Political Offences in the Law of Extradition

THE general rule that no extradition should be granted for political offences came up for consideration before the British High Court once more in *R* v *Governor of Brixton Prison, ex. parte Schtraks.*[1] The rule, which is well known and recognized in international law,[2] was put in issue under the Extradition Act 1870.[3] The relevant section of the Extradition Act states that,

> "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 to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character."[4]

This section purports to be declaratory of the prevailing international law. It provides for the non-extradition of persons accused of political crimes. The problem of defining the circumstances in which extradition will not be granted on these grounds remains, however, a difficult one. Difficulty arises, because the crime in issue would normally be an extraditable crime but owing to certain special circumstances is to be regarded as political.[5] The exact delimitation of these circumstances has given rise to differences of opinion. To illustrate the problem, the applicant may be accused of murder or arson in the state requesting extradition but the crime may have been committed to obstruct the efficient functioning of the government by the removal of a leading political figure or by the destruction of an important building such as a radio station. Under the extradition treaty between the two states concerned murder and arson may be extraditable crimes. The question arises here, however, whether the circumstances in which the crimes were committed warrants their being characterised as political offences so that extradition may be withheld.

1. [1962] 2 W.L.R. 976.

2. *Vide* Oppenheim, *International Law* (*8th ed.*), Vol. I, edited by Lauterpacht, at 704; Hyde, *International Law* (*2nd ed.*), Vol. I, Section 315; Fauchille, *Traite de Droit International Public* (8th ed.), Vol. I, Sections 464—466; *Harvard Research in International Law* (1935) *I*, 107—119.

3. The same Act is operative in Ceylon by virtue of the Extradition Ordinance 1877.

4. Extradition Act 1870 Section 3(1).

5. In an admirable analysis made as early as 1883, Sir James Stephen delineated three possible meanings of the term 'political offence'; *cf History of the Criminal Law of England, Vol. II* (1883), at 70. The first meaning comprised offences consisting of an attack upon the political order of things established

In the *Schtraks Case* the facts were as follows. In September, 1959, in Isreal, the grandfather of a boy, aged 7, refused to return the boy to his parents on the ground that he feared that the child would not be given the proper religious education of an orthodox Jew. In February, 1960 the parents brought proceedings in the High Court of Israel and got an order for his return. The order was ignored. The parents, thereupon, brought proceedings against the grandparents and the applicant for habeas corpus in the present case, Schtraks, the boy's uncle, who they alleged was making common cause with the grandparents, for contempt of court. Schtraks made a disposition in these proceedings that he had not seen the boy since January, 1960 and was not responsible for withholding him. The court, on the basis of this statement, made an order of imprisonment against the grandparents but not against Schtraks who subsequently came to live in England. On making inquiries in Israel, the Israeli police discovered that Schtraks had, in fact, been with the boy since January, 1960 and withheld him. On this evidence, Israel requested the extradition of Schtraks under the United Kingdom-Israeli Extradition Treaty of 1960 for perjury and child stealing.

Schtraks, in his defence, maintained that the charges had been brought and extradition requested in furtherance of a struggle between the various political parties in Israel arising out of the conflict between the religious and secular forces in the state. It was contended that at all material times the religious conflict had assumed a political character, so that, although the offences themselves did not have a political character, they arose from the conflict, and in charging the applicant, the State of Israel was merely trying to placate the secular parties in their struggle against the orthodox elements. The offences and request for extradition, therefore, assumed a political character and extradition for the offences would be contrary to the Extradition Act 1870 Section 3.[6]

The argument of the applicant is not entirely clear. There seems to be a coupling of the background of the offence and the purpose for which extradition was requested as bases for determining whether the situation was one in which a political offence was in issue so as to render the granting of extradition illegal. In effect, the applicant was making two points. He

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in the country where the crime is committed or against that state as such, e.g. High treason, seditious libel and conspiracies and riots for political purposes. These crimes are generally not extraditable so that they are not involved in the present discussion. The problem arises really in regard to other crimes, included in the other two meanings proposed by Sir James Stephen, which may ordinarily not be extraditable but which acquire a political character because of the surrounding circumstances.

6. *Loc. cit.* note 1 at 982.

was arguing, firstly, that, although the offences were not in themselves or would not ordinarily have been political offences, they arose from the political conflict and should be characterized as political. Secondly, an argument relied on more emphatically was that the purpose of the request for extradition was to charge the applicant for an offence with a view to promoting one of the politico-religious factions in the state so that the offence for which extradition was requested acquired a political character.

The court held that the applicant failed on both grounds. The second ground was regarded as irrelevant, while the first was insufficient for characterizing the offence as political. The case, thus, raised the issue of the exact limits of the exception of political offences in the law of extradition and the problems raised by it repay examination, although, as far as the case itself was concerned, there could have been little doubt that the exception was inapplicable.

The argument that the purpose of the extradition is to try the offenders for a different offence which is political.

The Extradition Act 1870, Section 3(1) ostensibly mentions two alternative situations in which the extradition of an offender is not available. On the face of it, the first of these is where the offence is a political offence, while the second refers to the situation where " the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character." It is the second alternative that is of relevance at this point. It creates two problems. Firstly, does it mean that a court can examine the question whether extradition is being requested in order to try him for a crime different from that for which extradition is being requested so as to establish that the real object of the request for extradition is to try him for another offence which is of a political character and not to try him for the offence for which ostensibly extradition is being requested? Secondly, does it mean that extradition will not be granted if the purpose of the trial and punishment of the offender in the state requesting extradition is to effect some political purpose such as the weakening of a political faction rival to that in power or the satisfaction of some desires of the governing party ?

With regard to the first question there seems to be a conflict of opinion in the English cases. The issue first came up in this specific form in *Re Arton* (*No.* 1)[7]. France requested the extradition of Arton on charges of

7. [1896] 1 Q.B. 108.

perfectly ordinary crimes such as falsification of accounts, fraud, obtaining by false pretences, larceny, embezzlement and offences against the bankruptcy laws. It was pleaded on behalf of the accused that the request for extradition was made with a view to try or punish him for other offences of a political character. Lord Russell in his judgement assumed that this was a valid ground for not granting extradition, if it could be proved, when he interpreted the second part of section 3(1) of the Extradition Act to have this meaning ;

> " Then, can it be said that the application for extradition has been made with a view to try or punish the prisoner for an offence of a political character ? It is clear what this suggestion means: it means that a person having committed an offence of a political character, another and wholly different charge (which does come within both the Extradition Act and treaty) is resorted to as a pretence and excuse for demanding his extradition in order that he may be tried and punished for the offence of a political character which he has already committed."[8]

On this interpretation the court may look into the question whether the real reason for the extradition is trial and punishment for a different offence of a political character. But not only does this view officially recognize that a state in requesting extradition may not be in good faith which is in reality an insult to the dignity of that state but it also is an implict denial of the principle of speciality which is operative in the law of extradition. This principle means that the person charged has to be tried only for the crime for which extradition is requested. Otherwise he must be given an opportunity of returning to the extraditing state or be returned to that state before he is tried for a different crime. Not only is this principle accepted generally[9] but it is incorporated in extradition treaties[10] and it has been specifically incorporated in the British Extradition Act 1870 as a basic requirement in any extradition proceedings.[11] To accept an interpretation of section 3(1) which implicitly denies this principle would be both inconsistant with the very provisions of the Act and bad policy. What is more, it may be argued that such a procedure which seriously questions the integrity and the *bona fides* of the state requesting extradition is contrary to international law since it rests on the assumption that the latter state does not intend to respect its international obligations. Thus, this proposition cannot be said to represent the true state of the law.

8. *Ibid.* at 113, per Lord Russell.

9. *Cf. U.S.* v *Rauscher* (1886) 119, U.S. 407, *U.S.* v *Mulligan* (1934) 74 F(2d)) 220 and (1935) 76 F(2d) 511, *R* v *Corrigan* (1933) Cr. App. Reps. 106, *Vallerini* v *Grandi* (Italy) Ann. Dig. 1935-1937, No. 176, *Fiscal* v *Samper* (Spain) Ann. Dig. 1938-1940 No. 152.

