

MORE'S SILENCE AND HIS TRIAL

It is possible to take the view that More's opponents, in deference to King Henry's wishes, were determined to remove him from the scene by any appropriate means. This is the outlook on the story propounded in Richard Marius' *Thomas More* (1985), certain to be an influential biography. There is much truth in this, but, as every biographer has noted, the councillors dragged their feet surprisingly, and gave More chance after chance of coming out, however faintly, on Henry's side in the succession, marriage, and supremacy questions. Great play is made with More's determination to keep silence, which became a fetish during his time in the Tower. As Marius implies, it was a loud silence.

The Third Count of the Indictment stated that More refused to break his silence. ¹ Charged with maliciously having kept silence, More submitted that silence itself was no crime, and an overt act must be proved for the charge of treason to stick. ² The English presumption is that silence means consent. Yet More's 'concelement' was one of the objections Rich made to him as a result of the inauspicious conversation they had in the Tower. I have never been happy with this. No solution has been offered. How can *silence*, refusal to speak, be seriously tendered, before the cultured European world, as a treasonable offence? The path to an answer was shown me recently and I hasten to pass it on as briefly as I may.

The Emperors Arcadius and Honorius enacted in A.D. 297 a special amendment to the Roman law on treason (*ad legem Iuliam maiestatis*, on which see Justinian, *Digest* 48.4). It was intended to protect the lives of any persons whom the emperor considered as members of his own body, and this was widely drawn. The law took its place in the Theodosian Code 9.14.3, and thence is to be found in the *Codex* of Justinian, 9.8.5. ³ It does indeed punish intent as well as commission of the treasons indicated. The mediaeval jurists Bartolus and Baldus in turn commented on the law. Bartolus (who died in 1357) was of the opinion that, since those who reveal a conspiracy of this character are to be rewarded and those actual conspirators who betray their confederates (in time) are to be pardoned, the law punished those who maintained silence throughout the conspiracy. This will have been known to Henry's councillors, whom we have always suspected had an eye to what the Byzantine caesaro-papism implied, and, through the episcopate, had direct access to civil-law learning (which, unlike canon law, Henry notoriously favoured) ⁴.

Johann Gottlieb Heineccius (1681-1741) had occasion to review the law as a theologian, philosopher, and, above all, jurist. As he read Bartolus on it, and the caustic comment of Baldus, who said Bartolus deserved torment for his interpretation, he concluded that the sixth point to be remembered in practice was *quod et nudum consilium et nuda scientia vel conscii silentium puniatur*: « mere advice, mere knowledge, and the (mere) silence of one privy to the plot were all punishable »⁵. Heineccius approved Bartolus in theory but in practice sided with Baldus.⁶ But, as is remarked by Edward Gibbon, partisan of the English constitution of his times, in the interests of which his massive treatise was composed, the Bartolan interpretation, so favourable to dictatorships, « was gravely quoted by the lawyers of Cardinal Richelieu ; and Eutropius [the eunuch in whose interests, Gibbon claims, the law was enacted] was indirectly guilty of the murder of the virtuous de Thou ».⁷

Now silence was no crime by common law, but the men who developed the law of treason under Henry VIII had civil law at their disposal, whether for their consciences or their contrivances ; and indeed if important men were to be allowed to escape punishment for concealing their opinion, and their consultations with dissidents, no statutory enactment of constitutional opinions or principles could have any hope of success. In that world of experiment where, as Marius would have it, the deaths of the Carthusian martyrs, of Bishop Fisher, and of More, were foregone conclusions, the international notion that failure to disclose what was going on -- clearly capable of being conceived as within the common-law offence of misprision of treason -- was in itself a crime under the *lex Julia maiestatis*, could be exploited opportunistically, and be carried (as Henry's reign showed abundantly) where the needs of the time took it. The hostility of the English Bar to the civil law during the whole of the seventeenth century is thus (in part) accounted for, not merely professionally (as anyone would expect) but also on principle.

Half Way House, High Street,
Blockley, Moreton in Marsh,
Glos., GL56 9EX.

John Derrett.

NOTES

1. J.D.M. Derrett, 'The trial of Sir Thomas More,' *English Historical Rev.* 312 (July 1964), 449-477, at p. 454.
2. *Ibid.*, at p. 459.
3. P. Kruger, ed., *Corpus Iuris Civilis* II (Berlin 1892, repr. 1954), pp. 373-4.
4. Compare the Act of Treasons (26 H.8. c. 13) (*Statutes of the Realm* iii, 508-9) with the imperial legislation. Note how, in the former, it is made high treason to 'maliciously wish, will, or desire by words or writing, or by craft imagine, invent, practise or attempt...to deprive them [the King, Queen or their heirs apparent] or any of them of the dignity, title or name of their royal estates...' That *silence* could be evidence of the *wish* or *will* is not impossible, but presumably a civil-lawyer would observe this more readily than a common-lawyer.
5. J.G. Heineccius, *Elementa iuris civilis*, tit. XVIII, § 1342 (ed. Lausanne 1766, pp. 565-6).
6. Heineccius cites Baldus, *Consilia* 1, 34.
7. E. Gibbon, *The Decline and Fall of the Roman Empire* [1776-1788] III (Oxford, World's Classics), 430-1.

