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Assisted Dying and Voting Schemes in the Royal Colleges and Other Such Bodies

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Abstract

Sometimes the governing bodies of organizations like the Royal Medical Colleges take a public stand on controversial issues in bioethics. When they do so, they sometimes consult their fellows and members. This paper reviews the voting schemes that might be used. In doing so, they face well-known logical problems involved in using any majoritarian voting procedure where more than two alternatives are at issue. There is no way around these problems. The problems are compounded if a super-majority principle is used where the status quo is not the default. The paper suggests that such policy decisions should be framed, so far as possible, as a movement from an existing policy position where one exists.

Key Words: assisted dying; Royal Colleges; majority voting; bioethics and public policy.

* Declaration of interest. I resigned as Chair of the RCP Committee on Ethical Issues in Medicine because I disagreed with the process by which the result was arrived at, largely on the grounds stated in this paper. In my Committee role I was privy to some information about the process that is not in the public domain, but nothing in this article depends on that private information. All the relevant information that I know of is in the public domain.

Introduction

On 21 March 2019 the UK's Royal College of Physicians (RCP) publicly announced that it was adopting a 'neutral' position on the question of physician assisted dying. (See <https://www.rcplondon.ac.uk/news/no-majority-view-assisted-dying-moves-rcp-position-neutral>.) It explained that 'neutral' meant that it 'neither supports nor opposes a change in the law'. The reason for adopting a position of neutrality was said to be the need to reflect the diversity of views expressed in a survey of UK fellows and members. The process by which the RCP arrived at its position depended greatly on the voting rules that it used to determine the results of the poll. Before the poll was conducted, the RCP's Council decided that, unless there was a super-majority of 66% either in favour or opposed to assisted dying, it would adopt a neutral position. The figure of 66% was subsequently changed to 60%. In the end, 43.4% of those voting opposed a change in the law; 31.6% supported a change; and 25.0% stated that they were neutral. Given the results, the RCP's public position followed as a logical consequence of the voting rules adopted.

The process and substance of the RCP's decision has been subject to much controversy. Prior to the vote in 2019 the RCP was widely taken – both by those opposed to a change in the law as well as by those in favour - as being opposed to physician-assisted dying. This understanding of the RCP's public position depended on the results of a previous poll conducted in 2014. As it turns out (see below), this assumption can be called into question. However, on the basis of the prevalent assumption about the RCP's position prior to the 2019 vote, there have been at least two legal challenges by representatives of those opposed to the RCP's new position, on the grounds that the voting rule adopted was procedurally unfair, in effect biasing the RCP towards the neutral stance. In addition, there have been a number of articles in the press covering the issue. (See, for example, Rozenberg, 2019; Wyatt 2019.)

Whichever way the controversy surrounding the RCP's decision is resolved, the case clearly prompts a larger question of principle that has implications for similar bodies. For example, on 22 June 2019 the Royal College of General Practitioners (RCGP) announced that it too would be carrying out a poll of its members, although at the time of writing, it has not stipulated what voting rules it will adopt.

What, then, should be the voting rules for a professional association when adopting a public position on an ethically controversial question like that of assisted dying? This paper focuses on that question. It suggests that the rules adopted by the RCP are logically flawed, and therefore that other Royal Colleges, like the RCGP, should avoid adopting similar voting procedures. It also suggests a way of dealing with the problem how associations should determine their stance in relation to legislation on ethically controversial issues – a way that, ironically, was adopted by the RCP's on assisted dying in 2006.

In this paper I focus entirely on the issues of procedural fairness rather than anything to do with the substantive rights and wrongs of assisted dying. My analysis would be applicable to a whole range of ethically controversial questions that have to be dealt with by legislation and on which professional associations might express a corporate view, including, among others,

abortion, opt-in or opt-out for organ donation and research using human embryos. However, the reader is entitled to know my position on the substantive issue as a way of judging the perspective from which the present analysis is conducted. That position is as follows. I have no objection in principle to physician-assisted suicide for designated categories of patient, in particular adults in a terminal condition enduring great suffering. My reservations about a change in law arise from whether it is possible to deal with hard cases beyond that core category, including those under 18, those in suffering who are not terminally ill or those who are simply tired of life. So with Steinbock (2005), I think the case 'not proven'. However, I accept that this a matter for reasonable disagreement among conscientious people, and that a continuing serious dialogue is needed, to see whether and how the difficult cases can be dealt with.

