

**'Court' of
Last Resort
A Study of
Constitutional
Clemency for Capital
Crimes In India**

Bikram Jeet Batra

WORKING PAPER SERIES

Centre for the Study of Law and Governance
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‘COURT’ OF LAST RESORT*

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INTRODUCTION

Capital Punishment or the death penalty remains a controversial subject in India. Despite the global move toward abolition, India retains such punishment. Yet although the death penalty was the default punishment for murder in the early post-independence years, changes in law and shifts in sentencing ensured that by the 1970s the death penalty had become an exceptional punishment.¹ This shift was formalised by a landmark

*The Court of Last Resort was an association formed by the writer Erle Stanley Gardner which investigated cases where it appeared that persons were falsely convicted. A number of persons found guilty by the judicial system were found by the group to be innocent and were subsequently released on the basis of the ‘new’ evidence found. I am grateful to Usha Ramanathan for this reference. This paper explores constitutional mercy, which, in the absence of any such citizen’s initiatives, is the ‘court’ of last resort for condemned prisoners in India.

I am grateful to Ujjwal Kumar Singh for giving me an orientation to the National Archives of India from which this study has greatly benefited as also his insightful comments on my presentation (role of the president) at a CSLG seminar. Another part of this study (executive-judiciary relationship) was presented at the LASSNET inaugural conference in January 2009 and I am grateful for the suggestions received. Thanks are also due to Siddhartha Sharma, Harinder Batra, V Venkatesan and Malavika Vartak for discussions & comments.

¹ For details of this shift see Bikram Jeet Batra, ‘Of Strong Medicine and Weak Stomachs: The Resort to Enhanced Punishment in Criminal Law in India’ in Kalpana

judgment of the Supreme Court in 1980 where the Court observed that the death penalty should be awarded only in the ‘rarest of rare’ murder cases.² Although most death sentences in India are awarded for murder, capital punishment can be awarded in India for a large number of other offences under the Indian Penal Code (IPC).³ The extreme penalty can also be awarded under a number of other legislations.⁴ Yet despite the frequent enactment of laws that prescribe the death penalty as well as the consistent award of death sentences by the judiciary, the actual number of executions or hangings carried out in India have reduced to a trickle. The past decade (1999–2009) has seen only one judicial execution.⁵ This seemingly paradoxical

Kannabiran and Ranbir Singh Ed., *Challenging The Rule(s) of Law: Colonialism, Criminology and Human Rights in India*, Sage, Delhi: 2008

² *Bachan Singh v. State of Punjab*, AIR 1980 SC 898

³ The IPC provides for capital punishment for the following offences, or for criminal conspiracy to commit any of the following offences (s.120-B): Treason, for waging war against the Government of India (s.121); Abetment of mutiny actually committed (s.132); Perjury resulting in the conviction and death of an innocent person (s.194); Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person (s.195A); Murder (s.302) and murder committed by a life convict (s.303) (although struck down by the Supreme Court, it still remains in the IPC); Abetment of a suicide by a minor, insane person or intoxicated person (s.305); Attempted murder by a serving life convict (s.307(2)); Kidnapping for ransom, (s.364A), Dacoity with murder (s.396).

⁴ Laws relating to the Armed Forces, for example the Air Force Act 1950, the Army Act 1950 and the Navy Act 1950 and the Indo-Tibetan Border Police Force Act 1992; Defence and Internal Security of India Act 1971 ; Defence of India Act 1971 (s.5); Commission of Sati (Prevention) Act 1987 (s.4(1)); Narcotic Drugs and Psychotropic Substances (Prevention) Act, 1985, as amended in 1988 (s.31A); Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) (s.3(2)(i)); Prevention of Terrorism Act 2002 (POTA) (s.3(2)(a)); Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 (s.3(2)(i)); Explosive Substances Act 1908, as amended in 2001 (s.3(b)); Arms Act 1959 (as amended in 1988), (s.27); Unlawful Activities Prevention Act 1967 (as amended in 2004) (s.16(1)). In addition there are a number of state legislations that allow for capital punishment to be imposed.

⁵ Dhananjay Chatterjee was the last person to be executed in India. The execution took place on 14 August 2004 in Kolkatta. No executions are reported to have

situation is largely explained by the provisions of mercy or clemency in Indian Law.

After the award of the death sentence by a sessions (trial) court, the Code of Criminal Procedure (CrPC) requires that the sentence must be confirmed by a High court to make it final.⁶ Once confirmed, the condemned convict has the option of appealing to the Supreme Court thus completing the three-tiered judicial check on the death penalty.⁷ Where the condemned prisoner is unable to appeal to the Supreme Court; or where the court either refuses to hear the appeal or upholds the death sentence, the prisoner also has the option of submitting a 'mercy petition' to the president of India and the governor of the state where he was sentenced to death seeking reduction of the punishment from the death sentence to one of imprisonment for life or a complete 'free pardon'.⁸

An execution cannot be carried out unless both the Governor and the President reject the mercy petition.⁹ The present situation of rare executions, despite a consistent number of persons being sentenced

taken place from 1998–2003 or subsequently. Statistics on executions since 1995 are available in 'Prison Statistics', an annual publication of the National Crime Records Bureau of the Ministry of Home Affairs. The 2006 edition is available at <http://ncrb.nic.in/PSI2006/prison2006.htm> (last accessed 31 March 2009)

⁶ Section 366, Code of Criminal Procedure, 1973 (hereinafter CrPC)

⁷ There is no appeal by right in capital cases in the Supreme Court except where the High Court has sentenced a person to death by overturning an acquittal of the trial court [Article 134(1)(a)]. In all other capital cases, appeals are only possible by seeking the special leave of the Supreme Court vide Article 136 on the Constitution. The admission rate of such appeals is low.

⁸ Detailed instructions are laid down by the Government in this regard: 'Instructions regarding procedure to be observed by the States for dealing with petitions for mercy from or on behalf of convicts under sentence of death and with appeals to the Supreme Court and applications for special leave to appeal to that Court by such convicts', Procedure regarding petitions for mercy in death sentence cases, Ministry of Home Affairs, undated, on file with author (hereinafter MHA mercy petition instructions). A 1950 version of the instructions is available in File no. 70/85/51-AN, MHA, New Delhi.

⁹ Instruction IX, MHA mercy petition instructions, *ibid.*

to death, is a result of mercy petitions not being rejected. The importance of clemency to the broader debate on the death penalty thus cannot be overstated. Despite this vital role, a comprehensive study on decision-making in clemency process is unavailable.¹⁰ Public and scholarly engagement has therefore remained restricted to a few individual cases.¹¹ Unfortunately the generality of public discussion and debate conducted in the absence of verifiable information tends to obfuscate the nuances and subtleties of clemency. Further, the obvious link with capital punishment, clemency jurisdiction also provides for extensive interplay between the executive, the president and the courts. The present working paper thus examines clemency as a dynamic site for negotiation within the state apparatus: a point where law, governance and realpolitik intersect. This paper also provides a comprehensive overview of the constitutional power of clemency along with its colonial origins. It includes a study of the various factors that influence decision-making as also an analysis of the current legal positions and the contours of the judiciary—executive relationship. In conclusion it examines the dilemmas posed by the current clemency situation and examines possible ways forward.

Terminology

It is important to note that the terms clemency and mercy are not used in the Constitution of the IPC and CrPC which instead refer to

¹⁰ The existing literature on the subject is wholly inadequate e.g. Janak Raj Jai, *Presidential Powers of Pardon on Death Penalty*, Regency Publications, New Delhi: 2006. There are a few quality works on the issue but extremely specific in their focus, e.g. Upendra Baxi, ‘Clemency, Erudition and Death: the judicial discourse in Kehar Singh’, *Journal of the Indian Law Institute*, Vol. 30(4), 1988, pp 501–506; Balkrishana, ‘Presidential Power of Pardon’, *Journal of the Indian Law Institute*, Vol 13(1), 1971, pp 103–120

¹¹ In the recent past the clemency debate is largely restricted to the cases of Mohammad Afzal Guru (Parliament Attack case); Nalini and others (Rajiv Gandhi Assassination case) and Sarabjit Singh (Indian spy on death row in Pakistan).

pardons, reprieves, respites and remissions, suspension, and commutation. The difference between the terms is explained below:¹²

- Pardon, sometimes also referred to as a ‘free pardon’ refers to an order that ‘clears the person from all infamy and all consequences of the offence’. Pardons can however also include conditions.
- Reprieve means to ‘take back or withdraw the judgment for a time’ and respite also similarly means delaying the punishment till a later date while a sentence beginning at a later date is covered by suspension.
- Remission means the reduction of the quantum of the sentence awarded by the court without changing its character (e.g. a term of 10 years reduced to 5 years).
- Commutation refers to the alteration of one kind of sentence to a lesser kind of sentence i.e. death sentence reduced to a term of imprisonment.

Although many authors refer to the set of above powers as ‘pardon powers’, this paper avoids that practice given the distinct meaning of pardon.¹³ The present paper therefore follows the practice of using the terms clemency and mercy (interchangeably) to include the various modes of reduction or change of sentence that are available in the constitutional provisions and discussed above. References in the paper to ‘pardon’ therefore mean a free pardon as explained above. Further, since this paper studies clemency in capital cases, it

¹² Most of the terms are defined by the Law Commission of India, *41st Report on Code of Criminal Procedure*, September 1969 at 249-250.

¹³ Pardon differs from all the other terms used in the text of Article 72 as a pardon wipes the slate clean with respect to the offender, the other powers only affect punishment and do not remove the judicial conviction. Seervai however uses the phrase ‘power of pardon’ as an omnibus phrase as he suggests that the power to pardon includes all power to remit, commute etc. HM Seervai, *Constitutional Law of India*, Universal Book Traders, Delhi: 2002 (4th Ed.), at 2093.

engages largely with commutation of the death sentence to a term of life imprisonment.

A HISTORICAL PERSPECTIVE

The power to pardon and exercise mercy towards prisoners was historically a power exercised by the Sovereign, perhaps emerging from notions of divinity of kings. Along with the power to declare war and make peace, the power to adjudicate disputes and to grant mercy to offenders has long been an essential component of sovereignty.¹⁴ It has been noted that the philosophy underlying the pardon power is that ‘every civilized country recognizes, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy.’¹⁵

Such powers of mercy were also exercised in India by the Mughal Emperors and rulers before them as well.¹⁶ In the early years of the East India Company’s operation, mercy in their courts remained limited to the prerogative powers of the British King-Emperor. Subsequently some powers of mercy also appear to have been granted vide royal charter to the Governor General in Council of Fort William and the Governors in Council of the Bombay and

¹⁴ For references to the large amount of literature on the subject, see David Tait, *Pardons in perspective: The role of forgiveness in criminal justice* at <http://www.canberra.edu.au/ncf/events/pardonsperspective.pdf> (last accessed 31 March 2009)

¹⁵ 59 *American Jurisprudence 2d*, page 5, quoted in written submissions of senior counsel Soli Sorabjee in *Epuru Sudhakar and Anr. v. Govt. of A.P. and Ors.* WP (Crl.) No. 284–285/2006.

¹⁶ See generally Bashir Ahmed, *Administration of Justice in Medieval India*, Historical Research Institute, Aligarh: 1941

Madras Presidencies.¹⁷ As Muslim criminal law largely prevailed in the mofussil territories, a scheme of pardon consistent to that law prevailed although the Governor General in council also had the power to pardon and commute sentences after the establishment of the Sadar Nizamat Adalat in 1772.¹⁸ Eventually with the merger of the mofussil and presidency systems, statutory clemency powers were provided for in the Indian Penal Code and the Code of Criminal Procedure that were enacted in 1860 and 1861 respectively. Although the British King-Emperor also continued his exercise his prerogative right and granted similar powers by royal charter to the Viceroy and Governor General of India, it was the statutory powers that were regularly exercised.¹⁹

With respect to capital cases the IPC and CrPC granted clemency powers in capital cases to the local governments and the Governor General in Council equally. Mercy petitions were thus first decided by the local government and upon rejection, were sent to the Centre.²⁰ As the Government's 'rules of business' allowed for the delegation of such powers, at the central level mercy petitions were effectively disposed of in the Home Department without even a reference to the Viceroy.²¹

¹⁷ MP Jain, *Outlines of Indian Legal History*, Wadhwa and Co, Nagpur: 2005 (5th ed), at 50 and 337.

¹⁸ *Ibid*, at 134-135

¹⁹ Noting by NA Faruqui on 17-1- 40, File no. Home (Judicial) 117/39, National Archives of India (NAI)

²⁰ In the case of Chief Commissioner's provinces (the precursor the modern day union territories), the Central Government acted as the Provincial Government.

²¹ The Governor General of India was empowered to make rules for the more convenient transaction of business in his Council and any order made or act done in accordance with such rules should be deemed to be the order or act of the Governor General in Council. The Viceroy Lord Northbrook however made a change in the rules and required that all mercy petitions be sent to the Governor General for disposal as he was under the impression that the prerogative of mercy vested in the Viceroy personally. This practice however ended with his departure in 1876 although the rules were amended to their previous form only in 1889. Note by HA Adamson, 4 May 1907, File no. Home (Judicial) 373/23, NAI

References were only made to the Viceroy where the Home Member had doubts about a case or where the Home Member considered that a sentence should be commuted.

No real change came about in the law after the CrPC was amended in 1898 and the same procedure continued. A memorandum prepared in 1923 listed cases (other than those where commutation or release was envisaged) to be ‘ordinarily submitted’ to His Excellency the Viceroy:

1. cases of a political character;
2. cases in which for some special reason, considerable public interest has been aroused;
3. when there is some doubt of the merits of a case;
4. cases in which the death sentence is a result of an appeal against the convict’s acquittal by the Court of Session, or of an application for enhancement of sentence whether suo-moto by the court or on application of the local Government.²²

A major substantive change came about around the drafting of the new ‘Federal Constitution’ in the 1930s. The Joint Select Committee of 1933–34 suggested that the statutory determination of mercy should rest only with the Provincial Government, it bearing the primary responsibility for law and order and the similar power should be taken away from the central government (Governor General in Council).²³ However to maintain an appeal and the two-tiered mercy system already in place, they proposed that the mercy power should now be exercisable by the Governor General in his discretion, as the Viceroy.²⁴

²² Memorandum showing the procedure adopted in connection with petitions for mercy submitted by convicts under sentence of death, File no. Home (Judicial) 373/23, NAI

²³ Provincial Governments also had the power to commute sentences on a subsequent petition filed even if the Centre had rejected the previous petition. See File no. Secretariat of the Governor General (Public), 23/9/45 - GG (B), NAI

²⁴ B Shiva Rao et al, *The Framing of India’s Constitution—A Study*, Indian Institute of Public Administration, New Delhi: 1968, at 368

As a result, Section 401 was amended and a new section 402A was added in the CrPC along with Section 295(1) of the Government of India Act, 1935. The Viceroy also retained the prerogative power of pardon delegated by the letters patent.²⁵ These changes came into effect from 1st April 1937.

The substantive change in clemency was that at the Centre the decision was no longer a decision of the Government but of the Viceroy. With nearly 700 mercy petitions received annually, the workload of the Governor General looked to increase dramatically.²⁶ To reduce the pressure, the new procedure approved by Lord Linlithgow ensured that most of the work on mercy petitions continued to be done by the Government as previously, and only the final decision was made by the Viceroy.²⁷ The procedure provided that provincial governments submit mercy petitions in death sentence cases to the Secretariat of the Governor General (Public) by whom each case was forwarded to Law Member. If the Law Member was in favour of rejecting the petition, the case was submitted direct to the Viceroy for orders. If the Law member considered that there were grounds for interference, the case was referred to the Home Member for his opinion before submission to the Viceroy for final orders.²⁸ The Viceroy was however not bound by the opinions of the Law or Home Members and the eventual decision by him was sent by the Secretariat of the Governor-General.²⁹

Independence and the Constituent Assembly Debates

Although the Colonial Government avoided the use of the royal prerogative clemency power, this became unavoidable after

²⁵ This was also referred to in Section 401(5), CrPC

²⁶ Minute by J.A Thorne, dated 24-6-36 in File no. Home (Judicial) 450/1936, NAI

²⁷ Order by Linlithgow dated 6-2-37 in File no. Home (Judicial) 450/1936, NAI

²⁸ Noting by EC Gaynor, Deputy Secretary (G), MHA dated 19 September 1947 in File no. Home (Public—B) 67/6/47, NAI

²⁹ Noting by NA Faruqui, 18 October 1939 in File no. Home (Judicial) 117/39, NAI

Independence as the discretionary powers of the Governor-General was removed.³⁰ Now the only power available to the Governor General to deal with mercy petitions from the provinces was the prerogative power which was delegated to him under Instruction III of the Royal Commission appointing Lord Mountbatten as Governor General of India.³¹ The source of the power may have changed but decision making remained in the control of the Governor General in his individual capacity although now it was ‘presumed that the Governor General, in the exercise of these powers, will be guided by the advice of the Minister for Law and Minister of Home Affairs.’³² The older internal procedure was continued but all mercy petitions would now be received in the Ministry of Home Affairs and would, after the above Ministers recorded their views, be referred to the Governor General for final orders. A minor change however was that the orders of the Governor-General would now be issued by the Ministry of Home Affairs.³³

In practice however it appears that as the first Governor General of Independent India, Lord Mountbatten did not really engage himself much with mercy petitions and by and large the decision of the Law Member BR Ambedkar was accepted. However his successor as Governor General, C Rajagopalachari appears to have taken this

³⁰ ‘(I)n virtue of omission of Section 295(1) of the Govt of India Act, 1935 under the India (Provisional Constitution) Order, 1947, the concurrent statutory powers exercised by the Governor General in this discretion will no longer exist. Section 402A of the Criminal Procedure Code also becomes nugatory’. Minute by AV Raman, Additional Secretary, Home Dept dated 29 August 1947 in File no. Home (Public—B) 67/3/47, NAI

³¹ Noting by Deputy Secretary EC Gaynor, 15 October 1947 in File no. Home (Public—B) 67/3/47, NAI

³² Minute by AV Raman, Additional Secretary, Home Dept dated 29 August 1947, File no. Home (Public—B), 67/3/47, NAI

³³ ‘In England mercy appeals are dealt with in the Home Office. I would therefore advise that the orders contemplated in 4(1) of the note should issue from the Ministry of Home Affairs’. Noting by Ministry of Law/ Legislative Department dated 3 September 1947 in File no. Home (Public—B) 67/3/47, NAI

task extremely seriously, often seeking advice on particular cases even from the Prime Minister Jawaharlal Nehru.³⁴ Despite being an ardent supporter of the death penalty, Rajagopalachari exercised his powers to their widest extent, holding his ground when he disagreed with the views of the Law or Home Members and even sending a petition back to the Home Minister twice for reconsideration.³⁵ Yet his actions and file notings do not represent the exercise of a discretionary and prerogative power of mercy, not bound by the recommendations of the members/ministers.³⁶

In the meanwhile, discussions on the nature of the mercy provisions in the forthcoming Constitution were also taking place in the Constituent Assembly. In response to the questionnaire on the salient features of the Constitution circulated by BN Rau, the Constitutional Advisor to the President in March 1947, Dr. Shyama Prasad Mookerjee referred to the President's power 'to pardon and to commute or remit punishment'.³⁷ Another member of the Union Committee, KT Shah, sent a note with 'general directives'—effectively a draft constitution.³⁸ This included 'pardon convicted criminals' as part of the powers of the Head of the State in Clause 15. However curiously the memorandum and draft clauses circulated by BN Rau on 30 May 1947 made no specific mention of the

³⁴ See for instance mercy petition of Tirthu Singh, File no. Home (Judicial), 20/93/48, NAI and that of Albonze and Muthusamban, File no. Home (Judicial) 20/132/48, NAI

³⁵ 'I am strongly against the abolition of the death sentence' wrote Rajagopalachari to the Law Commission when it was considering the question of abolition. Letter dated 14 January 1965, File no. MHA (Judicial-II) 19/61/62, NAI. He did however twice return the petition of Mst. Phullan and Asa Ram alias Jharu, File no. Home (Judicial) 20/134/49, NAI

³⁶ Presumably this was out of courtesy as the alternative (that he believed he was bound by the advice of the executive) appears unlikely.

³⁷ See B Shiva Rao et al. (ed.), *The Framing of India's Constitution—Select Documents, Volume II*, Indian Institute of Public Administration, New Delhi: 1968

³⁸ *Ibid*

mercy powers of the President.³⁹ After a few meetings of the Union Constitution committee, however, broad powers of mercy (pardon, remission and commutation) were included in the recommendations of the Committee on the Principles of the Union Constitution on 4th July 1947.⁴⁰

When the matter came up for discussion in the Constituent Assembly on 31 July 1947, there was lengthy discussion on how such powers should be exercised in the proposed ‘federal’ Indian state. This was largely brought about by concerns of the rulers of the Indian [princely/native] States who did not wish to lose their ‘sovereign’ powers of mercy in the new federal India although they did not object to concurrent powers.⁴¹ N. Gopaldaswami Ayyangar, speaking for the Union Committee discussed the need for this presidential power:

I think, Sir, the House will agree that, when we are setting up a Head of the Federation and calling him the President, one of the powers that should almost automatically be vested in him is the power of pardon. Now, is the power of pardon going to be unlimited in its character, or are we going to give him only limited powers of pardon? He is not like a hereditary monarch in a position to derive his powers of pardon from any theory on a royal prerogative and so on. If he exercises the power of pardon, we must vest the authority for it to the Constitution or to some Federal Law⁴²

³⁹ B Shiva Rao et al, *The Framing of India's Constitution—A Study*, Indian Institute of Public Administration, New Delhi: 1968, at 368

⁴⁰ Clause 7 of Part IV, ‘Functions of the President’. The recommendations did however note that such powers of commutation or remission could also be conferred by law on other authorities since this was already the case with the IPC/ CrPC. *Ibid.*

⁴¹ See the statements and amendment proposed by B. L Mitter from Baroda State on 31 July 1947, Debates of the Constituent Assembly of India—Volume IV, <http://parliamentofindia.nic.in/ls/debates/vol4p14.htm> (last accessed 31 March 2009)

⁴² *Ibid*

As a compromise, the Committee moved an amendment limiting the mercy powers of the President to only federal law jurisdiction, but as the President of the Constituent Assembly pointed out, practically the entire penal law was provincial domain and thus the mercy powers would not even cover murder cases. To remedy this situation, M. Ananthasayanam Ayyangar thus suggested an amendment by which the President would have similar mercy powers as any Governor of a province where a person had been sentenced to death since '[l]ife [sic, death?] sentence is a very serious one and therefore there must be another agency also to consider if there are any cases in which pardon should be exercised.'⁴³ The adopted memorandum of the Union Constitution thus gave the President concurrent powers of 'suspension, remission or commutation of sentence' in all cases where a person has been sentenced to death in a Province.⁴⁴ This however did not extend to death sentences awarded in a [Indian/princely] State.⁴⁵

The provision with minor amendments and renumbered clause 53(2)(b) also featured in the Draft Constitution prepared by BN Rau

⁴³ Although the amendment was confined to death sentences passed in a Province the member added that he would be glad to extend this power even to cases of death sentences passed in a State since '(d)eath sentences are being abolished in various countries in the world ... (a)ll progressive countries in the world have altogether abolished capital punishment.' *Ibid*

⁴⁴ Thus making mercy available at two levels, similar to that under the Government of India Act, 1935

⁴⁵ Clause 7(2)(b) also gave the President 'the power to grant pardons, reprieves, respites, remissions, suspensions or commutations of punishment imposed by any Court exercising criminal jurisdiction shall be vested in the President in the case of convictions (i) for offences against Federal laws relating to matters in respect of which the Federal Parliament has, and the unit Legislature concerned has not, the power to make laws; and (ii) for an offences tried by Courts-Martial.' Reading the entire provisions, it becomes clear that the President did not have the power to grant a *pardon* to a person sentenced to death in a province although he could commute the death sentence to life imprisonment. This was perhaps unintentional.

and presented to the Assembly in October 1947.⁴⁶ Taking over from Rau, initially the Drafting Committee on 24 January 1948 led by Dr. BR Ambedkar opined that mercy powers in death cases should not vest concurrently in the President and the Governor.⁴⁷ However after further drafts and meetings, eventually on 10 February 1948 the Drafting Committee changed its stance quite dramatically.⁴⁸ The now renumbered Articles 59 and 141 in the Draft Constitution prepared by the drafting committee and sent by the Chairman on 21 February 1948 included the footnote, ‘The committee is of opinion that the President should have power to suspend, remit or commute a death sentence, without prejudice to the powers of the Governor or Ruler.’⁴⁹ Thus the President was now given powers of mercy in all death sentences, concurrently with Governors of provinces and rulers of States. This was a sensible compromise.

