IS DIYA A FORM OF CLEMENCY?

Daniel Pascoe*

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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 executive2 — 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

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.


4 Duncan, supra note 3, at 47.
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, 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. As I will show below, Article 6(4) may feasibly apply to all states, regardless of whether they are parties to the treaty.

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—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. 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 victim or victim’s family but also against the tribe or clan of the victim.”

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9 See discussion and accompanying text infra note 77.

culprit, but also against the culprit’s tribesmen.”

Diya, which often came in the form of payment with chattel, emerged as the peaceful alternative to tribes’ acts of revenge. 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.” In those specific instances, however, diya “was often paid by the entire tribe from a special fund,” 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.”

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.” In light of the merits of diya — of both preventing inter-tribal warfare and unifying various tribes — diya was integrated into Islam. 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.” As such, diya is men-

13 HAKEEM ET AL., supra note 11, at 14.
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 S CHACT, 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. (citing Koran 4:92) (emphasis added).
tioned throughout Islamic jurisprudence, but it is principally regulated by
Islamic criminal law.\textsuperscript{20}

B. \textit{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.\textsuperscript{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 revela-
tion.”\textsuperscript{22} The main sources of Islamic law are the Koran,\textsuperscript{23} the most impor-
tant; the Sunna (sayings and practice of the Prophet);\textsuperscript{24} the \textit{ijma}
(consensus of Muslim jurists); and the \textit{qiya\textsubscript{s}} (juristic analogy).\textsuperscript{25} Additional
supplementary sources include \textit{istihsan} (equity), \textit{maslaha mursalah}
(consideration of public interest) and \textit{urf} (custom and usage).\textsuperscript{26}

While the principles of Sharia criminal law share some similarities with
those underlying secular common law, namely that the accused is pre-
sumed innocent until proven guilty and that the standard of proof is
beyond a reasonable doubt,\textsuperscript{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 indepen-
dently developed, as separate legal doctrines.\textsuperscript{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

\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{See} Hossein Esmaeili & Jeremy Gans, \textit{Islamic Law Across Cultural Borders: the
Involvement of Western Nationals in Saudi Murder Trials}, 28 \textit{DENV. J. INT’L L. &
\textsuperscript{22} \textit{Id.} at 147 (citing Rene David, \textit{Major Legal Systems in the World Today}
456 (John E. C. Brierley trans., 3d ed. 1985)).
\textsuperscript{23} \textit{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. \textit{Id.}
\textsuperscript{24} Azizah al-Hibri extensively described aspects of the Prophet’s personality and
character to include \textit{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, \textit{Islamic and American Constitutional Law;
Borrowing Possibilities or a History of Borrowing}, 1 \textit{U. Pa. J. Const. L.} 492, 500 n.43
(1999). However, the term clemency in this analysis has a particular political
meaning. \textit{See infra} Section IV.
\textsuperscript{25} Esmaeili & Gans, \textit{supra} note 21, at 147-48 (citing Farooq Hassan, \textit{The Sources
of Islamic Law}, 76 \textit{PROC. OF ANN. MEETING - AM. SOC. OF INT’L L.} 65 (1982)).
\textsuperscript{26} \textit{Id.} (citing Mohammad Hashim Kamali, \textit{Principles of Islamic
Jurisprudence} chs. 12-14 (1991)).
\textsuperscript{27} Duncan, \textit{supra} note 3, at 238-39.
\textsuperscript{28} Esmaeili & Gans, \textit{supra} note 21, at 152.
criminal trial is the type of punishment under consideration.”\textsuperscript{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: \textit{hudud}, \textit{tazir}, and \textit{qisas}.\textsuperscript{30}

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

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

Third, \textit{qisas}, which is the focus of this Article, means “retaliation in kind,”\textsuperscript{41} and it covers criminal acts of corporal violence, such as murders.

\textsuperscript{29} Id.


\textsuperscript{31} Baderin, supra note 30, at 145.


\textsuperscript{36} Id. (citing A.Q. Oudah Shaheed, \textit{Criminal Law of Islam} 86 (S. Zakir Aijaz trans., Adam Publishers & Distributors 2010)).

\textsuperscript{37} See id.


\textsuperscript{39} Hascall, supra note 32, at 55.

\textsuperscript{40} Baderin, supra note 30, at 73.

\textsuperscript{41} Hascall, supra note 32, at 56 n.93 (“[T]he term \textit{qisas} comes from the Arabic word \textit{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 atonement46 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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44 Hakeem et al., supra note 11, 15-17.

