



UNIFICATION OF LAWS IN FEDERAL SYSTEMS

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General Report

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INTRODUCTION

This study investigates the unification of laws in federal systems. We focus only on official law, thus ignoring issues of “private governance”, sometimes also referred to as “non-state law.” We seek to ascertain the level of legal unification within each system and the means by which unification is achieved, and to understand the institutional and social background against which legal unification occurs (or diversity is sustained). We provide an analytic description of the range of federal systems across the world with a view to identifying relevant correlations between certain characteristics of a system and the level of legal unification present within it. In closing we speculate about the possible causal relations that may lie behind the relevant correlations identified in this study.

DESCRIPTION OF THE STUDY

A. THE NEED FOR THIS STUDY

In investigating the relation between federal structure and legal unification, this study fills an important void in the scholarly literature. 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.¹ But no study has sought to ascertain comparatively the level of legal uniformity within federal systems across a host of legal domains. And no study has done so with a view to understanding better the relation between federal structure and legal uniformity.

B. UNIFICATION AND HARMONIZATION AS A SPECTRUM

For purposes of this study, we consider both legal unification and harmonization of law. While we take the former to mean (more or less complete) sameness, we understand the latter to mean similarity. We do not conceive of the difference between these two concepts as fundamental but 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

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.

level of similarity compares to the level of similarity found across the subunits of other federations.

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.

C. UNIFICATION OF RULES, NOT OF OUTCOMES

This study examines the degree, methods, and backgrounds of the unification of rules of law, 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.²

It is worth mentioning that even where the rules are similar, actual case outcomes can still differ significantly within a system for a variety reasons. As a result, finding a high degree of legal uniformity in this study merely suggests, but it does not guarantee, that like cases are actually treated alike throughout the system.

D. TYPES OF FEDERALISM

For purposes of this study, we define a federation as “a single polity with multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority.”³ As a result, our study comprises a vast range of federal systems: from classic state federations like Argentina to the sui generis entity of the European Union; from highly centralized systems like Italy, to marginally integrated systems like The Kingdom of the Netherlands; from “integrative” federal systems like Switzerland that resulted from the coming together of previously sovereign states, to “devolutionary” systems like Belgium that resulted from

² 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).

³ D. Halberstam, *Comparative Federalism and the Role of the Judiciary*, in *Oxford Handbook of Law and Politics* (K. Whittington, D. Kelemen, & G. Caldeira, eds., Oxford Univ. Press, 2008).

the decentralization of previously unified states; from “vertical” systems like Spain in which executive, legislative, or judicial powers are vertically integrated, to “horizontal” systems like the United States in which each level of government makes, executes, and adjudicates its own laws; from systems like India with regionally concentrated ethnic, linguistic, or economic cleavages, to federations like Austria with homogeneous populations or at most randomly scattered diversity; from asymmetric federations like Malaysia, in which some components receive greater powers than do others, to systems like Mexico in which all component states are constitutionally equal; from deeply democratic systems like Australia to borderline authoritarian regimes such as Venezuela; and from systems that formally acknowledge their federal nature, such as the Federal Republic of Germany, to others that formally view themselves as unitary, such as the United Kingdom.

We treat all these systems as federal without suggesting any particular stance in the political debates within these systems as to whether they should be considered “federal” in nature or whether their particular brand of federalism places them in a class of their own. For purposes of this study, the term federation is used simply as an analytic tool to determine the inclusion or exclusion of the system as an object of study. Also, we use the term “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 or “Regions” or “Communities” as in Belgium, etc.

The study will, however, examine whether the level of legal unification within a system is correlated with the overarching structural features of federal systems or whether other, more specific, aspects of a federal system seem to correspond more closely to unification or diversity within the federation. According, we have asked reporters to identify a host of more specific jurisdictional, institutional, and social characteristics of each system.

E. THE DATABASE

This study covers 20 more or less democratic federal systems from six continents: Argentina, Australia, Austria, Belgium, Brazil, Canada, Germany, India, Italy, Malaysia, Mexico, The Netherlands, Russia, Spain, South Africa, Switzerland, the United Kingdom, the United States,

Venezuela, and the European Union. Nigeria was originally considered part of this study, but to date we have been unable to locate a competent reporter.

The data summarized, analyzed, and interpreted in this General Report come from the answers provided by the national reporters in response to an extensive questionnaire which is reproduced in the Appendix. After asking for a brief introduction, the questionnaire presented about 50 questions pertaining to The Federal Distribution and Exercise of Lawmaking Power, The Means and Methods of Legal Unification, and the Institutional and Social Background. It also includes a “Unification Scorecard” on which the reporters were asked to assess the degree, and principal means, of unification across more than 40 areas of law, if need be with the help of local experts in the various fields. While this assessment is necessarily subjective, it is based on deep familiarity with the respective system and thus provides a valuable indication of the degree of its uniformity as viewed from an insider perspective.

We thank the national reporters for their time and effort. Obviously, this General Report would not have been possible without them. Their names are listed in the Appendix as well.

THE STATUS QUO OF UNIFICATION IN FEDERAL SYSTEMS

How uniform is law in federal systems in the world today? The question is, of course, impossibly general. After a brief caveat about method, we will therefore turn to answering this basic question more specifically first with regard to the various systems covered in this Report and second with regard to particular areas of law. Yet, even on such a scale, gauging the respective degrees of uniformity must generalize quite broadly.

A. A CAVEAT ABOUT METHOD

Measuring legal uniformity is a daunting task because neither yardsticks nor data are readily available. We thus had to create our own. For a yardstick we used a scale from 1 to 7. On this scale, 1 means no (or extremely low) uniformity; 4 means a medium degree (law being about half uniform, half diverse); and 7 indicates virtual (although not necessarily perfect) uniformity. In order to obtain data, we asked each national reporter to rate,

according to his or her best knowledge and if need be after consultation with other experts, the degree of uniformity for his or her country by providing us with a “uniformity score” from 1 to 7. We asked for specific information about eight major fields of law which were, in turn, divided into a total of twenty-nine sub-areas.

Obviously, the data obtained in this fashion remain questionable in many regards. They are based on one person’s (or, in some cases, a small team’s) assessment⁴; these assessments are inherently subjective; and the data are debatable on many other grounds as well, *inter alia*, because “uniformity” itself is not clearly defined. Still, the providers of the data are at home with the system assessed; errors around the margin should somewhat cancel each other out across a relatively large set of question; and more reliable data are, while desirable, extremely hard to come by.

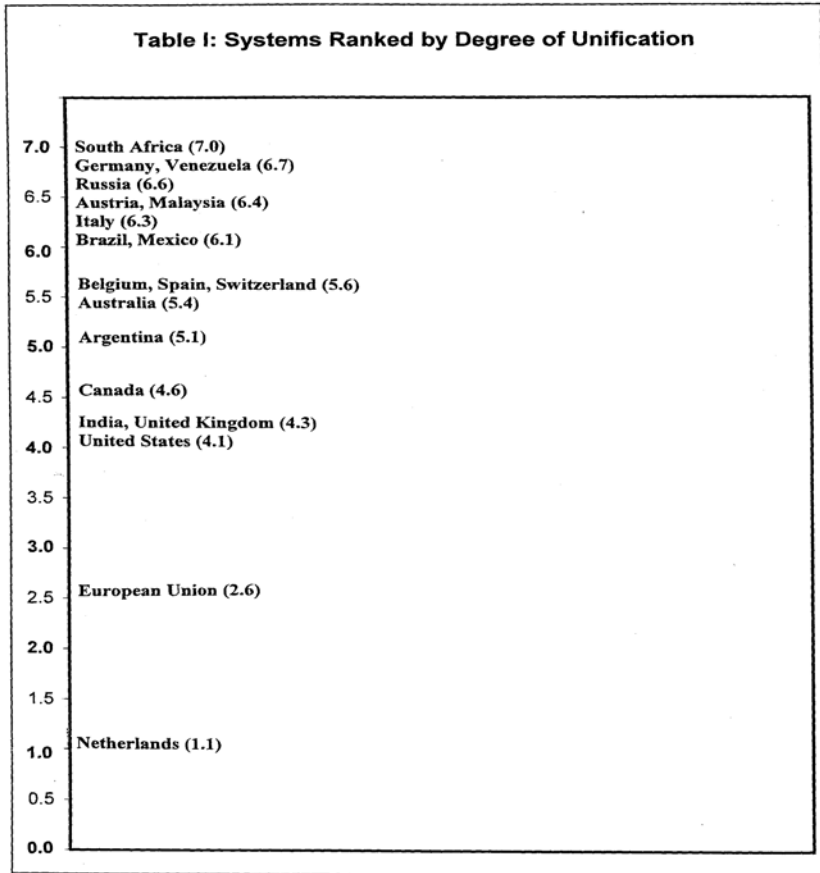
The data obtained can at least convey a general impression of the different degrees of uniformity in systems and areas of law. While it would be foolish to place much, if any, confidence in the significance of small differences between the respective scores, it is reasonable to assume that large discrepancies reflect actually existing differences in uniformity. Accordingly, while the rankings we have made should not be taken too seriously where small margins are involved, the big differences do matter and allow us to put systems and legal areas on a spectrum ranging from greater to lesser uniformity.

