

## “EXTERIOR TREASON”

### A STUDY IN COMPARATIVE CRIMINAL LAW

JOHN N. HAZARD\* AND WILLIAM B. STERN†

WARS and threats of wars during the past year have brought in their wake a wave of treason trials, indictments of alleged spies, and increasing vigilance on the part of the police forces in not a few countries. Berlin reports the execution of traitors to the Third Reich; Moscow publishes thick volumes of testimony presented in the spectacular treason trials; Paris finds it necessary to reintroduce the death penalty for spying; London reports testimony by mysterious witnesses whose identity is cloaked under letters from the end of the alphabet. Even in the United States the President warns that the national interests are insufficiently protected.

Recent events suggest a review of the law of treason, which has come to general attention more than at any time since the World War. The approach will be that of comparative law, the statutes and case law of various continental European states being compared with Anglo-American law.<sup>‡</sup>

#### THE SUBJECT DEFINED

While centering attention primarily upon modern law, this study would be omitting an important source of information in determining the nature of the crime of treason if it failed to examine the high points in the history of the crime. The concept of treason has never been narrow, nor has it remained fixed over long periods of time. Offenses brought within its orbit at one time have been reduced to common felonies at some later period, while actions not deemed offenses at all may have been later elevated to the position of the most heinous of crimes. Compunction should not be

\* Member of the New York Bar; Moscow Law Institute, 1934-37 as agent of the Institute of Current World Affairs.

† University of Chicago.

‡ A review of treason laws of various states was made in 1922 by T. R. Robinson. It differed from the present study in that the author chose merely to enumerate the then-existing laws of various states without making any attempt to compare their varying provisions. See Robinson, *Treason in Modern Foreign Law*, 2 *Boston U.L. Rev.* 34 and 198 (1922). Another study, made in Germany, is that of Van Calker, *Hochverrat und Landesverrat*, in *Vergleichende Darstellung des deutschen und ausländischen Strafrechts*, Besonderer Teil, Bd. 1, (1906). The author explains German law, emphasizing its basic underlying principles with illustrations from foreign law.

felt in adding new offenses to the roster of treason merely because they do not appear on the rolls of the immediate past.

Broad concepts such as that of *προδοσία* in Attic law,<sup>2</sup> or *perduellio* in early Roman law suffered considerable alteration even in their own time.<sup>3</sup> The concept of *crimen laesae majestatis*, developed by the Republic as a crime against the majesty of the Roman people, was narrowed by Nero, Tiberius, and Caligula to mean little more than an injury to the majesty of the Emperor, whether the interests of the people were affected or not. Ours is not the purpose to examine in detail these earliest periods in the history of crime, but rather to develop a general impression which may be of service in searching for some basic principle underlying the concept of treason—some principle which may guide present-day legislators in reframing the laws of their nations. For such a purpose all law of the past is pertinent. Greece and Rome were but the first examples of a process seen on every hand today, as outworn meanings are replaced by new ones better fitted to meet the exigencies of the moment.

English law presents the best opportunity for study of this changing character with its varying statutes as well as with its even more volatile concept of "constructive" treason.<sup>4</sup> Not only the statutory offense of money clipping and counterfeiting of coins or the King's seal were considered treason, but other transgressions were brought within the classification by way of the broad interpretation of the courts, who exercised their power to declare any attack on authority as "constructive" treason. Acts such as the tearing down of bawdy houses or the denial *ex cathedra* of the healing power of the King fell within the orbit of the most heinous of crimes. The practice of judicial expansion of the concept was so general that at one time almost any trespass or crime could have been punished as treason by virtue of the fact that all such offenses were considered violations of the "King's peace."

Convictions for treason in its nineteenth century sense as an armed attack upon the state or the sovereign have become something of a rarity in the twentieth century. During the World War no convictions for treason were obtained in the United States. Attention of legislators and prosecutors has become centered upon espionage, while in most recent years even this concept has been broadened to include the new concept of economic espionage.

<sup>2</sup> See 1 Bonner and Smith, *The Administration of Justice from Homer to Aristotle* 199 (1930); 2 *id.* 27 (1938). See also Calhoun, *The Growth of Criminal Law in Ancient Greece* (1927).

<sup>3</sup> See Greenidge, *The Conception of Treason in Roman Law*, 7 *Juridical Rev.* 228-240 (1895).

