

PREFACE

*Upasana Dasgupta and Christopher Whitehead**

It is with great pleasure that the Co-Chairs present to you this volume entitled “Governing Our Commons: What Matters to Us Today.”¹ It contains the proceedings of selected papers from the McGill Graduate Law Conference 2017 (“Conference”), organized by the Graduate Law Students Association in collaboration with the McGill University Faculty of Law (“McGill Law”) Graduate Studies Office and Dean Maxwell and Isle Cohen Doctoral Seminar Series in International Law.

What do the Co-Chairs mean by “commons” in this volume? In common parlance, the term “commons” denotes “a resource—usually referred to as a common-pool resource—to which a large number of people have access.”² Samuelson makes a distinction between commons and public goods, stating that unlike the commons, public goods are not diminished by use. However, this distinction is perhaps artificial, because if no one contributes to public goods (examples of which may be public radio stations and scientific knowledge) and bears their costs, such goods cannot be produced or supplied.³ Hence, in this volume, we use the term “commons” in a far broader sense, as meaning anything or anyone in which the public at large has a common interest. Governing the commons involves more than just avoiding the “tragedy of the commons,”⁴ a popular subject of discussion around the commons. The term “governing” refers to the proper management of “common-pool resources,”⁵ a concern which does not always have to do with the problem of depletion, and may also cover other conflicts surrounding the commons, such as claims of appropriation and the need for protection. The term is also associated with the regulation of the commons, with the aim of improving the benefit obtained by every user. The commons that this volume deals with in detail are the rule of law and democracy; human rights; children’s right to education; the right to self-defense; human resources as employees; legal education; indigenous artefacts; the sea; and sovereign rights over the sea.

The “global commons” that international law generally has as one of its concerns are the high seas; the atmosphere; Antarctica; and outer space.⁶ However,

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¹ Note that the main title is the same as that of Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 2015).

² Thomas Dietz et al, “The Drama of the Commons” in Elinor Ostrom et al, eds, *The Drama of the Commons* (Washington, DC: National Academy Press, 2002) 3 at 3.

³ *Ibid* at 5.

⁴ A concept developed by Garrett Hardin according to which every entity acts in self-interest and thus tries to reap maximum benefit out of a common resource, leading to the resource’s depletion: Garrett Hardin, “The Tragedy of the Commons” (1968) 62:3859 *Science* 1243.

⁵ See especially Elinor Ostrom, Roy Gardner & James Walker, *Rules, Games, and Common-Pool Resources* (Ann Arbor: University of Michigan Press, 1994), ch 1 at 3.

⁶ UN System Task Team on the Post-2015 UN Development Agenda, *Global Governance and Governance of the Global Commons in the Global Partnership for Development*, 2013, online: United Nations <www.un.org/en/development/desa/policy/untaskteam_undf/thinkpieces/24_thinkpiece_global_governance.pdf> at 5.

other commons, too, have an international dimension, particularly because the study and analysis of commons in one state or region could have implications for other states or regions. In other words, what is at stake is often the same, regardless of location.

For example, Professor Sajal Lahiri's research on children's right to education and the welfare of children in South Asia is relevant to other regions of the world. It is possible to see children as the future of the world; thus, we all have a broad interest in welfare of the children. Problems of child welfare often come down to a lack of infrastructure and of policy initiatives to educate children, and to the fact that children may present an economic interest to the family, if they are old and strong enough to work. Whereas Lahiri gives the example of the situation in South Asia (where 1.9 billion⁷ of the current world population of 7.7 billion⁸ resides), the lot of the children in the region as it is today will affect the future of the globe. In relation to the education to children, the questions arising in South Asia are not too different from those arising elsewhere in the world. In fact, the underlying questions related to different types of commons are often similar throughout the world, though the gravity of issues may differ.

