VICTIM–PERPETRATOR RECONCILIATION AGREEMENTS: WHAT CAN MUSLIM-MAJORITY JURISDICTIONS AND THE PRC LEARN FROM EACH OTHER?

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Abstract As States that use the death penalty liberally in a world that increasingly favours abolition, the Muslim-majority jurisdictions that are strict exponents of Islamic law and the People's Republic of China share a crucial commonality: their frequent use of victim–perpetrator reconciliation agreements to remove convicted murderers from the threat of execution. In both cases, rather than a prisoner's last chance at escaping execution being recourse to executive clemency, victim–perpetrator reconciliation agreements fulfil largely the same purpose, together with providing means of compensating victims for economic loss, and enabling the State concerned to reduce execution numbers without formally limiting the death penalty's scope in law. Utilizing the functionalist approach of comparative law methodology, this article compares the 13 death penalty retentionist nations that have incorporated Islamic law principles into their positive criminal law with the People's Republic of China, as to the functions underpinning victim–perpetrator reconciliation agreements in death penalty cases.

Keywords: capital punishment, China, clemency, comparative law, death penalty, Islamic law, pardon, PRC law, reconciliation agreements.

I. INTRODUCTION

As States that use the death penalty liberally in a world that increasingly favours abolition, the Muslim-majority jurisdictions that are strict exponents of Islamic law and the People's Republic of China (PRC) share a crucial commonality: their frequent use of victim–perpetrator reconciliation agreements to remove from convicted murderers the threat of execution. In both cases, rather than a prisoner's last chance at escaping execution being recourse to the executive clemency procedure mandated for capital crimes by Article 6(4) of the International Covenant on Civil and Political Rights (ICCPR), victim–perpetrator reconciliation agreements fulfil largely the same purpose, together with providing means of compensating victims for economic loss, and enabling the State concerned to reduce execution numbers without formally limiting the

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death penalty's scope in law. This article compares the 13 death penalty retentionist nations that have incorporated Islamic law principles into their positive criminal law[1] with the PRC, as to the functions underpinning these victim–perpetrator reconciliation agreements. In doing so, the authors adopt the functionalist approach of comparative law methodology as a means of drawing mutually-reinforcing lessons from two otherwise very different legal institutions: one deriving from religious texts and one secular.

II. A FUNCTIONALIST APPROACH

Simply stated, functionalism within comparative law methodology incorporates the following steps: a) identifying a similar problem faced by different legal systems; b) documenting the different legal measures taken by States to remedy this problem; and c) comparing and contrasting those remedial measures, before explaining the reasons for similarity and difference.[2] As Zweigert and Kötz famously stated, 'only rules which perform the same function and address the same real problem … can profitably be compared'.[3] In this manner, even the laws of divergent legal 'families' such as socialist law, civil law, religious law and common law can be likened.[4] Crucially, in performing this exercise, comparativists must consider not only the original intended function of the legal institution concerned, but also the 'latent' functions defined by its consequences: the originally unintended functions of the law.[5]

Reflecting on requirement a), above, in the 13 actively retentionist Muslim-majority jurisdictions under study[6] and in the PRC, victim–perpetrator reconciliation agreements presently perform the following three common functions:

1. Filling the legal vacuum created by the lack of individualized executive clemency procedures;[7]

[1] These are: Iran, Saudi Arabia, Yemen, United Arab Emirates, Kuwait, Bahrain, Jordan, Sudan, Nigeria (12 Northern States), Somalia, Libya, Afghanistan, and Pakistan. See n 39.

[2] CA Whytock, 'Legal Origins, Functionalism, and the Future of Comparative Law' (2009) 6 BYULRev 1879, 1879; A Frohlich, 'Functionalism in Comparative Law' (Blog Post, 2014) <https://comparelex.org/2014/03/20/functionalism-in-comparative-law/> G Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 65–6; M Dubber, 'Comparative Criminal Law' in M Reimann and R Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 1291.

[3] K Zweigert and H Kötz, *An Introduction to Comparative Law* (Oxford University Press 1998) 10.

[4] R Michaels, 'The Functional Method of Comparative Law' in Reimann and Zimmerman (n 2) 342, 358.

[5] Whytock (n 2) 1889; Michaels (n 4) 360–1; A Osanloo, 'When Blood Has Spilled: Gender, Honor, and Compensation in Iranian Criminal Sanctioning' (2012) 35 Political and Legal Anthropology Review 308, 309.

[6] An actively retentionist State is a State that has conducted at least one execution over the past 10 years, so as not to be labelled 'abolitionist in practice' (R Hood and C Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2015) vii).

[7] See Section VI.

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2. Providing the State with a means of controlling excessive punitiveness in the criminal justice system, as reflected by the number of annual executions;[8] and
3. Providing financial compensation to a murder victim's family, for pain and suffering and in lieu of lost earning capacity.[9]

In the case of compensation payments for intentional homicide in Muslim-majority jurisdictions (*diya*), only the third of these common justifications (compensating victims) was originally intended, the first two functions having developed more recently as *latent* consequences, with the advent of modern nation-States and their declining use of capital punishment to preserve social order. *Diya* actually originated as the religious codification of an ancient Arab tribal practice designed to prevent the escalation of conflict and to compensate the aggrieved tribe for the loss or injury of one of its members.[10] However, with the modern State's monopoly of coercive force through the police, military, prisons and of course the judicial death penalty, it is debatable whether the prevention of intertribal conflict and revenge still subsists as one of *diya*'s important modern functions.[11] For Chinese Victim-Reconciliation Agreements (VRAs) on the other hand, the latter two functions identified (controlling punitiveness and compensation) were those originally envisaged by PRC judicial reformers in the 2000s.[12] The first listed function (accounting for clemency) arose as an unintended consequence after VRAs became widespread in Chinese capital cases from 2007.[13] Altogether, regardless of their originally intended roles, these are the three common functions that both *diya* and VRAs now share, thereby demonstrating the institutions' aptness for comparison.[14]

This article explores the similarities and differences in the approaches taken in the PRC and in 13 Muslim-majority nations in promoting these three functional goals (executive clemency, leniency, and compensation) since

[8] See Section VII.

[9] ibid.

[10] MS El-Awa, *Punishment in Islamic Law* (American Trust Publications 1982) 70–1; S Greengus, *Laws in the Bible and in Early Rabbinic Collections* (Cascade Books 2011) 167–9; CR Lange, 'Public Order' in R Peters and P Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Ashgate 2014) 169; MJL Hardy, *Blood Feuds and the Payment of Blood Money in The Middle East* (EJ Brill 1963) 46.

[11] Contrast *diya* paid informally, outside the auspices of the formal judicial process, which is still used as a reconciliatory measure between tribes and communities. See n 39.

[12] S Trevaskes, 'Lenient Death Sentencing and the "Cash for Clemency" Debate' (2015) 73 The China Journal 38, 41; H Fu, 'Between Deference and Defiance: Courts and Penal Populism in Chinese Capital Cases' in L Bin and L Hong (eds), *The Death Penalty in China* (Columbia University Press 2016) 290.

[13] See Section IV.

[14] These are the three shared modern functions. Nonetheless, there are other modern functions that are *not* common between the jurisdictions concerned, such as for the State's positive law to honour and comport with religious precepts (*diya*—see E Gottesman, 'The Reemergence of Qisas and Diyat in Pakistan' (1992) 23 ColumHumRtsLRev 433, 435–6; El-Awa (n 10) xi); and as a utilitarian means of avoiding further appeals which may clog the court system (VRAs – Fu (n 12) 287).

2007, when VRAs became common in PRC murder cases. After initially outlining the salient features of both *diya* and VRAs, based upon this comparison, at the end of the article we suggest possible improvements deriving from the approach of the 'other' system,[15] in order to best fulfil the three common functions identified above. As Samuel describes, one of the great advantages of functionalism as a methodology is that it

> allows the comparatist to compare rules in order to determine which out of several different rules having the same purpose is the better solution to the problem that the rules address. Functionalism promises an evaluative method – the search for a 'better solution'[.][16]

III. *DIYA* IN ACTIVELY RETENTIONIST STATES

Diya (also spelt *diyya*, *diyah*, *dia* or *diyeh*) is the payment of compensation under Islamic law by the perpetrator of a serious crime against the person, in order to avoid retaliation in kind. Such retaliation may be authorized by Sharia courts as *qisas* (retribution), albeit carried out by the State rather than the victim.[17] As noted above, *diya* has its historical origins in the prevention of blood feuds in pre-Islamic tribal societies, and was later incorporated into the Quran and Sunnah.[18]

For the purposes of comparison with its Chinese equivalent, in this article we are only concerned with the application of *diya* in cases of intentional killing (murder). However, retaliation in kind is also possible under Islamic law for non-fatal bodily injury,[19] as is the payment of *diya* available for unintentional killing and unintentional bodily harm.[20] Under classical Sharia doctrine, relief from coercive punishment through *diya* is restricted to serious offences against the person and is thus incapable of being applied to *hudud* crimes with mandatory penalties (including death), such as theft, highway robbery, drinking alcohol, apostasy, illicit sexual relations, and allegations of unchastity.[21] Scholars across the various schools of Islamic law jurisprudence dispute which of these offences should properly be classified as *hudud*, and whether or not any can be pardoned by the State, given they are crimes against Islam itself.[22] *Tazir* offences, a third category of offences with

[15] Whytock (n 2) 1883; Samuel (n 2) 67; Michaels (n 4) 342.
[16] Samuel (n 2) 67.
[17] AA al-Aziz al-Alfi, 'Punishment in Islamic Criminal Law' in MC Bassiouni (ed), *The Islamic Criminal Justice System* (Oceana Publications 1982) 232; El-Awa (n 10) 72.
[18] El-Awa (n 10) 70–1.
[19] al-Alfi (n 17) 230.
[20] MC Bassiouni, 'Quesas Crimes' in Bassiouni (n 17) 206; S Gossal, 'Human Rights and the Death Penalty: A Comparative Analysis of International and Islamic Law' (2007) 12 CovLJ 16, 22.
[21] El-Awa (n 10) 1–2; R Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press 2006) 53–4.
[22] El-Awa (n 10) 1–2; Peters (n 21) 54; MA Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 73.The four schools of Sunni legal thought are the Shafi'i, Hanafi, Maliki and Hanbali, whereas the main Shia school is the Ja'fari (C Mallat, 'Comparative Law and the Islamic (Middle Eastern) Legal Culture' in Reimann and Zimmerman (n 2) 613).

