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POWER OF PARDON IN THE *SHARĪ'AH* AND ITS APPLICABILITY IN COMMON LAW

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ABSTRACT

The power of pardon is an important principle for umholding justice in the criminal justice systems of both common law and the Sharīʿah. The Sharīʿah pardon principle provides a fair opportunity for the victims or victims' heirs in murder cases to express their preferences as to how the offenders should be pardoned, and while also ensuring the perpetrators' rights as both disputing parties have to participate in the pardon process actively. However, the Sharīʿah pardon principle has certain inadequacies compared to the common law pardon process that hinder its independent implementation in the existing common law pardon process. The current common law pardon process can also be considered arbitrary and one-sided compared to the Sharīʿah pardon principle because the pardon petitions are decided exclusively by the state authorities, and victims or victims' heirs in murder cases are not heard or compensated. Therefore, this study aims to examine the Sharīʿah pardon principle and explore its potential to enhance justice in the

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common law pardon decision-making process. This study utilises a qualitative doctrinal method depending on the requirements for pardon as outlined in cases of qiṣāṣ. Primary attention is given to the relevant Qur'ānic verses, the Sunnah and a review of the juristic opinions on the extent of the application of these rules. This study submits that the common law pardon process can be improved if it is harmonised with the Sharīʿah pardon principle. This article further suggests how this harmonisation effort can be realised to develop an implementable and balanced pardon decision-making process that can enhance justice in common law jurisdictions.

Keywords: *power of pardon, Sharīʿah, common law, justice, harmonisation of pardon principles*

INTRODUCTION

The *Sharīʿah* is a religious law derived from the *Qur'ān* and the Sunnah of the Prophet Muhammad (PBUH).[3] This law also includes Muslim jurists' consensus ruling (*ijmāʿ*) and analogical reasoning (*qiyās*) as secondary sources of law to address issues that are not expressly covered by the primary sources namely the *Qur'ān* and Sunnah. Muslim jurists opine that the *Sharīʿah* is a religious obligation that all Muslims are bound to obey at all times and places.[4] Unlike the power of pardon in common law that is implemented in the United States (US), United Kingdom (UK), India, Malaysia and many other sovereign countries, Islamic jurisprudence has implemented the power of pardon to mitigate harsh punishments by acknowledging the status of the offender and the rights of the victims in cases of injury or victims' heirs in murder cases. The *Sharīʿah* pardon principle motivates the offenders to rehabilitate and become better persons

[3] Abdullahi Ahmed An-Na'im, 'The compatibility dialectic: Mediating the legitimate coexistence of Islamic law and state law,' *The Modern Law Review*, vol. 73/1 (2010): 4.

[4] Mashood A. Baderin, 'The evolution of Islamic law of nations and the modern international order: Universal peace through mutuality and cooperation,' *American Journal of Islamic Social Sciences*, vol. 17/2 (2000): 57; David A. Funk, 'Traditional Islamic Jurisprudence: Justifying Islamic Law and Government,' *Southern University Law Review*, vol. 20/2 (1993): 213, 220; Abdullahi Ahmed An-Na'im, 'The compatibility dialectic: Mediating the legitimate coexistence of Islamic law and state law,' 2.

than they were before.[5] Therefore, the victim of crime or victim's relatives in murder cases are inspired by the *Sharīʿah* to grant pardon or reduce *qiṣāṣ* punishments for free or monetary compensation. As the *Qur'ān* rules that "...if any remission is made by the brother of the slain, then grant any reasonable demand and compensate him with handsome gratitude".[6]

It is advised in the *Qur'ān* that the victim of the crime or victim's relatives in murder cases should not implement retaliation excessively.[7] Saving the life of a murderer with or without compensation can be considered a form of pardon because it mitigates the original punishment of death.[8] It can also be identified that Islamic law prescribes capital punishment for murder but also allows for discretion, pardon, and peaceful settlement between the disputing parties.[9] Therefore, decreasing or limiting the use of the death penalty in murder cases with the approval of the relatives of the deceased is in line with the Islamic doctrine of pardon.[10] To exercise this pardon principle, an offender must show his repentance and remorse for committing the crime and swear not to commit the crime again.[11] However, compared to the common law pardon principle, the *Sharīʿah* pardon principle has some inadequacies and does not demonstrate a complete pardon decision-making mechanism that can be implemented independently in current common law jurisdictions to exercise the power of pardon because the decision to execute or pardon a punishment is currently made by state authorities and not by the victims or the heirs of the victims in murder cases.

In contrast with the *Sharīʿah* pardon principle, the power of pardon in most common law countries, such as the United States (US), United Kingdom (UK), India, Malaysia, is constitutionally conferred on the President, King, Ruler or Governor as the head of state in all cases of

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5 Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in *Sharīʿah* and Malaysian Law,' *Pertanika Journal of Social Science & Humanities*, vol. 23 (2015): 49.

6 Surah al-Baqarah 2: 178.

7 Surah al-Isra` 17: 33.

8 Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in *Sharīʿah* and Malaysian Law,' 47-48.

9 Mohammad Shabbir, *Outlines of criminal law and justice in Islam* (International Law Book Services, 2002), 311.

10 Mohammad Hashim Kamali, Mohamed Azam Mohamed Adil and Wan Naim Wan Mansor, 'Death Penalty in Shariah and Contemporary Law: A Comparative Analysis,' Policy Issue Papers (PIP), No. 11, *International Institute of Advanced Islamic Studies* (2020).

11 Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in *Sharīʿah* and Malaysian Law,' 48.

crimes[12] as an act of grace[13] or a constitutional scheme to determine the fate of the criminals before or after the completion of judicial proceeding.[14] Unfortunately, the common law pardon principle does not consider any compensation for the victims or victions' heirs in murder cases in deciding pardon petitions. Furthermore, achieving pardon in this process does not require any consideration or repentance from the convict.[15] This pardon principle is also prone to arbitrariness, bias, political nepotism, abuse of power in many countries and has no rational pardon decision-making mechanism that can establish justice for all disputing parties, especially for victims or victims' heirs in murder cases and protect the public interest. Hence, it is important to learn from the *Sharīʿah* pardon principle and harmonise it with the common law pardon principle to enhance justice in the current common law pardon system as the *Sharīʿah* pardon principle proposes to decide pardon petitions based on mutual understanding between the disputing parties of the crime with the option of pardon by the victim or victims' relatives in murder cases with or without compensation.

Based on the above background, this study intends to examine the *Sharīʿah* pardon principle and its implication for enhancing justice in the common law pardon process. A qualitative doctrinal method is utilised to accumulate and analyse research data. This study focuses on the requirements of pardon laid down in cases of *qiṣāṣ* for injury or death. The authors pay primary attention to the relevant Qur'ānic verses, the Sunnah of the Prophet Muhammad (PBUH) and a review of the juristic opinions regarding the extent of application of the rule of pardon. This study further analyses the inadequacies of the applicability of the *Sharīʿah* pardon principle to the common law pardon process. The study recommends harmonising the *Sharīʿah* pardon principle with the common law pardon principle to enhance justice in the current common law pardon process and protect the public interest.

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12 *U.S. Constitution*, art. II, sec. 2; *Constitution of the Republic of India*, art. 72 and art.161; *Federal Constitution of Malaysia*, art. 42.

13 Anandan Krishnan, *Words, Phrases and Maxims: Legally and Judicially Defined* (Singapore: LexisNexis, 2008), 15; *United States vs Wilson*, 32 U.S. (7 Pet.) 150 (1833).

