

FORMATION OF CONTRACTS : A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS

A REVIEW ARTICLE¹

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This lengthy work² is the principal output to date of the General Principles of Law Project at the Cornell Law School in the United States. The purpose of this project has been to test and promote a new comparative law research method. Under this method, legal experts in a particular topic from a number of legal systems meet to compile a report indicating the similarities and differences in the ways their legal systems deal with the many detailed legal problems that comprise a general legal subject. The similarities found are considered to be the common core of those legal systems. Common core research is different from previous comparative law research, according to the authors of these volumes, both in its comprehensiveness and in its orientation to the resolutions of detailed legal problems.³ Much earlier comparative research has either been restricted to a limited number of legal systems or has focused on a narrow problem without considering results reached in the systems studied to resolve closely related problems. Comparative studies which have covered a broad subject and a considerable number of legal systems have usually discussed just general matters such as the style, the sources, or the conceptual approaches taken by the legal systems considered.

In his introduction to these volumes, Professor Schlesinger, the organizer of the Cornell Project and the general editor of this work, identifies three purposes for which common core research can be used:³

(1) in the development of teaching materials for use in comparative law courses in law schools; (2) as an aid in the development of national legal systems, particularly for new countries who have not

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1. This is based on *Formation of Contracts: A Study of the Common Core of Legal Systems*. Gen'l. Ed., Rudolf B. Schlesinger. [Dobbs Ferry, New York: Oceana Publications, 1968, 2 v., pp. xv+1,727, \$35.00.]

2. R. Schlesinger (ed.) *Formation of Contracts: A study of the Common Core of Legal Systems*, 2-3 (1968) (hereinafter referred to as *Formation of Contracts*.)

3. *Id.* at 5-17. Professor Schlesinger also suggests that this study can be justified as basic research, the full value of which will not become apparent for some time.

had an opportunity to adopt a refined system of their own; and (3) as an aid in the development of international and transnational law. In connection with this latter purpose, Professor Schlesinger places great stress on Article 38(1)(c) of the Statute of the International Court of Justice, which authorizes the Court, in cases in which other sources of international law fail to supply an answer, to apply the "general principles of law recognized by civilized nations". He argues that this common core study shows which principles of law concerning formation of contract are general—in the sense that they are widely accepted, even if detailed. Professor Schlesinger further argues in connection with this last purpose that there is an increasing need for a body of law not connected with any national system to govern contracts in which the parties cannot agree to be governed by the law of a single national system. He identifies agreements entered into by international organizations and agreements between an independent country and a foreign investor (e.g., concession agreements) as contracts of this type and suggests that common core research can produce the new body of law desired.

For its first application of common core research techniques, the Cornell project selected the subject of formation of contracts.⁴ In the course of this study, which altogether took about ten years, several methodological problems in applying common core research techniques arose. These problems, and the solutions devised, are described in the introduction to the volumes reviewed here as well as in several review articles published during the course of the study.⁵ One of the first problems was to choose the legal systems to be directly studied. The basic strategy of the organizers of the project was to include all the legal systems which historically have been influential in the sense that a number of other legal systems have been based on them, as well as a sampling of the derivative systems. In the end supposedly

4. In his introduction Professor Schlesinger notes that considerable importance was attached to the selection of a topic for this first study and the final decision was not made until experts from throughout the world had been consulted. Formation of contract was finally chosen because of the universality of contract in modern world and because, within the area of contract law, the rules relating to formation are less easily displaced by standard contracts and therefore are more important than other rules of contract law. *Id.* at 17-20.

5. See, e.g., Schlesinger, *The Common Core of Legal Systems—An Emerging Subject of Comparative Study*, in *Twentieth Century Comparative and Conflicts Law—Legal Essays in Honor of Hessel E. Yntema* 65 (1961); Schlesinger, *The General Principles of Contract Law*, in *World Peace Through Law—The Athens World Conference* 779 (1964). A bibliography of writings about the objectives and methods of the project can be found in *Formation of Contracts* 62-63.

thorough examination of the rules in the following systems were included in the published results of the project: United States, England, France, Germany, Switzerland, Austria, India, Italy, Poland and South Africa.⁶ Less thorough examination of the rules (termed annotations in the study) were made for certain commonwealth countries (principally Australia, Canada and New Zealand) and most of the eastern European communist countries. It was originally intended to include Spain and Egypt in the study, but the persons recruited to report on these systems found it necessary to withdraw from the project before its completion. In the introduction Professor Schlesinger, the general editor of the published results, explains that in determining the common core of legal systems, it was often possible to consider information about Spain and Egypt provided by the reporters for those systems, but no claim is made that the published results of the project are valid for those systems in view of their reporters' abbreviated participation.

