

1-1-1968

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Recommended Citation

W. J. Wagner, *Team Work Planning of a Comparative Law Research Project*, 17 Buff. L. Rev. 349 (1968).
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol17/iss2/3>

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TEAM WORK PLANNING OF A COMPARATIVE LAW RESEARCH PROJECT

W. J. WAGNER*

FOR a scholar working alone, it is very difficult to carry out great projects in comparative law. The more legal systems to be covered by the study, the more imperative it is to work in a team. First of all, with the ever increasing body of written legal rules and regulations, judicial decisions and scholarly writings, it becomes ever more difficult for a single jurist to master the intricacies of his own legal system, except on a narrow segment, and much more difficult to get acquainted with those of many jurisdictions. And second, for a true understanding of many legal principles and rules, their background and their working, recourse to mere law is insufficient. They should be placed in their "proper setting" and analyzed in conjunction with historical, cultural, economic, sociological, and political factors. To some extent, this is difficult even when a thorough study of one's own legal system is concerned. However, a "practitioner administering an individual legal system will usually be conscious of the changes in the substance of the law which are hardly perceptible from without, for law on the institutional side is reluctant to adjust the traditional forms to the changes in substance."¹ To a foreign observer, or even a student of a foreign legal system, it is often difficult, if not impossible, to realize either the existence or the extent of discrepancies between the written law and the living law, not to mention the atmosphere in which the legal rules are born and developed, and applied.

For the above reasons, it is advisable, in any significant comparative law project, to assure the participation of jurists from the various legal systems, on the one hand; and, on the other, to secure a cooperation of social scientists other than persons trained in the law. An outstanding comparatist observed that even the preparation of materials for thorough comparative law courses "entail a tremendous amount of work," and therefore should be "dealt with on a cooperative basis."² He continued: "Teamwork is of the essence. Experts on comparative and foreign law should, therefore, get together to plan a joint effort, to coordinate their research and to distribute the task among themselves."³ Another well-known legal scholar stated: "The work done in the great continental Institute of Comparative Law shows that here again the team work principle provides the best solution."⁴ The joining of efforts of a number of persons, trained in various legal systems, and having other than legal background, will tend to minimize the hazards inherent in comparative law study and the possibility of disregarding important factors or drawing unwarranted conclusions.⁵

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1. Schmitthoff, *The Science of Comparative Law*, 7 Camb. L.J. 94, 98 (1939).

2. Sereni, *On Teaching Comparative Law*, 64 Harv. L. Rev. 770, 779 (1951).

3. *Id.*

4. Schmitthoff, *supra* note 1, at 99.

5. For a more elaborate discussion see Wagner, *Research in Comparative Law: Some*

One of the most significant comparative law research studies recently undertaken is the Cornell Project, originally called "On General Principles of Law Recognized by Civilized Nations,"⁶ and then "On The Common Core of Legal Systems." Initiated by Professor Schlesinger, and financed by the Ford Foundation, a group of ten legal scholars from different countries (including the undersigned) undertook to establish these "general principles" in the field of contract law. The team working on the project first met in the spring of 1960, at Cornell Law School, and the technique applied to its work and experience gained during the meeting was presented by its Chairman to the comparative law world shortly thereafter.⁷ Two other long sessions and a shorter meeting at the University of Aix-en-Provence, France, followed. Since the initial meeting, the mechanics of formation of contracts has been covered, and two volumes dealing with this problem are being printed. Their purpose is to present and to document the common core of a larger number of diverse legal systems with respect to formation of contracts. Undoubtedly, these two volumes will be critically appraised when they are published in 1968. The present observations do not deal with the work which the Cornell team has actually completed, and which will be embodied in that publication; they are directed to the very process of planning a comparative research project, and to the presuppositions and complexities of that process. As an illustration, an interesting discussion which took place among the members of the Cornell team can be used. It concerned certain initial (and highly tentative) plans for a further research undertaking perhaps to be reached in the future.

At the time of this discussion it was undecided whether the group would be able to continue its work after completing the phase dealing with the formation of contracts. It was envisaged that perhaps future installments might come to grips with form and consideration (and its equivalent), interpretation, illegality, remedies and other aspects of contract law.

One of the possible topics for future coverage was that of freedom of contracting. Nineteenth century liberalism proclaimed complete freedom, which was the prevailing approach until its abuses were felt and society undertook to protect the economically weaker being forced to enter into disadvantageous contracts, and particularly, unfair employment agreements. Today, the principle of freedom of contracting, although still valid in the traditional legal systems, is severely curtailed by rules prohibiting certain contracts, imposing certain statutory terms in case the parties decide to contract, or obligating certain parties to accept offers made by certain other parties. The communist legal systems

Theoretical Considerations, in *Essays on Jurisprudence in Honor of Roscoe Pound* 511 (R. Newman ed. 1962).

