



Time to do something, Mr President

After Oklahoma's 'botched' execution, a call for human rights leadership

The State party should engage with retentionist states with a view to achieving a nationwide moratorium
United Nations Human Rights Committee, to the USA, 23 April 2014

Quite what long-term impact the recent “botched” execution in Oklahoma will have on support for the death penalty in that state and the USA more generally remains to be seen. What does seem clear is that, without principled, energetic and concerted human rights leadership, judicial killings are likely to remain a part of the legal and policy landscape in the USA for the foreseeable future.

On 29 April 2014, condemned Oklahoma inmate Clayton Lockett died some 40 minutes after his lethal injection began. In between, he gasped, writhed and mumbled. About 16 minutes into the execution, officials drew a curtain across the viewing window, preventing witnesses from seeing what was happening. Almost half an hour later, Clayton Lockett was pronounced dead of a heart attack.

Events in Oklahoma's death chamber came up during the White House press briefing on 30 April. Asked whether President Barack Obama was aware of the execution, and whether it raised “any concerns for him or the White House about the use of lethal injection or about the death penalty more generally”, the White House press secretary responded:

“What I can tell you is that he has long said that while the evidence suggests that the death penalty does little to deter crime, he believes there are some crimes that are so heinous that the death penalty is merited. In this case, or these cases, the crimes are indisputably horrific and heinous.

It's also the case that we have a fundamental standard in this country that even when the death penalty is justified it must be carried out humanely. And I think everyone would recognize that this case fell short of that standard.”

Amnesty International does not believe that there is any such thing as a humane execution, or that the cruelty of the death penalty is confined to what goes on in the death chamber. Holding someone under a threat of death – for years or even decades – can hardly be described as the conduct of a state adopting a progressive approach to criminal justice or human rights. However the state chooses to kill the prisoner – and whether the execution goes according to plan or not – does not change the fact that this is a punishment incompatible with fundamental human rights principles. Strap prisoners down in order to kill them with one brand or type of drug rather than another does not render the act compatible with human dignity. Execute an innocent person with a bullet instead of by chemical poison, and the error is not eradicated. Kill by noose rather than in the electric chair a prisoner whose death sentence is marked by discrimination or arbitrariness, and the unfairness does not die with the condemned. It is still cemented into irreversible permanence.

Six days before the execution of Clayton Lockett – now added to a list¹ of more than 40 other “botched” executions in the USA since 1982 – the UN Human Rights Committee published the final version of its concluding observations on US compliance with the International Covenant on Civil and Political Rights (ICCPR), ratified by the USA in 1992. This followed scrutiny by the Committee of the USA's Fourth Periodic Report under the treaty in Geneva in March 2014 to which the Obama administration had sent a large delegation.

The Human Rights Committee made clear that it “remains concerned about the continuing use of the death penalty” per se in the USA. After all it is now over three decades since this expert body issued its authoritative interpretation on the right to life under the ICCPR, article 6.6 of which states that nothing in article 6 should be

invoked “to delay or to prevent the abolition of capital punishment”. In this 1982 General Comment, the Committee said that, “all measures of abolition should be considered as progress in the enjoyment of the right to life”. It also noted that at that time, progress towards “abolishing or limiting the application of the death penalty” was “quite inadequate”. Dozens of countries have abolished the death penalty since then, while over 1,300 men and women have been put to death across the USA.

Thirty-two years later, in its latest findings on the USA, the Human Rights Committee called on the US government to “consider establishing a moratorium on the death penalty at the federal level and engage with retentionist states with a view to achieving a nationwide moratorium”. What happened in the Oklahoma death chamber on 29 April should be seized on by the President and by authorities across the country, whether at local, state or federal level, to work for a moratorium on executions.

Other condemned prisoners are being lined up for execution. It is still possible that Oklahoma could attempt another such killing on 13 May. Immediately after the “botched” lethal injection of Clayton Lockett, Oklahoma Governor Mary Fallin ordered a review into what had happened and issued a two-week stay for Charles Warner, who had been due to put to death later that same evening.² In a statement the following day, she said that if the review has not been completed by 13 May – when Warner is currently due to be put to death – “an additional stay will be issued”. She added that “Charles Warner had his day in court. He committed a horrible crime: the physical abuse, rape and murder of an 11 month old infant. His fellow Oklahomans have sentenced him to death, and we expect that sentence to be carried out as required by law.” She also emphasized the serious nature of the crime for which Clayton Lockett had been sentenced to death and that he had “had his day in court”.

Also currently scheduled for execution on 13 May is Robert Campbell in Texas. He has been on death row for more than half of his life. This African American teenager was tried before an all-white jury for a murder committed when he was 18 years and three months old. He would be the third Texas prisoner in two months to be executed for a crime committed at that age. The cases raise serious questions about the USA’s claim that the death penalty is reserved not just for the worst crimes but for the offenders possessing “extreme culpability”.³ If the crimes in these cases had been conducted about a dozen weeks earlier, the three would have been spared execution as they would have been considered categorically too immature to be culpable enough for the ultimate punishment.

