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Top-Down or Bottom-Up? A Look at the Unification of Private Law in Federal Systems

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Top-Down or Bottom-Up?
A Look at the Unification of Private Law in Federal Systems

MATHIAS REIMANN AND DANIEL HALBERSTAM

I INTRODUCTION—LEGAL UNIFICATION UNDER CONDITIONS OF FEDERALISM

At its current stage, European private law is still more an aspiration than a reality. It is true that there is a substantial body of European private law on the Union level; and it is also true that there are private law principles and rules shared by many—often by most, and sometimes even by all—European legal systems. Still, in most areas, we do not at present have one body of positive private law for all of Europe, but rather a coexistence of more or less similar national laws. Thus, to the extent one considers a European private law desirable, one must seek to unify, or at least heavily harmonise, the current multitude of national regimes. In short, European private law today is essentially a legal unification project.

A major problem with this unification project is that it must be pursued within the framework of a divided power system. The European Union rests on a division of powers, not only between the Union and the Member States, but among the Member States themselves. Of course, even with regard to private law, substantial law-making power has been delegated to the Union, but most of it still remains with the Member States. Even operating within the confines of European law, they retain considerable legislative competence, virtually all judicial power to interpret and apply private law and the entire executive machinery to implement the resulting decisions.

There are two principal avenues leading towards legal unification in a federation: top-down and bottom-up. Over the last few decades, uniform private law for Europe has been pursued in both ways. On the one hand, we have seen an ever increasing volume of unification commanded from above, mainly through legislation from Brussels (and Strasbourg) and in (much smaller) part through case law.

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1 Whether (and in which substantive areas) one common body of private law rules for Europe is desirable is, of course, a highly controversial question but it is not our concern here. Suffice it to note that we count ourselves among the sceptics (at least regarding areas beyond the hard core law of the market).
from Luxemburg; these efforts have largely focused on market regulation, ie, areas like consumer protection, corporate law and antitrust. On the other hand, there is a panoply of bottom-up efforts, mostly in the form of ‘principles’ and other drafting projects by private actors, but also in the form of promoting transnational legal scholarship and education; here, the main focus has been on the traditional core of private law, ie, contract, tort, property and family relations. At least until recently, the relationship between these two directions has been characterised more by separation rather than cooperation: while EU institutions have blazed ahead usually with little or no attention to (and often, it seems, in ignorance of) legal scholarship, legal scholars have often proceeded in happy disregard of (if not with hostility to) the regulatory jungle created on the EU level. The recent ‘Draft Common Frame of Reference’ (‘DCFR’)$^2$ is perhaps the first sustained project that has closely involved both the official EU institutions (ie, the Commission as an initiator and supporter) and a large network of scholars (ie, the Study Group of European Private Law and the Research Group on European Private Law (Acquis Group) as actual drafters) but as of yet, its destiny is undetermined. In most contexts, politicians and bureaucrats on the one hand, and academic scholars on the other, continue to go more or less separate ways.

This ongoing competition between (by and large legislative) top-down and (mainly academic) bottom-up efforts raises a fundamental question which underlies much of the current debate about private law unification in Europe: which approach is more promising? Will private law unification result primarily from command by central institutions? Or should we rather trust in the decentralised efforts of scholarship, teaching and legal practice?

We—a comparative law scholar with a specialisation in private law and a European Union law scholar specialising in comparative federalism—recently undertook a study on ‘The Unification of Law in Federal Systems’$^3$ which sheds some light on this question. Covering 20 jurisdictions around the world,$^4$ the study pursued three principal goals: it sought to determine the impact of the various means and methods of unification;$^5$ it attempted to measure the degree of legal uniformity, both in the respective federal systems and for various areas of law; and it tried to make sense of the data in light of various background factors.$^6$ The

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$^4$ Argentina, Australia, Austria, Belgium, Brazil, Canada, Germany, India, Italy, Malaysia, Mexico, The (Kingdom of the) Netherlands (a loose federation of the mother country and some former colonies in the Caribbean), Russia, Spain, South Africa, Switzerland, the United Kingdom, the United States, Venezuela and indeed, the European Union. Nigeria was originally part of this study but we were unable to locate a competent reporter for it.

