

Arbitrariness in Capital Sentencing System: No Disappearance of *Furman*-Like Challenge

Dr. Arvind P. Bhanu¹

Abstract

Even after *Bachan Singh*, the death penalty system has failed to erase the element of arbitrariness completely. From awarding to execution, the death penalty system has time and again been mechanized but the discriminatory treatment has been found on many occasions. The issue herewith is not of abolishment or retention of the capital punishment, but to trace out the situation where the death penalty system can be put on the wheels which can stop if there is a place of arbitrariness. Before four decades, in America the same challenge was meted out in *Furman* but it is still persists there too. It indicates that the efforts to eliminate the discriminatory element in the system have remained in vain. Can someone expect death penalty administration system free from all arbitrariness? is a question to be calculated. Both the systems are still making efforts to evolve a line whereupon the capital sentencing system can be administered equally. Is it a valid argument that the reliance should be made on long development and it should be presumed that it is not possible that death can be sent through the non-arbitrary dimensions? Here, the issue is required to be seen in comparative manner with a view to take down the developments and evaluate the perspectives of the death. The helpless conclusion adhered by many jurists that there is no option other than that of the death permanently be invalidated not on the grounds of moral philosophy but on the Constitutional justifications is finding place or not, is among other issues, this paper wants to evaluate.

Keywords: *death penalty, arbitrariness, discriminatory*

Introduction

In 1980, when landmark guiding ruling in *Bachan Singh v. State of Panjab* came, it was appeared that the discretionary power which might produce arbitrary feature in awarding death sentence, got ended in India.

¹ Associate Professor of Law, IIMT & School of law, GGSIP, University, Delhi, India.

But, later developments going through *Ravji alias Ramachandra v. State of Rajasthan* (1996) and other, have clearly shown that the grey area is still in existence giving space to arbitrariness¹. Post-awarding death proceedings are encompassing areas which have been unguided till very recent. Going through *T. V. Vatheeswaran v. State of Tamil Nadu* (1983), *Sher Singh v. State of Punjab* (1983) and *Triveniben v. State of Gujarat*, (1989), the discretions on the part of the executive are still unbridled- a feature of negation of rule of law.

In United States, *Furman v. Georgia* (1972) sent the message to almost everyone around the Country that the arbitrary imposition of the death penalty has been ended. Each of the five Justices in majority wrote individual opinions with differing reasoning relying upon the arbitrary imposition of the death penalty and concluded that the imposition of the death penalty is unconstitutional under the Cruel and Unusual Punishments Clause of the Eighth Amendment. It is emphatic that the common thread through each of the Justices' opinions was their concern with the arbitrary imposition of the death penalty. However, the view in *Furman* could not sustain for a long and the struggling efforts for erasing the arbitrariness from the capital punishment system rang the bell again after four years in *Gregg v. Georgia* (1976). The imposition of death was reinstated. The Supreme Court upheld the constitutionality of Georgia's new death penalty statute, believing that it eliminated the possibility of arbitrariness. However, a review of the current status of the death penalty in United States reveals that many factors are leading to *Furman*-like challenge to the death penalty.

Pre- 1996: No Negation of Grey Area: Reasoning and Measures

Prior to 1996- year in which *Ravji alias Ram Chandra* was decided, *Bachan Singh* had led two things. One was death penalty as an exception not as general rule and other a mechanism to achieve a balance between judicial discretion and individualized sentencing. The Court invented this mechanism to reach the *rarest of rare* cases by balancing the aggravating and mitigating circumstances appended to crime as well as criminal. Consequently, a surety from the Court that due compliance to the provisions of 235(2)² and 354 (3)³ of the Criminal Procedure Code has been done. The '*rarest of rare*' principle as a finding tool was believed that with reference to this, the capital sentencing justice could be rooted in human rights jurisprudence.

However, it could not erase gray area as it depended on the interpretation of individual judge and it is an acknowledged fact that the death penalty is 'barbaric', 'anti-life', 'undemocratic' and 'irresponsible', but it is legal ("Death penalty is barbaric", 2011).

