FEDERALISM AND LEGAL UNIFICATION
COMPARING METHODS, RESULTS, AND EXPLANATIONS ACROSS TWENTY SYSTEMS

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I. INTRODUCTION

This study investigates the unification of laws in federal systems. It describes how such unification is pursued, states the degree to which it has been accomplished, and seeks to explain the respective differences between the systems covered. While its database is fairly broad, its conclusions are tentative, and its authors are keenly aware of the need for further research.

1. *The Need for This Study*

This study fills a significant gap in the scholarly literature, especially in investigating the correlation between federal structures and degrees of legal uniformity. Many scholars have sought to make comparative assessments of the level of decentralization across federal systems. These valuable studies (mostly from political scientists) have examined such aspects as the nominal distribution of powers over policy areas, the relative distribution and expenditure of fiscal resources, the political interaction between the central and constituent governments and institutions, and the legal preservation of autonomy of constituent units or institutions of governance. Some projects (mostly by legal scholars) have examined legal convergence (usually with regard to single systems) in particular policy areas such as corporate governance, civil procedure, or tort liability. But ours is the first study that seeks to ascertain comparatively the level of legal uniformity within federal systems across a host of legal domains with a view to understanding better the relation between federal structure and legal uniformity.[1]

2. *Federalism Defined*

We define a federation as a compound polity with multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and direct legal authority over its citizens. Obviously, this definition masks a welter of particular forms.[2]

To begin with, the make-up of the federal models themselves can be distinguished along several lines. Some systems are classic state federations like Argentina, others *sui generis* entities like the European Union. Federations range from highly centralized systems like Italy to marginally integrated ones like The Kingdom of the Netherlands.[3] Some countries have “integrative” federal systems that resulted from the coming together of previously more or less sovereign states, like Switzerland, others constitute “devolutionary” systems that result from the decentralization of previously unified nations, like Belgium. There are "vertical” models like Germany in which executive, legislative, or judicial powers are vertically

[1] Some noteworthy exceptions are the studies published in Harmonization of Legislation in Federal Systems (Ingolf Pernice, ed., Nomos: Baden-Baden, 1996); and Harmonization of Legislation in Federal Systems (George Bermann, ed., Nomos: Baden-Baden, 1997). These works, however, do not attempt a comprehensive comparative study of the level of unification within federal systems either.

[2] *See generally,* Daniel Halberstam, Federalism: Theory, Policy, Law, in M. Rosenfeld and A. Sajo, ed.s, The Oxford Handbook of Comparative Constitutional Law (Oxford University Press *forthcoming).*

[3] Note that the Kingdom of the Netherlands is a larger unit the Netherlands (in Europe) itself. The Kingdom of the Netherlands consists of a rather centralized European country and a few small islands in the Netherlands Antilles. These islands were former Dutch colonies and are now loosely associated with the mother country through a “Statute”.

integrated, as well as "horizontal" models like the United States in which each level of government makes, executes, and adjudicates its own laws separately. There are federations in which all component states are constitutionally equal, like Mexico,[4] and asymmetric systems in which some components receive greater powers than do others, like Malaysia. And some countries formally acknowledge their federal nature, like Brazil, while others view themselves as by and large unitary, like the United Kingdom.

Furthermore, there are significant differences pertaining to the respective countries' political character and social make-up. Some federations have parliamentary systems, like Spain, while others have a presidential system, like Russia. Some are soundly democratic, like Canada, while others are borderline authoritarian, like Venezuela. And some systems are characterized by deep ethnic, linguistic, or economic cleavages, like India, while other federations have largely homogeneous populations, like Austria.

Last, but not least, the federations of the world belong to different legal traditions. Most of them are part of the civil law world, like Spain, while others belong in the common law orbit, like Australia. And some have a mixed legal system, like South Africa.

We shall gloss over these differences as we describe the modes of legal unification and present data about the varying degrees of legal uniformity.[5] Yet, when we seek explanations for the differences in the various federations' degree of legal unification, we will resort to at least some of the distinctions mentioned; thus, we will ask, for example, whether these differences can be explained by reference to the structural features, legal traditions or socio-political characteristics of the respective federations.

3. *Database and Method*

This study covers 20 federal systems from six continents: Argentina, Australia, Austria, Belgium, Brazil, Canada, Germany, India, Italy, Malaysia, Mexico, The (Kingdom of the) Netherlands, Russia, Spain, South Africa, Switzerland, the United Kingdom, the United States, Venezuela, and the European Union.[6] In cooperation with the International Academy of Comparative Law we identified these 20 systems as major, more or less democratic federations from which we could reliably obtain data within a reasonable time.

The data we summarize, analyze, and interpret come from national reports authored by local experts about each of these systems. These reports were written in response to a detailed questionnaire which is reproduced in Appendix 3. Questions asked covered *The Federal Distribution and Exercise of Lawmaking Power, The Means and Methods of Unification*, and the *Institutional and Social Background.* In addition, the questionnaire contained a "Unification Scorecard" on which the national reporters assessed the degree of unification in their respective systems across nearly 40 areas of law. We also obtained an additional assessment of uniformity for each system from at least one other expert who also filled out the "Unification Scorecard". While we checked the reliability of their assessment through eight "control questions", the data obtained about degrees of uniformity remain inevitably subjective because they are the views of expert insiders. Our data-gathering and evaluation process is described in greater detail in the Methodological Appendix (Appendix 2).

[4] The Federal District (Distrito Federal), i.e., Mexico City, has, like the District of Columbia in the United States, a somewhat special status as the seat of the federal government.

[5] Thus, for purposes of this study, the term federalism is used simply as an analytic tool to determine the inclusion or exclusion of the system as an object of study. Note that we use the generic terms "central" or "federal" to refer to the central level of governance and "component state", "member state", "component unit" or "member unit" to refer to the regional governments, be they "Member States" as in the European Union, "Provinces" as in Canada, "States" as in the United States, "Cantons" as in Switzerland, or "Regions" or "Communities" as in Belgium, etc.

[6] Nigeria was originally part of this study but we were ultimately unable to locate a competent national reporter.

A draft of this General Report was presented to all national reporters to ensure the reliability of the conclusions we drew from their initial submissions. Many national reporters supplied us with extensive feedback which we then incorporated.

4. *Three Caveats*

Three caveats are in order lest the scope and thrust of this study be misunderstood. They concern the meaning of legal unification and harmonization, the relationship between legal rules and actual outcomes, and the descriptive and analytic, rather than normative and programmatic, nature of this study.[7]

First, we consider both legal unification and harmonization. We take the former to mean (more or less complete) sameness and the latter to mean similarity.[8] We do not conceive of the difference between these two concepts as fundamental but rather as a matter of degree. In other words, unified and harmonized laws represent different points on a spectrum of likeness. To be sure, in examining the methods of unification and harmonization, we consider whether sameness results from simple takeover of an area by central authorities or from assimilation of the content of distinct laws across subunits. At bottom, however, the question of sameness is simple and generic. We ask how similar the law is across the subunits of a particular federation and how that level of similarity compares to the level of similarity found across the subunits of other federations.[9]

Second, this study examines the unification of legal rules, not of actual outcomes in concrete cases. While it looks beyond the law "on the books" and includes consideration of the respective rules' interpretation and application, it does not address the degree to which identical or similar disputes are actually decided identically or similarly. Measuring sameness or similarity on the level of actual outcomes would require a fundamentally different approach in the tradition of "common core" research.[10] Finding a high degree of legal uniformity in this study merely suggests, but does not guarantee, that like cases are actually treated alike throughout the system.

Third, the thrust of this study is descriptive and analytic. It summarizes and analyzes the data and seeks to explain them. It does not take a normative stance and thus does not ask to what degree legal uniformity is desirable, or how it can best be accomplished.[11] Perhaps lessons can be learned from our study in these regards but teaching them is not our goal.

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[7] Beyond the three limitations listed below, the study also limits itself to official (state) law. Thus, it does not deal with so-called "non-state" or "private" norms. Such norms are harmonized or unified through very different processes and often to a much greater degree than state law. They would require a study entirely in its own right.

[8] We are aware that there are other, more specific, understandings of these terms, as in Canada, for instance, where harmonization has special meaning in connection with so-called "harmonized bijural law," which takes both common and civil law traditions into account. For purposes of this report, however, we have communicated the understanding of these terms as laid out in the text to all participants as the operative understanding for purposes of this study.

[9] Consequently, this study is limited to the unification of law *within* federal systems. It does not address the question of uniformity across different federations, i.e., on the international level. We do, however, include the European Union in this study as a federal system.

[10] For the classic study of this sort, see Formation of Contracts - A Study of the Common Core of Legal Systems (Rudolf Schlesinger ed., 2 vols., 1968. A more recent, and much broader, enterprise of this nature is the Common Core of European Private Law project (often referred to as the "Trento Project"), see Mauro Bussani and Ugo Mattei (eds.), The Common Core of European Private Law Project (Cambridge 2004).

[11] See, e.g., Daniel Halberstam and Mathias Reimann, Top-Down or Bottom-Up? A Look at the Unification of Private Law in Federal Systems, in: Roger Brownsword et al., (eds.), The Foundations of European Private Law 2011.

5. *The Structure of this General Report*

Beyond this Introduction, this Chapter consists of three main parts, dealing, respectively, with the factors of unification, the current situation, and potential explanations for our findings.

Section II focuses on *the modes of legal unification*. It describes the factors that drive the process, looking at constitutions and legislation, court decisions and scholarly works, legal education and practice, and at the influence of international lawmaking projects. To do so, it summarizes and analyzes the national reporters' answers to the main part of the questionnaire.

Section III describes the *current level* of unification. It shows - inter alia through tables - the degree to which areas of law are unified as well as the degree to which the law within particular federal systems is uniform. The data here come from the assessments of legal uniformity in the "Unification Scorecards" filled out by the national reporters as well as by the respective second experts for each system.

Section IV then seeks *explanations* for the differences noted in Section III by considering the findings in Section I, but also by looking beyond to other factors. In this Section, we offer a series of explanations which are mutually compatible and should be considered in concert. Its conclusions, however, remain tentative and leave several questions open.

While the three main parts build on one another, they can also be read separately. For example, a reader who is mainly interested in how much uniformity there actually is can fast-forward to Section III, and a reader who is primarily interested in potential explanations can go straight to Section IV. The whole picture, however, only emerges from reading all Sections together.

II. MODES OF LEGAL UNIFICATION

In the process of creating (or working towards) legal unification (or at least harmonization) of law in federal systems, a variety of factors are usually at work. In particular, such unification can result from the exercise of central government power (infra 1); from formal or informal voluntary coordination among the component units (2); from non-state actors drafting restatements, principles, or model rules (3); from a nationwide system (or orientation) of legal education and legal practice (4); and from compliance with international law and participation in international unification efforts (5). The National Reports suggest that all these factors matter, albeit not always in all systems and often to substantially varying degrees.

1. *Top-Down Unification: Central Government Power*

Unification of law through the exercise of central government power is top-down. It regularly occurs in three principal ways: through central (“federal”) constitutional norms (infra A), via central (“federal”) legislation (B), and through the work of central courts creating uniform case law (C). Other means, such as centrally managed coordination among component units, play a more occasional and diffuse role (D).

A. *The Constitution*

All systems under consideration have a common (and in that sense "federal") constitution, although it may not be written in a single document (as in the United Kingdom), not called a "constitution" (as in the European Union), nor reflect the reality of federalism (as in Venezuela). Since legal unification studies have traditionally focused on commercial and private law (and, to a lesser extent, criminal and procedural law), it is easy to overlook that these constitutions have a significant unifying effect in and of themselves. This effect has two dimensions.

First, constitutions promote legal unification by allocating certain lawmaking power to the center, especially in the form of legislative jurisdiction. By granting legislative jurisdiction over at least some areas to the central government, a constitution authorizes legislation and therefore unification in these areas of law. As we will see (infra Section IV.), the allocation of legislative powers to the center has some regularity but it also varies considerably from one federation to another. Of course, the actual strength of a constitution's unifying force depends heavily on the interpretation of the respective provisions – the commerce clause of the United States Constitution, for example, could have been read narrowly but was in fact interpreted to allow a broad swath of uniform federal legislation often very tenuously related to actual commerce. For this and other reasons, constitutional texts can be deceptive. In particular, they sometimes suggest a high degree of decentralized lawmaking and thus diversity, while in reality, centralization and uniformity prevail, as in the cases of Argentina and Venezuela.

Second, constitutions often contain directly applicable norms that provide, sometimes within a margin of discretion accorded to local officials, for reasonably uniform law throughout the system. The most significant norms in this regard concern fundamental rights which are in one form or another part of almost all the constitutions we have examined (either as explicit catalogs incorporated in or appended to the constitution or implied in the constitutional text). Such fundamental constitutional rights are a significant force of legal unification because they typically require all public authorities, both at the central and component level of governance, to act (i.e., to legislate, execute, and adjudicate) in compliance with the same basic norms. This unifying force is at work in virtually all the federations under review here although its strength varies considerably. It depends mainly on four factors: the number, kind, and interpretation of basic rights guaranteed by the constitution; the extent to which they are voluntarily respected in practice; the degree of their enforcement by the courts; and the margin of discretion accorded local officials. Where the fundamental rights catalog is extensive and strong, respect for basic rights is high, and the courts exercise powerful judicial review with little tolerance of variation, the unifying force of fundamental constitutional rights is great. This is true in many federal systems, notably in Austria, Belgium, Canada, Germany, India, Italy, Mexico, Spain, South Africa, and the United States.[12] In other systems, the unifying force of central constitutional rights is weaker, either because the Constitution contains few constitutional rights, as in Australia, or because judicial review is less powerful or less extensive, as in the European Union, Malaysia, and the United Kingdom.

In addition, many constitutions contain (explicit or implicit) norms pertaining to the political character and legal structure of the subunits. This is the case, for example, in Belgium, Brazil, Germany, India, Malaysia, Mexico, Russia, Spain,[13] and the United States. The strength of these provisions and their impact on uniformity varies considerably.[14] As a general matter, however, these norms also militate in

[12] In some of these countries, special procedures exist for the enforcement of constitutional rights on a broad basis, like the German *Verfassungsbeschwerde* and the Mexican *amparo*.

[13] In Spain, these norms pertain only to some of the component states, i.e. those that followed a certain fast-track procedure to autonomy.

[14] For example, in the United States, the Republican Form of Government Clause has little bite. Argentina's Article 6 of the Constitution, by contrast, which similarly authorizes the federal government to intervene in the territory of the provinces to guarantee a republican form of government, has had a dramatic effect on component state autonomy. The Argentine central

favor of uniformity because they constrain the permissible variety of subunit structures. Thus, they make the structural political landscape generally more uniform - and thus also more likely to produce similar legal norms.

B. *Central Legislation*

In most systems under review, central legislation (including executive and administrative regulation) is reported to be the primary means of legal unification, and in all systems, it is heavily employed for that purpose. This is especially the case in the areas of commercial, private, and procedural law. Central legislation can promote unification in a variety of ways.

Most importantly, central legislation usually creates directly applicable norms which are thus *per se* uniform throughout the system.[15] In most federations, such directly applicable central norms are clearly the most powerful and effective means of unification. The reports for Brazil, Germany, Italy, Malaysia, Russia, and Venezuela emphasize this point in particular, but it is also true for Argentina, Austria, Belgium, India, Spain, and South Africa. In other systems, central legislation plays a somewhat less powerful, though still very substantial role, as in Australia and Switzerland. Finally, in a few federations, central legislation, while common and important, may not be the most dominant unifying force; one could say this about Canada, Mexico, and the United States, and it is also true for the European Union. In these systems, unification also occurs heavily through other means, especially through legislative models (in the form of federal laws, uniform statutes, EC directives, etc.).[16]

Beyond the enactment of directly applicable (uniform) rules, the central legislature can employ various other strategies of unification. These alternative legislative strategies appear only in a minority of systems. Still, where they are used, they can be powerful promoters of legal unification.

A small group of federal systems allow the center to enact legislation mandating that the member units pass conforming (implementing) rules. This strategy aims at legal harmonization rather than unification. It is particularly important in the European Union. Here, the center has enacted hundreds of "Directives" (and many "Framework Decisions")[17] prescribing basic policies, principles, and rules which the member states must then, with some choice regarding the details, implement in their national legislation. Similar central legislation exists in Austria (though in limited areas only) and occasionally in the Dutch federation. It also used to play an important role in Germany but was abolished by constitutional amendment in 2006.[18]

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government has used this power repeatedly to, as the Argentine Report puts it, "strong-arm the provinces into complying with federal mandates in any situation it deemed necessary to do so."

[15] They are, however, not necessarily entirely uniform in interpretation and practicable application. Different authorities (courts or executive officials) may interpret them differently. In Canada, federal legislation expressly provides that, due to the "bijuralism" of the legal system, federal rules may have to be interpreted differently in the common law contexts on the one hand and in the context of Quebec's civil law system on the other.

[16] In the latter three systems, part of the reason for this more limited unifying role of central legislation is the breadth of concurrent jurisdiction: even if the center legislates, the member units do not necessarily lose their competence to enact parallel, and possibly divergent, norms for their own territories. Of course, where the very point of central legislation is to create uniformity, the member units may lose that right, as in the case of *federal preemption* in the United States.

