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WILD LAW FROM BELOW

Examining the anarchist challenge to Earth Jurisprudence

Our struggle is to open every moment and fill it with an activity that does not contribute to the reproduction of capital. Stop making capitalism and do something else, something sensible, something beautiful and enjoyable. Stop creating the system that is destroying us. We only live once: why use our time to destroy our own existence? Surely we can do something better with our lives.

– John Holloway

1. Introduction

At least since Marx there has been a line of critical theory that conceptualises the capitalist state as merely a tool for advancing and entrenching the narrow economic interests of the rich and powerful, to the detriment of wider society (Marx 1983). A broader critique has arisen more recently that holds that governments across the political spectrum have developed a 'growth fetish' (Hamilton 2003), through which all societal goals, including or especially environmental ones, are subordinated to the overarching aim of maximising economic growth. These critical perspectives raise challenging issues for progressive legal theorists and activists who seek to advance their social or environmental causes by way of 'top down' legal change. Given that Earth Jurisprudence can be understood, first and foremost, as a movement that treats ecological sustainability as a fundamental legal principle (Berry 1999; Bosselmann 2008) – more fundamental even than the growth imperative (Alexander 2011a; 2011b) – the question of whether law

will ever accept such a principle in a growth-orientated world is a confronting question that ought not to be avoided. After all, what if the institutions of law are so compromised by growth fetishism and corporate interests that the changes needed to create a sustainable and just society will never be generated from the top down? Put otherwise, what if asking law to produce a sustainable and just society is like asking a zebra to change its stripes? We may desire the zebra to do so, and it may tell us it will change, but all history suggests that by nature it will not.

Furthermore, if the changes needed to produce a sustainable and just society will never be driven from the top down, but could only arise through social movements from below (Trainer 2010), what are the implications of this for Earth Jurisprudence, which to date has been characterised almost exclusively by the attempt to formulate and justify top-down legal approaches to environmental law? Is Wild Law a coherent category if the society it vaguely implies is something that could only be created at the grassroots by social movements, as opposed to something that could be produced by the legislature or the judiciary? These are some of the issues I wish to examine in this chapter, although my purpose is to raise questions rather than to lay down answers or provide solutions. I confess that the sands of my own thinking are shifting with uncertainty beneath my feet as I write, owing in part to the complexity of the issues involved (see Bollier and Weston 2013; Healy *et al.*, 2012). Nevertheless, what I am convinced of is that the importance of the questions posed justifies the attempt to grapple with them, so I ask that this exploratory essay be treated merely as an 'invitation to discuss'.

The central issue I would like to raise for Earth jurists, and for oppositional lawyers more generally, is the question of 'strategy'. That is to say, I would like to raise the question of how best to direct our limited energies and resources, for if change is truly what we desire, our energies and resources must be used to their fullest practical effect. Earth Jurisprudence, after all, is not an intellectual game we play to amuse ourselves. It is a framework for deep societal transition, and if we truly believe in the 'ends' for which we ostensibly struggle, then surely we must take care that the 'means' we employ are the best we have available.

To be clear, I do not seek to question the 'ends' or 'principles' of Earth Jurisprudence, with which I am deeply sympathetic (Burdon 2011a). Rather, this chapter seeks to evaluate the 'means' which Earth jurists (including myself) have generally taken up to try to achieve or realise those 'ends'. More directly, I want to ask the question of whether top-down change is really where we should be directing our energies, and to suggest that perhaps we should be

directing more of our energies toward building the new society at a grassroots level; building it beneath the legal structures of the existing society with the aim that one day new societal structures will emerge 'from below' to replace the outdated forms we know today. In this way, it could be said, I am presenting an 'anarchist' challenge to Earth Jurisprudence, in the limited sense, at least, that I am proposing that we consider ignoring the state rather than trying to use the state to advance 'deep green' causes which it seems wholly uninterested in supporting.