discretionary punishments that may also extend to the death penalty, may be pardoned by the ruler (head of State) but not by victims.[23]

Returning to the *qisas* crime of murder, only the victim's heirs may choose to remit punishment, rather than the State.[24] Through paying *diya*, the perpetrator escapes the retaliatory punishment of death, while the family of the victim that forgoes retribution gains in standing and in the afterlife,[25] as well as the monetary compensation itself. In modern criminal justice systems that have incorporated Sharia into their positive criminal law, *diya* as a pecuniary response to murder is generally supported by the State, as would be done for a settlement in a civil action, instead of the aggrieved party fully enforcing the civil right in the courts.[26] The price of *diya*, at least as a starting point, is set under classical Sharia as the value of 100 camels for a free Muslim male,[27] being reduced if the victim was a woman, a non-Muslim, or a slave, with differing amounts set under the schools of Islamic law jurisprudence.[28] *Diya* can be paid by the perpetrator himself, his heirs or family, or else the perpetrator's neighbours or tribe.[29] As such, the jurist MC Bassiouni has observed that: 'The principle of *Diyya* … embodies a concept of collective responsibility.'[30]

One controversy that arises within the jurisprudential literature is whether accepting the payment itself abrogates the punishment (and forms the 'pardon'), or else whether accepting payment is a separate issue following on from forgiveness through the award of a pardon by the victim's family.[31] In the majority of modern-day cases, *diya* will be paid as a means of removing the sentence of death and avoiding execution, although importantly, it is also possible for the heirs of the victim to refuse to accept *diya* and instead to remit the offender's punishment as a compassionate act of religious charity, called *afw*.[32] Viewing the process as two separate acts—forgiveness/remission, followed by payment—casts the sum as a means of *compensation* rather than as a coercive punishment such as a fine,[33] although there remain

[23] E Peiffer, 'The Death Penalty in Traditional Islamic law and as Interpreted in Saudi Arabia and Nigeria' (2005) 11 William and Mary Journal of Women and the Law 507, 518.

[24] Baderin (n 22) 73; Peters (n 21) 39. [25] Peiffer (n 23) 517, 536; Gossal (n 20) 20.

[26] MA 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' (2004) 11 Yearbook of Islamic and Middle Eastern Law Online 135.

[27] The blood price would usually be paid 'by an equivalent amount of money, either gold or silver, cows, sheep or garments' (El-Awa (n 10) 75–6).

[28] Peters (n 21) 50–2; Lange (n 10). See n 22.

[29] Bassiouni (n 20) 207; MM Qafisheh, 'Restorative Justice in the Islamic Penal Law: A Contribution to the Global System' (2012) 7 International Journal of Criminal Justice Sciences 487, 489. [30] Bassiouni (n 20) 207. [31] Baderin (n 22) 143 n 34; Bassiouni (n 20) 209.

[32] Qafisheh (n 29) 494; MC Duncan, 'Playing by Their Rules: The Death Penalty and Foreigners in Saudi Arabia' (1998) 27 GaJIntl&CompL 231, 236 n 36, 239; B Hubbard, 'Saudi Justice: Harsh but Able to Spare the Sword' *New York Times* (22 March 2015); Gottesman (n 14) 434.

[33] al-Alfi (n 17) 230; El-Awa (n 10) 85, 89. The fact that *diya* is primarily a compensatory, rather than punitive, remedy explains why different sums were traditionally payable for men and women

some influential modern scholars who instead characterize *diya* as a punitive order designed to deter future crimes.[34]

Nevertheless, as opposed to the historical application of *diya* and its elucidation within classical Sharia doctrine, in this article our comparative interest extends solely to the application of *diya* within the positive laws of modern nation-States. As noted earlier, there are 13 present-day jurisdictions in the Middle East (Iran, Saudi Arabia, Yemen, United Arab Emirates (UAE), Kuwait, Bahrain, Jordan), Africa (Sudan, Nigeria,[35] Somalia,[36] Libya), and South Asia (Afghanistan, Pakistan) that have chosen to incorporate Sharia into their positive criminal laws,[37] and which continue to sentence prisoners to death and to carry out the punishment as active retentionists.[38] All of these jurisdictions retain and continue to use the death penalty as a judicial punishment for murder but concurrently enable the perpetrator to pay a sum of money to the victim's next of kin to escape execution.[39] Given the evidently diverse range of societies to which it

and slaves and non-slaves, as a measure of lost economic output in the early Islamic era (AE Black *et al.*, *Modern Perspectives on Islamic Law* (Edward Elgar Publishing 2013) 221).

[34] Bassiouni (n 20) 206; G Benmelha, 'Ta'azir Crimes' in Bassiouni (n 17) 224; Gottesman (n 14) 447.

[35] Refers to 12 northern Nigerian States only: see Peters (n 21) 169 and GJ Weimann, *Islamic Criminal Law in Northern Nigeria: Politics, Religion, Judicial Practice* (University of Amsterdam Press 2010) 15, 103.

[36] Includes Federal Republic of Somalia, Puntland State of Somalia and the Republic of Somaliland: see 'Death Penalty Database' (S Babcock *et al.*, Cornell University Law School) <http://www.deathpenaltyworldwide.org/search.cfm>. During the remainder of this article, 'Somalia' refers to the internationally recognized Federal Republic of Somalia.

[37] Constitution of Saudi Arabia 1992, art 48; Iran Islamic Penal Code 2013, art 12; Yemen Law 12/1994, art 5; United Arab Emirates Penal Code 1987, art 26; Babcock *et al.* (n 36) (Kuwait; Somalia); Bahrain Penal Code 1976, art 109; Constitution of Jordan 1952, art 105(ii)–106; Sudan Penal Code 2003, section 251; Provisional Constitution of the Federal Republic of Somalia 2012, art 2(3), 4(1), 40(4); Constitution of the Republic of Somaliland 2001, art 90(5); Constitution of Puntland State of Somalia 2010, art 79(11), 133(1); Afghanistan Penal Code 1976, art 1; Pakistan Penal Code 1860, art 53, 310; 'Harmonised Sharia Penal Code Law' (Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria, March 2002) art 93, 199 (outlining the criminal laws of 12 Northern Nigerian States); Libya Law 7/2000, art 1.

[38] Babcock *et al.* (n 36); Hood and Hoyle (n 6) 503. *Diya* is also applied for *qisas* crimes in Mauritania, Qatar, the Maldives and Oman, however these States have not conducted an execution for over 10 years (Hood and Hoyle (n 6) 507–8). See Babcock *et al.* (n 36) (Oman); Mauritania Penal Code 1983, art 1; Qatar Penal Code 2004, art 1; Maldives Regulation R-33/2014.

[39] In several countries, including some where *diya* is a part of the positive criminal law (Pakistan, Somalia, Sudan, Afghanistan, Saudi Arabia) and some where it is not (Iraq, Egypt, Jordan, Palestine (Gaza Strip)), informal, extra-legal settlements are nonetheless arranged between parties to a crime, which precludes the crime's reporting to State authorities or its prosecution (N Malone, 'How Does Blood Money Work?' (*Slate Blog Post*, 2009); Gottesman (n 14) 457; E Goat, 'Trading Justice for Money: Prisoners on Pakistan's Death Row Can Pay Off Their Victims' Families in Exchange for Freedom' *The Independent* (10 January 2015); S Wacays, 'Somaliland: From Crisis to Stability' (unpublished Master's Thesis in Human Geography, Department of Sociology and Human Geography, University of Oslo, May 2008) 74; Babcock *et al.* (n 36); D Rogers, *Postinternationalism and Small Arms Control: Theory, Politics, and Security* (Routledge 2016) 68; interview with Afghan NGO Staff (Oslo, 23 June 2016); interview with Saudi Arabian NGO Staff (Oslo, 23 June 2016); Penal Reform International, *Sharia law and the Death Penalty: Would Abolition of the Death Penalty Be Unfaithful to the Message of Islam?* (Penal

applies, the positive law of *diya* operates at the intersection of Islamic law doctrine and the colonial legal influences experienced within the jurisdictions listed.[40]

Looking at the State practice in greater detail, depending on the jurisdiction concerned, after a confession or a finding of guilt, a judge will set the default amount of *diya*, using a fixed (eg Saudi Arabia; Iran; Yemen; Northern Nigerian States) or flexible (eg Pakistan) formula.[41] However, the final amount of money demanded by the victim's heirs can be privately negotiated between the parties under judicial oversight (a process known as *sulh*), and may deviate significantly from the judicial starting point.[42] As discussed above, it is even possible (albeit rare) for the perpetrator to be spared from the death penalty by the victim's heirs *without* any payment being made, via *afw*.[43]

The consequences of the payment being accepted or of *afw* being granted by the victim's next of kin are that the perpetrator will either walk free, or will have to serve a term of imprisonment or endure corporal punishment following a discretionary (*tazir*) sentence imposed by the judge in lieu of retaliation.[44] The range of possible alternative sentences across the jurisdictions is wide, reflecting Sharia's doctrinal vacuum in this area.[45]

Reform International 2015) 13). For the purposes of this article, we consider such informal reconciliation agreements inappropriate objects of comparison with Chinese VRAs, as State institutions do not play as active a role in bringing the former reconciliation agreements about, in contrast with the judicial oversight within regular *diya* negotiations. For further research on informal dispute resolution arrangements in the Muslim world, see YB Hounet, '"Reconciliation is the Foundation!": Courts of Justice and Unofficial Reconciliation Practices in Algeria and Sudan' (2015) 60(3–4) Diogenes 1; JH Wilson, 'Blood Money in Sudan and Beyond: Restorative Justice or Face-Saving Measure' (unpublished Doctor of Liberal Studies thesis, Georgetown University 2014); B Dupret and F Burgat (eds), *Le cheikh et le procureur: Systèmes coutumiers, centralisme etatique et pratiques juridiques au Yémen et en Egypte* (CEDEJ 2005); GE Irani, 'Arab-Islamic Rituals of Conflict Resolution and Long-Term Peace in the Middle East' (2000) 7 Palestine-Israel Journal <http://www.pij.org/details.php?id=994>; and GE Irani, 'Islamic Mediation Techniques for Middle East Conflicts' (1999) 3(2) Middle East Review of International Affairs 1.