In 1983, a new qualification of mandatory death penalty as unconstitutional was added in *Mithu v. State of Punjab* (1983). The Supreme Court grounded its reasoning that if any provision stops the application of 'rarest of rare' tool, it is unconstitutional since it completely cuts out the judicial discretion. The provision can not be said to be just, fair and reasonable within the meaning of Article 21⁴ of the Constitution. The 'rarest of rare' doctrine is regulator of judicial discretion but not the interpretation of individual judge. The principle followed in many cases has been uneven and inconsistent leading to criticism that the jurisprudence suffers from judge-centric rather than a principle-centric approach. In *Bachan Singh*, an approach through balance sheet theory in weighing the aggravating and mitigating circumstances was proposed before the Court of Law. The Court, by five-judge bench rejected the same. The theory required weighing aggravating factors of crime against the mitigating factors of the criminal. In *Machhi Singh v. State of Punjab* (1983), however, a three judge –bench, brought the balance sheet theory back, and gave it legitimacy. The theory has held the field post- *Machhi Singh*.

***Furman*: A Foundation of Fact**

In *Furman*, the Court was concerned that the unique punishment of death must not be imposed in an "arbitrary and capricious manner" because the Constitution would not tolerate a system where the penalty was "so wantonly and so freakishly imposed. The history of Cruel and Unusual Punishments Clause reviewed by various scholars shows that it derived from the English Bill of Rights, but noting Framers did not provide even a little interpretation of its meaning. In the more than 150 years between the ratification of the American Bill of Rights and *Furman*, the Court only decided ten cases providing any interpretation of the Clause *Powell v. Texas* (1968) et al. These cases provided little interpretation of the Amendment and noted the difficulty in defining the provision with exactness. Therefore, the justices in majority in *Furman* had little Eighth Amendment precedent to rely upon in declaring the death penalty unconstitutional. Justice Brennan and Marshall found the death penalty per se unconstitutional based in part on its arbitrary imposition.

Justice Brennan found arbitrariness “virtually inescapable” in a punishment inflicted in a “trivial number of cases in which it is legally available” (*Furman v. Georgia* 1972, p. 293). It was concluded that “Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison” *Furman v. Georgia* (1972, p. 305). Justices in this case based their decision on the arbitrary imposition of the death penalty. One of the justices also noted that the death penalty was applied “sparsely, selectively, and spottily to unpopular groups,” specifically African Americans, the poor, and the ill-educated. Over all the justices found arbitrariness in the capital punishment system and stretched eighth amendment doctrine to invalidate the death penalty statutes unconstitutional throughout the Country.

The Court in *Gregg*, reasoned that the new statute would direct the jury's attention to “the particularized nature of the crime and the particularized characteristics of the individual defendant,” ensuring a jury could no longer “wantonly and freakishly” impose death sentences, *Gregg v. Georgia* (1976, p. 206-07), but *Furman* was not overruled. It was determination on the part of the Court that the death penalty could be administered in a non-arbitrary manner under the statute. However, a review of the current state of the death penalty in United states reveals that the death penalty is imposed at least as arbitrarily as it was when *Furman* was decided in 1972.

Justice Lewis Powell who voted with the three-Justices in *Gregg* and authored the majority opinion in *McCleskey v. Kemp* (1987) became the first repudiator of the use of the death penalty. On asking, retired Justice Powell replied to his former law clerk John Jeffries⁵ in the summer of 1991 that “yes, I have come to think that capital punishment should be abolished”. ‘Their ‘respective rejections of the death penalty were institutional (and not moral) choices. The experience of these Justices in the Court over the past thirty-five years demonstrates the extreme difficulty in interpreting and applying the Eighth Amendment in a manner that ensures that states’ administration of the death penalty is fair and non-arbitrary. Therefore, the futility of trying to correct the myriad of problems with the States’ use of the death penalty leads to the conclusion that no fruitful remedy exists other than abolishing capital punishment. In *Herrera v. Collins* (1993), *Herrera* sought to prove his innocence by introducing an affidavit signed by his then-deceased brother that admitted to committing the homicide for which *Herrera* was found guilty.