B. UNIFORMITY OF LAW BY FEDERAL SYSTEMS

If one averages the overall “uniformity scores” for each of the 20 federal systems covered by this General Report, they rank from 7.0 (virtually full uniformity) for South Africa to 1.1 for the Kingdom of the Netherlands. The latter is not only a clear outlier on unification but also in its federal architecture so that we do not accord it much weight in the overall assessment⁵. We will therefore not consider it further in this part of the General Report.

⁴ We plan to provide greater objectivity by asking other experts from the respective countries independently to rate the degree of uniformity as well. In case of substantially divergent results, we will then seek explanations for them and/or average them.

⁵ 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”.



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

First, all national federal systems are located in the upper half of the Chart. With an average uniformity score of 4 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 4⁶ is also the only supranational federation, i.e., the European Union. Its uniformity score is so much lower than that of the rest (2.6 v. 4.1-7.0) 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 v. the various national orders.

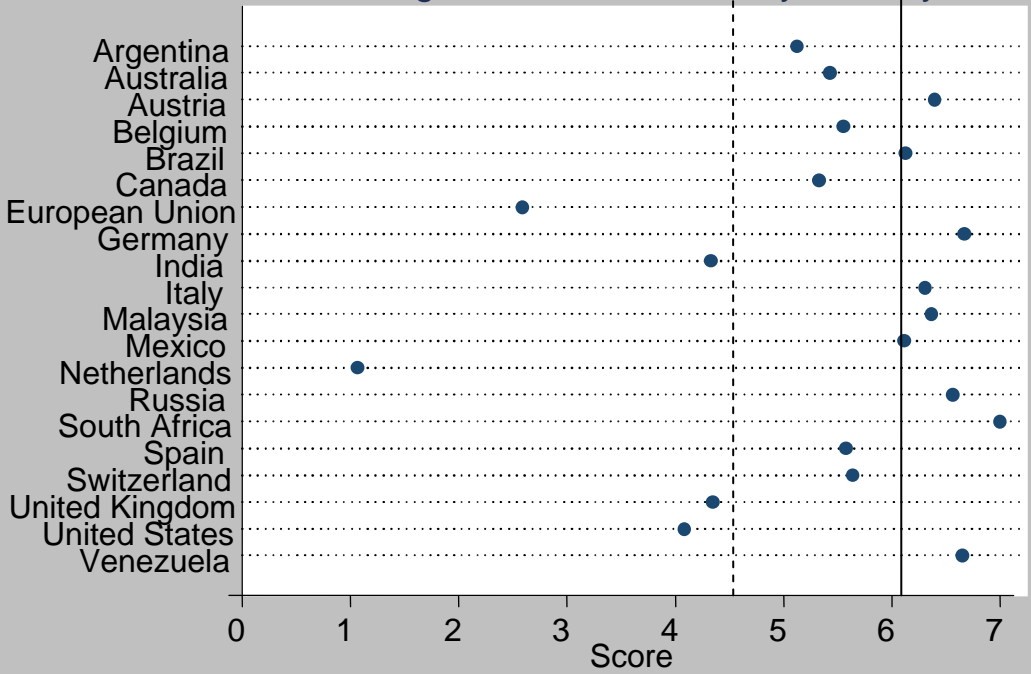
Third, one can - roughly - put the national legal systems into three groups. Towards the high end of the scale (uniformity score 6 and higher) lies the largest group consisting of South Africa, Germany, Venezuela, Russia, Austria, Malaysia, Italy, Brazil, and Mexico. In the middle (uniformity score 5 to 6), one finds Switzerland, Spain, Belgium, Australia, Canada, and Argentina. On the low end (uniformity score between 4 and 5) are Canada, the United Kingdom, India, and the United States.

Fourth, civil law systems tend to be located towards the high, common law jurisdictions towards the low end of the spectrum. Note that the high end group contains mainly civil law countries while the low end group consists of common law jurisdictions. To be sure, the picture is not perfect: two low ranking systems (the United States and Canada) have one civil law subunit (Louisiana and Quebec) while the high ranking group contains a system with a colonial common law background (Malaysia) as well as a mixed jurisdiction (South Africa). If we leave out Malaysia and South Africa for the moment because they are neither typical common nor civil countries, the average uniformity score of the civil law group is significantly higher (6.1) than that of the common law jurisdictions (4.7)⁷. In addition, the respective ranges (6.7-5.1 for the civil law, 5.4-4.1 for the common law) differ greatly; in fact, they barely overlap. The next graph shows the distribution of civil and common law countries.

⁶ Leaving aside the Kingdom of the Netherlands for the reasons explained above.

⁷ Regarding Canada, this counts the score for the common law provinces only (5.3). The total score for Canada (with Quebec) is obviously lower (4.6).

Average Unification Score by Country



Common Law System Average (4.7) : dotted line

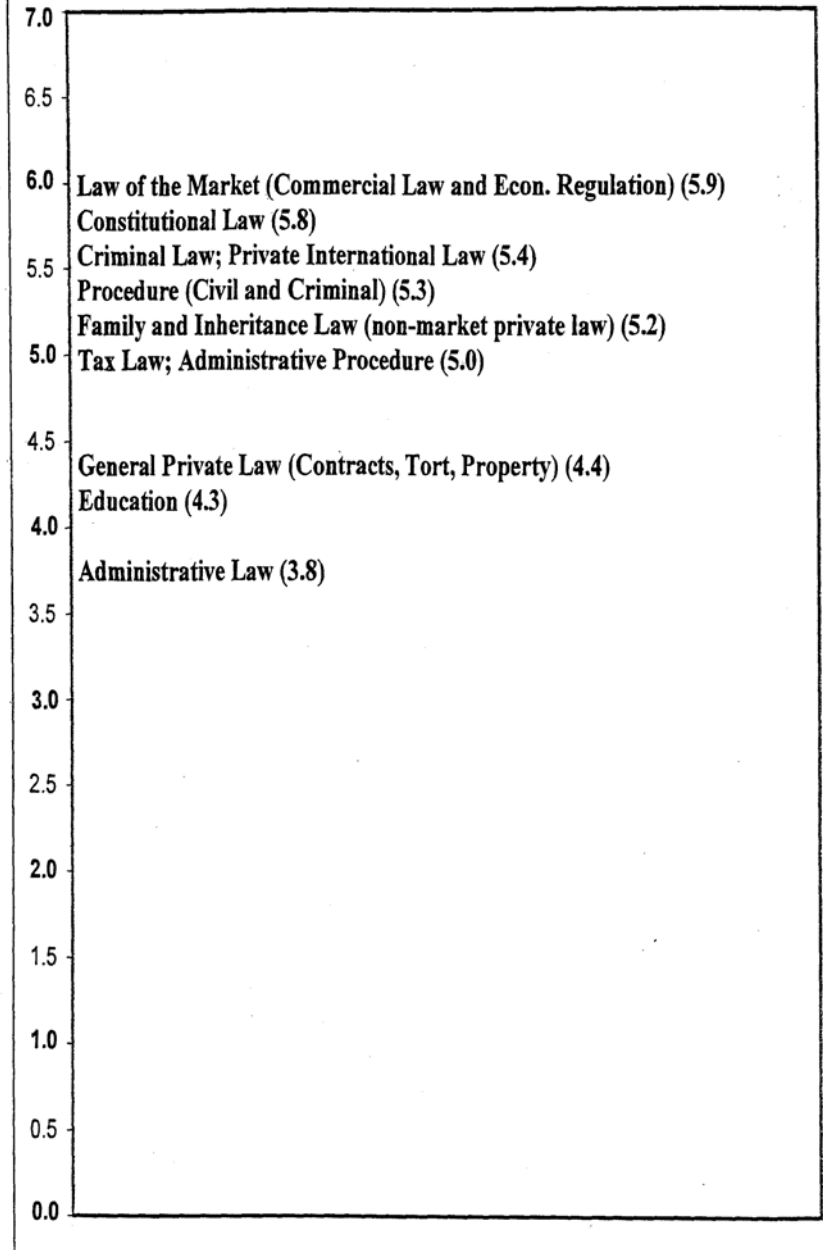
Civil Law Country Average (6.1) : solid line