14 Jonathan T. Menitove, 'The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency,' *Harvard Law & Policy Review*, vol. 3 (2009): 449; *Juraimi bin Husin v Lembaga Pengampunan Negeri Pahang & Ors* [2001] 3 MLJ 458.

15 Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in *Sharīʿah* and Malaysian Law,' 52.

The study is divided into four parts. The first part discusses the concept of power of pardon in the *Sharīʿah* and its application, including the theory of pardon in the *Sharīʿah*, the role of remorse and repentance in pardon, the authority to grant pardon in the *Sharīʿah*, the timing of pardon in the *Sharīʿah*, and the implication of the pardon power in the *Sharīʿah*. The second part of this study explains the theory of the power of pardon in selected common law countries and its inadequacies. The third part of this study examines some inadequacies of the applicability of the pardon power of the *Sharīʿah* to the current common law jurisdictions. The fourth part is the crux of this study, where it analyses how the *Sharīʿah* pardon principle can be harmonised with the common law pardon principle and formulates a pardon decision-making process that can enrich justice in the pardon process in common law jurisdictions. The fifth part of this study concludes that the pardon power of common law countries and the *Sharīʿah* should be harmonised to form a balanced and implementable pardon decision-making process that can establish justice for both disputing parties to a crime and protect the public interest in deciding pardon petitions.

THE CONCEPT OF POWER OF PARDON IN THE *SHARĪʿAH* AND ITS APPLICATION

Muslims believe that the *Sharīʿah* develops the power of pardon to enhance justice in the criminal justice system. Unlike the power of pardon in common law jurisdictions, the *Sharīʿah* pardon principle is designed to ensure the rights of both disputing parties to a crime and protect the public interest by rehabilitating the offender. This part of the study is planned to introduce and analyse the concept of the power of pardon under the *Sharīʿah* and its application.

1. Theory of Pardon in the *Sharīʿah*

In the *Sharīʿah*, the theory of "Pardon" is derived from the Arabic word "*al-ʿAfūw*" which signifies waiver or omission (*isqāṭ*) and defines as exempting the offender from the accountability for his criminal action. An alternative Arabic synonym for "*al-ʿAfūw*" is "*al-Ṣafḥ*" which denotes turning away from an individual and simultaneously fostering reconciliation by widening the space between them. "*Al-maghfirah*" is another synonym that means the granting of forgiveness by an individual in a superior or authoritative position. "*al-ʿAfūw*" differs from "*al-Maghfirah*" in that the former involves a waiver of blame and shame without any added virtuousness to the offender's account. In contrast, "*al-Maghfirah*" implies a degree of spiritual reward to the offender's account, which is not present in "*Al-ʿAfūw*".

Therefore, both "*al-'Afūw*" and "*al-maghfirah*" necessitate the omission of legal consequences of a crime, but the latter carries the possibility of rewards from the God.

In jurisprudential (*fiqh*) term, "*al-'Afūw*" signifies a waiver of punishment which is justly imposed for the commission of a crime. This specific meaning of "*al-'Afūw*" differs from its general connotation as it does not always entail the omission of sentence.[16] 'Abd al-Qādir 'Awdah has mentioned the views of the Imām Shāfi'ī and Ḥanbalī Schools that "*'Afūw*, in murder cases, means renouncing *qiṣāṣ* either for free or for payment of blood money (compensation)".[17] However, Imām Mālik and Imām Abū Ḥanīfah addressed that "waving *qiṣāṣ* for free is called pardon (*'Afūw*), but if the heirs waive it in lieu of accepting compensation (*diyya*); it is called settlement (*sulḥ*)".[18]

Al-'Afūw is a prominent theme in the *Qur'ān* and occupies a significant position in the Islamic justice system. The term *'Afūw* also encompasses a range of English equivalents, including pardon, amnesty, and forgiveness. Kamali urged that in Islamic law, a pardon can be granted by an individual, a group of individuals, or a corporate body or institution or government authorities.[19]

The legal and theological rulings of pardon can be evident in various methods. The *Qur'ān* utilises the term "*Maghfirah*" or forgiveness in a number of places to present the attributes of Allah as He is the most merciful.[20] Additional references relate to mankind who are encouraged and recommended to pardon one another for the sake of rewards from Allah for His kindness and mercy.[21] These people are also loved and praised by Allah

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16 Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' *Islam and Civilisational Renewal Journal*, vol. 6/4 (2015): 444.

17 'Abd al-Qādir 'Awdah, *al-Tashrī' al-Jinā'ī al-Islāmī Muqāranan bi al-Qānūn al-Waḍ'ī*, vol. 2 (Bayrūt: Dār Iḥyā' al-Turāth al-'Arabī, 1985), 157-58.

18 'Abd al-Qādir 'Awdah, *al-Tashrī' al-Jinā'ī al-Islāmī Muqāranan bi al-Qānūn al-Waḍ'ī*, 157-58.

19 Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 444.

20 Surah al-Baqarah 2: 175; Surah al-Nisā` 4: 106, 4: 110; Surah Az-Zumar 39: 5, 39: 53 (describing Allah forgiving or as the great forgiver).

21 Surah al-Baqarah 2: 109, Surah Ash-Shūrā 42: 37; Surah Az-Zukhruf 43: 40; Surah Al-Mā`idah 5: 45; Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 444; Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in *Sharīʿah* and Malaysian Law,' 46.

for displaying the acts of *al-ʾiḥsān* (beauty and kindness) without malice and desire for avenge.[22]

The Sunnah of the Prophet (PBUH) outlines the basic categories of pardon that are consistent with those found in the *Qur'ān*, but also provides practical guidance on the concept of pardon within the *Sharīʿah*. The Sunnah indicates that Muslims should extend pardon to those individuals who have not explicitly asked for pardon, even those who may be enemies. There are numerous examples of pardon during the lifetime of the Prophet (PBUH) including those displayed in the Charter of Madinah, the Farewell Sermon, and the pardon of opponents in Macca[23] and many more.[24] These practices also showed precedent of legal equality, tolerance, communal autonomy, and religious freedom in Islam. Nevertheless, Islam places great importance on justice, which may require the enforcement of punishment in particular cases, especially by policymakers, leaders, or judges, to hold the perpetrator accountable. Thus, justice and pardon frequently complement and balance each other, although there may be instances of conflict between the two.[25]

Pardon is not a mandatory legal obligation in the *Sharīʿah* but carries a moral significance in emulating mercy and justice of Allah. It is stated in the *Qur'ān* that "The reward of the evil is the evil thereof, but whosoever pardons and make amends, his reward is upon Allah".[26] Another verse of the *Qur'ān* states:

وَإِنْ عَاقَبْتُمْ فَعَاقِبُواْ بِمِثْلِ مَا عُوقِبْتُم بِهِۦۖ وَلَئِن صَبَرْتُمْ لَهُوَ خَيْرٌ لِّلصَّٰبِرِينَ﴿١٢٦﴾ وَٱصْبِرْ وَمَا صَبْرُكَ إِلَّا بِٱللَّهِۚ وَلَا تَحْزَنْ عَلَيْهِمْ وَلَا تَكُ فِى ضَيْقٍ مِّمَّا يَمْكُرُونَ ﴿١٢٧﴾

"And if you punish (your enemy, o you believers in the ones of Allah), then punish them with the like of that with which you were afflicted. But if you endure patiently, indeed it is better for

22 Surah al-Baqarah 2: 178, Surah An-Naḥl 16: 90; Surah Āli ʿImrān 3: 134; Surah Ash-Shūrā 42: 40.

23 Abū Jaʿfar Muḥammad b. Jarīr al-Ṭabarī, *The History of al-Ṭabarī Volume 8: The Victory of Islam*, trans. Michael Fishbein (SUNY series in Near Eastern Studies, 1997), 162.

