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2024

Article

NJECL

New Journal of European Criminal Law
2024, Vol. 15(4) 412–431


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The resurrection of the political offence exception to extradition in UK law

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Abstract
The resurrection of the political offence exception to extradition in UK law would be worthwhile. Once providing protection to persons sought for offences of a political character, the exception was removed from UK law in 2004. A number of factors weigh in favour of its reintroduction. Those relevant at the time of its development in the 19th century have become increasingly relevant again, supporting contemporary considerations. The cases of Julian Assange and Clara Ponsati illustrate the need for reintroduction. A new exception, a 'constitutionalism bar', founded upon the rule of law, human rights and democracy could protect the foundations of modern liberal democracies as well as individuals at risk of persecution.

Keywords
extradition, international law, criminal cooperation, political offence exception, United Kingdom

Introduction

Extradition is inherently political. The process ultimately involves the diplomatic act of transferring a requested person from one state to another. Extradition can also be political by virtue of the nature of the offence for which a person is sought. Indeed, originally the process largely concerned political offences by enemies of the state. Over time this changed, and extradition came to centre upon non-political common criminality, such as frauds and drugs offences, committed by citizens as well as

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foreigners. Political offences became excepted, including by s 3 of the UK's Extradition Act 1870, which allowed courts to reject a request where the offence was of a political character. This exception was removed from UK law by the Extradition Act 2003 (the '2003 Act'). Whilst that Act provides some protections to requested persons, including a bar based on the political motivation of the extradition request, the political character of the offence *per se* is today irrelevant. This shortfall is increasingly apparent. As described below, Julian Assange and Clara Ponsati could have benefitted from the erstwhile political offence exception. These and other cases illustrate the need for the resurrection of a bespoke political offence exception. Its absence creates a lacuna that brings the UK law and practice into disrepute.[1]

This paper argues that the removal of the political offence exception in UK law went too far in curtailing protection, not perhaps from requested suspected terrorists (whose activities hastened its end)[2] but instead from persons wanted for non-violent and evidently 'political' acts. The time is ripe to resurrect a new political offence exception founded upon the values of the rule of law, human rights and democracy – a 'constitutionalism bar'.[3] Whilst novel, the arguments in support accord with the rationale that first led to development of the doctrine in the early 19th century in the UK and elsewhere.

The purposes of extradition

Whether a political offence exception should form part of extradition law is affected by the purposes of the process. In general terms, extradition entails the transfer of accused and convicted persons from one jurisdiction to another to stand trial or serve a sentence. Whilst basically constant, this description belies the fact that the crimes and criminals subject to the process have changed over time, in line with changes in its purpose. Extradition's beginnings concerned the transfer of persons later protected by the exception, namely persons suspected of crimes against the state.[4] The subject matter of extradition expanded to include common crimes during the later 1800s[5] and to prevent the

1. For criticism of the Assange case, see: Dunja Mijatović, Council of Europe Commissioner for Human Rights, 'Letter to Rt Hon Priti Patel MP, Secretary of State for the Home Department of the United Kingdom' 10 May 2022, <https://rm.coe.int/letter-to-priti-patel-secretary-of-state-for-the-home-department-of-th/1680a67bc0> accessed 16 September 2024; Reply by Priti Patel, <https://rm.coe.int/reply-of-home-secretary-of-the-united-kingdom-priti-patel-to-the-lette/1680a6a0c4> accessed 16 September 2024; Nils Melzer, The Trial of Julian Assange: A Story of Persecution, (Verso 2022).
2. See Nisha Kapoor, *Deport, Deprive, Extradite: 21st Century State Extremism* (Verso 2018); Julia Jansson, *Terrorism, Criminal Law and Politics: The Decline of the Political Offence Exception to Extradition*, (Routledge 2020).
3. Also arguing for the reintroduction of a reformed political offence exception is Miguel João Costa, *Extradition Law: Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond* (Brill-Nijhoff 2019). In Chapter 8, Costa discusses the issues arising from the extradition of persons for political offences, such as secession and whistle-blowing (as in the cases of Ponsati and Assange described below). Costa's analysis aligns to an extent with the arguments made below.
4. Ivan Anthony Shearer, *Extradition in International Law* (Manchester University Press 1971) 13; Cindy Verne Schlaefer, 'American Courts and Modern Terrorism: The Politics of Extradition' (1981) 13(3) New York University Journal of International Law and Policy 617, 620; Antjie C. Petersen, 'Extradition and the Political Offence Exception in the Suppression of Terrorism' (1992) Indiana Law Journal 767, 771.
5. See Shearer *ibid* chap.1; John T. Parry, 'The Lost History of International Extradition Litigation' (2002-2003) 43 Virginia Journal of International Law 93; Peter D. Sutherland, 'The Development of International Law of Extradition' (1984) 28(1) Saint Louis University Law Journal 33.

emergence of 'safe havens'.[6] Today, the preamble to the UK-US Extradition Treaty 2003 vaunts the purpose of 'Desiring to provide for more effective cooperation between the two States in the suppression of crime…'.[7]

Cooperation is one of two major functions of extradition. The second is protection, both of the requested person and the integrity of the process. Several common features of extradition law serve the protective purpose: the speciality principle, double criminality requirement, and both the enumerative and eliminative approaches to extradition crimes.[8] Notably for our present purposes, the protective function was also served by the political offence exception which guarded against trials which would not be independent or impartial.[9] Alongside the loss of the political offence exception, the protective aspect has evolved in other directions[10] especially through the acceptance of the role of human rights.[11] Aside from concerns about the right to life (as affected by the death penalty) and potential abusive treatment, the European Court of Human Rights (ECtHR) has insisted that extradition should not lead to a 'flagrant breach' of the right to liberty or due process.[12] Relatedly, in England and Wales, a distinct and potentially broad abuse of process protective barrier has developed.[13]

It is clear that both cooperation and protection are intrinsic to extradition and should remain so. What can and has evolved, however, is the balance between them. Arguably the emphasis has moved too far towards the cooperative purpose at the expense of protection. The removal of the political offence exception from UK law is reflective of this trend. In part supporting the case for a newly forged exception are parallels between the context at the time of its emergence and the present day, and the reasons in support of the exception both then and now. It should be noted at the outset, however, the political offence exception is a complex doctrine. As Costa writes, 'Its problematic nodules are many, its theoretical interest vast, its symbolic charge immense.'[14] Resurrection within UK law would be correspondingly intricate.

The political offence exception

Emergence of the political offence exception

The political offence exception arose in the early 19th century.[15] It can be attributed to the political context at the time, and the belief that persons should enjoy freedom of political action in their

6. Colin Warbrick, 'Recent Developments in Extradition Law' (2007) 56 International and Comparative Law Quarterly 199, 201.
7. Cm 5821 (2003).
8. The enumerative approach identifies those crimes subject to extradition, whilst the eliminative approach employs filters such as minimum penalty.
9. M. Cherif Bassiouni, *International Extradition and World Public Order* (Oceana 1974) 425.
10. Schlaefer, n 4 above, 620.
11. See for example *Soering* v *United Kingdom* (1989) 11 EHRR 439.
12. *Soering* v *United Kingdom ibid* at [113]; *Mamatkulov and Askarov* v *Turkey* (2005) 41 EHRR 25; at [OIII 14]; *Othman* v *United Kingdom* (2012) 55 EHRR 1 at [235, 260, 261, 267]. See David Anderson and Clive Walker, *Deportation with Assurances*, Cm 9462 (2017) vol.2 at [230].
13. See *R* v *Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42.
14. Costa, n 3 above, 497.
15. Harvard Draft Convention on Extradition (1935) 29 American Journal of International Law (Supp) 249. Costa, n 3 above, discusses the original purposes of the exception at 497 et seq.

homeland.[16] The first paragraph of the US Declaration of Independence 1776, for example, asserts that '… whenever any Form of Government becomes destructive of (equality, and the rights to life, liberty and the pursuit of happiness) it is Right of the People to alter or abolish it'.[17] The political offence exception emerged as a manifestation of such political and philosophical developments. France introduced the exception into an extradition treaty with Belgium in 1834.[18] It became established as a principle of international law by the 1850s.[19] As noted, the exception is first mentioned in UK law in the Extradition Act 1870.

