THE CONSTITUTIONAL LIMITS OF ASSISTED DEATH

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Guernsey's States of Deliberation are shortly to consider a proposal in principle to permit assisted dying in certain circumstances. This article explores the possible constitutional consequences in the event that HM Government were to refuse to put any resulting legislation forward for Royal Sanction.

1 The Chief Minister of Guernsey, Gavin St Pier, and six other *requérants* have brought forward a proposition calling for the States of Deliberation (the Island of Guernsey's assembly, to which Alderney also sends two representatives) to "agree in principle to the development of a suitable legal regime to permit assisted dying in Guernsey". The proposition is conditional upon bringing into force legislation governing capacity and taking into account also the results of an 18 month study to be conducted by a working party looking at seven stated areas of concern. These range from legal and professional obstacles, whether terminal illness should be a requirement, whether physical assistance should be permitted, whether there should be a residential requirement (thus avoiding accusations of opening the way to "assisted dying tourism"), how to protect the vulnerable, and the role of doctors and conscientious objection. Alderney has already debated assisted dying, without reaching a conclusion, and the two legislatures are to liaise in order to avoid duplication of effort, assuming that the principle of assisted dying is approved there also.

2 The *requête* is due to be debated in May 2018 and has attracted national media coverage, much of it sensationalist and misrepresentative of the true nature of the proposition. The Roman Catholic Bishop of the Diocese of Portsmouth has expressed himself forcefully against the proposals, likewise some members of the medical professions. A group of 53 Guernsey clerics and church wardens have signed a letter jointly opposing the *requête*.[1] It is, however, not the first time that the States of Deliberation have considered assisted dying. A lengthy inquiry beginning in 2002

[1] *Guernsey Press*, Monday 16 April 2018.

culminated in a debate in 2004 when it was resolved "not to change the present legal position". The 2018 *requête* points out that several more jurisdictions have since legislated to permit assisted dying (Canada, the US states of California and Washington and the Australian state of Victoria—joining jurisdictions such as the Netherlands, Belgium and Switzerland). They rely also on evolution in matters of social policy and personal conscience more generally.

3 It is not for an article in a legal journal to pronounce on the moral rights and wrongs of assisted dying, but legal issues do arise if, one day, Guernsey (whether the Island of Guernsey alone, or Guernsey and Alderney or all three jurisdictions, including Sark) bring forward legislation to permit assisted dying. Such legislation would certainly be beyond the scope of local ordinance. While all three jurisdictions have an inherent power to make legislation for the regulation of local affairs without reference to London, the limits of such powers are poorly defined. Primary legislation would be required, which means sending the draft legislation to the Ministry of Justice, and then on to the Privy Council Committee for the Affairs of Jersey and Guernsey with a view to obtaining Royal Sanction. In practice, if legislation makes it past Ministry of Justice scrutiny it will go on to receive Royal Sanction,[2] and vice versa.

4 There must be a risk that the United Kingdom Government of the day (acting in right of the Crown) will refuse to permit a Crown Dependency to make assisted dying legislation on grounds of pure policy, which begs the question whether it is legally permissible for it to do so.

5 The United Kingdom Government claims such a right. In the Government's response to the Justice Committee's report, *Crown Dependencies*[3] the UK Government said this[4]—

> "The Government notes the Committee's concerns that the United Kingdom is influencing Island legislation at the policy level which 'may be motivated by wider political concerns, even though it is not legitimate on constitutional grounds' (paragraph 60). In completing the scrutiny process, the Ministry of Justice

[2] The terms "sanction" and "assent" are used interchangeably, a purist will refer only to "Royal Sanction".

[3] 8th report of Session 2009–10.

[4] *Government Response to the Justice Select Committee's Report: Crown Dependencies*, November 2010, at 11.

> does not generally check for congruence with UK policy unless divergence would demonstrate risk of breaches of the ECHR or breaches of EU or international law, and we would not accept that we carry out scrutiny beyond what is constitutionally legitimate. **Although we do not generally seek to do so, in addition to strict questions of lawfulness, in limited occasions we may consider it appropriate to intervene in policy matters where there may be the potential for a direct and adverse impact on UK interests** (for example in relation to changes to drug or immigration law in the Islands). Equally, if an Island Law sought to do something **fundamentally contrary to current UK principle,** or which may be **fundamentally damaging to UK interests,** we would not consider it constitutionally illegitimate to refuse to recommend the Law for Royal Assent. However, those are rare (and in large part theoretical) circumstances and the precise scope of such powers is untested." (Emphasis added.)