All this suggests that civil law countries tend more towards uniformity than common law jurisdictions. One possible reason is that civil lawyers prize clarity and predictability of legal rules more highly than their common law colleagues, and that these values make them prefer uniformity over diversity. The greater uniformity in civil jurisdictions may also be due to the civilian preference for hierarchical over coordinate structures of state authority, a preference which fosters the centralization of law.⁸ And it may be related to 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. We will return to the role of the civil v. common law dichotomy in the context of evaluating a larger set of possible explanations for the differences in legal uniformity within federal systems (see *infra*. V.A.).

C. UNIFORMITY BY AREAS OF LAW

We can also make some interesting observations if we rank the major areas of law by the degree of their average uniformity, i.e., across all systems involved.

⁸ Mirjan Damaska, *The Faces of Justice and State Authority* (1986).

Table II: Areas of Law Ranked by Degree of Unification

Again, even with a heavy dose of distrust towards 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 particular, we can again make at least three observations.

First, no major area of law is virtually always uniform or virtually always diverse. Instead most of them are clustered somewhere around or above the midpoint. This confirms the observation made by ranking the systems: on the whole, even in federal jurisdictions, law is by and large more uniform than not; only administrative law falls below that standard.

Second, it is noteworthy that the two most unified areas are constitutional law and the “Law of the Market” (including corporate, securities, antitrust, labor and employment, intellectual property, banking, insurance, and bankruptcy law)⁹. This is true in almost all systems. The relatively high uniformity of constitutional law reflects the fact that all systems involved here have a federal constitution with a strongly unifying effect throughout the system, including on the member states constitutions (if any). The significant uniformity of market law reflects the system-wide nature of the respective economies. At least according to standard wisdom, legal uniformity serves an integrated market by avoiding transaction costs. Yet, even in constitutional and market law, there is some diversity (their Uniformity Scores are nowhere near a perfect 7) which suggests that centrifugal forces are at work as well.

Third, administrative law clearly ranks at the bottom; this is also true in almost all jurisdictions covered here. Again, 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, and a relatively high degree of diversity in administrative law expresses that feature. Also, administrative law often concerns 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.

Beyond these observations, however, the Chart also raises quite a few questions that are difficult to answer. Why, for example, is general private law (i.e., contract, tort, and property), which still regulates market activity, on average less uniform than family and inheritance law, which does not?

⁹ The difference between their average Uniformity Scores (5.9 v. 5.8) is negligible.

Why does criminal law on the whole appear to be more centralized than tax law? Or why is private international law (conflict of laws) on the whole just moderately uniform (uniformity score 5.4) although in most systems it concerns, as its name indicates, primarily international cases in which one would expect nations “to speak with one voice”? We have no ready answers for these questions but raise them here as food for thought.

THE FEDERAL DISTRIBUTION AND EXERCISE OF LAWMAKING POWER

Broad allocations of central government power usually beget broad exercises of central government legislation. As we will see below (IV.B. and V.), the greater the amount of federal legislation, the greater the degree of legal uniformity within the system. It is therefore important to investigate how legislative power is distributed in federal systems, i.e., over which areas the central government has legislative jurisdiction, and which areas are left to the member units.

Before describing the federal allocation of jurisdiction in the various systems, two caveats are in order. In the following description we attend almost exclusively to the formal distribution of competencies, not the interpretation of these power allocating norms. Second, the effective exercise of allocated powers depends, of course, on the presence of effective political decision making at the central level of governance. These factors should be borne in mind before simply extrapolating from the description of the enumeration of powers below to any actual legislative activity of the central government.

A. RESIDUAL POWERS

A threshold question in all federal systems is where residual legislative power lies, i.e. if there is no specific allocation, is the center or are the member units in charge? In most federal systems, including Argentina, Australia, Austria,¹⁰ Brazil, Germany, the European Union, Italy, Malaysia,

¹⁰ Except for powers over schools and education, for which *Länder* powers are enumerated and residual powers go to the center.

Mexico, Netherlands, Russia, Spain¹¹, Switzerland, the United States, and Venezuela component states retain all powers not specifically assigned to the central government. Nonetheless, in light of the expansive enumeration of central government powers in federations such as Malaysia, Russia, and the United States, however, it is often difficult to identify what areas are constitutionally reserved to the constituent states by virtue of the residual power allocation.

Three states in our survey, Belgium, India, and South Africa, allocate residual powers to the central government. The United Kingdom could be put in this category as well. In the case of Wales and Northern Ireland, the U.K. retains the residual power. And although Scotland has all “non-reserved” powers, the U.K. has the power to reserve additional powers at any time. In the case of Belgium, South Africa, and the U.K., the retention of residual powers would seem to reflect quite plainly the devolutionary character of federalism, that is, the fact that component state powers are the result of devolution from a previously centralized state.¹² In the case of India, the retention of residual powers at the center may be due to a national desire to form a strong state when independence was achieved.

In two countries, Canada and Venezuela, there are competing central and component state residual power provisions for otherwise unenumerated matters of central and local nature, respectively. Finally, in some federations, such as Germany and Austria, courts have inferred a similar residual category of central powers over matters that, mainly in the courts’ view, functionally demand central regulation.

B. DEFENSE AND COMMERCE

Certain powers lie almost invariably with the central government. With the exception of the European Union, the central government of every federation enjoys broad powers over defense, international affairs, and nationality. Considering William Riker’s work on the centrality of common defense concerns to the creation and sustenance of federations, this comes as no

¹¹ In Spain, the central government enjoys residual power over matters not allocated to the component states through Autonomy Statutes. Given that the component states may assume all powers not specifically enumerated elsewhere to the central government, however, this translates into a version of residual power to the component states as well.

¹² Article 35 of the Belgian Constitution, introduced in 1993, proposes to change the rule on residual powers, but it has not yet come into effect as it depends on the creation of a constitutional provision determining the exclusive powers of the Federal Authority.

surprise. More important for purposes of our study, however, is the finding that, with the exception of the Netherlands, the central government of every federation enjoys significant legislative jurisdiction over commercial matters. The importance of at least some regulatory power over the market as a core characteristic of federations is driven home by the Dutch exception: here, where the center lacks power over the market, the center indeed has no powers other than those in the realm of defense, international affairs, and nationality.

In about half the systems, the central government's legislative jurisdiction over commerce is exclusive, whereas in the other half it is concurrent. These powers range from the famously 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.

Finally, 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. With the exception of the United States and the European Union, every federation provides significant powers to the central level of government over social security, pension, or welfare legislation as well.