I feel this perspective could be easily misunderstood, so before developing my line of reasoning a word of clarification is immediately in order. I do not wish to suggest that strong top-down environmental laws, such as those proposed by Earth jurists, are not desirable. On the contrary, it is perfectly clear to me that the judiciary and especially parliament could do many things to protect and conserve Earth's ecosystems (see Bollier and Weston, 2013), and over the last decade or so Earth Jurisprudence has been, and continues to be, a rich source of inspiration for what an eco-centric legal system might look like (Burdon 2011a). My tentative thesis, however, is that growth fetishism has such a strong hold on the branches of government that efforts directed toward producing strong top-down environmental law will essentially be ignored by lawmakers, and thus those efforts for progressive top-down change could well be wasted. We do not, of course, have a surplus of oppositional energy or resources to waste or misdirect, so if it is the case that the zebra of law will not change its stripes, it arguably follows that we should not dedicate our efforts toward convincing it to do so, no matter how desirable that top-down change may be. Rather, we should dedicate our efforts toward areas with the greatest leverage – with the greatest potential to effect positive change – and I have come to suspect that the areas that have the greatest leverage lie amongst the grassroots of social movements and culture, not parliament or the courts.

I do not pretend to be able to do this line of thinking justice in the space available; nor could I expect to convince the reader of its veracity, since I have already implied that in my eyes its veracity remains an open question. All I hope to do is raise the question of 'strategy' – the question of how best to direct our limited energies and resources – and if I can do that successfully I feel the essay should serve a worthwhile purpose. I begin unpacking these ideas in the next section by describing briefly how the growth model of progress has come to shape law. I proceed to outline ways that law has attempted (without success) to deal with the ecological impacts of growth and how Earth Jurisprudence opens up space for an alternative, post-growth approach to legal governance. Insofar as it

confronts growth, however, Earth Jurisprudence arguably renders itself politically unpalatable, and so I conclude by delving deeper into the question of strategy in order to explore the prospects or even the possibility of a Wild Law 'from below'.

2. Law and the Growth Model of Progress

With the development of the steam engine in the early decades of the 18th century, for the first time humankind was able to harness the vast stores of energy embodied in fossil fuels – coal, at first, and later oil and gas. This led to the industrialisation of economies around the world, a process that is still continuing to this day. Not since the Agricultural Revolution around 10,000 years earlier had there been such a radical change in the way human beings lived on Earth. The productive capacity of industrialising nations grew at exponential rates, driven onward by the seemingly endless supply of cheap and abundant energy, and this growth of production and trade provided industrialising nations and their inhabitants with what seemed like an endless supply of resources with which to meet their every desire. As a result, economic growth became the overriding objective of governments – the solution to all problems – especially in the Western world but increasingly elsewhere (Purdey 2010). Indeed, growth of the global economy seems to have become synonymous with 'progress' itself, and today this remains the dominant paradigm or lens through which social, economic, and political success is judged.

Unsurprisingly, perhaps, this growth paradigm also came to shape legal systems around the world, such that law, in many jurisdictions, can be seen to have developed a pro-growth structure (Alexander 2011a). The dynamics at play here are relatively straightforward: when economic growth, as measured by increases in GDP, is considered synonymous with national progress, laws that foster economic growth are presumptively justified, while laws that inhibit, slow, or reduce economic growth are presumptively unjustified. Over time this 'normative filter' has given legal systems their pro-growth structures, and while one could point to exceptions to this general statement (e.g., Filgueira and Mason, 2011), they are just that, exceptions within a growth paradigm that marginalise them.

Economic growth has brought with it many social benefits, of course, lifting millions of people out of poverty and providing many with a high material standard of living that would have been unimaginable only a few generations earlier. When focusing only on these types of material provision, the growth paradigm has some

initial plausibility, especially since there are billions of people on the planet who clearly still need to develop their economic capacities in some form, just to provide for their most basic material needs. At first consideration, then, it is quite understandable why economic growth is widely considered to be an appropriate, even necessary, social goal. It is arguably a goal that not only *does* but also *should* shape our social, economic, and political structures, including our legal systems.

