (using the term "extrinsic good pardons" for conditional pardons and listing examples such as, "pardons used to pacify the public into acquiescing in harsh laws, nonpardons in an election year to convince the public one is tough on crime, pardons to those who will agree to pioneer in new communities or serve in the armed forces," among several others); MOORE, *supra* note 92, at 5-6.

[115] Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1503 (2000).

[116] Acker et al., *supra* note 100, at 184; Kobil, *supra* note 91, at 535; MOORE, *supra* note 92, at 129; SARAT, *supra* note 2, at 20, 113.

[117] Abramowitz & Paget, *supra* note 100, at 138.

[118] HARRY R. DAMMER & ERIKA S. FAIRCHILD, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 251 (3d ed. 2006); WENDY KAMINER, IT'S ALL THE RAGE: CRIME AND CULTURE 171 (1995).

[119] Acker et al., *supra* note 100, at 184; George Lardner Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT'G REP. R. 212, 212-13 (2003).

[120] Lardner & Love, *supra* note 119, at 214.

tenced to death, irrespective of the relevant jurisdiction,[121] unless there are significant doubts over the propriety of the prisoner's conviction.[122]

IV. Varieties of Decision-Makers behind Clemency or Pardons

In practice, most of the actions described above are carried out by an actor within the executive branch of government since clemency is a power attached to sovereignty.[123] In the special case of amnesty, depending on the jurisdiction and historical context, the law can be promulgated as an executive decree through the exercise of sovereign prerogative, or as legislation to commute or dissolve the sentences of an entire class of prisoners.[124] The key similarity between clemency and amnesty is that both involve political decisions to remit punishment rather than through the use of *judicial* appeal. As such, for clemency scholars Professors Nasser Hussain and Austin Sarat, "the term clemency . . . refer[s] to the *political capacity* to reduce or remove any lawfully imposed punishment."[125]

So if the power to grant clemency or pardon (in the form of amnesty) derives from a political source, who is the exact decision-maker in each case? It is instructive to begin with a list of clemency decision-makers by initially ruling out those who are *not* empowered to grant commutations.

As noted above, clemency does not involve the reduction of a death sentence to a lesser punishment by members of the judiciary. Instead, the judiciary acts through the function of judicial appeals. Grants of clemency and pardon can also be distinguished from the personal forgiveness afforded to a convicted criminal by a victim, a victim's family or the wider community. The former carries institutional backing and is governed by a prevailing *political authority*,[126] rooted in the executive (or occasionally, legislative) branch of government,[127] whereas the latter usually does not result in practical or legal ramifications. Likewise, although the very definition of the clemency and pardoning power presupposes that such deci-

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[121] Burnett, *supra* note 108, at 14; Acker & Lanier, *supra* note 100, at 205; Kobil, *supra* note 91, at 532.

[122] *See generally* Austin W. Scott, Jr., *The Pardoning Power,* 284 Annals of the Am. Acad. of Pol. & Soc. Sci. 96-97 (1952).

[123] Adam Sitze, *Keeping the Peace, in* Forgiveness, Mercy, and Clemency 200-01 (Austin Sarat & Nasser Hussain eds., 2007).

[124] Sebba, *supra* note 2, at 232.

[125] Nasser Hussain & Austin Sarat, *Toward New Theoretical Perspectives on Forgiveness, Mercy, and Clemency: An Introduction*, *in* Forgiveness, Mercy, and Clemency 3 (Austin Sarat & Nasser Hussain eds., 2007) (emphasis added).

[126] *See* Abramowitz & Paget, *supra* note 100, at 138; Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 Va. L. Rev. 239, 255 (2003).

[127] *See* Sebba, *supra* note 2, at 112; *see also* Heise, *supra* note 126, at 240 (describing clemency as an "extrajudicial check on the discretion of courts," thereby encompassing both executive and legislative action).

sions effectively override those of the judiciary, sometimes judicial or quasi-judicial bodies provide guidelines on the exercise of clemency through caselaw throughout the retentionist states.[128] Nonetheless, at least in a formal sense, the final decision is always made within the executive branch of government.

Looking past the various advisers to the individual with final authority, a grant of clemency or pardon can be made by a range of executive decision-makers, namely a monarch or head of state, a senior government minister, a provincial governor, a parliamentary committee, or a specially-constituted clemency or pardons board.[129] Depending on the jurisdiction, the relevant authority can have a written constitutional, legislative, or even informal conventional mandate with which to perform these functions.[130] The key is that the decision to remit punishment serves as an executive check on the powers of the judiciary as part of the doctrine of "separation of powers."[131] In the following section, I touch upon the reasons behind a decision to grant clemency or pardon.