I. Structure of this volume

The introductory article to this volume takes the form of the keynote speech that was delivered at the Conference by Professor Noah Weisbord. He talks about the climate of fear that we are witnessing at present—one more prevalent in certain places, such as Florida. As he addresses the attendees of the conference, he says,

You have deliberately carved out a moment to meet and reflect on our common legal heritage, and how to safeguard it. It is meetings like these, in climates like these, that provide an opportunity to breath in, breath out, and face our fears with reason, compassion, and integrity.⁹

Thus, he raises the question of whether climates of fear are antithetical to the protection of commons. He also raises the question of whether self-defense is a justification or an excuse—or whether there is a commons of self-defense, requiring proper management and governance. The right to self-defense, which is provided for by the *Charter of the United Nations*,¹⁰ is available to all but should be used cautiously, though “climates of fear” make it difficult to use it cautiously. The introductory article sets the tone for the rest of the volume, by conceiving the right of self-defense both as a type of commons and as a right antithetical to the very concept of the commons when not used judiciously.

⁷ “Southern Asia Population (LIVE)” (last visited 2 November 2019), online: *Worldometers* <www.worldometers.info/world-population/southern-asia-population/> [perma.cc/6VTY-S6RC].

⁸ “Current World Population” (last visited 2 November 2019), online: *Worldometers* <www.worldometers.info/world-population/> [perma.cc/XU6U-UDBL].

⁹ Noah Weisbord, “Self-Defense in Climates of Fear” (December 2019 Special Edition) RQDI at p 17, online: SQDI: <www.sqdi.org/en/>.

¹⁰ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 51.

The first student-authored article in the volume, by Mirosław Michał Sadowski, identifies the rule of law and democracy as types of commons and looks at the specific case of Hong Kong, referring to the history of the governance of the Special Administrative Region (SAR). As such, Hong Kong has a special status. Before 1997, the territory was under the sovereignty of the United Kingdom; in 1997, it was transferred to China. Mirosław notes that the rule of law and democracy are commons that are hanging in the balance in Hong Kong, especially because of the tension between the local government of the SAR and the government of the People's Republic of China. Here, Mirosław talks about the proper governance of a commons threatened not by the “tragedy of the commons” but by conflict between those in power.

In the next article, Anumeha Mishra discusses the theoretical aspects of enforcing human rights horizontally. Identifying human rights as commons, she opines that it is not enough for proper governance of human rights that they are enforced only against the state, as is conventionally imagined. Anumeha challenges the state-centric approach to human rights, arguing that human rights violations should not be attributed exclusively to states in today's age of privatization. Perhaps a duty-based society, as existed in ancient India, is more conducive to the proper governance of human rights. The article is a call to re-assess the conventional “human rights discourse” tinted with modern Western view of liberalism, and to look beyond a state-centric approach to the application of human rights. The key to arriving at an improved governance of common-to-all human rights is this: learning to look at the concept of human rights other than through the lens of Western liberalism. Whereas human rights have an individualistic aspect (namely a right that every individual supposedly has), human rights—by virtue of such rights being recognized in every human being—amount to a type of commons.

The following article, by Isabelle Lefroy, looks at indigenous artefacts such as totem poles and how the cultural appropriation of such artefacts violates the rights of indigenous peoples. There are also two aspects to these rights: first, the fact that they are the rights of indigenous peoples specifically; and second, the corresponding duty of the state to protect the rights, endangered as they are today. It is especially this second aspect that makes the label “commons” appropriate. The narratives of indigenous peoples also form part of the history of the state, and the forms used for preserving indigenous culture call for careful protection. Such protection is especially relevant in states like Canada, where indigenous artefacts like totems are commercially exploited by non-indigenous peoples without the consent of indigenous peoples, and without due credit being given to them. At the same time, Isabelle refers to legal pluralism, noting that state-made law may not be always the best approach to protecting the rights of indigenous peoples. We may see her as arguing, in essence, that “where there's a will, there's a way”. Lefroy's message is clear: protecting the rights of indigenous peoples is possible where we acknowledge that these rights matter and then act accordingly.

