Articles

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Trialogical Subsidiarity in International and Comparative Law: Engagement with International Treaties by Sub-State Entities as Resistance or Innovation

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La subsidiarité trialogique en droit international et comparé: l'engagement par les entités infranationales avec les traités internationaux comme mode de résistance ou d'innovation

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Abstract

This article proposes a new model for the engagement of sub-state units with the international legal order. "Trialogical subsidiarity" acknowledges that some areas are best regulated locally, but it also argues that international law has an increasing say in areas traditionally reserved for local law. The implementation of an international cultural heritage treaty by constituent units (CUs) in federal states, despite objections of the federal authorities, is a case study for the possibilities and implications

Résumé

Cet article propose un nouveau modèle d'engagement par les unités infranationales dans l'ordre juridique international. La « subsidiarité trialogique » reconnaît que certains domaines sont mieux réglementés au niveau local, mais soutient également que le droit international a un droit de regard croissant dans les domaines traditionnellement réservés au droit local. La mise en œuvre d'un traité international sur le patrimoine culturel par les unités constituantes (UC) d'États fédéraux, malgré

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of the use of international law by CUs without the filtering of the central state. This use enhances the legitimacy of international law and can lead to better outcomes for local populations, moving international law closer to its promise of being a law of peoples rather than of states.

les objections des autorités fédérales, présente une étude de cas sur les possibilités et les enjeux du recours au droit international par les UC sans le filtre de l'État central. Ce recours renforce la légitimité du droit international et peut conduire à de meilleurs résultats pour les populations locales, rapprochant ainsi le droit international de son potentiel comme loi des peuples plutôt que des États.

Keywords: Subsidiarity; federalism; foreign affairs; treaty implementation; cultural heritage; UNESCO; intangible cultural heritage; Canada; Australia; Québec.

Mots-clés: Subsidiarité; fédéralisme; affaires étrangères; mise en œuvre de traités; patrimoine culturel; UNESCO; patrimoine culturel immatériel; Canada; Australie; Québec.

Introduction

The principle of subsidiarity tells us that certain issues are best dealt with locally. For instance, a local authority is in a better position to determine whether it is in the child's best interests to be adopted by a foreign family,[1] which authority should make decisions about competition law and policy,[2] or who should dictate rules on the use of the environment and natural resources.[3] The principle of subsidiarity has received a lot of attention in the context of European Union (EU) law,[4] but it is also a key principle of international[5] and domestic public law.[6] And, yet, there is an increasing push in international law, as well as in the domestic law of federal countries, to centralize authority. The complexities of

[1] Ann Laquer Estin, "Families across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States" 62 (2010) Florida L Rev 47.

[2] Barry Rodger, "Taking the Community Interest Line: Decentralisation and Subsidiarity in Competition Law Enforcement with Stuart Wylie" (1997) 8 Eur Competition L Rev 485.

[3] Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93: 3 AJIL 596.

[4] Antonio Estella de Noriega, *The EU Principle of Subsidiarity and Its Critique* (Oxford: Oxford University Press, 2002); Roger Van den Bergh, "Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law" (1998) 5: 2 Maastricht J Eur & Comp L 129; W Gary Vause, "The Subsidiarity Principle in European Union Law: American Federalism Compared" (1995) 27 Case W Res J Intl L 61.

[5] Paolo G Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97: 1 AJIL 38; see also Bodansky, *supra* note 3.

[6] See e.g. Bernard Enjolras et al, "Between Subsidiarity and Social Assistance-the French Republican Route to Activation" in Ivar Lødemel & Heather Trickey, eds, "*An Offer You Can't Refuse": Workfare in International Perspective* (Bristol: Policy Press, 2001) 41.

contemporary life, and the fact that international law touches upon nearly every aspect of everyday life, are often mentioned as reasons in favour of centralization.

These efforts at centralization assume that differences among the various levels being brought to the table, when they exist, are in the specifics of the "how" rather than in the fundamentals of the "whether." In other words, we may all agree that the ageing population should have access to tailored services and care, but we can also easily disagree about who pays for what and what kind of training is required to deliver certain types of care in different areas.[7] Yet this scheme's ostensible simplicity betrays much more complexity on the ground, as numerous cases on federalism around the world have shown.

Much of the discussion on these matters tends to focus on two dynamics: the international versus the domestic or the federal versus the constituent units (CUs).[8] Framing these issues as two-way conversations simplifies the frame of analysis and enables clear-cut solutions to "whether" questions: the truly competent authority is international (or domestic); the jurisdiction is the CU's (or federal). Public international law certainly tends to prefer this formula, by notoriously treating the state as a unitary entity for most purposes. Despite international law's increasing recognition of federalism, the basic rule in the *Vienna Convention on the Law of Treaties* (*VCLT*) is still clear: states cannot use their domestic law or arrangements as an excuse to skirt their international obligations.[9]

As mentioned above, though, there is increasing acknowledgement of the pervasiveness of international law in everyday life. Chief among the sources of international law are international treaties, which cover matters

[7] See e.g. Darragh O'Keeffe, "Clever Connections," *Australian Ageing Agenda* (25 June 2014), online: <https://www.australianageingagenda.com.au/2014/06/25/clever-connections/>.

[8] Because of the variation in terminology across different countries (provinces, states, and so on), I will use the term constituent units (CUs) to refer to these entities that form a federal state.

[9] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*VCLT*]: "Article 27. Internal Law and Observance of Treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty;" see also: "Article 29. Territorial Scope of Treaties. Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." To be sure, one of the International Law Commission (ILC) drafts of the *VCLT* allowed sub-federal entities to enter into treaties as long as authorized by the federal state. The ILC commentary recognized that international law did not prohibit sub-federal entities from having the power to conclude treaties. The provision was dropped after lobbying by Canada and other countries. For a discussion, see Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (Brussels: PIE Peter Lang, 2009) at 155–57. ILC, "State Responsibility, General Commentary" (2001) 2(2) ILC Yearbook 31 at 81.

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affecting everyday life ranging from contracts,[10] to taxation,[11] to basic criminal law,[12] to road traffic rules.[13] International law assumes that the state, including both the local and central levels, has reached an internal agreement and is ready to be treated as a unit for international law purposes. What if, however, this was not the case?

Two options are possible: one is that the central domestic authority is onboard with a treaty that the local level rejects. For that, more and more treaties include specific clauses on federal states, allowing states to ratify treaties on the proviso that they only apply to certain parts of their territory.[14] The second option, though, is when the local level wishes to engage with international law that the central domestic level rejects. This latter set of possibilities is the central focus of this article, even if the former also informs the dynamics at play and will be discussed.

From a formal perspective, CUs are not allowed to engage directly with international treaties, at least not those covered by the *VCLT*. However, in practice, many of these entities have done just that. In general, the subject matter of their engagement is bilateral and deals with neighbouring entities (whether states or CUs) and with narrow matters such as road tolls, forest fire management, and the use of waterways, among others.[15] These engagements, if they are considered treaties, would fall under the category of "contract treaties,"[16] and there are few, if any, implications beyond the

[10] *Convention on Contracts for the International Sale of Goods*, 10 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

[11] *General Agreement on Tariffs and Trade 1994*, 15 April 1994, 1867 UNTS 187 (entered into force 1 January 1995; *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 187 (entered into force 1 January 1995); see also Allison Christians, "A Global Perspective on Citizenship-Based Taxation" (2017) 38 Mich J Intl L 193.

[12] See e.g. Michael Kirby, *"Domestic Implementation of International Human Rights Norms"* (1999) 5: 2 Australian Journal of Human Rights 109.

[13] *Convention on Road Traffic*, 19 September 1949, 125 UNTS 3 (entered into force 26 March 1952).

[14] See e.g. Hague Convention on the Law Applicable to Trusts and on Their Recognition, 1 July 1985, 23 ILM 1389 (1984) (entered into force 1 January 1992): "Article 29. If a State has two or more territorial units in which different systems of law are applicable, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all of its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time. Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies. If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State."

[15] A Jacomy-Millette, *Treaty Law in Canada* (Ottawa: University of Ottawa Press, 1975) at 70–71.

[16] Arnold D McNair, "The Functions and Differing Legal Character of Treaties" (1930) 11 Brit YB Intl L 100.

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specific relationship between the two parties. Further, and crucially, the subject matter of these treaties falls well within the allotted constitutional division of legislative competences and is usually authorized or endorsed by the central domestic level. Since subsidiarity guides the division of competences, it is respected by its engagement with international law.

Increasingly, though, international treaties of the "law-making" type (multilateral, which are aimed at creating norms for the international community as a whole) touch upon matters that are the reserved competence of CUs.[17] If the central state refuses to engage with the treaty, this should be the end of the discussion. Yet some constituent units have taken upon themselves to go ahead and implement treaties anyway. Karen Knop's pioneering work in this area, focusing on US examples, shows how "international law can contribute to the configuration and attributes of virtually any part of the state for virtually any length of time" and that sub-state actors can even at the most local levels shape themselves in direct reference to international law.[18]

The implementation of these treaties requires subsidiarity to transcend its usual duality. The central state can no longer serve as the necessary common denominator between the local and the central domestically, on the one hand, and the domestic and international, on the other. CUs engage with international law directly, in spite of the central state, and often invoke subsidiarity as a ground upon which they should be allowed to do so. I argue in this article that the principle of subsidiarity's dual character no longer does the work it is meant to and that it needs to be reconfigured. I propose a trialogical model of subsidiarity that helps explain and justify CUs' engagement with international law. By trialogical, I mean a model in which international, central domestic, and local levels participate in the conversation all at once, and, in doing so, make and transform international law.[19] The local level I focus on in this article is sub-federal entities in a federal country, but the same ideas could be extended to other

[17] See e.g. Catherine Brölmann, "Law-Making Treaties: Form and Function in International Law" (2005) 74 Nordic J Intl L 383 (being critical of the distinction).