V. Discussion: differences and similarities

A. *Differences between Diya and Clemency and Pardons*

After having described both *diya* and clemency above, a few problems arise by attempting to place them in the same category. Most obviously, a death sentence excused by the payment of *diya* or by *afw* cannot be described as true "clemency" or "pardon" because the decision whether or not to substitute a lesser penalty than the death sentence is made by the victim's relatives rather than by an executive authority of the state.[132]

I previously noted that this private exercise of leniency by the victim or the victim's family, as opposed to a public exercise of leniency by the state, is not traditionally considered to be within the scope of the clemency power. Indeed, some commentators have suggested that *diya* is more akin to a wrongful death settlement by a tortfeasor,[133] or the result

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[128] *See* Lardner & Love, *supra* note 119, at 213; Sebba, *supra* note 2, at 115.

[129] *See* Robertson, *supra* note 111, at 147; Sebba, *supra* note 2, at 111-15.

[130] *See* Kevin Hewison, *The Monarchy and Democratisation, in* Political Change in Thailand: Democracy and Participation 73 (Kevin Hewison ed., 1997); Christopher Vicenzi, Crown Powers, Subjects and Citizens 234 (1998); Sebba, *supra* note 2, at 111.

[131] *See Ex Parte* Grossman, 267 U.S. 87, 118 (1925) (judiciary has the power to decide sentences, but the executive is able to commute that sentence in order to keep the balance of powers).

[132] Duncan, *supra* note 3, at 47.

[133] *See* Baderin, *supra* note 34, at 143; Malone, *supra* note 53; Osanloo, *supra* note 77, at 309.

of viewing murder as a "compoundable offence,"[134] than a remission from punishment after a conviction.

As such, *diya* appears to operate at the intersection of civil law, which resolves disputes between individuals, and criminal law, which resolves transgressions by individuals against the state through the collective imposition of punishment.[135] If the decision to grant remission from the death penalty is considered a two-part process, first through forgiveness then through the payment of money, then *diya* starts to resemble compensation for a civil wrong. On the other hand, viewing *diya* as remission from the death penalty *through* the payment of money seems to represent a substitution of one criminal sentence (death) for another coercive measure designed to maintain public order (a fine)[136] — which would be achieved through clemency as defined in secular or common law systems.

However, regardless of whether it is the act of "pardon" (*afw*), or the payment of *diya* that extinguishes the right to demand *qisas*, the choice made by the victim's heirs does not resolve the problem that it is a private exercise of leniency rather than a decision made by the public executive authority. Though it remains controversial, a "private exercise of leni-

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[134] *See* Gottesman, *supra* note 34, at 437-38, n.17; Moeen H. Cheema, *Judicial Patronage of 'Honor Killings' in Pakistan: The Supreme Court's Persistent Adherence to the Doctrine of Grave and Sudden Provocation*, 14 BUFF. HUM. RTS. L. REV. 51, 58 (2008). However, at least *diya* has its effect on the *punishment* subjected on the perpetrator, rather than the prosecution of the case in the first place or the finding of guilt (particularly in states where the perpetrator needs to serve a short sentence of imprisonment as *tazir* before release). Dropping the case before a finding of guilt or an acquittal due to the wishes of a murder victim's relatives, often in exchange for some pecuniary consideration would instead be categorized as a "compoundable offence": a concept largely phased out in common law systems. Yash Vyas, *Alternatives to Imprisonment in Kenya*, 6 CRIM. LAW. F. 73, 98-99 (1995).

[135] *See* Baderin, *supra* note 34, at 143; Bassiouni, *supra* note 43, at 206; Osanloo, *supra* note 77, at 310; E-mail from Moeen Cheema, Lecturer, Austl. Nat'l U., to author (May 30, 2015) (on file with author).

[136] *See* Baderin, *supra* note 34, at 143; Malik, *supra* note 60; al-Alfi, *supra* note 42, at 230; Gottesman, *supra* note 34, at 451 ("Most commentators. . . have argued that the right of remittance bestowed by the Quran upon the victim or heir gives the right to pardon, fully and without compensation."). *Diya* might also be thought of as a kind of victim compensation scheme. Although victim compensation schemes also exist in secular criminal justice systems, they are administered by the government rather than run by private individuals. *See generally* Black et al., *supra* note 6. Moreover, the award of compensation does not have any formal impact on the nature of the punishment imposed on the defendant, including compensation schemes in other death penalty retentionist states which are not tied to the execution or reprieve of a death sentence. In secular jurisdictions, compensation or restitution may be available as a sentence of the court, whereby an offender can be called upon by the sentencing judge to compensate the victim for expenses and pain and suffering caused through the infliction of a violent crime. *See generally* Stephen Schafer, *Compensation of Victims of Criminal Offenses*, 10 CRIM. LAW. BULL. 605 (1974).

ency" is certainly an accurate representation of the origins of *diya*. As a pre-Islamic tribal tradition, *diya* was utilized before the development of a state apparatus to prosecute crimes and uphold social order.[137] As I have outlined above, in the historical context, murder was considered as a wrong by one tribe against another, with the award of a sum of money, property, or livestock preempting retaliation in kind, oftentimes collectively provided by the aggrieved tribe.[138]