6 This power to refuse Royal Assent for reasons other than placing the UK in breach of its international law obligations has been put in various ways over the years. In the UK Government's March 2014 response to the Justice Committee's report, "Crown Dependencies: Developments Since 2010" the following was said—

> "Principal legislation made by the Islands' legislatures requires Royal Assent or sanction. **The Ministry of Justice examines such legislation to ensure that there is no conflict** with international obligations (including ECHR compliance) or **any fundamental constitutional principles**. This enables the Lord Chancellor to advise the Privy Council whether Her Majesty in Council can be advised to make an Assenting Order, and thereby grant Royal Assent." (Emphasis added.)

This begs the question of what is meant by "fundamental constitutional principle" and whether this is, in reality, a euphemism for something rather wider in scope than true constitutional nicety.

7 In any event it follows that democratically made legislation (in the sense of policy, drafting and endorsement by a democratically elected legislature) in Guernsey might, *prima facie*, fail to become law because of the policy of United Kingdom ministers having no democratic mandate of any kind in the jurisdictions in which that legislation is to apply. It might fail for being "contrary to current UK principle".

8 One could expect, and even hope for, a robust response from Guernsey. The UK Government claims the right to refuse to put

forward Channel Island legislation which would put the United Kingdom in breach of international law. (Even this claimed right is disputed in the Islands, certainly where any international law obligation has been contracted by the United Kingdom and extended to the Islands without their consent.)

9 Beyond this there is, perhaps, a margin of appreciation. There is, arguably, an overlap with the ultimate responsibility of the United Kingdom for the good governance of the Channel Islands—also touched upon in the Justice Committee's report, and the Government's response. United Kingdom ministers would probably assert that they have the right to refuse to put forward legislation falling outside a generous margin of appreciation of legislation which a mature and responsible "Western" democracy could choose to make. Where, however, the legislation being proposed goes no further than, say, measures already passed by responsible and respected members of the European Union then it doubtless would be argued that London cannot lawfully obstruct that legislation. Such would be the case with responsibly framed assisted dying legislation.

10 Interestingly, this would be consistent with Guernsey's draft Brexit legislation which would preserve the Bailiwick's right post-Brexit to implement any given provision of EU law by way of simple ordinance and without reference to London.[5] It is implicit that a measure already within EU law is overwhelmingly likely to be within the ambit of legislation which Guernsey could properly bring forward itself and which would receive Royal Assent thus making it unnecessary to take such proposals to London for approval.

11 How though would Guernsey proceed if the Ministry of Justice declined to put assisted dying legislation forward for Royal Sanction? The most likely response would be to bring judicial review proceedings challenging the Ministry or Privy Council Committee decisions not to put forward the legislation for Royal Sanction. While the States of Jersey and Guernsey as interveners in *R ex p Barclay v Secy of State for Justice*[6] forcefully opposed the jurisdiction of UK courts to review any positive decision to grant Royal Sanction to

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[5] By preserving the power given by s 1 of the European Communities (Bailiwick of Guernsey) Law 1994—

> "The States may by Ordinance make such provision as they may consider necessary or expedient for the purpose of the implementation of any Community provision."

[6] [2014] UKSC 54. "*Barclay No 2*".

Channel Island legislation, they reserved their position in relation to jurisdiction judicially to review the refusal of Royal Assent.[7] The Supreme Court went further though and held that the courts of the United Kingdom *did* have jurisdiction judicially to review an Order in Council made on the advice of the Government of the United Kingdom acting in whole or in part in the interests of the United Kingdom, albeit there were circumstances when that jurisdiction ought not to be exercised, the present case being one such example because the Islands had their own human rights legislation where such a challenge could and should have been brought.