The most controversial inclusion in the systems considered are the communist systems. The participants in the project were well aware that the contract rules in systems in which most of the important economic enterprises are state owned might not be comparable in any sensible way to rules devised in capitalist systems. In an article published during the course of the study, Professor Schlesinger discussed this problem and revealed that the project had decided to include the communist systems initially and only after some study of these and other systems, although before formulation of the common core principles, to decide the comparability issue.⁷ In the end it was decided that the results reached in the communist systems under their civil codes were comparable. The civil codes apply to all private transactions, to transactions between state and citizen, and to transactions between state enterprises in the absence of other special provisions. The justifications given for this determination of the comparability issue, which I as well as others,⁸ regard as not altogether convincing, are basically two: (a) the civil codes are in words very

6. On some of the topics only annotations were prepared for some countries (e.g., Italy, Australia) for which reports were usually prepared.

In justifying the inclusion of South Africa, Professor Schlesinger emphasizes that contract law "has not been affected by the controversial apartheid measures which the present rulers of South Africa has seen fit to adopt". He also notes that combination of civilian and common law influences in South Africa make this system particularly interesting to a comparativist. *Id.* at 21.

7. Schlesinger, *The Common Core of Legal Systems — An Emerging Subject of Comparative Study*, in *Twentieth Century Comparative and Conflicts Law — Legal Essays in Honor of Hessel E. Yntema* 65, 68-70 (1961).

8. See Greene, *Book Review*, (1968), 53 *Minn. L. Rev.* 187, 196-98.

similar to the pre-communist codes and to codes of other civil law capitalist countries; and (b) with the increasing decentralisation of planning and use of profitability as a measure of a state enterprise's efficiency in the communist countries, the processes of decision within a state-owned enterprise and a capitalist enterprise in another country are becoming more and more similar.⁹ Noted, but with little apparent account being taken of it, is the fact that disputes between state enterprises — even though the applicable law is the civil code — are generally decided by state arbitrators, who usually do not have legal training.¹⁰

Having chosen the systems to be studied, the next step was to select the participants who would "represent" these systems. In one of the afore-mentioned articles published during the course of the study, Professor Schlesinger indicated that two basic criteria guided the selection of participants. He stated that "members of the team must be persons familiar with the actual practice as well as the book learning of the countries" on which they report. At the same time, in order to increase the coverage of the study, there was a tendency to select persons who had knowledge about more than one system.¹¹ These two criteria are partly inconsistent with each other, for it is unlikely that any person will be familiar with the actual practices in more than one system, generally the system in which he resides. The effects of this inconsistency are reflected in the study. Thus, the reporter for South Africa was born in Germany, received his early legal training there and is presently a law teacher in Australia. His reports on South African law that are published in the present work are typically very short, make almost no mention of business practices or lower court decisions in that country, and generally seem to indicate that the reporter's knowledge is based on the study of textbooks. Perhaps the most questionable selection of a reporter, however, concerned the communist legal systems. The principal communist system covered was Poland and the reporter did receive his legal training there. Ever since the communist takeover, however, he

9. *Formation of Contracts* 25-29, 313-315.

10. *Id.* at 313. In addition to criticising the inclusion of the communist systems, some question might be raised about the exclusion of Japan and the Scandinavian countries. No explanation is given for the omission of these commercially important legal systems. For a comment on the developing countries included in the study, see note 22 *infra*.

11. Schlesinger, *supra* note 7, at 70-71. As a practical matter the second requirement meant that most of the reporters had done previous work in the comparative law.

has lived elsewhere.¹² As one might expect in these circumstances, his reports on Polish law are short and consist largely of quotations of appropriate sections from the Civil Code.¹³ There is no discussion, for example, about whether the Civil Code sections are interpreted differently in the three major types of cases in which they are applicable. For this reason alone, quite apart from the issues of comparability of communist systems discussed above, the conclusions reached in this study probably should not be considered applicable to communist legal systems.

As is indicated above, the basic strategy of this study was to have each of the individual reporters explain how their legal systems handled detailed legal problems concerning formation of contract, and then, after discussion of these reports, to define the similarities and differences between the systems. The first step devised to implement this strategy was for Professor Schlesinger to prepare working papers in which he raised a number of detailed but related legal problems covering what might be called a topic (e.g., is a writing or statement an offer or an invitation to deal?) To insure that all participants received the same understanding of the problems covered, the working paper discussed specific factual situations, usually taken from reported cases.¹⁴ The participants were then asked to prepare written reports in which they indicated how their legal systems would decide these cases and on what doctrinal bases. After these reports were prepared, the reporters met at Cornell in lengthy sessions¹⁵ to discuss the "national" reports and to define and put in writing the similarities and differences between the systems (that is, the common core). These formulations of the common core are called general reports in the present work

12. The reporter was Professor W. J. Wagner of the Indiana University School of Law. For a brief description of Professor Wagner's background, see *Association of American Law Teachers, Directory of Law Teachers 1968-1970*, at 406.