Even if *diya* can generally be considered a form of "mercy," given mercy's status as an all-encompassing concept of leniency in the criminal law, *diya* is still not a true pardon, commutation, amnesty, or grant of clemency, given that its decision-makers are still private citizens rather than state functionaries. Here, it is especially significant that even in some jurisdictions where *diya* is regularly practiced, the executive retains the option to grant a pardon in murder cases if the compensation is refused by the victim's family,[139] preventing the enforcement of *qisas*. This is true even if it might run contrary to classical Islamic Law doctrine, which stipulates that a pardon by the ruler is only available for *tazir*, or discretionary, penalties, rather than *qisas* or *hudud* crimes for which the penalties are fixed by scripture.[140]

B. *Similarities between Diya and Clemency and Pardons*

Although *diya* may not fit neatly within the definition of clemency, commutation, amnesty, or pardon for the purposes of Article 6(4) of the ICCPR, it does contain many recognizable characteristics of clemency and pardon. By broadening the scope of clemency and pardon to mean state-sanctioned *extra-legal* or *extra-judicial* discretionary responses to a death sentence, then clemency and pardons themselves begin to look more like *diya*. Importantly, from this perspective, the decision-makers

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[137] *See* discussion *supra* Section I(A).

[138] *See* Bassiouni, *supra* note 43, at 204; Gottesman, *supra* note 34, at 443-44; Osanloo, *supra* note 77; Rahami, *supra* note 88, at 244-45.

[139] *See* ADPAN, *supra* note 5, at 4-5; DEATH PENALTY WORLDWIDE, *supra* note 58 (for statistics on Kuwait, Yemen, Pakistan, Bahrain, Jordan, and Saudi Arabia). In Saudi Arabia, the King cannot pardon a prisoner who has committed a *qisas* crime, although under the Criminal Procedure Code, each death sentence must be authorized by Royal Order before it is carried out. *$10,090 to pay for life*, DAILY TELEGRAPH, Sept. 25, 1997. This will be significant for the purposes of compliance with the ICCPR. Jurisdictions which concurrently allow the Head of State to issue a pardon will not contravene Article 6(4), no matter how *diya* is interpreted. Note that it is unclear whether the Nigerian President or State Governors in the northern states that employ Sharia criminal law retain the power to grant clemency in these circumstances. *See Nigeria*, DEATH PENALTY WORLDWIDE, *supra* note 58. The same applies for the president of Afghanistan. *See id.*

[140] *See* Ghaouti Benmelha, *Ta'azir Crimes, in* THE ISLAMIC CRIMINAL JUSTICE SYSTEM, 211, 223-24 (M. Cherif Bassiouni ed., 1982); al-Alfi, *supra* note 42, at 227; Gottesman, *supra* note 34, at 440, 444-45.

in both cases of *diya* and clemency or pardon are not members of the judiciary. Although with the case of *diya,* the decision to relieve the offender of the death sentence is not the decision of the prevailing political authority, it certainly is supported and even encouraged by the state.[141] As discussed above, where *diya* is practiced in modern Islamic legal systems, it is explicitly authorized and regulated by a legislative framework.

The state's preference for *diya* as a resolution to a crime of intentional homicide is demonstrated by a number of factors: the pressure Sharia judges sometimes put on relatives and the state functionaries to accept the *diya* payment;[142] the requirement of official confirmation of the agreement by the judiciary in some jurisdictions;[143] and the practice of making the payment first to the state who then bears the responsibility to distribute the money to the victim's family.[144] Here, the predilections of Islamic jurisdictions' use of *diya* settlements to resolve murder cases are based upon the Koran's preference for forgiveness over retribution,[145] and the desire to minimize the number of executions carried out in jurisdictions where a view remains that a literal interpretation of Koranic criminal law prevents the outright abolition of the death penalty.[146]

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[141] Bassiouni, *supra* note 43, at 209; MOORE, *supra* note 92 (describing the definition of "pardon," to would include the definition of clemency described above: "an act by the executive (*or other legally empowered*) that lessens or eliminates a punishment determined by a court of law, or that changes the punishment in a way usually regarded as mitigating. A pardon is an act one can perform only in a social or legal role. This characteristic distinguishes it from forgiveness and mercy, which are virtues that person exhibit as individuals. Anyone who has been injured can forgive, but *only one formally constituted within a legal system is qualified to pardon* a violation of the norms of that system.") (emphasis added).

[142] *See* Duncan, *supra* note 3, at 234; Winky So, *Contemporary Issues of Capital Punishment in Saudi Arabia*, 2 CITY U. OF H.K. L. REV. 261, 271 (2010); *see also* Sheikh Mohammad Ibn Ibrahim Al-Hewesh, *Sharia Penalties and Ways of Their Implementation in the Kingdom of Saudi Arabia, in* THE EFFECT OF ISLAMIC LEGISLATION ON CRIME PREVENTION IN SAUDI ARABIA, PROCEEDINGS OF THE SYMPOSIUM HELD IN RIYADH, 351, 377 (Farouk Abdul Rahman Mourad et al. eds., 1976); Daniszewski, *supra* note 79; DEATH PENALTY WORLDWIDE, *supra* note 58.

