University of Reading

Climate populism, courts, and science

Article

Accepted Version

Hilson, C. ORCID: https://orcid.org/0000-0003-4114-6471 (2019) Climate populism, courts, and science. Journal of Environmental Law, 31 (3). pp. 395-398. ISSN 0952-8873 doi: 10.1093/jel/eqz021 Available at https://centaur.reading.ac.uk/84997/

It is advisable to refer to the publisher's version if you intend to cite from the work. See Guidance on citing.

To link to this article DOI: http://dx.doi.org/10.1093/jel/eqz021

Publisher: Oxford University Press

All outputs in CentAUR are protected by Intellectual Property Rights law, including copyright law. Copyright and IPR is retained by the creators or other copyright holders. Terms and conditions for use of this material are defined in the End User Agreement.

www.reading.ac.uk/centaur

CentAUR

Central Archive at the University of Reading

Reading's research outputs online

Comment: Environmental Law and Populism

Climate Populism, Courts, and Science

Chris Hilson*

Populism is very much in the air. It's not a new thing,[1] but this time it seems to be more or less everywhere. As a focus of academic study, it has not been much analysed by environmental lawyers. Legal academics have, thus far, tended to focus on populist attacks on the courts, which are seen as getting in the way of the will of 'the people'. As a field, this has predominantly been the terrain of constitutional lawyers, with the threats being ones against the rule of law.[2] Well known examples of such anti-court populism include the UK Daily Mail front page labelling the judges in the Brexit, *Miller*[3] case as 'Enemies of the People',[4] and the Polish government's changes to judicial retirement age, which threatened judicial independence and were ruled in breach of Article 19(1) TEU by the European Court of Justice.[5] Environmental politics scholars have studied the way in which right wing populist governments typically favour particular elements of the environment associated with nationalism and identity such as landscape,[6] but are often openly hostile to the science on climate change and hence to policy action to tackle it.[7]

However, in a recent article,[8] I made a start by exploring the extent to which climate change litigation might be regarded as an example of populism – both in terms of the type of litigant (with the EU 'People's Climate Case' perhaps the most obvious example)[9] and the style of argument (eg the populist, autobiographical narrative style of the witness submissions in *Juliana*).[10] I labelled these 'populist legalism' and 'legal populism' respectively.

The idea of 'the people' is no stranger to environmental law, whether in the law of standing or in debates about public participation. An appeal to the will of the people is a common feature of populism: populist leaders claim to speak for the 'real people' over incumbent democratically elected governments who have been captured by elites and hence serve only their interests and not those of the people who elected them.[11] The current campaigning battles against the climate emergency share something in common with this. Incumbent governments have at best taken woefully inadequate action given the scale and nature of the emergency or, at worst, been captured

* Chris Hilson, School of Law, University of Reading, UK (c.j.hilson@reading.ac.uk).

[1] See eg agrarian radicalism in 1880s America and Peronism in 1940s Argentina.

[2] Michaela Hailbronner and David Landau, 'Introduction: Constitutional Courts and Populism' (I-CONnect, 22 April 2017); Nicola Lacey, 'Populism and the Rule of Law' (LSE Working paper 28, January 2019).

[3] *R (Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[4] 4 November 2016.

[5] Case C-619/18 *Commission v Poland*, EU:C:2018:910.

[6] James McCarthy, 'Authoritarianism, Populism, and the Environment: Comparative Experiences, Insights, and Perspectives' (2019) 109 Annals of the American Association of Geographers 301.

[7] Matthew Lockwood, 'Right-wing Populism and the Climate Change Agenda: Exploring the Linkages' (2018) 27 Environmental Politics 712.

[8] Chris Hilson, 'Climate Change Litigation and the Narrative Turn: Law, Courts and Populism', in Susan Sterett and Lee Demetrius Walker (eds), *Research Handbook on Law and Courts* (Edward Elgar, in Press).

[9] Case T-330/18 *Carvalho and Others v Parliament and Council*, EU:T:2019:32.

[10] *Juliana v US*, No 6:15-cv-01517-TC.

