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**DAWSTWO ORGANÓW W KONTEKŚCIE SKŁONNOŚCI
CZŁOWIEKA DO BYCIA KONSEKWENTNYM.
ROZWAŻANIA Z POGRANICZA PRAWA I PSYCHOLOGII**

**ORGAN DONATION IN THE CONTEXT OF HUMAN
TENDENCY TO BE CONSISTENT. CONSIDERATIONS
WITH REFERENCE TO LAW AND PSYCHOLOGY**

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Streszczenie

W tekście zweryfikowane zostały hipotezy, że wykorzystując skłonność człowieka do bycia konsekwentnym oraz wprowadzając odpowiednie uregulowania prawne można zwiększyć dawstwo organów. W wyniku przeprowadzonych rozważań ustalono, że istnieją argumenty przemawiające za tym, że *status quo bias* (skłonność człowieka do bycia konsekwentnym) istnieje i oddziałuje na człowieka, a nadto – że istnieje wiele racjonalnych uzasadnień o charakterze psychologicznym tego rodzaju okoliczności. Ustalono jednocześnie, że *status quo bias* można by spróbować wykorzystać do zwiększenia dawstwa organów, wymuszając na człowieku dokonanie wyboru czy chce być dawcą organów, czy też nie, i liczyć na to, że z uwagi na swoją skłonność do bycia konsekwentnym wyboru tego w przyszłości nie zmieni. W Polsce wzmiankowane rozwiązanie można by wprowadzić przez dodanie do art. 11 ust. 1 ustawy o kierujących pojazdami punktu 7 o odpowiedniej treści.

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Słowa kluczowe: *status quo bias*, dawstwo organów, prawo, psychologia

Abstract

The text verifies the hypotheses that exploiting the human tendency to be consistent and introducing appropriate legal solutions can increase organ donation. The considerations found that there are arguments for the status quo bias (the tendency to be consistent) exists and affects humans. Concurrently, there are multiple rational psychological justifications for this kind of occurrences. Thus, the status quo bias can be exploited for increasing the organ donation, imposing on a person the decision regarding being willing to become an organ donor after their death or not, and count on this person not changing their decision in the future due to the tendency to be consistent. In Poland, such a solution could be introduced by adding the 7th item to the Article 11 section 1 of the Act on Vehicle Operators with the following wording: “declared that they agree or not to the removal of cells, tissues or organs from their corpses for transplantation, or the removal of cells and tissues for transplanting them into another person. The declaration may be changed at any time.”

Key words: status quo bias; organ donation; law; psychology

Introduction

The procurement of cells, tissues, or organs from human cadavers (organ donation) serves at least several important purposes, including, but not limited to, a diagnostic purpose (e.g., confirming an initial diagnosis), a scientific purpose (improving medical knowledge and the state of science), or a teaching purpose (educating medical students). However, it primarily serves a therapeutic purpose, i.e., saving the health and life of another human being². Unfortunately, in both Europe and the United States of America, the number of transplants performed is still below the

² See J. Haberko, in: *Ustawa o pobieraniu, przechowywaniu i przeszczepianiu komórek, tkanek i narządów*. Commentary, I. Uhrynowska-Tyszkiewicz, J. Haberko, Warsaw 2014, comments to Article 4, theses No. 6-10.

number of people waiting. Thus, organs are in short supply, and in 2021, due to the COVID-19 pandemic, the situation is likely to get even worse³.

In view of the above, it is worth considering what can be done to improve the statistics on organ donation and, consequently, also increase the chances of people in need of transplants to continue living. One of the ways, and a way that does not entail any costs, may be, as it seems, the introduction into the legal orders of individual states of appropriate legal regulations concerning the analysed issue. Regulations, we might add, that would make it possible to take full advantage of man's tendency to maintain the *status quo bias*⁴, and thus regulations that would constitute a kind of manipulation of human behaviour; after all, they would secretly use something that the addressee of the norm is typically unaware of in order to modify his behaviour⁵. The paper will consider the possibility of introducing into the legal systems of individual countries (in particular into the Polish legal system) legal solutions which would force people to choose whether or not to become organ donors after death and which, by using people's tendency to be consistent, would manipulate them to such an extent that they would not change their choice. The text will thus verify the thesis that the *status quo bias* can serve as a tool for manipulating people and that by taking advantage of people's tendency to be consistent and introducing appropriate legal regulations, organ donation can be increased.