24 Russell Powell, 'Forgiveness in Islamic ethics and jurisprudence,' *Berkeley Journal of Middle Eastern & Islamic Law*, vol. 4/1 (2011): 18-20.

25 Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 444.

26 Surah Ash-Shūrā 42: 40.

> *the patient. Endure you patiently, your patience is not excepted through the help of Allah".* [27]
>
> (Surah al-Nahl, 16: 126-127)

It is also promised in the *Qur'ān* that those who pardon generally will be rewarded with Paradise as it is stated:

> ۞ وَسَارِعُوٓاْ إِلَىٰ مَغۡفِرَةٖ مِّن رَّبِّكُمۡ وَجَنَّةٍ عَرۡضُهَا ٱلسَّمَٰوَٰتُ وَٱلۡأَرۡضُ أُعِدَّتۡ لِلۡمُتَّقِينَ ﴿١٣٣﴾ ٱلَّذِينَ يُنفِقُونَ فِي ٱلسَّرَّآءِ وَٱلضَّرَّآءِ وَٱلۡكَٰظِمِينَ ٱلۡغَيۡظَ وَٱلۡعَافِينَ عَنِ ٱلنَّاسِۗ وَٱللَّهُ يُحِبُّ ٱلۡمُحۡسِنِينَ ﴿١٣٤﴾
>
> *"Hurry towards your Lord's forgiveness and a [Paradise] as wide as the heavens and earth prepared for the righteous, who give, both in prosperity and adversity, who restrain their anger and pardon people –God loves those who do".* [28]
>
> (Surah Ali-Imran, 3: 133-134)

The tradition of the Prophet (PBUH) also encourages pardoning the offender and not enforcing the *qiṣāṣ* punishment as it is reported by Anas bin Mālik that "No case requiring *qiṣāṣ* was ever brought to the Messenger of Allah (PBUH), but he can enjoin pardoning".[29] The Prophet (PBUH) also encouraged pardoning in another *ḥadīth* saying:

> *"There is no man who suffers some (injury) on his body and forgives (the perpetrator), but Allah will raise him one degree in status thereby, or ease from him one".* [30]

Thus, these arguments have shown that Islam has prescribed fixed punishments for certain offences, but it also has encouraged and recommended to pardon the offenders for the sake of rewards from Allah which in practice appears to be a free pardon.

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27 Surah An-Naḥl 16: 126-127.

28 Surah Āli ʿImrān 3: 133-34.

29 Abū ʿAbdur Raḥmān Aḥmad bin Shuʿaib bin ʿAlī An-Nasāʾī, *English Translation of Sunan An-Nasāʾī*, vol. 5, trans. Nāṣiruddin al-Khaṭṭāb (Riyāḍ: Dār al-Salām, 2007), 417, *ḥadīth* no. 4788.

30 Muḥammad Bin Yazīd Ibn Mājah al-Qazwīnī, *English Translation of Sunan Ibn Mājah*, vol. 3, trans. Nāṣiruddin al-Khaṭṭāb (Riyāḍ: Dār al-Salām, 2007), 545, *ḥadīth* no. 2693.

It is worth noting that the Qur'ānic emphasis on pardon is rooted in establishing tolerance and justice which necessitates reciprocity.[31] Aaron Tyler[32] expressed:

> *"While reciprocity is the modus operandi for tolerance, Muslims are exhorted to overlook the transgressions of others, and be willing to speak and implement love and affection for mankind… Rather than being reactive, waiting to receive tolerance, (Allah's) viceregents are called to be proactive and eager to demonstrate forbearance and goodwill to the other as an ambassador of (Allah) and representatives of a magnanimous Islam. Mercy, kindness, and forgiveness are countenanced whenever possible".*[33]

It can also be identified that the *Sharīʿah* pardon principle establishes moral pardon and restores the self-respect of the criminal that cannot be properly achieved in any jurisdiction other than Islamic law as it is stated:

> *"If society is powerless to reprieve consciences, religion has the power to do so. When society pardons, it puts the man in liberty; that is all: it is only a material fact. When God pardons, he pardons the soul. With this moral pardon, the criminal regains self-respect, without which honesty is impossible. It is a result that society can never claim because human institutions, powerful on the actions and the will, have no power over consciences".*[34]

2. Role of Remorse and Repentance in Pardon

Muslim legal scholars have articulated that justice and fairness (*al-ʿadl wa alʾiḥsān*) are the main concerns of the penal philosophy of the *Sharīʿah*. It ensures the rights of the victim or victim's relatives in murder cases along

[31] Russell Powell, 'Forgiveness in Islamic ethics and jurisprudence,' 19.

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[33] Aaron Tyler, 'Tolerance as a Source of Peace: Gülen and the Islamic Conceptualisation of Tolerance,' *Islam in the Age of Global Challenges* (Georgetown University, United States, 2008): 743.

[34] Gustave De Beaumont and Alexis de Tocqueville, *On the penitentiary system in the United States and its application to France, trans. Emily Katherine Ferkaluk* (Palgrave Macmillan, 2018), 64.

with protecting the public welfare by rehabilitating the offender.[35] This requires the expression of remorse and repentance from the convict for his crime. This principle is evident from the *Qur'ān* which encourages repentance and rehabilitation, not merely as an option but as a constructive step in the right path as stated that "God loves those who turn to Him in repentance and who are willing to purify themselves".[36]

Repentance can be exhibited as evidence of reformation of the convict and negate the necessity for further punishment. This act encompasses the explicit declaration to cease engaging in criminal behaviour and adopt a law-abiding lifestyle.[37] Muslim jurists are almost unanimously agreed that a valid repentance must fulfil three conditions: (1) must demonstrate remorse for what occurred; (2) must express determination to refrain from repeating the offence; and (3) there is no actual repetition of crime.

The *Qur'ān* frequently mentions repentance in connection with committed crimes and emphasises that the opportunity for repentance is always open to perpetrators who renounce their wrongdoings and seek a new righteous path. Repentance is sometimes to waive fixed penalties or leniency, such as in the penalty for highway robbery.[38] However, it must be established before the authorities arrest the offender.[39] The *Qur'ān* has provided that "…except for those who repent before you take hold of them. Then know that God is the Forgiving, the Merciful".[40] Allah also pardons the punishment of adultery as He says, "If they both repent and mend their ways, then leave them alone. Verily, God is the accepter of repentance, the most Merciful".[41] Repentance is also mentioned in the punishment prescribed for theft that "Whoever repents after his wrongdoing and makes amends, then verily God will accept his repentance and verily God is the most Forgiving, the most Merciful".[42] Therefore, based on these arguments it can be clearly articulated that remorse and repentance of the convicts for their crimes can waive their deserved penalties in the *Sharīʿah*.

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35 Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in *Sharīʿah* and Malaysian Law,' 49.

36 Surah al-Baqarah 2: 222.

37 Rudolph Peters, *Crime and punishment in Islamic law: theory and practice from the sixteenth to the twenty-first century* (Cambridge University Press, 2005), 27.