13. The material published in these volumes on other communist systems are even briefer and more oriented towards Code sections than are the Polish reports. The materials on other communist systems only purport to be annotations, however, whereas most of the Polish materials purport to be reports, indicating an extensive inquiry into the law on the topic covered. It should be noted that the materials on national legal systems published in these volumes was put in final form after the formation of the common core of the systems covered; it is possible, although I think unlikely, that more comprehensive materials on Polish law were made available during the discussions at which the common core was formulated.

14. This method of introducing a topic is called the "factual method" by Professor Schlesinger. He reports that the method was so successful that "not a single instance occurred in which the participants were unsure or in disagreement as to the issue to be discussed", *Formation of Contracts* 32.

15. Altogether there were three such sessions—in 1960, 1961, and 1964—each lasting between two and four months. *Id.* at 36.

and each general report was subscribed to by all the participants in the project. In form the general reports consist primarily of rule-like statements indicating the approach or approaches taken by the legal systems covered on a particular topic. In addition, the general reports sometimes discuss the broad doctrinal principles, such as the doctrine of consideration or the principle in some civil law systems that makes a participant in contract negotiations liable for damages caused by his bad faith, that underlie the solutions to a particular problem devised by the different systems. Often the general reports also include explanations of how the rules under a related topic must be considered in understanding how actual cases would be decided. For example, in several places, the general reports point out the inter-relationship between the rules in each system determining the revocability of offers, the times at which a revocation and an acceptance become effective, and general principles of estoppel, good faith, abuse of rights and the like.¹⁶ Finally, as a last step in the study, each reporter reworked his individual national reports to reflect any changes in his thinking occasioned by the oral discussions and to give them the same organization as that contained in the corresponding general report. Annotations for those systems for which a report was not prepared before agreement on the general reports were also prepared at this time.

The work under review, therefore, consists primarily of the general reports and the reworked national reports. The reports are subdivided into 26 topics which are supposed to cover all the problems falling under the general subject of formation of contract.¹⁷ In addition to Professor Schlesinger's introduction to which I have previously referred, discussing the purposes and methodology of the study, there is also contained in the published work an introduction to each of the systems covered indicating the sources of that system's law (cases, codes, etc.) and some of its basic reference works.¹⁸

In evaluating a project of this type, reference must be made to the purposes for which the study can be used. Of these potential uses,

16. *E.g., Id.* at 162-63.

17. The 26 topics are divided into three major categories, those relating to the offer, those relating to the acceptance, and other problems concerning conclusion of contracts. Those topics falling into the offer category are designated "A" followed by a numeral, such as A-2, A-6, and so forth. Topics in the acceptance category are designated "B" followed by a numeral and a topics in the third category are designated "C" with a numeral. I will occasionally use this nomenclature system to refer to specific general and national reports.

18. There is also a short "Scope Note", written in the format of the general reports, which defines the substantive boundaries of the subject of this study. The Scope Note indicates that the study considered only exchange transactions, thereby eliminating most of the problems raised by the consideration doctrine in common law countries and similar principles in other systems.

perhaps the study has the least utility as an aid to the development of national legal systems.¹⁹ To be sure, the study does list the alternative approaches that have been taken to particular problems by a variety of legal systems, and this listing may suggest possibilities that would not otherwise occur to the decision makers in a national system developing new rules. The study would seem to have little utility in helping the decision makers make a choice between the different possibilities, however. Laws, of course, should be policy based. In adopting a particular rule of contract law, therefore, a national system should first determine what policies it wishes to implement and then determine what rules would best implement those policies.²⁰ The present study makes no concerted effort to identify the policies underlying the rules it itemizes (although, of course, the various national reports make occasional reference to policies) nor does it undertake the empirical inquiries into the effects of the rules on contractual practices that are necessary to determine whether the rules are effective in implementing the policies adopted by the systems in which they operate. In the absence of such information, a legal system adopting a particular rule, because this study indicates that it is adopted by all or a majority of the systems covered, would act without any assurance that the policies which the country wishes to promote with its contract law are the same as those promoted by the countries covered in this study. Or, assuming that the same policy goals are shared, that the rule in effect in the studied countries would effectively implement those policies in the socio-economic conditions of the country adopting the rule. Indeed, there is not even any assurance that the rule effectively implements desired policies in the studied countries.

