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# amnesty international

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## UNITED STATES OF AMERICA

### More about politics than child protection

#### The death penalty for sex crimes against children

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On 7 June 2006, the Philippine Congress passed legislation abolishing the death penalty in the Philippines, setting that country on course to become the 125<sup>th</sup> country in the world to be abolitionist in law or practice.

The following day, 8 June, the Governor of the US state of South Carolina signed into state law a bill allowing the death penalty for a person convicted for a second time of rape or other sex crimes against children under the age of 11. A day later, the Governor of Oklahoma signed a similar bill in his state providing the death penalty as an option in cases of defendants convicted more than once for the rape or other sexual abuse of a child under the age of 14.

Amnesty International acknowledges the serious nature of the crimes that are the subject of these two pieces of state legislation in the USA, but is concerned that they run counter to international standards seeking to narrow the scope of the death penalty, and that they contradict the global trend towards eradication of capital punishment. While children must be protected from violence, the death penalty is not the way to do it. And while the victims of childhood sexual assault deserve all possible therapeutic assistance, executing the offender does nothing to heal the trauma caused by the crime.

Article 6 (2) of the International Covenant on Civil and Political Rights (ICCPR), which the USA ratified in 1992, provides that the death penalty may only be imposed for the “most serious crimes.” The Human Rights Committee, the expert body established by the ICCPR to oversee implementation of that treaty, has held that this expression must be “read restrictively to mean that the death penalty should be a quite exceptional measure.”<sup>1</sup> In the same authoritative interpretation, the Committee also notes that Article 6 is abolitionist in outlook, and therefore “all measures of abolition should be considered as progress in the enjoyment of the right to life”. Writing in 1982, the Committee expressed its concern at the inadequate progress towards abolition or limitation of the death penalty among member states. Since then, some 60 more countries have abolished the death penalty. In the same period, the USA has executed more than 1,000 men and women for capital murder.

In 1995, the Human Rights Committee expressed concern about the “excessive number of offences punishable by the death penalty” in the USA, urging the US authorities to revise federal and state law with a view to restricting the number of crimes punishable by

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<sup>1</sup> Human Rights Committee, General Comment No. 6 (1982).

death.<sup>2</sup> In similar vein, the UN Commission on Human Rights called on all retentionist states “progressively to restrict the number of offences for which the death penalty may be imposed and, at the least, not to extend its application to crimes to which it does not at present apply”.<sup>3</sup>

In this context, the expansion of the death penalty in the case of crimes of less than murder – however serious – contradicts the requirement on states to read the Article 6(2) obligation restrictively. To put it another way, it involves the state heading away from, not toward, abolition, and towards the death penalty becoming less of an “exceptional measure” than it was previously. It should be noted that the US federal government, as the authority which signs and ratifies treaties, is under an obligation to ensure that the whole country complies with any treaty ratified. The federal structure of government does not absolve it of this obligation: under international law, the USA is a single state.<sup>4</sup> Neither does the reservation that the USA filed with its ratification of the ICCPR exempt it from this obligation. The reservation is itself void as it undermines the object and purpose of the treaty.<sup>5</sup>

Since the USA resumed executions in 1977, no one has been executed for rape or any other non-lethal offence. In that same year, in *Coker v. Georgia*, the US Supreme Court outlawed the death penalty as punishment for the rape of an adult woman. It found that “death is a disproportionate penalty for rape”, adding that the evidence from state legislatures and sentencing juries supported this conclusion. It noted that Georgia was the only state which allowed the death penalty for the rape of an adult woman. It further noted that in the vast majority of rape cases in Georgia (at least 90 per cent), juries did not impose a death sentence.

The Supreme Court made clear that it was not condoning rape or seeking to downplay the seriousness of its consequences. The plurality wrote:

*“We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim... Short of homicide, it is the ‘ultimate violation of self’. It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community’s sense of security, there is public injury as well. Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life”.*<sup>6</sup>

Surely the Supreme Court’s words apply to the rape of a child, despite the assertion of an Oklahoma Senator, a leading proponent of his state’s new law, that “there’s [no] more severe crime than child molestation.”<sup>7</sup> Nevertheless, while the *Coker v. Georgia* case

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<sup>2</sup> Human Rights Committee, Observations of the HRC: USA, UN Doc. CCPR/C/79/Add.50, 7 April 1995, para.16,31.