10. *Cf. Harvard Research in International Law, loc. cit.* note 1.

11. Extradition Act 1870, Section 3(2).

On a close examination of Lord Russell's judgement it would seem that there was a contradiction inherent in it, for he also expressed the view that the *bona fides* of France, the state requesting extradition could not be questioned.[12] Willes J. was also of the same opinion.[13] On the facts of the case it would appear that the novel proposition expressed by Lord Russell was unnecessary for the decision, since there was no evidence on which it could be said that France proposed to defy the principle of speciality. The issue could have been dismissed without reference to such a proposition. All in all, neither can it be said that the view represents good law, nor that it was part of the *ratio decidendi* of that case.

Unfortunately, this is not the only case in which this unacceptable principle was mentioned. Shades of it were recently resurrected by Cassels J. in *R* v *Governor of Brixton Prison, ex parte Kolczynski*,[14] when he said,

> " They committed an offence of a political character, and if they were surrendered there could be no doubt that, while they would be tried for the particular offence mentioned, they would be punished as for a political crime."[15]

This was a case in which the applicants for habeas corpus contended that, though extradition was being requested by Poland for the common crimes of assault and revolt or conspiracy to revolt on board a ship on the high seas, they would be punished for treason, since the former crimes were committed in the course of and with a view to escaping from Poland to a free western country which in the eyes of the Polish state was treason. In those circumstances it could be argued that Cassels J. was of the view that Poland would, though ostensibly trying the applicants for the extradition crimes, try them and punish them for a different offence, namely treason, and hence violate the principle of speciality. This would approximate to the view of Lord Russel in the *Arton Case* that the *bona fides* of the requesting state could be questioned. This view, as it has been shown above, is unacceptable for several reasons. Moreover, it may be argued that Cassels J. was enunciating a different principle, namely that where the circumstances of the case disclose that the offences for which extradition is being sought were committed in the course of the commission of an offence against the state as such, such as treason, the offence is to be treated as a political offence since the aggravating circumstances of the case are likely to be taken into account in the meting out of punishment to the offenders. That it may have been the intention of

12. *Loc. cit.* note 7 at 115.
13. *Ibid.*
14. [1955] 1 Q.B. 540.
15. *Id.* at 549.

the learned judge to take this view is supported by the fact that, in coming to to the conclusion to which he did come, the fact that it was an offence against the state amounting to treason, according to Polish law, to leave Poland and start life in another country weighed a great deal. The idea that the circumstances surrounding a case may aggravate a common crime in a special way, thus increasing the penalty, is probably at the base of the principle that there should be no extradition for political offences. On the above interpretation of Cassels J.'s view, his statement could be no more that an attempt to define the concept of a political offence for the purpose in hand[16] and has nothing to do with an inquiry into whether extradition was being requested for a crime different from that for which the requesting state intended to prosecute the offender. This may well be one way out of an unpleasant difficulty posed by the manner in which Cassels J. expressed himself, especially since it must be regarded as his statment of the operative principle in the case, but it must be conceded that the judgement is not very specific and has left room for ambiguity. Hence, in so far as it may lay down the principle that extradition is to be refused, if after an appropriate inquiry is made it is established that the requesting state intends to prosecute the accused for a crime different from that for which extradition is requested and of a political nature, it is not acceptable. In the same case Lord Goddard C.J. applied a different principle in reaching the same result as Cassels J. so that, if Cassels J's view is interpreted to allow a denial of the requesting state's good faith, the learned Chief Justice's view of the *ratio decidendi* of the case is to be preferred.[17]

In contradistinction to the views discussed above which either favour or appear to favour the view that the Extradition Act Section 3(1) permits a refusal of extradition on the basis that an enquiry is to be made and it has to be proved that the requesting state intends to try or punish the offender for a different offence and not for that offence for which extradition is requested, there are cases in which the opposite opinion has been expressed. In the *Kolczynski Case* Lord Goddard expressly dealt with the point when he said,

> "The second limb of the section [i.e. Section 3(1)] can not, therefore, in my opinion, mean that the court can say that if extradition is sought for crime A we believe that if surrendered he will be tried or punished for crime B."[18]

16. This aspect of the judgement is dealt with below at p. 230.

17. In so far as there are two competing *ratio decidendi* in this case each of them is of less weight. There is nothing to prevent a subsequent judge from accepting one in preferenec to the other as the binding *ratio decidendi* in an appropriate case.

18. *Loc. cit.* note 14 at 549.

Again in *Schtraks' Case* Lord Parker C.J. with whom Ashworth and Atkinson J.J. agreed took the view that the true construction of the section was far from clear[19] but adopted the construction put upon it by Lord Goddard C.J. in the *Kolczynski Case*.[20] The construction proposed by Lord Goddard C.J. is to be preferred to the opposite view, as has been explained above.

The argument that the trial is to be for a political purpose

Can the second part of section3(1) of the Extradition Act 1870 have the other meaning contended for in the *Schtraks Case*, namely that, if the extradition is being requested for an ordinary crime in order that the trial may be used to effect some political purpose such as the weakening of a political faction or the satisfaction of the desires of the governing party or has other political implications, extradition may be refused ? This issue has not been discussed by writers.

In the *Schtraks Case*, as pointed out, the argument was rejected. But there was little discussion of the point. The validity of such an argument must, therefore, be judged by the fundamental principles that underlie the rule that there should be no extradition for political offences. This conception is based on the notion that certain crimes which might otherwise be regarded as ordinary crimes which are extraditable acquire a special character from the circumstances of their commission, so much so that it would not be proper to extradite the offender because those circumstances justify the offender's being exempted from punishment by the state in which the offence was committed.[21]

These circumstances must have a "political character" which may be difficult of definition. But it is clear that it is the fact that these circumstances coincide with the commission of the crime that gives the offence this special character. It follows that the occurrence of certain conditions in connection with the trial of the offender in the state requesting extradition which takes place after the commission of the offence can not and should not influence the nature of the offence. Thus it can not be maintained that the fact that the trial of the offender for the offences for which extradition is requested is likely to be used for some political purpose by the state requesting extradition could warrant the characterization of that offence as a political offence so that the situation would fall within that part of section

19. *Loc. cit.* note 1 at 992.

20. *Id.* at 994.

21. *Cf.* works cited in note 2 *supra* for history of this exception.

3(1) of the Extradition Act which states that there should be no extradition, if the request for surrender has been made with a view to trying or punishing the offender for a political offence. The statement of the court in the *Schtraks Case* that the offence must have been of a political character at the time it was committed[22] is very relevant in this connection and lends support to the view here expressed.

In *Re Government of India and Mubarak Ali Mohamed*[23] an application for habeas corpus was made under the Fugitive Offenders Act 1881 under which the same principles apply in regard to political offences as in the case of the Extradition Act 1870. It was argued by the applicant that the proceedings in India, the state requesting his extradition, were based on political considerations only, that his family had been persecuted and that he would not be given a fair trial since he was branded as a political spy, although the crimes for which extradition was sought were the ordinary crimes of forgery and fraud. In form the argument was similar to that raised in the *Schtraks Case*. Lord Goddard, C.J. had no doubts about his answer rejecting the plea. It was said that, although no extradition would be granted for an offence that was political, it was irrelevant to this issue that the government of India regarded the applicant as a troublesome political personage; nor could the argument of the applicant that he would not receive a fair trial because of the political implications of his relations with the Indian government be a good one, for it was not open to the court to question the *bona fides* of the state requesting extradition. At the back of this decision is the principle that any subsequent political implications that might be associated with the trial of the accused were no reason for not granting the request for extradition on the basis that the accused was likely to be tried or punished for a political offence.

Mode of Proof

If then, as has been demonstrated, the meanings contended for in the cases discussed above can not be attributed to the second part of section 3(1) of the Extradition Act, the question still remains what meaning it can positively have. The explanation given by Lord Goddard in the *Kolczynski Case* is the most plausible and it rests on a view of the section in question as a whole.

22. *Loc. cit.* note 1 at 997.
23. 1 All E.R. (1952), 1060.