Economic growth, however, is a two-edged sword, one that produces both benefits and costs, especially ecological costs. Vast bodies of rigorous scientific evidence now indicate that today the size of the global economy exceeds, by some way, the sustainable carrying capacity of the planet (see, e.g., Vale and Vale, 2013). Furthermore, despite extraordinary technological advances in recent decades – advances that were supposed to solve the ecological crises – the overall impacts of economic activity continue to grow and intensify, not decline (Jackson, 2009). These facts radically call into question the legitimacy of the growth paradigm, at least in the most developed parts of the world, for if there is to be any 'ecological room' for an expanding human population to live at a dignified material standard of living, the richest societies must not continue increasing their material demands on a finite planet (Meadows *et al.*, 2004). Rather than rethink the growth paradigm, however, the international community has fudged the issue by talking of 'sustainable development,' which sounds lovely but has been rendered meaningless by decades of greenwash. Today, sustainable development has come to signify the attempt to produce and consume more sustainably, *provided this does not interfere with continued economic growth*. This description might sound cynical, but even a glance at reality will testify to its accuracy (Worldwatch Institute, 2013). As the global economy struggles to emerge from the global financial crisis, it is clear that 'growth fetishism' is alive and well – growth appears more important now than ever, the environment be damned – and this paradigm continues to provide a normative filter that determines which environmental laws are allowed to pass through the institutions of capitalism. It is at least arguable, then, that any approach to environmental law that seriously challenges the growth paradigm will never make it through this normative filter, and it is now worth taking a closer look at the various approaches to environmental law in order to better understand the forces that are at play here.

3. Three Broad Approaches to Environmental Law

In the legal sphere it could be said that there are three broad approaches to dealing with the environmental impacts of economic activity: 'market-based' approaches; 'command-and-control' approaches; and the 'deep green' approach of Earth Jurisprudence. I will now briefly outline these three approaches and emphasise the relationship of each approach to the growth paradigm.

3.1 '*Free market' environmentalism*

Within advanced capitalist societies today, the dominant approach to environmental law is based on neoclassical economics, exemplified most clearly by law-and-economics scholarship but which also has a much broader influence (Posner 1986). This approach (which comes in many varieties) assumes that the best way to maximise utility in a society, over the long term, is to create a well-functioning 'free market' economy. To oversimplify, this broadly involves the state protecting private property rights and enforcing contracts, but otherwise generally 'staying out' of the economy. In such an economy it is assumed that there will be price incentives in place to ensure that natural resources are exploited to an 'optimal' degree, but not further. If natural resources are overexploited in such a way as to engender sustainability concerns, this can only be because the costs of production are not fully internalised, often because the degradation of common resources is not being built into the price of the commodities produced, leading to overconsumption (i.e., a 'market failure'). Accordingly, within this model, environmental law aims to internalise any externalities, and privatise common resources, but otherwise let prices and market mechanisms determine how the economy functions in relation to the natural environment.

Without going further into the details of this complex theory of law, the point to emphasise presently is how easily this approach to environmental law sits within the growth model. Far from challenging growth, the neoclassical approach to environmental law assumes that the common good will be advanced most efficiently if individuals, businesses, and governments seek to maximise profits and grow the economy. Growth provides money, after all, and money provides individuals and governments with power to satisfy their desires, including environmental desires. The role of law is simply to create structures to ensure that markets function in an 'optimal' way. From this view, environmental problems are not due to economic growth, as such, but due to imperfect structures within

which economic activity occurs. Accordingly, growth itself is not questioned.[1]

3.2 '*Command-and-control' environmentalism*

The free market approach to environmental law might work nicely in theory, but its relationship with reality has proven to be tenuous indeed. An alternative approach can broadly be called 'command-and-control' environmentalism, which arose due to the failures of free market environmentalism to protect nature. The command-and-control approach (which also comes in many varieties) does not accept that market mechanisms will ever be sufficient, own their own, to adequately protect planetary ecosystems. Rather, this broad school holds that more direct regulation of the economy is needed. While the command-and-control approach might accept that internalising externalities is an important step in the right direction, it nevertheless insists that 'market failures' are so pervasive, and ultimately unavoidable to some degree, that direct governmental involvement is required, at least to address the most egregious environmental harms. Advocates of the free market respond arguing that such paternalism is an inefficient mode of governance, and that the same ends can be achieved more efficiently via market mechanisms. However, advocates of the command-and-control approach typically consider certain inefficiencies an acceptable price to pay for the more direct environmental regulation.