[40] SZ Ismail, 'The Modern Interpretation of the *Diyat* Formula for the Quantum of Damages: The Case of Homicide and Personal Injuries' (2012) 26 Arab Law Quarterly 361, 377; SC Hascall, 'Restorative Justice in Islam: Should Qisas Be Considered a Form of Restorative Justice?' (2011) 4 Berkeley Journal of Middle Eastern & Islamic Law 35, 61.

[41] H Esmaeili and J Gans, 'Islamic Law across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials' (1999–2000) 28 Denver Journal of International Law & Policy 145, 165–6 (Saudi Arabia); Pakistan Penal Code 1860, art 323; Iran Islamic Penal Code 2013, Book Four: *Diyat*; Yemen Law 12/1994, art 40; 'Harmonised Sharia Penal Code Law' (n 37) art 60 (Northern Nigerian States). See n 132 on contemporary prices.

[42] El-Awa (n 10) 76, 85, 89; Penal Reform International (n 39); interview with Saudi Arabian NGO Staff (n 39); interview with Iranian NGO Staff (Oslo, 23 June 2016).

[43] El-Awa (n 10) 84; Duncan (n 32) 239; Hubbard (n 32); Gottesman (n 14) 442.

[44] al-Alfi (n 17) 227; Bassiouni (n 20) 209.

[45] Lange (n 10) 170. Of the jurisdictions under study, Pakistani courts can impose a replacement sentence of death itself, life imprisonment, or a term of imprisonment of up to 14 years, and a minimum term of 10 years in cases of honour killing (Pakistan Penal Code 1860, art 311). However, none of these sentences are used with any regularity, with many perpetrators walking free after the settlement (MH Cheema, 'Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law' (2012) 60 AmJCompL 875, 899–900). Libyan law imposes a more consistent mandatory sentence of life imprisonment if *diya* is accepted (Libya Law 7/2000, art

On the other hand, if the offer of *diya* is not accepted, then the murderer is liable to be executed by hanging, beheading, or firing squad, depending on the jurisdiction.[46] Finally, as we elaborate on below, in some jurisdictions an offender who is not able to be reconciled with the victim's family is still eligible to receive clemency from the head of State, or at least a stay of execution.

IV. VICTIM RECONCILIATION AGREEMENTS IN THE PRC

The year 2007 heralded an era of capital punishment reform in the People's Republic of China, the goals of which were to 'execute fewer' and 'execute with caution'.[47] Victim–perpetrator Reconciliation Agreements in capital cases were initially intended to facilitate these aims: to punish better and to punish leniently, as well as to 'placate family members of victims, leading to the "social" harmony that President Hu Jintao first articulated in 2004'.[48] This forms both the backdrop to, and the deeper cause for, the new ascendency of reconciliation agreements between victims' families and capital defendants after 2007, although as Fu notes, VRAs may have a longer history in Chinese capital cases.[49]

In the PRC, death sentences imposed at first instance by the municipal-level Intermediate People's Courts may be appealed to the Provincial Higher People's Courts, and since 2007, each death sentence that remains in place is automatically reviewed by the Supreme People's Court (SPC) in Beijing.[50] Thereafter, there is no political appeal available to the head of State or government, unlike nearly every other retentionist jurisdiction,[51] although

1). In Yemen the alternative punishment is up to 15 years (Yemen Law 12/1994, art 55). In Sudan, the maximum punishment is 10 years' imprisonment plus a fine (Sudan Penal Code 2003, Section 251). In Iran, the Islamic Penal Code 2013, art 612 allows for 3–10 years imprisonment. In most Northern Nigerian States, the *tazir* penalty is fixed at one year's imprisonment and 100 lashes, whereas in Kano and Katsina States, up to 10 years' imprisonment is permissible (Weimann (n 35) 97–8). In Kaduna State no further punishment appears possible if *diya* is accepted ('Harmonised Sharia Penal Code Law' (n 37) 85 n 270). In Saudi Arabia, the usual punishment awarded has variously been reported as five years of imprisonment or less (Duncan (n 32) 239; Ismail (n 40) 377) or between eight months and two years' imprisonment (interview with Saudi Arabian NGO Staff (n 39)). Nonetheless, Sharia judges possess absolute sentencing discretion to impose harsher punishments as *tazir*, including corporal and capital punishment (Peters (n 21) 66–7). The same situation presumably follows in the UAE, Somalia, Bahrain, Jordan, Libya and Afghanistan, with no alternative *tazir* penalty proscribed in the relevant legislation or constitutional provisions.

[46] Babcock *et al.* (n 36).

[47] B Zhao, 'The Use of the Death Penalty in Contemporary China: For Reference' (2011) 6 China Legal Science 5, 5–22.

[48] Trevaskes (n 12); Fu (n 12).

[49] Fu (n 12) at 290 asserts that the SPC 'has *always* allowed cash for leniency and clemency in limited circumstances', and cites an SPC memo from 1999 on the subject (emphasis added).

[50] D Johnson and M Miao, 'Chinese Capital Punishment in Comparative Perspective' in L Bin and L Hong (eds), *The Death Penalty in China* (Columbia University Press 2016) 31.

[51] 'Amnesty International: When Justice Fails: Thousands Executed in Asia after Unfair Trials' (Amnesty International 2011) 31.

Articles 67(17) and 80 of the PRC Constitution 1982 together enable the State President to declare a 'special amnesty' as a means of releasing prisoners, on advice from the National People's Congress (the Chinese legislature) and its Standing Committee.

In this context, since 2007, Chinese judges have increasingly been prepared to use their sentencing discretion to impose 'suspended' death sentences if the victim's family and the perpetrator come to a financial settlement and the perpetrator expresses contrition for the crime.[52] Authorized under Article 48 of the Chinese Criminal Law 1997, a suspended death sentence means that the condemned prisoner's sentence is commuted to life or 25 years' imprisonment, contingent upon the prisoner not committing a serious crime in prison during the first two years of the sentence, which forms the 'probation' period. Empirical research suggests that over 95 per cent of suspended death sentences do not result in the prisoner's execution.[53] Therefore, a suspended death sentence (although still classified as capital punishment under Chinese law) essentially constitutes a long-term or life sentence of imprisonment.[54]

The VRA operates as a tool to guide sentencing discretion at trial,[55] alongside other mitigating factors such as voluntary surrender and providing information to police,[56] age, mental capacity and disability.[57] Importantly however, reconciliation agreements in capital cases are not yet legislatively recognized: criminal reconciliation (*xingshi hejie*) has only received legislative sanction since 2012 for minor civil disputes and offences of negligence, neither of which are capital offences.[58]

As for the mechanics, the VRA is an arrangement negotiated by all three parties to a capital sentencing proceeding—the court, which considers commuting the otherwise final punishment to a suspended death sentence, the victim's family which receives a sum of monetary compensation in exchange for accepting the lighter sentencing, and the defendant, who offers pecuniary restitution (alongside an apology, on most occasions).[59] Weatherly and Pittam describe the process in detail, as it applies to both capital and non-capital crimes:

[52] D Johnson and F Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (Oxford University Press 2009) 277; R Weatherley and H Pittam, 'Money for Life: The Legal Debate in China about Criminal Reconciliation in Death Penalty Cases' (2015) 39 Asian Perspective 277, 282–3; Fu (n 12) 292.

[53] M Miao, 'Two Years between Life and Death: A Critical Analysis of the Suspended Death Penalty in China' (2016) 45 IJLCJ 26, 38.

[54] Trevaskes (n 12) 38.

[55] B Zhao and X Peng, 'On Civil Compensation and Limiting the Application of the Death Penalty' (2010) 5 China Legal Science 52.

[56] Trevaskes (n 12) 38.

[57] J Shen, 'Killing a Chicken to Scare the Monkey: The Unequal Administration of Death in China' (2014) 23 Pacific Rim Law and Policy Journal 869, 898.

[58] Weatherley and Pittam (n 52) 278. For further detail on criminal reconciliation in minor cases in China, see J Jiang, *Criminal Reconciliation in Contemporary China: An Empirical and Analytical Enquiry* (Edward Elgar 2016).

[59] Weatherley and Pittam (n 52) 277–99; Fu (n 12) 291.

> the offender and the victim (or the victim's family, if the victim has been killed) participate in a series of 'criminal reconciliation meetings' presided over by the officiating judge. During those meetings, the parties are expected to resolve their differences through discussion. If an agreement on compensation can be reached, the judge will usually decide to commute the offender's death sentence [from one of immediate execution to a suspended death sentence]. The offender is also expected to exhibit a sufficient level of contrition for the crime committed.[60]

Most intriguing in this process is that, in addition to the private parties—the victim's family and the capital defendant—the court is also an active player in this process of communication and negotiation. Trial courts in the PRC, encouraged by the SPC,[61] have keenly fostered the twin goals of punitive parsimony and victim restitution through the growing use of VRAs.

V. EXECUTIVE CLEMENCY IN RETENTIONIST LEGAL SYSTEMS

Before moving to the operative differences between the Islamic law and Chinese reconciliation procedures, in this section we clarify the significance of executive clemency for the first of the three functional justifications for victim–perpetrator reconciliation agreements set out above.

In legal systems that retain the death penalty, once a defendant is sentenced to death by a court of law and has exhausted all available judicial appeals, his or her last remaining procedural hope is usually to petition for commutation or pardon from the head of State, head of government, or provincial political leader.[62] The clemency power has ancient origins, deriving from the sovereign power of absolute monarchs to remit punishment,[63] alongside the powers to wage war, sign international treaties, establish diplomatic relations,[64] and to enforce the death penalty itself.[65] However, the ability to relieve a prisoner from deadly punishment lawfully imposed nonetheless subsists in modern constitutional monarchies and republics. In modern criminal justice usage, the term 'clemency' usually denotes the conversion of a sentence of death into a sentence of imprisonment, while a 'pardon' or 'unconditional pardon' means that the decision-maker not only halts the

[60] Weatherley and Pittam (n 52) 278.

[61] Fu (n 12) 291.

