

Assembly and the Security Council are empowered to request them; UN member states are not competent to request advisory opinions.

- <sup>13</sup> Proposals made during the drafting of the Charter which would have placed the ultimate authority to interpret the Charter in the ICJ were not accepted. Vera Gowlland-Debbas, *supra* note 4, p. 664, n. 113 (Certain Expenses, 1962 ICJ RER at 168).
- <sup>14</sup> Akande, *supra* note 1, p. 330.
- <sup>15</sup> Sanctions against Libya, for example, were not viewed by many states to be legitimate and, therefore, compliance was low.
- <sup>16</sup> Karl Doehring, *Unlawful Resolutions of the Security Council and their Legal Consequences*, 1 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 1997, p. 97.
- <sup>17</sup> Max Hilaire, *Role of the United Nations in the Post Cold War Era*, 78 REVUE DE DROIT INTERNATIONAL (THE INTERNATIONAL LAW REVIEW), 2000, p. 128. This persistent perception is currently reinforced by the prominent position of the United States, within and outside the Security Council. Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 1997, p. 29, n. 85.
- <sup>18</sup> John Quigley, *The United Nations Security Council: Promethean Protector or Helpless Hostage?*, 35 TEXAS INTERNATIONAL LAW JOURNAL, 2000, p. 171.
- <sup>19</sup> Former UN Secretary General Dag Hammarskold joked that peacekeeping fits into 'Chapter Six and a Half' of the UN Charter.

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## Justice or Russian Roulette?

### Death Penalty in the U.S. - Past and Present

*Jaroslav Šuchman*

#### A Historical Struggle

The death penalty is under public scrutiny again in the U.S. Furthermore, the pressure on the death penalty has gone beyond the growing abolitionist movement. Science has impacted on the debate. Recently in a substantial number of cases, DNA tests have led to the exoneration of death row inmates. This in turn led Illinois Governor George Ryan to impose a statewide moratorium on executions in January 2000. Moreover, several new studies have raised the issue of racial bias in sentencing. There has been legislation seeking to tackle these problems including Senator Leahy's **Innocence Protection Act of 2000**.

The controversy over capital punishment is of long standing. The law of capital punishment in America goes back to colonial times. The first recorded execution was in 1608 at Jamestown Colony of Virginia. Ever since, there has been a struggle between the supporters of the death penalty, inc-

luding organisations such as the Washington Legal Foundation, and the abolitionist movement, including, for instance, the Illinois Coalition Against the Death Penalty. The number of executions in the U.S. was at its historic peak in the 1930s with an average of 167 people put to death each year. In 1966 the public support for capital punishment sank to an all-time low of 62%. In the following years there were several challenges to its constitutionality. Most were brought either under the **Eighth Amendment** to the U.S. **Constitution** which prohibits cruel and unusual punishment or under the **Fourteenth** which stipulates the right to the equal protection of the law.

#### First Constitutional Challenges

As early as 1958 the case of *Trop v. Dulles* was brought in the U.S. Supreme Court which, though it did not directly concern the death penalty, suggested a modern interpretati-

on of the **Eighth Amendment** as containing an evolving standard of decency that marked the progress of a maturing society. This was later used as the leading argument in the abolitionist struggle against capital punishment, since it was argued society had matured to a point where the death penalty was no longer tolerable having regard to the **Eighth Amendment's** ban on cruel and unusual punishments.

Two important cases brought in 1968, *U.S. v. Jackson* and *Whiterspoon v. Illinois*, dealt with the role of jury in capital processes. The former struck down a provision which encouraged the defendant to waive his right to trial by jury since the death penalty could be imposed only on the recommendation of a jury. In the latter the court stated the grounds upon which a juror could be disqualified with respect to his stand on the death penalty.

Juror discretion became the issue in the 1970s. In *Crampton v. Ohio* and *McGautha v. California* it was argued that on account of the due process clause in the **Fourteenth Amendment** it was unconstitutional for the jury to have unrestricted discretion in deciding whether the defendant should live or die. This argument was rejected by the court which stated that it was "beyond present human ability" to channel jury discretion in capital sentencing.