Whereas Isabelle writes about the appropriation of culture, Martijn Hoogeland writes about the appropriation of the sea. International law is clear that a state has sovereignty over its territorial sea and certain sovereign rights beyond, thanks to the

United Nations Convention on the Law of the Sea (UNCLOS),¹¹ and that the high seas are free for exploration by all, without any state having sovereignty over them. But then there arises a question: what if the boundaries of different areas of the sea that *UNCLOS* covers are not clear? Martijn provides us with a case note on the highly topical South China Sea dispute, a boundary dispute arising for both strategy and resource-related reasons. The case note summarizes this particularly complex and lengthy dispute, explaining it in a lucid fashion and contextualizing it by referring to both the past and the future. The case is an example of how a commons will not be available to all if wrongful claims of appropriation are made in relation to it.

The next article, by René David-Cooper, discusses pilot fatigue. Whereas airspace is not a global common (in the sense that, say, outer space is), pilot fatigue and aviation laws relevant to such fatigue affect the general populace. René treats human resources as a type of commons, relying on several interviews with pilots. He concludes that pilots are often fatigued as a result of airline policy. If not dealt with properly, pilot fatigue may result in aircraft accidents, killing passengers. This risk is one that must be examined in context: airlines face tough competition, high fuel charges, and other surcharges, and have to make the most of their human resources in order to make a profit and maintain operations. Recently, an airline suspended its operations as a result of being unable to pay debts and meet the costs of operating: India's Jet Airways, a 25-year-old airline which was also the longest-running private airline in the country. Important here is the question of where the balance lies between the economic interests of the airline (on the one hand) and the interests of the employee, who should not be overworked (on the other). The status quo is not the way forward; it creates both a risk of airline activities being suspended and a risk of pilot fatigue. Therefore, the status quo serves no one's interests—neither those of the airlines, nor those of airline employees. The purpose of the René's study is to provide us with the perspective necessary to help us work toward finding the right balance.

The following article relates to the commons of knowledge—to education, specifically legal education. Upasana Dasgupta compares the elite law schools of India (on the one hand) and the law schools of Canada (on the other), and discusses a question faced in both jurisdictions, and elsewhere: should law schools emphasize the imparting of “theoretical knowledge” or “practical knowledge”? Here also, the answer lies in achieving a balance between theory and practice. It is not binary. However, the question of where the “perfect” balance lies is difficult to answer. Nevertheless, it is worthwhile doing our best to answer it. This question leads to another, broader question: what should law schools teach? The author navigates the various aspects of this apparently simple question. The question also touches on another: that of the governance of legal education. Any failure to find an appropriate model could potentially have adverse effects for the future of law graduates and, by extension, the rest of society.

The concluding article, which discusses children's right to education, is the keynote speech that was delivered at the Conference by Professor Sajal Lahiri. Children

¹¹ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

are the future of today's world, and therefore, a child's right to education is something in which all of us have "common" interest. In Lahiri's words, "[e]ducation is a human right in itself. It is also a very important means with which one can realise other human rights. Education empowers economically and socially marginalized children to lift themselves out of poverty."¹² As Professor Lahiri points out, where parents are reluctant to have their children educated, often the reason is not so much the short-term interest of the children earning money for the family, but the poor quality of education that the parents expect the children to receive. Thus, the quality of education in much of South Asia must be improved, and the international community should step in to improve children's rights to education.

Thus, all the eight articles relate to commons. Professor Weisbord's introductory article deals with concepts antithetical to commons. The next two articles discuss the theoretical concepts relating to the protection of the commons, which may seem individualistic but also have broader relevance for society. Isabelle and Martijn's articles deal with the appropriation of different types of commons and the resultant controversies and effects. The next two articles, by René and Upasana, discuss governance-related aspects of commons, which, if not treated seriously, have the potential to raise existential questions. The concluding article by Lahiri goes on to talk about the management and governance of a commons that is of immense importance to everyone.

All the articles in this volume provide an important perspective on the concept of commons, understood more broadly than in the traditional sense of the word. Interestingly, many of the articles challenge the existing state-centric systems and point out the problems associated with them. For the Co-Chairs as editors, it was a pleasure to work on with the authors on such pertinent issues.

