THE MODERN LAW REVIEW
Modern Law Review
DOI: 10.1111/1468-2230.12826

The Travels of Treason

Michael Lobban*

The law of treason has been criticised for being based on 'outdated' statutes which are inflexible and unsuitable for modern needs. However, a historical examination of the evolution of treason in Britain and its empire suggests that the law was often adaptable. In nineteenth century England, jurists wished to rein in older constructive treasons, to leave the 1351 Act as the appropriate law for wartime treasons, while the more lenient 1848 Act was to be used against 'political' conspiracies to subvert the state by force. However, the 'constructive' treasons remained part of the law, and were given new life in imperial contexts. In Ireland and Canada, the idea that plotting the king's 'political' death was treason remained central to understandings of the 1351 Act. In India, the interpretation of the provision of the penal code against 'waging war' against the government was influenced by old English ideas of 'constructive' treason and used against those who challenged British rule. Imperial understandings of treason were also shaped by cases arising out of the Boer war, where the underlying law was Roman-Dutch law. Rather than being restrictive and unable to adapt to modern needs, the law of treason was flexible and malleable.

The law of treason has attracted a good deal of attention in recent years. Much of it has focused on the fact that the basis of the law remains a statute of 1351 which codified the medieval law of treason. At the heart of the offence is the betrayal of one's allegiance to one's king. This statute defines three central manifestations of treason: compassing and imagining the king's death; levying war against the king in his realm; and giving aid and comfort to the king's enemies, either in his realm or elsewhere.[1] A number of modern critics have argued that the 'obscure and difficult' language of this statute makes it hard to apply to contemporary situations, and have called for a reform of the law to modernise it.[2] Treasonable offences can also be punished under the 1848 Treason Felony Act.[3] Under this statute, a term of life imprisonment can be imposed on anyone who 'within the United Kingdom or without' shall 'compass imagine devise or intend' to 'deprive or depose' the monarch 'from the style, honour, or royal name of the

*Senior Research Fellow, All Souls College and Professor of Legal History, University of Oxford. An earlier version of this article was given as a plenary lecture at the Society of Legal Scholars' Annual Conference at King's College London in 2022.

1 25 Edw 3, s 5, c 2. Treason carried the death penalty until 1998: Crime and Disorder Act 1998, s 36.

2 While many are critical of the ancient law, there has been little agreement on what should be done. See Law Commission, *Codification of the Criminal Law: Treason, Sedition and Allied Offences* Working Paper No 72 (London: HMSO, 1977) para 21; Lord Goldsmith, *Citizenship: Our Common Bond* (London, 2008) 79; Law Commission, *Tenth Programme of Law Reform* Law Com No 311 (2008) para 2.30. For recent calls to reform the law, see Richard Ekins, Patrick Hennessey, Khalid Mahmoud MP and Tom Tugendhat MP, *Aiding the Enemy: How and why to restore the law of treason* (London: Policy Exchange, 2018).

3 11 & 12 Vict c 12.

imperial crown of the United Kingdom'. A similar sentence can be imposed on those who conspire to use force to compel a change of policy or to overawe parliament, as well as on those who stir up any foreigner or stranger to invade. Although often overlooked, this legislation has also been subject to criticism. In 2003 Lord Steyn described it as 'a relic of a bygone age' which 'does not fit into the fabric of our modern legal system.'[4] Such comments seem to suggest that the English law of treason is archaic, unworkable and in need of reform. The 1381 Act is often seen as unusable because it is too narrow and restrictive in its formulation, while the 1848 Act is seen as being too broad to be applied in practice.

Given the repeated recent calls to revisit or reform the law of treason, this article seeks to enrich our understanding of it by offering a historical re-examination of the evolution of treason in Britain and its empire from the eighteenth to the twentieth century.[5] It shows that the law of treason was more adaptable and flexible than is sometimes assumed, and that it operated differently in different parts of the empire. It will be seen that in Britain, the law of treason was developed in the mid-nineteenth century in a way to provide distinct tools (with distinct penalties) for different kinds of offences against the state. From the late eighteenth century onwards, attempts were made to rein in the reach of the medieval statute – which had been expanded by judges in the early modern era to cover a wide range of 'constructive' treasons, including political offences which did not threaten the life of the king – in order to make it primarily a legal tool to use in times of war. The legislation of 1848 was developed to provide a lesser penalty for political treasons. Despite its broad wording, the Treason Felony Act was not intended to facilitate the prosecution of newspaper editors seeking constitutional reform (or the abolition of the monarchy)[6] but was aimed at Irish Republicans wishing to obtain a change of government policy by force.[7] This was to adapt the law of treason in a changing political

4 He also observed that the idea that it 'could survive scrutiny under the Human Rights Act 1998 is unreal': *R (Rusbridger and Another)* v *Attorney General* [2004] 1 AC 357 (*Rusbridger*) at [4], [28].

5 Although the focus of this article is on treason, as the most serious offence, it should be noted that those who threatened the security of the state could also be charged with libel, sedition or conspiracy, or with public order offences, which (as misdemeanours in English law) carried lighter punishments. For the use of such offences in England in the first half of the nineteenth century, see Michael Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime, c.1770-1820' (1990) 10 OJLS 307, Philip Harling, 'The Law of Libel and the Limits of Repression, 1790–1832' (2001) 44 *Historical Journal* 107 and Thomas Keymer, *Poetics of the Pillory: English Literature and Seditious Libel, 1660-1820* (Oxford: OUP, 2019) ch 4. For the importance of sedition in early twentieth century India, see Janaki Bakhle, 'Savarkar (1883–1966), Sedition and Surveillance: the rule of law in a colonial situation' (2010) 35 *Social History* 51.

6 This was the assumption of the court in *Rusbridger* n 4 above at [4] per Lord Steyn. Contemporaries also saw the danger that it could be used to suppress critical speech; the wide ambit of the Act was noted in 1870 by James Fitzjames Stephen. When introducing a clause on sedition into the Indian Penal Code he noted that under section 3 of the 1848 Act, anyone 'who conceived in his heart any one of the several specified intentions' and manifested it by any act or writing could be transported for life: William Robarts Hamilton, *The Indian Penal Code, with Commentary* (Calcutta: Thacker, Spink & Co, 1895) 134 n (d).

7 It continued to be used for such purposes: in 1954, eight men were convicted in Belfast under the Treason Felony Act: *The Times* 16 December 1954, 5. In 1973, three Irishmen were charged

society in which the franchise was expanding and space was increasingly allowed for political protest, at least of a non-violent kind. However, as shall be seen, the law of treason was not limited to England. In an age of imperial expansion, questions were asked about what constituted treason beyond metropolitan shores. Both the medieval and Victorian statutes were applied elsewhere in the empire, but the way in which they were applied, and the meanings attributed to them could vary according to context. Within the empire, the law of treason might be used in far less liberal ways than was the case at the metropole; and ways which might, in turn, exert an influence on how the English saw their own law.

ENGLAND

Although the medieval statute defined treason quite narrowly – in essence plotting to kill the king or raising actual war against him – its reach had expanded by the late eighteenth century through the development of a number of constructive treasons.[8] Early modern sources stated that defendants could be guilty of compassing and imagining the death of the king not only if they plotted actually to kill him, but also if they conspired to depose him or imprison him until he 'yielded to certain demands'.[9] As Sir Michael Foster explained, the charge of compassing and imagining the king's death 'extended to every thing wilfully and deliberately done or attempted, whereby his life may be endangered … For Experience hath shewn that between the Prison and the Graves of Princes the Distance is very small.'[10] There was also much debate over whether a conspiracy to levy war – which was not itself treason under the statute – might be considered as an overt act of compassing the king's death.[11]

The treason of levying war against the king had also been extended by constructions. Early modern case law suggested that it included not merely resorting

in London under the Treason Felony Act, though these charges were dropped and they were convicted of lesser offences: *The Times* 16 January 1973, 3; 20 January 1973, 2.

8 For an examination of the law of treason in the eighteenth century, see John Barrell, *Imagining the King's Death: Figurative Treason, Fantasies of Regicide, 1793-1796* (Oxford: OUP, 2000) esp 30-44, 134-137. For the 1696 Treason Trials Act (which allowed defendants to use counsel), see John Langbein, *The Origins of Adversary Criminal Trial* (Oxford: OUP, 2005) ch 2.

9 Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: E. and R. Brooke, 1797) 12.

10 Sir Michael Foster, *A report of some proceedings on the commission of oyer and terminer and goal delivery for the trial of the rebels in the year 1746 … to which are added Discourses upon a Few Branches of Crown Law* (Oxford: Clarendon Press, 1767) 195-196. Hale gave the example of the *Duke of Norfolk's case* (1571) in Thomas Bayly Howell (ed), *A Complete Collection of State Trials* 33 vols (London: Longman, Hurst, Rees, Orme and Brown, 1816-26) vol 1, col 957 ff, whose plan to marry Mary, Queen of Scots and support her claim to the crown of England, was seen to be treason: Sir Matthew Hale, *The History of the Pleas of the Crown* 2 vols (London: E. and R. Nutt and R. Gosling, 1736) vol 1, 120.

11 Coke thought not (n 9 above, 15); but Hale gave examples of where it might: n 10 above, vol 1, 122-123. See also Henry Hallam, *The Constitutional History of England from the Accession of Henry VII to the Death of George II*, 2 vols (London: John Murray, 5th ed, 1846) vol 2, 316-317, discussing the case of *Sir John Freind* (1696) Howell, n 10 above, vol 13, cols 1, 62. See further Edward Hyde East, *Pleas of the Crown* 2 vols (London: A. Strahan for J. Butterworth, 1803) vol 1, 62-63.

to arms in the manner that a foreign enemy might, but also any general armed attack directed against royal authority. As Foster explained, insurrections to effect changes 'of a publick and general concern' – such as those aimed at closing all dissenting meeting houses[12] – were regarded as constructive levying of war, since their public nature meant that they were targeted 'against *his royal Majesty*' and had a tendency to dissolve the bonds of society.[13] By contrast, where those embroiled in a private quarrel took up arms – as where weavers armed themselves to destroy the looms of those who undercut their prices – this did not count as constructive treason.[14]

Such was the view of the law of treason when the leaders of the London Corresponding Society were prosecuted for the offence in 1794. The indictment against them was framed as a constructive compassing and imagining the king's death. They were charged with conspiring to incite rebellion and war against the king, to subvert the legislature and government, and to depose the king from his royal state and thereby to put him to death.[15] The overt acts by which the treason was to be proved related to the organisation of a convention, in which delegates from all over the country would meet and call for political reform. In effect, this was an attempt by the crown to use the ancient law of treason to criminalise a political reform movement during the era of the French Revolution. There was no evidence that the London Corresponding Society leaders planned any armed resistance or open rebellion, nor that they had any plans to kill the king. However, looking at events over the English Channel, the authorities feared that a popular movement of this sort, if unchecked, would end in the king's decapitation.

