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## Book Review: 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. GENERAL EDITOR, RUDOLF B. SCHLESINGER. Dobbs Ferry, N.Y.: Oceana Publications, Inc.; London: Stevens & Sons. 1968. 2 vols. Pp. xv, 1727. \$35.00.

*Formation of Contracts* by Rudolf Schlesinger,<sup>1</sup> General Editor, is one of the most important legal studies of our century. It took ten years to complete and involved the cooperation of nine experts highly qualified in the field of comparative law.<sup>2</sup> It will undoubtedly stimulate similar studies and serve as one of the models to guide such future endeavors.

The substantive law investigated is limited to problems relating to the formation of contracts. The study examines thirteen specific areas concerning "offer," eleven areas concerning "acceptance," and two additional problems often closely associated with the formation of a contract.<sup>3</sup> The study deals with the law of ten countries or groups of countries.<sup>4</sup> Some of the information is supplied in the form of "reports," and the remainder in the form of "annotations." The difference is that the annotations make no claim to being exhaustive and are not based on research in depth.<sup>5</sup> Although there are almost as many annotations as reports in the section dealing with "offer," the two remaining sections consist wholly of reports except for annotations on the communist countries.

The work begins with a lucid sixty-five-page explanation of its aims and methods. This is followed by Part I, consisting of the "General Reports," which are a synthesis of the "National Reports." In the General Reports the relevant rules of law of the various legal systems are compared, and areas of agreement and disagreement are marked out. It is here that one can find to what extent a "common core" or "general principles of law" exists, on the points referred to above, among the countries investigated. In

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<sup>2</sup> The associate authors are: Pierre G. Bonassies of the University of Aix-Marseille; Gino Gorla, Director of the Institute of Comparative Law of the University of Rome; Johannes Leyser of the University of Melbourne; Werner Lorenz, Co-Director of the Institute of Comparative Law of the University of Munich; Ian R. Macneil of Cornell Law School; Karl H. Neumeyer, Director of the Institute of Comparative Law of the University of Lausanne, and Director of the Seminar for Comparative Foreign Civil and Commercial Law of the University of Würzburg; Ishwar Chandra Saxena of the University of Rajasthan, Jaipur (Rajasthan); and W. J. Wagner of Indiana University School of Law. The study was done under the auspices of the Cornell Law School.

<sup>3</sup> These two problems concern the manifestation of assent without an identifiable sequence of offer and acceptance, and the effect of an agreement contemplating a writing or other formality.

<sup>4</sup> These include: United States; U.S.S.R., Bulgaria, Hungary, Czechoslovakia, and Yugoslavia; England; Australia, Canada, and New Zealand; France; Germany, Switzerland, and Austria; India; Italy; Poland; and the Union of South Africa. For a discussion of the choice of systems to be included, see 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 HASSEL E. YNTEMA* 65, 66-72 (K. Nadelmann, A. Von Mehren & J. Hazard eds. 1961).

<sup>5</sup> FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 59 (R. Schlesinger gen. ed. 1968) [hereinafter cited as FORMATION OF CONTRACTS].

commenting on the findings in the introduction, Professor Schlesinger states that the over-all picture emerging from the study bears out previous expectations only in part. Areas of agreement among the legal systems could be found where none were expected, and in numerous instances known areas of agreement were found to be larger than had been surmised.<sup>6</sup> The areas of agreement were sometimes hidden by opposite rules with diametrically opposed exceptions. Thus, on a specific point of law the same result could be reached under the rule in one system, and under the exception in another.<sup>7</sup> However, one finds occasional unexpected disagreement in matters of detail. "In some instances, even the seasoned comparativists participating in the Project were frankly surprised when they discovered that one or more legal systems registered a dissent from a proposition which many had taken for granted."<sup>8</sup> It is in the General Reports that one can get a quick, reliable overview of how the legal systems react to the problems covered by the study. The General Reports are presented in only 105 comprehensive pages which everyone who is seriously interested in contract law will want to read carefully.