It might be argued against the points made above that although law should be policy based, most persons would concede that in the area of contract law all systems with a modern economy based on specializ-

19. In fairness, I should note that Professor Schlesinger reports that many national legal systems have made references to the general principles of law and he indicates that this study can help those systems transform their references into a meaningful body of law. *Formation of Contract* 17. It seems clear, however, that Schlesinger believes it would be a good idea for countries adopting new legal systems to make substantial use of this study, and it is this proposition which I choose to examine in the text. Many of the same points could be made about the desirability of courts using this study to provide content to their country's statutory reference to the general principles of law.

20. This model surely provides too simple an explanation of how a legal system goes about devising a set of rules to be applied in courts. It is well recognised, for example, that the inadequacy of means can effect goal definition. Thus, a legal system may discover that no set of court-applied rules can adequately implement a desired policy and as a consequence decide to amend its definition of the policies to be achieved by court-applied rules. The model presented in the text is sufficient for the point I want to make here, however.

ation of labour and exchange have nearly identical basic policies—namely protection, and therefore promotion, of reasonable reliance on certain types of statements pertaining to the future (i.e., most “promises”) while at the same time preserving some freedom for the person or enterprise controlling the disposition of an item of property to dispose of it in the most desirable manner.²¹ Moreover, most underdeveloped countries, which are the countries most likely to use the present study as an aid in the development of a new legal system, have sectors of their economy based on exchange and specialisation of labour, and it is for use in this sector that they are generally trying to develop their contract law.²² If all this is true, then it might be argued that if all or most countries have a similar rule, the implication that the rule must be one effective way to implement the commonly held policies in exchange based economies is persuasive, for if the rule were not effective, in view of the importance of these policies to such economies, there would surely be demands for change in the rules.

Studies have shown, however, that at least in America this argument is not accurate. Rather than trying to change a rule of contract law with which they are dissatisfied, businessmen have often set up informal dispute settling systems that apply different rules.²³ Furthermore this study itself shows that in spite of the similarity of the basic contract law policies in the countries studied, there are many differences in the detailed rules chosen to implement those policies. For example, most common law countries have a rule permitting the offeror to revoke his offer before acceptance. Some civil law systems consider

21. There are many different motives for this last policy, including adherence to a value of maximising the freedom of an owner to dispose of his property as he sees fit and a belief that an economic system will function most economically if there is a good deal of decentralisation of decision making. See generally J. Galbraith, *American Capitalism* (1962); Harmathy, *The Reform of Economic Management and the New Regulation of Contracts in Hungary*, (1968), 10 *Acta Juridica Academiae Scientiarum Hungaricae Tomus* 215. The important point here is that, whatever the motive, the policy is increasingly recognised as an important one, even in socialist countries.

22. This fact may justify the failure of this study to include more developing countries in the legal systems covered. India is the only country covered that would ordinarily be considered developing. So long as only one developing country was to be included in the study for two reasons, India was probably an unfortunate choice: (1) India is more highly industrialised than nearly any other country considered underdeveloped; (2) India's legal system is based on England's and over the years India has adhered very closely to England on points of substantive law.

23. See, e.g., Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *Am. Soc. Rev.* 55 (1963); Comment, *The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices*, 66 *Yale L. J.* 1038 (1957). Apparently a similar conclusion could also be reached about the actions of businessmen in Japan. See J. Sawada, *Subsequent Conduct and Supervening Events* (1968).

most offers irrevocable, while other civil systems permit revocation of an offer unless the offer states that it will not be withdrawn but at the same time permit an offeree to collect limited damages if the revocation has caused him reliance damage.²⁴ The point is frequently made in the general reports that in these rules concerning revocation and other related rules,²⁵ each system is trying to draw a balance between the interests of the offeror and the offeree. Nevertheless there are differences, which are potentially important, in the rules in effect in the different systems. These differences may reflect adoption of different secondary policy goals for contract law by the systems studied, but this study makes no concerted effort to determine whether this is the case. Moreover, there is no comparative empirical study to determine the impact of these differences on business practices. Such a study might have tried to discern whether offerees in the various civil law systems tend to rely on offers sooner than their counterparts in common law systems, or whether there are any adverse business effects on offerors in civil law countries from the temporary inability to control their own assets that is created by their rules—assuming that they are observed in everyday business dealings—which prevent revocation of an offer before it is known whether it will be accepted. To be sure, such studies would not necessarily relieve a country developing a new legal system from the burden of making an inquiry into its own business practices. But such a study could help define the type of specific empirical inquiries that should be made, and by showing how the different rules operate in their respective systems, it might make less risky a decision to forgo a study of business practices altogether and to assume that the impact of a particular rule will be similar to its impact in another system.