In defending the accused, Thomas Erskine focused carefully on the words of the statute, telling the jury they should only convict if it was clear that the defendants intended to endanger the king's '*natural existence*'.[16] His rhetoric persuaded the jurymen, who were not convinced that the London Corresponding Society's political activity would end with the death of George III. Erskine's victory was much celebrated, and many assumed that he had buried the doctrine of constructive treason when it came to compassing and imagining the king's death. The British state would not again use this charge to discredit a mass movement.[17] Indeed, the doctrine was in many ways made redundant with the passing of the 1795 Treasonable Practices Act. This Act made it treason to compass, imagine, devise or intend to deprive the monarch of his kingly position in any of his dominions. It also made it treason to conspire to

12 See the case of *Daniel Dammaree* in Howell, n 10 above, vol 15, col 522.
13 Foster, n 10 above, 211.
14 Hale, n 10 above, vol 1, 131-132. For a further refinement, it was held that a conspiracy to levy actual war could be an overt act of compassing the king's death, but a conspiracy to levy a constructive war could not: *ibid*, 122-23.
15 Howell, n 10 above, vol 24, col 233.
16 *ibid*, col 881.
17 When Feargus O'Connor and 58 others were tried in 1843 for Chartist activities, it was under charges of seditious conspiracy and not high treason: *R* v *O'Connor* (1843) in John Macdonell and John E.P. Wallis (eds), *Reports of State Trials, New Series* 8 vols (London: HMSO, 1888-98) vol 4, col 935. Charges of levying war (under the 1351 Act) or of conspiring to do so (under the 1796 Act) were still used against leaders of popular movements, for example *The King* v *Andrew Hardie* (1820), *ibid*, vol 1, col 609, *The Queen* v *John Frost* (1839) *ibid*, vol 4, col 85.

levy war or insurrection to compel him to change his measures or counsels, or to overawe parliament.[18] The Act was unpopular and seen as oppressive, precisely because it explicitly made conspiracies against the government treasonable. Initially temporary, it was made perpetual in 1817.[19]

1848 saw the passing of the Treason Felony Act. This Act was passed in the context of growing unrest in Ireland in the year of European revolutions. Alarmed at the seditious material in the *United Irishman* newspaper, the government wanted a tougher law to deal with those who encouraged people to commit treason than was offered by the misdemeanour of sedition. As the Home Secretary Sir George Grey pointed out, in England those who incited people to treason could be prosecuted under the Treasonable Practices Act, but this law was not thought to extend to Ireland.[20] One aim of the Act was therefore to apply to Ireland the kind of provisions relating to political treasons introduced in England in 1795. Another – and one which was more popular with Radical MPs – was its aim to remove the death penalty and impose lesser penalties of imprisonment. The 'political' treasons introduced at the end of the eighteenth century were now re-enacted as felonies: the wording of section 3 of the 1848 Act in effect reproduced that of the 1795 Act.[21]

As a result of this legislation, there were in effect three branches of the law of treason in Britain. The first branch aimed to protect the personal integrity of the monarch. This was secured both by the 1351 Act, which continued in force, and by other legislation passed in the interval, such as the Treason Act of 1842, which imposed a non-capital penalty for those who attempted to injure or alarm the monarch, as by pointing weapons at her.[22] The second branch, also found in the 1351 Act, related to the capital treason of levying war or adhering to the king's enemies. The third branch, which related to the more 'political' treasons of conspiring to levy war or insurrection, or to overawe the government with force, was a non-capital felony under the 1848 Act.

Where did this leave 'constructive' treason? In the decade before the passing of the 1848 Act, there had been much discussion of the ambit of the law of treason by commissioners appointed to codify or consolidate the criminal law. They were aware that as a matter of law, the doctrine of constructive treason had not been undermined by Erskine's successful defence of those tried in 1794; for in James Watson's case in 1817, Lord Ellenborough quoted with approval Chief Justice Eyre's comment in the case of the London Corresponding Society leader Thomas Hardy that it was a settled presumption that 'he

18 An Act for the Safety and Preservation of His Majesty's Person and Government against treasonable and seditious Practices and Attempts (1795) 36 Geo III c 7.

19 Treason Act (1817) 57 Geo III c 6. It was repealed in 1998.

20 HC Deb 3rd ser vol 98 col 20 7 April 1848.

21 The 1848 Act itself repealed the 1795/1817 legislation, save those parts which had been included specifically to protect the personal safety of the sovereign's heirs and successors. Those parts were now extended to Ireland.

22 This is the treason statute most invoked in recent years. In February 2023, Jaswant Singh Chail, who had been found with a crossbow in the grounds of Windsor Castle, pleaded guilty to a charge under this Act. In 1981, Marcus Sarjeant was sentenced for a five-year prison term under the statute for firing blanks at the Queen during the Trooping of the Colour ceremony: *The Times* 15 September 1981, 1.

who conspires to depose the king, compasses and imagines the death of the king.'[23] The Criminal Law Commissioners were themselves highly critical of any constructive interpretations of the Act of 1351, which they thought had been rendered unnecessary by the passing of the 1795 Act. They wished to excise such constructive interpretations from the law. In their draft bill of 1841, which consolidated and re-enacted the earlier statutes, they therefore specified that 'compassing and imagining the death' of the king should be 'deemed to signify an actual intention to kill'. They also wanted the term 'levying war' to be understood in its literal sense.[24] However, given that the 1848 Act left the 1351 Act intact, and given that no consolidating legislation was passed on the lines suggested by the Criminal Law Commissioners, it remained theoretically possible to prosecute for the old 'constructive' treasons under the 1351 Act.[25]

In practice, no prosecution for such constructive treasons were brought. This was primarily because the new Treason Felony Act was sufficient to deal with those who plotted to subvert the state. In the United Kingdom, this Act was used primarily against Irish Republicans, for whom it had largely been designed. It was used against those who supported revolutionary movements in the press[26] as well as those who became members of revolutionary organisations.[27] In 1868, Dennis Mulcahy and five others were accused of compassing the deposition of the Queen and conspiring to levy war because of their membership of the Fenian Brotherhood. Confirming that they could be convicted under the legislation without proof of any overt acts beyond conspiring, Willes J ruled that 'the very plot is an act in itself'.[28] At the metropole, Treason Felony was the charge used against those suspected of plotting armed attacks against

23 Howell, n 10 above, vol 24, col 1361, *ibid*, vol 32, col 579. See also Abbott CJ's summing up in the 1820 treason trial of Arthur Thistlewood for the Cato Street conspiracy: *ibid*, vol 33, col 919.

24 Sixth Report of Her Majesty's Commissioners on Criminal Law PP 1841 (sess 1) (316) X.1, Art 10, 12, 24-25. This was also done in the 1843 bill: Royal Commission on Criminal Law, Seventh Report, PP 1843 (448) XIX.1, Art 10, 12, 119. The same approach was taken in 1848 by the commissioners appointed in 1845 to revise and consolidate the criminal law in their proposed measure. Fourth Report of Her Majesty's Commissioners for Revising and Consolidating the Criminal Law, PP. 1847-8 (940) XXVII.1, Art 2, 5, 9-10.

25 Sixth Report of Her Majesty's Commissioners on Criminal Law PP 1841 (sess 1) (316) X.1, 16-17; Sir James Fitzjames Stephen, *A History of the Criminal Law of England* 3 vols (London: MacMillan, 1883) vol 2 277-278; *Halsbury's Laws of England* Hailsham (ed) (London: Butterworth, 2nd ed, 1932) vol 6, 419-420.

26 John Mitchel was convicted under the Act in Dublin for advocating revolutionary nationalism in his newspaper, the *United Irishman*. *The Queen* v *John Mitchell* (1848) in Macdonell and Wallis (eds), n 17 above, vol 6, col 599. See also *R* v *O'Doherty* (1848) *ibid*, vol 6, col 831, *R* v *John Martin* (1848) *ibid*, vol 6, col 925. The prominent editor Charles Gavan Duffy was charged in Ireland on a number of occasions in 1848-49 under the Treason Felony Act for supporting the Young Ireland revolutionaries in his newspaper, *The Nation*, but the prosecutions failed: *R* v *Charles Gavan Duffy* (1848-49) *ibid*, vol 7, col 795.

27 The Treason Felony Act was widely used in Ireland to counter growing Fenian activity: by May 1866, 53 people had been charged in Dublin with Treason Felony, and a further 28 in Cork: PP 1866 (307) LVIII.517, No 15, 23. Legislation was also passed in February 1866 to allow detention without trial of those suspected of revolutionary activity (29 & 30 Vict c 1). By the end of November 1866, 752 had been detained under this legislation: HC Deb 3rd ser vol 185 col 733 21 February 1867.

28 *Mulcahy* v *The Queen* (1868) LR 3 HL 306, 317.

the state.[29] Such cases included that of Thomas Gallagher and others, convicted in 1883 for conspiring to bomb a number of public buildings as part of a campaign organised by some Irish-American groups.[30] Their campaign had never borne fruit, and the case turned on evidence of the preparations which had been made in setting up a bomb factory in Birmingham.[31] The Treason Felony Act was thus seen as suitable to deal with any plots to undermine the state by means of force.

While the 1848 Act was used for internal challenges to the authority of the state, the 1351 Act would be used over the next century in England only to prosecute traitors in times of war for levying war against the king or adhering to his enemies. Only a small number of cases were brought under the legislation, but two early twentieth century cases brought against Irishmen who had assisted the monarch's enemies abroad confirmed that the Act had an extraterritorial reach. The first case concerned Arthur Lynch, who went to South Africa in 1900 as a war correspondent for a French newspaper during the Anglo-Boer war. Soon after arriving in Pretoria, he swore allegiance to the Republic, and then led an Irish Brigade which fought on the Boer side in the war between March and May 1900. He also issued a call in the press for Irishmen to join him.[32] When the war turned against the Boers in mid-1900, he returned to Europe. In October 1901, he was nominated as a candidate for a by-election in Galway and was elected. Eight months later, he decided to return to Britain to take up his seat and was arrested for treason at Newhaven as he got off the boat from France.[33]

Charged under the 1351 Act, his defence was that the indictment did not disclose any offence. Focusing on the words of the statute which made it treason to be 'adherent to the King's enemies in his realm', it was argued that this meant either that the traitor had to be in the realm (even if the enemies were not) or that the enemies had to be in the realm (even if the traitor was not).[34] As for the words of the statute which made it treason to give 'aid and comfort' to the king's enemies 'in the realm or elsewhere', it was argued that this phrasing was meant to embrace situations where a traitor within the realm gave aid to an enemy abroad, as by transmitting information. The question of whether treasons committed outside the realm could be tried in England had been much

29 See also *R* v *Davitt and another* (1870) 11 Cox CC 676.

30 They were among the 21 Irish defendants were convicted between 1880 and 1885 of Treason Felony, for compassing to levy war or conspiring to alter the constitution by force. See PP 1884-85 (276) LXIV.273. This case was erroneously identified in *Rusbridger* as the last case brought under the Act: n 4 above at [51].