[11] Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (OUP 2017); Jan-Werner Müller, *What Is Populism?* (Penguin 2017).

by fossil fuel and other powerful economic elites who have an interest in preserving the status quo. Climate campaigners might therefore be said to be speaking up for the people against these recalcitrant elites. And they have done so, in part, using the courts.

A number of recent climate change litigation cases have involved challenges to inadequate state action, including setting climate mitigation targets which lack sufficient ambition.[12] Of course the question is whether the relevant litigants and such litigation are really speaking for the people.[13] That litigants are doing so via the courts – typically seen as part of the suspect elite (as per the *Miller* headline above) – might itself be regarded as unusual in populist terms. After all, part of the job of the courts is to uphold the rights of minorities – some of whom are regarded by right wing populists as not part of the real people and thus not deserving of favourable treatment. However, in left populist terms, the use of the courts is less striking in this respect, and climate litigation against government laxity is largely associated with the left. The real tension here is between slow movement by democratically elected governments and the desire for more urgent action by climate campaigners. Both in some senses represent what the people want: many people want serious action taken, but at the same time do not want to give up their carboniferous luxuries, let alone adopt a life of climate austerity. However, the balance point in that tension is not temporally static. Public opinion can shift and leave governments behind. In yielding to climate change demands, the courts are not necessarily moving beyond public opinion therefore – they may simply be reflecting the way in which the people have moved on. The public, overall, may not want to be quite as urgent as some campaigners, but they may be ready to be more urgent than existing government policy.

While it may be possible to see climate change litigation as a form of populism, one should not assume that climate law and litigation somehow represents the populist strategy of choice: far from it. Most climate change litigation has ended up in disappointment for campaigners: few cases straightforwardly win in the conventional sense and very few seem to catch much in the way of media and hence public attention. In contrast, protest action by movements like Extinction Rebellion (ER) and the school strikes has recently made much more of a splash in the UK and elsewhere in Europe. Some well-known international climate lawyers such as Farhana Yamin have even joined ER, having become disillusioned with the capacity of the law to achieve the required social and policy change to tackle the climate crisis.[14] Of course, whether this type of protest represents the will of the people or, perhaps more importantly, makes claims to do so, any more so than climate change litigation, is open to debate: the temporal arguments made above can be readily applied here too. However, what is perhaps as interesting to note is that left climate populism seems to be consigned to the strategies of protest and litigation. This lies in stark contrast to right populism, which tends to be associated with charismatic and authoritarian, populist political leaders. They don't simply litigate or protest against government: they *become* the government. While green or eco-authoritarianism

[12] See eg *Urgenda Foundation v The State of the Netherlands* NL:RBDHA:2015:7145 and, on appeal, *Netherlands v Urgenda* NL:GHDHA:2018:2610; *Plan B Earth and Others v The Secretary of State for Business, Energy, and Industrial Strategy* [2018] EWHC 1892 (Admin); *Carvalho* (n 9)4.
[13] Hilson (n 8).
[14] See Farhana Yamin, 'This Is the Only Way to Tackle the Climate Emergency' (*Time*, 14 June 2019).

as an idea is not a new one,[15] we have yet to see a populist climate authoritarian leader come to the fore and tackle the climate emergency.

If one defining feature of populism is an appeal to the will of the 'real' people, then another is its anti-expert stance, with science as a key form of such expertise in the firing line. My contention here is that the environmental movement and some academics (including environmental lawyers) have at times exhibited distinctly populist tendencies along these lines. As far back as the Brent Spar oil rig disposal issue and as recently as mobile phone masts and genetically modified organisms (GMOs), there has been a tendency among environmentalists to favour citizen perceptions of risk and emotions over the science.[16] In academic circles, a reliance on Science and Technology Studies (STS) – which has become quite fashionable in environmental law[17] – involves a similar scepticism towards positivist scientific knowledge. STS does not favour citizen views over the science as such: rather it argues that the latter cannot realistically be separated out from supposedly non-scientific elements, including the former.[18] Given that science is 'co-produced', it is always subject to deconstruction. However, there is then a problem for environmentalists and STS scholars in selecting which environmental law and policy these approaches are applied to.[19] GMOs are typically open season,[20] but then with climate change, we hear much less of this discourse.[21] The science there is more sacrosanct; there is a fear of epistemological questioning of the relevant knowledge for fear of lapsing into climate denialism. I raise this not to suggest that we ought to be questioning the climate science – far from it – it is simply to observe, sociologically, that it appears to receive different treatment.[22]