Again, the many nuances of this approach, and the intricate debate between approaches, cannot be unpacked further here (see Godden and Peel 2010). For present purposes, the point to note is that, like the free market approach, the command-and-control approach does not question the growth paradigm, but rather tries to better regulate economic activity in order to diminish the ecological costs of growth. The more direct regulation may, at times, slow growth to some extent, but this is considered an unfortunate side effect of environmental protection, not one of its aims. The underlying aim remains growth, although it is usually softened by such terms as 'green growth', 'smart growth', or that now dangerous

[1] It is worth noting, however, that if all environmental externalities were actually internalised this might so radically change the nature of economic activity that something very different from a growth economy might arise. In fact, neoclassicism could well be its own worst enemy, in the sense that the only reason neoclassicists promote growth is because they do not understand the radical implications of their own theory (see Alexander, 2011a: 245-6).

euphemism, 'sustainable development' (Worldwatch Institute 2013).

3.3 *Earth Jurisprudence*

When one asks advocates of free market or command-and-control environmentalism why the overall ecological impacts of economic activity are still increasing, both parties will claim that it is because their own systems of governance have not yet been fully or properly implemented. Advocates of the free market will insist that with a bit more deregulation and some tweaking of prices here and there, the 'invisible hand' will ensure that both growth and sustainability are achieved as a natural result of market forces. Advocates of command-and-control will argue that with some stricter regulation of the growth economy, the ecological costs of growth can be reduced within safe boundaries. But there is another reason for why both approaches have failed to produce sustainability, and I would argue that it is because neither approach questions the growth paradigm (Alexander, 2012a; 2012b). By assuming the legitimacy and desirability of growth, the mainstream approaches to environmental law outlined above formulate strategies for environmental protection within a macroeconomic framework that is inherently unsustainable. It should come as no surprise, therefore, that those strategies fail. In order for environmental law to have any chance of being effective, what is needed, first and foremost, is a jurisprudence 'beyond growth', and I have argued elsewhere that Earth Jurisprudence is the most promising place for such a jurisprudence to take hold (Alexander, 2011b).

Earth Jurisprudence is far from being a homogenous body of literature (Burdon, 2011a), but there do seem to be threads of commonality that unite the various forms. First among them is the idea that nature – the life-support system upon which the entire community of life depends – is more than a 'resource' to be exploited for human gratification. Nature is something that should not be, and indeed, cannot be understood merely in economic terms. An old growth forest or a marsh, for example, should be valued not merely (or at all) in terms of dollars, or treated as resources to be developed in ways that maximise profits, but primarily in terms of the role they play in maintaining the health and integrity of planetary ecosystems. In this sense Earth Jurisprudence treats ecological sustainability as fundamental, and accordingly seeks ways to construct legal systems in order to achieve that defining goal. If this approach interferes with economic development, then it is 'development' that must be reconsidered,

not the 'principle of sustainability' (Bosselman 2008). From this view, then, law should seek to facilitate the creation of 'post-growth economies' that sit safely within ecological limits, rather than trying to make 'growth economies' sustainable, as mainstream environmentalism tries to do, without success. Earth Jurisprudence must hack at the roots of unsustainability, not merely the branches, and I believe that this means operating beyond the growth paradigm.

As noted earlier, it is not the purpose of this chapter to unpack the details of what an Earth-centred jurisprudence would look like or how it might function. Those issues have been taken up with rigour in other chapters of this book, and elsewhere (Burdon, 2011a). Nor have I attempted to present the case against growth in any detail, a critique that has been made many times before (e.g., Meadows *et al*., 2004; Jackson, 2009). Instead, the present analysis seeks to evaluate the prospects of a post-growth Earth Jurisprudence in a growth-orientated world, and, in particular, to consider whether top-down change is a strategy that Earth jurists should be focusing on. I am now in a position to consider these issues in a little more detail and bring my argument to a head.