Is There an Issue?

Before looking at the details, we need first to deal with the objection that there is no real ethical issue to be discussed. The RCP along with other Royal Colleges is not a public body, and as a private association, albeit one with charitable status, it is entitled to make decisions by whatever procedural rules it chooses. So long as the decision is made by processes duly authorized in the terms and articles of association, no further question arises as to the ethical justifiability of the rule adopted. Issues of fairness in voting do not arise, so long as the procedure used was adopted by due process.

The problem with this line of argument is that it makes strong assumptions about what the fellows and members of the association can validly take into account when assessing the vote. For example, the fact of legal challenge suggests that many fellows and members did think that the RCP should conform to standards of procedure that could be assessed for their fairness over and above the fact that they had been adopted by due process. In other words, they thought that the Council should not only take its decisions within the sphere of its authority, but also in a form by which the adopted rules could be justified as fair. Indeed, it is not difficult to imagine the members of Council debating what would be a fair way of aggregating the votes, and in doing this they would be implicitly appealing to criteria and principles that they held to be generally defensible and not merely adopted as an act of authoritative will in the process of making their own decision.

Another line of argument ruling out considerations of the fairness of the voting rules rests on the claim that a professional body should not take a public position on a matter that is as ethically controversial as assisted dying. It might even be argued that a publicly announced position of neutrality was a way of reflecting this view. But there are several problems with this line of argument. The first is that there may well be changes in the law on which a body like the RCP would have to take a decision. For example, suppose that a proposed law made no provision for physicians to opt out of the procedure on grounds of conscience. A body representing physicians could hardly be expected to remain uninvolved in such circumstances. Second, whatever the merits of neutrality, the question is not whether it is the

right policy, but what the right way is for determining whether it is the right policy, and this leads directly back to the question of fairness and what fairness requires in such cases. Thirdly, adopting a position of neutrality in a situation in which a position of opposition is already thought to have been the public position is to take a policy decision of consequence. One may say that a body like a Royal College ought not to take a position on ethically controversial matters; it is another thing, however, to say that this means that it is free to change its position in a way unconstrained by principles of fairness.

There is one further line of argument that would undermine an appraisal of voting rules in terms of their fairness. This is the view that such matters should not be decided by voting but by deliberation. There is much to be said under this heading, and there are indeed strong arguments for saying that deliberation is an important instrument for social decision making in circumstances in which there is deep ethical controversy (Gutmann and Thompson, 2004). However, deliberation is time-consuming, and within the time-scale by which policies need to be made, there is no reason to assume that it will lead to consensus. In this context, even ardent proponents of deliberation have accepted either that it will enhance respect among those who differ, even though issues have to be resolved by voting, or that a vote can be seen as an interim consensus as part of a continuing dialogue. Either way, deliberation is no functional substitute for voting, and voting is a recognised way of coming to a collective judgement.

Fairness and Voting Rules

So, if considerations of fairness do bear on decisions like those of the RCP, RCGP and other similar professional bodies, what implications do they have for the voting rules that might be adopted? Here we need to turn to the principal findings from voting theory.

The most familiar rule for pair-wise choices – choices involving no more than two alternatives – is the simple majority rule. Between two alternatives X and Y, the simple majority rule says that the alternative that should be adopted as policy is the one favoured by a simple majority of those voting, 50% plus 1 of the relevant electorate. It is well-known that the simple majority rule is neutral between issues, not favouring one type of alternative over another, and anonymous between voters, only the number and not the names of the voters counting. In that sense it has special claims to fairness, since it provides for equal treatment for different voters, whatever position they hold. Everyone counts for one and no one for more than one. Simple majority rule is the *only* rule to have this character (May, 1952).