There is a second reason why the present study has little utility in guiding the development of new national legal systems. The study focuses almost entirely on substantive rules for deciding cases. It pays little attention to the different processes by which the countries covered identify and articulate the rule needed to decide a case, yet the choice between these differences can have considerable implications for a legal system.²⁶ The most obvious difference in process is, of course,

24. See particularly the French and German reports to A-10 *Formation of Contracts* 769-83. Italy appears to have an intriguing set of rules on this topic but unfortunately there is no Italian report, only a very brief annotation. Various aspects of the Italian law are discussed in the Italian reports to other topics. For the relevant Italian statutory provisions, see Arts. 1328 and 1337 of the Italian Civil Code of 1942, reproduced in English at *Id.*, 303-09.

25. See note 16 *supra* and accompanying text.

26. See generally on this problem, Ghai & Whitford, *Reform of Private Law in East Africa* (1969), 2 *Mawazo* 43.

between codified and uncoded systems. Professor Schlesinger does argue in his introduction that in the past too much importance has been attached to this distinction. He argues that with regard to a particular legal subject systems are more or less codified, depending upon the comprehensiveness of the Code in that subject in civil law systems and the degree of statutory intrusion (e.g., the Tanganyika Contract Act) in common law systems. The critical differences, Professor Schlesinger suggests, are whether the rules formulated by the Code or by case law are highly general and fail to account for desirable distinctions between differing fact situations, and whether the law-makers (courts or legislators) are willing to change the rules to reflect changing conditions or new knowledge about the best way to implement desired policies. Both codified and uncoded systems, Schlesinger seems to conclude, are capable of developing the desired degrees of flexibility and specificity in their rules.

There is, of course, a good deal of documentable truth to what Schlesinger says. There are, however, alleged differences between codified and uncoded systems which, can be crucial in the choice of a legal system, have not been conclusively documented, and are not explored by this study. Thus, many civilian lawyers argue that one of the more pernicious effects of a common law system is that courts are reluctant to interpret statutes so as to change the basic principles of judge-made law.²⁷ Certainly such was once assumed to be the case, and there are indications that this tendency is especially strong today in the less developed countries of the commonwealth. This study, however, makes no attempt to define the contemporary validity of the civilians' accusation, nor to explore the equally interesting question whether courts in civil systems also interpret conservatively legislated changes in derogation of basic civil law principles.

Perhaps even more importantly, the study does not explore differences in systems concerned not with how a system formulates its rules but with how, in the context of a particular case, it identifies and applies them. I have in mind here such related questions as whether a system has a principle of *stare decisis* with fully reported appellate decisions and how a system distinguishes between questions of law, on which an appellate court can reverse a trial court and insure a uniformity of decision, and questions of fact, on which there is often no appellate power to reverse.²⁸ These issues are related to the general

27. E.g., Eorsi, *Some Problems in Making the Law* (1967), *E.A.L.J.* 272.

28. For an interesting account of how one system wrestled with these questions see Lev, *The Lady and the Banyon Tree: Civil-Law Change in Indonesia* (1965), 14 *Am. J. Comp. L.* 282.

problem of whether it is desirable for a body of contract law to have certainty and predictability. To take an example, this study reveals that the French legal system has neither very detailed codification in the area of formation of contract nor an authoritative body of adequately reported judicial decisions. Moreover, France considers as questions of fact conclusively decided at the trial level many issues on which other systems would permit appeals.²⁹ The result, as Schlesinger again observes in his introduction, is that "in this area the French legal system has suffered some loss of certainty and predictability, even with respect to basic issues which in other civil law systems as well as in common law systems have been authoritatively resolved".³⁰ Schlesinger rather clearly regards France's predicament as unfortunate, but I am not convinced. The contract lawyer's usual presumption in favour of certainty rests, I think, basically on the assumption that a lack of certainty in contract law will cause businessmen to rely less on contracts containing future promises in arranging their affairs. But there are costs associated with certainty—for example, certain rules usually admit to less ability to adjust the result to meet the equities of the particular case.³¹ Consequently, a legal system deciding whether to avoid copying France's system for deciding contract questions should be interested in knowing whether the greater uncertainty of that system would cause its businessmen to shun the contract device. Some empirical studies in America and Japan suggest that would not be the likely result there.³² This study could have contributed valuable assistance in answering that question if it had, *inter alia*, determined how French businessmen have reacted to the observed uncertainty in their system.

The utility of the present study as teaching materials in comparative law courses depends largely on the purposes attributed to such courses. Professor Schlesinger has often expressed his view that the primary purpose of such a course is the very practical one of training lawyers to handle intelligently the legal problems involving more than one system that arise in international transactions. This training can best be provided, he seems to feel, by traditional teaching of black letter law, by urging students to memorize at least the basic principles in each of the legal systems with which he is likely to come into contact.³³ Yet with the vast increase in the amount of international

29. See, e.g., the French report on B-9, *Formation of Contracts* 1446-63.

30. *Id.* at 55.

