Review paper

Criminal and medical aspects of vasectomy procedure

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Abstract

In the view of the current pro-life and pro-choice debate, the admissibility of contraception measures, including vasectomy, has significantly increased. This paper discusses the medical aspects of vasectomy from the perspective of criminal liability. Poland is one of the few countries with unregulated status of voluntary vasectomy, which raises serious challenges for medics performing this procedure. The legality of vasectomy has recently become particularly acute, in view of a judgment of the constitutional tribunal, limiting the right to abortion to only 2 cases: pregnancy as a result of a crime and the case when the pregnancy poses a threat to the life or health of the pregnant woman. The purpose of this article is to highlight the issue of the legal status, threats to the rights of the patient, and the criminal liability of the doctor, as well as the need for de lege ferenda changes.

Introduction

As a result of changes to the abortion law in recent years, the issue of the legality of voluntary sterilisation procedures, including vasectomy, has gained renewed importance. In the U.S. Supreme Court ruling in the case *Dobbs v. Jackson Women's Health Organization*, the court overruled both *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992) decisions, holding that the constitution of the United States does not confer a right to abortion. The legality of vasectomy procedure has become a significant problem in the Republic of Poland, after Constitutional Court judgment in case K 1/20, limiting the right to abortion to only 2 cases: pregnancy as a result of a crime (including rape) and the case when the pregnancy poses a threat to the life or health of the pregnant woman [1]. In the face of such a far-reaching restriction of the right to a possible termination of pregnancy (without prejudging its validity), the legality of contraception methods has significantly increased in importance. Although UN reports [2] show a decidedly declining trend in the number of vasectomies performed all over the world, in view of the impossibility of performing female sterilisation procedures, as well as the gradual restriction of the admissibility of early pregnancy termination procedures, it can be assumed that interest in vasectomy procedures in Poland, as a potentially 'reversible' method of contraception, will increase. Vasectomy sometimes mistakenly referred to as a reversible procedure, while data from clinical research indicate significant difficulties in reversibility of the effects of vasectomy, which will be discussed later in the paper. Studies conducted in the United States after the *Dobbs vs. Jackson* ruling, showed a definite increase in interest in vasectomy procedures (an increase in medical visits), particularly among young men (< 30) and childless men [3]. Consequently, the purpose of this article is to highlight the issue of the legality of vasectomy, the uncertainty of the current legal status, the multiplicity of views expressed in the doctrine, and the need for regulating the legal status of vasectomy procedures.

Nature, purpose, and techniques

The basic idea of vasectomy involves the bilateral interruption of the vas deferens. The expected result of the procedure is a lack of sperm flow from the testicles to the prostate and urethra and no sperm in the semen. Numerous modifications to the surgical procedure have been described that improve and accelerate the performance of vasectomy. The modifications concern the site of surgical access, the method of local anaesthesia, the technique of separating the vas deferens, and the method of their closure. Among the available and practised approaches for performing a vasectomy, the following methods should be distinguished:

1) cutting the vas deferens with ligation of the ends;
2) cutting the vas deferens with end ligation and cauterisation of both ends (intraluminal or extraluminal cauterisation);
3) cutting the vas deferens with end ligation and insertion of clips on the ends of the vas deferens;

4) excision of the longer section of the vas deferens and attachment of either ligation or clips or cauterisation;
5) cutting the vas deferens and moving the ends between other fascial layers;
6) cutting the vas deferens with a foldback technique of the cut ends;
7) minimally invasive techniques, no-needle NNV, no-scalpel NSV (For anaesthesia use apparatus, which administers spray anaesthesia on the skin of the scrotum under increased pressure, while the vas deferens itself is severed by pulling the vas deferens just under the top surface of the skin with a small surgical instrument. This is followed by splitting the skin with a sharp peanut and pulling out a short section of the vas deferens above the surface to cut as continuity (no skin continuity is interrupted using a scalpel));
8) cutting the vas deferens with a subsequent open-end vasectomy (Procedure involves leaving both or one end of the vas deferens on the side of the testicle unbound. The technique is also sometimes used as an extra-ligation of both ends free, in which case it is necessary to move the ends to other fascial layers so that, although the ends are not closed, there is no sperm flow and recanalization of the vas deferens).