[17] A Eur-Lex search brought up over 2,000 directives and nearly 30 framework decisions. Many directives, however, are passed as amendments to earlier directives.

[18] In some systems, especially those marked by broad concurrent legislative power, central legislation does not strictly speaking require the member units to legislate, but allows, and indeed expects, them to do so. Here, the center enacts broad principles and rules while the member units fill in the details. In this manner, federal framework laws and member unit regulation end up working in tandem on different levels of specificity. Like EC Directives, this ensures uniformity regarding the broad outlines but at the same time allows for regional or local diversity regarding the particulars.

Furthermore, in areas of concurrent jurisdiction, the center can also threaten to take over a field unless the states agree on uniform rules or follow the center's preferred path of regulation. This has happened, albeit only intermittently, for example, in Australia, the European Union, and the United States. In Malaysia, the center has induced the states by political means to hand over competences. And in India, the federal legislature has frequently used its power to enact laws (by a 2/3 majority) in the national interest even in the areas of exclusive state jurisdiction. These options for national legislative overrides thus promote legal unification either by coaxing the states into enacting uniform laws or, if they fail to do so, by creating legal uniformity at the central level.

Finally, in a small number of federal systems, the center promotes legal uniformity by what is, in effect, regulatory bribery, or, to put the matter more mildly: its capacity to incentivize. Thus the center provides financial incentives for the member units to enact rules conforming to centrally determined (but so far non-binding) standards. This strategy has been employed in Australia, Canada and the United States, and to a lesser extent in the European Union. In the United States, for example, rules ranging from speed limits to the minimum drinking age are (or at least were until recently) fairly uniform throughout the country not because the federal government had legislative jurisdiction over them, but because the states were required to adopt federal standards in order to secure federal money for roads and other public projects. Its sometimes questionable constitutionality notwithstanding, this exercise of the "power of the purse" can thus have a unifying effect in practice. This power can also be rather informal and yet very effective: where the central government raises most of the revenue and then distributes it to the states, it can have a powerful political influence on lawmaking on the local level, as, for example, in Mexico.

C. *Central Court Jurisprudence*

Top-down legal unification through the exercise of central governmental power is not necessarily limited to constitutional or legislative rules ("written law"). It can also occur judicially, i.e., if central courts, especially Supreme Courts, create uniform case law. This case law does not have to be strictly binding in the (common law) sense of precedent. It can also create uniformity if it is de facto authoritative, i.e., if lower courts and other legal actors routinely follow it in practice, as is the case today in most civil law jurisdictions. The extent to which judicial norms created at the center contribute to legal unification top-down is rather difficult to gauge because it varies significantly in two regards: the type of law involved and the system concerned.

On the *constitutional* level, central judicial norm creation plays a significant role in the vast majority of federations. Wherever central courts exercise judicial review power, they ensure legal uniformity throughout the federation in the sense of keeping law within constitutional boundaries. They do so by striking down legislation that is constitutionally out of bounds, by reversing judicial decisions that violate the constitution or by interpreting the law to conform to established constitutional principles. Despite the general prevalence of all these mechanisms as sources of legal harmonization and unification, there are (as noted in 1. above) considerable variations regarding the nature and strength of judicial review across federations.

On the level of subconstitutional *federal* law, central courts can, and usually do, produce uniform interpretation for the entire system. Yet, the degree to which they actually manage to ensure such uniformity varies significantly as well. It is high in countries with large Supreme Courts deciding hundreds or thousands of cases per year, as in Germany, Italy, or Russia. But it is much lower in jurisdictions where smaller tribunals hand down many fewer decisions in select cases, as in Canada or the United States. Especially the United States legal system is rife with so-called "intercircuit conflicts", i.e., conflicting interpretations of federal law among the various federal circuit courts (of appeal). Most of

these conflicts will never be resolved by the Supreme Court because that tribunal has in recent times rendered fewer than a hundred fully reasoned opinions per year.[19]

On the level of *member unit* law, the picture is even more diverse. The main reason is that only some systems have a central court (or courts) with the jurisdiction to interpret the law of the member states authoritatively.[20] Where central courts do have such jurisdiction, they contribute significantly, and in some cases heavily, to legal unification by rendering authoritative and converging interpretations of subunit law. Interestingly, this is the case primarily in countries in the British orbit, i.e., the United Kingdom itself[21] and the former members (or close associates) of the British Empire, i.e., Australia, Canada, India, Malaysia,[22] and South Africa. It is true, however, also for Russia with its largely federal and thus unitary judiciary.[23] By contrast, where central courts do not have jurisdiction over member unit law, they cannot, of course, render authoritative interpretations of it; here, the member state courts have the last word.[24] This situation prevails in most civil law jurisdictions, both in continental Europe (e.g., Germany, Switzerland, the Kingdom of the Netherlands, and the European Union) and beyond (Brazil, Mexico). Note, however, that the United States with its full-fledged double (state and federal) hierarchy of courts also belongs into this category.[25]

Beyond the three levels of constitutional, federal, and member unit law lies yet another potentially unifying effect of central court jurisprudence, albeit one that is even harder to quantify: central (supreme) courts often contribute to legal uniformity by developing general principles or by emphasizing particular policies and values. These principles, policies, and values may not *bind* the other courts; they may thus not compel member state courts to interpret member state law in a particular fashion. But they can still exercise a heavy influence on the judiciary throughout the system, simply by setting examples and providing guidance. This is clearly the case in the United States where the guiding effect of US Supreme Court decisions can be very strong indeed, but also in Germany, India, Italy, Mexico, Russia, and Switzerland where the respective highest courts clearly set the tone for the judiciary throughout the country. Of course, such central court guidance does not guarantee uniformity of judicially created norms but it can work quite strongly in that direction.

[19] Some conflicts may trigger central legislation or regulatory enactments.

[20] Based on the information provided in the National Reports as they currently stand, it appears only a minority of federations grant their central courts jurisdiction authoritatively to interpret member unit law.

[21] At least in theory, this is supposed to change when the latest judicial reforms enter into force in 2009.

[22] In Malaysia, where national courts have the general power to interpret component state law, there is a fierce jurisdictional debate over whether and to what extent national secular courts have the power to interpret sharia law.

[23] In Russia, the constitutional or charter courts of the component states (of which there are presently sixteen) have exclusive competence to resolve disputes concerning the interpretation of regional constitutions (or charters) and compliance of regional laws and regulations with those constitutions (or charters). In all other respects the judiciary in Russia is unitary.

[24] These courts may of course follow each other's jurisprudence but that is not an exercise of central (judicial) power top-down but a matter of voluntary cooperation which will be addressed infra. 2.B.

[25] Russia and the United States make it impossible to say that common law jurisdictions give their supreme courts power over member state law while civil jurisdictions do not: each does the opposite of what its group membership would require. Still, the line-up suggests that the common and civil law heritages are not unrelated to this allocation of powers. Different notions of judicial power (precedent-creating vel non) may lurk in the background here, and the idea of a "common law" (common, that is, to the whole system) may also play a role. A full exploration of these matters is, however, beyond the scope of this Report.

D. *Other Centrally Controlled Means*

In addition to central constitutional norms, legislation, and judicial lawmaking, there are various other centrally controlled means that promote legal uniformity in one form or another. Their variety is considerable, and we will only briefly mention the most important ones.

The only institution of this sort that is somewhat widely shared is a "Law Commission" (or "Law Reform Commission"). Such Commissions are part of the British legal tradition and exist in the former Commonwealth member countries, i.e., the United Kingdom itself, Australia, India, Malaysia, and South Africa. Such a commission also existed in Canada for several decades but has recently become defunct for lack of funding. Typically created by the central legislature or executive and working under the auspices of the ministry of justice or its equivalent, these Commissions are quasi-governmental institutions. Their primary role is law reform.[26] Yet, reform efforts coordinated by a single body sponsored by the center will often have a unifying effect on the legal system as a whole. The force of this unifying effect varies. In the United Kingdom it is reasonably strong, whereas in India such unification apparently occurs only slowly and on a piecemeal basis.

In many other systems, the central government has created a variety of bodies or mechanisms to coordinate central and member unit policies. They come in all forms, shapes, and sizes, and their effectiveness is difficult to evaluate from an outside perspective.[27]

Notably, however, many federal systems do not seem to maintain any such official coordinative bodies or mechanisms at the central level. None are reported for Germany, the Netherlands, and the United States. Our tentative explanation for their absence is an institutional one. Most civil law countries have a tradition of professionally staffed ministries (of justice); here, the central bureaucracy handles law reform and unification efforts in-house, so to speak, obviating any need for a separate, British-style law (reform) commission. In the United States, distrust towards centralization has been strong and has thus militated against law (reform) institutions run by the federal government.[28] Of course, even in systems without unification efforts organized by the central government, legal unification can be pursued by the established political institutions, most notably by the legislature, and by the political parties, especially if one or two parties are dominant (see infra Section IV.).

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[26] In Malaysia, however, the primary role of such commissions is not to propose any substantial changes, but only to assist in such things as modernization of language.

[27] Such bodies and mechanisms exist in Austria with regard to the implementation of EU law; in Brazil where the federal legislature has created various national systems in select areas of law (such as environment and health) aiming at coordination within the federation; in Italy with its "Conference of State-Regions" and "Conference of State-Cities"; in Mexico, where the federal government constantly organizes and sponsors congresses, meetings, and publications to promote the uniformity of law; in Russia where the "State Council" (consisting of the heads of the subjects of the Russian Federation) assists the President in resolving disagreements with member units; in South Africa (in addition to the Law Commission) with the President's "Co-ordination Committee" which includes the provincial premiers, and several similar institutions; in Spain, where the central government has some "coordination power" over the states; in Switzerland, for example, through the Federal Commission for Coordination in Family Matters (COFF) and the Federal Commission for Coordination for Safety in Labor Matters (CFST); and in the EU where the Commission and Council monitor and work with the member states in search for common policies and strategies, more recently under the label of an "open method of coordination." In addition to these policy-oriented and coordinative bodies and mechanisms, the Russian central government also employs a more coercive means: the President has "envoys" (plenipotentiaries, "polpredys") in each of seven "federal district[s]," which are composed of six to eighteen component states each. Reporting directly to the President, they protect his constitutional authority in these districts and check member unit law for conformity with (central) constitutional norms. In other words, the central executive keeps watchdogs throughout the system that ensure that nobody strays from the flock.

[28] Uniform law making in the United States by and large takes place on the coordinate (i.e., state) level, see infra. 2.A.; the Administrative Conference of the United States is a federal institution but its goal is the "improvement of federal agency procedures", not the unification of administrative law on the state level, *http://www.acus.gov./about/the-conference/* (last visited August 1, 2011)

2. *Coordinate Unification: Cooperation among the Member Units*

In quite a few systems, legal unification also results from the voluntary cooperation among the member units of the federation and is thus, in a sense, bottom-up. Here, we distinguish between cooperation on the legislative level, among the member units' judiciaries, and between the executive branches.[29] On the whole, the picture is, once again, quite diverse.

A. *Cooperation on the Legislative Level*

Only two systems are reported to have permanent institutions in which states come together to work towards legal unification. The prime example here is the US-American *National Conference of Commissioners of Uniform State Laws* (NCCUSL), which is now called (more simply) *The Uniform Law Commission* (ULC). It consists of commissioners delegated by the states. Since its inception in 1892, the NCCUSL has promulgated about 200 Uniform Laws, i.e., blueprints that have no force in and of themselves but are proffered to the states for adoption. The NCCUSL's record with regard to promoting the uniformity of US-American law is decidedly mixed. On the one hand, its showpiece, the Uniform Commercial Code, has been adopted by all states (some parts excepted in Louisiana), and several other acts have been so widely adopted as to create virtual (legislative) uniformity throughout the country. In addition, states have occasionally followed a uniform law's lead without formally adopting it. On the other hand, only about 10 percent of the acts promulgated have been adopted by 40 states or more. In addition, states often modify a uniform act in the legislative process and courts sometimes interpret them differently with no national tribunal available to resolve conflicts. As a result, uniformity in practice is sometimes an elusive ideal. On the whole, it can perhaps be said that the NCCUSL has managed (by and large) to unify (statutory) state law in a few select and, on occasion, highly important, areas but not across the majority of law in the manner originally envisaged.

The NCCUSL's Canadian counterpart is the *Uniform Law Conference of Canada* (ULCC) with representatives of the provincial governments. Since its foundation in 1918, the ULCC has adopted nearly 100 uniform acts. Despite limited funding, it has recently engaged in an ambitious project, the "Commercial Law Strategy". This "Strategy" aims to produce and promote a considerable variety of uniform acts in the areas of commercial law and enforcement matters, some of which have already been adopted by state legislatures.[30]

In some other systems, there is ad hoc legislative cooperation among the member units. In Australia, for example, states can jointly delegate legislative jurisdiction to the center which may then legislate in a uniform fashion. The Australian states may also "adopt" Commonwealth law as amended from time to time (generally pursuant to an intergovernmental agreement that gives them some say over its content). In Austria, states sometimes conclude formal agreements ("concordats") with each other or with the federal government in order to establish legal uniformity in particular areas. In Germany, the states have sometimes come together (through government representatives) to create model laws, some of which were then so generally enacted as to create almost complete uniformity among the states and often also harmonization between state and federal laws.

[29] To be sure, in parliamentary systems so-called "executive" cooperation can take on a distinctly legislative character in light of the close connection between the government and the dominant coalition in the parliament. Nonetheless, for purposes of this report, we set out legislative and executive cooperation separately.

[30] In Italy, there is the "Conference of the Regions and the Autonomous Provinces" as well as a Conference of the State and Cities and Other Local Autonomous Entities. Their purpose, however, seems not primarily to be legal unification but rather coordination with respect to dealings with the national government. Similarly, in Belgium, various committees exist reflecting wide-spread cooperation among the federal government and the subunits as well as among the subunits themselves.

Finally, in many systems, including Australia, Belgium, Brazil, Germany, Spain, and the United States, the member units will closely consider, and often actually imitate, legislation passed by other member units. In other words, states tend to follow each other's example. At least in some cases, this spontaneous borrowing process can lead to considerable legal uniformity. This is also true in Mexico, albeit in a more peculiar fashion: the states often treat federal law as a model and thus follow its lead, again voluntarily establishing considerable uniformity in many core areas of law.

Still, in a surprising number of federal systems, there is no evidence of any significant interstate legislative cooperation at all. In some countries, like South Africa, Venezuela, and perhaps even Italy, this might be explained by the already high degree of centralization which leaves too little room for interstate unification efforts. This explanation has less force in other systems without such cooperation, notably Argentina, India, Malaysia, Russia, or Switzerland, although perhaps even here, centralized lawmaking weighs so heavily (at least *de facto*) that coordinate efforts are not considered worthwhile. The European Union is a different story. Governments already come together in the Council to decide upon Regulations (uniform legislation) or Directives (blueprints for harmonization) as a matter of EU law. These unification measures have already been quite far reaching in the last two decades. Unsurprisingly, there is little desire among many member states to push for even more Europe-wide legal unification through other intergovernmental cooperation. Such cooperation does exist, however, within particular regions, such as the Benelux countries and Scandinavia.

B. *The Role of Component State Judiciaries*

Do member state courts contribute to legal unification by looking to sister state court decisions when deciding cases under member state law? In other words, is there judicial "cooperation" on the horizontal level that fosters legal uniformity in federal systems?

In about a third of the systems under review, the question does not arise, at least not in this form, because there are no member state judiciaries. In the federations of Austria, Belgium, India, Italy, Malaysia,[31] Russia, Spain, South Africa, and Venezuela, there is (at least by and large) only one, unitary judiciary. A unitary judiciary should make it rather likely that courts located in one state decide matters of state law by considering pertinent decisions of courts sitting in other states, at least at the appellate level.

Where member state judiciaries actually exist, they do consider other member state courts' decisions. This is true not only in common law systems like Australia, Canada, the United Kingdom, and the United States. It also applies to civil law countries like Brazil, Germany, and Switzerland where court decisions are (with some exceptions) not binding *de jure* but treated as very nearly so in practice. In Mexico, state courts interpreting state laws often follow the decisions by federal courts interpreting (more or less) identical federal legislation. Similarly, in Argentina, courts in the provinces often take their lead from cases decided in the capital where most of the judicial prestige lies. On the whole, however, the degree to which state courts consider decisions from other jurisdictions seems to vary considerably. Notably, this difference does not seem to be directly related to the common v. civil law divide - German state courts, for example, take account of each other's decisions as routinely as do their US-American counterparts.

The European Union is, again, in a category apart. While it does happen that EU member state courts look at (and occasionally even follow) decisions from another country's judiciary, this is so rare that comparative lawyers note it with great interest when it occurs. This is not surprising: within the EU, we are dealing with *national* judiciaries which are not only ensconced each in its own legal culture but also separated by language barriers which range from merely inconvenient to the virtually insurmountable.

[31] In Malaysia, there is a unitary judiciary for secular matters only. In matters of sharia, however, there are separate and independent component state courts (without any coordinating high court).