II. A Glimpse at the Background to this Volume

As already mentioned, this volume of the *Quebec Journal of International Law* ("QJIL") is dedicated to the proceedings of the Conference. The editorial board for the volume includes individuals affiliated with McGill Law.

The McGill Graduate Law Conference is an annual event organised by graduate students at McGill Law. This event offers an academic forum for graduate students, other scholars, members of the legal profession, government, and industry to consider, share, and develop new ideas, concepts and approaches that bridge the gap between the law and other disciplines. Attendees share in McGill Law's rich intellectual culture, with its vibrant graduate community.

In 2016, Maria Manoli, Vice President (Academic) of the McGill Graduate Law Students Association, invited graduate students to form a committee to organize the Conference ("Committee"). The Co-Chairs volunteered, along with Wanshu Cong

¹² Sajal Lahiri, "A child's right to education: What can the international community do?" (December 2019 Special Edition) RQDI at p 166, online: SQDI: <www.sqdi.org/en/>.

(Vice President, Finance); Vincent Dalpé (Vice President, Communications); and Stéphanie Pépin (Vice President, Logistics).

After considerable brainstorming on what the themes for the conference could be, and on which theme would best reflect the diversity of original research conducted by graduate students, the Committee chose the title “Governing Our Commons: What Matters to Us Today”. The Committee released the call for papers in January, 2017. It was designed by talented Committee member Stéphanie Pépin. The call for papers was sent to all the law schools in Canada and to law schools abroad. The Committee’s efforts met with resounding success. It received 116 abstracts from universities all over the world. The abstracts were evaluated, with authors remaining anonymous, by the Committee and other graduate students at McGill Law: Timiebi Aganaba-Jeanty,¹³ Brian Bird; Jeff Kennedy; Maria Manoli; Giacomo Marchisio;¹⁴ Isavani Munisami; Ghyslain Raza; Christophe Savoie; and Sophie Verrier. Once the reviewers had evaluated the abstracts (according to a rubric proposed by us), the Committee took the final decision, having regard to the evaluation criteria, the slots available in the panels, and the expertise of the moderators. It selected 32 abstracts for the Conference, assigning each to a theme-based Conference panel. One of the two days in the Conference was dedicated to the Dean Maxwell and Isle Cohen Seminar Series on International Law.

The Committee was fortunate enough to welcome two exceptional keynote speakers. One was Noah Weisbord, then Associate Professor at Florida International University College of Law and now Associate Professor at Queen’s Law. The other was Sajal Lahiri, Vandever Chair Professor of Economics at Southern Illinois University at Carbondale. Both speakers emphasized the importance of properly governing and managing the commons, so that the enjoyment of rights by the one does not impede the enjoyment of rights by others.

The panels and the speakers were as follows:

Air and space law: Aram Daniel Kerkonian; René David-Cooper; and Maria Manoli;

General international law: Kai Chi Chang; Martijn Hoogeland; and Ming-Yu Bob Kao;

Transnational labour law: Si Chen; Thierry Galani, Tiemeni; and Christopher Whitehead (replacing Stéphanie Pépin, who was ultimately unable to speak);

International criminal law: Vincent Dalpé; Randle DeFalco; Mélanie Deshaies; and Asad Kiyani;

Law and the social sciences: Hannah Birkendötter; Upasana Dasgupta; Jessica Leblanc; and Mirosław Michał Sadowski;

¹³ Then a doctoral candidate at McGill Law, now Assistant Professor at the School for the Future of Innovation in Society, with a courtesy appointment to the Sandra Day O’Connor College of Law at Arizona State University.

¹⁴ Then a doctoral candidate at McGill Law, now a Doctor of Civil Law (having been a Lecturer and Research Associate at McGill Law).

