McGill Law Journal — Revue de droit de McGill

SUSTAINABLE DEMOCRATIC CONSTITUTIONALISM AND CLIMATE CRISIS

*James Tully**

We know that law is a major enabler of the human activities that cause climate change, biodiversity destruction, and related ecosocial crises. We also turn to the law to regulate, mitigate, and attempt to transform these unsustainable human activities and systems. Yet, these regulatory regimes are often "recaptured" or "overridden" in turn by the very anthropogenic processes causing the crises. The resulting vicious cycles constitute the global trilemma of the twenty-first century that is rapidly rendering the living earth uninhabitable for humans, in radically unequal ways, and for thousands of other species. Integral, non-violent, sustainable democratic constitutionalism is one modest, experimental, trial-and-error response to this trilemma.

Nous savons que le droit est l'un des catalyseurs d'activités humaines contribuant aux changements climatiques, à la destruction de la biodiversité, et aux crises écosociales connexes. Nous nous tournons également vers le droit pour atténuer et tenter de transformer ces activités humaines non durables. Pourtant, troisièmement, ces régimes de réglementation sont souvent « recapturés », voire « supplantés », à leur tour par les processus anthropiques à l'origine de ces crises. Le cercle vicieux qui en résulte constitue le trilemme mondial du XXIe siècle qui transforme la Terre, de manière inégale, en milieu inhabitable pour les humains et pour les autres espèces. Un constitutionnalisme démocratique durable, intégral, non violent, modeste, expérimental, à tâtonnement, est l'une des réponses à ce trilemme.

* Distinguished Emeritus Professor, University of Victoria. I would like to express my gratitude to the members of the McGill Law Journal editorial board for the invitation to give this lecture and for their wonderful hospitality from the beginning right through to rewriting and publication. I owe special thanks to Aaron Mills for all his insight and help with these complex issues. I would also like to thank the Dean and the Faculty and students who engaged in the lecture and discussions that followed in ways that embody the best of the dialogical seeds and tools mentioned in the lecture. This lecture, rewritten for publication, is my small and inadequate gift in gratitude and reciprocity.

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Citation: (2020) 65:3 McGill LJ 545 — Référence : (2020) 65:3 RD McGill 545

Introduction: The Crisis of Sustainability and Responses 547
A. The Sustainability Crisis 547
B. Three Phases of Ecosocial Systems 548
C. Misperceiving the Crisis 549

I. The Vicious Social Systems that Cause the Crisis 550
A. Four Processes of Disembedding and Re-embedding 550
B. The Picture of Law in These Vicious Systems 553

II. Learning from Gaia 556
A. Convergence of Western and Indigenous Life Sciences 556
B. Gaia Hypothesis, Symbiosis, and Symbiogenesis 557
C. Three Phases of Life Systems and Ecological Succession 558
D. Transforming Ecosocial Systems 559

III. The Ecology of Law 560
A. Transformative Ways of Ecosocial–Legal Succession 560
B. Four Seeds of Legal Transformation: Law and Society, Ecology, Indigenous Law, and Ethics 561
C. Six Common Law Tools of Transformation 565

Conclusion: Common Law Contestation, Transformation, Reconciliation 570

Introduction: The Crisis of Sustainability and Response

A. The Sustainability Crisis

As we all know, we humans are entangled in a cluster of interconnected crises of social and ecological sustainability and well-being.

Over the last four hundred years, the West has developed an assemblage of social systems of production, consumption, law, government, military, and education that is socially and ecologically unsustainable and self-destructive. It overreaches and undermines the social and ecological conditions that sustain life on earth for *Homo sapiens* and many other species and ecosystems. It is now the dominant global social system.

It is an assemblage of "vicious" social systems in the technical sense that the regular feedback loops within and between these social systems, and the *informal* social systems and ecosystems on which they depend, reproduce and intensify the destructive effects of the systems on the ecological and social spheres.

We have known that this anti-social system is unsustainable socially and ecologically since the first meetings of scientists at the United Nations on the sustainability crisis in the 1950s and 1960s. The limits to growth were pointed out in the 1970s. The global norm of sustainability was introduced and expanded to sustainability and social well-being in the 1980s and 1990s. The Intergovernmental Panel on Climate Change and thousands of scientific studies track the growth of the crisis and suggest responses. National and international meetings and agreements take place every year. There also have been countless legal responses to climate change and its cascading effects.[1]

Yet the crisis continues despite best efforts so far to address it. We are already into a sixth mass extinction of biological diversity—and biodiversity is the necessary condition of life on earth. If the cascading destructive ecological and social effects of business-as-usual development continue apace, much of the earth may be less habitable, or uninhabitable, for *Homo sapiens* and thousands of other species by the turn of the century. Moreover, the wealthiest people and countries are the major contributors to the crisis, while the poor and poorest countries are the major immediate victims.[2]

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1 See generally Jeremy L Caradonna, *Sustainability: A History* (Oxford: Oxford University Press, 2014).

2 See David Wallace-Wells, *The Uninhabitable Earth: Life After Warming* (New York: Tim Duggan Books, 2019).

Thus, the great question is: What have we learned over the last sixty years and how can we address the crisis most effectively today?

B. Three Phases of Ecosocial Systems

The first thing we have learned from the study of complex social and ecological systems is that they often become *vicious* in the way ours has. They develop in ways that use up the conditions that sustain them, degrading or destroying the interdependent life forms on which they depend, and thus destroying themselves. There are many examples in the history of life systems, both human and non-human.

Fortunately, there are also many examples of resilient members of vicious social and ecological systems changing their behaviour and transforming their vicious systems into virtuous and sustainable ones before collapse, and also examples of recovering from collapse and regenerating virtuous, self-sustaining systems.[3]

Thus, there are three possible phases of life systems. The first is the more or less virtuous and self-sustaining, or conciliatory phase. The second is the more or less vicious and unsustainable, or "crisis" phase. The third phase is the *way* in which unsustainable systems in a crisis phase learn how to change and regenerate the virtuous conditions of sustainability before they collapse. This is the third phase of ecosocial succession and transformation into a regenerated self-sustaining, virtuous system. The way a forest ecosystem recovers after clear-cutting is an example.[4]

From this perspective, we are in the second, unsustainable crisis phase. Thus, the third phase of a complex system is of immense importance for us—that is, of transformation of our vicious systems into virtuous systems. We can study examples of regeneration and think of how to apply them to our own situation.

The vicious social systems that are the cause of the crises of sustainability are not automatons, as the doomsayers claim.[5] They are very complex local and global social systems to which we are subject and on which most of us depend for our livelihood. Our daily productive and consumptive behaviour reproduces them. However, we are not so enslaved to them that we cannot think or act otherwise. We are free to reflect on them and to ask

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[3] Parts I and II of this lecture draw on James Tully, "Reconciliation Here on Earth" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 83 [Tully, "Reconciliation Here on Earth"].

[4] For these three phases or cycles, see Stephan Harding, *Animate Earth: Science, Intuition and Gaia* (White River Junction, Vt: Chelsea Green, 2006) at 231–49, 268–74.

[5] See Craig Dilworth, *Too Smart for Our Own Good: The Ecological Predicament of Humankind* (Cambridge, UK: Cambridge University Press, 2010).

how to live and act differently to regenerate and transform our second-phase, vicious social systems into virtuous, self-sustaining systems. Millions of people are doing so today. I call these responses "Gaia citizenship."[6]

In this lecture, I survey the relevant features of regenerative and transformative sustainability practices and explain how they apply to the practice of law. I call this integral, non-violent, sustainable democratic constitutionalism, or, simply, Gaia law.

C. Misperceiving the Crisis

However, before we turn to regenerative responses, we need to understand how our vicious social systems cause both the crisis phase we are in *and* the misperception we have of it as subjects within it. For Gaia citizens, the reason we have difficulty responding effectively to the sustainability crisis is that we misperceive the crisis.