38 Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 452.

39 Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 448.

40 Surah Al-Mā`idah 5: 34.

41 Surah al-Nisā` 4: 16.

42 Surah Al-Mā`idah 5: 39.

In Islam, it is believed that a repentance can erase all sins of the criminals. A sincerely repented person becomes like an innocent child. This can be remarked from a *ḥadīth* of the Prophet Mohammad (PBUH) that "A certain person had committed 99 murders. He went to a scholar and asked, is there any chance of my being forgiven? The scholar said no, you have committed too many crimes. The man killed the scholar too, but his heart was restless, so he went to another scholar and asked the same question. He was told yes, but you must leave this town of bad people and go live in the next town in the company of good people. So, the man set out to the town he was told to go to. On the way he died. A man passing by saw two angels arguing over his dead body. The Angel from Hell said, "His body belongs to me as he had not done any good in his life." The Angel from Heaven said, "His body belongs to me as he had repented and was set out to be with good people." The man who was the passer-by said, "Let us measure the distance of his body from the town he left and the town he was going to." This was done and the person was found to be nearer to the town he was going to. In another version, the earth was ordered by Allah to shrink and make the distance smaller, so that he was admitted to Heaven".[43] Based on this *ḥadīth*, it can be evident that a sincere repentance is the foundation to seek pardon from Allah.

Muslim jurists differ on whether repentance and rehabilitation can nullify *hudūd* punishments. According to Imām Shāfi'ī, all *hudūd* penalties can be suspended by the repentance of the offender.[44] Other jurists, including Imām Abū Ḥanīfah, Imām Mālik, and some jurists from the Shāfi'ī and Ḥanbalī schools, consented that repentance can only invalidate the punishment of highway robbery (*ḥirābah*) but not any other *hudūd* crimes because it cannot nullify any punishment.[45] Some other Muslim jurists alleged that the *hudūd* punishments can be suspended by repentance if it is done before

[43] Muḥammad ibn Ismā'īl al-Bukhārī, *The Translation of the Meanings of Ṣaḥīḥ al-Bukhārī*, vol. 4, trans. Dr. Muhammad Muhsin Khan (Dār al-Salām Publishers & Distributors, 1997), 424, *ḥadīth* No. 3470; Muslim Ibn al-Ḥajjāj al-Nīsābūrī, *English Translation of Ṣaḥīḥ Muslim*, vol. 7, trans. Nāṣiruddin al-Khaṭṭāb (Riyāḍ: Dār al-Salām, 2007), 141-43, *ḥadīth* No. 7008-7010.

[44] Al-Shāfi'ī, Muḥammad bin Idrīs, *Al-Umm*, vol. 7 (Dār al-Fikr, Beirut, 1990), 51.

[45] Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 449.

subjugation.[46] If the offence was brought before a judge and the judge found it to be true, the perpetrator must be punished.[47]

It is generally agreed by the Muslim scholars that the *hudūd* punishments may be withheld for an offender who demonstrates a consistent pattern of good behaviour and expression of remorse "for a long period of time". Imām Abū Ḥanīfah and his disciples (Imām Abū Yūsuf and Muḥammad) claimed that the *ḥadd* punishment is deemed nullified if a long period of time has elapsed, irrespective of whether the offence was reported, and whether the offender has expressed repentance. Abū Zahrah clarified that "A judicial repentance (*al-Tawbah al-Qaḍā'iyyah*) verifies the truth of repentance upon expiry of six months, some just mention 'a long time' in which the person concerned stays clear of repetition".[48] Concerning theft, an indicator of the repentance is the act of returning the stolen property to its rightful owner before any legal action is taken against the offender.[49] In cases where public funds have been stolen, the return of those funds to the state should be a necessary consideration to the pardon. For example, during the era of the second caliph 'Umar ibn al-Khattab, a theft case was reported involving a juvenile offender who was found guilty. However, prior to the implementation of the punishment, his mother appealed to the caliph to pardon her son, citing his first offence, his repentance and desire to reform. In response, the caliph pardoned him and stated that "God is too merciful to reveal the nakedness of his servant for his first failure".[50] It is highlighted that from the *ḥadd* for highway robbery (*ḥirābah*), repentance can suspend only the portion of Allah's right. If the criminal caused bodily injury or murder during the offence, it must be settled with the victim or heirs of the deceased person.[51]

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46 Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 450.

47 Ann Black, Hossein Esmaeili and Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Edward Elgar Publishing, 2013), 234.

48 Muḥammad Abū Zahrah, *Al-Jarīmah wa-al-ʿUqūbah fī al-Fiqh al-Islāmī* (Dār al-Fikr al-ʿArabī, 1996), 233.

49 Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 453.

50 Muḥammad Abū Zahrah, *Al-Jarīmah wa-al-ʿUqūbah fī al-Fiqh al-Islāmī*, ed. 10, ed. Muḥyī al-Dīn Fatḥī al-Shalūdī (Cairo: Dār al-Fikr al-ʿArabī, 2006), 134-36.

51 Al-Māwardī, *al-Aḥkām al-Sulṭāniyyah*, vol. 6 (Dār al-Fikr, Beirut, 1983), 218; Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 447.

In situations where reformation and repentance are intricately intertwined, the *hudūd* crimes are considered irrevocable once reported to the legal authorities, thereby excluding the possibility of rehabilitation and reformation, with no discretion vested in the judge, the head of state, or mujtahid except for their implementation on evidence, indicates the emergence of a fundamental asymmetry in the *fiqh* (Islamic jurisprudential) literature concerning *hudūd*. This interpretation of *hudūd* deviates from the intended meaning of *hudūd* and imposes unnecessary rigidity on the comprehensive understanding of *hudūd* as outlined in the *Qur'ān* and Sunnah. This legal rigidity of *hudūd* in *fiqh* has rendered challenging the implementation of *hudūd* both historically and contemporarily. As certain harsh punishments are associated with *hudūd*, judges and prosecutors are frequently hesitant to apply them. Nonetheless, it is feasible to enhance the implementation of *hudūd* by allowing for moderate levels of interpretation and *ijtihād* (independent reasoning) supported by textual evidence.[52]

If repentance plays a significant role in the legal proceedings of *hudūd*, it ought not to be limited solely to inchoate offences or to the pre-trial phase, but rather it should be extended logically to encompass the entirety of the criminal proceedings, including before and even after prosecution and trial. This proposition implies a fundamental shift in the traditional understanding of *hudūd*, namely, a transformation from rigid imposition of predetermined sanctions to a penological approach that acknowledges the significance of the *Sharīʿah* perspective and facilitates its appropriate application. Thus, the predetermined penalties should be defined as the maximum limits of punishment in the *Sharīʿah.*[53]

In summary, Islamic law recognises the application of pardon for all categories of offences on the condition that the offender presents repentance and compensates the sufferers of the crime for their losses accordingly. Even if the offender is rehabilitated and shows remorse and repentance for committing the crime, *hudūd* punishments can also be pardoned by accepting a moderate interpretation of the *Sharīʿah* principles.

3. Authority to Grant Pardon in the *Sharīʿah*

[52] Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 452.

[53] Mohammad Hashim Kamali, 'Principles and Philosophy of Punishment in Islamic Law with Special Reference to Malaysia,' *Islam and Civilisational Renewal Journal*, vol. 10/1 (2019): 14-15.

