THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES

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I

THE MEDIEVAL CONCEPT OF TREASON

'TREASON', said Maitland, 'is a crime which has a vague circumference and more than one centre'.[1] The law of treason which operated in England in the later middle ages had two major centres or elements, the Germanic and the Roman. This was also true of the treason laws of continental Europe, where the relative importance of the two components varied from state to state and even from province to province. The Germanic element was founded on the idea of betrayal or breach of trust [*treubruch*] by a man against his lord, while the Roman stemmed from the notion of *maiestas*, insult to those with public authority. *Seditio* is the word often associated in medieval writings with the Germanic concept, *laesa maiestatis* with the Roman. From the time of the collapse of the Roman Empire in the west in the fifth century, the Germanic idea of breach of trust was in retreat before the intellectually more advanced although partially conflicting notion of loss of majesty. As the invading peoples established primitive states they absorbed the atmosphere of *Romanitas* and their rulers assumed the dignities which they felt were suited to the successors of the Roman Emperors. To emulate Roman imperial style, as was often the aim, meant also to adopt in some degree the ideas of Roman law.

The laws of the Anglo-Saxons were affected by this process more slowly than those of most other Germanic peoples. What Roman influence there was may have been conveyed to England through the medium of the church. But even among the Anglo-Saxons pure Germanic treason, wherein loyalty to the lord was all and there were no special sanctions against hostility directed towards the king, can hardly ever have existed. The earliest of Anglo-Saxon law collections admitted the notion that it was a crime to violate the king's peace and by the time of the laws of Ine the idea had arisen that such crimes were unamendable and should be dealt with by the king because they were in contempt of him.[2] The first recognizable reference to treason itself was in the laws of Alfred, which separated

[1] Pollock and Maitland, II, 503.

[2] W. S. Holdsworth, *History of English Law* (3rd edn, London, 1923), II, 48–9.

plotting against the life of the lord from plotting against the life of the king: perhaps the earliest mention of what were later called high and petty treason. The same laws showed a definite Roman influence by their mention not only of open act of treason but also of the plotting of such a deed, a conception which figured in the law of *maiestas*.[1] The laws of later Saxon kings, those of Athelstan and Edgar, referred to plotting against lords in general rather than specifically against the king. Exceptional were the laws of Ethelred and Cnut, which clearly set out the procedure to be followed in rebutting charges of high treason, that is to say against the monarch.[2] Important for the later history of treason was also the law of Ethelred which allocated for the crime of false moneying the same processes and penalties as undergone by traitors.[3]

Obviously the Anglo-Saxons, like the other Germanic peoples, although not perhaps to the same degree, were influenced by the ideas of Roman law, and their notions of treason were affected by the concept of *maiestas*. This offence was created in the third century before Christ as a protection against the impugning of the authority of plebeian officials by insult or personal injury.[4] The crime was an amalgam of a number of different ideas. There was the misdeed of *perduellio*, that is to say an act often military in character which was hostile to the state: for example, deserting it or comforting or aiding the enemy. There were acts contrary to the constitution of the state, acts of maladministration by magistrates, the violation of civic duties both secular and religious, and personal injury done to magistrates. There was also a category of *maiestas* which included all types of insult to the emperor, for example by wearing the imperial purple, destroying a statue of the emperor, committing adultery with a princess of the imperial family, using divination, soothsayers or horoscopes to discover the future in matters of state or concerning the imperial family, and counterfeiting the emperor's image on coins.[5] Nearly all of these

[1] *The Laws of the Earliest English Kings*, ed. F. L. Attenborough (Cambridge, 1922), pp. 64–7.

[2] F. S. Lear, *Treason in Roman and Germanic Law* (Austin, 1965), pp. 188–9; *Laws of the Earliest English Kings*, ed. Attenborough, pp. 130–1; *The Laws of the Kings of England from Edmund to Henry I*, ed. A. J. Robertson (Cambridge, 1925), pp. 26–7, 86–7, 206–7.

[3] Lear, *Treason*, pp. 189–90; *Laws of the Kings of England*, ed. Robertson, pp. 68–9.

[4] Lear, *Treason*, pp. 11–12.

[5] *Ibid.*, pp. 26–9.