The Supreme Court upheld procedural bars to *Herrera's* claim of actual innocence on habeas appeal. Justice Blackmun again dissented, expressing shock at the decision to foreclose the ability to bring a claim of innocence, even though technically procedurally barred, stating, "Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent" (*Herrera v. Collins* 1993, p. 430). "I have voiced disappointment over this Court's obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please..... The execution of a person who can show that he is innocent comes perilously close to simple murder" (*Herrera v. Collins* 1993, p. 446).

Post-1996: Changing Facets and Interpretations

By amending the framework of *rarest of rare* cases framework in 1996, *Ravji alias Ramachandra* gave a shift in balance theory. The Court said that "it is the nature and gravity of the crime but not the criminal which are germane for consideration of appropriate punishment in a criminal trial" (*Ravji v. State* 1996, para. 25). This was contrary to the binding dictum in *Bachan Singh's* case. In 2009, the Supreme Court made an extra ordinary admission of this error in *Santosh Kumar vs State* (2009) and noted that "We are not oblivious that this case (*Ravji*) has been followed in at least 6 decisions of this Court in which death punishment has been awarded in last 9 years, but, in our opinion, it was rendered *per incuriam* (*Santosh Kumar v. State* 2009, para. 66). The Court in this case has admitted that *Ravji* has been followed in these cases- *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* (2009), *Mohan Anna Chavan v. State of Maharashtra* (2008), *Bantu v. State of U.P.* (2008), *Surja Ram v. State of Rajasthan* (1997), *Dayanidhi Bisoi v. State of Orissa* (2003) and *State of U.P. v. Sattan* (2009). Again in *Dilip Premnarayan Tiwari*, the Supreme Court referred to *Bariyar's* case and held that "We would, thus, follow *Bachan Singh's* case and the principles therein rather than *Ravji's* case", (*Dilip v. State* (2010), para. 43). This error was not about the correctness, or constitutionality or morality of capital punishment. On the basis of such flawed judgment, 13 men were sent to death (Sridevan, 2012). Fourteen eminent retired judges wrote to the President, pointing out that the Supreme Court had erroneously given the death penalty to 15 people since 1996, of which two- *Ravji Rao* and *Surja Ram* on May 4, 1996 and April 7, 1997 respectively were executed in pursuant to these flawed judgments.

The judges called this “the gravest known miscarriage of justice in the history of crime and punishment in independent India” (Kanimozhi, 2013). The Constitutional promise of equality before law suffered a terrible blow when they were executed due to erroneous judgments.

More than three decades after carving out ‘*rarest of rare*’ category of cases warranting award of death penalty, the Supreme Court introduced a new dimension to mitigating factor — poverty to commute a convict’s death penalty to life imprisonment. “Poverty, socio-economic, psychic compulsions, undeserved adversities in life are thus some of the mitigating factors to be considered, in addition to those indicated in *Bachan Singh* and *Machhi Singh* cases (*Sunil v. State* 2013, para. 18). In *Gurvail Singh v. State* (2013), Supreme Court felt that the time was ripe to develop the legal position to be socially more accommodative, while moving a step away from the “principled stand” as propounded in *Bachan Singh*. In 2013⁶, the legislature has expanded the scope of *rarest of rare* principle by including repeat offender/s of offence of rape with a view to deter criminal acts of such nature. This step on the part of legislature has shifted the *rarest of rare* doctrinal value to rule. The first conviction under the said law and the first death penalty in rape case where victim is alive, has been held (“In historic verdict..” 2014). In *Sushil Sharma v. State* (2013), the Court interpreted the ‘*rarest of rare*’ and said that the degree of brutality of a murder alone can not be the criteria for the quantum of sentencing. This is the principle that led the Court to rule that the accused did not deserve the death penalty but life imprisonment in *Naina Sahni murder case*. The accused cut up her body and attempted to burn the pieces in restaurant *tandoor* where the smouldering body was spotted by an alert policeman. The Bench headed by the chief justice observed that this was not a ‘crime against society’ and the appellant had no criminal antecedents. The Supreme Court also refused to give the death penalty in the *Graham Staines*, (*Rabindra Kumar Pal v. Republic of India*, 2011), *Jessica Lal*, (*Sidhartha Vashisht v. State*, 2010) and *Priyadarshini Mattoo*, (*Santosh Kumar Singh v. State*, 2010) murder cases, holding these did not fall within the category of “*rarest of rare*.” It is obvious that the gray area occupied by the dictum could not be erased.