C. PRIVATE LAW, CRIMINAL LAW, AND PROCEDURE

Turning to private law, i.e. contracts, torts, property, family law, and succession, we see that most civil law federations grant legislative jurisdiction over these matters to the center. Accordingly, Argentina, Germany, Austria, Brazil, Spain, Russia, Switzerland, Italy, and Venezuela provide their central governments with at least concurrent power over these areas. Given that its exercise usually results in the creation of a code, which will preempt component state law (see *infra*. V.A.), it apparently does not much matter whether this power is concurrent, as in Argentina, Germany, Spain, or Switzerland, or exclusive, as in Austria, Brazil, Russia, Italy, and Venezuela. Either way the power to create a national code of private law has a tremendously unifying effect.

Each of the civil law 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, two common law and one mixed, 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 stands out as a common law system of sorts that provides its central government with the most extensive powers over substantive and procedural private and criminal law, allocating all of this to the center. 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.

Only two systems, Belgium and Canada have different power allocations for general private law, on the one hand, and substantive criminal law, on the other. Belgium largely follows the standard civil law model by allocating general private law to the center, but reserves personalized matters to the component states and also allows its component states to make substantive criminal law as it relates to their regulatory powers. Canada, in turn, reserves most private law (“property and civil rights”) to the provinces while delegating marriage and divorce along with substantive criminal law to the center.¹³

Three common law systems – Australia, the United Kingdom, and the United States – provide their central government few powers, if any, over substantive or procedural private and criminal law.¹⁴

Mexico stands out as the only national civil law federation that does not provide its central government with powers over either substantive or procedural private or criminal law. While the European Union and the Kingdom of the Netherlands similarly fail to delegate these matters to their central level of governance, they are both *sui generis* federations.

¹³ Note that in both federations the treatment of criminal law to some degree tracks that of marriage and divorce or personalized matters. Both of these rather different areas are allocated specially to the center (in the case of Canada) or to the component states (in the case of Belgium).

¹⁴ 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.

Finally, in about half the systems, the power to determine administrative procedure is located at the component state level. It seems that only civil law countries – Austria,¹⁵ Brazil, Germany, Italy, Mexico, Spain, Russia, Switzerland, and Venezuela – plus the mixed system of South Africa provide the central government with power over administrative procedure. In all other federations – civil law, common law, and mixed - administrative procedure seems to be a matter for the component states.¹⁶

D. ENVIRONMENTAL LAW AND NATURAL RESOURCES

Environmental Law is not always treated as a separate subject. Especially in older federations, such as Australia, Canada, Switzerland, and the United States, the power to regulate the environment is not separately listed in the constitution. This does not mean that the central government lacks all jurisdiction over this area. In Canada, for example, the central government has been able to invoke its residual power to legislate for the “Peace, Order, and good Government of Canada” in connection with environmental regulation relating to interstate pollution. Similarly, the central level of governance in the United States has passed environmental legislation under other powers. In these systems, the justifications for central power over environmental law differ depending on the constitutional structure of central government authority. In Canada, for instance, central power is justified principally by the inter-jurisdictional effects of environmental pollution and thus reflects the basic principle of allocating jurisdiction to the center where provincial power would be incapable of addressing the problem. In the United States, by contrast, the central government’s power to issue environmental laws is a simple product of its rather formal connection to interstate or foreign commerce, treaties, or navigable waterways. Given this flexibility in interpretation, it is hard to determine which federal systems do not grant their central governments any power over environmental regulation.¹⁷

¹⁵ We assume this to be the case since there are only federal courts in Austria.

¹⁶ 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.

¹⁷ At least some federations - the European Union, Germany, Italy, Russia, Spain, South Africa, and the United Kingdom - expressly provide their central governments with significant authority over environmental matters. Mexico grants its central government the power to make agreements with the component states on environmental protection. And Belgium specifically allocates environmental policy to its regions although it is not clear whether that power is considered exclusive. We will need to ask our reporters for clarification on the scope of central legislative jurisdiction over environmental matters to

E. EDUCATION AND CULTURE

Finally, if we turn to commonalities in the retention of legislative jurisdiction for the component states, we see that federations seem to leave language, education, and cultural matters largely at the component state level. Even federations with residual power allocation to the central government, such as Belgium, South Africa, and the U.K., expressly allocate certain powers over language, along with culture and education, to the component states.¹⁸ 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 E.U., Germany (today), the Netherlands, and the United States seem to have no direct regulatory powers over education.¹⁹ So, too, Canada places jurisdiction over education at the provincial level of governance.

To the extent that central governments are granted 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 Austria, 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 indicating a particular national concern for greater uniformity in elementary and secondary education, 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

understand better this aspect of the federal allocation of powers. We also need to ask our reporters to clarify this division of powers, as it may represent the allocation of a significant source of revenue.

¹⁸ This seems to be true for India as well.

¹⁹ Based on our National Reports, this seems to be the case for the U.K. and Spain as well.

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 striking powers for central governments in a federation.

We are tempted to suggest that the strength of the central government’s jurisdiction over education in federations is in large measure due to 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 all 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.

F. SUMMARY

All federal systems except the Kingdom of the Netherlands allocate power over market regulation to the central level of government. Most civil law countries – and just over half of all the federations in our survey - grant their central governments power over substantive and procedural private and criminal law. Legislative power over administrative procedure is relatively decentralized, in that half the systems surveyed leave this to the component states. In most federations, the central government has some powers to regulate the environment, although the central governments here also draw on other, more general powers, as opposed to specifically enumerated ones over environmental law. Finally, the majority of federal systems leave most aspects of education and culture to the component states. Of the ten federations that give their central government any direct power over education at all, five limit the central government to providing basic guidelines and only two provide their central governments a full complement of powers over education.²⁰

²⁰ Many of these results must be verified further with our national reporters, as our questionnaire did not ask specifically about the power allocations over these particular areas.

THE MEANS AND METHODS 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 be accomplished by the exercise of central government power (*infra.* A); it can be produced by formal or informal voluntary coordination among the component units (B.); it can be promoted by non-state actors drafting restatements, principles, or model rules (C.); it can be fostered by a nationwide system (or orientation) of legal education and legal practice (D.); and it can result from compliance with international law and participation in international unification efforts (E.). The National Reports show that all these factors are at work, albeit not always in all systems and often to substantially varying degrees.

A. 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.* 1.), via central (“federal”) legislation (2.), and by virtue of central courts creating uniform case law (3.). Other means, such as centrally managed coordination among component units play a more occasional and diffuse role (4.).

1. 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), or not reflect the reality of federalism (as in Venezuela). Since legal unification has 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 certain areas to the central government the constitution sets the stage for legislation and

therefore unification in these areas of law. As we have seen in the previous section, the allocation of legislative powers to the center has some regularity but 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 may look harmless on paper but has been interpreted to allow large amounts of uniform federal legislation. 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, Mexico, and Venezuela.

Second, constitutions often contain directly applicable norms that provide, within a margin of discretion sometimes 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 involved here (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, again, varies considerably. It depends mainly on three 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 to 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, Spain, South Africa, and the United States. In other systems, the unifying force of central constitutional rights is weaker, mainly because judicial review is less powerful; Australia, the European Union, Malaysia, Switzerland, and the United Kingdom belong into this category.

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 Australia, Brazil, Germany, India, Malaysia, Spain, and the United States. The strength of these provisions and their

impact on uniformity varies considerably.²¹ As a general matter, however, these norms also militate in 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.

2. Central Legislation

In all systems under review, central legislation (including executive and administrative regulation) is heavily employed to unify the law. This is especially the case in the areas of commercial, private, and procedural law. In these areas, 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 system²². In most federations, such directly applicable central norms are clearly the overwhelming 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, and South Africa. In other systems, central legislation plays a somewhat less overwhelming, though still very powerful role, as in Australia, Canada, and perhaps also Spain, and Switzerland. Finally, in a few federations, central legislation is, while common and important, not necessarily the most dominant unifying force; one could say this about Mexico and the United States, and it is also true for the European Union. 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

²¹ 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 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."

