

amnesty international

A learning curve, towards a 'more perfect world'

World Day against the Death Penalty to cast spotlight on USA

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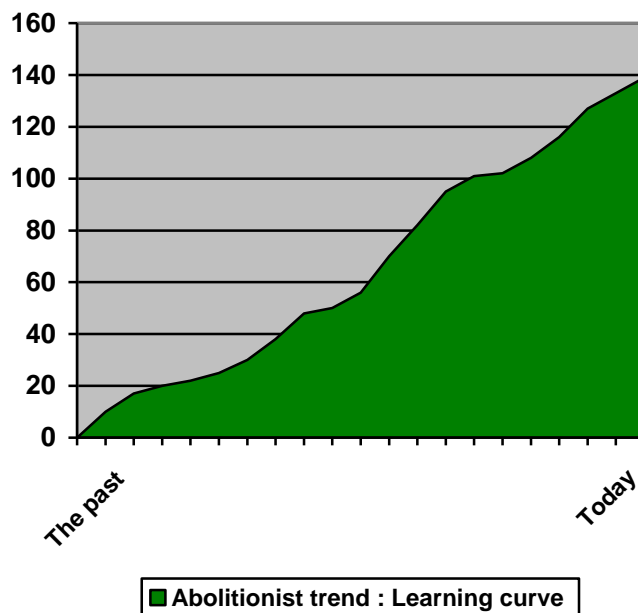
The differences that exist between rich and poor, between good and bad prosecutions, between good and bad defence, between severe and lenient judges, between judges who favour capital punishment and those who do not, and the subjective attitudes that might be brought into play by factors such as race and class, may in similar ways affect any case that comes before the courts, and is almost certainly present to some degree in all court systems... Imperfection inherent in criminal trials means that error cannot be excluded... But death is different, and the question is, whether this is acceptable when the difference is between life and death
Constitutional Court of South Africa, 1995¹

For a clear majority of countries, the death penalty is a thing of the past. They have concluded either that it is unnecessary, or that it is incompatible with modern standards of justice, or both.

While today 139 countries have abolished capital punishment in law or practice, a handful of countries account for a majority of the world's executions. One of them is the United States of America, where more than 1,000 prisoners have been put to death since 1993, a period in which more than 40 countries

(including South Africa in 1997) have legislated to abolish the death penalty. This year the World Day against the Death Penalty – which falls on 10 October – will cast a spotlight on the USA's continuing resort to judicial killing and activists will redouble calls on the authorities there to join the global abolitionist trend.

Another way of looking at this global trend is to view it as a "learning curve".² As countries have learned about the realities of the death penalty – its ineffectiveness, its incompatibility with human rights, and its inescapable risk of irrevocable error – they have turned against it. Some have reached this realization earlier than others, and there have been occasional backward steps, but the trend is undeniably towards eradication of this cruel, inhuman and degrading punishment.



The USA is among the minority of countries that has bucked this positive trend. It resumed executions in 1977 after about a decade without them after the US Supreme Court ruled in *Gregg v. Georgia* that new capital statutes passed by various US states also passed federal constitutional muster.³ Over twelve hundred men and women have been put to death across the country since then, more than 40 of them this year.

During this period, former US Supreme Court Justice John Paul Stevens has been among those who have demonstrated a personal learning curve in relation to the death penalty. In 2008, he revealed that he had decided, after more than three decades on the country's highest court, that the death penalty was a cruel waste of time. "I have relied on my own experience", wrote Justice Stevens, "in reaching the conclusion that the imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes". A punishment with "such negligible returns to the State is patently excessive and cruel", he added.⁴

Since retiring from the Supreme Court in June 2010, he has added to this opinion. In a recent interview with National Public Radio, the former Justice said that there was one vote during his nearly 35 years on the Court that he regretted – his vote with the majority in *Gregg v. Georgia*: "I think there is one vote that I would change and that's one – was upholding the capital punishment statute. I think that we did not foresee how it would be interpreted. I think that was an incorrect decision".⁵

Former Justice Stevens is not the first judge in the USA to have turned against the death penalty during his or her time on the bench, or indeed the only member of the US Supreme Court to do so. On 22 February 1994, nearly two decades after he had voted with Justice Stevens in the *Gregg v. Georgia* ruling, Justice Harry Blackmun announced that he would no longer "tinker with the machinery of death". The USA's experiment with the death penalty had failed, he wrote, and "the basic question – does the system accurately and consistently determine which defendants 'deserve' to die? – cannot be answered in the affirmative".⁶ Justice Lewis Powell, another who had voted for the *Gregg* ruling, after his retirement said that he had "come to think that capital punishment should be abolished".⁷ Given that the *Gregg* ruling was passed by seven votes to two, if Justices Blackmun, Powell and Stevens had voted in 1976 how they later suggested they would have voted had they known how the USA's experiment with the death penalty would turn out, judicial killing would not have been resumed in 1977, if at all.

Learning curves can be detected outside the judiciary too. Half a century ago, the American Law Institute issued its Model Penal Code. Section 210.6 of the code sought to provide legislators in states which decided to retain the death penalty with rules aimed at maximizing fairness and reliability in capital sentencing. The *Gregg v. Georgia* ruling cited provisions of §210.6 in giving the green light for executions to resume. Thirty-three years later, in 2009, the American Law Institute voted to withdraw §210.6 "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment". It noted that §210.6 was "an untested innovation in 1962. Now we have decades of experience with the evolution of American capital punishment systems and capital punishment laws over the last half century".⁸ In assessing whether to withdraw §210.6, the American Law Institute had considered, among other things, the inadequacies of the US Supreme Court's constitutional regulation of the death penalty and of federal habeas corpus review generally, the politicization of the death penalty, racial discrimination, systemic juror confusion in capital cases, the under-funding of defence counsel services, and death sentences against the innocent.