Part II contains the "National Reports," *i.e.*, the reports on the individual countries or groups of countries considered. It contains two divisions. The first division, entitled "Introductory Materials," is a collection of general introductions to the legal systems of the countries included in the study, with particular attention given to matters affecting their contract law. They deal briefly with the history, sources, classificatory schemes, and other general features of these legal systems. Each introduction includes a bibliography and many include pertinent statutory material, either in the original English or in translation. The second division of Part II of the National Reports is entitled "Individual Reports."<sup>9</sup> The detailed points of law of each of these reports correspond to the outline and subdivisions of the General Reports. Thus, once one has located the number of the particular point of law on the formation of contracts in which he is interested, it is an easy matter to locate the same point in the report of each nation and in the General Reports. The Individual Reports compose the largest part of the work, 1370 pages. Counting their introductions, the individual reports on each of the reported countries or groups of countries average

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<sup>6</sup> For example, the agreement between systems in which offers are normally revocable and those in which offers are normally irrevocable is greater than one might have expected. The supposed contrast between common law and civil law systems caused by the peculiar common-law doctrine of unilateral contracts produces only minor differences in actual results. *Id.* at 41-42.

<sup>7</sup> *Id.* at 40. For example, although French law seems to start with the rule that communication of the acceptance of an offer is in principle not a prerequisite to the formation of a valid contract, the exceptions in French law and in systems with a contrary rule greatly reduce the difference between the two sets of systems. *Id.* at 1322.

<sup>8</sup> "[T]he possibility that an undeclared revocation, which has never come to the knowledge of the offeree, might effectively destroy the offer . . . had not occurred to most of the participants until they read the French Report." *Id.* at 42.

<sup>9</sup> The terminology is somewhat confusing. Although the Introduction states that the Individual Reports are sometimes called National Reports, implying that the terms are interchangeable, the labeling of Part II uses the term "National Report" to describe the entire report on a nation or a group of nations, and the term "Individual Report" to describe only that part of the National Report addressed to the specific questions undertaken by the study.

approximately 150 pages. Although there is substantial variation in depth between some reports and some annotations,<sup>10</sup> it seems certain that in every case the work presents to the reader who is most familiar with American law and the English language the best available source of information on the foreign systems covered. In some cases the presentation may rival that of anything available in the native tongue.

As Professor Schlesinger suggests in the introduction, the by-products of a large-scale comparative study are likely to be at least as important as its contribution to our knowledge of the specific subject matter investigated.<sup>11</sup> One of the by-products, further discussed below, is the added insights which the participants obtained into other legal systems and the comparative process. Another is the illumination of legal problems reaching beyond the subject matter of the particular study—for example, the relationship between codified and uncoded systems. “Concerning the formation of contracts, the line between codified and uncoded legal systems cannot be drawn in the simple terms of the traditional dichotomy between civil law and common law. In France, a ‘civil law’ country, there are practically no code provisions dealing with offer and acceptance; thus the pertinent rules and principles had to be developed by the courts and legal writers.”<sup>12</sup> In the United States we have the Uniform Commercial Code and other statutes. In India the basic rules are comprehensively and rather systematically laid out in the Indian Contract Act.<sup>13</sup> Both a codification system and a common-law *stare decisis* system work fairly well. But when a system has in effect neither, as is arguably the case in France regarding many questions of contract formation, then difficulties can arise.<sup>14</sup> Perhaps the most significant by-products of the Cornell study are its contributions to a comparative research method. Because of the growing importance of these studies<sup>15</sup> and the special interest of the author of this Review, the following analysis is concerned primarily with questions relating to the method of conducting the study.

### I. FACT-SITUATION APPROACH

This study makes three important advances in the developing art of conducting large comparative legal studies. In the past, much of the effort to investigate foreign substantive law became bogged down in the intricacies of the legal doctrine, terminology, and procedure, plus the interplay and contradictions of the various laws and court decisions of the country being studied. The Cornell group was able to eliminate most of this by

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<sup>10</sup> The average length of the “offer” reports for each country or countries reported on is approximately 59 pages, of the “acceptance” reports, approximately 67 pages (counting England separately as it is listed in the “offer” reports, although it is joined with other Commonwealth countries in the remainder of the reports), and of the other problems, 11 pages.

<sup>11</sup> FORMATION OF CONTRACTS 50.

<sup>12</sup> *Id.* at 52.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 51-55.