31. In recognition of the costs of complete certainty, common law systems have always given judges at least some leeway to change rules of substantive law and apply them retroactively to the case before them.

32. See authorities cited in note 23 *supra*.

33. See Schlesinger, *Teaching Comparative Law: The Reaction of the Consumer* (1954), 3 *Am. J. Comp. L.* 492; R. Schlesinger, *Comparative Law: Cases—Text—Materials* i-xliv (2nd ed., 1959); *Formation of Contracts* 5-7.

dealings of all types that is occurring today and will continue to occur, the volume of information about different legal systems that a new lawyer can expect to need during his career is becoming more than can be taught in one or two comparative law courses using traditional teaching materials. Professor Schlesinger believes materials like those being reviewed here will help to solve this problem by permitting law schools to offer courses which provide "a synoptic view of the guiding precepts permeating the various legal systems on a regional or worldwide scale".³⁴

In my view the present study can profitably be used as teaching materials in comparative law courses which have goals similar to those of Professor Schlesinger. It does provide coverage of the basic principles concerning an important area of law in operation in many of the world's most important legal systems. The entire two volumes have more pages than would ordinarily be covered in a single course, particularly if other materials treating other subjects are to be covered. A teacher would probably rely mostly on the general reports, therefore. I often found that reading the general reports is insufficient to appreciate how the different rules operate to solve cases in the different legal systems, primarily because the general reports are short and written very tightly. (For example, the general reports almost never state a factual situation which illustrates how the different rules operate). Where this is an important problem, however, it can usually be overcome by reading some of the national reports for the topic concerned.³⁵

In discussing the utility of the present work as teaching materials,

34. *Id.* at 6 (emphasis in original). In the long run Professor Schlesinger foresees comparative law courses using treatises, similar to Corbin's and Williston's treatises on American contract law, that synthesise the law in broad areas on a multi-national scale. Studies like the present one are a necessary first step in the preparation of such monumental works, however, for they determine the "concepts and principles" common to all systems "in terms of which the material can be organised". *Id.* at 7.

35. Indeed, many of the national reports are so well written that they should be considered in themselves significant contributions to that system's domestic literature on the topic covered. I particularly liked many of Professor Ian Macneil's reports on American law. See, e.g., his American reports on A-1, A-3 and B-9, *Formation of Contracts* 327-42; 433-64; 1393-1433. The last report cited was published separately as a law review article in fact. Macneil, *Time of Acceptance: Too Many Problems For a Single Rule* (1964) 112 *U. Pa. L. Rev.* 947.

It should be noted that for the same reasons that the present study can furnish useful teaching materials for Professor Schlesinger's type of comparative law course, it can also provide a useful guide to the practising lawyer who has a multi-national legal problem and needs a well organised reference-type work to warn him about possible differences between his legal system and the other systems involved. Another reviewer tells of one instance in which this work was used for precisely that purpose, with advantageous results. Greene, *Book Review* (1968), 53 *Minn. L. Rev.* 187, 198 n. 53.

however, it must be remembered that not all teachers of comparative law share Professor Schlesinger's ideas about the content of such courses.³⁶ Some teachers perceive the principal value of comparative law courses as providing insights into the role of law in human societies rather than as injecting knowledge of black letter rules. These teachers see the different legal systems as providing laboratories for the study of the different public policies reflected in the laws of different cultures, of the different methods of formulating and applying law, and of the impact of different legal rules on similar and different cultures. A comparative law course having as its objective this type of study would not find the present work very useful as teaching materials, of course, for the same reasons that the present work is not very useful as a guide to the development of a new legal system.

The potential usefulness of the present study which Professor Schlesinger seems to emphasise most strongly in his introduction to this work and in his other writings is as an aid in determining the general principles of law for use in settling various international and transnational legal disputes. In this connection it needs to be pointed out that not all international and comparative scholars agree with the study's basic premise in this regard — that the "general principles" to which Article 38(1)(c) of the Statute of the International Court of Justice refers are principles which are widely held, even though detailed in scope. Some scholars argue that only principles that are both widely held and broad in scope can properly be applied under Article 38(1)(c).³⁷ If one adopts Professor Schlesinger's position on this issue, however, the basic approach used in this study to determine the general principles could be an appropriate technique.³⁸ The criticisms

36. See generally Kimball, *Book Review* (1959), 58 *Mich. L. Rev.* 151.

37. See Green, *supra* note 35 at 190; Jalet, *The Quest for the General Principles of Law Recognised by Civilised Nations* (1963), 10 *U.C.L.A.L. Rev.* 1941.