Some politicians, too, have changed their minds on the death penalty. On 18 March 2009, for example, the Governor of New Mexico, Bill Richardson, signed into law a bill that made New Mexico the 15th abolitionist state in the USA.⁹ In a statement, Governor Richardson explained that throughout his adult life he had been a supporter of the death penalty, but that in recent years he had come to the conclusion that its irrevocable nature rendered it an untenable punishment in an imperfect justice system:

"I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime. If the State is going to undertake this awesome responsibility, the system to impose this ultimate penalty must be perfect and can never be wrong. But the reality is the system is not perfect – far from it."

Perfectibility is a theme taken up by the US administration's August 2010 report to the United Nations in preparation for the forthcoming scrutiny of the USA's human rights record under the Universal Periodic Review process at the UN Human Rights Council. The report opens with the following words:

"The story of the United States of America is one guided by universal values shared the world over – that all are created equal and endowed with inalienable rights. In the United States, these values have grounded our institutions and motivated the determination of our citizens to come even closer to realizing these ideals. Our Founders, who proclaimed their ambition 'to form a more perfect Union,' bequeathed to us not a static condition but a perpetual aspiration and mission. We present our first Universal Periodic Review (UPR) report in the context of our commitment to help to build a world in which universal rights give strength and direction to the nations, partnerships, and institutions that can usher us toward a more perfect world".¹⁰

The question for the USA to answer then is this: Is a world without the death penalty more perfect than one with it? If its answer is yes, there is no reason for delay, the authorities across the USA must stop executions and start working for abolition. If its answer is no, then the USA's commitment to human rights is not what it says it is.

"The moral and political debate about capital punishment will continue, as it should", wrote a federal judge in California last month.¹¹ So where is the USA on the death penalty learning curve? It is not where it was two decades ago, with enthusiasm for the death penalty apparently on the wane. The annual number of executions is down by around 50 per cent from its peak in the late 1990s. More tellingly perhaps, the number of death sentences passed each year has dropped by two thirds from their peak in the middle of that decade. In addition, over the past decade the US Supreme Court has ruled that "standards of decency" have evolved in the USA to the extent that the use of the death penalty against offenders with "mental retardation" or who were under 18 years old at the time of the crime was no longer constitutional.¹² These decisions were a long time coming, relative to law and policy in most of the rest of the world. The political branches of government in the USA have it within their power to act against the death penalty a lot more quickly. They should do so now.

The USA's experiment with the death penalty over the past three and a half decades has revealed a capital justice system riddled with arbitrariness, discrimination and error. Indeed, the death penalty is more accurately described as a lethal lottery than the reliable winnowing out of the "worst of the worst" crimes and offenders its proponents claim. How much more has to be shown about the reality of the death penalty before a critical mass of officials in the USA recognizes that the country is engaging in the cruelly "pointless and needless extinction of life"?

On World Day against the Death Penalty, the USA should reflect on its growing isolation in an increasingly abolitionist world and how its continuing resort to judicial killing is impossible to square with its claim to be a progressive force for human rights in the world. Officials around the country should seize the opportunity presented by the general decline in death sentences and executions, and any growing recognition within the population at large of the futility of this punishment, to lead the USA away from the death penalty once and for all.

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¹ *The State v. T Makwanyane and M Mchunu*, 6 June 1995, finding the death penalty unconstitutional.

² The graph is illustrative only, and not an accurate depiction of the timing of abolition by individual countries. For dates in recent decades see <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>

³ *Gregg v. Georgia*, 428 U.S. 153, 2 July 1976.

⁴ *Baze v. Rees*, 16 April 2008, Justice Stevens concurring in the judgment.

⁵ See Justice Stevens: An open mind on a changed court, NPR, 4 October 2010, <http://www.npr.org/templates/story/story.php?storyId=130198344>.

⁶ *Callins v. Collins*, Justice Blackmun dissenting against the denial of *certiorari*.

⁷ Justice Powell was asked in 1991 by his biographer if he would change his vote in any case. He said, "Yes, *McCleskey v. Kemp*." (1987, on racial discrimination and the death penalty, see *Death by discrimination - the continuing role of race in capital cases*, April 2003, <http://www.amnesty.org/en/library/info/AMR51/046/2003/en>). He went on to say, "I would vote the other way in any capital case." Even in *Furman v. Georgia*, his biographer asked. "Yes" and "I have come to think that capital punishment should be abolished." See J. Jeffries, *Justice Lewis F. Powell, Jr.*, page 451 (Scribners 1994).

⁸ Report of the Council to the Membership of The American Law Institute on the matter of the death penalty, 15 April 2009.

⁹ The other 14 are: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The District of Columbia is also abolitionist. The remaining 35 states have the death penalty, as does the federal government and the US military.

¹⁰ Report of the United States of America, submitted to the UN High Commissioner for Human Rights in conjunction with the Universal Periodic Review, August 2010, <http://www.state.gov/documents/organization/146379.pdf>.

¹¹ *Morales v. Cate*, Order granting motion for leave to intervene; and denying conditionally intervenor's motion for a stay of execution, US District Court for the Northern District of California, 24 September 2010.

¹² *Atkins v. Virginia* (2002) and *Roper v. Simmons* (2005) respectively.