Roman ideas were to reappear in the laws of the European states of the later middle ages, as were details of interpretation, such as the blurring of the distinction between intent and actual deed, details of procedure, such as trial of the accused even after death, and details of penalty, like the damnation of the traitor's memory, the confiscation of his property, the denial to his heirs of their inheritance and the treating of failure to reveal traitorous plots as actual complicity. These laws of treason of classical Rome were confirmed by Justinian in the severer form which they had assumed in the later years of the Roman Empire in the west, and through his *Corpus Juris Civilis* were readily available to the lawyers of later centuries.

From the sixth to the eleventh centuries in Europe, as in England, the Roman theory of *maiestas* influenced codes which were basically Germanic but it never succeeded in supplanting the more primitive ideas of treason. The medieval mind was hardly mature enough to understand and apply the concepts of Rome and the unsophisticated nature of government did not suggest much need for Roman public law. The law collections which showed greatest debt to Roman law in general and to Roman treason in particular were probably the Visigothic *Breviary*, the Burgundian *Papian*, the *Leges Alammanorum* and the *Leges Baiuvariorum*. The lese-majesty of Rome, despite a fleeting appearance in the capitularies of Charlemagne,[1] did not figure significantly in law again until the revival of classical learning in the twelfth century. This heralded the renewed study of Roman law, which was a prime requisite for the development of new concepts of treason.

From the time of Archbishop Theobald, perhaps even before, Englishmen went abroad to study Roman law. Bologna was especially favoured and some, like John of Tilbury and Richard de Morins, were probably good enough to teach there. Nearly all of them returned later on to their own country and it must have been partly on their account that the teaching of Roman law began to flourish at Oxford, Northampton and other centres.[2] By the later twelfth century many ecclesiastical libraries were provided with a good number of books on Roman law, although rather on the

[1] *Monumenta Germaniae Historica* (*Legum, Sectio II, tomus i*), ed. A. Boretius (Hanover, 1883), p. 205.

[2] H. G. Richardson and G. O. Sayles, *Law and Legislation from Aethelberht to Magna Carta* (Edinburgh, 1966), pp. 71–3.

medieval than the classical variety.[1] A demand for the purer text of Justinian was first noticed towards the end of the reign of Henry II: it must have arisen from study in greater depth. From about 1160 there was some competition among prominent ecclesiastics to acquire the services of those skilled in the Roman law, the *jurisperiti*, but in fact outside the jurisdiction of the church courts there were to be few opportunities for the civilian in England. There was nothing approaching a twelfth-century reception of Roman law. The influence exerted on the common law was not decisive. For a time technical terms from the laws of Justinian were applied to English law, but then the limitations on the use of words which were not the precise equivalent of the original English were discovered, and the move towards conversion ceased.[2] How far the thoughts of English common lawyers engaged on a particular problem were influenced by a knowledge of Roman law, either that of Justinian or of their own age, there is no way of telling.

Those who wrote treatises on legal matters were more likely than most to be affected by Roman law. The author known as Glanvill was patently influenced by Roman manuals of procedure, the *ordines judiciarii*, although in arrangement rather than content, where there was little direct borrowing. Always he bore in mind the practices of the king's courts and, unlike Bracton later on, he did not insert whole passages from civilian and canon law. When he came to deal with treason he showed clearly that the civilian crime of lese-majesty was in his mind. He referred to the crime 'quod in legibus dicitur lese maiestatis':[3] the 'leges' must have been the Roman laws. Two elements of the offence were the killing or the sedition, that is the betrayal, of the king. For these an Anglo-Saxon origin seems very likely. The betrayal of the realm and of the army, which follow, are not so easily explained. The treason *seditio regni* was not one commonly mentioned by subsequent writers. It appeared in the works of only two of the English thirteenth-century legal treatises, in *Fleta* and in the *Summae* of Ralph Hengham.[4] Whence it derived is difficult to decide. Perhaps

[1] *Royal Writs in England from the Conquest to Glanvill*, ed. R. C. Van Caenegem (Seld. Soc., 1959), pp. 367–70.

[2] Richardson and Sayles, *Law and Legislation*, pp. 72–3, 80–2.

[3] Glanvill, *De Legibus et Consuetudinibus Regni Angliae*, ed. G. E. Woodbine (New Haven, 1922), p. 42.

