

Medicalization of Judicial Mode of Execution: A Critical Study in American Context

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Abstract

Modes of judicial execution of death sentence have to be determined in light of various objective factors like prevailing atmosphere of the international opinion, international norms and standards, contemporary penological theories and ever progressing standards of human decency. Though it's essential to adapt the most civilized method of judicial execution, nevertheless, what is more important is how that civilized process of execution is carried out. History is witness to the fact that how medical professionals have made invaluable contributions to make the existing modes of execution more civilized, humane and efficient by playing the most pivotal role. Medicalization of the process of judicial execution through intravenous lethal injection is not novel. However, currently direct participation of physicians in the implementation of the death penalty through intravenous lethal injection has become an extremely controversial subject, initiating voluminous intellectual debate at global platforms. Hence, an appropriate contouring of such participation is increasingly coming under sharp scrutiny on ethical and legal grounds. The question arises, will the physicians not be guilty of gross professional misconduct by refusing to oversee the executions and taking care of the condemned persons in their last crucial hours, thereby neglecting their ethical responsibility to minimize the suffering and maximize the comfort. Physicians need to fulfill their role as caregivers by actively participating in the implementation and development of lethal injection as the most humane mode of judicial execution.

Keywords: *Judicial execution, evolved standards, medicalization, physician, intravenous lethal injection.*

Introduction

"The final cause of law is the welfare of society"
—Benjamin Cardozo

Miles of distance have been crossed by man to transform the barbarian era to the current civilized society. Maturity, tolerance and understanding are all part and parcel of a civilization. History is witness to the fact that how medical professionals have helped in making the existing modes of execution more civilized, humane and efficient by playing the most pivotal role. To use a decapitating machine as a humane method of execution which later on was known as the guillotine, was first advocated and designed by Dr Joseph-Ignac Guillotine and Dr Antoine Louis, respectively. The electric chair, a method of execution that was considered 'more humane' for several years, was designed with the

help of a dentist named Dr Alfred Southwick. To use gas chamber and even hanging as method of execution was a valuable suggestion of Medical expertise only. It was Dr Stanley Deutsch, an anesthesiologist, who first conceived the idea of intravenous induction of general anesthesia through a lethal injection. In Texas in 1982, the first 'clinical trial' of the lethal injection was carried out on a 40-year-old African-American man as he was injected with anesthetic agents in the presence of two doctors. As a result, his death occurred within few minutes.²

America is one of the few countries to use Lethal Injection as a method of judicial execution. In this research paper we would be analyzing the participation of physicians in the implementation of the death penalty through lethal injection. And currently this

is an extremely controversial subject, initiating voluminous intellectual debate at global platforms.³ Social consensus on pressing issues like; whether physicians should be present at executions? Whether physicians should supervise the execution process? Whether they should inject the lethal injections or just pronounce and certify death? is imperative in order to draft adequate legislation to ensure the most appropriate involvement of physicians in the entire execution process.⁴

The choice regarding participation of physicians in the entire execution process by intravenous lethal injections is made harder by the presence of distinct circumstances and undeniable arguments existing both for and against their participation in the said executions. In this research paper, scholar would critically examine the relevant ethical and legal arguments that bear on this decision.

Physician's participation in mode of execution (intravenous lethal injection) of death sentence with special reference to America: In United States of America, various acts currently applicable to medical practice make physicians liable for professional misconduct for participating in the execution process despite the fact that most death penalty statutes overtly not only provide for such participation but even require them to do so.⁵ Although the method of judicial execution are becoming more and more medicalized, however, the negative effect of the threat of such sanctions and restrictions keeps on increasing. Now, it has become mandatory for the states to cure such statutory ambiguities, if physicians are required to contribute their part in the judicial executions.⁶ Combination of both, permissive death penalty legislations allowing the participation of physicians in the execution process along with the medical practice acts protecting them from any kind of disciplinary action for such participation are required to resolve this disparity. These kinds of legislations will not only protect the medical profession as a whole but will also take care of the needs of condemned persons and the public, in best possible manner.⁷

Arguments for and Against Physician Participation in Executions: Significant arguments raised by the subject of physician's participation in the execution are analyzed here and clarity is sought through rational and pragmatic support on these issues.