31 *R* v *Thomas Gallagher, Whitehead, Wilson, Ansburgh, Curtin and Bernard Gallagher* (1883) 15 Cox CC 291. See also *R* v *Deasy and others* (1883) 15 Cox CC 334.

32 For details, see 'Colonel Lynch at Bow Street' *The Times* 16 June 1902, 5. The proceedings in the prosecution against him are in T[he] N[ational] A[rchives] DPP 4/36.

33 '"Colonel" Lynch at Bow Street' *The Times* 12 June 1902, 4.

34 TNA DPP 4/36, p 107.

debated in early modern law[35] and some authorities[36] seemed to cast doubt on Lynch's counsel Horace Avory's attempt at a very strict construction of the 1351 Act. His argument did not convince Chief Justice Alverstone, who was clear that while the 1351 statute only made it an offence for a subject to levy war against the king in his own realm, it was treason for him to adhere to the king's enemies or aid them 'elsewhere'.[37] Lynch was convicted and sentenced to death, though the penalty was later commuted to a life sentence and he was pardoned in 1907. The case showed that the clauses of the 1351 Act relating to adhering to the king's enemies had an extraterritorial reach, so that anyone accused of these offences could be tried in England for them. This view was confirmed in the first world war case of Sir Roger Casement, who was tried for treason for activities undertaken in Germany.[38] Now on the bench, Justice Avory, who had argued so strongly for the counter view in Lynch's case, held that it was clearly treason for a British subject to adhere to the king's enemies abroad.[39] Casement was executed a week after the trial.

THE 'COMMON LAW' EMPIRE

The arguments in *Lynch* and *Casement* raised a question which had been discussed previously elsewhere in the British empire: did the same law apply to king's subjects wherever they lived, or were there local variations? The reach of the 1351 statute was discussed in the 1790s in two cases from Ireland and Canada. In 1798, Henry and John Sheares, members of the United Irishmen, were charged with compassing the death of the king by conspiring to stir up rebellion in Ireland to depose the king and overturn the government of the

35 William Hawkins noted the doubts which existed before the passing of the statute 35 Hen VIII c 2 about where 'treason done out of the Realm was to be tried' but thought 'it cannot reasonably be doubted, but that it as triable some Way or other, for it cannot be imagined that an Offence of such dangerous Consequence, and expressly within the Purview of 25 Ed. 3 should be wholly dispunishable': *A Treatise of Pleas of the Crown*, 4th ed, 2 vols. (London: E. Richardson and C. Lintot, 1762), vol 2, p 222. Hale and Foster held that the procedure introduced in this statute remained in force for treasons committed overseas: Hale, n 10 above, vol 1, 169; Foster, n 10 above, 238. Counsel for Lynch argued that this legislation only allowed for trials in England of acts committed overseas which constituted treason (such as compassing and imagining the king's death), but not those which were not treason (such as levying war outside the realm).

36 Lawyers for the crown identified the case of William Connell in 1812, a Prisoner of War in Mauritius, who joined the French army there and was later executed for treason. A copy of the record is in TNA DPP 4/36, f 296 (See also Andrew Knapp and William Baldwin, *The Newgate Calendar*, vol 4 (London: J. Robins & Co, 1828), p 62: case of 'William Cundell and John Smith executed for High Treason'). They also cited case law and statute which suggested a person could be prosecuted for treasons committed at sea (*R* v *Thomas Vaughan* (1696) Howell, n 10 above, vol 13, at cols 525-6 and 18 Geo II c 31) as well as an opinion of Hale's in Hale, n 10 above, vol 1, 167.

37 See also the report in *The King* v *Lynch* [1903] 1 KB 444.

38 In Lynch's case, most of the legal argument centred on his unsuccessful claim that as a naturalised burgher of the Republic, he owed no allegiance to the British crown. Although a mass of materials was gathered relating to the extraterritorial reach of the act, this went largely unreported, and the arguments were rehearsed in Casement's case.

39 *The King* v *Casement* [1917] 1 KB 98.

country by force.[40] The 1351 Act applied in Ireland by virtue of Poyning's Law of 1494, which introduced all existing English law for the public weal to that island.[41] However, questions remained over its application. Following Erskine's example, their counsel, George Ponsonby, argued that they had to be shown to have intended the king's physical death. Ponsonby conceded that it was possible to argue for constructive treason in England, since an attempt to force the king to change his measures *might* lead to his death there; but he argued that there could be no presumption of the king's own life being in danger as a result of rebellious activities in Ireland, since he had never physically been to Ireland.[42] The argument failed to convince Lord Carleton, who reiterated the view of constructive treason which Eyre had set out in the case of the London Corresponding Society leaders and rejected the idea that the king's non-residence in Ireland made any difference.[43]

A similar argument was attempted in the first North American treason trial, that of David McLane. He was tried in 1797 in Quebec City, charged under the 1351 Act both with compassing and imagining the death of the king and with adhering to the king's enemies. There was plenty of evidence to convict him on the second count. However, the question of whether he could be convicted for a constructive compassing of the king's death in Canada was raised in a motion in arrest of judgment, when George Pyke argued that the 1351 statute was a local one, limited to the realm of England. This argument was rejected by Osgoode CJ who held that English criminal law applied in this province by virtue of the Quebec Act of 1774.[44] He also held that the offence of compassing the death of the king was not confined to plots hatched in England. In both of these cases, colonial judges accepted the 'constructive' view of treason, that '[t]he king is partly a natural, partly a political character … and [that] to aim at the destruction of the one, or of the other, constitutes the crime of high treason.'[45] If the doctrine of 'constructive' treason was of diminishing importance at the metropole after 1795, it remained essential in the colonies.

40 *R* v *Henry and John Sheares* (1798) in Howell, n 10 above, vol 27, col 255. They were also charged with adhering to the king's enemies: this was a weak charge, since the charges centred on simply their activities in joining the United Irishmen, and there was no evidence of direct contact with the French.

41 10 Hen VII c 10 (Ireland).

42 Howell, n 10 above, vol 27, col 330. cf Plunkett's argument, *ibid*, col 342.

43 Howell, *ibid*, vol 27, cols 386–7. As late as 1849, Irish defendants would also argue that charges of levying war against the king could not be brought for actions done in Ireland, on the ground that the 'realm' mentioned in the Act was England: *William Smith O'Brien* v *The Queen* (1848-49) 3 Cox CC 360, Macdonell and Wallis (eds), n 17 above, vol 7, col 1.

44 14 Geo III c 83. For good measure, he also invoked a rule that in conquered civilised polities, English criminal law applied at once, even if the local civil law stayed in place until altered by the conqueror.

45 Howell, n 10 above, vol 26, cols 750-751 (the words of Attorney-General Sewell). A more controversial aspect of the case was the finding that McLane – an American citizen – owed allegiance to the British crown and so was liable to the treason laws. He was charged both as owing the allegiance of a subject and as owing local allegiance: but since he only visited Canada briefly while plotting to support a French invasion, it was open to doubt how far he owed any local allegiance. See further Jeremy Ravi Mumford, 'Why Was Louis Riel, a United States Citizen, Hanged as a Canadian Traitor in 1885?' (2007) 88 *Canadian Historical Review* 237.

In the mid-nineteenth century, British colonial administrators were increasingly keen to develop a consistent law of treason in the empire. However, it was not always clear how much of English law applied in the colonies. In colonies settled by the king's subjects, it was often assumed that the English law of treason had been carried with them. When asked in 1779 how persons accused of treason were to be prosecuted in New Hampshire (whose local provision against treason had been disallowed by Whitehall in 1718), the Law Officers, Edward Thurlow and Alexander Wedderburn, advised that 'it requires no Act of a provincial Legislature to constitute the offence of High Treason in any of His Majesty's Plantations'.[46] In conquered colonies, such as those acquired at the end of the Seven Years War, the king introduced English law by proclamation, while providing for local legislatures to be created to make laws 'as near as may be agreeable to the laws of England.'[47] Although such proclamations said nothing specific on treason, it was assumed that the English law of treason was the underlying law. For instance, in Grenada, the first local act dealing with traitors, passed in the aftermath of the Fedon Rebellion of 1795,[48] did not define treason but attainted 'certain persons named therein of High Treason, unless they shall render themselves and submit to justice', and set up a court to hear the cases of those who surrendered.[49]

Many colonies had no specific statute importing the English law of treason, but simply assumed that it applied. This can be seen from the responses to a circular letter sent to the governors of West Indian colonies in 1837, which asked (among other questions) how the local law of treason differed from that of England.[50] Law officers from numerous islands responded that there were no colonial laws in place for treason, but that it was 'cognizable under the common law, and such statutes as were in force at the time of the original settlement of this island'.[51] In some places, local legislation supplemented an originally applicable English law. In Jamaica, conquered in 1655, English law applied in general by virtue of the first royal commission to the Governor and a confirming

46 Opinion of 14 April 1775, in TNA DPP 4/36, f 148.

47 Proclamation of 7 October 1763, in *The Laws of Grenada and the Grenadines from the Year 1766 to the Year 1785* (London: George Phipps, 1875) 3-4; cf Proclamation of 10 January 1784, *ibid*, 10.

48 On the rebellion, see Edward L. Cox, 'Fedon's Rebellion 1795-96: Causes and Consequences' (1982) 67 *Journal of Negro History* 1, 7-19; Kit Candlin, 'The role of the enslaved in the "Fedon Rebellion" of 1795' (2018) 34 *Slavery & Abolition* 685. Peter Rushton and Gwenda Morgan, *Treason and Rebellion in the British Atlantic, 1685-1800: legal responses to threatening the state* (London: Bloomsbury, 2020) 207-210.

49 Act No 27, 1795 (Grenada). For the cases, see Court of Oyer and Terminer for Trial of Attained Traitors record book [1796], British Library, EAP295/2/6/1 at https://eap.bl.uk/archive-file/EAP295-2-6-1 [https://perma.cc/X6L2-EQFU].