[18] Karen Knop, "International Law and the Disaggregated Democratic State: Two Case Studies on Women's Human Rights and the United States" in Claire Charters & Dean R Knight, eds, *We, the People(s): Participation in Governance* (Wellington: Victoria University Press, 2011) 127 at 131.

[19] This terminology seems to be used in studies on education, to indicate overcoming a dialogical model in which knowledge is produced through interaction, to one in which knowledge is created through collaboration via shared objects. I do not purport to base my discussion on these models and simply borrow the terminology. But, on trialogical education, see Kai Hakkarainen & Sami Paavola, "Toward a Trialogical Approach to Learning" in Baruch Schwarz, Tommy Dreyfus & Rina Hershkowitz, eds, *Transformation of Knowledge through Classroom Interaction* (London: Routledge, 2009) 65.

configurations, even in unitary states, and include conversations among cities, the central state, and international law. My case study focuses on an international cultural heritage law treaty under the United Nations Educational, Scientific, and Cultural Organization (UNESCO), the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage* (*2003 UNESCO Convention*).[20] Intangible cultural heritage (ICH), popularly known as folklore, means traditional cultural practices and is often referred to as the embodiment of living culture.

The competence for regulating culture is ordinarily reserved to the local level in a textbook example of subsidiarity in action. Yet this treaty has been ratified by over 175 countries. Two countries that have chosen not to ratify the treaty are Australia and Canada. Yet, in both countries, a CU (the state of Victoria in Australia,[21] the province of Québec in Canada)[22] has chosen to "implement" this treaty and incorporate provisions on ICH in its state-level legislation. In doing so, these entities did not refer to what they were doing as a formal implementation. But they both made it clear that they were inspired by the *2003 UNESCO Convention* in their decision to add new provisions to their heritage legislation.

I will examine these dynamics with a view to articulating the possibilities of a trialogical model of subsidiarity. I will show how, in implementing the *2003 UNESCO Convention*, both of these entities have challenged both their federal states' resistance to the treaty and innovated *vis-à-vis* the treaty itself, presenting solutions that are different in some respects from the black letter of the treaty, sometimes reinforcing, and sometimes hindering the *2003 UNESCO Convention*'s purposes and objectives. This article therefore engages with, and contributes to, a range of different bodies of literature, including comparative federalism, foreign relations law, cultural heritage law, and international law more generally. Trialogical subsidiarity has the potential to unleash models of engagement between the international and the local extending beyond cultural heritage law and into other areas traditionally affected by subsidiarity in domestic law. Likewise, this model can even have an impact in non-federal structures by showcasing the dynamics of engagement of the local with international law or with "the everyday operation of international law."[23] There are forms of

[20] *Convention for Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006) [*2003 UNESCO Convention*].

[21] *Aboriginal Heritage Act 2006*, No 16, consolidated with 2016 amendments [*Victoria Heritage Act*].

[22] *Cultural Heritage Act* (*Loi sur le patrimoine culturel*) 2011, c 21, consolidated with 2012 amendments [*Québec Heritage Act*].

[23] See generally Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge, UK: Cambridge University Press, 2015).

engagement with international law that our current dualist lenses do not capture, and we therefore need a new analytical prism.

In what follows, I will first briefly introduce the ways in which culture in general (and cultural heritage in particular) is perceived as an object of international regulation. I will then proceed to examine the dynamics of subsidiarity in international and domestic law. The following section will look at the dynamics of treaty powers in federal systems, particularly Australia and Canada. I will then discuss in detail the *2003 UNESCO Convention* case study mentioned above, before canvassing the trialogical subsidiarity model and its implications in some more detail. Concluding remarks follow, outlining possible directions for future research.

Culture as an Object of International Legal Regulation

Culture, and cultural heritage, in particular, is a good mechanism through which to think about the implications of subsidiarity in international law, particularly once the dynamics of intra-state law are factored into the process. That is because culture is normally thought of as being regulated by the local in domestic law, and much of international law makes an exception to the application of international law rules on the basis of culture. There is, for instance, an exception to free trade rules in international law on the basis of the protection of certain cultural industries.[24] Likewise, regimes on minority protection are also examples in which exceptions to legal rules of broad application are made for the benefit of local culture.[25]

Among the different ways of regulating culture in international law, cultural heritage law focuses on different manifestations of culture as the key objective of legal protection rather than exceptions to the objective (protections to cultural industries) or as a part of, or conduit to, more holistic protections (minority regimes). The majority of international law in this area has been concluded under the aegis of UNESCO, and it includes a range of regimes on different domains of heritage, including heritage in wartime,[26]

[24] See generally Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge, UK: Cambridge University Press, 2007); Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Oxford: Hart Publishing, 2013).

[25] Francesco Palermo & Jens Woelk, "From Minority Protection to a Law of Diversity? Reflections on the Evolution of Minority Rights" (2003) 3:1 European Yearbook of Minority Issues xi.

[26] *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention*, 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956); *Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, 249 UNTS 358 (entered into force 7 August 1956); *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, 26 March 1999, 2253 UNTS 172 (entered into force 9 March 2004).

cultural objects,[27] world cultural and natural heritage,[28] and underwater cultural heritage.[29] The *2003 UNESCO Convention* is but one of the existing heritage domains, even if it is the latest treaty in UNESCO's standard setting in the area. One of the unintended consequences of this division in domains, particularly with respect to the *2003 UNESCO Convention*, is that it conveys the illusion that ICH is separate from the rest of heritage, whereas, in fact, as Laurajane Smith has suggested, all heritage is in fact intangible.[30]

These international regimes connect to numerous initiatives by regional organizations such as the African Union, the Council of Europe, and the African Union, a full analysis of which is beyond the scope of, and possible space within, this article.[31] Key for our purposes, though, is that there are no clauses on the interrelationship between international and regional heritage treaties. Conflicts are avoided, it seems, because the heritage safeguarding mechanisms involved in either level are very different. Crucial for our discussion, though, is to understand the internationalization of standard setting around cultural heritage. If, as already suggested, culture is best regulated domestically, then the fact that so many specific instruments exist internationally challenges this premise. John Henry Merryman has famously postulated that there are two ways of thinking about cultural heritage: one is based on its value for the nation-state (the case for nationalism) and the other is based on heritage's value for all of humanity (the case for internationalism).[32]

The case for internationalism is premised on the idea that the international (broadly understood, to include cosmopolitan institutions like "the universal museum"[33] and wealthy Western countries) is in a better position

[27] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) [*1970 UNESCO Convention*].

[28] *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975).

[29] *Convention on the Protection of the Underwater Cultural Heritage*, 2 November 2001, 2562 UNTS 3 (entered into force 2 January 2009).

[30] Laurajane Smith, *The Uses of Heritage* (London: Routledge, 2006) at 56.

[31] For an overview, see Janet Blake, *International Cultural Heritage Law* (Oxford: Oxford University Press, 2015).

[32] John Henry Merryman, "Two Ways of Thinking about Cultural Property" (1986) 80 AJIL 831.

[33] James Cuno, "View from the Universal Museum" in John Henry Merryman, ed, *Imperialism, Art and Restitution* (Cambridge, UK: Cambridge University Press, 2006) 15 [Merryman, *Imperialism*].

with respect to cultural heritage for three reasons.[34] First, the international can better protect cultural heritage. Second, the international can ensure the integrity of cultural heritage and contextualize *vis-à-vis* the achievements of the entire human race, as opposed to just one or another group. Third, the international also ensures more visibility and access to the cultural heritage in question because of its central (metropolitan) position. Under this iteration, the international is globalized and cosmopolitan and places culture in an optimal position, where it represents what it is meant to represent: the achievements of human civilization. Further, it fulfils a key mandate, articulated in the UNESCO Constitution, of promoting international cultural exchange and cooperation (therefore, the internationalization of culture) as the cornerstone of international peace.[35] Further, the internationalization of culture, at least in theory, allows for minorities to legitimize their own claims against the state by having a mechanism to circumvent it, having a certain self-determination tone.[36]

Conversely, the case for nationalism is based on the idea that, yes, cultural heritage is best understood and appreciated in its context. It is only by seeing the pyramids in the Egyptian desert that we can truly appreciate their relevance and why they may have been built in a certain way. Likewise, the case for nationalism connects heritage closely to the formation and nurturing of national identity. It is well known that heritage has often been used to foster and even create national identity.[37] International law on cultural heritage acknowledges nationalism through the 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, which is the product of a post-colonial mindset.[38] In this situation, newly independent countries, eager to overcome the harm of European domination, but faced with the challenge of artificial

[34] Drawn from Merryman, *Imperialism*, *supra* note 33; see also Francesco Francioni, "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity" (2003–04) 25 *Michigan Journal of International Law* 1209; Francesco Francioni, "Cultural Property-International Law" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008), online: <http://opil.ouplaw.com/home/EPIL>.

[35] *Constitution of the United Nations Educational, Scientific and Cultural Organization*, 16 November 1945, 4 UNTS 275 (entered into force 4 November 1946).