<sup>3</sup> *The question of the death penalty*. Human Rights Resolution 2005/59.

<sup>4</sup> Article 27 of the Vienna Convention on the Law of Treaties (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”).

<sup>5</sup> Reservations violate international law if they are “incompatible with the object and purpose of the treaty” (Article 19, Vienna Convention on the Law of Treaties). The US reservation to Article 6 of the ICCPR reads “that the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age”. The Human Rights Committee has called on the USA to withdraw this reservation.

<sup>6</sup> *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

<sup>7</sup> *Repeat child molesters to get death penalty*. AP in Durant Daily Democrat, 10 June 2006.

involved a man sentenced to death for the rape of a 16-year-old girl, the Georgia law and the Supreme Court characterized the victim as an adult. As a result, a handful of states have read the *Coker* ruling as leaving the door open to legislators to test the boundaries of the US Constitution when the rape victim is a child. Today, only Oklahoma, South Carolina, Montana, Louisiana, and Florida allow the death penalty for such crimes. No one has been executed under these laws and the US Supreme Court has not ruled on their constitutionality.

In recent years, however, the Supreme Court has outlawed the death penalty for murders committed by juveniles and by offenders with mental retardation after finding that about half of the 38 death penalty states (together with the 12 abolitionist states) no longer allowed the execution of these categories of offenders. It took this as sufficient evidence that a national consensus against such executions had been reached. Far fewer states allow for the execution of child rapists than allowed the execution of juvenile offenders or people with mental retardation, and those that do have not executed anyone under these laws. This, coupled with the 30-year old *Coker* precedent, suggests that if it were to be consistent, the US Supreme Court would find that execution for the rape of a child is an unconstitutionally disproportionate punishment.

While the constitutionality of these state laws is in question, so too are their practical implications. Signing the new law in South Carolina on 8 June, Governor Mark Sanford said that it “will be an incredibly powerful deterrent to offenders that have already been released” and is “an enormous step toward ensuring that children across the state are protected against those who would try and harm them.”<sup>8</sup> Yet the death penalty has never been shown to be a uniquely effective deterrent, as numerous US officials have acknowledged. For example, in 2000, the then US Attorney General, Janet Reno, said: “I have inquired for most of my adult life, about studies that might show that the death penalty is a deterrent, and I have not seen any research that would substantiate that point”.<sup>9</sup> More recently, New Jersey Attorney General Zulima Farber stated of the death penalty: “I don’t think it’s a deterrent. And I understand revenge. I think some people deserve it. But I don’t think it’s a necessary tool... I don’t have a philosophical or religious opposition to the death penalty; I have a practical opposition to the death penalty.”<sup>10</sup>

Even if there was a special deterrent effect to the death penalty, that would imply that capital crimes are committed by offenders who behave rationally, soberly, with their mental faculties entirely intact, and with full awareness of how the law differentiates between the “average” murder and one that is a capital offence.<sup>11</sup> Such a capital offender is a rare being if the modern era of judicial killing in the USA is anything to go by – for example, among those executed are many mentally ill or otherwise impaired individuals. Nevertheless, in the case of a repeat sex offender who does act entirely rationally, a law that increases the punishment for child rape from imprisonment to death may in fact put the life of the child at increased risk. If such an offender rapes or otherwise sexually abuses a child, and is aware of the detail and scope of the law, he might decide that he has nothing to lose by killing the child, the only witness to the offence. The death penalty would thus have become a counter-deterrent.

On the other hand, a child who becomes a witness is vulnerable to making false statements, a matter of extreme concern when such evidence may be what secures a death sentence. Yet the already error-prone nature of the US capital justice system appears not to have troubled the Oklahoma or South Carolina legislators who passed the new laws. Since

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<sup>8</sup> Governor Sanford signs Jessie’s Law. Office of the Governor news release, 8 June 2006.

<sup>9</sup> Weekly media briefing, US Justice Department, 20 January 2000.

<sup>10</sup> *Attorney general tells of death-penalty doubts*. Associated Press, 17 March 2006.