[143] Ghassemi, *supra* note 59, at 163; Chibli Mallat, *From Islamic to Middle Eastern Law: A Restatement of the Field*, 51 AM. J. COMP. L. 699, 703 (2003); *Saudi Arabia – Retentionist,* HANDS OFF CAIN (2014) http://www.handsoffcain.info/bancadati/schedastato.php?idcontinente=23&nome=Saudi%20arabia (last visited Sept.14, 2015).

[144] *See* Bassiouni, *supra* note 43, at 206-07.

[145] *See* Gottesman, *supra* note 34, at 446; Hascall, *supra* note 32, at 74-75; Peiffer, *supra* note 1, at 517.

[146] *See* Baderin, *supra* note 34, at 144; *Affront to Justice: Death Penalty in Saudi Arabia*, AMNESTY INT'L 9 (2008), https://www.amnesty.ie/sites/default/files/report/2010/04/Saudi %20DP_combined.pdf; Hannah Ridge, *Economic and Historical*

A purported distinction that scholars have raised involves *diya*'s transactional nature: that the prisoner gives something to the decision-maker (money or goods) in exchange for sparing his or her life.[147] According to this argument, the actions of the victim's relatives in demanding money from the offender are not truly equivalent to a compassionate exercise of mercy by a powerful political leader who stands to gain nothing in return, other than the respect and admiration (or anger) of his political constituents. For example, Kathleen Dean Moore's understanding of "mercy" is that the leniency granted by the ruler is gratuitous, as leniency is granted with the sole motivation to lessen the perpetrator's suffering.[148]

However, there are two problems with separating *diya* and clemency on these grounds. First, as I have discussed above, according to certain jurisprudential interpretations, the payment of compensation to a victim's family is a separate and later issue to the initial benevolent decision to "pardon" the perpetrator (although in practice, the two acts may be carried out at the same time). As such, a *qisas*-based pardon in the form of *afw* could not be seen to be "bought," as part of a transaction. *Afw* is instead granted as a means of forgiveness.

Second, the transactional exchange to preserve life is not unique to the practice of *diya*, let alone to Islamic jurisdictions. Although it may not accord with Kathleen Dean Moore's conception of gratuitous "mercy," there also exists a category of clemency and pardons in death penalty cases in which the prisoner is "rewarded" for displaying good character or behavior, or for carrying out meritorious activities before arrest, before conviction, or most commonly, in prison post-conviction.[149] Examples of justifying conduct include the following:

- Demonstrated rehabilitation, remorse and repentance by the prisoner during the time spent in detention (similar to the institutions of parole and remission for sentences of imprisonment);[150]
- Embracing religion in prison;[151]

Influence on the Application of Capital Punishment in Turkey and Saudi Arabia, 3(1) MESSA J. 1, 20 (2014).

147 *See* ROWE, *supra* note 51.

148 *See* MOORE, *supra* note 92, at 188-89.

149 *See* MOORE, *supra* note 92, at 204-05; Jonathan Harris & Lothlórien Redmond, *Executive Clemency: The Lethal Absence of Hope*, 3 CRIM. L. BRIEF 2, 7, (2007); Rapaport, *supra* note 115, at 1523.

150 *See* Elliot J. Blumenthal, *Executive Power to Grant Reprieves and Pardons: How Can Your Client Receive the Scooter Libby Treatment*, ABA CRIM. LITIG. COMM. NEWSL. 21 (Fall 2007); Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection and the Politics of Gender in Women's Capital Cases*, 4 BUFF. CRIM. L. REV. 967, 987, 998 (2000); Sebba, *supra* note 2, at 230-31.

151 *See* Abramowitz & Paget, *supra* note 100, at 168; MOUCARRY, *supra* note 46, at 271.

- Previous national service of some form;[152]
- Service as an informant or as a witness in a case against his or her accomplices;[153]
- Any acts "to assist the prison authorities in preventing [another prisoner's] escape, injury, or death";[154] and
- A promise to act in the armed forces, to be deported to a penal colony, or to undergo some other form of conduct in the national interest, as with a "conditional pardon"[155]

Moreover, there are also historical examples of death sentences being commuted in secular legal systems through a simple payment made to the executive authority.[156] Depending on the circumstances, such payment to escape death row might be considered outright bribery,[157] or a form of compensation paid to the state to be used for utilitarian benefit,[158] depending on the way in which the money is spent.

Finally, even the *executive* in a secular legal system has granted clemency in a number of situations as a result of payment by the perpetrator to the victim's family, either on a gratuitous basis or because of a successful civil action brought by the family.[159] As such, while it still remains an executive decision-maker who ultimately reduces the death sentence to a

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[152] *See* Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 222 (2003); MOORE, *supra* note 92, at 204.