[4] *Radulphi de Hengham Summae*, ed. W. H. Dunham (Cambridge, 1932), p. 5: 'Constat quod placita de crimine lese maiestatis, ut de nece vel seditione persone domini regis vel regni vel exercitus . . . '; *Fleta*, p. 57.

it came from the old Germanic crime of *landesverrat*, which was treason against land and folk, that is, attempts on the life of the organized group whether family, community or state. It may have derived from the works of the continental canonists or decretists or even the glossators of the Roman law, each of whom laid some emphasis on love of the fatherland [*patria*]. The glossators even suggested it might be treason to fight against the fatherland.[1] Perhaps this speculation is too fanciful and the answer is more simple. *Seditio regni* might merely have been an early example of the extension of the aura of majesty from the king's person to his country. There are other comparable examples of the use of the word *regnum* in a treason context but they are rare before the fourteenth century.[2] It may have been that the word *regnum* was being used, as it was in the later period, as a synonym for 'crown', a juristic expression of the unity of the king and his subjects. *Seditio regni* did not find a place in the treason act of 1352 unless perhaps it was concealed within the offence of adhering to the king's enemies.

Like Glanvill, Bracton and *Fleta* after him both included in their definition of treason the crime *seditio* (or *seductio*) *exercitus*, although like *seditio regni* it did not appear in the act of 1352.[3] Special penalties of the type associated with the gravest of offences were awarded by the Anglo-Saxons against those who left the army without permission when the king was present. This was in the dooms of Ethelred.[4] There were similar rules in continental Germanic laws, such as those of the Lombards and Franks. However, since the fomenting of sedition and riots among the soldiers was considered *laesa maiestas* under the Roman Empire, Glanvill may equally well have been drawing on a Roman source. One other type of treason to which this author referred was the crime of forgery or falsifying. It was not the making of false coin or of false measures which he specifically distinguished as lese-majesty, though they were each given separate mention, but the making of a false royal charter in contrast with forging a private charter.[5] The Anglo-Saxons were wont to punish false moneyers

[1] G. Post, 'Two Notes on Nationalism in the Middle Ages', *Traditio*, IX (1953), 281–96.

[2] Below, chapter 8.

[3] Bracton, II, 334; *Fleta*, p. 56.

[4] *Laws of the Kings of England*, ed. Robertson, pp. 86–7.

[5] Glanvill, *De Legibus*, ed. Woodbine, p. 179.

with the same penalties and by the same processes as were used in cases of high treason, but reference to the forgery of royal charters is lacking, as is the case in the other less sophisticated Germanic laws. Thus a Roman origin for Glanvill's forgery is the more likely, bearing in mind that the crime of *maiestas* included counterfeiting, destroying or desecrating or displaying lack of respect for the image of the emperor divine through making a fraudulent likeness,[1] and that some alteration or forging of a seal was likely to have been employed.

For Glanvill therefore the law of treason was a mixture of Roman and Germanic ideas, but he should not be regarded as the chief cause of the fusion. Well before the lifetime of this author, even in the sixth century, Roman and Germanic concepts of treason were joining together in Europe and even the Anglo-Saxon kings appropriated Roman ideas useful to their laws. Glanvill very probably wrote down the rules which judges in his day had come to accept. The concise formula 'the killing of the king or the betrayal of the realm or the army' has the ring and appearance of a neat and pliable contemporary legal maxim. How it was applied in each case was doubtless for the judges to decide.

The history of the influence of Roman law in thirteenth-century England is more complex. Its new-found popularity as an important study for lawyers was no longer maintained: indeed it suffered some notable defeats. Crucial no doubt were the principles of government obtaining. The later Angevins displayed a tendency to ignore due process of law and act how they wished. They were tempted to override established customs and rights although they rarely did so openly.[2] What pleased the king might indeed have had the vigour of law, but even the Angevins found it politic to clothe their acts with a legal fabric. In their case the law so used was often Roman and their servants had to have knowledge of it. Unfortunately for later kings the royal power was decisively curbed by Magna Carta, the feudal pact by which the king's aspirations to a theocratic capacity were greatly reduced.[3] Nonetheless, Roman law did not lose its foothold in England for about a century. It could be learned at Oxford, and there was no shortage

[1] Lear, *Treason*, p. 119.

[2] W. Ullmann, *The Principles of Government and Politics in the Middle Ages* (London, 1961), p. 157; J. E. A. Jolliffe, *Angevin Kingship* (London, 1955), pp. 60 n, 61 n.

