

Formation of Contracts a Study of the Common Core of Legal Systems

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BOOK REVIEW

Formation of Contracts: A Study of the Common Core of Legal Systems. RUDOLF B. SCHLESINGER (GEN. ED.). Dobbs Ferry, N. Y.: Oceana Publications, Inc., and London: Stevens & Sons. 1968. Vol. I, Pp. xv, 910; Vol. II, Pp. xiv, 913-1727. \$35.00.

The sight of these volumes in print is a source of confidence and relief. Confidence derives from Professor Schlesinger's¹ ample qualifications to lead this multi-national and multi-authored study and from the abilities of the eight additional authors.² Relief stems from the great need for published research on the common core of the world's legal systems and from the excellence of the product of such a difficult undertaking.³

The project's purpose was to ascertain, in an important area of contract law, the extent to which there exists a "common core" among several major legal systems.⁴ Contract law was chosen to be the subject of the study because of the universality of the notion of consensual obligations and its every-day practical use in international and domestic transactions.⁵ Professor Schlesinger's common core research represents a pioneer effort, for both his aims and methodology differ from traditional comparative research. In the first place, the study was aimed at a fairly broad field of law, as opposed to past narrower approaches; this permitted "the discovery, within each of the legal systems selected, of the functional and systematic interrelationship among a large number of precepts and concepts."⁶ Second, a large number of legal systems was included, as opposed to the smaller number (often two) usually found in traditional comparative research; both the number and selection of the systems included lends a "truly multinational validity"⁷ to

¹ William Nelson Cromwell Professor of International and Comparative Law, Cornell Law School.

² The additional authors are Pierre Bonassies, Gino Gorla, John Leyser, Werner Lorenz, Ian R. Macneil, Karl H. Neumayer, Ishwar C. Saxena, and W. J. Wagner. Each author appears to be an expert in at least one of the legal systems included in the project. See pp. 30, 58-59 n.*. (Their professional affiliations are listed at p. xv.) The many ways in which this individual and collective expertise was utilized in the preparation of this study are described in part II(4) of the Introduction. Pp. 30-41.

³ The project took ten years to complete. See p. 17 n.1. The final group sessions were held in the autumn of 1964, and the authors assume no responsibility with respect to cases reported or other authorities published after July 1, 1964. Pp. 61-62.

⁴ P. 2.

⁵ P. 18.

⁶ P. 2.

⁷ P. 3. In regard to the selection of the systems included, Professor Schlesinger asserts

the common core results, which increases the probability that a particular proposition obtains in those systems not reported on. Third, Professor Schlesinger's aim was to proceed beyond the *compilation* and *juxtaposition* characteristic of previous research, to *true comparison*;⁸ from this emerged complex and intertwined similarities and dissimilarities, which were then explicitly identified and formulated.⁹

These aims were admirably served by a unique methodology developed by Professor Schlesinger at the outset of the undertaking. Rather than postulating rules of law, he posed a series of fact situations, usually taken from reported cases, with regard to which the authors were to direct their research and form their conclusions. The authors were to present the responses of their respective legal systems to the various fact situations in terms of who would win in litigation, the kind and measure of relief which would be awarded, the authorities supporting these conclusions, and their doctrinal bases.¹⁰ By eliciting responses "having a common focus,"¹¹ and by avoiding "mere consonances and dissonances,"¹² the result, as described by Professor Schlesinger, was that

not a single instance occurred in which the participants were unsure or in disagreement as to the issue to be addressed. . . . [T]heir discussion, whether or not they agreed on the answer to a given question, was always focused on the same question.¹³

This factual approach confirms confidence in the validity of the study's conclusions as to the comparability of law governing the formation of contracts.

Aside from its virtue of assuring a common focus, the factual approach confers a further merit in its end product—that of "maximum specificity" in findings. For, as Professor Schlesinger asserts, only reasonably specific findings are of any use to those utilizing the results of

that "almost every legal system in the world is more or less closely related to one or several of the systems fully covered" in the study, so that informed inferences and working hypotheses even as to those systems not included may be made. Pp. 29-30.