The *Sharīʿah* characterises homicide or injury as a private matter between the perpetrator and the victim or the victim's relatives known as "guardian of blood (*wali al-dam*)" in murder cases,[54] as they are the sufferers of the crime.[55] If the victim is dead and his family members survive, only adult heirs who are deemed mentally competent may pardon the perpetrator.[56] According to the Islamic theory of *qiṣāṣ* (retribution), the victim or his relatives in murder cases are authorised to request the state authorities to execute decided punishment or pardon the offender by collecting monetary compensation.[57] They are also eligible to pardon the offender free of cost or by accepting certain amount of compensation in their free choice. If the victim is alive, he can have the sole authority to demand compensation or grant any type of pardon.[58]

In Islam, the victim or his relatives in cases of murder are well inspired to pardon the offender[59] as the *Qur'ān* provides:

وَلَا تَقْتُلُوا۟ ٱلنَّفْسَ ٱلَّتِى حَرَّمَ ٱللَّهُ إِلَّا بِٱلْحَقِّ ۗ وَمَن قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لِوَلِيِّهِۦ سُلْطَٰنًا فَلَا يُسْرِف فِّى ٱلْقَتْلِ ۖ إِنَّهُۥ كَانَ مَنصُورًا ﴿٣٣﴾

"Do not take life, which God has made sacred, except by right: if anyone is killed wrongfully, We [God] have given authority to the defender of his rights, but he should not be excessive in taking life, for he is already aided [by God]".[60]

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54 Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 460.

55 Ebru Aykut, 'Judicial Reforms, Sharia Law, and the Death Penalty in the Late Ottoman Empire,' *Journal of the Ottoman and Turkish Studies Association*, vol. 4/1 (2017): 17.

56 Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 460.

57 Susan C. Hascall, '*Sharīʿah* and Choice: What the United States Should Learn from Islamic Law about the Role of Victims' Families in Death Penalty Cases," *The John Marshall Law Review*, vol. 44/1 (2010): 7; Ann Black, Hossein Esmaeili and Nadirsyah Hosen, *Modern Perspectives on Islamic Law*, 220; Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 456; Rudolph Peters, *Crime and punishment in Islamic law: theory and practice from the sixteenth to the twenty-first century,* 44-45.

58 Ann Black, Hossein Esmaeili and Nadirsyah Hosen, *Modern Perspectives on Islamic Law*, 221.

59 Surah Al-Mā`idah 5: 45; Surah Āli ʿImrān 3: 133-34; Surah Ash-Shūrā 42: 40.

60 Surah al-Isra` 17: 33.

(Surah al-Isra, 17: 33)

The *Qur'ān* further provides that "Never should a believer kill another believer, except by mistake. If anyone kills a believer by mistake, he must … pay compensation to the victim's relatives, unless they charitably forgo it".[61] If the *qiṣāṣ* is waived in lieu of pecuniary penalty, it must be paid from the own wealth of the convict.[62] 'Abd al-Qādir 'Awdah opined that the victim or if the victim is dead his relatives must ensure before issuing pardon in lieu of compensation that the convict is financially capable to pay the required payment. If the convict is not capable to pay the compensation, the victim or his relatives in murder cases will not have the option of imposing *qiṣāṣ* again but will ultimately be bound to pardon the convict without any further liability.[63] In such cases, the state authority may impose discretionary punishment other than death for the purpose of rehabilitating the offender to become better person than he was before. However, if the offender is dead before execution of *qiṣāṣ* or before payment of compensation, most of the Islamic legal schools including Imām Shāfi'ī and Imām Aḥmad allege that the required compensation must be paid from legal estate of the convict.[64] Unless the victim or his relatives in murder cases decide otherwise, the compensation must be paid right away and without any justifiable delay.[65]

There is a difference of opinion among the major Islamic schools of thought regarding pardoning offenders with or without compensation. Imām Shāfi'ī, Imām Abū Ḥanīfah and Imām Aḥmad provided a wider view, arguing that all legal heirs in cases of murder are empowered to grant pardon of *qiṣāṣ*.[66] According to Imām Abū Ḥanīfah and Imām Mālik, the consent of the convict is required for the pardon of *qiṣāṣ* in exchange for compensation, and without his valid consent, the decision will be invalid as he will be bound by the decision to pay the compensation. To them, it is not a pardon but a compounding of *qiṣāṣ*.[67] In contrast, Imām Shāfi'ī and Imām Aḥmad opined that the heirs of the deceased might pardon the punishment of *qiṣāṣ* by accepting compensation or without it, and the convict is bound to accept, and thus, his consent is not necessary. They believed that waiving a *qiṣāṣ*

61 Surah al-Nisā` 4: 92.
62 Osāma ʿAdlī, *Diyya al-Qatl* (Cairo: Dār al-Nahḍah al-ʿArabi, 1985), 66.
63 'Awdah, *al-Tashrī' al-Jinā'ī al-Islāmī Muqāranan bi al-Qānūn al-Waḍ'ī*, 675.
64 'Awdah, *al-Tashrī' al-Jinā'ī al-Islāmī Muqāranan bi al-Qānūn al-Waḍ'ī*, 156.
65 'Awdah, *al-Tashrī' al-Jinā'ī al-Islāmī Muqāranan bi al-Qānūn al-Waḍ'ī*, 181.
66 Abdul Qadir 'Awdah, *Criminal Law of Islam*, vol. II, ed. 1 (Karachi, 1987), 157-158.
67 Abdul Qadir 'Awdah, *Criminal Law of Islam*, 157-158.

punishment with compensation is called pardon.[68] But Imām Abū Ḥanīfah argued that the meaning of pardoning *qiṣāṣ* is to pardon without any consideration.[69] However, if the criminal is pardoned by the victim or by his relatives upon his death, the state authorities have the power to impose *ta'zir* (discretionary) punishment other than the prescribed one on the criminal to protect public interest and rehabilitate the offender to become better person than he was before and protect the community from the threat of the convict's criminal acts.[70] Imām Mālik expressed that if the crime is committed intentionally, the offender must get a *ta'zir* punishment, but other major three schools of thought believed it is not mandatory. In this case, the majority Muslim legal jurists argued that the ruler or the judge (*qadi*) should decide whether to impose a certain *ta'zir* punishment or not.[71]

Endowing victim or victim's relatives in murder cases to demand *qiṣāṣ* can potentially decrease the inclination towards revenge and increase the likelihood of leniency. From a psychological perspective, individuals typically exhibit a propensity to pardon or relinquish their punitive entitlements upon realising that they do not need to exercise them.[72] Some Muslim jurists argued that the victim or victim's relatives in murder cases are empowered to pardon only the prescribed punishment of the offence, but not the offence because it harms the victim or his relatives in murder cases, breaches the public interest and threatens the communal security. Even if the punishment and crime both are pardoned expressly, it can only be applicable to the punishment otherwise the state authorities can have nothing to impose on the offender for violating the public rights and threating the safety of the society.[73]

According to the four major Islamic schools of thought, in the absence of the victim or he dies, the legal heirs must be unanimously consented to impose *qiṣāṣ* punishments.[74] However, the pardon of a single heir is deemed sufficient to spare the culprit from the death penalty.[75] In case where the

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68 Mohammad Shabbir, *Outlines of criminal law and justice in Islam*, 309.

69 Mohammad Shabbir, *Outlines of criminal law and justice in Islam*, 307.

70 Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in Sharīʿah and Malaysian Law,' 49.