It is undeniable that mutual attention among member state courts contributes to legal uniformity, simply because it increases the chance (or reflects an aspiration on the part of the courts) that similar norms will be interpreted identically and that like issues will be decided alike. In some systems, as in Australia, Canada, Germany, Switzerland, and (with regard to federal court decisions) Mexico, this contribution can be quite significant. It is also undeniable that judicial promotion of legal uniformity on the coordinate level has severe limits. To begin with, it can work only where sufficiently similar cases come up before several member state judiciaries. Furthermore, pertinent decisions from other judiciaries have to come to the attention of the respective court, and that court has to be willing to follow them or consider them seriously in making its own decision. In addition, adopting another court's solution leads to uniformity only where member state courts of the system faced with the issue generally fall into line. And even then, it creates uniformity only with regard to single issues, not across whole fields of law.[32] This is not to belittle the importance of member state judicial "cooperation", but at least compared to the impact of constitutional norms, central legislation, and central supreme court jurisprudence, it can be only a minor factor in the unification of law.

C. *Coordinate Action by the Executive Branches*

In most federations, the executive branches of the member units have established platforms for coordination and cooperation. In many instances, these platforms involve the central executive as well, and therefore serve as a connecting link between the two levels of government. But in many other cases, the member state governments cooperate on a purely horizontal level.

Although unification may be promoted by horizontal executive coordination, this is apparently more the exception than the rule. In Germany, ministerial conferences on the *Länder* level have developed several model laws which were adopted either uniformly or at least so widely that they have by and large unified the law throughout the nation in certain areas (such as higher education and the police). In Switzerland, the cantons often conclude *concordats*, i.e., treaties, which establish inter-cantonal cooperation and at times lead to uniform legislation. Similarly, in Australia, the Standing Committee of Attorneys General has occasionally developed uniform laws. There is an extensive network of ministerial councils, all of which can contribute to uniformity of law in the area concerned.[33] In some instances, a framework exists to permit cooperative legal unification on the member state level but it is rarely or never used for that purpose.[34]

Unsurprisingly, most executive cooperation between member units apparently concerns administrative and policy matters or serves to represent the member states' collective interests vis-à-vis the central government.[35] Administrative and policy oriented cooperation can of course also contribute to legal

[32] In the United States at least, the virtually routine consideration of sister state court judgments has not overcome the diversity of law in most areas. In many instances, it has actually exacerbated the chaos of case law.

[33] A unique case is presented by Russia. Here, the chief executives of the component units are now nominated by the federal President (they must then be confirmed by the regional legislatures), and they can also work in the federal civil service. They can thus contribute to legal unification on the subunit level as parts of the "unified system of executive power". Yet, since they are largely on the tether of the central executive, the top-down element is so strong here that this process cannot count as truly coordinate.

[34] In Spain, the federal constitution provides for "collaboration conventions" and "cooperation agreements" among the member units but few such conventions or agreements have ever been concluded in a multilateral fashion; as a result, that mechanism has played little or no role in the unification of law. In the United States, there are interstate compacts or various sorts, but they have, again, normally not concerned legal uniformity.

[35] This is the case, for example, in Austria with its meetings of the chief executives of the member states (called, by a wonderfully long German word, *Landeshauptmännerkonferenz);* in Canada in the meetings of the provincial premiers; in Italy with its variety of standing regional conferences; in Mexico with its National Conference of Governors; and in the United States with its National Governors Association.

unification, e.g., with regard to administrative regulations and practices, but this effect resists measurement in any general way.

3. *Unification through Non-State Actors*

In gauging the role of non-state actors in legal unification, one should distinguish between two kinds of activities: those that directly generate uniform norms and those that merely influence the creation of norms by other players.

A. *Direct Uniform Norm Generation*

Private actors sometimes directly generate uniform norms for adoption by, or at least to provide guidance to, state actors, especially legislators and judges. Such direct private norm generation occurs, however, only in very few federal systems. In saying this, we do not count the Law (Reform) Commissions that exist in various countries as non-state actors since these Commissions are normally created by governments and work under their auspices.[36] We are also not counting non state law, i.e., norms created by private actors for the regulation of particular industries or commercial practices. These private norms often accomplish greater uniformity in practice than state law can provide (indeed, that is part of their attraction) but assessing unification of law attributable to "private ordering" would require a study in its own right.[37]

If we thus leave state created Law Commissions as well as private industry standards aside, the creation of uniform norms through private actors matter only in three of the systems here under review.

In the United States, private norm setting is longstanding and fairly prominent. Here, the *American Law Institute* (founded in 1923) has put together *Restatements of the Law* for almost a century. They cover about a dozen areas mainly of private law, and several are now in their third generation. They are often cited, especially abroad, as one of the most important unifying factors in US-American law. To some extent, this is true: Restatements do establish a set of principles and rules which can serve as a common reference point especially for courts and also for scholarship and law teaching. Still, the degree to which Restatements actually establish legal uniformity is limited for three reasons. First, they are by and large ignored by state legislatures which have now covered even the traditional areas of the common law with a dense network of statutory rules, mostly in deviation from the common principles enshrined in the Restatements. Second, even courts, to whom the Restatements were primarily addressed, often ignore them; in some areas (such as contracts or conflict of laws), the respective Restatement enjoys a lot of authority; in others, such as torts, only some sections are routinely consulted. Third, perversely, Restatements can have a *dividing*, rather than unifying, function. Thus, with regard to products liability, many courts have continued to adhere to the *Second Restatement of Torts* (1965) (especially § 402A) while others have switched to the newer *Restatement Third: Products Liability* (1998). On the whole, the unification of (private) law through Restatements is more apparent than real – and usually overrated by outside observers, probably because Restatements are the feature of US law that most closely resembles, in structure and tone, the codifications with which especially jurists from civil law countries are so familiar.

[36]Thus their impact is addressed supra II.2.A. Given their often considerable independence, one could plausibly consider them non-state actors, and many National Reports address them in this mode. In that case, non-state actors must be said to have a significant influence on legal unification in a considerable number of federal systems.

[37]To be sure, the lines are blurry here. Sometimes, privately created industry and other standards are sanctioned or even ratified by states and can thus take on an official character.

In the European Union, direct norm generation by private actors is more recent but has grown to impressive proportions over the last twenty years. It has arisen in the context of pursuing a common private law of Europe. This pursuit has been mainly an academic agenda but it has sometimes been endorsed and even financed by the European Community (especially the Commission) itself. Its origins lie in the *Commission on European Contract Law* (also known, after its founder and chairman, as the *Lando Commission*) which began its work in the early 1980s. Over a period of about twenty years, it compiled *Principles of European Contract Law* (*PECL*) in a *Restatement*-like fashion. Today, there is a veritable academic industry of proliferating follow-up projects, ranging from *The Study Group on a European Civil Code* (*von Bar Group*) and the *Academy of European Private Lawyers* (*Gandolfi Group*), to a host of study groups in individual areas such as contracts, torts, property, family law, trusts, and insurance, as well as the search for a *Common Core of European Private Law* (*Trento Project*). In addition, there is a semi-official project: the drafting of a *Common Frame of Reference* (*CFR*) for core areas of European private law by the *Joint Network of European Private Law*. This project is the result of the European Union's initiative and financial support. To be sure, none of the many works published by this entire law reform industry has the force of law, and to date, these efforts have not had much of a unifying effect in practice. But these endeavors may well become the foundations on which a future (more or less) common private law of Europe can be built.

Finally, since its creation in 2004, the *Mexican Center of Uniform Law* has worked towards harmonization and unification of law in the Mexican federal system (and beyond). It has cooperated with the NCCUSL in the United States and the ULCC in Canada. It is currently undertaking the project of a model contract law for the Mexican states, and it has played a significant role in putting together the *White Book* of the Mexican Supreme Court, which emphasizes the need for greater harmonization and uniformity in the Mexican federation.

B. *Influencing Uniform Norm Creation*

As several National Reports (in particular those on Austria, Italy, Malaysia, Mexico, and Spain) show, in many (and probably in all) federations covered here, private industry groups and other non-governmental organizations often lobby legislatures and regulators to adopt particular rules. Where such groups and organizations operate on a nationwide (and in the EU, Europe-wide) scale, they are likely to lobby for system-wide rules in their interest. Thus they push for legal uniformity, and where they succeed, help to establish it in an indirect fashion. The significance of this activity for legal unification is extremely difficult to gauge but possibly quite high.

Finally, as some National Reports indicate, the unification of law can be fostered by the academic literature. Especially in the civil law tradition, scholarly writings often offer important guidance for the courts as well as ideas for legislative reform.[38] In fact, where authors of leading treatises, commentaries (on the major codes), and other writings reach an agreement on a particular issue, they become the "prevailing opinion" (*herrschende Meinung*). Legislatures and courts are of course not bound by these views, but they will often adopt them. In European private law, a growing number of academic publications, such as Hein Kötz' *European Contract Law*[39] and the *Ius Commune Casebooks* published under the auspices of Walter van Gerven,[40] have sought to contribute to the unification of law by demonstrating the commonalities of the various European legal orders in particular areas. In the common

[38]This, of course, presumes a certain quality level of scholarly research and literature which may not exist everywhere. The National Report on Argentina, for example, laments serious deficits in this regard.

[39]Hein Kötz, Axel Flessner, and Tony Weir, European Contract Law v. 1 (1998), German original: Hein Kötz, Europäisches Vertragsrecht I (1996). See also Christian von Bar, The Common European Law of Torts (2 vols., Oxford 1998-2000) (German original: Gemeineuropäisches Deliktsrecht, 2 Bde., München 1996-98); Thomas Kadner Graziano, Europäisches Vertragsrecht (2008); Peter Schlechtriem, Restitution und Bereicherungsausgleich in Europa. Eine rechtsvergleichende Darstellung (2001).

[40] See, e.g., Walter van Gerven et al, Torts (1999).

law orbit, the authority of academic writings continues to be smaller, but even here it can be significant, and in some countries, notably in England, its influence has grown substantially in recent years.[41] In the United States, there is a small library of leading works that are frequently consulted and cited by courts.[42] Although the precise degree of their influence is hard to measure, they contribute to uniformity since they are usually written from a national perspective.

4. *Legal Education and Legal Practice*

Legal uniformity is not merely a matter of existing norms. It is also a matter of whether the legal profession thinks and operates on a system-wide level. To be sure, the character and outlook of the legal profession is itself shaped by the degree of legal centralization: unified law engenders unified training, a common legal consciousness and similarity of practice while diversity of law does not. But it also works the other way around: where legal education focuses on system-wide law, where exams test primarily central norms, and where the profession operates easily across member state boundaries, legal uniformity is fostered through a common body of professional knowledge, perspectives, and practices.

As we will see below, both legal education and legal practice in federations are usually more unified than the systems of law in which they operate. Both provide lawyers with a nationally oriented perspective. As a result, the bar should on balance be considered a pro-unification factor in virtually all federal systems, with the probable exception of the European Union, where a system-wide bar has yet to develop. After all, lawyers with a system-wide perspective are likely to prefer, and push for, legal uniformity because it seems more natural and convenient to them than diversity among the member units.[43]

A. *Legal Education*

In most federations, legal education has a primarily nation-wide focus – with regard to the students as well as to the curriculum.[44] This is not surprising in systems where central law dominates anyway, as in Austria, Germany, India, Italy, Russia, and South Africa. But it is true also in others where lawmaking is more decentralized, as in Australia, Mexico, Switzerland, and the United States.

In the clear majority of systems, students at the various law faculties come from throughout the country. Even when students stay relatively close to home, as many do, this is mainly a matter of cost and convenience and usually not a function of jurisdictional boundaries within the federation. Elite law schools, in particular, recruit students from all over the system; this is most visible in Canada, India (at the graduate, i.e., LL.M. or Ph.D. level), Russia, the United Kingdom, and the United States, and is beginning to be the case in Australia. And law schools in dominant cities such as Buenos Aires, Caracas, Kuala Lumpur, Mexico City, Moscow, and Sao Paulo are similarly attended by students from the whole nation. In other words, in by far most federal systems, there is a largely national pool and body of law students trained in much the same way.

Our study identified only four exceptions. In Belgium, students from Wallonia and Flanders overwhelmingly stay in their home region. In Canada, there is a similar dividing line between the

[41] See Alexandra Braun, Guidici e Accademia nell'esperienza inglese. Storia di un dialogo (Mulino, Bologna 2006).
[42] See, e.g., Dan Dobbs, The Law of Torts (St.Paul/Minn. 2001), Allan Farnsworth, Farnsworth on Contracts (3 vols., New York 2008); James J. White and Robert Summers, Uniform Commercial Code (4 vols., St. Paul/Minn., 5th ed. 2002-).
[43] In the United States, this statement must be handled with caution. There is, in some contexts, a truly national bar for which the statement is true. There is, however, also a more local bar which is often intensely tied to state or even municipal law; this local bar may actually be a force working against national unification because it often has an interest in keeping law local and idiosyncratic.
[44] This is true even where legal education is organized by the member units, as in Germany or Switzerland, and, with regard to both public and private universities.

common law provinces on the one hand and civil law oriented Quebec on the other, although four Canadian law faculties now offer a "bijural" legal education covering both common and civil law and are thus attended by students from both areas.[45] In the United Kingdom, the exchange between England and Scotland is very limited, for very few English students study law in Scotland. The fourth, and most pronounced, exception is the European Union. While there is some cross-border student mobility, the vast majority obtain their law degree in their home countries. Given the cultural, language, and other barriers on the international level, this is only to be expected.

Perhaps even more importantly, the curriculum in most systems focuses mainly on national (i.e., central, uniform) law rather than on the law of the member units. That does not necessarily mean that member unit law is ignored. In some systems, especially where important areas of private law, criminal law, or procedure are left to the states, local law receives some attention; this is notably the case in Canada (especially between the common and civil law), Mexico, and Switzerland as well as Argentina (with regard to procedure). But even in these countries, subunit law does not dominate, and in most systems, it plays a distinctly marginal role.[46] This is perhaps most surprising in the United States where many (if not most) core areas of law are largely left to the states yet law schools mainly focus on law and legal issues common to the entire legal system.[47]

With regard to the curriculum, there are only three exceptions, and two of them are of limited significance. In Canada, the split between common and civil law translates into a partial split of the curricula between the anglophone provinces and francophone Quebec, mainly with regard to private law; even this partial split is overcome at the institutions providing a "bijural" legal education, such as McGill University in Montreal or the University of Ottawa. In the United Kingdom, English and Scottish universities do not normally teach the respective other law; yet, with the exception of criminal law, this does not much affect the core areas. The third exception, however, is significant: in the European Union, legal education focuses on the respective national laws. It is true that European law is now also taught virtually everywhere and that courses comparing various European legal orders are quite common. Still, legal education continues to be so overwhelmingly geared toward national law that a student can do very well with very little knowledge of anything that spans national boundaries.

Finally, there are a variety of institutions and practices involving post-graduate legal education which can have a considerable unifying effect. In some federations, special programs bring together law graduates from all over the system for academic training in central law, as in India (LL.M. and Ph.D. programs) and the European Union (College of Europe/Bruges, European University Institute/Florence, Europäische Rechtsakademie/Trier). Sometimes, graduates clerk for judges sitting on central courts; this is mainly the case in common law countries (Australia, Canada, India, and the United States) but also at the European Court of Justice. Elsewhere, as in Germany, India, and the Dutch Federation, judges are sometimes temporarily delegated to another court, inter alia to learn from their colleagues dealing with a different docket. And some countries have special national training programs for members of the bench, as in Canada, Mexico, and Russia, or even a national school for judges, as in Spain.[48] Such system-wide platforms for post-graduate training will usually foster a system-wide legal consciousness and, more likely than not, a concomitant preference for legal uniformity.

[45]In both Belgium and Canada, the respective language barriers play a role in this. It also limits the mobility of students in Switzerland between the German and French speaking parts.

[46] This is not the case in Australia, however, where the teaching of subjects that are controlled by state law (e.g. criminal law) will focus on the law of the state within which the law school is situated.

[47] In the United States, the degree to which this is true depends on the rank of the law school in the overall hierarchy. Elite law schools pay next to no attention to the law of the state in which they sit. As one descends the prestige ladder, passing the (state) bar exam is more important (as well as more problematic) so that teaching state law plays a greater role. Also, in Louisiana, legal education has to focus more than elsewhere on state law due to specific nature of its codified private law system.

[48]Some systems also require, or at least offer, continuous legal education (CLE), especially for members of the bar. These programs may also have a national focus but they can just as well deal with member state law, as is often the case in the United States.