4. Three Strategies for Change: Democratic, Socialist, Anarchist

My analysis so far has been based on the following two premises: (1) that the growth paradigm acts as a normative filter which over time has given law a pro-growth structure; and (2) that the growth paradigm is inherently unsustainable. Upon those premises I argued that environmental laws that do not question the growth paradigm have failed and will always fail to achieve sustainability, and that Earth Jurisprudence must therefore be a post-growth jurisprudence if it is to succeed where free market and command-and-control environmentalism have failed. The issue I will now address is the question of what strategies could or should be taken if the aim is to create an Earth Jurisprudence beyond growth.

The strategy that Earth jurists (including myself) have generally taken up to advance their causes is what can be called the 'democratic' strategy. This essentially involves formulating and defending top-down legal proposals that embody the principles and values of Earth Jurisprudence. This strategy trusts that when the majority see the desirability of developing an eco-centric legal system, that sentiment will filter upward and eventually manifest in law. With particular reference to the legislature, the democratic strategy expects that when there is a culture that wants Earth

Jurisprudence, those cultural values will be embraced by representative politicians and used to shape public policy in order to win or maintain office (Alexander, 2013).

This strategy is perfectly coherent in theory, but it assumes that representative democracies are functioning well, and a strong case can be made that many so-called democracies are under the undue influence of corporate interests (e.g., Tham, 2010). If that is so, even a culture shift in favour of Earth Jurisprudence would not necessarily bring about the required top-down structural change, because we can be sure that the corporate interests influencing public policies are not interested in Earth Jurisprudence, certainly not an Earth Jurisprudence beyond growth. In the Australian context, a disheartening example of corporate influence in politics occurred in 2010 when then Prime Minister, Kevin Rudd, sought to impose a relatively small tax on the mining industry, only to be subjected to a multi-million dollar, corporate-funded scare campaign that ultimately resulted in Rudd being booted out of office and replaced with a more 'moderate', more corporate-friendly Prime Minister. The most worrying aspect to this political event was the fact that the tax being proposed was hardly radical, and yet corporate interests shut down even this moderate legal reform. On a global scale, the same point could be made with respect to how the state responded to the Occupy Movement. As soon as the movement looked like it could potentially develop some real momentum, the state bore down with the full force of executive power and ensured that this fundamentally anti-capitalist political demonstration was nipped at the bud.

These are but particularly explicit examples of what is generally a more insidious process of control. Arguably the deeper forms of undemocratic influence come from political parties' dependence on corporations for political campaign funding, or from privately owned media conglomerates feeding the public only or mainly what is in the corporate interest, thereby 'manufacturing consent' and keeping politicians in line (Chomsky and Herman, 1994). Of course, culture often puts pressure on politicians to act this way or that, and sometimes, in accordance with democratic theory, the politicians are forced to abide or lose office. Fragments of an Earth Jurisprudence might even slip through law's normative filter (e.g., Filgueira and Mason, 2011), as might some advances in social justice. But as soon as politicians, or the culture which those politicians are supposed to represent, seriously threaten to confront corporate power, it seems that a sophisticated political and ideological process is set in motion that functions to maintain, more or less, the existing order of things. In such circumstances, what hope is there for a top-down Earth Jurisprudence beyond growth?

Empire, we can be sure, will not contemplate self-annihilation (Hardt and Negri, 2000); it will struggle for existence all the way down.

Marxists essentially accept this critical view of representative democracy, arguing that, indeed, the capitalist state is merely a tool for maintaining the status quo and furthering the narrow interests of economic elites. From this perspective, the deep changes that are arguably needed for Earth Jurisprudence depend not on the citizenry putting upward pressure on representative politicians, but on the citizenry taking control of the state more directly in order to advance the common good by way of state socialism. Since the economic elites will never voluntarily give up their hold on power, it follows that the Marxist or socialist revolution must be a violent revolution. In theory, at least, state socialism presents Earth Jurisprudence with a second strategy for achieving its environmental goals.