$^5$ It envisages five principle ways of unification: by the exercise of central power (ie, top-down); by coordination among the Member States (ie, somewhat bottom-up); by non-state actors, via legal education and legal practice; and through adherence to international norms. The study gathered the requisite information primarily from one or more national reporters for each jurisdiction based on an extensive questionnaire.

$^6$ The study deals only with the uniformity of legal rules, ie, the law on the books; it does not gauge the uniformity of outcomes in actual disputes, ie, with the law in action. A comparison of uniformity of
findings of this study are obviously no recipe for particular action, but they allow us to put the project of private law unification in Europe into a broader context and thus get a better sense of its strengths and weaknesses.

The first part of this chapter looks at top-down unification and its major drivers, especially in the private law context. The second part focuses on bottom-up projects and their much more limited contributions. The third part then considers the actual data on legal unification in the European Union and shows that they confirm the findings of the first two parts. The conclusion suggests that the price for effective private law unification in Europe may thus well be an uncomfortably high degree of power centralisation.

II TOP-DOWN UNIFICATION—MAJOR DRIVERS

Top-down unification of private law can result from several factors. We will look at the three most salient ones roughly in order of their practical impact: central legislation, constitutional norms and judicial decisions. In addition, the degree of legal uniformity within a federation is closely related to the overall degree of ‘structural centralisation’ of the whole system.

A Central Legislation

Our study indicates that on the whole, central—ie, federal—legislation is clearly the leading means of legal unification in federal systems. It is predominant in most jurisdictions and a very significant force in the rest, albeit to varying degrees. In the area of private law, this law-making consists mainly of formal legislation, either in the form of codifications or of more limited statutes.7

The leading role of central law-making in legal unification shows itself in several regards. To begin with, the national reporters attest to it almost without exception. Furthermore, there is a strong correlation between the extent of federal legislative jurisdiction and the degree of legal unification: systems with lots of federal law-making power, like Italy, have highly uniform law; systems with less such power, like Argentina, display greater diversity. The same holds true for particular areas of law: areas mostly subject to federal law-making are, on the whole, much more uniform than others. Thus, the centre usually has power over commercial law (ie, the law of the market) which, as a result, is highly uniform almost everywhere, while the Member States often retain power over areas like family law which are, accordingly, usually more diverse.8

7 In other areas, especially in public law, central regulations play a significant role as well.
8 See Halberstam and Reimann, ‘Unification of Law in Federal Systems’, above (n 3). There is a caveat. The extent to which federal law-making power actually creates legal uniformity depends not only
These findings are not surprising, of course, but they allow two observations regarding the European situation in particular. First, they show that the increasing amount of top-down (and thus uniform) private law-making in the European Union is, in a sense, simply par for the course—central legislation is how most federal systems unify most law most of the time. In fact, compared with other federations, central legislation in the EU is still quite rare—the result being a comparatively low degree of legal uniformity.9 Secondly, the close relationship between the strength of federal legislative power (and its exercise) and the degree of legal uniformity also suggests that central legislation is simply the most effective means—at least as far as the law on the books is concerned. The European situation fits that impression: by far most of the private law uniformity created10 in Europe over the last few decades is the result of directives forcing the Member States to march to the beat of a single drum.

B Constitutional Norms

Federal constitutions have a unifying effect because they often contain norms which are immediately applicable throughout the whole system.11 Since these norms normally have supremacy effect, they displace potentially diverse Member State rules. The most important constitutional norms in this regard are fundamental rights provisions which provide common values and set common boundaries throughout the whole system. It is true that this effect is stronger in public than in private law, but even in the latter field, the unifying effect of constitutional law can be quite significant; its strength depends mainly on the content of the respective constitutional texts, the strength of judicial review and the degree of constitutionalisation of the legal culture. Thus, constitutional norms have a significant unifying effect in the United States (especially under the due process and equal protection clauses of the fourteenth amendment), Mexico (through its amparo procedure) but matter much less in the United Kingdom or Malaysia.

These observations can help us to recognise not only that the unifying effect of central ‘constitutional’—ie, treaty—norms on European private law is comparatively weak; they also indicate why this is so: traditionally, few treaty norms applied directly to private law,12 and the European Court of Justice still has no general power under the treaty to review private law for its reasonableness or compliance on the degree to which legislative jurisdiction is formally allocated to the centre, but on the degree to which the center exercises its power. Again, this is true especially in private law. In some countries, like Germany, the federal legislature (or regulators) have virtually gone to constitutional limits and thus created maximum legal uniformity; in others, such as the United States, much of the central legislative power (herein under the ‘commerce clause’) has been left untapped, leading to greater legal diversity.