All of the above makes clear that while environmental lawyers may not have been thinking much about populism, it provides plenty of food for thought. First, it reminds us that emotions play a significant part in environmental law.[23] Populism appeals to emotions over rationality, facts and the truth which are associated with distrusted experts. How you feel about something becomes more important than what you know or should know about it. Climate litigation, in emphasising compelling and moving narratives about lives already being shattered by climate disruption, has

---

[15] See eg Alan Carter, 'Eco-Authoritarianism, Eco-Reformism or Eco-Marxism?: Part Two of 'Foundations for Developing a Green Political Theory'' (1996) 10 Cogito 115.

[16] See eg Mark Huxham and David Sumner, 'Emotion, Science and Rationality: The Case of the "Brent Spar"' (1999) 8 Environmental Values 349; Claire Marris, 'Realist Constructivist Contribution to Food Policy on the Safety of Genetically Modified Crops and Foods' in Ben Martin (ed), *The Joys of Truth: Science Policy in the Public Interest: A 'light' Festschrift in Honour of Erik Millstone* (University of Sussex 2018).

[17] See eg Maria Weimer and Anniek de Ruijter, *Regulating Risks in the European Union: The Co-production of Expert and Executive Power* (Hart 2017).

[18] See eg the texts cited in nn 16-17.

[19] This problem facing STS's critical stance is raised in Bruno Latour, 'Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern' (2004) 30 Critical Inquiry 225.

[20] Geoffrey Podger, 'The Handling of Uncertainty: A Risk Manager's Perspective' in Sander van der Linden and Ragnar E Löfstedt (eds), *Risk and Uncertainty in a Post-Truth Society* (Routledge 2019) 75.

[21] But cf eg Silke Beck and Tim Forsyth, 'Co-production and Democratizing Global Environmental Expertise: The IPCC and Adaptation to Climate Change' in Stephen Hilgartner, Clark Miller, Rob Hagendijk (eds), *Science and Democracy: Making Knowledge and Making Power in the Biosciences and Beyond* (Routledge 2015).

[22] Neither am I implying that the science on eg GMOs is always right, uncontentious or static; even where the science is reasonably clear, it may be supportive of GMOs on human health grounds but mixed or negative on environmental grounds, and the science clearly moves on with time.

[23] See Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases, and Materials* (OUP 2019) 265.

begun to appeal much more to emotion. In climate communication terms, this populist style works much better than mention of just dry climate science and law. Similarly, emotional responses to risk have long been part of the academic conversation in environmental law: whether regulators should take into account 'unscientific' emotions or be guided purely by scientific rationality is a key question within the literature on risk regulation.[24] Secondly, the people also feature heavily in environmental law. While an appeal to the people does not, in itself, necessarily make something populist, the interesting question is really about what counts as the people. In environmental law, the people impacted by pollution have often been the marginalised, people of colour and the poor. This is the territory of the environmental justice movement. While climate change is similarly impacting communities in unequal ways, both within nations and between them, it has also changed things in bringing home that we are, potentially, all people who will be affected by climate change. While environmental justice litigation might therefore only represent affected minorities – and some of the climate change litigation we have seen so far undoubtedly shares this attribute[25] – this is becoming increasingly untrue of climate change litigation: it speaks for us all.

[24] ibid. Fisher, Lange, and Scotford, in line with STS approaches, observe that it is difficult to draw a stark line between the two in this way.

[25] eg *Native Village of Kivalina v ExxonMobil Corp* 696 F3d 849 (9th Cir 2012).