> " The precise meaning of this difficult section," he said. " has not yet been made the subject of judicial decision and textwriters have found it difficult of explanation, but in my opinion the meaning is this: if in proving the facts necessary to obtain extradition the evidence adduced in support shows that the offence has a political character the application must be refused, but although the evidence in support appears to disclose merely one of the scheduled offences, the prisoner may show that in fact the offence is of a political character. Let me try to illustrate this by taking a charge of murder. The evidence adduced by the requisitioning state shows that the killing was committed in the course of a rebellion. This at once shows the offence to be political; but if the evidence merely shows that the prisoner killed another person by shooting him on a certain day, evidence may be given.....to show that the shooting took place in the course of a rebellion Then if either the magistrate or the High Court on habeas corpus or the Secretary of State is satisfied. by that evidence that the offence is of a political character, surrender is to be refused. In other words the political character of the offence may emerge either from the evidence in support of the requisition or from the evidence adduced in answer."[24]

According to this view the two parts of the sub-section refer to two different ways in which the political nature of an otherwise ordinary offence may be proved. The first part refers to proof by reference to the evidence adduced by the state requesting the extradition only, while the second refers to proof by production of evidence by the accused in answer to the requisition. This interpretation of the subsection is most acceptable and provides an explanation which is eminently in keeping with the current international law on the matter. It was also accepted in the *Schtraks Case*.[25]

Definition of Political Offence—English Cases

Extradition, then, is not granted only if it is proved that the offence is a political offence in the sense that certain circumstances which surrounded the commission of the offence give it a specifically political character. A pressing problem is that of determining what exactly these circumstances are. As Sir James stephen pointed out in 1883, the term political offence cannot refer to offences which have for their object an attack on the state as such or on the political order as such.[26] Offences such as treason and seditious libel which have such an object are not extraditable offences normally so that it is not possible to interpret the rule as referring to them. Since they are not subject to extradition, it is not possible to suppose that the exception was intended to apply to them. It would seem to be natural that the exception should refer to offences that are generally extraditable, that is, to ordinary extraditable crimes which become non-extraditable for special reasons.

24. *Loc. cit.* note 14 at 549.

25. *Loc. cit.* note 1 at 994. *Cf.* also *In Re Castioni*, [1890] 1 Q.B. 149, where a similar view was expressed when it was said that the *onus probandi* was not indicated in the Act but that it was a question for the court to decide on all the evidence: *per* Denman J. at 156. Though Hawkins J. took a slightly different view when he said that the *onus probandi* was on the criminal (at 162), this does not contradict the interpretation of the section advocated above.

26. *History of the Criminal Law of England, Vol. II*, (1883) at 70.

The problem of determining what these reasons are is not a new one. As early as 1854, when France requested the extradition of two Frenchman who had attempted to cause an explosion on a railway line with the purpose of assassinating Emperor Napoleon III, the Belgian Court of Appeal held that, the offence being a political one, it fell within the exception and no extradition could be granted. This was regarded as an unsatisfactory decision by Belgium herself and led to the enactment of what has come to be known as the *attentat* clause which stipulated that murder or attempted murder of the Head of a foreign government or a member of his family should not be considered a political crime. Several European countries have followed the Belgian example in respect of such legislation. There have also been attempts to bring about some international agreement on certain crimes or acts which should not be included in the concept of a political offence.[27] And there has been some legislation in which it has been laid down that where the ordinary nature of a crime predominates what might be regarded as a political crime should be a non-political offence for which extradition should be granted.[28] But these instances do not provide a clue to a satisfactory definition of a political offence. At best, they indicate certain exceptional circumstances in which an offence is not to be characterized as a political offence and are negative in their import.

On the positive side various definitions have been suggested for political offences in connection with the law of extradition based mainly on the nature of the motive or object of the crime but these have not been fully received into practice, so much so that up to the present day all attempts to formulate a satisfactory conception of the term have failed.[29] While admitting that there are difficulties in the way of a complete definition of the notion, it is submitted that a definition is necessary and may, indeed, be satisfactorily evolved for the purpose in hand on the basis of the existing practice. Sometimes, in approaching this problem, courts have stated that they do not intend to lay down an exhaustive definition,[30] while on one occasion a court intimated that it did not want to give a wider definition than might be possible.[31] These opinions indicate the nature of the problem. It is difficult to provide a definition of an exclusive nature so as to preclude the possibility of expansion and flexibility, while at the same time

27. *Cf.* the Russian attempt of 1881 in regard to murder or attempts to murder and the Convention on Terrorism of 1937.

28. *Cf.* The Swiss Extradition Law 1892 Art. 10.

29. Oppenheim, *loc. cit.* note 2 at 707.

30. *In Re Castioni*, [1890] 1 Q.B. 149 at 155, per Denman J.

31. *The Schtraks Case*, *loc. cit.* note 1 at 997.

it is necessary to arrive at a definition that is not so wide as to defeat the very purposes of the extradition law. It is possible to agree upon a minimum to be included in a definition but it is also necessary that the maximum included in such a definition preserve the intersts of the state requesting extradition and those of the international community in seeing that offenders are effectively punished.

In discussing the problem, Sir James Stephen refers to two possible definitions—the first characterizing any ordinary offence committed in order to obtain any political objective as a political offence, the second being narrower and including only those offences which are incidental to and form part of poltical disturbances.[32] According to the first; all offences such as perjury, arson, forgery and theft committed under the orders of any political party, secret or otherwise, would be political offences, while the scope of the second is much more circumscribed.

The issue whether a political offence was to be regarded as a political offence for the purposes of the law of extradition first came up before an English court in *In Re Castioni*.[33] There was a movement in the Ticino, in Switzerland, against the state government on the issue of constitutional reform. In accordance with the constitution of the canton, the required number of individuals signed a petition requesting that the matter be referred to the people and submitted it to the government. The government, contrary to the constitution, refused to act on this. The consequence was that the people in favour of reform rose against the government, took up arms and invaded the council chamber and various other key buildings. Castioni, who had just returned to Switzerland from abroad, joined this revolt and in the course of it he shot and killed a member of the state government who offered opposition to the crowd as it surged forward. Evidence was given that the shooting was not necessary for the success of the rebellion. In proceedings for the extradition of Castioni for this murder, it was pleaded that the offence was a political offence for which extradition was not available. The meaning of political offence was, thus, put in issue. The court adopted fairly narrow definitions, while at the same time stating that it was not necessary to give an exhaustive definition. The definitions adopted ostensibly approximated to the latter of the two definitions mentioned by Sir James Stephen, for which he himself had expressed a preference.[34] It

32. *Loc. cit.* note 26 at 70.

33. [1890] 1 Q.B. 149. That there was no legal decision on this issue before this was stated by Denman J. at 155.

34. Sir James Stephen was on the bench that decided *In Re Castioni* and agreed with the court.

had to be proved that " the act was done in furtherance of, done with the intention of assistance, as a sort of over act in the course of acting in a political matter, a political rising or a dispute between two parties in the state as to which is to have the government in its hands."[35] In the language used by Stephen, J. and adopted by Hawkins, J. in that case, it was necessary to show that " the crimes were incidental to and formed part of a political disturbance."[36] It was held that (i) there was more that a small rising of a few people, in short, a state of war in which an armed body rushed into the municipal council chambers, demanded admission and, when refused, broke down the outer gate with a view to taking control of the government, (ii) Castioni took part in this, firing the shot at his victim for the purpose of promoting the political object for which the movement had been organized, and (iii) had no motives of spite or ill-will against the deceased. Therefore, the offence came within the definitions of political offence adopted. It was also held that the criterion was not whether the acts being impeached were wise in the sense that they were acts which the man who did them would have been wise in doing with a view to promoting the cause in which he was engaged, but whether they was really done with the object of promoting the purpose of the rising.

On the narrow definitions adopted the acts being impeached fell within the category of political offences so that even on a wider definition the result would have been the same. Even so, in this first case, the attitude of the court to the question of definition is of paramount importance.

(1) The court rejected the broadest definition of political offence which was mooted, namely that it was sufficient that the offence be committed to attain some or any political object;

(2) The court rejected the notion that it was sufficient that the offence be committed merely in the course of a political rising;

(3) Positively, the court purported to apply definitions which had certain definite requirements but on a close examination it is apparent that the statements of the definition by the two judges Denman J. and Hawkins J. have important differences. The area of disagreement is, however, confined to the first requirement of the definition.

