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USA: 'THE NATION WE ASPIRE TO BE'

REVISITING INTELLECTUAL DISABILITY AND THE DEATH PENALTY, SUPREME COURT STRIKES DOWN FLORIDA LAW

The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be
United States Supreme Court, *Hall v. Florida*, 27 May 2014

The USA's death penalty experiment continues – a tweak here, a little more tinkering there, and a judicial killing on average every 10 days since the first execution of the "modern" era was carried out by a Utah firing squad on the morning of 17 January 1977. There have been 20 executions so far this year.

The latest revision comes, as so often, via a split vote on the US Supreme Court. In a 5-4 decision issued on 27 May 2014, the Court struck down a Florida law requiring that a defendant claiming to have intellectual disability (formerly known as 'mental retardation') – and to therefore be exempt from execution under a 2002 Supreme Court ruling – show an IQ score of 70 or below. "Intellectual disability is a condition, not a number", the majority ruled; "Courts must recognize, as does the medical community, that the IQ test is imprecise". It found that Florida's rigid IQ 70 cut-off, which blocked the presentation of evidence other than IQ that would demonstrate limitations in the defendant's mental faculties, was itself unconstitutional:

> "Pursuant to this mandatory cut-off, sentencing courts cannot consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances. This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70.
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> Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise."

The Supreme Court's 2002 prohibition of the execution of persons with intellectual disability – *Atkins v. Virginia* – left to states "the task of developing appropriate ways to enforce the constitutional restriction". Although the Court had pointed to clinical definitions of "mental retardation" as a disability, manifested before the age of 18, characterized by significantly sub-average intellectual functioning, and with limitations in two or more adaptive skill areas, its failure to be more prescriptive has contributed to less than full protection.[1]

The *Atkins* ruling was grounded in the Supreme Court's notion articulated over half a century ago of the "evolving standards of decency which mark the progress of a maturing society". As long ago as 1910,

[1] In Texas, for example, a number of people have been executed since 2002 despite compelling claims of intellectual disability. See http://www.amnesty.org/en/library/info/AMR51/019/2014/en or http://www.amnesty.org/en/library/info/AMR51/071/2012/en

the Court had said that the US Constitution's Eighth Amendment ban on "cruel and unusual punishments" was not "fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice". By 2002, it deemed domestic standards had evolved to the extent that there was now a national consensus against the execution of anyone with intellectual disability. Now the Court has found that law and practice in the USA "provide strong evidence of consensus that our society does not regard this strict cut-off [of IQ 70] as proper or humane" – in 41 states of the USA (including 18 abolitionist states), an individual with an IQ of 71 would "not be deemed automatically eligible for the death penalty", it found.[2]

The case before the Court had been brought on behalf of Freddie Lee Hall, sentenced to death in June 1978 for a murder committed four months earlier. As the majority saw it, "Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test". Freddie Hall "may or may not be intellectually disabled", the opinion noted, "but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime".

The ruling does not yet necessarily mean that Florida will drop its efforts to get this 68-year-old man to the death chamber. This is a state that has shown little inclination to lessen its use of capital punishment. More than one in five of the death sentences passed in the USA in 2012 and 2013 were handed down in Florida. In 2013, Florida executed more people than it had in any year since 1984 and today lies behind only Texas, Virginia and Oklahoma in the number of executions carried out since 1976 when the US Supreme Court approved new capital statutes. So far in 2014, a quarter of the 20 executions in the USA have been in Florida.

This is not to say that *Hall v. Florida* which, it is estimated, could lead to new hearings on the intellectual disability claims of some 10 to 20 death row inmates in the USA, should not be welcomed. But even if the ruling tightens the *Atkins* protection and as such would be consistent with international safeguards, let us again consider the notion of evolving standards, this time taking the rest of the world into consideration.

Since Freddie Hall was sentenced to death, much of the world has moved away from this punishment, as international human rights principles have taken root, grounded in the Universal Declaration of Human Rights and its recognition of the "inherent dignity and of the equal and inalienable rights of all members of the human family". In that time, some 73 countries have rid themselves of the death penalty for all crimes, and another six for ordinary crimes; today 140 countries are abolitionist in law or practice. The world has agreed that even for the most serious crimes prosecuted in international tribunals – crimes against humanity, genocide and war crimes – the death penalty cannot be an option. The UN General Assembly has passed repeated resolutions calling for a global moratorium on executions as a first step towards abolition.

In the 12 years since the *Atkins* ruling, 21 countries – from Bhutan to Mexico, Rwanda to Bolivia, Samoa to Turkey, Philippines to Latvia – have abolished the death penalty for all crimes. No more tinkering there, but rather an end to the use of judicial killing altogether. Although there have been more than 600 executions in the USA during this period, there have been some recent positive moves – as the *Hall v. Florida* opinion itself points out, since the *Atkins* ruling, five US states have abolished the death penalty through legislation (Connecticut, Illinois, Maryland, New Jersey and New Mexico), and New York State's death penalty statute was invalidated by judicial ruling and not reinstated by the legislature.

Hall v. Florida reiterates the Supreme Court's view that dignity is the basic concept underlying the US constitutional ban on "cruel and unusual punishments", and asserts that this "protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be." Florida's IQ cut-off law, it ruled, "contravenes our Nation's commitment to dignity and to its duty to teach human decency as the mark of a civilized world". This begs the question; how does the fact that there are some 3,000 people awaiting execution on death rows in the USA help to teach human decency and promote the notion of human dignity?

"I believe in American exceptionalism with every fibre of my being", President Barack Obama said on 28 May 2014. He asserted that "what makes us exceptional is not our ability to flout international norms and the rule of law; it's our willingness to affirm them through our actions." Just a few weeks

[2] According to the majority in *Hall v. Florida*, the nine states with strict IQ 70 cut-offs are Alabama, Arizona, Delaware, Florida, Kansas, Kentucky, North Carolina, Virginia and Washington.

earlier, the UN Human Rights Committee, after assessing the USA's compliance with its obligations under the International Covenant on Civil and Political Rights, ratified by the USA in 1992, had called on the federal authorities to "engage with retentionist states with a view to achieving a nationwide moratorium" on executions.

The states of the USA, the *Hall v. Florida* ruling said, "are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects". Not only should the authorities ensure that the strictest safeguards are respected in all capital cases, including the exclusion of individuals with mental and intellectual disabilities from those against whom the death penalty may be imposed, but they should act to end the country's experiment with a punishment that is incompatible with human dignity, wherever and whenever it occurs. The USA should join the global abolitionist evolution.