Referring to the division presented above, the methods listed in points 1–6 assume the cutting of the vas deferens and then appropriate protection of their ends depending on the chosen method. The vas deferens can be ligated with a non-absorbable thread, closed with clips, and additionally coagulated from the outside, or with a needle electrode from the lumen. Some surgeons prefer to cut a section of about 1–2 cm of the vas deferens to prevent reattachment of the ends and recanalisation of the vas deferens. The ends also can be displaced between different layers of scrotal tissue. One of the modifications used is to leave the testicular end open to prevent or minimise chronic testicular pain, which is one of the complications. The sperm can escape freely, and only the distal end is ligated. Another modification involves coagulating both ends of the cut vas deferens to induce a burn reaction and overgrowth of the vas deferens lumen. The recent modification of no-needle vasectomy (point 7) uses a jet injection technique to establish local anaesthesia. A jet injection instrument generates a high-pressure spray, which is forced through the skin, vas, and perivasal tissues. An incision in the skin, usually very small, can be on both sides of the scrotum or single, in the median line of the body from which both vas deferentia can be reached [4]. The latest technique, called non-scalpel vasectomy (NSV) involves minimising surgical trauma even further. The vas deferens, isolated by the operator, is immobilised with a special surgical instrument. The scrotal skin is then separated with a sharp claw just above the immobilised vas deferens. The vas deferens is pulled out through a tiny hole of about 2 mm, divided, and closed. The choice of occlusion techniques is wide and varies between surgeons. Occlusion is independent on which method is used to approach the vas – commonly used methods include suture ligature, surgical clips, electrocautery, intra vas devices, partial vas excision, open-end vasectomy, and fascial interposition [4]. However, the 2012 American Urological Association guidelines on vasectomies found that the evidence on the effectiveness of these technical variations is limited, and only grade C evidence exists [5]. The popularity of each method varies by region of the world. No-needle/non-scalpel methods are gaining more followers due to its less invasive nature and faster reconvalescence. Regardless of the choice of technique and method, the common denominator of all the aforementioned procedures is to cause obstruction of the vas deferens, which prevents fertilisation by the physiological route and results in loss of fertility.

Legal status

The status of vasectomy, as a common urological procedure, varies significantly between countries and legal orders. In principle, there are three/four groups of regulations relating to the procedure of voluntary vasectomy (more broadly treating voluntary sterilisation): a model that implicitly allows the possibility of carrying out sterilisation procedures for contraceptive purpose or demographics programs, the model of full legality provided by the conditions (in the case of women ex. as to age or number of children), the criminalising model – among which are states that prohibit vasectomy for non-therapeutic reasons, and the model of tacit legality – which, as a matter of principle, does not contain legal regulations that explicitly prohibit or criminalise vasectomy [6]. Poland is one of the countries with an unregulated status of both voluntary sterilisation procedures in the broad sense and vasectomy itself. There is a lack of both positive and negative regulation. The framework for the provision of medical services in the national order is formed primarily by Act of December 5, 1996 on the professions of physician and dentist, i.e. (oryg. Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentysty (t.j. Dz. U. z 2022 r. poz. 1731 z późn. zm.)), and with regard to permissible terminations of pregnancy, the Law on Family Planning, Protection of the Human Foetus, and the Conditions for Permissibility of Termination of Pregnancy (oryg. Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży (t.j. Dz. U. z 2022 r. poz. 1575)). None of the above-mentioned laws addresses the issue of voluntary sterilisation and vasectomy. There is no doubt that the vasectomy procedure, carried out for therapeutic purposes – by which

the author understands the existence of medical indications to carry out the procedure, due to the need to take life-saving or health-saving measures (although it must be pointed out that these type of cases are extremely rare, practically non-existent.), with the consent of the patient, consistent with the current state of medical knowledge, carried out by an authorised entity, enjoys the status of full legality [7]. Doubts about the legality of the procedure, therefore, relate to cases of conducting a vasectomy, without medical indications.