[36] But the potential of international heritage processes for self-determination purposes is often over-promised. See Lucas Lixinski, "Heritage Listing as Self-Determination" in Andrea Durbach & Lucas Lixinski, eds, *Heritage, Culture and Rights: Challenging Legal Discourses* (Oxford: Hart Publishing, 2017) 227.

[37] David Lowenthal, *The Heritage Crusade and the Spoils of History* (Cambridge, UK: Cambridge University Press, 1998).

[38] Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge, UK: Cambridge University Press, 2006). *1970 UNESCO Convention*, *supra* note 27.

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boundaries that did not correspond to pre-colonial national, ethnic, or tribal lines,[39] saw themselves in need of forging new national identities. Heritage was a useful means through which to accomplish just that.[40] Therefore, the case for nationalism is also connected to narratives of self-determination in this national context (and not restricted to the Third World).[41] It is in this version that subsidiarity seems to be at its strongest.

Resolving the tension between nationalism and internationalism is not for this article; rather, the tension has been used as a means of showcasing the role of subsidiarity in thinking about international law and culture, and the work this principle can do with respect to international regulatory efforts. More specifically, subsidiarity puts a question mark over the legitimacy of international law in areas close to local identity and seemingly can only be superseded when the local cannot perform its role properly.

Other areas of international law also rely on the principle in this formulation. International criminal law is one example. The principle of complementarity, used to decide whether the International Criminal Court has jurisdiction over a case, dictates that the international jurisdiction will only be triggered if the states with other jurisdictional links to the case are "unable or unwilling" to investigate and prosecute the case themselves.[42]

[39] Makau W Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry" (1995) 16 Mich J Intl L 1113.

[40] Sarah van Beurden, "The Art of (Re)Possession: Heritage and the Cultural Politics of Congo's Decolonization" (2015) 56:1 Journal of African History 143.

[41] A particularly interesting case study is that of Norway, which in the nineteenth century, then under Swedish rule, ventured into creating the concept of "True Norwegianness," built precisely around the celebration of folk culture, including costumes and festivals. Folk culture was then re-introduced in smaller villages, an improved version of a cultural distinctiveness then disappearing or vanished. The use of costumes and dialects generated a sense of pride and spurred the quest for authentic Norwegian identity, which ultimately fuelled the political independence movements in the country. See Astrid Oxaal, "Bunaden: stagnasjon eller nyskapning" in Øystein Sørensen, ed, *Jakten på det norske. Perspektiver på utviklingen av en nasjonal identitet på 1800-tallet* (Oslo: Ad notam Gyldendal 1998) 141; Anne Lise Seip, "Det norske 'vi': kulturnasjonalisme i Norge" in Sørensen, *ibid*, 95. Interestingly enough, Sweden also engaged in this process of identity building through folk culture during the same period. See Billy Ehn, Jonas Frykman & Orvar Löfgren, *Försvenskningen av Sverige; Det nationellas förvandlingar, Natur och Kultur* (Stockholm: Natur och Kultur: 1993) at 140. I am thankful to Mats Ingulstad for this insight and his help with the Norwegian sources.

[42] Sarah MH Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge, UK: Cambridge University Press, 2013). Further, it is worth noting that, in the practice of the International Criminal Court, certain justice-delivery processes like traditional Gacaca courts in Rwanda or even non-judicial transitional justice mechanisms, are seen as not falling within the bounds of a state's duty to address a situation domestically. I am thankful to Maite Schmitz for this insight.

This reliance on subsidiarity keeps the possibility of mandate creep by international law and institutions in check, but it also leaves culture, and cultural heritage, in particular, caught between two difficult positions: on the one hand, heritage is central for international peace mandates, and the international can offer important avenues for the articulation of cultural identity against an oppressive state, and on the other hand, cultural heritage is an important part of how states define their own polity and national identity. The next section looks at the role of culture in domestic federal contexts as well as the role of subsidiarity in municipal law.

Constitutional and Federalist Challenges

As discussed above, subsidiarity is a principle that aids in the allocation of authority. In its operation, the presumption is against the centralization of authority. This principle expresses the balance between unity and diversity in federalism.[43] This principle is commonplace in the constitutional traditions of many countries, but it seems to be underused, at least under this banner, in common law jurisdictions. Peter Hogg, for instance, in the leading treatise on Canadian constitutional law, states that subsidiarity is seldom invoked in Canadian political discourse around federalism, even if it is a useful way of thinking about the Constitution of Canada.[44]

Subsidiarity usually refers to areas of social policy such as education, health, and public security. It applies "not as an independent basis for the distribution of legislative powers, but as an interpretive principle."[45] In other words, subsidiarity does not in itself decide which way power is distributed but, rather, helps interpret decisions with respect to the allocation of powers, alongside other elements such as written texts on the allocation of powers. As society evolves and new areas of state action and policy arise, for which there is no clear allocation of competence, subsidiarity becomes increasingly important.

The principle of subsidiarity is more relevant in federal than unitary states, but even unitary states have allocations of competence involving levels other than the central one, if not in law-making, at least in the application of policy. The presumption in favour of the local level has come increasingly under attack, particularly in federal systems. The argument is that, given the mobility of modern life, the lines dividing the local and the national (or, for that matter, the international) are increasingly blurred,

[43] Thomas O Hueglin & Alan Fenna, *Comparative Federalism: A Systematic Inquiry*, 2d ed (Toronto: University of Toronto Press, 2015) at 3.

[44] Petter W Hogg,*Constitutional Law of Canada*, student edn (Toronto: Thomson Reuters, 2017) at 5–12 [Hogg, *Constitutional Law of Canada*, 2017].

[45] *Re Assisted Human Reproduction Act*, [2010] 3 SCR 457 at para 273, cited in Hogg, *Constitutional Law of Canada*, 2017, *supra* note 44 at 5-14.

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and the separation of these issues is contestable.[46] In defense of subsidiarity, there is the insistence that the delivery of services needs to be adjusted anyway to local circumstances, so even if the framework is central delivery can never be fully uniform. Further, in many federal countries, particularly in Canada, the preservation of a line of separation between the central and the local is essential for the survival of the federation.[47]

This traditional reading of subsidiarity in the federal context, however, assumes that allocation is done in an either/or fashion: either the central level has the jurisdiction to the exclusion of the local or the other way around. Concurrent jurisdiction over certain subject matters exists, but even then, in the event of conflict, one level is chosen over the other. In practice, though, that is hardly the case (anymore); rather, intergovernmental relations (IGRs) are an alternative to conflict by suggesting that all involved levels share some of the competence and that they coordinate among themselves using different mechanisms. IGRs have become increasingly part of the practice of federalism, "as played out behind formal structures and rules."[48] Even though law's role is underestimated in IGR arrangements,[49] it is very much present. Nevertheless, "in spite of their ubiquitous character and the impact they have on the lived reality of any federation, IGRs remain largely opaque to the public, scholars, and even sometimes to public authorities."[50] IGRs serve trialogical subsidiarity by underscoring that matters are engaged simultaneously by different levels of governance and that coordination, rather than exclusivity, is the key. What trialogical democracy does in addition to IGRs is to shed light on the presence and role of the international.

Culture, and cultural heritage, in particular, is in a particular situation with respect to domestic public law. Older constitutions do not as a rule make provisions on culture, let alone on the division of powers with respect to the regulation of culture. Therefore, general principles, including subsidiarity, become key to determining competence over heritage. In order to allocate competence, a key question that must be answered is who the subject matter (in this case, cultural heritage) serves. Laws that affect people

[46] Hueglin & Fenna, *supra* note 43 at 27.

[47] *Ibid* at 58.

[48] Johanne Poirier & Cheryl Saunders, "Comparing Intergovernmental Relations in Federal Systems: An Introduction" in Johanne Poirier, Cheryl Saunders & John Kincaid, eds, *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Oxford: Oxford University Press, 2015) 1 at 1.

[49] *Ibid* at 7.

[50] Johanne Poirier & Cheryl Saunders, "Conclusion: Comparative Experiences of Intergovernmental Relations in Federal Systems" in Poirier, Saunders & Kincaid, *supra* note 48, 440 at 442 [Poirier & Saunders, "Conclusion"].

are deemed to be better made and enforced at the more local levels. So, if heritage is for the people (specifically, the communities that live in, with, or around heritage), then the competence is better placed locally. However, if heritage is for the nation-state and national identity, the competence may lie primarily with the central domestic level.

With respect to cultural heritage, in particular, federalism tends to lean towards the local. For instance, German federalism came at the end of Second World War in order to dilute the power of the unitary (and totalitarian) state.[51] In the context of heritage, that meant curbing the use of heritage as a nationalist cause, which had been common in Germany during the Third Reich.[52] Canadian provinces have the legislative authority to designate property as heritage property.[53] When it comes to IGRs, IGR processes and institutions often involve local government representation in heritage.[54] And for IGR processes involving cultural heritage, or culture more broadly, that speaks to a minority, there seems to be a preference for more formalized procedures. Québec is a good example, as is that of Indigenous peoples.[55] Indigenous peoples, incidentally, and their culture are often seen as a separate category in federal arrangements, with federal powers applying exclusively to Indigenous peoples, and CU legislation that affects Indigenous peoples often seen as violating division-of-power rules. However, CU legislation affecting Indigenous heritage has not been construed jurisprudentially as particularly problematic, provided the legislation

[51] Hueglin & Fenna, *supra* note 43 at 2–3.

