

Unearthing the Relationship Between Environmental Law and Populism

Elizabeth Fisher*

Environmental problems and environmental law are a flashpoint for what has become known as right-wing populist politics. The ‘epistemological delirium’ which is climate change denial.¹ The persistent anger of the gilets jaunes (yellow vests) protests against fuel levy hikes.² The powerful political force that bitter antipathy towards environmental regulators gives rise to.³ The ideological attacks on courts adjudicating on environmental issues.⁴ Given that environmental problems are real and environmental law should benefit

* General Editor, *Journal of Environmental Law*. Professor of Environmental Law, Faculty of Law and Corpus Christi College, University of Oxford.

¹ Bruno Latour, *Down to Earth: Politics in the New Climatic Regime* (Polity 2018) 22.

² Jeremy Harding, ‘Among the Gilets Jaunes’ (2019) 41(6) *London Review of Books* 3.

³ Arlie Russell Hochschild, *Strangers in Their Own Land: Anger and Mourning on the American Right* (The New Press 2016). For a discussion see Liz Fisher, ‘Review: *Strangers in Their Own Land: Anger and Mourning on the American Right*. By Arlie Russell Hochschild and *The Mushroom at the End of the World: On the Possibility of Life in Capitalist Ruins*. By Anna Lowenhaupt Tsing’ (2017) 29 JEL 383

⁴ See for example the media criticisms after *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7 as discussed in Justice François Kunc, ‘Current Issues: A Tale of Three Cases’ (2019) 93 Australian LJ 251, 253.

all, this state of affairs is initially puzzling. But given the nature of environmental law it is not surprising.

1. Frustrations and Disappointments

Environmental problems and environmental law are frustrating. Both inevitably are sources of disappointment. Take environmental problems. Wouldn't it be fabulous if we lived in a world where we could pollute as much as we liked without threatening environmental or health quality and resources were inexhaustible? It would also be very bizarre and very weird,⁵ but it would mean there would be a lot less to worry about. Our down-to-earth reality is we live in a physical world where our actions have consequences for others. Our pollution creates health risks. Our use of non-renewable resources is a zero-sum game. One community's choices about environmental quality have implications for others.

To make matters even more challenging, environmental problems are not easily visible and so those consequences are not always immediate and obvious.⁶ We need to rely on science to tell us about the scope of an environmental problem and what to do about it. The natural environment is also dynamic – we cannot depend on it in making our life and business plans.

⁵ Although as Raworth points out that down-to earth reality does not always figure in environmental models. See Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (Random House 2017).

⁶ Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard UP 2011).

All of that is frustrating and disappointing. We cannot just do exactly what we like. Our freedom is curtailed by the freedom of others and by the limits of the environment.⁷ That is not an abstract political statement. It is a very real one. Pollution hangs around. Extinct species are extinct.

Environmental law as a response to environmental problems is even more frustrating. It requires us to face the reality of environmental problems and that the management of them is not easy and is often ongoing. As a collective response to environmental problems environmental law also requires a choice to be made about what environmental quality should be. Not all will agree with the choice to be made. Environmental law will constrain action and create immediate winners and losers. In the long-term improved air quality is a benefit to all, but in the short term it will require people to change their practices.

It is for all these reasons that environmental law has developed a complex architecture to mediate between different interests and to ensure that environmental decisions are as robust, legitimate, and fair as they can be.⁸ It is the ultimate legal expression of the fact that we live in a pluralistic society. In being so, environmental law engages all the institutional and legal resources of a constitutional democracy to operate - public discourse, expertise, public administration, legislation, accountability, dispute resolution, multi-level governance, and much else besides.

⁷ Amitav Ghosh, *The Great Derangement: Climate Change and the Unthinkable* (University of Chicago Press 2016) 119.

⁸ Elizabeth Fisher, *Environmental Law: A Very Short Introduction* (OUP 2017).

That last sentence might surprise many readers. Environmental law is often perceived to be the wild-child outsider when it comes to law and governing, borne itself out of a strand of left-wing populist politics in the 1960s and 1970s.⁹ But while much environmental law is due to grassroots demands for democratic change, environmental law is a set of complex institutionalised practices that are grounded in a commitment to public reason and the rule of law. This helps ensure that environmental law is legitimate. It doesn't however, make environmental problems and environmental law any less frustrating.

2. Populist Impulses

The way in which environmental law is both embedded into democratic constitutionalism and is frustrating begins to explain why it is a spark for populist politics. Populism is not easy to define.¹⁰ At its core, it is the mobilisation of 'the people'¹¹ to express a political will, against what is characterised as a group of 'elites'. Inherent in such mobilisation is a strong desire to override or bypass existing governing institutions and practices in the

⁹ Philip Shabecoff, *A Fierce Green Fire: The American Environmental Movement* (Rewed, Island Press 2012).

¹⁰ For some overviews see Jan Werner Müller, *What is Populism?* (Penguin Books 2017) and Cristóbal Rovira Kaltwasser and others, 'Populism: An Overview of the Concept and the State of the Art' in Cristóbal Rovira Kaltwasser and others (eds), *The Oxford Handbook of Populism* (OUP 2017).

¹¹ For an exploration of this idea see Alain Badiou and others, *What Is a People?* (English trans, Columbia UP 2016).

name of democracy. There is an immediacy to this. It is all about the ‘power of the moment’.¹²

Beyond that it gets tricky.¹³ Populism doesn’t have a single ideological home. Who does the mobilising and why people are mobilised varies. Populism is a complex set of political and social phenomena grown out of, and closely entwined with democratic practice and political ideologies. It has deep historical roots. It is emerging in different legal and political cultures. Its consequences vary. It is not a simple thing. Nor are the relationships between environmental law and populism simple.