<sup>15</sup> Some indication of the importance attached to studies of this type is apparent from the fact that the Ford Foundation made a grant of approximately \$300,000 to the Cornell International Law Project in 1958. The major part of the grant was apparently destined for this study.

posing, at the beginning of their study, a series of fact situations, usually taken from reported cases, incorporating the legal questions they wished to investigate. The group asked their members to determine the response which the legal systems on which they were reporting would give to each fact situation. This method states the question in such a way that it cannot be misunderstood by the foreign expert. It places upon him, as the party most able to bear that burden, the full responsibility of determining the end response of his legal system to the fact situation presented. It avoids misunderstandings,<sup>16</sup> and results in saving of time and energy as well as in increased accuracy of findings. "The factual approach . . . cut right through the conceptual cubicles in which each legal system stores its law of contracts, and made it possible to proceed immediately to the matching of the results reached by the various legal systems."<sup>17</sup> Legal theory and the views of scholars are not eliminated from the study, because in some jurisdictions they play an important role in answering those fact problems, posed at the beginning of the study, to which the local courts had not yet given a clear answer. But even in those cases where the courts had clearly spoken it was necessary to understand the classificatory scheme, the concepts, and the techniques of the foreign law in order to understand the answers and the ramifications to which they may lead in slightly altered fact situations.<sup>18</sup>

Although previously there had been sporadic use of a "fact-situation" approach to comparative law, Professor Schlesinger appears to be the first to have used it systematically in a large comparative study. Its advantages are obvious and reaction to it appears to be uniformly favorable. The editors of the new *International Encyclopedia of Comparative Law*, which is being prepared under the auspices of the International Legal Association, have adopted a similar approach.<sup>19</sup> The new *Encyclopedia* project is an attempt to make a comparison of all major legal systems in virtually all areas of law. Without the use of a fact-situation or problem-type approach, this mammoth project would probably be doomed to failure.<sup>20</sup>

## II. EXTENSIVE MEETINGS OF EXPERTS

The second important advance which the Cornell group made in the art of conducting comparative studies was to hold, instead of a single meeting of the foreign law experts, a series of such meetings, scheduled so as to

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<sup>16</sup> Professor Schlesinger reports that there was not a single instance in which the participants were unsure or in disagreement as to the issue to be addressed, and that their discussion always focused on the same question. FORMATION OF CONTRACTS 32.

<sup>17</sup> *Id.* at 57-58.

<sup>18</sup> *Id.* at 35.

<sup>19</sup> The Executive Secretary of the *International Encyclopedia* project is Dr. Ulrich Drobniig of the Hamburg Max Planck Institute for Foreign and International Private Law. Dr. Drobniig assisted Professor Schlesinger in the preparation of the original fact-situation questionnaire. FORMATION OF CONTRACTS 67.

<sup>20</sup> For a description of the *Encyclopedia* project, see Riegert, *The Max Planck Institute for Foreign and International Law*, 21 ALA. L. REV. 475 (1969). For a more detailed discussion of the fact-situation approach, written early in the project, see Schlesinger, *supra* note 4, at 72-79. See also FORMATION OF CONTRACTS 30-41.

provide time for reflection between the meetings, and also to greatly increase the length of the individual meetings. Indeed, Professor Schlesinger may have gone too far in this direction. Instead of meeting just once for only two or three days, as is the practice of the Heidelberg colloquia,<sup>21</sup> the experts met in 1960, 1961, and 1964 for intensive working sessions lasting from two to four months.<sup>22</sup> As a group they synthesized their National Reports into General Reports instead of having a general reporter and his staff do this, as had been the case in previous large comparative studies. In neither the monumental comparative study of the law of the sale of goods by the late Professor Ernst Rabel,<sup>23</sup> nor in the Heidelberg colloquia,<sup>24</sup> did national reporters meet for such extended group sessions or synthesize their own national reports into general reports. A longer meeting period such as that of the Cornell Project permitted a more leisurely and extensive exchange of views, and certainly more extensive and precise results.<sup>25</sup> Professor Schlesinger writes that his experience with the Project indicates that it is necessary for the general reporter to have the benefit of true face-to-face "give and take" with representatives of all the legal systems reported upon in order to assure the validity of the general reports.<sup>26</sup>