Rationale and premise behind the exception

The case for the contemporary resurrection of the political offence exception is substantially aligned with arguments which fostered its first emergence. As mentioned, the foundational political and legal context gave rise to the view that individuals have a 'right to resort to political activism to foster political change'.[20] This assertion, in turn, can be conceptualised as relating to three sets of considerations; humanitarian, diplomatic and moral.[21] Shedding light on the reasons behind the exception in the UK, Attorney General Robert Collier explained in 1870 that the UK was slow in concluding extradition treaties 'lest they might be required (to surrender) political offenders, and to violate the right of asylum always afforded here to political refugees'.[22] Linked to these sentiments is the view that '… political crimes have greater legitimacy than common crimes'.[23] Some argue political crimes are not real crimes at all, being generally victimless acts directed at the structure of government.[24] That view is inaccurate in some respects, since attacks on governments can result in tangible harms, including include economic damage and political instability, even if sometimes exaggerated.[25] Nevertheless, the development of liberal and representative institutions in Western Europe and beyond promoted a more favourable climate for political activism even if it involved criminality.[26] What emerged was international solidarity between freedom-loving states and repressed militants abroad,[27] resulting in the view that extradition should only apply to apolitical criminality.

16. Charles L. Cantrell, 'The Political Offence Exception in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland' (1977) 60 Marquette Law Review 777, 778, n 5.
17. See <https://www.archives.gov/founding-docs/declaration-transcript> accessed 16 September 2024.
18. See Belgian *Loi du 1er octobre 1833 sur les extraditions*, art.6 at <https://www.ejustice.just.fgov.be/eli/loi/1833/10/01/1833100150/justel> accessed 16 September 2024. For the Franco-Belgian Treaty of 22 November 1834, see Shearer, n 4 above, 167 n 2.
19. *Quinn* v *Robinson* (1986) 783 F 2d 776 (9th Circ) 792, 793.
20. *Quinn* v *Robinson* ibid, 793 quoting Schlaefer n 4 above, 622.
21. Costa, n 3 above, 504. Costa here refers to the analysis found in Christine Van den Wyngaert, 'The Political Offence Exception to Extradition: Defining the Issues and Searching for a Feasible Alternative' (1983) 17 Belgium Review of International Law 741, 752-754.
22. HC Deb vol 202 col 301 16 June 1870. See also *Cheng* v *Governor of Pentonville Prison* [1973] AC 931, 944; *Re Doherty* (1984) 599 F. Supp. 270 at 275 n 5 (SDNY).
23. *Quinn* v *Robinson* n 18 above, 793, citing Schlaefer n 4 above, 623.
24. See Petersen n 4 above, 776.
25. See John Mueller and Mark G. Stewart, *Terror, Security, and Money: Balancing the Risks, Benefits, and Costs of Homeland Security* (Oxford University Press 2011).
26. Schlaefer n 4 above, 620. See also Harvard Draft Convention n 15 above, 108-109.
27. See S. Prakesh Sinha, *Asylum and International Law* (Martinus Nijhoff 1971) 50.

The legislative, jurisprudential and conventional acceptance of activities that pursued political change coincided with the purpose of many political movements at the time - the protection of individual dignity. The political offence exception accorded respect to an individual's right to 'resort to political activism to foster political change'[28] through focusing upon the rights to freedom of expression, association and assembly, and fair trial in the requesting state. Freedom from torture and inhuman and degrading treatment and punishment was also germane. These human rights were manifest not through explicit or direct reliance on justiciable entitlements, but rather by the inclusion of the exception into treaties. The protective function of extradition had explicitly emerged.

Distinct from the national liberation and individual humanitarian purposes of the exception was its diplomatic goal of '… avoiding entanglement in the internal political affairs of other states'.[29] This aim arguably conflicted with the exception's humanitarian objective[30] because it supported the neutrality principle, allowing states to remain uncommitted as regards conflicts abroad.[31] In one sense, it comports with the right of self-determination, an aspect of which is that foreign governments should not intervene in the internal political struggles of other nations.[32] By invoking the exception, a requested state can be said to preserve its neutrality toward the internal struggle in the requesting state.[33] The opposite argument can also be made, however. By refusing to extradite an individual sought for a political offence the requested state appears to side with the cause of the accused. Indeed, upholding the exception in post-WWII Western Europe could be depicted as illiberal, given the political schism manifest in the Cold War.[34] Overall, while the purposes of the exception were relatively clear, its practical operation was not. Within the UK, the executive (diplomatic and ministerial), legislative and jurisprudential iterations and applications of the exception markedly varied.[35]

The exception in UK law and practice

In UK law and practice the exception had three manifestations. It had become a regular feature of UK extradition treaties from the late 19th century, ranging from article 5 of the Thailand–UK Extradition Treaty 1911[36] to article 5 of the UK–India Extradition Treaty 1992.[37] In more recent years, it was limited in its scope. Article 5(2) of the 1992 Treaty, for example, contains a list of offences not to be regarded as offences of a political character. This approach is mandated by the Council of Europe's Convention on the Suppression of Terrorism 1977, discussed below. The UK-US Extradition Treaty 2003[38] follows a similar pattern, in article 4. More recently, the UK-United

28. Schlaefer n 4 above, 622.
29. Cantrell n 16 above, 782.
30. Van den Wyngaert n 21 above, 752-754.
31. *Ibid* at p 752.
32. See Mark Dell Kielsgard, The Political Offence Exception: Punishing Whistleblowers Abroad, EJIL: Talk, 2013, <https://www.ejiltalk.org/the-political-offense-exception-punishing-whistleblowers-abroad/> accessed 16 September 2024.
33. Petersen n 4 above, 776.
34. Cantrell n 16 above, 782-783.
35. See Geoff Gilbert, 'Terrorism and the Political Offence Exemption Reappraised' (1985) 34 International and Comparative Law Quarterly 695.
36. C 5861 (1911).
37. Cm 2095 (1992). See Paul Arnell, 'India-UK Extradition Law and Practice: The Case for Reform' (2020) 45(3) Commonwealth Law Bulletin 411.
38. See n 7 above.

Arab Emirates Extradition Treaty 2006[39] does not contain the political offence exception at all. It does, however, have a discrimination clause (explained below). It also, in article 4(2)(a), provides that extradition may be refused where the requested person has been granted political asylum. Thus, the manifestation of the exception in the UK's extradition treaties has shifted from adoption without limitation, through adoption with specific limitations, to instances of complete omission. Due to treaties being concluded over time, there are today considerable variations between treaty terms and the legally enforceable position in UK courts under the 2003 Act.[40]

The original UK legislative iteration of the political offence exception was section 3(1) of the Extradition Act 1870:

A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character or if he prove… that the requisition for his surrender has in fact been made with a view to try to punish him for an offence of a political character.

The second legislative version of the exception took the form of section 6(1)(a) of the Extradition Act 1989.[41] It provided a general restriction on return where '… it appears to an appropriate authority— that the offence of which that person is accused or was convicted is an offence of a political character'. Affecting, and in essence ultimately replacing, the exception *per se* was a political motive and prejudice bar, sometimes called the 'discrimination clause', introduced by the Suppression of Terrorism Act 1978 (addressed below). However, the political offence exception finds no place in the current statute, the Extradition Act 2003.

