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CONSPIRACY IN CIVIL LAW COUNTRIES

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The present observations are the first ever published in American legal periodicals about conspiracy as understood in the civil law system.—EDITOR.

It was revealed, at the Nuremberg Trial, that the approach to the problem of conspiracy in common law and in civil law countries is different. Mr. Justice Jackson, who was the United States counsel at Nuremberg, stated in his concurring opinion in *Krulewitch v. United States*, 336 U. S. 440 (1949), that the modern law of conspiracy, as understood in common law, "does not commend itself to jurists of civil law countries, despite universal recognition that an organized society must have legal weapons for combating organized criminality."

The concept of conspiracy, punishable even where no crime has been committed, in its broad application as historically developed in common law countries, is not known in the traditional civil law system. Historically, the term "conspiracy" was associated, in continental Europe, with some political purposes. Political conspiracy may be defined as a "secret combination of persons for the purpose of changing the form or personnel of government by violence or other unconstitutional means."¹ However, some statutes enacted in many countries made the concept of conspiracy closer to the common law concept, extending it beyond the field of political plots.

As most representative of the continental European criminal law, French, German, Italian and Polish law may be considered.

FRENCH LAW

As a general rule—just as in the common law system—it may be said that in France the decision itself to commit a crime is not punishable, and the mere preparation is not punishable either.

If more than one person is involved in the planning of some crime, there may be, between the decision and the attempt to commit the crime, three stages of preparation: a) a proposition to conspire, which may not be accepted; b) the acceptance of a proposition, thereby forming the conspiracy; c) some material acts which prepare the execution of the purposes of the conspiracy.²

1. Joseph J. Senturia in 4 Ency. Soc. Sci. 238 (1931).

2. R. Garraud, 3 Traité Théorique et Pratique du Droit Pénal Français 306 (1899).

The principle that the mere intention to commit a crime by an individual, even if clearly established (confessed) remains unpunishable, has no exceptions. The three preliminary stages of perpetrating a crime are unpunishable also, without exceptions, if they relate to a crime against individuals. However, where the security of the state is at stake, the law is more watchful than in other cases; and it creates exceptions which make—though in a very limited scope—the French concepts of conspiracy similar to the common law concepts. A few other exceptions are laid down in cases involving public interests. Thus, all the cases of conspiracy punishable where the substantive crime has not been committed, are included in the part of the French Penal Code of 1810, still in force, dealing with “Felonies and Misdemeanors against public interests.”³

In a few cases, even in crimes against individuals, the Penal Code treats as an *aggravation* of crime the fact that it was committed by more than one person: larceny (art. 381, 2°), mendicity (art. 276). However, there may be hardly any comparison with the common law crime of conspiracy, as the Code does not make punishable an agreement to commit the crime which has not been carried into effect.

There is more similarity to the common law concept of conspiracy in articles 109-110 of the Code.

Art. 109 establishes a penalty of imprisonment, from 6 months to 2 years, for impeding one or more citizens in the exercise of their civic rights, and the following article reads as follows: “If the perpetration of this crime is a result of a plan, agreed upon to be carried out in the whole country, or in one or several departments, or in one or several circuits of communities, the penalty will be banishment.”

In this case, conspiracy is expressly referred to, and its concept is close to the common law concept. However, it does not constitute an independent crime; it is only an aggravating circumstance if the crime is perpetrated.

Provisions which lay down rules still more similar to the common law approach to the question of conspiracy may be found in articles 123-126 of the Code, which make punishable special cases of concerted action. Entitled “Coalition of Employees,” they refer to a “concord of illegal measures,” done by employees of the state, which aim to prevent the enforcement of law or of the orders of the government, or whose purpose is to resign from performing public duties in order to impede or to suspend the administration of justice or of any other service.