In United States, the attempt of States to provide guidelines was held to be constitutional whereas the mandatory death penalty was struck down in *Grigg*. The debate on application of death penalty and individualized sentencing could not stand still even after the *Gregg*. The death penalty system remained to be evaluated again and again on discriminatory basis.

After his retirement in 1991, Justice Powell continued to work on issues related to administration of death penalty. His work has been a contributory factor of clear repudiation of death penalty in findings of several committees including Steiker Report seeking to improve the administration of capital punishment in United States (Michael, Radelet and Traci, 2009). The Steiker Report documented in detail that the U. S. experience with guided discretion since 1976 has been disastrous and concluded that the death penalty continued to be administered in an arbitrary manner.

Arbitrariness with a New Face

When a person is awarded death penalty by the Apex Court, he is put on death row to be executed. However, he may file a petition before the President or Governor for clemency. Under Indian Constitution there are two provisions contained in Article 72⁷ and 161 which vest the power of clemency with the President and Governor respectively. With this power, it is open to the President to scrutinize the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court in regard to the guilt of, and sentence imposed on the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it (*Devender Pal Singh Bhullar v. State*, 2013, para 45) et al.

However, The Constitution is silent as to the manner in which the Presidential power of mercy is to be exercised. The system follows the Cabinet convention in India, therefore, this power like other powers of the President, is exercised on the advice of the Cabinet. Article 74⁸ of Indian Constitution provides the manner in which all executive powers are to be discharged by the President of India. So the power of clemency is also governed by this provision of the Constitution. The Supreme Court in several cases like *Ediga Anamma v. State of Andhra Pradesh* (1974) et al. has taken a note of arbitrariness in terms of delayed execution and reduced the death sentence to life imprisonment.

In *T. V. Vatheeswaran v. State* (1983), it was held that delay of two years or more in execution of death sentence is liable to be quashed and death sentence was commuted in life imprisonment whereas in same year, the year based criteria was rejected in *Sher Singh v. State* (1983, para., 24) and it was propounded that the substitution of the death sentence by a sentence of life imprisonment cannot follow by the application of the two years' formula, as a matter of "quod erat demonstrandum". Hence, it may not be treated as a rule but unreasonable delay may be taken into consideration in mitigation of the punishment. The above principle has been supported in *Triveniben v. State* (1989, para. 74)⁹ by holding that if there is inordinate delay in execution, the condemned prisoner is entitled to come to the Court requesting to examine whether, it is just and fair to allow the sentence of death to be executed. In *Sunil Batra v. Delhi* (1978), it was said that "True our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after *Cooper* (1970) and *Maneka Gandhi* (1978), the consequence is the same..... Part III of the Constitution does not *part company with the prisoner at the gates*, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority. Is a person under death sentence or under trial unilaterally dubbed dangerous liable to suffer extra torment too deep for tears? Emphatically no, let social justice, dignity of the individual, equality before the law, procedure established by law and the seven lamps of freedom (Article 19) become chimerical Constitutional claptrap". Likewise, a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law, *Bhuvan Mohan Patnaik v. State* (1975).