It is not clear what led this dramatic change in the powers of the President and Governors/ Rulers by the drafting committee. However there could have been many factors as this was not only a question about clemency powers, but a broader issue of the position of the President vis-à-vis the Governors and rulers of states and therefore a vital part of the federalism debate. Further as Austin writes, ‘[t]he leaders of the Constituent Assembly did not work in a vacuum.’⁵⁰

⁴⁶ B Shiva Rao et al. (ed.), *The Framing of India's Constitution—Select Documents, Volume III*, Indian Institute of Public Administration, New Delhi: 1968

⁴⁷ The committee therefore amended clause 123 taking away the mercy power of the Governors with respect to death sentences. Within the drafting committee, there were also previous incremental steps increasing the extent of the Presidential power with respect to the states. Initially the power of the President was not to extend to some of the (princely/ native) States ‘specified in Part III of the First Schedule.’ Subsequently the clause was further amended to extend the power of the President to states that had concluded agreements allowing so. *Ibid*

⁴⁸ This was the position adopted by the drafting committee in its meeting dated 10 February 1948. *Ibid*

⁴⁹ *Ibid*

⁵⁰ Granville Austin, *The Indian Constitution: Cornerstone of a nation*, Oxford University Press, Delhi: 2003, at xviii

These were indeed turbulent times for the new independent country—the war in Kashmir was still ongoing as were communal riots in other parts of the country. Between these two meetings of the drafting committee, the assassination of Mahatma Gandhi took place on 30 January 1948. One can only speculate about what may have influenced the drafting committee.

The discussions in the assembly on 31 July 1947 about protecting the rights of the rulers of princely states seemed far removed when the mercy provisions of the Draft Constitution came up for discussion in the assembly on 29 December 1948. One suggested amendment even attempted to remove the concurrent powers of mercy in death cases provided to the Governors and Rulers thus giving the President sole powers of mercy over all the states.⁵¹ The statement of the member Tajamul Hussain introducing the amendment is useful for it indicates the mood in favour of a strong centre and President:

In those days when there was no talk of partition of this country they were thinking of a weak Centre with three or four subjects like Communications, Defence, Foreign Affairs, etc., and the provinces were to enjoy complete autonomy. Now that the country has been partitioned we people who are the citizens of this country have decided once for all that the Centre will not be weak but a strong one, that we would have the strongest possible Centre. If this is our aim the head of the Central Government must have this power.⁵²

This was however opposed by Dr. Ambedkar who noted that the proposed provision was similar to present practice where both

⁵¹ Debates of the Constituent Assembly of India—Volume VII, <http://parliamentofindia.nic.in/ls/debates/vol7p28.htm> (last accessed 31 March 2009)

⁵² Another member Mr. Sidhwa although supporting the concurrent powers stated, ‘As far as rulers are concerned I am not very clear ... (i)f the ruler is autocratic and not responsible to the legislature certainly I would not like to give him that power. But assuming as I do that the rulers of the States are going to be made responsible to the legislatures I support the article as moved by Dr. Ambedkar.’ *Ibid*

Governors and the Governor-General had mercy powers in capital cases. He further stated:

[T]he Drafting Committee has not seen any very strong arguments for taking away the power from the Governor. After all, the offence is committed in that particular locality. The Home Minister who would be advising the Governor on a mercy petition from an offender sentenced to death would be in a better position to advise the Governor having regard to his intimate knowledge of the circumstances of the case and the situation prevailing in that area. It was therefore felt desirable that no harm will be done if the power which the Governor now enjoys is left with him. There is, however, a safeguard provided. Supposing in the case of a sentence of death the mercy petition is rejected, it is always open, under the provisions of this article, for the offender to approach the President with another mercy petition and try his luck there.⁵³

Article 59 was approved and added to the Constitution, as was the corresponding Article 141. These were renumbered as Article 72 and Article 161 in the Draft Constitution as Revised in November 1949 and remained the same on 26 November 1949 when the Constitution was finally adopted by the Constituent Assembly. With the coming into force of the Constitution of India on 26th January 1949 and the change of the mercy procedure, new ‘instructions’ for submission of the mercy petitions were also prepared and sent to all the states.⁵⁴

CLEMENCY IN INDIAN LAW AND POLICY

Article 72 of the Constitution of India states:

⁵³ *Ibid*

⁵⁴ Letter number 23/1/49—Judicial, dated 14 March 1950 from EC Gaynor, DS MHA to All Chief Secretaries to Governments of Part A and Part B States and all Chief Commissioners (for Part C states) (except Chief Commissioner Andaman and Nicobar Islands)

- (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—
 - (a) in all cases where the punishment or sentence is by a Court Martial;
 - (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;
 - (c) in all cases where the sentence is a sentence of death.
- (2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.
- (3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

Article 161 states: ‘The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.’

In addition to the constitutional clemency powers, the executive also has similar powers of clemency prescribed both in the IPC and the CrPC.⁵⁵ Further, Article 72(2) also allows the military hierarchy to exercise similar powers with respect to those sentenced by a court martial.⁵⁶ This particular paper however does not enter the above

⁵⁵ See Section 54–55, IPC and Section 432–433A CrPC. Curiously however S. 54 and S. 433 do not appear to have been used in commuting death sentences post-independence.

⁵⁶ This power was recently exercised by the Minister of Defence in a case apparently on the recommendation of the Chief of Army Staff. See ‘Antony commutes death

two domains as it focuses only on the constitutional commutation powers of the President of India with respect to death sentences, referring to the powers of the Governor only when necessary.⁵⁷

Despite the language of the constitutional provisions (Article 72 and 161), for all practical purposes, clemency is exercised not by the President but by the government. Initially there was some controversy over the extent to which the President was bound by the advice of the council of ministers but that was brought to a swift end.⁵⁸ This

penalty of jawan’, *Sify news*, 31 October 2008 at <http://sify.com/news/fullstory.php?id=14788210> (last accessed 31 March 2009)

⁵⁷ Although the powers are concurrent, as per procedure the initial mercy petition must be sent to the Governor of the State. Only once it has been rejected is the mercy petition to the President even considered. Where the Governor grants clemency, the President does not have the power to overturn the decision on sit in appeal against it. Where however the President has rejected a mercy petition, a subsequent mercy petition should not be admitted by the Governor, instead it should be sent by the State Government to the Central Government. See letter dated 20 July 1967 from Under Secretary MHA to Secretary, Home Department Punjab reiterating a similar instruction in a previous letter dated 6 March 1950. The letter continues, ‘I am further to add that where a condemned prisoner, whose mercy petition had earlier been rejected by the President, informs the State Government that he has submitted another petition to the President, but does not disclose the grounds on which he has sought reconsideration, the State Government need not stay the execution unless orders to the contrary are received by them from the Government of India.’ See File no. MHA (Judicial-III), 32/1/67, NAI. See also Instruction VII, MHA mercy petition instructions, *supra*. A perusal of mercy petition files also makes clear that a large number of second petitions are rejected at the level of the MHA and not even placed before the President unless the MHA believes that there are new grounds in the petition.

⁵⁸ When the constitution came into force the Article 74(1) merely read ‘(t)here shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President’. There had thus been dispute over the absence of any clear statement providing that the President was bound by advice. As President of the Constituent Assembly Dr. Rajendra Prasad had sought clarity on the point. However unfortunately despite the discussion that ensued, no instrument of instructions was included in the Constitution and the matter was left only to convention. In 1951 disputes over the Hindu Code Bill between Prime Minister Nehru and President Prasad led to the issue being referred to Attorney General Setalwad. The Attorney

position was eventually endorsed up a seven-judge constitution bench of the Supreme Court in *Samsher Singh v. Union of India*.⁵⁹ Subsequently the Constitution was amended to reflect the correct and undisputed position.⁶⁰ Article 74(1) now reads: '[t]here shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.' In another constitutional bench judgment, the Supreme Court clarified that decisions in clemency petitions would follow the same process.⁶¹

Thus for all practical purposes, the decision on a mercy petition is arrived at within the MHA as the subject has been allocated to the Department of Home, MHA vide the second schedule of the Government of India (Allocation of Business) Rules 1961.⁶² A memorandum on the case is prepared by a junior official in the Ministry and on the basis of the same, a Joint Secretary or an Additional Secretary 'recommends' a decision to commute the death sentence or reject the mercy petition. This 'recommendation' is considered by the Minister of Home Affairs who makes the final 'recommendation', on behalf of the Cabinet of Ministers, to the President. The proviso to Article 74(1) provides the President with only one opportunity to return the 'recommendation' for the decision

General expressed the view that the Indian Constitution was based on the British parliamentary system and thus despite no clear statement, the President was bound by the advice of the council of ministers. He was also supported by another scholar Alladi Krishnaswamy Ayyar but their views were countered by jurists including KM Munshi, BN Rau, PB Mukherji and MM Ismail. See Granville Austin, *The Indian Constitution, supra* at 135, 141–142.

⁵⁹ AIR 1974 SC 2192

⁶⁰ 42nd Amendment of the Constitution, 1976

⁶¹ *Maru Ram v. Union of India and others*, (1981) 1 SCC 107. As Justice Krishna Iyer put it, 'the President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and only on the advice of the Council of Ministers...'

⁶² See the schedule at http://cabsec.nic.in/abr/abr_scnd.htm (last accessed 31 March 2009)

to be reviewed. If no change is made, the President has little option but to sign his assent.⁶³

Guidelines for Decision Making

As in evident from the law and procedure discussed above, mercy proceedings are completely distinct from judicial proceedings and there is no overlap.⁶⁴ It is further settled law that executive exercise of clemency (excluding pardon) does not remove the conviction from the individual’s record but instead amends the particular punishment that was awarded by the court. There are important differences in the nature of the proceedings as well. Unlike courts that are required to examine the evidence produced before them and adjudicate within them, mercy proceedings are bound neither by evidence nor by the findings of the courts. Mercy proceedings thus examine a larger set of circumstances and facts beyond the ‘fact’ of the judicial world can be examined in clemency proceedings.⁶⁵ In 1923, Lord Reading argued that the executive would not only be entitled but was ‘indeed bound to take into full and anxious consideration matters which would be excluded in a court of law and could not there receive the same kind of analysis and attention.’⁶⁶ In the present day, this

⁶³ See however Section 5 of this paper, ‘Role of the President’, *infra*

⁶⁴ In *Nanavati*, the Supreme Court looked into the question of overlap and held, ‘any possible conflict in exercise of the said two powers can be reasonably and properly avoided by adopting a harmonious rule of construction’, *K.M. Nanavati v. The State of Bombay*, AIR 1961 SC 112 at para 29

⁶⁵ Some factors suggested to the Supreme Court by the amicus curiae in a cases were: (a) interest of society and the convict; (b) the period of imprisonment undergone and the remaining period; (c) seriousness and relative recentness of the offence; (d) the age of the prisoner and the reasonable expectation of his longevity; (e) the health of the prisoner especially any serious illness from which he may be suffering; (f) good prison record; (g) post conviction conduct, character and reputation; (h) remorse and atonement; (i) deference to public opinion. See Sorabjee submissions, *supra*.

⁶⁶ Lord Reading prefaced the above by referring to the necessity of the Governor General in Council arriving ‘at a fair and just conclusion paying high regard to the

is particularly relevant in the context of class and caste equations, ostensibly ignored in judicial proceedings.

Although over time, the power of mercy in India has moved away from its origins (as a sovereign prerogative power of grace vested in the Ruler) to its present form more akin to remedial powers or a 'court' of last resort, the wide scope of mercy has remained. Thus much like Gardner's initiative mentioned in the title of this study, clemency jurisdiction offers a non-judicial final opportunity for prisoners. Here though not only is a new investigation possible, but the prisoners can also plead diverse factors favouring their case. However clemency jurisdiction is wider than the Gardner initiative since it does not restrict itself only to cases those who may be innocent, but largely provides a last resort for those seeking a reduction in sentence. What factors do or should be taken into account in the 'wide' decision-making in clemency petitions has also long remained a subject of controversy. Such factors have also been extensively discussed within the government although little has been revealed publicly. The discussion below examines attempts at collating such factors.

The earliest references to principles of decision-making appear to be in a note dated 9 September 1873 by Lord Hobhouse of the Home Department of the Colonial Government, while discussing the mercy petition in the case of *Regina v. Nha Loogyee*:

The principles on which the prerogative of mercy should be exercised may be then briefly summarized. First, if the quality of the case is such that from a moral point of view the offence is not so grave as it is from the legal point; secondly, if fresh evidence not procurable for the trial is brought forward to throw doubt on a sentence which cannot be judicially reviewed; thirdly, if those who

decisions of the Courts and to principles of law...' See the 'order in council' dated 10 August 1923, File. No. Home (Judicial) 373/1923, NAI

tried the case differ among themselves or on subsequent reflection fell doubt enough to ask that their decision may be reviewed...⁶⁷

By a subsequent 1923 order in council, then Governor General of India Lord Reading clarified that although it would be ‘impossible to lay down any definite rules’ for the disposal of mercy petitions, the following guidelines were adopted as ‘general guides’:

In particular, the primary aspect in which such cases should be in the first instance be considered should be the object of determining whether there are grounds of an exceptional nature, connected either with the personality of the accused (such as age, sex or mental deficiency) or with the facts of the case (such as provocation or other extenuating circumstances) or otherwise, to justify suspension, remission or commutation. If, in the course of the examination of the case in this aspect, any grave and serious doubts arise on the question of guilt, this question should be fully examined.⁶⁸

The above order in council was also sent from the Home Department to the Secretariat of the Governor-General for the Viceroy’s guidance after the Government of India Act, 1935 came into force and the clemency powers were to be exercised to the Governor-General in his discretion.⁶⁹ Thus even when the effective decision-making moved from the Home Department, the principles upon which it was to be exercised remained the same. These principles continued to be followed even upon independence when decision-making again moved back to the Indian Ministry of Home Affairs (MHA) in 1947.

⁶⁷ Excerpted in File no. Home (Judicial) 373/1923, NAI

⁶⁸ *Ibid*

⁶⁹ Demi-official letter from JA Thorne to JG Laithwaite, Private Secretary to H.E The Viceroy, dated 25 March 1937, excerpted in File no. Home (Judicial) 450/1936, NAI

In 1962 when the Law Commission was examining the question of abolition of the death penalty, they sought information from the MHA on the principles followed in dealing with mercy petitions. Noting that they were ‘well understood’ an Under Secretary of the MHA stated that they fell ‘broadly into the following grounds, viz. age, sex, mental deficiency, grave or sudden provocation, absence of motive and premeditation. There are other grounds which are also taken into consideration i.e. inadequacy of evidence, long delays in investigation and trial, fixation of responsibility in ‘gang murders’, difference of opinion in a two-Judge bench, necessitating reference to a third Judge of the High Court etc. Apart from these, the case is considered, examined and disposed of on its own merits.’⁷⁰

Eventually the 1873 note, the 1923 order and the ‘well understood’ principles of the MHA were distilled into ‘Guidelines for dealing with mercy petitions’ prepared by the MHA for internal decision-making.⁷¹ The guidelines provide the following general grounds when clemency is justified on special consideration:

- I. Personality of the accused (such as age, sex or mental deficiency) or the circumstances of the case (such as provocation or other similar justification)

⁷⁰ Note by Gulzar Singh, Under Secretary MHA dated 11 June 1962, File no. MHA (Judicial –II) 19/61/62, NAI. In the letter to Shri SK Hirachandani, Secretary of Law Commission dated 6 July 1962 the MHA however noted, ‘But it must be mentioned that the principles, which are followed for the disposal of mercy petitions, should not be allowed to be adopted and followed or made the basis of any decision to be taken for amending the existing law on the subject.’

⁷¹ The cyclostyled sheet is undated. These guidelines prominently featured in decision-making in the 1980s but similar guidelines appear to have been followed in the previous decades as well. A copy of the guidelines were sent by the Ministry of Home Affairs to the Ministry of Law and Justice in response to request dated 20–6–06 by Satish Chandra, Addl. Government Counsel seeking guidelines on decision making in mercy petitions. Copy of this communication is available tagged with the mercy petition of Kheraj Ram s/o Cheema Ram, File no. 14/4/2003—JC, MHA, New Delhi.

- II. Cases in which the Appellate court has expressed its doubt as to the reliability of the evidence and has nevertheless decided on conviction
- III. Cases where it is alleged that fresh evidence is obtainable mainly with a view to seeing whether fresh enquiry is justified
- IV. Where the High Court has reversed on appeal an acquittal by the Session Judge or has on appeal enhanced the sentence

The Guidelines further note, ‘In the course of years, various Home Ministers have also contributed to enlarge the field of considerations. These are:

- I. Difference of opinions in a bench of two judges necessitating reference to a third judge of the High Court
- II. Consideration of evidence in fixation of responsibility in gang murder cases.
- III. Long delays in investigation and trial etc⁷²

The latest version of the ‘guidelines’ which appear to remain in force presently has the same points above but integrated and numbered I—VII.⁷³

These guidelines were however thought to be inadequate by the President Dr. APJ Abdul Kalam, who in 2005 requested consideration of the following:

⁷² The guidelines also make reference to a particular decision taken by the Cabinet of Ministers in its meeting on 7 September 1976 to amend Section 302, IPC into two grades of murders—only one of which would be punishable by death. The Cabinet policy laid down that till legislation to amend was not cleared by Parliament, this division should be considered in clemency decisions as well. The bill however lapsed in Parliament and the policy was subsequently revoked. Such classification may however informally remain a factor in decision-making.

⁷³ Minute by AK Jain, Joint Secretary—HR J1, dated 29-6-04 in mercy petition of Dhananjay Chatterjee, File no. 4/3/94—MP, MHA

1. The Home Ministry, before recommending any action on a petition, should consider the sociological aspect of the cases;
2. Besides the legal aspects, the Ministry should examine the humanist and compassionate grounds in each case; these grounds include the age of the convict and his physical and mental condition;
3. The Ministry should examine the scope for recidivism in case a death sentence is commuted to life imprisonment through the President's action; and
4. The Ministry should examine the financial liabilities of the convict's family.⁷⁴

Although the official response of the MHA to the above is not publicly known, it was reported that the Ministry has recognized the importance of socio-economic factors and the age and health of each convict but has further stressed the importance of taking into account the gravity of the offence, whether the offence was premeditated or not and the conduct of the convict in jail.⁷⁵ Publicly however, the MHA speaks in a different voice, refusing even to acknowledge the existence of the guidelines. When information on mercy petitions guidelines was sought via a question in Parliament in 2006, the MHA responded:

No specific guidelines can be framed for examining the mercy petitions as the power under Article 72 of the Constitution is of the widest amplitude, can contemplate myriad kinds and categories of cases with facts and situations varying from case to case. However, the broad guidelines generally considered while examining the mercy petitions are personality of the accused such as age, sex or mental deficiency or circumstances of the case, conduct of the

⁷⁴V.Venkatesan, 'Death Penalty: The Presidential Dilemma', *Frontline*, Volume 22(23), Nov. 5–18 2005

⁷⁵ *Ibid*

offender, medical abnormality falling short of legal insanity and so on.⁷⁶

The Judicial approach to Guidelines

The knotty question of guidelines has often come before the Supreme Court of India. In 1980 in its judgment in *Maru Ram*, the constitutional bench of the apex court observed that ‘[t]he proper thing to do’ would be for the executive ‘to make rules for its own guidance in the exercise of the [clemency] powers keeping, of course, a large residuary power to meet special situations or sudden developments.’⁷⁷ Another subsequent judgment however suggested that this view was *obiter dicta*, particularly as clemency was not the main subject matter in the case.⁷⁸ The first head-on engagement on the issue came when a condemned prisoner in the infamous *Billa–Ranga* case challenged the rejection by the President of his mercy petition taking the plea of arbitrariness and the absence of any guidelines. The writ petition was admitted by the Supreme Court, which noted, ‘[w]e do not know whether the Government of India has formulated any uniform standard or guidelines by which the exercise of the constitutional power under Article 72 is intended to be or is in fact governed.’⁷⁹ After seeking an explanation from the State on the existing guidelines, the court mysteriously appears to have changed its mind.