[52] Bettina Arnold & Henning Hassmann, "Archaeology in Nazi Germany: The Legacy of the Faustian Bargain" in Philip L Kohl and Clare Fawcett, eds, *Nationalism, Politics, and the Practice of Archaeology* (Cambridge, UK: Cambridge University Press, 1995) 70 at 70–71; see also Bettina Arnold, "Justifying Genocide: Archaeology and the Construction of Difference" in Alex Laban Hinton, ed, *Annihilating Difference: The Anthropology of Genocide* (Berkeley: University of California Press, 2002) 95.

[53] Donald F Bur, *Law of the Constitution: The Distribution of Powers* (Markham: LexisNexis, 2016) at 1713. Citing *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 SCR 146 at 162, n 4260 (SCC): "All parties agree that legislation concerning the protection of heritage or cultural property falls under provincial legislative jurisdiction as being a law relating to property and civil rights within the province, under s. 92(13) of the Constitution Act, 1867. The intervener, the Attorney General of Canada, agrees, with one caveat. She points out that some cultural properties may fall under federal jurisdiction or that the application of unspecified federal heads of power may affect them. In the present case, the Attorney General of Canada supports the validity of the legislation challenged by the appellants. The respondents and all the interveners take the same position."

[54] John Phillimore & Jeffrey Harwood, "Intergovernmental Relations in Australia: Increasing Engagement within a Centralizing Dynamic" in Poirier, Saunders & Kincaid, *supra* note 48, 42 at 46.

[55] Poirier & Saunders, "Conclusion," *supra* note 50 at 488–89.

is not specifically targeted at Indigenous peoples. Disproportionate effects are written off as a historical fact rather than as a problem with the legislation.[56] This disconnect, while potentially problematic with respect to issues that are beyond the scope of this article, reinforces the idea that the division of competence over culture and cultural heritage is not clear-cut.

The idea that cultural heritage belongs to the community that practices or lives in, with, or around heritage would suggest that its regulation be done locally and that, therefore, the local should decide whether and what heritage is worth safeguarding. On the other hand, the centralizing move suggests that, because cultural heritage serves the national identity, it belongs first to the nation-state (or the international community, represented by the nation). Further, international commitments of the state, through UNESCO treaties, require central action.

The tension around nationalism and internationalism with respect to heritage, discussed in the previous section, insists for the most part that heritage serves humankind and not the nation-state. Therefore, the nationalist version must give way to internationalism, inasmuch as it refers to heritage as not serving a national political project. However, international law rules require that it be the central state that incorporates international cultural heritage law obligations. In fact, in the two countries that are the focus of this article (Australia and Canada), the matter of international treaty powers has been at the root of much controversy, and both countries, in spite of a shared legal tradition, have adopted vastly different responses to the matter. The next section examines this issue in some detail.

Federalism and International Law

As discussed in the introduction, federalism poses a specific problem to international law in that it enables central states to engage in international law-making that could bind the entire state in areas of internal competence of the CUs.[57] Therefore, traditional international law rules, by only giving full legal personality to the central state, create a situation in which the central state is caught between the international community and the CUs' legislative competences.[58] Of course, it is not necessarily the case that CUs do not engage in international law and foreign affairs. In a number of federal countries, both the central state and the CUs engage in foreign

[56] Bur, *supra* note 53 at 1713.

[57] Robert B Looper, "Limitations on the Treaty Power in Federal States" (1959) 34 NYU L Rev 1045 at 1046–1047.

[58] But see Fleur Johns, "Introduction" in Fleur Johns, ed, *International Legal Personality* (London: Ashgate, 2010) i (mapping other forms of assertion of at least partial personality in international law).

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affairs and, consequently, in international law.[59] In other words, much of the debate on federalism and treaty powers, while mired in the "either/or" of watertight legislative competences, glosses over the fact that, internally, many of these competences are already shared anyway, through mechanisms like IGRs. Foreign affairs law seems to arrive at the same realization through a different route, and it is therefore an important contribution to this debate.

However, a focus on the more traditional legal debates sheds light on the importance of these issues and what they mean historically as well as in present political arrangements. In this respect, the Australian and Canadian approaches are almost polar opposites. The Australian federal model has largely drawn upon the US model but was still influenced by nineteenth-century English political philosophy.[60] At the federal level, provisions exist so as to ensure that "the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government [POGG] of that State that have extra-territorial operation."[61] The POGG power is key also in Canadian federalism, as discussed below, and, in Australia, it is deemed to be a "plenary power."[62] In general, too, each level enjoys immunity in relation to the other.[63]

Yet, in the event of simultaneous application of inconsistent laws between federal and CU law in Australia, the former prevails, rendering CU law invalid to the extent of the inconsistency.[64] Three distinct tests exist as to whether state and federal laws will be deemed to be inconsistent. The first of these is where a direct inconsistency arises from the inability to obey both the state and the federal laws.[65] The second of these tests is whether one legislative scheme deprives a benefit, right, or privilege conferred by the other legislation.[66] The third test as to inconsistency of laws takes a broad approach as to whether the area being legislated for has a legislative

[59] For a collection of essays on the topic, including Canada, the United States, and India, see Curtis A Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, forthcoming).

[60] George Williams, Sean Brennan & Andrew Lynch, *Blackshield & Williams Constitutional Law and Theory: Commentary and Materials*, 6th ed (Sydney: Federation Press, 2014) at 232.

[61] *Australia Act 1986* (Cth), s 2.

[62] *Union Steamship Company of Australia Pty Ltd v King*, [1988] HCA 55 at para 14.

[63] *Bropho v Western Australia*, (1990) 171 CLR 1; *Austin v Commonwealth of Australia*, [2003] HCA 3, 215 CLR 185; *Clarke v Commissioner of Taxation*, [2009] HCA 33; see also *Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority*, [1997] HCA 36, (1997) 190 CLR 410.

[64] *Commonwealth of Australia Constitution Act* (Cth), s 109 [*Australia Constitution Act*].

[65] *R v Licensing Court of Brisbane; Ex parte Daniell*, (1920) 28 CLR 23.

[66] *Clyde Engineering v Cowburn*, (1926) 37 CLR 466.

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intention of the Commonwealth Parliament to be exclusively covered and whether a state law has encroached upon this exclusive area.[67] If it is found that such an intention exists by the Commonwealth Parliament, the state law will be found to be inconsistent. The Commonwealth may prospectively remove legislative intention to exclusively cover the field; however, the Parliament cannot retrospectively remove legislative intention to cover the field.[68]

With respect to international law, the *Commonwealth of Australia Constitution Act* has a clear provision allocating jurisdiction over foreign affairs to the federal level.[69] The approach in Australia is to specify the powers of the federal level and leave for the states the remainder of legislative powers.[70] The external affairs power in the Australian Constitution has been the subject of discussion involving the characterization of what can be deemed to be of international importance. The current understanding is that, given the expansion of international law and its interplay with everyday life, there is wide scope for a subject matter to be considered international. If the topic is the subject of an international treaty, as long as it is entered into in good faith, then the matter is international for the purposes of the external affairs power.[71]

The matter is somewhat complicated in a federation because of the interplay of legislative competences. But the broad reading of the foreign affairs power in Australia has also meant that there is a centralization of federal legislative competence over a range of issues. More specifically, since the *Tasmanian Dam* case (coincidentally, also a case about an international cultural heritage treaty, the *Convention Concerning the Protection of the World Heritage and Natural Heritage* [*World Heritage Convention*]), it has been clear that any international treaty the federal government enters into dislocates legislative competence from the CU to the federal government.[72] The minority in this case posed an argument grounded on subsidiarity, indicating that the CU government would be best placed to decide on measures of implementation. Nevertheless, the majority read the language

[67] *APLA v Legal Services Commissioner*, (2006) 224 CLR 322; *Cth v Australian Capital Territory*, [2013] HCA 55.

[68] Peter Hanks, "'Inconsistent' Commonwealth and State Laws: Centralizing Government Power in the Australian Federation' (1986) 16 Federal L Rev 107 at 125.

[69] *Australia Constitution Act*, *supra* note 64, s 51: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: … (xxix) external affairs."

[70] Williams, Brennan & Lynch, *supra* note 60 at 242.

[71] As mapped in *ibid* at 885–903.

[72] *Commonwealth v Tasmania*, (1983) 58 CLR 1. *Convention Concerning the Protection of the World Heritage and Natural Heritage*, 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) [*World Heritage Convention*].

of the *World Heritage Convention* as controlling, particularly the fact that the obligation at stake was to determine the universal value of the heritage (a typical internationalist activity) rather than the management of the heritage site on the ground in relation to other social and economic considerations.[73] Subsidiarity, therefore, was pushed aside in favour of a centralizing internationalist narrative.

Subsequent cases in this area have confirmed this view, only emphasizing that the federal legislation must be seen as a direct implementation of the language of the treaty, and it being unclear whether international soft law is covered by the external affairs power (that is, whether the federal government could claim competence to legislate in an area on the basis of an international declaration or resolution of an international body).[74] This interpretation of the foreign affairs power has made it one of the most important justifications for environmental federal legislation in Australia, for instance.[75] With respect to the implementation of international law by a CU, like in the example of the state of Victoria discussed in the next section, it can be read as an attempt to claw back at the encroachment on state powers in Australian federalism, by engaging with international law in spite of the exclusive powers of the federal level. Alternatively, it can be simply a way to jolt the federal government into action by taking the lead in this area.