The reason we misperceive the crisis is that we view it from within the ways of thinking and acting that sustain the vicious social systems that are causing it. It is our self-formation as participants within these social systems that discloses the world around us and our relationship to the environment in a way that overlooks or distorts how they degrade the life-sustaining conditions. Thus, even when we can no longer ignore or discount the damage we are doing, we respond in the standard problem-solving ways and means of the vicious systems, and thereby reproduce their positive feedback loops, rather than changing them. This is the "regulatory trilemma" I mention at the beginning.

Hence, the problem is one not only of misperception, but also of being subjects of the social systems that generate the misperception. Barry Commoner first suggested this in 1971:

> To survive on the earth, human beings require the stable, continuing existence of a suitable environment. Yet the evidence is overwhelming that the way in which we now live on the earth is driving its thin, life-supporting skin, and ourselves with it, to destruction. To understand this calamity, we need to begin with a close look at the nature of the environment itself. Most of us find this a difficult thing to do, for there is a kind of ambiguity in our relation to the environment. Biologically, human beings *participate in* the environmental system as subsidiary parts of the whole. Yet, human society is designed to *exploit* the environment as a whole, to produce wealth. The paradoxical role we play in the natural environment—at once participant and exploiter—distorts our perception of it. ... [We] have become enticed

[6] See James Tully, *On Global Citizenship: James Tully in Dialogue* (London, UK: Bloomsbury, 2014) at 92–93 [Tully, *On Global Citizenship*].

> into a nearly fatal illusion: that ... we have at last escaped from dependence on the natural environment.[7]

In the first section, I discuss the vicious social systems that cause the crisis and generate this fatal illusion of independence from the ecosphere on which all life depends. In the second section, I examine the three phases of the life systems that sustain life on earth, yet that we misperceive from within our current social systems. In the third and longest section, I apply Gaia's teachings to the roles that the practice of law can play in transforming the unsustainable social systems into sustainable, conciliatory ecosocial systems.

I. The Vicious Social Systems that Cause the Crisis

A. Four Processes of Disembedding and Re-embedding

Rather than building social systems that participate in and co-sustain the social and ecological relationships of reciprocal interdependence on which they depend, we have built social systems that prey on them. In 1944, Karl Polanyi initiated one of the best analyses of this global, superpredatory mode of extraction, production, consumption, and disposal that came to global hegemony over the last four centuries. He called it the "great transformation" and "disembedding" from life-sustaining ecological and informal social systems.[8] More recently, scientists call the period from World War II to the present the "great acceleration" of these anthropogenic processes because of their increasingly destructive effects on biodiversity.[9]

From this perspective, four major processes of modernization and globalization disembed humans from participation in the social and ecological systems that sustain life. These processes re-embed us in abstract and competitive economic, political, legal, and military systems that are dependent on, yet destructive of, the underlying interdependent ecosocial relationships.

The first process is the dispossession of peoples who live embedded in reciprocally sustained ecosocial relationships of their territories and lifeways. This includes Enclosure movements in Europe and the worldwide dispossession of Indigenous peoples. They were then subjected to Western

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[7] Barry Commoner, *The Closing Circle: Nature, Man and Technology* (New York: Knopf, 1971) at 14–15.

[8] See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Times*, 2nd ed (Boston: Beacon Press, 2001); George Dalton, ed, *Primitive, Archaic and Modern Economies: Essays of Karl Polanyi* (Garden City, NY: Anchor Books, 1968).

[9] See JR McNeill & Peter Engelke, *The Great Acceleration: An Environmental History of the Anthropocene Since 1945* (Cambridge, Mass: Harvard University Press, 2014).

institutions and laws, such as the *Indian Act* and residential schools in Canada.[10]

It is important to see that Indigenous peoples were dispossessed not only of their traditional territories, but also of their relationship to their territory. Indigenous people explain that the living earth does not belong to them as property. Rather, they belong to the living earth as their mother. She takes care of them with her gifts. In reciprocity, they take care of her by using her gifts in mutually sustainable ways. From their perspectives, colonization refers to the dispossession of their ecosocial, participatory, cyclical, and sustainable ways of life with the living earth.

Aaron Mills explains that Anishinaabe peoples refer to these symbiotic ecosocial systems as gift-gratitude-reciprocity relationships with the living earth. Moreover, they learn how to live this way from how more-than-human animals, plants, and ecosystems live together.[11] Colonization dispossesses and discredits this worldview as "primitive" and replaces it with the modern view that the earth belongs to humans as property. The following three processes of disembedding follow from this initial double dispossession.

The second process of disembedding is the cognizing of the living earth as a storehouse of "natural resources" that become the property of humans, corporations, and states by re-embedding them in systems of Western property law. What we now treat as extractable and commodifiable natural resources are interdependent co-participants in the ecological webs and cycles that sustain life on earth. Relating to the living earth as a storehouse of commodifiable resources disembeds them from these ecological relations and re-embeds them in the abstract and competitive relations of the global market system.[12]

The result of extraction and development under this system is the destruction of the webs of interdependent ecological relationships that sustain the natural and human world, giving rise to the environmental crisis and climate change, and the cascading social crises. Yet, the damage these

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10 See James Tully, *Public Philosophy in a New Key*: *Democracy and Civic Freedom*, vol 1 (Cambridge, UK: Cambridge University Press, 2008) at 257–88 [Tully, *Public Philosophy*, vol 1]; Allan Greer, *Property and Dispossession: Natives, Empires and Land in Early Modern North America* (Cambridge, UK: Cambridge University Press, 2018); Robert Nichols, *Theft is Property! Dispossession and Critical Theory* (Durham, NC: Duke University Press, 2020).

11 See Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847; Aaron Mills, "Rooted Constitutionalism: Growing Political Community" in Asch, Borrows & Tully, *supra* note 3, 133 at 155–58; John Borrows, "Earth-Bound: Indigenous Resurgence and Environmental Reconciliation" in Asch, Borrows & Tully, *supra* note 3, 49 [Borrows, "Earth-Bound"].

12 See Anthony J Hall, *Earth into Property: Colonization, Decolonization and Capitalism* (Montreal: McGill-Queen's University Press, 2010).

processes cause to the ecosphere all along the chains of dispossession, extraction, finance, commodification, production, consumption, disposal, and resource and climate wars has been perceived until recently as "external" to the property system that causes it.

Once the means of the reproduction of human life are under the control of corporations within legal systems of competition, the third process is to treat the productive capabilities of human beings as commodified "human resources" for sale on the labour market. This process is legalized by the global spread of Western contract, labour, and corporate law. It disembeds human producing and consuming capabilities and activities from the surrounding, interdependent, informal social and ecological relationships in which they take place and re-embeds them in abstract, competitive, and non-democratic global market relations.

The productive capabilities of humans are not commodities. They are the co-operatively exercised abilities through which humans participate in the social and ecological systems that sustain life. They are the capabilities through which we belong to and participate in local ecosystems and communities. Yet, they are treated as abstract capabilities that we as separate individuals own; and, by selling the use of them to a corporation, they become the means by which we become subjects of the global market system. The damage that labour and corporate competition do to the informal social systems that producers and consumers live in and which sustain them—such as families, communities, First Nations, networks, and so on—is treated as another externality.

The result of development under this system is the erosion of the webs of interdependent social relations of mutual aid that sustain human communities, giving rise to the well-known forms of social suffering and degradation of modern life: alienation, horrendous inequalities, slums and gated communities, resource and climate wars, and the increasing violence of everyday life.

If the costs of facilitating and protecting this global system, and of remediating the damages it externalizes, were internalized, the system would be economically irrational and would collapse. Yet, from within, it is perceived as the paradigm of economic rationality.[13]

The fourth process is the extraction of the intersubjective human powers and responsibilities of local self-government from their local practices and their alienation to centralized, representative governments, by means of competitive electoral systems in which political parties compete for votes. This fictitious transfer of powers of self-government atomizes and

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[13] See Lester Brown, *World on the Edge: How to Prevent Environmental and Economic Collapse* (New York: WW Norton & Company, 2011).

reduces democratic citizen participation to the individual right to vote and express an opinion in the public sphere.