9 See below IV: Degrees of Uniformity.
10 As opposed to pre-existing uniformity resulting from common traditions or from common responses to social and economic issues.
11 In addition, they also have an indirect effect on legal unification by allocating certain legislative jurisdiction to the centre which, if exercised, leads to legal uniformity; see above II.A: Central Legislation.
12 Notable early exceptions were the equal pay provision, now Art 157 Treaty on the Functioning of the European Union (TFEU), and the competition provisions, now Art 101 et seq TFEU.
with fundamental rights. At least when compared with other federations, this means that one cannot expect ‘constitutional’ norms to contribute much to private law unification in the EU for the time being.

C Central Adjudication

Legal uniformity can also be created through decisions by central (federal) courts. Yet, their contribution varies hugely among federations. The main reason is that its extent depends almost entirely on the law involved and on the power of the courts. Leaving aside judicial review under a federal constitution and turning to the adjudication of secondary federal law (such as statutes and regulations), two types of adjudication must be clearly distinguished.

First, central—ie, federal—courts usually have and exercise jurisdiction over matters arising under central (federal) law. They can thus ensure—or at least promote—uniform interpretation of that law. Here, central courts do not, strictly speaking, create (new) legal uniformity; instead, they preserve the uniform application of an existing (uniform) rule that was created by the central legislature. The degree to which central courts perform this function varies greatly. It is high where a central court of final instance is large and hears hundreds—if not thousands—of cases every year, as in Germany or Italy; it is much lower where such a court is small and decides only a very limited selection of disputes, as in Canada or the United States.

Secondly, central courts actually help to create uniformity when they provide authoritative (uniform) interpretations of Member State laws. This, however, is more the exception than the rule. It requires that central courts have the power to decide state law issues with binding effect throughout the system, and that is true only in a minority of jurisdictions. Where central courts lack such power, the Member State courts have the last word in state law issues, and uniformity ultimately depends on their cooperation.

We can see why the European central judiciary’s contribution to private law unification has been—and will continue to be—quite limited. Like many central courts, the Court of Justice of the European Union (CJEU) has jurisdiction only over central—ie, Union—law. It can thus provide binding interpretations of regulations and directives, ie, keep the interpretation of secondary Union law (more or less)

13 By contrast, it does not depend—at least not significantly—on whether a system operates under a formal rule of precedent or not. Of course, where the binding effect of higher court decisions is strong, as in the United Kingdom, these courts can more easily force the lower tribunals to follow a certain interpretation of law than in systems without such an effect, as in most civil law jurisdictions. But even in common law jurisdictions, lower courts may still ‘distinguish’ the case before them and thus escape unwanted precedent, and even in civil law systems, most lower courts will follow most higher court decisions so routinely (albeit ‘voluntarily’) anyway that open deviations are rare. The degree to which higher courts can effectively tell lower courts to toe the line depends primarily on the unity and hierarchical structure of the court system, the patterns and practices of judicial promotion and on the overall judicial mentality, especially the judges’ attitudes towards authority and obedience.

14 See above II.B: Constitutional Norms.

15 Especially in the latter, divergent interpretations of federal law abound, and the US Supreme Court has neither the resources nor the will to resolve more than a tiny portion of them.

16 See below III.A: Coordinate State Action.
uniform. To be sure, within the scope of application of secondary law, the CJEU can also contribute to the uniformity of the Member States’ private law in an indirect fashion: the supremacy of even secondary Union law, as well as its indirect (horizontal) effect, ultimately forces the Member States to bring their domestic law into conformity with CJEU pronouncements. But this contribution can only be as strong as secondary legislation permits. Beyond that, the Court of Justice and the General Court (formerly the Court of First Instance) lack the formal power to interpret the law of the Member States. They can thus not contribute independently of the Union legislature to *national* legal unification across Member States on any broad scale.

Like the United States—but unlike Canada—the EU does not have a central tribunal which can directly unify Member State private law through its decisions. In addition, the Court of Justice is a relatively small court—like the Supreme Court of the United States or the Supreme Court of Canada. Even when adding the General Court, the central high courts of the EU do not have the capacity to harmonise federal law—let alone, indirectly, Member State law—through large-scale adjudication.