Before abolition, the jurisprudential meaning of the exception in UK law was contested.[42] Attempts to define 'political offence' proved too difficult for legislators leading up to the 1870 Act, and so the matter was left to the courts.[43] The difficulties pertained in particular to 'relative' political offences, in contrast to 'pure' political offences. The latter includes those inherently politically motivated and targeted crimes such as treason, sedition, and espionage which are always directed against the political organisation or government of the state.[44] However, relative or indirectly political offences comprise commonplace crimes (such as robbery) which are directed toward political objectives.[45] This distinction was manifest by virtue of pure political offences not being included in Schedule 1 to the 1870 Act. Not being listed meant extradition for pure political offences was not possible. Relative political offences could fall within the exception, with courts charged with the task of delineation.

39. Cm 7283 (2007). Compare the UK-Kuwait Extradition Treaty, 15 December 2016, Cm 9657 (2018), article 3, as discussed by Khaled S. Al-Rashidi and Clive Walker, 'Extradition between Kuwait and the UK: New Dispositions, Old Doubts' (2021) 66 International Journal of Law, Crime and Justice 66.
40. See *Government of the USA* v *Assange* [2021] EW Misc 1 (Mag C).
41. See Leonard Leigh, 'Terrorism and Extradition: a British Perspective' in Maurice Flory and Rosalyn Higgins (eds), *Terrorism and International Law* (Routledge 1996).
42. J.R. Young, 'The Political Offence Exception in the Extradition Law of the United Kingdom: A Redundant Concept' (1984) 4 Legal Studies 211, 211.
43. See House of Commons Select Committee on Extradition (HC Select Committee 393 1867-68); HC Deb vol 202 col 302 16 June 1870; *Royal Commission to inquire into Working and Effect of Law relating to Extradition of Persons accused of Crime*, Report (C 2039, 1878); Geraint Rees, 'Extradition: The Extradition Acts, 1870-1873' (1971) 2 Cambrian Law Review 47; Scott Baker, David Perry, and Anand Doobay, 'A Review of the United Kingdom's Extradition Arrangements' (Home Office: London, 2011) (the 'Baker Review') chaps. 2, 3.
44. Manuel R. Garcia-Mora, 'The Nature of Political Offences: A Knotty Problem of Extradition Law' (1962) 48 Virginia Law Review 1226, 1234.
45. J.-G. Castel, and Marlys Edwardh, 'Political Offences: Extradition and Deportation – Recent Canadian Developments' (1975) 13(1) Osgoode Law Journal 89, 92.

The judicial tack initially adopted was the 'incidence' or 'insurrection' approach. The first case reported on section 3(1) of the 1870 Act, *Re Castioni*[46], held that crimes were political if they were incidental to, and formed part of, political disturbances.[47] Common crimes committed in the course and in the furtherance of a political disturbance could be treated as political offences. This view was extended in *R* v *Governor of Brixton Prison, ex p Kolcyznski*[48] to crimes which involved escape from oppression in Eastern bloc Poland. In *Cheng* v *Governor of Pentonville Prison*[49] the House of Lords held the exception did not protect an individual for the attempted murder of Taiwan's vice premier in New York. It held that 'political character' required that the requested person was in opposition to the requesting state. Over time, the judicial delineation of political offence has been intractable. As Viscount Radcliffe noted in *R* v *Governor of Brixton Prison, ex p Schtraks* 'Generally speaking, the courts' reluctance to offer a definition has been due, I think, to the realisation that it is virtually impossible to find one that does not cover too wide a range…'.[50]

The demise of the exception

The demise of the exception in UK law began with the enactment of the Suppression of Terrorism Act 1978 which, in turn, reflected the beginnings of the trend in international law towards the criminalisation of terrorism.[51] Applying until the advent of the 2003 Act, the 1978 Act provided that offences corresponding to those listed in Schedule 1 were not to be regarded as offences of a political character for the purposes of the then applicable extradition law. Notably, the 1978 Act went considerably further than required by the terms of the European Convention on the Suppression of Terrorism 1977 (1977 Convention), upon which it was based, in terms of the range of crimes deemed to be non-political.[52]

The 1977 Convention was the '… first major group effort to deal transnationally with the problem of terrorism through heightened cooperation…'.[53] In short, the spreading desire by states to take action against terrorism led to the limitation of the political offence exception, with the UK government in the vanguard because of frustrations over the exception blocking the rendition of Irish Republican fugitives.[54] The Explanatory Report to the 1977 Convention asserts that 'It was felt that the climate of confidence among likeminded States... their democratic nature and their respect for human rights... justify introducing the possibility and, in certain cases, imposing an obligation to

46. [1891] 1 QB 149.
47. *ibid* 166 per Hawkins, J. Further aspects of the incidence test, from an asylum perspective, are the need for a causal link, and the absence of remoteness between the political situation and the crime: *T* v *Secretary of State* [1996] AC 742, 766.
48. [1954] 1 QB 540.
49. [1973] AC 931.
50. [1964] AC 556, 589.
51. See Ben Saul, 'Counter-Terrorism law and the shrinking legal space for political resistance and violence' in Liora Lazarus and Benjamin Goold (eds), *Security and Human Rights* (2nd ed, Hart 2017).
52. ETS no 90; Protocol of 2003 (ETS no 190). As of September 2024, there are 35 parties to the 2003 Protocol and 46 to the 1977 Convention. See A.V. Lowe and J.R. Young, 'Suppressing terrorism under the European Convention' (1978) 25 Netherlands International Law Review 305.
53. Petersen n 4 above, 781-782.
54. See Jack Holland, *The American Connection* (Poolbeg 1989); Colm Campbell, 'Extradition to Northern Ireland: Prospects and Problems' (1989) 52 MLR 585; Gerard Hogan and Hilary Delany, 'Anglo-Irish extradition viewed from an Irish perspective' [1993] Public Law 93.

disregard, for the purposes of extradition, the political nature of the particularly odious crimes mentioned... in the Convention'.[55] Consequently, the 1977 Convention obliges state parties to disregard an offence connected with a political offence or an offence inspired by political motives those offences within the scope of specified criminally-related international conventions (such as hijacking aircraft). The list of such treaties was expanded by a 2003 Protocol.

Following the 1977 Convention, the UK became party to further international and EU arrangements which restricted the exception. On a bilateral level, the UK-US Supplementary Extradition Treaty 1985[56] restricted the exception to non-violent political acts. Within the EU, it was not just the UK but also Spain that played a leading role in the demise of the exception. The latter's campaign ultimately produced the Convention on Extradition between Member States 1996,[57] article 5(1) of which provided that no offence may be regarded as a political offence.[58] The 1996 Convention was superseded by the Framework Decision on the European Arrest Warrant 2002.[59] The Framework Decision led to the effective abolition of the exception among EU Member States, including the UK. The EAW was considered '... a key element of the EU's post-9/11 "Road Map on Terrorism"'; accordingly, the political offence exception must find no place within it.[60]

Whilst the exception has been largely or totally negated within UK, regional and international law vestiges remain. For instance, article 4 of the UK-US Extradition Treaty 2003 specifies that 'Extradition shall not be granted if the offense for which extradition is requested is a political offense'. Article 4 excludes six categories of offences, including offences with their basis in a treaty, murder, hostage-taking and using an explosive device. Of course, the terms of the treaty are not directly applicable in the dualist system maintained in UK law. An attempt to rely on the 2003 Treaty failed in the extradition hearing of Julian Assange in late 2020. The District Judge stated that a treaty did not confer rights on Assange that were enforceable in the Westminster Magistrates' Court.[61] It was held that '… Parliament clearly took the decision to remove the political offences bar which had previously [been] available to those facing extradition… it cannot then be for this court to act against this clear intention, by reinstating the bar'.[62] A further notable example is the Trade and Cooperation Agreement 2020 (TCA), which replaces previous European Arrest Warrant arrangements as between the UK and EU.[63] Article 602(1) prohibits the refusal of an extradition request on the grounds