[153] *See* Blumenthal, *supra* note 150, at 21; Kobil, *supra* note 91, at 589; ROBERTSON, *supra* note 111, at 297; Sebba, *supra* note 2, at 227, 229.

[154] MINISTRY OF JUSTICE, THE GOVERNANCE OF BRITAIN: REVIEW OF THE EXECUTIVE ROYAL PREROGATIVE POWERS: FINAL REPORT 2009 (U.K.), at 17, http://webarchive.nationalarchives.gov.uk/20110310111923/http://www.justice.gov.uk/publications/docs/royal-prerogative.pdf.

[155] *See* Meyer, *supra* note 114, at 74; MOORE, *supra* note 92, at 199.

[156] JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 3-4 (2009); Heise, *supra* note 126, at 298; Todd David Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1238 (2003); Susan Trevaskes, *Lenient Death Sentencing and the "Cash for Clemency" Debate*, 73 THE CHINA J. 38, 39 (2015).

[157] *See* ROGER HOOD & CAROLYN HOYLE, THE DEATH PENALTY: A WORLD PERSPECTIVE 316 (5th ed. 2015); ANDREW J. NOVAK, COMPARATIVE EXECUTIVE CLEMENCY: THE CONSTITUTIONAL PARDON POWER AND THE PREROGATIVE OF MERCY IN GLOBAL PERSPECTIVE 188 (Routledge, 2015).

[158] Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?, in* FORGIVENESS, MERCY, AND CLEMENCY 6, 42 (Austin Sarat & Nasser Hussain eds., 2007).

[159] *See* Acker & Lanier, *supra* note 100, at 209; MOORE, *supra* note 92, at 146; *Family Aghast After King Pardons Killer*, THE NEW PAPER, Jan. 30, 2008. A similar result has been achieved by Chinese judges where murderers reach monetary reconciliation agreements with the relatives of their victims. *See* Robert Weatherley & Helen Pittam, *Money for Life: The Legal Debate in China About Criminal Reconciliation in Death Penalty Cases* 39 ASIAN PERSPECTIVE 277, 278 (2015).

lesser punishment, the payment of monetary compensation is an important factor in encouraging this decision.

As is evident, even "traditional" clemency and pardons are not awarded solely on the basis of the grace and compassion of a sovereign ruler,[160] or because of doubts over the propriety of convictions or the proportionality of death as a punishment,[161] or even because of a utilita-

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[160] According to this model, clemency is considered a merciful "gift" from the executive to the prisoner, and as such, its granting may be more a reflection of the benevolent nature of the ruler and his or her desire for social control and to exercise of the "power over life and death," rather than any particularly deserving features of the case. DOUGLAS HAY ET AL., ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 42, 48 (1975); COYNE & ENTZEROTH, *supra* note 99, at 839; SARAT, *supra* note 2, at 16; Kobil, *supra* note 91, at 571, 582. Clemency granted by a monarch or dictatorial ruler, often to an entire class of condemned persons, generally comports with this kind of classification. DANIEL V. BOTSMAN, PUNISHMENT AND POWER IN THE MAKING OF MODERN JAPAN 45 (2005); Sebba, *supra* note 2, at 232.

[161] According to this model, clemency in the name of retributivism requires the commutation of a death sentence to a term of imprisonment in a number of predetermined circumstances, where strict conformity with the original sentence imposed would result in undeserved or disproportionate punishment. *See* F. C. DeCoste, *Conditions of Clemency: Justice from the Offender*, 66 SASK. L. REV. 1, 9 (2003); MOORE, *supra* note 92, at 129. Pardons or grants of clemency in this context are justified on the basis that they are seen to *enhance* retributive justice, rather than detract from it. Acker et al., *supra* note 100, at 185; Meyer, *supra* note 114, at 86. Examples include clemency granted on the bases of: wrongful conviction; one or more dissenting judgments contained in the original conviction casting a degree of doubt over the accused's guilt; the death sentence being disproportionate in relation to similar cases or co-defendants; the fact the crime was committed "out of necessity, coercion or adherence to moral principles"; the circumstances of the cases falling just short of an established defense in law; the age and gender of the prisoner; and compassionate grounds due to terminal illness of the prisoner or a family member. *See* COYNE & ENTZEROTH, *supra* note 99, at 843. *See also* CROUCH, *supra* note 156, at 25 (granting clemency due to illness); MOORE, *supra* note 92, at 97, 156-65, 208-09 (discussing moral grounds for propriety of conviction and proportionality of punishment); ROBERTSON, *supra* note 111, at 147, 150 (mitigating factors making clemency reasonable and explaining international law principles governing the executions of children); SARAT, *supra* note 2, at 155 (suggesting retributivist principles guide clemency); Abramowitz & Paget, *supra* note 100, at 165-70 (mitigating circumstances important to clemency); Daniel T. Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U. L. REV. 567, 572 (2000) (clemency for miscarriages of justice); William Alex Pridemore, *An Empirical Examination of Commutations and Executions in Post-Furman Capital Cases*, 17 JUST. Q. 159, 164 (2000) (suggesting race and age may affect commutation); Rapaport, *supra* note 115, at 1521-22 (using retributive justice); Rapaport, *supra* note 150, at 968, 982, 987 (explaining why women succeed in clemency petitions more than men).