Conversely, in Canada, the stakes are higher with respect to treaty powers. The division of legislative powers in Canada creates lists of exclusive powers to both the federal and the CU levels, leaving residual powers to the federal level.[76] There are four principles that aid in seeking to understand the relationship between Canada's federal and provincial legislative powers and the primacy of particular legislation of a jurisdiction over that of the other: pith and substance, paramountcy, double aspect, and inter-jurisdictional immunity. Pith and substance relates to the true nature or character of the legislation in question beyond incidental objectives.[77] Paramountcy indicates that provincial legislation is inoperative if it conflicts with federal law to the extent of the conflict.[78] The third principle of inter-jurisdictional immunity is founded on the idea that certain "core" federal and provincial powers may not be encroached upon by the other level of government.[79]

[73] Andrew Byrnes & Hilary Charlesworth, "Federalism and the International Legal Order: Recent Developments in Australia" (1985) 79 AJIL 622 at 638.

[74] As discussed in Williams, Brennan & Lynch, *supra* note 60 at 919–29.

[75] James Crawford, "The Constitution and the Environment" (1991) 13 Sydney L Rev 11 at 21.

[76] Williams, Brennan & Lynch, *supra* note 60 at 242.

[77] *R v Morgentaler*, [1993] 3 SCR 463; see also Patrick J Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2017) at 248.

[78] *R v Morris*, [2006] 2 SCR 915 at 947–48.

[79] *Canadian Western Bank v Alberta*, [2007] 2 SCR 3.

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Finally, the principle of double aspect enshrines an element of recognizing overlapping laws in that where provincial and federal laws are of equal importance and similarity both may be valid.[80] Therefore, the discussion on the limits of federal and CU legislative power is largely discussed using the same tests and language as in Australia, underscoring the shared legal tradition between the two countries in this area, which would suggest a similar treatment of all aspects of federalism.

But, at the same time, Canada has historically been one of the only, if not the only, main federation without a clear treaty power dislocating competence to the federal level.[81] More specifically, the Canadian Constitution has no clear treaty power within it, meaning a somewhat uneasy state of affairs between the CUs and the federal government.[82] While, as mentioned above, the CUs do engage in international law-making, they do so with Ottawa's blessing, in spite of the fact that there is no clear rule. But Ottawa sees this practice as creating a constitutional convention of sorts and, thus, as resolving the situation in its favour.[83]

In Canada, too, an important distinction is drawn between the capacity to enter into a treaty internationally and the implementation of a treaty in domestic law. While, arguably, the ratification of a treaty may remain a federal competence on the basis of the royal prerogative (and there is discussion around this, as seen in the next subsection), the implementation of legal obligations following from a treaty must abide by the division of powers in the Canadian Constitution. In the 1937 *Labour Conventions* case, the UK Privy Council decided that the federal government in Canada could not implement a series of treaties under the International Labour Organization (ILO) because the obligations in those treaties were within the competences reserved to the provinces.[84] So, while the federal government's ability to sign onto the treaties was not in question, their ability to implement them did not exist.

The language on watertight compartments of the federal division of powers in the *Labour Conventions* case has also permeated other aspects

[80] *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161.

[81] Looper, *supra* note 57 at 1053.

[82] Hugh M Kindred, Phillip M Saunders & Robert J Currie, eds, *International Law Chiefly as Interpreted and Applied in Canada*, 8th ed (Toronto: Emond Montgomery, 2014) at 160.

[83] Department of External Affairs, *Federalism and International Relations* (Ottawa: Government of Canada, 1968). Treaty-making power rests on three considerations: "principles of international law relating to the power of component parts of federal states to make treaties; the constitution and constitutional practices of federal states; and, finally, the Canadian Constitution and constitutional practice." Cited in Kindred, Saunders & Currie, *supra* note 82 at 160.

[84] *Attorney-General of Canada v Attorney-General of Ontario and Others*, [1937] Privy Council Appeal No 100 (1936).

of Canadian federalism.[85] For our purposes, the case means that legislation implementing a treaty may not be classified as "in relation to" the treaty but, rather, in relation to the subject matter with which the treaty deals.[86] This case has been defended as a lynchpin of the federation, lest the expansion of international life eliminates all CU legislative competence.[87] Over time, the rule in the case, restricting the POGG powers of the federal government, has been softened, at least with respect to the environment. *R v Crown Zellerbach Canada* discussed the impossibility of drawing lines in this transboundary context as a reason to give full bearing to POGG,[88] but this type of reasoning is unlikely to have much of a bearing on international heritage law, which is largely based on the presence of heritage within a confined territory.[89] The rule has also been softened in allowing the presence of an international treaty to be at least part of the reason for the federal Parliament to enact legislation on a given subject matter.[90]

Therefore, unlike in Australia, where implementation follows necessarily from entering into a treaty, with the effect of dislocating competence, in Canada the CU competence is still protected by this focus on procedure rather than on substance.[91] And, effectively, the Canadian federal government has no clear powers when it comes to international law, leaving open the door for at least some powers for the provinces. Over time, this idea has been used by Aboriginal peoples in Canada as a model for their engagement with the different levels of government.[92] The Canadian solution therefore seems to be more respectful of subsidiarity, even though it looks somewhat artificial (particularly from an international law perspective). Nevertheless, given the centrality of debates around Québec identity, over time this province's attitude *vis-à-vis* international law has exploited the

[85] Peter W Hogg, *Constitutional Law of Canada*, 4th ed (Toronto: Thomson Reuters, 1997), 300 [Hogg, *Constitutional Law*, 1997].

[86] *Ibid* at 300–01.

[87] *Ibid* at 303.

[88] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, cited in Kindred, Saunders & Currie, *supra* note 82 at 177–78.

[89] Even intangible cultural heritage (ICH) is largely defined in relation to the territory where it is practised.

[90] Hogg, *Constitutional Law*, 1997, *supra* note 85 at 303.

[91] On the use of proceduralism as an approach to division of powers in federal countries, see Hueglin & Fenna, *supra* note 43 at 136.

[92] Gib Van Ert & Stefan Matiation, "Labour Conventions and Comprehensive Claim Agreements: A New Model for Subfederal Participation in Canadian International Treaty-Making" in Oonagh E Fitzgerald, ed, *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006) 203 at 203.

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loopholes in the federal arrangement in Canada with respect to international law.[93]

THE SPECIAL CASE OF QUÉBEC?

Québec's engagement with the federal government in Canada has always been tense. As the only fully francophone province in a mostly anglophone country, Québec has often felt its allegiances lay elsewhere and that it needed to protect itself against encroachment by the federal government. The distinctiveness of Québec has triggered a succession of independence movements that has been reflected in a range of legal and constitutional issues. For instance, in 1991, the Constitutional Committee of the Québec Liberal Party called for a wholesale devolution of powers from Parliament to the provinces across a number of areas. Some of these were listed in the Constitution, but over two-thirds of them were not, including matters such as the environment, culture, and social affairs.[94]

This engagement in terms of distinctiveness has also extended to international law, particularly through the 1965 Gérin-Lajoie doctrine. This doctrine proclaims that Québec should be able to engage in international law-making in areas of its competence, in the absence of clear language in the federal Constitution, and in pursuance of Québec's "peculiar destiny."[95] It applies specifically to areas such as language, cultural rights, media and communications, and education.[96] This statement's legal status has always been in discussion.[97] The general consensus is that it is

[93] Armand De Mestral & Evan Fox-Decent, "Implementation and Reception: The Congeniality of Canada's Legal Order to International Law" in Fitzgerald, *supra* note 92, 31 at 36–37.

[94] Williams, Brennan & Lynch, *supra* note 60 at 260.

[95] Allocution de M Paul Gérin-Lajoie, vice-président du Conseil exécutif du Québec et ministre de l'Éducation, aux membres du Corps consulaire de Montréal, 12 avril 1965, reprinted in *Positions du Québec dans les domaines constitutionnel et intergouvernemental de 1936 à mars 2001* (Québec City: Gouvernement du Québec, 2001) 137 at 141, online: <http://www.saic.gouv.qc.ca/documents/positions-historiques/positions-du-qc/partie2/PaulGerinLajoie1965.pdf>.

[96] *Ibid.*

[97] See e.g. a special issue of the *Revue québecoise de droit international* entirely dedicated to the fiftieth anniversary of the statement (June 2016). See particularlyStéphane Paquin & Annie Chaloux, "La doctrine Gérin-Lajoie: 50 ans et pas une ride!" (2016) Revue québecoise de droit international, special series 5; Daniel Turp, "L'approbation des engagements internationaux importants du Québec: La nouvelle dimension parlementaire à la doctrine Gérin-Lajoie" (2016) Revue québecoise de droit international, special series 9; Michèle Rioux & Destiny Tchéhouali, "La *Convention sur la Protection et la Promotion de la Diversité des Expressions Culturelles* de l'Organisation des Nations Unies pour l'éducation, la science et la culture face aux enjeux et défis du numérique" (2016) Revue québecoise de droit international, special series 185; Véronique Guèvremont, "L'exercice de la compétence culturelle du Québec au-delà de ses frontières: de la coopération culturelle internationale au développement du droit international de la culture" (2016) Revue québecoise de droit international, special series 227.

a political statement rather than an upfront challenge to the Canadian federal government.[98] But it has been described as having a myth-making aspect that makes it dangerous from a separatist point of view (not to mention technically incorrect).[99] There has been extensive Québecois practice in international affairs (much like in other provinces) even previous to the Gérin-Lajoie doctrine,[100] which has always been authorized by Ottawa.[101] Thus, the doctrine does not fundamentally alter anything per se. Rather, it is a lightning rod for debate on the autonomy of Québec in relation to Canada with respect to international law.