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<sup>21</sup> Every three or four years the Heidelberg Max Planck Institute for Foreign Public Law and International Law holds a conference on a legal subject considered of particular importance, which is approached from a comparative point of view. At a conference held in the summer of 1968 on Judicial Protection of the Individual Against the Executive, leading experts from 32 nations participated. The topics of earlier conferences were: 1958, State and Private Property; 1961, Judicial Review of Constitutional Questions; and 1964, Liability of the State for Illegal Conduct of its Organs. The planning of a conference begins with the selection by the senior members of the Institute of a topic, the comparative treatment of which promises to be fruitful. A questionnaire is then formulated so as to illuminate the various aspects of the problem and assure their discussion in logical sequence. The questionnaire, which is prepared in German, is translated into English and French and sent to the participants, who then prepare the national reports by answering the questionnaire. A full copy of the report of each participant is sent to every other participant before the conference begins. On the basis of these reports, certain legal areas (in the 1968 colloquium, nine, in earlier colloquia, only four) are selected for discussion at meetings held during the conference. These topics are then assigned to members of the Institute who, on the basis of the national reports, and sometimes in part on the basis of their own independent study, prepare what they call "comparative reports" (Querberichte). It is in the preparation of these reports that the comparative work is done, and they correspond to the General Reports of the Cornell study. They are read to the assembled national experts during the colloquium. The experts may object to them or ask for clarification during the colloquium, or thereafter, orally or in writing. This gives the national experts an opportunity to correct any errors, ambiguity or improper emphasis which may be contained in the comparative reports. The length of the conference, which for earlier colloquia had been two days, was increased in 1968 to three days. After the meeting, a report on the colloquium is published containing the questionnaires, the national reports, the revised comparative reports, most of the discussion, and a final report which summarizes and explains the results of the colloquium. An English edition of the general reports, final report, and four reports on international law aspects of the 1968 colloquium is now in preparation and will be published in 1970 by the Max Planck Institute under the title "Judicial Protection Against the Executive." For further information on the structure and work of the Heidelberg Institute, see Riegert, *The Max Planck Institute for Foreign Public Law and International Law*, 3 INT'L LAWYER 506 (1969).

<sup>22</sup> There was also a one-week planning session at Aix-en-Provence in the summer of 1963. FORMATION OF CONTRACTS 36.

<sup>23</sup> E. RABEL, *DAS RECHT DES WARENKAUFS* (vol. 1, 1936; vol. 2, 1958). Ernst Rabel was the director of the Max Planck Institute for Foreign and International Private Law from 1926-1938. In 1939 he immigrated to the United States. The first volume was completed in the Max Planck Institute. This study did not have national reporters in the formal sense, but Rabel received assistance from the members of the Sales Law Committee of the Rome Institute who were experts in the sales law of their own countries. See the foreword in volume 1 of the study.

<sup>24</sup> See note 20 *supra*.

<sup>25</sup> Cf. FORMATION OF CONTRACTS 33, 38.

<sup>26</sup> *Id.* at 38.

Repeated and extensive meetings, such as used by the Cornell Project, have the very important collateral effect of further developing the expertise of the participants. "In the intensive, prolonged round-table discussions at Ithaca, each participant had a truly unique opportunity to probe into, and to get a new understanding of, the inner workings of several systems other than his own."<sup>27</sup> At an early stage of the proceedings the participants found it indispensable to educate each other on the history, sources, classificatory scheme, and other general features of the legal systems reported upon.<sup>28</sup>

[A]ll of the participants helped in developing, and became fully conversant with, the methods of comparison [used in the study]. It is already apparent that some of the participants—in their capacities as deans, directors of institutes, or individual law teachers—are translating the Cornell Project's factual approach into novel methods of teaching comparative law. The impetus of the group's common experience is carried, also, into individual research projects . . . .<sup>29</sup>