55. Explanatory Report to the European Convention on the Suppression of Terrorism, para 17, at <https://rm.coe.int/16800d4b94> accessed 16 September 2024.
56. Cmnd 9565 (1985). See Douglas A. Fellman, 'Limiting Extradition Law's Political Offense Exception: the United States-United Kingdom Supplementary Extradition Treaty' (1987) 20 Cornell International Law Journal 363; Valerie Epps, 'In Re Requested Extradition of Smyth' (1996) 90(2) American Journal of International Law 296, 297; Karen McElrath, *Unsafe Haven* (Pluto Press 2000).
57. OJ C 313/11, 23 June 1996.
58. See: Sibel Top, 'Prosecuting Political Dissent: Discussing the Relevance of the Political Offence Exception in EU Extradition Law in Light of the Catalan Independence Crisis' (2021) 12(2) New Journal of European Criminal Law 107.
59. Framework Decision 2002/584/JHA on the European Arrest Warrant and the Surrender Procedures between EU countries, OJ L 190, 18 July 2002.
60. Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, SN 140/01, <https://www.consilium.europa.eu/media/20972/140en.pdf> accessed 16 September 2024.
61. *Government of the USA* v *Assange*, n 40 above, at [41].
62. ibid at [50].
63. CP 426 (2021). See HMG, *The Future Relationship with the European Union*, CP 211 (2020) at [51]; Gemma Davies and Paul Arnell, 'Extradition Between the UK and Ireland After Brexit' (2021) 85 Journal of Criminal Law 98; Rosemary Davison, 'Everything is Different but Nothing has Changed: the New post-Brexit Extradition Arrangements between the UK and the EU' [2021] Criminal Law Review 427.

that the executing state regards it as a political offence or connected with a political offence. It also provides, however, that states may opt for exceptions, albeit limited to those offences listed in the 1977 Convention, associated offences and terrorism as defined in Annex 45 to the TCA.[64]

Post-political offence exception: the discrimination clause (political motive and prejudice exceptions)

The demise of the political offence exception does not prevent requested persons from putting forward politically-related arguments against extradition. A provision somewhat akin to the political offence exception is that based on a possible political motive or prejudice on the part of the requesting state, sometimes termed the 'discrimination clause'. Thus, requests can be denied where they are motivated by a desire to punish individuals on account of their political opinions or where their subsequent trial may be prejudiced on account of them. The clause has been reflected in the Convention Relating to the Status of Refugees 1951, article 5,[65] the European Convention on Extradition 1957, article 3(2),[66] and the 1977 Convention, article 5. In UK law, section 81(1) of the 2003 Act *inter alia* bars an individual's extradition if it appears that '(a) the request for his extradition… is in fact made for the purpose of prosecuting or punishing him on account of his… or political opinions, or (b) if extradited he might be prejudiced at his trial or punished… by reason of his… political opinions'. A similar provision in section 13 applies to extradition requests from EU Member States. This circumscribed protection has now taken the place of the political offence exception *per se*.

The application of the political motive and prejudice exception requires the requested person to '… show a causal link between the issue of the warrant, his detention, prosecution, punishment or the prejudice which he asserts he will suffer and the [facts upon which they are based].[67] Whilst this clause does offer requested persons some protection, it is not a substitute for the political offence exception nor, for our present purposes, would it necessarily address the mischief of individuals being sought for political acts where they are not at risk of being punished or prejudiced on account of their opinions.[68]

64. By September 2024, twelve EU Member States indicated they would apply a political offence exception; a further 23 states apply restrictions on the surrender of nationals: Home Office, Notifications made by the European Union to the UK under Part Three of the UK-EU Trade and Cooperation Agreement, pp.11-14 at <https://assets.publishing.service.gov.uk/media/65438f5bd36c91000d935c47/2023-07-27_EU_Notifications_to_the_UK.pdf> accessed 16 September 2024.
65. 189 UNTS 150. For links between asylum and the political offence exception, see C.F. Amerasinghe, 'The Schtraks Case, Defining Political Offences and Extradition' (1965) 28 MLR 27, 29.
66. See Sibylle Kapferer, 'The Interface Between Extradition and Asylum' (2002) *UNHCR Legal and Protection Policy Research Series* vi, at <https://www.unhcr.org/uk/protection/globalconsult/3fe84fad4/5-interface-extradition-asylum-sibylle-kapferer.html> accessed 16 September 2024.
67. *Hilali* v *Spain* [2006] EWHC 1239 (Admin), [62].
68. But in *Turkey v Tanis* [2021] EWHC 1675 (Admin), [50], the High Court did not set aside the view of District Judge Zani that, were the requested person to be returned, there was a serious possibility of s. 81(b) prejudice by reason of '… apparent links to/ espoused support for the PKK'.

The resurrection of a new political offence exception

UK law (and that in other liberal democratic jurisdictions, especially in Europe) would benefit from the reintroduction of a political offence exception fit for the 21st century. Certain recent cases provide strong support for this reform, mentioned presently. The difficulty lies in fashioning a new exception in a way that protects requested persons from being extradited where there are legitimate politically relevant grounds for refusal and, at the same time, accords with the cooperative purposes of extradition, including counter terrorism policies. The approach that should be taken, it is submitted, embeds the exception in an objective standard based upon the rule of law, human rights and democracy – what might be called the 'constitutionalism bar'.[69] The invocation of constitutionalism 'targets primarily the conditions of legitimate power' in the context of extradition.[70] All three constituent values can together be described not only as worthwhile 'British values'[71] but also as fundamental universal norms. UK extradition law has contained a human rights bar since the advent of the 2003 Act.[72] The revised political offence exception would be pointless if it just replicated facets of it, or indeed the political motive and prejudice exception or the forum bar.[73] So, while related to extant bars, the new exception would directly address the mischief that they do not. This lacuna is that the UK's extradition partners have on occasion sought persons for apparently political acts, but the law does not allow consideration of an argument to refuse a request founded upon the principles of constitutionalism. The argument for the resurrection of a form of political offence exception is multi-faceted. Prior to discussing those arguments, however, it is useful to summarise the cases of Julian Assange and Clara Ponsati, both of which illustrate the need for the resurrection of the exception.

Assange had been indicted on charges relating to computer intrusion and espionage (under the US Espionage Act 1917[74]) arising from publishing classified information on the Wikileaks platform which he founded.[75] As to whether Assange could have been extradited from the UK, the double criminality requirement was met by corresponding crimes in the UK's Computer Misuse Act 1989 and the Official Secrets Act 1989 which also override most claims to freedom of expression.[76] Yet,

69. For the value of constitutionalism, compare David Beetham D, *The Legitimation of Powers: Issues in Political Theory* (Macmillan 1991); Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022).
70. Jo E.K. Murkens, 'The Quest for Constitutionalism in UK Public Law Discourse' (2009) 29 Oxford Journal of Legal Studies 427, 453.
71. See Representation of the People Act 1983; Human Rights Act 1998; Constitutional Reform Act 2005, s 1; Home Office, *Prevent Strategy*, Cm 8092 (2011) 107, Annex A.
72. Extradition Act 2003, ss 21, 21A and 87.
73. Extradition Act 2003, ss 13 and 81, and 19B and 83A respectively.
74. 18 USC s.793. For the indictments see: 'US v. Julian Paul Assange 2018', at <https://www.justice.gov/opa/press-release/file/1153486/download> and 'US v. Julian Paul Assange 2019', at <https://www.justice.gov/opa/press-release/file/1165556/download> accessed 16 September 2024. See Polona Florijančič, 'The Assange Case: Transnational Prosecution of Investigative Journalism' (2023) Journal of Criminal Law at <https://doi.org/10.1177/00220183231191476> accessed 16 September 2024.
75. See Julian Assange, *The WikiLeaks Files* (Verso Books 2015). As to whistleblowing and extradition, see Costa, n 3 above 516-520. Our paper disregards previous sexual offence charges alleged by Swedish authorities.
76. In *Assange v United States* [2024] EWHC (700 (Admin) the High Court requested that assurances be provided by the United States as regards *inter alia* Assange's ability to rely on the First Amendment to the US Constitution at his trial (see further below). See as to the freedom of expression and official secrets in UK law *R* v *Shayler* [2002] UKHL 11.