In a defence of the doctrine, Hugo Cyr has suggested that the speech "was luminous in its pragmatism and far from being revolutionary; it was in the pure British tradition of constitutional evolution and continuity."[102] He disconnects the doctrine from the secessionist movement in Québec[103] and suggests instead that "Canadian constitutional law relating to international relations is much more a product of immanent progressive growth than an instant act of will."[104] Contrary to Ottawa's position, he suggests it is not the case that provinces have international affairs powers because the central government allows it; rather, it is the case that the federal government has foreign affairs powers because of the implied consent by the provinces.[105] This assertion, of course, is not supported by the relevant practice in which Ottawa has always issued statements authorizing the provinces to enter into international agreements. He pushes for the principle of subsidiarity and, at the same time, tries to assuage the issue of Québec treaty powers helping boost the case for separatism (at least as an international legal recognition concern).[106]

Even if this doctrine's status is debated, Québec has successfully argued for some status in international law, alongside Canada, in some areas of competence that have to do with its cultural identity and distinctiveness. Chief among those is the 2006 agreement between Québec and Canada on the permanent representative of Québec in the Canadian delegation

[98] A Jacomy-Millette, *Treaty Law in Canada* (Ottawa: University of Ottawa Press, 1975) at 79.

[99] Stéphane Beaulac, "The Myth of *Jus Tractatus* in *La Belle Province*: Québec's Gérin-Lajoie Statement" (2012) 35 Dalhousie LJ 237 at 241.

[100] *Ibid* at 79–80.

[101] *Ibid* at 80–83.

[102] Cyr, *supra* note 9 at 14.

[103] *Ibid* at 14.

[104] *Ibid* at 38.

[105] *Ibid* at 57.

[106] *Ibid* at 172–73.

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before UNESCO.[107] Heralded as "a new era of partnership,"[108] this agreement is framed by the Québec government as "an unprecedented acknowledgment" of Québec's distinctiveness and international presence.[109] In effect, the agreement means that Québec now has the right to have one of its own representatives, remunerated by the Québec government, on the Canadian delegation before UNESCO and that, whenever possible, the Canadian position will be in consensus with Québec before all activities in the organization. It is also meant to set a precedent for the engagement of CUs in other federal states with UNESCO.[110]

The structure of the delegation provided for in the agreement can be seen as partly mirroring the mixed delegation model of the ILO, but it is original in its inclusion of CUs rather than specific economic actors.[111] This model is relevant for exploring the dimensions and possibilities of trialogical subsidiarity, in that it creates a way for CUs to be a part of the central government's representation, while standing for the interests of CUs. With respect to culture specifically, even though culture does not feature prominently in the Canadian constitutional text (and the federal government intervenes in it, particularly through the spending power),[112] discussions around culture and heritage have always been central in the deals to get Québec to become or remain a part of the constitutional covenant in the country.[113] Therefore, the stakes are particularly high when discussing the

[107] *Agreement between the Government of Canada and the Government of Québec Concerning the United Nations Educational, Scientific and Cultural Organization*, 5 May 2006, online: <http://en.ccunesco.ca/-/media/Files/Unesco/About/Governance/AgreementGOCGOQUNESCO2006.pdf?la=en> [*UNESCO Agreement*].

[108] Speech by Jean Charest, Premier of Québec, 5 May 2006, quoted in Québec Relations Internationales et Francophonie, *Québec-Canada Agreement on UNESCO*, online: <http://www.mrif.gouv.qc.ca/en/relations-du-quebec/organisations-et-forums/representation-unesco/accord-unesco>.

[109] *Ibid.*

[110] *UNESCO Agreement*, *supra* note 107 at 3.4.

[111] Where the delegation is composed of a representative of government, one of employers, and one of employees. This tripartite model is enshrined in the Constitution of the ILO: "Article 3. Conference — Meetings and Delegates. 1. The meetings of the General Conference of representatives of the Members shall be held from time to time as occasion may require, and at least once in every year. It shall be composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members." ILO, *Constitution of the International Labour Organisation (ILO)*, 1 April 1919, adopted by the Peace Conference in April 1919, the ILO Constitution became Part XIII of the Treaty of Versailles (28 June 1919). For a discussion, see José E Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005).

[112] Williams, Brennan & Lynch, *supra* note 60 at 260.

[113] Hogg, *Constitutional Law of Canada*, 2017, *supra* note 44 at 4-5, 4-12.

possibility of a clear competence over culture and using the foreign affairs power as a potential ground for claiming the power. This fact alone makes the case study on intangible cultural heritage more relevant; not only is it an instance in which the CU has attempted to implement international law in spite of the central government's objections, but it is also a subject matter that speaks directly to cultural identity that has pitted the CU and the federal government against each other over time.

Intangible Cultural Heritage as a Case Study

Intangible cultural heritage is defined by the *2003 UNESCO Convention* as "the practices, representations, expressions, knowledge, skills — as well as the instruments, objects, artefacts and cultural spaces associated therewith — that communities, groups and, in some cases, individuals recognize as part of their cultural heritage."[114] It thus speaks to living culture that is constantly renewed and lies close to the identity of groups. In fact, during the drafting of the *2003 UNESCO Convention*, the connection between ICH and minority culture was debated, amidst fears from certain countries that ICH could be used to trigger or foster nationalist or independentist movements. As a result, safeguards in favour of state control over ICH's meaning and international listing were tightened in relation to the initial draft, which already had a number of protections for state sovereignty, seeing as it was based on the 1972 *World Heritage Convention*.[115]

ICH is safeguarded through a range of mechanisms, including education, research, promotion, documentation, international cooperation, and research.[116] Communities are given a nominal role in the national inventorying of ICH (and the requirement of community involvement is a first for a UNESCO treaty) but relatively little role internationally.[117] Among these mechanisms, international lists are key as they pursue one of the objectives of the *2003 UNESCO Convention*, namely to give visibility to ICH.[118] These lists are innovative in that they are meant to be "representative" of ICH around the world, rather than creating a hierarchy of "better-listed" heritage, which is what happened with the World Heritage List.[119]

[114] *2003 UNESCO Convention*, *supra* note 20, Art 2.1.

[115] For more details on this history, see Lucas Lixinski, "Selecting Heritage: The Interplay of Art, Politics and Identity" (2011) 22:1 EJIL 81 [Lixinski, "Selecting Heritage"].

[116] *2003 UNESCO Convention*, *supra* note 20, Art 2.3.

[117] Lixinski, "Selecting Heritage," *supra* note 115.

[118] *2003 UNESCO Convention*, *supra* note 20, Art 1.

[119] Benedetta Ubertazzi, "The Territorial Condition for the Inscription of Elements on the UNESCO Lists of Intangible Cultural Heritage" in Nicolas Adell et al, eds, *Between Imagined Communities and Communities of Practice: Participation, Territory and the Making of Heritage* (Göttingen: Universitätsverlag Göttingen, 2015) 111.

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While these lists are not without their problems,[120] they have been successful in raising the profile of ICH and the *2003 UNESCO Convention*, which in less than fifteen years since its approval has already been ratified by 175 countries (at the time of writing).[121]

As indicated in the introduction, these countries do not include Australia or Canada. The reasons for these two countries' lack of engagement are hard to pin down. However, it seems that, in the Australian case, the resistance is related to the process of Indigenous recognition, with the Australian government seeing Indigenous peoples as the only ones with ICH (which is a mistake, seeing as the *2003 UNESCO Convention* purposefully avoids the use of the term "Indigenous" in the operative part of the treaty).[122] In Canada, it seems that the focus on living culture has been mostly devoted to the 2005 *Convention on the Protection and the Promotion of the Diversity of Cultural Expressions*, another UNESCO treaty that, adopted roughly in the same period, creates a cultural exception to trade in cultural products and that was spearheaded by Canada (but the risk of Indigenous claims being spurred by the *2003 UNESCO Convention* may have also been a factor).[123]

The *2003 UNESCO Convention* includes language on the accommodation of federal countries, which largely replicates the one in the *World Heritage Convention*.[124] This provision — Article 35 — includes two formulae.[125]

[120] Lixinski, "Selecting Heritage," *supra* note 115.

[121] For an updated status list, see UNESCO Intangible Cultural Heritage, *The States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage* (2003), online: <https://ich.unesco.org/en/states-parties-00024>.

[122] For a deeper discussion of these reasons, see Matthew Bevins, *Australia and the Convention for the Safeguarding of the Intangible Cultural Heritage* [manuscript on file with the author].

[123] As discussed by personal communication with Antoine Gauthier (23 October 2017), who led the efforts within Québec for ICH legislation.. *Convention on the Protection and the Promotion of the Diversity of Cultural Expressions*, 20 October 2005, 2440 UNTS 311 (entered into force 18 March 2007).

[124] *World Heritage Convention*, *supra* note 72, Art 34. For a commentary, see Ben Boer, "Article 34: The Federal Clause" in Francesco Francioni, ed, *The 1972 World Heritage Convention: A Commentary* (Oxford: Oxford University Press, 2008) 355.