In these systems of representative democracy, representatives govern *for* the people. Yet, representatives are dependent on non-democratic corporations for taxes, jobs, donations, and thus for re-election. The damage this political system does to learning and exercising reciprocal responsibilities of participatory democratic self-government with fellow citizens in their social and ecological communities is yet another externality.[14] Yet, local participatory democracy is the permaculture of a healthy representative democracy.

Charles Taylor calls these disembedding processes of modernization "excarnation" in *A Secular Age*.[15]

Polanyi predicted that the result of this great transformation would be the demolition of society and the destruction of the environment. Despite his warning and hundreds of others, this competitive assemblage of systems continues to expand.

It is a classic case of a self-destructive "super-predatory" system. It depends on, and is nested within, the informal social and ecological relationships that sustain life on earth. Yet, it preys on and destroys them in an extractive, non-reciprocal, linear, and unlimited way. Moreover, at the same time, it treats the damage it does to them as externalities, as if it were independent of them.

These are the main vicious systems that are creating and accelerating the crisis phase of the earth's life systems and rendering it uninhabitable.

B. The Picture of Law in These Vicious Systems

What is the paramount perception of law that goes along with participation in these vicious social systems? First, as Commoner argued, the constitutive and regulative legal systems are misperceived as independent and autonomous from the ecological and informal social systems on which they depend.[16]

Second, the constitutive role of law is the coercive imposition of a structure of laws that govern the four systems. Since the eighteenth century, the role of law has been to facilitate and regulate competition over the exploitation and use of these commodified, natural, and human resources for

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14 See Tully, "Reconciliation Here on Earth", *supra* note 3 at 106–07; Tully, *On Global Citizenship*, *supra* note 6 at 84–100.

15 Charles Taylor, *A Secular Age* (Cambridge, Mass: Harvard University Press, 2007).

16 See Commoner, *supra* note 7.

the sake of security, linear economic growth, profit, and comparative advantage, and to do so in accordance with the private and public freedoms and rights of modern subjects and corporations.

The rationale is that legally constrained competition among individuals, groups, corporations, unions, political parties, universities, states, and military-industrial complexes in these value spheres is the motor of human development and progress. Through the hidden hand of these dynamic social systems and the reflexive monitoring and regulation of law, these competitive, self-interested activities move the human species through developmental stages toward representative democracy, perpetual peace, global equality, and technological solutions to the climate crises in some future generation. The increasing wars, oligarchies, inequalities, and ecosocial destruction of the present are not evidence against this faith in further development, for these vicious means are presumed to lead to virtuous ends in some generation that is always said “to come” by more of the same.

Adam Smith, Immanuel Kant, Georg Wilhelm Friedrich Hegel, John Stuart Mill, Karl Marx, and Max Weber developed this background picture and it continues to shape perceptions today.[17]

In the 1970s, it became obvious that these so-called progressive systems are undermining the ecosocial sustainability conditions of life on earth. The response was to add the norm of “sustainability” onto the meta-norm of “competitive development”: that is, “sustainable development.” The great, ongoing legal struggles for regulation and limitation under the sustainable development norm have made important modifications to the four systems and their effects. However, these regulations have been captured—and often rolled back—by the overpowering dynamic of the vicious systems, and subordinated to it.[18] This is the trilemma of the present.

A third misperception is of a modern, constitutional legal system as the imposed basis of civility, sociality, and democracy, rather than one that is in concert with, or dependent on, other life-sustaining systems. Hence the uniquely modern term “constitutional [representative] democracy.” Humans are portrayed as anti-social and incapable of self-organization and self-government without it—in either an antagonistic state of nature without the rule of law (*terra nullius*) or a “failed state” today.[19]

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17 See Tully, *Public Philosophy in a New Key: Imperialism and Civic Freedom*, vol 2 (Cambridge, UK: Cambridge University Press, 2007) chs 5, 7 [Tully, *Public Philosophy*, vol 2].

18 See Caradonna, *supra* note 1.

19 See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995) [Tully, *Strange Multiplicity*]; Tully, *Public Philosophy*, vol 1, *supra* note 10, ch 8; Tully, *Public Philosophy*, vol 2, *supra* note 17, ch 9. For the application of this way of thinking to “failed states” today, see Vijayashri Sripati, *Constitution-Making Under UN Auspices: Fostering Dependency in Sovereign Lands* (New Delhi: Oxford University Press, 2020).

Yet, despite this orthodoxy, there is considerable evidence for the contrary view that there are informal, everyday, local, and global social systems of co-operation and conciliation that precede historically and continue to underlie the formal competitive relationships of the dominant competitive social systems. These informal relationships of mutual aid are seen as the major factor in human evolution. *Homo sapiens* would have perished long ago if this were not the case.

The argument is that humans are able to survive the destructive competitiveness of modern life only in virtue of the continuing existence of such relationships of mutual aid within and around the formal, competitive systems in which we are constrained to inhabit. When these conciliatory relationships are noticed from within the dominant worldview, they are misperceived as "social capital" or a minor, volunteer sector. As the race for what's left of natural resources increases, climate and social crises and wars intensify, and antagonistic relations of organized anger become the norm, these intersubjective co-operative relationships become frayed and broken. Yet, even in the worst of cases, these informal relationships appear and enable the victims to survive.[20]

That is a very brief summary of the vicious social systems that are causing the crisis and three misperceptions of the roles of law that accompany them. While brief, it is enough, I hope, to indicate how state and international law have been radically transformed in the modern period to serve the development of the four vicious social systems and limit legal and governmental attempts to reform them in response to the crisis.[21] I will now move around and describe our situation from the perspective of the surrounding, life-sustaining ecological and informal social systems.

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20 For the classic presentation of this argument, see P Kropotkin, *Mutual Aid: A Factor of Evolution* (London, UK: William Heinemann, 1902). See also Fritjof Capra, *The Hidden Connections: Integrating the Biological, Cognitive, and Social Dimensions of Life into a Science of Sustainability* (New York: Doubleday, 2002); Joanna Macy & Chris Johnstone, *Active Hope: How to Face the Mess We're in Without Going Crazy* (Novato, Cal: New World Library, 2012); Samuel Bowles & Herbert Gintis, *A Cooperative Species: Human Reciprocity and Its Evolution* (Princeton: Princeton University Press, 2011).

21 See James Tully et al, "Introducing Global Integral Constitutionalism" (2016) 5:1 Global Constitutionalism 1. For a devastating critique of this role of Western law in colonization and modernization from an Indigenous perspective, see Aaron James Mills (Waabishki Ma'iingan), *Miinigowiziwin: All That Has Been Given for Living Well Together; One Vision of Anishinaabe Constitutionalism* (PhD Dissertation, University of Victoria, 2019) [unpublished] [Mills, *Miinigowiziwin*].

II. Learning from Gaia

A. Convergence of Western and Indigenous Life Sciences

In this section, I discuss what the life sciences can teach us about how life systems have learned to sustain and complexify life and well-being over 3.8 billion years. I call this learning from Gaia. In the final section, I discuss lessons the legal profession can learn from Gaia in transforming our vicious social systems into virtuous systems.