[3] Ullmann, *Principles of Government*, pp. 160–74.

of popular textbooks on the subject, which had been translated into French. Most important was the fact that the king's justices were often clerics who knew something of the civil law as a result of their study of canon law. Not until the end of the reign of Edward I was the judiciary laicized. One particular use which was found for Roman law in the thirteenth century was to fill gaps in the young system of English common law. Thus there was probably some copying of civilian and canonical practice in cases of novel disseisin, even if there is more doubt about the Roman ancestry of the idea of damages and the actions of trespass and *cessavit*. The great influence in this field, however, was the writings of Bracton, who had very definite views of how the Roman law should be used to combat the weaknesses of the common law. His great treatise contained not a cross section of cases before the courts but those cases which were significant to his own point of view, which was that the confused English system of pleas and writs needed the assistance of the legal thought of Rome.[1] Propaganda or not, the treatise influenced lawyers greatly for the next half-century, persuading them to make use of a number of Roman legal terms and concepts.

How far was Bracton's definition of treason a derivation of Roman ideas? He started the relevant chapter by using a few words from the *Institutes* and later on utilized Tancred's *Ordo Judiciarius* and Glanvill.[2] Like Glanvill he called high treason *laesa maiestas*, a term which was used by his copiers and by monastic chroniclers but which was only accepted by the English chancery clerks in the reign of Edward IV, and in fact never did find a place in the plea rolls. There *traditio*, *seditio* or *seductio* and ultimately *proditio* were preferred. Going beyond Glanvill, Bracton stated that the crime exceeded in turpitude all other crimes. When he listed the various categories of *laesa maiestas* Bracton followed Glanvill by regarding sedition done to the king and his army (but not the realm) as the central offence. In making as criminal as the actual committing of treason the misdeeds of procuring treason to be done or giving aid or consent to those who were plotting treason, even if the plans were not carried out, Bracton advanced the English doctrine

[1] T. F. T. Plucknett, 'The Relations between Roman Law and English Common Law down to the Sixteenth Century', *University of Toronto Law Journal*, III (1939), 37–43.

[2] H. G. Richardson, *Bracton. The Problem of his Text* (Seld. Soc., 1965), pp. 122–5.

of treason a great deal.[1] There can be little doubt that his ideas influenced the makers of the statute of 1352. Plotting treason, forming part of a conspiracy against a member of the imperial council and consistory or the senate, or against any other person in imperial service, or the emperor by implication, was defined as lese-majesty in the *Lex Quisquis* of Justinian. Treasonable conspiracy may have been borrowed by Bracton from Roman sources but, as we have seen, plotting against the king's life was emphasized at the expense of actual killing in the laws of King Alfred and in the Edict of Rothar (A.D. 643) where cogitating (*cogitaverit contra animam regis*) was high treason.[2] Another crime which was lese-majesty to Bracton was forgery. This included fabricating base coin, debasing or clipping good coin and counterfeiting the king's seal on charters or writs: it was an extension of Glanvill's category which seems to have contained only the latter.[3] Bracton, like Glanvill, probably drew on Romanesque sources here, perhaps the chapter 'De Falsa Moneta' in Justinian's *Codex*. Thus, in defining treason Bracton added to Glanvill rather than contradicted him, and his aim seems to have been to provide a reasonably comprehensive law of treason by drawing on his knowledge of Roman law either in its contemporary continental or its more ancient form.

In the matter of procedure to be employed in cases of treason, Bracton again supplemented Glanvill. He may have done so not by reference to the customs of Rome but by utilizing professional opinions based on actual cases in the English courts. When he wrote about conspiracy of treason and the danger in waiting for treasonable plots to become public knowledge, he was probably bearing in mind a particular case. He argued that any man who possessed information about such a conspiracy should inform the king immediately without delaying for two nights in any one place, on peril of being held a manifest traitor.[4] Yet even in this sphere a Roman influence can be argued, if with less certainty. In the later Roman Empire failure to reveal treasonable conspiracy was punished as complicity, and informers [*delatores*], those who told of an offence without making a formal accusation, were encouraged.[5] The punishment of traitors had hardly been mentioned by Glanvill. It depended, so he said, on royal clemency, as