Human rights: Jiangyuan Fu; Stephanie Chipeur; and Christopher Whitehead;

Law, information, and technology: Ido Kilovaty; Isabelle Lefroy; and Sophie Verrier;

Law and social justice: Jeffrey Kennedy; Blair Major; and Anumeha Mishra;

Environmental law: Samuel Cogolati; Alberto Quintavalla; and Johanna Aleria P. Lorenzo;

International humanitarian and refugee law: Mirka Fries; Chris O’Meara; and Chao Yi.

Having decided on the provisional program, the Committee approached McGill Law faculty to act as moderators of the panels and provide financial support. Those who acted as moderators were Professors Adelle Blackett; Richard Gold; Ram Jakhu; Frédéric Mégret; Nandini Ramanujam; Geneviève Saumier; Shauna Van Praagh; and Mark D Walters. Professor René Provost, too, had kindly agreed to moderate, but was unable to do so—as a result of a clerical error on the part of the Co-Chairs, for which they apologize once again! Also acting as moderator was Vanessa Henri. While a graduate student at McGill Law, Vanessa was Chair of the Organization Committee for the McGill Law Graduate Conference 2016.

Three experienced practitioners attended the conference as a part of their continuing legal education. Along with the other attendees, they were treated to presentations of an excellent quality, attracting insightful comments by the distinguished moderators. The attendees found the conference to be outstanding, with one of the practitioners describing it as the most interesting conference on law that she had ever attended!

One of the Committee’s post-conference tasks consisted in arranging for the reimbursement of presenters who had received need-based financial assistance to attend. The McGill Law Accounts Administrator, Sabrina Falco, took charge of this work with her usual flair.

While investigating options for the publication of the proceedings, the Committee had the good fortune to make the acquaintance of Noémie Boivin of the *QJIL*. After discussions with Noémie and others there, the idea of this volume was conceived.

III. Process of Review for this Volume

The first round of review that took place for this volume was during the paper selection for the Conference.

Having considered the quality of the abstracts and the Conference presentations, the requirements of *QJIL*, and the presenters’ availability to publish, the Committee decided on six articles for publication in this volume.

The first round of editing was entrusted to doctoral students at McGill Law, based on their subject-matter expertise: Wanshu Cong; Adrien Habermacher; Vito Di

Mei; Stéphanie Pépin; and Vishakha Wijenayake. These Contributing Editors, along with Co-Chairs, provided detailed feedback on the draft articles, with a view to producing work of an even higher quality. These reviews proved to be very helpful. It was an excellent team, and it was a pleasure for everyone to work with everyone else involved.

The second round of editing was carried out by the Co-Chairs. While attending to the substance of the draft articles, the Co-Chairs focused more on language and adherence to the *Canadian Guide to Uniform Legal Citation*.

The Co-Chairs are doctoral students at McGill Law. Upasana specializes in international law and has performed editorial assignments as graduate research assistant at the McGill Law Institute of Air and Space Law. She edited five of the six articles, except the one authored by herself.¹⁵ Christopher is a Lecturer at the Auckland University of Technology Law School. He has a background in linguistics and in both common law and civil law (of France and Quebec). Christopher edited all six articles. Once edited, the articles were then sent back to the authors, who considered the proposed revisions.

The third and final round of review was carried out by the QJIL itself.

IV. Acknowledgements

As is clear based on the above, this is a volume that would have not seen the light of the day but for the hard work and encouragement of several people.

First, the Co-Chairs would like to thank the authors, without whose hard work there would no volume. The Co-Chairs would also like to thank those McGill Law doctoral students who helped translate the abstracts: Adrien Habermacher,¹⁶ into French; Maria Ceballos, into Spanish; and Silvana Gomez, also into Spanish.

The Co-Chairs would also like to thank the other members of the Committee for their cooperation, diligence, and brilliant ideas, as well as the other doctoral students at McGill Law who helped at the Conference itself: Vito Di Mei; Adrien Habermacher; Maria Manoli; and Lukas Vanhonaeker.¹⁷ The Co-Chairs are grateful to all of them for their support. The Co-Chairs are also grateful to the McGill Law graduate students who helped in the selection of the abstracts.

