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Formation of Countracts: A Study of the Common Core of Legal System

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REVIEW

Formation of Contracts: A Study of the Common Core of Legal Systems. Conducted under the auspices of the General Principles of Law Project of the Cornell Law School, RUDOLF B. SCHLESINGER, General Editor. Oceana Publications, Dobbs Ferry, New York and Stevens & Sons, London, 1968. Two vols. pp. xvi, 1,727. \$35.00.

Max Rheinstein†

This book constitutes the most intensive comparison of legal institutions that has ever been undertaken. In 1,727 pages a team of ten legal scholars representing ten different legal systems, presents the results of an inquiry that was carried on for almost ten years. The topic is narrow: that part of the law of formation of contracts that is generally called the law of offer and acceptance. In the French Civil Code, that topic is not mentioned at all; in the German Civil Code, it is covered in twelve sections,¹ the Restatement of the Law of Contracts devotes to it 54 sections spread over 56 pages. In the present book, the first 70 pages contain the General Introduction, in which the General Editor discusses the aim of the project and describes the ways in which it was carried out. Six pages are occupied by the draft of a proposed Uniform Law on the Formation of Contracts for the International Sale of Goods, 27 pages by the Index. The General Report, in which the results of the comparison are systematically presented, is 106 pages long. On the remaining 1,518 pages the legal rules of the "legal systems under consideration" are discussed in meticulous detail.

The vast enterprise was conceived and guided by Professor Rudolf B. Schlesinger of the Cornell Law School, who is also the author of that part of the book which is overmodestly called Introduction, and which contains the General Orientation about the Nature of the Study and the discussion of the Problems that were encountered and the techniques in which they were handled, and, as an important by-product, trenchant observations about aims and methods of legal comparison and about the legal systems under consideration. The authors of the several "Individual Reports" and "Annotations" were Pierre G. Bonnasies, Professor of Law at the University of Aix-Marseille, France; Gino Gorla, Professor of Law at the University of Rome, Italy, and

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¹ § 145-56.

Professor-at-Large at Cornell University; Johannes Leyser, Reader at the University of Melbourne, Australia; Werner Lorenz, Professor of Law at the University of Munich, Germany; Ian R. Macneil, Professor of Law at Cornell; Karl H. Neumayer, Professor of Law at the Universities of Lausanne, Switzerland, and Würzburg, Germany; Ishwar Chandra Saxena, Dean of the Faculty of Law of the University of Rajasthan, Jaipur, India; W. J. Wagner, Professor of Law at Indiana University, Bloomington, Indiana, as well as Professor Schlesinger himself.

The legal systems covered were those of the United States; France; England and Australia, Canada, New Zealand; Poland and the other Communist countries of Europe; Germany-Austria-Switzerland; India; Italy and South Africa. Occasional observations on the law of Egypt and on Islamic law are taken from a report of Professor Abdel-Wahab of Cairo, Egypt, who when he was appointed to a high governmental office of his country, was unable to complete his work on the project. Some observations on the law of Greece were contributed by Constantine J. Simantiras, Professor of Law at the University of Thessaloniki.

The high cost of the project was covered by the Ford Foundation's International Legal Studies Grant to Cornell University.

The primary aim of the project was the discovery of the core that might be common to all the legal systems under consideration and, as the necessary counterpart, the differences between them. The topic chosen—formation of contracts: offer and acceptance—is universal.

The efforts of the project were concentrated on the problem of offer and acceptance. The team excluded all other problems that may occur in connection with the conclusion of a contract, such as those of mistake, coercion, fraud, or those which are treated under the vexed concepts of consideration or "cause." As to these, one would probably have found greater diversity of solutions and of conceptual tools. But their treatment might well have required another ten years or more. Besides, the very high degree of compatibility of national treatment of offer and acceptance renders them particularly well suited for comparative observation. Whatever differences exist are subtle or hidden, the common core is extensive but not universal. In fact, the sphere of divergences turned out to be surprisingly large.

The project was conceived by Schlesinger, who prepared it in the most incisive way, who acted as the chairman, and who also carried on the cumbersome task of General Editor. Schlesinger laid the groundwork by elaborating a Working Paper in which he systematically stated the problems that were to be investigated. As it is indispensable in a comparative inquiry, the problems had to be stated in factual terms.