Central courts can, of course, informally influence the interpretation and application of state law by acting as a model. They can provide guidance (for example, in their interpretation of similar federal law), point in certain policy directions and endorse values the state courts might then adopt. Such a model function, however, requires that the central court have sufficiently broad jurisdiction to set enough examples, as well as sufficient general authority to exercise meaningful leadership. The CJEU is not in such a position. Its jurisdiction is limited to Union law, which many Member State judges still consider to be special matter separate from most domestic (private) law. The Court does not have general appellate jurisdiction over cases originating in the Member States and thus cannot directly decide them. Finally, while the style of its decisions has become more accessible over the years, it might still be considered too specialised to provide broad leadership or significant guidance in policy matters for domestic courts. That may change as the scope of Union law broadens, the stature of the CJEU grows and its opinions become widely read; but at least with regard to general private law, the Court is unlikely to become a major unifying influence in the near future.

**D Structural Centralisation**

Beyond the unifying effect of federal legislation, constitutional norms and central adjudication, it seems that the extent of legal uniformity in a federation is also influenced by the degree to which the system as a whole is structurally centralised. A federation’s degree of ‘structural centralisation’ is determined by how much governmental power—legislative, executive, judicial, fiscal, etc.—lies with the centre rather than with the Member States.\(^{17}\) To put it more colloquially: some federations, like

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\(^{17}\) The study measured this ‘structural centralisation’ by combining six factors of centralisation and created a ‘structural composite’ index for each system, ranking from 1 (decentralised) to 7 (centralised). Such an approach can, of course, only provide approximations, but even on that level, it is clear that federations are structurally centralised to significantly different degrees.
South Africa, are clearly more centralised than others, like Australia. Our study shows a significant correlation between the degree of—overall—'structural centralisation' and the degree of legal uniformity: highly centralised systems tend to have highly uniform law; less centralised systems usually show greater legal diversity.

Of course, this is only to be expected, and of course, correlation does not guarantee causality. But the picture suggests that legal uniformity resulting from top-down forces is not only due to the formal exercise of governmental—for example, legislative and judicial power; it is also linked to the overall architecture of a federation. It seems that federations conceived primarily as one entity—albeit with several sub-units—generally push strongly for legal uniformity while federations conceived as a club of members (albeit under a common federal umbrella) generally tolerate greater diversity; many, of course, lie somewhere in between. If we thus envisage federations on a spectrum ranging from strong to weak structural centralisation, the European Union must be located on the weak end. Despite the progress of European integration, most of the constitutional, legislative, judicial, executive, fiscal and other government power continues to lie with the Member States. Indeed, EU law increasingly determines the content of Member State law, but the Union’s overall sovereign power is still comparatively weak—certainly much weaker than in virtually all national federations. As a result, the EU’s institutional architecture cannot exert much general gravitational pull towards uniformity in private law either.

III BOTTOM-UP UNIFICATION—LIMITED CONTRIBUTIONS

Like the top-down process, bottom-up unification can occur through a variety of factors. There are coordinate efforts by state actors, especially legislatures and courts; non-state actor projects abound, mainly in the form of formulating principles or rules; there is the impact of legal education and transboundary practice; and there is unification through adoption of international legal norms. The global federalism study outlined in the introduction suggests that on the whole, most of these factors make rather limited contributions to the unification of law in federal systems.

A Coordinate State Action

Legal unification is sometimes the result of coordination among state actors. In private law, this can involve both Member State legislatures and Member State courts.

The prime example of Member State legislative coordination is, of course, the US-American National Conference of Commissioners on Uniform State Laws (NCCUSL, now called more simply Uniform Law Commission, UCL); a similar

18 South Africa's 'composite centralisation' index was 5.8, while Australia's was 4.4; see Halberstam and Reimann, 'Unification of Law in Federal Systems', above (n 3).

19 See Halberstam and Reimann, 'Unification of Law in Federal Systems', above (n 3).
organisation exists in Canada. Informal cooperation mechanisms are reported for several other countries as well. While these efforts sometimes lead to uniform state legislation, experience shows that they accomplish complete—or even large-scale—legal uniformity only in a few, rather exceptional instances, not across a broad spectrum of legal areas. This is true even for the often-cited showpiece in this regard, the United States, the notable exception of the much cited Uniform Commercial Code notwithstanding.

