genocidal acts, as well as non-aggravation of the dispute. These measures were reiterated in yet another order in September 1993; both were disregarded as evidenced by the genocide in Srebrenica in 1995. In light of the failure of the provisional measures to halt an impending genocide, it would seem that a more proactive stance by the ICJ is warranted.

The Order of the ICJ is the first provisional measures order relating to the Genocide Convention since the *Bosnia v Serbia* case. However, of even greater significance in this case is the standing of The Gambia based on *erga omnes partes* obligations, which will undoubtedly open the door to other similarly situated claims. Thus far, standing on this basis has only been granted under the Torture Convention and now the Genocide Convention, given the nature of these offences and their status as crimes under international law. There is also a discernible shift in the role and engagement of the court, to a more proactive institution. This may be a slippery slope, not least due to the lack of enforcement capacity of the Court. The limits of this role will be tested, given multiple reports of an escalation of hostilities and attacks against civilians in Rakhine state, since the issuance of the Order. In the larger context, the significance of litigating the obligations of the Genocide Convention cannot be emphasised enough, further refining the interpretation of the treaty. While in *Bosnia v Serbia*, facts had already been established by judgments of the UN International Criminal Tribunal for the Former Yugoslavia (ICTY), no such reference point is available here. The interaction with other courts and institutions that have commenced investigating the crimes against the Rohingya will be a crucial element to follow. There are lengthy and complex proceedings ahead, and the first step has already set a new direction for the Court.

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COMMON-LAW CONSTITUTIONAL RIGHTS: ONE STEP FORWARD, TWO STEPS BACK?

FOLLOWING the Human Rights Act 1998 (HRA)'s enactment common-law rights became secondary to the new statutory framework. Yet, in recent years, the Supreme Court began to re-emphasise the primacy of common-law rights (see inter alia *Osborn v Parole Board* [2013] UKSC 61, [2014] A.C. 1115). The focus on common-law rights raises questions about their interaction with the HRA and how we know what the common law protects.

Such issues are examined in *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10. The appellant's son, Mr. El Sheikh, is alleged to have joined the Islamic State of Iraq and the Levant ("Daesh") in Syria. Whilst there, Mr. El Sheikh is alleged to have been party to a

group that beheaded 27 men. Having been captured, Mr. El Sheikh is currently in the custody of the US.

The UK received a request from the US for mutual legal assistance (MLA) in respect of Mr. El Sheikh's alleged activities. The MLA was to provide information. Without MLA, no prosecution of Mr. El Sheikh would take place. Two offences that the US were investigating carried the death penalty. The Home Secretary was prepared to provide MLA on the condition that assurances were given that the US would not seek to impose the death penalty. This was standard practice in extradition and MLA matters. The US declined. The Home Secretary acceded to the MLA request, and information was sent to the US.

The appellant challenged the decision to provide MLA without assurances. She did so on two grounds: (1) it was unlawful under the Data Protection Act 2018 (DPA); and (2) the common law prohibits the providing of MLA to foreign authorities if it will facilitate the death penalty. The appellant succeeded on the first argument, which means that, whilst MLA has already been provided to the US, it will not necessarily be without complications for the Home Secretary to provide further MLA. This comment examines the Supreme Court's approach to the latter question on common-law rights.

The majority said that there was no common-law right that prohibits the provision of MLA that will facilitate the death penalty. The common law must develop with "caution" (at [193]) and "incrementally" (at [170]). Legal certainty must be preserved, which means "judicial development of the common law must . . . be based on established principles". An incremental approach is "compatible with the pre-eminent constitutional role of Parliament in making new law". Recognising a right to life in the way the appellant proposed would not be an incremental step (at [171]); developments vis-à-vis the death penalty have come from Parliament and the European Convention on Human Rights (ECHR), not the common law (at [194]). Whilst there might be a right, at common law or under the HRA, against extradition where the death penalty will be imposed, those cases are about physical removal, not a wider right against facilitation (at [199]–[204]). It was noted that the authorities support the recognition of the value of life and when the value is engaged the courts will carry out a more intensive review than usual. Yet here the Secretary of State had not acted irrationally.

Lord Kerr alone dissented. His view was that the right the appellant sought ought to be enforced (at [142]) except where such facilitation was "absolutely necessary as a matter of urgency in order to save lives or to protect the security of the nation" (at [164]). For Lord Kerr this was the "natural and inevitable" extension of the prohibition (under the common law and HRA) of extradition without death penalty assurances. Lord Kerr did not see this as a radical step; for him it was an incremental step that may have appeared radical given this was the first time the matter had come before the Supreme Court (at [142]).