38. It may not be the only technique, however. For example, rather than covering the entire area of formation of contract, the Cornell Project might have identified the specific types of commercial legal problems which might have to be resolved by reference to general principles of law and then have applied their inductive technique to determine the common core of legal systems with respect to those legal problems. This approach might have helped to reduce some of the over-generalisation problems that plague restatement-type projects. See notes 44-47 *infra* and accompanying text.

It should be noted that the utility of the present study for international and transnational law purposes could be considerably reduced if the 1964 Hague Convention proposing a *Uniform Law on the Formation of Contracts for the International Sale of Goods* is widely adopted. Professor Schlesinger discusses the utility of this study if the Convention is widely adopted in *Formation of Contracts* 43-50. It is interesting to note that one commentator who participated in the drafting of the uniform law indicates it draws heavily on Scandinavian law. That system of law was not covered in the present study, of course. See Schmidt, *The International Contract Law in the Context of Some of its Sources* (1965), 14 *Am. J. Comp. L.* 1.

made earlier about the failure of the study to identify the policies underlying the different rules and to explore the impact of the different rules and the different methods of applying them in the societies in which they operate are not so appropriate in this context. For purposes of international and transnational law, it is more important to concentrate on what the rules are in fact that are applied in courts. The principal doubt about the study's utility for this purpose of the approach taken in this study concerns the problem of the comparability of the detailed rules of contract law in communist and capitalist systems. I have previously indicated my belief that this study fails to establish the necessary comparability because of its failure to take account of the differing roles of legal rules in the two economic systems.³⁹ It may be that future studies could establish comparability, at least if the inquiry in the communist systems is limited to the rules applied in transactions involving a foreign party.⁴⁰ If not, however, then there would be some reason to doubt whether it is ever possible to find detailed rules that are held widely enough to be applied under Article 38(1)(c) of the Statute of the International Court of Justice.

Assuming that the basic approach taken by this study was appropriate to fulfil this last purpose, attention needs to be given to whether the general reports of this particular study accurately portray what they purport to portray. I have earlier criticised the method by which the reporters were chosen in this study.⁴¹ This criticism, if deemed valid, could easily be corrected if the approach of this study is used in any further study into the common core of legal systems. There is another methodological fault that is not so inexpensively corrected, however. Only one person reported on the rules operating in a particular system on each topic. In many instances, of course, the rules applied by courts in resolving a detailed problem are sufficiently obvious that anybody schooled in that system's law will accurately report these rules. In other instances, however, it is not so clear what "the law is", as is illustrated by the differences in Williston's

39. See notes 7-10, 12-13 *supra* and accompanying text.

40. It is possible that in effect this study did limit its inquiry in communist systems to transactions involving foreign parties, since the reporter did little other than quote code sections. Further documentation is needed, however, before it is safe to assume that the code provisions accurately reflect the rules applied in these transactions.

41. See notes 11-13, *supra* and accompanying text.

and Corbin's treatises on American contract law.⁴² In using only one reporter for each system, therefore, the present study insured that frequently they received a report about the rules operating in a particular system with which not all scholars in that system would agree. (Indeed the national reports often explicitly recognize this point). The inevitable effect is to cast doubt on the objectivity of the general reports.

Closely related to the problem of a single reporter is a problem that plagues all projects to restate legal rules. Some "super-realists" maintain that the only determinants of judicial decisions are the social background of the judge, the quality of counsel, and so forth.⁴³ Although it must be recognised that these factors are important, I, together with the participants of this study, believe that rules are at least one important determinant of judicial decisions, and that therefore there is some utility in identifying those rules. It must be admitted nevertheless that the realists have shown that too often in the past, lawyers in many countries have tended to state these rules too broadly and too certainly. Frequently, the most that can be said accurately is that the existence of certain facts will influence a judicial decision in one direction or the other. In the area of contract law, there has been a tendency to state rules in terms of a body of general contract law that apply to all transactions, whereas in fact there are only differing sets of rules that apply to different types of specialised commercial transactions.⁴⁴

The general reports reflect the lessons of the realists only partially. In a number of instances, the reports indicate that there is no certain rule in the legal systems covered but that a number of identifiable

42. This point is graphically illustrated at one point in this study. Different reporters were assigned the task of reporting on English law concerning "Offers to the Public" (A-7) and "Acceptance by Performance", including acceptance of offers to the public (B-6). In the course of their respective reports each reporter commented on the decision in *Gibbons v. Proctor* (1891), 64 *L.T. (N.S.)* 594, 7 *T.L.R.* 462. The reporters clearly disagree about the holding in that case and the contemporary authority of decision. *Formation of Contracts* 657-58, 1248.