²² 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 "bi-juralism" 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.

legislation is to create uniformity, the member units may lose that right, as in the case of federal preemption in the United States.

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”)²³ 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 and occasionally in the Dutch federation. It also used to play an important role in Germany but was abolished by constitutional amendment in 2006.

Furthermore, 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.

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, 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.

²³ 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.

Finally, in a small number of federal systems, the center promotes legal uniformity by regulatory bribery: it 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 for example in Austria, Canada, Spain, and to some extent in the European Union, and it is commonplace in the United States. In the latter, rules ranging from speed limits to the minimum drinking age are (or at least were until recently) largely uniform throughout the country not because the federal government had legislative jurisdiction over them, but because it forced the states to adopt its standards under penalty of losing 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 strong unifying effect in practice.

3. 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 with 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 thousand 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 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.

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 authoritatively the law of the member states.²⁴ Where central courts 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 itself²⁵ and the former members (or close associates) of the British Empire, i.e., Australia, Canada, India, Malaysia, and South Africa. It is true, however, also for Russia with its largely federal and thus unitary judiciary. By contrast, where central courts do not have jurisdiction over member unit law, they can of course not render authoritative interpretations of it; here, the member state courts have the last word.²⁶ This situation prevails in most civil law jurisdictions, both in continental Europe (e.g., Germany, Switzerland, 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.²⁷

²⁴ 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.

²⁵ At least in theory, this is supposed to change when the latest judicial reforms enter into force in 2009.

²⁶ 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*. B.2.

²⁷ Russia and the United States being in the respective “other camp” thus make it impossible to say that common law jurisdictions give their supreme courts power over member state law while civil jurisdictions do not. Still, the line-up suggests that the common and civil law heritage is 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.

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 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 Belgium, Germany, Italy, and Switzerland where the respective highest courts clearly set the tone for the judiciary throughout the country. This is probably true in most other federal systems as well.²⁸ Of course, such central court guidance does not guarantee uniformity of judicially created norms but it can quite strongly work in that direction.

4. 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 for purposes of this report it must therefore suffice briefly to mention the most important ones.

The only somewhat widely shared institution of this sort 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 but it stands to reason that 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 degree to which this is the case, however, is not clear from the national reports as they currently stand.

²⁸ [Check with National Reporters.]

In many other systems, the central government has created a variety of bodies or mechanisms to coordinate central and member unit policies. This is the case, for example, 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; 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 “federal district”. 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 who ensure that nobody strays from the flock.

Notably, quite a few federal systems do not seem to maintain any such official coordinative bodies or mechanisms at the central level. Thus, none are reported for Belgium, Germany, the Netherlands, Switzerland, and the United States. Our tentative explanation for their absence is scarcely uniform. 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 thus militated against law (reform) institutions run by the federal government; notably, the existing institutions are either operated on the coordinate level, i.e., among the states (the National Conference of Commissioners on Uniform State Laws, NCCUSL, see *infra*. B.1.), or on an entirely non-governmental basis (the American Law Institute, ALI, see *infra*. C.1.). Of course, even in systems without unification efforts organized by the central government, legal unification can

be pursued by the established political institutions, especially the legislature, and by the political parties, especially if one or two parties are dominant.

B. 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 system and is thus, in a sense, bottom-up. Here, we must distinguish between cooperation on the legislative level, among the member units' judiciaries, and between the executive branches. On the whole, the picture is, once again, quite diverse.

1. 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 which have no force in and of themselves but are proffered to the states for adoption. The NCCUSL's record with regard to 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 considerably in the legislative process and courts sometimes interpret them differently with no national tribunal to resolve the 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 to (by and large) unify (statutory) state law in a few select and, on occasion, highly important, areas but not across the board 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 scarcity of 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 legislatures²⁹.

In some other systems, there is considerable 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. In Austria, states often 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.

Finally, in many systems, including Australia, Belgium, Brazil, Germany, and Spain, 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 tend to treat federal law as a model and often follow its lead, again voluntarily establishing a high degree of 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 of them, like South Africa, Venezuela, and perhaps even Italy, this can perhaps be explained by the already high degree of centralization which leaves too little room for interstate unification efforts. This explanation is less forceful 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

²⁹ In Italy, there is the “Conference of the Regions and the Autonomous Provinces”. Its purpose, however, seems not to be legal unification but rather the coordination of provincial policies and the representation of provincial interests vis-a-vis the central government.

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.

2. 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. Instead, there is (at least by and large) only one, unitary judiciary throughout the federation. This is true for Austria, India, Italy, Malaysia, Russia, Spain, South Africa, and Venezuela. 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. The national reports, however, do not provide any information in this regard, and so we cannot be sure.

Where member state judiciaries 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. 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 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 other judiciaries, 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 the merely inconvenient to the virtually insurmountable.

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, however, 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 law³⁰. 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.

3. 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. In the following we consider whether this latter kind of horizontal executive cooperation contributes to the unification of law?

Unification as a result of horizontal executive coordination 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

³⁰ 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.

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 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 laws³¹.

In some instances, there is a suitable framework permitting cooperative legal unification on the member state level but it is rarely or never used for that purpose. 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 of various sorts, but they have, again, normally not concerned legal uniformity.

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. 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. Administrative and policy oriented cooperation can of course also contribute to legal unification, e.g., with regard to administrative regulations and practices, but this effect is virtually impossible to measure in any general way.

C. 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.

³¹ 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.

1. Direct Uniform Norm Generation

Private actors sometimes directly generate uniform norms for adoption by, or at least to provide guidance for, state actors, especially legislators and judges. Such direct private norm generation, however, occurs only in very few federal systems. Yet, two clarifications are in order here. First, this Report does 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.³² Second, as stated in the Introduction to this Report, we do not cover 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 the unification of law on the level of “private ordering” would require a study in its own right.³³

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, it is longstanding and fairly prominent. Here, the American Law Institute (founded in 1923) has put together Restatements of the Law for almost a century by now. 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 in practice is quite 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, are often happy to 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

³² Thus their impact is addressed supra B.1. 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.

³³ 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.

some sections are routinely considered. Third, Restatements can easily 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 (especially § 402A) while others have switched to the newer Restatement Third: Products Liability. On the whole, the unification of (private) law through Restatements is more apparent than real - and usually overrated by outsiders.

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 is 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 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 a European contract law by the Joint Network of European Private Law (2007). This project is the result of the European Union's initiative and financial support, and the Commission has already begun to publish papers on the adoption of the CFR. 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 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.

2. 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 factor 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 published in particular areas. Especially in the civil law tradition, scholarly writings often offer important guidance for the courts as well as ideas for legislative reform³⁴. 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 the common law orbit, the authority of academic writings continues to be smaller but even here, it can be quite significant, and in some countries, notably in England, it has grown substantially in recent years. In the United States, there is a small library of leading works that enjoy great influence in practice, and since they are usually written from a national perspective, they help keep the law uniform. In European private law, a growing number of academic publications, such as Hein Kötz’ *European Contract Law*³⁵ and the *Ius Commune Casebooks* published under the auspices of Walter van Gerven, demonstrate the commonalities of the various European legal orders in particular areas.

D. 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.

³⁴ 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.

³⁵ Hein Kötz, Axel Flessner, and Tony Weir, *European Contract Law v. 1* (1998), German original: Hein Kötz, *Europäisches Vertragsrecht I* (1996).

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, legal consciousness, and 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 fairly national perspective. As a result, the bar should on balance be considered a pro-unification factor in virtually all federal systems, probably with the exception of the European Union. 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.

1. Legal Education

In by far most federations, legal education has a primarily nation-wide focus - with regard to the students as well as to the curriculum.³⁶ This is not surprising in systems where central law dominates anyway, as in Austria, Germany, India, Italy, Russia, and South Africa. But it true also in others where lawmaking is more decentralized, as in Australia, Mexico, Switzerland, and the United States.