Indigenous people have been learning from Mother Earth by trial and error for thousands of years and preserving this knowledge in their traditional ecological sciences, practices, laws, and stories of interdependency and gift-reciprocity relationships among all living beings. I have learned about this from Richard Atleo Sr., John Borrows, Aaron Mills, and Val Napoleon.[22]

Ethno-ecologists argue that there is a convergence of Indigenous sciences of sustainability and the new, Western earth and life sciences. After centuries of dismissing Indigenous lifeways and promoting the misperceptions of independence, dominance, and exploitation, the Western life sciences are coming around to an interdependent, symbiotic, and co-sustaining picture of the place and role of humans in the living earth with our more-than-human relations. They are entering into a local and global dialogue with Indigenous peoples in research and practice.[23]

Aldo Leopold, a forest ranger in the United States and Canada, foresaw this transformation in 1949. He argued that we have to move from seeing ourselves as the conquerors and controllers of nature, to seeing ourselves as "plain member[s] and citizen[s]" of the biotic communities in which we live. We need to learn and practise the primary responsibilities we have as co-sustaining citizens of the living earth.[24]

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[22] See E Richard Atleo (Umeek), *Tsawalk: A Nuu-chah-nulth Worldview* (Vancouver: UBC Press, 2004); Borrows, "Earth-Bound", *supra* note 11; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Indigenous Constitution*]; Mills, *Miinigowiziwin*, *supra* note 21; Valerie Ruth Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, 2009) [unpublished].

[23] See Nancy J Turner, *The Earth's Blanket: Traditional Teachings for Sustainable Living* (Seattle: University of Washington Press, 2005) at 232; Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge and the Teaching of Plants* (Minneapolis: Milkweed, 2013).

[24] See Aldo Leopold, *A Sand County Almanac with Essays on Conservation from Round River* (New York: Oxford University Press, 1966) at 217, 220.

B. Gaia Hypothesis, Symbiosis, Symbiogenesis

In the 1960s, James Lovelock, an earth systems scientist, discovered the Gaia hypothesis. Despite the vast changes in the solar energy coming to the earth over the last 3.8 billion years, and despite the vast changes in the forms and conditions of life on earth over the same period, the atmospheric conditions and the temperature of the earth have somehow remained in the range that sustains life on earth.[25]

The Gaia hypothesis is that the ecosphere, and all the systems of life that compose it, somehow regulate the atmosphere and temperature to sustain life. The biotic and abiotic ecosphere as a whole is self-organizing and self-sustaining (sympoietic). The hypothesis has survived a number of tests and is now classified as a theory. The reason Lovelock called it the Gaia hypothesis is that the Greeks also believed that the earth is alive. They called the spirit of earth *anima mundi* (the soul, energy, or animacy of earth). They took it to be a goddess—Gaia. The majority of scientists associated with the Intergovernmental Panel on Climate Change endorse it.[26]

This discovery has led to attempts to explain how the systems that compose the ecosphere actually regulate the content and temperature of the atmosphere within a broad range of cycles that sustain most forms of life—from ice ages to warm periods, such as the Holocene and Anthropocene, in which we live.

For our purposes, the important insight comes from Lovelock's colleague, Lynn Margulis. She argued that the Gaia hypothesis is not based on the assumption that the assemblage of life systems that compose the ecosphere is itself a purposeful living being that regulates the climate and temperature to sustain life. Rather, the self-sustaining quality of Gaia is an emergent property of the life systems that compose the ecosphere. Some Gaia theorists explain that the Gaia hypothesis is just symbiosis and symbiogenesis on a planetary scale. Life sustains, develops, and complexifies through life systems living with each other in complex interdependent ways (symbiosis), and giving rise to new life systems (symbiogenesis).[27]

Spatially, symbiosis refers to the immensely complex webs or networks that link all forms of life in relationships of reciprocal interdependence. Temporally, these networks are cyclical. They form cycles in which the

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25 See e.g. James Lovelock, *The Ages of Gaia: A Biography of Our Living Earth* (New York: WW Norton & Company, 1995). For an introduction to Lovelock's Gaia theory, see Harding, *supra* note 4 at 68–91.

26 See John Gribbin & Mary Gribbin, *He Knew He Was Right: The Irrepressible Life of James Lovelock and Gaia* (London, UK: Allen Lane, 2009). For an explanation and testing of the Gaia hypothesis (now classed as a theory), see Harding, *supra* note 4.

27 Lynn Margulis, *Symbiotic Planet: A New Look at Evolution* (Amherst, Mass: Basic Books, 1998); Gribbin & Gribbin, *supra* note 26 at 155–56, 189, 221.

"waste" of one interdependent member is used in some sustaining way by another member, so that nothing is wasted, and at a temporality that enables species and ecosystem renewal. Photosynthesis is the prototype of this spatio-temporal quality of reciprocal interdependency and cyclical renewability of life.[28]

C. Three Phases of Life Systems and Ecological Succession

The way life sustains life is not that the whole system regulates the conditions of life for its members. Rather, it is the other way round. The plain members and citizens of Gaia sustain it by means of their symbiotic participation in it. *Homo sapiens*, as one minor species among millions, are members and citizens just like all others, with ecological responsibilities to participate in ways that reciprocally sustain the networks that support them. *Symbiosis* and *symbiogenesis* are just technical terms for how forms of life live together in mutually supportive ways and, in so doing, give rise to new symbiotic forms of life.

These virtuous feedback relationships of mutual support and sustainability are the major factor in the evolution of life on earth. Life systems that sustain life symbiotically are "virtuous" life systems. Sustainable, conciliatory-phase life systems are not harmonious. They are often far from equilibrium, patchy, full of cheaters, and subject to perturbations that can cause the system to tip over into a second-phase, vicious system. Yet, for all that indeterminacy, their remarkable qualities of resilience enable them to sustain themselves over vast stretches of time.

Conversely, second-phase life systems that destroy the interdependent life systems on which they depend, and thus destroy themselves, are called "vicious" life systems. If vicious life systems were the major factor in evolution, life would have perished. The opposite is the case. Life has become more complex. Symbiosis and symbiogenesis have prevailed most of the time, even recovering from five mass extinctions and periodic ice ages.

Like virtuous systems, vicious systems are also far from equilibrium and subject to tipping points. Life has resilient powers of regeneration by producing networks of symbiosis within a vicious system, or within the ruins of a vicious system.

Regeneration or reconciliation work by being the change. Members of a vicious system begin to change and interact symbiotically and symbiogenetically within it, thereby transforming it step-by-step into a virtuous one. Regeneration or ecological succession is *autotelic*: the means prefigure and

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[28] See Commoner, *supra* note 7 at 18–31.

enact the end. This is the third phase of life systems in which the participants transform a vicious system into a virtuous or conciliatory one, by interacting symbiotically.

Take the example of the recovery of a forest from clear-cutting. Living plants and microorganisms that remain in the clear-cut forest do not only reproduce themselves. Their very life processes nourish their habitat and co-generate the conditions of life around them. These cycles of life creating the conditions for more life continue as a forest gradually grows back into a rich, biodiverse ecosystem. This is ecological succession. We humans can learn how to transform our own vicious social systems from the way in which ecological succession transforms a vicious ecosystem into a virtuous one.[29]

D. Transforming Ecosocial Systems

The human sciences have entered into a dialogue of mutual learning with the life sciences in three important ways. The first is over the terms *symbiosis* and *symbiogenesis*. They have a long history in the human sciences. They refer to how human beings and communities have lived together in interdependent relationships of mutual support, conflict, conciliation, and peace. Such informal symbiotic social relationships exist within and across every social system, even within the most vicious and damaging social systems. Like the clear-cut forest, they can provide the basis for initial, small steps of regeneration.

The second Gaia lesson is the realization that we are not dealing with two independent paths of symbiotic evolution, one for non-human life and the other for human life. Rather, non-human symbiotic ecosystems and human symbiotic social systems are perceived as evolving interdependently and reciprocally. They are interdependent, strongly coupled, and co-evolving ecosocial systems. As a result, humans are perceived as co-evolving apprentice citizens within their interdependent ecosocial systems. As William Rees argues, “we can no longer understand the dynamics of either the natural system or the human subsystem in isolation without understanding the dynamics of the other component.”[30] This is a revolutionary transformation of the independence misperception.