On the next hearing on 20 January 1982 it blandly noted:

The question as regards the scope of the power of the President under article 72 of the Constitution to commute a sentence of death into a lesser sentence may have to await examination on an

⁷⁶ Rajya Sabha Unstarred Question no. 815, answered on 29 November 2006

⁷⁷ *Maru Ram v. Union of India and others*, (1981) 1 SCC 107

⁷⁸ *Ashok Kumar alias Golu v. Union of India and others*, AIR 1991 SC 1792

⁷⁹ *Kuljeet Singh alias Ranga v. Lt. Governor, Delhi and anr*, AIR 1981 SC 2339

appropriate occasion. This clearly is not that occasion because in so far as this case is concerned, whatever be the guidelines observed for the exercise of the power conferred by article 72, the only sentence which can possibly be imposed upon the petitioner is that of death and no circumstances exist for interference with that sentence... we are quite clear that not even the most liberal use of his mercy jurisdiction could have persuaded the President to interfere with the sentence of death imposed upon the petitioner.⁸⁰

Without entering here into the merits of the view of the Court, it is clear that the Court completely backtracked from its previous position adopted only a few weeks before. As Seervai has pointed out, these facts were known to the court when it admitted the petition.⁸¹ In the absence of clear answers, one can but speculate on the causes of this backtracking and the possibility of public outrage over a possible commutation may have played a vital role.⁸²

The Court's next engagement with the issue of guidelines was no less controversial. In *Kehar Singh*, the court rejected the plea that to prevent an arbitrary exercise of power under Art. 72, the Court should draw up a set of guidelines regulating the exercise of executive clemency. The Supreme Court asserted that there was 'sufficient indication' in the terms of the power, the history and case law and no further guidelines were required. They further added, 'power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it

⁸⁰ *Kuljit Singh alias Ranga v. Lt. Governor of Delhi and Ors*, AIR 1982 SC 774

⁸¹ HM Seervai, *Constitutional Law of India*, Universal Book Traders, Delhi: 2002 (4th Ed.), at 2108

⁸² The murder victims in the case were two school-going children of a Indian Navy officer based in Delhi. The case captivated public imagination and was widely covered in the regional and national press. Billa and Ranga were subsequently executed on 31 January 1982.

is of great significance that the function itself enjoys high status in the constitutional scheme.⁸³ The Court reiterated this position again in its recent judgment in *Epuru Sudhakar*.⁸⁴

ADDITIONAL FACTORS IN DECISION-MAKING: A STUDY

In addition to factors included in the above guidelines, many other factors have come to be considered by the executive when deciding clemency petitions. Unlike judicial proceedings, clemency proceedings are ‘closed’, their ‘judgments’ unpublished and the reasons for the decision not made public. This section therefore relies on available archived petitions covering the period 1947–1949 and 1953–1971 as also contemporary petitions from 1981–2006.⁸⁵ Despite the gaps and the inherent limitations of the sources, even a bare perusal of the available material (discussed below) shows that several factors beyond those mentioned in the guidelines have influenced the eventual decision in a clemency petition.⁸⁶ Such a multi-dimensional approach to decision-making, where the ‘on the

⁸³ *Kehar Singh and anr. v. Union Of India and anr*, AIR 1989 SC 653

⁸⁴ *Epuru Sudhakar and Anr. v. Govt. of A.P. and Ors*, AIR 2006 SC 3385. In this case the amicus curiae appointed by the Court suggested that considering the frequency of clemency petitions and the present political scenario it would be appropriate for the Supreme Court to lay down guidelines so that there would be no scope to misuse the power. See Sorabjee submissions, *supra*.

⁸⁵ Archival research was conducted at the National Archives of India. Contemporary petitions was sourced vide Right to Information (RTI) applications and follow-up inspection of files at the MHA.

⁸⁶ As per the ‘retention schedule’ for mercy petitions in the judicial division MHA, cases in which death sentences are commuted are marked ‘B-keep’ and where petitions are rejected, they are marked as ‘C-10’. The latter files are destroyed while the former are sent to a records room for storage for 25 year storage as per the provisions of the Public Records Act, 1993 and the Public Record Rules, 1997. After this period they are transferred to the National Archives. With respect to the files sourced from the MHA through RTI, pending petitions were not made available for inspection and of the 76 mercy petitions disposed from 1981–2006, only 26 files were available for inspection.

ground' situation often overrides the finding of the courts makes clemency a valuable site, not only for academic research but also for tactical commutation campaigns. Further, despite their limited precedence value, such a study also allows for potential policy inputs by expanding the guidelines for decision-making.⁸⁷

Factors relating to Evidence

Despite the wide scope of mercy proceedings, it is generally believed that the government should not provide an additional court of appeal. This has also been stressed by the executive.⁸⁸ The existing seven-point guidelines, therefore, suggest that the government should only look into matters of evidence in cases where the judges expressed some concern about it (Guideline II), or in specific cases where fresh evidence was claimed (Guideline III), or where an individual's role in a gang murder had to be determined (Guideline VI). In practice however the government has commuted a large number of sentences on grounds of inadequate or unsatisfactory evidence even when the courts were convinced about the suitability of the evidence. These reasons have ranged from 'absence of direct evidence'⁸⁹ to 'defects in the evidence'.⁹⁰ In a large number of cases the executive has

⁸⁷ Note by JA Kalyanakrishnan, Home Secy dated 19 December 1988 in the Kehar Singh case stated, 'Decisions in cases of mercy can have no precedent and will be unique in every case. To this extent it is a subjective value judgment which has to be exercised every time.' See File no. 9/4/88—Judl, MHA.

⁸⁸ Such concerns were raised as long ago as 1873 by Lord Hobhouse who warned, 'But to use the prerogative of mercy for the practical erection of an additional Court of Appeal is, as I think, to abuse it.' See File no. Home (Judicial) 373/1923, NAI. Similar statements are seen recurrently in internal ministerial discussions on clemency.

⁸⁹ Petition of Lila Singh s/o Chittar Singh, File no. MHA (Judicial-1) 32/64/65, NAI

⁹⁰ Petition of Sundararajan, File no. MHA (Judicial-1) 32/31/62, NAI ; see also 'Evidence is not clear' in Petition of Raja Ram, File no. MHA (Judicial-1) 32/102/57, NAI; 'Evidence is not strong—miscarriage of justice' in Petition of Sarana, File no.

commuted the sentence on the grounds that the evidence left some scope for doubt or did not show ‘cent per cent reliability’.⁹¹ In a rare case, the death sentence of one prisoner was commuted to a 10-year sentence due to the infirmities of evidence.⁹²

The discussion on evidence in mercy petitions within the MHA has often extended to minute particular details and often sentences have been commuted on the executive being dissatisfied with the particular evidence presented in a case. In the petition filed by one Jit Singh, the sentence was commuted, as the executive believed it would be risky to send a person to the gallows only on the basis of ‘oral evidence of a stereotyped nature’.⁹³ Other reasons have ranged from the inconsistencies in dying declarations⁹⁴ and the scope for tutoring to contradiction in witness testimonies and lack of independence in testimony.⁹⁵ In one case the executive even found fault with the evidence from the post-mortem, concluding that it did not support the time of death claimed by the prosecution

MHA (Judicial-1) 32/67/61, NAI; ‘Unsatisfactory state of the evidence’ in Petition of Debi Singh, File no. MHA (Judicial-1) 32/44/61, NAI; ‘Infirmities in evidence’ in Petition of Jang Bahadur, File no. MHA (Judicial-1) 32/39/61, NAI.

⁹¹ Petition of Manickam, File no. MHA (Judicial-1) 32/2/62, NAI. Other similar reasons include ‘Many holes in the evidence’ in Petition of Joseph Thomas, File no. MHA (Judicial-1) 32/186/61, NAI; ‘Circumstantial evidence not without holes’ in Petition of Dhakkan, File no. MHA (Judicial-1) 32/185/61, NAI; ‘generally poor evidence’ in Petition of Subramaniam, File no. MHA (Judicial-1) 32/172/61, NAI

⁹² Mercy petition of Babu, File no. MHA (Judicial 1), 32/64/62, NAI. In another case, the MHA had recommended a complete remission of the sentence but this was not assented to by President Prasad who instead decided to only commute the death sentence. See Mercy petition of Darbara Singh, File no. MHA (Judicial 1) 32/14/56, NAI

⁹³ Mercy petition of Jit Singh s/o Bachan Singh etc, File no. MHA (Judicial-1) 32/163/61, NAI

⁹⁴ Mercy petition of Augusthy Augusthy@ Kunjukunju, File no. MHA (Judicial-1) 32/181/59, NAI

⁹⁵ Mercy petition of Mahabir s/o Jagannath, File no. MHA (Judicial-1) 32/121/59, NAI

and therefore removing a vital link from the chain or circumstances found against the condemned prisoner.⁹⁶

Even where the executive has not been able to find fault with the evidence on record in a particular case, it has commuted a sentence ‘by way of abundant caution’.⁹⁷ In a few cases, it has even gone so far as to conclude that the evidence on record does not show the real facts of the case, thereby *presuming* other reasons for the offence.⁹⁸ While such presumptions are avoidable, it is clear that the executive has in practice evolved and practiced a higher threshold for the evidence before rejecting the petition. The failures of the India criminal justice system, even in capital cases, to filter out fabricated or manipulated evidence, the use of confessions obtained by torture, as also regular errors in the appreciation of evidence are well documented.⁹⁹ In such a context such examination of evidence in mercy proceedings adds another layer of protection. The use of a higher threshold cannot but be welcomed.

Legal Defence

Although as per existing law, all persons accused of murder and other heinous offences are provided free legal counsel by the State, concerns have been raised about the adequacy and competence of such legal-aid lawyers.¹⁰⁰ Although this should be a matter what is

⁹⁶ Mercy petition of Batahu Sahani, File no. MHA (Judicial-1) 32/177/57, NAI. The MHA notings argued that the undigested food found in the stomach of the victim during the post-mortem showed a later death than what the prosecution claimed.

⁹⁷ Mercy petition of Punugupati Venkatramiah etc, File no. MHA (Judicial-1) 32/177/61, NAI

⁹⁸ Mercy petition of Natarajan s/o Ganapathy Goundan, File no. MHA (Judicial-1) 32/25/62, NAI; Mercy petition of Ram Singh, File no. MHA (Judicial-1) 32/1/58, NAI; and Mercy petition of Thiruram Chucklian, File no. MHA (Judicial-1) 32/191/57, NAI

⁹⁹ See Amnesty International India and People’s Union for Civil Liberties (TN&P), *Lethal Lottery: The Death Penalty in India*, New Delhi: May 2008, at Chapter 6.

¹⁰⁰ Section 304, CrPC. For concerns raises, chapter 7, *ibid*

dealt with sentencing in the judicial process, the lack of adequate legal defence has unfortunately not been sufficiently considered as a mitigating circumstance even in capital cases. In such a context, it is welcome that despite this not being mentioned in the guidelines, the competence and adequacy of the legal defence has been a key factor for commutation of sentences in several cases.

In a case where a man killed his wife (and the son) suspecting her of infidelity, the executive noted that the defence case was not properly thought of and a wrong defence made out on the petitioner’s behalf.¹⁰¹ This resulted in the petitioner being found guilty by the court despite strong comments on the inadequate defence of the petitioner. The Minister of State for Home Affairs, also finding that witnesses for the prosecution were not even properly cross-examined, recommended commutation of the sentence, noting that he was ‘amazed at the utter incompetency of the defence put forward on behalf of the petitioner’.¹⁰² In a number of other cases as well, the poor legal defence available to the prisoner led to the commutation.¹⁰³ In addition to the defence, commutations have also been granted where the role of other institutions including the prosecution and the high court has been suspect.¹⁰⁴

Broad Political Situation

Lord Reading’s order in council laying down factors to be considered in decision making on clemency petitions was based largely on the

¹⁰¹ Mercy petition of ‘Haridas Ramdas @ Abdul Rashid Abdul Rehman’, File no. MHA (Judicial–1) 32/96/58, NAI

¹⁰² Noting by BN Datar dated 11 November 1958, *ibid.*

¹⁰³ Mercy petition of Hazara Singh s/o Sunder Singh, File no. MHA (Judicial–1) 32/66/58, NAI; Mercy petition of Anthoni Vannan, File no. MHA (Judicial–1) 32/49/58, NAI; Mercy petition of Sita Ram s/o Dhara Singh, File no. MHA (Judicial–1) 32/36/56, NAI; Mercy petition of Parthasarathy Chettiar, File no. MHA (Judicial–1) 32/111/53, NAI

¹⁰⁴ ‘Evidence of Prosecution suffers from manipulation’ in Mercy petition of Raja

notes prepared by his Home Member WH Hailey. Hailey's note of 28 May 1923 however also noted that the factors discussed 'do not and cannot of course apply to cases in which there are special or political considerations. I refer to instances of the type of the Amritsar appeals, the Katarpur appeals in the past and Chauri Chaura appeals when they come up to us. These must be considered partly in view of their political implications; indeed as a rule such cases are settled only after circulation in council.'¹⁰⁵ Although this was not mentioned in the final order, it is clear that 'political cases' were treated distinctly and the regular criterion was not applied to them.¹⁰⁶

Although there are no similar references in independent Indian MHA literature, it is undeniable that political considerations are a factor in determining mercy in such cases. In one of the early prominent cases soon after the formation of Gujarat, the petitioner who had killed his wife over a dowry dispute had his sentence commuted by the President. Although officially this was done citing concerns about the lack of proof of the motive, another factor that appeared to have influenced the decision was the nearly 1,500 petitions sent by persons across Gujarat pleading for mercy in the case. Most of the petitioners saw the death sentence as an affront to the new Gujarat state and identity.¹⁰⁷ A more obvious case was

Ram, File no. MHA (Judicial 1) 32/102/57, NAI; High Court judgment was effectively 'special pleading' in Mercy Petition of Banshi Munda, File no. MHA (Judicial) 32/80/54, NAI

¹⁰⁵ Minute by WH Hailey dated 28 May 1923, File No. Home (Judicial) 373/1923, NAI

¹⁰⁶ E.g. the reference to the 'Amritsar appeals' appears to be in a case where five Indians were sentenced to death for the murder of five Britishers at Amritsar on 10 April 1919. Although their appeals were dismissed even by the Privy Council, their sentences were eventually commuted by the Viceroy in exercise of his prerogative power of mercy and *not* by the local Government or the Governor-General in Council. See http://hansard.millbanksystems.com/written_answers/1920/jun/09/amritsar-disturbances-commuted-death (last accessed 31 March 2009).

¹⁰⁷ Mercy petition of Dinubhai Bhimbhai Desai, File no. MHA (Judicial-1) 32/136/60, NAI

that of Sukha and Jinda (the assassins of former Chief of Army Staff General Vaidya) where the Maharashtra Government left the decision to the Central Government given that the petition raised ‘political issues relating to developments in Punjab’.¹⁰⁸ In another high-profile case relating to the assassination of Indira Gandhi, the then Prime Minister, the initial noting in the mercy petitions noted that given the circumstances of the case, ‘the question of grant of clemency in this case hardly arises’.¹⁰⁹ This was a case where the broader political circumstances completely swept aside serious concerns of inadequate evidence with respect to *Kehar Singh*.¹¹⁰

Dealing with such cases sufficiently is likely to be one of the key objects of retention of clemency power. However as is apparent from the above the executive in India has not exercised its power to the extent it could with respect to political cases—if anything, in both the abovementioned cases petitions were rejected. In the present context, lawyers and scholars remain divided on whether the broader situation in Kashmir can be a valid factor for the government to consider Afzal Guru’s clemency petition favourably.¹¹¹ On the basis

¹⁰⁸ Letter from Secretary, Maharashtra Home Dept to Secretary, MHA dated 24 Aug 1992 in Mercy Petition of Sukhdev Singh @ Sukha and Harjinder Singh @ Jinda, File no. 9/2/92—Judl. (MP), MHA

¹⁰⁹ See Note by PS Ananthanarayanan, US (Judl) dated 15 October 1988, Mercy petition of Satwant Singh and Kehar Singh, File. no. 9/4/88—Judl, MHA. There was hardly any real discussion on clemency in the Government and virtually none on the (lack of) evidence against Kehar Singh. Even in the second round of decision making (required as per the direction of the Supreme Court) despite the involvement of the Solicitor General the summary prepared by the MHA did not enter into issues of evidence.

¹¹⁰ For a sharp and detailed analysis of the inadequate evidence and the case in general, see HM Seervai, *Constitutional Law in India, supra*, pp 1206—1233. After the full analysis, he agrees with former Justice Tarkunde’s statement that even a dog could not be hanged on such evidence.

¹¹¹ For opposing views see, A.G. Noorani, ‘Popular feeling in Kashmir is valid ground to grant Afzal pardon’, *The Hindusthan Times*, 24 October 2006 and Soli Sorabjee, ‘Before we tender clemency’, *Indian Express*, 6 October 2006.

of the above, there seems to be little doubt that it can.¹¹² Whether it will however is another question: certainly the above-mentioned cases do not inspire confidence.

General Security Considerations

Similar to consideration of broad political situations are general security considerations in as much as the Courts do not validly enter this domain. Impact on law and order has often been taken into account as a factor by the executive in the decision making process. In the case of Sawai Singh, the petition was rejected since the victim was a policeman and commutation 'would not be in the interests of maintaining the morale of the police'.¹¹³ References to the general 'law and order' situations in the state were made and were a factor in recommending rejection in other cases as well.¹¹⁴ In a case from Punjab in 1956, President Prasad observed the prevalence of continuing family feuds in the state. He therefore warned, '[w]e have therefore to look into such cases coming from the Punjab with a view also to the effect that the decision in the particular case under review may have on the people concerned and their likely conduct in the future'.¹¹⁵

¹¹² The Report of the Royal Commission on Capital Punishment (UK) states: 'It has occasionally been felt right to commute the sentence in deference to a widely spread or strong local expression of public opinion, on the ground that it would do more harm than good to carry out the sentence if the result was to arouse sympathy for the offender and hostility to the law. Quoted in Law Commission of India, 35th report on *Capital Punishment*, 1967, at page 328.

¹¹³ Mercy petition of Sawai Singh, File no. 9/5/85—Judl, MHA

¹¹⁴ Manipur's law and order situation was referred to by Secretary, Manipur Administration in Mercy Petition of Pukhrabam Jugeshwar Singh, File no. MHA (Judicial-1) 32/131/62, NAI; the law and order situation was also discussed in mercy petition of Suraj Ahir, File no. MHA (Judicial-1) 32/195/61, NAI.

¹¹⁵ See handwritten note by President Prasad dated 27 May 56 in Mercy petition of Santa Singh, File no. MHA (Judicial 1) 32/65/56, NAI. See also Mercy petition of Bagh Singh, File no. MHA (Judicial) 32/45/56, NAI

Extinction of the Family-Line

Continuation of ‘family line’ is one of the more curious factors that have influenced the executive to commute death sentences. This appears to have come in as early as 1956 when the sentence of one Angrez Singh was commuted ‘with a view to saving the family from virtual extinction’.¹¹⁶ In another case, where one brother murdered his parents, the executive commuted the sentence to avoid ‘magnifying the loss’ of the remaining brothers,¹¹⁷ while in yet another, a husband who killed his wife had his death sentence commuted to prevent the children from becoming guardian-less.¹¹⁸ The eventuality of an old man becoming ‘sonless’ was sufficient to commute the sentence in another case.¹¹⁹ Although it is arguable that these cases are instances of clemency proceedings being able to gather and appreciate the ground situation, where two brothers were sentenced to death, such rationale effectively became a lottery since despite identical roles in the murder; one brother was sentenced to life while the other was hanged.¹²⁰

Identity of Victim

Although appearing to be a vital consideration in practice, this is one factor that is rarely mentioned on the record. A rare exception was a case where the Home Minister of then Madras State sought the rejection of a mercy petition as the victim was the mother of one of the Deputy Directors of Education in the State ‘and the case had

¹¹⁶ Mercy petition of Bagh Singh. *ibid.*

¹¹⁷ Mercy petition of Koola Boyan, File no. MHA (Judicial-1) 32/87/61, NAI

¹¹⁸ Mercy petition of Pukhrambam Jugeshwar Singh, *supra.*

¹¹⁹ Mercy petition of Nasib Chand s/o Jai Ram, File no. MHA (Judicial-1) 32/121/58, NAI

¹²⁰ Mercy Petition of Bharwad Mepa Dana, File no. MHA (Judicial-1) 32/7/60, NAI; and Mercy petition of Abdul Hafiz s/o Salimullah, File no. MHA (Judicial-1) 32/18/62, NAI

created a lot of excitement locally'.¹²¹ In two other cases, victims' family members officially played a vital role. In the petition filed by one Parmatma Saran, a letter from the father of the victim in favour of mercy played a major role in the government's decision to commute the sentence,¹²² while in proceedings relating to Dhananjoy Chatterjee (1994), a letter from the father of the victim asking for the rejection of the petition and the execution of the accused was relied upon by the MHA in recommending rejection in its summary for the Home Minister.¹²³ In a large number of cases absence of pre-meditation and/or lack of motive were considered grounds for clemency, these can also be read as being part of the 'circumstances of the case' mentioned in Guideline I.¹²⁴ Given the importance accorded to 'parity' in decision-making on a large number of petitions, this factor can also be read into Guideline I.

Cracks in the System: ad-hoc policies, personal views and errors

Some ad-hoc policies also appear to have developed although they were limited to specific periods. In a petition soon after independence, Home Minister Patel noted, 'I am inclined to take a less severe view of offences arising out of these disputes over agricultural property, particularly where monetary transactions are involved. It is impossible for us to appreciate the feelings of a poor villager when he is deprived of his land and other agricultural property, as a result of transactions to which we might attach both moral and legal value, but which he can

¹²¹ See Mercy petition of Subramanian, *supra*. The petition was rejected by the Governor of Madras, but it was commuted by the President largely on grounds of insufficient evidence.

¹²² Mercy petition of Parmatma Saran s/o Kailash Chandra, File no. MHA (Judicial-1) 32/183/61, NAI

¹²³ See for instance the minute dated 28 June 2004 by YK Baweja, Deputy Secretary in Mercy petition of Dhananjoy Chatterjee, MHA, *supra*.