### **Suspension of the Death Penalty**

A breakthrough decision came in 1972: *Furman v. Georgia*, *Jackson v. Georgia* and *Branch v. Texas*, collectively known as *Furman v. Georgia*. The constitutionality of the death penalty was this time challenged under the **Eighth Amendment** to the **U.S. Constitution**, which prohibits the imposition of cruel and unusual punishments. The case was decided five to four. Justice Brennan, Jr., one of the majority judges in his speech developed and applied a test that would show the death penalty as then administered in an overwhelming majority of the states was unconstitutional. This cumulative test to reveal whether a punishment was 'cruel and unusual' consisted of four questions:

1. Is the punishment unusually severe?
2. Is there a strong possibility that the punishment is being inflicted arbitrarily?
3. Is the punishment substantially rejected by contemporary society?
4. *Is there a reason to believe that the punishment does not serve its penal purpose more effectively than any less severe punishment?*

Justice Brennan, Jr. examined each of these matters in detail and answered them in the affirmative. Even though the vote resulted in a decision by the closest margin to declare the Georgia statute unconstitutional, only two Justices (William J. Brennan, Jr. and Thurgood Marshall) thought the death penalty itself unconstitutional. The eloquent argument that based the interpretation of the **Eighth Amendment** on the theory of "evolving standards of decency" gained wider support in the U.S. Supreme Court. The five concurring Justices agreed only upon the fact that

the death penalty was being imposed in an arbitrary manner. The scope of the decision was therefore limited to the procedural aspect of capital punishment. Nevertheless, the U.S. Supreme Court thereby effectively avoided the forty death penalty statutes and thus suspended the death penalty.

### **Reinstatement of the Death Penalty**

The reaction of state legislatures was swift but varied. Thirty-five out of the forty pre-*Furman* death penalty states soon passed new statutes while trying to take account of the *Furman* decision. Florida was the first, taking only five months. Two routes were followed by state legislatures. The first consisted in mandatory imposition of the death penalty for those convicted of capital crimes. This simple way out of the problem was later held unconstitutional by the Supreme Court in *Woodson v. North Carolina*, 1976. Mandatory statutes were struck down because they failed to "fulfill *Furman's* requirement to replace arbitrary and wanton jury discretion with objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death" (Justice Stewart). Other states took a more sophisticated approach in revising their death penalty statutes which was later approved by the Supreme Court in *Gregg v. Georgia*, 1976.

These states sought to introduce sentencing guidelines for the judge and the jury for deciding whether to impose death. The major procedural reforms upheld in *Gregg* can be summarized as follows:

1. For the defendant to be sentenced to death, the court must find beyond reasonable doubt that there exists at least one of the statutorily specified aggravating circumstances, e.g. killing for hire.
2. A bifurcated trial is necessary, meaning that deliberations concerning the guilt and the punishment must be held in separate phases of the trial.
3. There must exist a special direct review in addition to the conventional appellate review.

In the review the court is to rule out any possible influence of arbitrary factors such as passion or prejudice, to determine whether there exists a statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Besides these procedural reforms, the court in *Gregg* after addressing the dicta from *Furman* made the determination that the capital punishment per se is not unconstitutional. The main argument was that the social sentiment is demonstrably in favor of the death penalty, and this may be inferred from the legislative response to *Furman* to put death penalty legislation back on the constitutional track.

### **Recent Constitutional Challenges**

But this was not the end of constitutional challenges to capital punishment. Numerous cases are brought every year

and the process of fine tuning the system continues. The issues currently in question include whether a mentally retarded person can be put to death for murder, *Perry v. Lynaugh*, 1989, and what age limits must be observed when considering the imposition of the death penalty on minors, *Thompson v. Oklahoma*, 1988.