1. Reflections

According to the theory of rational decision-making⁶, individuals choose, in the simplest terms, the alternative they know that ranks highest in their personal ranking, and thus, knowing the decision-maker's ranking,

³ See Council of Europe, *European Day for Organ Donation and Transplantation – 9 October 2021*, <https://www.Edam.eu/en/european-day-organ-donation-and-transplantation-9-october-2021> (access: 16.04.2021); The Division of Transplantation, *Organ Donation Statistics*, <https://www.organdonor.gov/statistics-stories/statistics.html> (access: 16/04/2021).

⁴ For more on this topic see. W. Samuelson, R. Zeckhauser, *Status Quo Bias in Decision Making*, "Journal of Risk and Uncertainty" 1988, no 1(1), p. 7-59.

⁵ See more R.H. Thaler, C.R. Sunstein, *Impuls. Jak podejmować właściwe decyzje dotyczące zdrowia, dobrobytu i szczęścia*, Poznań 2017, p. 207-215.

⁶ For more on this topic see. Unit Buchanan, G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy*, Ann Arbor 1962.

we can infallibly predict his choice, and observing his actual choice, we know that we are dealing with the alternative that was rated highest by him. This assumes that the individual's decision, the choice of a given alternative, is influenced only by the salient features associated with his (the individual's) preferences, but no longer by the order in which the alternatives are presented or the labels worn by those alternatives. In reality, however, this is not the case (in fact, we are not subjects whose decisions are always rational) - among the alternatives we usually find one that bears the label of the *status quo* that strongly influences the decision-maker (passivity or maintaining the decision is, after all, almost always possible). As it turns out, when confronted with new opportunities, decision makers often cling to the indicated alternative and thus seek to maintain the *status quo*⁷.

From what does the above result? Viewed from a psychological perspective, at least several justifications can be identified. By way of example, let us point out, following Samuelson and Zeckhauser, two of the most interesting. First, *status quo bias* may arise from an individual's desire for consistency, including achieving consistency in decisions. Past choices are rationalized by the individual while rejecting or suppressing information that indicates that the past decision was wrong. The process of rationalization extends to present and future choices, leading - ultimately - to the maintenance of existing choices⁸. Second, according to attitude self-perception theory⁹, individuals establish their basic attitudes and preferences by observing their own behaviour, just as they do in the context of third parties. So in making present and future choices, they refer to their past decisions, thinking: "If it was good enough for me then, it is (must be) good enough for me now"¹⁰. This kind of reasoning leads to upholding a previously made choice, and thus to maintaining the *status*

⁷ See W. Samuelson, R. Zeckhauser, *Status...*, p. 7-8.

⁸ *Ibidem*, p. 39.

⁹ For more on this topic D.J. Bem, *Self-Perception Theory*, "Advances in Experimental Social Psychology" 1972, no 6, p. 1-62.

¹⁰ W. Samuelson, R. Zeckhauser, *Status...*, p. 39.

quo¹¹. Similar, but also additional, justifications are identified by Bernecker¹², Blasch and Daminato¹³, and Cialdini¹⁴.