71 'Awdah, *al-Tashrīʿ al-Jinā'ī al-Islāmī Muqāranan bi al-Qānūn al-Waḍʿī*, 84.

72 'Awdah, *al-Tashrīʿ al-Jinā'ī al-Islāmī Muqāranan bi al-Qānūn al-Waḍʿī*, 549.

73 Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 457.

74 'Abdullāh Ibn Aḥmad Ibn Qudāmah al-Maqdisī, *Al-Mughnī*, vol. 9 (Beirut: Dār al-Kitāb al-ʿArabī), 464.

75 'Awdah, *al-Tashrīʿ al-Jinā'ī al-Islāmī Muqāranan bi al-Qānūn al-Waḍʿī*, 160.

deceased leaves no legitimate heirs or cannot be found, the power of pardon is vested in the head of state based on the following *ḥadīth* "the ruler is the guardian [*wali*] of the one who does not have a guardian",[76] but the ruler cannot compensate on behalf of the convict because it is against the public interest.[77] Imām Mālik illustrated that among the legal heirs or relatives are only the immediate relatives of the deceased on the father's side such as son, father, brother, uncle or female who is the direct heir of the deceased.[78] In the *Sharīʿah*, a pardon offer may be made by either the convict or the victim of the crime or the heirs of the victim in cases of murder. They may negotiate among themselves to establish their own demands. When they reach a decision, both parties must follow it accordingly. However, it is essential to note that for a valid pardon, no party can be coerced or threatened or deceived or unduly influenced to accept or reject a specific proposal of pardon.

4. Time of Pardon in the *Sharīʿah*

The *Sharīʿah* pardon principle ensures justice through peaceful settlement between the disputing parties. This principle allows the victim or anyone of his legal heirs in cases of murder to grant pardon at any time from the moment the crime was committed until immediately before the execution. In other words, a pardon is legally valid in the *Sharīʿah* if it is granted before or after the presentation of the case to the judge, after the sentence is pronounced, or even before the execution of the sentence.

It is worth noting that at the time when *qiṣāṣ* and pardon are both viable options in the pardon decision-making process, granting pardon is typically preferred. In such situations, the heirs of the deceased possess the right to pardon the perpetrator, even if they initially sought *qiṣāṣ*.[79] Once a pardon is granted, it is considered final and cannot be rescinded. This means that the victims or victims' heirs in cases of murder are not permitted to reverse their decision to pardon the offender and subsequently seek *qiṣāṣ*. Therefore, the pardon grants effectively shield the lives of the perpetrators from potential death sentences for the cases of murder, as the heirs of the victim are prohibited from pursuing *qiṣāṣ* after the granting of pardon.

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[76] Abū Dāwūd Sulaymān Bin al-Ashʿath, *English Translation of Sunan Abū Dāwūd*, vol. 2, trans. Yaser Qadhi (Riyāḍ: Dār al-Salām, 2008), 520, *ḥadīth* no. 2083.

[77] ʻAbdullāh Ibn Aḥmad Ibn Qudāmah al-Maqdisī, *Al-Mughnī*, 476.

[78] Abdul Qadir ʻAwdah, *Criminal Law of Islam*, 157-158.

[79] Osāma ʿAdlī, *Diyya al-Qatl*, 75.

It is further pertinent to note that in cases where the heirs of the deceased initially pursue *qiṣāṣ*, they still retain the right to receive pecuniary compensation if they ultimately decide to pardon the offender.[80] Although the act of demanding *qiṣāṣ* initially results in the forfeiture of the rights to claim compensation, these rights are subsequently reinstated upon the decision to opt for pardon. This principle serves to ensure that the victim's heirs in the cases of murder are not discouraged from extending mercy to the perpetrators.[81] Moreover, it is highlighted that the death penalty is more severe than pecuniary compensation, thus, it can be considered as a form of pardon which can be in the best interest of the convict as a means of a less severe punnishment.[82]

5. Implication of the Pardon Power in the *Sharīʿah*

The main objective of Islamic jurisprudence is to establish personal as well as communal justice. It prioritises the peaceful settlement of the conflicts between the convict and the injured party.[83] Hence, the *Sharīʿah* has established the notion of pardon which ensures the protection of the rights of the sufferers of the crime and removes hardship from the convict by lifting the prescribed punishment. This pardoning principle can help to eliminate potential corrupt practices from the criminal justice system and apparent integrity issues from the society[84]

The *Sharīʿah* has considered that the pardoning authorities are the third parties to the dispute because they are not the sufferers of the crime. If the power of pardon is vested to any third party, he may sometimes grant pardon unilaterally or partially with corruption and political power.[85] Furthermore, the third party lacks the means to guarantee the protection of the rights of the victim of the crime or his legal heirs. Additionally, this act of pardon may not satisfy the victim or his legal heirs as they may perceive it as an unjust outcome, potentially fuelling sentiments of revenge and generating

[80] ʻAbdullāh Ibn Aḥmad Ibn Qudāmah al-Maqdisī, *Al-Mughnī*, 475.
[81] Osāma ʿAdlī, *Diyya al-Qatl*, 77.
[82] ʻAbdullāh Ibn Aḥmad Ibn Qudāmah al-Maqdisī, *Al-Mughnī*, 475.
[83] Mohammad Shabbir, *Outlines of criminal law and justice in Islam,* 311.
[84] Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in Sharīʿah and Malaysian Law,' 48.
[85] Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in Sharīʿah and Malaysian Law,' 47-48.

long-term animosity. Such unrest and condemnation can result chaos in the society, thereby exacerbating the situation.[86]

The *Sharīʿah* has sanctioned that when a person causes harm to another person, the victim has a right to achieve remedies.[87] This is an exclusive demand of the party being affected. It is also believed that if the pardoning power is delegated to the injured party, it may carry out justice, establish fairness and ensure equality before the law. In addition, this act can open the gate of mercy with free wish of the victim (or his family) or with compensation or otherwise where the state authority should ensure that the victim is pleased with the pardon decision.[88]

The *Sharīʿah* proposes that justice and pardon should come together to formulate a moderate principle of law. Based on this notion, the *Sharīʿah* recommends the formation of a fair and peaceful dispute resolution process in which all disputing parties are directly involved in the decision-making process. It is expected that this unique dispute resolution process can foster peaceful relationships between the disputing parties involved in the crimes and strengthen social ties. Therefore, compared to the *Sharīʿah* pardon principle, the current constitutional practice of pardon is incomplete and forms a one-sided or even a third-party dispute resolution process as the victim is not heard or even compensated.[89] Consequently, the common law pardon principle may lead to revenge from the convicts as the rights of the victims or victims' heirs in murder cases are violated and equal treatment of law is not reached or not compensated in the pardon decisions.[90]

POWER OF PARDON IN COMMON LAW AND ITS INADEQUACIES

In common law countries, such as the United States (US), United Kingdom (UK), India, Malaysia and many other sovereign countries, the power of pardon is a constitutional scheme vested in the executive the head of state or

[86] Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in Sharīʿah and Malaysian Law,' 48.

[87] Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 455; Peri Bearman, *The Ashgate research companion to Islamic law* (Routledge, 2014), 170.

[88] Abd El-Rehim Mohamed Al-Kashif, '*Sharīʿah*'s Normative Framework as to Financial Crime and Abuse,' *Journal of Financial Crime*, vol. 16/1 (2009): 87.

[89] Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in Sharīʿah and Malaysian Law,' 48.