45 Bekkin, supra note 14, at 14 n. 34.


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.\textsuperscript{52} Hanafi, Maliki, Shafi’i, Hanbali and Shia.\textsuperscript{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.\textsuperscript{54} The final sum in settlement can be paid by the perpetrator himself, his heirs or family, or the perpetrator’s neighbors or tribe.\textsuperscript{55} As such, similar to the pre-Islamic times of warring tribes, the principle of \textit{diya} continues to “embod[y] a concept of collective responsibility”\textsuperscript{56} in intentional homicide cases, involving the victim’s family, the perpetrator, and the state.

II. THE CONTEMPORARY PRACTICE OF \textit{DIYA}

At this point, I must also make a distinction between \textit{diya} as a pre-Islamic tribal tradition,\textsuperscript{57} \textit{diya} in classical Islamic law jurisprudence, and \textit{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 \textit{diya} practice, and then I will examine the current trends of \textit{diya} practices in these areas.

A. The Relevant Countries

As opposed to the historical application of \textit{diya}, my primary interest is the practical application of \textit{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, Afghanistan, Afghanistan.

\textsuperscript{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.”).


\textsuperscript{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.

\textsuperscript{55} Bassiouni, supra note 43, at 207; Qafisheh, supra note 33, at 489. For an example of multiple \textit{diya} claims being paid by a charity, see Charity Group Pays \textit{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.

\textsuperscript{56} Bassiouni, supra note 43, at 207.

\textsuperscript{57} See Siti Zubaidah Ismail, The Modern Interpretation of the \textit{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. Of these countries, Saudi Arabia, Pakistan and Iran are the three Muslim countries that employ diya and perform the greatest number of executions.

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. 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. Thus, an appreciation of classical Sharia law doctrine is only the first step to a complete understanding of how diya is practiced today.

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-

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.


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.
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Ining diya over execution. However, the State may still encourage such actions as well.

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. Within this practice, the degree of judicial authority over the price, and the considerations behind setting a price also vary per jurisdiction. 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. 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.” 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.”

Another practice of setting the diya price is through negotiation between the perpetrator and the victim’s heirs. 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. Iran also provides this right to a victim’s family members, which in practice may have contributed to

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.
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.\textsuperscript{72} The government also can negotiate on behalf of the perpetrator, a practice used in the UAE.\textsuperscript{73} Alternatively, a mediator can negotiate the amount.\textsuperscript{74}

In combination with the methods described above, the \textit{diya} price can also be subject to a statutory minimum or maximum.\textsuperscript{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.\textsuperscript{76} In Iran, the \textit{diya} is capped at $62,500 for a Muslim man in 2012.\textsuperscript{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 \textit{diya} settlement.\textsuperscript{78} For instance, in Saudi Arabia, the usual punishment after a \textit{diya} payment is a prison term of five years or less.\textsuperscript{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.\textsuperscript{80} In Iran, Article 612 of the 1996 Islamic Penal Code allows for three to ten years’ imprisonment — effectively becoming a \textit{tazir} punishment in such circumstances.\textsuperscript{81} Certain northern Nigerian states have imposed substituted punishments of one hundred lashes and a year of imprisonment.\textsuperscript{82}

\footnotesize
\begin{itemize}
\item \textsuperscript{74} Malone, supra note 53.
\item \textsuperscript{75} Ebrahim Ghodsi, \textit{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.
\item \textsuperscript{76} See Malone, supra note 53 (for Saudi Arabia, Iran).
\item \textsuperscript{77} Arzoo Osanloo, \textit{When Blood Has Spilled: Gender, Honor, and Compensation in Iranian Criminal Sanctioning}, 35 PoLAR 308, 317 n.18 (2012).
\item \textsuperscript{78} See Gottesman, supra note 34, at 442.
\item \textsuperscript{80} Moeen H. Cheema, \textit{Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan’s Law}, 60 AM. J. COMP. L. 875, 900 (2012).
\item \textsuperscript{82} See J.N. Matson, \textit{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, \textit{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 \textit{Afw}, rather than where \textit{diya} was paid).
\end{itemize}
In the UAE, the equivalent tazir penalty is a minimum of three years and a maximum of seven years imprisonment.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{86}

Both diya and afw are acts by the victim’s heirs that prevent retaliatory punishment from being carried out by the state.\textsuperscript{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.\textsuperscript{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.\textsuperscript{89}

\textsuperscript{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.
\textsuperscript{85} See al-Alfi, supra note 42, at 227; Bassiouni, supra note 43, at 209; Gottesman, supra note 34, at 451.
\textsuperscript{86} See Gottesman, supra note 34, at 442, 451; Shah, supra note 71 (for Pakistan).
\textsuperscript{87} See generally DEATH PENALTY WORLDWIDE, supra note 58.
\textsuperscript{88} See Gottesman, supra note 34, at 442.
\textsuperscript{89} 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).
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. 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, and it can be traced back to Roman times. 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.” Parliament officially recognized but simultaneously limited the clemency power by enacting the 1700 Act of Settlement. 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.