43. For a citation of some commentators who might be considered the international law equivalents of the American "super-realists" and an evaluation of their position, see Davis, *Comparative Law Contributions to the International Legal Order: Common Core Research* (1969), 37 *Geo. Wash. L. Rev.* 615, 623-28.

44. See Whitford, *The East Africa Treaty for Co-operation and the Unification of Commercial Laws*, 1 *E.A.L. Rev.*; L. Friedman, *Contract Law in America* (1965). I recognise that the points made by the realists are principally based on observations of American law and may not be completely valid for all countries. The fact that the realist position is valid for some countries included in this study is sufficient justification for the point made subsequently in the text, however.

factors seem to be weighed in all or most systems in reaching a decision.⁴⁵ In other topics an admirable effort has been made to identify different fact situations that will commonly arise and to define the results that will be reached in each type of situation. For example, in considering whether silence will be construed as acceptance, the general report identifies a number of different fact situations in which the issue can arise and indicates that somewhat different rules may be applied to each situation.⁴⁶ In other situations, however, it seems to me the study has yielded to the temptation to state a rule more broadly or more certainly than court decisions will permit. For example, in no place does the study separately consider the problem of the "battle of the forms"—that is, where two business concerns having standard forms for making and accepting offers exchange conflicting forms—although it seems highly likely that courts in many systems treat this problem differently in some respects from the situation in which a considered reply to an offer fails to conform completely with the terms of the offer.⁴⁷

One final point needs to be made about the general reports. Most of the reports are clearly written and their findings are supported by the corresponding national reports. Many of them exhibit considerable craftsmanship in discerning areas of agreement among systems which tend to use different concepts in discussing the relevant problems, thereby testifying to the usefulness of this study's tactic of confining discussion of a topic in the first instance to concrete factual situations.⁴⁸ Certain of the general reports, however, make statements about the rules in particular systems that are at variance with the corresponding national reports, and in so doing appear to overstate

45. E.g., A-3, *Formation of Contracts* 90.

46. B-5, *id.* at 131-40.

47. The problem is mentioned briefly in various national reports. The failure to consider special problems like the "battle of the forms" may raise another methodological problem for a study of this type. It is obvious from reading the national reports that not all the reporters were philosophically in agreement with the realist position. It may be for this reason that the study is not more oriented towards fact situations than it is. If so, it raises the question whether in a study of this type an effort should be made to select reporters who are all of realist, or non-realist if that is the organiser's philosophical bent, persuasion.

48. I found the general reports on B-5 (Acceptance by Silence) and B-6 (Acceptance by Performance) quite good, for example. *Id.* at 131-46.

the areas of agreement among the legal systems covered.⁴⁹ It is possible of course, that in these instances, the national reports do not accurately reflect the opinion of the reporter about his own system's rules held after the oral discussions at which the general reports were drafted. This possibility is not a likely one, since each reporter had an opportunity to rework his national reports after the general reports were put in final form. In either event, however, the appearance of variances between the general and national reports indicates a lack of care that should not occur in a study into which there is invested as much time and money as was put into this one.

In conclusion, some attention should be directed to the question whether this first experiment with the use of common core research techniques has sufficiently demonstrated their utility that other projects using these techniques should be initiated. I have expressed my opinion that common core research has considerably less utility than is claimed for it by the authors of this study. Moreover, although the present work does not reveal the costs of the Cornell Project, they must have been substantial in view of the substantial periods of time all the participants spent at Cornell. Nevertheless, I cannot conclude that the costs of this project exceed its benefits, since I am not schooled in international and comparative law and cannot evaluate either the importance of developing the "general principles of law recognised by civilised nations" or the value of this technique in this endeavour. If persons more expert than I do decide that common core research is worthwhile and initiate new projects based on this research design, I hope they will note the defects in the way this project was carried out and avoid them in their own projects. Although it would increase the costs, consideration might also be given to inviting more than one reporter to discuss each legal system included in the study, and perhaps even to including an empirical dimension and studying the impact of at least some of the rules covered in the societies in which they operate.

49. The most common fault of this type is a tendency for the general reports to indicate that a particular system has adopted a rule to deal with a problem when the national reports indicate that the law is very uncertain. For example, compare the general report on B-3 (Rejection and Return Offers), *id.* at 127-29, with the English report on that topic, *id.* at 1014-17. In some instances the general report indicates that a system has adopted a particular rule when the national report suggests a different rule has been adopted. Compare, for example, the general report on B-1 (Assignability of Offers), *id.* at 121-24, with the German report on that topic, *id.* at 928-33.