⁸ P. 2.

⁹ Pp. 2-3.

¹⁰ Pp. 31-32. The "Working Paper" embodying this factual method does not form part of the published work. It is, however, on file at the Cornell Law School Library.

¹¹ P. 34.

¹² P. 40.

¹³ P. 32. The danger in using abstract legal terms to delineate issues would have been heightened in this project by the multinational backgrounds of the authors; "each participant might have read particular notions of his own legal system into such terms . . ." P. 31. *But see* pp. 32-33 for the limitations of this factual method.

common core research.¹⁴ One might further agree with him that to arrive at these necessarily "detailed and accurate statement[s]," the "factual approach may well be indispensable."¹⁵

Formation of Contracts is organized to facilitate determination of both the universality of a particular rule of substantive contract law—the common core—and the position of that rule in all of the legal systems included in the project. The common core appears in "General Reports" which were formulated jointly by all authors after their individual reports had been compiled and compared. Significantly, the General Reports commanded unanimous agreement, and the authors assume joint responsibility for them. The statements of particular rules in this common core were spelled out with as much specificity as the subjects permitted, in keeping with the aims mentioned above. Still, without sacrificing this specificity, the participants found it possible and helpful to formulate some general observations and to delineate areas of agreement and disagreement in terms of rules, principles and trends. But always the formulation was in terms of the actual results reached by the various systems.¹⁶

A further virtue of the study is that it was conducted without any preconceived notions as to the extent of the common core; thus, in formulating the limits of agreement the authors accurately report the areas of genuine disagreement. These findings of disagreement are as valuable to the users of the study as are the findings of agreement.¹⁷

The General Reports are divided into major headings related to offer, acceptance, and two special problems in the formation of contracts; these headings are then broken down into detailed and well-organized sub-topics. The work is carefully confined to statements *de lege lata*, avoiding proposals and recommendations. The General Reports should be particularly useful to those concerned with legal systems not covered in the "National Reports," as this common core distilled from many well-selected systems permits informed inferences as to those excluded.¹⁸

The National Reports are presented separately, and consist of two parts. The first is a section of "introductions" to each legal system; each introduction includes the doctrinal framework within which the system's contract laws function, and, with some exceptions, a bibliog-

¹⁴ P. 39. For its potential uses, see the text following note 21 *infra*.

¹⁵ Pp. 33-34.

¹⁶ Pp. 35, 40.

¹⁷ See pp. 39-40.

¹⁸ See note 7 *supra* and accompanying text.

raphy and selected statutory provisions. The second part of the National Reports is divided into the same sub-topics as the "General Report" and "keyed" accordingly. This device allows immediate cross-reference from the General to the National Reports and vice versa. It thus simplifies determination of the extent of agreement or disagreement of a particular national system with the propositions stated in the "General Reports."

The American (United States), some Communist, English (and some Commonwealth), French, Austrian-German-Swiss, Indian, Italian, Polish, and South African legal systems are included in the study,¹⁹ thus establishing a solid basis for determining the common core of the world's legal systems in the area of formation of contracts.²⁰

Formation of Contracts admirably fulfills its overall goal²¹ of enhancing professional knowledge in comparative law of contracts. That there is a great need for such knowledge is apparent from the immediate concrete purposes for which it may be used. Professor Schlesinger points out several areas in which his and future common core research will be helpful. First, there is a growing need on the part of

¹⁹ It should be noted, however, that these legal systems are covered in varying degrees of thoroughness. The general term "National Reports" refers to both full-fledged "Reports" and less comprehensive "Annotations"; the latter "are intended to supply some relevant information . . . but they make no claim to being exhaustive, and they are not based on research in depth," as are the "Reports." P. 59. The American, English, French, German-Swiss, Indian and South African systems are treated exclusively by way of Reports. The Commonwealth (Australia, Canada, New Zealand—but excluding India which is treated separately), Austrian, Italian, and Polish systems are presented partly in Reports and partly by way of Annotations, depending on the particular sub-topic being discussed. The Communist systems covered (the U.S.S.R., Bulgaria, Hungary, Czechoslovakia, and Yugoslavia—but excluding Poland which is treated separately) are treated as a whole and exclusively by way of Annotations. Time and other factors dictated these diverse treatments. See pp. 23, 30, 59-60, 189.