Although the extension of the meetings beyond the two- or three-day length is a clear step forward in the development of the comparative technique, it seems to this reviewer that the Cornell Project went too far in this direction. It extended the meetings well beyond their optimum length. The long, repeated meetings entail substantial disadvantages in that they make it difficult to get experts from each of the respective nations to commit themselves to such extensive projects. Professor Schlesinger was apparently unable to replace either the Spanish jurist who withdrew before the first meeting, or the Egyptian jurist who withdrew before the last meeting.<sup>30</sup> In part, it may have been the difficulty of working with a large number of experts during an extended period over a number of years which caused Professor Schlesinger to assign the law of several countries to a single expert, instead of securing an expert from each of the systems to be considered. This is the practice in some of the other comparative studies, including the Heidelberg colloquia referred to above. It probably would have been a more efficient and economical approach to have planned less extensive meetings and to have had a leading expert from each reported system instead of having some members report on systems other than their own. Most legal systems are so esoteric that maximum efficiency is likely to be achieved only by the use of an expert whose daily work requires expertise in the law on which he is to report. The Heidelberg colloquia seem to indicate that such an expert, particularly one with a prior knowledge of comparative methods, will probably be able to provide the information needed in only a fraction of the time, and more reliably than anyone else.<sup>31</sup>

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<sup>27</sup> *Id.* at 50-51.

<sup>28</sup> *Id.* at 55.

<sup>29</sup> *Id.* at 51.

<sup>30</sup> *Id.* at 21.

<sup>31</sup> One reviewer who praises parts of the General Reports "for their excellence," and parts of the National Reports for their "superior quality," states of other portions of the National Reports, that they "give the distinct impression that they simply lack the basis of extensive research." Greene, *Book Review*, 53 *MINN. L. REV.* 187, 194, 195 (1968).

This method was successfully adopted by the Hamburg Institute for a small private symposium held there in 1966.<sup>32</sup>

The expense of the repeated long meetings is a separate factor tending to reduce the potential number of participants, and in this study it did prevent the participation of a Scandinavian expert.<sup>33</sup> In addition, the long meetings exhaust the funds available for comparative research projects, thus reducing the total amount of ground which can be covered.

Four factors tend to explain the Cornell choice of the long meetings. First, the success of the Heidelberg colloquia could not have been known at the time of the 1957 planning session for the Cornell Project, because the first colloquium was not held until about a year later and its results were not published until 1960. Second, the desire for absolute accuracy seemingly focused on having the national experts participate in the drafting of the General Reports instead of having only a larger group of leading experts from those countries chosen for the study. Professor Schlesinger's questioning of the validity of studies in which a general reporter prepares the general reports has persuaded neither the Heidelberg Institute,<sup>34</sup> nor the editors of the *International Encyclopedia of Comparative Law*,<sup>35</sup> to deviate from this method. Third, there was doubtless a desire to increase the expertise of participants. Fourth, the desire to develop and test research techniques in the project would seem to make it necessary to extend the project beyond the optimum length in order to determine that length and the amount of marginal product. The full length of the Cornell Project seems to be justified solely, yet completely, by these last two purposes.<sup>36</sup> When one considers how many attempts are often necessary for success in other sciences, one becomes more conscious of the fact that it is unjust to demand that comparative research projects attain perfection on the first attempt. There is certainly a wide span between the few days' duration of the Heidelberg meetings and the approximate nine-month period of the Cornell meetings which were spread over five years. From this disparity, some optimum intermediate period<sup>37</sup> for the meetings of the experts should be selected. In cases where an intensive study of a relatively small area of the law is involved, and where a large number of difficult and obscure details must be explored, a longer period will be justified than in those studies which seek the establishment of broader and better known general principles.

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<sup>32</sup> The study which dealt with the application of foreign law in private international law was published in 1968 under the title *DIE ANWENDUNG AUSLÄNDISCHEN RECHTS IN INTERNATIONALEM PRIVATRECHT* (Materialien zum Ausländischen und Internationalen Privatrecht No. 10, 1968).

<sup>33</sup> *FORMATION OF CONTRACTS* 30 n.36.

<sup>34</sup> Professor Martin Bullinger of Freiburg, Germany, prepared, on the basis of the national reports and the "comparative reports" prepared by members of the Institute, a concluding report on the Heidelberg colloquium held in 1968. Neither he nor the members of the Institute believe that a change in the system of preparation is necessary or desirable.