¹²⁴ It presently only refers to circumstances 'such as provocation or other similar justification'.

only view from the point of view of exploitation and usurpation.’¹²⁵ Although this view was followed as ad-hoc policy, it did not last long. By 1956 the MHA found no extenuating circumstances in a case where murders took place in an agricultural dispute.¹²⁶

In a case of murder by the victim’s 31 year old brother over a property dispute, the Minister had observed, ‘In such cases, where there is positive refusal on the part of a member of a family of such a nature as to drive the other member thereof to desperation, it is our practice to treat it as constituting some element of mitigation.’¹²⁷ Although such a case can also be read within provocation in Guideline I, the situation becomes more complicated when such views are extended generally to cases where the prisoner was a ‘wronged’ party in some form.¹²⁸ Such a broad formulation of ‘wronged’ can also become a crutch for personal views to be brought in. This is evident in a large number of cases in the 1950s, the then Minister of State for Home Affairs BN Datar commuted the sentence of many men sentenced to death for the murder of their wives on the presumption that for a man to have taken such an extreme step, he *must* have been wronged.¹²⁹

¹²⁵ VJ Patel, Home Minister dated 5 September 1948 in Mercy Petition of Tirthu Singh, File no. MHA (Judicial) 20/93/48, NAI. In another case on 11 April 1949, Patel recommended commutation also ‘(I)n accordance with our previous attitude over such disputes on agricultural property’, Mercy petition of Kanchan Mahton, File no. MHA (Judicial) 20/39/49, NAI

¹²⁶ Minute by Gulzar Singh, Under Secretary, in Mercy petition of Harpal s/o Ram Singh, File no. MHA (Judicial 1) 32/37/56, NAI

¹²⁷ Minister of State for Home Affairs BN Datar dated 24 June 1962 in Mercy petition of Abdul Hafiz, *supra*.

¹²⁸ ‘When it is possible to believe that both the parties were wrong in the interests of justice or humanity, it would not be proper to send this young man of impecunious habits to the gallows’, BN Datar, noting dated 22 December 1961 in Mercy petition of Pokkiri, File no. MHA (Judicial-1) 32/181/61, NAI

¹²⁹ See Mercy petition of Pannady, File no. MHA (Judicial 1) 32/6/56, NAI; Mercy petition of Kiran Singh, File no. MHA (Judicial 1) 32/29/58, NAI; Mercy petition of Sadhu Singh, File no. MHA (Judicial 1) 32/157/61, NAI; Mercy petition of

The role of the individual view of the Minister or other officials is also evident in the rare cases where due to a change in personnel mid-way in the decision-making process, the previous recommendation is invariably reversed.¹³⁰ In fact in a large number of cases, prisoners have been able to get their rejected mercy petition reviewed via a second mercy petition with a new official in place and been second-time lucky.¹³¹ Given that as per current practice, all mercy petitions pending before the President at the time of installation of a new government are sent back for reexamination to the MHA, we may see a large number of similar cases in the future.¹³²

Yet despite a variety of standard operating rules to assist decision-making, in a number of cases clear errors are visible. For instance, although there is a general practice of not executing old persons, a condemned prisoner aged 75 was refused clemency. In another case where a 65 year old was executed in 1991, the issue of age was not even discussed during the deliberations on clemency.¹³³ The vice of arbitrariness remains a large question mark over decision-making in clemency petitions. This is perhaps best illustrated with two cases in the same year: although both were heinous murders with quite similar facts, the executive presumed some mental disturbance in the former and refused to even consider it in the latter.¹³⁴

Chiraunji Lal, File no. MHA (Judicial 1) 32/41/61, NAI; Mercy petition of Eswaran, File no. MHA (Judicial 1) 32/53/61, NAI

¹³⁰ Mercy petition of Ram Charan, File no. MHA (Judicial 1) 32/70/62, NAI; Mercy petition of Randhir Singh, File no. MHA (Judicial 1) 32/154/63, NAI

¹³¹ See for instance Mercy petition of Ramsahai, File no. MHA (Judicial 1) 32/27/66, NAI. This is one of 14 similar petitions over various years.

¹³² See Ritu Sarin, 'Beg your pardon, Mr. President?', *Indian Express*, 23 October 2005

¹³³ Mercy petition of Ajodhya, File no. MHA (Judicial 1) 32/16/61, NAI; Mercy petition of Nataraya Gounder and Nattuthurai @ Natarayan, File no. 9/2/88—Judl (MP), MHA .

¹³⁴ In Shiv Dayal's case (File no. MHA (Judicial 1), 32/25/56, NAI) the petitioner was a 50-year-old man who had killed his own cousin and his infant son. While the Minister agreed that petitioner was not technically of unsound mind, he observed

Where questions of ‘national security’ etc are raised, politicisation of clemency powers is inevitable. The execution in 1984 of Mohammed Maqbool Butt, the founder and former leader of the separatist Jammu and Kashmir Liberation Front is an apt illustration. His petition, pending for 7 years, was rejected after the abduction and killing of an Indian diplomat in Britain by the ‘Kashmir Liberation Army’ which sought the release of Butt in return for the diplomat.¹³⁵ Such concerns are particularly relevant in the cases of Mohammed Afzal Guru (sentenced to death for conspiracy in the attack on the Indian Parliament) and Murugan, Santhan and Arivu (sentenced to death for their role in the conspiracy to kill former Prime Minister Rajiv Gandhi) who remain on death row.

Although precedents may have limited value in mercy petitions, there is little doubt that many of the above discussed points and cases are relevant with respect to Afzal’s petition.¹³⁶ Questions of evidence, the quality of legal defence and the broader political implications in Kashmir have all been raised in petitions filed by Afzal and by others on his behalf.¹³⁷ The above cases show that each of the factors has

‘I am constrained to believe that the petitioner’s mind had not been working in a normal order. It is impossible to believe that that a person would act in the manner that the petitioner did even towards his own kith and kin except on the assumption that he was working under the strain of a great excitation or perturbation that made his cease to be a human being.’ However in the case of Sukhbir (File no. MHA (Judicial 1) 32/31/56, NAI) where the petitioner had killed his own two children, the Minister did not even enter the domain on his mental health noting instead; ‘A man who, in a gust of rage and emotion murders his own children, is not entitled to any clemency’.

¹³⁵ ‘Death Penalty: Political Bias (Editorial)’, *Economic and Political Weekly*, 14 October 1989, at 2277. Curiously there is no reference whatsoever to any clemency proceedings in his case in the lists supplied by the Ministry of Home Affairs in response to the application under the RTI act.

¹³⁶ V Venkatesan, ‘Mercy Guidelines’, *Frontline*, Volume 26(7), 28 Mar—10 April 2009, p. 34. For the discussion on precedent cases, see Bikram Jeet Batra, ‘Wider Ambit’, at 37.

¹³⁷ Champa: The Amiya and BG Foundation, *The Afzal Petition: a quest for justice*, Promilla and Co. publishers, New Delhi: 2007

already been a consideration for mercy in the past. Further many facts have also been raised in Afzal's petitions in support of the plea for a fresh investigation or inquiry into the attack on Parliament House.¹³⁸ Such an investigation would not be unprecedented. In a number of mercy cases, both State and Central governments found it fit to seek fresh inquiries from various State criminal investigation departments. In at least three cases in the 1960s, such re-investigations at the mercy stage led to commutation.¹³⁹

JUDICIAL REVIEW & ACCOUNTABILITY OF THE EXECUTIVE

There is now little dispute that clemency is not a prerogative power. Although the guidelines and the additional factors that have influenced decision-making are broad, yet they are limited by constitutional boundaries. With errors, bias and arbitrariness invariably forming a part of the clemency system, the question of judicial review, albeit in a limited form, becomes relevant. Former Supreme Court Justice Krishna Iyer has also observed that the grant of remission 'constitutes an area highly prone to corrupt and dubious practices.'¹⁴⁰ Even the All India Jail Reforms Committee similarly observed the wide-spread feeling that remission system is generally operated in an arbitrary manner'.¹⁴¹ In *Rajendra Prasad v. State of Uttar*

¹³⁸ See generally *13 Dec: A Reader, The Strange Case of the Attack on the Indian Parliament*, Penguin Books, Delhi: 2006

¹³⁹ Mercy petition of Avtar Singh s/o Sohan Singh, File no. MHA (Judicial 1) 32/199/61, NAI;

Mercy petition of Bajj Nath Puri chela Shankar Puri, File no. MGA (Judicial 1) 32/122/63, NAI; Mercy petition of Har Charan s/o Chandrabhal, File no. MHA (Judicial 1) 32/61/67, NAI

¹⁴⁰ VR Krishna Iyer, *Leaves from my personal life*, Gyan Publishing House, New Delhi: 2004, at 207. Although he refers mainly to remission in the CrPC, it is not very different practice and procedure from constitutional remission.

¹⁴¹ *Ibid*, at 213

Pradesh, an alert bench of the Supreme Court had observed that courts could not be complacent and rely on executive clemency powers to prevent errors since discrimination was inherent in such a process.¹⁴² Subsequent benches have however ignored such a warning and failed to hold the executive accountable. Some have gone further and even relied on executive clemency to sort out their disagreements.¹⁴³ Previously in the paper, the discussion on the judicial process was limited to the question of guidelines. This section however examines how the judiciary has engaged the complex issue of judicial review of constitutional clemency decisions.

A Careful Approach

In the early decades of the Supreme Court there was little engagement with the constitutional clemency jurisdiction in capital cases as the Court was careful not to impinge on executive jurisdiction. This did not however stop the Court from hinting that certain cases were fit for clemency.¹⁴⁴ However with opinions on the death penalty

¹⁴² AIR 1979 SC 916. The Court noted: ‘For one thing, the uneven politics of executive clemency is not an unreality when we remember it is often the violent dissenters, patriotic terrorists, desperadoes nurtured by the sub-culture of poverty and neurotics hardened by social neglect and not the members of the establishment or conformist class, who get executed through judicial and clemency processes.’

¹⁴³ In *Ram Deo Chauhan @ Raj Nath v. State of Assam* (AIR 2001 SC 2231), two judges took opposing views on whether to accept the claims that the accused was a juvenile and commute the sentence. The third decisive judge agreed to reject the petition, arguing that the accused had the remaining remedy of executive clemency. In *Devender Pal Singh v. State, N.C. T. of Delhi and anr.* (AIR 2003 SC 886), the majority bench also relied on the safety-net of executive clemency when upholding the death sentence after the bench was divided on conviction and sentence.

¹⁴⁴ In *Bissu Mahgoo v. State of Uttar Pradesh* (AIR 1954 SC 714), the Court ‘suggested’ that the appellant file an application for clemency to the central government there were ‘good grounds’ for their consideration. In *Bhagwan Swarup v. The State of U.P.* (AIR 1971 SC 429) the Court noted that the appellant’s young age of 19 while not sufficient for awarding lesser punishment could be taken into consideration in a mercy petition.

sharply polarized amongst Supreme Court judges in the 1970s, far more aggressive hints were evident from judges opposed to the death penalty—in particular Justice Krishna Iyer. This tactical use of references to presidential clemency by Judges is visible in *Bishan Dass* where the bench finding nothing in favour of judicial commutation and reluctantly upholding the death penalty still made a strong case for the President to commute the sentence citing, ‘the general trends in courts and among juristic and penal codes in this country and in other countries ... towards abolition of capital punishment’.¹⁴⁵ In another case in the same month, the bench again argued, ‘that the execution of the death sentence will render extinct the immediate progeny of Prem Raj and will throw the family of the condemned prisoner orphaned and resourceless on the scrap-heap of society, are matters extraneous to the judicial computer. Nevertheless these are compassionate matters which can be, and we are sure, will be considered by the Executive Government while exercising its powers of clemency’.¹⁴⁶

In *G Krishta Gowd* where the appellants had come to the Supreme Court after their mercy petition was rejected by the President, the Court did not find ‘any demonstrable reason or glaring ground to consider the refusal of commutation in the present case as motivated by malignity or degraded by abuse of power’.¹⁴⁷ However it noted, ‘(T)he rejection of one clemency petition does not exhaust the power of the President or the Governor.’ The bench virtually wrote a draft mercy petition for the convicts stating:

The circumstances pressed before us about the political nature of the offence, the undoubted decline in capital punishment in most countries of the world, the prospective change in the law bearing

¹⁴⁵ *Bishan Dass v. State of Punjab*, AIR 1975 SC 573

¹⁴⁶ *Shanker v. State of U.P.*, AIR 1975 SC 757

¹⁴⁷ *G. Krishta Gowd and J. Bhoomaiah v. State of Andhra Pradesh and Ors.* (1976) 1 SCC 157

on that penalty in the new Penal Code Bill, the later declaration of law in tune with modern penology with its correctional and rehabilitative bias emphasized by this Court in *Ediga Anamma*, the circumstance that the Damocles’ sword of death sentence had been hanging over the head of the convicts for around 4 years and like factors may, perhaps, be urged before the President.

The court aggressively recommended commutation in a number of other cases.¹⁴⁸ Yet the cautiousness of the apex court with treading on constitutional clemency jurisdiction is visible in a couple of judgments. In *Mohinder Singh* which came up before the Supreme Court in 1976, the condemned prisoner had been initially sentenced to death in 1969 and was still on death row despite the Supreme Court having confirmed his sentence years ago.¹⁴⁹ Noting however that a mercy petition was presently pending before the President the Court stated, ‘(t)his Court has no jurisdiction to deal with the petition that is in the seizen of the President of India and has no power therefore to pass any order, interim or other.’ Propriety so dealt with, Krishna Iyer further referred to the delay and concluded, ‘Legal justice belongs to the Court but compassionate commutation belongs to the top executive... So we, dismiss this petition, leaving the prisoner to move the President for any interim orders, if he is so advised.’

The Court’s discipline in restricting itself to suggestions, albeit unobtrusive ones, was tested severely in the shocking case of *Harbans Singh*.¹⁵⁰ The Court noted the shocking failures of the judicial system

¹⁴⁸ *Joseph Peter v. State of Goa, Daman and Diu*, (1977) 3 SCC 280. In *Shiv Mohan Singh v. The State (Delhi Administration)*, (AIR 1977 SC 949) the bench clarified that while the President may have previously rejected some petitions, ‘(m)ercy, like divinity, is amenable to unending exercise’. See also *Nachhattar Singh and Ors. v. The State of Punjab*, AIR 1976 SC 951.

¹⁴⁹ *Mohinder Singh v. State of Punjab*, AIR 1976 SC 2299

¹⁵⁰ This was a unique case where three prisoners convicted for similar roles in a murder and condemned to death suffered varied fates. Jeeta Singh’s special leave

in this case and noted that it would be appropriate to commute Harbans Singh's sentence. Yet instead of doing so themselves, they observed that the President had previously rejected a mercy petition by Harbans Singh and therefore decided to refer the case to the President for exercise of his constitutional powers to commute the sentence. However this careful approach of the Supreme Court may have also allowed the execution of a mentally ill prisoner. In the case of *Amrit Bhushan Gupta* despite a finding by court appointed experts that the condemned prisoner was suffering from schizophrenia and was thus of unsound mind, there was no direction or even a suggestion that the Government examine the matter.¹⁵¹ In fact in a previous writ petition, the Delhi High Court had noted, '(W)e have no doubt in our minds that if the petitioner is really insane, as stated in the petition, the appropriate authorities will take necessary action.' On its part the Supreme Court observed, 'as the President of India has already rejected the appellant's mercy petitions, *we presume* that all relevant facts have received due consideration in appropriate quarters.'¹⁵² Although the President had previously rejected mercy petitions in this case, the Court disappointingly presumed that schizophrenia would have been taken into account, rather than clarifying whether it was. It is a moot question whether a bench including Justices Krishna Iyer, Sarakaria or Desai would have done the same.

petition (SLP) to the Supreme Court was rejected while Kashmira Singh's SLP was admitted and his sentence reduced by a different bench. The third accused Harbans Singh's SLP and review petition were also rejected even though the Supreme Court registry had mentioned in its office report that Kashmira's death sentence was commuted. Mercy petitions of Harbans and Jeeta were rejected and both accused were to be executed on 6 October 1981. Harbans Singh however filed the writ petition and had his execution stayed while Jeeta who did not file a writ was executed. *Harbans Singh v. State of Uttar Pradesh*, (1982) 2 SCC 101

¹⁵¹ The Supreme Court however argued that there was no claim of insanity at time of commission of offence or during the trial and that there was no judicial power to prohibit the carrying out of a sentence of death legally passed upon an accused person on the ground that he was of unsound mind.

¹⁵² *Amrit Bhushan Gupta v. Union of India and ors.*, AIR 1977 SC 608. Italics added

A response to Executive Delays

Decision-making on mercy petitions was a fairly speedy process in the early decades—a petition pending for three months in the MHA was deemed 'delayed' by the President in 1956.¹⁵³ Yet as disposal of petitions began to be delayed, the Supreme Court which had previously been careful in intervening in the domain of executive clemency, showed first signs of intervention. In 1971, the Supreme Court commuted the death sentence of Vivian Rodrick noting that he had already spent six years under sentence of death and it would be inhuman to make him wait till the executive decided on a mercy petition.¹⁵⁴ This was a rare case of the court intervening instead of referring the bringing the matter to the attention of the executive.

It was however only in the 1980s that the Supreme Court lost patience with delays in mercy petition disposal. This was possibly after the astonishing experience with the *Harbans Singh* case (see above). Even after the Supreme Court recommended that the President commute the sentence, the mercy petition of Harbans Singh was kept pending. Eventually the Court was again approached in a review petition and this time around the Supreme Court commuted the sentence observing:

[I]t cannot be too eloquently and emphatically emphasised that there is imperative urgency in matters concerning life and death. We would have been happier and the petitioner Harbans Singh could have been spared the pangs of the death cell if the Government had responded to our recommendation within a reasonable time. That

¹⁵³ In his noting on 20 May, President Prasad noted, 'There has been considerable delay in this disposal of this petition. The petition for mercy appears to have been received here on the 4th February last and it has been lying with the Government of India since then and did not come to me till the 19th May 1956. In death sentence cases such delay should not be permitted.' Mercy petition of Malook Singh, File no MHA (Judicial 1) 32/19/56, NAI

¹⁵⁴ *Vivian Rodrick v. The State of West Bengal*, (1971) 1 SCC 468

time has passed by any test. Accordingly, we reduce the sentence of death imposed upon the petitioner to imprisonment for life.¹⁵⁵

Such circumstances played a crucial role in the call by Chief Justice Chandrachud in *K.P. Mohammed* suggesting that the State accept a self-imposed rule and decide on mercy petitions within three months.¹⁵⁶ Soon after, in *Sher Singh*, Chandrachud again reiterated the three-month period and lamented the ‘sad experience’ that no priority whatsoever was being given to mercy petitions.¹⁵⁷ Further commutations due to delay in mercy petitions took place in *Javed Ahmed Abdul Hamid Pawala*,¹⁵⁸ *Madhu Mehta*,¹⁵⁹ *Daya Singh*¹⁶⁰ and *Shivaji Jaising Babar*.¹⁶¹

By 1989 a Constitutional Bench of the Supreme Court finally arrived at a conclusive position on delay—although no time limit was specified, delay in disposal of the mercy petitions or delays occurring at the instance of the executive would be counted as a

¹⁵⁵ Unreported Order of the Supreme Court, referred in *Khem Chand v. The State*, 1990 Cr.L.J 2314 (Del)

¹⁵⁶ *K.P. Mohammed v. State of Kerala*, 1984 Supp SCC 684. Indirectly referring to another bench’s ruling in *TV Vatheeswaran* that where delay in execution executed two years from date of sentencing, the sentence of death should be quashed, the Court noted: ‘These delays are gradually creating serious social problems by driving the court to reduce death sentences even in those rarest of rare cases in which, on the most careful, dispassionate and humane considerations death sentence was found to be the only sentence called for.’

¹⁵⁷ *Sher Singh and Ors. v. State of Punjab*, AIR 1983 SC 465

¹⁵⁸ *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra*, (1985) 1 SCC 275

¹⁵⁹ *Madhu Mehta. v. Union of India and Ors.*, AIR 1989 SC 2299. This was a PIL filed on behalf of Gayasi Ram who was sentenced to death in 1978. Mercy petitions sent in 1981 were rejected by Governor but due to negligence between the Centre and State Governments, the mercy petition was not considered till 1989. The District and Sessions Judge of Jhansi after a visit to the jail had noted in a report: ‘Gayasi’s mental state is such that he might commit suicide by hanging his head on the iron grill of his cell is a decision on his petition is not taken soon’.

¹⁶⁰ *Daya Singh v. Union of India and ors.*, AIR 1991 SC 1548

¹⁶¹ *Shivaji Jaising Babar v. State of Maharashtra*, AIR 1991 SC 2147

factor in favour of commutation.¹⁶² This was a damning indictment of the clemency process by a Court which had in the past, as a general rule, restricted itself to ‘recommending’ that the President commute the sentence rather than actually taking this on itself.¹⁶³ Although failing to get a time-limit put in place, the Supreme Court’s views on delay did certainly influence decision-making in the MHA. In a couple of cases that came before the President in 1988, he expressed ‘great unhappiness’ that the cases had been pending in the Ministry for over 4 years.¹⁶⁴ The wording of the memo by the Secretary to the President—‘the delay itself impels the decision on the petition in the direction of the relief sought’—suggests that the concern was not humanitarian alone.¹⁶⁵ Nonetheless the President’s and Court’s displeasure set the wheels of the MHA in motion, 29 mercy petitions were disposed off in 1988 leaving no backlog at the end of that year.¹⁶⁶

¹⁶² *Smt. Triveniben v. State of Gujarat*, (1988) 4 SCC 574

¹⁶³ Yet there remained many questions about cases where the Supreme Court did not take delay into consideration—one such case is that of Nripat, Uttam and Mahipal Singh all of who were sentenced to death in 1973. Although the Supreme Court upheld their death sentence in 1977 they were not executed till 1983. Unfortunately the Court rejected their writ petition claiming delay. They were executed on 12 December 1983. This information was noted by the MHA in the mercy petition of Satwant and Kehar Singh, File no. 9/4/88, MHA. It is not clear how many other similar cases there would be, especially since orders are not available for petitions not admitted or leave not granted.

¹⁶⁴ Subsequently the Home Minister ordered disciplinary action against the concerned officer (Under Secy PS Ananthanarayan) for gross negligence and also directed the setting up of a monitoring group to submit a weekly report of progress. No information is available about the functioning of this group. See Mercy petition of Chandrakant Krishna Bankar, File no. 9/2/84, MHA.

¹⁶⁵ Mercy petition of Nana Bhau Chormale, File no. 9/4/84, MHA. In his autobiography, President Venkataraman also refers to the note he addressed to the Prime Minister on the same subject. In the note he states, ‘Delay in deciding mercy petitions not only inflicts mental torture on the convicts but also compels decision in favour of commutation, even where a penalty of death is otherwise warranted.’ R Venkataraman, *My Presidential Years*, Indus (Harper Collins), Delhi: 1994, at 158.