The students at the law faculties in the clear majority of systems come from all over the country. Of course, many students stay relatively close to home, but that is mainly a matter of cost and convenience and usually not a function jurisdictional boundaries within the federation. Elite law schools, in particular, recruit students from all over the system; this is most visible in Australia, Canada, India (at the graduate, i.e., LL.M. or Ph.D. level), Russia, the United Kingdom, and the United States. And law schools in the dominant cities like Buenos Aires, Brussels, Sao Paulo, Kuala Lumpur, Mexico City, Moscow, Madrid, and Caracas are 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.

³⁶ This is true even where legal education is organized by the member units, as in Germany, Switzerland, and, with regard to both public and private universities.

There are only four exceptions. In Belgium, students from Wallonia and Flanders overwhelmingly stay in their home region, except if they attend one of the universities in Brussels. In Canada, there is a similar dividing line between the common law provinces on the one hand and civil law oriented Quebec on the other, although four Canadian law faculties now offer a “bi-jural” legal education covering both common and civil law and are thus attended by students from both areas.³⁷ In the United Kingdom, the exchange between England and Scotland is very limited, at least in the sense that it appears that 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 country. Given the cultural, language, and other barriers on the international level, this is only to be expected.

Perhaps even more importantly, the curriculum in by far 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 common and civil law), Mexico (with regard to much of private law), and Switzerland as well Argentina (with regard to procedure). But even here, subunit law does not dominate, and in most systems, it plays a distinctly marginal role. This is perhaps most astounding 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 system³⁸.

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, however, is overcome at the institutions providing a “bi-jural” legal education. 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

³⁷ 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.

³⁸ 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. At the lower levels, training for the (state) bar exam is more important so that teaching state law plays a greater role.

education focuses clearly 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 beyond it.

Finally, there are a variety of institutions and practices of 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.³⁹ 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.

2. 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. Most of the respective systems either generally allow nationwide practice, as in Italy or Switzerland, or at least have fairly generous rules about mutual recognition of bar exams and memberships, as in Australia and Canada. Still, in some systems, the boundaries between the subunits do

³⁹ Some systems also require, or at least offer, continues 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.

constitute serious barriers. Perhaps surprisingly, the most fragmented system in this regard 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 most barrier-ridden system is the United States, where most states require lawyers licensed to practice another jurisdiction to pass the local bar examination before being admitting to local practice.

Despite these administrative barriers in some federations, legal practitioners can, and frequently do, move through out 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 (wherever they may be) 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. These barriers are often daunting, of course, within the European Union but they also play a significant role in Belgium and Canada and, although in a much more attenuated fashion, in Switzerland, Spain, and (despite the lack of a language barrier) the United Kingdom, i.e., between England and Scotland.

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 it were not for an essentially national bar.

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

1. 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, the Netherlands, Spain, and the United Kingdom. EU law is binding on the member states and supreme to their domestic legal orders.⁴⁰ 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 significant 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 more occasionally. At first glance, this may seem somewhat surprising because almost all systems considered here are, for example, members of the major United Nations

⁴⁰ This is contested with regard to the member states Constitutions only.

human rights treaties⁴¹ and thus subject to the same international law obligations⁴². But in most systems, the respective 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 could not. In addition, domestic courts often interpret domestic law in light of international norms; this is reported particularly for Australia, India, and South Africa but clearly also true for Canada, Germany, Italy, the United Kingdom, and, within narrower limits, the United States as well. 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. 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

⁴¹ 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 out of 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).

⁴² In addition, they are all subject to customary international law, of course.

the Service of Process 2001) or international beyond it (Hague Service Convention). 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.

2. 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,⁴³ 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, Russia, and Spain) mention, this involvement can have a unifying effect, e.g., where model norms or regulations 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 law and to (internal) legal unification, as in Australia, this is actually much more the exception than 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 merely to a reform but not to a unification because the law of international arbitration had been federal already before. And finally, in several countries where this area has been left to the member units, such as Canada and the United States, the Model Law was adopted only by a of minority states - thus, again, harmonizing the law internationally but at the time fragmenting it on the domestic level.

⁴³ Even the European Union became a member in 2007 after the organization's statute had been specifically amended for that purpose.

F. SUMMARY AND EVALUATION

It is clear that of the five major means and methods of unification discussed in this chapter, the most powerful factor is 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 that 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 high only within the European Union. Beyond that, it is surprisingly limited. The vast majority of the systems surveyed here are members of highly important international conventions and participate in the leading worldwide unification projects, but the respective (treaty or model) norms contribute

little to national unification. Mostly, these 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 regime for international cases.

In summary, when it comes to legal unification in federal systems, 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. 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.

UNIFICATION AND CENTRALIZATION: A LOOK AT STRUCTURAL FACTORS AND BEYOND

Part II of our study reported that civil law federations, on the whole, exhibit greater legal uniformity than common law countries. Part III looked to the distribution of lawmaking power in federations. And Part IV established that the principal mechanism of creating legal uniformity within a federation is by central legislation. We now turn to the constitutional architecture of federations to see how the structure of a federation relates to the level of unification we see within it. Are generally more centralized federations generating greater legal uniformity?

To examine this question, we rated federations in terms of the inherent centralization or decentralization reflected in their constitutional architecture. We considered the federal distribution of legislative, executive, and adjudicative powers, the component states' tax autonomy, as well as the strength of component state representation and participation in the central legislative process. We combined these factors into a weighted "structural composite" score ranging from 1 (decentralized) to 7 (centralized).⁴⁴ The

⁴⁴ The Structural Composite Index was calculated according to the following formula: Structural Composite = (5 x Legislative Powers + 1x Executing Central Law + 3 x Adjudicating Central Law + 3 x Adjudicating Component State Law + 3 x Component State Revenue + 3 x ((Upper House Composition + Upper House Participation) / 2)) / 18. Note that the entry "Component State Resources" reflects not the

idea was rather simple: strong central legislative powers combined with little component state involvement in the execution or adjudication of laws, few state taxing powers, and ineffective component states representation in central government legislation should lead to more uniform law throughout the federation.

A. GENERAL FINDINGS AND FURTHER QUESTIONS

The structural composite score indeed predicts legal uniformity rather well. The correlation between a federation's structural composite score and its level of uniformity is strong and statistically significant. In only four countries (Mexico, Germany, Brazil, and Switzerland), the structural composite score underestimates legal uniformity by 2 points, a matter to which we shall return below.

access of component states to fiscal resources, but the autonomy of state fiscal policy. Accordingly, independent component state taxing power would receive a lower number than the existence of even a reliable system of general revenue sharing, the thought being that fiscal autonomy encourages local policy entrepreneurship more than the simple reliable access to funds.

Table V.1

	Average Unification Score	Composite Structural Decentralization:	Legislative Powers	Difference to Composite	Difference to Leg. Powers
South Africa	7.0	5.8	6.5	1.3	0.5
Germany	6.7	3.6	5	3.1	1.7
Venezuela	6.7	6.7	6	0.0	0.7
Russia	6.6	5.7	5.5	0.9	1.1
Austria	6.4	5.6	5.5	0.8	0.9
Malaysia	6.4	5.6	5.5	0.8	0.9
Italy	6.3	5.8	6	0.5	0.3
Mexico	6.1	3.9	4	2.2	2.1
Brazil	6.1	4.2	5.5	1.9	0.6
Switzerland	5.6	3.5	5	2.1	0.6
Spain	5.6	5.5	5.5	0.1	0.1
Belgium	5.6	5.6	5	0.0	0.6
Australia	5.4	4.4	4	1.0	1.4
Argentina	5.1	3.8	5	1.3	0.1
Canada	4.6	4.5	4	0.1	0.6
India	4.3	4.6	5	-0.3	-0.7
United Kingdom	4.3	5.0	4.5	-0.7	-0.2
United States	4.1	2.9	3	1.2	1.1
European Union	2.6	1.9	2	0.7	0.6
Netherlands	1.1	1.2	1	-0.1	0.1

Setting aside the structural index for a moment, we found that the single most significant predictor of legal uniformity was the federal allocation of legislative powers.⁴⁵ This is consistent with the message from our national reporters that the principal means of creating legal uniformity in a federation is the creation of central law (supra IV.A.2. and E.). By examining the constitutional architecture, we now see that most central governments seem to be capable, in general, of exercising the powers that are allocated to them. This leads to a very simple conclusion: as a general matter, the more powers a central government enjoys, the more it legislates, and the more uniform the law throughout the federation will be.