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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.


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 responsibility100 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

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.


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*, which I will discuss below.

*Commutation* essentially has the same meaning as I have ascribed to “clemency” above. 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. 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. 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, or to enable further investigation of the case. 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.” 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. 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.”

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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).


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


109 See *Burnett, supra* note 108, at 178; Acker et al., *supra* note 100.

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


the U.S., amnesty tends to be granted for political offenses, such as treason, rebellion, or civil disorder.\footnote{113}{Id. at n.47.}

\textit{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.\footnote{114}{See Linda Ross Meyer, \textit{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); \textit{Moore}, supra note 92, at 5-6.}

\textit{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.”\footnote{115}{Elizabeth Rapaport, \textit{Retribution and Redemption in the Operation of Executive Clemency}, 74 CHI.-KENT L. REV. 1501, 1503 (2000).} 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.\footnote{116}{Acker et al., supra note 100, at 184; Kobil, supra note 91, at 535; \textit{Moore}, supra note 92, at 129; \textit{Sarat}, supra note 2, at 20, 113.}

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.\footnote{117}{Abramowitz \& Paget, supra note 100, at 138.} However, considering the advent of long-term imprisonment and rehabilitative punishments,\footnote{118}{\textit{Harry R. Dummer \& Erika S. Fairchild}, \textit{Comparative Criminal Justice Systems} 251 (3d ed. 2006); \textit{Wendy Kaminer, It’s All the Rage: Crime and Culture} 171 (1995).} 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.\footnote{119}{Acker et al., supra note 100, at 184; George Lardner Jr. \& Margaret Colgate Love, \textit{Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850}, 16 FED. SENT’G REP. R. 212, 212-13 (2003).}

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.\footnote{120}{Lardner \& Love, supra note 119, at 214.} In the modern context, an unconditional pardon is extremely rare for a prisoner sen-
tenced to death, irrespective of the relevant jurisdiction, unless there are significant doubts over the propriety of the prisoner’s conviction.

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. 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. 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.”

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, rooted in the executive (or occasionally, legislative) branch of government, 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-

121 Burnett, supra note 108, at 14; Acker & Lanier, supra note 100, at 205; Kobil, supra note 91, at 532.
124 Sebba, supra note 2, at 232.
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. 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. Depending on the jurisdiction, the relevant authority can have a written constitutional, legislative, or even informal conventional mandate with which to perform these functions. 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.” 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.

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, 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.
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,”\(^\text{134}\) 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.\(^\text{135}\) 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)\(^\text{136}\) — 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-

\(^{134}\) 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).


\(^{136}\) 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).
IS DIYA A FORM OF CLEMENCY?

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. 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.

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, 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.

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

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.
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).


\(^{144}\) 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.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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);\textsuperscript{150}
- Embracing religion in prison;\textsuperscript{151}

\textbf{*Influence on the Application of Capital Punishment in Turkey and Saudi Arabia*, 3(1) MESSA J. 1, 20 (2014).}\textsuperscript{R}

\textsuperscript{147} See Rowe, supra note 51.

\textsuperscript{148} See Moore, supra note 92 at 188-89.

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


\textsuperscript{151} See Abramowitz & Paget, supra note 100, at 168; Moustitis, 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

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.
¹⁵⁵ See Meyer, supra note 114, at 74; Moore, supra note 92, at 199.
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, or because of doubts over the propriety of convictions or the proportionality of death as a punishment or even because of a utilit-
rian benefit conveyed to the state or to the ruler. 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 judiciously-imposed punishment.

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).

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. 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. 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.

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.

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.
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.\footnote{See generally Ghodsi, supra note 75; Qafisheh, supra note 33.} 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.\footnote{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.}

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
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. Jurisdictions that instead rely solely on *diya* and do not allow for secular executive clemency or pardon in cases of *qisas* crimes will likely contravene the ICCPR’s Article 6(4), 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).

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. It is an important international

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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.

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, 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.

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, 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, 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.

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.