Assange's case, it is submitted, supports the arguments laid out below in favour of the reintroduction of a form of the political offence exception into UK law. Before abolition, the exception probably applied to espionage charges.[77] Under the proposed bar, as set out below, a UK court could consider Assange's motivations in carrying out the acts giving rise to the alleged offences and adjudge whether his extradition is in the interests of justice with reference to the rule of law, human rights and democracy.

Clara Ponsati was sought by Spain from Scotland under a pre-Brexit European Arrest Warrant.[78] The request had its origins in the independence referendum held in Catalonia in 2017 which was organised by the Catalan Government (including Ponsati and others).[79] The means through which Ponsati and others sought to achieve their political goal were peaceful, however, the leaders of the Catalan Government were arrested and prosecuted for charges such as rebellion, sedition and misuse of public funds.[80] Ponsati, who had fled Spain and was working for the University of St Andrews in Scotland, was accordingly charged with rebellion and misuse of public funds. Scottish prosecutors at the time stated that they planned to rely on the UK Treason Felony Act 1848 in order to satisfy the double criminality requirement.[81] The Spanish prosecuting authorities later withdrew that extradition request and replaced it with another based on sedition, though doubts remained about double criminality following abolition in Scotland.[82] During the course of the Scottish extradition proceedings Ponsati became a member of the European Parliament and moved from Scotland to Brussels.[83] Given her physical absence, on 26 August 2021, the Scottish extradition proceedings were brought to an end.[84] Nevertheless, Spain's attempt to secure Ponsati from Scotland was an instance where the former political offence exception could arguably have been invoked to block her extradition. Similarly, the proposed constitutionalism bar would allow courts to consider whether, in

77. The issue was raised in the deportation decision, *R* v *Governor of Brixton Prison Ex p. Soblen* (No.2) [1963] 2 Q.B. 243, 256, 262, 283, 300 (espionage was deemed non-extraditable). Compare *R* v *Secretary of State for the Home Department, ex p. Hosenball* [1977] 1 W.L.R. 766, 786.
78. See Top, n 58 above, 119. Costa, n 3 above 514-515, discusses the handling of secession in extradition law.
79. No Catalan independence movement has ever been listed as a terrorist organisation by the EU under Common Position on the Application of Specific Measures to Combat Terrorism 2001/931/CFSP.
80. See *Junqueras* 459/2019, Casa Tribunal Supremo, 14 October 2019 (nine Catalan separatists were convicted of sedition, misuse of public funds and contempt of court); *Puigdemont and others* Superior Regional Court of Schleswig-Holstein, *The Times*, 13 July 2018 p.27 (Puigdemont could be extradited for corruption but not for rebellion); *Puigdemont* Tribunal Supremo 12 January 2023 (charges of sedition were dropped since Penal Code art 544 was revoked by Ley Orgánica 14/2022 de 22 de diciembre): Tribunal Supremo, Sala de lo Penal, Causa Especial núm.: 20907/2017, 12 January 2023). See also Julia König, Paulina Meichelbeck and Miriam Puchta, 'The Curious Case of Carles Puigdemont—The European Arrest Warrant as an inadequate means with regard to political offenses' (2021) 22 German Law Journal 256, where the removal of the exception from the EAW is criticised.
81. See Paul Arnell, 'Extraditing Ponsati to Spain is not a clear cut process and involves certain procedures' *The Scotsman* 15 November 2019.
82. See Criminal Justice and Licensing (Scotland) Act 2010, s.51 (for Scotland); Coroners and Justice Act 2009, s.79 (for England and Wales).
83. Proceedings then arose as to immunity from prosecution of MEPs: European Parliament decision of 9 March 2021 on the request for waiver of the immunity of Clara Ponsatí Obiols (2020/2031(IMM)) P9_TA(2021)0061; *Puigdemont and Comin v Parliament* [2023] EUECJ T-115/20 (05 July 2023) (refusal of the Parliament President to defends members' privileges and immunities was not challengeable); *Puigdemont, Comin and Ponsati v Parliament* [2023] EUECJ T-272/21 (05 July 2023) (decision of Parliament to waive parliamentary immunity upheld). See Victor Torre de Silva, 'Enlarging the Immunities of European Parliament's Members: The Junqueras Judgment' (2021) 22 German Law Journal 85.
84. See BBC News, 'Scottish Court Dismisses Clara Ponsati Extradition Case' 26 August 2021, at <https://www.bbc.co.uk/news/uk-scotland-58316688> accessed 16 September 2024.

light of Ponsati's motivations, her extradition was in the interests of justice. Both the cases of Assange and Ponsati are illustrative of the need for a resurrected political offence exception. They support four more general arguments discussed hereafter.

The essence of the original rationale remains and is arguably enhanced

Perhaps the strongest factor militating in favour of the resurrection of the exception is that its underlying rationale persists, and indeed has increased in importance in the first decades of the 21st century.

First, the avoidance of foreign entanglements remains a valid consideration and is underlined in the Catalan cases not only by the repeal of the crime of sedition but also by ongoing debates about amnesty legislation.[85] A state of flux also affects the Assange case. Following judicial prompts, assurances were lodged by the US government about avoiding prejudice based on nationality, permitting a non-citizen to raise the US constitution protection of free speech, and ruling out the death penalty.[86] The first two of these were pending at the point when a plea agreement between the US and Assange was reached, resulting in a sentence of 62 months (time-served in the UK on remand) for violation of the Espionage Act 1917 (18 U.S.C. s.793(g)) and removal to Australia.[87]

Second, it might be supposed that the level of protection for human rights, democracy and the rule of law made this safeguard mechanism 'superfluous'[88] in jurisdictions such as the UK and EU. Yet, this view negates the possibility that committing offences for a political purpose could ever be legitimate in the UK and EU for the purpose of non-rendition, regardless of the type of crime and circumstances of commission.[89] The cases of political dissidents and whistleblowers suggest otherwise.