6. For reasons which prompted Professor Schlesinger to launch the project, and the advantages of such a research, see Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 *Am. J. Int'l L.* 734 (1957).

7. Schlesinger, *The Common Core of Legal Systems—An Emerging Subject of Comparative Study*, in *XXth Century Comparative and Conflicts Law, Legal Essays in Honor of Hessel E. Yntema* 80 (K. Nadelmann, A. von Mehren & J. Hazard eds. 1961).

went much further and in general eliminated the principle of freedom of contracting, although some freedom remains in restricted scope.⁸

The Cornell Project prepared a comprehensive "working paper" on the problem of freedom of contracting,⁹ which was distributed to the participants for consideration and comment. One of the most interesting sessions of the Project was devoted to it. The question discussed was how to approach the problem. Views expressed by those present are of much interest to comparatists, and their deliberations reflect difficulties which face those who undertake a major comparative law project of this kind.

The table of contents of the "Working Paper" was as follows:

A 1—Introductory Notes and Questions

I. LIMITATIONS ON THE FREEDOM TO REFRAIN FROM CONTRACTS

A 2—Traditional Duty to Contract on the Part of Certain Professions

A 3—Compulsory Contracts in the Field of Public Utilities

A 4—Compulsory Contracts in the Field of Insurance

A 5—Duty to Serve on the Part of Certain Professions with Special Standards of Ethics.

A 6—Duty to Serve on Account of a Monopolistic Position

A 7—Limitations upon Freedom to Contract for the Protection of Certain Groups

A 8—Duty to Contract Under a System of Rationing

II. LIMITATIONS ON THE FREEDOM TO CONCLUDE CONTRACTS

A 9—Regulation of Entry into a Profession or Trade

A 10—Allotment of Quotas

III. FREEDOM AS TO THE TERMS OF CONTRACTS

A 11—Regulation of Prices and Rates

A 12—Regulation of Wages and Working Conditions

A 13—Regulation of Fees in Certain Professions with Special Standards of Ethics

A 14—Regulation of Other Terms

A 15—Indirect Methods of Regulations

Introducing the problem, the Chairman of the meeting, Professor Schlesinger, asked the members of the group to express their opinion both as to the feasibility of such a study and the merits of the "Working Paper."

The French participant from Aix-en-Provence, France, agreed, in substance, with the organization of the topic as outlined in the "Working Paper," and suggested that it should cover not only freedom or obligation to enter into contracts, but also to continue contractual relations. He pointed out that general principles of freedom to contract have not been specifically enumerated in French Law. The Civil Code simply states that contractual commitments are binding on the parties. As to public utilities, French doctrines on their legal obligations are scarce. The law of "socialist" countries does not seem comparable to that of the traditional legal systems in this field.

8. See generally Naschitz, *Rumanian Contracts of Delivery: A Comparative Analysis*, 17 Buffalo L. Rev. 375 (1968).

9. The primary redactor was Dr. Guendisch of the Max-Planck Institute of Hamburg, Germany. He worked under the supervision of Professor Schlesinger.

The Egyptian participant from Cairo, United Arab Republic, stated that the law of Egypt lends itself to comparison with the traditional legal systems. The constitution of the country proclaims it to be a cooperative state, and introduces some innovations to the classical structure of the law. Nevertheless, private property is inviolable, and the Civil Code states that a contract makes law between the parties. Only those enterprises which have primary importance for the economy of the country have been nationalized. Contracts of adhesion can be drafted by a governmental enterprise or a private individual or corporation.

The undersigned expressed the opinion that the Cornell Project should primarily be pursued with the purpose of establishing general principles of law which could be helpful to and used by courts, international or national, and legal practitioners. Purely academic and scientific interests are only of secondary importance. Therefore, some other problems of the law of contracts, such as consideration or mistake, should be given priority. Rules on freedom of contracts are generally statutory law which is changing and which can hardly influence a court if in its legal system statutes are clear. Finding general principles of law in this field could amount to discovering trends which would be interesting mostly to theoreticians. Therefore, granted that research along the lines suggested may be thrilling, it should be postponed to the end of the project, if there is still time left for it. The law of the "socialist" countries deviates too much from the traditional approach to freedom of contracts to be included; however, occasional references to Polish and Yugoslav law, when it is comparable to the traditional systems, should be made.