B. *Admission to the Bar and Legal Practice*

In light of the largely system-wide student bodies and curricula, it is somewhat surprising that bar examinations (where they exist) and admission to the bar (where it is formally required) take place on the member unit level in a majority of federal systems. Yet, in most cases, one should not make too much of that. Even where bar examinations and admissions are run by states, provinces, cantons, etc., it is mostly quite easy to practice law in another subunit.[49] Still, in some systems, the boundaries between the subunits do constitute serious barriers.[50] Perhaps surprisingly, the *legally* most fragmented system of bar admission is no longer the EU, because European law now mandates far-reaching recognition of academic degrees as well as considerable mutual admission to practice among the member units. Instead, the system most ridden by legal barriers is the United States, where most states require lawyers licensed to practice in another jurisdiction to pass the local bar examination before being admitting to local practice. *In practice*, however, relocating to another member state is still easier in the United States than in Europe, not only because some states are willing to "waive in" lawyers from other jurisdictions with several years of experience,[51] but also because the cultural, language, and other practical obstacles are much less serious in the United States than within the European Union.[52]

Despite these administrative barriers in some federations, legal practitioners can, and frequently do, move throughout the system, although the degree of their mobility varies considerably among the federal systems and the strata of the profession. More or less everywhere, many lawyers set up shop, or take a position, close to home while many others gravitate toward the big cities or otherwise move from one subunit to another. The National Reports strongly suggest that where geographic mobility is systemically hindered, it is not so much by jurisdictional boundaries than by cultural and linguistic barriers.[53]

The geographic mobility of legal professionals militates in favor of legal uniformity because greater mobility increases the transaction costs of diversity. To be sure, as the example of the United States vividly illustrates, a high degree of such mobility is by no means a guarantee for a high degree of legal uniformity. But it is almost certain that US-American law would be even less uniform than it is if lawyers in the United States were not as mobile as they are and if there was not, in addition to local practice, an essentially national bar.[54]

5. *The Impact of International Law*

So far, we have looked at the factors promoting legal unification from *within* the respective systems. Is unification also the result of factors operating from the *outside*, i.e., on the international level? Here, we

[49] Most of the respective systems either generally allow nationwide practice, as in Belgium, Italy or Switzerland, or at least have fairly generous rules about mutual recognition of bar exams and memberships, as in Australia and Canada.

[50] In Malaysia, for example, lawyers admitted to practice in the peninsula cannot easily practice in the East Malaysian states of Sabah and Sarawak.

[51] Also, US states' bar examinations now contain a "multistate" part, which covers areas of law that are uniform throughout the country. While candidates also have to take the state-specific part, in some states, passing the multistate section (or passing with a specified high score) can mean that the state-specific part will not be graded. This often leads candidates to concentrate particularly on the multistate section, i.e., uniform law.

[52] As a result, many American lawyers are admitted to the practice of law in more than one member state while such multiple admissions are still a rarity in Europe.

[53] These barriers are often daunting, of course, within the European Union but they also play a significant role in Belgium (except for the mix of lawyers practicing in Brussels) and Canada and, although in a much more attenuated fashion, in Switzerland and (despite the lack of a language barrier) the United Kingdom, i.e., between England and Scotland.

[54] The national organization of lawyers, the American Bar Association (ABA), also provides a platform for a nationwide discussion of legal issues among lawyers and often takes positions on law reform in its monthly publication, the American Bar Association Journal (ABAJ).

should distinguish between *mandatory* compliance with international norms on the one hand and *voluntary* participation in international unification projects on the other.

A. *Mandatory International Norms*

Mandatory compliance with the supranational law of the European Union plays a large role for unification within Europe, of course, i.e., for Austria, Belgium, Germany, Italy, Spain, the Netherlands, and the United Kingdom. EU law is binding on the member states and supreme to, and within, their domestic legal orders.[55] Many provisions of the respective treaties and all Regulations are directly applicable, and Directives must be implemented in domestic law. The unification effect of EU law is twofold. First, it unifies (or, in case of Directives, harmonizes) the law *within the European Union* itself, i.e., among the member states. Second, EU law also frequently unifies the law *within the member states* because its direct applicability and supremacy make it override even the law of the member states' subunits (Länder, Provinces, Regions, etc.). In other words, where EU law rules, both the member states and their parts must all march to the beat of the same drum. Since EU law has proliferated at a breathtaking pace over the last few decades, it now unifies significant amounts of law within Europe, especially in the areas of economic regulation, private law, private international law, and increasingly civil procedure.

Mandatory compliance also plays a role within the Council of Europe because all its members must abide by the European Convention on Human Rights (ECHR). This concerns all the states just mentioned plus Russia and Switzerland. Yet, the unification effect of the ECHR is much smaller than that of EU law because the basic rights listed in the ECHR are by and large already contained in the member states' domestic federal constitutions. To be sure, there are some differences, but instances in which the ECHR (as interpreted by the European Court of Human Rights) has overridden and thus unified the member states' subunit law are fairly rare exceptions. Still, the ECHR can have a unifying effect in some systems. It does so, for example, within Russia, as a more recent member of the Council of Europe, because compliance with the ECHR is still a work in progress; as the Russian report points out, the supremacy of treaty obligations under the ECHR has led to considerable harmonization and even unification of law. This could also be said for the United Kingdom, where the Human Rights Act of 1998 implemented the ECHR and thus codified a detailed fundamental rights catalog for the first time in the history of the UK.

On a worldwide level, the picture is much more mixed, and compliance with international law seems to have a unifying effect just occasionally. This may seem somewhat surprising because almost all systems considered here are, for example, members of the major United Nations human rights treaties[56] and thus subject to the same international law obligations.[57] But in many systems, these international norms have no direct internal effect (i.e., they are not "self-executing") and thus cannot themselves unify domestic law. And in most instances, international human rights obligations are, again, largely duplicative of federal constitutional provisions which are already uniform throughout the respective countries.

International law can, however, have a unifying effect in some more specific regards. For example, the center often has the power to make and then implement treaties even in areas falling (internally) under the jurisdiction of the subunits. Thus the center can create uniformity via international law where it otherwise

[55] This is contested with regard to the member states' Constitutions only.
[56] All but the European Union, which is not a state in the international sense and thus cannot be a UN member, and Malaysia are members of the International Covenant on Civil and Political Rights (ICCRR); 16 of our 20 systems considered here are members of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and 17 are members of the International Covenant on the Elimination of all Forms of Discrimination against Women (CEDAW).
[57] In addition, they are all subject to customary international law, of course.

could not.[58] In addition, domestic courts often interpret domestic law in light of international norms; this is reported particularly for Australia, India, Mexico, and South Africa but clearly also true for Canada, Germany, Italy, the United Kingdom, and, within narrower limits, the United States. The extent to which these powers and practices actually contribute to internal legal unification is, as the Canadian Report points out, hard to measure. It also varies a lot because the domestic legal actors' concern with international norm compliance can range from a sense of obligation to virtual disinterest.

One must also not overlook that international legal obligations can have both a unifying and a divisive effect at the same time. Perhaps the most illustrative case in point is the (Vienna) Convention on the International Sale of Goods (CISG) which has been ratified by 14 out of the 20 systems covered in this Report. In systems in which the law of (commercial) sales is left to the subunits, such as Canada and the United States, the CISG, as a self-executing treaty with the rank of federal law, indeed unifies the law nationwide. But since it does so only for the transactions it covers, it also creates a new split: international sales fall under the CISG while domestic sales are still governed by the law of the respective subunits.[59] In short, unification via international law is often a double-edged sword and should be approached with caution. It creates full uniformity only where both international and domestic cases are treated alike, and such (in a sense, vertical) uniformity is often hard to accomplish.[60]

B. *Voluntary Participation in International Unification Projects*

The vast majority of systems covered in this Report regularly participate in international unification efforts. All 20 are members of the Hague Conference on Private International Law,[61] 17 are members of the International Institute for the Unification of Private Law (UNIDROIT), 15 participate in the United Nations Commission on International Trade Law (UNCITRAL), and 12 belong to the Organization for Economic Cooperation and Development (OECD). Thus, the great majority are more or less constantly involved in the drafting of internationally uniform treaty or model norms. As some reports (for Australia, Germany, Mexico, Russia, and Spain) mention, this involvement can have a unifying effect, e.g., where such models are adopted either on the federal level or by the member units.

Yet, while national participation in international unification projects certainly fosters the spirit of legal uniformity, the actual impact of these activities on the domestic level should not be overrated. The example of the UNICTRAL Model Law on International Commercial Arbitration illustrates the limits of this impact. While participation in UNCITRAL has sometimes led to the adoption of the Model Law and to (internal) legal unification, as in Australia, this is the exception, not the rule. To begin with, the Model Law has been adopted in only half of the systems under review here. Moreover, in most of these countries, like Austria, Germany, Mexico or Spain, its adoption amounted to a reform but did not cause (greater) uniformity, because the law of international arbitration had been federal already before. Finally, in the United States, where this area has been left to the member units, the Model Law was adopted only by a of minority component states – thus, again, the pursuit of international harmonization has fragmented the law on the domestic level.

[58] For example, in systems were procedural law is the domain of the member states, the center can still unify aspects of civil procedure by ratifying the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965). When the United States ratified the Convention in 1976, it became "the supreme law of the land" (US Const. Art. 6 § 2), binding federal and state courts and litigants alike.

[59] An important unifying effect is also created by the wide (and voluntary) use of [define first?] INCOTERMS in international sales transactions.

[60] In fact, such a split can even occur without concomitant unification benefit, namely where the subject covered by a treaty is already unified under federal law. For example, service of process in many European Union members states is governed by different sets of rules depending on whether such service is purely domestic (federal law), transboundary within the EU (Regulation on the Service of Process 2001) or international beyond it (Hague Service Convention).

[61] Even the European Union became a member in 2007 after the organization's statute had been specifically amended for that purpose.

6. *Summary and Evaluation*

It is clear that of the factors driving unification discussed in this chapter, the most powerful appears to be central constitutional and statutory law. This is especially so, of course, where federal law is exclusive and supreme. Unification through the central courts, i.e., case law, is already a more diverse phenomenon. It is strong at the federal constitutional level and significant in systems where central courts interpret both federal and member state law. But in many federations, the central courts have no jurisdiction over the law of the subunits and can thus not contribute directly to its unification.

Cooperation on the horizontal level, i.e., among the member units, to create legal uniformity exists in some systems but not in others. Uniform model laws play a role only in a small minority of federations, especially in the United States and in the countries with a law (reform) commission. Member state judiciaries (where they exist) do look to sister state case law but this seriously contributes to legal unification only in a few systems. Other coordination schemes exist here and there but play a very minor role in the grand picture.

Non-state actors contribute to legal unification mainly when they draft common norms, but this is a significant factor only in the United States (*Restatements*), the European Union, and, in an incipient fashion, in Mexico. Non-state actors may also prompt legal uniformity through system-wide lobbying efforts but the impact of these efforts varies greatly and is almost impossible to gauge.

Legal education and legal practice have a nationwide orientation in most countries; note that this is true even where lawmaking power is widely distributed and legal diversity is high. The way the legal profession is trained and operates must therefore count as unifying factors because lawyers thinking in national terms and working in a national context tend to prefer uniformity over diversity. But again, the concrete impact of these factors on legal unification is hard to measure.

Apart from the special case of the supranational law of the European Union, the significance of international law and international unification efforts is surprisingly limited *within* federal systems. Mostly, treaty or international model norms concern areas that are already governed by federal law and thus uniform; often, these norms have no direct (domestic) effect and can thus not themselves unify domestic law; and sometimes they even contribute to legal fragmentation by creating separate regimes for international cases.

In summary, when it comes to legal unification in federal systems, it seems that nothing beats the top-down exercise of central government power. All other means and methods are second best – less consistently employed, less reliable and, on the whole, less successful.[62] We will return to this point in order to see whether the respective strength of central legislative power is in fact correlated with the degree of uniformity in the federal systems here under consideration (infra IV.1.B.).

III. LEVELS OF LEGAL UNIFICATION

After reviewing and assessing the factors that drive legal unification in federal systems, it is time to ask how much these factors have actually accomplished. In short, how uniform *is* law in federal systems in the world today? The question is, of course, impossibly general. We will therefore attempt to answer it

[62] Of course, one may respond that the challenge of legal unification in federal systems really begins where central government power ends, and where one must therefore resort to other means. In that case, the sum total of the national reports suggest that none of these other means is obviously superior to any other and that the best strategy will combine them as far as possible.

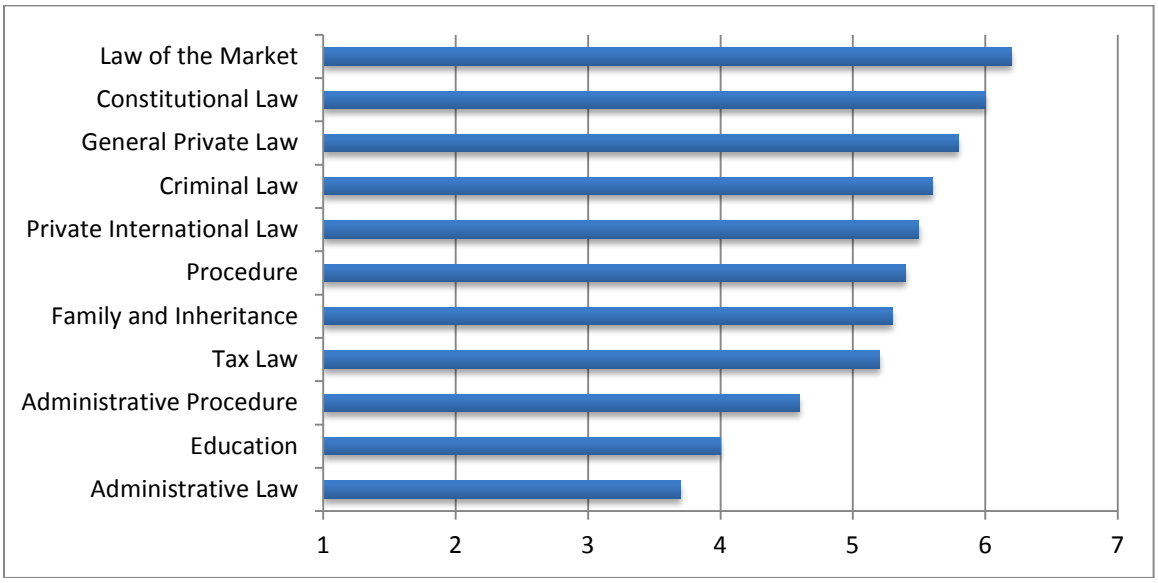
more specifically first with regard to particular areas of law and second with regard to the various systems covered in this Report.[63]

The following findings have to be handled with circumspection because they derive from the (necessarily subjective) assessment of uniformity by insiders to the respective federal systems.[64] Thus, it would be foolish to place much, if any, confidence in the significance of small differences between the respective scores. At the same time, it is reasonable to assume that large discrepancies reflect real differences in uniformity. Accordingly, while the rankings we have performed should not be taken too seriously where small margins are involved, the big differences do matter and allow us to put legal areas and systems on a spectrum ranging from greater to lesser uniformity.

1. *Uniformity by Areas of Law*

If we rank the major areas of law covered by our questionnaire (and across all systems involved) by their degree of average uniformity on a scale of 7 (completely uniform) to 1 (completely diverse), the following picture results.

Figure 1: Uniformity by Area of Law



Even with a heavy dose of distrust towards the precision of the uniformity scores, this ranking can be instructive. Most obviously, we can see that some areas of law clearly tend to be more uniform than others. In addition, no major area of law is reported as being virtually always uniform or virtually always diverse. Instead, most of them are clustered somewhere above or around the midpoint. If we imagine a reporter's score of 4.0 (the middle of our scale) to suggest the perception that a system's uniformity is as prominent as its diversity then this means that, on the whole in federal jurisdictions, law is perceived to be by and large more uniform than not; with only administrative law falling below that standard (i.e., below 4.0). Beyond these generalities, we offer four more specific observations.

[63] Of course, even on such a scale, gauging the respective degrees of uniformity demands rather broad generalizations.
[64] See the Appendix on Methods.

First, it is noteworthy that the most unified area is "Law of the Market" (which includes corporate, securities, antitrust, labor and employment, intellectual property, banking, insurance, and bankruptcy law). This is true in virtually all systems. This may reflect the system-wide nature of the respective economies; at least according to standard wisdom, legal uniformity serves an integrated market by lowering transaction costs.

Second, constitutional law (understood as a generic reference to both central and component state constitutional norms) is not far behind (and the only other area with a score of 6.0 of higher). This reflects the fact that in most systems a single source (i.e., the central and thus uniform constitution) plays a dominant role in generating constitutional norms and that this source also has a unifying effect on member state constitutions (if any).[65] This also confirms the national reporters' emphasis on the strong unifying force of (central) constitutions (supra II.1.A.)

Third, there is a group of major areas of law that are somewhat less uniform than market and constitutional law but still considerably more uniform than diverse (all above 5.0). This group contains both general private law, i.e., contract, tort, and property, which (at 5.8) is almost as uniform as the more specific "Law of the Market", and family and inheritance law, which (at 5.3) is slightly more diverse, probably reflecting its closer ties to cultural differences among regions. The group also contains criminal, law, procedure, and private international law, which are all marked by about equal degrees of uniformity (5.6-5.4) and, somewhat below this, tax law (5.2).

Fourth, laws governing education, administrative law and procedure clearly rank at the bottom; this is also true in almost all jurisdictions covered here. At least with regard to the latter areas, i.e., administrative law and procedure, this is not surprising. After all, federations are, by definition, divided-power systems. Almost invariably, this means that component states have general authority over their own structure. At least some public power will therefore be exercised by the component states according to component state procedures. Also, administrative law and procedure often concern local affairs, such as zoning, building codes, and local public services, the regulation of which is thus often left to the subunits of the federation and sometimes even to the municipalities.[66] The relatively low degree of the law governing education probably reflects the often intensely cultural and thus local concerns underlying this field; education is "close to home", so to speak, and thus may lead to greater local insistence on diversity.