The problem with this strategy for societal change, however – aside from the acceptance of violence which seems fundamentally contrary to the ethics of Earth Jurisprudence – is that Marxism, and socialism more generally, have almost without exception remained embedded within the growth paradigm that I have argued Earth Jurisprudence must reject. In other words, state socialists have tended to seek state power, not to use that power to move away from the growth economy, but to facilitate continued growth only in more socially just ways and with a broader distribution of wealth. The same could be said of social democrats. While it is possible to imagine an eco-socialist Earth Jurisprudence – certainly it is easier than imagining a state capitalist Earth Jurisprudence! – there arguably remains the concern that states of *any type* – whether capitalist, socialist, or some other variety – are in and of themselves structurally inclined to be pro-growth. The basic critique here, which I cannot detail presently, is that all states are dependent for their existence on a taxable economy, and the larger the tax-base, the more funds the state can draw from to carry out its policies. This is the basic incentive structure that makes governments of any variety inclined toward growth.

This line of reasoning leads to a third, broad vision of social change, arising out of the anarchist tradition – the environmental anarchists, in particular, such as Murray Bookchin (1990) and Ted Trainer (2010). Although these theorists have their important differences, they essentially agree with Marxists that state capitalism is unjustifiable on the grounds that it is being used unjustly as a tool to maintain the existing order. But unlike Marxists, they do not think the solution is taking control of the state. They think the solution is building the new society at the local,

grassroots level, where communities create self-governing, localised, participatory democracies. Part of the disagreement with Marxists here is because these 'deep green' anarchists think that the state is inextricably intertwined with economic violence against nature, and so from this perspective, no state, not even state eco-socialism, is going to lead to sustainability. But even if there were hope of a green state, these theorists would not advocate that people direct their energies toward top-down change, because they think that state governance is an unjustifiable form of hierarchy and rule, no matter how 'green' it might be. Accordingly, they believe that if a just and sustainable society is to emerge, it has to be built without help from the state (and probably with a lot of resistance). Far from giving up on democracy, however, these theorists are demanding it – in the most direct form possible.

While this brief review does a disservice to the richness of the ideas and thinkers discussed, it does serve the purpose of raising questions about how any transition to a sustainable way of life could unfold. Would it (or could it) be somehow voted in through the mechanisms of parliamentary democracy? Would it require a political revolution and the introduction of some form of eco-socialism? Or would it require grassroots movements to essentially do it mostly themselves, building the new economy underneath the existing economy, without state assistance? I have tentatively argued that efforts to convince or pressure the state to adopt a post-growth Earth Jurisprudence might be an exercise in futility, on the basis that governments seem to be fundamentally committed to growth economics. Not only can the argument be made that governments are effectively tools used for securing and advancing the narrow interests of economic elites, as Marxists have long asserted, but a broader critique suggests that governments across the political spectrum, whether capitalist or socialist, are in the grip of a 'growth fetish' (Hamilton, 2003). If either or both of these diagnoses are correct, then this raises challenging questions about how and where Earth jurists should be directing their efforts. I have come to think that a post-growth Earth Jurisprudence is, and for the foreseeable future will be, politically unpalatable, and this suggests to me that, as a matter of strategy, Earth jurists should be dedicating more of their efforts toward building the Earth-centred society at the grassroots level, where – if you will excuse the metaphor – we are likely to get a better 'return on investment'. Strategy will always be a context-dependent issue, of course, and there may be times when attempting to push on governments might be the best strategic use of our efforts. That is for each of us to assess as individual agents embedded in unique contexts. But given the limits of oppositional energy at our disposal, it is important that not one

joule of it is wasted, and saying that 'top down' change is *desirable* is not a sufficient excuse for misdirecting that energy. Of course top-down change is desirable! But the question I have posed in this chapter is the question of how to achieve the 'ends' of Earth Jurisprudence *most effectively*, and the tentative thesis I have presented is that this might involve working toward a Wild Law 'from below'.