<sup>4</sup> For a concise review of the history of the English law of treason see *Treason in Legal History*, 161 *Law Times* 115-116 (1926).

Review of the history of treason gives rise to the conclusion that no specific list of offenses can be compiled as an index to those acts which constitute treason. The most that can be done is to deduce a basic principle which may serve as a criterion in determining whether a given act at a given time may be classified as treason. Phrasing of this principle might take the following form: treason is the crime of committing an attack upon institutions which the ruling groups in a community recognize as essential to the continued existence of the community as constituted at the time. The community may be organized as a feudal state, as a republic, a monarchy, or a totalitarian state. The form of the state appears to make little difference in the basic principle underlying the definition of the crime, although the form may account for the inclusion or exclusion of particular acts.

This study deals only with those acts considered treason because they endanger the international position of the state—its external security. Putting it negatively, no attempt will be made to deal with acts which might be classified as treasonable attacks upon the constitutional life of the state. The field of discussion is narrowed to what has been called in some laws “aid and comfort to the enemy,” and in others “exterior treason.” This approach has been suggested by the fact that continental European law, though not without criticism, has developed a separate category of exterior treason.

The Prussian *Allgemeines Landrecht* (1794) established the German tradition by contrasting *Landesverrat* (exterior treason) with *Hochverrat*. The French code of 1810, which remains in force today, separates *crimes et délits contre la sûreté extérieure de l'Etat* from *crimes ... contre la sûreté intérieure de l'Etat*, whereas the Italian code of 1889 differentiates in a somewhat different way *delitti contro la patria* from *delitti contro i poteri dello stato*.<sup>5</sup>

#### OF AID AND COMFORT TO THE ENEMY

A comparative study of the modern law of exterior treason must start with an apology, for in fact there can be little comparison even of near similarities. Comment is often limited to the pointing out of contrasts, a process which cannot be called comparison in the true sense of the word. This contrast between different systems of law is due in part

<sup>5</sup> Compare in this respect the new Swiss code of 1937 which subdivides the heading “Crimes ou délits contre l'état et la défense nationale” into:

- a. Crimes ou délits contre l'état (arts. 265-271)
- b. Espionage (arts. 272-274)
- c. Groupements illicites (art. 275)
- d. Atteintes à la sécurité militaire (arts. 276-278)

to the fact that much of the English and American law of treason is of ancient vintage and manifests traces of now discarded schools of legal thought. Only some aspects of the law of the Soviet Union give evidence of the general approach common to Anglo-American law. The rest of European law is in a class by itself.

English law concerning aid and comfort to the enemy dates back to the now-famous statute of 1351.<sup>6</sup> In English translation it states that an offense should be adjudged treason

when a man doth compass or imagine the death of our lord, the King . . . .  
 or if a man do levy war against our lord the King in his realm,  
 or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere . . . .  
 and if a man counterfeit the King's great or privy seal, or his money . . . .  
 and if a man slea the chancellor, treasurer, or the King's justices . . . .

Although this statute was intended to do away with the uncertainty as to what offenses constituted treason, constructions later appeared which defeated this end.<sup>7</sup> Matters came to such a pass that constructive treason became quite popular with British courts until 1795 when by the enactment of the Treason Act of that year<sup>8</sup> the court's power of construction was abolished.

A few years previously the American Constitution had attempted to effect a similar standardization of the offenses amounting to treason. It had declared:<sup>9</sup>

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.

The precise language of this section, repeated in many state constitutions, would seem to have admitted of little doubt, and to have called for little interpretation. In spite of this fact, judge-made law crept into the American law of treason, until Nelson, J., was able to say,<sup>10</sup> "Questions arising under this clause must depend very much upon the facts and circumstances of each particular case. . . ." The strict limitations made by the Constitution were of no protective value. Convictions for treason under the sections of the United States criminal code, which in effect do nothing more than reflect the constitutional provision, followed as the result of the commission of offenses of various sorts. The cases have been

<sup>6</sup> 25 Edw. III, stat. 5; see 4 Halsbury's Law of England 273-4 (1929 ed.).

<sup>7</sup> In Sindercombe's case (1657, 5 St. Tr. 848) it was considered as only declaratory of the common law.

<sup>8</sup> 30 Geo. III, c. 7.

<sup>9</sup> Art. 3, § 3 (1).