35. *Loc. cit.* note 33 at 156.

36. *Id.* at 166.

(*a*) The first requirement according to the view of Hawkins J. was that there had to be some political disturbance. This can only have one meaning,—there had to be some rising, insurrection or, at least, riot of a political nature. What was meant by the 'political nature' of the disturbance is not explained, but we may safely assume that on this point Hawkins J. was in agreement with Denman J. who postulated a struggle for power between two political parties. Hawkins J., then, required that there be some disturbance set off by a struggle for power between two political parties.

Denman, J. thought it necessary that there be "a political matter, a political rising or a dispute between two parties in the state as to which is to have the government in its hands." On this view something less than a disturbance would apparently be sufficient. A mere disagreement or a dispute between two political parties would be covered.

However, it is submitted, that according to both views there must be a struggle for power between the two political parties. The difference between the two views can best be illustrated by an example. Suppose in state A the communist party disagrees with the policy of taxation followed by the National Democratic party which is in power and X, a member of the communist party, by a false and fraudulent declaration in his tax returns evades these taxes with a view to embarrassing the government and so promoting the cause of the communist party. The offence of fraud so committed would be covered by Denman J's definition of a political offence, but not by that of Hawkins J.'s which would require more than a dispute, namely some form of civil disturbance amounting to rioting as a result of the dispute between the parties. With this difference the other requirements in the two definitions are the same.

As to the requirement that there should be a struggle for power between the two political parties, there is no indication in either of these definitions whether one of them should be the party in power, so that it is not clear whether a stuggle between two other parties in the state struggling for power is included in the definition. Where there are more than two political parties in a state and two of them, not including the one in power, enter into a struggle to eliminate each other as a political influence so that the other cannot be a serious contender for power, could it be said that there is a struggle between two political parties for the purposes of the definition ? Would the crime of murdering a rival political leader committed during

riots between such political parties and for the promotion of the purposes of the parties in the context of such a struggle be included in the definition of a political offence ? There seems to be no logical reason for making a distinction between a struggle between two parties excluding the party in power and one between the party in power and another political party. Both situations involve the question of power to rule in a state.

The *Castioni Case*, however, involved facts falling into the latter category of situation so that it may be argued that it was only such a situation that the court had in mind in laying down a definition. On the other hand, it may be argued that if the court was purporting to lay down a general definition, it would most certainly have taken into account other situations which could be included in the definition. This is not incompatible with the statement of Denman J. that he did not intend to lay down an exhaustive definition, for it is possible that a definition be general though not exhaustive. The difficulty of understanding exactly what the court meant on this aspect of the definition remains but for the purposes of a sound definition, it is submitted that both categories of situation should be included in the definition.[37]

(*b*) It was generally agreed that the offence had to be committed in furtherance of the political struggle, however, this was delimited. It had to be proved that the crime in question was committed with a view to achieving the specific purpose of the struggle and with a view to promoting and assisting it.

(*c*) In view of this, if the offence had been committed from personal ill-will or spite or to satisfy some personal end, it would not fall within the category of a political offence. Thus, for example, if the crime of grievous assault is committed with the object of paying off a private grudge and not for the purpose of promoting the political ends of the party involved in a struggle against another party for power, the offence would not be a political offence, even though it took place during a riot attributable to that struggle.

(*d*) It was not considered necessary that the offence be a reasonable means of achieving the ends of the struggle between the political parties.

37. In the *Schtraks Case* the court seemed to prefer to restrict its definition to a struggle in which the party in power was involved; *loc. cit.* note 1 at 997.

The case thus offers more than one definition, one wider and one narrower, but neither of them wide enough to cover a crime committed for any political object of from any political motive. If the difficulty adverted to above arising from the nature of the political struggle be excepted, two definitions emerge. The narrower definition includes only those offences committed in the course of an actual physical d sturbance occuring betwen two political parties involved in a struggle for power in a state provided that the offence is committed with a view to furthering and promoting that struggle, while the other covers offences committed in the course of any dispute, not necessarily a disturbance, occuring between two political parties involved in a struggle for power in a state, provided the offence is committed with a vi w to furthering and promoting that struggle. In both definitions it is not clear, as already stated, whether the struggle must be between the party in power and another political party or between any two political parties in the state.

With this precedent before them, the judges of the court, in *Re Meurnier*,[38] had no difficulty in deciding against an applicant for habeas corpus in an extradition case. Meurnier had caused two explosions in Paris, one at the military barracks and the other at a cafe. He was an anarchist and alleged that the former offence was a political one since it was directed against government property. It was held that there was no struggle between two political parties in this instance, so that the crime of the accused did not come within the definition of a political offence. Anarchists worked primarily against the whole body of citizens and only incidentally against all governments. It is evident that the court did not regard anarchists as forming a political party vieing for power in the state. On this basis, the decision cannot be criticized.

The court did, in addition, cite a comprehensive definition of a political offence for the purpose in hand. It said that in order to constitute a political offence there must be two or more parties in the state, each seeking to impose its government on the other (*sic*) and the offence must be committed by one side or the other in pursuance of that object.[39] This definition would seem to coincide with the broader interpretation of the definition of Denman, J. in the *Castioni Case* and to be even more explicit on the point whether it is necessary that the struggle be between the governing party and another party in the state or whether it is sufficient that the

38. [1894] 2 Q.B. 415.

39. *Id.* at 419.

struggle be between any two political parties in the state vieing with each other for power. The fact that the court made specific reference to " two or more parties " indicates that the latter meaning was intended.[40]

Further, the court emphatically stated that there were not two political parties in the case, thus denying that the anarchists were a political party. This stresses the important part that political parties play in the definition. It is not a question of political objects or motives as such. But it is essential that political parties be at variance before the notion of a political offence can come into operation.

The case contributed to the development of a definition in two respects.

(*a*) The court preferred the definition of Denman J. in the *Castioni Case* to that of Hawkins J. in the same case by implication, in that it did not require the existence of a physical political disturbance.

(*b*) It implies that the struggle need not necessarily be between the governing party in a state and another political party, but that it is sufficient that there is a struggle between any two political parties in the state.

However, both these points need not have been made in order to decide the case, since there was in any event no struggle between two political parties on the court's view of the facts. Thus, to this extent that the case expands on the narrowest view of Hawkins J.'s definition which excludes struggles between political parties of which neither is the governing party and which was sufficient for the decision in the *Castioni Case* as well as for the decision in the *Meurnier Case*, it may be regarded as containing an *obiter dictum*, just as much as the view of Denman J. in the *Castioni Case* may be regarded as *dictum* in so far as it was wider than the definition of Hawkins J. as narrowly interpreted. However, there seems to be no logical reason for excluding the two additional points relating to the nature of the dispute and the nature of the political parties involved in the struggle from a definition of the concept of a political offence.

In the *Schtraks Case*, the facts of which have been outlined above,[41] the problem confronting the court in the relevant part of the case also concerned

40. In the *Schtraks Case* it was said that the *Meurnier Case* showed that " an offence must be aimed against the government of the state " in order to be a political offence: *loc. cit.* note 1 at 996. But it is submitted that this is too limited an interpretation of the view of the rule contained in that case.

41. *Cf. supra* p. 204.

an alleged conflict between political parties. The applicant pleaded that the crimes he had committed arose from the conflict between the orthodox and the governing secular religious factions in the state which was of a political character. The court examined the previous cases on the issue of political offences and attempted to provide a definition, at the same time stating that it did not purport to lay it down as a possible definition ! The definition was supposed to be wider than anything yet offered in connection with the circumstances of the kind involved in the case :

> " A crime of a political character is a crime committed as part of a political movement with the object of influencing the governing party of the state."[42]

It was pointed out that the definition required that the offence be committed as a part of the political movement or struggle and with the object of advancing it. Since there was nothing in the case to suggest that the acts of the applicant were done as a part of a movement or struggle rather than as part of a purely religious and domestic dispute within the family, albeit it occurred at a time when there was a political struggle, one of the primary requirements of the definition had not been satisfied and the offence could not be characterized as political. The decision turned on the application of a principle that had been accepted in all the definitions that emerged from the previous cases of this kind, namely that it was necessary that the offence be committed in furtherance of the political struggle. It was not necessary for the decision that the court should have elaborated on the nature of the struggle that should exist or on the nature of the dispute that should take place. Yet the court did attempt a definition and it is important to see how far it deviated from the definitions of the previous cases, if it did so. There are two points to be made in this connection.