Using the vast material of cases contained in the reports of primarily American, but also of German and Italian courts, Schlesinger formulated hypothetical cases the decisions of which were to be found in each of the systems under contemplation. This very process presented a problem of comparative law: what is a fact? In a legal context it is impossible to formulate the relevant facts so that they do not already contain elements of legal systematization. Fortunately, it turned out that the formulations could be expressed in terms which are common to or at least understandable in all the systems under consideration. In the field chosen the systematization is, to a large extent, a part of the common core. In dealing with the hypothetical cases, the individual reporters could not limit themselves to a simple "decision for plaintiff" or "for defendant." They had not only to indicate the nature and extent of the remedy, but they had to deal also with the systematic framework in which the problem would be placed. The answers thus indicated the differences that exist within the common core general systematization, especially as to the pigeonholes of the general system, which would be regarded as appropriate for specific problems. Inevitably, also, the respondents had to indicate and at times to present and discuss the relevant statutory provisions and precedents.

In response to the Working Paper the members of the team prepared National Reports, which, in turn, served as bases for the comparative General Report. Much of the work was carried on by correspondence; there were also three lengthy meetings of between two and four months at Ithaca at which much essential work was accomplished. The General Report was worked out so that each member of the team was responsible for a specific topic, for which he submitted to the team successive drafts for intensive discussion and elaboration. In the course of these discussions, the National Reports also underwent continuous rewriting and refinement. The General Report is published as the joint product of the team. The National Reports are not published as such. They are cut up in small segments which are then combined under the same headings under which the problems are arranged in the General Report. This arrangement is tri-partite: Offer, Acceptance, and Other Problems Concerning Conclusion of Contracts, including Manifestation of Assent Without Identifiable Sequence of Offer and Acceptance and Effect of an Agreement Contemplating a Writing or Other Formality. Part One, "Offer," and Part Two, "Acceptance," are subdivided into thirteen and eleven chapters respectively. In each of the latter, the sequence of presentation is generally as follows: American Report, Communist Legal Systems Annotation, English Report, Australian-Canadian-New Zealand Annotation, French Report, Ger-

man-Swiss Report with Austrian Annotation, Indian Report, Italian Report, Polish Report, South African Report. These topical presentations are preceded by introductions to the several national reports and annotations designed to give the reader concise—in fact, very concise—indications of the general characteristics of the legal systems in question and their source materials.

Leading comparatists have expended an immense amount of work upon the Project. Never before has a narrow topic been subjected to such intensive comparative treatment. What are the results?

First of all, the Project has yielded a series of monographic presentations of the treatment of offer and acceptance in a number of significant legal systems, in several of which the problems have never been treated in such an incisive and comprehensive manner. It has been one of the insights of comparative study that some problems which are treated in loving detail in one system are hardly observed or treated but lightly in others. The mere fact that the field was subdivided in categories that had been elaborated in a preliminary comparison compelled all the national reporters to follow a common scheme with the result that problems frequently had to be seen in a new light. One who wishes to obtain reliable information about the treatment of offer and acceptance in any one of the systems under contemplation will find it here, together with indication of the sources and selective bibliographies.

But the Project's aim was comparison rather than compilation of national monographs. Such comparison has been effectively achieved both on the level of actual solution of concrete problems of life and of systematic conceptual approaches. Methods of legal thought have also yielded fruitful comparisons. In these latter respects the Project's significance extends beyond its concrete topic. Of all the alleged differences between common law and civil law one appears to be significant: the common law's long attention to the impact of varying fact situations in contrast to the civilian preference for broader generalization. However, in all systems the core problems are as near to each other as the solutions. Of course, in the socialist countries contracts between economic enterprises are to a large extent negotiated and concluded within the framework of overall plans by which important terms of the contracts are prescribed to the contracting parties. But neither are all contracts in socialist systems parts of the network of planning nor are all contracts of "bourgeois" society free from governmental or other direction or binding prescription. Besides, even in a contract that is concluded within the framework of economic planning, some terms must be fixed in the traditional manner of negotiation, *i.e.*, of offer and acceptance.

Of the ends which have been pursued by the Project, the first mentioned by Schlesinger in his Introduction is the stimulation of comparative materials for law schools. Here he touches on one of the most troublesome problems of legal education. In the United States as elsewhere preparation for legal practice and law creation can no longer stop at the national boundaries. No law man is well educated who is not interested in any legal system but that of his own country. But what can, what ought to be, done in national law schools to awaken the students' international consciousness, not to speak of his knowledge of foreign legal systems? The problem cannot be pursued here. If cooperative works similar to the present are added, a series of valuable teaching tools will be available for purposes of introduction into comparative law and international legal practice. In Italy, material that has emerged from the Cornell Project is already used in the comparative law courses of Professor Gorla. It will be interesting to see in what ways the present work will be utilized as class material in American law schools.

