

In the early 1960s, during and after the time of the Vatican Council (II) and before *Humanae Vitae*, there was widespread expectation in the Church that contraception would be officially accepted. At least implicitly, this entailed the rejection of the important Thomistic concept of 'sins against nature' (masturbation, etc.). Against this background masturbation and homosexual activity came to be, equally, considered blameless. Meanwhile homosexuality came to be deemed a natural condition, created by God.

Following from all this it looks as if homosexual behaviour

had come to be seen as permissible, regardless of any vow of chastity, whether in the religious life or the secular priesthood. Separately there were some in society who even argued that it was harmless and even beneficial to young people. Obviously no one had asked the victims.

The Church missed the chance that it had, after the Council, to revise its moral theology and, in particular, its version of the natural law (still largely based on Aristotle and the early Greek philosophers' understanding of nature). I wonder if it might consider doing so now?

I.J.

A CASE AGAINST THE OPT-OUT SYSTEM OF ORGAN DONATION

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A new opt-out donation law, 'Max's law', is to be introduced in England if Parliament gives its approval to the proposed change. Named after 10-year old Max Johnson from Cheshire, who waited nine months for a new heart, the proposed law may come into force in 2020.

Under the new opt-out law, most adults aged 18 or over would be presumed organ donors after death, unless they have added their details to the NHS Organ Donation Register and said that they do not want to donate their organs, or if their family strongly believes that the deceased would not have wanted to serve as an organ donor. In other words, what will be introduced is a 'soft opt-out' system, as distinct from a hard opt-out system.

The government's plans were first announced following the Prime Minister's speech at the 2017 Conservative Party Conference. The government subsequently published a consultation document on 11 December 2017 inviting responses until 2 March 2018. According to the government's response, *Consultation on introducing 'opt-out' consent for organ and tissue donation in England*,^[1] published on 5 August 2018, some 80% of people are willing to donate their organs after death, yet few people register as organ donors. Furthermore, in the last ten years the number of organ donors has increased by 75%, while 'deceased transplants' have increased by 56%. Nonetheless, there is a shortage of donors and some 6,500 people are waiting for organs.

Some 17,000 people responded to the consultation. It may be noted that looking at the government's summary of the key findings it is not clear whether most of the respondents were in favour of a change from the opt-in to the opt-out system. We are told that there were 'mixed views' about what should happen if a person had not opted out, though most respondents thought donation should go ahead anyway.

It is also noted that some Jewish and Muslim respondents 'expressed concerns' about the proposed changes. The government invites people to register their organ donation decision as from December 2018.

Summarising the proposed opt-out system, the government announced that there will be a 12-month transition period between the passing of the new law and its coming into effect. It will be possible to state your faith in the Register and 'religious and cultural considerations will form part of discussions with the family'. There will always be a family consultation before a donation goes ahead and 'the family will be given the opportunity to provide information if their loved one would not have wanted to donate their organs or if their recorded decision was not the most recent'. And children under 18, people lacking capacity and those who have been resident in England for less than 12 months would be excluded.

The question is: Should we, or should we not, welcome the proposed change to the law? At present England has an opt-in system. This means that your organs may only be used for donation after your death: (1) if you carry an NHS organ donor card; or (2) if you do not carry such a card, your next of kin gives permission for your organs to be used; or (3) if you have nominated another person to deal with the use of your body after death, and consent is given by your nominated representative. However, if you do carry a donor card, your family cannot intervene and object to organ donation.

The reason why the government wants to change from an opt-in to an opt-out system of organ donation is obvious. It is hoped that this would increase the number of organs available for donation. The government says that if an opt-out system were introduced in England, it might save up to 700 people each year. The question is would it? And are there other considerations that ought to be taken into consideration as well? Are there other reasons for or against a change in the law?

It is noteworthy that the Nuffield Council on Bioethics, an independent think tank, has expressed concern about the proposed changes to the law. Following the announcement by the Prime Minister at the Conservative Party Conference in 2017, the Nuffield Council made a brief response noting that 'the case for moving to an opt-out

system in England has not yet been made, as existing evidence fails to show that the opt-out system has led to more organs being made available for transplant.^[2] This was with specific reference to a report commissioned by the Welsh Assembly Government (WAG) following the introduction of an opt-out system in Wales in 2015.^[3] The WAG report published on 30 November 2017 shows that the opt-out system has not increased organ donations. Deeply critical of the government, the Nuffield Council also noted that in February 2017 Nicola Blackwood, the then Parliamentary Under-Secretary of State for Health, had said that government was monitoring the impact of the new legislation in Wales, but in fact no such monitoring has taken place.