(i) The definition here given does not insist on the presence of a political disturbance of the kind envisaged by Hawkins J. in the *Castioni Case*. The existence of a political movement or struggle is deemed to be sufficient. In this respect it comes closer to the definition adopted by Denman J. in the *Castioni Case* and that of Cave J. in the *Meurnier Case*.[43]

(ii) There is an indication that it is necessary that the struggle be between the governing party and another political party in the state. It is

42. *Loc. cit.* note 1 at 997.

43. There is also no mention of a " particular dispute or matter " as between the two parties as Denman, J. specifies in his judgement. But it is submitted that this is not really a material difference. Where there is a struggle between two parties, there is also bound to be a matter or dispute in their relations with each other.

insufficient that the struggle be between any two political parties in the state. In this respect it is different from the definition offered in the *Meurnier Case*. It also has chosen the narrower of the two views discussed in connection with the *Castioni Case* between which the judges in the latter case made no choice.

A third point may be made of the fact that the definition refers to the object of the crime as being that of " influencing the policy of the governing party". This would appear to be narrower than the object as expressed in the other definitions which refer to a broad purpose of furthering the aims of the political party concerned. However, further on in the judgement the court refers to the broader notion of the object as being one of the requirements when it says that the crime must have been done " in the context of a movement or struggle of a political nature but as part of it and with the object of advancing it".[44] It is to be understood, therefore, that the court intended to accept this notion of the object of the crime rather than the narrower one. Moreover, the narrower one would be clearly unsatisfactory, for it would exclude the case where a member or supporter of the governing party committed a crime in the course of a struggle between it and another political party for the purpose of promoting the aims of the governing party, an exclusion for which there can be no logical reason.

From this line of cases four possible definitions can be extracted, ranging from the considerably narrow to the wider.

(1) The offence to be political must be committed in the course of a physical disturbance between the governing party and another political party in the state, with which it is struggling for power, with a view to furthering the ends of either of the political parties concerned and not for any other purposes or from any other motives. This is the narrower interpretation of the definition given by Hawkins J. in the *Castioni Case*.

(2) The offence must be committed in the course of a physical disturbance between any two parties in the state struggling for power and not necessarily including the governing party, with a view to achieving the purposes of the party concerned and not for any other purposes or from any other motives. This is the broader interpretation of the definition of Hawkins J. in the *Castioni Case*.

44. *Loc. cit.* note 1 at 997.

(3) The offence must be committed in the course of any dispute, not necessarily a physical disturbance, between the governing party and another political party in the state vieing with it for power, with a view to achieving the purposes of the party concerned and not for any other purposes or from any other motives. This is the narrower interpretation of the definition adopted by Denman, J. in the *Castioni Case* and that offered by the court in the *Schtraks Case*.

(4) The offence must be committed in the course of any dispute, not necessarily amounting to a physical disturbance, between any two political parties in the state struggling for power and not necessarily including the governing party, with a view to furthering the purposes of the party concerned and not for any other purpose or from any other motive. This is the broader interpretation of Denman J.'s definition in the *Castioni Case* and the definition cited in the *Meurnier Case*.[45]

It is submitted that the last and broadest of these definitions is the most acceptable, as there is no logical reason for making the distinctions made in the other definitions as far as political offences for the purpose of the law of extradition are concerned. If extradition is refused for any of the offences that fall within the first three definitions or any of them, it should also be refused for those that fall outside them but within definition (4). All such offences would really share the same character. This is so even though it is true that the result in all the cases above considered would have been the same had the narrowest of these definitions alone and no other been applied in each of them.

Continental and Latin American Cases

There are some cases on political offences in the law of extradition decided in Switzerland, Guatemala and France. Definitions of a political offence were offered in some of them.

In *Re Ockert*[46] Germany demanded the extradition from Switzerland of a German national for homicide. He had killed someone in the course of an affray in Frankfurt between the German Social Democratic party and

45. A fifth definition arising from the initial statement of the court in the *Schtraks Case* may be formulated thus; the crime must be committed in the course of a struggle for power between the governing party of a state and another political party, not necessarily involving a physical disturbance, and it must have the object of *influencing the policy of the governing party* and nothing less. It has been submitted above, however, that the court modified this definition by accepting a broader notion of purpose or object in the same judgement, so that this definition which is narrower than either of the definitions (3) and (4) is not maintained as a competitor.

46. Annual Digest 1933—1934, No. 157.

the Socialist party, being a member of the former. Extradition was refused on the ground that he had committed a political offence. It was found by the court that the offence had been committed with a view to furthering the objectives of the German Social Democratic party. The facts would fall within any of the definitions emerging from the English cases discussed above, even the narrowest. The court, however, stated a principle in apparently broad terms. It said that a common crime became political, when *because of its motive and object*, it assumed a predominantly political complexion. This statement may be interpreted broadly to mean that any common crime becomes political, if it is committed with any political object or motive, the latter phrase being given a broad meaning to cover crimes committed irrespective of the existence of a struggle between political parties or of a political movement and without reference to the aims of the relevant political parties, so much so that offences committed by individuals not associated with any political parties purely for the purpose of embarrassing the government or out of dislike for it or in order to gain a stronger position for themselves in politics would be included as political offences. Not only would such a definition be incompatible with sound policy, as is obvious from the example given above, but it is submitted that this could not be what the court meant. The statement is to be seen in the context of the case. The facts involved a struggle between political parties and what the court was saying was limited to those circumstances. The reference to motive and object should really be seen as a reference to the requirement of the definitions discussed above that the offence should be committed with the purpose of furthering the aims of the political party involved in the struggle. This is what really converted the offence in question, which was an ordinary crime into a political offence. The reference to motive or object in this case must, therefore, it is submitted, be interpreted in a limited sense and not as a general reference to any political motive or object. From the context it appears that the notion of political crime is similar to that embodied in the definition emerging from the English decisions which was submitted to be acceptable.

That this explanation is plausible is borne out by another Swiss case. In *Re Noblot*,[47] Noblot forged a bill of exchange with a view to damaging the working of the Dawes plan in Germany. He was not associated with any political party. It was held that extradition should be granted on the ground that, in order to be a political crime, it should have been committed in an attempt to seize power in the state or as an isolated incident in a struggle

47. Annual Digest 1927—28, No. 240.

against the political regime of the state. In insisting on a struggle against the state it would seem that the court showed a preference for the narrower interpretation of Hawkins J.'s definition in the *Castioni Case* or that propounded in the *Schtraks Case*. The statement is not specific in that it does not state all the requirements of a political crime, but it must be seen in the context of the case. It was sufficient for the case that the absence of this important element be pointed out. It does not necessarily mean that the view can be attributed to the court that any crime committed in the course of a struggle against the state, irrespective of its object or motive, would be a political offence or that a struggle against the state can exist in the absence of political parties competing for power. The approach of the court was, therefore, not inconsistent with the definitions, above referred to, of Hawkins J. and the *Schtraks Case*.