Problems arise, however, when a voting body is confronted by more than two alternatives, as can happen with bioethical issues. For example, on abortion there may be proposals ranging from no abortion, through abortion up to the first trimester to abortion up to the second trimester and so on. In its poll on assisted dying the RCP offered its fellows and members a three way choice: in favour of legislative change, neutral or opposed. With three-way choices it is common for there to be no simple majority winner. No alternative may gain 50% plus 1 of

the votes. Recall that in the RCP poll 31.6% of those voting supported a change in the law; 43.4% opposed such a change; and 25.0% stated that they were neutral. What should be the voting rule when there is such a three-way split of this sort with no simple majority winner?

One common solution to this dilemma is to use an elimination procedure in voting, by which voters are presented with successive pairs of alternatives. For example, the RCP poll could have been structured in the following way. Members and fellows could first have been asked whether the College should take a position on assisted dying. Then, if there was a majority in favour of taking a position, the members and fellows could have been asked which position they should take, and the result of that second-stage vote would determine the position of the College. Conversely, if at the first stage members had voted against taking a position, then the College would have taken a neutral position. If we suppose that in 2019 a majority would have voted in favour of taking a position, because a clear majority did take one of the two positions, and then the neutrals had split 50: 50, the result would have been a majority opposed to a change in the law. But other results are also possible, depending on how one imagines the neutrals would have split. For example, if the neutrals at the first stage had split 5 to 1 in favour of a change in the law, then the majority position would be in favour of change.

Another solution to the three-way split problem is to adopt the plurality rule. The plurality rule says that a body should adopt a position favoured by the single largest groups even if that falls short of a majority. The most familiar embodiment of this rule is found in UK parliamentary elections, where the candidate securing the largest vote, usually short of an absolute majority, is declared the winner. In the case of the RCP poll, the plurality rule would have indicated that the College should be opposed to a change in the law.

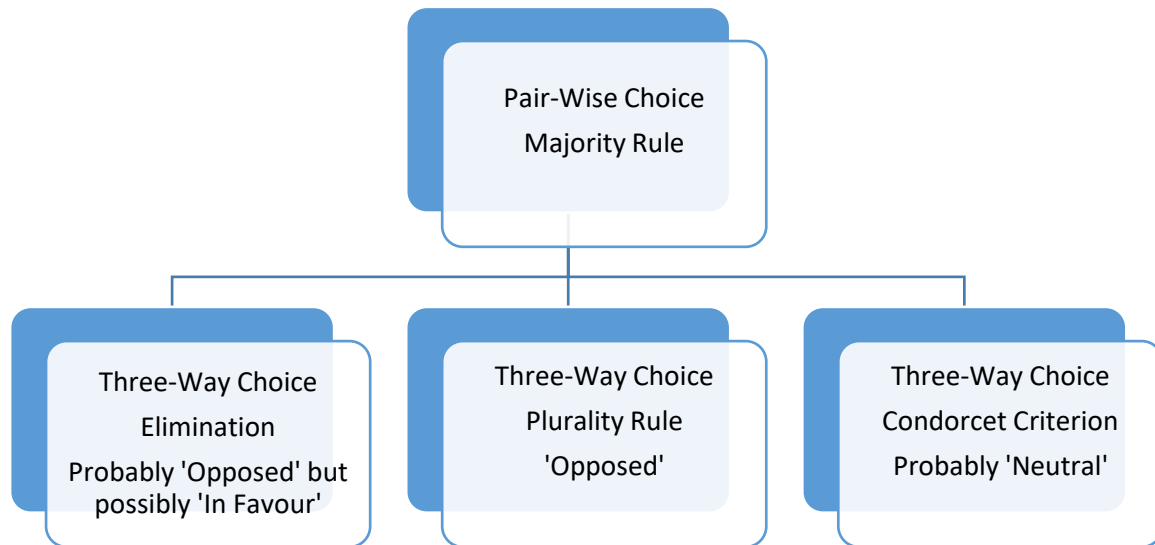
A third solution to the three-way split problem is to adopt the criterion of the so called Condorcet-winner. In a contest with more than two alternatives, the Condorcet-winner is that alternative that can secure a majority against all the other alternatives when pitched in pairwise contests with those other alternatives. Finding the Condorcet-winner can be done by asking voters to rank-order alternatives from most preferred to least preferred. If we assume in the RCP poll that neutral was the second ranked alternative among both those who favoured change and those who opposed change, then the Condorcet-winner would have been neutral.