[90] Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in Sharīʿah and Malaysian Law,' 47.

President, King, Ruler, or Governor in most common law countries in all cases[91] of crimes as an act of grace[92] to release a criminal before or after completing judicial proceeding.[93] Chief Justice John Marshall stated in the case of *United States v. Wilson*[94] that:

> *"A pardon is an act of grace proceeding from the power entrusted with the execution of the laws which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed".*

The power of pardon is constitutionally designed to be exercised in accordance with the advice of the Prime Minister or the Cabinet of Ministers or the Pardons Board and not arbitrarily. However, the mechanism of advice removes the discretionary powers of the head of state in some legal systems. An abuse of constitutional power may be committed if the advice is disregarded or if there is misuse of the power of pardon for political influence and nepotism. This abuse may lead to the contravention of the idea of equality before law and defiance of judicial powers. Furthermore, there is no specific criteria or consideration, rehabilitation or repentance that must be achieved by the convicts in deciding a pardon petition.[95]

Some legal scholars claim that the common law pardon principle fails to ensure justice to the victims or victims' heirs in cases of murder as it does not give them any right to seek compensation for their injury or death in the pardon decision-making process.[96] It is claimed that whether the convict to be pardoned or executed is the discretionary right of the victim or his family due to the harm they suffer. In addition, the current pardon process is one-sided or even a third-party dispute resolution process as no disputing party

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91 *U.S. Constitution*, art. II, sec. 2; *Constitution of the Republic of India*, art. 72 and art.161; *Federal Constitution of Malaysia*, art. 42.

92 Anandan Krishnan, *Words, Phrases and Maxims: Legally and Judicially Defined,* 15; *United States vs Wilson*, 32 U.S. (7 Pet.) 150 (1833).

93 Jonathan T. Menitove, 'The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency,' 449; *Juraimi bin Husin v Lembaga Pengampunan Negeri Pahang & Ors* [2001] 3 MLJ 458.

94 32 U.S. (7 Pet.) 150 (1833).

95 Majdah Zawawi and Nasimah Hussin, 'Forgiving the Enemy: A Comparative Analysis of the Concept of Forgiveness in *Shari'ah* and Malaysian Law,' 52.

96 Mohammad Hashim Kamali, 'Exploring Facets of Islam on Security and Peace: Amnesty and Pardon in Islamic Law,' *Islam and Civilisational Renewal (ICR)*, vol. 3/3 (2012): 528.

is involved in the decision-making process.[97] Consequently, these kinds of injustices may lead to revenge or reactive crime by the victim or victim's family in murder cases as their rights are violated and equal treatment of law is not reached and not compensated in the current common law pardon decision-making process.[98]

Since the common law pardon process is prone to arbitrariness, bias, political nepotism, abuse of power and has no rational mechanism or policy that can establish justice for the victims or victims' relatives in murder cases, it is important to integrate the common law pardon principle with the pardon principle of other jurisdictions to enhance justice in the pardon process and protect the public interest.

INADEQUACIES OF THE APPLICABILITY OF THE *SHARĪʿAH* PARDON POWER IN COMMON LAW

The *Sharīʿah* provides a valuable mechanism for pardon and reconciliation which can be adapted or supplemented to address the needs of modern societies and legal systems. However, the *Sharīʿah* pardon principle can have some inadequacies compared with the common law pardon principle. Such as, it can be be opaque with decisions made by the victim or victim's relatives in murder cases without clear guidelines or standards. In the *Sharīʿah* pardon system, the reasons for granting or denying a pardon might not be clear, and there might be little oversight or accountability for those who make the pardon decisions. In some cases, it can lead to situations where the offenders cannot secure pardons even if they deserve and sincerely seek pardons. For example, a person who has committed an offence might be pardoned while others in similar circumstances might not be pardoned. Furthermore, the *Sharīʿah* pardon principle might conflict with the ethics of justice as it might lead to the release of a guilty person without appropriate punishment as enacted in the common law jurisdictions. Even if pardons are granted too freely, it can undermine the credibility of the legal system and lead to a breakdown in social order in the current common law justice system. Additionally, the application of the *Sharīʿah* pardon process can lead to a lack of transparency and accountability compared with the current legal system, which can lead to injustice, suspicion, and distrust among the public.

[97] Majdah Zawawi and Nasimah Hussin, 'Forgiving the Enemy: A Comparative Analysis of the Concept of Forgiveness in *Shari'ah* and Malaysian Law,' 48.

[98] Majdah Zawawi and Nasimah Hussin, 'Forgiving the Enemy: A Comparative Analysis of the Concept of Forgiveness in *Shari'ah* and Malaysian Law,' 47.

Thus, the lack of a proper mechanism for granting pardons in the *Sharīʿah* limits its application in the modern common law justice system.

The implementation of the *Sharīʿah* principle requires the development of social, political, and economic stability.[99] Before reaching such status, the enforcement of the *Sharīʿah* pardon principle can be characterised as a rigorous and harsh approach towards vulnerable people, such as the poor in the society, while the powerful and wealthy might grasp greater flexibility. The poor are typically stimulated to commit crimes due to economic disequilibrium and social inequality. Without guaranteeing their basic needs, the implementation of punishment prescribed by the *Sharīʿah* on them can never be just and fair.[100] Even in the case of issuing pardon with compensation, they might not have sufficient resources to compensate the victim or victim's relatives in murder cases for their losses caused by the crime. On the other hand, if powerful and rich people commit crimes, they might easily obtain pardons by giving compensation. Sometimes the victim or his relatives upon his death may be compelled or induced by the power or money of the convict to grant pardon which may create discrimination and a loophole in achieving justice in the society. In other words, the powerful and wealthy can benefit more from the *Shari'ah* pardon process than the poor. Thus, the *Sharīʿah* principle of pardon might not be implemented fairly and equitably in the modern justice system unless there is a mechanism which can equally protect and ensure the rights of all people in the society.

Islamic law sanctions and mandates to obey the state laws to maintain justice and public peace.[101] When a state implements a principle of the *Sharīʿah*, it becomes state law rather than a religious obligation. Hence, state laws cannot be violated to justify Islamic law but can be be complementary.[102] Although the *Sharīʿah*'s power of pardon aims to establish the rights of the victim or the victim's relatives in murder cases, its inadequacies might raise concerns about fairness, justice, and accountability in the contemporary legal system. Therefore, the *Sharīʿah* pardon principle cannot be implemented as a standalone in the current constitutional practice

[99] Yūsuf al-Qaraḍāwī, *Sharīʿat al-Islām Ṣāliḥah li-l-Taṭbīq fī Kull Zamān wa Makān (Cairo: Dār al-Ṣaḥwah*, 1393/1972), 139.

[100] Yūsuf al-Qaraḍāwī, *Sharīʿat al-Islām Ṣāliḥah li-l-Taṭbīq fī Kull Zamān wa Makān*, 162.

[101] Abdullahi Ahmed An-Na'im, 'The compatibility dialectic: Mediating the legitimate coexistence of Islamic law and state law,' 3, 5.

[102] Abdullahi Ahmed An-Na'im, 'The compatibility dialectic: Mediating the legitimate coexistence of Islamic law and state law,' 4.

of pardon as it also has some inadequacies compared to common law pardon process.