Our structural composite index, however, also leads us to ask further, possibly more interesting, questions, looking beyond constitutional architecture alone. In particular, we examine why some federations deviate more from the uniformity predicted by the structural composite score than others. And we examine why some federations are more uniform and others are less uniform than one would predict based solely on their constitutional structure.

⁴⁵ This factor predicts legal uniformity even better than our structural composite index.

Table V.2

	Average Unification Score	Composite Structural Decentralization:	Legislative Powers	Difference to Composite	Difference to Leg. Powers
Germany	6.7	3.6	5	3.1	1.7
Mexico	6.1	3.9	4	2.2	2.1
Switzerland	5.6	3.5	5	2.1	0.6
Brazil	6.1	4.2	5.5	1.9	0.6
Argentina	5.1	3.8	5	1.3	0.1
South Africa	7.0	5.8	6.5	1.3	0.5
United States	4.1	2.9	3	1.2	1.1
Australia	5.4	4.4	4	1.0	1.4
Russia	6.6	5.7	5.5	0.9	1.1
Austria	6.4	5.6	5.5	0.8	0.9
Malaysia	6.4	5.6	5.5	0.8	0.9
European Union	2.6	1.9	2	0.7	0.6
Italy	6.3	5.8	6	0.5	0.3
Canada	4.6	4.5	4	0.1	0.6
Spain	5.6	5.5	5.5	0.1	0.1
Venezuela	6.7	6.7	6	0.0	0.7
Belgium	5.6	5.6	5	0.0	0.6
Netherlands	1.1	1.2	1	-0.1	0.1
India	4.3	4.6	5	-0.3	-0.7
United Kingdom	4.3	5.0	4.5	-0.7	-0.2

In the following, we consider several factors that may explain these differences. In particular, we examine the impact of the civil v. common law dichotomy, the effects of social cleavages, and the age of federations. We also point to the possible role of separation of powers and political party structure.

B. CIVIL V. COMMON LAW

As we have seen in Part II of this Report, law in civil law countries is, on the whole, more unified than law in common law systems. We can now further pursue the question why this is so. In particular, our composite structural decentralization index allows us to ask whether it may be due simply to greater structural centralization in civil law countries. In other words, perhaps civil law jurisdictions show greater uniformity because their systems are generally more centralized.

To some extent, this may be true because the average centralization index for the civil law countries is 4.9 (ranging from 5.8 to 3.6) while it is 4.3 for the common law jurisdictions (ranging from 5.0 to 2.9)⁴⁶. Given that all these numbers have to be approached with circumspection, this is not a large difference but it may very well be of some significance.

Yet, these average numbers do not tell the whole story. If we take a closer look at the data, we can observe something else that is very interesting: while most systems' law is more uniform than our structural centralization index suggests, this is far more so in civil than in common law jurisdictions. Not only are the five countries showing the greatest excess of actual over expected uniformity all from the civil law orbit (Germany, Mexico, Brazil, Switzerland, and Argentina); civil law countries are also on the whole more "surprisingly" uniform than common law countries⁴⁷.

⁴⁶ These numbers do not include South Africa and Malaysia (in both cases, the centralization indices, 5.8 and 5.6 respectively, are higher than both averages) and also exclude The Kingdom of the Netherlands and the European Union because none of these four systems can be counted as a sufficiently typical civil or common law jurisdiction.

⁴⁷ If one takes the numerical difference between our Composite Structural Centralization Index (the predictor of uniformity) and compares it with our Uniformity Index (the actual degree of uniformity), the range of excess of the latter over the former (i.e. the extent to which actual uniformity overshoots prediction) is 3.1 to 0 for civil law countries and 1.2 to -0.7 (the negative number indicating a lower than expected degree of uniformity) for common law countries. In other words, actual uniformity in civil law countries ranges from hugely exceeding expectations to matching them, while in common law jurisdictions, it ranges from slightly exceeding expectations to falling below them.

In short, while some of the greater uniformity in civil law systems may be attributable to their (somewhat) greater structural centralization, civil law jurisdictions are often so much more uniform than their structural centralization suggests that other factors must play a major role. The starkest cases are Germany and Mexico: both are structurally quite decentralized (their composite structural decentralization indices are 3.6 and 3.9, respectively) but their law is surprisingly uniform (very much so in Germany with a Uniformity Index of 6.7 and still fairly so in Mexico with a Uniformity Index of 6.1).

So, what factors other than the structural ones (especially centralization of legislation, administration, and adjudication) push for uniformity especially in civil law countries? It is not the greater unifying force of (federal) constitutions because these are tremendously strong in most common law countries as well. Nor is it the 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. Instead, three other factors are probably significant here.

First, civil law legislatures tend to use the full extent of their constitutional powers to unify law as much as possible. Where constitutions in civil law countries like Germany give concurrent jurisdiction to the center, this concurrent jurisdiction is almost exhaustively exercised which then results in a high degree of legal unification. This tendency 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.

Second, where civil law country legislatures use their lawmaking power in the traditional core areas of private, commercial, criminal, and procedural law, they have tended to enact comprehensive codifications. These 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 or Canada, India or the United Kingdom have national codifications on a civil law scale. Instead, these common law jurisdictions usually enact piecemeal statutes which cannot unify the law to the same extent.

Central (especially concurrent) legislative power thus has different implications in civil and common law countries. In the former, it essentially means an exhortation, if not a command, not only to legislate but actually to codify as far as possible. In the latter, legislative power is essentially conceived as a mere option which, if used at all, is exercised in a much more piecemeal fashion. As a result, the same amount of federal legislative jurisdiction results in much greater actual legal unification in civil law systems than in common law jurisdictions.

Third, both these tendencies - to use the full extent of central power for the sake of legal unification and to codify broadly if possible - are ultimately expressions of 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 see as chaos. Admittedly, this is a somewhat time-worn and rather vague consideration, but it is not therefore without significance. In particular, it helps to explain relatively high degrees of legal uniformity even in systems where the center does not have broad 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 shows 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.

C. CLEAVAGES

We have seen that the majority of federations show considerably greater legal uniformity than their centralization index suggests. Some, however, do not: their law is just about as uniform as one would expect - or even less so. Why is that? For example, why is legal uniformity in Belgium and Spain (classic civil law countries!) as well as in Canada not exceeding expectations, and, perhaps more dramatically, why is legal uniformity actually lower than expected in India and the United Kingdom?

The reason may lie in the ethnic, cultural, linguistic, religious, historical, economic or other social differences that characterize the populations in some federal systems and may 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 are not likely to insist on (geographic) legal diversity and thus to 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 Belgium, Canada, Switzerland, and arguably the United Kingdom; here, these differences can amount to real “cleavages” that split the federation, and the states, provinces, regions, cantons, etc., which consider themselves different from the rest have reason to resist federal lawmaking (and thus legal uniformity) for the sake of maintaining regional differences.⁴⁸

Our data support this thesis. In systems where social cleavages are high (Belgium, Canada, India, the European Union, Spain, and the United Kingdom) actual uniformity exceeds predicted uniformity far less than in systems without such cleavages. Of these Belgium, Canada, Spain and the Netherlands deliver about as much centralization as one would expect whereas the United Kingdom and India deliver even less.

Yet, the picture is not perfect because in three systems with “lumpy” cleavages, uniformity is nonetheless considerably higher than one would expect: South Africa, Russia, and Switzerland. Yet, in these three, particular counterveiling (i.e., strongly unifying) forces are at work which may obliterate much (or indeed all) of the “cleavage” effect: in South Africa the dominance of the ANC, in Russia the almost ruthless centralization policies under President Putin, and in Switzerland the strong national sense of identity which overshadows much of the *Kantönligeist* (“small cantonal spirit”)

The importance of cleavages is probably particularly great when the subunits with a special sense of identity are large in comparison to the whole

⁴⁸ 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.