¹⁶⁶ See annexure II, *infra*

Although two decades have now passed since President Venkataram's notings as also the Supreme Court judgment on delay in mercy petitions, delay remains a vital feature of executive clemency jurisdiction in India. Although executions continued at a trickle in the 1990's, they virtually ended after 1997. As a result a large number of mercy petitions are pending.¹⁶⁷ Reading the Government's recent statement in Parliament that mercy petitions would take 6–7 years for a decision and the *Triveniben* ruling of the Constitutional Bench of the Supreme Court, future judicial intervention in this respect appears inevitable.¹⁶⁸

Limited Review

Other than the procedural ground of delay, the Supreme Court was extremely careful in confronting the executive over its exercise of its constitutional clemency powers. While hearing the case of *G Krishna Gowd* in 1975, the Supreme Court admitted that when the president is the custodian of power it made 'an almost extreme presumption in favour of bona fide exercise' and would only act where '[a]bsolute, arbitrary, law-unto-themselves mala fide execution of public power' was established. The court provided an illustration of this—where a president gripped by communal frenzy directed or refusing commutation on the basis of the convict belonging to particular communities alone.¹⁶⁹

¹⁶⁷ *Ibid*

¹⁶⁸ In response to a RTI query, the Home Ministry further clarified that there was no ongoing detailed study or analysis of different reasons for the average of seven years taken in deciding the mercy pleas nor any proposal to review and revamp the procedure. 'No written procedure to deal with mercy petition: Home Ministry', *Zee News*, 9 August 2008, at <http://www.zeenews.com/articles.asp?aid=461217&sid=NAT> (last accessed 31 March 2009)

¹⁶⁹ *G. Krishna Goud and J. Bhoomaiah v. State of Andhra Pradesh and Ors.*, (1976) 1 SCC 157

The issue came up again before a constitutional bench of the Supreme Court in the landmark *Maru Ram* judgment in 1980. The bench laid down, ‘considerations for exercise of power under articles 72/161 may be myriad and their occasions protean, and are left to the appropriate government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or malafide. Only in these rare cases will the court examine the exercise.’¹⁷⁰ although the law is sound, the rationale for it and the continual references to the ‘president’ are a bit odd for the court is no doubt about who actually exercises the power.

After laying down when they would intervene, a few years after their backtracking in the *Billa-Ranga* case the Supreme Court had another opportunity to translate its words into action. The scope of the President’s power was questioned in a case relating to the mercy petition of those sentenced to death for the assassination of then Prime Minister Indira Gandhi. In response to a request for oral hearing by the petitioner’s lawyers, the Secretary to the President had noted: ‘The President is of the opinion that he cannot go into the merits of a case finally decided by the Highest Court of the land. Petition for grant of pardon on behalf of Shri Kehar Singh will be dealt with in accordance with the provisions of the Constitution of India.’¹⁷¹

This obviously incorrect statement gave the petitioners an opportunity to challenge the rejection of the clemency petition. The Supreme Court rightly held that it was open to the President (read the executive) to scrutinise the evidence and come to a different conclusion regarding guilt as the executive in mercy proceedings was not bound by the judgment of the Court. It however rejected the call for a right to personal hearing and also refused to enter the

¹⁷⁰ *Maru Ram v. Union of India and others*, (1981) 1 SCC 107

¹⁷¹ Letter dated 15 November 1988 by Prem Kumar, Secretary to President of India in response to letter dated 23 October 1988 sent by Member of Rajya Sabha and senior lawyer Ram Jethmalani to the President.

domain of the correctness of the decision on the mercy petition. The judgment states, ‘we are confined to the question as to the area and scope of the President’s power and not with the question whether it has been truly exercised on the merits. Indeed, we think that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram etc. v. Union of India*’.¹⁷² The Supreme Court tamely concluded with a direction that the petition ‘shall be deemed to be pending before the President to be dealt with and disposed of afresh.’ Unsurprisingly the petition was again rejected and Kehar Singh was executed in January 1989.

In a scathing indictment, where he refers to the judgment and its eventual direction as ‘a functional equivalent of death warrant for the accused’, Upendra Baxi points out how the Court failed to apply the same Article 21 ‘right to life’ standards it had articulated earlier the same year in the *Antulay* judgment.¹⁷³ He points out, ‘over and over again, the court affirms that the ‘question as to the area of the President’s power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review.’ If we then ask, ‘what can be so examined?’ *Kehar Singh*, over and over again, says, *nothing*. No right to oral hearing can be required, no judicial guidelines for the exercise of clemency power can be prescribed, no rejection of clemency can be adjudicated. The clemency power is ‘sovereign’ *except* that the President may not say that he is bound by the ‘Highest Court in the Land’’. In conclusion Baxi also wonders if the Supreme Court’s intervention was an attempt to protect itself against the global outrage in response to Kehar Singh’s sentence. This would not be a surprise given that the Court appeared to show keen sensitivity to public opinion in the *Kuljeet Singh* (Billa-Ranga) judgment as well.

¹⁷² *Kehar Singh and anr. v Union Of India and anr, supra.*

¹⁷³ Upendra Baxi, ‘Clemency, Erudition and Death: the judicial discourse in Kehar Singh’, *Journal of the Indian Law Institute*, Vol. 30:4, 501–506.

The case of *Dhananjoy Chatterjee* was another one where the Supreme Court flattered to deceive. The prisoner in this case was sentenced to death in 1994 but due to official negligence he was still on death row in West Bengal in 2004. Chatterjee had filed a petition in the Calcutta High Court challenging the rejection of his mercy petition by the Governor. The High Court had stayed his execution till the writ was disposed however ‘the stay of execution was not vacated by the High Court as the fact of rejection of his mercy petition by the Governor was not brought to the notice of the court either by the counsel who appeared for the State of West Bengal or by the counsel for the appellant.’ The above was observed by the Supreme Court in its judgment on a writ filed by the prisoner.¹⁷⁴ However the apex court did not find this gross negligence by the State sufficient to commute the sentence—instead it merely directed the State Governor to review his own decision on the grounds that appropriate material was not placed before the Governor.

While this may possibly have been a subtle hint by the Court in favour of commutation, it was clear in another petition filed by the convict’s brother that neither the State Governor nor the President had examined this delay in subsequent rejections of the mercy petitions of the accused.¹⁷⁵ However the Constitution Bench which heard another petition filed on behalf of the condemned prisoner tamely observed that the petition had been pending with the President for about six weeks and there was ‘no reason to assume that the President of India has not applied his mind to all the relevant facts and aspects of the case. Nor are we inclined to hold that there is any material which the President considered relevant and was inclined to look into but was not before him or was not called for

¹⁷⁴ *Dhananjoy Chatterjee @ Dhana v. State of West Bengal and others*, (2004) 9 SCC 751

¹⁷⁵ *Bikas Chatterjee v. Union of India and Others*, (2004) 7 SCC 634

by him when he took the decision to reject the petition for grant of pardon.’

It is odd that despite another judgment of the same court acknowledging gross negligence by the state authorities that led to a prisoner spending over 10 years on death row, this bench did not call upon the Government to show what material was placed before the President for making such a decision.¹⁷⁶ After its decision in *SR Bommai*, it is clear that the Court had the power to seek the material and the mercy petition file from the MHA.¹⁷⁷ Had they in fact done so, they would have seen that the file clearly acknowledges the ten year delay in execution and ‘the present crisis [that] has taken place due to the slackness of the State Administration.’¹⁷⁸ Unfortunately this was conveniently and incorrectly glossed over in later summaries for the Minister and President which claimed that the prisoner himself was responsible for the delay. The Minister and the President were therefore not provided a full and clear picture of the facts.¹⁷⁹ Chatterjee was subsequently executed in August 2004—the only person to have been hanged in India since 1998.

¹⁷⁶ See also the case of *Amrit Bhushan Gupta (supra)* where the court *presumed* that the authorities would have considered the mental health of the prisoner despite a finding by court appointed experts that the condemned prisoner was suffering from schizophrenia and was thus of unsound mind. The prisoner was subsequently executed.

¹⁷⁷ Article 74(2) of the Constitution notes, ‘The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.’ In this judgment, a constitutional bench observed the difference between the advice, the reasons for the advice and the material relevant to it. The Court concluded that the constitutional bar was only on the specific advice and the reasons which would be part of it. Relevant materials placed before the President would not form part of the advice and thus fell within the purview of the Court. *S.R Bommai v. Union of India*, AIR 1994 SC 1918

¹⁷⁸ Noting dated 11 May 2004, Petition of Dhananjay Chatterjee, MHA *supra*

¹⁷⁹ The file was inspected in the MHA as part of this study, Petition of Dhananjay Chatterjee, MHA, *supra*.

Taking on the Executive

Although the courts were reluctant to intervene in the cases above, the past decade has also seen three cases in which the Supreme Court quashed commutation orders passed by the Governor of a State exercising his constitutional powers vide Article 161. While none of these cases involved the powers of the President and none were capital cases, they are included in this study as they provide an insight into the court’s recent stance on executive discretion in clemency jurisdiction.

In *Swaran Singh*, the Supreme Court quashed the order of the Governor of Uttar Pradesh by which a murder-convict and former Member of the State Legislative Assembly sentenced to life imprisonment was released after serving 2 years.¹⁸⁰ The Court set aside the Governor’s order finding that key facts were not made available to the Governor at the time the decision was made favouring remission. In an affidavit before the Court, a senior bureaucrat had conceded that five other serious criminal cases were pending against the released convict. This fact was not brought before the Government and the Governor nor was the Governor informed that another clemency petition by the convict had been rejected only a few months ago.¹⁸¹ In such circumstances the Court found that in the absence of such material facts before him, ‘the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner’ and the decision was arbitrary and unsustainable.

Soon thereafter in *Satpal*, another bench of the Supreme Court quashed the order of the Governor of Haryana finding that the decision was made mechanically and the Governor had not applied

¹⁸⁰ Persons sentenced to a life sentence for murder fall within the restriction of Section 433A, CrPC which requires a minimum 14 year period of incarceration before release. Constitutional clemency powers are however not bound by any statutory restrictions.

¹⁸¹ *Swaran Singh v. State of U.P. and Others*, (1998) 4 SCC 75

his mind to the material on record. The Court noted that the decision was made in haste even before the convicted prisoner surrendered to the Court to serve his sentence after the conviction.¹⁸² The Court observed, “The entire file had been produced before us and we notice the uncanny haste with which the file has been processed and the unusual interest and zeal shown by the authorities in the matter of exercise of power to grant pardon.’ In this case too, the released prisoner had links with a political party and the murder had taken place during a local election.

In *Epuru Sudhakar* the Supreme Court quashed the order of the Governor of Andhra Pradesh releasing a murder convict on the grounds that irrelevant and extraneous materials entered into the decision making process, thereby vitiating the order.¹⁸³ The Court pointed out that although views of local officers were taken, the Collector did not make his own enquiries and relied upon those by his staff. The Supreme Court found that the report of the District Probation Officer made reference to the prisoner as a ‘good congress worker’ who had been wrongly implicated due to political rivalry. The report also falsely noted that the family on the deceased was on good terms with the prisoner. The Court observed that the report of the Superintendent of Police claiming no ‘law and order’ implications upon the release of the prisoner was odd as only a few months ago he had stated that there was a likelihood of breach of peace if the convict was released on parole. The Court concluded that the views of the police officer had changed merely due to the change of government. In this case, the Supreme Court also listed the grounds on which the judicial review of the order of the President or the Governor under Article 72 or Article 161 was possible:

- (a) that the order has been passed without application of mind;
- (b) That the order is mala fide;

¹⁸² *Satpal and Anr v. State of Haryana & ors*, (2000) 5 SCC 17

¹⁸³ *Epuru Sudhakar and Anr. v. Govt. of A.P. and Ors*, AIR 2006 SC 3385.

- (c) That the order has been passed on extraneous or wholly irrelevant considerations;
- (d) That relevant materials have been kept out of consideration;
- (e) That the order suffers from arbitrariness¹⁸⁴

In all three cases above the accused had links with political parties and partisanship was a common thread, although each decision of the Governor was struck down on other grounds. However it is important to observe the varied quality of the evidence that the Court refers to in quashing the orders of the Governor. The evidence in *Swaran Singh* is obvious but not so clear in *Satpal* and *Epuru Sudhakar*. In both these cases the Supreme Court judgment does not even refer to the advice by the State Government’s Home Department and the Home Minister/ Chief Minister to the Governor, but quashes the decision of the Governor made on the basis of their recommendations. How does the evidence in these cases compare with the information known to the Court in Dhananjoy Chatterjee’s case? When the above three judgments are compared with the refusals by the Supreme Court to intervene in the cases of Kehar Singh and Dhananjoy Chatterjee—where lives were literally on the line and the factual matrix far more obvious—they do appear incongruous.¹⁸⁵

Although so far the Supreme Court has only set aside the decisions of Governors and that too not in capital cases, this too may change as the Supreme Court has presently reserved judgment in a case where the Governor of Assam had commuted the death sentence.¹⁸⁶ In the present petition, the family members of a murder victim approached the court claiming that the Governor’s order commuting the death

¹⁸⁴ *Ibid*, para 16.

¹⁸⁵ It may be telling that all three decisions have come in the past decade and may be part of a broader change of equations between the judiciary and the executive.

¹⁸⁶ *Bani Kanta Das & another v. State of Assam and others*, Writ Petition (Civil) No. 457 of 2005.

sentence of Ram Deo Chauhan should be set aside.¹⁸⁷ Media reports of a previous hearing suggest that the Court reacted strongly to the past recommendation by the National Human Rights Commission to the Governor to commute the sentence in this case and was likely to set aside the Governor's order on the ground that the order was passed on extraneous or wholly irrelevant considerations.¹⁸⁸ Although it may be argued by some that these recent cases merely show the judiciary fulfilling its task of keeping the executive accountable, it is pertinent to note that all the Supreme Court's interventions have taken place where the executive recommended commutation and there is yet no instance of judicial review where the petition was rejected and the person sent to the gallows.¹⁸⁹ Such understanding of judicial review certainly raises concern.

¹⁸⁷ There was sustained pressure upon the State Government in this case from activists who believed that the accused was a juvenile at the time of the offence and this matter was not brought to the Court's attention during the trial. During the appeal and review petition in the Supreme Court, Ram Deo's death sentence was upheld by a majority (2:1) decision. The judge with the deciding vote also added that the accused was not remediless as the power to commute the sentence also lay with the executive. See also *Ram Deo Chauhan @ Raj Nath v. State of Assam*, AIR 2001 SC 2231

¹⁸⁸ See 'SC questions NHRC recommendation for clemency to death row convict', *The Times of India*, 20 January 2009 at <http://timesofindia.indiatimes.com/articleshow/msid-4003314,prtpage-1.cms> (last accessed 31 March 2009). In this case appeals for commutation were also made by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.

¹⁸⁹ There is however a case of the Delhi High Court setting aside the rejection of a mercy petition by the President. This was perhaps one of the more unexpected impacts of the Kehar Singh fiasco. In *Khem Chand v. State* (1990 CrLJ 2314 (Del)) the Delhi High Court heard the writ petition of a 70 year old man whose mercy petition was rejected by the President after a delay of over 4 years. Although the Court was convinced on delay it surprisingly went further. Noting that the mercy petition was decided by the President on 16 November 1988, the Court observed this was the period where Khehar Singh's case showed that the President wrongly believed that he could not entertain the merits of the case since it was settled by the Supreme Court. There was no question therefore of the President exercising his jurisdiction properly. The Court therefore set aside the President's rejection of the petition and commuted the death sentence.

THE ROLE OF THE PRESIDENT

The present day constitutional clemency powers of the President and Governors originate from the Government of India Act, 1935, but unlike the Governor-General, the President and Governors in independent India do not have any prerogative clemency powers. Further given the constitutional scheme and the requirement that the president act on the advice of the executive, the President cannot exercise this power in his discretion. Present day mercy provisions in India are therefore best seen as a layer of remedial justice in the hands of the executive, although here too it there is a limitation in that it cannot be allowed to become another court of appeal.

Where then does that leave the President and Governor? Are they nothing more than ciphers or rubber stamps? In a significant decision in March 2004, the Supreme Court had asked the Governor of West Bengal to re-consider the mercy petition of a condemned prisoner as it was not satisfied that the Governor had exercised his own independent mind on the merits of the petition for clemency and believed that the Governor had merely given his assent to the rejection issued by the Home Department of West Bengal without any application of independent mind.¹⁹⁰ The Supreme Court’s finding that the Governor did not have the opportunity to exercise his power in a fair and just manner in the absence of all material facts before him (including mitigating circumstances) raises interesting questions about the exact role of the President and the Governor in the decision-making process. Although the court is in no doubt that the power is only nominally in the hands of the President or Governor, yet it nonetheless requires that all the relevant material

¹⁹⁰ In this particular case an affidavit sworn by the Deputy Secretary of the Judicial Department, Government of West Bengal stated, ‘After examining and considering the prayer the State Government rejected it, thereafter it was communicated to the Governor only because it was addressed to him, and therefore the Governor in his turn, rejected the convict’s prayer which was duly communicated to the convict.’ *Dhananjay Chatterjee @ Dhana v. State of West Bengal and others*, (2004) 9 SCC 751

must be placed before the President and Governor for consideration and application of mind. Is this an example of the apex court merely calling for the façade to be maintained in a case where the government had obviously slipped up; or was this a subtle hint to the executive for clemency in that particular case? Was it even an attempt by the court to create political space for the President and Governor to exercise their moral authority?

Outside the facts of that particular case, the larger question is to understand the thin line available for the President and Governor to tread in deciding mercy petitions. This line suggests that they must apply their minds independently on the material placed before them while being bound by the advice of the executive. Unfortunately most constitutional experts who have studied the office of the President have focused little attention on President's mercy powers presuming that there was little role of the president. The following is an attempt to examine the small spaces which various Presidents have able to carve out within the limited sphere of their mercy powers.

The Early decades

The early tussles between the first President Rajendra Prasad (1950–1962) and Prime Minister Nehru over the extent of the President's discretionary powers ended in favour of the cabinet and executive. Although there is doubt that the dispute ended largely on merits of their arguments, their personalities too are said to have influenced the eventual result.¹⁹¹ Personal standing also appears to have played

¹⁹¹ Sen suggests that their personalities, a domineering Nehru (Prime Minister) and a gentle Prasad (President), were partly responsible for the practice in which the position of the President appeared to have become no better than that of a figure-head. S. R. Sen, 'President and Prime Minister', *Economic and Political Weekly*, Vol. 27 (7), 15 February 1992, pp. 331–334. Minoos Masani, a member of the constituent assembly is also reported to have shared similar views. See Fali S. Nariman, 'The Silences in our Constitutional Law', (2006) 2 SCC (Jour) 15

a significant role with respect to the President’s powers in mercy petitions, although here to Prasad’s advantage. President Prasad was able to significantly influence the decisions of the executive on mercy petitions without overstepping his powers. Although Dr. Prasad’s personal views on capital punishment are unclear, his notings on petitions suggest that he was not a vocal supporter, tended not to disagree when the Government recommended commutation.¹⁹² He was however able to put his legal expertise to sound use in cases where the Government recommended rejection but he had concerns about culpability and role of the petitioner, recommending reconsideration of such petitions.¹⁹³

In a petition filed by one Malook Singh, President Prasad suggesting reconsideration of the recommendation by the executive to reject the petition noted, ‘(T)here seems to be no evidence of any premeditation on the part of the appellant and the offence seems to have been committed in the heat of the moment as a result of a wordy quarrel between the two brothers. It is true that the attack was made and continued with ferocity and that the appellant did not desist except on intervention by a third party. Still it was *one continuous act* and there was neither motive nor premeditation to commit the murder.’¹⁹⁴

Despite the criticism faced by President Prasad for what has been seen as attempts to increase the powers of the President, a study of his

¹⁹² After accepting the commutation Prasad adds in his own handwriting, ‘I do not ordinarily express my opinion contrary to that of the HM, particularly when the recommendation is for commutation of death sentence, as imprisonment for life which is given in substitution is a serious enough sentence.’ Mercy petition of *Ramu Khirappa Patil*, File no. MHA (Judicial 1) 32/125/57, NAI

¹⁹³ Mercy petition of Baba Narain Das, File no. MHA (Judicial 1), 32/14/61, NAI; Mercy petition of Iswar Dutt, File no. MHA (Judicial 1) 32/202/60, NAI; Mercy petition of Kaloo, File no. MHA (Judicial 1) 32/14/58, NAI and Mercy petition of Pakkirasami Nadar, File no. MHA (Judicial 1) 32/7/56, NAI.

¹⁹⁴ Italics added. Note dated 20 May 1956 in Mercy petition of Malook Singh, File no. MHA (Judicial-1) 32/19/56, NAI

notings in mercy petitions suggests that he was aware of the extent of his powers—both with respect to the Government and the Courts. He was wary of not converting the clemency process another tier of appeal. In one particular note to the Ministry he observed, ‘(B)ut coming to the conclusion that commutation is called for we need not go into the merits of the case, specially if the Courts have considered the point and come to a conclusion in evidence. We are not sitting in appeal and our jurisdiction comes only on the basis of the findings of the courts, otherwise clear acquittal and not mere reduction of sentence will be the result.’¹⁹⁵ He also did not push his views on the Government. In *Bharwad Mepa Dana*, the Government was commuting the sentence of one brother to avoid the family becoming extinct. Prasad believed that there was no difference between the cases of the two brothers. However since the Government did not appear to be keen to commute the sentence of both the brothers, he eventually concluded, ‘I would leave it entirely to the Home Minister without indicating any preference of my own after what he has written and shall accept his recommendation.’¹⁹⁶

In the 12 long years in office the interest shown by President Prasad in mercy petitions certainly played a major role in making the clemency system fairer and more credible. In addition while his rigorous analysis stretched the limited powers available and asserted his moral authority over the executive, his propriety avoided embarrassing confrontations on this front. He thus undoubtedly made the task easier for his successors, although raising expectations as well.