Regardless of the justification adopted, however, it must be said that the *status quo bias* exists and affects human beings, and this offers an opportunity, as already mentioned, to improve statistics on organ donation. In doing so, a simple manipulation of the law, involving a small change in the legal regulations governing the procurement of cells, tissues, or organs from human cadavers, with the goal (though of course this goal would not be expressed explicitly; hence the manipulative nature of the operation) of exploiting the human tendency to maintain the status quo, may suffice to increase organ donation. Such a change could consist, for example, in changing the existing provision in a given legal order which makes the harvesting of cells, tissues and organs from human cadavers conditional on the deceased giving their consent during their lifetime, into a provision which is identical or similar in content to the one currently in force in Poland. Recall that under the current Polish law of July 1, 2005 on the collection, storage and transplantation of cells, tissues and organs, the collection of cells¹⁵, tissues or organs from human cadavers for the purpose of transplantation or the collection of cells or tissues for human application can be performed if the deceased person did not object during his or her lifetime. In turn, the objection can be expressed in the form:

- 1) an entry in the central register of objections to the procurement of cells, tissues and organs from human cadavers;
- 2) a written declaration accompanied by a handwritten signature;
- 3) an oral statement made in the presence of at least two witnesses and confirmed in writing by them. At the same time - the objection can be withdrawn at any time.

Such a change (consisting of introducing into a given legal order a solution analogous to the one envisaged in Poland), introducing a kind of

¹¹ *Ibidem*.

¹² See A. Bernecker, *Is Status Quo Bias Explained by Anchoring? Evidence from Survey Experiments*, <https://www.vwl.uni-mannheim.de/media/Lehrstuehle/vwl/Gruener/StatusQuoBiasAnchoring.pdf> (access: 16/04/2021).

¹³ See J. Blasch, C. Daminato, *Behavioral Anomalies and Energy-related Individual Choices: The Role of Status-quo Bias*, "Energy Journal" 2020, no 41(6), p. 181-214.

¹⁴ R. Cialdini, *Wywieranie wpływu na ludzi. Teoria i praktyka*, Sopot 2020, p. 75-132.

¹⁵ Act of July 1, 2005 on collection, storage and transplantation of cells, tissues and organs (Journal of Laws of 2020, item 2134, as amended).

default option, which would require an activity on the part of an individual in the form of expressing his or her objection in case of a desire to change it, would constitute a point of reference for the individual in making subsequent decisions and would be an alternative bearing - already mentioned - a strong *status quo* label, acting as an impulse and creating additionally the impression (right or wrong) that the default alternative has the implicit support of its creators, in this case, the legislator¹⁶. As Thaler and Sunstein point out: "The impact [of such a change - author's note] on the consent rate is enormous. To get an idea of the strength of the default option rule, let's analyse the difference in consent rates in two similar countries, Austria and Germany. In Germany, where there is an opt-in system [i.e. a system requiring consent to be an organ donor - author's note], only 12% of citizens have consented to donation, while in Austria [where implicit consent to be an organ donor has been adopted - author's note] almost all (99%) have done so"¹⁷.

An alternative, and perhaps an even better solution, could be to introduce into the legal orders of individual states a solution similar to that used in Illinois (USA). As Thaler and Sunstein point out: "In 2008, the state of Illinois adopted some version of this procedure. When a driver goes to get the picture needed for a new driver's license, they are asked if they want to be a donor. When he answers in the affirmative, he is reminded that the family will not be allowed to impose its will, and is asked to reconsider. The early results of this program are very promising"¹⁸. In Poland, for example, an additional requirement for obtaining a driver's license could be introduced in the form of an obligation for a person who has passed a theoretical and practical driving test to decide whether or not they want to be an organ donor. Remember that in the current state of the law, a driver's license is issued to a person who:

- 1) has reached the minimum age required to drive vehicles of the appropriate category;
- 2) has obtained: a) a medical certificate of lack of medical contraindications to driving a vehicle, b) a psychological certificate of lack of psychological contraindications to driving a vehicle - not

¹⁶ See R.H. Thaler, C.R. Sunstein, *Impuls...*, p. 52.

¹⁷ *Ibidem*, p. 211.