[62] L Sebba, 'Clemency in Perspective' in S Landau and L Sebba (eds), *Criminology in Perspective: Essays in Honour of Israel Drapkin* (Lexington Books 1977) 230; A Sarat, 'At the Boundaries of Law: Executive Clemency, Sovereign Prerogative, and the Dilemma of American Legality' (2005) 57 American Quarterly 611, 619.

[63] Sarat (n 62) 16; N Hussain and A Sarat, 'Toward New Theoretical Perspectives on Forgiveness, Mercy, and Clemency: An Introduction' in A Sarat and N Hussain (eds), *Forgiveness, Mercy and Clemency* (Stanford University Press 2007) 6; A Sitze, 'Keeping the Peace' in Sarat and Hussain ibid 200–1.

[64] C Turpin and A Tomkins, *British Government and the Constitution: Text and Materials* (Cambridge University Press 2007) 146, 464–8.

[65] D Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Oxford University Press 2010) 77; Sitze (n 63) 186; A Sarat, 'Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State' (2008) 42 Law and Society Review 183, 185.

execution of the death sentence, but also grants the recipient an unconditional release from prison altogether,[66] sometimes accompanied by the complete erasure of criminal responsibility.[67] Throughout the remainder of this article, we use the term 'clemency' to include both 'pardon' and 'commutation', with the important qualification that grants of clemency can only be gifted on a case-by-case basis, unlike a mass grant of amnesty for example. In capital cases, an 'amnesty' is a grant of commutation or pardon to an entire *class* of prisoners without detailed consideration of individual circumstances, promulgated by executive decree *or* by legislation.[68]

Despite its origins as a purely political power attaching to and being a reflection of sovereignty,[69] clemency has gradually evolved in order to address particular problems in modern systems of criminal justice. Although the ascent of the 'administrative State', with its judicial methods of correcting injustice, has blunted its importance as a fail-safe against excessive and erroneous punishment,[70] clemency remains an important safeguard in capital cases, because of the broad range of reasons that a death sentence can be abrogated by executive action:

[66] LJ Palmer, *Encyclopedia of Capital Punishment in the United States* (McFarland & Co 2001) 110; R Coyne and L Entzeroth, *Capital Punishment and the Judicial Process* (Carolina Academic Press 2001) 838.

[67] JR Acker *et al.*, 'Merciful Justice: Lessons from 50 Years of New York Death Penalty Commutations' (2010) 35 Criminal Justice Review 183, 184; JR Acker and C Lanier, 'May God – Or the Governor – Have Mercy: Executive Clemency and Executions in Modern Death Penalty Systems' (2000) 36(3) CrimLBull 200, 204–5; E Abramowitz and D Paget, 'Executive Clemency in Capital Cases' (1964) 39 NYULRev 136, 138.

[68] G Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Penguin Press 2006) 296.

[69] Garland describes sovereignty as the 'claimed capacity to rule a territory in the face of competition and resistance from external and internal enemies' (D Garland, 'The Limits of the Sovereign State' (1996) 36 BritJCriminol 445, 448). Today, as in the past, clemency provides key benefits for the decision-maker who exercises it, entirely independent of the prisoner's interests and those of the broader constituency. Frequent use might cast the decision-maker (usually the head of State) in a benevolent light, increasing the ruler's hold over the 'life and death' of his citizens (DT Kobil, 'The Quality of Mercy Strained: Wresting the Pardoning Power from the King' (1991) 69 TexLRev 569, 571, 582; Sarat (n 62) 16; M Shapiro, 'Appeal' (1980) 14 Law and Society Review 629, 635–6; Coyne and Entzeroth (n 66) 839). Relatedly, clemency might help an autocratic government increase its international legitimacy, or clemency may conform with the ruler's conception of religious piety (D Pascoe, 'Clemency in Southeast Asian Death Penalty Cases' (2014) 1 Centre for Indonesian Law, Islam and Society Policy Papers). Clemency may even act as a form of corruption, being granted for the financial or direct political benefit of the decision-maker (Sebba (n 62) 231; E Rapaport, 'Staying Alive: Executive Clemency, Equal Protection and the Politics of Gender in Women's Capital Cases' (2001) 4 BuffCrimLR 967, 982; M Heise, 'Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure' (2003) 89 VaLRev 239, 289, 298; JP Crouch, *The Presidential Pardon Power* (University Press of Kansas 2009) 4).

[70] RE Barkow, 'The Ascent of the Administrative State and the Demise of Mercy' (2008) 121 HarvLRev 1332, 1335.

- clemency operates as a final procedural level of 'appeal' for defendants seeking to preserve their own lives;[71]
- clemency allows for retributivist leniency from the executive when the prisoner's criminal conviction or severity of punishment may be undeserved;[72] and,
- clemency is a means of taking into account extra-legal and post-arrest factors in the decision as to whether or not to carry out a death sentence. Such factors may relate to good deeds carried out by the prisoner him or herself, or else purely utilitarian considerations.[73]

The vast majority of States worldwide (both death penalty retentionist and abolitionist States) allow for clemency within national constitutions, legislation, or by convention.[74] Indeed, the right to have a death sentence considered by the executive for clemency may have entered customary international law, so widely is it exercised.[75]

However, there are a handful of States that run counter to this trend. The PRC,[76] together with at least six other actively retentionist nations that have incorporated Sharia into their positive criminal law to varying extents (UAE, Yemen, Iran, Sudan, Libya and Saudi Arabia), do not allow for a prisoner sentenced to death for murder to apply for or be individually considered for clemency by the executive political authority.[77] For political and resource-allocation reasons (in the case of China)[78] and for doctrinal religious reasons (in the six Muslim-majority jurisdictions) those convicted of murder do not have the right to have their cases individually considered for executive clemency. Instead, victim–perpetrator agreements, such as *diya* and VRAs, operate as partial functional replacements for executive clemency.

[71] S Cooper and D Gough, 'The Controversy of Clemency and Innocence in America' (2014) 51 CalWLRev 55, 98; B Cunningham, 'Empty Protection and Meaningless Review—The Need to Reform California's Stagnant Capital Clemency System' (2012) 44 LoyLALRev 265, 271.

[72] FC DeCoste, 'Conditions of Clemency: Justice from the Offender' (2003) 66 SaskLRev 1, 9; K Moore, *Pardons: Justice, Mercy and the Public Interest* (Oxford University Press 1989) 129; LE Carter, 'Lessons from Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Conventions on Consular Relations' (2005) 15 DukeJComp&IntlL 259, 269.

[73] D Pascoe, 'Is Diya a Form of Clemency?' (2016) 34 BUIntlLJ 149, 171–4.

[74] Amnesty International (n 51); L Sebba, 'The Pardoning Power: A World Survey' (1977) 68 JCrimL&Criminology 83.

[75] Hood and Hoyle (n 6) 313; Shen (n 57) 899.

[76] Shen (n 57) 899; C Su, 'The Present and Future: The Death Penalty in China's Penal Code' (2011) 36 OklaCityULRev 427, 445.

[77] Babcock *et al.* (n 36) (Libya, Saudi Arabia, UAE); Sudan Criminal Act 1991, section 38(2); Iran Islamic Penal Code 2013, art 261; Yemen Law 12/1994, art 48. This no-clemency categorization may well also extend to Somalia, whose Constitution (while strongly Islamic) is silent on this issue (see Provisional Constitution of the Federal Republic of Somalia 2012, art 90 (p)). Notably, the constitutions of neighbouring semi-autonomous provinces Puntland and Somaliland bar executive clemency in *qisas* cases (Constitution of the Republic of Somaliland 2001, art 90(5); Constitution of Puntland State of Somalia 2010, art 79(11)).

[78] Miao (n 53) 34.

VI. VICTIM–PERPETRATOR AGREEMENTS AS FUNCTIONAL REPLACEMENTS FOR CLEMENCY?

At the outset of this article, filling the executive clemency 'vacuum' was identified as one of three functions purportedly played by both *diya* agreements and VRAs. Moreover, in the preceding section, we described the multifaceted role played by executive clemency in death penalty systems. In retentionist jurisdictions where executive clemency is completely absent, do victim–perpetrator agreements play all of the roles identified, or are they imperfect functional replacements? Moreover, is there any difference between the way in which *diya* agreements and VRAs 'replace' clemency in their respective States of origin?

First of all, important national differences exist in the formal relationship between the victim–perpetrator agreement and the executive clemency mechanism, if the latter exists. In the Chinese case, although the Standing Committee of the National People's Congress can authorize the President to grant a 'special amnesty' (*teshe*) to particular prisoners via Articles 67(17) and 80 of the PRC's present (1982) Constitution, this procedure was not utilized at all between 1975 to 2015, with all grants prior to 1975 being made to release 'counter-revolutionaries' or 'war criminals'—in other words, opponents of the Communist regime.[79] Eschewing the ICCPR's 'right to seek' pardon or commutation of a death sentence in Article 6(4), the Chinese President's issuing of 'special amnesty' has never followed an individualized petition process.[80] Moreover, the power of the PRC Chairman to grant a 'general amnesty' (*dashe*) on legislative advice was present within the 1954 Constitution, but was never used,[81] and was omitted from both the 1975 and 1982 documents.

The implication is that since they were first granted in 1959,[82] 'special amnesties' have historically fulfilled the role traditionally played by legislative or executive amnesties in other jurisdictions, whereby prisoners are released en masse according to predetermined categories, such as the crime committed, the age of the prisoner, or previous national service. Following seven special amnesties granted exclusively to counter-revolutionaries or war criminals between 1960 to 1975, in 2015 the first special amnesty for 40 years was applied to prisoners who were under the age of 18 at the time of their crime,

[79] 'China: Juveniles Biggest Winners in 2015 Special Pardon' (Dui Hua Foundation, NGO article, 2016).

[80] Z Zhou, 'The Death Penalty in China: Reforms and Its Future' (Waseda University Institute for Advanced Studies, 2011) 35; Shen (n 57) 899; Su (n 76) 445. The PRC signed the ICCPR in 1998, yet has not yet ratified it.

[81] 'Pardon Us: Asian Clemency Laps China' (Dui Hua Foundation, NGO press release, 2012).