It should now be obvious that, in voting situations where voters are presented with three-alternatives, there is no simple answer to the question of what voting rules should be used. The elimination procedure, the plurality rule and the Condorcet criterion given different answers. Figure 1 summarizes what this might mean given the results of the RCP poll.

Given these possibilities, an organization proposing to take a public position needs to decide which rule it will use and why. This choice is not easy, since there are weaknesses with each of the possible rules. A plurality winner may be only slightly ahead of all other alternatives (in the limit 33; 33; 34, where 34 is the plurality winner), and members of an association may

feel uncomfortable about taking a public stance on such a slim margin. An elimination procedure may not pick a Condorcet-winner, meaning that a majority is opposed to the policy that is adopted. And a Condorcet-winner may be the first preference of only a small minority, even if it is the second preference of a majority.

Figure 1. Likely Results of Voting Rules



The Status of the Status Quo

So far I have conducted the analysis as though it were a question of choosing rules in the abstract. However, in practice, many professional organizations will already have taken stances on ethically controversial questions, and the question arises as to what weight an existing position should have. What should be the status of the status quo?

As we saw in the previous section, the simple majority principle is neutral with respect to the status quo, in the sense that a simple majority of those voting can change a policy. However, it is sometimes held that it ought to be more difficult to change the status quo than it is to confirm it. A way to achieve such status quo bias is to require a super-majority for change, where a super-majority is any percentage larger than 50% plus 1. Typical super-majority percentages include 60%, 66.6% or 75%. It should be intuitively obvious that the larger percentage required to secure change, the less likely change is to happen.

Why might an association want to impose a super-majority requirement when making decisions on ethically controversial questions? One answer to this question is that the

association might fear temporary majorities taking advantages of circumstances to impose their preferences contrary to the preferences of an underlying stable majority. Another reason is that when important matters are at stake, it requires a certain weight of opinion to alter a previous commitment. For example, opponents of physician-assisted dying can cite long-standing assumptions about the role of physicians in relation to the ill, assumptions that should only be overturned by a considerable weight of current opinion.

All the familiar arguments for the use of a super-majority rule assume that the status quo is the default choice: it is the choice that will emerge *unless* there is a super-majority to overturn it. Had the RCP adopted this interpretation of the super-majority rule, then it would have confirmed what was widely taken to be its existing stance, namely that it was opposed to a change in the law. However, the voting rule actually adopted changed the default from the status quo to neutral, thus in effect making a change in policy before the vote was taken. Call this the super-majority/new default procedure.

There are several problems with this procedure, all of which stem from that fact that, with a three-way choice, it is seldom possible to achieve a simple majority, let alone a super-majority. In effect, the new default becomes the policy. However, this is clearly problematic. The point of holding a vote of fellows and members is to reflect a certain balance of opinion: changing the default and requiring a super-majority in effect imposes a policy by Council on the fellows and members. Secondly, if the worry is that a simple majority would not reflect differences of opinion in the association, then a super-majority with a change of default runs the risk of imposing a position held only by the smallest body of opinion. This was precisely what happened. The price the RCP paid for avoiding 43.4% of the members determining the policy was that the policy coincided with the first preference of only 25% of the members. This looks like a form of minority rule. It is possible that this is not as paradoxical as it sounds, if neutrality were the Condorcet-winner, but that is pure supposition. No steps were taken in the voting to determine whether there was a Condorcet-winner and what that might be.

Without access to the chain of reasoning followed by the RCP's Council, it is impossible to know how they decided on the super-majority/new default procedure. However, here is a possible line of argument. Suppose one were on Council and were worried by a corporate position being determined by less than a simple majority of the membership on the grounds that this did not capture the diversity of opinion within the association. One might also have the thought that, if there were a super-majority, then one's worries would be allayed. At least there was an overwhelming balance of opinion in favour of a certain position. So, one might conclude, we should make a super-majority a requirement of adopting an ethically controversial policy.