3. For the text of the Code see Dalloz, Code Pénal (1946).

The expression "concord of illegal measures" is by no means very clear. It has been held punishable to summon, by means of concerted meetings and speeches, other employees of the state immediately to cease working.⁴ Similarly, the crime of "coalition of employees" was perpetrated when the "maires" (heads of small administrative units) decided—following a concord between them—to resign from their offices,⁵ action which would be lawful if committed individually, even if its purposes were the impeding of the administration of public services.

Most cases of the crime of conspiracy are found in the chapter entitled "Crimes Against the Internal Security of the State."

The provisions of art. 89 (amended in 1832) read as follows: "The conspiracy aiming to perpetrate crimes referred to in arts. 86 and 87, if followed by an act committed or begun in order to prepare their execution shall be punished by deportation."⁶

"If it was not followed by any act committed or begun in order to prepare their execution, the punishment shall be that of detention."⁷

"There is conspiracy as soon as the decision to act is taken and concerted by two or more persons.

"If there has been a proposition but no agreement to conspire in order to perpetrate crimes referred to in arts. 86 and 87, the person who made the proposition shall be punished by imprisonment from 1 to 5 years. Besides, the culprit may be prohibited from the exercise of rights referred to in art. 42."⁸

Art. 86, referred to in art. 89, deals with crimes against the external security of the state, and art. 87—with assault in order to destroy or change the government and with inducement of people to bear arms against the authorities. According to the interpretation of the Cour de Cassation (French Supreme Court),⁹ to destroy the government is, e.g., to replace the republic by a monarchy; to change the government is, e.g., to suppress the Senate or to abolish some constitutional rights of the President or of the Parliament.

In connection with art. 86, art. 125 of the Code establishes the penalty of death for concord of measures of employees of the state against the interior security of the state.

Art. 91 subjects to the same punishments as those established in art. 89 conspiracies and propositions to conspire aiming to incite a civil war or to trouble the state by devastation, massacre or plunder.

4. Trib. Corr. Seine, 4 déc. 1934, D. P. 1935, 2, 57.

5. Crim. 6 déc. 1907, D. P. 1910, 1, 53.

6. Transportation for life out of continental France.

7. From 5 to 20 years.

8. Specified civic, civil and family rights.

9. Cass. 1 févr. 1849 (D. 49.1.129); 17 févr. 1849 (D. 49.1.51).

Art. 91 seems rather unnecessary, as its provisions are covered by art. 87.¹⁰

Thus, the above articles made conspiracy a distinct crime, irrespective of its results, and conditioned the severity of the penalty on the stage of preparation to commit the crime.

There are still some other provisions of the Code, whose approach to the problem of conspiracy is similar.

Articles 96-100 make it a crime to conspire in order to form armed bands (*bandes armées*) whose activities, enumerated in the Code, may be dangerous to the security of the state. According to the degree of participation, the Code prescribes different penalties, including death. Art. 100 relieves from any punishment a person who, although a member of the band, did not take any active part in its organization or its management, and abandoned the band at the first summons of the authorities.

How many people suffice to organize a "band?" Legal scholars suggested different answers to this question: 5, 10, or 15,¹¹ but the Code left the question open, to be decided by the court according to the circumstances of every case.

The above provisions of the Code have been supplemented by the statute of May 24, 1834, which punishes, as a special crime, the mere preparation for an uprising, as revealed by unauthorized manufacturing, distributing or possessing of munitions or weapons or by other specified acts.

The part of the Code dealing with "Felonies and Misdemeanors against public interests" includes also articles 265-267; those articles establish the only case of criminal conspiracy against the interests of individuals by treating it as a crime against public peace.

Article 265 (wording of 1893) reads as follows: "Any established association, irrespective of the period of time of its existence and of the number of its members, any agreement entered into with the purpose of preparing or perpetrating crimes against individuals or things, constitute a crime against the public peace." The following two articles fix penalties for participation in such associations.