In Europe, there are currently virtually no system-wide coordination efforts on the Member State level in private law—at least nothing comparable to the United States. Of course, much legislation is based on comparative surveys, but this is driven mainly by the search for good ideas rather than by a pursuit of Europe-wide unification. Thus, where Member State legislatures have not been forced by directives to harmonise their laws, they have largely gone solo. It is true that recently there has been a growing tendency to adjust national law to international or European sources. Outside their scope, however, the legislative process is still by and large national in scope because lobbying, log-rolling and party politics play out mainly on the national level as well.

The contribution made by courts on the coordinate level is also quite modest in most federations. It is true that in federal nations, Member State tribunals often look at each other’s decisions, at least at the appellate level, and in some jurisdictions they do so routinely enough to create some unifying effect. But even where it occurs, such cooperation can only have a limited impact for three reasons: it can foster uniformity only where the same issue comes up before a significant number of state judiciaries; it creates uniformity only if all (or at least a clear majority) of state courts then actually adopt the same view—which is often not the case. And, most importantly, it works only for the particular issue at stake, not more broadly for a whole field of law. This is not to deny that state court cooperation can—and sometimes does—foster legal uniformity; it is simply to point out that in the grand scheme of things, its effects are comparatively minor and always ad hoc.

In Europe, the effects of Member State cooperation on private law uniformity is even weaker than within most national federations—simply because there is, as of yet, so little of it. The fanfare with which comparative lawyers celebrate instances in which national courts pay any attention to sister state decisions attests to the rarity of such events. This rarity is no wonder: national courts continue to think very much in national terms; a few exceptions, the language barriers separating them range from inconvenient to insurmountable; and the considerable economic,

20 Australia, Austria, Belgium, Brazil, Germany, Spain and also the United States.

21 Only about 10% of the more than 200 uniform laws promulgated by the NCCUSL since its foundation in 1892 have been adopted by 40 or more states; most have been adopted only by a small number of states, and many have not been adopted by any.


23 Transnational judicial borrowing in private law does occur, of course, but it is on the whole quite rare in most jurisdictions; see U Drobnig, The Use of Comparative Law by Courts (The Hague, Kluwer,
cultural and social differences still prevailing throughout much of the EU suggest great caution in adopting foreign judicial views.

B Non-state Actor Projects

Systematically organised (model) norm creation though non-actor efforts exists only in very few federations, notably the United States, Mexico and, of course, the European Union. In all these instances, their actual impact on legal uniformity has—at least so far—been quite limited or outright non-existent. Their effect is perhaps strongest in the United States where the American Law Institute has produced a substantial set of ‘Restatements of the Law’ (in successive editions). Some of these restatements have had a unifying effect because courts have adopted or otherwise been influenced by their rules. But one must not overlook that most restatement norms receive little attention from judges and none from legislators. As a result, the unification effect of the restatements is on the whole more apparent than real—and usually overrated by outsiders.24

In a similar fashion, the many initiatives currently underway in Europe have not yet had any significant unification effect—at least not in practice. So far, legislatures and courts have paid them little or no attention, some notable exceptions notwithstanding.25 Of course, should any of these projects receive legislative sanction in Brussels and Strasbourg, they would become major factors in the unification of European private law, and that is normally their ultimate goal.26 But such a sanction is extremely unlikely in most cases and not imminent in the rest. Again, this is not to deny that the drafting of ‘principles’ of European contract, tort and other private law can help to bring European laws together; but they do so only very slowly, incrementally and with uncertain success.27

C Legal Education and Transboundary Practice

Interestingly—in the vast majority of the federations covered by our study—legal education has a primarily nationwide focus. That is true, firstly, with regard to the curriculum, ie, the subjects taught—most legal education covers federal and 1999). While this study is somewhat dated by now, whatever change has occurred in the meantime is scarcely dramatic.

24 It is a different matter altogether that many of the restatements’ rules simply reflect already existing consensus—which was, of course, the original intention of these projects.


26 If they receive such legislative sanction, the unifying effect would, of course, come from the legislation that enacts them—which brings us back to the top-down mode,. See above II.A: Central Legislation.