It is two decades since a US Supreme Court Justice concluded that the “basic question – does the system accurately and consistently determine which defendants ‘deserve’ to die? – cannot be answered in the affirmative”. The system, he said, “fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution”. The same is true today; inconsistency, discrimination and error remain hallmarks of the capital justice system.

Whether one’s concern arises from what happens in the execution chamber or before the condemned prisoner is taken there, or both, the death penalty is a matter crying out for human rights leadership.

In his 2009 Nobel lecture, President Obama noted how “the capacity of human beings to think up new ways to kill one another proved inexhaustible”. Although he was addressing the subject of war, his words might bring to mind those of the US Supreme Court Chief Justice in 2008 when providing a potted history of how states in the USA had altered their execution methods over time in the purported pursuit of “more humane means” of carrying out death sentences:

“By the middle of the 19th century, hanging was the nearly universal form of execution in the United States. In 1888, New York became the first State to authorize electrocution as a form of capital punishment. By 1915, 11 other States had followed suit, motivated by the well-grounded belief that electrocution is less painful and more humane than hanging. Electrocution remained the predominant mode of execution for nearly a century, although several methods, including hanging, firing squad, and lethal gas were in use at one time. Following the 9-year hiatus in executions that ended with our decision in *Gregg v. Georgia*, however, state legislatures began responding to public calls to re-examine electrocution as a means of assuring a humane death. In 1977, legislators in Oklahoma, after consulting with the head of the anaesthesiology department at the University of Oklahoma College of Medicine, introduced the first bill proposing lethal injection as the State’s method of execution. A total of 36 States have now adopted lethal injection as the exclusive or primary means of implementing the death penalty, making it by far the most prevalent method of execution in the United States”.⁴

In his Nobel lecture, President Obama went on to refer to the need for a “gradual evolution of human institutions” to deal with the problem of “human folly”. Again, the words of the US Supreme Court might come to mind. Over a century ago, the Court said that the Constitution’s Eighth Amendment ban on “cruel and unusual punishments” was not a static concept but could “acquire meaning as public opinion becomes enlightened by a humane justice.” Fifty-six years ago, it said that the Eighth Amendment draws its meaning from the “evolving standards of decency that mark the progress of a maturing society”. Applying this measure, in recent years the Court has prohibited the

execution of offenders with “mental retardation”, and those who were under 18 years old at the time of the crime.

Executive and legislative authorities do not need to wait for the US Supreme Court to rule on such matters, however. They should force the pace of the evolution.

“A gradual evolution of human institutions”, President Obama said in his Nobel lecture. “What might this evolution look like? What might these practical steps be?” he asked.

The President should reflect on the USA’s position on the death penalty in an increasingly abolitionist world, and work to turn the country’s attention to joining that global trend.

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Among other things, Amnesty International calls upon the US administration to:

- ☑ Publicly acknowledge the abolitionist outlook of Article 6 of the International Covenant on Civil and Political Rights and commit to meeting that goal;
- ☑ Call on US death penalty states to act upon the Human Rights Committee’s 1982 General Comment 6 on the desirability of abolition under the ICCPR and ensuring that the states are aware of the Committee’s recommendation to the USA in 1995, 2006 and 2014 for a moratorium on executions pending abolition;
- ☑ Impose a moratorium on federal and military executions, consistent with recommendations from the Human Rights Committee, the Committee for the Elimination of Discrimination, the Inter-American Commission on Human Rights, and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, and the four UN General Assembly resolutions on a moratorium on the use of the death penalty;
- ☑ Commute the death sentences of those on federal death row;
- ☑ Immediately withdraw any existing authorization for federal prosecutors to seek death sentences and to cease any further such approvals;
- ☑ Abandon military commission trials, and drop pursuit of the death penalty against any detainee currently held at Guantánamo;
- ☑ Work with state authorities to develop concrete plans to abolish the death penalty.

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## ENDNOTES

<sup>1</sup> See <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions?scid=8&did=478>

<sup>2</sup> On 29 April, Governor Fallin ordered a review of the state’s execution procedures “to determine what happened and why” during the Lockett execution. The following day, she elaborated: the review would be led by the Commissioner of the Oklahoma Department of Public Safety and would focus on three areas: Clayton Lockett’s cause of death; whether or not the Department of Corrections followed its current execution protocol; and any recommendations for improving execution procedures.

<sup>3</sup> For further information, see USA: ‘He could have been a good kid’, 1 May 2014, <http://www.amnesty.org/en/library/info/AMR51/027/2014/en>

<sup>4</sup> *Baze v. Rees*, 16 April 2008.