The previous wording of art. 265 (1810) was aimed at associations of criminals formed after the Revolution of 1789. These associations became a real scourge, but largely disappeared after the beginning of the 19th century. The law of 1893 changed the phraseology of art. 265, adapting it to new circumstances. It was focused on the activity

10. R. Garraud, *op. cit.*, vol. 3, p. 323.

11. R. Garraud, *op. cit.*, vol. 3, p. 331.

of the anarchists.¹² But the new provision laid down a general rule that any organization of criminals, established in order to perpetrate crimes, is punishable. However, this idea is still not equal to the common law general approach to the problem of conspiracy, as the Code speaks only about agreements to perpetrate some undetermined crimes, and not one determined crime, by a temporary understanding. Only this type of associations of criminals was considered to be dangerous enough to make them punishable even in the stage of preparation.

In all other cases, conspirators may be prosecuted only if the crime was actually committed or attempted,¹³ as accomplices, according to art. 59-60; to be considered as an accomplice, it is sufficient to help the culprit in some stage of his preparation, not necessarily to participate in the perpetration of the crime itself.¹⁴

GERMAN LAW

According to the traditional approach of civil law countries to the problem of conspiracy, the German Criminal Code of 1871¹⁵ introduced the punishment of conspiracy as such, irrespective of whether the intention of the conspirators was attempted to be carried out, only in the field of offenses against the state—treason and high treason. The respective provisions of the Code were amended by the Nazis in 1934.

The old art. 83 read in its first paragraph: "If several persons have made an agreement to carry out an understanding of high treason, but no punishable act under art. 82 has taken place, such persons shall be punished by confinement in a penitentiary or in a fortress for not less than five years," and art. 84 applied the penal provisions of art. 83 to any person who in preparation for high treason either made contact with a foreign government or misused a power entrusted to him by the Reich or a German state, or enlisted men, or trained them in the use of arms.

Military treasonable conspiracy (contact with a foreign government in order to induce it to wage war against the Reich) was made punishable in art. 87, and diplomatic treason (disclosure of secret documents, destruction of evidence having reference to the rights of the Reich,

12. R. Garraud, *op. cit.*, vol. 2, p. 498.

13. Art. 2 of the Code makes the attempt to commit a felony punishable in the same measure as the perpetration of the crime if the felony was not carried out because of circumstances independent of the will of the culprit; according to art. 3, attempts to commit misdemeanors are treated as misdemeanors only in cases established expressly by law.

14. Crim. 14 avril 1904, D. P. 1905.1.342.

15. For the English translation of the Code, see "The Statutory Criminal Law of Germany," by V. Gsovski, The Library of Congress, 1947.

carrying on with another government of any affairs of state to the disadvantage of the Reich)—in art. 92.

The Code made punishable, too, preparations for a treasonable undertaking (art. 86).

In 1934, the provisions of the Code dealing with treason were substantially extended and redrafted. The first paragraph of art. 82 received the following wording: "Whoever makes an agreement with another to undertake high treason (articles 80, 81) shall be punished by death, confinement in a penitentiary for life, or for not less than five years." In the second paragraph of art. 82, the same penalties were established for crimes referred to in the previous art. 83. The scope of acts considered as treason was considerably broadened by the following articles.

All the above provisions of the Code were expressly repealed in 1946, by art. 1 of the Law No. 11 of the Control Council for Germany;¹⁶ and their abrogation did not revive any former laws which were repealed by the provisions abrogated (art. IV of the Law No. 11).

Further provisions of the Code in which the basis of criminal liability may be compared to that in conspiracy, are found in Chapter 7 of the Code, dealing with crimes against public order. Art. 128 makes it punishable to participate in secret societies, and art. 129—to participate "in a combination which includes among its objectives or activities the hindrance by unlawful means of administrative measures issued by the government or the execution of the law."

The concept of conspiracy was also reflected in art. 3(1) of the decree of 1939, supplementing penal provisions for the protection of the armed force of the German people: "Whoever supports, or participates in, an organization inimical to the national defense shall be punished by confinement in a penitentiary or in less serious cases by imprisonment." The decree was repealed by Law No. 11 of the Control Council.

