AMNESTY INTERNATIONAL

Index: AMR 51/1976/2015 29 June 2015

USA: SUPREME COURT UPHOLDS USE OF EXECUTION DRUG, BUT TWO JUSTICES QUESTION CONSTITUTIONALITY OF DEATH PENALTY ITSELF

Rather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution… I believe it highly likely that the death penalty violates the Eighth Amendment

US Supreme Court Justice Stephen Breyer, joined by Justice Ruth Ginsburg, *Glossip v. Gross*, 29 June 2015

In a five-to-four ruling, the US Supreme Court has upheld the use of midazolam in Oklahoma's three-drug lethal injection protocol.[1] Executions in those states that have adopted this drug, including Oklahoma and Florida, are likely to move to resume executions after pausing in their killing while the decision was pending.

Amnesty International reiterates its call on the political branches of government in all the death penalty states of the USA, as well as at the federal level, to impose a moratorium on executions across the country, with a view to abolishing the death penalty altogether.[2] This is a punishment that should have been consigned to history long ago.

Of particular note in the *Glossip v. Gross* ruling is a detailed dissent written by Justice Stephen Breyer, and joined by Justice Ruth Bader Ginsburg. Between them, these two Justices have more than four decades of experience on the Court. The dissent calls for the Court to hear arguments about the constitutionality of the death penalty *per se*, regardless of execution method. Justice Breyer concludes by revealing that he belives it "highly likely" that the death penalty violates the constitutional ban on "cruel and unusual punishments".

Justice Breyer took his seat on the court in August 1994, replacing Justice Harry Blackmun. Justice Blackmun was one of the Supreme Court Justices who had voted with the majority in *Gregg v. Georgia* in 1976 to allow executions to resume under new capital statutes (the Court had found the old statutes unconstitutional in *Furman v. Georgia* in 1972 because of the arbitrary manner in which the death penalty was being applied).

It took Justice Blackmun some two decades to give up on this "death penalty experiment". In February 1994 he announced that his experience of death penalty cases had led him to conclude that "the basic question – does the system accurately and consistently determine which defendants 'deserve' to die? – cannot be answered in the affirmative". He said that he "would no longer tinker with the machinery of death."

Another two decades on, and his successor appears to have reached a similar conclusion.

> "In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed… Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use".

His 20 years of experience on the Court, Justice Breyer said, have contributed to his current belief that "the death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishment'".

On the reliability question, Justice Breyer pointed to "convincing evidence" found by researchers indicating that "in the past three decades, innocent people have been executed.[3] He also noted the more than 150 cases since

[1] See, USA: Talking killing: Nebraska becomes the 19th abolitionist state as US Supreme Court mulls lethal injection, 27 May 2015, https://www.amnesty.org/en/documents/amr51/1690/2015/en/

[2] See also US / Death penalty: UN experts call for federal moratorium as Boston bomber gets death sentence, 26 June 2015, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16160&LangID=E

[3] He cites the cases of Carlos DeLuna, executed in Texas in 1989, and Cameron Willingham, executed in Texas in 2004.

1973 of people who had been sentenced to death and later exonerated. There would appear to be a "serious problem of reliability" in the application of the death penalty in the USA, he wrote.

On arbitrariness, the dissent points to studies showing that

> "the factors that most clearly ought to affect application of the death penalty – namely, comparative egregiousness of the crime – often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*".

Among possible contributors to arbitrariness, Justice Breyer points to prosecutorial discretion, lack of resources for defence lawyers, political pressures (including on elected judges), as well as "deeply rooted community biases (conscious or unconscious)" which may impact jurors decision making, including on their evaluation of mitigating evidence.

After giving some examples of the length of time prisoners are being held on death row, Justice Breyer noted that "nearly all death penalty States keep death row inmates in isolation for 22 or more hours per day." The "dehumanizing effect of solitary confinement", he continued, is "aggravated by uncertainty as to whether a death sentence will in fact be carried out". The lengthy delays in carrying out the punishment "aggravate the cruelty of the death penalty", he asserted, and "it is not surprising that many inmates volunteer to be executed, abandoning further appeals" or that "many inmates consider, or commit, suicide".

The length of time prisoners are held on death row, the dissent continues, also undermines its purported justifications such as retribution and deterrence. Rightly, he noted that speeding up the time between conviction and execution would undermine the death penalty's constitutionality, including exacerbating the unreliability problem and contributing to procedural unfairness. Without such delays, some of those who have been released from death rows after decades for crimes they did not commit, would likely have been executed.

Justice Breyer pointed to the increasingly "unusual" nature of the death penalty in the USA, and that it has become "increasingly concentrated geographically". He noted that some 30 states in the USA have "either formally abolished the death penalty or have not conducted an execution in more than eight years". In 2014, only seven states conducted an execution – "in other words, in 43 States, no one was executed". He also pointed to the international picture, citing Amnesty International's information among other things. Many countries, he noted, have abolished the death penalty in law or practice.

The last time that the US Supreme Court considered lethal injection, in *Baze v. Rees* in 2008, the then most senior Justice on the Court, John Paul Stevens, revealed that he had concluded that "the imposition of the death penalty represents the pointless and needless extinction of life". In 1976, he had joined the *Gregg* opinion allowing executions to continue. There have been more than 1,400 executions in the USA since then. It is long past time for the USA to stop this punishment.

While Justice Breyer's dissent is a welcome development, we should not have to wait while individual Justices learn from their experience that the death penalty is fundamentally flawed.

The death penalty is a cruel, brutalizing and ineffective waste of resources. It risks irreversible error and inequity. It is incompatible with human dignity. The authorities in Oklahoma and elsewhere should drop their support for the death penalty and work for abolition.