The third lesson is how to transform vicious social systems so they interact symbiotically, rather than destructively, with the ecosocial systems

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[29] See Ronald K Faulseit, ed, *Beyond Collapse: Archaeological Perspectives on Resilience, Revitalization, and Transformation in Complex Societies* (Carbondale, Ill: Southern Illinois University Press, 2016) at 6–16; Tully, “Reconciliation Here on Earth”, *supra* note 3 at 113.

[30] William E Rees, “Thinking ‘Resilience” in Richard Heinberg & Daniel Lerch, eds, *The Post Carbon Reader: Managing the 21st Century’s Sustainability Crises* (Healdsburg, Cal: Watershed Media, 2010) 25 at 32.

that support them by learning from ecological succession. While recognizing the unique features of human social systems, successful ecosocial transformation and re-embedding of our four vicious systems requires modelling on, or biomimicry of, ecological succession. This way of transformation goes beyond the modern models of reform and revolution, both of which are internal to the vicious systems and based on their legitimating misperceptions. This ecosocial way is to "be the change": to act and interact symbiotically and co-sustainably in and around the vicious social systems we inhabit.

This is how Fritjof Capra puts it:

> [W]e do not need to invent sustainable communities and ways of transformation from scratch but can model them after nature's ecosystems, which are sustainable and regenerative communities of plants, animals, and microorganisms. ... [A] sustainable human community is one designed in such a manner that its ways of life, businesses, economy, physical structures, and technologies do not interfere with nature's inherent ability to sustain life.[31]

Rather, these communities of practice participate in this life-sustaining ability—the greatest power on earth.

III. The Ecology of Law

A. Transformative Ways of Ecosocial-Legal Succession

If Indigenous and Western life sciences are correct, then our damaged yet still life-sustaining ecosocial systems can be the permaculture of regeneration and transformation. The way of transformation of crises-ridden systems toward a self-sustaining future is to participate in, cultivate, expand, and scale out the symbiotic or being-with relationships of reciprocal interdependence in which we find ourselves in our everyday activities. At some locale and time, a critical mass of such communities of practice will reach a tipping point and transform the local unsustainable social systems. As these local initiatives are nurtured and grown, they interconnect with others and bring about larger transformations, as in ecological succession. Think globally, act locally.[32]

In this way of regeneration there is no privileged position or actor. It is applicable whenever and wherever we find ourselves, in every ecosocial

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[31] Capra, *supra* note 20 at 230. For an example of implementing this biomimicry, see William McDonough & Michael Braungart, *Cradle to Cradle: Remaking the Way We Make Things* (New York: North Point Press, 2002).

[32] See Rees, *supra* note 30; Faulseit, *supra* note 29. I discuss the history of this way of thinking about ecosocial change in James Tully, "Life Sustains Life 1: Value, Social and Ecological" in Akeel Bilgrami, ed, *Nature and Value* (New York: Columbia University Press, 2020) 163 and in James Tully, "Life Sustains Life 2: The Ways of Reengagement with the Living Earth" in Bilgrami, *supra* note 32, 181.

footstep we take. It encompasses all the experiential, trial-and-error, reflexive, practical arts of being virtuous Gaia citizens. Millions of people are already engaged in them, in being the change.[33]

As earth citizens reciprocate by taking care of the social and ecological systems that sustain their well-being and connect with others doing the same, something both miraculous and commonplace occurs. The ecosystems regenerate and reciprocate in turn, thereby further animating these fellow citizens and their sustainable social systems. This "rebound" is the sign of humans reconnecting with the animacy of the living earth: the co-operative power of life itself. It is pragmatic proof of the Gaia hypothesis.[34]

In this final section, I examine the roles that practitioners of common law can play in this way of succession and transformation. I am far from the first to do so. Two famous lawyers developed this whole way of transformation of Polanyi's four vicious systems in the first half of the twentieth century: Mahatma Gandhi and Richard Gregg. I refer to it as integral non-violence.[35]

B. Four Seeds of Legal Transformation: Law and Society, Ecology, Indigenous Law, and Ethics

I believe we can perceive four legal seeds or movements of transformation that have been planted and cultivated in response to the climate crisis over the last seventy years. To use a mantra connected to McGill University, these are legal "seeds of a good Anthropocene."[36]

The first seed is the reconnection of law and society. The law and society revolution rejects the autonomy and priority of law and recognizes its rela-

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[33] See Paul Hawken, *Blessed Unrest: How the Largest Movement in the World Came into Being and Why No One Saw It Coming* (New York: Viking, 2007); Tully, *On Global Citizenship*, *supra* note 6.

[34] See Macy & Johnstone, *supra* note 20; Harding, *supra* note 4. For two of the most comprehensive accounts, see Fritjof Capra & Pier Luigi Luisi, *The Systems View of Life: A Unifying Vision* (New York: Cambridge University Press, 2014); Sean Esbjörn-Hargens & Michael E Zimmerman, eds, *Integral Ecology: Uniting Multiple Perspectives on the Natural World* (Boston: Integral Books, 2009).

[35] Gandhi is well known. Richard Gregg (1885–1974) was a Harvard-educated lawyer who practised law during the great railway workers' strikes of the early 1920s, moved to India and lived and worked with Gandhi between 1925 and 1929, returned to the United States, yet continued to correspond, visit with, and write about Gandhi until 1947. He became friends with Martin Luther King Jr., and the civil rights movement of the 1950s and 1960s used his books extensively. See Richard Bartlett Gregg, *The Power of Nonviolence,* ed by James Tully (Cambridge, UK: Cambridge University Press, 2019).

[36] Seeds of Good Anthropocenes is a global network that has a major node at McGill University. It connects people around the world who are working to regenerate sustainable ecosocial systems: see "Seeds of Good Anthropocenes" (2019), online: <goodanthropocenes.net> [perma.cc/SM67-VCSN].

tional interdependency on the surrounding virtuous and vicious social systems. This includes the academic and practical work on law and race, gender, sexual orientation, class, language, religion, Indigeneity, and intersectionality. The objective is to bring the practice of law into dialogue with diverse citizens who are subject to it, so they can become active agents and citizens of it. This refers not only to dialogues between the courts and representative government and public spheres. It includes dialogues with the diverse citizens who are subject to the particular law in question, so they are active agents of it, having a democratic say, and even a hand, in the laws' life cycles of formulation, enactment, enforcement, review, challenge, and amendment.[37]

This social democratization of lawmaking is enacted through countless practices of consultation in almost every area of law. Citizens have a say about it from their intersectional standpoint within the virtuous and vicious social relationships they inhabit. The law is required to understand them in their language and from their perspective (the duty to listen). It is justified by the democratic principle that "all affected" should have an effective say. This movement is based on the equiprimordiality of democracy and rule of law. Thus, it is called "democratic constitutionalism," in contrast to constitutional democracy, which is based on the priority of the constitution to representative democracy. A constitutive norm of democratic constitutionalism is the sustainability and well-being of all communities and members affected by it.[38]

The second seed is the reconnection of law and ecology or environment. Here, the law-and-society nexus is re-embedded in the Gaia laws of the ecosystems and ecosphere that underlie and co-sustain all other *nomoi*.[39] It rejects the misperception that the earth is a legal vacuum prior to the imposition of human law and adopts the working hypothesis that the earth's systems constitute a plenitude of Gaia laws.[40]

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[37] See e.g. Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2013); Gina Starblanket & Heidi Kiwetinepinesiik Stark, "Towards a Relational Paradigm—Four Points for Consideration: Knowledge, Gender, Land, and Modernity" in Asch, Borrows & Tully, *supra* note 3, 175.

[38] For the emergence of democratic constitutionalism and its major features, see Tully, *Public Philosophy*, vol 2, *supra* note 17 at 91. For a critical discussion of it from various perspectives, see Tully, *On Global Citizenship*, *supra* note 6; Robert Nichols & Jakeet Singh, eds, *Freedom and Democracy in an Imperial Context: Dialogues with James Tully* (Abingdon: Routledge, 2014). On sustainability as a constitutive norm of democracy, see Anthony Simon Laden, "The Value of Sustainability and the Sustainability of Value" in Bilgrami, *supra* note 32, 205.