According to Article 156 §1 p.1 of the Criminal Code, the deprivation of someone's ability to procreate is considered to be a grievous bodily harm. The nature of the vasectomy involves the bilateral interruption of the vas deferens to prevent sperm flow from the testicles to the prostate and urethra, including the deprivation of semen in sperm and thwarting the possibility of successful fertilisation. Therefore, literal analysis of the content of the provision indicates that a vasectomy procedure, or rather its result, may constitute grave bodily harm within the meaning of Article 156 §1 p.1 of the Criminal Code. From the literal meaning of the provision, the nature of the vasectomy and its questionable reversibility are irrelevant, because the legislator did not limit the scope of criminalisation exclusively to cases of permanent deprivation of the ability to procreate. The authors do not agree with the view based on the belief that a vasectomy does not result in deprivation of the ability to procreate, since the ability to have intercourse is preserved and the damage may be temporary [8]. The provision clearly stipulates the ability to procreate (i.e. the potential ability to successfully fertilise an egg), not the ability to have sexual intercourse or produce sperm. The phrase *ability to procreate* should be understood as the general ability of fertilisation (fertilisation of the ovum), which the vasectomy procedure effectively prevents [9]. The common belief among patients that the procedure is temporary or at least reversible is completely incorrect. While the vasectomy itself is a simple and easy procedure to perform and does not require specialised equipment, restoring the continuity of the vas deferens and at the same time obtaining semen (the parameters of which will be suitable for reproduction) is a difficult medical challenge considering the difficulties of finding the severed ends of the vas deferens and the changes in the testicles themselves caused by the long-term blockage of vas deferens outflow. The longer the state of blocked sperm outflow from the testes persists, the more difficult it is to restore sperm in the ejaculate. The vas deferens is an anatomical structure resembling a very long tube with a thick, solid wall but with a relatively narrow lumen. The outer diameter of the vas deferens varies in the range 2–3 mm, and the lumen is about 0.5 mm. Restoring continuity requires not only suturing the walls, but also very precise alignment of the two ends to achieve patency inside the vas deferens. This requires both experience in microsurgical procedures and the correct equipment – microinstruments and optical devices that magnify the image of the operated structures. To better illustrate this scale of difficulty, a 10-0 or 9-0 suture is used to suture the vas deferens. The thickness of such a suture is about 0.02–0.029 mm (10-0 suture) and 0.03–0.039 mm (9.0 suture). According to available statistics, if the time of blocked vas deferens is up to 3 years, the percentage of restoration of sperm in semen is up to 97%, but the percentage of pregnancies obtained is only up to 76%. If the vasectomy was performed between 3 and 8 years ago, the percentage of sperm present in the semen is 88%, and pregnancy is obtained only in 53%. If attempting to regain vas deferens patency after a period of 15 years or longer, the percentage of sperm in the semen can be up to 71%, and pregnancy is obtained in only about 30% of patients [10]. One should strongly advocate considering the treatment in question as only "potentially reversible". The premise of vasectomy is infertility, and its immanent and typical risk is the inability to effectively reverse the flow of semen or obtain semen with normal parameters. The authors disagree with the statement that considers vasectomy to be a legal procedure due to the lack of fulfilment of the elements of a crime.

The question of the possibility of giving legally effective consent of the disposer to perform a vasectomy procedure is also disputed. The principle of *volenti non fit iniura* suffers significant limitations in criminal law due to the collision of the legal goods of the individual and the social interest [11], and among representatives of the doctrine, different views are expressed as to the limits of permissibility of the consent of the disposer of a legal good. According to the first, the basis for the "secondary" exclusion of their unlawfulness is the non-statutory defence of the so-called "consent of the victim", while the second is based on the element of a specific collision of legal goods and interests, from among which the legal good or interest of greater social value should be chosen [12]. The first gives priority to the consent of the disposer of the asset, considering certain conditions for recognising consent as validly expressed as the only criteria. This belief is based on regard for the reproductive rights of citizens, of which the voluntary sterilisation procedure is one of the forms [13]. States respecting rights in this area should allow all possible contraceptives (natural, hormonal, chemical, mechanical), in accordance with the current state of medical knowledge [9, 14]. However, there are also voices in the doctrine to the contrary, suggesting the consent of the disposer is not decisive – it is necessary but not sufficient (a clause limiting the ability to give legally effective consent was present in the 1963 Criminal Code, which limited the ability to give consent in the event of a collision with the principles of social life.), since there should be interest justified from the point