12 The question of whether London could block Channel Island legislation "in the public interest" was touched upon. In her judgment, Lady Hale noted as follows—

> "17. . . . the appellants[8] take the view that Assent may be withheld if 'it would clearly not be in the public interest for it to become law' (Treasury Solicitors' letter to the claimants, 16 November 2007). This too is not accepted by the interveners.[9] The Kilbrandon Report did state that 'the Crown has ultimate responsibility for the good government of the Islands' (Cmnd 5460, para 1361). Intervention by the United Kingdom Government 'would certainly be justifiable to preserve law and order in the event of grave internal disruption' but 'the UK Government and Parliament ought to be very slow to seek to impose their will on the Islands merely on the grounds that they know better than the Islands what is good for them' (para 1502). The Justice Committee reported a high degree of consensus that 'good government' would only be called into question in the most serious of circumstances, such as a fundamental breakdown in public order or endemic corruption in an Island government, legislature or judiciary (2010, HC 56, para 37). The Government agreed (Cm 7965, p 9). Given this very narrow scope for direct intervention, the interveners argue that the 'public interest' is not a ground upon which Royal Assent can be refused.
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> 18. These questions do not arise on this appeal, nor do they necessarily cover the full ground . . . It is not necessary for this court to express a view upon these contentious issues. We flag

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[7] Paragraph 49.

[8] *I.e.* The Secretary of State for Justice, Lord Chancellor and associated parties, in reality HM Government.

[9] *I.e.* the Governments of Guernsey and Jersey.

> them up because they would arise in the (no doubt highly unlikely) event of a recommendation that Royal Assent be withheld . . ."

13 It is therefore sufficiently clear from the judgment that the courts of the United Kingdom[10] would have jurisdiction to rule upon the legality of a refusal by the United Kingdom Government to allow legislation to go forwards for Royal Sanction. There is also the limited precedent of the threat of litigation made by Jersey when the UK Government of the day refused, for internal policy reasons, to put forward a 1998 Finance Bill for Royal Sanction. The UK Government eventually backed down.[11] Indeed, for as long as final decision-making over Channel Islands legislation remains in London it is as inevitable that judicial review in London should be asserted by the Islands as the principal remedy against unconstitutional acts by the Government of the day.

14 Differences of interest have been recognised in other contexts as being both legitimate and requiring the United Kingdom to represent and defend those conflicting interests, notably in international relations.[12] Differences of policy are no less legitimate and no less commanding of respect, within the generous scope of what today constitutes responsible governance.

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[10] Again, in reality, the High Court, London and the appellate courts above, but not, of course, the Judicial Committee of the Privy Council—although to add to the confusion there might be petitions made to the Privy Council Committee for the Affairs of Jersey and Guernsey both in support of, and opposing, the giving of Royal Sanction to any *Projet de Loi*, see further below.

[11] See "A harmful delay" in *Editorial Miscellany* (2001) 5 Jersey Law Review 120

[12] See, for example, the Framework for Developing the International Identify of Guernsey of 18 December 2008, which includes the following statement of principle—

> "the UK recognises that the interests of Guernsey may differ from those of the UK, and the UK will seek to represent any differing interests when acting in an international capacity."

Ironically, the signing of the framework document was delayed from 2007 because HM Government was unhappy with lack of progress in making Sark's parliament fully elected. It had already refused to put forward legislation for the reform of Chief Pleas which would not have complied with the requirements of the European Convention on Human Rights.

15 As the *requérants* rightly say—

> "… there is now a greater expectation that as a mature, independent jurisdiction, Guernsey is capable of fundamentally different policy and legal approaches to these highly sensitive issues, compared to the UK."

Assuming, which seems likely, that the UK Government either did back down or was compelled to back down, there are other potential obstacles.

16 It is likely that individuals and groups would petition the Committee for the Affairs of Jersey and Guernsey not to permit Royal Sanction to be given.[13] But again, the overwhelming likelihood is that, if the draft legislation were to clear the Minister of Justice hurdle, it will also clear the Committee hurdle and proceed to Royal Assent. In the present circumstances, the key point will already have been considered and either rejected by the Minister of Justice or adjudicated upon by an English Court—*i.e.* whether such legislation can be blocked by the Minister of Justice/the Committee on policy/principle/public interest grounds.

17 The biggest problem that assisted dying legislation might face is a more subtle one. Assisted dying requires, in practice, the assistance of medical practitioners—at least any assisted dying of the kind likely to be contemplated by the Guernsey legislature. Guernsey depends upon UK medical registration (in effect it operates a secondary register) and the supervision by UK professional bodies of medical professionals working in Guernsey. To the extent that assisted dying is not permitted by United Kingdom professional bodies then, in practice, no Guernsey medical professional will engage with assisted dying. As matters stand, the British Medical Association opposes all forms of assisted dying and supports the current legal framework, with an emphasis upon high quality palliative care permitting patients to die with dignity.[14] The Royal Pharmaceutical Society has published a carefully worded policy document which appears to support working with the Government of the day to introduce and implement appropriate assisted dying legislation, should that ever come about, whilst insisting upon both

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[13] See the Order in Council of 13 July 2011 setting a timetable for the receipt of Petitions for or against Channel Island Laws (*sic*).

