amnesty international

USA: Pause for thought

Another lethal injection halted by US Supreme Court

18 October 2007 **AI Index: AMR 51/161/2007**

Four hours before Christopher Scott Emmett was to be put to death in Virginia on the evening of 17 October 2007, the US Supreme Court stepped in and issued a stay of execution. It was the third time that the Court had blocked an execution since it agreed on 25 September, in *Baze v. Kentucky*, to consider a challenge, under the US Constitution's Eighth Amendment ban on "cruel and unusual" punishment, to the three-chemical lethal injection process used in Kentucky, and in most other states that use this method.

On 27 September the Supreme Court had issued a stay of execution in the case of Texas prisoner Carlton Turner. Although the Court did not say why it had done so, Turner's appeal had been linked to the Kentucky case. Then on 16 October, it denied an appeal from the State of Arkansas to vacate a stay of execution issued by the Eighth Circuit Court of Appeals for inmate Jack Jones. Justice Scalia dissented against the Court's refusal to lift the stay. In his view the Eighth Circuit's decision "was based on the mistaken premise" that the pending *Baze v. Kentucky* case "calls for the stay of every execution in which an individual raises an Eighth Amendment challenge to the lethal injection protocol". Justice Scalia suggested that Jones's challenge to the Arkansas lethal injection protocol, "brought nine years after his conviction and sentence became final", was an abusive delaying tactic.[1]

Notwithstanding Justice Scalia's dissent, it seems that there may now be a *de facto* moratorium on lethal injections pending the Supreme Court's ruling in 2008 on the questions raised in *Baze v. Kentucky*.[2] The vast majority of executions in the USA are by lethal injection, and most condemned prisoners challenge their execution.[3]

This apparent pause in the conveyor belt of death at the end of the USA's 30th year of judicial killing provides an opportunity for the USA to reflect upon its attachment to this punishment. It should seize the moment and commit itself to another direction, in step with the 133 countries that have abolished the death penalty in law or practice. Clemency authorities should commit themselves to a permanent moratorium on executions. Legislators should commit themselves to abolition.

Historian Arthur Schlesinger wrote in 1983: "No paradox is more persistent than the historic tension in the American soul between an addiction to experiment and a susceptibility to ideology". On the one hand, Schlesinger suggested, "Americans are famous for being a practical people, preferring fact to theory, finding the meaning of propositions in results, regarding trial and error, not deductive logic, as the path to truth". On the other hand, "they also show a recurrent vulnerability to spacious generalities".[4]

The USA's attachment to the death penalty carries echoes of Schlesinger's paradox. The facts on the ground say abolish, but an idealised notion of capital punishment says continue. Today, 30 years and nine months after Gary Gilmore was shot by firing squad in Utah on the morning of 17 January 1977, restarting executions after almost a decade without them, the USA's reluctance to let go of judicial killing sets it apart from a clear majority of countries. Surely,

however, with arbitrariness, discrimination, error and cruelty among its hallmarks, the USA's death penalty experiment has failed, to use US Supreme Court Justice Harry Blackmun's words. In his now famous 1994 dissent, Justice Blackmun vowed that after two decades of struggling to fashion a capital justice system that would be consistent, fair and error-free, he would no longer "tinker with the machinery of death". No combination of rules or regulations, he wrote, could ever save capital punishment from its inherent flaws.

Nevertheless, the USA has continued with its dead-end experiment, refusing to give up what Justice Blackmun suggested was the "delusional" notion that the death penalty can be made to work. Delusional is an appropriate word, for the death penalty makes assumptions about a world that does not exist. It assumes the absolute perfection of the criminal justice system, and the absolute imperfection of the people it condemns to death. It assumes that human beings can decide – free from error or inequity – which of their fellow human beings convicted of crimes should live and which should die. It assumes that even if discrimination has not yet been eradicated in society, it can be overcome in the course of capital justice. And, even if government is the focus of public distrust in a country founded in revolution against a tyrannical monarchy, the state is still somehow assumed to be imbued with incorruptibility and infallibility when it turns its hand to executions.

If these assumptions are *not* made, and the imperfection of the justice system and the fallibility of government are accepted, then those advocating the death penalty must also accept the inevitability of executing the wrongfully convicted or the unfairly sentenced. One cannot have it both ways. The method chosen to kill the prisoner has no impact on this equation. The myth of capital justice that is "humane" or "fair" is laid bare whether the prisoner is hanged, shot, gassed, electrocuted or injected with this, that or the other chemical, or a combination of all three.

As a Supreme Court Justice wrote in 1972, "the imposition and execution of the death penalty are obviously cruel in the dictionary sense".[5] Another Justice added: "We know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."[6] More than a century ago, the Supreme Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it."[7]

In 2006, the US government said to the UN Committee Against Torture in Geneva: "All governments are imperfect because they are made up of human beings who are, by nature, imperfect. One of the great strengths of our nation is its ability to recognize its failures, deal with them, and act to make things better."[8] Applying this thinking to the death penalty must end in abolition, recognizing that no amount of tinkering with the machinery of death can free the death penalty from its inescapable flaws.

To end the death penalty is to abandon a destructive, diversionary and divisive public policy that is not consistent with widely held values. It not only runs the risk of irrevocable error, it is also costly – to the public purse, as well as in social and psychological terms. It has not been proven to have a special deterrent effect. It tends to be applied discriminatorily on grounds of race and class. It denies the possibility of reconciliation and rehabilitation. It promotes simplistic responses to complex human problems, rather than pursuing explanations that could inform positive strategies. It prolongs the suffering of the murder victim's family, and extends that suffering to the loved ones of the condemned prisoner. It diverts resources that could be better used to work against violent crime and assist those affected by it. It is a symptom of a culture of violence, not a solution to it. It is an affront to human dignity.

[1] *Norris v. Jones*. Justice Scalia dissenting ("in this case, Jones's challenge to the lethal injection…was dilatory").

[2] On 3 October 2007, the Supreme Court stated that it was limiting its consideration to three of the questions raised by the Kentucky petitioners. These are: (1) Does the Eighth Amendment to the United States Constitution prohibit means for carrying out an execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain? (2) Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used? (3) Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?

[3] "Consensual" executions are the subject of *USA: Prisoner-assisted homicide: More 'volunteer' executions loom*, May 2007, http://web.amnesty.org/library/Index/ENGAMR510872007. Daryl Holton, one of the cases detailed in this report chose to be put to death in Tennessee's electric chair on 12 September 2007. Other prisoners "volunteering" for execution or choosing to be killed by a method other than lethal injection may yet cause a break in the possible current moratorium. However, see also, the stay of execution issued in the case of "volunteer" William Castillo in Nevada on 15 October 2007, http://web.amnesty.org/library/Index/ENGAMR511572007.

[4] For citations and longer version of this document, see *USA: The experiment that failed: A reflection on 30 years of judicial killing*, January 2007, http://web.amnesty.org/library/index/engamr510112007.

[5] *Furman v. Georgia*, 408 U.S. 238, Justice White concurring.

[6] *Ibid*, Justice Brennan concurring.

[7] *In re Medley*, 134 U.S. 160 (1890).

[8] Statement available at http://www.state.gov/g/drl/rls/rm/2006/66065.htm.