What place does the political offence exemption have in modern extradition law?

The question at hand has both descriptive and prescriptive elements: what is the position of the political offence exemption in modern extradition law, and what *should* it be? This essay will argue that despite its decline, the political offence exemption still has a valuable role to play. To overcome its deficiencies, though, it must be refreshed and redefined in a manner bold enough to embrace its ideological origins.

Definition and origins

At its most basic level, the political offence exemption ('POE') provides that requests for extradition will be refused where the underlying offence is political in nature. There is no universal definition of a political offence; the question of categorisation is for the requested state to resolve.

The POE emerged in the flowering of liberalism after the American and French Revolutions in the late eighteenth century. As revolts rocked Europe in the nineteenth century, liberal powers saw revolutionaries as heroes. The POE avoided complicity in the punishment of dissidents by despotic regimes.[1]

The sweeping original formulation of the POE granted protection to violent and otherwise unpalatable behaviour. This soon led to restrictions. In 1856 Belgium pioneered the *attentat* clause to exclude assassinations of heads of state from the protection of the exemption. Over the years since, actions like aeroplane hijacking and hostage taking have also been excluded.[2] Many other carve-outs feature in recent bilateral treaties, including in relation to substantial property damage.[3]

Current position

The POE has a long history and remains in some regards well established: it features, for example, in the UN Model Treaty of Extradition 1990. However, its inclusion in extradition treaties has grown much rarer in recent years. The European Arrest Warrant abolished it altogether within the European Union. In the UK, the Extradition Act 2003 broke with a tradition extending back to 1870 by not including a POE. In the Assange case, it was found that this departure clearly expressed Parliament's intention to do away with the POE. Further, Mr Assange was found to derive no enforceable rights from the POE contained in the US-UK Extradition Treaty of 2007.[4] Though that first instance judgment is open to appeal, its reasoning seems on firm legal ground given recent Supreme Court jurisprudence on unincorporated treaties.[5]

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[1] Jansson, J. (2021). TERRORISM, CRIMINAL LAW AND POLITICS : the decline of the political offence exception to extradition. Routledge.

[2] Lord Simon of Glaisdale in *Cheng Tzu Tsai v Governor of Pentonville Prison* [1973] A.C. 931, 951

[3] Jansson, 195

[4] *USA v Assange* (Westminster Magistrates' Court, 4 January 2021) https://www.judiciary.uk/wp-content/uploads/2022/07/USA-v-Assange-judgment-040121.pdf

[5] See e.g. *R (SC) v SSWP* [2021] UKSC 26 [74]-[96]

Arguments for the POE

1. Humanitarian concern for the requested person

The primary concern is that suspected political offenders may not be granted a fair trial. (Concerns around torture have been allayed within the Council of Europe by *Soering v UK*.[6]) However, the POE is a weak means of protecting a requested person from an unfair trial.

First, suspects may face unfair trials even for non-political offences. This problem is better addressed by the discrimination clause that is commonplace in extradition treaties and is incorporated into the 'extraneous considerations' provisions of the Extradition Act 2003.[7]

Second, is the rationale behind this concern that there can be no fair trial for a political offence? If so, why do political offences remain on the statute books domestically? Does the UK believe itself exceptional in this regard? Mutual trust and respect would seem to dictate that we credit the judicial systems of fellow democracies with the ability to conduct such proceedings fairly.

2. Political offences are different

It has been suggested that political offences lack an element of malice or self interest, and that political offenders are therefore less deserving of punishment.[8] Again, this contention begs the question of why we choose to punish political offences domestically. One answer might be to preserve the stability of our state and our democracy. Why then should we not assist fellow democracies to do the same, by cooperating in the extradition of those who threaten them?[9]

3. Self-interest

The POE has been described as a mechanism by which states advance their own self-interest.[10] The theory goes that operating a blanket ban enables a requested state to maintain that a refusal to extradite involves no element of discretion and no picking of sides in any internal conflict within the requesting state. This is diplomatically advantageous: it preserves relations with current governments and avoids antagonising rebels who may later come to power. This notion may be particularly attractive as autocracies gain influence in the modern world,.

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[6] [1989] ECHR 14

[7] Sections 13 and 81

[8] Groarke, J.P. (1988). Revolutionaries Beware: The Erosion of the Political Offense Exception under the 1986 United States-United Kingdom Supplementary Extradition Treaty. University of Pennsylvania Law Review, 136(5), 1515. https://doi.org/10.2307/3312293

[9] Goldie, L.F.E. (1986). The "Political Offense" Exception and Extradition Between Democratic States. Ohio Northern University Law Review, 53, 95.

[10] Restrepo, D.J. (2021) "Modern Day Extradition Practice: A Case Analysis of Julian Assange," Notre Dame Journal of International & Comparative Law: Vol. 11: Iss. 1, Article 8.

However, determining what constitutes a political offence inevitably involves making value judgements. The more restrictions have been made to the POE, the more obviously political those judgements have become. States may also choose how far to restrict the POE with a particular treaty partner based on their assessments of that partner's judicial system and constitutional safeguards.[11] In jurisdictions where individual decisions on extradition or categorisation of offences lie with the executive rather than the judiciary, the veneer of neutrality is even thinner.