The Co-Chairs would also like to thank the Conference's two main sponsors, the Dean Maxwell and Isle Cohen Doctoral Seminar Series in International Law and the McGill Law Graduate Studies Office. The Committee received particular encouragement from Jo Anne Sulzenko, daughter of Dean Maxwell and Isle Cohen. Unfortunately, Ms Sulzenko was unable to attend the conference. However, she was

¹⁵ Upasana's article was reviewed by Adrien Habermacher.

¹⁶ Now Assistant Professor at the University of Moncton Faculty of Law.

¹⁷ Now Post-Doctoral Fellow at McGill Law.

kind enough to send us her greetings and well wishes, to be shared at the conference. Richard Gold, the then Associate Dean (Graduate Studies) at McGill Law, was also very supportive to the Committee. He gave it the freedom to make the conference what they wished it to be, all the while providing guidance whenever asked. He also delivered the welcome address. The Co-Chairs would also like to thank the Institute of Air and Space Law and the Erin J.C. Arsenault Fund for sponsoring lunch on one of the Conference days.

The Conference also received generous financial contributions from Professors Andrea Bjorklund, L. Yves Fortier Chair in International Arbitration & International Commercial Law; Professor Ram Jakhu, Institute of Air and Space Law; Adelle Blackett, Canada Research Chair in Transnational Labour Law & Development; Angela Campbell; François Crépeau, Hans & Tamar Oppenheimer Chair in Public International Law, Centre for Human Rights & Legal Pluralism; Fabien Gélinas & Lionel Smith, Sir William C. Macdonald Chairs in Law; Robert Leckey; Johanne Poirier, Peter MacKell Chair in Federalism; René Provost; Nandini Ramanujam, Centre for Human Rights & Legal Pluralism; Geneviève Saumier, Peter M. Laing QC Professor of Law; Stephen A. Scott; Shauna Van Praagh; Hoi Kong, now Rt Hon Beverley McLachlin, PC, UBC Professor in Constitutional Law at Peter A. Allard School of Law at the University of British Columbia; and Mark Walters, then FR Scott Professor of Public & Constitutional Law, now Dean of the Queens University Faculty of Law. Thanks go to the Conference's other sponsors: the McGill Graduate Law Students Association, the McGill Law Career Development Office, Professor Stephen Scott (from personal funds) and Regroupement Droit, changements et gouvernance.

The Co-Chairs also wish to express their gratitude to the two keynote speakers, each of whom kindly agreed to provide a written speech for this volume. The Co-Chairs are also thankful to all the moderators, including faculty, who added further interest and depth to the conference with their input. The Co-Chairs are appreciative of the work of all the presenters, without whose brilliant presentations the Conference would not have taken place. The Co-Chairs also thank the other attendees, including those who attended as part of their continuing legal education.

The Conference would not have been possible without the support of the McGill Law administrative team, particularly Margaret Barrata, Véronique Bélanger, Laura Blaszczyk, Sabrina Falco, Pina Rocco, and Continuing Legal Education Coordinator Valérie Black St-Laurent. The Co-Chairs are also grateful to McGill Parking Services and McGill Security Services for logistical assistance before and during the conference.

The Co-Chairs are grateful to Hotel Omni for hosting one of our keynote speakers, Devi Restaurant and la Société Bistro for hosting the conference dinners, and the Post-Graduate Students' Society (PGSS) House catering team for providing delicious meals and refreshments during the conference.

The Co-Chairs would also like to thank Noémie Boivin and the rest of the *QJIL* team for giving us the opportunity to publish the conference proceedings. The team's patience and timely advice proved invaluable. Throughout the process of preparing this volume, Noémie was just a message away from the Co-Chairs, even

when she was on vacation. The Co-Chairs cannot thank her enough for helping bring everyone's efforts to fruition.

Last, but not least, the Co-Chairs would like to thank the graduate student community at McGill Law for their support throughout the preparation of the conference and the publication of this volume.