5. Wild Law from Below: A Coherent Legal Category?

Before closing I would like to offer a word about whether it is appropriate to speak of Wild Law if the changes aimed for are brought about from below rather than from the top down. After all, conventional use of the word 'law' implies a rule or body of rules emanating from parliament or the courts, and indeed Earth jurists accept that 'In Earth Jurisprudence, "human law" is the essence of what is meant by the term law. It's meaning is largely consistent with orthodox theory' (Burdon 2011b: 67). This raises the question of whether Wild Law is even a coherent category if it were something that could only emerge in the social sphere, beneath parliament and the courts. Perhaps 'law' is not the right word for the mode of governance to which I refer?

If 'law' were interpreted narrowly as meaning the rules emanating from parliament and the courts, then it would follow that Wild Law from below is not a coherent category on the grounds that it is not law, proper. However, this conventional understanding of law is arguably unduly narrow, evidenced by the fact that jurists have long accepted 'customary law' to be a legitimate form of law, despite in such cases there being an absence of conventional lawmaking institutions, such as parliament or courts as we know them today (Bollier and Weston, 2013). The customary laws of many indigenous communities are a case in point, where cultures were governed, and to some extent still are, by sets of knowable and enforceable rules that arose from elders, myth, and tradition – from customs – rather than from parliament or courts. As Ng'ang'a Thiong'o writes of Earth Jurisprudence in an African context:

> In Africa, wilderness, or what you call 'wild law,' is the great source of law, not written common law. In fact, our traditional law is oral and is passed from one generation to another orally, through music, art, dance, drumming, and through the "do's and don'ts" of the community (Ng'ang'a Thiong'o 2011: 183).

While I am not arguing that systems of common law or civil law should adopt African customary law, I am suggesting that there could be space, even in the West, for a customary Wild Law to develop beneath conventional lawmaking institutions (see also Bollier and Weston, 2013: Chs 4 and 8 especially). This would depend, however, on a cultural revolution of sorts, through which the values and principles of Earth Jurisprudence become broadly accepted and acted upon at the community level, irrespective of, and perhaps in defiance of, state-based law. 'The force behind customary law,' Thiong'o (2011: 175) writes, 'is that legitimisation comes from the community,' and that 'It is important to see [customary law] as a way of life, rather than hard, cold, legal norms imposed from elsewhere' (Thiong'o 2011: 174). Could it not be, then, that over time a Wild Law from below could develop at the community level, changing the structures of society, not as a result of new statutes or case law, but as a result of new social and economic customs based on principles of ecological sustainability? That is indeed the possibility I have tried to raise in this chapter. Having only sketched out a skeletal framework, however, it follows these bones must await another occasion to be fleshed out.

6. Conclusion

An objection that is likely to be levelled at the thesis presented in this chapter is that I have unwisely or inappropriately privileged one mode of transition (grassroots social movements) above another (top-down legal change), when both modes are equally necessary to create a sustainable society and thus both modes should be pursued. It is important that this objection and my response to it are understood, otherwise it could be very easy for my argument to be misunderstood. My argument has not been that top-down legal change could not help facilitate the transition to a sustainable society. Obviously there is much that parliament and the courts could and should do to help in such a transition (see, e.g., Bollier and Weston, 2013), and for many years Earth jurists, among others, have been explicating some of the laws and legal principles upon which such a transition could be based. Rather, my argument has been that the formal institutions of law may be so compromised by the growth paradigm that expecting those institutions to produce a fundamentally Earth-centred legal system, at the expense of growth, is akin to expecting a zebra to change its stripes. I do not claim to have established this thesis to any level of certainty. My aim has simply been to bring this issue to the surface, because if my tentative thesis that 'law is a growth-orientated zebra' were more or

less correct, this has significant implications on how and where oppositional lawyers (and activists more generally) should direct their energies and resources. More specifically, it suggests that trying to convince a growth-orientated state to use the vehicle of law to create a post-growth society might be futile, a waste of our efforts. If that were so, it would seem to be more fruitful for oppositional lawyers to dedicate their energies and resources toward advancing their causes at the grassroots level and attempting to build the new society from below, rather than trying to bring it about from the top down. Put otherwise, I am suggesting, as an Earth jurist, that we consider ignoring the state that is almost certainly going to ignore us, and instead attempt to create eco-centric customs of Wild Law among the grassroots of our local communities. How we might do that, and what it might look like, are subjects for another occasion.

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