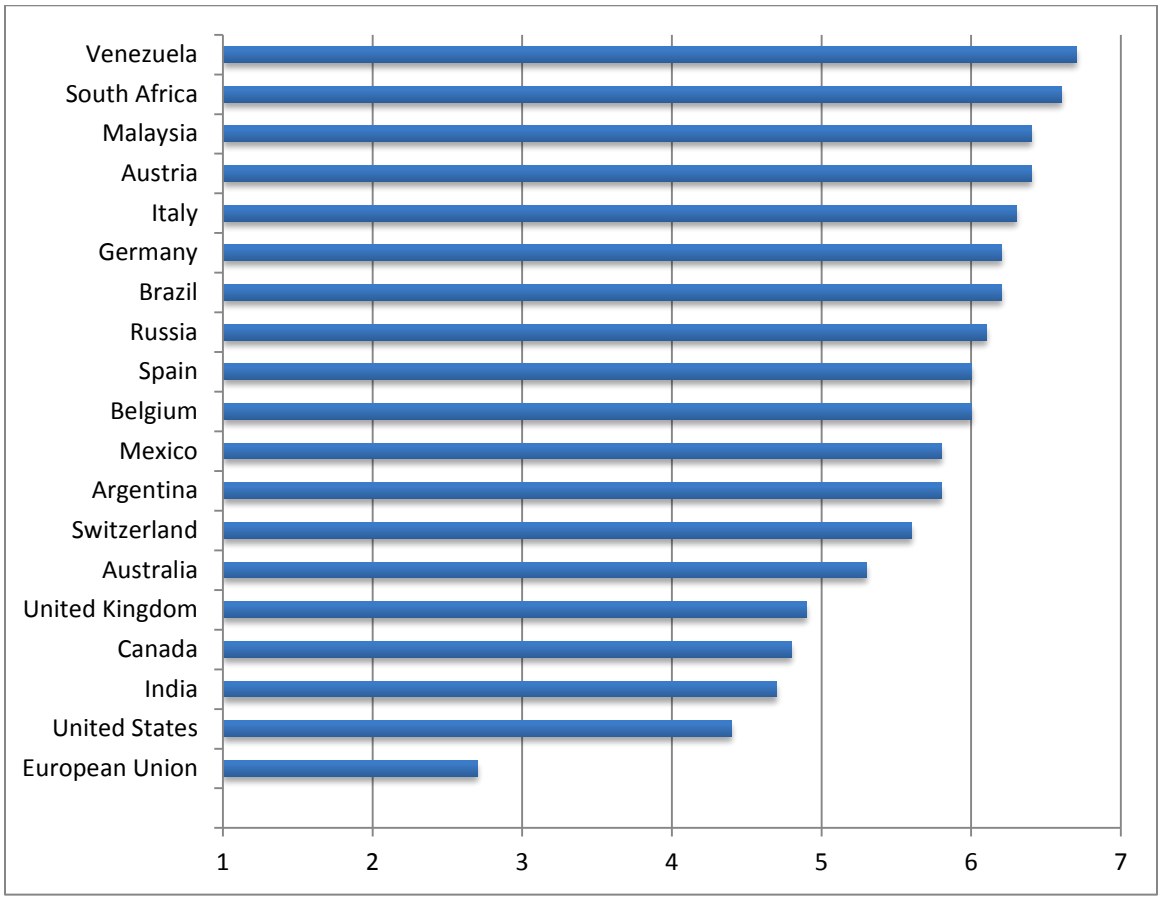
[65] There are, of course, prominent exceptions, such as the European Union. The Spanish Constitution should be noted in this regard as well, as it is open-ended in the sense that it not only unifies, but also invites diversity. Indeed, the potential for diversity in the Spanish Constitution has not (yet) been exhausted.

[66] This idea of local autonomy as a means to enhance efficiency by encouraging sorting among (potential) residents of local jurisdictions has been championed since Charles M. Tiebout's classic piece "A Pure Theory of Local Expenditures Export," 64 The Journal of Political Economy, 416 (1956).

2. *The Uniformity by Federal System*

If one averages the overall "uniformity scores" for each of the 20 federal systems covered by this General Report, they range from 6.7 (almost full uniformity) for Venezuela (and, close behind at 6.6, South Africa) to 1.1 for the Kingdom of the Netherlands. The Kingdom of the Netherlands is a clear outlier not only on unification, but also in its extremely loose federal architecture. Thus, we do not accord it much weight in the overall assessment and do not consider it further in this Chapter.
The results (minus the Netherlands) are displayed in Table II below.

Figure 2: Uniformity by Federation



Even if we look at Figure 2 with the appropriate amount of skepticism regarding the exact numbers and thus do not attribute much weight to small differences, four interesting observations emerge.

First, all national federal systems are located in the upper half of the Chart. With an average uniformity score of 4.0 or higher, their law has been assessed to be, on the whole, more uniform than not. In other words, in national federal systems, legal uniformity is perceived by insiders to be more the rule than the exception.

Second, the only system below the midpoint (4.0)[67] is also the only supranational federation, i.e., the European Union. Its uniformity score is so much lower than that of the rest (2.7 v. 4.4 for the national systems) that it clearly stands out. One can almost say that in terms of legal uniformity, it is the European Union versus The Rest of the World, or, to put it differently, the supranational federation versus the various national orders.

Third, one can – roughly – put the national legal systems into two groups. The top group is larger and consists of Venezuela, South Africa, Austria, Malaysia, Italy, Brazil, Germany, Russia, Belgium, Spain, Argentina, Mexico, and Switzerland; while there is some distribution from the bottom to the top, their scores are roughly all within one point (6.7-5.8), with Switzerland falling slightly below that range (5.6). The bottom group is much smaller and consists of the United Kingdom, Canada, India, and the United States, all of which have significantly lower scores (all in the 4s) than the top group. Australia sits somewhere in the middle between these two groups (at 5.3).

Of course, this picture raises more questions than it answers. In particular, what explains the differences we see? In other words, *why* is law apparently considerably much more uniform in some areas of law and in some federal systems than in others?

IV. EXPLAINING UNIFICATION

This Report does not claim to provide final explanations for the varying degrees of legal uniformity; however, it does generate what we deem to be plausible hypotheses related to the causes of the observed variance. This part takes first steps in exploring several structural, political, and cultural features that may contribute to the variation that we have seen. We emphasize at the outset, however, that our explanations are tentative. They point not to proven conclusions but to avenues for further empirical research. We shall briefly explore the following six factors: legislative power, structural centralization, civil v. common law, social cleavages, political parties, and age of a federation.[68]

1. *The Legislative Power Hypothesis*

As we have learned from the reporters' description of the means and methods of legal unification, the most important process for unification seems to be central legislation. If this is the case, we should see (all else being equal) a correlation between legal unification and central legislative powers. The first hypothesis that we shall investigate, then, is rather simple: *the more legislative authority resides with the central government, the more unified the law will be.* Call this the legislative power hypothesis.

To be sure, the effective use of allocated authority depends critically on a host of factors that enable the central government to exercise its authority. We intentionally leave these other factors aside for the moment, in the hope that there is sufficient variation among systems with regard to these other factors for a general correlation between the formal allocation of power and the level of unification to emerge.

To investigate our initial, and rather elementary, thesis about legislative power, then, we shall examine the formal[69] distribution of legislative authority in federal systems to see whether it correlates with the observed variation in legal unification. We shall do this, first, by looking at the variation across areas of law and, second, by looking at the variation across federal systems.

[67] Leaving aside the Kingdom of the Netherlands for the reasons explained above.
[68] Given the small number of observations and the difficulties that inhere in the underlying data, we are hesitant to pursue multivariate regression analysis at this point lest our explorations be given an improper air of scientific accuracy.
[69] In the following description we attend to the basic distribution of competences, not the more fine-grained interpretation of these power-allocating norms.

A. *Legislative Centralization by Area of Legislation*

To examine the variation in legal unification across different areas of the law, we shall examine three examples: (a) matters that are usually allocated to the center, (b) matters that are usually allocated to the component units, and (c) matters that are sometimes allocated to the center and sometimes allocated to the component units. We should find that matters in the first group correspond to those areas that are also the most unified, that matters in the second group correspond to those that are the least unified, and that matters in the third group lie somewhere in between on the overall level of unification. And, indeed, this is what we find.

a. Commerce

Of the areas covered by this study, the legislative power most consistently allocated to the central government is that over commerce:[70] the central government of every federation enjoys significant legislative jurisdiction over commercial matters.[71] In about half of these systems, the central government's legislative jurisdiction over commerce is exclusive, whereas in the other half it is concurrent. These powers range from the expansive concurrent powers of the U.S. Congress to regulate "Commerce... among the several States" to the more limited market harmonization powers of the European Union. Whether concurrent or exclusive, however, the grant of central legislative jurisdiction over market regulation is, as noted above, the single most consistent power allocation next to defense and nationality.

Most federations that enumerate central government powers over commerce will also, separately, allocate legislative jurisdiction to the center over intellectual property, banking and insurance, as well as labor and employment. Moreover, with the exception of the United States and the European Union, every federation provides express powers to the central level of government over significant portions of social security, pension, or welfare legislation. Given that the U.S. Commerce Clause has been interpreted expansively to allow direct regulation of this area, the European Union now stands alone as a federation that lacks direct central government power to regulate these areas.

The general allocation of substantial legislative authority over commercial and economic matters, i.e., "The Law of the Market", thus correlates strongly with the general level of unification of this area of the law as shown in Table I.

b. Education

If we turn to commonalities in the retention of legislative jurisdiction for the component units, we see, for example, that, with the exception of Malaysia, federations seem to leave education, along with language and cultural matters, overwhelmingly at the component state level.

Even federations with residual power allocation to the central government, such as Belgium, South Africa, and the United Kingdom, expressly allocate certain powers over language, culture, and education

[70] This study did not consider the law pertaining to defense or nationality. With the exception of the European Union, the central government of every single federation in our study enjoys broad powers over these areas. As these areas of governance do not correspond to any substantive area of legal unification that we asked about in our survey, the general allocation of these particular powers to the center does not help predict the legal unification we have studied here.

[71] The importance of some regulatory power over the market as a core characteristic of federations is indeed driven home by the Dutch exception. Here, where the center lacks power over the market, the center has *no* powers other than those in the realm of defense, international affairs, and nationality.

to the component states.[72] In systems with residual component government powers, these areas are frequently not mentioned at all or they are discussed only in ways that suggest highly limited powers at the central level. Accordingly, the central governments of the European Union, Germany (today), the Kingdom of the Netherlands, and the United States seem to have no direct regulatory powers over education. So, too, Canada places jurisdiction over education at the provincial level of governance. To be sure, central governments may exercise considerable power indirectly by conditioning the receipt of federal funds on state law reform in these (and other) areas. But the legislative power hypothesis would still suggest that, all other things being equal, areas of law that are subject to direct central regulation would be more uniform than areas of law subject only to central inducement through financial incentive.

To the extent that central governments are granted direct powers over education, culture, and language at all, these tend to be rather limited. In Argentina, for example, the central power over indigenous peoples and their bilingual and cultural education seems to be a kind of protective jurisdiction, not jurisdiction to impose dominant rules on a minority. In Argentina, Brazil, Germany (before its latest federalism reform), Russia, and Switzerland, the central government has power only over basic guidelines and coordination, and mostly in the area of higher education.

We see somewhat stronger central legislative jurisdiction over education in Italy, India, and South Africa, where the central government has concurrent power with the component states over education more generally. India and South Africa reserve the regulation of universities to the component states whereas Italy indicates a special exception for the autonomy of scholastic institutions.

Malaysia and Mexico stand out by granting the strongest powers over education to their central governments. In Malaysia, the federal government's jurisdiction over education is exclusive. In Mexico, the Federation has the exclusive power to establish, organize, and sustain elementary, superior, secondary, and professional schools of scientific research, or fine arts and technical training, as well as practical schools of agriculture, mining, arts, and crafts. Moreover, the central level of government in Mexico has the power to make laws "seeking to unify and coordinate education in all the Republic." According to our survey, these are unusual powers for central governments to have in a federation.[73]

The general picture that emerges is that the bulk of authority over education is usually left to the component states. In several federations, the central government has no direct power over education at all, and in federations that empower the central government to act, specific delegations and exceptions preserve substantial power for the federal subunits. This finding also supports our legislative power hypothesis in that the area of education is also one of the least unified areas of the law.

c. Private Law, Criminal Law, and Procedure

The picture with regard to private law, civil procedure, criminal law, and criminal procedure is more mixed. Whereas most federations allocate substantial powers over these areas to the center, a significant

[72] This is true for India as well. With regard to education, disagreements over the center's regulatory powers led first to education being removed completely from the State to the Union List, and then to being transferred to its current location in the Concurrent List while leaving only certain regulatory powers over higher education on the Union List.

[73] We are tempted to suggest that the strength of the central government's jurisdiction over education in federations is in large measure due to the degree of cultural diversity coupled with the distribution of financial resources. Thus, the strong central powers over education in Malaysia and Mexico may well be in large part a product of the existence of extreme poverty and a concomitant need for concerted action to lift the education level among the general population as well as of the absence of local resources on the part of the component states to do so on their own. This might also explain the general concurrent power over education in India and South Africa, and the joint power over education in Brazil or the power over the organization of education in Argentina. More systematic study would be needed, however, to confirm this intuition.

minority of federations retains substantial, if not all, legislative authority over these areas for the component units.

Most civil law federations grant legislative jurisdiction over contracts, torts, property, family law, and succession to the center. This power is sometimes concurrent (as in Argentina, Germany, Spain, or Switzerland) and sometimes exclusive (Austria, Brazil, Russia, Italy, and Venezuela). Each of the countries mentioned so far also grants its central government power over criminal legislation and (with the exception of Argentina) civil and criminal procedure as well.

Three other systems fall into this first group of federations with strong central powers over substantive and procedural private and criminal law. India provides its central government with considerable jurisdiction over the substance and procedure of private law as well as criminal law, granting the center concurrent powers over these areas (with the apparent exception of torts and criminal procedure). Malaysia allocates substantive and procedural private and criminal law to the center, while placing only Islamic family and inheritance law and the limited jurisdiction over offences against Islam under the exclusive domain of the state shariah courts. And the mixed system of South Africa, in which federal powers are residual, leaves everything except for indigenous and customary law to the central government.

By contrast, Australia, the United Kingdom, and the United States, along with Mexico, the European Union and the Kingdom of the Netherlands, provide their central government few powers, if any, over general substantive or procedural private and criminal law.[74] Finally, in about half the systems, the power to determine administrative procedure is located at the component state level.[75]

We see that the mixed picture with regard to the allocation of powers over these areas corresponds to the intermediate level of unification of these areas of the law as compared to others. In contrast to either the law of the market at the top end and of education towards the bottom, the allocation of legislative jurisdiction over private law, criminal law, and procedure does not follow any great regularity across all or even across an overwhelming majority of federal systems. In some federations, legislative power over these areas is allocated to the center, in others to the component states. At the same time, each of these areas of the law are, on the whole, also less unified than the law of the market and more unified than education. This, too, provides support for the legislative power hypothesis. [Table I]

B. *Legislative Centralization by Federation*

A second way to examine our legislative power hypothesis is to consider the level of unification across federal systems. Put another way, we would expect that the more legislative authority the central government of any given federation has, the more unified the law in that federation is.

To investigate this second aspect of the legislative power thesis, we rated federations in terms of the centralization of legislative power and provided each with an index on a scale from 1 (decentralized) to 7 (centralized).[76] We then compared this "legislative centralization index" with the average unification score of the federation. The legislative power hypothesis would predict that the two scores would roughly

[74] Australia gives the central government legislative jurisdiction over marriage and divorce, and the UK's arrangement with Scotland leaves products liability with the central government. Canada stands out for having a different power allocation for general private law, on the one hand, and substantive criminal law, on the other. It reserves most private law ("property and civil rights") to the provinces while delegating marriage and divorce as well as substantive criminal law to the center.

[75] According to the National Report, Malaysia assigns "civil and criminal law and procedure and the administration of justice" to the federal government. We do not currently read this as assigning power over administrative procedure to the central government.

[76] The scoring is explained in further detail in the Appendix on Method.

track each other. More specifically, this would mean that the difference between our legislative centralization score and the average unification score would be reasonably small and reasonably constant across federations. Put another way, the legislative centralization score of a given federation ought to predict that federation's average unification reasonably well and similarly well across federations.