rian benefit conveyed to the state or to the ruler.[162] These can also be awarded as the result of a "transaction" between the condemned and the political authority or even the family of the victim. In the latter cases, clemency is not automatically "triggered" by the payment of a certain sum of money or the performance of particularly meritorious actions, but rather it remains up to the discretion of the executive decision-maker whether to forgive the prisoner and abrogate the prisoner's death sentence, if the prisoner is seen to deserve it. Therefore, the fact that *diya* is commonly granted in exchange for pecuniary consideration as victim compensation does not significantly distinguish the practice from clemency and pardons as they are awarded in secular retentionist systems.

To bring *diya* closer to clemency, scholars can also look at *diya*'s effect on the conviction itself. Unlike compoundable offences or tort settlements for wrongful death, *diya* relates to the remission of punishment *after* a judicial finding of guilt in a criminal case, rather than a cessation or preclusion of prosecution. The execution of punishment is at the discretion of the victim's relatives, whereas the finding of guilt is still determined by the Sharia court on behalf of the state. As such, in the same manner as clemency, a grant of *diya* asks the question of whether the remission of the death sentence "subverts" the authority of the sentencing court by substituting a non-judicial order in place of a judicially-imposed punishment.[163]

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[162] These are benefits that do not explicitly relate to the prisoner and his or her case. Examples here are an amnesty granted to combatants on both sides of a civil war in order to facilitate societal "healing"; the commutation (and probable relief) of the death sentences of political prisoners after a transition from autocracy to democracy; clemency granted to the citizen of an abolitionist nation (or in response to a request made by a powerful international ally) in order to maintain good diplomatic and trade relations with that nation and changing public, political, judicial or international law views on the "morality, justice and effectiveness" of the death penalty after the sentence has been imposed; and commutation in exchange for a promise to act in the armed forces, to be deported to a penal colony, or to undergo some other form of conduct in the national interest. *See, e.g.,* COYNE & ENTZEROTH, *supra* note 99, at 842 (suggesting most clemency grants serve political goals); CROUCH, *supra* note 156, at 3, 20, 28-29 (describing Presidents George H.W. Bush, Clinton, and George W. Bush pardoning controversial cases); MOORE, *supra* note 92, at 199-200 (suggesting executives grant most pardons because they serve the public); Heise, *supra* note 126, at 289 (examining political factors leading to executive pardon); Kobil, *supra* note 77, at 222 (noting President Johnson pardoning prisoners of war after the Civil War); Schabas, *Twins*, *supra* note 46, at 1086-87 (discussing Sierra Leone utilizing death penalty pardons to heal after conflict).

[163] *See, e.g. 'Use and Misuse of Presidential Clemency Power for Executive Branch Officials': Hearing on H.R. 110-57 Before the Comm. on the Judiciary*, 110th Cong. 6 (2008); OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS & THE INTERNATIONAL BAR ASSOCIATION, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 121 (United Nations, New York & Geneva 2003).

Another purported difference between the two concepts may be that as a stand-alone act, *diya* may be considered as a "free" *pardoning* of the offender, rather than a reducing of their sentence, whereas granting an unconditional pardon leading to release from prison, is exceedingly rare in death penalty cases anywhere else in the world.[164] Nevertheless, in certain jurisdictions, the usual result of a *diya* settlement is that the offender's life and liberty are not compromised; instead, the punishment resembles the use of restorative justice to bring the victim and the perpetrator together in an agreement to rectify the harms caused by the crime under the authority and supervision of the state.[165] While restorative justice has in the past been suggested as a means of reconciling murderers and their victims' families, very few, if any, secular scholars have suggested that this should take place in lieu of a lengthy sentence of imprisonment.[166]

However, this difference is not one of substance, but simply one of degree. In murder cases, both *diya* and clemency or pardon effectively result in the abrogation of a death sentence, replaced with something less than death. Outside of any pecuniary compensation for the victim, whether it is term imprisonment, life imprisonment, or immediate release from prison with the conviction for murder still intact, the difference between the practice in Islamic legal systems and that in secular legal systems is merely its prevalence.

As I have mentioned above, while such cases arise infrequently nowadays, there are a number of possible circumstances in which a murder convict sentenced to death could be released from prison by executive pardon in a secular legal system, other than where there are doubts over the propriety of conviction. For example, a prisoner may have already served ten or twenty years on death row by the time his or her pardon petition is considered, or there may be compassionate circumstances such as terminal illness or psychological conditions suffered by the prisoner or a relative. Significantly, before the advent of mass imprisonment in the nineteenth century, "free" pardons were once the most common form of executive leniency in secular legal systems with capital punishment. As

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164 BURNETT, *supra* note 108, at 14; Scott, *supra* note 122, at 96.