¹⁸ *Ibidem*, p. 213.

applicable to driver's licenses of categories AM, A1, A2, A, B1, B, B+E or T;

- 3) has received the training required to obtain a driver's license in the applicable category;
- 4) has passed the state exam required to obtain a driver's license in the appropriate category;
- 5) informed of the penal liability for making false statements or for having concealed the truth, has declared that his place of residence is on the territory of the Republic of Poland, whereby:
 - a) resides in the territory of the Republic of Poland for at least 185 days in each calendar year due to personal and professional ties or with the intention of permanent residence solely due to personal ties, or
 - b) resides regularly in the territory of the Republic of Poland due to his personal ties, and at the same time that, due to his professional ties, he resides successively in at least two Member States of the European Union, or
 - c) resides irregularly on the territory of the Republic of Poland due to personal ties, because he stays in another Member State of the European Union in order to fulfil a task of a definite duration, or
 - d) resides in the territory of another state because of studies or schooling undertaken in that state;
- 6) warned of the penal liability for making a false statement or concealing the truth has declared that:
 - a) has not been ordered, by a final court ruling, not to drive a motor vehicle,
 - b) has no driver's license or permit to drive a streetcar seized,
 - c) does not have a revoked driving privilege¹⁹.

To the above-mentioned catalogue of requirements could be added, as already mentioned, the obligation for a person who has passed the theoretical and practical driving test to decide whether or not he or she wants to be an organ donor. Such an obligation could be introduced by adding a clause 7 to Article 11(1) of the Driving Act, which could read: "has stated that he or she does or does not consent to the removal of cells, tissues, or organs from his or her cadaver for the purpose of transplantation or the removal of cells or tissues for human use." Such a regulation would

¹⁹ See the Act of January 5, 2011, on the drivers of vehicles (Journal of Laws of 2020, item 1268, as amended).

seem to meet the minimum requirements provided for in Article 31(3) of the Constitution of the Republic of Poland²⁰, and as a consequence - would be fully permissible in a democratic state of law; for it should be stressed that:

- 1) the restriction of human freedom (in the form of the obligation to make a decision about organ donation) would be introduced by a legal act of statutory rank;
- 2) it would serve to protect public health, as well as to protect the freedoms and rights of others (and in particular to protect their right to life and health);
- 3) it would be able, as was sought to be demonstrated, to achieve the objectives set before it (principle of utility);
- 4) it would be necessary for the protection of the public interest to which it is linked (principle of necessity; other means used so far, however, have not proved sufficiently effective);
- 5) would be in proportion to the small burdens imposed on the citizen (*sensu stricto* principle of proportionality).

Of course, it would be advisable to leave at the same time for the person applying for a driver's license to later change his choice by adding a second sentence that reads: "The statement may be amended at any time." Such a possibility appears to be necessary from the perspective of the human right to privacy, and therefore - speaking in the simplest terms - from the perspective of the human right to decide about one's own life at one's own discretion (see Article 47 of the Constitution of the Republic of Poland), and the prohibition of restriction of human freedoms and rights in a situation in which such restrictions would not be necessary from the perspective of the protection of other important - in the opinion of the legislator - goods (see Article 31(3) of the Constitution of the Republic of Poland). In contrast, in a situation where the use of *status quo bias* would be a sufficient mean of motivating a person, limiting the ability to change an initially made decision through legal means would hardly be described as truly necessary.

A prior decision to donate organs, due to the psychological mechanisms identified earlier, including in particular the individual's desire for consistency, may be an appropriately strong factor in maintaining that

²⁰ Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended).

decision in the future (the possibility of such an effect may also be supported by comparing the effects of legal solutions used in different countries, as discussed earlier) and this is what people waiting for a transplant are counting on and this is what we, as a society, should strive for (of course, we are assuming that the decisions made in advance will be in a positive form, that is, in the form of consent to organ donation, although, of course, this does not have to be the case). This obligation to strive for an increase in organ donation through legal regulations results - we should add - from the assumption adopted by the legislator that everyone should be ensured legal protection of their life (see Article 39 of the Constitution of the Republic of Poland), and the proposed legal change can undoubtedly contribute to such protection, with only a slight limitation of other human freedoms and rights (in fact, one may risk a statement that with the lack of any infringement of human freedoms and rights); and where we have the possibility of using measures which are less harmful to human freedoms and rights than others, and these measures are appropriately effective (equally effective, and perhaps even more effective in comparison with other measures), we should take advantage of this possibility. On the one hand, then, the state's obligation to provide legal protection of life to the individual will be fulfilled, while on the other hand - the principle, which is crucial from the perspective of a democratic legal state, commonly referred to as the principle of proportionality (see Article 31(3) of the Constitution of the Republic of Poland) will be preserved.

