

DEATH PENALTY: NATIONAL AND INTERNATIONAL PERSPECTIVE (2010). By Thrity D. Patel and Rohini A Mahurkar. Cehrra Publication, 001, Konark Apartment, Khare Town, Dharampeth, Nagpur - 440010. Pp. 416. Price: Rs. 600.

THE DEATH penalty has been a feature of criminal punishment throughout human history. One would think that human society had long ago come to terms with the penalty's moral and existential implications. Contemporary debate over the death penalty reveals, however, the extent to which nations and peoples disagree about core issues such as human rights, the right to life, and the rule of law, especially in the context of the death penalty. Emotions often run high in this debate, limiting the scope of rational discourse. Well-researched, factually rich, deeply reasoned works are needed to provide the means for rational exchange of ideas and views, and indeed numerous books have been published to that end in Europe, the United States, and elsewhere.¹ Thrity D. Patel and Rohini A. Mahurkar² attempt to bring this ongoing discussion to bear upon the issue of the death penalty in India, a timely topic as Indian jurists continue to debate the death penalty's efficacy, the "rarest of rare" doctrine, arbitrariness, and executive pardon. Although a few chapters of *Death Penalty: National and International Perspective* provide an introduction to controversial questions about the death penalty in India, the book fails to bring the debate current or to explore the subject adequately.

"The aim of this book," as stated in the preface, "is to make students, teachers, law professionals and also the lay person...to understand...issues relating to the death penalty" (p. ix). The intended audience is, consequently, very broad and aspires to include readers highly trained in the law as well

1. See, for example, Austin Sarat and Jürgen Martsschukat, *Is the Death Penalty Dying: European and American Perspectives* (Cambridge University Press, 2011) and Hugo Adam Bedeau and Paul Cassell, *Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Case* (Oxford University Press, 2005).

2. Thrity D. Patel and Rohini A Mahurkar, *Death Penalty: National and International Perspective* (2010).

as those with little, or even no, training. The scope of the book is equally broad, including sections on the generic history of the death penalty, and cursory treatment of selected religious perspectives, a glossary of modes of execution, a survey of the death penalty in India. The final section of the book presents an international perspective on the death penalty. The combination of the broad aims and the three-part organizational framework of the book yields mixed results. One might even say that there are basically three “books” in this single volume: one on the generic history of the death penalty, a second on some death penalty decisions and issues in India, and a third, on selected international contexts involving capital convictions and application of the death penalty. Additionally, the three sections of the book are effectively written for three audiences, with the historical section written at the level of the layperson, the section on India written largely for readers with some legal training, and the section dedicated to international perspectives reading mostly as a law school textbook. While any one of these three books may appeal to the appropriate audience, their inclusion in a single volume creates an unevenly written work, rather than a holistic treatment of the subject.

Following an introduction that places the question of the death penalty within the context of theories of punishment, the authors attempt to cover its history from ancient times to the modern era in a mere sixty-two pages. From the historian’s perspective, the first section evidences defects in research and methodology, as well as delivery. The historical narrative reads as a collection of general observations about how selected societies and religions viewed the death penalty, but without the factual basis and guidance necessary to allow the reader to draw independent conclusions. For example, the “Jain” perspective receives a scant ten lines, without any source references. A second historical sub-section follows, focusing on modes of execution, substantially borrowed from the *187th Report on Mode of Execution of Death Sentence and Incidental Matters*, produced in 2003 by the Law Commission of India. This sub-section is essentially a list of the manifold ways in which societies can, and have, taken life as punishment for crimes. Many items on the list are merely definitional, thus, “flaying is removal of skin from the body,” and “disembowelment (evisceration) is the removing of some or all of the vital organs, usually from the abdomen.” With the exception of a few more developed entries such as “electrocution” and the “gas chamber,” little historical development is provided, leaving the reader to wonder what the purpose of the section is. Again, the cited source material is on the whole unhelpful,

since, as stated in the book, “material in this sub-section is largely taken from ‘Modes of Executing Capital Punishment,’ Wikipedia, the free encyclopedia, 2008.” No URL or other guidance is offered to retrieving the Wikipedia entry; consequently, the reviewer could not confidently reproduce the authors’ research.

The historical section of the book may be reduced to two simple propositions. First, the death penalty has been applied throughout human history by many societies, often in connection with religious belief. Second, there is a long list of ways in which societies have practiced the death penalty throughout history, but the trend in recent times seems to move toward increased humaneness.