The acts and circumstances of whistle-blowers and secessionists are not the only causes for reflection. The rise of populism and reactionary policies in Europe and North America also weigh in favour of the exception's resurrection.[90] Populism is said to be 'essentially illiberal, especially in its disregard for minority rights, pluralism and the rule of law'.[91] A further facet of the liberal order, and one aligning with the demise of the exception, was the recognition by a number of states that they share common interests and values and that they are able to cooperate to extend the rule of law and realise mutual benefits.[92] This cooperative inclination must now be revisited and conditioned where the political outlook of the UK's potential extradition partners becomes less palatable. Even the EU is aware of the drift away from shared fundamental values and, under article 7 of the Treaty on European Union, has commenced a system of rule of law annual reports, with the threat of financial

85. Sedition (Spanish Penal Code, art 544) was revoked by Ley Orgánica 14/2022 de 22 de diciembre. In turn, the 122/000019 Proposición de Ley Orgánica de amnistía para la normalización institucional, política y social en Cataluña (November 2023) has been approved by the Congresso de los Deputados but condemned as unconstitutional by the Consejo General del Poder Judicial (*Informe*, 21 March 2024).
86. *Assange v USA* [2024] EWHC 700 (Admin).
87. See *US v Assange*, North Mariana Islands USDC, 25 June 2024, https://www.justice.gov/usdoj-media/opa/media/1358636/dl?inline; Crown Prosecution Service, Julian Assange Extradition Case Concludes, <https://www.cps.gov.uk/cps/news/uk-julian-assange-extradition-case-concludes> accessed 16 September 2024.
88. Top n 58 above, 115.
89. Top n 58 above, 115.
90. See Robert G. Patman, 'The Liberal Order and Its Populist Adversaries in Russia, UK and USA', in Frank A. Sengel, David B. MacDonald and Dirk Nabers, D., (eds), *Populism and World Politics* (Palgrave Macmillan 2019).
91. Cas Mudde, 'Europe's Populist Surge' (2016) 95(6) Foreign Affairs 25.
92. Patman n 90 above, 279-280.

penalties for those states that do not meet the criteria[93] (with Hungary and Poland being first in line).[94] It would be an oversight to say that this development has no implications for the revision of determinedly apolitical systems of extradition.

Even before the relatively recent populist development, the persistence of the rationale for the political offence exception was discussed in the House of Commons during debates leading to its abolition by the 2003 Act. Harry Cohen MP stated:

> I note that the exception for political offences, which provides a defence of political motivation, is to be abolished. However, that defence is still needed. People may commit a criminal act. For example, some of those who fought against apartheid in South Africa committed criminal offences, and some of the people resisting the Zimbabwean regime now may be committing criminal offences.[95]

In the nearly two decades since the enactment of the 2003 Act, the threats to the international and national rule of law, human rights and democracy in both the Western world and further afield may have mutated, but they have intensified rather than withered away.

Limitation of the political offence exception went too far

The limitation of the political offence exception has gone too far in being completely removed from the 2003 Act, as well as the EU's Framework Decision on the European Arrest Warrant. Both reflect the security dominated milieu post-9/11.[96] The 2003 Act, however, has exceeded the UK's international legal obligations. Referring to the UK-US Supplementary Treaty 1985 and other instruments limiting the political offence exception, Petersen states that 'Flexibility was given up for certainty, and protection of the individual was traded for protection of the group. The motivations which animated the original political offense exception - fairness toward those desiring political change or the desire to remain neutral towards such struggles - have all but disappeared'.[97] As noted, the trend of extinguishing political considerations in extradition was set before 9/11.[98] In acting as it did, the UK failed to accept that '[c]ontroversy has always followed the exception'[99] and that the reasonable response has been to allow independent judges to apply its terms in the public interest.

According with the view that the limitation of the exception went too far are the emergent signs of second thoughts. Signals include the post-Brexit TCA acceptance that EU Member States and the UK may *inter se* refuse an extradition request where it is considered by the requested state as relating

93. See European Commission, *A new EU Framework to strengthen the Rule of Law* COM(2014) 158 final, 11 March 2014; European Commission, *Further strengthening the rule of law within the Union: State of play and possible next steps* COM(2019) 163 final, 3 April 2019; European Commission, *Strenthening the rule of law within the Union: A blueprint for action* COM (2019) 343 final, 17 July 2019.
94. *Commission* v *Poland* Case C619/18, 24 June 2019. See Timea Drinóczi and Agnieszka Bień-Kacała, *Rule of Law, Common Values, and Illiberal Constitutionalism Poland and Hungary within the European Union* (Routledge 2021).
95. HC Deb vol 396 col 102, 9 December 2002.
96. See David Feldman, 'Human Rights, Terrorism and Risk' [2006] Public Law 364; Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis* (Cambridge University Press 2006).
97. Peterson n 4 above, 786, footnotes omitted.
98. See Karin Landgren, 'Deflecting International Protection by Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests' Working Paper No. 10, UNHCR 1999 32, 39 at <https://www.unhcr.org/uk/media/deflecting-international-protection-treaty-bilateral-and-multilateral-accords-extradition> accessed 16 September 2024.
99. Van den Wyngaert, n 21 above, 742-743.

to a political offence or connected with one, excluding offences listed in the 1997 Convention and terrorism as defined within the Agreement.[100] Next, reconsideration has followed political and legal dissatisfaction with the perceived excessive and oppressive operation of the UK-US extradition arrangements, which were seen as favouring US over UK trials[101], as well as the European Arrest Warrant which has been considered to allow disproportionate renditions for relatively minor crimes accompanied by dire foreign detention conditions and questionable criminal processes.[102]

The oscillating nature of the existing protective devices

Support for the resurrection of a form of the political offence exception next derives from the purposes of extradition developing and changing over time. Whilst not an argument in favour *stricto sensu*, it adds to the case by demonstrating that the law is fluid and so the previous abolition should not be considered permanent. Simply put, the reintroduction of an exception would be consistent with the ebb and flow of the purposes and nature of extradition. Thus, in *T* v *Secretary of State* Lord Mustill noted that the history of the political offence exception 'discloses a series of oscillations'.[103] As seen, the exception emerged and subsisted for a considerable period of time, though its application was never uniform or reliant on a precise definition of political crimes. As described, subsequent animus emerged to limit and then in some cases abolish the exception for perpetrators of political violence, especially if targeted against civilians.[104] Yet, there is no steadfast historical reason militating against its resurrection in any circumstances. A further oscillation in UK law and beyond in favour of protecting some persons sought for political activities is now required.

The impact and limits of human rights protection

The restricted impact and limits of human rights protection in extradition provide support for the resurrection of a form of the political offence exception. At present, human rights largely fail to consider generalised concerns taking the form of, *inter alia*, public awareness and the freedom of the press collectively. The lacuna is seen in the Report following the visit to the UK of Council of Europe Commissioner for Human Rights Dunja Mijatović in 2022:

> … [p]roceedings have so far mainly focused on Mr Assange's personal circumstances. While this is a very important aspect of the case, it means that the wider human rights implications of Mr Assange's extradition, which reach far beyond his individual case, may not have been considered adequately thus far. [I]t remains unclear… to what extent the grounds to prohibit extradition… will provide a sufficient

100. n 63 above.
101. See the Baker Review, n 43 above; House of Lords Select Committee on Extradition Law HL 126 (2014-15) chap.11 and Government Response Cm 9106 (2015); Auke Willems, 'Extradition on two sides of the Atlantic' (2016) 27 Criminal Law Forum 443; Anti-social Behaviour, Crime and Policing Act 2014, Part 12; Asif Efrat, 'Resisting Cooperation against Crime: Britain's Extradition Controversy, 2003-2015' (2018) 52 International Journal of Law, Crime, and Justice 118.
102. See Joanna Dawson, Sally Lipscombe and Samantha Godec, 'The European Arrest Warrant' (London: HC Library 07016 (2017); EU Council, 'The European Arrest Warrant and Extradition Procedures - Current Challenges and the Way Forward' OJ 2020/C 419/09.
103. n 47 above, 761.
104. *ibid*.

> opportunity to have account of the wider implications for freedom of expression and media freedom that the extradition of Mr Assange would have.[105]

Even where human rights protection does apply, it may be lawfully curtailed. In the examples of Assange and Ponsati, both were exercising their rights to the freedoms of thought, expression and association (under the European Convention on Human Rights, articles 9, 10, and 11). Assange's legal team have invoked article 10 in his litigation. Ponsati's case involves an added claim of the right to self-determination.[106] Any further claim by Ponsati to the right to participate in free elections under article 1 of Protocol 3 of the ECHR would face the adverse argument that the right does not extend to referenda.[107] More generally, however, no UK case has yet upheld an argument upon article 10 in extradition in such circumstances. Articles 9-11 are, of course, qualified rights. They can be lawfully interfered with if that interference is prescribed by law, necessary in a democratic society, and for one of the interests listed in the second paragraph of the relevant article including national security, territorial integrity and public safety.

