

and Kanamori, and in which the government explained how to reconcile Article 9 and the UN Charter. According to the booklet, at the 1946 constituent Parliament, many raised the concern that Japan would be unable to repel attacks from abroad under Article 9. The booklet states that there is no reason to worry over this issue, because Japan will join the United Nations soon after becoming independent, and the UN Charter clearly recognizes the right to self-defence for its member states.

This implies that the government at the time of the promulgation of the Constitution regarded the right of individual self-defence as permissible as a way of repelling foreign attack under Article 9. If so, we can doubt whether there was any fundamental turnaround on the part of the government when the Self-Defence Forces were established in 1954.

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Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective

by Andrew Novak

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In 1977, Israeli academic Leslie Sebba published two articles comparing constitutional arrangements for executive clemency the world over.¹ Despite some thematic coverage in comparative constitutional law or death penalty textbooks² and in several smaller-scale comparative studies,³ Sebba's work remained the leading scholarship on executive clemency across national borders for almost 40 years. There are good reasons for the scarcity of academic literature on executive clemency – broadly defined as the executive branch reducing or abrogating lawfully-imposed punishment, without fully exonerating the prisoner (p. 159) particularly in a comparative context. Clemency deliberations by executive decision-makers throughout the world are usually performed in secret, with public justification for the exercise of clemency rarely given. Accordingly, possible reasons behind death sentence commutations are rarely analyzed in any systematic way. However, this does not make such research any less urgent. As Kobil observes, clemency and pardons now demand academic explanation to an even greater degree: “[L]ike the monarchical power from which it derives, clemency is shrouded in mystery and often fraught with arbitrariness at a time when other aspects of [criminal justice systems] are becoming more open and fair.”⁴

1. Leslie SEBBA, “Clemency in Perspective” in Simha F LANDAU and Leslie SEBBA, eds, *Criminology in Perspective: Essays in Honour of Israel Drapkin* (Lexington, Mass: Lexington Books, 1977); Leslie SEBBA, “The Pardoning Power: A World Survey” (1977) 68(1) *The Journal of Criminal Law and Criminology* 83.
2. See e.g. Wen-Chen CHANG et al, *Constitutionalism in Asia: Cases and Materials* (Oxford and Portland, Oregon: Hart Publishing, 2014), 129-136; Roger HOOD and Carolyn HOYLE, *The Death Penalty: A Worldwide Perspective*, 5th ed (Oxford: Oxford University Press, 2015) 312-321.
3. See e.g. Ariane M SCHREIBER, “States That Kill: Discretion and the Death Penalty – A Worldwide Perspective” (1996) 29 *Cornell International Law Journal* 263; Rob TURRELL, “It’s a Mystery: The Royal Prerogative of Mercy in England, Canada and South Africa” (2000) 4(1) *Crime, History & Societies* 83; Daniel PASCOE, “Clemency in Southeast Asian Death Penalty Cases” (2014) *Centre for Indonesian Law, Islam and Society Policy Papers* 1.
4. Daniel KOBIL, “Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency” (1992-1993) 27 *University of Richmond Law Review* 201 at 202.

Despite the lack of information about how clemency decisions are made and the factors that contribute to their frequency or scarcity, they usually determine whether or not a prisoner sentenced to death ultimately lives or dies, and hence they are vitally important in criminal justice systems that retain capital punishment.⁵ Moreover, given long-term sentences of imprisonment, clemency may operate as a final level of “appeal” in cases of innocence or excessive punishment, or as a means to show leniency for reasons outside of those permissible by parole. Although the frequency of clemency grants has declined in a range of jurisdictions throughout the 20th century,⁶ recourse to clemency in capital cases is mandated by the *International Covenant on Civil and Political Rights* (ICCPR) in Article 6(4). A right to seek or to be considered for clemency, whether in a capital case or not, may even be so widely accepted that it forms part of customary international law.⁷

Into this literary vacuum steps Andrew Novak, Adjunct Professor of Criminology and Law and Society at George Mason University,⁸ with his welcome new text *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective*. Novak’s ambitious comparative law project, set out in nine chapters, aims to juxtapose the laws and procedures governing executive clemency across the entire common law world, from Alabama to Zimbabwe. The author begins in the Introduction and Chapter 2 by setting the stage with a history of common law clemency and by summarizing the clemency laws of non-common law jurisdictions.

Chapter 3 relays international law treaty and jurisprudential standards pertaining to clemency and amnesty provisions, before the book’s real comparative substance begins in Chapter 4. From Chapters 4 to 8, the author cannily divides clemency into various issues of legal importance to underline his comparison between common law jurisdictions. Here, Novak compares relevant constitutional provisions, clemency decision-making or advisory committees, clemency’s scope over particular types of offences, offenders and conditions, procedural norms, and the permissibility (or impermissibility) of judicial and legislative review.