50 Circular Dispatch 6 November 1837, PP 1837-38 (154-1) XLIX.1, 3, 5.

51 Response of the Solicitor General for Antigua, Robert Horsford, 'Papers relative to W. Indies: Part III. Leeward Islands,' PP 1839 (107-V) XXXVII.1, Enc in No 10, 13. See also responses from Nevis (*ibid*, 24-25) and Tortola (*ibid*, 27). cf the position in the Channel Islands, where it was assumed that English law applied, though there was no specific provision for it: see PP 1847-48 (945) XXVII.215, qq 6220-6222, 277 (Guernsey), PP 1847 (865) XV.101, xlviii (Jersey).

statute of 1728,[52] though no specific mention was made of treason.[53] However, in 1823, the island introduced an act 'for the more effectual punishment of treason, treasonable conspiracies and seditious meetings.'[54] The first section made it treason to plot to levy war or excite insurrection 'against the government of this island' to force the governor, council or assembly to consent to 'alter or change the constitution of this island'. Subsequent clauses gave the authorities the power to disperse seditious meetings and to punish those who excited others to rebellious acts or administered seditious oaths. Although 'of [an] unusual nature', the Governor regarded the Act to be 'very necessary'.[55] In August 1823, a major slave rebellion had broken out in Demerara, which was thought to have been instigated by an evangelical missionary,[56] and there were fears that Jamaica would face a similar uprising.[57] Although it was clearly modelled on the English legislation of 1795,[58] when the Colonial Office considered the legislation in 1837, both Kingston and London agreed that it was 'more extensive in its operations than the British acts'.[59] The Secretary of State, Lord Glenelg, who thought the act a temporary one, indicated that the first section 'would require to be brought into a nearer conformity with the law of England, before the renewal of it could be sanctioned.'[60] In fact, only the provisions relating to seditious meetings were temporary,[61] and the act remained in place.[62]

A desire to ensure a consistent law of treason across the region was also seen in the Colonial Office's keenness for colonies which had been conquered from other European powers, in which other legal systems remained in place, to reform their laws of treason to echo that of the imperial power. These included British Guiana, acquired from the Dutch at the end of the Napoleonic Wars,

52 Charles II's commission to the Governor at the Restoration was to use such 'just and reasonable' customs as were exercised in other colonies and were not repugnant to the laws of England, 'Case of the Constitution of the Island of Jamaica' (1678), Howell, n 10 above, vol 6, cols 1350-1352. An Act of 1728 declared all statutes of England 'as have been at any time esteemed, introduced, used, accepted or received as laws in the island' to be in force. 'First report of the commissioners of enquiry into the administration of criminal and civil justice in the West Indies', PP 1826-27 (559) XXIV.285, 10.

53 The only specific legislation introduced was an act of 1681 which made it treason to counterfeit the royal seal of the island: 33 Car II c 16 (Jamaica).

54 4 Geo IV c 13 (Jamaica).

55 Manchester to Bathurst, 24 December 1823, TNA CO 137/154, f 491.

56 Emilia Viotti da Costa, *Crowns of Glory, Tears of Blood: The Demerara Slave Rebellion of 1823* (New York, NY: OUP, 1994) 215-217, 290-291.

57 The legislation was aimed at dealing with free people who might instigate rebellion, rather than slaves, who could be punished under slave laws which provided for the punishment (by death) of slaves engaged in rebellious conspiracies: 17 Geo III, c 25 s 46 (Jamaica). In 1824, this legislation was used to prosecute (and execute) many slaves accused of rebellious conspiracy: see PP 1825 (66) XXV.1.

58 The Seditious Meetings Act, 36 Geo III c 8 regulated public meetings.

59 The Attorney General's answers to queries in the circular Despatch of 15 November 1837, dated 17 May 1838: TNA CO 137/228, f 95. For the Colonial Office's questions, see PP 1837-38 (154-1) XLIX.1, 3, 5.

60 Glenelg to Smith, 15 September 1838, PP 1839 (107-1) XXXV.143, enc in (H), 22.

61 They were rendered permanent in 1836: PP 1837 (521) LIII.1, Appx No 185, 598.

62 See James Minot, *Digest of the Laws of Jamaica* (Kingston, Jamaica: M. De Cordova & Co, 1865) 736. In the aftermath of the 1865 Jamaica rebellion, George William Gordon was arrested for treason and sedition, but tried by a martial law court: see R. W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: OUP, 2005).

which introduced the English law of treason in 1846,[63] and St Lucia, acquired at the same time from the French, where similar legislation was passed in 1851.[64] By the mid-nineteenth century, the English law of treason thus appeared to have an imperial reach, with the 1351 Act being used to prosecute rebellious indigenous subjects for levying war against the Queen as far afield as Ceylon[65] and New Zealand.[66] Further steps were taken in the second half of the century to ensure that colonies followed English law. In December 1867, in the aftermath of the Jamaica rebellion, the Colonial Secretary, Lord Buckingham, sent a circular letter to colonial governors asking them to pass legislation on the lines of the 1848 Act.[67] The legislation was implemented rapidly in most West Indian Colonies,[68] as well as in Canada,[69] Australia,[70] New Zealand[71] and Natal.[72]

However, the application of this law could differ according to context. This can be seen by contrasting the approach taken in the first case prosecuted for Treason Felony in British Honduras in 1882 with that taken in England and Ireland in the same decade.[73] The case was that of Manuel Jesús Castillo, a wealthy timber logger of Spanish descent who lived on the frontier between British Honduras and Yucatan.[74] Castillo and three others were charged with conspiracy to raise an insurrection and to incite foreigners to invade the colony.

63 Ordinance 20 of 1846, *The Laws of British Guiana* (Demerara: L. M'Dermott, 1870) vol 1, 567. This was part of a general introduction of English criminal law.

64 Law of 17 January 1851, *Laws at Present in Force in the Island of St. Lucia* (London: W. Clowes and Son, 1853) 253, which imposed a death penalty for compassing, imagining, devising or intending anything which was treason by the law of England. For the continued applicability of the French law relating to treason beforehand, see PP 1850 (69) XXXVI, 1 Enc 2 in No 14, 14.

65 See *Trial of the Kandyan State Prisoners* (Colombo: Government Press, 1835) in TNA CO 54/137, 84.

66 In 1869, Maori who had taken part in Te Kooti's War were charged with treason, after the government satisfied itself that they were subjects. See Justice Johnston's detailed explanation of the English law to a Grand Jury in Wellington. PP 1870 (c. 83) L.1, enc 1 in No 27, 106. For the cases, see *Turanga Tangata Turanga Whenua, vol II, The Report on the Turanganui a Kiwa Claims* (Waitangi Tribunal Report 2004) 610-626 at https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68185126/Wai814(2).pdf [https://perma.cc/8EHK-KY2A].

67 Circular despatch, 11 December 1867: CO 854/8, f 631. Buckingham's attention had been drawn to this matter by 'recent circumstances', which may have been the Jamaican rebellion of 1865. This had been dealt with under martial law, and earlier in 1867, the Colonial Office had drawn up a Circular Dispatch on how all governors in colonies without responsible government should administer martial law.

68 For Grenada, see TNA CO 101/129, ff 32, 34; for Jamaica and the Bahamas, see PP 1871 (c. 334) XLVII.1, 10, 52; for Tobago and Antigua see PP 1870 (c. 85) XLIX.1, 65, 78. St Lucia did not pass legislation, considering its Act of 1851 sufficient. However, an ordinance of 1880 affirmed that its law of treason followed that of England: TNA CO 321/38, ff 220 et seq.

69 31 Vict c 69 (Canada).

70 31 Vic No 25 (New South Wales), 32 Vic No 2 (South Australia). For critical comment, see *The Freeman's Journal* (Sydney) 7 March 1868, 8.

71 The Treason Felony Act 1868, 32 Vic No 5 (New Zealand), discussed in Justice Johnson's charge to the Grand Jury in Wellington in September 1861, in PP 1870 (c. 83) L.1, 106.

72 Law No 3 of 1868 (Natal).

73 In this colony, both the 1351 statute and the 1848 statute were treated as imperial statutes which applied in the colony, and the charges were brought under the British Treason Felony Act. For the applicability of the English acts, see *Consolidated Laws of the Colony of British Honduras* (London: Waterlow and Sons, 1887).

74 *A Full and Particular Account of the Trial of Manuel Jesus Castillo, Jose Santos Lopez, and Jose Maria Sevilla for Treason-Felony* (Belize, British Honduras: Colonial Press Association, 1882) 1 (TNA

The overt acts with which they were charged included publishing and distributing copies of treaties between Britain and Spain to induce the belief that part of the colony was the property of Mexico, as well as drafting a letter from an Icaiche Maya leader threatening to raise the Mexican flag. The treaties were said to have been distributed 'with the express and avowed object that every Yucatecan who was ignorant of them would be made acquainted with them' and that the resulting belief that the territory was Mexican would lead them to revolt. In his summing up, Chief Justice Musgrave told the jury that even if the treaties showed that the territory in question was Mexican, it would be an offence to publicise this with the intention charged. The jury took ten minutes to convict the men, who were sentenced to terms of imprisonment between seven and ten years.[75] Castillo's conviction showed the elasticity of the charge of Treason Felony at the margins of empire, where a conspiracy to depose the crown might be inferred from weak evidence.

There was also a second difference in the colonial experience. While the substantive law enacted in 1351 might extend throughout the empire, the procedural protections enshrined in English legislation such as the 1696 Treason Trials Act did not.[76] This can be seen from the Irish High Treason case of William Smith O'Brien and others, decided in the Irish Queen's Bench at the start of 1849. O'Brien, leader of the Young Irelanders' Irish Confederation, was convicted under the 1351 Act of levying war against the Queen as a result of a rebellious outbreak in Tipperary. After he was sentenced to death, he brought a writ of error, one of the grounds of which was that he had not been given a copy of the indictment and a list of witnesses ten days before trial, as was required by the 1696 Act.[77] His challenge failed, when Blackburne CJ held that the protection given to English defendants by late seventeenth and early eighteenth century statutes did not apply in Ireland, either by virtue of the 1817 Act or the 1848 one.[78]

The fact that those accused of treason might be tried under very different procedures from those used in the metropole was confirmed by the highest imperial court after the 1885 Canadian trial of the *Métis* leader Louis Riel for his leading role in the North West Rebellion.[79] Charged under the 1351

CO 123/168). For the Attorney-General's report, see the letter of William Henry Dillet to Lt-Govr Frederick P. Barlee, 17 July 1882, TNA CO 123/168/780.

75 Although the Colonial Secretary, Kimberley, thought the sentences 'very severe', the authorities in Belize strongly resisted any mitigation. TNA CO 123/167/13082. He was released in August 1883: Rajeshwari Dutt, 'Loyal Subjects at Empire's Edge: Hispanics in the Vision of a Belizean Colonial Nation, 1882-1898' (2019) 99 *Hispanic American Historical Review* 31, 42.

76 7 Wm III c 3.

77 He also argued (as others had previously attempted) that levying war against the crown in Ireland was no offence under the 1381 Act: *William Smith O'Brien* v *The Queen* n 43 above.

78 Poyning's Act, which introduced English law into Ireland, had not given the English parliament any power to make law for Ireland in future. Ireland therefore had passed its own statute, albeit one with less protection: 5 Geo III c 21 (Ireland). As Blackburne noted, legislation in 1821 (1 & 2 Geo IV c. 24) had specifically extended parts – but not all – of the 1696 Treason Trials Act to Ireland.

79 This also occurred in other parts of the empire. 79 Maori accused of treason for their part in Te Kooti's War were convicted under the procedures provided by the Disturbed Districts Act 1869. The legislation can be found in 'Further papers relative to the affairs of New Zealand' PP 1870 (c 83) L.1, enc 3 in No 28, 111.