27 For the impact of legal scholarship, especially of the growing number of treatises on European private law, see Halberstam and Reimann, ‘Unification of Law in Federal Systems’, above (n 3) II.C.2.
uniform, rather than local and diverse law. It is also true, however, with regard to the student body which is mostly recruited from all over the federation rather than exclusively from this state or that province only. It is, finally, true with regard to the qualification awarded—a law degree earned in one Member State usually allows access to the Bar examination (or directly to the Bar) all over the country. In addition, legal practice tends to have a nationwide scope in the sense that barriers between Member States are either non-existent or relatively easy to overcome.

Yet the extent to which the mostly nationwide focus of legal education and practice promotes the unification of law is difficult to ascertain and far from clear even within national federations. On the one hand, it stands to reason that the study of law on a mainly national level and a legal practice largely unhindered by state boundaries will create a significant degree of ‘national consciousness’ among the legal profession. This, in turn, can be expected to create a predilection for legal uniformity. On the other hand, in many federations, the primarily national outlook of legal education and legal practice coexists with an amazingly high degree of legal diversity. Consider the United States: law schools teach little local law; much legal practice is nationwide; and at least the elite of the legal profession thinks of itself in national rather than local terms. And yet, private law, being largely the domain of the states, displays a bewildering diversity in many (though by no means in all) regards. Thus, a national outlook on legal education and practice is certainly no guarantee for legal uniformity; in fact, it seems questionable whether it is even a very significant force.

In the European Union, this force is currently particularly small. In contrast to most national federations, legal education in EU Member States is not primarily system-wide to begin with, but rather focused on local (Member State) law. Although European law is now a mandatory subject in most universities, it is still a comparatively small—and rather separate—element; in most countries, one can obtain a law degree (and with distinction) without knowing more than a few basics of EU law. Of course, exchange programmes bring students from one Member State to another, but this involves only a minority, engenders exposure only to one other system and is usually limited to one or two semesters. There are, at best, a handful of truly ‘European’ law schools, and they typically operate only on the graduate level. In short, since there is no broadly based European legal education, it cannot have much of an impact on legal unification.

The situation is similar with regard to transboundary practice. While its volume has, of course, been growing, it is still the business of a relatively small elite. Most lawyers in Europe practise local law locally—often in happy (though dangerous) ignorance of the European dimension. In addition, the number of lawyers from one Member State practising in another is comparatively tiny. Even though the legal barriers of transboundary practice have been lowered significantly, the language and cultural barriers remain formidable and much higher than in virtually all national federations.
Finally, hope for legal unification is sometimes found in international norms, ie, norms originating entirely outside a federation. More often than not, they come in the form of treaties. If a federation adopts a treaty, its rules may become commonly applicable throughout the whole system and thus unify its law. Yet, such a unification effect is actually quite rare for a variety of reasons. Many international treaties are not self-executing and thus without direct internal effect; most of them affect areas of law that are governed by federal and, hence, uniform law anyway; and very few of them have any impact on private law.

Still there is, in European private law, the considerable unifying effect of the Convention on the International Sale of Goods (CISG). Not only have most EU Member States adopted it, it is usually treated as directly applicable and it has also influenced the purely domestic law of some Member States who have adjusted their sales provisions to the CISG. And yet, even the CISG's unifying effect has severe limits. Most importantly, this effect is incomplete because some EU Member States (notably the United Kingdom) are not members. And even among the members, adoption of the CISG often unifies the law and fragments it at the same time by subjecting purely internal transactions to one set of rules (domestic provisions) and international sales to another (an international treaty).

IV DEGREES OF UNIFORMITY—A LOOK AT THE DATA

The review of the factors promoting legal unification in federal systems suggests that the European Union presents a more difficult case than most—if not all—other federations. This is because in the EU, the top-down forces, which usually drive unification, are relatively weak and the bottom-up forces, which are more developed, have a rather limited impact. This is exactly what our data show, and quite dramatically.