<sup>11</sup> The vast majority of murders in the USA either do not qualify for the death penalty or are not pursued as capital crimes.

the USA resumed executions in 1977, more than 100 people have been released from death rows on the grounds of innocence. Others have gone to their deaths despite serious doubts about their guilt. In addition, the system is littered with arbitrariness, with no principled way of justifying why one capital defendant receives a death sentence while another receives a life prison term. Adding crimes to the list of offences for which prosecutors may seek death can only exacerbate this situation. This would especially be true in the inflammatory atmosphere that frequently surrounds the cases of people accused of violent or sexual crimes against children. As a Supreme Court Justice noted in 1972 in the decision that overturned the country's death penalty statutes: "It is the poor, the sick, the ignorant, the powerless and the hated who are executed."<sup>12</sup> There are few more publicly vilified figures in society today than those labelled as paedophiles.

Moreover, there is a profound hypocrisy at the heart of this issue. A large percentage of those on death row in the USA, and scores of those who have already been executed, were themselves subjected to sexual and physical abuse when they were children. Take the case of Gary Etheridge, executed in Texas on 20 August 2002. He had been physically abused by his father, particularly when his father was drunk. He was repeatedly raped and physically abused by an older brother starting from when he was six years old. Gary Etheridge began using drugs and getting into trouble with the law from the age of 12. He attempted suicide on at least two occasions, once after being raped while serving a prison term for a prior, non-violent offence. His severe depression, when left untreated outside prison, contributed to his self-medicating with illegal drugs and to serious drug addiction. He was intoxicated on a combination of heroin and cocaine when he sexually assaulted and murdered a 15-year-old girl. At his trial for that murder, his lawyers were aware of the mitigating evidence of his horrific upbringing, but chose not to present it. They feared that this evidence could be used by the prosecutor to argue that Gary Etheridge would be a future danger if allowed to live (a prerequisite for a death sentence in Texas). Indeed at the 1990 trial, the judge had referred to the defendant as a "piece of trash" and "a blight on society".<sup>13</sup> Such language is reminiscent of that used by at least one Oklahoma legislator who referred to child molesters as "monsters" and "less than human" during the debates on the Oklahoma sex offender bill.<sup>14</sup>

Legislators in both Oklahoma and South Carolina suggested that the sexual abuse of children causes permanent damage and is as bad as death. For example, a leading proponent of the new Oklahoma law said: "We allow the death penalty for someone who has killed a body. Why would we allow someone to escape who has killed a soul?"<sup>15</sup> In similar vein, one of his counterparts in the South Carolina Senate said: "When a child is invaded this kind of way, there's something taken from the soul of that child that the child will never recover. We feel it's as bad as taking a life".<sup>16</sup> Why then did authorities in these states and elsewhere pursue the execution of people like Gary Etheridge even when the potentially mitigating effects of their childhood abuse had not been considered by the jury? The truth is that "tough on crime" politics riddles the death penalty, whether in the process of seeing a death sentence through to the execution chamber or when guiding a death penalty bill through the legislative chamber.

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<sup>12</sup> *Furman v. Georgia*, 408 U.S. 238, 251 (1972), Justice Douglas concurring (quoting former US Attorney General Ramsey Clark).

<sup>13</sup> Case taken from Amnesty International report, *USA: The execution of mentally ill offenders*, January 2006, [http://web.amnesty.org/library/pdf/AMR510032006ENGLISH/\\$File/AMR5100306.pdf](http://web.amnesty.org/library/pdf/AMR510032006ENGLISH/$File/AMR5100306.pdf).

<sup>14</sup> *Repeat child molesters to get death penalty*. AP in *Durant Daily Democrat*, 10 June 2006.

<sup>15</sup> *Death penalty for repeat child molesters clears Oklahoma legislature*. *The Herald Democrat*, 5 June 2006.

<sup>16</sup> *Jessie's Law in effect now*. *Fox Carolina*, 15 June 2006.

Undoubtedly, the links between trauma suffered by individuals during childhood or later in life and their own propensity to violence are complex and varied. So too are the causes of adult sexual violence against children. Amnesty International does not seek to excuse criminal violence, but to end a punishment that is blind to such complexity and diverts resources from efforts seeking to explain violence and prevent its recurrence. The death penalty is a simplistic response and is itself a part of a cycle of violence. It does not move forward one iota our understanding of the roots of violence, including that committed against children.

Amnesty International urges all legislative, executive and judicial authorities in the United States to meet their human rights obligations by not permitting any expansion of the death penalty to non-lethal crimes such as sexual assault. The organization also renews its call for a total moratorium on executions in the United States, pending abolition of the death penalty, as a necessary measure for the protection of fundamental human rights.

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