As the Nuffield Council says, the government ought not to introduce the proposed change until there is evidence that it actually would increase the number of donations. Indeed, the Government should not change the law 'until there is evidence it works, and until we are confident that it won't undermine people's trust in the system in the long term'.^[2] The last point is significant. The introduction of an opt-out system could undermine the public's trust in the health services. It could generate fear of state-sanctioned acts of cannibalising the dead.

The Nuffield Council also points out that the government's consultation document is potentially misleading, inasmuch as it states that 'a person is considered a possible organ donor following their death only if they actively took steps to consent in their lifetime'.^[2] Thus, as the Nuffield Council observes: 'This is not correct: agreeing to be an organ donor (via the Organ Donor Register) is just one way that people can become donors after they die; families can also consent to organ donation, regardless of whether their relative has agreed in their lifetime'.^[2]

Reiterating its concerns in its subsequent August 2018 *Response to the Government's plan for an opt-out system for organ donation*, the Nuffield Council further notes that 'more public awareness, more investment in staff training, more specialist nurses and ensuring that all families are central to the donation process would do more to help those in need of an organ'.^[4] Quite rightly it also declares that 'for an opt-out system to work ethically, people need to be fully informed so they can make an active choice about whether or not to donate'.

More recently a study by Queen Mary University of London has expressed the view that it is unlikely that an opt out-system would increase the number of dead donors.^[5] Yiling Lin, one of the researchers, says of the plans to launch an opt-out organ donation system that 'what we show is that it is unlikely to increase actual rates of organ donation or reduce veto rates, all it will do is increase the number of people on the organ donation register'. And Dr Magda Osman, lead author of the report, says that we 'need to offer people a way to indicate explicitly what they wish to do. This would involve an expressed statement of intention if they wish to donate, or an expressed statement of intention if there is an objection to donate. This reduces the ambiguity in trying to infer what one wanted to do when it comes to donating their organs'. The report, which was published in the *Journal of Experimental Psychology: Applied*,^[5] is based on three studies in which the researchers asked American and European participants 'from countries that have

either a default opt-in or a default opt-out system to take on the role of a third party to judge the likelihood that an individual's "true wish" was to actually donate his or her organs, given that the decedent was registered to donate on the organ donation register.... Overall regardless of which country participants came from, they perceived the donor's underlying preference to donate stronger under the default opt-in system and mandated choice systems as compared with default opt-out and mandatory donor systems'.

These findings are significant. Even under a soft opt-out system, the suggested change to the English law would amount to a radical change. There are good reasons for having reservations about the proposed new law, and not only because it is doubtful whether it would increase the number of organ donations. Organ donation raises questions about bodily integrity in the case of dead as well as in the case of live donors. Respect for the dead means not treating their bodies as mere raw material. The dead body of a person is surely to be respected as more than a potential source of spare parts. The dead body is the body of a person who belonged to a family. Quite rightly the views of the family would be taken into account under the new law. But what if the family do not want their dead relative to be a donor? What pressure might they be put under? And who would have the last say?

Also, does the term 'organ donation' not suggest an intentional and declared act of giving? To speak of organ donation in the case of an opt-out system is a misnomer. Under an opt-in system organ donation is truly treated as a gift on the part of the donor. Not so under the out-out system. Under the opt-out system your dead body is actually treated as a property of the state. Under an opt-out system the dead body is effectively a state-owned organ reserve, that is, a state-owned reserve of bodily spare parts. Is there not something Orwellian about this?

How can you speak of real consent under a presumed consent system, that is, under an opt-out system? Normally we speak of a requirement of informed consent in the context of health care. Should we not expect informed consent in the context of organ donation as well as in the context of medical care? Why should the state have a greater say in the case of the dead than in the case of the living? A mandated choice system would be more respectful of the individual person, or of individual choice, than an opt-out system. Though this is what might be called a nudging system. For by forcing a person to make a choice, you put a moral pressure on the person. An opt-in system is the only system that allows the individual to volunteer in the true sense of the word.

REFERENCES

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