of view of social values, which would justify the secondary legalisation of the action [15]. Despite many demands for codification, there is no consensus on its exact content. As pointed out by Zalewski, in no European legislation does the consent of the disposer have an absolute nature – as a rule, it is subject to subjective, quantitative, and qualitative limitations, relating primarily to the catalogue of goods that can be freely disposed [16]. It is quite generally accepted in the doctrine that it is not possible to consent to the infliction of grave bodily injury, or the exposure of life and health to the danger of losing it [17]. Although Derek rightly questions the possibility of unequivocally placing a strict limit, noting that there is social acceptance of certain behaviour causing grievous harm with consent, at the same time in certain circumstances even light harm will not be permitted [18]. Yet, in the authors' opinion, the problem does not lie solely on the level of the type of harm or the socially acceptable limits of a person's self-determination of his or her body and related rights. The question of the validity of consent in connection with the issue of reversibility could only be evaluated *in concerto*. Such issues as age, the degree of maturity, and emotional awareness are important. After all, the decision of an 18-year-old, with no previous children, no stabilised life situation, still at the stage of developing life plans and ambitions, should be considered differently, as should the decision of a sprightly middle-aged/older person, experienced in life, with offspring and a different perspective on the experience of parenthood. Indeed, in urological practice there are cases in which patients, having undergone a vasectomy at a relatively early stage of life, after a shift in their life situation, try to reverse the effects of the procedure, seeking to restore fertility, which is often impossible. Thus, the concept of the consent raises significant structural questions and does not remove legal doubts. Moreover, there are also present opinions that categorically exclude the possibility of excluding liability for incapacitation procedures, pointing out that their performance at the request of the patient is always unlawful and fulfils the characteristics of a crime [19, 20].

Part of the academic community upholds the exclusion of criminal liability for conducting vasectomy procedures under the theory of primary legality, based on the therapeutic nature of medical procedures. The proposed solution does not seem to be optimal and clear of interpretative doubts either. The problem remains in defining therapeutic and non-therapeutic purposes. The Act on the professions of physician and dentist does not use the concept of activities of a therapeutic nature. The Act on Patients' Rights and Patients' Ombudsman, art. 3 (1) pt. 6 uses the concept of a medical service, referring in this regard to the definition of a medical service referred to in art. 2(1)(10) of the Act of April 15, 2011, on medical activity. According to the Act, a medical service is defined as activities aimed at preserving, saving, restoring, or improving health, as well as other medical activities resulting from the treatment process or separate regulations governing their performance. This definition does not clarify the difference between therapeutic activities and activities of a non-therapeutic nature. It is assumed that if the performance of a certain medical procedure is motivated by medical considerations (the need to save life and health), the activity has a therapeutic character. Other considerations, e.g. convenience and aesthetics, constitute the non-medical nature of the activity. Due to the collision of legal goods, a vasectomy carried out strictly for therapeutic reasons will benefit from the so-called concept of primary legality, which will completely exclude criminal punishment under criminal law. On the other hand, a vasectomy carried out on a wish, for reasons including, for example, the desire to avoid having children, fear of passing genetic diseases, unwillingness to use contraceptives, or religious or eugenic reasons, should be considered a medical act outside of medical treatment, not entitled to any protection under the concept of primary legality. The above concept faces two fundamental problems. It is based on a narrow understanding of therapeutic treatment, concentrating. Whereas, in the 21st century, there is no doubt that health elements include mental health and well-being in the broadest sense. Thus, the will to have a vasectomy may not so much stem from convenience or a desire for sexual preference, but from concern for mental well-being and mental health. A vasectomy may not only have a eugenic basis. Concerns about the possibility of passing on genes responsible for serious diseases can cause fear, anxiety, feelings of shame, worry, lowered temper, and other negative consequences in the area of mental health. While, according to the World Health Organisation, the concept of health is understood not only as a state of complete/total wellbeing/physical wellbeing, but also mental and social wellbeing, and not only the absence – objectively existing – of disease or infirmity. Based already on the above concept, serious doubts arise regarding the proposed division between therapeutic and nontherapeutic activities in genera. It seems that, assuming mental health as a natural component of health in the broadest sense, therapeutic and nontherapeutic activities cannot be abstractly distinguished. Even the nontherapeutic activities (aesthetic medicine procedures) in some cases, due to the impact of injuries/disfigurements/illnesses, may be therapeutic due to their individual impact on mental health. Moreover, it is difficult to conceive of an indication for a vasectomy of a therapeutic nature, understood strictly as physical life and health. Indeed, there are no purely therapeutic indications specifically for vasectomy. In textbooks and medical publications, indications for vasectomy are listed among the general indications for the use of forms of contraception/prevention of pregnancy or maintenance of sexual

