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USA

STILL LETHAL AFTER ALL THESE YEARS

Gregg v. Georgia at 40

[T]he State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings… The fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded
Gregg v. Georgia, US Supreme Court, 2 July 1976, Justice Brennan dissenting

Recognition of the death penalty as a human rights issue has driven resolutions passed in 2007, 2008, 2010, 2012 and 2014 by the United Nations General Assembly calling on retentionist countries to establish a moratorium on executions with a view to abolishing the death penalty.[1] During these years, according to the US Department of State, "a central goal of US foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights". At the same time, more than 330 prisoners have been killed in execution chambers in the USA since 2007.

Every death sentence, and every execution, directly contradicts the USA's stated commitment to the principles of the Universal Declaration and its vision of a world in which the rights to life and freedom from cruel, inhuman or degrading punishment of all people, regardless of who they are or what they have done, are fully respected.

In total, 1,436 prisoners have been put to death in the USA since its Supreme Court approved new capital statutes in *Gregg v. Georgia* on 2 July 1976. More than 8,000 death sentences have been passed during these 40 years. Nearly 3,000 men and women remain on death row today.

In an opinion issued by the US Supreme Court 11 months before adoption of the Universal Declaration of Human Rights in 1948, four Justices noted that the USA had recently "pledged" itself, via the United Nations Charter, "to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion".[2] Three of these four had left the Court by June 1972 when, in *Furman v. Georgia*, it struck down the country's capital statutes because of the arbitrary manner in which the death penalty was being handed out. Justice William Douglas (still the longest serving US Supreme Court Justice in history) was the last of them to remain. He had concurred in *Furman*, quoting a former US Attorney General who had said "It is the poor, the sick, the ignorant, the powerless and the hated who are executed." Justice Douglas added that "One searches our chronicles in vain for the execution of any member of the affluent strata of this society."

Justice Douglas retired on 12 November 1975, four months before the Court heard oral argument on the constitutionality of revised capital laws passed in the wake of *Furman*. How he would have voted if he had still been on the Court for *Gregg v. Georgia* is a matter for conjecture. Perhaps he would have been open to the argument made in Amnesty International's *amicus curiae* brief to the Court that "the United Nations Charter, interpreted through the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights, promotes the humane governance of society and thus, the abolition of the death penalty in the United States".

In the event, only two Justices dissented from the *Gregg* decision which gave a green light for executions to resume after nearly a decade without them – from that day on, Justices Thurgood Marshall and William Brennan

[1] UN General Assembly Resolutions 62/149 of 18 December 2017; 63/168 of 18 December 2008; 65/206 of 21 December 2010; 67/176 of 20 December 2012; and 69/186 of 18 December 2014.

[2] *Oyama v. California*, 19 January 1948.

continued to view the death penalty as unconstitutional. Of the seven judges in the *Gregg* majority, Justice Lewis Powell said after he retired from the Court that he had come to think that the death penalty should be abolished. Justice Harry Blackmun famously gave up on the "death penalty experiment" in 1994 after concluding that "the basic question – does the system accurately and consistently determine which defendants 'deserve' to die? – cannot be answered in the affirmative". He promised to "no longer tinker with the machinery of death." In 2008, the then most senior Justice on the Court, John Paul Stevens, who had also voted with the *Gregg* majority, revealed that he too had concluded that "the imposition of the death penalty represents the pointless and needless extinction of life".

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 the USA in 1977, if at all.

Meanwhile, judicial doubts about the death penalty's constitutionality continue. After two decades on the Court, Justice Stephen Breyer has concluded that it is "highly likely" that the death penalty violates the Eighth Amendment ban on "cruel and unusual" punishment. In *Glossip v. Gross* in June 2015, joined by Justice Ruth Bader Ginsburg, he called on the US Supreme Court to consider that question:

> *"I recognize that in 1972 this Court, in a sense, turned to Congress and the state legislatures in its search for standards that would increase the fairness and reliability of imposing a death penalty. The legislatures responded. But, in the last four decades, considerable evidence has accumulated that those responses have not worked."*

Arbitrariness and error in capital cases, as well as cruelty against the condemned, were among the issues highlighted by Justice Breyer. He suggested that the increasing confinement of the death penalty to a small number of states in the USA, and to a small number of counties within those states, raised questions of arbitrariness "when we consider the Nation as a whole". If prosecutors pursue the death penalty more often than not for a first-degree murder committed in one county, while in the vast majority of counties across the country it is infrequently or never pursued for such crimes, the USA's adherence to its international obligation to prohibit the arbitrary deprivation of life surely comes into question.

The three states whose revised post-*Furman* statutes were upheld in *Gregg v. Georgia* were among those that had based their new sentencing procedures on the Model Penal Code. The latter had been developed by the American Law Institute (ALI); Section 210.6 of the Code sought to provide legislators in states which retained the death penalty with rules aimed at maximizing fairness and reliability in capital sentencing. In 2009, ALI withdrew §210.6 "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment". The three states were Florida, Georgia and Texas. Between them, they account for 48 per cent of executions in the USA since the *Gregg* ruling (694 of 1,436). The geographic bias is deepening. These three states account for 56 per cent of executions carried out since 2007 (212 of 379).

Five US states have abolished the death penalty since 2007 – New Jersey (2007), New Mexico (2009), Illinois (2011), Connecticut (2012) and Maryland (2013).[3] The USA's growing isolation on this human rights issue was expressly noted in these states as their governors signed into law the abolitionist bills passed by the legislatures. By the time of the *Gregg* ruling, 16 countries had abolished the death penalty for all crimes. The total today is 103, with another 31 countries abolitionist in practice (and six more abolitionist for ordinary crimes only).

In *Furman* in 1972, Justice Brennan had noted that "What was once a common punishment has become, in the context of a continuing moral debate, increasingly rare. The evolution of this punishment evidences, not that it is an inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience." In *Gregg* four years later, his fellow dissenter, Justice Marshall concluded by stating:

> "*[T]he taking of life 'because the wrongdoer deserves it' surely must fall, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth. The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty*".

The death penalty is the ultimate cruel, inhuman and degrading punishment and is incompatible with human dignity. To end the death penalty is to abandon a destructive, diversionary and divisive public policy, which not only runs the risk of irrevocable error, but is also costly, to the public purse as well as in social and psychological terms. The death penalty has not been proved to have a special deterrent effect. In the USA, it tends to be applied in a discriminatory way, on grounds of race and class. It rejects the possibility of reconciliation and rehabilitation. It prolongs the suffering of the murder victim's family, and extends that suffering to friends and relatives of the condemned prisoner. It diverts resources that could be better used to work against violent crime and assist those affected by it. Officials at all levels and in all branches of government should work to end the death penalty in the USA once and for all.

[3] Also, in 2007, New Jersey abolished the death penalty and the last death sentence in New York State was commuted, following a 2004 court ruling that its capital law violated the state's constitution.