<sup>10</sup> Charge to Grand Jury, 5 Blatch. 549, 30 Fed. Cas. No. 18,271 (C.C. N.Y. 1861).

classified under several headings<sup>11</sup>: selling to, or buying goods from an enemy government,<sup>12</sup> or to or from its agents or forces; communication of intelligence;<sup>13</sup> joining the enemy in time of war, or offering services by letter;<sup>14</sup> delivering of prisoners and deserters to the enemy;<sup>15</sup> trading with enemy subjects;<sup>16</sup> acts directed against the government or government property with intent to cause injury thereto and in aid of the enemy;<sup>17</sup> acts which tend and are designed to defeat, obstruct, or weaken the American arms.<sup>18</sup>

Whether or not this extensive interpretation amounts to the constructive treason from which the founding fathers sought to escape is a matter of opinion. The broadening of the scope of the crime is not, however, out of keeping with the modern practice of other countries. Soviet codes have been outstanding in adding from time to time descriptions of new offenses thought to be particularly harmful to the Soviet state. Comparison may also be made with the broad conception of *nullum crimen sine poena* which has recently been propagated in Germany to indicate that no offense against the moral standards of society should go unpunished even though the letter of the law has not been violated.

Proponents of the European system of enumeration in the codes, of offenses which may be considered treason, may find fault with the lack of constitutional and legislative punctiliousness in the American "aid-to-the-enemy clause," but American courts have enlarged its meaning to such an extent that in effect most cases which on the European continent would fall under the exterior treason statute, are punished also in the United States as felonies on the basis of statutory enactments in the federal criminal code. The American judge has apparently seen to it that the United States shall be as fully protected against the acts threatening its continued existence as is any state adopting the principle of enumeration.

<sup>11</sup> Warren, What Is Giving Aid and Comfort to the Enemy? 27 Yale L. J. 331 (1918).

<sup>12</sup> Sprott v. United States, 20 Wall. (U.S.) 459 (1874); Hanauer v. Doane, 12 Wall. (U.S.) 342 (1870); Carlisle v. United States, 16 Wall. (U.S.) 147; (1872); Young v. United States, 97 U.S. 39 (1877); United States v. Aaron Burr, 4 Cranch App. (U.S.) 469 (1807); People v. Lynch, 11 Johns. (N.Y.) 549 (1814).

<sup>13</sup> Charge to Grand Jury, 1 Bond (U.S.) 609, 611, 30 Fed. Cas. No. 18,272 (C.C. Ohio 1861). Also *Respublica v. Carlisle*, 1 Dall. (U.S.) 35 (1778).

<sup>14</sup> *United States v. Greiner*, Fed. Cas. No. 15,262 (D.C. Pa. 1861); *Medway v. United States*, 6 Ct. Cl. 421 (1870); *Respublica v. M'Carty*, 2 Dall. (U.S.) 86 (1781).

<sup>15</sup> *United States v. Hodges*, 2 Wheel. Cr. 477, 26 Fed. Cas. No. 15,374 (C.C. Md. 1815).

<sup>16</sup> See note 10 *supra*. Also *The Tulip*, 3 Wash. 181, 183 (C.C. 1812).

<sup>17</sup> Charge to Grand Jury, 1 Story 614, 616, 30 Fed. Cas. No. 18,275 (C.C. 1842).

<sup>18</sup> *Rex v. Casement*, [1917] 1 K.B. 98, 133; also see Sprague, J. in Charge to Grand Jury, 2 Sprague 285, 30 Fed. Cas. No. 18,277 (C.C. 1861).

There may, however, be another consideration involved in discussing the merits of enumeration. Not only the assurance of protection may be achieved by a precise list of treasonable acts, but law may be better able as a result of this procedure to perform its function as an instrument of education. It may be that enumeration of offenses in a code is more effective as a means of guiding the nation than is a case law which only a lawyer can know. With the belief that there is much to be learned from European practice in the matter, the authors present a review of the Continental approach.

#### THE TREASONABLE ACTS

Legal systems which completely codify the law of exterior treason begin their enumeration with the crime which has come to be known as "military treason." Article 75 of the French *Code Pénal* provides the prototype of this offense. It reads, "Tout Français qui aura porté les armes contre la France sera puni. . . ."