Act for levying war after his defeat at the Battle of Batoche,[80] he was tried under the provisions of the (Canadian) North West Territories Act of 1880, which gave criminal jurisdiction to stipendiary magistrates sitting with a jury of six. Riel's lawyers objected at the trial to a capital offence being tried under these provisions, and after his conviction appealed first to the Queen's Bench in Manitoba and then to the Privy Council. Riel's lawyers argued that the crown had no power to try him under the provisions of the North West Territories Act.[81] They claimed that the Canadian parliament only had a delegated power, which 'cannot be exercised to deprive the people there of rights secured to them as British subjects by Magna Charta, or in any way alter these old statutes to their prejudice'.[82] It was argued that treason was an imperial matter and that the Canadian legislature could not pass laws inconsistent with the imperial law. The argument cut little ice with the court in Manitoba, which traced the power of the Canadian parliament to make laws for the peace, order and good governance of the territory in question from imperial legislation,[83] while also rejecting the larger constitutional arguments broached by Riel's lawyers.[84] Given the line of statutory authority from Westminster via Ottawa, there seemed no room for any argument that the local law relating to procedure was *ultra vires*.

Delivering the judgment of the Privy Council, which endorsed the lower court's view of the powers of the Canadian parliament, Lord Halsbury made a significant observation. He noted that the statute empowering this Canadian legislation used 'words under which the widest departure from criminal procedure as it is known and practised in this country have been authorized in Her Majesty's Indian empire.'[85] Drawing attention to India was intended to demonstrate that the same imperial parliament which was often so keen to introduce English criminal evidence and procedure into its colonies – because of the very protection it gave to criminal defendants – was also content to give local legislatures plenary powers to depart from the metropolitan model. Halsbury's choice of India as an example was particularly significant, since in this jurisdiction, it was not only the procedural law which departed from the metropolitan model. Indian legislation dealing with treasonable offences was also distinct in its substance from that found in those parts discussed of the empire so far. However, as shall now be seen, the Indian law dealing with such offences was not *sui generis* but developed from a repurposing of English ideas in a colonial context.

80 *The Queen vs Louis Riel, accused and convicted of the crime of High Treason* (Ottawa: Queen's Printer, 1886). The overt acts related to the three battles at Duck River, Fish Creek, Batoche, and he was charged owing both the permanent allegiance of a subject, and the local allegiance of a resident.

81 43 Vic. c 25, s 76 (Canada).

82 *The Queen vs Louis Riel* n 80 above, 183.

83 *ibid*, 179.

84 The court rejected arguments drawn from an analogy with American constitutional law, that the legislature only had the powers delegated by the sovereign people, with the people retaining powers not so delegated. As Taylor J explained, 'To the extent of the powers conferred upon it, the Dominion Parliament exercises not delegated but plenary powers of legislation': *ibid*, 184. cf *ibid*, 197 per Killam J.

85 *Riel* v *The Queen* (1885) 10 App Cas 675, 678.

INDIA

In the jurisdictions discussed so far, an argument could be made that there was a common substantive law of treason in the empire, while there could be variations in the procedures used in trials according to changes made by local legislation. But in India, matters were much more complicated, given the nature of British jurisdiction there. India was not a conquered or settled colony. Until 1858, British rule was administered by the East India Company, whose initial right to govern derived not from His Majesty's government, but from the grant given by the Mughal Emperor Shah Alam II in 1765 of the *diwani*, or right to collect taxes in Bengal, Bihar and Orissa. As a result of this grant, the company obtained jurisdiction over civil matters connected with these rights. However, criminal matters remained under the jurisdiction of Indian officials applying Islamic criminal law. In 1774, a Supreme Court was established in Calcutta with criminal jurisdiction over British subjects (and their employees) in Bengal, Bihar and Orissa, as well as over anyone resident in Calcutta.[86] British subjects who owed allegiance to the crown might therefore be liable to be tried for treason under English law in this court, but the court had no such jurisdiction over Indians in the *mofussil*.[87]

The likelihood of British subjects plotting the King's death in Calcutta was small indeed. A bigger concern was how to deal with Indians who might take up arms against the Company. The problem was revealed by the case of Shams-ud-Daulah and Mirza Jaun Tuppish, who were accused of treasonable correspondence with a number of hostile Indian princes and zemindars and of plotting an uprising against British rule. They were convicted in a special court at Calcutta in August 1799 of 'treason against the state'.[88] In accordance with Islamic practice, both men were sentenced to be held in close confinement 'until the Governor General in Council upon being satisfied by the sincere repentance of the prisoner shall grant the necessary authority for his release'.[89] The fact that Islamic law provided no exemplary punishment for rebels troubled Governor General Richard Wellesley, who considered the sentence imposed on these men 'altogether disproportionate to the Crimes of which they had been convicted'. He therefore asked for a regulation to be drafted 'for the Trial of Persons charged with Crimes against the State framed in conformity to the principles of the English Law of Treason, as far as that Law might appear to be applicable to the circumstances of the British Government in India.'[90]

Although a measure was prepared, it was not enacted. Instead offences against the state in Bengal would be dealt with by legislation granting the government

86 Thomas M. Curley, *Sir Robert Chambers: Law, Literature and Empire in the Age of Johnson* (Madison, WI: University of Wisconsin Press, 1998) 187.
87 13 Geo III c 63 ss 13-15 (Regulating Act).
88 The procedure used was provided for by Regulation IV of 1799.
89 Extract from proceedings of Nizamut Adawlut 25 Feb 1800, B[ritish] L[ibrary] IOR/F/4/128/2371, 2. See also Aniruddha Ray, *The Rebel Nawab of Oudh: Revolt of Vizir Ali Khan: 1799* (Calcutta and New Delhi: K.P. Bagchi, 1990) 283. For the Islamic practice, see John Herbert Harington, *An Analysis of the Laws and Regulations enacted by the Governor General in Council at Fort William in Bengal* (London: A. J. Valpy, 1821) vol 1, 293-294.
90 Extract of secret letter from Bengal dated 27 February 1802, BL IOR/F/4/128/2371, 49. See also Harington, *ibid*, 294n.

exceptional powers. Regulation X of 1804, the 'Bengal States Offences Regulation', empowered the government to declare martial law in any area where people took up arms or aided the enemy and to 'direct the immediate trial, by courts martial, of all persons owing allegiance to the British Government, either in consequence of their having been born, or of their being resident, within its territories, and under its protection'.[91] Regulation III of 1818 provided for the detention for 'reasons of state' of 'individuals against whom there may not be sufficient ground to institute any judicial proceeding'.[92] In contrast to Bengal, Bombay did make provision for offences against the state when in 1827, it passed Regulation XIV to define crimes and punishments within the Presidency. Section XII made it treason to raise 'armed men for the purpose of making war against any of the British Governments in India or the adjacent countries'. The definition of treason also embraced those who assisted foreign enemies or rebels and those 'guilty of any act for the subversion of any of the said Governments or the forcible dismemberment of its territories'.[93] The accompanying Regulation XI also defined who was subject to this jurisdiction, which went much further than natural born subjects of the crown of England. Such legislation did not speak the language of allegiance to the crown, nor of the need to protect the body of a person who was not, after all, monarch in India. It was a definition of political crime tailor-made for Indian conditions, and which had little to do with the English law.

The subject was revisited in the 1830s by Macaulay's Indian Law Commission, which was set up under the Charter Act of 1833. This Act also appointed a Governor General and Council which was given the power to legislate for India, with one significant limitation: it was not authorised to pass any law which would interfere with the laws of the United Kingdom relating to allegiance to the crown.[94] With this in mind, when Macaulay came to draft a penal code for India, and considered how to deal with offences against the state, he concluded that the Indian legislature had no power to legislate for offences against any power but the government of India, since any attempt to define the crime of treason or any punishment for it more broadly would stray into this forbidden territory. Macaulay realised his draft code left gaps in the law. He doubted whether the 1351 statute bound 'a native of India in the mofussil', though he thought 'it would be absurd to deny that the natives of British India are now subjects of his Majesty.'[95] He therefore recommended imperial legislation to extend the English law of treason to India, since he thought it was not unlikely that 'persons residing in the territories of the East India Company may be parties to the levying of war against the British Crown, without violating any local regulation.'[96]

91 On the measure, see Troy Downs, 'Bengal Regulation 10 of 1804 and Martial Law in British Colonial India' (2022) 40 *Law and History Review* 1.
92 PP 1821 (59) XVIII.107, 7.
93 PP 1821 (201) XXIII.195, 193.
94 3 & 4 Wm IV c 85 s 43.
95 *A Penal Code Prepared by the Indian Law Commissioners* (Calcutta: G.H. Huttmann, 1837) Note (C), 23.
96 *ibid*, Note (C), 24. In 1848, the Indian Law Commissioners repeated the argument that the imperial parliament should legislate for treason in India, now commenting that '[w]e conceive

Macaulay's draft itself sought to adapt the English law to Indian conditions. It included a provision that whoever 'wages war against the Government of any part of the territories of the East India Company, or attempts to wage such war, or by instigation, conspiracy, or aid previously abets the waging of such war, shall be punished with death.'[97] This in effect embraced both the notion of 'levying war' found in the 1351 English Act and that of conspiracy to do so, found in the 1795 Act. A further provision, parallel to the 'political' treasons defined by the 1795 statute in England, made it an offence (punishable by a seven year prison term) to overawe or restrain members of the government in the exercise of their lawful powers, or to attempt to do so. As the Indian Law Commissioners made clear in a second report in 1848, this formulation was intended to reflect contemporary metropolitan ideas (such as those found in the recent reports of the English criminal law commissioners) aimed at reining in the scope for constructive treasons.[98]

The code had not been passed by the time the 1857 Indian rebellion broke out. In dealing with the rebels, the British authorities relied on martial law courts created by legislation passed in the aftermath of the revolt, which built on earlier legislation such as Bengal's Regulation X of 1804. Perhaps the most important of these trials was that of the last Mughal emperor, Bahadur Shah II. Although in theory the titular sovereign from whom the East India Company's powers derived, he was described in the charge sheet variously as a 'Pensioner of the British Government', a 'subject of the British Government in India' and a 'false traitor against the State'. He was charged before a military commission with declaring himself 'the reigning King and Sovereign of India', and with conspiring to levy war and insurrection 'against the State' with the intent of 'overthrowing and destroying the British Government in India.'[99] The first three charges did not specify under which law they were laid, but they clearly referred to offences defined in Act XI of 1857, 'An Act for the prevention, trial, and punishment of offences against the State', which was passed soon after the rebellion broke out. In its first section, which echoed Macaulay's draft, the Act provided for the punishment of 'persons owing allegiance to the British Government who … shall rebel or wage war against the Queen or the Government of the East India Company', as well as those who attempted or conspired to do so, or who instigated or abetted any rebellion. Subsequent sections, which echoed Bengal's Regulation X, allowed for trials to be conducted by commission in any area proclaimed to be in a state of rebellion. Act XIV passed one week later further provided for offences under this Act to be dealt with by martial law courts. The final charge of the four laid against him – which charged him as an accessory to murder – explicitly mentioned Act XVI of 1857, an Act 'to make temporary provision for the trial and punishment of heinous offences

that offences of a treasonable nature committed against the Govt of India, must, in contemplation of law, be considered as offences against the Crown.' PP 1847-48 (330) XXVIII.117, 8.