In the *Pavan Case*[48] France requested the extradition of an anti-fascist journalist who shot at and killed an Italian fascist in Paris. Extradition was granted by the Swiss court. It was said that the criminal act must be immediately connected with its political object in order to be invested with a predominantly political character. The act must be in itself an effective means of attaining this object or at least it must form an integral part of acts leading to the desired end or it must be an incident in a general political struggle in which similar means are used by each side. The act in issue in the case was an isolated act of terrorism and was not connected with any political object as such so that the court must have had in mind particularly the problem of the object of the offence. In general terms, what it said about the object of the act as far as relevant to the case was sufficient for the decision since there was no hint of a political object at all in the case. However, in its statement of the other conditions of a political offence it went quite far, although this was unnecessary for the decision of the case. The notion of the political struggle or the struggle between political parties is present, but further there is a reference to the possibility of political offences even in the absence of such a struggle. On this broad interpretation of the words of the decision it cannot be gainsaid that court was approving of a very wide principle, which may not have been fully considered in view of the obvious nature of the facts of the case in relation to the issue and whose limits may not have been discussed at all. The definition includes any offences committed as an effective means to attaining a political object or as an integral part of achieving such an object. Offences committed by private individuals in order to embarrass the government

48. Annual Digest 1927—1928, No. 239.

or out of dislike for it, provided they are effective means to achieve these ends or are integral parts of achieving them, would be covered. This, it is submitted, is far too wide a definition. It approximates to the first alternative definition mentioned by Sir James Stephen[49] and rejected by the court in the *Castioni Case*, with the possible difference that the idea of the offence being an effective means towards or an integral part of the object in view is emphasized.

However, it is possible to argue that this is not necessarily the view that the court intended to express. The court specifically mentions a political struggle in its definition and, what is more, the facts before it did raise the question whether a conflict of parties could be said to exist because the accused was an anti-fascist and his victim a fascist. Hence, it is just possible that what the court said should be read in the light of the assumption that it was thinking of a conflict of political parties or a political movement. On this basis the statement would mean that the crime had to be an effective means towards or an integral part of achieving a political object arising out of the political struggle between political parties or incidental to the political struggle. Even if this interpretation is accepted, there remains the difficulty that the statement allows a wider scope for offences than that permitted by any of the definitions emerging from the English court decisions. For, it is sufficient according to the Swiss court, if the crime were committed as an incident to a political struggle. The relation between the crime and the object of the struggle is not insisted on here. It seems to be sufficient that the crime merely occurs in the course of a political struggle. This is a dangerous extension that was rejected by the English court in the *Castioni Case*.

On any interpretation of the *Pavan Case* definition, it seems that the definition offered is an extension of anything proposed in the English courts. On the broader view crimes committed to achieve any political objective, irrespective of a political struggle, or crimes committed in the course of a political struggle irrespective of their relation to the object of the struggle are political crimes. On the narrower view, only those offences committed in the course of a political struggle are political offences, whether they are in furtherance of the political objectives of the struggle or not. In so far as these definitions go further than the broadest definition mooted in the English courts, their content has been specifically rejected by the English courts and it is submitted that, as definitions, they are unsatisfactory and

49. *Cf. supra* p. 213.

should be rejected. As for the case itself, the outcome would have been the same had any of the definitions proposed in the English courts been applied.

In *Re Kaphengst*[50] the Swiss courts implicitly rejected the broader definitions of the *Pavan Case* and adopted a somewhat more restricted approach. Kaphengst, a German national, had committed certain bomb outrages in Prussia to further the ends of the 'Country People's Movement' whose aim was to change the law of taxation. It was held that these were purely terrorist acts which were not episodes in a course of action aiming at the overthrow of the state and were not political offences. The court, however, did not stop at this statment of principle but went on to say that the damage caused to individuals caused the common elements of the crimes to become predominant so as to prevail completely over the political aspects.

> "For a common delict to be classed as a predominantly political offence it is not enough that it has a political motive or object or that it is capable of realizing or furthering that object. Idealist motives must be strong enough to let the injury or threat to private rights be excusable. There must be a certain relationship between objective and means selected."[51]

While the court rejected the broad notion that any political object or motive was sufficient to convert an ordinary crime into a political offence for the purposes of the law of extradition, it does not seem to have unequivocally laid down the requirements of such an offence.

There seem to be two trends of thought. First, it was thought that some attempt to overthrow the state was necessary for the commission of a political offence. It is not necessary that for such an attempt to exist there should be a political struggle between political parties for power in the state. Thus this approach of the court can not be directly related to any of the definitions proposed in the English courts, limited as it is in its scope. What the relation of the crime to the aim of overthrowing the state should be is also indicated in the statement that there must be a certain relationship between the objective and the means selected. The exact meaning of this is not clear but presumably it means that, at least, the crime must have been committed with the purpose of or with the intention of assisting in the overthrow of the state. It could have the further meaning that the crime must be a reasonable and effective means of achieving the end as well, a principle which was rejected in the *Castioni Case* in relation to the definitions dis-

50. Annual Digest, 1929—1930, No. 188.
51. *Ibid.*

cussed there. On the other hand, there is room for saying that the court had in mind a broader definition, namely that it was sufficient that there be some political object or motive behind the crime, irrespective of an attempt to overthrow the state, provided that the relationship between the crime and the object aimed at was sufficiently close to warrant it being termed a political offence. Apart from this being a definition as wide as that rejected in the *Castioni Case* there is a great deal that is vague and unexplained in it. Is any political object sufficient? What is the relationship referred to? Could the bomb outrages which formed the subject-matter of the case have been regarded as political crimes, if they were effective means of getting the taxation law changed—a political object? If the court intended to adopt such a wide definition, it is likely that the facts would have been discussed from the point of view of this last question, at least. All in all, it is probable that the court did not intend to lay down a definition in these broad terms but rather made some further statements in explanation of the narrower view discussed above. But the position is not at all clear and it is submitted that the case should be regarded as offering alternative definitions, one wider than the other, although there is much that is unexplained in both. Suffice it to say that the case decided that the crime in question did not come within the concept of a political offence whichever interpretation is the correct one, and that had the broadest English definition, namely that of the *Meurnier Case*, been applied the result would have been the same.

There are two other cases from Gautemala and France respectively in which it was held that the crimes concerned were not political offences but little was said positively about the nature of a political offence by way of definition. In *Re Echerman* (Guatemala)[52] the accused had murdered X, believing him to be a spy. The accused was a member of a secret society organized to operate in defence of his country. It was held that the mere fact that Echerman was a member of a secret society did not give his crime a political character. It was said that

> "universal law characterizes as political sedition, rebellion and other offences which tend to change the form of government or the persons who compose it; but it can not be admitted that ordering a man to be killed with treachery.... constitutes a political crime."[53]

The case supports the negative view that the presence of any or some political motive or object in the commission of a crime does not make it political. Positively, the case refers only to such offences as political as

52. Annual Digest 1929—1930, No. 189.

53. *Ibid.*

come within the category of pure political crimes which are not generally extraditable in any case. This does not help towards a definition of the notion which covers the case of common crimes turning political which concerns us here. In *In Re Giovanni Gatti* (France)[54] extradition was granted in a case where a person was accused of attempted homicide by firing at a communist. Although the defendent had some political object or motive, it was not characterized as political. The case too supports the negative view that a mere political motive or object does not make a common crime political.

The foreign cases are of such a kind that whether they were decided one way or the other the same decision in each case could have been reached by the application of the broadest definition formulated in the English courts, namely that the offence must be committed in the course of a dispute, not necessarily amounting to a physical disturbance, between any two political parties in the state struggling for power and not necessarily including the governing party, with a view to furthering the achievement of the purposes of the party concerned and not for any other purpose or from any other motive. Although other definitions were mooted in the foreign courts, some different, some broader and others narrower, the facts in the one case in which it was held that a political offence had been committed, namely *Re Ockert*, fell within this definition and the crimes in the other decisions in which they were held not to be political fell outside this definition. In short, there has been no foreign case in which a crime has been held to be a political crime because a broader definition was applied so that as far as the present decisions of this kind go, this definition would have sufficed. However, the fact remains that different definitions were given and it is important to see how different they are and how valid they are on their own merits.

It is noteworthy that all the cases examined either explicitly or by implication rejected the general definition that it was sufficient that the crime be committed with a political object or motive in its absolute form.

(1) One of the possible definitions emerging from the *Pavan Case* is that the crime should be an effective means towards any political objective, irrespective of any political struggle, or an integral part of acts leading to any desired political end, irrespective of any political struggle, or simply

54. Annual Digest, 1947, No. 70.

an incident in a political struggle. This is the broadest definition that these cases provide and, as has been pointed out, it is not only unlikely that this is what the court meant but it has unacceptable consequences.