The carrying of arms, or to be more exact, the carrying of arms *for* an enemy and *against* one's own country is the basic type of military treason. This is not the only offense within this classification, for military treason comprises also that which is described in article 91b of the German code<sup>19</sup> as follows:

A person who during a war against Germany, or with regard to an imminent war [against Germany] engages within Germany, or if he is a German [national], within Germany or abroad, in the support of a hostile power or in damaging the war power of the Reich or her allies, is liable to punishment . . . .

In short, not only the carrying of arms, but also any other furtherance of the success of the hostile war machine may be considered military treason. From such an approach there are evolved sections of the code such as Article 92a which declares a person a traitor who "during a war against the Reich, or when such a war is imminent, fails to perform a contract made with a state authority regarding requirements of the armed forces of the Reich or her allies," or "who performs such a contract in a way which tends to defeat or endanger the purpose of the performance of the contract." This article also includes similar acts or omissions on the part of sub-contractors, middlemen, or agents.

Another type of offense is often considered military treason though its proximity to what is known as "diplomatic treason" is evident. Reference is made to the establishment of treasonable connections which lead, or, in the intention of the traitor, should lead to hostilities involving his

<sup>19</sup> As changed by the Law of April 24, 1934 (RGBI 1934. I. 341). All the following translations are those of the authors.

country.<sup>20</sup> In this respect the Czarist Russian code contained an interesting feature when it declared as treason the inducing of a foreign power to refuse to conclude or to break an alliance with Russia.<sup>21</sup>

The Soviet Union's law on this question is no less complete.<sup>22</sup> There is introduced the principle of punishing those who interfere with the external safety of the nation by obstructing its foreign policy or relations. On the basis of this principle the murder within the Soviet Union of a representative of a foreign state has been recognized as a crime against the Soviet state itself,<sup>23</sup> while counterfeiting within the Soviet Union the money of a foreign state is also punishable.<sup>24</sup> Either of these acts, usually treated by most codes as ordinary murder, or in the case of counterfeiting of foreign currency at times as no crime at all,<sup>25</sup> is considered as a threat to the safety of the Soviet state in that it might lead to international complications.

Soviet law also provides punishment for those who communicate with treasonable intent with those (economic) classes abroad which are trying to overthrow the Soviet form of government.<sup>26</sup>

A second classification within the field of external treason is that which has come to be known as diplomatic treason. It can be defined loosely as the betraying of one's country to an enemy in some way other than by use of arms. Most important of the offenses in this classification is the treasonable disclosure of state secrets. A state secret has been defined as:

any writings, drawings, other objects, facts or informations [about such writings, etc.] the concealment of which is required for reasons of the welfare of the state and especially for reasons of national defense.<sup>27</sup>

Diplomatic treason is the treasonable disclosure of such a state secret.

<sup>20</sup> German crim. code, art. 91; French *code pénal*, art. 76.

<sup>21</sup> Art. 110.

<sup>22</sup> Soviet law lists only a few acts as treason, but numerous others are punishable equally severely although not being elevated to the class of most serious crimes. Art. 133 of the Constitution of Dec. 5, 1936 states, "The defense of the fatherland is the sacred duty of every citizen of the U.S.S.R. Treason to the fatherland: violation of oath, desertion to the enemy impairing the military might of the state, espionage—is punishable with the full severity of the law as the most heinous crime." For translation of text of the Constitution, see Rappard, Sharp, Schneider, Pollock, and Harper, *Source Book on European Government* 108 (1937).

<sup>23</sup> § 53<sup>r</sup> of the Criminal Code of the R.S.F.S.R., though not definitely mentioning the offense of murdering a foreign ambassador, may be applied to cover this offense. An earlier code was so interpreted at the time of the murder of the German ambassador, Mirbach, in Moscow in 1918.

<sup>24</sup> § 59<sup>g</sup>.

<sup>25</sup> Proposals and international agreements to make similar acts "international crimes" have been omitted from consideration, since they are, as yet, of little practical importance.

<sup>26</sup> § 58<sup>4</sup>.

<sup>27</sup> German criminal code, art. 88.