<sup>35</sup> Rheinstein, Book Review, 36 *U. CHI. L. REV.* 448, 453-54 (1969).

<sup>36</sup> One of the express purposes of the Cornell study was "to test the feasibility of the research method developed and used in the course of the Cornell Project." *FORMATION OF CONTRACTS* 2.

<sup>37</sup> It is difficult to compare the size of legal areas compared. It could be argued that the Cornell Project worked a legal area larger than that of any one of the Heidelberg projects.



### III. COMMON-CORE AND OTHER PURPOSES OF THE STUDY

The third important development made by the Cornell study in the method of conducting comparative studies is the "common-core" approach. One of the leading purposes of the study was to determine to what extent a common core of rules exists among nations in the legal area investigated, in order that it might be used as a source of law for settling certain disputes.<sup>38</sup> This is a problem most notably associated with the International Court of Justice whose organizational statute in article 38(1)(c)<sup>39</sup> provides that the general principles of law recognized by civilized nations shall serve as one of the sources of law to be applied by the Court. Other treaties and civil codes, as well as contracts of both international organizations and private businesses, sometimes call for the application of law based on general principles of law recognized by civilized nations or by two or more specified nations. Even when no particular law is specified, courts and arbitrators sometimes attempt to use such general principles as a source of law in transnational transactions.<sup>40</sup>

The determination of the common core for use as a source of law in article 38(1)(c)-type situations can be an extremely valuable function of a large comparative study. For a long time there has been an acute need for a reliable systematic determination of these common principles.<sup>41</sup> As important as this function is, however, there are probably two other functions traditionally associated with comparative studies which are even more important—that of determining the foreign law for purposes of application in transnational legal transactions, and for use in local and transnational law reform.<sup>42</sup> Professor Schlesinger probably would now agree that the determination of a common core for use in article 38(1)(c)-type situations is not the most important function of this or future common-core studies. His stress on the article 38(1)(c) aspect has decreased since the study began.<sup>43</sup>

The study serves admirably both of the functions traditionally associated with comparative studies. The fact-situation approach is more likely to be directed to problems of great practical importance in transnational transactions, as in the Cornell Project, rather than to theoretical problems of little practical importance. The organization of the study is such that within the framework of the questions covered by the study, one need only find the fact situation in which he is interested and read the result of the appropriate system. For problems which do not coincide with the selected

<sup>38</sup> FORMATION OF CONTRACTS 7-16; Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 AM. J. INT'L L. 734 (1957).

<sup>39</sup> I.C.J. STAT. art. 38(1)(c). The statute, annexed to the Charter of the United Nations, is set forth in 59 Stat. 1055 (1945), T.S. No. 993, at 25.

<sup>40</sup> For a discussion of the possible art. 38(1)(c) uses of general principles, see FORMATION OF CONTRACTS 7-16; Schlesinger, *supra* note 38, at 734-39.

<sup>41</sup> FORMATION OF CONTRACTS 10-12.

<sup>42</sup> These are the purposes normally associated with the research projects of the five Max Planck Institutes for legal studies. Of course, most projects have a training or educational component, and some an experimental component, but in the last analysis these serve the more ultimate purposes of application and reform.

<sup>43</sup> Schlesinger, *supra* note 38, at 734-39.

fact situations, interpolation is probably no less reliable than subsumption would be in the more usual conceptionally-oriented study. The common-core approach of the study aids local lawyers in understanding the foreign law by showing them the patterns in which it runs. On the negative side, there occasionally may be a tendency to make parts of the National or General Reports less detailed on some questions because their answers make no contribution to the common-core purpose. This need not be so. As in the Cornell Project, the article 38(1)(c) purpose should be recognized as an additional, and not the sole, purpose of the study.