97 n 95 above, ch 5, s 109.

98 PP 1847-48 (330) XXVIII.117, 4.

99 'Proceedings on the Trial of Muhammad Bahadur Shah, titular King of Delhi before a Military Commission upon a Charge of Rebellion, Treason and Murder held at Delhi on the 27th day of January 1858, and following days' PP 1859 (session 1) (162) XVIII.111, 8.

in certain districts'. This Act allowed for the trial under a martial law court or commission of anyone who was not 'a natural-born subject born in Europe' who had committed one of the heinous offences mentioned. These included not only murder (the subject of this charge) but 'all crimes committed with the intention of assisting those who are waging war against the State or forwarding their designs'.[100] The military tribunal which tried the 'ex-King of Delhi' (as he was described) thus owed its authority to exceptional emergency laws, and the charges against him were a mixture derived from recent permanent and temporary laws, which allowed the court to claim jurisdiction over a man whose very status – as a sovereign or a subject – remained open to contestation.

The Indian Penal Code was finally enacted in 1860, two years after company rule in India was replaced by the crown. Section 121 enacted that whoever waged war against the Queen or abetted the waging of war was punishable with death or transportation for life. That it was intended to have imperial reach – which the draft of 1837 did not have – was shown by one of the explanatory illustrations, which stated that a person in India who abetted a rebellion in Ceylon by sending weapons there would be guilty of the offence.[101] Unlike the 1837 draft, the code as passed did not include a provision relating to conspiracies to wage war (though section 122 did outlaw the collection of men and arms in preparation for war). Legislation in 1870 amended this by providing that anyone (whether within or without British India) who conspired either to wage war, or to deprive the Queen of the sovereignty of India, or to overawe the government by means of force committed an offence, liable to life transportation.[102] This provision was introduced by the Law Member of the Viceroy's Executive Council, J. F. Stephen. It was modelled on the British Treason Felony Act to fill a gap which Stephen feared might be filled by judges making the kind of constructive interpretations of the law which English judges had resorted to before 1795.[103]

When the Code was first implemented, commentators did not look to English law to guide their interpretation of the meaning of 'waging war' in section 121.[104] Like the Indian Law Commissioners, they thought that the phrase 'waging war' was unambiguous, and connoted the kind of hostile challenge which a foreign invading enemy would present. By the end of the century, however, by which time British rule in India was coming under pressure from a growing nationalist movement, some commentators began to look to English constructions to guide their interpretations.[105] In his 1896 treatise, John D. Mayne thought that the commissioners had failed to see an important distinction between international wars (to which a literal meaning of levying war might safely be applied) and 'social wars' (to which it could not). In his view, insurrections

100 Act XVI of 1857, s 2. These measures had been passed because of the government's doubts over how far Regulation X of 1804 extended; see Downs, n 91 above, 16–20.
101 Section 109 of the 1837 draft had only reached the abetting of war against any of the governments in India.
102 Section 121A, enacted by Act XXVII of 1870, s 4.
103 Hamilton, n 6 above, 128 note (b).
104 Walter Morgan and Arthur George MacPherson, *The Indian Penal Code* (Calcutta: G.C. Hay & Co, 1861) 100.
105 Hamilton, n 6 above, 123.

often began with a 'mere local disturbance' which then grew into a full rebellion. Mayne found the English notion of constructive levying of war helpful in distinguishing those riots which were treasonable from those which were not. As he saw it, the difference was to be traced in 'the object with which it is started':[106] if a riot broke out between Hindus and Muslims over the killing of cows, and the troops sent to quell the riot were resisted, this would not (he argued) constitute waging war; but if an insurrection was 'got up by leaders with the view of inducing the Hindu community to rise, and by violence or show of violence to coerce the Government of India into prohibiting the killing of cows', it would.[107] By applying the 'constructive' interpretation of the English offence of levying war to section 121 of the Code, Indian judges and jurists were able to argue that any violent gathering with an object of a public nature which struck against government authority constituted waging war. Although the 1351 Act would not be used in England to prosecute for subversive political offences in the nineteenth century, the equivalent legislation was used in India to such effect. In India, the moribund 'constructive treasons' came to life, so that those who took part in mob protests aiming at the subversion of British power – such as those who took part in the Khalifat movement at the end of the first world war – could be convicted of waging war.[108] Indian courts were also prepared to read section 121 as having an extraterritorial effect long before the English courts considered this point in *Lynch* and *Casement*.[109]

In nineteenth-century India, the British recast the law of treason for an imperial context. First developed in the 1830s before British India was under the formal rule of the crown, it sought to adapt English ideas of treason in a way which would protect a 'government', rather than a monarch. Although the 1860 Code substituted the 'Queen' for the government, the Code did not include any provisions derived from the 1351 statute to protect the person of the monarch. The old feudal ideas of allegiance to the king which underpinned the medieval statute were missing from this legislation. The Code sought to

106 John D. Mayne, *The Criminal Law of India* (Madras: Higginbotham & Co, 1896) 461-463.

107 *ibid*, 468-469. cf M. H. Starling and F. C. Constable, *Indian Criminal Law and Procedure* (London: W. H. Allen & Co, 3rd ed, 1877) 99: 'In order to support this charge, it is necessary to prove that which in law amounts to a waging of war, or an attempt to wage war, directly or constructively, against the Queen'.

108 In *Barindra Kumar Ghose* v *Emperor* (1910) ILR 37 Cal 467, 505 Jenkins J rejected the argument of the crown that the framers of the Code intended it to reproduce both the 1351 Act and the constructive interpretation placed on it by the cases: and he found that the acts committed by the defendants could not be held to be waging war under s 121. However, in 1921, the Madras High Court, citing the English precedents of *R* v *Gordon* and *R* v *Frost*, held that where 'the object of the mob was not merely resistance to the District Magistrate or to any isolated action, or for any particular purpose' but aimed at 'the total subversion of the British Power' and the establishment of a Khilafat Government, then this constituted waging war under the Code: *In re Kunhi Kadir* (1921) 42 *Madras Law Journal Reports* 108, 111. cf *Aung Hla and others* v *King-Emperor* (1931) 33 *Criminal Law Journal of India* 205, 206-208; *Manganlal Radhakishnan* v *Emperor* AIR (33) 1946 Nagpur 173, 186 and *Vasu Nair* v *State* AIR (42) 1955 Travancore-Cochin 33, 39.

109 In 1865, Maulvi Ahmadullah was convicted of 'traitorously furnishing supplies of men and money to fanatics at Sittana [outside of British India] engaged in warring against the Queen'. Judge W. Ainslie held 'that the term waging war includes war by a foreign foe.' Papers connected with the trial of Moulvie Ahmedoollah of Patna, and others, for conspiracy and treason [1864-65] BL IOR/V/23/102, No 42, 58.

criminalise acts designed to endanger the state without worrying about such concepts as allegiance or loyalty. On occasion, Indian defendants sought to invoke the notion of allegiance to secure procedural protections when held for offences against the state, but without success. Amir Khan, when challenging his detention under Regulation III, and Barindra Kumar Ghosh, when challenging his trial without a jury in 1909, both invoked legislation which forbad the Governor-General in Council from making any laws which repealed 'any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom.'[110] Their argument was that as allegiance and protection were reciprocally due from sovereign and subject, any attempt by the sovereign to take away the protection he gave – as by removing a right to jury trial – 'at the same time relaxes the duty of the subject to observe allegiance towards his Sovereign, and is, therefore, *ultra vires*'.[111] The argument got nowhere in either case. As Justice Markby put it in Amir Khan's case, 'the notion of reciprocity … upon which this argument depends, is one which is wholly inadmissible in any legal consideration'.[112]

As in other parts of the empire, the notion that Indian defendants should have the same rights as English treason trialists made little headway. Five years after a number of men were prosecuted in Ambala and Patna under section 121 of the Indian Penal Code for being part of a Wahhabi Muslim conspiracy to raise a *jihad* against British rule,[113] another alleged co-conspirator was brought to trial at Dinapore. His counsel claimed that the law of treason applied in India, and that under Treason Trials Act of 1696, all charges had to be brought within three years of the offence. The argument was brushed away by Justice Norman, making the simple point that Amiruddin was charged not with treason per se but with offences against the Indian Penal Code.[114]

India's example of codifying its criminal law was followed in other colonies.[115] The criminal code drafted for England in 1878 by J. F. Stephen, who had been Law Member in India, failed to make it onto the English statute book, but it was adopted in a number of settler colonies. The bill based on Stephen's draft sought to codify the existing law, and so explicitly protected the persons of the sovereign, his spouse and heir in a way not done in the Indian Penal

110 Amir Khan's argument invoked the 1833 Charter Act (since the 1858 legislation under which he was held was passed under powers regulated by the Charter Act), while Ghosh's invoked the Indian Councils Act 1861 (24 & 25 Vict c 67 s 22).

111 *Barindra Kumar Ghose* v *Emperor* n 108 above, 515 per Carnduff J. Both Carnduff and Jenkins J held that a similar argument (challenging the Criminal Law Amendment Act of 1908) had not succeeded in the unreported case *King-Emperor* v *Kartik Chandra Dutt and Others*.

112 *In the matter of Ameer Khan* (1870) 6 *Bengal Law Reports* 459, 482–483.

113 See Julie Stephens, 'The Phantom Wahhabi: Liberalism and the Muslim fanatic in mid-Victorian India' (2013) 41 *Modern Asian Studies* 22 and Peter Robb, 'The impact of British rule on religious community: reflections on the trial of Maulvi Adhamdullah of Patna in 1865' in Peter Robb (ed), *Society and Ideology: Essays in South Asian History presented to Professor K. A. Ballhatchet* (Delhi: OUP, 1993) 142.

114 *Queen* v *Amiruddin* (1871) 7 *Bengal Law Reports* 63, 69. He also rejected the idea that the English law of treason had applied in India.

115 A code largely modelled on the Indian Penal Code was introduced in Ceylon in 1883 in Ordinance No 2.

Code, though it omitted the provision protecting the chastity of his daughter.[116] These provisions were enacted in 1892 in the Canadian Criminal Code, which codified English treason law in its traditional form.[117] The same formulation was followed by Queensland in its code of 1899[118] and New Zealand in its criminal law consolidation of 1908.[119] The person of the monarch remained central to the conception of treason in these settler colonies, even though the life of monarch herself was just as unlikely be threatened in these distant colonies as in India.[120]

SOUTH AFRICA

In the areas discussed so far, the applicable law of treason was either English law, or a local variant in some way modelled on it. However, in the conflict which saw by far the largest number of treason trials, the Anglo-Boer War of 1899-1902, the law which was applied was a local law, which differed in significant ways from English law. The law of the Cape colony and neighbouring Natal was the Roman-Dutch law which applied at the Cape before it was acquired by the crown during the Napoleonic wars. In the Cape, Roman-Dutch law was the common law by virtue of the fact that it was never replaced. In Natal, it rested on statutory foundations.[121]

Although doubts had been raised in a treason trial in the Cape in the middle of the nineteenth century whether the law of treason in a colony could differ from that at the metropole,[122] by 1868 it was clear that the local authorities in South Africa saw the Roman law of treason – in particular the *crimen perduellionis* – as the basis of their law. This can be seen from the wording of Natal Law of 1868, implementing the 1848 British Treason-Felony Act. Where the original act contained a saving clause stating that nothing in it should affect the working of the 1351 statute, the Natal version preserved the Roman-Dutch *crimen perduellionis* as the relevant underlying law to deal with those who levied actual war or rebellion. The Cape Colony went so far as to decline to implement the 1848 Act, regarding it as unnecessary, and potentially disruptive for their system.[123]

116 See Royal Commission to consider Law relating to Indictable Offences. Report, Appendix (Draft Code), PP 1878-79 (C 2345) XX 169, 19, 77; and the bill introduced to parliament: PP 1880 (47) II. 223, 134.