[39] *Nomoi* is the plural of *nomos*. *Nomoi* refers to the plenitude of human and natural normative orders embedded in their broader cultures.

[40] See generally Fritjof Capra & Ugo Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland, Cal: Berrett-Koehler, 2015).

Hence, a proposed law is tested on its ability to sustain both the ecosystems and the social systems it affects intergenerationally. Legal practitioners do this by dialogues with the humans who live there, and, as much as possible, with their fellow citizens of plants, animals, micro-organisms, and ecosystems. Experts in various fields often perform this for the courts. However, it can also be done by means of perceptual dialogues of citizens with their bioregions and their members. These dialogues involve using all one's senses—synesthesia. Deep ecologists, eco-phenomenologists and eco-psychologists argue that human–nature dialogues reconnect us with the living earth, overcome our misperception of independency, and heal our nature deficit disorder.[41] Excellent examples of this movement are the Indigenous and non-Indigenous land-based legal courses in Canadian law schools.

The third seed is the beginning of just and democratic relationships of common and civil law with Indigenous legal systems. Settler law is moving ever so slowly toward the possibility of transforming and abjuring its colonial relation to Indigenous legal systems, recognizing their priority and equality, and entering into dialogues of negotiation and reconciliation.[42] This movement has the potential to effect a double decolonization.

First, this seed works to uproot dispossession—the first step in the generation of the four systems that cause climate crises. This slow movement works in many ways. For example, Indigenous and non-Indigenous legal practitioners slowly persuade the Crown to recollect and acknowledge that whatever sovereignty it may possess, it is only de facto; and that it can be made de jure only by nation-with-nation treaty negotiations in accord with the Royal Proclamation of 1763, now in section 25 of the *Canadian Charter of Rights and Freedoms,* and with the *United Nations Declaration on the Rights of Indigenous Peoples*.[43]

Second, Canadian courts are beginning to recognize that Indigenous legal systems are embedded in their enveloping social and ecological systems, and have been oriented to sustaining them over the last 12,000 years. Con-

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41 See e.g. David Abram, *The Spell of the Sensuous: Perception and Language in a More-Than-Human World* (New York: Vintage Books, 1997) at 125.

42 See Borrows, "Indigenous Constitution", *supra* note 22 at 118–119, 124; John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 37–38. The University of Victoria joint common law and Indigenous law program (JID) that Borrows, Val Napoleon, and Jeremy Webber established, and which Sarah Morales and Robert Clifford joined, is exemplary. See "Joint Degree Program in Canadian Common Law and Indigenous Legal Orders (JD/JID)" (last modified 2020), online: *University of Victoria* <www.uvic.ca> [perma.cc/7PWW-VZG7].

43 See Joshua Ben David Nichols, *A Reconciliation Without Recollection? An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020) at 24; Kent McNeil, "Indigenous and Crown Sovereignty in Canada" in Asch, Borrows & Tully, *supra* note 3, 293.

sequently, Western legal practitioners can learn through comparative dialogues with Indigenous law keepers how to live in good, sustainable ways with Mother Earth. The Honourable Justice Grammond states, "Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land. ... In a long line of cases, Canadian courts have recognized the existence of Indigenous legal traditions and have given effect to situations created by Indigenous law."[44]

This movement challenges and dismantles the superiority complex of modern Western law and goes beyond Capra's injunction to learn from Gaia. As the Honourable Chief Justice Finch argues, it enjoins lawyers to listen and learn from Indigenous people who have been learning from Mother Earth for millennia.[45]

The fourth seed is the connection of law and ethics. At the heart of this re-embedding movement is the hypothesis that each of us has to be the change we wish to bring about, to be exemplars of a virtuous—sustainable and conciliatory—ethos in the way we teach, learn, and practise law. It rejects the adversarial-imposition view and adopts the view that law is a complex, difficult, and challenging dialogue of co-operation and contestation with all our interdependent relatives.[46]

In summary, these four seeds enable us to re-embed and reconnect ourselves as co-dependent members and citizens of the plenitude of ecological, social, and legal normative systems that sustain life, with responsibilities to sustain them in reciprocity. Common law is one interdependent *nomos* among many in the commonwealth of all laws. The very fact that these seeds exist and appear to be growing gives a glimmer of hope in our dark times.[47]

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[44] *Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 8.

[45] See The Honourable Chief Justice Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper delivered at the Continuing Legal Education Society of British Columbia conference on Indigenous Legal Orders and the Common Law, Vancouver, 15 November 2012), online (pdf): <www.cerp.gouv.qc.ca> [perma.cc/H789-2ZRY]. See also Nancy J Turner & Pamela Spalding, "Learning from the Earth, Learning from Each Other: Ethnoecology, Responsibility and Reciprocity" in Asch, Borrows & Tully, *supra* note 3, 265; Brian Noble, "Treaty Ecologies: With Persons, Peoples, Animals, and the Land" in Asch, Borrows & Tully, *supra* note 3, 315.

[46] See John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019). He describes the seven grandparent ethical teachings or gifts of Anishinaabe legal practice (*Niizhwaaswi-Miigiwewinan*). He compares these with seven ethical virtues of the Western tradition and then shows the similar (and dissimilar) ways they are used in both legal traditions. See further on ethics in Part III-C, *below*.

[47] For an excellent critical and constructive survey of these four seeds, see Didier Zúñiga, *Relational Ethics for a World of Many Worlds: An Ecosocial Theory of Care, Vulnerability and Sustainability* (PhD Dissertation, University of Victoria, 2020) [unpublished]. For a complementary study that integrates legal, social, ecological, and spiritual dimensions of Anishinaabe law, see Mills, *Miinigowiziwin*, *supra* note 21.

C. Six Common Law Tools of Transformation

Now, I would like to discuss six common law tools that can be used to cultivate these four seeds of transformative growth. Similar tools also exist in the civil law and other Western legal traditions. My argument is that they can be used in the ways I describe to decolonize the common law from its subservience to the unsustainable development of the four vicious systems and to take up a critical, constructive, and potentially transformative orientation of sustainable democratic constitutionalism within the law. They provide a toolkit to overcome the trilemma. Of course, these are not the normal ways of teaching and using these tools in the present age. If they were, we would not be in the climate crisis. They are standardly either not used or misused and abused in ways that serve further unsustainable development. Notwithstanding, they are being taught and used in the exceptional ways I described in the four constructive movements of the previous section. My aim is to explain how they are being used in these creative ways and how, taken together, they constitute the means of legal succession from our present crisis phase to a conciliatory and sustainable phase.[48]

The first tool is surely the realization that private property is not the basis of common law or Western law. The basis is the norm that long use and occupation generate a right to continue use and occupation and a right to the fruits of use (usufruct). In the language of Roman law, *usus* gives rise to *ius*. Right or justice (*iustitia*) comes into being through long use and occupation. The norm of long use and occupation has been the basis of rightful use, occupation, and self-government for over two thousand years. In the common law, it is contrasted with feudal law imposed by the Norman Conquest.[49]

Long use gives rise to right only if the users occupy the land, not if they simply claim to own it. Moreover, the right requires “long” use. Use has to be cyclical and sustainable or else it would not be “long use.” Unsustainable misuse or abuse does not give rise to a right; it violates the right.

Classic examples of long use and occupation giving rise to right are common foot paths and gardens that are continuously used, cared for, and kept open by their fellow commoners. The right these activities bring into being is so strong it trumps enclosure and privatization. On this view, justice does

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48 I am indebted to the thoughtful way Joshua Nichols explains how using legal tools creatively can be transformative in the preface and introduction to *A Reconciliation Without Recollection* (*supra* note 43 at xviiff).