The concept of conspiracy as a crime in cases where the interests of the Reich or of the German states as such were not impaired, was unknown to the German Criminal Code of 1871.

The first statute which introduced the crime of conspiracy was the "Law Against Criminal or Generally Dangerous Use of Explosives," enacted in 1884 (and amended in 1941). Supplementing art. 5 of the statute which made it punishable by confinement in a penitentiary the intentional causing, by the use of explosives, a danger to the property,

16. Official Gazette of the Control Council for Germany, No. 3.

life or health of another, art. 6 announced the mere conspiracy to commit such acts to be a crime.¹⁷

In other cases, a person who did not attempt to commit a crime, could be prosecuted only as an accomplice or instigator.

A further application of the concept of criminal conspiracy was made nearly half a century after the enactment of the law of 1884. However, it concerned only the crime of homicide. Art. 49b of the Code, enacted in 1932, punished by imprisonment any person who participated "in a combination or an agreement" which had for its purpose "the commission of major crimes against life" or which had "such crimes in view as a means to other purposes;" giving of support to such combination was also made punishable. The same article relieved from penalty anyone who in due time notified the authorities or the person threatened so that the crime could be prevented.

According to the interpretation given to the Code by the German Supreme Court,¹⁸ "agreement" (*Verabredung*) should be defined as an understanding between at least two persons to commit an act;¹⁹ this definition brings it in the same line as the common law conspiracy. However, up to 1943, it was applied only in the cases of homicide.

On the other hand, "combination" (*Verbindung*) is a union of several persons, established for a longer period of time, in order to carry out some common purposes, and organized in some manner.²⁰ Thus, the concept of "combination" may be compared to the French concept of "association of criminals" (articles 265-267, French Penal Code).

A further expansion of the application of the concept of conspiracy was brought about in 1943. By an amendment to the Code, the words "or an agreement" in art. 49b were cancelled, and a paragraph was added to art. 49a which made a crime "an agreement to commit a major crime" or entering "into serious negotiation" concerning the same.

By this amendment, the German approach to conspiracy is similar to the common law approach; it is limited, however, to conspiracies aiming at the perpetration of major crimes.

17. Art. 6: "If several persons agree to commit one or several offenses punishable under article 5 or band together for a continuous commission of acts of that sort even if they are not defined in all details, such persons shall be punished by confinement in a penitentiary not to exceed five years, even though the decision to commit a crime was not carried out by an act which would constitute the beginning of the execution of the crime."

18. R. G. St. 69, 165.

19. Adolph Schoenke, *Strafgesetzbuch Kommentar*, 4th edition, 1949, p. 160.

20. Adolph Schoenke, *op. cit.*, p. 161.

ITALIAN LAW

The Italian Penal Code of 1930²¹ is perhaps the best reflection of the civil law approach to the problem of conspiracy. Art. 115 reads, in its first paragraph, as follows: "Except where the law provides otherwise, whenever two or more persons agree for the purpose of committing an offense, and it is not committed, none of them is punishable for the sole fact of making an agreement;" thus, it lays down the general principle that conspiracy is not punishable, but provides for exceptions to this rule. Besides, it allows the judge (in its paragraph 2) to apply a police measure in a case of agreement to commit a crime.²² The same provisions are applicable "in the case of instigation to commit an offense, if the instigation has been favorably received, but the offense has not been committed" (paragraph 3, art. 115).

According to the traditional European approach, the most important exceptions relate to "crimes against the international personality of the state" and to "crimes against the internal personality of the state." Art. 302 of the Code deals with instigation to commit such crimes (enumerated in the Code), and art. 364, entitled "Political conspiracy by means of an agreement," punishes by imprisonment from one to six years an agreement concluded between "several persons" in order to commit a crime indicated in art. 302, even if such crime is not perpetrated. According to art. 305, the penalty is increased (five to twelve years) for persons who took an active part in the organization of an association numbering three or more members with the purpose of committing such crimes; the fact itself of being a member of such association is punished by imprisonment from two to eight years.