It should also be noted that Islamic law and Egyptian law are given a very limited treatment by way of footnote references. See note 20 *infra*.

²⁰ Here again it should be kept in mind that this selection allows informed hypotheses to be made concerning legal systems not included. See note 7 *supra* and accompanying text. For Professor Schlesinger's reasoning in selecting the systems included, see part II (3) of the Introduction and authorities cited therein.

In addition to the systems included, the project had contemplated the inclusion of both Spanish-Portuguese and Islamic-Egyptian law. However, the scholars charged with these systems had to withdraw from the project at times too late to replace them. The Spanish-Portuguese systems had to be totally excluded. It was possible to accord limited footnote treatment to the Islamic and Egyptian systems as this scholar's withdrawal came after some partial reports had already been prepared.

Work has already begun on co-ordinating the results of this study with other legal systems. Greek annotations to the main work have been prepared and are on file in the Cornell Law School Library, to be published at a later date.

²¹ P. 2.

the legal profession for such research. In light of the increasing frequency of international transactions, a growing number of future lawyers "will have to be truly familiar with a broad spectrum of legal systems."²² *Formation of Contracts* will help remedy today's dependence by international legal practitioners on local counsel whose opinions cannot be subjected to the evaluation possible when familiar legal systems are involved.

Second, such common core research can immediately contribute to the development of international and transnational law. Article 38(1)(c) of the Statute of the International Court of Justice (ICJ) directs that "the general principles of law recognized by civilized nations" shall be applied by the court in deciding disputes in accordance with international law. To date, such "general principles" have been an insignificant factor in international jurisprudence. The biggest obstacle to their effective use has been the insufficient elucidation of areas of agreement among the world's legal systems. Common core research which specifically formulates²³ those rules shared by a large number of legal systems will provide a needed source for these general principles to be applied by international courts.²⁴

In addition to the ICJ Statute, references to these "general principles" as applicable in international disputes are found in many other instruments: Treaties, charters of international organizations, contracts between governments and foreign investors, even contracts between private parties.²⁵ Furthermore, the Hague Conventions of 1964 relating to Uniform Laws on the International Sale of Goods call for gaps to be filled, provisions to be interpreted, and usages to be determined by reference to comparative data.²⁶ *Formation of Contracts* is an important step toward facilitating the development of international law in these many areas.

Third, common core research may contribute to the development of national legal systems. This is especially true in new countries which must look to the world's legal systems for guidance in creating their own systems.²⁷

The other overall goal of this project was to test the feasibility

²² P. 6.

²³ Professor Schlesinger points out that the term "general principles" refers to agreement among a *sufficiently large* number of legal systems, not the *generality* of the language used to express the principle. P. 9.

²⁴ See pp. 7-12.

²⁵ See pp. 12-15.

²⁶ See pp. 43-50.

²⁷ See p. 17.

of the research method developed and used by the authors.²⁸ Not the least of this project's contributions is its pioneer common core research method which can now serve as a model for future comparative research. *Formation of Contracts* raises the inevitable question of where the search for the common core among the world's legal systems goes from here. Other areas of law deserve the same type of thorough examination which resulted in this work. The present study was made possible by the Ford Foundation's generous financial support of the International Legal Studies Program of the Cornell Law School. Efforts to secure financial support for continuing work of this sort must be made, and deserve the active support of all.

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²⁸ P. 2.

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