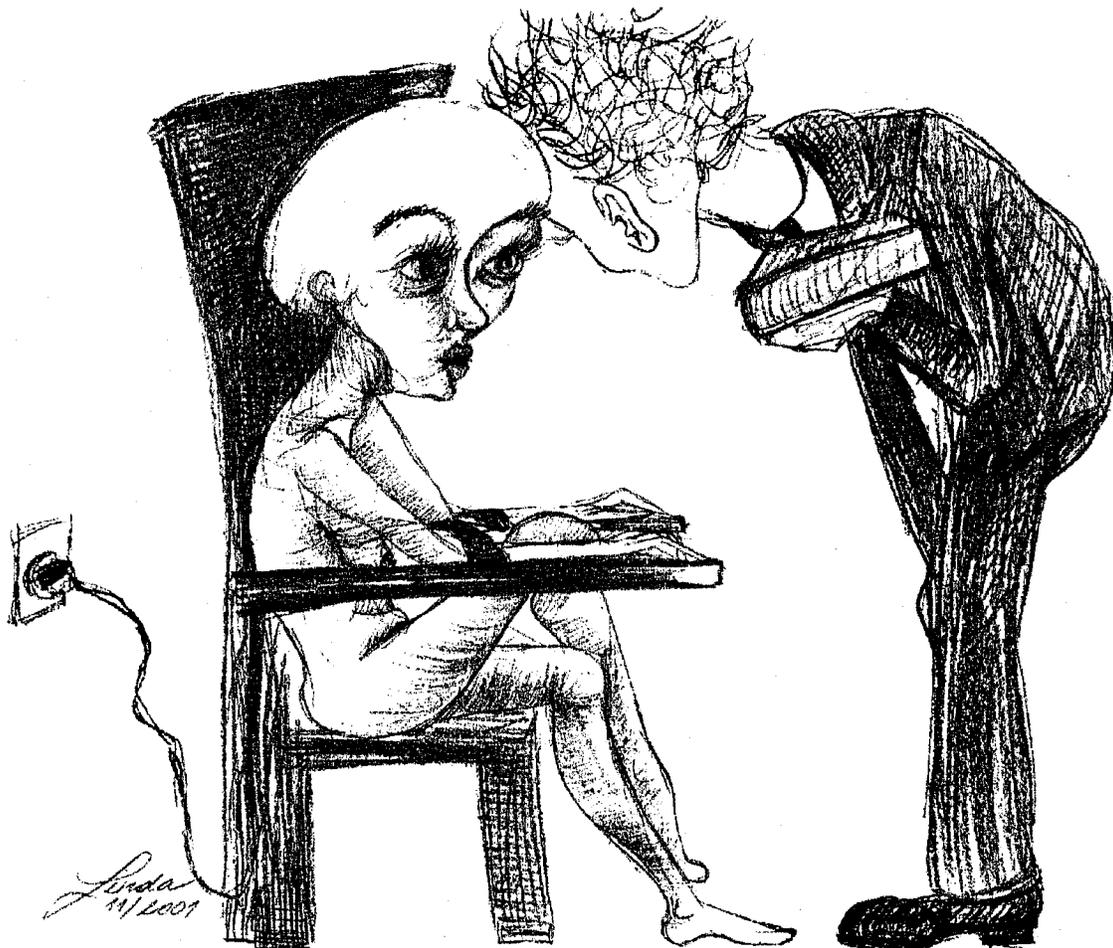
One of the most serious criticisms of the death penalty system relates to its racial bias. The numbers provided by several statistical studies are striking. Seventy-six percent of defendants approved for federal death penalty since its reinstatement were members of minority groups. The Baldus study, an extensive study on which an argument in *McCleskey v. Kemp*, 1987, was founded, showed that in Georgia defendants charged with killing a white victim were 4.3 times as likely to receive a death sentence than defendants charged with killing black victims. But the court ruled 5 to 4 not to recognize racial disparities as a constitutional violation of equal protection of the law unless intentional racial discrimination can be shown.

### Language of Numbers

Today the criminal codes of thirty-eight states of the U.S. federation provide for the imposition of the death sen-

tence on persons convicted of the most serious crimes. There are also now more than 40 federal crimes for which the death penalty may be invoked. These include murder related to the smuggling of illegal immigrants, murder of a juror or a member of Congress or a foreign official and murder in connection with drug trafficking. From the reinstatement of the death penalty in 1976 to September 18<sup>th</sup> of this year 732 people were executed in the U.S., (Timothy McVeigh being number 717 and the first federal execution since 1963. There have been only 35 federal executions since 1927). The actual numbers of people being put to death are not evenly distributed among the states. The runaway leader in executions is the state of Texas which executed 40 people in 2000 followed by Virginia which executed 8 that year. The distribution of executions since 1976 by region shows the South topping the list with 80%, while the North-East lags with just 0.5%. Until 1999, the number of people executed rose each year. The trend now appears to have been reversed. In 1999, 98 people were executed; 85 in 2000; and by mid-September 2001 'only' 49 had been executed.