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 different legal tradition, as both Quebec and Scotland are strongly civil law influenced subunits 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.

D. THE AGE OF FEDERATIONS

Does the age of federal systems play a role for the degree of their legal uniformity? One problem with this question is that in many cases, such as Germany, Russia or the United Kingdom, the age is dubious because it is not clear at what point the federation was born, to so speak - when the federal system first came together or when the exact present form of federalism (i.e., the current constitution) was adopted?⁴⁹ 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 of that sort. The United States as the oldest federation is the national system with the lowest unification score, Italy is among the younger federations but has one of the highest scores, and 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

⁴⁹ 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.

growth of federal law in the twentieth century; 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) is now imminent; 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 systems⁵⁰. 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 "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.

One final observation is noteworthy in this context: in all civil law systems in which federalism is "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 the early years and has long leveled off; in others, like Switzerland, it has continued to rise more gradually⁵¹. The European Union also belongs into 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. The retarding force is exerted largely by the United Kingdom - not accidentally the European Union's largest common law member.

E. POLITICAL PARTIES AND SEPARATION OF POWERS

Finally, we suspect that two other factors influence the manner in which central (legislative) government power is exercised: the role of political parties and the choice between a presidential or a parliamentary system at the central level of governance.

In systems that have strong federation-wide political parties, the central level of governance will pass laws over regional objections more easily than in federations with strong regional parties. Put another way, a strong national

⁵⁰ Another, although special, case in point is Venezuela where federalism has by and large been suffocated over the last decade by an authoritarian regime.

⁵¹ It took Switzerland more than 60 years to unify its private law (1848 to 1907/11, and by the time the new codes of civil and criminal procedure enter into force, it will have taken 160 years to unify its procedure.

party system unifies politics across regions and tends to dilute the representation of any distinct regional political will. Because many systems with social cleavages tend to feature strong regional parties (e.g., Belgium, Canada, European Union, and the U.K.), however, this “regional party” factor will likely replicate the social cleavage factor identified in the previous section. And yet, it seems worth while pursuing this potential factor as a separate element of the analysis.

Second, in a presidential system with weak party discipline like the United States, it will, on the whole, be more difficult to pass central legislation than in a parliamentary regime with a strong party system (like Germany). In a presidential system such as that in the United States, legislation must garner the support of three distinct branches that do not necessarily belong to the same party. Even if a political party has control of more than one branch, passage of legislation is not guaranteed due to the generally weak party discipline in the United States. Contrast this with a parliamentary system with strong party discipline in which the government’s legislative proposals, by definition, already boast the support of the lower house and the executive. Add to this strong party discipline among the members of the two houses and passing legislation becomes relatively easy. If uniformity depends on the amount of central legislation, then this separation of powers factor should affect the degree of uniformity as well. We have not yet focused on this factor in our study. As with the role of political parties, the role of separation of powers and its correlation to legal uniformity therefore deserves further study.

CONCLUSION

This General Report fills a significant lacuna in the literature on comparative federalism by describing and analyzing the extent, means, 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. 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, supplemented by our own research.

The degree of legal uniformity in federal systems is, on the whole, higher than one might expect. In every national federation, the author of the National Report judged his or her own system to be, on the whole, more

uniform than diverse.⁵² The European Union stands apart in this regard; as the only supranational regime, the reporters judged the law within the E.U. to be, on the whole, more diverse than uniform. Civil law countries show by and large a significantly higher degree of legal uniformity than common law jurisdictions. This is not only because their constitutional and political system are more centralized to begin with but probably also because the civil law tradition shows a greater penchant for uniformity than the common law. The degree of uniformity is also clearly higher in some areas of law than in others. It is usually highest with regard to constitutional law (particularly fundamental rights) and the law of the market (i.e., the law governing economic activity); it is, on the whole, fairly high in the areas of general private law, criminal law, and procedure; and law remains most diverse in administrative law and matters of especially culture and education.

It is interesting to compare the degree of unification in certain areas of law with the distribution of lawmaking power in federations. While the distribution of legislative jurisdiction varies considerably, there is a discernible overall pattern. Almost invariably, the power to make the law of the market is assigned to the center; more often than not, legislative jurisdiction over general private law, criminal law, and procedure also lies there; yet, legislative jurisdiction over administrative law is frequently, and matters of culture, language, and education are usually retained by the member units. Evidently then, the distribution of lawmaking power closely tracks the degree of uniformity in the respective areas of law. In other words, where law can be made at the center, it usually will be, and if it is, legal uniformity will result. Of course, other factors come into play as well.

The close relation between central lawmaking power and degree of legal uniformity is confirmed if one surveys the various means and methods of legal unification. Clearly, the most powerful mode of unification is top-down. The federal constitution performs two separate functions in this regard. First, through directly applicable norms it establishes a common ground for the exercise of all public authority throughout the system. Second, the Constitution allocates jurisdiction within the federation, usually, as we have found, granting significant lawmaking power to the center. The National Reports suggest that the exercise of the resulting lawmaking power at the center is the most common, important, and effective path to legal uniformity. Other means and methods of legal unification play a distinctly

⁵² 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.

secondary role. Lawmaking 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. Unification on the horizontal level, i.e., through voluntary coordination among the member units' legislatures, judiciaries, or executives, however, 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 only in the United States and the European Union. Legal education and legal practice both have a system-wide orientation in 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 international law plays a crucial role only in the European Union, and the various federations' widespread participation in international unification projects contributes astoundingly little to national legal unification - largely because the areas concerned are typically governed (internally) by federal law and thus already uniform within the respective countries.

Legal unification is quite closely related to the overall degree of structural centralization of power in a federation; that is not surprising. Yet, there are also some inconsistencies which indicate that this is not whole story. Most importantly, while most systems' law is more uniform than the underlying constitutional architecture (including the distribution of lawmaking power) would indicate, other systems' law is just as uniform as its architecture would predict or, in two instances, even less so. This points us to forces outside the structural constitutional framework that must be at work in either promoting or retarding legal uniformity. Among the promoting forces is the (already noted) civil law tendency towards greater uniformity as well as the tradition of enacting comprehensive codes. Among the retarding factors are 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. In addition, the specific nature of separation of powers and the political party landscape within the system also matter because they can facilitate or impede the lawmaking process at the federal level. Finally, the age of federations can play a role but it may easily work in opposite directions - where federalism is "integrative" (i.e., aimed at the coming together of previously separate units), at least in civil law countries, legal uniformity typically grows over time; by contrast, where federalism is

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

This General Report answers some important questions, but it also raises at least as many others. Much of the information gathered through the National Reports 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, but that currently lie beyond our National Reports, will require additional research.

APPENDIX

General Reporters	
	Daniel Halberstam Mathias Reimann
Argentina	Ana-Maria Merico
Australia	Cheryl Saunders Michelle Foster
Austria	Berhard Koch Anna Gamper
Belgium	Alain Verbeke
Brazil	Jacob Dolinger Luis Roberto Barroso
Canada	Aline Grennon
European Union	Jan Wouters Walter Van Gerven
Germany	Christoph Moellers
India	Sunita Parikh
Italy	Louis Del Duca Patrick Del Duca

Malaysia	Amanda Whiting ANG Hean Leng
Mexico	Rafael Estrada Samano
Netherlands	Arjen van Rijn
Russia	Jeffrey Kahn Nikolai Balayan Alexei Trochev
Spain	Aida Torres Perez
South Africa	Karthy Govender
Switzerland	Anne-Sophie Papeil
United Kingdom	Stathis Banakas
United States	James Maxeiner
Venezuela	Jan Kleinheisterkamp Allan R. Brewer-Carias

QUESTIONNAIRE ON UNIFICATION OF LAWS IN FEDERAL SYSTEMS

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 2009

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 law-making 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.

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.