117 55 & 56 Vict c 29 s 65 (Canada).

118 Criminal Code Act 1899, 63 Vic No 9 (Queensland).

119 An Act to consolidate certain enactments of the General Assembly relating to crimes and criminal procedure, 1908, s 94.

120 In fact, the first monarchical visit to India – George V's attendance at the Delhi Durbar in 1911 – long preceded the first visit of a monarch to Canada (1939), New Zealand (1953) or Queensland (1954).

121 1845 Ordinance No 12 (Cape).

122 *The Queen* v *Botha* (1852) 6 Searle 150, 153, where Chief Justice Wylde asked 'whether treason can vary … in any part of the British dominions?'

123 See 'Report on Circular from Her Majesty's Principal Secretary of State' CO48/441/7899, f 216.

The underlying Roman-Dutch law was much more extensive than the English medieval statute. It was based on the Roman Lex Julia on Treason, the crime 'committed against the Roman people or against their safety'.[124] What the law meant was explained and elaborated by a series of early modern writers. In Van Der Linden's general definition, the *crimen perduellionis* 'is committed by those who, *with a hostile intention*, disturb, injure, or endanger the independence or security of the state'.[125] Those who committed this crime acted in the manner of enemies towards the state.[126] In contrast to the English law of treason, the offence was committed against the state or the government, rather than the person of the sovereign.[127] It embraced both actions in support of external enemies of the state and those which sought to undermine sovereign authority internally.

It had already been confirmed by cases such as Louis Riel's that there could be distinct procedural rules when it came to treason. In 1902, in the case of Jan Lodewyk Marais, the Privy Council confirmed that there could also be different substantive laws relating to treason in different colonies. Marais challenged his conviction for treason by the special court set up in Natal under legislation passed in 1900 to allow for expedited trials without a jury of rebels charged with High Treason during the Anglo-Boer war. The Act defined 'treason' as including the *crimen perduellionis*, the Natal Law of 1868 statute, as well as *crimen laesae majestatis*, sedition and every attempt to commit, or solicitation to commit, every kind of participation in treason.[128] Having been convicted of aiding and assisting the enemy,[129] Marais appealed to the Privy Council, where he sought to challenge the right of the special court to try him under the law of Natal relating to treason.[130] Arguing on his behalf, Lord Coleridge stated that Marais had the right to be tried by a jury under English law. He claimed that the original English settlers in Natal had carried with them the law of England, which included trial by jury, and that it was not within the power of the legislature of the colony to pass legislation repugnant to such an important part of the law of England. He also challenged the validity of section 4 of the 1868 Treason Felony Act which preserved the Roman-Dutch law relating to *perduellio*. He concluded that '[i]t was an extraordinary thing to say that they could have one law of treason in one colony, and another law of treason in another colony.'[131] Lord Chancellor Halsbury was unmoved. In his view, the

124 D.48.4.1.1.

125 Joannes van der Linden, *Institutes of Holland, or Manual of Law, Practice and Mercantile Law* Sir Henry Juta (trans) (Cape Town: Juta & Co, 3rd ed , 1897) 202 (2.4.2).

126 See Antonius Matthaeus, *On Crimes: A Commentary on Books XLVII and XLVIII of the Digest* M.L. Hewett and B.C. Stoop (ed and trans) (Pretoria: University of South Africa Press, 1993) vol II, 220 (48.2.2.2); Johan Moorman, *Verhandelinge over de Misdaden* (Dordrecht: Abraham Blusse and Son, 1772) 56 (1.3.2).

127 Moorman, *ibid*, 56 (1.3.2).

128 Act No 14 of 1900 (Natal) in PP 1902 (Cd 981), 50. Similar legislation was passed at the Cape (Act No 6 of 1900 (Cape), *ibid*, 58). For the creation of these courts, see Michael Lobban, *Imperial Incarceration: Detention without Trial in the Making of British Colonial Africa* (Cambridge: CUP, 2021) 333-339.

129 *Reg* v *Jan Lodewyk Marais and Adrian Izak Marais* (1900) 21 NLR 242.

130 *In re The Queen* v *Marais* [1902] AC 51. He also challenged the composition of the court.

131 *The Times* 25 July 1901, 14.

Colonial Laws Validity Act of 1865 had given the colony the power to vary its law from the English rule. It was perfectly open to a colony have a law of treason which was distinct both procedurally and substantively from that of the mother country.

A raft of cases which came before the special court in Natal elaborated on the definition of treason within this jurisdiction, but in so doing, they elaborated concepts which could in turn be influential on English notions of treason, particularly when South African cases were appealed to the Privy Council. Many cases arose out of the Boer invasion of northern Natal at the end of 1899, when much of the region, including the towns of Newcastle and Dundee, was occupied for more than seven months. This generated the kinds of problems which had never come before an English court. In dealing with these cases, the presiding judge in the Natal special court, Sir William Smith, drew heavily on the Roman-Dutch writers, as well as textbooks of international law. One of the cases the court heard was that of William Bester, who had taken his family into the Orange Free State after the Boer invasion of northern Natal. Once in the Orange Free State, he was commandeered by the local authorities to guard the border with Basutoland. Convicting him of treason, Smith drew on the work of the jurist Antonius Matthaeus, to rule that if anyone in wartime deliberately left his own country and took up residence with the enemy, he was guilty of treason.[132] He added that '[i]t is clear on the authority of [Benedictus] Carpzovius, that an act of treason may be committed outside the boundaries of the Colony'.[133]

Those charged with treason for joining the enemy or assisting it in various ways during this time often claimed that once the area had been taken over by the Boer authorities, their allegiance to a British sovereign no longer capable of protecting them was dissolved.[134] An argument could be made for this under English law. Under English law, a natural allegiance was owed by all subjects born in lands held by the crown.[135] Although this bond between subject and sovereign was meant to be a personal one which could not be severed even if territory fell into foreign hands,[136] an exception was made by legislation from the reign of Henry VII, which provided that no one should be tried for treason for serving a *de facto* king in war time.[137] English law also recognised that those who were not natural-born subjects could gain and lose allegiance to the English crown. Aliens who lived within the protection of the crown owed a

132 *Reg* v *W.A.L. Bester* (1900) 21 NLR 237, 239. See Matthaeus, n 126 above, 228 (48.2.2.13).

133 *Reg* v *W.A.L. Bester ibid*, 240. Halleck's treatise on international law also stated that it was a settled principle of international law that no subject of a belligerent could transfer his allegiance from his sovereign by changing residence. Sir Sherston Baker (ed), *Halleck's International Law* (London: C. Kegan Paul & Co, 3rd ed, 1893) vol 1, ch 12 § 29, 431.

134 This was Marais's original line of defence: *Reg* v *Jan Lodewyk Marais and Adrian Izak Marais* n 129 above.

135 *Calvin's Case* (1608) 7 Co Rep 1, 27b. See Hannah Weiss Muller, *Subjects and Sovereign: Bonds of Belonging in the Eighteenth-Century British Empire* (Oxford: OUP, 2017) 31-32.

136 Muller, *ibid*, 31. Halleck argued that 'the laws of treason are binding upon the subjects of a State no matter where the treasonable act is done, for their allegiance, until changed, is considered as travelling with them wherever they may go': *Halleck's International Law* n 133 above, vol 1, ch 7, § 14, 207.

137 11 Hen VII c 1.

'local allegiance' during their time of residence; but if they lost the local protection, their duty of allegiance also fell away. As a corollary, English authority also suggested that anyone living in places conquered by the crown immediately became a subject, which suggested that Britain could gain new subjects by military occupation of foreign territory.[138] The Roman-Dutch authorities discussed the question in different terms: treason could be committed by 'those who are, by nature or by law, subject to the supreme authority of another.' Those who acquired it by nature were born subjects; those who acquired it by law were either domiciled in the state or had been subdued in war.[139] Did this mean that those living under occupation lost their duty of allegiance, at least during the time of occupation?[140]

This question was explored in a number of the Natal wartime cases. In the case of Philip Rudolph Vermaak (who thought he had become a citizen of a state which had annexed the territory), Smith explained the 'international and municipal law' – in effect the Roman-Dutch municipal law – which related to occupying forces. When a country was occupied in war, he noted, the occupying forces were bound to take measures for the preservation of order and the maintenance of government and the citizens of the occupied territory were in turn obliged to obey the laws of the occupier. However, '[m]ilitary occupation of a territory during the progress of hostilities does not amount to conquest'. Consequently, no change of allegiance took place, and no right or duty to take up arms for the occupier was recognised in international law. To recognise such a right, Smith noted, would provide a pretext for desertion 'and would enable the inhabitants of the occupied territory to give assistance and adherence to the public enemy'.[141] Smith rejected Vermaak's contention that he considered himself obliged to serve the occupiers, since they had annexed this part of the colony, for he found no clear evidence of any annexation. In the case of Johannes Prozesky, a German citizen, who had acted as a magistrate in Newcastle during the occupation, Smith drew on the Roman-Dutch authorities to confirm that a foreigner who had fixed his domicile in Natal could be punished for treason just as if he were a natural born subject. In passing, he commented

138 See *Halleck's International Law* n 133 above, vol 2, ch 32, § 7, 443. What constituted such 'conquest' was open to debate. In the early nineteenth century, the government recognised as natural-born subjects children born during the British occupation of Saint-Domingue: see Jan C. Jansen, 'Aliens in a revolutionary world: refugees, migration control and subjecthood in the British Atlantic, 1790-1820s' (2022) 255 *Past and Present* 189. However, in the later nineteenth century, the crown took the view that inhabitants of a protectorate were not subjects liable to be tried for treason: see Lobban, n 128 above, 61, 269.

139 Matthaeus, n 126 above, 215 (48.2.1.7). In Voet's definition, '[i]f they be subjects by reason of domicile, they may have become such either because the territory in which they dwelt has been conquered by the power to which they have thus become subject, or because they have been naturalised as subjects'. S. H. Rowson (ed and trans), *Voet Ad Pandectas Lib. XLVIII, TIT IV. Ad Legem Juliam Majestatis* (Cape Town: J.C. Juta & Co, 1900) 6 (48.4.4).