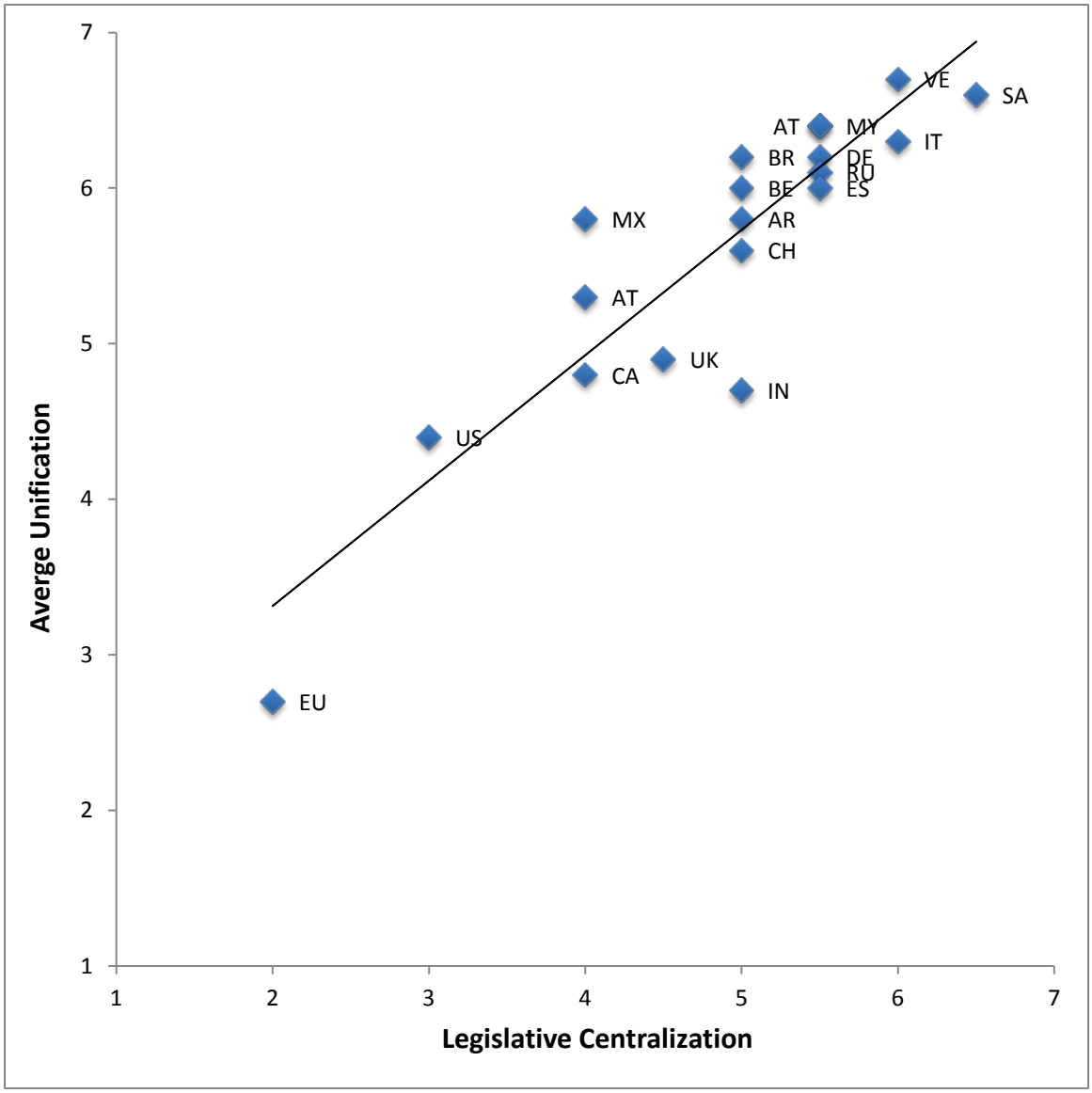
This is, indeed, in general what we find. The following table shows the results organized by decreasing level of average unification. It shows that, by and large, the federations with high uniformity scores also enjoy high degrees of central legislative authority:

Table 1: Uniformity and Legislative Centralization

	Average Unification Score	*Legislative Centralization*	*Difference between Unification & Legislative centralization*
Venezuela	6.7	6	0.7
South Africa	6.6	6.5	0.1
Austria	6.4	5.5	0.9
Malaysia	6.4	5.5	0.9
Italy	6.3	6	0.3
Germany	6.2	5	1.2
Brazil	6.2	5.5	0.7
Russia	6.1	5.5	0.6
Belgium	6.0	5	1.0
Spain	6.0	5.5	0.5
Mexico	5.8	4	1.8
Argentina	5.8	5	0.8
Switzerland	5.6	5	0.6
Australia	5.3	4	1.3
United Kingdom	4.9	4.5	0.4
Canada	4.8	4	0.8
India	4.7	5	-0.3
United States	4.4	3	1.4
European Union	2.7	2	0.7

The systematic correspondence can be shown better in the following figure:

Figure 3: Uniformity and Legislative Centralization



As both Table 1 and Figure 3 show, the correlation between legislative centralization and average unification is strong and reasonably even[77]: for 15 out of 20 federations, the difference is 1.0 or below (averaging 0.6). Thus, as a general matter, this too supports our legislative power hypothesis. Yet, in some federations the average unification of law seems to reflect the legislative centralization score better than in others. In a few federations (at the top end), notably Mexico, the United States, Australia, and

[77] We should emphasize that the empirically significant fact is the general regularity of the correlation between the legislative centralization score and the unification score across federations, not the correspondence of absolute scores for a particular federation taken in isolation. Although the measurement of legislative power and legal unification both use the same scale, the resulting score on each is an indication only of the relative achievement of any given federation with regard to either legislative power or legal unification. Thus, the absolute score that a federation receives on one measure need not correspond to the absolute score it receives on the other.

Germany, the law is considerably more unified than the legislative centralization score would predict. And for India (at the bottom end), the average unification score is actually lower than the legislative centralization score would predict.

These differences in the correlation between the average unification score and legislative centralization score points to the existence of additional factors that may be at work in bringing about legal unification in federal systems. This, too, should come as no surprise. As we noted when introducing the legislative power hypothesis, the central government's *effective exercise* of legislative authority depends on more than the formal allocation of legislative jurisdiction. We shall consider some of these factors next.

2. *Structural Centralization Hypothesis*

The central government's ability to unify the law within a federation depends not only on the formal distribution of legislative authority but also on other aspects of constitutional architecture. These structures beyond the formal enumeration and limitations on powers (what Filippov, Ordeshook, and Shvetsova would call "Level 2" design features of a federation), [78] range from the federal distribution of executive and adjudicative powers to the component states' tax autonomy; they also depend on the strength of component state representation and participation in the central legislative process. The idea is still rather simple: strong central legislative powers combined with weak component state powers more generally should lead to more uniform law throughout the federation. Call this the structural centralization thesis.

The leading characteristic in this regard would be whether the system of government at the center is a parliamentary system or a presidential system with separation of powers. As the latter adds another "veto player"[79] to the central legislative process, one might expect separation of powers systems to produce less central legislation and, therefore, feature a lower degree of legal unification than parliamentary systems. The data, however, do not seem to bear this out – at least not in a straightforward manner. All Latin American federations are presidential systems and yet they fall toward the high end of the unification spectrum. And with the exception of the United States, all systems toward the low end of the unification spectrum are parliamentary systems. Although presidential systems may retard central government activity, other factors must clearly be at work to overwhelm the effect of the form of government on the unification of law.

Other structural characteristics similarly do not correlate independently with legal unification. Features such as the strength of the upper house of the legislature as a representative of component state interests, member state tax autonomy, component state judicial autonomy (i.e. central versus local power to interpret or apply component state law), central government power to execute central law, and central government power to adjudicate or apply central law, would all seem to affect the unification of law. And yet, taken individually, none seems correlated with the levels of unification that we find. We leave it to a further study to examine whether a combination of these factors can be combined sensibly into a structural centralization index that might be correlated with legal unification.

3. *The Legal Traditions Hypothesis: Civil v. Common Law*

In examining the level of legal unification across different federal systems (supra Table 1 and Figure 3), we note an interesting feature: all civil law systems are located at the high end of the spectrum while all common law systems rank at the bottom. The only flaw in this picture is that the high group also contains

[78] Mikhail Filippov, Peter C. Ordeshook, and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (2004).
[79] George Tsebelis, *Veto Players: How Political Institutions Work* (2002).

two jurisdictions that are not civil law systems: Malaysia and South Africa. Yet, neither of them can be characterized as a common law system either because they are hybrids.[80] Leaving them aside for a moment, the differences in the unification scores between the civil law and the common law jurisdictions are striking.

Figure 4: Uniformity by Legal Tradition

	Civil Law Systems	*Common Law Systems*
High Unification	Venezuela (6.7) Austria (6.4) Brazil (6.2), Germany (6.2) Russia (6.1) Belgium (6.0), Spain (6.0) Argentina (5.8) Mexico (5.8) Switzerland (5.6)	
Low Unification		Australia (5.3) United Kingdom (4.9) Canada (4.8) India (4.7) United States (4.4)

The average score for the civil law group is 6.1 while it is 4.8 for the common law countries – a difference of more than one full point; this indicates that on average, law is significantly more unified in civil law systems than in common law jurisdictions. Note also that there is no overlap between these groups – the scores for the civil law countries range from 6.7 to 5.6 while scores for the common law group range from 5.3 to 4.4; in other words, even the most diverse civil law system (Switzerland) displays greater legal uniformity than the most unified common law jurisdiction (Australia). In short, the

[80] South Africa is mixed civil/common law system, and Malaysia, with its colonial common law heritage now is *sui generis* due to the heavy, and increasing, influence of Islamic law. Another slight imperfection in the picture is the fact that some of the common law systems contain civil law elements, i.e., Canada (with Quebec), the United States (with Louisiana), and arguably even the United Kingdom (with Scotland as a mixed jurisdiction).

differences in degrees of legal uniformity seem linked to membership in the civil versus the common law group.

We are of course aware that the civil/common law dichotomy is time-worn and that has recently come under much attack in comparative law scholarship (although some use for the distinction still remains).[81] We recognize that from many perspectives, it makes little sense, and that especially in light of the ongoing interpenetration of legal systems, globalization of law, and the rise of the modern administrative state, most legal systems in the world are essentially hybrids. This reality signifies that civil law and common law systems are ideal types rather than empirical entities. Still, there is no gainsaying our data, which indicate that, with regard to legal uniformity, there is something to the distinction between these two families that cannot be ignored.

Yet, if membership in the civil law versus the common law group is linked to degrees of legal uniformity, this just leads to the question: why? Why does it matter for legal uniformity whether a federation belongs to one group rather than the other?

One reason might be that civil law systems are generally more centralized than common law jurisdictions. This, indeed, may be true. If we look back at the degree of legislative centralization, for example, civil law systems are located toward the higher end of the spectrum while common law systems are located toward the low end. This correlation, however, is far from perfect. With the exception of the United States, every common law system has one or more civil law system counterparts in which legislative powers are centralized to a similar degree.

It also does not appear that any one method of unification is more readily available in civil as compared to common law jurisdictions. We know that there is generally no greater unifying force of (federal) constitutions because these are tremendously strong in most common law countries as well. Nor is there greater uniformity in legal education and legal practice because based on the national reports, we have no reason to believe that in that regard, the common law jurisdictions lag behind the civil law world.

In the case of uniformity through legislation, the civil versus common law dichotomy may still have some purchase in that it reflects a combination of three highly specific and distinct features of a federal legal system that tends either toward unification or diversity of laws.

First, civil law legislatures tend to use the full extent of their constitutional powers to unify law as much as possible while common law countries tend not to. Where constitutions in civil law countries like Germany give concurrent jurisdiction to the center, this concurrent jurisdiction is almost exhaustively exercised by the center, resulting in a high degree of legal unification. This might express the civilian preference for hierarchical over coordinate structures of state authority as Mirjan Damaska famously described,[82] a preference which fosters the centralization. In any event, the tendency to exhaust central legislative powers is considerably weaker in common law countries. The United States Congress, for example, could surely rely on the Commerce Clause to legislate massively virtually all across commercial and private law – but it has used that power very selectively and, on the whole, sparingly. This may, in part, reflect certain citizen preferences that fetter the federal use of this clause.[83]

Second, and perhaps most important, where civil law country legislatures do use their lawmaking power in the traditional core areas of private, commercial, criminal, and procedural law, they have tended to

[81] See Mirjan Damaska, The Common Law / Civil Law Divide: Residual Truth of a Misleading Distinction, 49 Sup. Ct. L. Rev. (Canada) 3 (2010).
[82] See Mirjan Damaska, The Faces of Justice and State Authority (New Haven 1986).
[83] Robert A. Mikos, *The Populist Safeguards of Federalism,* 68 Ohio St. L.J. 1669 (2007).

enact comprehensive codifications. This is an expression of the civil law tradition's habit to find law in a single authoritative text rather than in a multitude of individual decisions or scattered statutes. Codifications unify law with one stroke and on a massive scale - in fact, such unification has been among their primary purposes. To be sure, in less traditional areas, such as consumer protection, labor and employment relations or environmental law, codification projects lack the tailwind of history and often face significant political contestation. But even here, they often succeed and thus create legal uniformity across the board and for the whole nation in one fell swoop. Such massive national codification projects are almost unknown in common law jurisdictions. Again, while the US Congress could surely enact a national commercial or private law code (at least one covering contracts, torts, and moveable property), it has never made so much as a serious attempt to do so. Nor do Australia, Canada, India or the United Kingdom have national codifications on a civil law scale. Instead, these common law jurisdictions usually enact piecemeal statutes that do not aspire to unify the law to the same extent.

Central (especially concurrent) legislative power thus has different implications – indeed perhaps even different "meanings" – in civil and common law countries. In civil law systems, it is an implicit exhortation, perhaps even command, not only to legislate but to enact a comprehensive code in so far as possible. In common law systems, legislative power is essentially conceived of as a mere option that, if used at all, is exercised in a piecemeal fashion. Small wonder then, that the same amount of federal legislative jurisdiction results in much greater actual legal unification in civil law systems than in common law jurisdictions.

Third, and more speculatively, both these tendencies – to use the full extent of central power for the sake of legal unification and to codify broadly if possible – may ultimately express a fundamental property of the civil law mentality: the strong preference for legal uniformity and the concomitant dislike of legal diversity – which civil lawyers quickly associate with chaos. Civil lawyers prize clarity and predictability of legal rules more highly than their common law colleagues, and these values make them prefer uniformity over diversity. The civil lawyers' preferences are, like the common lawyers', likely the direct result of their legal education. In contrast to their Anglo-American colleagues, whose study of cases presents the law as a series of concrete decisions in particular instances and thus trains the students in the art of distinguishing one from the other, students in civil law faculties tend to encounter the law in the form of broad principles and systematically organized rules and are thus trained to generalize – and unify.

We emphasize the speculative nature of resorting, at this point, to the general preferences of civil lawyers as an explanation for legal uniformity. But it may help explain relatively high degrees of legal uniformity, especially in systems where the center does not have broad formal legislative powers over all the core areas of law. In Mexico, for example, where general private law is by and large left to the states, their respective codes frequently emulate, indeed often outright copy, the federal models. This may be attributable to a lack of resources at the state level. But it may also suggest that in a civil law country, legislative command from above is not necessarily required to establish significant uniformity because there is a strong tendency to create it voluntarily. In the civil law tradition, deviation from the common path is a serious matter. It is normally avoided unless the reasons for it are very strong.

The legal traditions hypothesis may be especially useful in understanding the European Union. The EU contains both civil and common law member states and, as such, cannot be assigned exclusively to one or the other legal family. One might think that the EU is predominantly a civil law organization, as it was originally founded by a group of civil law states and is overwhelmingly populated even today by lawyers with civil law training. Yet, at least for the first three decades of its existence, the EU functioned more like a common law system making law in a piecemeal fashion as far as necessary to reach a specific goal (a common market) and fixing potholes along the way. More recently, however, that has changed. As the subsequent treaties granted ever wider legislative powers to the EU, civil lawyers have pushed increasingly towards more uniformity on the European level. The latest manifestation of this trend is the

effort to create a common private law of Europe, perhaps even in codified form. In this trend, the civilian penchant for uniformity through codification once against asserts itself. In certain areas, such as private international law and international civil procedure, it has already succeeded in codifying and thus unifying the law on a European scale unthinkable twenty years ago.

4. *Political Parties*

Political parties operate one step removed from the structural features just discussed. Filippov et al. usefully refer to these as "Level 3" design issues. As scholars from William Riker into the present have shown, political parties can bring together separated institutions as well as fragment a single parliament. In systems that have strong federation-wide political parties, the central level of governance can pass laws over regional objections more easily than in federations with strong regional parties. Put another way, a strong national party system can unify politics across regions and tends to dilute the representation of any distinct regional political will.

Our study does not presently consider political parties. Hence, we have not formulated a hypothesis in this regard. Still, it seems valuable to pursue this potential factor as a separate element of the analysis; in that regard, however, more research is required. If we were to formulate a thesis, it would be twofold: First, all else being equal, a federal system with strong regional parties would be lower on the legal unification index than a federal system with weak regional parties. Second, all else being equal, a federal system with strong national parties will be higher on the legal unification index than a federal system with weak national parties. These two can be independent of one another, as, for example, the United States has neither strong regional nor strong national parties. Any such future study should take care, however, to consider the extent to which political parties reflect or overlap with the presence of persistent, mobilized, social cleavages, to which we turn next.