[82] 'Calls Grow in China for Special Pardon to Mark PRC's 60th Birthday' (Dui Hua Foundation, NGO press release, 2009).

disabled elderly prisoners (over age 75), or war veterans.[83] According to the Dui Hua Foundation, 95 per cent of the 31,527 prisoners granted amnesty in 2015 were juveniles at the time of their offence.[84] Significantly, prisoners facing capital punishment were excluded from the scope of the amnesty in 2015,[85] as had been the case in all previous grants.[86] The result is that lenient executive discretion in *capital* cases, while technically possible via the PRC Constitution in the form of a special amnesty, has *never* been exercised in contemporary Chinese penal history. Moreover, the ability to *petition* the head of State directly for clemency, informally available within imperial China,[87] did not survive the establishment of the PRC as a socialist State in 1949. Until the rise of VRAs from the mid-2000s, no quasi-legal institution allowed capital defendants the chance to plead for a lesser punishment from the executive branch of government.

As for *diya*, defining the relationship between clemency and victim–perpetrator reconciliation agreements depends upon which jurisdiction is being considered. The UAE, Yemen, Iran, Sudan, Libya and Saudi Arabia are the six actively retentionist jurisdictions where a prisoner sentenced to death for murder does *not* have individual recourse to clemency from the relevant head of State. In these countries the only extrajudicial means of commuting the death sentence are by paying *diya* to, or receiving *afw* from, the victim's family.[88] Unlike at least four other Muslim-majority jurisdictions that utilize *diya* in murder cases yet concurrently allow for executive clemency to override the victims' retributive wishes (Kuwait, Pakistan, Bahrain, and Nigeria),[89] in this set of six jurisdictions the formal post-conviction role of the executive is negligible.[90]

[83] Xinhua News Agency, 'The Order for A Special Pardon by the President of the People's Republic of China' (29 August 2015).

[84] Dui Hua Foundation (n 79); S Chen, 'Dongguan Intermediate Court: From Paying Restitution in Exchange of Lesser Punishment to Penal Reconciliation' *21st Century Business Herald* (7 February 2007).

[85] Dui Hua Foundation (n 79).

[86] AM Andrew and JA Rapp, *Autocracy and China's Rebel Founding Emperors: Comparing Chairman Mao and Ming Taizu* (Rowman & Littlefield 2000) 75.

[87] Shen (n 57) 899; Shapiro (n 69) 634–5.

[88] See n 77.

[89] Babcock *et al.* (n 36) (generally); Constitution of Kuwait 1962, art 75; Constitution of Pakistan 1973, art 45; Bahrain Penal Code 1976, art 90; Constitution of Nigeria 1999, art 175, 212 (President and State Governors). The Constitution of Afghanistan provides for Presidential clemency, without specifying exclusions for *qisas* offences, in art 64(18), as does the Jordan Penal Code 1960, art 51. In those two jurisdictions, it is unclear whether clemency is available in murder cases if the victim's heirs demand retribution.

[90] Nevertheless, despite lacking a formal and binding power to commute, government representatives may still attempt to persuade the victim's family to accept *diya* or to grant *afw* (Ismail (n 40) 377; interview with Saudi Arabian NGO Staff (n 39); interview with Iranian NGO Staff (n 42)). Executive authorities can also choose to simply not enforce the death penalty, leaving the perpetrator indefinitely on death row, given that *qisas* punishments are now enforced by the State, rather than the victim's next of kin. This option has a legislative basis in Saudi Arabia, with the King able to 'veto' executions, even if there is no official power to pardon *qisas* offences. (Saudi Arabia Law on Criminal Procedure 2001, art 220(a); Duncan (n 32) 240). An identical power vests in the President of Yemen (Constitution of Yemen 1991, art 123).

Retentionist States incorporating Sharia into their positive criminal law face a difficult choice between failing to allow for 'secular' clemency in murder cases (thereby contravening Article 6(4) of the ICCPR as State parties or under customary international law),[91] or failing to properly follow classical Sharia doctrine. Islamic law holds that only the victim's family can forgive those accused of *qisas* offences, and (within the *Hanafi* jurisprudential school at least) only God can forgive those convicted of *hudud* crimes, rather than the ruler (the head of State).[92] In the retentionist Muslim-majority States favouring the ICCPR-compliant approach, the murder convict therefore possesses *two* quasi-legal options to downgrade the death sentence: first via *diya* or *afw*, and then with clemency granted by the State President or Monarch. However, as indicated above, these jurisdictions are in the minority. Even within three of the four Muslim-majority jurisdictions under study where executive clemency remains formally available (Kuwait, Bahrain and Pakistan), it appears to be rarely exercised in murder cases,[93] with political authorities preferring to leave the victim's heirs as ultimate arbiters over life and death.

Given that individualized clemency has never been practised in the PRC, have VRAs filled the breach since 2007? Moreover, does *diya* perform some or all of the roles of executive clemency in both ICCPR-compliant and non-compliant States? We noted above that when employing the functionalist approach to comparative law, not only should the law's original functions be taken into account, but also any unintended consequences: the law's *latent* functions. In all the jurisdictions under study, although not perhaps intended, victim–perpetrator agreements appear to fill the functional lacunae left by a lack of executive clemency, at least to a certain extent.

We begin by looking at what national governments have said about the matter, together with the views of academic commentators. *Diya*, with ancient tribal origins predating the rise of modern sovereign States,[94] was

[91] Of the preceding six jurisdictions listed, four (Yemen, Iran, Sudan and Libya) are parties to the ICCPR. However, if the right to seek clemency is indeed a customary international law right (n 75 above), then it also binds the UAE and Saudi Arabia, unless these States are classified as persistent objectors, which remains controversial within customary international law (P Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59 ICLQ 779, 802). Afghanistan and Somalia, whose executive clemency power in murder cases remains unclear, are also ICCPR State parties.

[92] As noted above, there is some jurisprudential dispute as to which offences are classified as *hudud* (El-Awa (n 10) 2) and whether or not any *hudud* offences are pardonable by the State (Baderin (n 22) 73).

[93] Babcock *et al.* (n 36) (Kuwait; Bahrain); International Federation for Human Rights, 'Slow March to the Gallows: Death Penalty in Pakistan' (January 2007) 17; K Lewis, 'Pakistan: Paralysed Death-Row Prisoner "Suffering Life Worse Than Hell" after Stay of Execution Expires' *The Independent* (London 26 April 2016). Nigeria is the notable exception, where the President and State Governors have been active in granting clemency to prisoners on death row, and while remaining formally retentionist, the country has rarely executed prisoners over the past 10 years (P Alston, 'The Death Penalty' (Project on Extrajudicial Executions, Center for Human Rights and Global Justice, New York University School of Law) 11–12; Babcock *et al.* (n 36)).

[94] Ismail (n 40) 364–7; Hardy (n 10) 71; Osanloo (n 5) 318.

clearly not created or codified in order to fill the legal lacunae created by the lack of executive clemency in murder cases. However, its ongoing retention as the sole means of extrajudicially commuting a death sentence in at least six jurisdictions has been recently justified in this way by the governments of Saudi Arabia, Libya and Sudan during Universal Periodic Review before the United Nation's Human Rights Council.[95] Likewise, Roger Hood has argued that *diya* now 'operates *in place* of commutation where the offender has been convicted of murder'.[96] Moreover, in 1998, Mary Carter Duncan opined that Saudi Arabia's *diya* practice *was* that jurisdiction's form of pardon.[97]

As for Chinese VRAs, although their conceptual ancestry can be traced back to mediation in imperial times,[98] their State-supported incarnation in death penalty cases after 2007 arguably represents a means of 'taking clemency private'. Absent a constitutional executive clemency procedure to impart leniency on a case-by-case basis, Johnson and Miao find VRAs to be one of the five means of '*elite*-led reconfiguration of Chinese capital punishment', alongside the legislature reducing capital offence numbers, replacing shooting with lethal injection as a method of execution, recentralizing judicial review in the SPC, and encouraging courts to issue 'suspended' death sentences.[99]

Next, considering the institutions from the defendants' point of view, in both the Chinese and the *diya* cases, the victim–perpetrator agreement is equivalent to a quasi-legal right of 'appeal' against the death sentence, as is the right to seek executive pardon or commutation under ICCPR Article 6(4), albeit that the 'appeal' takes the form of an attempt to negotiate with the bereaved family members. Nonetheless, the prisoner still possesses a degree of agency. Indeed, if a wider frame of reference is taken, and executive clemency is considered as a form of State-sanctioned *quasi-legal* or *extrajudicial* discretionary leniency sought by a condemned prisoner, then *diya* and VRAs more closely resemble clemency.[100] Although in the case of VRAs and *diya* the decision to relieve the offender of the death sentence is not that of the prevailing political authority, it certainly carries State backing. While VRAs

[95] Saudi Arabia (UN Human Rights Council, 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council resolution 16/21: Saudi Arabia' (UN Doc A/HRC/WG.6/17/SAU/1, 5 Aug 2013a) [37]); Iran (UN Human Rights Council, 'National Report Submitted in Acordance with Paragraph 5 of the Annex to Human Rights Council resolution 16/21: Iran (Islamic Republic of)' (UN Doc A/HRC/WG.6/20/IRN/1, 4 Aug 2013b) [4]); Libya (UN Human Rights Council, 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Libya' (UN Doc A/HRC/WG.6/22/LBY/1, 5 May 2015) [76]; L Chenwi, 'Fair Trial Rights and Their Relation to the Death Penalty in Africa' (2006) 55 ICLQ 609, 631 n 133).

[96] R Hood, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2002) 167 (emphasis added).

[97] Duncan (n 32) 247. Compare Pascoe (n 73) 177.

[98] Weatherley and Pittam (n 52) 281.

[99] Johnson and Miao (n 50) 308, 311 (emphasis added).

[100] Pascoe (n 73) 176.