140 Writers on international law held that mere occupation without formal conquest did not change the national character of the inhabitants: 'the allegiance of such inhabitants is temporarily suspended, but not actually transferred to the conqueror. They owe to such military occupants certain duties, but these fall far short of a change of the allegiance due to their former sovereign' *Halleck's International Law* n 133 above, vol 1, ch 12, § 30, 431-432 (no change of allegiance), vol 2, ch 22, §§ 14, 16, 450-451.

141 *Reg* v *Philip Rudolph Vermaak* (1900) 21 NLR 204, 210.

that the doctrine of some of the English cases, 'that a foreigner owes a local allegiance, by a sort of quasi contract, in return for the protection afforded to him', was neither 'logical nor consistent with our law'.[142]

The matter was tested before the Privy Council five years after the end of the war in the case of Lodewyk de Jager, who appealed against his conviction for treason, which had ended in both a five-year prison sentence and a £5,000 fine. De Jager was a burgher of the South African Republic, but had lived for ten years in Natal, where he had been entered on the voters' roll. His claim to be entitled to belligerent rights, not being a British subject, was rejected by Smith, following his earlier decisions.[143] In the Privy Council, Sir Robert Finlay, drawing on English authorities rather than Roman-Dutch law, argued that although British subjects 'owed allegiance to his Sovereign the world over', a 'foreigner's only tie was the protection he enjoyed under the British crown', and that when that ceased, he was within his rights to join the forces of his native country.[144] The argument failed yet again. However, instead of stating that the matter was settled by Roman-Dutch law, Lord Loreburn held, '[i]t is old law that an alien resident within British territory owes allegiance to the Crown, and may be indicted for high treason, though not a subject.' He added, '[t]he protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation'.[145] The Privy Council's decision was also informed by a general argument that it would be intolerable in the modern age if resident aliens were free to take up arms to support an invading force. On this occasion, when elaborating the substantive law of treason, the Privy Council was prepared to read into the English law of treason a rule developed in the Roman-Dutch jurisdiction.

Cases arising from the occupation of northern Natal also invited the court to consider what constituted aiding the enemy. In many of the cases which came before this court, the help given to the occupier did not take the form of bearing arms, but other forms of aiding the enemy, such as acting as a policeman[146] or as a Supervisor of Natives,[147] or as a supplier of provisions. English writers were relatively brief on what constituted aiding the enemy,[148] but this question was much more widely discussed in the Roman-Dutch literature and among international lawyers. It was these texts which Smith drew on. Drawing on Matthaeus, he held that a subject remaining in occupied territory 'is not entitled voluntarily to do any act which may directly or indirectly assist the enemy in the conduct of the war.'[149] The broad view of what constituted treasonable assistance to an enemy was also applied in Natal after the end of the war to those

142 *Reg* v *Johannes Julius August Prozesky* (1900) 21 NLR 216, 218. cf *Reg* v *Bernardus Johannes Badenhorst* (1900) 21 NLR 227.
143 *R* v *Lodewyk Johannes de Jager* (1901) 22 NLR 65, following the earlier decisions of *Reg* v *Bernardus Johannes Badenhorst ibid*, *Reg* v *Johannes Julius August Prozesky ibid*.
144 *The Times* 23 March 1907, 3.
145 *Lodewyk Johannes de Jager* v *Attorney General of Natal* [1907] AC 326, 328.
146 *R* v *J.L. Marais and A.I. Marais* n 129 above.
147 *R* v *W. P. J. Adendorff* (1900) 21 NLR 230.
148 Foster wrote that furnishing rebels with money, arms or other necessaries made a man a traitor, as did the sending of intelligence: Foster, n 10 above, 217, citing the Case of William Greg (1707).
149 *R* v *Gowthorpe* (1900) 21 NLR 221, 224.

accused of treason in the context of a rebellion. In 1908, in the aftermath of Bambatha's rebellion in Zululand in 1906, the Zulu king Dinuzulu was tried for treason, in another special court appointed under statute.[150] Suspected of being the driving force behind this rebellion, he faced charges of conspiracy to levy war and insurrection, set out in 23 counts.[151] The presiding judge, once again, was Sir William Smith. There was little evidence to convict him on the counts of levying war or preparing for war, but Dinuzulu was convicted on counts of harbouring rebels and supplying them with food and shelter. Developing the law he had applied in the wartime cases, Smith stated that if 'a person supplies another whom he knows is engaged in carrying out an act of treason with food and shelter, that amounts to an act of treason'. It was a direct act of assistance to the enemies of the state, from which a hostile intent could be presumed. In this case, he also came to the conclusion that the act of harbouring Bambatha's wife and family amounted to treason, since 'the sheltering of a man's family whilst he is in active rebellion is a material assistance to him, and a direct encouragement to him to continue a hostile course'.[152] This was a significant step widening the ambit of treason.

These cases demonstrated that the reach of the offence of treason in its Roman-Dutch form was very extensive. It embraced a large range of activities which could be of service to an enemy, whether they were done within British jurisdiction or without. Nor did the test of 'hostile intent' prove much of a hurdle in the cases before the special court in Natal. However, while these cases suggested a much more capacious law of treason than that suggested by the wording of the 1351 act, the penalties imposed by the judges were often light. By the start of the twentieth century, it was accepted that judges under the Roman-Dutch law had 'a very wide discretionary power' when it came to the punishment of treason, which could range from the death penalty to a fine.[153] In cases of High Treason heard by the Cape judges in the Supreme Court or on Circuit during the war, the highest penalty (imposed on only four defendants) was that of a five year prison sentence, with 24 getting three year gaol sentences and 18 sentences of a year or less.[154] The special courts were even more lenient. J.L. Marais, convicted of joining a military patrol with the enemy, was sentenced to one year's imprisonment and a £200 fine. This was a long way from the death penalty imposed under the 1351 statute for levying war against the king or giving aid and comfort to his enemies.[155]

150 It was set up under Act 8 of 1908. See Shula Marks, *Reluctant Rebellion: the 1906-08 Disturbances in Natal* (Oxford: Clarendon Press, 1970) chs 10-11. Dinuzulu had already been tried for treason once before: see Lobban, n 128 above, 105-121.

151 PP 1908 (Cd 4404) LXXII.793, enc 3 in No 4, 19.

152 *The Trial of Dinuzulu on Charges of High Treason at Greytown, Natal, 1908-09* (Pietermaritzburg: Times Printing and Publishing Co Ltd, 1910) xv.

153 *Reg* v *Gert, Arnold and Hendrik Boers* (1900) 21 NLR 116, 123 per Finnemore J.

154 Fourteen were given non-custodial sentences. The figures are taken from the printed lists in Western Cape Archives, Cape Town, AG 2117.

155 It was also a long way from the severe penalties handed down by martial law courts in this war for treason. In the Cape, eleven men – not all of whom were British subjects – were executed under martial law for charges which included 'High Treason', while a further 18 were executed for being 'actively in arms' or 'engaging in the military forces of the enemy', PP 1902 (Cd 981), No XVIII.

CONCLUSION

Treason was an imperial matter. The oath of office of every colonial governor required him to disclose to Her Majesty 'all treasons and traitorous conspiracies which may be formed against her.'[156] At the same time, the empire contained a variety of treason laws, ranging from the 1351 statute, through variants of the 1848 Treason Felony Act, to local provisions, such as the Indian codes introduced by legislation, or the Roman-Dutch law inherited from earlier rulers. Both English and colonial law gave considerable scope for the authorities to prosecute those who had taken up arms against the crown and had given any kind of aid and assistance to its enemies anywhere outside the realm. Where British territory was occupied, as in northern Natal, the Roman-Dutch explanation of 'aid and assistance' embraced any acts that supported the occupation. Where those who could be defined as British subjects aided the enemy abroad, as by broadcasting propaganda, the Edwardian statute could be used to send them to the gallows.[157]

The authorities had the choice of whether to prosecute traitors at the metropole or at the periphery. While most British rebels in northern Natal in 1900 were tried for *perduellio* under Roman-Dutch law in Natal under local procedures, and given light sentences, Arthur Lynch who had left South Africa after forming his Irish Brigade was tried in London under the 1351 statute and sentenced to death by a judge seized 'with evident emotion'[158] (though he was spared the gallows).[159] The possibility that colonial rebels might be prosecuted in London for treason was raised again in 1965, with much ink being spilled over whether members of the Southern Rhodesian government, which had issued a Unilateral Declaration of Independence, could be prosecuted either under the 1351 statute or the 1848 one.[160] These statutes had a worldwide reach.

In England, the use of the charge of treason was largely restrained. The 1351 Act continued to be used for wartime treasons, while the 1848 one was used for domestic forms of terrorism. Outside of England – and notably in India

156 See 'Copy of each oath now required to be taken in any colony by the governor or other chief magistrate, the members of the legislature, or supreme council, or other similar body respectively', PP 1866 (344) L.523.

157 See the cases of John Amery (*The Times* 29 November 1945, 2) and William Joyce (*R* v *Joyce* 173 Law Times Reports 377; *Joyce* v *Director of Public Prosecutions* [1946] AC 347).

158 Donning the black cap, Justice Wills told Lynch, 'Civilized communities … afford protection to their subjects from foreign aggression and domestic violence and wrong, and they expect in return loyalty and allegiance … and if every one who disapproves of the foreign or domestic policy of his country was at liberty to take up arms against her and to attempt to join her enemies to her destruction, the very foundations of civilized society would be gone and violence and anarchy would take the place of ordered government'. 'Trial of "Colonel" Lynch' *The Times* 24 January 1903, 14.

159 Lynch's lawyers unsuccessfully argued that he should have been tried in Australia, since at the end of the war, it was agreed that British subjects who joined the enemy would be liable for trial 'under the law of that part of the Empire to which they belong' (Chamberlain to Milner, 27 May 1902, PP 1902 (Cd 1096) LXIX. 365, No 21, 8, quoted DPP 4/36, f 106v). This provision was made largely to pacify Natal, which wanted to be able to try its rebels.

160 See Hugh Pattenden, 'Britain, Rhodesia, and the Law of Treason, 1964-1980' (2021) 42 *Journal of Legal History* 304, 310-132.

and South Africa – the notion of what constituted warfare or giving aid to enemies expanded. While these were clearly distinct jurisdictions, it was not so clear that the boundaries between them were impermeable. There might, in effect, be little to stop judges in London interpreting the meaning of giving 'aid and comfort' under the 1351 Act as generously as the South African judges interpreted *perduellio*. Seen in its wider context, it is evident that the 1351 Act was not as restrictive or uncertain a law as has sometimes been assumed by modern commentators. It was in fact highly flexible and adaptable. Its wording might lend itself to the kind of 'constructive' interpretations which continued to inform Indian judges in the early twentieth century dealing with riotous protest, or to the broad interpretations of what constituted aiding the enemy which were seen in Natal. If judges at the metropole did not themselves put forward such broad interpretations of the law, it was not because they were constrained by its wording. Rather, how the law was used in dealing with those who threatened the state depended on context and need. At the metropole, it was not the law itself which was restrained, but its use.