49 See JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge, UK: Cambridge University Press, 1957).

not come into practice through mine and thine, but rather through symbiotic relationships with each other and the living earth. The global commoning movements, such as food sovereignty, are contemporary examples.[50]

Long use and occupation have always been the basis of Aboriginal title in common law settler countries.[51] In the *Tsilhqot'in Nation* case, the Supreme Court defined Aboriginal title in terms of three features: (1) Aboriginal title is the proactive use and management of title territory for the benefit of the Tsilhqot'in Nation; (2) it inheres in the Tsilhqot'in people as a whole, not just this generation, but all future generations; and (3) each generation of Indigenous people must exercise this right in such a way that future generations will always be able to exercise the right as well. That is, they must exercise the right in ways that sustain the Tsilhqot'in people, their society, and the ecosystems that sustain them, forever.[52]

This remarkable decision defines the rightful use and occupation of Mother Earth in terms of sustaining the well-being of all affected. The Tsilhqot'in affirm this understanding of land use from within their own traditions of "belonging to the land." This definition of title reverses the first step of dispossession and colonization in the imposition of unsustainable social systems. When it is applied to the legal systems of Indigenous peoples, it shows that many have rightful use and occupation of their traditional territories.

Moreover, recognition of the right of self-government of peoples historically and of self-determination more recently are often grounded in the prior long use, occupation, and governance of their territories. Finally, long use and occupation is evidently the norm manifest in the trial-and-error ways Gaia continues life on earth over billions of years.

If we judge our modern, unsustainable property systems by this basic norm, they appear to be unjust and in need of transformation. They violate and extinguish the Indigenous, social, and ecological social systems that sustain life through long use and occupation.

The second tool follows from the first: the precautionary principle of continuity. It enjoins courts to recognize and study existing "customs and ways." If they pass the long use and occupancy test, then the courts should

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[50] The Nobel Prize–winning work of the late Elinor Ostrom has been instrumental in bringing this commoning world beyond state and market to a broader audience. See David Bollier & Silke Helfrich, eds, *The Wealth of the Commons: A World Beyond Market and State* (Amherst, Mass: Levellers Press, 2012); Joe Parker, *Democracy Beyond the Nation State: Practicing Equality* (New York: Routledge, 2017); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (New York: Cambridge University Press, 1990).

[51] See Kent McNeil, *Flawed Precedent: The St Catherine's Case and Aboriginal Title* (Vancouver: UBC Press, 2019) at 151.

[52] See *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 73–74.

support their continuance. If they are vicious and unsustainable systems, courts should work to discontinue or transform them, with the approval of the people subject to them.[53]

The continuity norm is based on the presupposition that the world in which humans and other animals have lived for millions of years cannot possibly be *terra nullius*. To have existed for so long it must comprise a plenitude of laws, and our first task is to recognize and learn our way around in this infinitely complex labyrinth that sustains us. Thus, the sustainable legal sphere is the mutual recognition, coordination, and continuity of the complex, symbiotic family of legal orders that pass the test of long use and occupancy. The common law recognized and linked arms with Indigenous laws in treaties based on the Royal Proclamation of 1763 and with the civil law in the *Quebec Act* of 1774.[54]

This legal pluralism of partners in treaty and constitutional federalism constitutes a commonweal. Its good coordination generates the common wealth. The transformative role of the common law today is to correct past injustices, continue the negotiations, and extend the same principle of continuity to the surrounding ecological and social norms that constitute the commonwealth of all life. Here I am following the footsteps of Roderick MacDonald, Jeremy Webber, Alain Gagnon, and Charles Taylor, from whom I have learned so much.[55]

If these common law norms had been followed and improved over the centuries, we would not be in crises today. However, beginning with Thomas Hobbes, a right of unilateral discontinuity and extinguishment at the pleasure of the Crown was grafted onto the common law, against the objections of Sir Matthew Hale. This marked the assertion of the Crown as sovereign, rather than as a partner in relations of mutual subjection, and modern law as a system imposed over a customary yet lawless state of nature.[56]

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53 See James Tully, *Strange Multiplicity*, *supra* note 19 at 30, 116, 124–29, 154, 158, 161, 209.

54 See *ibid* at 117–24, 129, 145–49, 154–55; Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 101.

55 For an introduction, see Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167; Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 McGill LJ 579. For a creative application of this deep legal pluralist approach to Canada's legal pluralism, see Keith Cherry, *Practices of Pluralism: A Comparative Analysis of Trans-Systemic Relationships in Europe and on Turtle Island* (PhD Dissertation, University of Victoria, 2020) [unpublished].

56 See Thomas Hobbes, *Writings on Common Law and Hereditary Right: A Dialogue Between a Philosopher and a Student, of the Common Laws of England*, ed by Alan Cromartie (New York: Oxford University Press, 2005) at 26–27; Matthew Hale, "Reflections by the Lrd. Chiefe Justice Hale on Mr. Hobbes His Dialogue of the Lawe" in the Rt

To transform this vicious juridical system, the first task is to show clearly that it is extinguishing the biodiverse systems that sustain life on earth—that it is engaging in ecocide. Then, the complementary task is to show that the common law presents a democratic and sustainable alternative in a world of biodiversity and legal diversity. The first two tools of long use and occupation and continuity begin to do this.

The third tool is the common and civil law norm of QOT: *Quod omnes tangit ab omnibus tractari et approbari debet* (what touches all must be approved by all). The modern legal norm of the equiprimordiality of democracy and the rule of law—democratic constitutionalism—is a redescription and updating of this ancient norm of Roman law. It extends "approved by all" to the democratic participation of the people who are subject to it, as well as to the sustainability and well-being conditions of more-than-human forms of life.[57]

These first three tools are the basis of the nation-with-nation treaty system of settler and Indigenous laws from the common law perspective.

The problem with the normative tools of long use and occupation and continuity on their own is that they do not provide a tool of dissent and contestation by human and non-human subjects oppressed by de facto forms of use and occupation. This is why the third tool of QOT is required—the approval of those subject to it. Then, the question becomes, what is the best way of gaining the approval of all affected?

The fourth legal tool provides the answer: *audi alteram partem*, "always listen to the other side[s]." Aeschylus introduced this legal norm in *Eumenides,* the third play in the *Oresteia* trilogy. The Roman lawyer Cicero brought it to prominence in Roman law and the Western tradition.[58] The basic idea is that full understanding of the justice or injustice of a case can be acquired only by moving around and listening carefully to all affected explaining how the case affects them from their diverse standpoints and perspectives. Engaging in these intersectional dialogues, citizens and judges become aware of their parochial perspectives, provincialize them, and try to see the situation from the diverse perspectives of others. By these dialogues of mutual understanding and enlightenment, participants begin to see how they can negotiate a fair resolution acceptable to all. This crucial

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Hon Frederick Pollock & WS Holdsworth, "Sir Matthew Hale on Hobbes: An Unpublished MS" (1921) 37 Law Q Rev 274; WS Holdsworth, *A History of English Law*, vol 5, 2nd ed (London, UK: Methuen & Co, 1937) at 485. Thomas Hobbes presents his theory of sovereignty in *Leviathan* (Oxford: Clarendon Press, 1965).

[57] For the first seed, see Part III-B, *above*. For democratic constitutionalism, see *supra* note 38.

[58] See Desmond Manderson, "Athena's Way: The Jurisprudence of the Oresteia" (2019) 15:1 L Culture & Humanities 253; Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge, UK: Cambridge University Press, 1996) at 138.

process is successful only if courts encourage participants to speak in their own customs and ways, show them due respect when they have the courage to do so, and really listen carefully to what is being said.[59] Although it is far from perfect in practice, *audi alteram partem* is now a convention of the European Union, the Supreme Court of Canada, and alternative dispute resolution practices.