[125] *2003 UNESCO Convention*, *supra* note 20, Art 35: "Article 35 — Federal or non-unitary constitutional systems. The following provisions shall apply to States Parties which have a federal or non-unitary constitutional system: (a) with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of the federal or central legislative power, the obligations of the federal or central government shall be the same as for those States Parties which are not federal States; (b) with regard to the provisions of this Convention, the implementation of which comes under the jurisdiction of individual constituent States, countries, provinces or cantons which are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption."

The first, which covers countries like Australia, is intended for countries where the treaty-making power creates federal competence for implementation of the treaty; the second, which covers countries like Canada, speaks of countries where the implementation is still left to the CUs. The second formula, in particular, specifies that the federal government only needs to notify the CUs about the treaty and recommend its adoption, therefore not creating clear obligations for the CUs or putting the federal government in breach of the *2003 UNESCO Convention*. Regardless of this compromise, which can accommodate the Canadian situation discussed in the previous section, Canada still has not ratified the treaty.

In spite of the resistance of these two federal entities, CUs within their territories have gone ahead and sought to incorporate the *2003 UNESCO Convention* into their sub-federal legislation, as discussed in the introduction. In Canada, Québec's *Cultural Heritage Act* (*Loi sur le Patrimoine Culturel*) defines ICH as "the know-how, knowledge, expressions, practices and representations transmitted from generation to generation and constantly recreated … that a group recognizes as part of its cultural heritage, and where the knowledge, safeguarding, transmission or valuing is in the public interest."[126] The *Cultural Heritage Act* includes a specific chapter on ICH, and it was widely considered to be heavily inspired, and following from, the *2003 UNESCO Convention*.[127] The provisions on ICH were part of a broader reform of heritage legislation in Québec, a process during which incorporating the *2003 UNESCO Convention*, as the latest instrument within UNESCO, seemed like the obvious choice to keep the *Cultural Heritage Act* in keeping with best international practice.[128]

This piece of legislation, with respect to ICH and the *2003 UNESCO Convention*, focuses on enhancing the value of ICH for Québec's "national identity," but it does relatively little with respect to safeguarding measures, beginning with the fact that it does not contain a clear means of financing the safeguarding of ICH. Further, this act, in its part on ICH, only binds the Québec Ministry of Culture and not other cultural bodies.

[126] *Québec Heritage Act*, *supra* note 22, s 2: "'[P]atrimoine immatériel': les savoir-faire, les connaissances, les expressions, les pratiques et les représentations transmis de génération en génération et recréés en permanence, en conjonction, le cas échéant, avec les objets et les espaces culturels qui leur sont associés, qu'une communauté ou un groupe reconnaît comme faisant partie de son patrimoine culturel et dont la connaissance, la sauvegarde, la transmission ou la mise en valeur présente un intérêt public."

[127] Antoine Gauthier, *Confessions d'un gestionnaire: Les possibilités et les choix liés au patrimoine immatériel à l'échelle nationale* (Québec City: Conseil québécois du patrimoine vivant, 2014).

[128] Personal communication with Antoine Gauthier (23 October 2017); see also Conseil québécois du patrimoine vivant, *Le patrimoine immatériel dans la législation québécoise: Mémoire sur le projet de loi 82 sur le patrimoine culturel déposé à la Commission de la culture et de la éducation de l'Assemblée nationale* (Québec City: Conseil québécois du patrimoine vivant, 2010).

Therefore, the reach of the ICH mandate in the *Cultural Heritage Act* is fairly limited. At the time of writing, there are thirty-seven items on Québec's ICH inventory.[129] These include accordion making, textile weaving, boat racing, harvest festivals, and skiing, among many others. Some elements in this inventory are Indigenous ICH, but they are restricted to Inuit peoples so far. In an act that at least on paper is meant to foster the national identity of Québec (and that is generally perceived to be francophone culture),[130] it is a welcome development that Inuit heritage has been incorporated as part of the Québec cultural narrative.

Indigenous heritage is the central focus of Victoria's *Heritage Act*, which is focused exclusively on Aboriginal heritage, and the Act defines ICH as part of Aboriginal heritage, including "oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public."[131] The last few words of this definition are particularly telling of the overall tone and objective of the legislation, namely to provide the mechanisms so that Aboriginal communities can control their heritage and its uses.

The focus of the *Heritage Act* is on the propertization or control over ICH, which is a means of safeguarding, but one that goes against the idea of cultural commons that is at least partly articulated in the *2003 UNESCO Convention*.[132] The 2016 reforms introduce the concept of ICH to law and policy around Indigenous heritage and allow for the control of ICH by communities of origin.[133] The exploitation of ICH by third parties is possible but only for heritage previously registered on a governmental inventory (the primary purpose of which seems to be to avoid intellectual property claims over ICH by making the criterion of novelty impossible)[134] and then via negotiated agreements involving the communities of origin.[135]

[129] Québec culture et communications, *Répertoire du patrimoine culturel du Québec*, online: <http://www.patrimoine-culturel.gouv.qc.ca/rpcq/rechercheImmateriel.do?methode=afficherResultat>.

[130] Paul Davenport, "Introduction" in Paul Davenport & Richard H Leach, eds, *Reshaping Confederation: The 1982 Reform of the Canadian Constitution* (Durham, NC: Duke University Press, 1984) 1 at 6. Citing Daniel Latouche, "Les Calculs Stratégiques derrière le "Canada Bill"" in Davenport & Leach, *ibid*, 165.

[131] *Victoria Heritage Act*, *supra* note 21, s 79B.

[132] For a general discussion, see Lucas Lixinski & Louise Buckingham, "Propertization, Safeguarding and the Cultural Commons: The Turf Wars of Intangible Cultural Heritage and Traditional Cultural Expressions" in Valentina Vadi & Bruno de Witte, eds, *Culture and International Economic Law* (London: Routledge 2015) 160.

[133] *Victoria Heritage Act*, *supra* note 21, s 12(a).

[134] *Ibid*, s 79C.

[135] *Ibid*, s 79D.

Unauthorized use, or use in violation of negotiated agreements, is dealt with as a criminal offence.[136] The list does not seem to be open to the public,[137] which means the element of visibility of ICH as an objective in itself is downplayed, in favour of control over ICH by communities of origin.

Comparing international mechanisms to the local mechanisms in these two cases highlights not only the ways in which ICH processes are used to evoke the international against, or in spite of, the federal government of each country but also how the international is transformed in this process. Obviously, the Québec and Victoria acts are not direct implementations of the *2003 UNESCO Convention*, even if both CUs refer to the *2003 UNESCO Convention* as being a clear source of inspiration (and civil society actors who led the charge in Québec even see Québécois processes as being capable of aiding the international).[138]

The comparison can be made across a number of domains. Both CUs and the *2003 UNESCO Convention* seem to engage in respect for the subsidiarity of the international and for the treatment of heritage being best done locally (see the *2003 UNESCO Convention*'s language on the involvement of communities). Second, with respect to community engagement and inclusivity, while the language of the *2003 UNESCO Convention* is largely nominal, community engagement is very central to Victoria's *Heritage Act* (which is after all about the control of ICH by the community of origin), but it seems largely secondary in the Québec case (given the lack of emphasis on actual safeguarding and the fact that, at least nominally, Québec's *Cultural Heritage Act* focuses on heritage of importance to Québec's national identity, equating communities' identity with national identity).

Third, in terms of listing as a key safeguarding mechanism, lists exist in all three instances. However, in Victoria's case, listing is not an end in itself as there is little emphasis on the visibility of Aboriginal ICH. Rather, listing is a relatively minor part of a far more aggressive safeguarding and control strategy, whereas it is a central component of the *2003 UNESCO Convention*'s approach to safeguarding and the only tool available in Québec's *Cultural Heritage Act*. Lastly, and importantly, the CU heritage acts advance the law around ICH in an important way relative to the *2003 UNESCO Convention*, by making ICH safeguarding part of a holistic approach to heritage, fully integrated with tangible heritage, rather than a separate regime.

[136] *Ibid*, ss 79G (absence of contract) and 79H (non-compliance with terms of contract).

[137] Government of Victoria, *Registering Aboriginal Intangible Heritage*, online: <https://www.vic.gov.au/aboriginalvictoria/heritage/aboriginal-intangible-heritage-in-victoria/registering-aboriginal-intangible-heritage.html>.

[138] Antoine Gauthier, "Medir el Patrimonio Cultural Inmaterial: Enfoques, desafíos y retos" (manuscript on file with the author).

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Knop has suggested in her case studies on the implementation of international law by sub-state actors that the obligations in the treaties were less relevant than the techniques in them.[139] The same seems to occur here. While both CU statutes implement some sort of inventorying, they do so to achieve objectives (at least partly) that are different from the *2003 UNESCO Convention*: in Québec, visibility is a key concern, and, while it aligns with the *2003 UNESCO Convention*'s objectives, it is only a fairly incomplete way of safeguarding ICH; in Victoria, the listing is done to promote control in favour of communities, which in some ways aligns with the idea of community involvement in ICH but goes against the idea of awareness raising that is so central to ICH safeguarding.

These two CU examples, in referring to the *2003 UNESCO Convention*, could use its spirit to advance their own heritage law, in spite of objections by their federal states. Nevertheless, in their engagement with the international treaty, they have not always been faithful to its letter and spirit. That is understandable; after all, the Québec and Victoria acts are not a direct implementation of the *2003 UNESCO Convention*, and, even if they were, there would still be some leeway in the implementation of the treaty. But these implementation efforts, particularly in light of the resistance of the federal states, highlights the stakes and possibilities of a new engagement with subsidiarity as a legal principle in domestic and international law.