28 In the European context, EU law is obviously not ‘international’ in that sense but rather ‘central’ in the sense described, above II: Top-down Unification.
29 Unless they are implemented by domestic legislation which then becomes the primary agent of unification, see above II.A: Central Legislation.
30 Hague Conventions have a very limited impact as well. Most of them concern private international law and procedure which are whole different matters to begin with (and many of them are now being superseded by European law, especially regulations on procedural matters). Of those pertaining to substantive private law, few have been adopted broadly enough to have a serious unifying effect.
31 Of course, the CISG normally applies only if both jurisdictions involved are members; see Article 1(1) CISG.
32 The data were obtained as follows. For each jurisdiction, we asked the national reporter(s) and at least one additional expert to rate the legal uniformity for more than 40 areas of law on a scale from 1 to 7. The scores were then averaged for each jurisdiction as well as for particular areas of law. We checked the reliability of the scores in two ways. First, we reviewed the responses against a set of neutral control questions which served to identify a respondent's tendency systematically to over or underrate unification compared with the average response. Where such a tendency showed (ie, where the response to the control questions differed from the average of all responses by more than one standard deviation), the scores obtained from the particular expert were eliminated from the data set as unreliable; additional experts were then recruited for the respective legal system. Secondly, if the average scores obtained for each system (and controlled for systematic bias) deviated from each other by more than one point (a rare
A Uniformity of Law in General

According to our data, legal uniformity within the European Union with regard to law in general is far lower than in any national federal system. We measured the uniformity of law on a scale from 1 (not uniform at all) to 7 (completely uniform), with 4 being the mid-point (uniformity and diversity in equipoise). The average uniformity score for all 18 national systems surveyed is 5.833 while the score for the European Union is 2.7—ie, less than half. In all national systems, the uniformity of law was rated above the mid-point (law being, on the whole, more uniform than not), while the European Union fell way below that mark (law being, on the whole, much more diverse than uniform). In terms of overall average legal uniformity, it is, so to speak, the EU versus ‘The Rest of the World’ (of federations). No doubt, legal unification is a greater challenge in the EU than in any major national federation.

B Uniformity of Private Law in Particular

The picture is similar with regard to private law. It confirms our general findings not only with regard to the gap between the EU and ‘The Rest of the World’ but also with respect to the relative impact of top-down versus bottom-up forces.

In our study, ‘private law’ included two major categories. The ‘Classic Core’ contains the areas typically covered in continental civil codes, ie, contract, tort, property, family law and succession, each with various subcategories. The category of ‘Commercial Law and Regulation’ consists of commercial law areas, ie, business organisations, labour, negotiable instruments and intellectual property, as well as—at least partially—regulatory matters, ie, antitrust/competition, securities regulation, banking, insurance and bankruptcy.

Let us first look at both these categories together, ie, at ‘private law’ in the larger sense of including both purely private rights and market regulation. Here, we see a picture highly similar to the one of law in general. Weighing both categories equally, the average uniformity score for all national systems is 6.1934 while the score for the European Union is 3.2—again, about half. These scores also reflect that all national federations’ uniformity scores are well above the mid-point while the EU’s is well below. In other words, while private law writ large is, on the whole,
considerably more uniform than not in ‘The Rest of the World’, the opposite is true in the European Union.\textsuperscript{35}

Let us now look at the two categories individually. What we see here confirms our finding that legal unification is driven primarily by top-down forces, especially by central legislation, rather than by bottom-up efforts. In the EU, the top-down forces (regulations and directives) are at work mainly in the area of commercial law and market regulation and the data show the impact: EU’s unification score in this area is 4.05. While this is still considerably lower than the national federations’ average score of 6.44, the relative difference is significantly smaller here than with regard to both law in general and to ‘private law’ as a whole. By contrast, bottom-up unification efforts (various Principles, Common Frame of Reference, scholarly treatises, etc) have focused mainly on the ‘classic core’ subjects of private law and the data show the weakness of the effect: the EU average unification score here is a mere 2.34. This is not only much lower than the EU market regulation score, it also lags dramatically behind the national federations’ average of 5.94. In other words, where EU legislation has been common, legal unification has significantly increased, clearly exceeding the EU’s average unification and narrowing the gap with the national federations. By contrast, where bottom-up efforts have been at work, legal unification has remained at a very low level, lagging behind not only the average for EU law (2.34 versus 2.7)\textsuperscript{36} but also widening the gap with ‘The Rest of the World’ (2.34 versus 5.94).

The following table summarises these data.