(2) An interpretation of the definition offered in the *Kaphengst Case* requires only that the crime be an effective means towards the attainment of any political object. This is an improbable interpretation and, moreover, it is submitted that it is too broad.

(3) An interpretation of the definition given in the *Pavan Case* requires that the crime be committed in connection with a political struggle, as an effective means to or as an integral part of the political object or even merely as an *incident* in such a struggle which may or may not be a physical struggle. This is what the court probably meant, in that case, to offer by way of definition but it goes too far in its final extension and is unacceptable to that extent.

(4) The definition offered in *Re Ockert*, according to the interpretation submitted above, is the same as that of the *Meurnier Case* or of Denman J. in the *Castioni Case*, in its wider meaning.

(5) The definition applied in *Re Noblot* approximated to that of the *Schtraks Case* which is narrower than (4).

(6) The more probable interpretation of the court's definition in the *Kaphengst Case* requires that the crime be committed in an attempt to overthrow the state, provided the crime bear to the purported end some relationship which is not defined but probably involves the crime being an effective means towards achieving the end. This definition is, in general, narrower than any of the above definitions, but at the same time it covers ground that is not covered by some of them.

Definition (4) coincides with that definition of the English courts which was submitted to be acceptable. Sufficient has been said in justification of it and to warrant the exclusion of anything narrower than it. Thus definition (5) may be rejected and definition (6) to the extent that it is already covered by the acceptable definition. That is to say, definition (6) covers an area already covered by the acceptable definition, in so far as it includes those crimes which are committed in an attempt to overthrow the state which arises out of a struggle between any two political parties in the state

and are both aimed at overthrowing the state and an effective means to achieving that end. To this extent it need not be considered. It is inadequate in so far as it falls short of the acceptable definition. On the other hand, it also covers situations which are not covered by the acceptable definition. For instance, where there is no struggle between political parties but an attempt is made to overthrow the state in which certain common crimes are committed, these crimes would come within (6), if they bear the right relationship to the aim of overthrowing the state, while they would fall outside the acceptable definition. To this extent it requires consideration, since it purports to have a very limited scope unlike some of the other broader definitions. It will be seen readily that where a crime is committed in the course of an attempt to overthrow the state it is committed during the commission of another offence against the state as such, namely treason. As will be seen below, there is precedent for including such offences committed in circumstances in which a political offence in the sense of an offence against the state only and as such is also committed within the concept of political offences for the purposes of extradition.[55] To the extent, therefore, that definition (6) is in excess of the general definition submitted to be acceptable, it would come within another acceptable extension to that definition, although its requirements are such that it would be narrower than that definition too. In its total scope, therefore, definition (6) is narrower than both the general definition and its extension, taken together. Hence, definition (6) need not be considered, as it happens to be too narrow in any case.

As for the other definitions that are wider than (4), namely definitions (1) to (3), the question remains whether they offer anything worth retaining. Apart from the fact that the two broadest, (1) and (2), are unlikely interpretations of the cases concerned, all three definitions have elements which are open to serious criticism, as has already been shown. (1) and (2) contain the notion of a general political object, albeit with other limitations, even though this notion was rejected in most of the decisions under consideration in its absolute form. Yet that general notion does not in these definitions acquire sufficient limitation and definition. Hence, these definitions can lead to the most undesirable consequences. (1) and (3) contain the notion of crime merely incidental to a political struggle which is again too broad and can lead to dire consequences. It may be added that all these notions were rejected in the English cases for obvious reasons. It is submitted that

55. *Vide infra*, p. 230.

these definitions should not be retained wholly or in part in so far as they are wider than the definition submitted to be acceptable which coincides with (4).

Extensions to the general definition—The Kolczynski Case

Assuming that the general definition of the *Meurnier Case* and Denman, J. is acceptable, we are still left with the question whether there are, in fact, any circumstances outside the definition which would warrant an ordinary crime being characterized as a political offence. The question was answered in the affirmative by the court in *R* v. *Governor of Brixton Prison, ex parte Kolczynski.*[56] The facts of the case were that seven Polish seamen serving as members of the crew of a Polish trawler decided to seek asylum in England. They felt that they were being spied upon by certain police supervisors who were on board. There was evidence that there were political officers on board who were recording the conversations of the prisoners with a view to preparing a case against them on account of their political opinions. Therefore, they overpowered the captain and other members of the crew and brought the ship into an English port. Poland demanded their extradition for assault and revolt or conspiracy to revolt on board a ship on the high seas. The accused raised the defence that their offences were political offences. The court accepted the defence but the judges gave different reasons for their conclusion. Both judges concurred that the laws existing in Poland at that date warranted an extension of the notion of political offences.[57] But this was as far as their agreement went.

Cassels J. rested his decision on the principle that the offences for which extradition was requested were committed in circumstances in which, if surrendered, the accused would, although being tried for those offences, be also punished for an offence of a political character.[58] It has been submitted that in so far as this statement means that the court may refuse extradition, if it appears on investigation that the defendant is likely to be tried or punished for a different offence from that for which extradition is sought, it is unacceptable.[59] Moreover, it is very probable that the words have a different meaning in this context. What Cassels, J. said in the operative part of his judgement was,

56. [1955] 2W.L.R. 116.
57. *Id.* at 121 per Cassels J., and at 123 per Lord Goddard, C.J.
58. *Id.* at 121.
59. *Cf. supra*, p. 207.

> " It is submitted on behalf of the men that if they should be extradited they may well only be tried for the offences for which their extradition is requested, but they will be punished as for an offence of a political character, and that offence is treason in going over to the capitalistic enemies.. ..... They committed an offence of a political character, and if they were surrendered there could be no doubt that while they would be tried for the particular offence mentioned, they would be punished as for a political crime."[60]

This could very well mean here that if the facts of the case disclose that, in committing the ordinary crimes for which extradition is demanded, the accused also committed a political offence in the sense of an offence against the state only and as such, such as treason or seditious libel, which is so inextricably involved with the ordinary crimes that the ordinary crimes can not be separated from the larger offence against the state only and as such, then extradition is to be refused on the ground that the ordinary crimes acquire the character of political offences by association. In the case in hand, the offences of revolt, conspiracy to revolt and assault on a ship on the high seas were committed in the course of an escape to a capitalist foreign state, namely England, and this amounted to an offence against the Polish state as such, namely treason. Therefore, the ordinary crimes themselves became political offences for the purposes of extradition law. The requirements of the definition are quite clear ;

(*a*) There must be a crime committed against the state only and as such.

(*b*) The ordinary offences must be committed in the course of the commission of that crime.

(*c*) The latter must be so closely associated with the former that a prosecution for the latter would on the facts amount to a prosecution for the former as well.

Thus, if a citizen of state A, where it is an offence against the state as such to evade work in the factory to which one is assigned, were to murder a foreman or supervisor in breaking out of his place of work because he is dissatisfied with the way he is being treated, such a murder would be covered by the definition of Cassels, J. As will be seen the operation of the definition is dependant on the content of the law in a given system on offences against the state as such and its application to a given set of circumstances will hinge on how wide the concept of political offences in this sense, that is in the sense of offences against the state as such, is in any state. The

60. *Loc. cit.* note 56 at 121.

definition extends the concept of political offences submitted to be acceptable above[61] not by reference to any vague notion of political motives or objects but by reference to a particular restricted situation.

Lord Goddard C.J. took a different approach. Although recognizing, as Cassels, J. did, that the laws in Poland and the attitude of the communist countries towards the west warranted an extension of the notion of a political offence, his view of how the definition should be extended in the case in hand was totally dissimilar.