Unlike the first President, his successor S. Radhakrishnan (1962–1967) had a clear abolitionist position.¹⁹⁷ However while he

¹⁹⁵ Mercy petition of Ramu Khirappa Patil, *supra*

¹⁹⁶ Mercy petition of Bharwad Mepa Dana, *supra*

¹⁹⁷ See letter dated 21 May 1962 from President Radhakrishnan to Prime Minister Nehru; Nehru’s reply to the President dated 22 May 1962 and the President’s response dated 23 May 1962; PM Nehru’s letters to the Home Minister dated 22 May 1962 and 25 May 1962 in File no. MHA (Judicial II) 19/61/62, NAI

did initiate discussion with Prime Minister Nehru on abolition of capital punishment, he did not use his clemency powers to further this personal agenda.¹⁹⁸ Unlike Prasad, Radhakrishnan was not trained in law and thus did not get involved with the finer details in his notings on petitions yet he actively continued the tradition of Rajendra Prasad asking the Government to reconsider their rejection of a number of petitions where he believed the decision ought to be changed.¹⁹⁹ In his brief stay in the office, President Zakir Hussain (1967–1969) too appears to have continued similarly seeking reconsideration and adopted a style similar to Radhakrishnan, relying often on the Secretary to the President to make the notings.²⁰⁰ He further even allowed regular public audiences where amongst other citizens, family members of petitioners could also meet with the President.²⁰¹ A large number of petitions in this period as also the early years of the V.V Giri presidency (1969–1974) were commuted because of the Mahatma Gandhi birth centenary amnesty decision of the Government.²⁰²

Unfortunately there is little information post 1970 available in the archives.²⁰³ The mid 1970s was also the time when the number of

¹⁹⁸ His biographer suggests that throughout his five years in office, President Radhakrishnan rarely rejected a petition for mercy. This does not appear to be correct however since 112 petitions were rejected in 1963 and 128 in 1964. See Annexure 1.

¹⁹⁹ Unlike Dr Prasad who usually made his own notings, Radhakrishnan however tended to speak either informally with the Minister or send memos prepared by the Secretary to the President when required.

²⁰⁰ Noting by Nagendra Singh, Secretary to President, dated 27 April 1967 in mercy petition of Chinnappan, File no. MHA (Judicial-1) 32/99/66, NAI merely states, ‘President would like the case to be reviewed.’

²⁰¹ Mercy petitions of Chajju etc, File no. MHA (Judicial-III), 32/96/67, NAI

²⁰² As per the Cabinet meeting on 12 November 1968, all persons under sentence of death as of that day would have their sentences commuted. This decision was communicated to the State Governments vide circular letter no. 35–2–68 J III dated 17 November 1968. See mercy petition of Shamrao s/o Apparao Chavan, File no. MHA (Judicial-B) 32/6/71, NAI

²⁰³ While there are a few cases involving V.V Giri available in the archives, not much can be read about his views or his actions since most of the capital cases of the period

mercy petitions coming for disposal to the MHA reduced dramatically. From a total 1034 petitions disposed from 1965–1974, only 173 petitions were disposed from 1975–1984.²⁰⁴ It is unclear why there was such a dramatic decline in the number of petitions especially since year-wise breakups are further not available. It is conceivable however that the decline in death sentences awarded was due to the impact of the new CrPC, 1973 which made life imprisonment the ordinary punishment for murder and death sentence the exceptional punishment.²⁰⁵ Further in the late 1970s and the early 1980s, the death penalty was a subject of great controversy in the Supreme Court. This led to the landmark *Bachan Singh* formulation of the death penalty being awarded only in the ‘rarest of rare’ case.²⁰⁶ The impact of this decision and the resultant reduction in death sentences awarded is also evident in the dramatic reductions in mercy petitions coming up to the MHA in the 1980s.²⁰⁷

The 1980s and 1990s

Decision-making on clemency petitions appears to have virtually come to a halt in the early 1980s. This was probably the result of the ongoing debate on capital punishment in the Supreme Court that also led to occasional stays on executions and death

available (till 1971) were commuted due to the decision taken by the Cabinet to commute all death sentences not carried out to commemorate Mahatma Gandhi’s birth centenary year. Petitions from the tenure of Fakruddin Ali Ahmed (1974–77), N Sanjiva Reddy (1977–82) are not available in the National Archives presently.

²⁰⁴ See Table 1, *infra*.

²⁰⁵ Section 354(3), CrPC required that judges record ‘special reasons’ where they did not award life imprisonment

²⁰⁶ *Bachan Singh v. State of Punjab* (AIR 1980 SC 898). This principle remains the bedrock on which the death penalty has persisted in Indian criminal justice administration, despite grave concerns regarding the inherent subjectivity of the principle. See Amnesty International India and People’s Union for Civil Liberties (TN&P), *Lethal Lottery: The Death Penalty in India*, New Delhi: May 2008

²⁰⁷ See Table 1, *infra*

sentences.²⁰⁸ A large backlog of petitions was eventually decided in 1983 and a few in 1984 during the tenure of Giani Zail Singh (1982–87). Material available from the Ministry of Home Affairs indicates that only 2 out of these 23 cases were commuted in this period.²⁰⁹ Unfortunately however none of these files are available to know what role the President played in the decision-making. By the time President Zail Singh remitted office, there was again a backlog of mercy petitions to be disposed in the MHA and President Venkataraman’s tenure (1987–1992) saw 28–29 petitions being disposed in 1988.²¹⁰ Although the total number of petitions coming before the President further reduced during this time tenure, the percentage of commutations too dramatically declined. During Venkataraman’s tenure, of the 39 petitions disposed, sentences were commuted only in five cases—four commutations were on grounds of delay.²¹¹

President Venkataraman appears to have personally been in support of capital punishment; even his interventions on delay were not on humanitarian grounds but because delay ensured that the Government had little choice but to commute the sentence.²¹² His tenure also saw the unusual event of a President sending back a

²⁰⁸ See for instance *Kuljeet Singh*, *supra*. The Court stayed all executions after 7 November 1981. This stay was however removed on 20 January 1982, see *Kuljit Singh*, *supra*. The only petition that was disposed from 1980 to 1982 was that of Kuljeet Singh (Ranga) and his associate Billa.

²⁰⁹ Only the sentences of one Kundasamy (October 1983) and Chinnaraj (May 1983) were commuted. Information from annexure 1 in the reply received dated 14 December 2007 from the MHA in response to application in 2007 under the RTI act. On file with author.

²¹⁰ See annexure II for yearly disposal of mercy petitions.

²¹¹ CK Banker (May 1988), Harbhajan Singh (July 1988), Nana Bhai Chormole (June 1988) and Daya Ram (August 1989). The only commutation on merits was Lok Pal Singh (July 1988). As per 14 December 2007 MHA RTI reply, on file with author.

²¹² In his autobiography, President Venkataraman also refers to the note he addressed to the Prime Minister on the same subject. In the note he states, ‘(D)elay in deciding mercy petitions not only inflicts mental torture on the convicts but also compels

petition where the Government itself had suggested commutation of the capital sentence.²¹³ In a second case later in the same year, when the President again sent back a petition where the MHA had recommended commutation (on the ground of youth), the Home Ministry returned the unchanged petition to the President.²¹⁴ Within clemency jurisdiction where previous presidents (particular Prasad

decision in favour of commutation, even where a penalty of death is otherwise warranted.' R Venkataraman, *My Presidential Years*, Indus (Harper Collins), New Delhi: 1994, at 158.

²¹³ Mercy petition of Sawai Singh, File no. 9/5/85—Judicial, MHA. In this case the Home Minister revised the recommendation to rejection as per the President's suggestion.

²¹⁴ The accused was sentenced to death by a special court u/s 302 and 149, Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhinayam. The MHA noted (Joint Secretary Kankan on 19 April 88), 'High Court has observed that they had 'no other option but to confirm the death sentence awarded by the Special Judge u/s 10 of the MP Dakaiti Aur Vyapharan Prabhavit Kshetra Adhinayam 1981, (as) death sentence is the rule while life imprisonment is an exception, as reasons have to be given for awarding a lesser sentence.' Further the official noted that even by the High Court's estimation the petitioner would have been 18–20 years at time of offence and quite immature. Given that the gang-leader was acquitted by the High Court and that there was a delay of 4 years 8 months since death sentence imposed, this was an appropriate case for clemency. Home Minister Buta Singh signed the summary accordingly for the President. However memo dated 24 May 88 from Prem Kumar, Secretary to President, states that the case 'brings out extreme brutality. As many as 7 persons were murdered and one family almost wiped out due to enmity on account of family feuds or land disputes ... not an act of youthful impulsiveness but pre-meditated and pre-planned and done in cold-blood.' He further adds, '(T)he fact that others could not get convicted would not be a ground to be lenient to those who do get convicted in a trial. It would be a risky principle to show leniency on this account to those convicted. The President would like the HM to review the case considering the heinousness of the offence...' On 3 June 88 Kankan notes that the Supreme Court has ruled that the death penalty is the exception and life imprisonment is the norm and that this was not followed in this case. Additional Secretary Srinivasan notes on 5 June 88 that the grounds noted earlier were valid and earlier recommendation may be reiterated. On 27 June 88 HM Buta Singh again signed the summary which 'respectfully recommend that the President may be pleased to commute the sentence.' Eventually on 24 July 88, President R Venkataraman noted, 'Considering the young age of the convict when

and Radhakrishnan) ably guided and aided the executive, such acts by the President and the resulting snub by the Government appear unprecedented.

It was also during President Venkataraman’s tenure as President that the Kehar Singh clemency fiasco seriously damaged the moral standing of the President.²¹⁵ Not only was it clear that the office of the President had little idea about its own role in clemency proceedings (supra, section IV), but President Venkataraman’s actions and omissions too suggested that rather than attempt to assert whatever moral authority he had on the executive to examine the case fairly, his attempts were limited to distancing himself from the rejection. His autobiography informs us that he changed the draft order rejecting the petitions (Having considered the materials in this case... I hereby reject the petitions) as it ‘would imply that the President had come to the conclusion independently in his personal capacity’²¹⁶

Unfortunately as a perusal of the mercy petition file of Kehar Singh reveals, suggesting the alternative text for rejection of the petition is the entire extent of his application of mind on the mercy petition, which was unsurprisingly virtually prejudged.²¹⁷ Given that there was no petition disposed by the Governor in this case, the

the crime was committed, the sentence of death... is hereby commuted.’ See Mercy petition of Lok Pal Singh, File no. 9/7/85–Judl, MHA

²¹⁵ George Fernandes wrote to the President on 19 Oct 1988: while decisions on pardons are made by the Cabinet, ‘Nevertheless, the President’s office has such enormous moral authority and prestige that it can, at least on matters like Presidential pardon, assert itself.’ Mercy petition of Satwant Singh and Kehar Singh, *supra*.

²¹⁶ R Venkataraman, *My Presidential Years* at 249. Curiously however the President only appears to have objected to the standard-format reply in this case and did not raise similar objections in rejecting petitions either before or after *Kehar Singh*.

²¹⁷ There is little substantive discussion on the facts or innocence. In this respect, the note by the MHA Under Secretary merely notes, ‘In the light of the observations of the highest judicial forum in this country and circumstances of this case, the question of grant of clemency in this case hardly arises...’ Minute by PS Ananthanarayanan, Under Secretary (Judicial) dated 15 October 1988. The summary for the President signed by Home Minister Buta Singh on 17 October 1988 is virtually identical. Mercy petition of Satwant Singh and Kehar Singh, *supra*.

least the President could have done was demanded a rigorous and analytical look at the evidence placed before the executive.²¹⁸ Further even after the Supreme Court remanded the petition back to the MHA and President for a second disposal, neither the executive nor the President took this opportunity to make amends on substantively reviewing the evidence.²¹⁹ The only difference this time around was that the petition was discussed in the Cabinet meeting on 20 December 1988 before the petition was dismissed by the President with the president-friendly text on 26 December 1988.²²⁰

Unfortunately President Venkataraman's own biography does not reveal what he subsequently thought of the innocence or otherwise of Kehar Singh. He does however reveal that he advised the cabinet that

it would be better if the sentence was not carried out before Guru Nanak's birthday on November 23. Besides, I had arranged a prayer congregation in Rashtrapati Bhavan as homage to Guru Nanak on November 21 and did not want that to be marred.²²¹

As the reviewer of his autobiography puts it, '(s)uch was RV's response to a situation which should have caused an intense moral

²¹⁸ Due to Delhi's status as a union territory the Administrator of Delhi did not have clemency jurisdiction like the Governor of a state. *Ibid.* See also Instruction III(b), MHA mercy petition instructions, *supra*.

²¹⁹ A noting by Home Secretary JA Kalyanakrishnan dated 19 December 88 was attached with the new note prepared for the Home Minister which stated: 'It will be appropriate to recall a couple of important aspects of this matter at this stage for purposes of record. These are points which do not figure in the Summary but are factors which have influenced our consideration of the case: 1) SC which acquitted Balbir Singh found evidence against Kehar Singh acceptable...' This was the sole statement with respect to the evidence and innocence question showing clearly that the executive did not even actually apply its mind independently. See Mercy petition of Satwant Singh and Kehar Singh, *supra*.

²²⁰ See noting by Home Secretary JA Kalyanakrishnan dated 20-12-88, Mercy petition of Satwant Singh and Kehar Singh, *supra*.

²²¹ R. Venkataraman, *My Presidential Years*, at 238

dilemma to any ordinarily decent person.’ The reviewer further goes on to suggest that it would have been appropriate for the President to resign or *at least* threaten to resign rather than signing the rejection of the petition leading to the hanging of an innocent person.²²² It is arguable that had the President done so, the ‘judicial murder’ of Kehar Singh would have been avoided.²²³ Following Venkataraman, President SD Sharma’s tenure (1992–1997) saw a further reduction of total petitions decided but all 14 petitions were rejected. Although lawyer-writer AG Noorani writes: ‘the Indian Presidency really came into its own when Shankar Dayal Sharma became President’, a study of the petitions available shows little indication of application of mind by the President.²²⁴ In all the petitions available, President SD Sharma did little more than sign the rejection order sent to him.²²⁵

The Past Decade

It is in this context that President Narayanan’s tenure in Rashtrapati Bhavan (1997–2002) must then be seen. Further during most of

²²² S. Guhan, ‘The Blotted Copybook: My Presidential Years by R. Venkataraman’, *Economic and Political Weekly*, Vol. 29, No. 35 (Aug. 27, 1994), pp. 2283–2288, at 2285. President Narayanan, although writing in the context of legislation, refers to the opinion of lawyer Soli Sorabjee that where the President was strongly and conscientiously of the view that the proposed legislation to which he is required to assent is subversive to constitutional values, the proper course is for the President to resign and state publicly the reasons for his resignation. See KR Narayanan, ‘The President’s role and responsibility in the Constitution’ in Mool Chand Sharma and Raju Ramachandran Ed., *Constitutionalism, Human Rights and the Rule of Law: Essays in honour of Soli J Sorabjee*, Universal Law Publishing, New Delhi: 2005, at 5. There is no reason however why this must be limited only to legislation.

²²³ This was the phrase used by lawyer-MP Ram Jethmalani in his autobiography; Ram Jethmalani, *Conscience of a Maverick*, UBSPD, New Delhi: 2007, at 81. Writing in the Statesman on 22 Jan 1989, former member of the Constituent Assembly and senior parliamentarian Minoo Masani also used the same phrase. See HM Seervai, *Constitutional Law of India*, at 1207. Seervai also concurs at 1232.

²²⁴ AG Noorani, ‘Not quite a free hand’, *The Hindustan Times*, 13 August 2007

²²⁵ Nearly half of the 14 cases adjudicated upon by SD Sharma were inspected in the MHA while researching this study. Notes and details on file with author

President Narayanan's tenure the Bharatiya Janata Party (BJP) led National Democratic Alliance (NDA) was in power and LK Advani was the Minister of Home Affairs. Yet the trickle of executions that continued through the past decade completely ended in President Narayanan's tenure.²²⁶ What led to such a pause in executions? With President Narayan's personal papers yet unpublished and with mercy petition files relating to this period unavailable in the MHA, there is little option but to piece together what happened during that tenure from available facts.

The first mercy petition forwarded to President Narayanan was that of Piara Singh and others on 11 November 1997 with a recommendation to reject from the Inder Gujral led United Front government. This petition was sent back for reconsideration by President Narayanan.²²⁷ The next petition forwarded in March 1998 came with advice to commute and the President disposed it accordingly.²²⁸ Subsequently with the BJP led NDA forming the Government and the pro death-penalty LK Advani heading the Home Ministry, many more petitions with recommendations to reject began to be forwarded to the President. In all a total of nine cases (including Piara Singh which was resent) were placed before President Narayanan from 1999 to 2001 with advice to reject.²²⁹

²²⁶ No executions took place in his tenure from July 1997—July 2002.

²²⁷ As per annexure in MHA reply dated 11 September 2008 to an application under the RTI act. Reply on file with author.

²²⁸ The sentences of GV Rao and SV Rao were commuted. Their mercy petitions were previously dismissed by President SD Sharma on 5 March 1997 (vide RTI reply dated 11 Sep 2008) but the execution was stayed by Prime Minister Deve Gowda after the intervention of a number of activist groups led by the Andhra Pradesh Civil Liberties Committee raised a number of issues about motive and background to the case which had not been recorded by the court judgments. See 'Freedom eludes convicts in bus-burning case', *The Hindu*, 16 August 2004. A fresh petition was submitted in March 1998 and was placed before President Narayanan with advice to commute the death sentences.

²²⁹ Piara Singh and Sarabjit Singh (June 1999); Shyam Manohar and five others (Jan 1999); Mohan and Gopi (July 1999); R. Govindasamy (Oct 1999); Jai Kumar

Although he kept eight of the nine petitions (including Piar Singh) pending, President Narayanan did reject one petition—that of Govindasami from Tamil Nadu.²³⁰ The rejection of this petition suggests that although he was opposed to the death penalty, President Narayanan had not made any blanket decision to commute all sentences or keep petitions pending thereby forcing his own views on the government. This view is also shared by the Governor of West Bengal Gopalkrishna Gandhi who was Secretary to President Narayanan throughout his tenure:

President Narayanan had an approach to the power of pardon which, when the recommendation was one of rejecting the appeal for commutation, explored the farthest limits of the case’s ‘rare’ ness. He also believed in dredging evidence painstakingly for any possible extenuation, be it the age factor (of the convict) or be it circumstantial or pertaining to the establishing of mens rea. And he never forgot that biases are at work in our society including inherited psychologies that work in our criminal investigation processes. But he did not automatically or in a ‘slide-on’ manner transfer his own views on capital punishment (he was certainly very contemporary in that regard) to cases that came to him for decision.²³¹

Govindasami’s execution, subsequent to the rejection of the petition, was however stayed by the Government.²³² With no other

(July 1999); Dharam Pal (Feb 2000); Shobhit Chamar (March 2000), Molai Ram and Santosh (May 2001) and Mahender Nath Das (June 2001). See MHA RTI reply dated 111 September 2008, on file with author.

²³⁰ The petition of R. Govindasamy was rejected by the President in October 1999. He was not however subsequently executed. See MHA RTI reply dated 111 September 2008, on file with author.

²³¹ Personal e-mail communication with Mr. Gandhi, on file with author

²³² Initially Govindasami challenged the rejection of his petition in the Madras High Court and the court stayed the execution. This was however rejected by an order on 25 Jan 2000 and a next date for execution was fixed for 16 March 2000 after a division bench confirmed the order and the Supreme Court refused to admit an

petitions rejected by President Narayanan, his tenure ended in 2002 without a single execution in the five years. Given his own personal views on the death penalty, President Narayanan would have certainly been glad to see a hiatus on executions in the country, yet as is clear this is not something that appears to have been planned or schemed by him.

Why did the BJP led NDA government chose to stay the execution of Govindasami, soon after they recommended rejection of his petition to the president, is unclear? There were certainly a number of appeals from influential persons opposed to the death penalty across India.²³³ It is arguable that the Karunanidhi led DMK government in Tamil Nadu (also a constituent of the NDA) may have also played a role in convincing the NDA to stay the execution. A major role was certainly played by various groups against the death penalty led by the People's Union for Civil Liberties (PUCL), Tamil Nadu which sent a fact-finding team to gather more details about the crime and the social context in which it was committed. With the help of the report a PUCL lobbying team in Delhi was able to convince four ministers of the NDA government to appeal to the MHA for commuting the sentence.²³⁴ The Government stayed the

appeal. A further 15 days stay was however granted on 14–15 March 2000 after various appeals were sent to the government. Unconfirmed reports suggest that the execution was indefinitely stayed by the MHA subsequently as it was decided to relook at the mercy petition. It is not clear whether President Narayanan had any role in the suspension of the execution.

²³³ Appeals were sent by former Supreme Court judge V R Krishna Iyer, former Chief Justice of India PN Bhagwati, social activist Baba Amte, Rajya Sabha member Kuldip Nayar and others. See 'People in the Erode dist send mercy petitions for Govindasamy', *Indian Express*, 21 March 2000 at <http://www.expressindia.com/news/ie/daily/20000322/ina22022.html>. (last accessed 31 March 2009)

²³⁴ These were Defence Minister George Fernandes, Power Minister Rangarajan Kumaramangalam, Parliamentary Affairs Minister Arun Jaitley and Law Minister Ram Jethmalani. See V. Suresh and D. Nagasaila, 'Campaign to Commute A Death Sentence—Random Reflections', *PUCL-TN/Pondicherry Booklet on Death Penalty*, Kodaikanal: October 2000.

execution but no second mercy petition in this case was forwarded by the NDA government to President Narayanan till the end of his term, or even their term of office.

APJ Abdul Kalam was the next President of India (2002–2007) and he inherited the eight mercy petitions kept pending by his predecessor.²³⁵ In November 2003, he received his first petition from Home Minister Advani in the MHA.²³⁶ In the last days of the NDA term, four more petitions were forwarded to the President between April–May 2004.²³⁷ However the BJP did not forward the mercy petitions with advice to the President in the Rajiv Gandhi assassination case although the file had been in the MHA since 2000.²³⁸ This case can perhaps be more easily explained by partisan-politics influencing clemency decision-making.

This flurry of forwarded petitions all advising rejection of the petition did not however intimidate President Kalam who appears to have continued where President KR Narayanan left off and therefore took no action on the thirteen files pending with him till the end of the NDA term of office. When the UPA Government took up office

²³⁵ *Supra*. See also annexure III. Some have suggested that the number was higher but this does not appear to be the case.

²³⁶ Sheikh Meeran and two others. See also annexure III

²³⁷ S.B. Pingale (April 2004), Dharmendra Kumar and Narendra Yadav (April 2004), Suresh and Ramji (April 2004) and Om Prakash (May 2004). See also annexure III. Given that these petitions had been lying in the MHA over the past few years, this was certainly a last-minute attempt by the NDA government to dispose these petitions before leaving office.