In the following chapters (4 to 7) the authors demonstrate the book’s main value, namely, as an introductory survey of capital punishment and the death penalty in India. Chapter 4, “National Perspective,” traces the history of capital punishment in India principally from the Indian Penal Code, 1860, to the more recent past, focusing on a line of Indian cases as to criminal procedure and the death penalty. Chapter 5, “Constitutional Validity,” focuses upon the substantive rights derived from article 21 of the Constitution of India, such as the right to life and the right to personal liberty. The authors present basic information relative to the “rarest of rare” doctrine in this chapter, beginning with *Bachan Singh v. State of Punjab*³ and concluding *Attorney General of India v. Lachma Devi*.⁴ Unfortunately, no subsequent cases dealing with the “rarest of rare” doctrine are addressed. It would be interesting to learn the authors’ perspective on recent, arguably landmark, “rare of the rarest” cases,⁵ but they are not mentioned. Chapter 6 addresses the judicial perspective on the death penalty within the context of an inherent incongruity between the right to life and the death penalty. Beginning with the case of *Jagmohan Singh v. State of Uttar Pradesh*⁶ through the end of the *de facto* moratorium created in *Dhananjoy Chatterjee alias Dhana v. State of West Bengal*,⁷ the authors trace the outlines of this inherent incongruity, concluding that,

3. (1982) 3 SCC 24.

4. 1989 Supp (1) SCC 264 : 1989 SCC (Cri.) 413.

5. See *Swamy Shbraddananda @ Murali Manobar Mishra v. State of Karnataka*, AIR 2008 SC 3040 or *Santosh Kumar Satishbbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498.

6. AIR 1973 SC 467.

7. AIR 1995 SCW 510.

“life is too precious that no one should be killed even by the state” (p. 287). It may have been useful for the authors to comment that there has been a strand of public opinion that has demanded that the death sentence be introduced for crimes such as terrorism and rape; it is already the maximum sentence in many other laws, some of them recent laws. It would also have been useful to state briefly the concept of “rarest of rare” cases. In Chapter 7, the final chapter of the section on death penalty in India, the pardoning power of the President of India is addressed, with the conclusion that this power “is firmly established under the Constitution of India...a hallmark of a well developed system of criminal jurisprudence and is justified on humanitarian grounds” (324). Chapters 4 through 7 stand out for their topical coverage, the increased use of quoted sources, some citation of divergent authority, relevance, and are recommended to readers interested in a brief survey introduction.

The concluding chapter of the book, fifty-six pages in length, presents limited international perspectives on the death penalty. It moves quickly into a summary of post-World War Two international agreements and conventions that bear upon the issue, starting with the 1948 United Nations Universal Declaration of Human Rights, moving through the 1966 International Covenant on Civil and Political Rights and the 1989 Second Optional Protocol on the ICCPR, the 1989 UN Convention on the Rights of the Child, the Third and Fourth Geneva conventions of 1949, and into regional conventions such as the 1969 American Convention on Human Rights and the 1981 African Charter of Human and People’s Rights. The analytical and observational aspects of this portion of the final chapter provide some guidance via numerous quoted references from the texts of these conventions, and help the reader draw their own conclusions relative to the claim that the nations of the world are moving toward abolition of the death penalty. There has been debate over extradition issues of an Indian from Europe which does not support the death penalty. In that sense those opposed to the death penalty find Europe a more useful reference than the United States of America.

This section also contains a very brief discussion of the death penalty in the USA and in England. The section on the United States (about seven pages in length) seeks to cover the death penalty principally through summary of selected U.S. Supreme Court case law and in light of the Eighth and Fourteenth amendments. The section is weakened by conflicting conclusions as to the application of the death penalty in the United States:

“the death penalty is being sparingly used [in the United States]” (p. 357), and, “the death penalty is retained and frequently imposed in the USA” (p. 364). The case law summary ends with *Ring v. Arizona*,⁸ which focused upon a defendant’s right to a jury in the context of capital trials. Unfortunately, the book fails to include a critical line of recent cases that shed light upon the claim that the U.S. may be leaning toward abolition of the death penalty, and which incorporate many of the above-cited international conventions. Two cases in particular deserve not only mention in the book, but a prominent place in the discussion: *Atkins v. Virginia*,⁹ and *Roper v. Simmons*.¹⁰ Both cases follow an Eighth Amendment rule first stated in *Trop v. Dulles*:¹¹ “[T]he words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society (at p. 101, *emphasis added*). In *Atkins*, the U.S. Supreme Court invalidated the death penalty as applied to the mentally retarded, and in *Roper* it invalidated the penalty as applied to juveniles. Although the restriction of the scope of the penalty’s application alone should be of interest to the authors, it is the growing reference to international law in *Atkins* and *Roper* that merits attention in the book. Justice Kennedy, writing for the majority in *Roper*, noted that, “It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.” (*Roper*, 1200). Increased U.S. Supreme Court reliance upon international law, including many of the conventions mentioned in the book such as the ICCPR and the Convention on the Rights of the Child, argue for at least passing reference in a section dedicated to the death penalty in the United States.

In conclusion, out of the three “books” presented on the death penalty in this volume, the middle chapters of *Death Penalty: National and International Perspective* focusing upon capital punishment in India, despite the defects in other sections, may prove informative and instructive by way of a brief introduction to the subject. Unfortunately, readers will

8. 536 U.S. 584 (2002).

9. 536 U.S. 304 (2002).

10. 543 U.S. 551 (2005).

11. 356 U.S. 86 (1958).

have to wait for the up-to-date and detailed analysis, the subject death penalty in India deserves.

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