Average Uniformity Scores

<table>
<thead>
<tr>
<th></th>
<th>All law</th>
<th>All ‘private law’</th>
<th>Classic core of private law</th>
<th>Commercial law and market regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>National systems (combined)</td>
<td>5.80</td>
<td>6.19</td>
<td>5.94</td>
<td>6.44</td>
</tr>
<tr>
<td>European Union</td>
<td>2.70</td>
<td>3.20</td>
<td>2.34</td>
<td>4.05</td>
</tr>
</tbody>
</table>

V CONCLUSION—CENTRALISATION AS THE PRICE FOR UNIFORMITY?

It is risky, of course, to draw conclusions from the experiences of other federations for Europe. Legal unification works differently in different contexts, and the European Union is, as has often been emphasised, \textit{sui generis} in many regards. Still, two basic findings emanating from our broader study are clear enough to merit careful consideration in the European context. First, the most effective path to legal unification is top-down, and clearly the most powerful instrument is central legislation. Central constitutions can help but only if they significantly affect private law, which is rarely the case in the EU. Central courts can assist, but only if they

\textsuperscript{35} Both scores also suggest that private law within federations is, on the average, slightly more uniform than law in general, although the differences may well be too small to be significant.

\textsuperscript{36} Again, this difference may be too small to be significant.
have power to settle issues of state law which is not true for the Court of Justice. Secondly, bottom-up unification efforts promise much less success. Coordinate state action can help through uniform legislation, and cooperation among Member State courts can make contributions as well, but both are virtually non-existent in Europe today. Non-state actor projects (‘Principles’) so far have had little direct impact beyond the academic sphere; legal education and practice make at best a minimal contribution; and international norms unify private law only rarely and imperfectly.

Our data confirm the general message suggested by these findings, ie, that the European Union is a tougher candidate for legal unification than any national federation—its degree of legal uniformity remains hugely lower. This does not mean, of course, that legal unification is doomed to fail in the EU. On the contrary, there are good reasons to believe that it will continue to increase. One reason is the prevalence of the civil law tradition within the EU: as we show in greater detail elsewhere, civil law systems display a markedly greater tendency towards unification than common law jurisdictions, especially in private law.37 The other reason is time: the EU is still young, and federations that are ‘integrative’, ie, that are created by the coming together of previously independent units, tend—all other things being equal—towards increasing uniformity.38 In fact, where these two elements are combined, ie, in civil law based integrative federations, legal uniformity has mostly grown in the long run. Indeed, neither aspect guarantees increasing uniformity in Europe—the common law elements and the retarding force they can exercise are far from negligible, and it is far from clear whether the overall integration of Europe will continue in the near future or whether it has rather peaked, at least for the time being.

Our data also confirm the more specific finding that top-down unification forces, especially central legislation and regulation, are much more effective than bottom-up efforts. Where top-down forces are at work, legal uniformity in the EU has achieved a level of unification much higher than its general law average—and indeed approximating that of some national federations. Where bottom-up efforts predominate, unification has remained even below that of its general law average, and the gap with the national federations remains huge. This strongly suggests that those who want to see private law in Europe unified (or at least heavily harmonised) should put their trust primarily in regulations and directives from Brussels and Strasbourg.

Such a conclusion will not be popular. It will be outright unpopular among most European private law scholars whose efforts are thus relegated to preparatory work for legislation at best, and, at worst, left without any significant practical impact whatsoever. Before they protest too loudly, however, they should remember that the unification of private law in France, Germany or Switzerland did not occur when Pothier, Windscheid or Huber wrote their treatises; it occurred when a central legislature codified the law for the whole country.

37 Halberstam and Reimann, ‘Unification of Law in Federal Systems’, above (n 3) IV.B.
38 In contrast, in federations that are ‘devolutionary’, ie, that result from the gradual distribution of previously centralised power to the member units, time is likely to work in the opposite direction, ie, towards greater diversity; cf K Lenaerts, ‘Constitutionalism and the many faces of Federalism’ (1990) 38 American Journal of Comparative Law 205.
The uncomfortable truth is that—at least in the absence of an effective uniform law movement or of a strong central court with jurisdiction over Member State law—broad scale private law unification normally does not happen without central legislation. Such central legislation, in turn, requires central power as well as its extensive exercise. Especially in light of the strong correlation between the overall ‘structural centralisation’ of a federation and legal uniformity,\(^ {39}\) it seems that the centralisation of power is an almost inevitable price for effective legal unification. Those in Europe who want to have the latter without the former may well be victims of a grand illusion.

\(^ {39}\) Above, ILD: Structural Centralisation.