165 *See generally* Wing-Cheong Chan, *Family Conferencing for Juvenile Offenders: A Singaporean Case Study in Restorative Justice*, 8 ASIAN CRIMINOLOGY 1 (2013); *see also* Hascall, *supra* note 32, at 61; Jiang et al., *supra* note 70; Qafisheh, *supra* note 33, at 491.

166 *See* James Logan, *Healing Memory, Ontological Intimacy, and U.S. Imprisonment: Toward a Christian Politics of "Good Punishment" in Civil Society*, 75 LAW & CONTEMP. PROBS. 77, 83 (2012); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?,* 3 ANN. REV. L. & SOC. SCI. 161, 176 (2007); Ann Skelton, *Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective*, 42 BRIT. J. OF CRIMINOLOGY 496, 505 (2002). .

such, that *diya* may result in a prisoner's release does not distinguish it from clemency or pardon.

Furthermore, in certain jurisdictions, legislation now establishes that a prisoner whose *diya* is accepted is still liable to serve a discretionary or compulsory sentence of imprisonment as a *tazir* punishment.[167] Although the nature of the sentence, if discretionary, is within the power of the sentencing body, and is not determined by the victim's heirs, the result is that the recipient is punished in a manner more analogous to a prisoner who is granted a commutation in a secular legal system, where one punitive sentence of death is replaced with another lesser one of imprisonment. Indeed, in a jurisdiction where the prison sentence is mandatory, the victim's heirs will be able to choose indirectly between death and imprisonment as punishments.[168]

Generally speaking, the pecuniary and punitive consequences suffered by a prisoner paying *diya* (the payment, plus short to medium term prison sentence) will be less onerous than an average clemency recipient, whose consequences may range from twenty years to life imprisonment, but these are relatively minor differences in punishment compared to the literal life-or-death scenario for other perpetrators. Overall, the formal outcome for the prisoner is not a primary factor that distinguishes *diya* from clemency and pardons in secular legal systems. Rather, the participants and the nature of their involvement, as well as the extent of political processes, differentiate the two concepts.

Conclusion: implications for human rights law and scholarly discourse

Diya and clemency share a number of conceptual similarities. *Diya* can be considered as a form of state-sanctioned "mercy" — an exercise of leniency that reduces the punishment of death to something lesser through non-judicial or extra-legal means. As with some instances of clemency, *diya* is also arguably granted on a transactional basis: both parties mutually benefit from the acceptance of "blood money" by the victim's heirs. Furthermore, in some jurisdictions prisoners paying *diya* may now endure a compulsory sentence of imprisonment even if the victim's family accepts payment, bringing those prisoners closer in line with the modern beneficiaries of clemency in terms of the continuing severity of punishment.

However, there are a number of significant doctrinal differences between *diya* and clemency or pardon, which affect the interpretation of Article 6(4) of the ICCPR for nations favoring a strict interpretation of

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[167] *See generally* Ghodsi, *supra* note 75; Qafisheh, *supra* note 33.

[168] *See, e.g.,* Baderin, *supra* note 34, at 143; Bassiouni, *supra* note 43, at 206; Duncan, *supra* note 3, at 236 n.36, 239; Gottesman, *supra* note 34, at 434; Hubbard, *supra* note 84; Osanloo, *supra* note 77, at 310; Qafisheh, *supra* note 33; E-mail from Moeen Cheema *supra* note 135.

Sharia Law, as well as the future academic research on *diya*. The one crucial way in which *diya* falls outside a technical definition of clemency and pardon is the fact that the preference to remit punishment by receiving *diya* or granting *afw* is chosen by the victim's heirs rather by an executive leader. This is particularly noticeable in countries where the secular or monarchical power to grant clemency already exists alongside *diya* in murder cases.[169] Jurisdictions that instead rely solely on *diya* and do not allow for secular executive clemency or pardon in cases of *qisas* crimes,[170] will likely contravene the ICCPR's Article 6(4),[171] with deleterious effects on the chances of juveniles, indigent prisoners and foreign nationals receiving pardons (due to their limited financial resources and absence of ties to the local community).[172]

The crux of the power to pardon is that it is exercisable by the executive — either a ceremonial leader or the head of state — and as a feature of the separation of powers among the three branches of government (executive, legislature, and judiciary), clemency or pardon serves as a check on the powers of the judiciary.[173] It is an important international

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[169] *See, e.g.,* Bassiouni, *supra* note 43, at 204; Gottesman, *supra* note 34, at 443-44; Osanloo, *supra* note 77; Rahami, *supra* note 88, at 245.

