



## A human rights embarrassment

### Officials failing to lead USA away from death penalty, 35 years after executions given go-ahead

Thirty-five years after the US Supreme Court gave the green light for executions to resume in the USA after nearly a decade without them, officials there are clearly failing to lead their country away from the death penalty as expected of them under international standards. The USA's continuing pursuit of judicial killing in an increasingly abolitionist world deals a serious if not fatal blow to its claims to be a progressive force for human rights.

In a new report – ‘An embarrassment of hitches’ – issued to mark the 35<sup>th</sup> anniversary of the Supreme Court's *Gregg v. Georgia* ruling of 2 July 1976 and set against the backdrop of continuing litigation surrounding the lethal injection method of execution, Amnesty International offers some reflections on the USA's death penalty as the organization continues its decades-long campaign for an end to the death penalty worldwide.

The application of this inherently cruel and degrading punishment has long been shown to be mixed with substantial doses of discrimination, arbitrariness and error in the USA. In addition to this big picture, in recent years the killing end of the capital process has been under a spotlight cast by legal challenges to the three-drug lethal injection protocols used by most of the USA's death penalty jurisdictions to anesthetize, paralyze and kill condemned prisoners. Most recently, the situation has been bordering on the shambolic following the decision of the sole US manufacturer of sodium thiopental, the anaesthetic component of the three-drug mix, to cease production of the drug. States have scrambled for alternatives, resorting to questionable tactics in so doing.

Pentobarbital has become the substitute of choice, over the condemnation of its Denmark-based manufacturer. In recent months this drug has been used in executions in Alabama, Arizona, Texas, South Carolina, Oklahoma, Ohio, and Mississippi, and the last execution in Georgia before the 35<sup>th</sup> anniversary of the *Gregg v. Georgia* ruling was the state's first using pentobarbital (its supply of sodium thiopental imported from the UK having been seized by the federal Drug Enforcement Administration in March 2011). The executed man's lawyer has called for an investigation into the 23 June execution, supported by the conclusion of an anaesthesiology expert that the prisoner was “inadequately anesthetized” during the lethal injection and that he “suffered greatly” as a result.

As questions of domestic law swirl around lethal injection procedures and imports, Amnesty International's report seeks to remind officials that no amount of tinkering with the method of execution can alter the bigger picture surrounding the death penalty. 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.

It is the death penalty's fundamental flaws that have led to what once seemed a permanent part of the legal landscape in many countries being dissolved, with 139 countries today abolitionist in law or practice. The Obama administration has dismissed appeals for abolition from such countries as reflecting “continuing policy differences, not a genuine difference about what international human rights law requires.” This nod of deference to international law should be placed alongside the fact that the USA continues to maintain that it is bound only by domestic constitutional standards in relation to the death penalty, including who it subjects to this punishment, how it ends their lives, and how long and under what conditions it keeps them on death row before killing them.

Other governments should not take no for an answer. While it is true that international human rights law, including article 6 of the International Covenant on Civil and Political Rights (ICCPR), recognizes that some countries retain the death penalty, this acknowledgment of present reality should not be invoked “to delay or to prevent the abolition of capital punishment”, in the words of article 6.6 of the ICCPR. The USA signed the ICCPR three and a half decades ago and ratified it nearly 20 years ago. The UN Human Rights Committee, the expert body

established under the ICCPR to monitor the treaty's implementation, has said that article 6 "refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life".

Dozens of countries have abolished the death penalty since the Human Rights Committee issued this authoritative interpretation in 1982, at which point four people had been executed in the USA since the *Gregg* ruling. Over 1,250 more men and women have been put to death across the country since then, including 25 so far this year, and more than 3,000 others are currently on death row. Clearly, officials in the USA are failing to do all they can to bring nationwide abolition closer in any reasonable timeframe.

Adherence to international standards, President Barack Obama has said, "strengthens those who do, and isolates those who don't." The USA's growing isolation on the death penalty is likely to continue as long as it remains blind to the international vision of a future without judicial killing, and the timing of abolition there will likely be determined at a pace set by, in US Supreme Court parlance, "evolving standards of decency" at a national level.

It is now 17 years since US Supreme Court Justice Harry Blackmun announced his conclusion that the USA's post-*Gregg* capital punishment experiment had failed. Then, in 2008, in a ruling upholding the three-drug lethal injection process, senior Supreme Court Justice John Paul Stevens drew much the same conclusion, describing the retention of the death penalty in the USA as the "product of habit and inattention" by legislatures across the country. The USA's death penalty is a habit that appears harder to break than in many other countries. One reason why it retains a punishment abandoned in law or practice by a majority of countries is that its judges are waiting for legislators to act and legislators are waiting for the public to act, while most members of the public are daily confronted by issues in their lives they perhaps consider more pressing than the death penalty. At the same time, the notion of a "life for a life" appears to be a large contributor to public support for the death penalty in the USA. While such retributive sentiment may well exist in other countries, the degree of political and judicial endorsement for such sentiments in the USA has left the death penalty more firmly embedded there than elsewhere.

In the past decade or so, however, the space for progress against the death penalty has opened up as this policy's flaws become plain to all who look and learn. In recent years, the number of executions has declined, the Supreme Court has excluded certain categories of offender and crime from the scope of the death penalty, annual death sentencing rates have declined to about a third of their levels a decade and a half ago, executive clemency seems to have become a greater possibility than it once was, and abolitionist activity has intensified in state legislatures. The recent decisions to abolish the death penalty in New Jersey, New Mexico and Illinois are hopefully a sign of more progress to come. But even if the current pace were to be maintained, three states legislating to abolish the death penalty in the last four years of a now 35-year experiment with judicial killing could suggest waiting for several more decades before the remaining 34 states, federal government and US military do the same thing, unless the US Supreme Court were to intervene to this end earlier.

Moreover, not everything relating to capital justice is heading in the right direction today. For example, the US government may be about to open a new chapter in the country's ugly history of judicial killing by applying the death penalty after unfair trials at its detention facility at Guantánamo Bay in Cuba. And on the US mainland, because public and political sentiments on the death penalty are so susceptible to being influenced by high-profile violent crimes, there may be setbacks along the way to abolition unless politicians resist the temptation to react to such crimes with support for the death penalty. The recent expansion of the death penalty in New Hampshire and the failure of an abolitionist bill in Connecticut are cases in point.

The USA's international isolation on the death penalty has become more and more acute. It is even impacting the scramble by authorities in the USA as they try to fix their lethal injection protocols to take account of the shortage of sodium thiopental. The USA now faces not just opposition from other governments to its continuing use of the death penalty, but also from pharmaceutical companies that manufacture drugs for patient care – not for killing prisoners. The death penalty has surely become an embarrassment to any official that seeks to promote the USA as a progressive force for human rights.

Since retiring from the US Supreme Court in 2010, former Justice John Paul Stevens has 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* which he now thinks was an "incorrect decision". Given that the *Gregg* ruling was passed by seven votes to two, if Justices Harry Blackmun, Lewis 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.

Today, if the federal government, or any of the death penalty states, were to adopt a human rights perspective, they would quickly recognize that the right choice would be not to continue this failed experiment but to pull the plug on it.

**See: USA: An embarrassment of hitches, at <http://www.amnesty.org/en/library/info/AMR51/058/2011/en>**