

推定反對？ 器官捐贈選擇退出制度與 特定組織器官的排除(一)*

Presumed Dissent? Opt-out Organ Donation
and the Exclusion of Organs and Tissues (I)

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摘要

人們經常聲稱，器官捐贈的合法方式應為選擇退出制

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關鍵詞：視為同意 (deemed consent)、器官捐贈選擇退出 (opt-out organ donation)、器官捐贈政策 (organ donation policy)、政策排除和豁免 (policy exclusions and exemptions)、推定同意 (presumed consent)、移植倫理 (transplantation ethics)

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度，也稱為「推定同意」、「視為同意」或「視為授權」，因此，除非個人有明確拒絕，否則死後將推定或視為願意捐贈至少一部分組織或器官。但即便大致上許多制度都預設支持捐贈，但它們在幾個關鍵面向有所不同，例如，潛在捐贈者家庭成員的偏好所扮演的角色、地位與重要性；排除特定人口群體，或額外強調的保護機制；或是仍被排除在選擇退出制度的器官或組織。本文將對英格蘭、蘇格蘭及北愛爾蘭近期事後退出權的轉變進行案例研究，並參考推動整個英國造成這樣轉變的關鍵因素，本文將會嘗試提問：倘若如此，為何且如何，死後器官捐贈制度中的事後退出權應排除某些視為同意的特定器官或組織。換句話說，死後器官捐贈制度的事後退出權，是否應當對特定器官或組織的捐獻提出質疑？

It is often claimed that a legitimate approach to organ donation is an opt-out system, also known as ‘presumed consent’, ‘deemed consent’, or ‘deemed authorisation’, whereby individuals are presumed or deemed willing to donate at least some of their organs and tissues after death unless they have explicitly refused permission. While sharing a default in favour of donation, such systems differ in several key respects, such as the role and importance assigned to the family members of prospective donors and their preferences, and exclusions and safeguards which often specify the demographic groups, purposes, or organs and tissues that will remain outside the scope of the opt-out system. Using the recent shift to opt-out in England, Scotland, and Northern Ireland as case studies, and by reference to the key goals motivating this shift across the UK, this article asks whether and, if so, why, and how, opt-out systems for post-mortem organ donation should restrict the types of organs and tissues for which consent is deemed. In other words, ought opt-out systems for PMOD

presume dissent regarding the donation of certain organs and tissues?

壹、引言

在關於器官捐獻的哲學與政策文獻中，人們普遍認為，除了得到明確同意能從死者身上摘取器官外，另一種合法的替代方案是選擇退出制度，也稱為「推定同意」（presumed consent）、「視為同意」（deemed Consent）或「視為授權」（deemed authorisation）¹。在這類制度中，國家假設（或視為）²在沒有明確拒絕的情況下，個人願意在死後「捐獻」（donate）³其器官及組織。利用心理學及社會學的「預設值效

- 1 See, eg: RH Thaler and CR Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Penguin 2009) 184–92; Department of Health and Social Care (DHSC), ‘Consultation on Introducing “Opt-Out” Consent for Organ and Tissue Donation in England’ (2018) <<https://www.gov.uk/government/consultations/introducing-opt-out-consent-for-organ-and-tissue-donation-in-england/consultation-on-introducing-opt-out-consent-for-organ-and-tissue-donation-in-england>> accessed 28 November 2020; British Medical Association, ‘Parliamentary Brief: Organ Donation (Deemed Consent) Bill 2017-19’ (British Medical Association 1 February 2019) <<https://www.bma.org.uk/media/1423/bma-briefing-on-organ-donation-deemed-consent-bill-hoc-in-england-feb-2019.pdf>> accessed 16 November 2021.
- 2 闡述不同制度的選擇退出政策，其重點差異在歸納授權面向（例如「推定」或「視為」同意），參見B Saunders, ‘Opt-out Organ Donation Without Presumptions’ (2012) 38 J Med Ethics 69.
- 3 這裡的「捐贈」一詞用引號括起來，是因為我們認知到這裡可以提出法律問題，也就是在沒有明確同意的情看下從死者身上摘取器官，是否可以被準確地描述為捐贈行為。畢竟，捐贈作為一種禮物形式，人們通常認為只有自願捐贈的物品才能被視為禮物。因此，那些認為選擇退出器官捐贈政策構成「推定」，而非「視為」或「默示」同意的人，可能會反對在此用「同意」一詞。而對於這些讀者，在適當的情況下可以將「捐贈」替換為「摘取」。