This middle section (Chapters 4-8) forms Novak’s most important contribution to the academic literature on clemency, for three reasons. First, little has been previously written on mercy committees outside the US state context. Novak expands on American scholarship by Heise, Mandery, and Gershowitz⁹ in considering clemency advisory bodies in nations as diverse as Botswana, Guyana, Sierra Leone, and Fiji. Second, for comparative constitutional law, customary international law or criminal justice scholars, or the drafting committees for new national or provincial constitutions, even the smallest island states’ and territories’ laws serve as useful precedents. Although the author’s own normative preferences on clemency laws and procedures are sometimes unclear,¹⁰ this is a real strength of Novak’s work: shining light on neglected parts of the constitutional order in the Caribbean, the Pacific, and Africa. Prominent examples are the coverage in Chapters 4-8 given to subnational territories such as the self-governing islands of the Federation of Micronesia, the Cayman Islands, the Falkland Islands, and the North Mariana Islands, as well as small states like the Seychelles, Grenada, Mauritius, Saint Vincent and the Grenadines, and Swaziland. Third and finally, for lawyers and legal scholars contemplating judicial review challenges to clemency grants, refusals, conditions, or procedures, Chapter 8 contains an invaluable summary of recent

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5. Cathleen BURNETT, *Justice Denied: Clemency Appeals in Death Penalty Cases* (Boston: Northeastern University Press, 2002) 16; Kobil, *supra* note 4 at 214.
 6. Carolyn STRANGE, “Introduction” in Carolyn STRANGE, ed, *Qualities of Mercy: Justice, Punishment, and Discretion* (Canada: UBC Press, 1996) 14-15.
 7. See Hood and Hoyle, *supra* note 2 at 313. Nearly every common law jurisdiction allows for executive clemency: Novak (p. 4).
 8. Novak’s previous publications focus on capital punishment, the international criminal court, and sports history, often in the sub-Saharan African context.
 9. Michael HEISE, “Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure” (2003) 89 *Virginia Law Review* 239; Evan J MANDERY, *Capital Punishment: A Balanced Examination* (Sudbery, MA: Jones and Bartlett 2005); Adam M GERSHOWITZ, “The Diffusion of Responsibility in Capital Clemency” (2001) 17 *Journal of Law and Politics* 669.
 10. Rare examples are Novak’s two sections entitled: ‘What works best?’ (Chapters 6 and 9), and his preference for publicizing clemency reasons (p. 162).

case law precedents, even if they may not be formally binding on the next jurisdiction to consider the issue. Clemency litigation will undoubtedly become more common in the future. As the author notes:

[A] written and justiciable constitution has, since independence, opened some aspects of the exercise of the mercy power to judicial and legislative review... In most Commonwealth countries, the modern construction of the clemency power, now governed by administrative regulation, is no longer an ‘act of grace’ by the sovereign, but a constitutionally-defined process (p. 37).

For readers particularly interested in clemency within the East and Southeast Asian contexts, Novak focuses on the constitutional provisions and recent caselaw developments of common law jurisdictions such as Singapore, Malaysia, Brunei Darussalam, and Hong Kong, with a particular emphasis on judicial review. Nevertheless, only Hong Kong (with the colonial Governor’s pardons of death sentences, and amnesties for police corruption in the 1970s) receives any attention on clemency state practice. One notable omission is commentary on the constitutional provisions of Myanmar,¹¹ although that nation’s recent rapid democratization and attendant legal changes may provide explanation.

The author concludes by conjecturing over the future of executive clemency: undeniably, clemency will continue to become even rarer with the rise of the “administrative state”,¹² the need for predictability rather than personal charisma in criminal justice decision-making, and the growing importance of probation and parole. However, mandatory minimum punishments and the increasing popularity of restorative justice methods have the potential to prompt its rise again. Whether future clemency scarcity is welcome or not depends on Novak’s readership: whether they oppose the death penalty and lengthy sentences of imprisonment as too punitive, whether they favour mandatory minimum sentences, whether they value rehabilitation over strict proportionality and general deterrence, and whether they see executive clemency as a vital check on the judiciary as part of a Montesquieuan separation of powers, or else as a capriciously-exercised interference in the impartial administration of criminal justice.