5. *Territorially Bounded Cleavages*

Ethnic, cultural, linguistic, religious, historical, economic or other social differences that characterize the populations in some federal systems are likely to militate against legal unification. To be sure, such an effect is unlikely where the respective differences are evenly distributed throughout the federation, as in the United States; where the respective groups are not concentrated in particular regions, they will probably not insist on (geographic) legal diversity nor resist lawmaking at the national level (and thus legal uniformity). But an impact on legal uniformity is likely where such differences are "lumpy", i.e., associated with particular regions, as in the multinational federations of Belgium, Canada, Spain, and arguably the United Kingdom; here, these differences can amount to real "cleavages" that may be politically mobilized to split the federation. In such federations, states, provinces, and regions that consider themselves different from the rest have reason to resist federal lawmaking (and thus legal uniformity) for the sake of maintaining regional differences.[84]

If we examine the raw data on unification of laws, they do not bear out this effect. To be sure, India, the United Kingdom, and Canada are at the low end of the unification index. At the same time, however, Belgium and Spain figure toward the high end of legal unification. What would merit further study is the

[84] This does not necessarily mean that federations with social cleavages are *generally* less centralized or exhibit less legal uniformity than those without social cleavages. But it suggests that whatever potential for decentralization lies within a federation's constitutional architecture will be guarded more carefully in systems with lumpy social cleavages than in those without such a federal society. In systems without social cleavages or where social cleavages are randomly dispersed through the federation, we would expect system-wide left-right politics to take over and dilute the federation's structural potential for decentralization.

effect of social cleavages while holding structural centralization constant. That is, federations with strong territorially bounded cleavages may weaken the exercise of central power even where the center has been granted considerable authority. Put another way, all else being equal, systems in which territorially bounded cleavages run deep should feature less legal unification than systems in which cleavages are either scattered throughout the federation or do not figure prominently (i.e., are not politically mobilized) at all.

We would expect the importance of cleavages to be particularly great when the subunits with a special sense of identity are large in comparison to the whole federation. Belgium, Canada, and the United Kingdom are the most obvious cases in point. In Canada and the United Kingdom, the separate identity of the subunit even corresponds to adherence to a (partially) different legal tradition, as both Quebec and Scotland are civil law influenced jurisdictions in common law dominated federations. And in Belgium, there are only two subunits of roughly equal size so that no one is clearly superior to the other. Obviously, a large and powerful subunit can more easily obstruct federal legislation (and unification) than a small one: the federal legislature in Belgium cannot subdue an obstructionist Wallonia or Flanders; the Canadian parliament cannot commandeer Quebec; and the United Kingdom cannot ride roughshod over Scotland. By contrast, where the areas with a special identity are smaller (and less powerful) in relation to the whole, they can be more easily brought into line by the rest. Perhaps that helps to explain why Swiss law is surprisingly unified despite considerable cleavages - among the 26 cantons, none is so clearly dominant that it can be seriously obstructionist, not to mention make credible secessionist noise.

6. *The Age of Federations*

Finally, one might wonder whether the age of federal systems plays a role for the degree of legal uniformity. One problem with this question is that in many cases, such as Germany, Russia or the United Kingdom, age is a dubious measure because it is not clear at what point the federation was born, so to speak – when the federal system first came together or when the exact present form of federalism (i.e., the current constitution) was adopted.[85] But even if the age is determined, its relevance depends exactly on the aspect we focus on.

If one focuses just on whether law in federal systems grows more uniform over time, the answer is that there is no evidence for such any *general* trend. As a federation, Germany is much older than Italy, yet its law is no more uniform (and at least arguably, somewhat less so). In general, the overall correlation between age and uniformity of law is decidedly poor.

Beneath this general picture, however, the situation is more complex. In some federations, the uniformity of law has increased significantly over time. This is noteworthy in the United States, mainly because of the massive growth of federal law in the twentieth century which is likely to continue as the federal government is now determined to exercise much tighter control over larger parts of the economy; in Russia during the last decade because of President Putin's rigorous centralization program; in Switzerland where federal law has grown as well and even procedural uniformity (both civil and criminal) has now been accomplished; and also in the European Union where legal unification has skyrocketed during the last twenty years although it still remains at a level below all national systems.[86] But in many other systems, such as Austria, Germany or India, the situation has been largely stable over long periods of time. And in some countries, the trend has actually been in the opposite direction: where federalism is

[85] In Germany, one would probably look to the unification under Bismarck in 1871 but could also argue for the adoption of the *Grundgesetz* in 1949. In Russia, one could go back to the early days of the Soviet Union (1922) or look at the current constitution (1993). In the United Kingdom, one could go back as far as the Act of Union with Scotland (1707) or consider only the devolution project of the last 20 years.

[86] Another, although special, case in point is Venezuela, where federalism has by and large been suffocated over the last decade by an authoritarian regime.

"devolutionary", i.e., embraced for the very reason of decentralizing power, uniformity of course tends to *decrease* as time goes on. This has recently been noticeable in Belgium, Italy, Spain, and the United Kingdom. It should also be noted that the very categories of "integrative" versus "devolutionary" federations must be taken with a grain of salt, as some systems may well have different phases over time.[87]

One final observation is nonetheless noteworthy in this context: in all civil law systems in which federalism would be called "integrative" (i.e., where it brought the system together in the first place), legal uniformity has tended to rise over time. In some of these systems, like Austria and Germany, it rose quickly in an earlier period and has long since leveled off; in others, like Switzerland, it has continued to rise more gradually.[88] The European Union also belongs in this category. It is true that the uniformity level in the EU is still very low compared to national systems, but the EU is relatively young, and legal uniformity within it has risen rapidly especially over the last twenty years. Since the EU is largely shaped by the civil law tradition, one can expect this tendency to continue. A major retarding force in this process is the United Kingdom – not accidentally the European Union's largest common law member.

V. CONCLUSION

This General Report aims at filling a significant gap in the literature on comparative federalism by describing and analyzing the means, extent, and background of legal unification within federal systems. Its analysis of "unification" includes the "harmonization" of law as a lesser degree of likeness. It focuses on the unification of legal rules, not of actual outcomes in concrete disputes, and it is limited to official law, excluding non-state rules. Covering twenty federal systems from six continents, it cuts across a wide variety of national federal systems and also includes the supranational federation of the European Union. It is based on National Reports written by specialists, information provided by additional lawyers from each of the systems covered, and supplemented by our own research.

Among the manifold *means and methods* of legal unification, clearly the most powerful modes operate top-down. Federal constitutions perform two separate functions in this regard. First, through directly applicable norms they establish a common ground for the exercise of all public authority throughout the system. Second, constitutions allocate jurisdiction within the federation, usually, as we have found, granting significant lawmaking power to the center. The National Reports suggest that the exercise of this central lawmaking is the most common, important, and effective path to legal uniformity. Other means and methods of legal unification play a distinctly secondary role. Uniform interpretation by central courts is still fairly important in many systems, especially where the central judiciary has power not only over federal but also over member unit law. By contrast, unification on the horizontal level, i.e., through voluntary coordination among the member units' legislatures, judiciaries, or executives, plays a significant role only in a few systems. And legal unification through private actors, i.e., via Restatements, Principles or similar devices, is an important factor mostly in the United States and the European Union. Legal education and legal practice both have a system-wide orientation in virtually all federations (except for the European Union) and should count as unifying forces as well, although their concrete impact is almost impossible to measure. Finally, compliance with norms from outside the nation state plays a crucial role only for the members of European Union; in most other instances, the various federations' widespread participation in international unification projects contributes astoundingly little to *internal* legal unification (i.e. among their component states) – largely because the areas concerned are typically governed (internally) by federal law and thus already uniform within the respective countries.

[87] See Halberstam, *supra* note 2.

[88] It took Switzerland more than 60 years to unify its private law (1848 to 1907/11) and until the present, i.e., about 160 years to unify its civil and criminal procedure

The *degree of legal uniformity* in federal systems is, on the whole, higher than one might have expected. In every national federation, the author of the National Report as well as almost all the additional experts consulted judged their own system to be, on the whole, more uniform than diverse.[89] The European Union stands apart in this regard; as the only supranational regime, the reporters and other experts judged the law within the E.U. to be by and large more diverse than uniform. The degree of uniformity also differs substantially across subjects. The law of the market as well as constitutional law are the most uniform; general private, criminal, procedural, and private international law occupy a middle ground; and administrative law and procedure as well the law governing education, language and culture, are the most diverse.

The primary *explanation* for the different degrees of uniformity among subject matters as well as among the various federal systems is likely the different degree to which lawmaking power is allocated to the center rather than to the member units. Subject matter areas under central control are much more uniform than those left to the member states. And in federations with strong central lawmaking power, uniformity is almost consistently higher than in federations in which legislative jurisdiction is more widely distributed. In other words, where law can be made at the center, it usually will be, and it if is, legal uniformity will result. In a sense, this is only to be expected. At the same time, it should give one pause before embracing too quickly the argument[90] that a federation's benefits of experimentation and diversity can be reaped equally by decentralization within a unitary system.

Yet, it is also clear that factors other than the allocation of legislative jurisdiction play a significant role as well. Further research is needed, for example, to investigate the extent to which the overall degree of structural centralization of power in a federation is related to legal uniformity. In this context, the difference between presidential and parliamentary systems and the strength of an upper house in the legislative process may be especially relevant.

One influential factor supported by our data is the importance of the civil law tradition. Civil law systems are clearly more uniform than common law federations. The main reasons are probably their more extensive use of central lawmaking power and the civilian penchant for comprehensive codification.

The make-up of the political party system can also have a significant unifying effect, e.g., where strong national parties can mute local interests, or a diversifying impact, e.g., where strong regional parties successfully push for local constituencies.

A retarding factor may be the existence of major ethnic, cultural, linguistic, religious, economic or other social differences within the population. Where such differences are "lumpy," that is, where distinct populations are concentrated in particular regions, these differences create relevant "cleavages" within a federation (as in Belgium, Canada, or the United Kingdom) which make legal unification harder to accomplish (and perhaps also less desirable).

Finally, the age of federations can play a role, although it may easily work in opposite directions. Where federalism is "integrative" (i.e., aimed at the coming together of previously separate units) legal uniformity typically grows over time, at least in civil law systems. By contrast, where federalism is

[89] The only exception is the extremely loose federation of the Kingdom of the Netherlands, which is atypical in almost all regards and should therefore not distract from the conclusion in the text. The National Report for the United States describes US-American law as "not uniform...[but] largely harmonized", meaning that while there are "numerous inconsistencies in the law", they are mostly "matters of detail only" (which can, however, "be extremely important in individual cases".) We consider this evaluation consistent with our general conclusion.

[90] See, e.g., Malcolm M. Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (2008); Malcolm M. Feeley and Edward Rubin, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903 (1994).

"devolutionary" (i.e., aimed gradual de-centralization of a previously unitary system), uniformity tends to diminish as time goes on.

At the end of the day, this General Report answers some important questions, but it also raises many others. Much of the information gathered through the National Reports and from additional local experts needs to be confirmed in light of the conclusions that we have drawn. More data need to be collected, especially about aspects the relevance of which became clear only while working on this Report. And several forces that we have identified as potentially influencing the degree, modalities, and background of legal unification within federal systems, currently lie beyond our National Reports, and will thus require additional research.

APPENDIX 1: METHODS

Collecting Data about Degrees of Uniformity

We began by asking each national reporter to rate 47 areas of the law in their country on a scale of uniformity from 1 – 7 by filling out a "scorecard". We encouraged each expert to consult others within his or her system to the extent the national reporter did not feel comfortable answering all the questions on his or her own. The national reporter's score is therefore merely one expert's (or a small coordinated group's) subjective judgments of the level of uniformity within that particular system. And yet, one strength of expert estimates is that they allow us to capture what country specialists have in mind when they talk and write about legal unification in the literature.[91]

This left us with two reliability concerns. The first was a straightforward concern about the reliability of our national reporter's view of his or her system as compared to what another (independent) expert's view of that same system might have been. We sought to address this problem by obtaining at least one additional score for each system from another expert whom we judged to be as qualified as the national reporter to assess the level of unification in his or her system across the spectrum of fields listed on the scorecard. If the second expert answered fewer than 75 % of the questions asked (or gave a "0" for more than 25 % of the answers), we eliminated him or her and engaged a third (and, if necessary, fourth) expert. This ensured that the "surviving" experts were as broadly confident about their perception of unification across all areas of the law within their own system as was the primary national reporter.

The second was a concern about comparability across systems, i.e., about intercoder reliability between the national reporters from different systems. This latter concern was that one national reporter's view of what constitutes uniformity (as a general matter) might be biased as compared to the views of a national reporter from a different system. Because this latter concern about intercoder reliability related specifically to the reliability of reporters across systems, we termed this the problem of intersystemic coding reliability.

We addressed this second concern by also giving the additional experts a separate set of eight control questions designed to identify a systematic bias in rating uniformity more generally. Each of these control questions presents a hypothetical scenario of laws in a hypothetical federation with regard to a particular area of the law and asks the coder to rate the level of uniformity for the hypothetical federation within that given area of law.[92] Each of these questions sought to elicit an answer that would reveal a different kind of bias. For example, in one scenario we present a federation in which all but one of twelve constituent jurisdictions have the same law. In another question, we present a federation in which every constituent jurisdiction has a speed limit, but the speed limits vary between 55 and 65 mph. The point with each of these questions was not to look for right or wrong answers, but simply to ensure intercoder reliability in the sense of checking that each coder took roughly the same general approach to coding uniformity and disuniformity when presented with the same scenario.

We disqualified experts whose average score on the control questions was more than one standard deviation from the average score that all the other additional experts gave to the control questions. This ensured that the surviving experts were what we termed "intersystemically reliable," because they had

[91] Cf. Kenneth Benoit and Michael Laver, "Estimating Party Policy Positions: Comparing Expert Surveys and Hand-Coded Content Analysis," 26, *Electoral Studies* 90-107 (2007).

[92] This practice was developed to correct for instances when respondents use the ordinal response categories in questions in different ways, which may bias the validity of analyses based on the resulting data can be biased. Anchoring vignettes is a survey design technique intended to correct for these problems. See Gary King, Christopher J. L. Murray, Joshua A. Salomon, and Ajay Tandon, "Enhancing the Validity and Cross-Cultural Comparability of Measurement in Survey Research," 97 *American Political Science Review* 567-583 (2003).

shown generally to rate uniformity in a manner roughly similar to the other experts. This helped us increase the reliability of comparing unification scores across different systems. Again, where we eliminated one expert as unreliable, we turned to a third and in some cases even a fourth. For logistical reasons of solicitation and timing, we occasionally wound up with more than one intersystemically reliable "second opinion" for a given system.[93]

In calculating a particular system's unification score for an individual area of the law, for sub-scores across several areas of the law, and for the overall average unification score across all areas of the law, we then took the average of the national reporter's and additional (surviving) experts' scores.

Legislative Centralization Index

The two authors of the general report each separately evaluated legislative centralization by taking into account 1) the breadth and number of areas assigned to the center under the text of the constitution, 2) the practical importance of the various fields (e.g., weighing "commercial law" more heavily than "water rights"), 3) where we had sufficient information, how grants of federal legislative power have been interpreted (e.g., the broad interpretation of the commerce clause under the U.S. Constitution), and 4) whether residual legislative power is assigned to the center or the member units. Each of us arrived at a composite score indicating, for each federation, the concentration of powers at the central level of government on a scale ranging from 1 (lowest) to 7 (highest). When we compared our individual scores, we found that we agreed in the overwhelming majority of cases. Where we did not, our disagreement was small (one point or less), and we arrived at an agreement or compromise after some discussion.

We did not consider how broadly, forcefully, or successfully the respective legislative powers at the central or member state level have been or are exercised. We also ignored both the broader institutional architecture and the social or political context in which the allocation of primary legislative jurisdiction was embedded. The legislative centralization index is therefore intended as an index solely of the formal allocation of legislative jurisdiction in any given federation.

[93] For four systems (Germany, Italy, Spain, United Kingdom) we wound up with two intersystemically reliable scores in addition to the score of the national reporter. For two systems (Canada and Argentina) we wound up with four intersystemically reliable scores in addition to the score of the national reporter.

APPENDIX 2: NATIONAL REPORTER QUESTIONNAIRE AND SCORECARD

UNIFORM LAW AND ITS IMPACT ON NATIONAL LAWS
LIMITS AND POSSIBILITIES
Intermediary Congress of the International
Academy of Comparative Law
Mexico City, 13-15 November 2008
Questionnaire
on

Unification of Laws in Federal Systems

General Reporters
Daniel Halberstam
Mathias Reimann

INTRODUCTION

This study investigates the unification of laws in federal systems. We seek to ascertain the level of legal unification within each system, to understand the institutional, social, and legal background against which legal unification occurs, and to explore the means by which unification is achieved and by which diversity is sustained in each federal system.

The questionnaire consists of six parts. Part I invites you to write a brief overview of the federal system, in particular as it pertains to the issue of unification. Parts II-IV provide a series of broad questions about the distribution of power, means of unification, and institutional and social background. Most of the questions in Parts II-IV are divided into specific sub-questions. Please answer all sub-questions to the extent they are applicable. Part V is a "unification scorecard," which will ask you to score the level of uniformity and indicate the various causes and sources of uniformity and diversity in several specific areas of law. In Part VI, we ask for a brief essay reflecting your general assessment, conclusion, and/or prognosis on legal unification in the federal system on which you are reporting.

While some of the questions in Parts II-IV may be answered in a simple yes/no format, others invite reporters to respond in narrative fashion, to emphasize the points important in their own legal system. Your answers to these questions should provide, whenever possible, a historical and evolutionary perspective. Where appropriate, they should point out whether and how norms, facts, or circumstances have changed over time in a significant manner. They should also indicate future trends if such trends are sufficiently discernible.