Ethical Arguments against Physician Participation: Doctors being the healers, hence their active participation in the judicial execution process is completely irreconcilable with their basic ethical code, is the chief contention of the opponents of such participation of the physicians. Public strongly believe and think that it's the inherent duty of the medical profession to use its skills and tools only and only for the betterment of the public health.⁸ However, usage of such curative skills to act as the harbinger of death is completely in contravention of medicine's first and foremost goal, moreover it clearly violates a physician's fiduciary duty to serve the patient's interest in the best possible manner.⁹

In modern as well as ancient medical ethics, a substantial support exists for such a stand and position. Over 2000 years old, the Hippocratic Oath, still exists as the most potent weapon and repeatedly cited foundation of professional ideals for practicing physicians. Any action taken by the physician with intent of causing any direct or indirect harm or death is broadly condemned by the overt language of the oath. The relevant text reads as, "I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug, nor give advice which may cause his death."¹⁰

The participation of physicians in some instances may help possibly reduce pain, but there exist many countervailing arguments as well. Firstly, the purpose of medical involvement through a physician should not be to reduce pain or suffering, but to help save life and humanity. Secondly, the presence of a physician also serves to give an aura of medical legality to the whole procedure of death penalty.¹¹ Thirdly, in a broader perspective, the physician is taking over some of the responsibility for executing the punishment, makes the physician handmaiden of the state as an executioner. The benefit for possible reduction of pain by the physician who is in fact acting under the control of the state, rather lawfully does harm.

Ethical Arguments for Physician Participation: The ethical ideal which should be aspired by physicians is; "The task of medicine is to cure sometimes, to relieve often, to comfort always."¹² Deepest obligation of physicians is to take utmost care of the interest and wishes of their patients. Although the preservation of life remains the supreme maxim of medical profession,

however, as always, it's neither the chief ethical value nor in the best interest of the patients. Therefore, at times the preservation of life must give way to other goals of medical profession like the cure of extreme sufferings. This is the reasonable logic that backs the ethical approval to withhold and withdraw life-sustaining treatment in order to relieve pain and suffering.¹³ As a result, doing so does accelerate and questionably even results in death. However, the medical condition of some patient's is such that the only alternative in their best interest is to welcome death rather than to wait for a slowly deteriorating life of agony. By and large, the Double Effect Doctrine is sanctioned by both, medical ethics as well as contemporary legal theory, which contemplates that measures carried on for beneficial purposes, like minimizing the sufferings, may be allowed morally even if they foreseeably lead to death.¹⁴

Now considering this reality, vagueness still exists as to whether the physician participation in judicial execution is contrary to the doctor's ethical obligations imposed by the Hippocratic Oath or the interest of the patient. As is categorically stated by AMA that a physicians being components of a profession which is fully committed to save life whenever there exists hope of doing so, hence must forbid themselves from participating in any kind of judicial execution.¹⁵ However, the situation is entirely different in case of a judicial execution, wherein the patient (convict) is surely going to die; hence, there exists no such hope of life. After exhaustion of last appeal by the convict, an execution date is assigned by the Court and it's only after that physicians are supposed to act in the actual execution process.

Physicians can not only ensure that the drugs are injected in the correct order but also prescribe and arrange a lethal pharmacological procedure which is in tune with the unique medical condition of the condemned, thus wiping out all possibilities of any unfortunate incident that could occur during the lethal injection procedure, like; the condemned may regain consciousness and undergo the unimaginable trauma of conscious asphyxiation.¹⁶ The condemned will also not suffer the humiliation and pain as a result of multiple needle pricks by incompetent medical technicians as the physicians can insert the catheters correctly after locating the appropriate veins. Physician participation negates any irreversible brain damage condition by closely monitoring the vital signs during the entire procedure, thereby guaranteeing death.