Article 306 establishes penalties for forming and participating in armed bands, organized with the purpose of committing such crimes; art. 307 makes punishable assistance to conspirators and members of the armed bands, and the next two articles specify cases where members of conspiracy and armed bands shall be relieved from punishment.

An important case of conspiracy made criminal even though it does not involve the security of the state is provided for in art. 416, entitled "Association for Purposes of Delinquency," which made it criminal to associate for the purpose of committing more than one crime, and established penalties according to the degree of participation in such associations.²³

These provisions are comparable to the articles of the French Penal

21. For the text of the Code, see L. Franchi and V. Feruci, "Quattro Codice" (1946).

22. According to art. 215, the police measure which may be applied in this case is "Liberty under supervision."

23. Art. 416: "When three or more persons associate for the purpose of committing more

Code dealing with armed bands and associations of criminals. They were applied mostly against the Sicilian organizations of law-violators, promoted by the Mafia.

Besides, curiously enough, according to the wording of the Italian Penal Code, the basis of the liability for an attempt to give or to receive a bribe is similar to that in the case of conspiracy; art. 322 punishes both parties of an agreement to give and to receive a bribe in the performance of official duties, even if the crime is not committed; similar provisions refer to a bribing of a witness, expert or interpreter. (art. 377.)

In other cases, conspiracy may be only an aggravating circumstance if the crime has been committed, according to the provisions of art. 112.²⁴

POLISH LAW

The provisions of one of the most modern penal codes of the world, the Polish Penal Code of 1932,²⁵ make the application of the concept of criminal conspiracy broader than in some other civil law countries.

True, if not expressly punished by law, mere preparation to commit a crime escapes prosecution, but preparation made by more than one person was deemed in some cases sufficient to constitute a separate crime. This approach may be accounted for by the idea of the danger inherent to any conspiracy and the general subjective tendency of the Code which stresses in many provisions the importance of the actual intention and makes the results of the act only a secondary element in prescribing the penalty.²⁶

than one crime, those who promote, constitute or organize the association shall be punished, for that fact alone, with penal servitude from three to seven years.

"The punishment for the sole fact of participating in the association shall be penal servitude from one to five years.

"The leaders are subject to the same penalty as is prescribed for the promoters.

"If the persons associated overrun the country or the public roads in arms, penal servitude from five to fifteen years shall be inflicted.

"The punishment shall be increased if the number of persons associating is ten or more."

24. Art. 112: "The punishment to be inflicted for the offense committed shall be increased—

"(1) If the number of the persons co-operating in the offense is 5 or more, unless the law directs otherwise.

"(2) In the case of individuals who, even apart from the cases contemplated in the two following numbers, have promoted or organized co-operation in the offense, or have directed the action of the persons who co-operated in that offense.

"(3) In the case of individuals who, in the exercise of their authority, direction, or supervision, have caused persons subject to them to commit the offense. . . .

"The increases of punishment prescribed in Nos. (1) to (3) of the present article shall apply even if any one of the persons participating in the acts is not chargeable or punishable."

25. For the English translation of the Code, see "The Polish Penal Code of 1932," Duke University Press, 1939.

26. R. Lemkin, Introduction to the Polish Penal Code of 1932, Duke University Press, 1939.

Similarly to the provisions of the French Penal Code, the Polish Code punishes by imprisonment a person who conspires to commit an offense against the state, irrespective of whether the aims of the conspiracy were carried out or not. Thus, after prescribing penalties, in articles 93-95, for seeking to deprive the Polish State of independence, or to detach a part of its territory; for seeking by violence to change the organization of the Polish State; for making an attempt on the life or on the health of the President of the Republic; for seeking to overthrow the President, or to usurp his power, or to influence his acts by violence or illegal threats; for seeking by violence to overthrow the Diet, the Senate, the National Assembly, the Government, a Ministry or the Courts, or to usurp their power—the Code makes it punishable, by its art. 96, to make preparations to commit these offenses, and provides in art. 97 (1): “Whoever, with the purpose of committing an offense defined in Article 93, 94, or 95, shall conspire with other persons, is punishable by imprisonment.”