I have no way of know whether this was what went on in some peoples' mind. However, if it were the line of thought, it is clearly based on a version of the fallacy of affirming the consequent. The fallacy of affirming the consequent is to say that if A is sufficient for B, then A is necessary for B. This is clearly fallacious. I may be able to get from Cambridge to

London by bus, but if there is no bus, that does not mean I cannot get to London; I can take the train instead.

Another possible chain of reasoning in favour of the super-majority/new default procedure is that the decision is being taken as though there is a clean-sheet. It is as though the College did not already have an existing policy. But this is clearly contrary to fact, and the fact is not something that can merely be assumed away.

How To Deal with Diversity

We are still left with the question of how a professional association should determine its position on ethically controversial matters, when its membership is divided.

Return to the way in which the RCP defined neutrality: the College ‘neither supports nor opposes a change in the law’. Notice here that ‘support’ and ‘oppose’ are treated as contradictories. If you do not support, you oppose; and if you do not oppose, you support. If you do not want to do either, you have to stand outside the contest. You have to be neutral.

However, this logic favouring neutrality only exists if we treat support and opposition in a binary way. But there is no reason to do this. Not supporting a change in the law does not commit one to opposing a change in the law. It is perfectly possible not to support a change without undertaking active opposition. Not lending your weight to a campaign is not the same as lending your weight to an opposing campaign. In fact, the RCP had adopted such a stance on assisted dying in 2006, in a statement the key part of which said that ‘the College cannot support legal change at the present time’.

It is true that since 2006 the RCP has made public statements that presuppose its formal position is one of opposition to assisted dying. For example, the press statement on the 2014 poll said that the College ‘reaffirms position against assisted dying’. But, a correct understanding of the 2006 statement means that 2014 statement is contradictory. Either the RCP was reaffirming its position, in which case it was not opposing. Or it was opposing, in which case it was not reaffirming.

A crucial advantage of the 2006 formula of simply saying that there can be no support for a change in the law is that it makes no commitment either way as to what a professional body might do when confronted with a prospective change. It makes the decision as to whether to oppose or not depend on the particularities of any proposed legislation. There may well be changes in the law that a body like the College ought not to oppose. For example, spouses and partners of those helping loved ones to travel to the Dignitas clinic in Switzerland may sometimes be cautioned by local police forces who read the guidelines issued by the Director of Public Prosecutions on assisted suicide in different ways. Removing the indeterminacy in the administration of these guidelines, for example through a system of pre-registration, may well be a change that ought not to be opposed.

Conversely, there may well be proposed legal changes that a body like the RCP ought to oppose. For example, suppose a proposed law allowed assisted dying under certain conditions, but did not allow physicians the right not to participate on conscientious grounds. For the RCP to say that it will not oppose a change in the law could leave it ham-strung in this situation. There is no sense to committing yourself to not opposing a proposed law the content of which you are ignorant of. For those who are not absolutist about these issues, in many fields of bioethics, the crucial question in judging the justifiability of legislation turns not on questions of principle but on the conditions under which an ethically controversial practice will take place. Leaving open the possibility, but not the necessity, of opposition recognizes this fact.

Conclusions

Knowing how to come to a corporate position on a deeply charged issue of bioethics is hard. For a corporate body like the RCP and the other Colleges, any stance taken will disappoint some members. But people can be reconciled to losing a vote if they feel the poll was fairly conducted and if there is openness to the possibility of further argument. Understanding the logic of voting will not resolve the ethical issues, but it will provide a basis on which differences of view can be dealt with fairly.

References

- Gutmann, Amy and Dennis Thompson, (2004) *Why Deliberative Democracy?* (Princeton and Oxford: Princeton University Press).
- May, Kenneth O. (1952) 'A Set of Independent, Necessary and Sufficient Conditions for Simple Majority Decision', *Econometrica*, 20, pp. 680-84.
- Rozenberg, Joshua (2019) 'Muddying the Waters on Assisted Suicide', *Law Society Gazette*, March 18, p. 15.
- Steinbock, B. (2005) 'The Case for Physician Assisted Suicide: Not (Yet) Proven', *Journal of Medical Ethics*, 31, pp. 235-4.
- Wyatt, Tim (2019) 'Doctors' Ethics Chief Quits over Change to Assisted Dying Policy'. *Sunday Telegraph*, April 7, p. 13.