During the period of the World War it became apparent that the state would have to punish as diplomatic treason not only the divulging of true secret information, but also the invention and dissemination of purported state secrets which turned out to be false or falsified. Quite as much confusion was caused by sending information as to troop movements which had never occurred, as was caused by disclosure of authentic detail. This struggle against the treasonable exploitation of the modern means of propaganda to disseminate falsehoods has found its expression, for instance, in recent laws of several states by which punishment is meted out to: (a) one who composes false writings, drawings, or other objects which if genuine would be state secrets, or who falsifies them, and who intends to betray such writings, etc. as genuine; or (b) one who obtains such "state secrets" with the knowledge of their false or falsified character.

The law takes a step further to provide for punishment of a person who, whether a national or not, greatly endangers, whether at home or abroad, the prestige of the country by making untrue or grossly distorted factual statements. Even the announcement or discussion of previous state secrets which are already known or have been officially communicated to the foreign government from which they had been kept secret, may be punishable, when the announcement or discussion is of such a character as to endanger the welfare of the state.<sup>28</sup> In a number of states inquiry by the proper authorities into betrayals of state secrets has received legal protection equaling that of the state secrets themselves. In French law, for example, not only is the treasonable divulgence of such proceedings punishable, but also the violation of a court order protecting the secrecy of such proceedings may subject the transgressor to the sanctions of the law.<sup>29</sup>

Espionage falls within the classification of diplomatic treason and accounts for the promulgation of voluminous laws. The justice of incorporating espionage law in the general body of the law of treason has aroused some criticism. An American newspaper contributor argues<sup>30</sup> that the motives of professional spies are rarely those of traitors. He contends that the number of spies who work for money's sake or who want revenge for some personal injustice allegedly done to them is greater than seems to be indicated by the idolizing and breath-taking novels and mov-

<sup>28</sup> See German criminal code, art. 90b, and Hoche, *Die Verordnungen zum Schutz von Volk und Staat, und gegen Verrat am Deutschen Volke*, in 38 *Deutsche Juristenzeitung* 398.

<sup>29</sup> Law of January 26, 1934, arts. 12 and 13. It must be remembered that French law does not know an equivalent to the American conception of "contempt of court."

<sup>30</sup> Baldwin, *The Spy Flourishes in an Era of Rearmament*, *New York Times*, June 26, 1938, part 7, p. 4.



ing pictures. In spite of the plausibility of this argument, it would appear to bear little weight in excluding espionage from the realm of treason, since external treason laws appear to be intended primarily to protect states against actual dangers threatening from without, regardless of the state of mind of the spy. Code provisions on espionage are a basic part of the law of treason, and from all indications they will continue to grow, rather than to diminish in importance.

National defense measures taken during the World War account for the present law of espionage. The American statute<sup>31</sup> covers not only what has been classified herein as diplomatic treason proper, but an effort is made to protect the defense interests of the United States by painstakingly enumerating all forbidden actions. Hardly less detailed are the French law of January 26, 1934, and the German law.

Common among the precautionary measures taken by states to protect themselves against their potential enemies has been the enlarging of defense areas into defense zones in which some of the fundamental rights of citizenship, such as freedom of sojourn and freedom from unreasonable searches and seizures, are no longer respected. Today a traveler may subject himself to prosecution not only when he photographs a sunset in a Japanese port, a bit of European scenery from an airplane, or a street vendor at an Italian railroad station, but he may even find himself in an embarrassing situation when photographing some "sights" in the United States.<sup>32</sup>

Of the various innovations brought into espionage statutes since the war, the most striking has been the introduction of the concept of "industrial espionage," or "industrial treason." As warfare has continued to draw further away from the period when it was characterized primarily by the personal heroism of the battlefield and hand-to-hand combat, national defense has become largely a struggle for priority in the invention and production of war materials. It has become a race to devise methods of production which may eliminate the necessity of foreign imports.<sup>33</sup> It is not surprising that small states which have been hesitant in building their future upon promises of strong allies and which have faced the dangers of economic starvation, have preceded others in legislating against industrial espionage. The Czechoslovak and Swiss laws are most outspoken in this respect; the laws of the latter reading as follows:<sup>34</sup>

<sup>31</sup> June 15, 1917, c. 30 title I, 1; 40 Stat. 217; 50 U.S.C.A. ch. 4, § 31.

<sup>32</sup> Newspaper accounts have on occasion appeared, telling of detention of suspicious foreigners found photographing near airports or naval bases.

<sup>33</sup> See Thierrack, *Der Wirtschaftsverrat*, in 41 *Deutsche Juristenzeitung* 849.