Art. 97 (2) exempts from penalty a person who “shall participate in such a conspiracy, but shall give information thereof to an authority competent to prosecute for offenses before such authority obtains knowledge thereof, and before any harmful consequences have resulted therefrom to the State.” However, “the person who is the author of such conspiracy is not to be exempted from penalty.”

As aggravating circumstances are considered facts that the conspiracy either constituted a treason or aimed at the inducing of an armed struggle. (art. 98.)²⁷

The next article, first in the chapter entitled “Offenses Against External Interests of the State and International Relations,” is connected with the preceding one, but deals with the treason which aims directly to occasion a war or other hostilities against Poland.²⁸

Further cases of criminal conspiracy are established in the chapter dealing with offenses against public order.

Art. 163 makes it criminal to participate in a public gathering which by combined force uses violence or illegal threat with the purpose of

27. Art. 98: “Whoever, with the purpose of committing a felony defined in Articles 93, 94, or 95:

“(a) shall conspire with a person acting in the interest of a foreign state, or an international organization, or

“(b) shall assemble instruments for struggle under arms, is punishable by imprisonment for not less than 5 years.”

It is not difficult to guess that by “international organization” the authors of the Code meant the Komintern.

28. Art. 99: “Whoever shall conspire with a person acting in the interest of a foreign state, or an international organization, with the purpose of provoking war activity or other hostile activity against the Polish State, is punishable by imprisonment for not less than 10 years.”

coercing an official to forego or to undertake an official act, or which makes an assault upon any person or property.

Although the provisions of art. 163 make the participation "in a public gathering" a crime irrespective of whether the culprit, himself, committed any act tending toward the carrying out of the plans of the gathering, there may be only a slight analogy to the common law crime of conspiracy, as the commission of the crime or the use of violence by the gathering is required, and the mere intent or preparation are not sufficient; thus, the basis of criminal liability settled in art. 163 may be founded rather on an expansion of the theory of instigation and aiding (articles 26-30 of the Code). But the next articles reflect closer the concept of criminal conspiracy as such.

Art. 164 makes it criminal to participate in an assembly or group having the purpose of committing an offense; art. 165—to participate in an association the existence, organization, or purpose of which is designed to be kept secret from the public authorities; art. 166—to participate in an association having the purpose of committing an offense; art. 167—to participate in an illegally organized armed association. Special penalties are provided for organization or directing of assemblies and associations referred to in articles 163-167.

The "assemblies or groups" mentioned in art. 164 may be compared to the French notion of "bands," and the associations mentioned in art. 166—to the notion of associations of criminals referred to in articles 265-267 of the French Penal Code, but in both cases it is sufficient, according to the Polish Law, that their purposes be to commit one single offense, not necessarily some offenses, as it is required by the French Law. The provision about the secret associations is similar to that of the German Law. Although, in theory, a mere transient conspiracy to commit a crime, punishable in common law, still does not amount to participation in an assembly, group, or association, made criminal in Poland—in practice a broad interpretation of the Polish Penal Code may make its provisions pretty similar to the common law approach to the problem of conspiracy.

Special cases of criminal conspiracy are provided for in articles 180 and 219, regarding some crimes as particularly dangerous to public interests. In both cases, preparations to commit the crime are subject to penalties equal to penalties provided for in the case of conspiracy. Art. 180 refers to counterfeiting of money, and art. 219—to producing public danger of conflagration, inundation, collapse of a building, or of a catastrophe to commerce on land or water, or in the air; to producing a public danger to human life or health, or a serious danger to

property, by use of explosives or inflammable materials or gases, by damaging or misusing the installations of public utilities, by dissemination of human, animal or vegetable contagion or by other actions under circumstances especially dangerous.

In both cases, special exemptions from penalty are provided for a person who participated in a conspiracy but gave information thereof to the authorities, similarly to the provisions of art. 97 p. 2, referred to above.