Given that some of the questions may overlap with others, you should feel free to make cross-references where appropriate, as long as your answers cover all the points raised in the specific question to which you are responding. Where there are no meaningful answers in a given system, please say so and briefly explain why. Of course, each reporter may wish to add information of particular significance in his or her federal system not covered by the questionnaire.

Throughout the questionnaire, we use the term "unification" (of law). The reports (both national and general) should encompass "harmonization" of law as well. For purposes of this questionnaire, we view unification and harmonization as different points on a spectrum of "likeness." In other words, we are interested not only in "sameness" of law throughout a federation but also in "similarity."

Finally, we use the phrases "central" government and "component" state or government to refer to the various levels of government in a federal system. To the extent that the constitution recognizes and protects other political subdivisions (e.g. language communities, regional communities, municipalities, or counties), please explain and please include these in your discussion of component powers whenever applicable. Note that in the unification scorecard (Part V), we specifically break out municipal (and other sub-component state) legislation as one potential factor causing diversity.

I. OVERVIEW

Please provide a very brief historical overview of the federal system and its development. You might do this in as little as 250 words and no more than 500 words (i.e., about ½ - 1 single-spaced page). Please highlight those factors that you deem most relevant in your system to the relation between central and component state power and the degree of uniformity of law.

II. THE FEDERAL DISTRIBUTION AND EXERCISE OF LAWMAKING POWER

1. Which areas of law are subject to the (legislative) jurisdiction of the central authority?

   a. Which areas of (legislative) jurisdiction do constitutional text and doctrine formally allocate to the central government?
   b. Which of these powers are concurrent and which are exclusive?
   c. Briefly name the most important/most frequently used constitutionally specified sources authorizing central government regulation (e.g., in the United States, the commerce clause)?
   d. Briefly describe the most important areas of central government regulation in practice-based terms (e.g., labor law, consumer protection law, environmental law, civil procedure)?

2. Which areas of law remain within the (legislative) jurisdiction of the component states?

   a. What areas of (legislative) jurisdiction do constitutional text and doctrine allocate to the component states?
   b. Which of these are exclusively reserved to the states and which are concurrent powers?
   c. Does the exercise of central concurrent power constitutionally prevent the states from exercising their concurrent power?
   d. In practice, what are the most important areas of exclusive or predominant component state government regulation (e.g., education, family law, procedure)?
   e. In practice, what are the most important areas (if any) in which central and component state regulation coexist?

3. Does the constitution allocate residual powers to the central government, the component states, or (in case of specific residual powers) to both?

4. What is the constitutional principle according to which conflicts (if any) between central and component state law are resolved (e.g., supremacy of federal law)?

5. Do the municipalities – by virtue of the constitution or otherwise – have significant lawmaking power and if so, in what areas?

III. THE MEANS AND METHODS OF LEGAL UNIFICATION

1. To what extent is legal unification or harmonization accomplished by the exercise of central power (top down)?

a. via directly applicable *constitutional* norms?
(e.g., the equal protection clause in the US requires specific features of family law; due process limits in personam jurisdiction)
b. via central legislation (or executive or administrative rules)?
i. creating directly applicable norms
ii. mandating that states pass conforming (implementing) legislation (e.g., *Rahmengesetze*, EC directives)
iii. inducing states to regulate by conditioning the allocation of central money on compliance with central standards
iv. indirectly forcing states to regulate by threatening to take over the field in case of state inaction or state action that does not conform to centrally specified standards
c. through the judicial creation of uniform norms by central supreme court(s) or central courts of appeal?
d. through other centrally controlled means, such as centrally managed coordination or information exchange among the component states (e.g., Europe's "Open Method of Coordination)?

2. To what extent is legal unification accomplished through formal or informal voluntary coordination among the component states? (somewhat bottom up, coordinate model)

a. by component state legislatures, e.g., through uniform or model laws?
b. by component state judiciaries, e.g., through the state courts' consideration of legislative or judicial practice of sister states?
c. by the component state executive branches, e.g., component state governors' agreements?

3. To what extent is legal unification accomplished, or promoted, by non-state actors (e.g., in the US: American Law Institute, National Commissions on Uniform State Laws; in Europe: Principles of European Contract Law (Lando Principles, etc.))?

a. through restatements
b. through uniform or model laws
c. through standards and practices of industry, trade organizations or other or private entities?
d. To what extent do the activities listed in a-c, above, provide input for unification or harmonization by central action (top down) or by the states (coordinate)?

4. What is the role of legal education and training in the unification of law?

a. Do law schools draw students from throughout the federal system?
b. Does legal education focus on (i) central or system-wide law or (ii) component state law?
c. Is testing for bar admission system-wide or by component state?
d. Is the actual admission to the bar for the entire federal system or by component state?

e. Do graduates tend to set up their practice or take jobs anywhere in the federation?
f. Are there particular institutions of (primary, graduate or continuing) legal education and training that play a unifying role (e.g., internships by state court judges at central courts, national academies or training programs)?

5. To what extent do external factors, such as international law, influence legal unification?

a. Does compliance with international legal obligations play a role?
b. Does international voluntary coordination play a role (e.g., participation in international unification or harmonization projects, UNCITRAL, UNIDROIT, Hague Conference on Private International Law, etc.)?

IV. INSTITUTIONAL AND SOCIAL BACKGROUND

1. The Judicial Branch

a. Is there a court at the central level with the power to police whether central legislation has exceeded the lawmaking powers allocated to the central government?
b. If yes, do(es) the central court(s) regularly and effectively police the respective constitutional limitations? (Please explain and give examples.)
c. Is there a court at the central level with power authoritatively to interpret component state law?
d. Are there both central and state courts, and if so, are there trial and appellate courts on both levels?
e. Are there other mechanisms for resolving differences in legal interpretation among central and/or component state courts? If yes, please describe their nature and the extent of their use.

2. Relations between the Central and Component State Governments

a. Does the central government have the power to force component states to legislate?
b. Who executes central government law? (the central government itself or the component states?) If it depends upon the areas involved, please explain.
c. Are component states or their governments, or other communities, represented at the central level, and if so, what is their role in the central legislative process?
d. How and by whom are component state representatives at the central level elected or appointed?
e. Who has the power to tax (what)? The central government, the component states or both?
f. Are there general principles governing or prohibiting multiple taxation?
g. Are there constitutional or legislative rules on revenue sharing among the component states or between the federation and the component states?

3. Other Formal or Informal Institutions for Resolving Intergovernmental Conflicts

Are there other institutions (political, administrative, judicial, hybrid or sui generis) to help resolve conflicts between component states or between the central government and component states?

4. The Bureaucracy

a. Is the civil service of the central government separate from the civil services of the

component states?
b. If there are separate civil service systems, to what extent is there lateral mobility (or career advancement) between them?

5. Social Factors

a. Are there important racial, ethnic, religious, linguistic or other social cleavages in the federation? If yes, please briefly describe these cleavages.
b. Are distinct groups evenly or randomly dispersed throughout the federation or are they concentrated in certain regions, territories, states or other political subdivisions? If they are concentrated in certain regions, etc., please explain how this concentration relates to the structure of the federal system.
c. Is there significant asymmetry in natural resources, development, wealth, education or other regards between the component states? If yes, please explain how this relates to the structure of the federal system.

V. UNIFICATION SCORECARD

The following unification scorecard asks you to assess the degree of legal uniformity across a host of areas on a very basic scale and to indicate the predominant means/causes of uniformity and diversity.

We have listed various substantive and procedural areas of the law. Please indicate for each area your assessment of the degree of legal uniformity across the federal system. You may wish to consult a practitioner or other expert for fields that lie outside your area of expertise.

Please score the degree of uniformity on a scale of 1-7, whereby:

1 = no or low degree of uniformity
4 = medium degree of uniformity
7 = high degree of uniformity

Note that 1 and 7 are not to be considered ideal points never achieved in practice. For example, a score of 1 would be compatible with the existence of some legal similarity, harmonization, or uniformity across a small subset of component states, as long as there is no or only minimal uniformity across the entire federal system. Conversely, a score of 7 would be compatible with a situation in which a single, centrally issued legal rule governs and yet there is some very minimal diversity in the process of adjudication.

Do not use a score of 4 in cases where you do not know and simply cannot ascertain the level of uniformity or in situations where a uniformity score, for whatever reason, is simply not applicable. If you remain unable to determine the level of uniformity for a given area even after consulting with another practitioner or expert or the question is simply inapplicable, please mark down a score of 0.

If, in any given area, we have omitted a significant specialized sub-area that would be scored differently from the general area, please explain and if possible, provide a score for that area in a separate note which you may attach in an appendix. (For example, in the area of torts, we have broken out the sub-field of "products liability;" in the area of criminal law, it might make sense in a particular system to break out "drug offenses".)

After scoring the degree of uniformity, please check off the applicable box(es) to indicate the principal means by which the degree of uniformity is achieved for that particular area. Please check off more than one box whenever applicable. Please use an X to mark the box.

Please also check off the applicable box(es) indicating the principal sources or reasons for diversity for that particular area.

Finally, we invite you to create a brief appendix with any comments you may have on individual scorecard entries.

Unification Scorecard

Uniformity Diversity due to

	uniformity score #- 1 (low) to 7 (high)	directly applicable constitutional norm	directly applicable central legislation	central mandates that component states pass conforming laws	central financial inducement to the component states	central threat to displace nonconforming state legislation	central judiciary's creation of uniform norms	component state legislatures' horizontal coordination	component judiciaries' horizontal coordination	non-state actors' efforts to create restatements	non-state actors' efforts to create model laws	private industry standards and practices	international legal obligations	international voluntary coordination	exclusive component state power	concurrent component state power	exclusive municipal or sub-state power	concurrent municipal or sub-state power
1.PRIVATE LAW A.Classic Core																		
1. contracts																		
a. *general*																		
b. *commercial*																		
c. *consumer*																		
2. tort																		
a. *general*																		
b.*products liability*																		
3. property																		
a. *real*																		
b. *personal*																		

c. *secured transactions*																		
4. family																		
a. *marriage*																		
b. *divorce*																		
c. *parents and children (incl. custody)*																		
d. *adoption*																		
5. succession																		
a. *wills*																		
b. *intestate succession*																		
c. *trust arrangements (or the equivalent)*																		
B. Commercial Law and Economic Regulation																		
1. business organizations																		
2. securities regulation																		
3. antitrust/ competition law																		
4. labor																		
a. *collective bargaining*																		
b. *employment*																		
5. negotiable instruments																		
6. intellectual property																		
7. banking																		
8. insurance																		

9. bankruptcy																		
2. **Criminal Law**																		
a. definition of crimes (and defenses)																		
b. sentences																		
3. PUBLIC LAW																		
A. Constitutional																		
1. fundamental rights																		
2. organizational structure of the state																		
B. Administrative																		
1. police																		
2. zoning																		
3. water																		
4. environmental law																		
5. civil service																		
6. education																		
7. provision of social security																		
8. welfare																		
4. TAX																		
A. **Personal Income**																		
B. Corporate																		
C. Sales/VAT																		

D. Property																		
E. Inheritance/ Estate																		
5. PROCEDURE																		
A. Civil																		
B. Criminal																		
C. Administrative																		
D. Private International Law/conflicts Law																		
1. domestic conflicts law (within the federation)																		
2. international conflicts law (involving other countries)																		
E. Arbitration																		

VI. CONCLUSION

We invite you to write a brief conclusion on the state of unification in your system more generally, e.g., discussing whether the predominant state of the law is full unification, mere harmonization, diversity of law with or without mutual recognition among the component states, and whether there is pressure to change the status quo. We have in mind an essay of between 250 and 500 words.

APPENDIX 3: SUPPLEMENTAL EXPERT SCORECARD AND CONTROL QUESTIONS

Unification Scorecard

The following unification scorecard asks you to assess the degree of legal uniformity across a host of areas on a very basic scale and to indicate the predominant means/causes of uniformity and diversity.

We have listed various substantive and procedural areas of the law. Please indicate for each area your assessment of the degree of legal uniformity across the federal system. You may wish to consult a practitioner or other expert for fields that lie outside your area of expertise.

Please score the degree of uniformity on the following scale of 1 - 7:

1 = no or low degree of uniformity
4 = medium degree of uniformity
7 = high degree of uniformity

Note that 1 and 7 are not to be considered ideal points never achieved in practice. For example, a score of 1 would be compatible with the existence of some legal similarity, harmonization, or uniformity across a small subset of component states, as long as there is no or only minimal uniformity across the entire federal system. Conversely, a score of 7 would be compatible with a situation in which a single, centrally issued legal rule governs and yet there is some very minimal diversity in the process of adjudication.

Do not use a score of 4 in cases where you do not know and simply cannot ascertain the level of uniformity or in situations where a uniformity score, for whatever reason, is simply not applicable. If you remain unable to determine the level of uniformity for a given area even after consulting with another practitioner or expert or the question is simply inapplicable, please mark down a score of 0.

After completing Part A, please score the 8 generic scenarios in Part B.

Thank you very much for your effort and cooperation!

A. *Unification Scorecard for* _____

1. PRIVATE LAW	
A. Classic Core	
1. contracts	
a. *general*	
b. *commercial*	
c. *consumer*	
2. tort	
a. *general*	
b. *products liability*	
3. property	
a. *real*	
b. *personal*	
c. *secured transactions*	
4. family	
a. *marriage*	
b. *divorce*	
c. *parents and children (incl. custody)*	
d. *adoption*	
5. succession	
a. *wills*	
b. *intestate succession*	
c. *trust arrangements (or the equivalent)*	

B. Commercial Law and Economic Regulation	
1.business organizations	
2. securities regulation	
3. antitrust/ competition law	
4. labor	
a. *collective bargaining*	
b. *employment*	
5. negotiable instruments	
6. intellectual property	
7. banking	
8. insurance	
9. bankruptcy	
2. CRIMINAL LAW	
A. definition of crimes (and defenses)	
B. sentences	
3. PUBLIC LAW	
A. Constitutional	
1. fundamental rights	
2. organizational structure of the state	
B. Administrative	
1. police	
2. zoning	
3. water	
4. environmental law	
5. civil service	
6. education	

7. provision of social security	
8. welfare	
4. TAX	
A. Personal Income	
B. Corporate	
C. Sales/VAT	
D. Property	
E. Inheritance/ Estate	
5. PROCEDURE	
A. Civil	
B. Criminal	
C. Administrative	
D. Private International Law/conflicts Law	
1. domestic conflicts law (within the federation)	
2. international conflicts law (involving other countries)	
E. Arbitration	

B. *Generic Scorecard*

On this page, we ask you to score 8 hypothetical legal scenarios. Please rate the uniformity of law in each of the following scenarios, using the same scale (1-7) that you used in the previous part. Each of the Federations in the following scenarios has 12 component states.

1. In the Federation of A, family law, including divorce, is a matter of component state law. All component states allow divorce on a no-fault basis (i.e., allowing divorce on demand), and all component states have the same marital property regime. In dividing marital property upon divorce, however, about half the component states penalize a party for marital fault, such as adultery, desertion, or physical violence against the spouse, while the other states do not consider such factors. *Please rate the uniformity of divorce law*: ____

2. In the Federation of B, speed limits are a matter of state law. Four component states set it at 55 mph, four at 60 mph, and four at 65 mph. *Please rate the uniformity of speed limits*: ____

3. In the Federation of C, there is a comprehensive statute (code) governing all aspects of criminal procedure in both the central and component state courts. There are differences in the lower courts' interpretation of various provisions of this statute, and there is a central supreme court which routinely resolves conflicts arising among the lower courts. *Please rate the uniformity of the law of criminal procedure*: ____

4. In the Federation of D, eleven are common law jurisdictions and thus recognize the institution of a trust while the twelfth is a civil law jurisdiction and does not. In that twelfth component state, there can be no division between legal and equitable title and hence no trust (only a contractual obligation to administer property in another's interest). *Please rate the uniformity of the law of trust*: ____

5. In the Federation of E, the law of commercial contracts is a matter of component state law and comprehensively codified on the component state level (i.e., each component state has its own statute comprehensively regulating commercial contracts). The text of these statutes is virtually identical. They are authoritatively interpreted by the component state supreme courts, which has created some differences in interpretation (e.g., states supreme courts draw the line between permissible liquidated damage clauses and impermissible penalty clauses differently). *Please rate the uniformity of the law of commercial contracts*: ___

6. In the Federation of F, the law of succession is exclusively a matter of component state law. Six component states recognize wills. The other six do not recognize wills, so that in these states all of a decedent's property is subject to the rules of intestate succession fixed by law. *Please rate the uniformity of the law of wills* ___

7. In the Federation of G, product liability is exclusively state law. About half of the component states impose strict liability for all defects. The remaining states impose strict liability only for manufacturing defects (defects affecting single items in a production line) but require the showing of negligence for design defects (defects affecting a whole production line) and

instruction defects (insufficient warning). *Please rate the uniformity of the law of product liability*: ____

8. In the Federation of H, sales/VAT tax is exclusively a matter of component state law. Six component states impose a sales/VAT tax on all sales. The other six impose a sales/VAT tax only on luxury goods for personal consumption. (The tax rate is the same throughout the federation.) *Please rate the uniformity of the law of sales/VAT tax*: ____