Trialogical Subsidiarity and the Law

The actions of these two CUs (Québec and Victoria) is formal law from the perspective of municipal law and informal law from the perspective of international law.[140] The refusal by Australia and Canada to ratify the treaty left the door open for these CUs (and potentially other bodies and branches) "to engage informally in heterogeneous national and transnational activities oriented around the treaty."[141] In promoting this informal engagement, the international plays a double function. First, it provides guidance on best international practice. Second, this engagement allows for the CU to mount a stand against the central government and indirectly denounce its neglect of the subject matter, while reinforcing the cultural identity of the affected groups (Indigenous peoples in Victoria; the Québecois "national identity" in Québec). This second modality is particularly relevant in the case of Québec and also has some bearing in Victoria, given the controversies in Australia about the recognition of Indigenous culture in the broader legal and political framework. Capitalizing on the subsidiarity of domestic mandates on culture and cultural

[139] Knop, *supra* note 18 at 140–41.

[140] *Ibid* at 133.

[141] *Ibid* at 134.

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heritage, these CUs can also leverage the international to enhance the legitimacy of their actions.

There is a question here as to what the objective of this implementation is. As Knop suggests from a legal process perspective, the implementation can be a means of nudging the central state towards ratification, or it can be the end game in which the CU allows itself to cherry pick the provisions of the treaty it likes best, without the risk of international responsibility or other obligations that follow from ratification. This latter view of implementation as the end game also appeals to legal pluralism since it enhances local diversity. Lastly, it is possible to say that the implementation by CUs allows for the *2003 UNESCO Convention* to be influential, without the risk of Canada's and Australia's potentially problematic positions on ICH[142] to influence the international work on the *2003 UNESCO Convention*.[143]

Subsidiarity can help shed light on these objectives and, most importantly, on their effects. As a key principle of international and constitutional law, subsidiarity is usually conceived of as helping decide on the allocation of authority, with the burden lying on the attempt to centralize authority.[144] Therefore, subsidiarity carries with it a presumption that the local level is best placed to implement law and policy and is often key in periods of institutional transformation, as part of negotiations to lead parties to agree to common authority.[145] That viewpoint, while accurate, assumes a starker division between the local and the international, or the central and the local, which is not in line with the increasing presence of transnational regulation. All local obligations have an international dimension.[146] Further, in many areas, precisely because of the growth of international law's influence, there is a growing suspicion of subsidiarity, as indicated above.

Subsidiarity, read in this way, is unidirectional and only involves two actors at a time. What I propose and call trialogical subsidiarity involves ongoing conversations among the international, the central state, and the local. While the case studies in this article are in federal states (and federations offer clearer incentives and mechanisms for this type of engagement), the ideas herein can also be replicated in unitary states. This version of subsidiarity is different from, and complements, legal pluralism by creating institutional avenues of engagement.

[142] On the Australian position, see Bevins, *supra* note 122.

[143] Knop, *supra* note 18 at 136–38.

[144] For a discussion, see Andreas Føllesdal, "Survey Article: Subsidiarity" (1998) 6: 2 Journal of Political Philosophy 190 at 190.

[145] *Ibid* at 191.

[146] Cyr, *supra* note 9 at 241–42, citing Mark A Luz & C Marc Miller, "Globalization and Canadian Federalism: Implications of the NAFTA's Investment Rules" (2002) 47 McGill LJ 951 at 985–86.

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Trialogical subsidiarity acknowledges that, while the local is presumed to be best placed to implement law, it is also impossible to maintain the illusion that the local can operate in a vacuum. Rather, trialogical subsidiarity creates formal means to channel the possibilities of the international in conjunction with the central state and the local. It allows the central state to refer to international law openly in its dealings with the local and, likewise, allows the local to refer to international law in its own areas of competence.

In terms of the benefits of this model, they spread across the international, central state, and local levels. As far as international law is concerned, international law gains in terms of its spread and influence. The conversation also moves in the direction of a "world federalism that is no longer based on sovereignty but rather on the harmony of overlapping existential communities and functional regimes."[147] Further, clearer lines as to whether and how international law is implemented enhance its legitimacy and give the international a means to influence local behaviour and, at the same time, learn from experience on the ground without it being filtered by the central state. International law can in this way better live up to its aspiration of being a law of the people rather than a law of nations.[148]

With respect to the central state, one possible objection to this model is that it imperils sovereignty. But, even if we buy into the idea of sovereignty still existing in the Westphalian sense, it is not affected by the model I propose. Specifically, it is not for international law to affect federal arrangements in any way; the objective should rather be to find ways of acknowledging those dialogues and help structure them. To be sure, there is the question of international supervision, which would not be possible in CU implementation of international law. But, in those instances, the federal state may use IGR in a way that does not necessarily mean exclusive competence. It is irrelevant to linger on the formal dynamics of the exclusivity of competence to implement treaties, which create an either/or scenario that is not only at odds with reality on the ground but also ultimately unproductive.

With respect to the CU or local level, it gains from broadening the number of possible avenues to which it can resort in enacting local law. While this process already happens informally, as the examples in this article show, more formalized engagement enhances the legitimacy of local action. It also resolves issues around the status and participation of CUs and the local in international law, paving the way for more cooperative and participative international law-making in areas subject to the application of subsidiarity. With more input from the local, too, the results in international law-making are likely to be better.

[147] *Ibid* at 266.

[148] See generally John R Morss, *International Law as the Law of Collectives: Toward a Law of People* (London: Ashgate, 2013).

The analytical payoff is therefore considerable, as trialogical subsidiarity helps us grasp modes of engagement with international law that are largely excluded by a dualist frame. In evaluative terms, the phenomenon I focused on in this article is largely positive, and it can have deep policy implications. In thinking of trialogical subsidiarity as simultaneously engagement with international law and resistance to the central state, one is presented with a sensitive balancing act. More specifically, the CU's engagement with international law, if described as direct exercise of foreign affairs, can lead to a declaration of its unconstitutionality. Trialogical subsidiarity, by deformalizing and transcending the legal strictures of the dualist model, presents a workaround, grounded in pluralism, which enables this engagement of the local with the international.

The international likewise is formally restricted in its engagement with the local since the information is filtered by the central state, as the party to the treaty and the participant in the relevant international fora. But participatory schema like the ILO's, discussed above, present models that can be emulated in other contexts. The implications for areas outside cultural heritage are significant. All areas of social policy that are currently mostly regulated internationally through soft law, like health, education, development, and cultural activities beyond existing cultural heritage can benefit from trialogical subsidiarity. Further, even areas where there is more hard law, like human rights and the environment, stand to gain from clearer lines of cooperation and organization involving the local, the state, and the international.

With respect to global health law, for instance, trialogical subsidiarity can better connect global initiatives to local delivery. The local level's contribution to international rule making in this area can speed up international response to major health outbreaks like the Zika epidemic, for instance, by promoting better data sharing.[149] Education is another valuable example. In education, trialogical subsidiarity can turn aspirational values in soft law documents like the Sustainable Development Goals into concrete policy and delivery more easily.[150] It can also happen to harden international law in this area by being more open to the input from local units.[151]

[149] Christopher Dye et al, "Data Sharing in Public Health Emergencies: A Call to Researchers," *Bulletin of the World Health Organization* (2016), online: http://cdrwww.who.int/bulletin/online_first/16-170860.pdf>.

[150] United Nations, *Sustainable Development Goals*, online: <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

[151] For an overview and arguing for the need to harden international law around education, see Klaus Dieter Beiter, *The Protection of the Right to Education by International Law Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (Leiden: Brill, 2005).

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Finally, with respect to the environment, trialogical subsidiarity can help better articulate competing values such as local development needs. In this respect, trialogical subsidiarity can soften the distortion effects of framing in international legal regimes and leave open ways for more nuanced approaches to the protection of the environment.[152] In doing so, regimes are more effective because local communities, which ultimately enliven those international norms, become themselves stakeholders in the success of the international commitment as opposed to resenting commands coming from distant institutions abroad.

Concluding Remarks

From a substantive perspective, CUs' implementation of international law on culture presents important opportunities to enliven subsidiarity and drive an international law of peoples rather than states. There are a lot of pitfalls, though, and this potential cannot be overpromised. From an institutional perspective, it can be a laboratory for IGR applied to international law beyond the EU debates. Specifically, it paves the way for what I call trialogical subsidiarity. Trialogical subsidiarity transcends debates in international and constitutional law based on either/or answers to issues of allocations of competence and assumes that multiple levels can and should engage with each other, even if not all simultaneously and not all in alignment all the time. This type of engagement can create safeguards for the local against the central state based on the international and, likewise, enhance the legitimacy of the central state in the way it relates to the local. It also comes a long way in establishing a shared language of conversation and enhances international law's reach and bridges its democratic deficit.

While the case studies discussed here have to do with cultural heritage law, a prime case study because of culture's routine connection to the principle of subsidiarity, they extend far beyond culture and into domains like the environment, health, and development. Future research exploring these potentials can add more nuance and further ground this idea. Trialogical subsidiarity has the potential to enhance activity in these areas in a way that, while respecting some of the boundaries between the local, national, and international, simultaneously acknowledges the porosity of those divisions.

[152] André Nollkaemper, "Framing Elephant Extinction" 3: 6 *ESIL Reflection*, online: <http://www.esil-sedi.eu/node/643>.

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