2. Ethical issues

As noted above, the proposed legal change bears the hallmarks of manipulation. As B. Harwas-Napierała points out: "This term [manipulation - author's note] describes such a way of influencing other people, the mechanism of which is intended to be hidden from those subjected to its influence. It is characterized by two main features:

- 1) involves a generally indirect effect on consciousness;
- 2) the intent and purpose of that interaction (beneficial to the manipulator) is to be more or less concealed from the subjects, causing them to assume that it is not beneficial to them (which is generally true).

Manipulation, in other words, is the intentional and deliberate control of behaviour that is not perceived as such in the consciousness of the

person being influenced. The condition of successful manipulation is its invisibility"²¹. The solution suggested in this work would have two goals: a direct goal - in the form of forcing a person to make a choice of whether or not to become an organ donor after death, and an indirect goal - in the form of taking advantage of a person's tendency to be consistent and influencing him in this way so strongly that he does not change his choice; the latter goal, however, would not be expressed directly in legal regulations, and thus - the solution suggested in this work would fully meet the characteristics of manipulation indicated above.

In view of the above, the question can be posed whether the discussed solution can be regarded as ethical, and more specifically - whether in the case of its introduction we would not have to deal with "subjective treatment of a person subjected to such influence, mutilation (to various degrees) of his/her dignity and freedom (a person's own will is replaced by an alien one)"²².

The answer to the question thus posed should, it seems, be negative. Firstly, by definition, the law is intended to have a motivational effect on people, and the purpose of this effect is not always known to the addressee of individual regulations and legal norms. K. Opałek and J. Wróblewski rightly point out that the impact of law on society has two sides:

- 1) informational;
- 2) motivational; the motivational side, the motivational influence of the law on people, is an attainable and fundamental goal (the point is, after all, to guide behaviour in a certain way by evoking the right motives)²³.

Secondly, the proposed solution does not lead to harm to the person being manipulated (or at least - this kind of harm is not perceived by the author of the paper), but it contributes (or at least - can contribute) to results that are extremely beneficial from the perspective of life and health of others. Thirdly, and finally, the proposed solution leaves the person being manipulated a great deal of freedom, without affecting his or her psyche either directly or indirectly; it (the proposed solution) only exploits the natural tendency of the human being to maintain the status quo, and

²¹ B. Harwas-Napierała, *Etyczne aspekty manipulacji*, "Poznańskie Studia Teologiczne" 2005, no 18, p. 248.

²² *Ibidem*.

²³ K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa*, Warsaw 1969, p 150.

when viewed in this way, one might even question whether the term "manipulation" is really appropriate in its context.

In view of the above, it is impossible to consider the proposed solution as unethical, violating human dignity and unacceptable in a democratic state of law.

3. Conclusions

With these considerations in mind, it is fair to say that there are arguments that *status quo bias* (the tendency of humans to be consistent) exists and affects humans. At the same time, there are many rationales of a psychological nature for such circumstances. Status quo bias could thus be attempted to be used to increase organ donation by forcing a person to choose whether or not to be an organ donor, and counting on the fact that, because of their tendency to be consistent, they will not change that choice in the future (*status quo bias* could thus serve as a tool to manipulate people). Unfortunately, there are no studies proving that such an approach will actually increase organ donation, but as Thaler and Sunstein²⁴ point out, in places where it has been used, the results appear promising.

In Poland, this solution could be introduced by adding clause 7 to Article 11(1) of the Act on Driving Vehicles, which would read as follows "has stated that he or she does or does not consent to the removal of cells, tissues, or organs from his or her cadaver for the purpose of transplantation or the removal of cells or tissues for human use. The statement may be amended at any time."

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