4. Advancement of liberal ideals

The POE emerged to protect revolutionaries, and thereby to advance the liberal ideals for which they fought.[12]

The efficacy of the POE in fulfilling that purpose fell into doubt as it increasingly protected individuals who had striven to undermine or destroy liberal values.[13] Yet restrictions on the POE have focused on the types of acts committed by requested persons, rather than on their motivations. Once a requested person's motivations have been established as political, courts have refused to "inquire whether a 'fugitive criminal' was engaged in a good or a bad cause".[14] This arguably protects the judiciary from politicisation and ensures consistent application of the POE as a legal rule. Conversely, courts have at times appeared to vary the application of the POE according to their sympathy with the cause of the requested person.[15] This may avoid protecting opponents of democracy. Under the current formulation of the POE, however, it is unprincipled and risks arbitrary or discriminatory decision-making.

Of course, even today many of those accused or convicted of political crimes are resisting tyranny. Moreover, democracies must not be complacent. Democratic backsliding in Hungary and Poland has been well documented. Cases like those of Julian Assange and Clara Ponsatí raise questions about what constitutes legitimate political conduct within a democracy. Indeed, it has been contended that a 'ghost' form of the POE was applied even within the EU in regard to Spanish requests for the extradition of the Catalan politicians (including Ponsatí) who had conducted an unauthorised independence referendum.[16] This indicates that the POE is still relevant and necessary.

<u>Arguments against the POE</u>

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[11] Goldie, 94

[12] Jansson

[13] Gilbert, G. (1991). Aspects of Extradition Law: International Studies in Human Rights. Dordrecht: Nijhoff. 115

[14] Lord Reid, in *R v Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556, 582-583

[15] Groarke

[16] Top, S. 'The political offence exception clause to extradition in Europe' (PhD thesis, Vrije Universiteit Brussel 2022).

1. "Out of date"[17]

Political offences are different now: methods, ideology and technology have all changed. The targeting of civilians has become widespread. Where revolutionary conflicts were once localised, for some the struggle is now against liberal democracy in general. Modern weaponry is capable of huge destruction. These factors all militate towards reform or abolition of the POE. However, technological advances also mean that political offences may now be committed online outside the territory of the requesting state. This development prefigures an increase in both the salience of extradition and the need for safeguards such as the POE.

2. Do other mechanisms do its work better?

The POE is only one safeguard in the sphere of extradition. Other safeguards include the discrimination clause, the system of asylum and the use of a human rights framework. But these safeguards do not all cover the same ground.

The discrimination clause takes no account of the nature of the alleged offence. Thus, while it may be effective at protecting the rights of the requested individual, it does little to protect the ideals that person has promoted.

The non-refoulement principle in asylum law is an almost identical legal provision to the discrimination clause.[18] It also has its own version of the POE: refoulement is permissible if a refugee has committed a serious crime, unless that crime is political.[19] The arguments made in this essay apply also to that provision.

Human rights also protect the requested individual to some extent, but the bar is high: per Strasbourg, there must be a real risk of a flagrant breach of an important right for extradition to be prevented.[20] Where Article 3 ECHR is not engaged, a requested person might seek to defeat an extradition for political offences on Article 10 grounds. However, prior indications of the European court do not bode well for such an approach.[21] Moreover, a human rights perspective must also take into account the rights of victims in a way that the POE does not.[22] This may curtail the protection it offers to political offenders.

Upon analysis, then, the POE plays a unique role within the landscape of safeguards in modern extradition law.

<u>Ideas for reform</u>

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[17] Lord Mustill *T v SSHD* 1996 WL 1092214

[18] Jansson, 48

[19] Article 1 F(b), 1951 Refugee Convention

[20] *Soering*

[21] *Z and T v UK* [2006] ECHR 1177

[22] *Castaño v Belgium* [2019] ECHR 8351/17

Some have suggested that an international court should be set up to deal with political offences, in the mould of the ICC or the ECtHR.[23] Others have advocated for the revival of a broad POE, combined with the extension of extraterritorial jurisdiction so that political offences can be tried in the requested state. However, these proposals would impose increased burdens on the international community and the requested state. An international body would also require an international definition of a political crime, which would be difficult to agree.

There is an alternative: liberal democracies should have the courage of their convictions. They should reformulate the POE so that it expressly protects liberal democratic values.

The reformulated POE could operate negatively, denying protection to activities aimed at the destruction of those values. As Article 30 of the Universal Declaration of Human Rights shows, it is necessary for democracy to be able to defend itself. As such, it is appropriate to exclude from an instrument's protection acts aimed at the destruction of the rights and values that the instrument was conceived to serve.

Alternatively, the new POE could operate positively, protecting only justifiable acts done to further democratic values. This option would likely provide less generous protection. Certainly, the standard of justifiability ought not to be too onerous. Terrorism and the targeting of civilians could be excluded from the purview of the POE, but it may be realistic and appropriate to protect discriminate, proportionate violent activities.

Putting the reformulated POE on a statutory footing would mitigate constitutional concerns: courts would merely be following the instructions of Parliament. In any event, such concerns appear to have receded. As Lord Lloyd-Jones has pointed out, where UK courts were once reluctant to examine the conduct of foreign states, a "striking shift in attitude" has seen them become far more comfortable in doing so.[24]

Conclusion

There is a place among the range of safeguards in modern extradition law for a reformed political offence exemption. The exemption was conceived to protect liberal democratic values; its reformulation should make that commitment concrete.

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[23] Groarke; Di Filippo, M. (2008). Terrorist Crimes and International Co-operation. European Journal of International Law, 19(3), 533–570.

[24] International law before United Kingdom courts: a quiet revolution, I.C.L.Q. 2022, 71(3), 503-529, 519