Take the right-wing populist governments that have emerged or are emerging around the world. The *need* for environmental laws is not usually part of right-wing populist discourse and environmental law is rarely part of the arsenal of the populist leader’s pledges. It is the exact opposite – the repealing of environmental laws and institutions is often what is promised.¹⁴

¹² Samuel Issacharoff, ‘Populism v Democratic Governance’ in Mark Graber, Sanford Levinson and Mark Tushnet (eds) *Constitutional Democracy in Crisis* (OUP 2018) 449.

¹³ (n 10).

¹⁴ ‘The Amazon’s Fires Could Burn Jair Bolsonaro’ (*The Economist*, 29 August 2019), <https://www.economist.com/the-americas/2019/08/29/the-amazons-fires-could-burn-jair-bolsonaro> accessed 2 September 2019; Michelle Ye Hee Lee, ‘Trump’s Claim that Waters of the United States Rule Cost ‘Hundreds of Thousands’ of Jobs’, (*Washington Post*, 2 March 2017), <https://www.washingtonpost.com/news/fact-checker/wp/2017/03/02/trumps-claim-that-waters-of-the-united-states-rule-cost-hundreds-of-thousands-of-jobs/> accessed 2 September 2019.

All this makes sense. Environmental quality is not something that a leader can automatically deliver on. Environmental protection relies on the public and global institutions that are often being denigrated, and the centralised pooling of executive power, a common feature of populism, also sits uncomfortably with the need for an environmental rule of law with the range of institutions it requires.

More significantly, recognising environmental problems is recognising that ‘the people’ are not as free, as sovereign, and as in control as populist politics asserts them to be. ‘Take back control but do think about your waste problem’ is not very evocative. Populist discourse also distinguishes between ‘the people’ and ‘the other’ - it eschews pluralism.¹⁵ But recognising environmental problems requires recognising that there may be many different people causing problems and being affected by them in different places across the globe. It is about acknowledging that environmental ‘precarity’ is due to the fact that we are all vulnerable to others.¹⁶

Environmental problems and law are also easy material for those wanting to generate populist outrage. By doubting climate change, government action on it can be undermined. Regulators can be disparaged as ‘elite’ experts.¹⁷ Those that seek to further their economic interests also find it easy to generate panic about the consequences of environmental regulation and/or to blame regulation for a series of economic woes.

¹⁵ Müller (n 10) 3.

¹⁶ To paraphrase Anna Lowenhaupt Tsing, *The Mushroom at the End of the World* (Princeton UP 2015) 20.

¹⁷ Damian Carrington, “Green Movement ‘Greatest Threat to Freedom’, says Trump Adviser,” *The Guardian*, January 30, 2017.

Environmental laws are easily perceived to vest too much power into the hands of unelected regulators and experts due to the fundamental role that science plays in identifying environmental problems and finding ways of addressing them. That makes it easy to arouse distrust in environmental institutions.

And for populations feeling frustrations for other reasons – due to their economic situation and due to the fear and powerlessness they feel,¹⁸ environmental law can be easy to blame. The recognition of environmental problems makes those feeling precarious feel even more precarious.¹⁹ For example, many of the participants in gilets jaunes protests against fuel hikes in France were those feeling marginalised both economically and geographically.²⁰

3. The Need for Deeper and More Complex Narratives

Populism is not a simple phenomenon, but paradoxically it nurtures the telling of simple stories.²¹ Those stories are at the core of populist politics - the people against the elite, and the ‘real’ people against the ‘other’ being the most obvious. As the above makes clear, the frustrations and disappointments of environmental problems and environmental

¹⁸ William Davies, *Nervous States: How Feeling Took Over the World* (Jonathan Cape 2018).

¹⁹ Hochschild (n 3).

²⁰ While written before the protests see Christophe Guilluy, *Twilight of the Elites: Prosperity, The Periphery, and the Future of France* (English trans, Yale UP 2019) is an interesting exploration of this dynamic.

²¹ Müller (n 10) 11.

law are a rich source of such narratives. These stories may not be true, but they easily captivate.

At the same time, it is also far too easy to tell simple stories about populism. This is particularly so when it threatens environmental quality or even planetary survival. It is tempting to see populism as a singular narrative about the disenfranchised. Or a narrative about racism. Or a narrative about vested interests manipulating the masses. Or a narrative about the ignorant. These simple narratives lead us to forget as George Marshall notes in relation to climate change that ‘there is an infinite number of different stories that have yet to be told’.²²

To put the matter another way, I have only scratched a small surface area when it comes to populist discourse. But is not just that there is more to explore. In thinking about and making sense of populism, we need to understand the ‘deep stories’ behind the times we find ourselves in.²³ Populism and its relationship to environmental law is not only a story of multiple strands, but each story is also deeply embedded within communities and how they understand the world and the place of themselves and law and government in it. I make no pretence unearthing these stories is easy. It is analytically challenging to

²² George Marshall, *Don't Even Think About It: Why Our Brains Are Wired to Ignore Climate Change* (Bloomsbury 2014) 39-44.

²³ I borrow this idea from Hochschild (n 3) Ch 3.

do. It is unlikely to yield a linear narrative.²⁴ It will however help us make sense of ‘the power of the moment’.²⁵ In doing so it will bring us ‘down to earth’.²⁶

²⁴ Ghosh (n 7) and Tsing (n 16).

²⁵ Issacharoff (n 12).

²⁶ Latour (n 1).