²³⁸ The Governor of Tamil Nadu M. Fathima Beevi in April 2000 rejected petitions of three of the accused but commuted the sentence of Nalini on the advice from the Tamil Nadu cabinet headed by Chief Minister M. Karunanidhi. The Governor had previously rejected petitions of all four prisoners in October 1999 but changed her recommendation second time around after the initial rejection was set-aside by the Madras High Court (*infra*). It was also reported that Nalini’s commutation was influenced by Congress (I) president (and widow of Rajiv Gandhi). Sonia Gandhi’s support to Nalini’s petition. The main ground for commutation was avoiding orphaning Nalini’s seven-year-old daughter. See ‘Motherhood and mercy’, *The Hindu*, 28 April 2000

the case of Dhananjoy Chatterjee was creating a stir in the MHA with the prisoner having been on death row for over ten years due to official negligence. With a large number of petitions filed by him or on his behalf, a final summary for the President was prepared by the MHA, signed on 1 July 04 by the Home Minister Shivraj Patil. President Kalam rejected the mercy petitions on 3 August 2004. It was widely reported that President Kalam was opposed to the death penalty in principle and that he also consulted the Attorney General to discuss the case and see if there was any way out.²³⁹ There is however no indication in the Chatterjee mercy petition files of any move by President Kalam to send the case back to the MHA for reconsideration. Chatterjee was executed on 14 August 2004 in Kolkata.

Following the norm of new regime providing fresh advice on pending appointments and other matters, the UPA Government resubmitted all the thirteen petitions to President Kalam between April 2005 to August 2005.²⁴⁰ In addition from April through September 2005, the MHA also sent the fresh mercy petition of Govindasami (June 2005) and the petition in the Rajiv Gandhi assassination case (June 2005) along with five more petitions.²⁴¹

By end September 2005 there were therefore twenty petitions pending with the President, all of which carried recommendation for rejection. The first public indication that Kalam was dissatisfied with

²³⁹ President Kalam is reported to have met Attorney General Milon Banerjee on 6 July 2004. See 'Dhananjoy case: Kalam consults Attorney General', *The Hindu*, 7 July 2004

²⁴⁰ These included the eight petitions kept pending by President Narayanan and the five petitions submitted by the NDA Government to President Kalam. One report suggests that the President sent the petitions back to the MHA however that is incorrect. See Ritu Sarin, 'Beg your pardon, Mr. President?' *supra*.

²⁴¹ The five new petitions were Sushil Murmu (April 2005), Laliya Doom and Shivilal (May 2005), Simon and three others (May 2005), Devender Pal Singh (August 2005) and Praveen Kumar (Sep 2005). See annexure III.

the existing system of death sentences and clemency came during his lecture at the National Police Academy in Hyderabad on 15 October 2005 where he reportedly deviated from the official text and went into the issue of why there were only poor people on death row.²⁴² Only a few days later, on 18 October 2005, President Kalam addressed a letter to the MHA asking for a review of the twenty pending mercy files on the basis of new yardsticks prepared by him.²⁴³ The last of President Kalam’s public statements on the death penalty was on 26 October 2005 when in response to a question about his letter to the MHA, he is reported to have called for a ‘comprehensive policy on the death penalty after all aspects relating to it and mercy petitions were discussed in Parliament.’²⁴⁴ These views do not appear to have much influence in the MHA or the Government since another two more petitions were forwarded to him for rejection in 2006 and one more in 2007—taking the tally to 23 pending petitions.²⁴⁵ However a rare petition advising commutation was also forwarded to him—the first since 1998—and President Kalam authorized the commutation for Kheraj Ram on 29 September 2006.²⁴⁶

Given President Kalam’s various concerns about the death penalty, his rejection of the petition in Dhananjay Chatterjee’s case in 2004 is

²⁴² ‘Why only poor on death row?’ *The Times of India*, 18th October 2005

²⁴³ V Venkatesan, ‘Presidential Dilemma, *supra*. Another report notes, ‘Officials familiar with the correspondence say the files came back in three bulky bundles. The president had carefully catalogued the cases and given suggestions on possible remedial and rehabilitation methods the Home Ministry could adopt. Kalam is understood to have named specific convicts who had crossed 75, or belonged to the poorest strata of society, or for whom there was no scope of recidivism.’ See Ritu Sarin, ‘Beg your pardon, Mr President?’ *supra*.

²⁴⁴ SK Dhawan, *President APJ Abdul Kalam: Day-by-Day Historical Study*, Abhi Books, Delhi: 2007, Volume II at 260.

²⁴⁵ Kunwar Bahadur Singh and Karan Bahadur Singh (Jan 2006), Jafar Ali (August 2006) and Gurmeet Singh, (May 2007). See also annexure III.

²⁴⁶ Mercy petition of Kheraj Ram s/o Cheema Ram, Rajasthan, File no. 14/4/2003—JC, MHA.

jarring.²⁴⁷ Why did he not even send the file back for reconsideration as he was empowered to? Although some have suggested that he may have made an exception in this case, his personal views on the death penalty appear fairly universal. His former secretary notes: 'Kalam had always maintained that he wouldn't like to give an order to take away a life since he was in no position to give a life.'²⁴⁸ Perhaps President Kalam was influenced that the petition was previously rejected by President Shankar Dayal Sharma previously and therefore he could not or should not send it back it again for reconsideration.²⁴⁹ Regardless there is no doubt that President Kalam had a well known way out: that of not taking a decision, a tactic he has subsequently adopted. Instead his assent to the rejection allowed the execution of Chatterjee to take place ending a 6–7 year period without any hangings.

Another controversy around mercy petitions and President Kalam arose with respect to Afzal Guru's mercy petition. This was largely a controversy that appears to have been created for politicking both by the BJP and the Congress. Under constant attack from the BJP, the Congress government not keen to execute Afzal Guru for various reasons often took refuge under misinformation. One blatantly false claim was that the decision was that of the President and not the

²⁴⁷ One writer suggests that Kalam 'seemingly concurred with the view that grant of pardon to the rapist-killer of West Bengal would suggest indifference to the public outrage over the gravity of his crime.' V Venkatesan, 'Death as Penalty', *Frontline*, Volume 21 (7), 14–27 August 2004

²⁴⁸ PM Nair, *The Kalam Effect: My Years with the President*, Harper Collins, Delhi: 2008, at 103–104.

²⁴⁹ It is a moot point of law and constitutional propriety whether one President would be bound by the reconsideration vide Article 74(1) sought by another. Another related question would be the exact definition of 'reconsideration' under Article 74(1). It is not quite clear whether an omnibus letter or memo of the nature sent by Kalam would amount to seeking reconsideration of advice or whether only one official noting sending the file back to the MHA would count.

Government.²⁵⁰ The second claim of the Congress party was that the decision was delayed by President Kalam before whom the petition was pending.²⁵¹ A recent and successful strategy of the Congress however has been to counter-attack the BJP for not doing enough to reject petitions and execute during their term in the centre.²⁵² President Kalam however did not indicate his personal views on the case or how he would have dealt with a rejection.²⁵³

Like his predecessor, President Kalam also left a legacy of petitions behind for his successor Pratibha Patil. Only now the list of pending petitions had grown from eight to twenty-three. In addition a further case was forwarded to President Patil advising rejection in 2007, and another two again with recommendations to reject in 2008.²⁵⁴ Although her personal position on capital punishment is not known, in November 2007 President Patil returned one of the mercy petitions pending since 2004 to the MHA for reconsideration.²⁵⁵

²⁵⁰ Although a claim that would work better with uninformed public, it was used even in Parliament. See the statement by Congress MP and spokesperson Abhishek Manu Singhvi in the Rajya Sabha on 27 November 2006: ‘(W)e do not stand for compulsory acquittal and we do not stand for compulsory mercy. The application has to come either from the family or from the accused or the convict. It has to go to the Home Ministry; the Home Ministry has to refer it to the prosecuting State. That does not mean that Afzal should be let off or that he should be hanged. *Let the President decide*’ (italics added). <http://164.100.24.167/rsdebate/synopsis/209/27112006.htm> (last accessed 31 March 2009)

²⁵¹ Soon after he left office former President Kalam clarified in an interview that he had never received the papers relating to this case. ‘I didn’t get any papers on clemency to Afzal Guru’, *India Today*, 5 September 2007. Information available from the MHA corroborates this as it indicates that the petition is still under consideration with the Government. MHA RTI reply, *supra*.

²⁵² ‘Advani to blame for delay in Afzal hanging’, *The Hindu*, 25 November 2008

²⁵³ Fali S Nariman writes that Kalam was being politically savvy by not revealing his views on the case of Afzal Khan (sic, Guru), see foreword pp. xi-xii in PM Nair, *The Kalam Effect*, *supra*.

²⁵⁴ Saibanna (Sept 2007), Sonia and Sanjeev (Feb 2008) and Satish (July 2008). See annexure III.

²⁵⁵ Mercy petition of Om Prakash. MHA RTI reply dated 11 September 2008 notes that the case is being examined in consultation with the Government of

Such a move augurs well for the future as it suggests that she does not see her role as President to merely rubber-stamp executive decision on petitions and provides hope that she would exercise her limited powers to the fullest possible extent.

Limited Maneuverability

During his tenure, President Kalam publicly raised concerns about discrimination and the class composition of condemned prisoners. He followed this with a call to the Government for a ‘comprehensive policy’ on mercy petitions and the death sentence after a debate in Parliament.²⁵⁶ Senior lawyer and scholar, AG Noorani criticised this plea arguing, ‘The clamour for clarity and certitude does not reckon with the complexities of crime and of the power of pardon, subjects of criminal law and constitutional law to which the colossal erudition unfortunately did not extend. No country has ‘a comprehensive policy’ on the subject. In the very nature of things discretion must remain unfettered.’²⁵⁷ More importantly, the episode shows the limited space for the President to manoeuvre and be able to influence policy without overstepping the boundaries. One manner that has become common with respect to mercy petitions and ending executions is that of not disposing the petitions at all. It is clear that the ‘no decision’ approach by both Presidents Narayanan and Kalam does not overstep any constitutional limits.²⁵⁸ Lawyer Fali Nariman

Uttaranchal. Om Prakash alias Israel Lakra is believed to be a juvenile. See the legal proceedings in this case, see Amnesty International India and PUCL, ‘Lethal Lottery’, *supra* at pp 105–106.

²⁵⁶ ‘Kalam for policy on death penalty, pardon’, *The Tribune*, 26 October 2005

²⁵⁷ Although Noorani’s comment is appropriate for clemency, it appears that the President’s reference to comprehensive policy may have been referring to a broader policy on capital punishment and not merely on clemency alone. Since the unprepared statement was made in response to a journalist’s question and the exact text of the reply is unclear, such harsh criticism may not be completely warranted.

²⁵⁸ See also the views of former Law Minister and Senior Advocate Shanti Bhushan.

points out that time runs in the President’s favour and President Giani Zail Singh had also used this tactic to great advantage with the Post Office Bill during his tenure.²⁵⁹ Although far from ideal, it is an understandable tactic given the tightrope that Presidents must tread along with the limited powers available to them.

On a subject as controversial as the death penalty the hiatus of executions resulting from this tactic allows space for examination and discussion on the feasibility of doing away with the punishment in its entirety.²⁶⁰ Even if that seems too far-fetched; delay would certainly provide the particular prisoners another shot at commutation of sentence by the judiciary. The law is now settled that delay in disposing of mercy petitions could be a factor in favour of commutation (*supra*). Even though the Supreme Court did not lay down any fixed time-period some of the petitions have been pending since 1998 and will certainly fall within the ambit of delayed disposal.²⁶¹ Yet on the flip side such delay and uncertainty also causes severe trauma for the condemned prisoner.²⁶²

The task of a conscientious President concerned about sending people to the gallows is made no easier by the fact that he is under-

http://news.bbc.co.uk/2/hi/south_asia/6066764.stm (last accessed 31 March 2009)

²⁵⁹ Fali S. Nariman, ‘The Silences in our Constitutional Law’, *supra*.

²⁶⁰ Some commentators have however suggested that rather than such broad political goals, delaying assent by the Presidents was largely to avoid their own headache, See Ritu Sarin, ‘Beg your pardon Mr. President’?, *supra*

²⁶¹ See the judgment of the Supreme Court in *Smt. Triveniben v. State of Gujarat*, (1988) 4 SCC 574

²⁶² One writer who met with the three men on death row since 1998 for the assassination of Rajiv Gandhi writes, ‘They have reached a stage where they say, ‘Please do something to end this agony at the earliest if you can, or let us be hanged.’’ Thiagu, ‘Waiting for the Hangman’s noose’, *Combat law* at http://www.combatlaw.org/information.php?article_id=1121&issue_id=39 (last accessed 31 March 2009). Afzal Guru has also reportedly stated, ‘I really wish L K Advani becomes India’s next prime minister, as he is the only one who can take a decision and hang me. At least my pain and daily suffering would ease then.’ ‘Let me be hanged’, *Deccan Herald*, 9 June 2008.

equipped to deal with oft complicated petitions.²⁶³ A study of archival petitions shows clearly the laudable analysis by Rajendra Prasad whose legal background may have saved the lives of many condemned prisoners. Writing in his autobiography, albeit not in the context of mercy petitions, former President Venkataraman notes, 'I wondered what a President without legal training would do in such cases ... he could hardly distinguish between evidence and hearsay... If he relied on his secretary who oftentimes was an administrative officer and not one trained in law, his advice could not be of much value.'²⁶⁴ Although Venkataraman was writing in the context of the discretionary power of the President in deciding on sanction to prosecute the Prime Minister, similar concerns would remain in clemency cases. The burden on the President may be lighter in clemency cases since these are not discretionary decisions and he receives the note and recommendations from the Ministry of Home Affairs, yet given that the Presidential assent virtually sends the convict to the gallows, the petition can hardly be rejected without application of mind.

A final check by the President becomes all the more important given the fact that the initial proceedings on mercy petitions in the MHA is undertaken by fairly junior and legally inexperienced staff and the Additional/Joint secretaries as also the Home Minister who recommend a final decision to the President may not have the skills or training to analyze complicated criminal law questions.²⁶⁵

²⁶³ The President is only assisted by a single IAS officer who serves him as a constitutional, legal and procedural advisor. See James Manor 'The Presidency', in Devesh Kapur and Pratap Bhanu Mehta ed., *Public Institutions in India*, Oxford University Press, New Delhi: 2007

²⁶⁴ R Venkataraman, 'My presidential years', *supra* at 420

²⁶⁵ Presently the initial note on the case is prepared by the Section Officer/ Ad-hoc dealing assistant. This is then seen by the Director (Judicial)—an officer of the Central Secretariat Service not necessarily legally qualified. The file is then seen by the Joint Secretary (Judicial) and the Additional Secretary (CS) before going to the Home Secretary. All these officials are likely to be members of the Indian

Over a century ago in 1907, an official of the Home Department noted similarly, ‘I have on more than one occasion pointed out that it is impossible for a Government department to deal adequately with findings of fact in appeals of this kind. The gentlemen who note upon them [mercy petitions] have not always had sufficient judicial experience to be able to express an opinion of value.’²⁶⁶

An illustration of the dangerous implications of inexperienced advisors is the case of *Henry Westmuller Roberts*. In this case one of the notes prepared by the MHA official stated: ‘[s]ince the Convict was arrested on 10–4–75 he has completed 14 years of imprisonment (including pre–trial detention) and if his death sentence is commuted to life imprisonment, he *will* be released immediately’.²⁶⁷ Such a conclusion was completely incorrect as the release on the completion of 14 years is the prerogative of the government and cannot be claimed as a right by the convict. The error was not corrected by the Additional and Joint secretaries as it went up the chain and it was clear that the incorrect information played a role in the rejection of the prisoner’s petition and his eventual execution.

CONCLUSION: THE WAY FORWARD

This study sought to examine the operation of clemency for those sentenced in capital cases in India—in particular the complexity of decision making on mercy petitions within the government apparatus as also the review of such decisions by the judiciary. With

Administrative Service and may not be able to appreciate the finer points of criminal law. Personal conversation of the author with officials in the MHA dealing with mercy petitions.

²⁶⁶ Noting dated 4 March 1907 by HE Richards, File no. Home (Judicial) 373/23, NAI

²⁶⁷ Noting by PS Ananthanarayanan, Under Secretary, dated 14 June 1989 in Mercy petition of Henry Westmuller Roberts, File no. 9/6/85—Judl, MHA. Italics added.

little research available about the clemency process in India and hampered by the opaqueness of these processes, it is only possible to provide a limited view. No doubt the government must have a wide space within which to operate, given the very nature of clemency and guidelines must be general enough to allow for that. Yet opaqueness is not a solution since concerns of arbitrariness and partisanship cannot be ignored.

The study also examined the role and powers of the President in decision-making on mercy petitions. One commentator has suggested that in present practice the President is being asked to submit to the opinion of an Additional/ Joint Secretary in the Department of Justice & the Home Minister in their individual capacities since the Council of Ministers headed by the Prime Minister does not collectively apply its mind on most mercy petitions.²⁶⁸ A similar view was taken in Nalini's case in November 1999 by the Madras High Court which set aside the rejection of the mercy petition by the Governor on the grounds that the advice of the council of ministers had not been received by the Governor. Although the State pointed out that the petition was forwarded to the Governor by the Chief Minister who held the office of the Minister of Home Affairs in the State and as per the Tamil Nadu Government Business Rules, mercy petitions were not required to be brought before the entire council, the High Court ruled that the entry in the business rules

²⁶⁸ V. Venkatesan, 'Death Penalty: The Presidential Dilemma', *supra*. Although this argument is constitutionally suspect, it is however factually correct as a senior bureaucrat makes the effective decision. E.g. In the mercy petition of Jayaprakash the notes prepared by the Under Secretary and Joint Secretary recommend commutation. However another noting by US(J) on 29-4-88 ends such a possibility stating: 'This was discussed with AS (J) who directed that he view in this case should be to reject the mercy petition. A revised summary is placed below.' There does not appear to be any stated reason why the Additional Secretary decided on this course of action—the summary was merely changed to reflect his views and subsequently accepted by HM and President. File no. MHA (Judicial) 9/10/85, MHA.

could not do away with the constitutional requirement.²⁶⁹ This was an incorrect reading of the law by the High Court as it ignores the very role and nature of the Rules of Business and the principle of collective responsibility of the council of ministers.²⁷⁰ At the central level too, the Government of India (Transaction of Business) Rules, 1961 and the Government of India (Allocation of Business) Rules, 1961 divide the functions and powers of the council of ministers between various ministries and departments for effective functioning. A recommendation of the Minister of Home Affairs is therefore a recommendation of the council of ministers.²⁷¹ This principle was also upheld by the Supreme Court in *Samsher Singh*.²⁷²

Another suggestion mooted to reduce partisanship is to make clemency a discretionary power of the President—outside the purview of the council of ministers.²⁷³ In his autobiography former

²⁶⁹ *Nalini and 3 Others v. The Governor, State of Tamil Nadu and 4 others*, 2000 (1) Current Tamil Nadu Cases, 28. The order in Nalini’s case was given by Justice K. Govindarajan on 25 November 1999. Curiously two months later on 25 January 2000, this very argument was raised before the judge in another similar case where a prisoner’s petition had been rejected by the President. Here however ruled the other way on the same point. *Govindasamy v. The President of India, Government of India, New Delhi and 7 Others*, at para 26.

²⁷⁰ In fact such a reading of the law would need to set aside all the decisions on mercy petition as in none of the cases researched did the advice from the entire council of ministers. Even in exceptional cases including that of Kehar Singh, the decision was taken by the Cabinet and not the Council of Ministers. Note by JA Kalyanakrishnan, Home Secretary dated 20 December 1988 in the mercy petition file of Satwant and Kehar Singh, *supra*.

²⁷¹ Article 75(3) of the Constitution also notes, ‘(t)he Council of Ministers shall be collectively responsible to the House of the People.’

²⁷² See para 30–31, *supra*. In 2006, the Supreme Court summarily dismissed a petition that sought recognition that the President/ Governor had the power to decide the mercy petition irrespective of the decision of the council of ministers. See ‘Mercy Powers of President’, *Indian Express*, 11 July 2006.

²⁷³ One author notes that the *potential* for independent Presidential action has come to be recognized in the exercise of his powers to grant mercy to convicted prisoners. See Sudhir Krishnaswamy, ‘Executive and Legislature Separation: Full or Partial?’ *Halsbury’s Law Monthly*, October 2008 at <http://www.halsbury.in/executive-and->

President Venkataraman writes, 'Kehar Singh's case raised a few queries in my mind. First, should not the President have discretion to examine any extenuating circumstance and alter the death sentence without the advice of the government? How else can prejudice or partisanship be prevented?'²⁷⁴ It is arguable that even without such drastic change; the President can influence the Government by fulfilling his role to be consulted, to encourage and to warn. President Narayanan further adds, '[t]he success of the Constitution ultimately depends not merely on legal interpretations of its provisions but the wisdom and far sightedness of those at the helm of affairs...'²⁷⁵

On the other end of the spectrum are those who believe that the Courts provide a solution.²⁷⁶ Many thus argue that to end the partisanship of mercy, it should be required that the courts be consulted before a grant of mercy. While preparing the new CrPC in the early 1970s, the Government sent the Criminal Procedure Code Bill, 1970 to the Law Commission for its views. In its 48th report, the Commission suggested, 'It is our view that in order to

Legislature-separation-full-or-partial.html (last accessed 31 March 2009). Some jurists have claimed that this is already the case and the presidential power is already 'unfettered'. The former Chief Justice of India PN Bhagwati argues, 'the president has absolute powers of deciding on a mercy plea and he is not bound to listen to the advice of the Home Ministry.' See, Ritu Sarin, 'Beg your pardon Mr. President', *supra*. This argument however appears untenable given the pronouncements of the Supreme Court discussed previously.

²⁷⁴ R. Venkataraman, *My Presidential Years*, at 249–250. President Venkataraman's motives are however not only to prevent prejudice. He continues, '(a)bsence of such a power unnecessarily brings blame to the President. Only jurists understand that the word 'President' is a shortened form for the central government'. Although a tad selfish, there is an element of truth in it since the common belief is that the President decides on mercy cases. Moreover politicians too encourage this view as it is often advantageous to them. See for instance the statement by Congress MP Abhishek Manu Singhvi in the Rajya Sabha on 27 November 2006, *supra*.

²⁷⁵ KR Narayanan, 'The President's role and responsibility in the Constitution', at 6.