The Cornell common-core approach is also particularly well suited to serve the second traditional purpose of comparative studies, concerning local and transnational law reform, because it goes further than previous studies in comparing the legal systems under consideration. By pointing out the similarities and differences, it places the results in a more usable form.<sup>44</sup> By pointing out the common core, it focuses the lawmaker's attention on the common solutions of the majority of systems investigated.<sup>45</sup>

The importance of the law-reform function of general comparative studies seems everywhere to be underestimated. Perhaps it is fear of unfavorable reaction which causes reformers to de-emphasize the foreign origin of laws. Some of the most important changes taking place in our law today amount to little more than a copying of institutions from various of the civil law jurisdictions.<sup>46</sup> This does not mean that the civil law is inherently superior to the common law. Both sides of the Atlantic and Pacific have profited by highly successful "exotic transplants" and "invigoration by hybridization."<sup>47</sup>

It is probably more useful and more accurate to look upon Professor Schlesinger's study as a traditional large-scale comparative study, and upon the common-core approach as simply an added feature. This is better than viewing the project as some completely new type of study.<sup>48</sup> Indeed, at the

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<sup>44</sup> Professor Schlesinger stresses the novelty and importance of this comparison. FORMATION OF CONTRACTS 2-7.

<sup>45</sup> The study has been criticized for its failure to take systematic account of the sociological and economic factors underlying the law. See Greene, *supra* note 31, at 196-98. There is a certain justification for the caution which experienced comparativists like the Cornell team and all of the Max Planck Institutes for comparative legal studies exhibit when it comes to leaving the relative certainty of the area of legal rules in which they are at home for the less certain and less familiar economic and social seas. How best to take full account of the relevant sociological and economical factors, whether, for example, the task should be entrusted to jurists, social scientists, mixed teams, or dual specialists, is a problem yet to be solved. A proposal to establish a small department for sociological research is presently under consideration in the Hamburg Institute for Foreign and International Private Law.

<sup>46</sup> Some examples are: the changes in the law regarding the basis necessary for jurisdiction in civil matters, beginning with *Hess v. Pawloski*, 274 U.S. 352 (1927), and extending over *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957), to such broad jurisdictional statutes, which in some ways go beyond their civil law predecessors, as WIS. STAT. ANN. § 262.05 (Supp. 1969), and N.Y. CIV. PRAC. LAW & RULES § 302 (Supp. 1969); the very slow spread of the comparative negligence doctrine (W. PROSSER, LAW OF TORTS § 66 (3d ed. 1964)); and a number of changes brought about by the UCC, including UNIFORM COMMERCIAL CODE § 2-205 which under certain conditions makes offers binding despite lack of consideration.

<sup>47</sup> Perillo, Book Review, 37 FORDHAM L. REV. 144, 148 (1969).

<sup>48</sup> This is also apparent from the introduction.

True, there were some previous projects which covered a relatively broad subject and a considerable number of legal systems; but these projects as a rule were limited to the *compilation* and *juxtaposition* of the various solutions found, without proceeding

International Congress of Comparative Law, held in Paris in 1900, where the first serious attempts to formulate the functions and aims of comparative law were made, one theory advanced was that the main function of comparative studies generally was to ascertain these common principles.<sup>49</sup> To view the Cornell study as a modern, improved version of the traditional large-scale comparative studies puts it into proper perspective with other comparative studies. The common-core approach, when properly used, may not only make traditional studies useful for the relatively new article 38(1)(c) purpose, but also more useful for the two older purposes of comparative studies.

As Professor Schlesinger states at the beginning of the introduction,<sup>50</sup> a special purpose of the Cornell Project was to test the research methods developed and used in the study. Although these methods may still be subject to considerable refinement, they have moved the art a substantial step forward on the road to development.

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to the further step of *comparison*. The difference between juxtaposition and true comparison is a crucial one. . . . When a study is focused on the style, the sources, the methods or generally the approach of several legal systems, the similarities and dissimilarities often are so obvious . . . that mere juxtaposition becomes an implicit comparison. . . . But where . . . attention is directed . . . to details . . . [the comparison] requires an additional explicit step . . . the identification and formulation of elements of similarity as well as dissimilarity.

FORMATION OF CONTRACTS 2-3.

<sup>49</sup> H. GUTTERIDGE, *COMPARATIVE LAW* 5 (2d ed. 1949). But by 1949 a different attitude was prevalent. "So far as the views by these two famous jurists were based on the existence of certain principles common to all systems of law, they rest on a somewhat flimsy foundation and appear to have been abandoned to a very large extent at the present day." *Id.* at 6.

<sup>50</sup> FORMATION OF CONTRACTS 2.

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