The fact that the fall in executions, the first in 25 years, has continued for a second year can be attributed to several



"Wanna hold your hand."

connected factors. One is the decreasing public support for the death penalty. A Washington Post-ABC News poll conducted recently found that support among the general public was 63%, other agencies (Harris Poll, USA Today) gave out slightly different figures, but all agree upon the fact that the support for capital punishment is at a twenty year low. Furthermore a Gallup Poll discovered that 91% of people acknowledge that at least one innocent person has been sentenced to death over the past 20 years.

The second factor is a ten-year fall in crime levels. Lastly there has been an enormously high and growing number of exonerations. According to the U.S. Justice Department reports, in the past three years 21 people have been released from death row because DNA tests or other new evidence have cast doubt on their convictions. And since 1973 a total of 98 people in 22 states have been declared innocent. The number of exonerations has been rising steadily over recent years. Between 1973 and 1993, an average of 2.75 of those convicted and sentenced to death were subsequently found to be innocent and released and since then the average has risen to 5 people released per year.

### Reform

These factors indicate a crisis in the system. As Governor George Ryan put it when decreeing a statewide moratorium on executions in Illinois: "There is a flaw in the system and it needs to be studied." And even stronger words came from Senator Patrick Leahy: "One vindication for every seven executions is not criminal justice system that is working right. It is a case of Russian Roulette."

And what are the results of this outrage? Twenty-three states have enacted some form of death penalty reform. Senator Leahy introduced a bill called the **Innocence Protection Act of 2000**, a piece of legislation aimed at making it easier for those under sentence of death who are innocent to gain access to DNA evidence, have it tested, and use the results to challenge their conviction. These measures require states and the federal government to preserve biological evidence for possible future testing, establish minimum competency standards for court-appointed defense attorneys in capital cases (no more inebriated or cataleptic lawyers to represent people accused of capital offenses), establish procedures to pay "reasonable damages" to innocent people sent to death row. Furthermore, these measures require that juries in capital cases be informed of the sentencing option of life imprisonment without parole in states that offer the option and cooperate to limit the federal government's ability to seek the death penalty for crimes committed in states that do not allow the death penalty.

The latest effort to remedy the ailing system is a report submitted by a bipartisan group made up of renowned legal professionals called *Mandatory Justice: Eighteen Reforms to the Death Penalty*. This recommends ways to prevent wrongful executions focusing again mainly on effective

defense counsel, access to DNA tests and removal of racial bias from all steps of the sentencing process.

International pressure on the U.S. to abolish the death penalty is substantial though its impact in the U.S. is perhaps less than might be expected. Besides the disapproval of the Vatican and numerous NGOs, there have been a number of significant events recently. In April 1999, the UN Human Rights Committee passed a resolution supporting a worldwide moratorium on executions. Quite recently the UK Foreign Office issued a statement threatening to mount a legal challenge to the U.S. at the International Court of Justice in The Hague.

### Where next?

The ultimate penalty is and has been much debated by the American public. It would seem that a movement toward tougher or more liberal sentencing depends primarily on public opinion. Today, we are apparently witnessing a period of limitation for the death penalty. Limitations are imposed by increasing checks in the system, since clearly the chief concerns are that only the guilty have this irreversible sentence imposed on them and to ensure due process no matter how strict, even unjust, it may be.

Opponents of the death penalty will no doubt keep adding arguments to their store in the hope that the Supreme Court will draw on them. Not every individual's position will be rationally based, and in the end sentiment will determine whether the people keep the executioner on the payroll. If people feel secure, juries might find it harder to reach unanimity on the death penalty. Capital punishment might die by way of desuetude as it has in several countries. Developments after September 11<sup>th</sup> may however push the death penalty off the agenda. It is not altogether unlikely that there will be a move toward an even stricter justice system with an emphasis on tougher punishment.

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