The "Working Paper" was found by the undersigned to be good; however, he suggested some changes. Chapter II on the limitations on the freedom to conclude contracts includes questions with which it is difficult to deal under the label of contracts. In essence, section A-9 deals with licensing. The distinction between licensing of persons by virtue of their personal qualifications (physicians or lawyers) and licensing based on objective circumstances, does not warrant including the last group in the study on the freedom of contracts. The impossibility to conclude contracts by persons who did not get a license is only a consequence of the primary question of whether the entering into some business should be permitted to everyone. This is a problem of constitutional and administrative law rather than of contract law. Again, section A-10—Allotment of Quotas—has only a remote bearing on contracts. On the other hand, Chapter II should include regulations which prohibit the sale of some merchandise to persons who are not permitted by the government to buy them, for example, in many countries, during times of shortage or of war, copper cannot be freely sold. A-15 seems to cover problems which cannot be dealt with in a study on contracts: customs, duties, taxes, subsidies. Therefore, only brief mention of the bearing of relevant statutes on contract law is needed. Moreover, there are some general principles of law recognized by civilized nations in this field such as rules

protecting debtors against usury, which are not covered by the "Working Paper."

Professor Schlesinger explained that this problem would be included in the chapter on illegality, and upon observation of the undersigned that the borderline between illegality and freedom of contract is dim, added that in the chapter on illegality he proposed to add old, traditional prohibitions, which involve some moral connotations. Usury fits this description.

The undersigned gave another example: that of modern regulations protecting the conditional buyer against forfeitures and harsh terms of the bargain imposed upon him by the seller. The Chairman recognized that this is a borderline situation, which could be included in either of the two chapters.

Then, the undersigned pointed out that even in times of peace there are important limitations on the freedom of sale of some land, and particularly, on subdividing agricultural land beyond a statutory acreage. Similarly, zoning ordinances which regulate the sale and use of land in towns have a direct bearing on contract law.

The Chairman agreed that in many countries there are restrictions on the sale of agricultural land, and added that in many legal systems one also finds limitations on the freedom of sale of many types of goods, particularly firearms, explosives and liquor.

The German participant from Wuerzburg, Germany, agreed that the problem of freedom of contracts should be discussed last, and pointed out that the law moves so quickly in this field that some conclusions of the study may become obsolete before the end of the research. He emphasized the difficulties of this undertaking, involving both public and private law, and stated that there are few jurists who would be able to answer all question arising from the subject matter of the project even with respect to their own jurisdiction. Professor Lorenz expressed the view that section A-8 on contracts under a system of rationing could be omitted.

The Italian participant from Rome, Italy, agreed with the organization of the "Working Paper," but doubted whether the whole project was feasible, as it involves a tremendous amount of problems and a great number of regulations. Essentially, most problems are those of economic "dirigism," and have only little to do with the law of contract. They are not homogenous. Should they be lumped together? In this field, what is called law may mean different things in various legal systems. In addition, everything is changing faster here than in other fields. Clearly, important questions of policy are involved. The chapter should deal with trends in politics and economics rather than general principles of law. Another problem is the effect of the statutory rules which would be the center of the research. The question would be whether their impact and reach is real or only theoretical. They may be enforced in one legal system, and disregarded in some others. Special situations may occur which could hardly be covered by research; for example, the state could be a shareholder of theoretically private enterprises. Also, there may be hidden monopolies; some corporations may be

able to control the market. These problems hardly lend themselves to be adequately presented on a comparative basis, involving several countries. In many situations, questions will arise which cannot be answered by lawyers. For instance, connections between banks are either difficult or impossible to be discovered. As to comparability with the "socialist" legal systems, it would be advisable to invite a Russian jurist to take part in the project.

And so the discussion continued. It was pointed out that the study would be very interesting, but would involve many extra-legal points which possibly would be advantageous, for law should not be separated from morals, economics or politics. The research should cover the law in action, and possibly more than just one expert from each legal system should participate in the project and cooperation of non-jurists should be sought. A survey of some questions suggested, such as monopolies, or price control, is much easier than that of indirect methods of regulation and of influencing contracts, etc. In its full scope, the study raises so many problems that there appears no end to the research which it would necessitate. It could cover some questions of labor law, of human rights (such as racial discrimination as influencing contracts), of anti-trust law, trade regulation, and other fields. There was general agreement that the study would be more difficult than other aspects of contract law, and that it should take place after most other chapters of the Cornell Project were finished.

Theoretical speculation about comparative law undertakings may be interesting and helpful—but it must be realistic. It is only in connection with an actual, living research project, that the applicability of abstract premises and conclusions may be checked. The success of an important project largely depends on its careful preparation.

The foregoing observations, it is hoped, reveal some of the considerations which enter into this process of preparation. It should be kept in mind, however, that the planning discussion outlined above dealt with a particularly elusive topic. As applied to other, more "down-to-earth" legal subjects, the Cornell method of common core research has already proved its feasibility.

The publication of the results of the Cornell Project's work is awaited with interest by the comparative law circles of the world. The Cornell Project method may serve as a model for other major undertakings in the field of comparative law.¹⁰

10. See, e.g., Kos-Rabcewicz-Zubkowski, *L'harmonisation des règles de conflits de lois et de juridiction de l'U.R.S.S. et des démocraties, in fine*, Report submitted to the Sixth Int'l Cong. of Comp. Law in Hamburg, Germany, 1962.