[1] Bracton, II, 334–7.
[2] Lear, *Treason*, pp. 44, 185, 236–7.
[3] Bracton, II, 337–8.
[4] *Ibid.*, II, 335.
[5] Lear, *Treason*, p. 33.

with felonies. However, the goods and chattels of a convicted traitor were to be confiscated [*confiscandis*] and his heirs disinherited for ever.[1] This provision Bracton embellished. The convicted man was to suffer the last punishment with an aggravation of corporeal pain. He was to lose all his goods, and his heirs were to be perpetually disinherited, as in Glanvill, but then Bracton added that it was scarcely permissible for the heirs to live, perhaps thinking of the penalties of infamy, confiscation of property and incapacity to inherit imposed on traitors' sons in the later Roman Empire.[2] The increased concern with which late medieval society, when provided with some notion of Roman ideas, viewed attacks on the king, showed itself in the devising of particularly gruesome modes of execution.

Concepts of treason never flourish in a vacuum. They depend greatly on the prevailing thesis of government. Throughout the later middle ages there was a tendency for European kings to seek, even if they did not readily gain, the power of absolutism. This has been attributed in part to the rediscovery of Aristotle's *Politics* in the thirteenth century, but there were two other causes which were more important. The concept of obedience, much favoured by ecclesiastical writers early in the eleventh century, although more in regard to the pope than to kings, was overshadowed later on by Gregory VII's extreme measures against the emperor, involving deposition and the freeing of his subjects from their duty of obedience. In the twelfth century the German ecclesiastical princes assumed the right to judge the ruler whom they had crowned and there was one writer, John of Salisbury, who actually advocated tyrannicide. The argument in favour of right of resistance to the monarch seems to have called forth the antithesis of divine right of kings, which emphasized the duty of passive obedience on the part of the subject as well as the divine consecration of the ruler.[3] It was then that the medieval monarchs, searching for legal arguments to bolster their political position, discovered the arsenal of Roman law. Whereas in Germanic thought the king lived and ruled under the law of his people, Roman Emperors had been regarded as vicars of God and as such above the law.

[1] *Tractatus de Legibus et Consuetudinibus Regni Angliae qui Glanvilla vocatur*, ed. G. D. G. Hall (London, 1965), p. 173.

[2] Bracton, II, 335; Lear, *Treason*, pp. 35–6.

[3] F. Kern, *Kingship and Law in the Middle Ages* (Oxford, 1939), pp. 97–117.

It was to this theocratic station that most late medieval monarchs aspired. Each saw himself as God's vicegerent, transformed by the oil with which he was anointed at his coronation. Despite the existence of the Holy Roman Emperor, who claimed sole secular sovereignty, there were from the end of the twelfth century kings who demonstrated both by deed and word that they admitted no lay superior and claimed to be themselves sovereign. In 1202 King John equated the kingdom of England with an empire and in the same year in the decretal *Per Venerabilem*, Innocent III mentioned that Philip Augustus of France recognized no superior in temporal matters.[1] Soon after 1200 some canonists were willing to grant *de facto* recognition to the sovereignty of kings, for example Vincentus Hispanus, Alanus and Guido de Baysio, a glossator on the *Decretum*, who suggested that despite the general jurisdiction of the emperor each king had similar power within his dominions.[2] But in general the claim was closely disputed throughout the thirteenth century. The opposition derived, as we might expect, largely from the lawyers of the emperor, who quibbled about sovereignty *de facto* and *de iure*. Not until the beginning of the fourteenth century did the march of events decide the issue of the battle, and the formula of Guido de Baysio that every king was emperor within his own kingdom become generally accepted.

The acknowledgement of the king as sovereign had an effect on the treason laws of many European states. Most noticeable was the alteration in attitudes towards rebellion. In the earlier middle ages, as Kern pointed out, the subject owed his ruler fealty rather than obedience. Fealty was reciprocal and was owed only as long as the other party kept faith. Neither king nor subject was a free agent: both were bound by the law of the kingdom. Thus when in the later middle ages the king claimed to be *lege solutus* the old balance was upset. Before the thirteenth century many a ruler recognized a subject had the right to disobey him: tacitly this understanding was included in every act of homage. It was even argued that a man wronged by his king had a duty, after offering formal defiance [*diffidatio*], to seek justice through rebellion. Who was in the right would be decided by judgement of God as revealed by victory in pitched battle. By no accident did the baronial rebels in England

[1] F. Schultz, 'Bracton on Kingship', *Eng. Hist. Rev.*, LX (1945), 149–51.