However, *Devinder Pal Singh Bhullar v. State* (2013) gave a shift in death penalty jurisprudence regarding unreasonable delay that there was a difference in treatment to be meted out to convicts under Indian Penal Code and those convicted under terror laws. But later on, the same was declared *per incuriam* in *Shatrughan Chauhan v. Union of India* (2014) on the ground that the heinousness of the crime is the subject matter to be tackled with reference to *Bachan Singh* whereas after final sentencing to death convict, double imprisonment is violative of Article 21 of the Constitution.

The other aspect, pardon is exercised on the advice of the Centre. Therefore, it is an executive action. Days before her retirement, President Pratibha Patil commuted death sentences of as many as 35 convicts to life — among them were those convicted of murder, kidnapping and rape.

However, she did not look into the other pending cases like *Afzal Guru*, *Santhan*, *Murugan* and *Perarivalan* (who conspired to kill *Rajiv Gandhi*, then Prime Minister) and *Balwant Singh Rajoana*. Presidents¹⁰ like APJ Abdul Kalam, KR Narayanan and Shankar Dayal Sharma formulated their own guidelines on death sentence. This shows that they were influenced by their personal views on the death penalty. The Ministry of Home Affairs is neither required by law to publish a list of pending and processed mercy petitions nor does it have to disclose the reasons tendered by the president. A certain amount of arbitrariness in granting pardons is bound to creep in (Sachar, 2012). *Afzal Guru* was convicted and sentenced to death on August 4, 2005 for the crime of attacking Parliament. He was hanged on February 9, 2013 after seven years and over six years after his clemency petition was made to the President of India on November 8, 2006. Apart from this delay, the rejection of his petition by the President was kept in secrecy and deliberately not communicated to his family. Within a few days after the rejection of his mercy petition, *Afzal Guru*, (*State v. Navjot Sandhu*, 2005) was hanged in morbid secrecy without informing his family and his body was buried in equal secrecy (Andhyarujina, 2014). Recently, a resolution passed by Tamil Nadu State Assembly for presidential clemency for the three death-row convicts in the Rajiv Gandhi assassination case, *Sonia Gandhi* and *Priyanka Vadra* (wife and daughter of Rajive Gandhi respectively) showing extraordinary strength of character for the commutation of the death sentence awarded to *Nalini* and a violent bandh of Punjab on call of *Parkash Singh Badal* in response to the news that *Rajoana*¹¹ was to be hanged, are unfortunate collective pressures and the uneven responses that have added yet another element of arbitrariness to the entire process of capital punishment in India, ("Halt all hangings", 2012).

In many cases, the Supreme Court was requested to issue the guidelines in order to curtail the arbitrary powers. But the Court denied on the ground of the nature of the powers vested under article 72 and 161 of the Constitution. Both the Articles 72 and 161 repose the power of the people in the highest dignitaries, i.e., the President or the Governor of a State, and there are no words of limitation indicated in either of the two Articles. However, in *Maru Ram v. Union of India* (1981) the Constitution Bench did recommend the framing of guidelines for the exercise of power under Articles 72 and 161 of the Constitution. They were mere recommendation and not a *ratio decidendi*.

Now, a new reforming dimension in two cases- *Shatrughan Chauhan .v. Union of India* (2014) and *Murugan v. Union of India* (2014) can be seen as restrictions to the scope of arbitrariness in capital cases on the part of executives. The Court has sent a clear message to the executive not to cause unexplained and inordinate delay. The executive should step up and exercise its time-honored tradition of clemency power one way or the other within a reasonable time. The bench held that "Delay makes the process of execution of death sentence unfair, unreasonable, arbitrary and capricious and thereby, violates procedural due process guaranteed under Article 21 of the Constitution and the dehumanizing effect is presumed in such cases". Solitary confinement is unconstitutional. All the prison Manuals are required to provide necessary rules governing the confinement of death convicts. The Prison Manuals must have the provision for legal aid for preparing appeals or mercy petitions or for accessing judicial remedies after the mercy petition has been rejected. Since it is a fundamental right under Article 21, if convict's mercy petition is rejected, he/she and his/her family are entitled to be informed immediately in writing of the decision. The Court highlighted this fact that though prison manuals provide for informing the prisoner of the rejection of the mercy petition, it is seen that this information is always communicated orally, and never in writing. As in case of *Afzal*, the same was raised at various levels. As far as execution of death is concerned, now it is not possible to execute a convict just after his/her mercy petition is rejected. The Court has ruled that minimum 14 days notice between the receipt of communication of the rejection of the mercy petition and the scheduled date of execution has to be provided to the convict. It is seen that among various prison manuals there is no uniformity. Minimum period of notice was found between one to fourteen days. It is submitted that these two cases are a significant indicator towards a fair administration of death penalty.

