

The End of Enlightened Environmental Law?

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ABSTRACT

The rise of populism threatens enlightened environmental law. In an age where ignorance is seen as a virtue, not a vice, environmental laws risk regression. No longer are debates about environmental problems driven by opinions founded on evidence, scientific method and reason. Instead, these debates, and how the law should address them, are driven by differing ways of viewing the world. Populists play on cultural biases and intuitive reasoning, personalise politics and use seductive slogans to distort the reality of environmental problems. As we become further estranged from our natural environment, people no longer can verify or deny these populist claims. This comment examines some of the ways populism has taken hold of environmental governance and how it might be addressed.

KEYWORDS: populism, environmental governance, environmental law, rule of law

‘Ignorance is strength’ pronounced Big Brother in George Orwell’s novel *1984*.¹ But fact is stranger than fiction. This slogan could be the catch cry today. Ignorance is seen as a virtue, not a vice. The scientific philosopher Karl Popper identified that ‘Ignorance is not a simple lack of knowledge, but an active aversion to knowledge, the refusal to know, issuing from cowardice, pride, or laziness of mind’.² Whatever the reason, ignorance is on the rise.

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¹ George Orwell, *1984* (Penguin New Ed Classics 2004) 6.

² Quoted in Ryszard Kapuscinski, ‘The Philosopher as Giant-Slayer’ *The New York Times Magazine* (New York 1 January 1995) 25.

Populism thrives on ignorance. Populist propaganda succeeds when people fail to recognise its falsity. Populism attacks the ideals of the Age of Enlightenment, of empirical evidence, the scientific method and reason, and it attacks those knowledgeable experts whose opinions are founded on evidence, scientific method and reason. The right-wing populist denial of climate change and pressure for the continuation of carbon extraction and emission at current levels are illustrative of the polemical overthrow of evidence, scientific method and reason.³

1. The Role of Culture, Intuition and Preconceptions

Identifying the causes of this active aversion to knowledge and reason is complex. It involves undertaking a thicker account of the debate to reveal the deeper social processes at work.⁴ The debate about contemporary environmental problems is driven by differing ways of viewing the world. The way people view the world is influenced by their cultural beliefs and values. Smith and Pangsapa observe that:

As the debate on climate change illustrates, a practically adequate understanding of contemporary environmental problems also has to take account of the social

³ Matthew Lockwood, 'Right-wing Populism and the Climate Change Agenda: Exploring the Linkages' (2018) 27 *Environmental Politics* 712.

⁴ Elizabeth Fisher, 'Through 'Thick' and 'Thin': Comparison in Administrative Law and Regulatory Studies Scholarship' in Peter Cane and others (eds) *Oxford Handbook of Comparative Administrative Law* (forthcoming OUP).

dimension. The way we see environmental problems, like all social representations, is also subject to mechanisms of social construction.⁵

The way people view the world is also influenced by their knowledge, training and experience: scientists, economists and lawyers view the world and its problems not only differently to one another but to people not steeped in those disciplines. Jeremy Waldron gives the example of differing views about the rule of law, ‘the dissonance between academic and lay understandings of the Rule of Law’.⁶

Populism is driven by culture. People want to protect their perception of who they are, what they stand for and where they fit in society. Clive Hamilton, commenting on the recent Australian electoral result which saw many people voting against their economic interests to return the conservative Liberal-National Coalition to power, observed that: ‘For these citizens voting is less about economics than about culture, that is, a social environment and way of life made up of values, behaviours and symbols that accord with their sense of who they are and where they fit.’⁷ Hamilton suggests that: ‘those who vote against their economic interests

⁵ Mark J Smith and Piya Pangsapa, *Environment and Citizenship: Integrating Justice, Responsibility and Civic Engagement* (Zed Books 2008) 13.

⁶ Jeremy Waldron, ‘Thoughtfulness and the Rule of Law’ (2011) 18 *British Academy Review* 4.