The search for the core common to a plurality of legal systems has been stimulated by the provision of Article 38(1)(c) of the Statute of the International Court of Justice, which, like its predecessor, the Statute of the Permanent Court of International Justice, mentions as one of the sources the Court is to apply, "the general principles of law recognized by civilized nations." To a considerable extent, international disputes are concerned with treaties. The view that the principles and norms which in national law apply to private contracts are totally inapplicable to international treaties, is exaggerated. Difficulties that have been encountered in utilizing for treaties rules of national laws on private contracts have been largely the result of uncertainty concerning the common core of the national systems. By its careful, detailed elaboration of the common core, the Cornell team has rendered a great service to the practitioners and scholars of international law, as it will be applied not only by the International Court of Justice, but also by negotiators, tribunals, arbitrators and boards which have to mediate or to resolve disputes that arise among nations, between governments and concessionaires, investors and other private parties, within international organizations such as the United Nations and UNESCO, and between such organizations and their members. The results of the project are likely to be of even greater practical importance for the ordinary commercial practice of law when it transcends national boundaries.

Schlesinger aptly observes that "in a world moving in the direction of pluralism and tending to affirm the values of diversity and mutual

tolerance, we cannot expect monotonous unification."² But unification has been pursued and is likely further to be pursued as to certain topics. In the United States we now have the Uniform Commercial Code. The countries participating in the Hague Conference have, after deliberations of several decades, signed the Hague Convention of 1955 on the Law Applicable to International Sales of Goods. As this law has not yet been ratified by a sufficiently large number of countries, it has not yet taken effect. But in response to the necessity of supplementing the uniform law on sales, the Hague organization has also elaborated a Uniform Law on The Formation of Contracts for the International Sale of Goods, which has not yet entered into effect either. In the preparation of this law, the Max-Planck-Institute of Foreign and International Law at Hamburg, Germany, prepared under the guidance of Dr. Ulrich Drobnig, a comparative study which, although less elaborate than that of the Cornell Project, constituted in several respects a precursor. But the thoroughgoing Cornell study found the Hague Uniform Law on the Formation of Contracts to require modification and supplementation in so many respects that a new draft of a Uniform Law on the Formation of Contracts for the International Sale of Goods was elaborated by the team. It appears as an appendix in the present book.

The presentation of the national laws and their comparison is detailed, but it is what may be called legalistic. The answers to the factual problems are stated in legal terms. The theories, concepts and systematic categories are presented with meticulous accuracy. The underlying economic, political and social constellations are mentioned in many places, especially in the discussions of the interplay between contract and plan in the socialist systems. Historical roots are traced in many places, for instance in the parts dealing with the mixed legal systems of South Africa or Quebec. Business practices are mentioned frequently. But no consistent effort has been made to explore the relationship between law and social reality.

The aim of viewing law as a social phenomenon in the total context of social life, has not been pursued. It probably cannot be pursued in a team enterprise, particularly not by a team composed exclusively of legal scholars. In a footnote (at p. 38), Schlesinger expresses "doubt on the accuracy of the results reached through any method of multilateral comparison which relies on a single general reporter not having the benefit of a true give-and-take with representatives of all legal systems under consideration." The doubt is justified, but is the difficulty in-

² P. 5.

surmountable? If it were, the giant enterprise of the International Encyclopedia of Comparative Law would be doomed to failure. But that enterprise does not aim at a detailed investigation of so minute a nature as the Cornell Project. It is meant to constitute an inventory of basic problems and of the ways in which they are approached in those legal systems which have developed ideas of originality. In the Encyclopedia, the science of law will have to be regarded as a branch of social science. The law, its machinery and its administration will have to be seen as integral parts of living societies. The authors of the several parts must be men of vision, legal scholars who are conscious of the law's position within the framework of society. Of course, every one of the general reporters needs the information that can be furnished only by national experts. He also needs discussion with scholars in the law, in the social sciences and in history. But the ultimate composition must be the achievement of one single man of vision, just as the ultimate combination of all the strands of the Cornell Project was the work of one scholar, Rudolf B. Schlesinger. It has been under his guidance that the Cornell Project was conceived, organized, carried through and brought to fruition. To him we owe this imposing work that will stand as a model of comparative law, the contents and, above all, the methods of which will have to be studied in all future work of comparative law.