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in capital cases have not yet received legislative backing at the central government level,[101] supporters of VRAs since the mid-2000s have included individual judges of China's highest judicial organ, the SPC,[102] together with the Supreme People's Procuratorate.[103] Trevaskes has observed that:

> The SPC … began issuing 'notices', 'opinions' and 'judicial interpretations' in late 2006 and early 2007, strongly urging lower courts to choose 'life' (suspended death) over death (immediate execution) for homicide offenders who had killed as a result of domestic or neighbourhood disputes and who were willing to compensate their victims adequately [although the practice has since been extended to premeditated murder outside of the domestic setting]. Courts were urged where possible not to hand down immediate executions, but to give a suspended sentence when the offender surrendered to police, was extremely remorseful, and provided immediate financial compensation to the victim's family. The expectation was that the lower courts could take advantage of China's vague and amorphous death penalty legislation.[104]

Likewise, although *diya* is ostensibly a private transaction between the victim's family and the perpetrator, where it is practised in modern legal systems in the Middle East, North Africa and South Asia, the payment of *diya* is explicitly authorized and encouraged by the State. Across the 13 Muslim-majority nations under study, the State's preference for *diya* or *afw* as means of resolving a crime of intentional homicide is evinced by factors such as the pressure put on relatives by judges, members of the royal family and the State functionaries to accept the offer of payment,[105] the official confirmation of the agreement by the judiciary in some jurisdictions,[106] the State's replacement role as prosecutor and negotiating party where the murder victim has no next of kin,[107] the fact that the payment can be made indirectly to the State, which is then responsible for distributing the money to the victim's family,[108] or even the State treasury paying the *diya* itself, where the perpetrator cannot do so.[109]

[101] Weatherley and Pittam (n 52) 285. The aforementioned authors suggest that it is likely that VRAs will be explicitly recognized by the Communist Party leadership in the future, albeit perhaps on a more limited scope so as to exclude murder cases (Weatherley and Pittam (n 52) 295).

[102] Trevaskes (n 12) 38–40; Weatherley and Pittam (n 52) 282–3, 287.

[103] Weatherley and Pittam (n 52) 291–2.

[104] Trevaskes (n 12) 44.

[105] Baderin (n 22) 73 (generally); Babcock *et al.* (n 36) (UAE; Libya); Duncan (n 32) 234; M Al-Hewesh, 'Sharia Penalties and Ways of Their Implementation in the Kingdom of Saudi Arabia' in United Nations Social Defense Research Institute (ed), *The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia* (Crime Prevention Research Centre 1976) 377; interview with Saudi Arabian NGO Staff (n 39) (Saudi Arabia); interview with Iranian NGO Staff (n 42) (Iran).

[106] G Ghassemi, 'Criminal Punishment in Islamic Societies: Empirical Study of Attitudes to Criminal Sentencing in Iran' (2009) 15 European Journal on Criminal Policy and Research 159, 163 (Iran); 'Saudi Arabia – Retentionist' (Hands off Cain, NGO website 2014).

[107] M Rahami, 'Islamic Restorative Traditions and Their Reflections in the Post Revolutionary Criminal Justice System of Iran' (2007) 15 EurJCrimeCrLCrJ 227, 235 (Iran); Pakistan Penal Code 1860, art 310(3), 313(2)(a) (Pakistan).

[108] Bassiouni (n 20) 206–7 (generally).

[109] See Iran Islamic Penal Code 2013, Book Four: *Diyat*.

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Nevertheless, other than providing defendants with a quasi-legal 'appeal' route from execution to a lesser sentence, there are clear limits on the extent to which victim–perpetrator reconciliation agreements properly subsume the functions of clemency. Looking at the list of roles that clemency plays within modern criminal justice systems, neither VRAs nor *diya* provide for discretionary leniency on the basis of *retributivist* justifications: they do not mitigate a death sentence on the basis that the punishment imposed is underserved or disproportionate.[110]

As we explain in greater detail below, in both the retentionist *diya* States and the PRC, victim–perpetrator agreements are primarily means of compensating murder victims' families, and tools for the government to dilute excessive punitiveness within the criminal justice system. These goals do echo some of the *redemptionist* or *utilitarian* reasons that executive clemency achieves in retentionist legal systems. There are worldwide precedents for 'secular' clemency being granted by the executive following a perpetrator's payment to the victim's family in a murder case,[111] and ample occasions on which clemency has been used to reduce the total number of executions, reflecting official ambivalence over capital punishment.[112] In these respects at least, VRAs and *diya* both perform some of the roles attributed to clemency in death penalty retentionist States. Yet given the broad range of reasons why clemency is granted, both remedial systems fall short of being complete and effective substitutes.

VII. COMMON FUNCTIONS: REDUCING PUNITIVENESS AND COMPENSATING FOR ECONOMIC LOSS

We noted earlier that VRAs are an important component of the Chinese State's rethinking and humanizing of the death penalty system. Along with its cousin, the suspended death sentence, VRAs were expressly brought into Chinese judicial practice as a means of reducing execution numbers.[113] Looking at the bigger picture, China's ongoing capital punishment reforms are aimed at curbing the excessive punitiveness seen during the 'Strike Hard' era of the 1980s and 1990s by reducing the number of death sentences and executions meted out by Chinese courts.[114] To a certain extent, the VRA is a reconstruction of the conventional penal approach to capital cases from the inside. As promoted by the SPC, one of the VRA's purposes is to provide an

[110] DeCoste (n 72) 9; Moore (n 72) 129.

[111] Acker and Lanier (n 67) 209; The New Paper, 'Family Aghast after King Pardons Killer' *The New Paper* (Singapore, 30 January 2008); Moore (n 72) 146.

[112] Sebba (n 62) 230, 232; Rapaport (n 69) 1001; Sarat (n 62) 67.

[113] Fu (n 12) 287, 291; Johnson and Miao (n 50) 311.

[114] S Trevaskes, 'Yanda 2001: Form and Strategy in a Chinese Anti-Crime Campaign' (2003) 36 ANZJCrim 272, 272–92. See generally HM Tanner, *Strike Hard! Anti-Crime Campaigns and Chinese Criminal Justice 1979–1985* (Cornell University East Asia Program 1999).

alternative means of achieving leniency in the criminal justice system, without altering the system itself by establishing new procedures for executive clemency. The VRA thereby facilitates the reduction of executions at minimum political cost.

Rather than vesting in the national executive part of the judicial power in to determine the ultimate destiny of condemned prisoners, the VRA regime fulfils a leniency-granting function by delegating judicial power to grassroots-level parties who have higher stakes in the capital proceedings. This reform strategy, with no need to challenge populist demands for the ultimate sanction,[115] wins support from liberal reformers and concurrently earns approval by parties to capital cases (in particular, victims' families, who are sometimes the staunchest opponents of leniency).

At first glance, the origins of *diya* suggest it has a completely different purpose. The primary justification for *diya*'s incorporation within the criminal codes of modern Muslim-majority nation States is a religious and textual one: the Quran, Sunnah and the Hadiths require *diya* to be used.[116] Yet as with VRAs, in its modern incarnation, *diya* also acts as a government-sponsored brake on punitive sentiment in Islamic criminal justice systems which shows a more 'human' face and provides flexibility in the law's enforcement. Although the choice of whether to pursue *qisas*, grant *afw* or accept *diya* is ultimately the preserve of the victim's family, they are considerably influenced by the State. The preferences of Muslim-majority jurisdictions for *diya* settlements are based upon the Quran's preference for forgiveness over retribution,[117] together with a desire to minimize the number of executions carried out in circumstances where there still remains the view that a strict interpretation of Quranic criminal law prevents the outright abolition of the death penalty.[118] Likewise, in the Chinese context, the court as a government institution reserves a certain degree of control. The court initiates, monitors, and facilitates the development of the reconciliation process. The power granted to the victim's family in shaping the process as well as the outcome of capital sentencing is not absolute.[119] In both the VRA and *diya* cases, State influence over murder victim reconciliation reflects a degree of official ambivalence over the rate of executions. Direct and indirect regulation demonstrates a desire to find solutions which do not fundamentally alter the existing system of capital and non-capital crimes, and without relying

[115] See generally M Miao, 'Capital Punishment in China: A Populist instrument of social governance' (2013) 17 Theoretical Criminology 233.

[116] Osanloo (n 5) 311, 318.

[117] Gottesman (n 14) 446; Hascall (n 40) 60, 63; Peiffer (n 23) 517.

[118] Baderin (n 26) 144.The non-religious motivations of States to encourage mercy include concern for the State's international image and multilateral norms, placating public unrest over wrongful executions, and compassion for those on death row given a lack of other discretionary means to show leniency.

[119] Sun W, 'Is Penal Reconciliation Acceptable or Needed in Capital Cases?' (2010) 1 China Legal Science 180, 180–91.

upon executive clemency to formally and publicly 'subvert' the outcome of a finalized judicial process.[120]

The second functional similarity of the institutions is that the VRA and *diya* systems have a compensatory role, providing financial relief to the family or tribe of a murder victim, the burden of which falls on the perpetrator. Victim–perpetrator agreements largely fulfil the role that criminal restitution orders and tort law for personal injuries perform in Western legal systems,[121] providing compensation for economic loss and for pain and suffering.[122] However, unlike these Western remedies, both *diya* and VRAs embrace collective responsibility. The tribal origins of *diya* mean that a significant role is played by the perpetrator's family and the broader community in compensating the victim, if the perpetrator is not able to do so him-or herself.[123] As regards VRAs, given the strong intergenerational support and close contact among family members in Chinese society, the compensation is often provided by the defendant's family rather than the defendant.[124] Both mechanisms therefore have in-built means of addressing socio-economic inequality, given the life of an indigent defendant can still be spared through family and community connections.

VIII. DIFFERENCES IN APPROACH

We earlier described the way in which the three principal functions played by *diya* and VRAs are similar: providing those convicted of murder with a quasi-legal means of 'appealing' impending punishment in lieu of a right to petition the executive for clemency, providing a means of diluting excess punitivism in order to lower execution rates and to compensate family members for the victim's death and any consequential economic loss. All jurisdictions being studied here achieve these goals by encouraging and facilitating a private agreement between the offender and the victim's family. However, those States which employ *diya* and VRAs to realize these three policy goals do so through slightly different means.

[120] UN High Commissioner for Human Rights & International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations 2003) 121.

[121] For *diya*'s comparison with tort law, see Osanloo (n 5) 309–10 and Peters (n 21) 7, 20. For *diya* compared with restitution orders, see Hascall (n 40) 45–6; Wilson (n 39) 1; and El-Awa (n 10) 89–90. Although the PRC does possess a rudimentary system of State-funded victim compensation, and moreover victims also retain the right to pursue offenders in parallel civil actions, such awards are generally considered financially insufficient or unenforceable, hence the vital restitutory role played by VRAs (Weatherley and Pittam (n 52) 283, 292; Z Nie, 'Is Penal Reconciliation Applicable to Capital Cases' *People's Court News* (12 October 2007); Fu (n 12) 290–1).