To reach this conclusion, Lord Kerr drew on a variety of sources: the Bill of Rights forbids cruel and unusual punishment; British values are reflected in the abolition of the death penalty and the Government's long-standing approach to the death penalty; ECHR jurisprudence sets itself against the death penalty; EU jurisprudence condemns the death penalty; and the Privy Council jurisprudence makes clear that there is a growing revulsion towards the death penalty. Further, Lord Kerr's view was that it is illogical to refuse to extradite an individual where there is a risk of the death penalty being imposed yet facilitate a trial with the same outcome.

It is clear that the relationship between the common law and the HRA is not settled, and *Elgizouli* is another case demonstrating radically different approaches. Citing authorities, Lord Kerr stated that the ECHR rights are a threshold; they are not an inhibitor of the common law (at [147]). Lord Carnwath, however, suggested that cases like *Osborn* "support the development of the common law in line with the European Convention, but not beyond as here proposed" and previous common-law advances represented "at most a very limited development" (at [193]). For Lord Kerr the HRA is a floor below which the common law may not fall; for Lord Carnwath, the HRA is a ceiling above which the common law cannot ascend.

What can be made of that dispute? It must be right to say that the HRA does not stop common-law development. If the HRA were intended to occupy the field of human rights in the UK, why would the courts pray in aid of common-law rights in cases such as *Osborn*? It would appear bizarre to assert, on the one hand, that common-law rights come first and the HRA is there as a backstop but, on the other hand, argue that when the HRA was introduced it delimited certain rights in the UK.

A second key area of dispute between Lord Kerr and the majority is the extent to which common-law rights can develop. Lord Reed states that the common law builds incrementally on existing principles and Lord Kerr's approach is not incremental. Yet Lord Kerr views a common-law right to life in such circumstances as an incremental step and intimates that it only appears as a novel step because this is the first time the matter had come to the courts.

Recognition of a development in the law cannot simply be a matter of incrementality. There is no yardstick against which to measure the novelty of judicial development, much less one that provides an objective end point beyond which such development becomes impermissible. Nor would the same have any sound basis in a coherent constitutional theory of judicial review. Instead, the perceived incrementality or otherwise of a proposed development plays two modest roles. It places a burden on the party seeking development and adds a value against which the development must be judged.

First, it is legitimate for the courts to be wary of novel developments and to put the burden of convincing the court on the party proposing the

development. The greater the apparent novelty in what is asked for, the more convincing a court will need. That is a legitimate judicial tool to make sure that sweeping changes are not lightly adopted. It allows the courts to be sufficiently sure of a proposed novel course of action.

Second, Lord Reed warns against anything other than incremental changes due to legal certainty. Yet legal certainty cannot be the master of all, else nothing would change. To elevate legal certainty to the primary consideration would be to beg the question: how sufficiently uncertain must a proposed development be to fall outside the scope of permissible developments? This is not a question that could be adequately answered, nor does the majority attempt to do so.

Predictability in the law is a value with normative weight. Yet so too is consistency in principle. When Lord Kerr argues for the proposition that the common law should recognise a right not to have the state facilitate the death penalty, it is not necessarily a radical departure from the pre-existing web of common-law principles into the unknown. For Lord Kerr, adoption of such a right is a seamless step from, inter alia, the right not to be extradited if you will face the death penalty, revulsion regarding the death penalty, and the Government's policy against the death penalty. From that viewpoint, it is inconsistent for the common law to not recognise unlawfulness in giving MLA that will lead to execution. On Lord Kerr's approach, a refusal to adopt the proposed right in *Elgizouli* would be to create an inconsistency in principle in the common law; that would be the antithesis of the rule of law, which demands like cases be treated alike. From this viewpoint, the adoption of the "new" right is no such thing; it is the first time the Supreme Court has been asked to adjudicate on such a right and, on Lord Kerr's method, to answer the question one ought to draw on the principles *underlying* previous cases, as well as, more broadly, supranational and international jurisprudence, treaties the UK is a signatory to, and so on. To do otherwise would be to segment law, with principles grounding one area not supporting another, which would be undesirable. It is regrettable that the majority focused on legal certainty and incrementality at the expense of analysis of deeper legal and constitutional principle.

Elgizouli adds to the debate about which rights are protected by the common law and how the courts identify those rights. Further, given Elgizouli's success with the DPA argument (which this comment has not examined), increasing questions will no doubt be asked about the reach of the DPA and its role in extraterritorially protecting human rights.

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