<sup>34</sup> Swiss Penal code of 1937, art. 273.

A person who attempts to discover a manufacturing or business secret in order to make it accessible to an official or private foreign entity, or to a private foreign enterprise, or their agents, [and]

A person who makes accessible a manufacturing or business secret to an official or private foreign entity or to a private foreign enterprise or their agents shall be punished. . . .

The remarkable characteristic of this section is that violation of private property rights in which the state is not directly interested as purchaser or proprietor, is considered a public crime and dealt with in the treason section of the code.

Economic espionage receives perhaps its broadest definition in Soviet law.<sup>35</sup> The breadth of definition caused such confusion among Americans as to the exact nature of an offense for which even foreigners have been tried by the Soviet government, that President Roosevelt asked Commissar Litvinov for a precise definition at the time of the establishing of diplomatic relations between the United States and the U.S.S.R. Litvinov's reply as the most concise and authoritative statement on the subject yet to appear deserves to be set forth in full:

The widespread opinion that the dissemination of economic information from the Union of Soviet Socialist Republics is allowed only in so far as this information has been published in newspapers or magazines is erroneous. The right to obtain economic information is limited in the Union of Soviet Socialist Republics, as in other countries, only in the case of business and production secrets and in the case of employment of forbidden methods (bribery, theft, fraud, etc.) to obtain such information. The category of business and production secrets naturally includes the official economic plans, in so far as they have not been made public, but not the individual reports concerning the production conditions and the general conditions of individual enterprises.

The Union of Soviet Socialist Republics has also no reason to complicate or hinder the critical examination of its economic organization. It naturally follows from this that everyone has the right to talk about matters or to receive information about such matters in the Union, in so far as the information for which he has asked or which has been imparted to him is not such as may not, on the basis of special regulations issued by responsible officials or by the appropriate state enterprises, be made known to outsiders. (This principle applies primarily to information concerning economic trends and tendencies.)<sup>36</sup>

<sup>35</sup> Criminal code of the R.S.F.S.R. § 58<sup>g</sup>, part 2, "The transmission or the stealing or collecting with a view to transmission, to the organizations or persons mentioned above [foreign governments, counter-revolutionary organizations or private persons], whether for remuneration or without reward, of economic information which, though not by its nature a specially protected state secret, is nevertheless—under a direct prohibition of the law or under orders issued by the chiefs of departments, administrations or enterprises—not allowed to be published, entails deprivation of liberty for a period not exceeding three years."

<sup>36</sup> Establishment of diplomatic relations with the Union of Soviet Socialist Republics 12-13 (U.S. Government Printing Office, 1933).

It will be seen that the average tourist who reports on his observations made in the normal course of travel, or the foreign student who is permitted to live within the Union for a period of time to acquire professional knowledge, is not subject to prosecution under this act. The provisions are designed to strike at those who specifically set out to discover information not made available in public or even narrower professional circles. Reading books or official reports or having conversations with scattered individuals does not amount to violation of the law. It is another matter if the conversations are carefully planned to provide material which will piece together into a detailed report as was found to be the case by the Soviet court in the Metro-Vickers engineers' trial. No indication is given as to the spheres of information specifically protected. While industrial production figures are most usually thought of in this connection, the concept might be broadened to include information on harvest, supplies of raw material, ore deposits or any other subject of importance to this national economy.

No discussion of types of treasonable offenses could close without mention of a few laws regarding *qualified treason*. In laws on external treason a special place is accorded to treason committed by state officers. Not only disclosure of state secrets by state officers, agents, or other state functionaries is in most countries a crime *per se*, but also their conduct of state business abroad to the detriment of their home countries may warrant the death penalty for treason. Similarly, falsification, destruction and *suppression of evidence* as well as the creation of false evidence may be considered treason if the evidence is intended for use in a manner detrimental to the international interests of the state.

#### THE TRAITOR

Statutes of the various states differ as to the persons who may commit treason. Some states such as the Soviet Union adopt the principle that only the "citizen" owes allegiance to the state, and that therefore he alone may be guilty of treason. Foreigners who commit similar acts may be punished under other sections of the criminal code with severe penalties, but only the citizen can be a traitor.