[122] Weatherley and Pittam (n 52) 283. See also n 33.

[123] al-Alfi (n 17).

[124] W Du and Z Ren, 'Forgiveness by the Victim and the Application of the Death Penalty' (2005) Journal of Social Sciences 72, 72–6.

A. Consequences of the Agreement

A first key difference between *diya* practice and VRAs concerns the consequences for the offender. In both cases the perpetrator or their associated supporters suffer a financial hardship, although as we have described, with *diya* it is possible (albeit unlikely) that the victim's family 'pardons' the offender without demanding compensation at all. In the case of VRAs, the terms of the agreement may extend beyond strict financial compensation, to include an apology and an expression of remorse,[125] something usually absent from *diya* settlements, unless the case is one of pure forgiveness through *afw*.[126]

Moreover, a VRA does not completely relieve the convicted murderer from the threat of execution. The defendant in a VRA case is still sentenced to death, albeit to a 'suspended death sentence', the second harshest punishment on the Chinese penal ladder,[127] rather than 'the death penalty with immediate execution'.[128] At the end of the two-year suspension period, and if the prisoner has not committed any further serious offence whilst in prison, the death sentence may be commuted to life imprisonment or to a fixed-term of imprisonment. As noted above, empirical research suggests that more than 95 per cent of suspended death sentences result in commutation.[129] In theory, however, a prisoner party to a VRA could part with a large sum in compensation and later be executed.

By contrast, the vast majority of *diya* agreements definitively reduce a death sentence to something less than death. It has been noted that both Sharia doctrine and the criminal codes of some Muslim-majority nation-States establish that a prisoner whose offer of *diya* is accepted is still liable to serve a discretionary (*tazir*) sentence. While in up to eight of the jurisdictions studied this can theoretically extend to death itself (Pakistan, Saudi Arabia, UAE, Somalia, Bahrain, Jordan, Libya and Afghanistan), it is far more common for the initial death sentence to be replaced with sentences of imprisonment and corporal punishment, given the courts' desire to respect victims' wishes, and the States' own preference for reconciliation rather than talionic retribution. In other Muslim-majority States under study, the maximum *tazir* sentences permitted are life imprisonment (Libya); 15 years (Yemen); 10 years plus a fine (Sudan); 10 years (Iran; Kano and Kastina States, Nigeria), and one year plus 100 lashes (other Northern Nigerian States).[130] In the latter jurisdictions *diya* immediately converts a capital sentence to a non-capital one.

After the victim's next of kin has accepted payment, the distinction between a non-capital and a suspended death sentence is stark, and constitutes a key

[125] Weatherley and Pittam (n 52) 277–99; Fu (n 12) 291.
[126] R Cohen, 'Language and Conflict Resolution: The Limits of English' (2001) 3 International Studies Review 25, 41.
[127] Miao (n 53) 30; Trevaskes (n 12) 42.
[128] Chinese Criminal Law 1997, art 48.
[129] See n 53.
[130] See n 45.

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difference between the Chinese and the Sharia-inspired laws. Even if the majority of Chinese suspended death sentences do not result in execution, the replacement prison terms of between 25 years and life are far more severe than the *tazir* sentences usually imposed in modern Muslim-majority States following a *diya* agreement, excepting Libya's mandatory life sentence.[131] When combined with the potential for *afw* involving no financial compensation at all, it is clear that perpetrators in *diya* jurisdictions face less severe consequences than under a VRA agreement, although the amounts paid in compensation will vary from jurisdiction to jurisdiction and from agreement to agreement.[132] This is due to the differing origins of *diya* and VRAs: *diya* as a pre-Islamic tribal practice preceding modern nation-States and long-term imprisonment, whereas VRAs were developed *within* a modern penal system already accustomed to long sentences. *Tazir* sentences, imposed for deterrent and rehabilitative purposes following *diya* payments,[133] help bridge the retributive gap between the Chinese and the Islamic law approaches, but have not entirely eliminated it.

B. Final Decision-Maker

The second operative difference between *diya* and VRAs relates to the identity of the final decision maker. In the case of *diya*, the discretion to offer *afw,* accept compensation, or to order death as a retributive punishment rests with the victim's relatives (albeit under pressure from the judge and other State functionaries). A *diya* agreement is, at its core, a private institution. *Diya* is the religious codification of a *private* private solution to intertribal violence and economic survival,[134] rather than a modern institution developed within a State judicial framework.

By contrast, it is the judge, not the family, who is the most important decision-maker regarding a VRA. VRAs are only one of a number of factors that the trial judge will take into account when sentencing the offender.[135] In theory, it would

[131] ibid.

[132] In the PRC, settlements have been reached for as much as RMB 500,000 (approximately US $75,000) (Weatherley and Pittam (n 52) 283). Turning to the Muslim-majority jurisdictions, in 2011, the default *diya* price for a male Muslim in Saudi Arabia was US$106,666 for premediated murder ('Saudi Arabia triples blood money to SR300,000' *Emirates 24/7 News* (11 September 2011). In 2014, the default price for premeditated murder of a Muslim male in the UAE was set at US $54,450 ('United Arab Emirates – Retentionist' (Hands off Cain, NGO website 2014). In Pakistan, although the base amount set by a judge may vary from case to case with the parties' financial circumstances, in 2015 the default price was set at approximately US$53,000 (Goat (n 39)). In Iran, a 2012 article reported the *diya* price as US$47,000–62,500 (Osanloo (n 5) 317). In Niger State, Nigeria, the default amount of *diya* is set by legislation at US$35,000 (Weimann (n 35) 97). For contemporary default prices in other Muslim-majority jurisdictions, see Ismail (n 40) 378. Note however that all of these figures for *diya* reflect the negotiations' starting point, rather than representing the final settlement reached under *sulh* (see n 42 and associated text above).

[133] Peters (n 21) 66.

[134] Hardy (n 10) 46.

[135] Trevaskes (n 12) 44; Weatherley and Pittam (n 52) 285; Fu (n 12) 292. Here, Trevaskes (n 12, 55) bemoans that: 'the *principal sentencing decision on life or death* for the capital offender is

still be possible for a judge to sentence the offender to the death penalty 'with immediate execution', rather than pass a suspended death sentence, if a VRA is reached. However, this is unlikely to occur in practice, given the judge's central role in mediating between the two parties.[136] Conversely, in fixing a suspended death sentence it is also possible for a Chinese judge to take into account the offender's *offer* of apology and compensation to the victim's family, even if the victim does not accept it,[137] although how often the victim's family's wishes for execution are ignored remains empirically untested. Suspended death sentences are even available for murder cases where there has been no negotiation *at all* between the perpetrator and the victim's family.

Although both institutions give the victim's relatives influence in determining the penalty faced by the offender, with the case of *diya* this power quite literally extends to condemning a prisoner to death, as with the sentencing judge in a Chinese murder case. What the victim's relatives do not have the power to decide in a *diya* case is the *tazir* punishment applied to the perpetrator after the agreement is concluded. Likewise, in the PRC case, victims have no power to determine the type of replacement sentence: 25 years or life, following the two-year probation period for a suspended death sentence.[138]

IX. CONCLUSION: TRANS-SYSTEMIC RECOMMENDATIONS

In comparing how *diya* and VRAs performs the three common functions of replacing clemency as a quasi-legal remedy for prisoners, restricting punitiveness, and compensating victims' families, this final section identifies four lessons that have the potential to lead to legislative reform of victim–perpetrator agreements. Importantly, Whytock has urged functionalist comparativists to remember that: 'the same legal rule may produce different results in different countries (and perhaps no significant results in some countries) due to contextual factors', such as social, economic, historical and cultural differences.[139] We therefore offer four modest recommendations deriving from the comparative study of *diya* and VRAs, without attempting to entirely transplant an institution into a jurisdiction ill-suited to host it. Although there are differences between the extent to which Sharia is incorporated into the positive criminal law of Muslim-majority jurisdictions, in any case, Sharia's status as a sacred body of religious principles precludes

reduced to a decision made by a party – the victim's family – who are not of the judiciary, or even of the legal system'.

[136] However, Fu notes that some perpetrators and victims have now started to initiate the process on their own, without the assistance of the court (Fu (n 12) 292). See also n 45 above, on the possibility of *tazir* death sentences.

[137] Trevaskes (n 12) 45.

[138] SA Alsagoff, *Al-Diyah as Compensation for Homicide Wounding in Malaysia* (International Islamic University Malaysia 2006) 151.

[139] Whytock (n 2) 1898. See also Michaels (n 4) 351.

any fundamental changes being made that evince significant discord with the textual sources.[140]

First and most obviously, the common failure of VRAs and *diya* to perform all the functions now attributed to clemency (other than providing defendants with a final level of 'appeal') suggests that a system of executive clemency is essential in any jurisdiction which retains capital punishment. As described earlier, Saudi Arabia, Libya and Sudan have justified their lack of constitutional or legislative clemency provisions in death penalty cases by the continued use of victim–perpetrator reconciliation agreements.[141] However, in both the Chinese and the Muslim-majority cases, victim–perpetrator agreements are inadequate substitutes for executive clemency. While an extrajudicial leniency mechanism is notionally available in China in the form of 'special amnesty', and in a minority of the retentionist *diya* jurisdictions by clemency from the head of State, the limited empirical data suggests that these methods are rarely (if ever) used in capital murder cases.[142]

If, as is likely, all the jurisdictions under study retain capital punishment in the medium term,[143] it is desirable that a formal right to appeal for clemency is adopted in all cases, as mandated by the ICCPR's Article 6(4). In China's case, a new provision mandating the right of a prisoner sentenced to death to *petition* the State President for commutation would need to be inserted into the 1982 Constitution. Articles 67(17) and 80 are presently insufficient, as they only allow for 'amnesty' granted unilaterally to large groups of prisoners at once. On the other hand, the *diya* jurisdictions that do not currently allow for the right to plead for clemency could follow the model provided by Kuwait, Pakistan, Bahrain, and Nigeria, whereby a convicted murderer has a constitutional or legislative right to be considered for clemency if a *diya* settlement cannot be reached.[144] Moreover, leaders in the

[140] Nevertheless, there is notable disagreement between Muslim scholars over whether Islamic law should be interpreted in a literal or revisionist manner. See A An-Naim, *Islam and the Secular State: Negotiating the Future of Shari'a* (Harvard University Press 2009) 19; Baderin (n 22) 11–12, 39–40, 219; Peters (n 21) 181, 184.