[2] W. Ullmann, 'The Development of the Medieval Idea of Sovereignty', *Eng. Hist. Rev.* LXIV (1949), 4, 9.

in 1215 call themselves the 'army of God'.[1] In one important aspect England was different from most other European states. Formal defiance of the king on the part of rebels was rarely held to excuse some form of judicial penalty if the insurrection failed. Nonetheless, before the reign of Edward I weighty retribution rarely occurred. In France the change from a generous to a severe royal policy on rebellion came at about the middle of the thirteenth century. In their legal treatises Guilelmus Durandus and Jean de Blanot both suggested that a baron who rose against the king was committing lese-majesty and in 1259 the jurisconsults decided the king could be the object of the same crime. As a result a baron who committed such an offence might forfeit his privileged position by royal decree.[2] Maitland, writing about treason in England, stated that only after 1340, when he had renounced his homage to the king of France and was therefore sovereign, did the English king adopt a severer policy towards those of his subjects guilty of insurrection. He was thinking apparently of the rubric about levying war against the king within the realm, which appeared in the treason statute of 1352.[3] The argument is unsound. For levying war against the king men had been convicted of treason during the two preceding reigns. Kings assumed the guise and the rights of sovereign princes some considerable time before they were universally recognized as such.

The full Roman law doctrine of lese-majesty was never accepted in England. Magna Carta and later on baronial cohesion effectively prevented the English kings becoming theocratic monarchs, although they made several attempts in that direction through the use of such instruments as the privy council, the privy seal, the royal household, the wardrobe and the chamber. In France, in contrast, because of a system of administration which was staffed by jurists trained in Roman law, because of the nature of the judicial process and the lack of baronial cohesion and articulateness, theocratic kingship flourished properly. The French king's avowed aim was a high level of public order, but this turned into the removal of all forces which opposed him. In criminal law one most important change which occurred in the thirteenth century was the substitution for the old method of accusation, much like the

[1] Kern, *Kingship*, pp. 85–92.
[2] Ullmann, *Eng. Hist. Rev.*, LXIV (1949), 10–11.
[3] Pollock and Maitland, II, 505–6.

English appeal, of inquisitorial procedure. This was official prosecution based on the model of Roman and canon law.[1] Another important introduction was of a new wide category of offence which involved in some way the violation of royal dignity. Such crimes were called *cas royaux* and originated at the time when cases of lese-majesty first began to occur. The king was never obliged to give them careful definition or to list them exhaustively, and they tended to multiply in number through the instrumentality of royal officials keen to extend royal authority.[2] Cases of lese-majesty were a central element in the collection of *cas royaux* and like them were never given precise definition. In the thirteenth century lese-majesty was held to include all attempts on the person or the honour of the king, but by the end of the middle ages it embraced, as well as the obvious crimes of attempts no the life of the king or his family or levying war against him, the offences of highway robbery, abduction of women, saying that the king needed his subjects' consent to their taxation, selling a fortress or refusing the king entry to it, having dealings with the king's enemies or with infidels, or speaking badly about the king by, for example, saying he was not worthy to live. Bouteiller referred to a crime he called 'combination' as lese-majesty: this seems to have been an urban offence, probably conspiracy, for purposes of revolt, including the taking of a common oath. The making of false coin, unlike the English practice, was not generally held as lese-majesty, although Bouteiller regarded it as such.[3] The scope of lese-majesty in France was in practice very similar to that of high treason in England. There are in fact one or two pieces of evidence, rather vague, which point to the French definition of lese-majesty influencing the English directly,[4] but the similarities between the two are really to be discovered in a common debt to the law of Rome.

In contrast with England, where men were usually tried for treason according to the same procedures as they would have been for any other crime, those accused of lese-majesty in France were

[1] Ullmann, *Principles of Government*, pp. 195–200.

[2] J. Brissaud, *Manuel d'histoire du droit Français* (Paris, 1898), p. 671.

[3] C. L. Von Bar, *History of Continental Criminal Law* (London, 1916), pp. 163–4, 173, 183; C. E. Dumont, *Justice Criminelle des Duchés de Lorraine et de Bar, du Bassigny et des Trois Évêchés* (Nancy, 1848), pp. 113–17; Brissaud, *Manuel d'histoire*, p. 925; F. Aubert, *Parlement de Paris de l'origine à François I, 1250–1515* (Paris, 1894), I, 266.