[14] https://www.bma.org.uk/advice/employment/ethics/ethics-a-to-z/physician-assisted-dying. At the same time a survey is reported as showing that a majority of UK doctors support assisted dying, with calls for the BMA to change its policy: https://www.bmj.com/content/360/bmj.k301

respect for individual conscientious objection and legal protection.[15] The General Medical Council steers a careful course in the advice it gives but clearly states that doctors should, *inter alia*, "follow the laws . . . relevant to their work".[16]

18 Those laws include s 9 of the Offences Against the Person Act 1861, which provides—

> "Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not, **every offence committed by any subject of Her Majesty in respect of any such case**, whether the same shall amount to the offence of murder or of manslaughter . . . **may be dealt with, inquired of, tried, determined, and punished . . . in England** or Ireland . . ."[17] (Emphasis added.)

This provision, with its explicitly extra-territorial effect, would, *prima facie*, and as a matter of United Kingdom law only, apply to assisted dying carried out by UK nationals in Guernsey and act as a very powerful deterrent—unless and until amended to exclude assisted dying in Guernsey.[18] While it is one thing judicially to review the refusal to put forward Channel Islands legislation for Royal Sanction, it is quite another to purport to legislate for a Crown Dependency on a domestic matter considered by the autonomous legislature of that territory.

19 It could indeed be argued forcefully that it would be an abuse of process to seek to prosecute in England conduct which was lawful in Guernsey. There would also be the inconsistency of prosecuting in the

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[15] https://www.rpharms.com/Portals/0/RPS%20document%20library/Open%20access/Policy%20statements/Assisted%20Suicide%20Policy.pdf

[16] https://www.gmc-uk.org/-/media/documents/DC4317_Guidance_for_FTP_decision_makers_on_assisting_suicide_51026940.pdf

[17] See more generally the case of *R v Abu Hamza* [2006] EWCA Crim 2918. The Suicide Act of 1961 seems less problematic given that it extends only to England and Wales only, see s 3(3).

[18] The obvious defence to run would be that the accused was not guilty of "murder" but acting lawfully in the British Island concerned and in accordance with legislation which had received Royal Sanction from Her Majesty in Council after that legislation had either been approved voluntarily by HM Government or pursuant to English court order.

name of the Crown conduct which had been sanctioned by Order in Council.

20 Whether in the name of policy, United Kingdom principle, United Kingdom interest, fundamental constitutional principle or alleged public interest, it is suggested that the United Kingdom Government may not lawfully block the progress of Channel Island legislation, unless, arguably, such legislation will put the United Kingdom in clear breach of its international obligations or is outside the very generous margin of legislation which a responsible, democratic legislature could properly make. From this principle, it follows that neither should the United Kingdom permit its own extra-territorial legislation to thwart Channel Island legislation which is otherwise entitled to Royal Sanction. In a helpful recent development, on 1 May 2018, the *Guernsey Press* published a letter from the former Lord Chancellor, Lord Falconer, dated 25 April 2018 stating that (in his opinion) the Privy Council would not intervene on this issue. He too makes the point that it would be an abuse of process to seek to prosecute in the United Kingdom any matter which was not a criminal offence in Guernsey, but that, in any event, it would be relatively simple to pass any necessary Westminster legislation.

21 As for United Kingdom medical professional bodies, one would expect them to accommodate legal developments in the Islands, subject only to legal safeguards for patients themselves being acceptable (*i.e.* that the scheme of the legislation was itself appropriate), legal protection for their members being in place and respect for individual conscience.

22 A forward-thinking United Kingdom Government and UK medical institutions might quietly welcome such legislative developments on Guernsey's part as giving a responsible proving ground for possible future equivalent progressive legislation in the UK. Guernsey, as a British Island, and as a microcosm of the British nation, with shared values, shared culture and not dissimilar institutions, could perform a valuable role in testing difficult legislation in what is a very sensitive area. The issue is very unlikely to go away and the number of responsible jurisdictions permitting assisted dying bound to increase. It is difficult to think of another current issue[19] where one side of the argument perceives itself as demanding an obvious and basic right while the other perceives what is proposed as being, at best morally

[19] The abortion debate was doubtless similarly polarising.

wrong and at worst, positively evil. From a purely legal perspective the issue would, however, test the limits of autonomy.

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