Opposed to this view is that of England and of the United States whose laws declare that a foreigner in so far as he owes allegiance to the United States by virtue of his right to demand protection from it, may also be prosecuted for treason.<sup>37</sup> The German and French law take a position

<sup>37</sup> Such acts are held to be treasonable whether committed by a citizen of the United States or by an alien domiciled, or residing, in the United States, inasmuch as resident aliens as well

similar to that of the common law countries, thus leaving the Soviet Union and a few other states alone in their position.

Another question arising in this connection is whether or not an offense may be classed as exterior treason regardless of the place of its commission—at home or abroad. The trend has been to treat exterior treason as a “universal crime,” a crime which is punishable at home though committed abroad, perhaps even by a foreigner. This trend is further proof of the extensiveness of the crime of treason, in that it calls for severe punishment whenever, wherever, and by whomever committed. Many laws punish attempts to commit treason in the same manner as the completed offense would have been treated. Accomplices are subject to the law to the same extent as their masters, and participants in a crowd like their leaders.<sup>38</sup> In England and in the United States misprision has become a felony, and the continental European law does not differ materially in this respect. According to German law some kinds of treasonable offenses can be committed negligently, and in England and America a spy can be convicted without proof of his treasonable intent, if “from the circumstances of the case or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the state.”<sup>39</sup>

#### THE TRIAL

Early treason trials, especially during feudal periods, were characterized by star chamber procedure, by torture, and by threats which made possible little doubt what the outcome would be, once prosecution had begun.

---

as citizens, owe allegiance to the United States and its laws. Proclamation issued under sec. 1-3, 6 of the Criminal Code and Constitution, art. III, § 3, 18 U.S.C.A., ch. 1. 1.

See also *Rex v. Lynch*, 20 Cox C.C. 468 (1903); *Rex v. Casement*, 25 Cox C.C. 480 (1916); *De Jager v. Attorney General of Natal*, [1907] A.C. 326.

Commentators draw a distinction between (a) foreigners who live within the United States or England at the time war breaks out and who may thereafter be pressed into the intelligence services of an enemy power and (b) foreigners who enter the state with the intent of serving the intelligence service of a foreign power. The latter class is not considered as owing allegiance, since they never had a right to demand protection from the state to which they have come. See *McKinney, Spies and Traitors*, 12 Ill. L. Rev. 591, 598-605 (1918).

<sup>38</sup> Warren, *op. cit. supra* note 11, at 340.

<sup>39</sup> The Official Secrets Act, 1911 (1 and 2 Geo. V. c. 28), sec. 1. American law, while requiring intent or reason to believe, except in wartime in the vicinity of military zones, in effect in no case requires intent actually to commit treason. It is enough if the court finds intent to commit the act itself, for then the treasonable intent will be presumed because of the serious consequences which any man might be expected to have foreseen. See *Hanauer v. Doane*, 12 Wall. (U.S.) 342, 347 (1874) and statute *op. cit. supra*, note 31.

Since that time law in the Anglo-Saxon countries has gone far in attempting to assure the accused a fair trial. Constitutional guaranties of a jury trial apply in most cases in the United States, although a member of the military forces, or a civilian taken within the area of military operations in time of war, is placed before a court martial and is deprived of the right of appeal.<sup>40</sup> It is not a case of an emergency causing the suspension of the constitutional guaranties, but rather it is the law embodied in the Constitution which incorporated the guaranty of jury trials only for those types of cases in which they had become established at the time of its adoption. In view of the fact that military offenses were triable at courts martial at that time, and also in view of the fact that espionage even by a civilian has been considered a military offense if performed within a sphere of military operations, offenders of this type have never had a claim upon constitutional guaranties. Anglo-American law requires that the accused be given a copy of the indictment and the right to defense counsel. Most of the European laws now make such provisions, the most recent addition being that to Soviet law.<sup>41</sup> German law provides for the trial of treason before the *Volksgerichtshof* (People's Court) which was established in 1934 and entrusted with the task of dealing with all major treason cases.

#### THE PUNISHMENT

At no time mild, punishment for acts of treason has varied in severity with the extent of danger faced by the state, and with the growth of a feeling of revulsion against torture and bloody execution. Under the Empire of Rome,<sup>42</sup> the death penalty replaced the older *aqua et ignis*. Property was confiscated and torture in some cases ensued. Even the sons of the traitors could be degraded and disgraced, although this measure followed only in the most heinous forms of treason, as it was felt that such a penalty did little more than create new enemies of the state.