abstinence. These include, among others: female diseases significantly increasing the risk of pregnancy and childbirth, the risk of transmission of diseases to offspring, certain diseases of the cardiovascular system, nervous system, and visual system. However, this constitutes is an indication for broadly defined pregnancy prevention measures, not for vasectomy to save life and physical health. Accepting the narrow meaning of therapeutic purposes, therefore, would lead to the conclusion of the total illegality of vasectomy procedures, in the absence of the possibility of indicating exclusively therapeutic indications for its performance. For the above reasons, the authors of this study do not consider the proposed solution sufficient either. In practice, determining whether a vasectomy procedure was originally legal (as a therapeutic act) or did not benefit original legality would require a case-by-case analysis, seeking a psychiatric/psychological opinion on the state of health, and deciding *de facto* after the fact on its legality. In the rule of law, such a solution does not seem acceptable.

Finally, the doctrine has also expressed the view that the vasectomy procedure is primarily legal because there is no violation of the rules on acting with a legal good. In justification of the above thesis, it is pointed out that there is no attack on life or health (and therefore a violation of the object of protection) as for the matter of fact all actions are taken to protect and preserve it read [21, 22]. Consequently, acting with the approved rules of the profession in order to save or preserve/restore health cannot be considered an unlawful act because it is socially acceptable and thus primarily legal [21, 22]. However, the presented view does not solve the problems raised and described above, regarding the definition and differences between the therapeutic and non-therapeutic activities and the definition of "health". Not all medical procedures have a therapeutic character; some do not, or may even have the opposite character (e.g. some plastic surgery procedures performed at the patient's request, despite questionable indications or even significant risks of side effects, impairments, complications etc.). A certain weakness of this theory is the inability to justify the primarily legal nature in the case of treatments with a significantly disputed therapeutic nature, or even disputed admissibility in light of current medical knowledge. Considering the growing number of non-medical treatment services and advances in technology, it raises significant questions. What is more, the concept of primary legality raised in past significant disputes, among which some authors questioned the possibility of considering medical actions as primarily legal, pointing out that that any violation of the integrity of the body fulfils the elements of bodily harm, while its unlawfulness can only be secondarily denied due the certain circumstances excluding criminal liability (read more: [22] and the literature cited therein [15, 23]). This brings us again to the discussion on the therapeutic nature, its limits, and the relevancy as well as effectiveness of the consent of the disposer of the legal good.

Conclusions

The above considerations lead to the following conclusions: the status of vasectomy procedures is regulated in a decidedly inadequate manner in the Polish legal order. From a formal-legal perspective, any deprivation of the ability to procreate constitutes the realisation of the elements of an act under Article 156 §1 pt. 1/3 of the Criminal Code. The only cases excluded from the scope of criminalisation are those in which vasectomy procedures are carried out as part of medical activities peformed to save the life or health of a patient. The non-statutory exclusion based on the victim's consent is insufficient, while both the scope of legal goods at the exclusive disposal of the holder and the conditions for its granting are disputed. The current situation poses a threat both from the point of view of the patient's right to a clear definition of the available medical services and contraceptives, and from the point of view of the clarity of criminal law and the criminal liability of doctors who are uncertain about the limits of the legality of the procedures performed. Especially in times of unstable socio-political conditions and a certain susceptibility of law enforcement and the judiciary to political climate, it would be reasonable to clearly regulate the status of the vasectomy procedure and not to rely on pure procedural opportunism. In the author's opinion, vasectomy in general should be considered as an acceptable form of contraception in light of current medical knowledge. However, it is necessary to distinguish the form and way of qualification for the procedure. In the case of persons over 35 years of age with offspring, it should be possible to perform the procedure already on the basis of voluntary and informed consent given by the patient, after prior notification of risks and complications, with particular attention paid to the issue of reversibility. In the case of persons under 35 years of age without offspring, obtaining consent should be accompanied by a psychological consultation to establish specifically whether the patient is aware and discerning of the decision, effects, and consequences of the procedure, in particular the significant risk of irreversibility. In the absence of such discernment, other forms of contraception should be recommended. In addition, for those under 35 years of age who do not have offspring, from a medical perspective it would always be advisable to consider performing the procedure based on techniques that leave one vas deferens without cauterisation in order to increase the chances of a possible revasectomy.

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Conflict of interest

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