Further features of extant human rights protection in extradition supporting a resurrected bar are its prospective and extraterritorial application. This point arises when a requested person argues that a human rights violation will occur subsequent to extradition within the requesting territory. The leading case, *Soering* v *UK*, found that in principle a requested person can rely on human rights in such a way provided the given test is met.[108] The test varies according to the right in question.[109] As noted, article 10 has not successfully been relied upon in such a case. Indeed, it would almost certainly not be germane in a case such as Assange's, as it could not be realistically argued that his extradition would unlawfully interfere with his future right to freedom of expression.[110] In Ponsati's case, there is no justiciable entitlement that could act to prevent her extradition specifically relating to the political character of the acts forming the basis of her request. That noted, in both cases the right to a fair trial could be relevant, but the test conditioning that right comes with a high bar.[111] The political character of their alleged offences would be unlikely to impair sufficiently the prospective trial processes in Spain or the United States.[112] Indeed, that argument would fall under the discrimination clause, mentioned above. Overall, the human rights bar in UK law offers limited direct

105. (Comm DH (2022) 27 at [67].
106. That is not justiciable within the UK. See Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 Human Rights Law Review 609, 626.
107. In *Moohan* v *Lord Advocate* [2014] UKSC 67 at [8], the UK Supreme Court held that article 3 of Protocol 1 did not apply to referenda.
108. See John Dugard and Christine Van den Wyngaert, 'Reconciling Extradition with Human Rights' (1988) 92 American Journal of International Law 187.
109. See Paul Arnell, 'The European Human Rights Influence upon Extradition – Myth Debunked' (2013) 21 European Journal of Crime, Criminal Law and Criminal Justice 317.
110. See Gary Ross, 'Espionage, the First Amendment and the Case Against Julian Assange' (2020) 33(4) International Journal of Intelligence and Counterintelligence 747, 762-763.
111. The test is that the requested person risks suffering a flagrant denial of a fair trial: *Othman* v *UK* (2012) 55 EHRR 1 at [260].
112. But see Benet Salellas i Vilar, 'Legal experiments in the Spanish judicial fight against jihadist terrorism' in Clive Walker et al (eds.), *Precursor Crimes of Terrorism: The Criminalisation of Terrorism Risk in Comparative Perspective* (Edward Elgar 2022).

assistance to persons charged with crimes of a political character.[113] Whilst human rights have in some respects offered doughty protection (especially as regards article 3 prohibiting torture and inhuman treatment), they are not designed to offer direct and explicit protection to persons accused of crimes of a political character.

The resurrected political offence exception

Devising a 21st century bar to extradition that will protect persons accused of crimes of a political character faces considerable challenges. As seen, the original exception engendered judicial inconsistency and opacity. Further, the reaction in law to contemporary terrorism has excluded from possible inclusion a broad category of political crimes. The latter point, however, could readily be defused under the proposed bar by excluding crimes of violence, or actions contrary to international law. In any event, it is hard to conceive that acts of terrorism will comport with the values of the rule of law, human rights and democracy. Instead, the bar should return to those values. They are redolent of the original rationale of the exception. Based on these three values, the bar would serve to protect collective interests beyond those of requested persons, whilst at the same time acting for their individual benefit if upheld.

The resurrected bar could be formulated along the following lines:

(1) The extradition of a person ('D') may be barred if the offence that D is accused or has been convicted is an offence of a political character.
(2) For the purposes of this section, an offence is of a political character if the judge decides the specified matters, and only the specified matters, relating to offences of a political character in the affirmative.
(3) These are the specified matters relating to offences of a political character -
    (a) The offence is not excluded from consideration as an offence of a political character by the Suppression of Terrorism Act 1978 or otherwise as a serious crime of violence;
    (b) The offence was directed against a public authority;
    (c) The offence was not committed for private gain;
    (d) The offence did not involve actions contrary to international law (including indiscriminate and disproportionate acts during armed conflicts).
(4) If the judge decides that the offence was an offence of a political character, he must decide if it is in the interests of justice to refuse extradition having regard to D's motivations:
    (a) defending and upholding the rule of law;
    (b) protecting and promoting human rights; or
    (c) protecting and promoting democracy.
(5) The judge must order D's discharge if he decides that D's extradition would not be in the interests of justice.

Overall, this proposed exception mirrors aspects of the forum bar.[114] They both extend to issues beyond the specifics of an individual case. The political offence exception, as discussed, is founded upon the belief that it may not be in the interests of justice to extradite an individual who committed

113. See further Asif Efrat and Marcello Tomasina, 'Value-free Extradition? Human Rights and the Dilemma of Surrendering Wanted Persons to China' (2018) 17 Journal of Human Rights 605.
114. The forum bar was inserted into the 2003 Act by the Crimes and Courts Act 2013 schedule 20.

or was convicted of an act of a political character where he was motivated by the defence, protection or promotion of the values underpinning liberal democracies. The forum bar is premised upon the notion that an extradition may not be in the interests of justice where there is a closer connection between the requested person and their alleged crime and the UK, as opposed to the requesting state.

Section 1 provides that extradition may be barred where a requested person is charged with, or has been convicted of, offences of a political character. A decision by a judge that the offence is of a political character does not in itself bar extradition. The phrase 'offence of a political character' is derived from previous incarnations of the exception. It is retained because it accords with the essence of the resurrected bar whereby the UK retains the right to refuse to extradite persons charged with or convicted of certain crimes affecting public interests. Criteria signalling those crimes are set out section 3.

Section 2 provides that it is the judge at the extradition hearing who takes the decision of whether a particular extradition request relates to a crime of a political character. The phraseology of section 2, and the criteria in sections 3 and 4, are such that judges are accorded considerable discretion in coming to decisions on whether an offence is one of a political character and whether it is in the interests of justice not to extradite. The courts are thereby allowed to develop a body of jurisprudence within the terms of the exception. As Viscount Radcliffe said in *Schtraks* v *Israel* when discussing the absence of a definition of offences of a political character, '… it has come to be regarded as something of an advantage that there is no definition. I am ready to agree in the advantage so long as it is recognised that the meaning… does nevertheless represent an idea which is capable of description…'.[115] Further support for the broad terms of the proposed bar follows some of the values in section 4 already being the subject of legislation and case law (especially the Human Rights Act 1998). In so far as there is but bare mention of a value (such as the 'rule of law' in the Constitutional Reform Act 2005, section 1), one can hardly accuse the judges of being self-effacing in its invocation and elaboration.[116] In these ways, a body of jurisprudence is already available to the judiciary to develop and refine the proposed bar within the confines of the criteria in sections 3 and 4.

Section 3 of the proposed bar lists the specified matters which a judge at an extradition hearing must consider where it is argued by a requested person that the offence for which she is sought is of a political character. Section 3(a) provides that offences designated not to be regarded as of a political character by section 1(1) of the Suppression of Terrorism Act 1978,[117] and serious crimes of violence are excluded from consideration. In this vein Lord Mustill accepted in *T* v *Secretary of State* that acts of terrorism are rightly not considered political crimes for they exist as a '… means to inspire terror at large, to destroy opposition by moral enfeeblement, or to create a vacuum into the like-minded can stride'.[118] The proposed bar does not affect that position. In the spirit of that dictum is the additional ground in section 3(d), which adds actions contrary to international law to those not to be considered of a political character.