HARMONISATION OF THE *SHARĪʿAH* AND COMMON LAW PARDON PRINCIPLES

The concept of harmonisation has a greater potential to gain widespread support because it is inclusive by nature and encourages intellectual sharing to develop a better understanding that is good for everyone.[103] Some Muslim jurists opined that the *Sharīʿah* pardon principle can certainly be harmonised with modern constitutionalis.[104] This harmonisation can bring better coordination and uniformity between these two legal systems[105] and enhance justice in the current application of the power of pardon. In essence, this harmonisation can promote a coherent and just approach to pardoning offenders within diverse legal contexts, fostering greater consistency and fairness in legal outcomes. It should be noted that this study does not intend to implement or replace the *Sharīʿah* over common law jurisdictions in general, but to adopt the *Sharīʿah* pardon principle which is not found in common law jurisdictions. This adoption can be achieved through the harmonisation of common law pardon principle with the pardon principle of the *Sharīʿah*.

It can be acknowledged from the previous discussion that the power of pardon in common law and the *Sharīʿah* aims to eliminate legal hardship and severity of punishment and establish justice. However, this study further identifies that the pardon laws in common law countries irrationally ignore the rights of the victims or victims' relatives in murder cases in deciding pardon petitions, which may create hatred among people and cause communal unrest.[106] Unlike, the *Sharīʿah* pardon principle suggests that the pardon decisions should be made based on mutual understanding between the victim or victim's heirs in murder cases and the convict. However, this

[103] Mohammad Hashim Kamali, '*Sharīʿah and civil law*: Towards a methodology of harmonisation,' *Islamic Law and Society*, vol. 14/3 (2007): 393.

[104] Mashood A. Baderin, 'Administration of Justice under the *Sharīʿah*, Common Law and Civil Law System: Towards a Better Understanding,' *Malaysian Journal of Syariah and Law*, vol. 2/1 (2010): 4; Mohammad Hashim Kamali, '*Sharīʿah and civil law*: Towards a methodology of harmonisation,' 393.

[105] Mashood A. Baderin, 'Administration of Justice under the *Sharīʿah*, Common Law and Civil Law System: Towards a Better Understanding,' 4.

[106] Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in Sharīʿah and Malaysian Law,' 47.

study addresses that there are some inadequacies in the applicability of the *Sharīʿah* pardon principle in the common law system. Furthermore, the *Sharīʿah* pardon principle is not currently applied in any common law jurisdiction. Likewise, the power of pardon in common law jurisdictions is prone to arbitrariness, bias, abuse, political nepotism and violates the rights of the victims or victims' heirs in murder cases. Thus, this study suggests that the pardon principles of the *Sharīʿah* and common law jurisdictions should be harmonised to enhance justice and minimise potential abuse of the current constitutional pardon power, and to ensure the rights of the victims or victims' heirs in murder cases as well as the convicts and protect the public interest in deciding the pardon petitions.

The harmonisation of the *Sharīʿah* and common law pardon principles can gather coherent and just approaches from both jurisdictions and bring about better coordination and uniformity between these two legal systems. This process can formulate a doable and balanced pardon decision-making process that can enhance the applicability of the power of pardon in current constitutional practice and reduce the potential inadequacy of the pardon applications in both legal systems. Furthermore, this harmonised pardon decision-making process can be accepted by the vast majority of people and implemented to ensure the rights of the victims of the crime or victims' relatives in murder cases and the convicts and can protect the public interest in the state.

The harmonisation of the pardon principles of common law and the *Sharīʿah* requires reforming the current pardon laws and forming a Pardon Advisory Board where the victim of the crime or his representative and the convict or his representative should be important members while the state authorities should play a vital role as mediators to resolve all relevant issues. The pardon decisions of the proposed pardon board should be made based on mutual understanding between both the disputing parties involved to the crime with love and generosity, but the state authorities should ensure the protection of the public interest in deciding pardon petitions. The victim or victim's relatives in murder cases should be convinced to grant a free pardon for humanitarian purposes or to seek rewards from Allah (SWT) in the Hereafter as per the belief of Muslims. As mediators, the state authorities should resolve all other issues between the disputing parties justly and fairly. If the victims or victims' heirs in murder cases want to grant pardon with compensation, the state authorities should ensure that the amount of the compensation is proportionate, just, fair and reasonable. The state authorities should further ensure that the decisions of pardon consider certain mitigating factors, such as post-conviction activity and sign of repentance and rehabilitation of the offenders. In cases where public funds have been stolen,

the return of those funds to the state should be a necessary consideration and a sign of repentance and rehabilitation of the offender to the pardon.

The reformed pardon decision-making process should be an open consultative decision-making process. It should be transparent and apply reporting and publication requirements to pardon deliberations. It should have justice-enhancing elements and create a role for victims or their families in murder cases in the pardon decision-making process as the current pardon process does not provide any compensation or require any scope to have their rights heard. Therefore, it is hoped that the proposed pardon policy can ensure justice and fairness for both disputing parties as it can protect the rights of the victim of the crime or his relatives in cases of murder. In addition, it can create an opportunity for inmates to reform from their criminal behaviour and apply for pardon with the hope and incentive to return to society and lead their lives better than they were before. Thus, it is hoped that the harmonisation of the pardon principles of the *Sharīʿah* and common law can develop a moderate and balanced pardon decision-making process that can establish justice and reduce possible abuse of the power of pardon in the context of constitutional supremacy.

CONCLUSION

The *Sharīʿah* pardon principle emphasises the protection of the rights of the victims or victimss relatives in murder cases in granting pardons as they are the suffers of the crimes.[107] Muslim jurists expect that the *Sharīʿah* pardon principle can assist to develop a competent pardon authority in the state, which can enhance justice and minimise communal unrest, animosity, and revenge in society.[108] At the same time, if the offender is pardoned by the victim or victim's relatives in murder cases, the *Sharīʿah* authorises the state authorites to impose additional punishments other than death to rehabilitate the offender and protect the community from the threat of the convict's criminal acts.[109] However, this study identifies that the inadequacies of the applicability of the *Sharīʿah* pardon principle in the common law jurisdictions might raise concerns about fairness, justice, and legal accountability. Compared to the *Sharīʿah* pardon principle, the pardon

[107] Mohammad Hashim Kamali, 'Amnesty and Pardon in Islamic Law with Special Reference to Post-Conflict Justice,' 455; Peri Bearman, *The Ashgate research companion to Islamic law*, 170.

[108] Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in Sharīʿah and Malaysian Law,' 47.

[109] Majdah Zawawi and Nasimah Hussin, 'Forgiving the enemy: A comparative analysis of the concept of forgiveness in Sharīʿah and Malaysian Law,' 49.

principle of common law jurisdictions is considered arbitrary and one-sided because the pardon petitions are decided exclusively by the state authorities, the rights of the victim or victim's heirs in murder cases are not heard and even compensated in the pardon process. Therefore, this study proposes a harmonisation of the pardon principles of both the *Sharīʿah* and common law jurisdictions and developts a Pardon Advisory Board to decide pardon petitions which can bring better coordination and uniformity between these two legal systems and enhance justice in the pardon process.[110]

It is hoped that the harmonisation of the pardon principles of the *Sharīʿah* and common law syetems designs a pardon decision-making process which can be a moderate and balanced model to enhance justice and reduce potential abuse of power in the exercise of the power of pardon. In this harmonised pardon decision-making process, the state authorities should act as mediators to resolve the issues in a just and fair manner and protect the public interest by ensuring necessary measures of rehabilitation to make the offenders better persons than they were before.

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