[141] See n 95.

[142] Dui Hua Foundation (n 79) and n 93 above.

[143] In the PRC, as Weatherley and Pittam note, 'abolition is not currently an option [for the Chinese government]. Public support for the death penalty is extremely high, with one survey suggesting that 80 per cent of respondents are in favour of retaining it' (Weatherley and Pittam (n 52) 280). As for the *diya* jurisdictions, the Quran and Sunnah's textual support for the death penalty in the case of *hudud, tazir* and *qisas* offences is often cited as a fatal obstacle to outright death penalty abolition in the Muslim world (Baderin (n 26) 144; H Ridge, 'Economic and Historical Influence on the Application of Capital Punishment in Turkey and Saudi Arabia' (2014) 3(1) The Messa Journal 1, 20; Amnesty International, 'Affront to Justice: Death Penalty in Saudi Arabia' (Amnesty International, 2008).

[144] As, jurisprudentially speaking, this move contravenes a strict interpretation of Sharia doctrine in *qisas* (and *hudud*) cases, an alternative model is that employed by Saudi Arabia, whereby the King retains the legislative power to veto executions, rather than to formally commute death sentences to a lesser punishment (see n 90). Addressing the same conundrum, Philip Alston, the former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (n 93, 50) has pointed to a similar system previously in force in Tunisia, even if this did formally contravene ICCPR art 6(4).

retentionist Muslim-majority nations that already allow for executive clemency should consider reviewing and commuting subsisting death sentences for murder on the basis of the retributive, rehabilitative or even utilitarian factors that have not already been taken into account during *diya* negotiations.

Second, if VRAs are to be retained in the PRC, tighter regulation of the three parties' broad ambit to negotiate, mediate and enforce the victim–perpetrator agreement is desirable, in order to promote consistency in compensation across like cases and to avoid corruption on the part of the supervising judge.[145] Currently, there are few legislative guidelines on how the victims' discretion should be exercised, and how the State's oversight of the process should work. Here, the Chinese model could draw ideas from certain *diya* jurisdictions, where, if the parties choose not to vary the award, the 'blood price' reverts to a fixed amount, or to a sum set by the judge after considering the aggravating and mitigating factors and the parties' differing financial means.[146] Although some Chinese courts are now restricting the amount of compensation able to be offered, there remain large and unjustifiable regional variations in VRAs practices throughout the PRC.[147] The Muslim-majority nations applying *diya* could also learn from the PRC, where no formal differentiation of the 'blood price' is made between male and female victims. Gender differences in compensation awards are increasingly untenable in the modern world, given the role of women in the workplace and as property owners.[148] Although it is not reflected in the classical doctrine, Sudan is an example of a Muslim-majority State which does not specify a difference in blood price between men and women in its codification of Sharia precepts.[149] Iran, on the other hand, codifies the classical approach, making it explicit that a woman's *diya* is only half that of a man's.[150]

A third and related problem within both systems is the relative ease with which wealthier and better-connected perpetrators can avail themselves of a lesser sentence.[151] It is not obvious why the ability of wealthier capital defendants to offer pecuniary compensation to the victim's family indicates a lower degree of blameworthiness or future dangerousness so as to justify a sentence reduction.[152] The simplistic logic which prevails in Chinese judicial practice is that monetary compensation *per se* is an expression of remorse by

[145] Weatherley and Pittam (n 52) 279–89, 291.

[146] Gottesman (n 14) 445 (on Pakistan). Reverting to fixed *diya* prices in all Muslim-majority countries, without the possibility for negotiation through *sulh*, may have the undesirable consequence of increasing the number of unofficial settlements outside the legal system, thereby preventing prosecution in the first place (interview with Iranian NGO Staff (n 42)). In these circumstances, the perpetrator will not have to serve a replacement *tazir* sentence of imprisonment at all, and will continue to be at liberty.

[147] Johnson and Miao (n 50) 311.

[148] Osanloo (n 5) 317–19.

[149] Peters (n 21) 167, 178; Sudan Penal Code 2003, section 251.

[150] Iran Islamic Penal Code 2013, art 383.

[151] Sun (n 119) 180–91; Weatherley and Pittam (n 52) 279, 289; Hood (n 96) 37, 167; Amnesty International (n 51); MK Lewis, 'Leniency and Severity in China's Death Penalty Debate' (2011) 24 ColJAsianL 304, 329.

[152] Johnson and Miao (n 50) 311.

the defendant and qualifies as a mitigating factor in sentencing. The more money offered, the greater the remorse.

A solution that better promotes proportionality and just deserts in sentencing, if victim power over capital sentencing is retained in either system,[153] would be a lengthy punishment in lieu of execution after agreement is reached between the victim's family and the perpetrator.[154] Legislation allowing for a sentence of life imprisonment or a 15–20 year sentence *even if* a reconciliation agreement is reached means that rich and poor defendants, or defendants whose victims' families are either vengeful or conciliatory, will be treated as equally as possible (even if the difference between death and life remains stark). Of the two systems under study here, the Chinese system is the one closest to this ideal: the difference between a suspended death sentence and a sentence of immediate execution is not as great as between death and immediate release or a short-to-medium *tazir* sentence of imprisonment in *diya* jurisdictions. Lengthening the *tazir* sentences typically imposed in high-volume death penalty jurisdictions such as Saudi Arabia, Pakistan and Iran (by adopting the life imprisonment term presently available in Libya, for example) remains perfectly compatible with Sharia's textual sources. Such a move would help to confirm *diya* agreements for what they really should be: means of compensating for the victim's loss, rather than as pecuniary penalties against offenders and their own relatives in lieu of capital punishment.[155] In addition to reducing the disparity in treatment between richer and poorer defendants, the possibility of more severe but humane punishment following a *diya* agreement may even incentivize victims' families to choose life over death.

Fourth and finally: social and psychological healing is a necessary component of 'reconciliation', alongside purely financial reparation. Within both institutions under study, the reconciliation agreement between the victim and offender should, ideally speaking, help to repair the broken fabric of social relations, torn apart by violent crime.[156] Negotiating the agreement provides an ideal opportunity for the parties to communicate, and if possible, to make peace with one another.[157]

However, as with most *diya* settlements, the administration of VRAs in capital cases in the PRC is currently more about securing financial interests,

[153] The radical alternative would be to abolish victim–perpetrator agreements altogether, replacing them with multiple levels of court review, formal executive clemency procedures, discretionary restitution orders in criminal cases and State-funded victim compensation schemes. However, this reformist option may fail in the jurisdictions concerned due to: a) court-ordered restitution relying on the defendant's financial position, b) a lack of State funding for victim compensation in developing States; c) the resource implications for the head of State to give fair consideration to thousands of clemency petitions a year in PRC, and d) the immutable textual basis of *qisas* and *diya* in the Quran, Hadiths and Sunnah.

[154] G Liang, 'Ten Falsification Tests on Penal Reconciliation in Capital Cases' (2010) Legal Science 3, 3–21; Johnson and Miao (n 50) 311; al-Alfi (n 17) 230.

[155] See nn 31–34 and associated text.

[156] Du and Ren (n 124) 72–6; Weatherley and Pittam (n 52) 278; Hascall (n 40) 74–5.

[157] Sun (n 119) 180–91; Weatherley and Pittam (n 52) 278.

rather than promoting emotional relief or psychological benefits.[158] While nothing can bring back the life of the victim, financial compensation should only be part of a larger reconciliation agreement to 'compensate' for loss. Here, a *package* of restorative measures such as perpetrator apology and expression of remorse, face-to-face meetings with victims, agreeing to undertake rehabilitative activities in prison, and providing the victim's family with a direct means of expressing the pain that the death has caused[159] are all further means of healing, moving forward, and again, incentivizing murder victims' families to spare the perpetrator's life. Although such steps sometimes form part of Chinese VRA compacts,[160] they are usually lacking with the case of *diya* and *sulh*.[161]

The four preceding measures have the potential to ensure that the nations under study best fulfil the functional goals with which *diya* and VRAs have become associated over the course of their lifespan: 1) filling the legal vacuum creating by the lack of individualized clemency procedures, 2) respecting the delicate political and religious context by enabling the governments concerned to reduce execution totals without abolishing or otherwise legally restricting capital punishment, and 3) providing adequate compensation to victims' families for their loss. The suggested measures of reform promote these three goals by seeking to regulate and domesticate victim–perpetrator agreements to transform them from seemingly ad hoc extraordinary remedies to more predictable and bureaucratized criminal justice solutions, evincing fairness between like cases and greater participant satisfaction. While greater domestic support for victim–perpetrator agreements may result from case-based equity and party satisfaction, increased international legitimacy will also follow from the overall reductions in execution numbers that these best-practice reforms have the potential to yield in some of the world's most prolific users of capital punishment.[162]

[158] J Bian and L Feng, 'Constructing a Chinese Model of Penal Reconciliation on the Basis of Penal Reconciliation' (2008) 26 The Forum of Politics and Law 3, 3–21.

[159] Weatherley and Pittam (n 52) 283–4; L Zedner, 'Reparation and Retribution: Are They Reconcilable?' (1994) 57 MLR 228, 234–5; Qafisheh (n 29) 488.

[160] Fu (n 12) 291; Weatherley and Pittam (n 52) 284.

[161] Cohen (n 126) 41.

[162] Of the 10 most prolific death penalty States worldwide during the period 2007–12, seven utilized victim–perpetrator reconciliation agreements of one kind of another (PRC, Iran, Saudi Arabia, Iraq, Pakistan, Yemen, Libya) (S Rogers and M Chalabi, 'Death Penalty Statistics, Country by Country' *The Guardian* (13 December 2013) <http://www.theguardian.com/news/datablog/2011/mar/29/death-penalty-countries-world>).