Section 3(b) provides that for a crime to be an offence of a political character it must be directed against a public authority. This issue caused considerable difficulties in the operation of the exception under the 1870 and 1989 Acts. As noted, it led to the categorization of political offences as pure and relative. The requirement that offences are directed against a public authority may not be

115. [1964] AC 556, 589.
116. See Clive Walker, 'Counterterrorism within the Rule of Law? Rhetoric and Reality with Special Reference to the United Kingdom' (2021) 33 Terrorism and Political Violence 338.
117. Section 1 was repealed by the Extradition Act 2003 and would have to be re-enacted.
118. n 47 above 772.

straightforward in specific cases. An attack on a privately owned telecommunications system, for example, may be considered to be directed at either the private concern or a public authority dependent upon it. Consequently, the motives of the accused or convicted person comes into play, as was also true in the past.[119] A further difficulty as regards the public authority requirement may arise where a crime is committed against a public authority other than that of the state requesting extradition. As in the previous cited *Cheng* case,[120] such a claim should fail since the political aspect lies elsewhere than with the requesting state.

Section 3(c) provides that an offence of a political character cannot be committed for the private gain of the accused or convicted person. This point echoes section 3(b) in that the motives of the individual are relevant. This position also has pedigree in the immigration context, where the UNHCR's Background Note on the Application of the Exclusions Clauses, Sept. 2003, states, 'A serious crime should be considered non-political when other motives (such as personal reasons or gain) are the predominant feature of the specific crime committed...'.[121]

Section 4 lists the criteria that may lead to the extradition judge deciding that it is not in the interests of justice to extradite by reason of the requested person's motivations in carrying out the act giving rise to the request. As such, it forms the crux of the proposed exception. The judge does not adjudge or endorse the specific act of the requested person, the wider political cause, or the context in which it took place but instead considers the motivations of the requested person and the interests of justice.[122] More specifically, section 4(a) requires the judge to consider the motivation of the requested person's acts in defending and upholding the rule of law. The rationale for the inclusion of this section is founded upon the protection of the international order shared by liberal democratic states.[123] Rule of law motivations have begun to emerge in extradition jurisprudence under the European Arrest Warrant in some EU Member States. Even the European Court of Justice accepted in *Minister for Justice and Equality* v *LM* that a national court can potentially refuse rendition where there is a real risk of breach of the fundamental right to a fair trial by reason of systemic or generalised deficiencies in the independence of the issuing Member State's judiciary and there are substantial grounds for believing that the requested person will run such a risk if surrendered.[124] This point was applied to the Catalan Ministers in the *Request for a preliminary ruling under Article 267 TFEU from the Tribunal Supremo (Supreme Court, Spain)*.[125]

The second 'interests of justice' criterion in section 4(b) is a motivation for reasons of the protection and promotion of human rights. As discussed, the human rights of the requested person are protected by an existing bar to extradition. This extra protection centres upon the rights of third persons or groups. Akin to section 4(a), the formula aims to protect from extradition requested

119. *T v Secretary of State for the Home Department* n 47 above, 764.
120. *Cheng* v *Governor of Pentonville Prison* n 21 above. See also *R* v *Governor of Belmarsh Prison Ex p. Dunlayici The Times,* 2 August 1996; [1996] 7 WLUK 55.
121. At <https://www.refworld.org/docid/3f5857d24.html> 15, accessed 16 September 2024.
122. The relationship, or degree of political or moral affinity, between the requesting state and the UK is of no relevance. This differs from the analysis of Costa, where it is suggested that a degree of moral affinity make vitiate a diplomatic justification not to extradite, see Costa n 3 above, 513-514.
123. See Jeremy Waldron, 'The Rule of International Law' (2006-2007) 30 Harvard Journal of Law and Public Policy 15; Terence Etherton, 'The Universality of the Rule of Law as an International Standard, (2018) 51(3) Israel Law Review 469.
124. ECLI:EU:C:2018:586 (25 July 2018). See Theodore Konstadinides, 'Judicial independence and the Rule of Law in the context of non-execution of a European Arrest Warrant: LM' (2019) 56 Common Market Law Review 743.
125. ECLI:EU:C:2023:57 (31 January 2023). See Joan Solanes Mullor, 'Be careful what you ask for' (2023) 30 Maastricht Journal of European and Comparative Law 201.

persons who have allegedly committed a political offence with the aim of preventing or exposing a human rights violation. The applicable human rights could include the civil and political rights under the ECHR and those economic, social and cultural rights and third generation rights binding upon the UK such as those protecting self-determination and a clean environment.

The third 'interests of justice' criterion, in subsection 4(c), refers to the protection and promotion of democracy. Elements of this criterion are covered by section 4(b), especially aspects of political campaigning which encompass expressive rights. However, as illustrated by the *Ponsati* case, there may be some democratic processes, such as referenda, which do not fall within recognised human rights. There is little doubt that even if aspects of democracy do not fall within the rubric of human rights, there are good reasons to act to assert protection, including through the refusal of an extradition request.[126]

The final section 5 of the proposed bar provides that the extradition judge must order the requested person's discharge if extradition would not be in the interests of justice. In coming to a decision on whether the extradition of an individual accused of a crime of a political character is not in the interests of justice, a judge would, in addition to the above criteria, take into consideration the well-established public interest in favour of extradition. Lord Phillips in *Norris v United States* stated 'The public interest in extradition… weighs very heavily indeed'.[127] Evidentially, it is likely that deference will be given to the executive's position on matters such as the interests of national security and international relations.[128] Consideration of these issues could arise as regards the first limb of the exception, categorisation as the crime as one of a political character or the second limb, that the motivations of the requested person were such that is not in the interests of justice to extradite. In light of both the public interest in extradition and judicial deference to matters of national security and international relations the successful invocation of a resurrected political offence exception is likely to be rare. However, likely rarity in successful invocation no way diminishes the weight of the arguments in favour of its reintroduction.

Conclusion

A resurrected political offence exception – a constitutionalism bar - would be opportune. The UK went too far in removing the exemption completely. Whilst the cases of *Assange* and *Ponsati* lend support to its reintroduction, the arguments in favour are based on deeper and more universal principles. As devised, the resurrected bar could assist the protection and promotion of the rule of law, human rights and democracy. It would permit the UK to refuse to cooperate in circumstances where one of those fundamental tenets of liberal democracy and an ideal global order could be, or have been, inimically affected. It could bolster 'an essential political dogma of liberal democracy'.[129] It could act as a deterrent to states which might seek to extradite and prosecute individuals for acts that are politically motivated where rendition is not in the interests of justice. Those who aspire to the advancement of liberal democracy should be accorded protection in a way which would not damage diplomatic relations.[130] It is not suggested that the acts of Assange and

126. Matthew Lister, 'There is No Human Right to Democracy - But May We Promote it Anyway' (2012) 48 Stanford Journal of International Law 257.
127. [2010] UKSC 9, at [51].
128. See *R (Begum)* v *Special Immigration Appeals Commission* [2021] UKSC 7.
129. Van den Wyngaert n 21 above, 752.
130. Jansson n 3 above, 227.

Ponsati would meet the terms of the resurrected bar.[131] Rather, the bar would engender debate on the nature of the offences with which they were charged and whether it was not in the interests of justice to extradite them by reason of their motivations. The bar could thus help to filter abusive uses of cooperative mechanisms in the EU and beyond, without betraying the mutual trust underpinning multilateral and bilateral extradition treaties and the fight against terrorism. The resurrected political offence exception could help revitalise the core values upon which extradition arrangements should be based.[132] Devising an exception to protect those accused of non-violent political crimes in some circumstances is not simple. But political dissent, the exposure of egregious state behaviour, and non-violent action in favour of self-determination surely merit potential protection.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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131. See further Scott Crosby, 'Crime and Constitution in Spain and Britain' (2018) 9(2) New Journal of European Criminal Law 169, 172.
132. Top n 58 above, 127; Jansson n 3 above, 234.