> "The revolt of the crew," he said, "was to prevent themselves being prosecuted for a political offence and, in my opinion, therefore, the offence had a political character."[62]

The learned Chief Justice emphasised the fact that political officers were keeping observation on the accused for the purpose of preparing a case against them on account of their political opinions in order that they might be punished for holding, or at least, expressing them which was an offence against the state as such belonging to the same category as treason. Such a prosecution would have been a political prosecution or a prosecution for a political offence in the pure sense of the term. Since the common crimes for which extradition was demanded were committed with the purpose of avoiding such a prosecution, they acquired the character of political crimes. Although the notion that a crime committed with a political object is a political offence is implicit here, it is not a broad conception of political object that is admitted but a specific and limited one. It is as specific as the notion of political object in the general definition of political offence deriving from the *Meurnier Case*, although it is not contained within that definition. As pointed out by another writer, it would be insufficient that the common crime were committed from mere dissatisfaction with the life in a totalitarian state.[63] The same would apply to dissatisfaction with life in a democratic state, for it cannot be said that it was the intention of the learned Chief Justice to limit his definition to crime committed in totalitarian states, although the facts concerned such a state in the case before him. On the other hand, defrauding a bank in order to leave the country in order to avoid a political prosecution would become a political offence as would murder or causing grievous bodily harm committed in the course of breaking jail in order to avoid a political prosecution, as defined above.

61. *Cf. supra*, p. 221.

62. *Loc. cit.* note 56 at 121.

63. J.A.C.G. in "*The Notion of Political Offences and the Law of Extradition*," 31 British Yearbook of International Law [1954] 430, at 435.

Although the learned Chief Justice did not explain the detailed requirements of this extension to the normal definition, it is reasonable and necessary, it is submitted, that there be some limitations on its application. The following are suggested ;

(i) There must be a political prosecution in the sense explained above either in progress or certainly imminent or, at least, very probable. It cannot be sufficient that there is a possibility or remote likelihood of such a prosecution or that the accused thought that there would be a prosecution for a political crime against him. This would leave room for abuse and fantastic claims to exemption from extradition on the slightest pretext. A person must not only have reasonable grounds for believing that there is such a prosecution brewing but there must be, at the time the common offence is committed, at least, some objective and high degree of probability that such a prosecution will be brought. On the other hand, it would be too strict a view to insist that either the prosecution must already have been instituted or it will certainly and definitely be brought.

(ii) The common offence in question must have been committed with a view to avoiding the prosecution and not for any other purpose or from any other motive.[64] It is not sufficient that the crime be committed merely in the course of a jail-break which is undertaken in order to avoid a political prosecution, for instance. There must be a relation of purpose between the escape from prosecution and the commission of the crime. Thus, if the accused sought out a guard whom he particularly disliked and shot him in the course of such an escape, the relation of purpose between the crime and the escape from prosecution would not be present and the crime could not be called a political crime. On the other hand, if a sole witness or a leading witness in the prosecution were murdered in order to make it impossible for the prosecution to be brought, it would seem that the required purpose would be present.

A problem may arise in circumstances involving a different kind of political offence from an offence against the state only and as such. Suppose, for instance, that X, in the course of a riot in state A in which the opposition communist party tries to break up a meeting of the governing party held to promote the imposition of a sales tax on essentials, in order to achieve the purpose of the riot, namely the obstruction and prevention of the meeting so that the sales tax may not be promoted, inflicts serious bodily injury on

64. The same idea was mooted by J.A.C.G., *ibid.* at 435.

a member of the governing party. Then, in order to evade arrest and trial for this offence of serious bodily harm, he fires at a frontier guard and kills him in a bid to cross over to state B. State A requests his extradition for this murder. It would appear that the murder in question was committed in order to avoid prosecution for the offence of causing grievous bodily harm which was however committed in furtherance of a political struggle. This latter offence is characterized as a political offence for the purpose of the law of non-extradition in general. Does this mean that it is to be characterized as a political offence for the purposes of the rule under discussion and is it to be said that since X committed the murder in order to avoid a prosecution for a political offence, extradition is to be refused ? It is submitted that, if this view of political offence were accepted for this purpose and non-extradition permitted, it would lead to a further extension of the rule permitting non-extradition. The *Kolczynski Case* itself concerned facts in which the prosecution in question was for offences against the state only and as such. Hence, the rule should be limited to cases where the crime for which extradition is requested is committed in order to avoid a prosecution for a political offence in the narrow and primary sense of an offence against the state only and as such and should not include cases where the crime is committed to avoid a prosecution for those ordinary offences which acquire a political character for the purposes of the law of extradition by reason of their connection with a political struggle of some kind.

The *Kolczynski Case* is based on two different principles propounded by the two judges and the question arises which is to be regarded as the *ratio decidendi* of the case. In the *Schtraks Case* Lord Parker C.J. preferred the approach of Lord Goddard, C.J. but it is submitted that both approaches may be regarded as valid, so much so that it may be said that the ordinary definition of political offences permitting non-extradition has been extended in two ways. A common offence becomes political for these purposes, if it falls outside the normal definition used in the *Meurnier Case* and by Denman J., if (*a*) It is committed in circumstances in which a political offence in the sense of an offence against the state only and as such is committed at the same time and is so inextricably involved with it that the two cannot be separated or (*b*) it is committed in order to avoid a prosecution for a political offence in the narrow sense of an offence against the state only and as such. These extensions are not contradictory to anything which was said in the previous cases. They are extensions by reference to specific circumstances and objects. Hence, they do not try to revive in any way

the broad definitions which were either rejected in previous cases or were submitted to be unsatisfactory, viz. the wider definitions of the Swiss courts.

Conclusion

The problems connected with common crimes which are also political offences in the law of extradition are neither insignificant nor easy to solve. In the above article, an attempt has been made to discuss and provide answers to some of them. Most important of these problems are those pertaining to the question whether the nature of the trial and its surrounding circumstances have any relevance to the issue of non-extradition and those relating to the substantive content of the definition of the concept of a political offence. Both these problems were presented to the English High Court in the *Schtraks Case* recently. The following conclusions are submitted in respect of the present state of the law on these matters.

(1) Although there is some conflict of opinion in the cases, it is the better view that the question whether the accused in an extradition suit is likely to be tried for a political offence, although extradition is requested for a different non-political offence, is not one that the court can examine, because to allow otherwise would conflict with the principle of speciality and would reflect on the good faith of the requesting state. The conflict of opinions being created by a case in which the contrary view was expressed only as a *dictum* and as an ambiguous *dictum*, at that, and by a statement in another case which probably has a different interpretation,[65] the above view may be accepted as the law.

(2) Extraneous factors, such as that the trial may be used for political purposes or that the offence has acquired a political implication subsequent to its commission are irrelevant. The question is always whether the offence was political at the time it was committed.

(3) As for the political nature of the offence, it may be proved either by reference to the facts adduced by the requesting state, or, if this is insufficient, by evidence adduced by the accused as well. This rule is contained in section 3(1) of the Extradition Act 1870.

(4) The actual content of the definition of the concept of a political offence for the purposes of non-extradition requires delimiting, although this may not be easy. There have been several definitions mooted in

65. *Re Arton* (*No. 1*) and Cassels J. in *Kolczynski's Case.*

English decisions and even in the decisions of other countries. However, the problem is to select a definition which is neither too broad nor too narrow. On a liberal interpretation of the Swiss decisions it may be said that some definitions expressed in terms of the general notion of the political motive or object of the offence have been suggested. But these are not only too broad to secure acceptance and to be practicable but it is uncertain whether the Swiss courts meant to go so far. Moreover, they are inconsistent, for the most part with what has been the general view of the English courts. Apart from these anomalies, the most acceptable definition among the others is the broadest expression of a general definition applied by the English courts with the addition of two qualifications to expand the definition, also made by the English courts. Others emerging from both English and other decisions are too narrow. The proposed definition is not in any way inconsistent with the decisions in any of the cases so far decided in England or elsewhere. If this definition were applied in lieu of the narrower or boarder ones which may have been resorted to in some cases, the decisions in those cases would still be the same.

The definition would run as follows :

Where a common offence is committed in the course of any dispute, not necessarily amounting to a physical disturbance, between any two political parties in the state struggling for power, not necessarily including the governing party, and it is committed with a view to furthering the achievement of the purposes of the party concerned and not for any other purposes or from any other motives,

or where a common offence is committed in circumstances in which a political offence in the sense of an offence against the state only and as such is also committed at the same time and is so inextricably involved with it that the two cannot be separated,

or where a common offence is committed in order to avoid a prosecution for a political offence in the sense of an offence against the state only and as such,

the offence is a political offence.

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