[4] Below, p. 74, n. 1. Perhaps also in the Gerberge, Litel and Beche cases.

tried in the king's courts by special process. It was not one peculiar to treason, but was operable for other serious crimes, especially those which were denied and had been committed secretly. It was called the 'extraordinary procedure'. Since there could be no death penalty without a confession from the accused, torture was the normal method by which the judges attempted to discover the truth: they might even inflict it on the accuser. Almost without exception the depositions of witnesses were hidden from the accused. As in England, conspirators were held equally guilty with those who committed overt treasonable acts. He who had knowledge of any traitorous design was expected to reveal it immediately, on pain of sharing in the guilt:[1] this was the same rule as in Bracton. The punishment meted out to traitors was more severe than that inflicted on other convicted criminals. In France they might be flayed alive or hanged and quartered, first being dragged, as in England, to execution at the horse's tail. All their goods were forfeited, usually to the king, and their fiefs went to their feudal lords. General confiscation such as this was limited in France to lese-majesty and heresy: even for these crimes it did not prevail in every province. Punishment did not necessarily cease with the traitor's death and the forfeiture of his possessions. His children might also lose their lives. The argument was that the crime of treason was so horrible that the traitor's offspring were contaminated by his misdeed and ought to be destroyed with him. If in fact the lives of the children were spared they might still suffer civil death. The severity of the punishment was only moderated in regard to daughters: they were supposed to be allowed a quarter of the property of their mother.[2] Some details of emphasis were slightly different, but in general the punishment of traitors, like the scope of high treason, was similar all over Europe at this time. The Golden Bull of the Emperor Charles IV (1356), giving the protection of the laws of lese-majesty to the German electors, ordered the confiscation of traitors' possessions in very similar terms.[3]

[1] A. Esmein, *History of Continental Criminal Procedure* (London, 1914), pp. 128 ff.; Von Bar, *Continental Criminal Law*, pp. 163–4.

[2] Von Bar, *Continental Criminal Law*, pp. 189, 192; P. C. Timbal, 'La Confiscation dans le Droit Français des XIIIe et XIVe siècles', *Revue Historique de Droit Français*, XIX-XXI (1940–2), 44–61.

[3] E. F. Henderson, *Historical Documents of the Middle Ages* (London, 1896), pp. 252–4.

Thus the English law of treason of the later middle ages was founded on a Germanic base but contained also much that was derived either from the law of classical Rome or from contemporary European practice. From about the mid-thirteenth century there was considerable, but not continuous, resistance to the introduction of Romanist notions, although the kings tried repeatedly to make them. Two of the more successful were Edward I and Henry V. Edward introduced the treason of levying war against the king, doubtless being influenced by the Roman theory that the right of levying war belonged only to princes without a secular superior, while Henry utilized elements of the laws of war, which were closely based on Roman doctrines, in his statutes (2 Henry V st. 1, c. 6 and 4 Henry V st. 2, c. 7) about truces and their preservation and marque. The finding of mere words as treason in the fifteenth century had parallels on the continent which may have had an influence on English thought. Edward III attempted to turn highway robbery and abduction of women into treason, as they were in France, but was unsuccessful. During the first half of the fourteenth century the crime of accroaching or usurping the royal power made several appearances, figuring both in accusations by the king and by the baronial opposition. This class of offence approximated quite closely to the category of *cas royaux* in France, both being concerned with infringement of the royal dignity. It never took proper root, for in the definition of treason contained in the great statute of 1352 accroaching was deliberately omitted. This was partly because the king feared its use against himself or his ministers by the baronial opposition, but mostly because the magnates disliked the use he had made of the formula in the 1340s to extend the law of treason as it then stood. This abandonment meant the loss of an important means of extending royal power and contributed greatly to the continuance of the feudal state. It is worth noting that the king was prompted to introduce Roman notions into the treason laws not so much to increase his own powers *per se* as to maintain a reasonable level of public order. The extension of the penalties for treason to lesser crimes both at this time and in the fifteenth century was intended to remedy complaints about lack of governance, which was a perennial grievance in the England of the later middle ages.