Early English law demanded the death penalty in a revolting form: hanging and disembowling before death came. But Parliament tried from time to time to repeal the statutes which provided for cruel punishment. In the preamble of the repeal act of 1553<sup>43</sup> it was stated that

<sup>40</sup> Articles of War, sec. 82, 10 U.S.C.A. ch. 36 § 1554 and Articles for the Government of the Navy, sec. 5, 34 U.S.C.A. ch. 21, § 1200.

<sup>41</sup> Soviet Constitution, art. 111.

<sup>42</sup> Greek law knew of a certain means of execution which was reserved for execution in treason cases; it was called *ἀπορρυπανισμός*; see Bonner and Smith, *op. cit. supra* note 2, at 282.

<sup>43</sup> 1 Mary, Sess. 1 c. 1.

lawes . . . justly made for the preservacōn of the cōmmune weale, without extreame punishment or greate penaltie, arre more often for the most parte obeied and kepte, then lawes and statutes made with greate and extreame punishementes. . . .

but only in the nineteenth century were the last remnants of the medievally cruel laws repealed.

French law as originally codified in the *Code Pénal*, provided the death penalty for treason,<sup>44</sup> but in 1848<sup>45</sup> with the general abolition of the death penalty, imprisonment in an *enceinte fortifié* replaced the guillotine, except for military treason and military espionage. With the increase in European tension during 1938, the penalty of the guillotine was reintroduced as a maximum penalty for espionage.<sup>46</sup>

Soviet law provides an alternative of a twenty-five year sentence<sup>47</sup> or the death penalty not only for the crimes listed as treason in the constitution, but for many of the other offenses listed in the criminal code as amounting to counter-revolution. Not only may the offender himself be punished for an act of treason, but, in some cases, his family as well. Soviet law provides that the adult members of the family of a military man who flees abroad may be imprisoned for a period of from five to ten years if they knew of the planned flight, while even those adult members who knew nothing of the flight, but lived in the same home as the offender may be banished to remote regions of Siberia for a period of five years.<sup>48</sup>

National Socialist Germany knows of various types of treason for which the death penalty, at times with an alternative of imprisonment and hard labor for cases of extenuating and less serious circumstances, may ensue. Milder punishment is provided for other types of treason and for foreigners.

During the years following the World War German leftist circles advanced the proposal that the *conscientious traitor* should be permitted to go free. In particular, it was suggested that the law of exterior treason should not apply to a traitor who could prove the truth of the state "secret." Such an argument has been presented to justify disclosure of rearmament in violation of the Treaty of Versailles on the ground that the individual owes a higher sense of duty to the world than to any individual state. Proposals like this never became law. On the contrary, all

<sup>44</sup> Art. 75.

<sup>45</sup> Const. Nov. 4, 1848, art. 5.

<sup>46</sup> Decree of June 29, 1938.

<sup>47</sup> Introduced by law of Oct. 2, 1937, *Sobranie Zakonov i Rasp.*, S.S.S.R., 1937, I. No. 66, art. 297. Previously the alternative to death had been ten years imprisonment.

<sup>48</sup> Criminal Code, R.S.F.S.R., § 58<sup>10</sup>

over the world the attention of governments is now being concentrated upon the tightening of those provisions of criminal law which deal with exterior treason.

#### A FINAL WORD

Had war been successfully outlawed, and had the vision of a world in which secret diplomacy would play no part been more than a dream, the problem of exterior treason would not be concerning us today. The situation is far different from what idealist statesmen envisaged, for the states of the world, not excluding the United States, are hurrying to protect themselves—to conclude secret agreements and to develop new formulas of war which will remain valuable only so long as they are unknown to others. Legal draftsmen are being called upon to frame statutes which will protect these secrets, and there is indication that the process will become accelerated as the months go by.<sup>49</sup>

Sensing the urgency for action the authors have attempted to point out the experience of other nations in framing their law of treason. It is hoped that this brief paper may have demonstrated the practicability of the comparative law approach in developing this and cognate fields.

<sup>49</sup> See Act of Congress of June 8, 1938, requiring the registration of certain persons employed by agencies to disseminate propaganda in the United States. See also statement of United States Attorney Lamar Hardy to the effect that American statutes must be amended to permit the prosecution of corporations for espionage. *New York Times*, October 11, 1938, p. 4.