[170] *See* DEATH PENALTY WORLDWIDE, *supra* note 58 (for UAE, Saudi Arabia, and for Sudan, Iran, Somalia, and Libya, who are all parties to ICCPR). There is also a forceful argument that the right to be considered for (executive) clemency or pardon when sentenced to death has already passed into customary international law, in light of the fact that it exists in nearly every abolitionist and retentionist country in the world, see CUSTOMARY INTERNATIONAL HUMANITARIAN LAW STUDY, INTERNATIONAL COMMITTEE OF THE RED CROSS (2015), https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin (last visited Nov. 30, 2015), with those nations relying solely on *diya* being notable exceptions, as this article has demonstrated. If the right to apply for clemency or pardon when sentenced to death is a customary international legal right, justified by the presence of sufficient state practice and *opinio juris*, then even non-signatories to the ICCPR such as Saudi Arabia, the UAE and Sudan would be in breach of the international law obligation. *See, e.g.*, ADPAN, *supra* note 5; Madden, *supra* note 5; Sebba, *supra* note 2.

[171] Precisely the opposite conclusion is favored by Duncan, *supra* note 3, at 247. Note that although it falls outside the scope of this paper, the conclusion that ICCPR Article 6(4) would be contravened through the exclusion of executive clemency would also by implication apply to capital *hudud* crimes, where no remittance of punishment (by the victim or by the state ruler) is permitted for offenses against Islam itself. *See* Baderin, *supra* note 34, at 145; Gottesman, *supra* note 34, at 444; Qafisheh, *supra* note 33, at 491. Nonetheless, irrespective of the classical Sharia doctrine, certain jurisdictions do also permit the head of state to issue pardons for capital *hudud* crimes. *See, e.g.*, DEATH PENALTY WORLDWIDE, *supra* note 58 (Iran, Pakistan, and Bahrain).

[172] HOOD, *supra* note 3, at 37; ADPAN, *supra* note 5, at 30-32.

[173] Sebba, *supra* note 2, at 226; Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 404-05 (1993).

law safeguard on the execution of a death sentence because of the broad range of reasons that a death sentence can be abrogated in this fashion. A murder victim's heirs do not have the same level of detachment or the same level of checks as the head of state; they are personally, emotionally, and financially invested in the decision to abrogate punishment for *diya*.

In contrast, a political decision-maker may take into account a range of merciful, retributive, transactional, and utilitarian factors, and will have access to a full range of documentation on the prisoner and his or her case. If Article 6(4) of the ICCPR was originally intended to offer prisoners a final procedural recourse for a death sentence by the courts,[174] then the fact that the payment of financial compensation is almost always involved in the process of remitting punishment through *qisas* cases clouds the impartiality and public utility of the decision. Granting "pardon" by means of *diya* is presumably not what the drafters of Article 6(4) originally had in mind, and hence Duncan's characterization of *diya* as a form of leniency satisfying this provision is erroneous. Thus, although grants of *diya* share some of the characteristics of clemency and pardons, *diya* and clemency cannot be classified for the purposes of international human rights law as one and the same thing.

This distinction also clearly affects the way academics should think about *diya* when conducting academic research on the topic, prompting comparative law scholars to more closely and carefully examine the history and nuanced practices of *diya*. *Diya* is oftentimes arbitrarily granted and legally unimpeachable, as with clemency and pardons in secular common law systems, but future empirical studies have the potential to reveal particular patterns of use in relation to certain categories of offenders and decision-makers.[175]

Studies focused on which categories of offenders lead to the refusal or acceptance of *diya* or *afw*, as well as studies that attempt to calculate the frequency of *diya*'s use in jurisdictions such as in Saudi Arabia, Iran and Pakistan, can still begin their literature reviews with an analysis of clemency and pardons in death penalty jurisdictions, as the relevant informative theoretical paradigm. However, the distinct nature of *diya* as a *sui generis* institution within Islamic legal systems also requires a substantial analysis of Islamic Sharia Law, forgiveness, restorative justice,[176] victims'

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[174] BADERIN, *supra* note 30, at 74.

[175] For example, a study could sort those prisoners into categories of those granted or denied *diya* based upon factors such as (a) the sum offered; (b) the nature of the negotiations; (c) the prisoner's nationality; (d) mitigating or aggravating characteristics of the murder case and the prisoner him or herself; (e) the nature of the involvement of foreign governments, legal representatives or the prisoner's community and (f) the identity and social status of the victim.

[176] *See* Chan, *supra* note 165; Jiang et al., *supra* note 70; Qafisheh, *supra* note 33. "The law of *qisas* has something in common with the small-scale societies that

rights,[177] and compensation for civil wrongs where appropriate. A working knowledge of each of these subjects is necessary to understand an institution as novel as *diya* from the perspective of a secular common law jurisdiction.

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advocate restorative justice studies to find inspiration for their practices. Furthermore, the law of *qisas* fulfills some of the objectives of the restorative justice movement by allowing victims to participate in sentencing and encouraging forgiveness and reconciliation." Hascall, *supra* note 32, at 37-38.

[177] "The principle of *Diyya* finds analogous expression in the contemporary science of victimology, whereby victim compensation emphasizes decriminalization of the act and compensation of the victim as an alternative to the traditional punishment of incarceration." Bassiouni, *supra* note 43, at 205. *See also* SHAHID M. SHAHIDULLAH, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 380 (2014).