The fifth tool is a distinctive, contextual form of common law legal reasoning that has been deeply shaped by the previous tools. It is the mode of reasoning appropriate for the complex, interdependent, multi-perspectival ecosocial-legal world in which we live. It is often overshadowed by an abstract and universalizing form of legal reasoning that claims to be context-transcending. Nevertheless, the contextual approach continues to be taught and practised in the common law, especially in the four movements of the previous section. Its practitioners often argue that the interpretation and application of the presumptively transcendent rules are particular, situated judgments masquerading as universals.

The contextual and pragmatic mode of reasoning consists in embedding particular cases in their legal, social, intersectional, and ecological contexts; considering all sides and aspects carefully; acknowledging the indeterminacy of language use; generalizing without universalizing; proposing resolutions; recognizing their fallibility and pre-judgments; respectfully recording dissent; revisiting a judgment and its reasons as a precedent in future cases and contexts; and, thereby, locating it within the ongoing dialogue that is the common law. At the centre of this *audi alteram partem* mode of reasoning together is the demand of justice to learn how the case appears from the perspectives of all affected in order to acquire a many-sided view. This enables them to generate a fallible, situated legal judgment that is "even-handed," rather than abstract and independent, yet, for this very reason, always open to judicial and citizen dissent.[60]

This form of common law reasoning exhibits both similarities and dissimilarities with Indigenous traditions of legal reasoning. An example is the practice of passing around a "talking stick" to each party involved at a meeting called a potlatch (to give). A talking stick is passed to each in turn to give their story of the events in question from their perspectives. The listeners express their gratitude to each speaker for this gift that enables them to see aspects of the case they overlooked from their own perspective.

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[59] See Finch, *supra* note 45.

[60] This contextual form of legal reasoning is associated with Lon Fuller, Jeremy Webber, Roderick MacDonald, John Borrows, Val Napoleon, and many scholars and practitioners associated with the four seeds movements. See e.g. Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2009) 45 at 65; Webber, "The Grammar of Customary Law", *supra* note 55.

They reciprocate by telling their stories in turn. As they listen, speak, and learn, they begin to see pathways to good, even-handed resolutions.[61]

The sixth and final tool, perhaps the most important, is common law ethics. The dialogical abilities legal practitioners acquire through the integrated use of these six tools comprise a jurisprudential ethics and ethos that constitute a way of being in the world with others. Using these tools in these ways is how legal practitioners participate in transforming the vicious systems they adjudicate into virtuous and conciliatory ones. In so doing, they cultivate further the four seeds their predecessors sowed. It is the way of being the change within the law.[62]

Conclusion: Common Law Contestation, Transformation, Reconciliation

In conclusion, I would like to address one objection to everything I have said. It is that the adversarial nature of legal practice is incompatible with the ethos of being the change I outline. On this polarized, us/them view of law, the role of lawyers is to try to defeat their adversary and win the case. It allows only for victory, defeat, or compromise. Lawyers acquire this competitive ethos in law school and in practice. Even when they fight for ecosocial justice, they do so within this dichotomized, competitive, power-over and "winner take as much as possible" ethos and worldview. They thus become conscripts of the power-over and competitive-advantage ethos of the second-phase, vicious social systems they inhabit, whether they support or oppose them.

This may be the hegemonic practice of adversarial conflict, contestation, and conflict resolution. Nevertheless, the common law ethics I have described include an alternative adversarial practice that also exists in courts, consultation, negotiation, protests, alternative conflict resolution, and everyday disagreements. As Gregg explains, this non-violent, common law ethos is Gandhi's direct response to the colossal inability of us/them adversarial practices in law and elsewhere to lead to reconciliation and peace. Rather, they lead to the increasingly destructive vicious cycles of

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[61] These diversity awareness dialogues with all human and more-than-human citizens are symbolized in the monumental work of art by the Haida artist Bill Reid and his diverse co-workers—*The Spirit of Haida Gwaii.* See Ulli Steltzer, *The Spirit of Haida Gwaii: Bill Reid's Masterpiece* (Vancouver: Douglas & McIntyre, 1997). For some of the challenges of these dialogues among cultures, traditions, and civilizations, see James Tully, "Deparochializing Political Theory and Beyond: A Dialogue Approach to Comparative Political Thought" (2016) 1:1 J World Philosophies 51 [Tully, "Deparochializing Political Theory"].

[62] See Borrows, *Law's Indigenous Ethics, supra* note 46.

adversarial conflict and counter-conflict that engulf the present.[63] The Gandhian alternative is based on the premise that means determine ends. It consists in the integrated, non-violent application of the six tools in disputes and conflicts of all kinds. Gandhi called it *Satyagraha*—the transformative power of non-violent contestation. Its telos is to transform the adversaries into partners in mutually sustaining relationships by being such a partner from the beginning. That is, they act in a way analogous to ecological succession.[64]

On one hand, practitioners (*Satyagrahi*) present their views of the controversy as truthfully and openly as possible. On the other hand, they invite adversaries to do the same and enter into negotiations. They continue to do so in response to us/them counterattacks by adversaries, always offering an open hand rather than a closed fist, until adversaries realize they are trustworthy. At some phase in the negotiations, both practitioners and adversaries also come to realize that their adversarial mode of conflict resolution is the root of the conflict they are trying to address. They gradually shed this vicious relationship and regenerate being-with relationships that are the very condition of sustainable living.

They then begin to enter into negotiations based on the six tools of sustainable democratic constitutionalism. The critical dialogues that follow lift the initially adversarial dispute and disputants to a higher plane in which they can discover common ground. They literally discover a sustainable way of being-with each other—and of settling future conflicts—that they could not see from within their polarized, adversarial plane. Gregg famously calls this transformative succession "moral jiu-jitsu."[65]

In cases of disputes and conflicts over the climate crisis and sustainability, these truth-speaking and truth-seeking transformative dialogues free the norm of sustainability and well-being from its colonization by the hegemonic norm of competitive development. This enables the participants to call the crisis-causing competitive developmental norm and the vicious systems it legitimates into the space of questions and responses.

In so doing, they experience the *animacy* of combining their energy and working with each other, rather than against each other, or over and under

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63 See e.g. Pankaj Mishra, *Age of Anger: A History of the Present* (New York: Farrar, Strauss & Giroux, 2017).

64 Gregg draws the analogy between transformative non-violent contestation and ecological succession in *The Power of Nonviolence* (*supra* note 35 at 139). *Cf* John Borrows & James Tully, "Introduction" in Asch, Borrows & Tully, *supra* note 3, 3.

65 *Supra* note 35 at 50. Gregg also argues that it is an effective substitute for war and revolution (see *ibid* at 101). This mode of conflict resolution is similar in many respects to the classic Greek practice of *parrhesia,* speaking truthfully to power (see Tully, "Deparochializing Political Theory", *supra* note 61). I am grateful to Ryan Beaton for discussions of this connection and its importance for law students.

one another. This being-with experience has different names in different traditions, such as reconnection, de-alienation, compassion, spiritual unity, integration, *agape*, gift-gratitude-reciprocity, and *Tsawalk*.[66]

This unique, transformative practice is reconciliatory justice for both the participants *and* the conflict they are addressing. It is the non-violent way of moving each other from a vicious adversarial relationship to a virtuous and conciliatory one. It could be called legal succession. Gandhi and Gregg argue that it can be practised in any human relationship when conflict arises. If it includes all affected, it reconnects us with the animacy of the crisis-ridden living earth—and Gaia reciprocates.

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[66] For some of these traditions, see Matthieu Ricard, *Altruism: The Power of Compassion to Change Yourself and the World*, translated by Charlotte Mandell & Sam Gordon (New York: Little, Brown & Company, 2013); Atleo, *supra* note 22 at xi; Niobe Way et al, eds, *The Crisis of Connection: Roots, Consequences, and Solutions* (New York: New York University Press, 2018); Martin Luther King Jr, *The Radical King*, ed by Cornel West (Boston: Beacon Press, 2015) at 39–64, 75–96. “Spiritual unity” is Gregg’s term (see *supra* note 35).