Legal Arguments against Physician

Participation: In some states medical practice acts may get violated by the participation of physicians in judicial execution process, is one of the chief legal arguments of the opponents. Various grounds are established for physicians by the medical practice acts; to be either disciplined or de-licensed. "Dishonorable" or "unprofessional" conduct is time and again listed as a ground for professional sanction by these acts. Moreover, several medical practice acts incorporate actions, which are against the ethical norms existing within the profession, into their definitions of "unprofessional" or "dishonorable" conduct.¹⁷ It's quite possible that various state medical boards may take disciplinary action against physicians for such judicial execution participation, as several medical lobbying groups have stood in opposition to such participation, including the AMA. Although, no such disciplinary action for defying these ethical norms has been undertaken by the state boards till date, however, the possibility still remains.

Legal Arguments for Physician Participation:

Despite the fact that physician participation is strictly prohibited by several medical practice acts, the capital punishment statutes of most states either permit or call for some sort of such physician participation. It's worth mentioning that such physician participation is allowed by the federal execution protocol, however, the same is not called for by the protocol. Apparently, it seems that there exists a latent legislative disagreement between the capital punishment statutes and medical practice acts.¹⁸ Established rules of interpretation and construction of statutes state and suggest that the medical practice acts should be superseded by the capital punishment statutes for two reasons.

Firstly, the rule of "last in time" is usually followed by the courts in case of conflicting statutes. In case of a conflict between two statutes, whether actual or perceived, the last enacted statute is allowed to override the one enacted earlier with respect to the conflicting provisions only, for the obvious and commonly accepted logic of being more accurate reflection and description of the prevailing will of people through the legislature. The ruling should definitely be in favour of the death penalty statutes being more recent in time as compared to the medical practice acts.¹⁹

Secondly, as per another rule of statutory construction, the statute which is specific in nature (deals directly with the subject matter) must prevail

over the general one (does not deal with the subject matter directly), as the specific statutes provide more accurate and clear guidelines for the appropriate course of legal action. With regard to the present conflict, since the capital punishment statutes explicitly deal with the issue by directly addressing the same, which the medical practice acts fail to do, hence the capital punishment statutes are bound to prevail over their corresponding medical acts.

Moreover, physician participation in judicial executions is possibly required by the American Constitution. Eighth Amendment to the Constitution has put an absolute bar on inflicting cruel and unusual punishments. The Supreme Court of America, in 1972, categorically declared and held certain executions unconstitutional on the basis of involved procedures and processes constituting unusual and cruel punishments.²⁰ On the other hand, in 1976, in Florida, Georgia, and Texas, in a series of cases, the Court upheld the imposition of capital punishment as constitutional, because these states had incorporated more humane modes of execution as contrary to the precious ones which comprised of cruel and unusual procedures. Now the obvious question arises, what constitutes unusual and cruel punishment? Is it the absence of supervision by physician that makes the execution method cruel and unusual?

Specifically in this context, for the Eighth Amendment purposes, the Court in *Trop v. Dulles* noted that what constitutes unusual and cruel punishment is entirely based on the ever evolving standards of human decency which ultimately mark the progress of a maturing society.²¹

Conclusion

Taken as a whole, key ethical and legal arguments supporting and opposing the participation of trained physicians in intravenous lethal injection judicial executions; point towards a clear single conclusion that deliberations favoring the participation strongly overshadow the ones against it. By now, we are clear as to how the ethical arguments are wrongly based on mistaken belief as to the ethical role of physicians and the kind of mutual trust between the medical profession and public at large. In fact, physicians will be guilty of gross professional misconduct by refusing to oversee the executions and taking care of the condemned prisoners in their last crucial hours, thereby neglecting their ethical

responsibility to minimize the suffering and maximize the comfort. Moreover, the legal questions raised by the medical practice acts are adequately invalidated by potential deliberations of Eighth Amendment and the legal rules of statutory construction.

Physicians need to fulfill their role as caregivers by actively participating in the implementation and development of lethal injection as the most humane mode of judicial execution. Additionally, prevailing ambiguity in medical statutes as to the physician participation must be removed by the competent legislatures, thereby, explicitly allowing physicians to supervise the whole execution procedure. Such rulings will not only benefit the convicts but the society at large. Supervision of judicial executions by competent medical professionals will not only ensure that the botched executions are minimized as much as possible but also protect the human rights of dying convicts by maintaining the standards of decency.

Ethical clearance: Not Required

Source of Funding: Self

Conflict of Interest: Nil

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