All the broad exceptions to the rule that conspiracy as such is not punishable make the rule itself nonexistent in many cases; where it is still in force, it may be possible, in some cases, to prosecute the conspirators as instigators or aiders, according to Chapter IV of the Penal Code, entitled "Instigation and Aiding."

The instigator and the aider are responsible within the limits of their intent, independently of the responsibility of the person doing or who meant to do the intended act (art. 28).

CONCLUSION

In the traditional continental legal system, conspiracy was punishable only when it aimed to attain some political purposes. Criminal codes and statutes made it a crime, in many countries, to conspire within the bounds of organized groups of criminals,²⁹ as particularly dangerous to the society. Some more recently enacted provisions broadened in many countries the scope of criminal conspiracy, making it a crime when it relates to the disturbance of public peace or to the commission of major crimes. All the cases, however, appear to be rather exceptions than the rule.

It may be said, as a general proposition, that it is easier for a public prosecutor to obtain a conviction of criminals in civil law than in common law countries; the court is not restricted by all the rigorous rules of evidence, and in most countries which still retain the jury system, the verdict reached by the majority of the jurors suffices to obtain a conviction. However, in the case of conspiracy, the common law system is much more stringent against the criminal than the civil law system. In civil law countries, the crime of conspiracy—if recognized by law—is deemed to be committed only where there was an actual agreement between the conspirators. Conviction of conspiracy in cases similar to

29. A comparative survey of statutory provisions relating to criteria, principles and precedents for declaring collective criminality has been made by Justice Robert H. Jackson, pleading at the Nürnberg trial, 8 *Trial of Major War Criminals* 361 ss (G.P.O. 1947); 2 *Nazi Conspiracy and Aggression* 9 ss (G.P.O. 1946); Jackson, the Nürnberg Case, p. 103 ss (1947).

Rex v. Meyrick and Ribuffi, 21 Cr. App. R. 94, 45 T.L.R. 421 (1929), where the defendants bribed a police officer without being in direct communication with each other and were held guilty—would be inconceivable in Europe; the concept of a common design to accomplish a common purpose is unknown in civil law countries. Furthermore, a conspirator in the civil law countries who informs the authorities of the existence of the conspiracy is usually relieved from punishment. Moreover, the concept of the “unlawfulness” of the act never replaces, in Europe, that of the “criminal act.” The only case an act is made criminal only because it is the result of a concerted and not of an individual action has been expressly laid down by the French Penal Code. Certainly, European lawyers would concur in the dissent of Mr. Justice Clay in the case of *Commonwealth v. Donoghue*, 250 Ky. 343, 358, 63 S. W. (2-d) 3 (1933): “When a court on the theory of conspiracy declares an act to be a crime, which was not recognized as a crime at the time it was done, its decision savors strongly of an *ex post facto* law . . . The decision not only presents a strained application of the conspiracy doctrine, but its chief danger lies in the fact that for all time to come it will be the basis for the creation of new crimes never dreamed of by the people.”

Besides, the broad application of the doctrine of conspiracy may, in many cases, be inconsistent with the constitutional prohibition against double jeopardy.³⁰

Thus, extensive application of the doctrine of conspiracy, given the broadest interpretation, may be a convenient instrument in the hands of the prosecutor, but seems hardly to square with the principal of a fair administration of justice. As pointed out by Mr. Justice Jackson,³¹ the crime of conspiracy, as understood in modern common law system, “is so vague that it almost defies definition,” may supersede the liability based on aiding and abetting,³² and introduces implied crimes.

It is doubtful whether such understanding of the notion of criminal conspiracy is desirable.

30. Gordon Ireland, *Double Jeopardy and Conspiracy in the Federal Courts*, 40 J. Crim. L. & Criminol. 445, 457 (1949).

31. Concurring opinion in *Krulewitch v. United States*, 336 U.S. 440 (1949).

32. See, *e.g.*, *Pinkerton v. United States*, 328 U.S. 640 (1946).