The book has two main shortcomings, both concerning methodology. First is the author’s sometimes anecdotal style: data and examples of clemency *practice* from different jurisdictions are sporadically used to illustrate the author’s arguments, rather than being collected and analyzed in a systematic way, despite Novak’s early assurance that his book “explores the practice of clemency and not the theory” (p. 3). Even if a jurisdiction under study possesses the world’s most detailed constitutional mercy scheme, the clemency power becomes meaningless if petitions are never, or almost never, entertained by the executive. Without data on clemency practice and without empirical or socio-legal analysis, the reader has no way of knowing whether clemency is a power exercisable only “on the books”. In death penalty cases, Singapore, Texas, and Florida form prominent examples: successful death penalty clemency appeals are so rare, that in the words of one late Singaporean criminal defence lawyer, petitioning was invariably a “waste of time”.¹³ Admittedly, Novak does provide some examples of data on clemency “rates” in the Introduction (USA), Chapter 2 (UK, former British colonies in Africa), Chapter 6 (South Carolina), and Chapter 7 (India, USA), but these serve mainly illustrative purposes.

This calls into question the author’s ambition in his project design: the greater the number of jurisdictions compared (with reference to more than 110 jurisdictions in the index)¹⁴, the less that can

11. See *Constitution of the Republic or the Union of Myanmar 2008* (adopted 29 May 2008), arts 204(a) and (b).

12. Rachel E BARKOW, “The Ascent of the Administrative State and the Demise of Mercy” (2007-2008) 121 *Harvard Law Review* 1332, 1335.

13. Subhas ANANDAN, *The Best I Could* (Singapore: Marshall Cavendish, 2009) 90. Florida has not granted death penalty clemency since 1983, whereas Texas has granted only two petitions since 1976. See “Clemency” Death Penalty Information Centre (2016), online: *Death Penalty Information Centre* <<http://www.deathpenaltyinfo.org/clemency>>.

14. This includes 48 US states, missing only North Dakota and West Virginia.

be known about each, beyond a doctrinal comparison of law “on the books”. Systematically-collected statistical data would provide evidence for the author’s (probably correct) assertions that “an executive clemency decision, outside of public view, allows a harsh sentence to be modified after the fact without undermining any deterrence impact of the original sentence” (pp. 1–2) and that “the degree to which the pardon authority is aligned to the other powers of state, including law enforcement and prosecution, may be determinative of the frequency of clemency grants” (p. 139).

Similarly, using elite interview data in Chapter 6 (Mercy Committees) would also enable the reader to draw firmer conclusions about how clemency decisions are made around the table: whose voice, or which documents, prove the most influential, and whether or not a singular chief executive usually pays heed to advisory opinions.

Second, while the author ably outlines the similarities and differences of common law clemency laws and procedures, the reader is prompted to ask: “why the variance?”. All nations evince differences in their constitutional and legislative arrangements, but what builds on describing similarities and differences is averring to the *reasons* for those similarities and differences: the historical, cultural, structural, and political roots of variance¹⁵ – explanations too often ignored by comparative law scholars.¹⁶ It is a shame the author holds back in this regard, although again the enormity of the project may be the reason: there is only so much comparative explanation that a compact volume can accommodate. Nevertheless, Novak’s work prompts plenty of questions and avenues for further clemency research, particularly on the empirical side. And perhaps that is the point: not to end the conversation on comparative executive clemency, but to restart it again after Sebba.

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Constitutional Interpretation in Singapore: Theory and Practice

by Jaclyn L. Neo (ed)

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In this new collection, Jaclyn Neo has brought together an extremely impressive list of scholars to reflect on the current state of constitutionalism in Singapore. It is a testament to the strength of constitutional scholarship in Singapore today that so many contributors to the volume are well-known not only in Singapore but also globally. All contributors also show great insight and nuance in analyzing various dimensions to contemporary Singapore constitutional practice. Moreover, the list of topics covered by the volume as a whole is itself very impressive: it includes attention to various modes and theories of constitutional interpretation, the scope of judicial review, the basic structure doctrine, natural justice, the right to freedom of expression, proportionality and balancing, and the use of foreign law.

A key premise of the collection is that the volume is being published at a moment of potential constitutional transition in Singapore. In her introduction, Neo suggests that “Singapore is witnessing a shift in legal and political culture as both judges and citizens display an increasing willingness to engage with constitutional ideas and norms” (p. i).

15. David NELKEN, *Comparative Criminal Justice: Making Sense of Difference* (London: Sage Publications, 2010) 13 and 31.

16. Mark DUBBER, “Comparative Criminal Law” in Mathias REIMANN and Reinhard ZIMMERMAN, eds, *The Oxford Handbook of Comparative Law* (New York: Oxford University Press, 2006) 1288 at 1291.