²⁷⁶ For a strong endorsement of increased judicial review, see Ranjeev C Dubey, 'Hang Clemency', *Business World*, 6 November 2006

avoid any appearance of arbitrary action, to remove any suspicions of political consideration and otherwise in the interests of justice, such consultation [with judges] should, by a statutory provisions, be made compulsory in the case of all [clemency] powers exercised under the existing sections.²⁷⁷ The report further notes that although this would not affect the constitutional clemency powers, ‘it is in our view desirable that the same practice should be adopted for exercising similar powers even under the Constitution.’²⁷⁸

No requirement of consultation in clemency powers was however included in the new CrPC, 1973.²⁷⁹ This was not altogether surprising since previously its report on capital punishment (1967) the Law Commission rejected the plea for executive consultation with the High Court or Supreme Court before grant of mercy arguing that it went against the very nature of mercy jurisdiction.²⁸⁰ Again in its 41st report on the CrPC the Law Commission had rejected the MHA’s suggestion that the executive be required to consult the appropriate judge before granting a ‘free pardon’.²⁸¹

Some jurists including former Justice Krishna Iyer are in favour of a high-level advisory board to advise the executive.²⁸² However even consultation with any advisory committee was opposed by the 1967 report which argued that consultation with the President could already consult with the Attorney General if required.²⁸³ A

²⁷⁷ Law Commission of India, 48th Report, *Some questions under the Code of Criminal Procedure Bill, 1970*, 1972 para 46–47.

²⁷⁸ It is pertinent to note that the Commission decided to give its views suo-moto and the Government had not sought views on this provision, suggesting that it was not even considering such addition.

²⁷⁹ With respect to remission and suspension however, section 401 CrPC 1898 already had a provision authorizing consultation with the Court that sentenced the prisoner and this was continued in CrPC 1973

²⁸⁰ Law Commission of India, 35th Report, *Capital Punishment*, September 1967 at 332

²⁸¹ Law Commission of India, 41st Report, *Code of Criminal Procedure*, September 1969 at 249

²⁸² VR Krishna Iyer, *Leaves from my personal life*, at 216.

²⁸³ Law Commission of India, 35th Report, at 332 and 335 respectively

drastic suggestion is that the constitutional and statutory mercy powers should be taken away from the executive and given to the judiciary.²⁸⁴ Former President Venkataraman supported this view (albeit excluding in death sentences) arguing that ‘the conditions prevailing in the country’ require that this power of review should vest with the judiciary and not with the President i.e. the executive.²⁸⁵

Would such a transfer of clemency power to the judiciary really achieve the objective desired? Given the judiciary’s own well documented problems with arbitrariness in sentencing in capital cases, there is no reason to believe that judicially administration of clemency would fare any better. This paper also attempted to provide an insight into the complicated relationship between the judiciary and the executive on the issue of mercy petitions. Although judicial review is meant to and should combat arbitrary and discriminatory decision-making in clemency proceedings, past experience has been disappointing. This is particularly visible where petitions have been rejected by the State (see the discussion on *Kehar Singh* and *Dhananjay Chatterjee* supra). On the other hand, the recent past has seen an increased interventionist approach by the Supreme Court where commutation orders were issued by Governors. When the reluctance of the Court to intervene in *Kehar Singh* etc and *Dhananjay Chatterjee* is contrasted with the eagerness to quash commutation orders in *Satpal*, *Swaran Singh* and *Epuru Sudhakar*, the problem is further compounded. In effect, the issue of review is not merely of one when the court *can* intervene, but one of where it *chooses* to intervene. On the face of it, it would appear that the court is willing

²⁸⁴ This was the practice followed by some princely states in the past. Mr. Mahomed Sheriff, the member from Mysore State in Constituent Assembly noted, ‘So far as Mysore is concerned, His Highness the Maharaja has rarely exercised this prerogative (mercy). Everything is left to the High Court. He does not interfere at all.’ Debates of the Constituent Assembly of India—Volume IV, <http://parliamentofindia.nic.in/ls/debates/vol4p14.htm> (last accessed 31 March 2009)

²⁸⁵ R Venkataraman, *My Presidential Years*, at 250

to take on the executive where it grants clemency, but unwilling to intervene where it rejects petitions.

It is naïve to expect the removal of arbitrariness and partisanship by making clemency a judicial power. Further given the absence of any substantive review or check on the Supreme Court it would be inadvisable to completely transfer executive exercise of clemency to the judges. In this past decade, the Supreme Court has already (and completely incorrectly) attempted to end remission powers of the executive with respect to ‘lifers’ despite the unambiguous statutory grant of such powers to the executive.²⁸⁶ Given other recent ‘tough on crime’ approaches of the Supreme Court generally with respect to punishment and sentencing, it is arguable that executive clemency despite its evils *may* offer a more rational and constructive approach than the ‘independent’ and ‘blind justice’ of the judiciary.²⁸⁷ Where the executive falls prey to arbitrariness and partisanship, the judiciary already has the power to intervene and must indeed do so.

The above is not however an argument for preserving the status-quo, which clearly has its own problems. One mode of making the procedure more transparent would be to make public the MHA’s existing guidelines on the issue and even provide reasons in writing for the final decision on a petition. Although no judicial review of the decision *per se* is possible, a reasoned decision would also

²⁸⁶ See for instance the move by the Supreme Court to create a new punishment of ‘life imprisonment without possibility of release’ in its judgment dated 22 July 2008 in *Swamy Shraddananda @ Murali Manohar Mishra vs. State of Karnataka*, Criminal Appeal No.454 of 2006. For the series of cases leading to this judgment, see Bikram Jeet Batra, ‘Life imprisonment and powers of remission’, *The Hindu*, 9 October 2005.

²⁸⁷ Given that activists and academicians have been long and validly suspicious and concerned about arbitrary and whimsical executive action, even such a suggestion may be drastic. Yet the thought must be seen in the context of the particular manner in which the judiciary in India has acted with respect to issues of rights and class and in particular in diluting criminal procedure over the past decade.

indicate whether all the relevant material was placed before the President or not and how it was treated.²⁸⁸ In *Dhananjay Chatterjee* (supra), the briefs prepared for the President provided an inaccurate and incomplete view of the ten-year delay in execution as official negligence was ignored. It is arguable that President Kalam would have sought reconsideration of the opinion by the MHA had he been made aware of this point. Had a reasoned decision (without any mention of delay) been made public, it would have been sufficient for the Supreme Court to intervene on the grounds that relevant material was not placed before the President.

A Clear Trend towards Abolition?

In the early-mid twentieth century, the colonial British Government of India was averaging 550 executions annually.²⁸⁹ From 1941–1944 over 700 persons were executed each year. Most of these were ‘ordinary’ murder cases and pre 1937 mercy petitions in such cases would have been decided by the Home Department at the Centre or the Provinces without even a reference to the Viceroy. It was only in the few ‘political’ cases that the matter was discussed ‘in Council’. Rejection of petitions was the norm and commutation the exception. One mercy petition forwarded by the Government of Bombay was sent without any of the case documents but only a news-clip from the ‘Times of India’ newspaper containing a report of the trial. After this was received and queried in the Home Department, a noting by one RBD dated 28 April 1917 records that this was ‘In accordance with their practice in cases tried on the Original Side of the Bombay High Court. Although this case led to an amendment in the mercy

²⁸⁸ Given developments with respect to the right to information, it is arguable that much of this information although initially denied by the Government, may be available upon appeal vide the RTI act itself.

²⁸⁹ 8240 persons were executed from 1926 to 1940, F no Home (Public) 1/22/46, NAI

petition submission instructions to the provincial governments, the Home Department rejected the mercy petition on that evidence alone.²⁹⁰

Even after enactment of the Government of India Act, 1935, executions were the norm. The attitude towards mercy petitions is visible from the paper trail. The procedure in decision-making involved the Law Member sending his opinion directly to the Viceroy where he believed the case should be rejected. Only in cases where he was recommending commutation, was the petition sent to the Home Member to get his opinion as well. The trend of large percentage of rejecting mercy petitions continued from the colonial government to independent India as well. There was no improvement in the procedure followed within this ministry after independence.²⁹¹ If anything, it got more complicated when commutation was being considered—now the file went from the Law Minister to the Home Minister through the Home Secretary before it finally went for orders to the Governor-General. Where rejection was planned, the file went straight from the Law Minister to the Governor General.

It is the normalcy and ordinariness of the process executing hundreds of people every year that is striking today, but this view is informed by over sixty years of the international human rights movement. Over the past six decades, a regular and ‘ordinary’ mercy petition has now become an extra-ordinary affair. Where sending hundreds of persons to the gallows was not even a consideration in that era, today each judicial execution in India is carried out under the glare of the press and would raise continuing protests. While

²⁹⁰ See File no. Home Department (Judicial A), May 1917, Proceedings no. 118–122, NAI

²⁹¹ Noting by RN Banerjee, Secretary dated 20 September 1947 records, ‘I see no objection to the old practice continuing’. This was assented to by the Home Minister in a subsequent noting. File no. Home (Public—B) 67/6/47, NAI

Table 1 Mercy Petitions commuted and rejected by the President, 1965–2006

<i>Period</i>	<i>Total Petitions disposed</i>	<i>Committed (no. of petitions)</i>	<i>Petitions rejected</i>	<i>Commutation %</i>
1948–1954	1430	341	1069	23.85
1955–1964	2083	601	1482	28.85
1965–1974	1034	543	491	52.51
1975–1984	173	52	121	30.05
1985–1994	45	4	41	8.88
1995–2006	9	2	7	22.22

Source: Information in rows 3–6 is from the annexure in the reply by S. Regupathy, Minister of State in the Ministry of Home Affairs on 29 November 2006 to Rajya Sabha Unstarred Question No. 815 by S.S. Ahluwalia. Information in rows 1–2 is collated from Annexure I, *infra*.

post-independence executions did reduce dramatically from the colonial peaks in the early 1940s, the numbers were still significantly high. As the statistics on disposal of mercy petitions in the annexes reveal, from 1947 till 1964 well over a hundred persons were being executed annually.²⁹² The figures for the next four decades however show a remarkable decline.

The dramatic downward slide in persons being executed (petitions being rejected) in every decade since 1965 is obvious and striking. To put it in a clear perspective, of the (at least) 3507 persons who

²⁹² Annexure I. It is difficult to know the exact number of persons executed in Independent India as the figures available and referred in this study only refer to petitions rejected. A petition may involve a number of people. Here each petition is presumed to be only one person—the very minimum and figures of (minimum) execution arrived at accordingly. The actual number of persons executed may however be much higher.

appear to have been executed in India since 1947, nearly 81% or 2847 persons were executed between 1947 and 1964.²⁹³

The executive too has begun to take the disposal of matter of clemency petitions more seriously. Where in the early decades after independence, the recommendation of the Ministry of Home Affairs was given by the Minister in the MHA (equivalent to the present Minister of State); by 1966 it was the Home Minister who was taking the final call on sending a person to the gallows. Till recently it was the rare ‘political’ case (Kehar Singh etc) that went to the cabinet or the Prime Minister, but in the present context there is no doubt that the next execution can only take place with the consent of the Prime Minister and after discussion in the Cabinet.²⁹⁴ After executing only once in the past 11–12 years, the decision to resume executions will not be one taken in ordinary course but a significant political statement.²⁹⁵ Despite the limited powers and scope for action

²⁹³ A breakup of executions in 1947 (pre and post independence) is not available. It is likely however that most of the executions that took place in the year were prior to 15 August 1947 as the Government of India had declared an amnesty for prisoners in celebration of Independence. As per the amnesty instructions, all death sentences awarded before 3 August 1947 or subsequently until 16 August 1947 should be commuted to a sentence for transportation for life except in cases where the person was convicted of offences connected with communal disturbances. Although these instructions were only binding on the military and the chief commissioner territories, copies were also sent to all provincial governments for action on similar lines if they ‘see no objection’. Letter dated 3 August 1947 from GV Bedekar, Deputy Secretary in the Home Department, Government of India to the Chief Commissioners of Delhi, Ajmer–Mewara, Coorg, Andaman & Nicobar and Panth Pidloda. File no. Home (Jails) 7/6/47, NAI.

²⁹⁴ Although Dhananjay Chatterjee’s petition does not appear to have been formally discussed in the Cabinet, there is little doubt that the eventual decision to reject the petition was taken by the Home Minister upon instructions from above. This case was also politically sensitive since it was from West Bengal whose ruling party; the CPI-M was also an ally in the central United Progressive Alliance.

²⁹⁵ See table 1 *supra*. Although there is a reference to 7 petitions being rejected between 1995 and 2006, six of those persons were executed between 1995 and 1997. The sole person to be executed after that was Dhananjay Chatterjee in 2004.

available to them, this may be perhaps one of the most underrated legacies of President Narayanan and Kalam.

The issue at stake thus is no longer the law, practice or procedure of clemency but instead the broader issue of the death penalty in India. The decline in mercy petitions rejected and executions also correlate to the reduction in death sentences confirmed by the Supreme Court (see table 1, *supra*). The trend is noticeable and the conclusions inescapable even if all the reasons for such a decline may not be known. Like most other nations, India too is slowly but inevitably moving away from the death penalty. This gradual move is sometime shrouded by the constant rhetoric on the death penalty by the leading political parties as also the occasional passing of new laws that allow for the death sentence to be awarded, but the reducing numbers of mercy petitions rejected and the executions not carried out tell their own tale.

Another indicator of the trend away from executions and the death penalty is the high number of mercy petitions that are pending and awaiting adjudication. As annexure IV shows, 28 petitions (involving 50 condemned prisoners) were pending a final decision in the centre as of 21 November 2007. This has grown steadily from the one petition that was pending at the start of 1998.²⁹⁶ With four petitions now pending between the MHA and the President for over a decade and another nine having completed nine years awaiting decision on their petition, a crowded death row is inevitable. The statement in Parliament by former Home Minister Patil that a clemency petition ordinarily takes 6–7 years to dispose suggests that this trend is unlikely to change.²⁹⁷

It is beyond the scope of this study to examine the mental health impact on condemned prisoners of such lengthy delays.²⁹⁸ However

²⁹⁶ See Annexure II for year-wise pending and disposal of petitions.

²⁹⁷ 'Can't rush through Afzal petition, Patil tells Oppn', *Indian Express*, 14 December 2006.

²⁹⁸ There is now growing acceptance of prisoners suffering from 'death-row syndrome'

in terms of the impact on clemency policy, given the judgment of the constitutional bench of the Supreme Court, it would appear that many of the prisoners on death row would have their sentence commuted on the grounds of the extremely lengthy delays in the disposal of their mercy petitions.²⁹⁹ Such a petition in the courts may however, depending on the bench hearing the case, also become a decisive battleground between the Supreme Court and the executive over the death penalty. Although it would be difficult for the Court to refuse to intervene where mercy petitions of the particular prisoners have been pending for 9–10 years, there is a possibility that the Supreme Court may also lay down a mandatory period within which mercy petitions are to be decided.

As discussed previously, the issue of a time-based decision had indeed come up in the early 1980s when the Supreme Court suggested a maximum of three months self-imposed rule for the executive to dispose a petition. Subsequently however the Court backtracked from setting a time limit and merely noted that executive delay in disposal of mercy petitions would be a factor in judicial commutation. However much has changed since then and what may have been considered inappropriate action or stepping on the executive’s toes then, may now be acceptable to the Supreme Court.³⁰⁰ Until such a case comes before the Court, the possible ruling remains a moot point. Much would depend on the constitution of the bench and the views of the individual judges who hear the case. Undoubtedly however the status-quo and the crowded death row cannot continue for much longer and whichever way the Supreme Court decides will certainly begin a new chapter in the executive-judiciary relationship in clemency and also impact India’s broader policy on the death penalty.

²⁹⁹ See the judgment of the Supreme Court in *Triveniben*, *supra*.

³⁰⁰ A ‘public interest’ petition seeking time-bound dismissal of mercy petitions was however summarily dismissed by the Supreme Court in 2007. ‘Mercy appeals: Plea in court, hearing on hold’, *Indian Express*, 21 June 2007.

As this paper goes to print in April 2009, India's Home Minister P Chidambaram in response to a interviewer's question of fixing time limits for deciding mercy petitions responded that there was 'the larger issue that death penalty itself be replaced with life sentence without parole.'³⁰¹ This statement is not unsurprising since the MHA has previously given indications of such thought.³⁰² It further recommended the same in the most recent death sentence commuted.³⁰³ Given that the Supreme Court itself has also recently argued for whole life sentences as an effective replacement for the death penalty,³⁰⁴ this may well be the common ground between the executive-judiciary that will avoid confrontation and deal with the delay question. It will however replace the controversial death penalty with the equally controversial 'whole life' sentence.

³⁰¹ See the interview with P. Chidambaram, 'Government is not soft on terror', *The Hindu*, 10 April 2008 at <http://www.hindu.com/2009/04/10/stories/2009041055950900.htm> (last accessed 10 April 2008)

³⁰² See Bikram Jeet Batra, 'Dangerous Amendments to IPC on the cards?' *Indian Express*, 15 July 2005

³⁰³ The undated summary for the President signed by Home Minister Shivraj V Patil while recommending commutation notes, 'I also recommend to the President that no benefit of remission, under any law for the time being in force, may be available to the condemned prisoner.' Mercy petition of Kheraj Ram, *supra*.

³⁰⁴ See the judgment of the Supreme Court in *Swamy Shraddananda*, *supra*.

ANNEXURE I

Details Of Mercy Petitions Commuted And Rejected
By The President, 1947–1964

<i>Year</i>	<i>Total petitions disposed</i>	<i>Petitions commuted</i>	<i>Petitions rejected</i>
1947	283	7	276
1948	167	23	144
1949	217	43	174
1950	183	46	157
1951	195	75	120
1952	164	41	123
1953	263	58	205
1954	221	55	166
1955	199	45	154
1956	192	68	124
1957	200	80	120
1958	175	48	127
1959	257	56	201
1960	263	47	216
1961	262	88	174
1962	188	62	126
1963	153	41	112
1964	194	66	128

Notes: 1. From 1947—Jan 1950, the Head of State was the Governor General

2. Details from 1947–1956 are excerpted from an internal note of Ministry of Home Affairs titled ‘Abolition of Capital Punishment in India’. **Source:** Ministry of Home Affairs (Judicial II), 1961, File no. 14/7, National Archives of India

3. Details from 1957–1961 are excerpted from an internal note of Ministry of Home Affairs titled ‘Abolition of Capital Punishment in India’ dated 3 August 1962 and prepared by LM Nadkarni, Joint Secretary. **Source:** Ministry of Home Affairs (Judicial II), 1962, File no. 19/61, National Archives of India
4. Details from 1962–1964 are excerpted from a file noting by Gulzar Singh, Under Secretary, Ministry of Home Affairs, dated 19 February 1965. **Source:** Ministry of Home Affairs (Judicial II), 1962, File no. 19/61, National Archives of India—New Delhi

ANNEXURE II

Disposal of Mercy petitions by the President, 1980–2006

<i>Year</i>	<i>No. of petitions/cases pending at the beginning of the year</i>	<i>Additions during the year</i>	<i>MPs decided in the year</i>
1980	–	7	0
1981	7	5	1
1982	11	9	0
1983	20	7	23
1984	4	6	5
1985	6	10	0
1986	16	6	0
1987	22	3	0
1988	25	4	29
1989	–	6	4
1990	2	3	4
1991	1	2	3
1992	–	3	3
1993	–	–	0
1994	–	6	3
1995	3	–	3
1996	–	5	2
1997	3	1	3
1998	1	3	0
1999	4	9	0
2000	13	–	0
2001	13	1	0

<i>Year</i>	<i>No. of petitions/cases pending at the beginning of the year</i>	<i>Additions during the year</i>	<i>MPs decided in the year</i>
2002	14	1	0
2003	15	4	0
2004	19	4	0*
2005	23	1	0
2006	24	—	1**

Source: Information in Columns 1–3 is from the annexure in the reply by S.Regupathy, Minister of State in the Ministry of Home Affairs on 6 December 2006 to Rajya Sabha Unstarred Question No.1547 by S.S.Ahluwalia. The information in column 4 has been inferred from column 2 and 3.

* Petitions filed by Dhananjay Chatterjee in 2004 were tagged in the MHA on to the older petitions filed by him in 1993–94 and thus tabulated in 2004. ** The sentence of Kheraj Ram was commuted.

ANNEXURE III

Mercy Petitions pending at central level, as on 21 November 2007

<i>S. Name of condemned prisoner/s No.</i>	<i>Date of receipt from the State Government/ Pending for disposal</i>
1 Piara Singh, Sarabjit Singh, Gurdev Singh and Satnam Singh—Punjab	2003*
2 Shyam Manohar, Sheo Ram, Prakash, Suresh, Ravinder and Harish—U.P.	1998
3 R. Govindasamy—Tamil Nadu	1998
4 Mohan and Gopi—Tamil Nadu.	1999
5 Murugan, Santhan and Arivu—Tamil Nadu	2000
6 Jai Kumar—Madhya Pradesh	1999
7 Mahender Nath Das—Assam.	2000
8 Sheikh Meeran, Selvam and Radhakrishnan—Tamil Nadu	2000
9 Shobhit Chamar—Bihar	1999
10 S.B. Pingale—Maharashtra	2001
11 Dharmender Kumar and Narendra Yadav —U.P.	1999
12 Dharam Pal—Haryana	1999
13 Molai Ram and Santosh—Madhya Pradesh	2000
14 Suresh and Ramji—U.P.	2002
15 Devender Pal Singh—Delhi	2003
16 Om Prakash—Uttaranchal	2003 **
17 Praveen Kumar—Karnataka	2004
18 Simon, Ghanaprakash, Madaiah, Bilavendra. —Karnataka	2004

<i>S. Name of condemned prisoner/s No.</i>	<i>Date of receipt from the State Government/ Pending for disposal</i>
19 Kunwar Bahadur Singh and Karan Bahadur Singh—U.P.	2005
20 Sushil Murmu—Jharkhand	2004
21 Lai Chand, Shivlal—Rajasthan	2004
22 JafarAli-U.P.	2006
23 Mohd. Afzal—Delhi	2006 **
24 Gurmeet Singh, Uttar Pradesh	2006
25 Satish, U.P.	2007
26 Saibanna, Karnataka	2007
27 Sonia & Sanjeev, Haryana	2007
28 Bandu Baburao Tidake, Karnataka	2007 **

Source: Annexure in reply dated 27 November 2007 by Shrimati V. Radhika Selvi, Minister of State in the Ministry of Home Affairs to part (a) of Lok Sabha Unstarred Question No. 1565 by Raghuvir Singh Kaushal

* In this particular case some of the prisoners were tried and sentenced to death earlier while the others were still absconding. The petitions relating to a few prisoners are therefore pending since November 1997.

** These cases were pending in the MHA on 11 September 2008 (vide MHA RTI reply, on file)