Conclusion

No doubt, the measures are still on to curb the arbitrariness in capital sentencing administration system not only in India but the other Countries with capital punishment also. But, *Furman* as a history is repeating itself. It is very much clear by two land mark recent verdicts- *Shatrughan* and *Murugan* that the Supreme Court of India is very far from setting itself on the path to abolition. Also these two cases show an acknowledgement on the part of the Supreme Court signifying that death penalty has to stay in India. As far as *rarest of rare framework* is concerned it is not beyond the fact that the *rarest of rare* history is clubbed in grey area.

Whether it is *Machhi Singh* charged with contrary principle or practical application to *Bachan Singh* is still requiring the explanation in the line of *Ravji*. The fact that the personal convictions of a judge in interpretation while administering the sentence is not ignorable. Further it is seemingly weak to assert that the guidelines in present cases will remove all possibility of arbitrariness on the part of the State in administration of death penalty. Here, the experience of three United States Supreme Court Justices, Powell, Blackmun, and Stevens, occupies the place. However, in the light of the present development in death penalty jurisprudence, the *rarest of rare dictum* is needed to be rewritten.

Notes

1. The label of arbitrariness can not be put on the part of judiciary because it is against the very tenets of Jurisprudence and logic expanded in *Naresh v. State of Maharashtra*, AIR 1967 SC 1, and *A. R. Antulay v. R. S. Nayak*, AIR 1988 SC 1531. However, it could conveniently be called gray area in order to assess hitches. Also see Death penalty is barbaric. (2011, November 16). *The Hindu*, New Delhi. The Supreme Court Judge A.K. Ganguly termed '*rarest of rare*' doctrine evolved in *Bachan Singh* is a grey area.
2. (If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 hear the accused on the question of sentence, and then pass sentence on him according to law).
3. (When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.)
4. (In *Bachan Singh* which upheld the constitutional validity of the death penalty, Sarkaria J., speaking for the majority, said that if Article 21 is understood in accordance with the interpretation put upon it in *Maneka Gandhi*, it will read to Say that: No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law. P. 730)
5. Jeffries has written biography of Justice Powell. Quoted by Michael L. Radelet & Traci L. Lacock. (2009) Do Executions Lower Homicide Rates?: The Views of Leading Criminologists. *The Journal of Criminal Law & Criminology*, Vol.99/No.2/spring, 489.
6. Criminal law (Amendment) Act 2013, section 376-E. provides whoever has been previously convicted of an offence punishable under section 376 or section 376-A or section 376-D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.

7. (l) 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— (c) in all cases where sentence is a sentence of death.
8. (1) There 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: Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.
9. *Triveniben v. State of Gujarat*, (Para17, "...While considering the question of delay after the final verdict is pronounced, the time spent on petitions for review and repeated mercy petitions at the instance of the convicted person himself however shall not be considered. The only delay which would be material for consideration will be the delay in disposal of the mercy petitions or delays occurring at the instance of the Executive".)
10. Before Kalam, 25 mercy petitions, but he disposed only two. Similarly done by Narayanan. Shankar Dayal Sharma rejected all 14 mercy petitions filed before him.(from 1997 to 2007 one mercy petition was decided. From 2007 to 2013, a change was seen. More than 40 petitions were decided out of which 20 petitions were rejected)
11. Balwant Singh Rajoana was sentenced to death for the assassination of then Punjab chief minister Beant Singh in 1995.

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