⁷ Clive Hamilton, ‘Culture Shock: Politics Upended in Era of Identity’ *The Guardian* (23 June 2019) <<https://www.theguardian.com/australia-news/2019/jun/23/culture-shock-politics-upended-in-era-of-identity>> accessed 3 September 2019.

are as rational as other voters; it's just that they don't behave according to the pundit's mental model – in which economic interests guide rational voting behaviour'.⁸

Environmental problems threaten our way of life. Recognising and responding to these problems is essential, but requires transforming our society and culture. The intense debate surrounding the proposed Adani Coal Mine, a very large open cut coal mine in the Galilee Basin in Queensland, Australia, is emblematic of this point. Opposition and support for the proposed mine divided voters at the recent Australian federal election. Opposition is based on the immense environmental impacts of the mine, including the consequential greenhouse gas emissions. Support for the mine arises from a concern for economic development and job creation in regional areas. Supporters inflate the local jobs the project would create but deflate the environmental impacts of the project. In this process, knowledge is sidelined in favour of appeal to culture. The conflict becomes a 'symbol of the cultural rift between the regions and the cities'.⁹

Liz Fisher, drawing on Arlie Hochschild's sociological analysis of Tea Party voters in South West Louisiana¹⁰, makes a similar observation about voters in areas dominated by a number of heavy industries that pollute and degrade the environment, who vote in favour of abolition of the protection provided by environmental law and regulation. Although this seems to be voting against their self-interest, it is not in fact because they value and prioritise other cultural interests over the interest of environmental protection. Fisher explains:

⁸ Ibid.

⁹ Ibid.

¹⁰ Arlie Hochschild, *Strangers in Their Own Land: Anger and Mourning on the American Right* (New Press 2016).

What Hochschild's thick account reveals is a 'deep story'. It is a story of people seeing themselves as standing in a line working towards the Great American Dream. That line is not only at a standstill, but those standing in line perceive that people are cutting ahead of them – minorities, women, immigrants, refugees and the environment. In this deep account, Hochschild is charting different nuanced accounts of why this group of people are feeling this way. Some are loyal to industry. Others prioritise others things. Others think regulation and government control prevent free choice. Others place greater faith in the free market.¹¹

People are seduced to vote against their self-interest, both economic and environmental. This seduction is facilitated by ignorance. Engagement with relevant information would reveal that their self-interest is being threatened, but this is not appreciated because of their refusal to know.

Indeed, it has been observed that people 'systematically violate the principles of rational decision making'.¹² Calabretta and others suggest that rational decision-making involves identifying and formulating the problem, assessing all relevant information, generating alternatives, evaluating the costs and benefits of each alternative and employing logic to select the solution.¹³ But human beings eschew rationality in favour of intuition.

¹¹ Fisher (n 4) 22.

¹² Paul Slovic, Baruch Fischhoff and Sarah Lichtenstein, 'Cognitive Processes and Societal Risk Taking' in John S Carroll and John W Payne (eds) *Cognition and Social Behavior* (Erlbaum 1976) 165, 169.

¹³ Giulia Calabretta, Gerda Gemser and Nachoem M Wijnberg, 'The Interplay between Intuition and Rationality in Strategic Decision Making: A Paradox Perspective' (2017) *38Organization Studies* 365, 367.

While intuitive judgments involve reasoning processes, ‘these stages occur faster and are mostly non-conscious and deeply intertwined’.¹⁴ When uncertainties are involved people respond ‘with predictable biases that often ignore or misprocess important information.’¹⁵

The problem is exacerbated by inadequate guidance or structure for decision-making. Where ‘the task domain has little structure or the structure is unknown’, individuals employ weaker methods of decision-making.¹⁶ Daniel Kahneman describes this intuitive response as ‘what you see is all there is’.¹⁷ Where individuals are exposed to one-sided accounts, even when they are aware there is missing information, they confidently respond on the basis of their limited information.¹⁸ Kahneman explains, ‘knowing little makes it easier to fit everything you know into a coherent pattern’.¹⁹

Perversely, in an age of eschewing evidence-based decision-making, there is too much information available on the internet, social media and mainstream media. As Peter Pomerantsev explains:

We now have more information than ever before but it hasn't brought only the benefits we expected. More information was supposed to mean more freedom to stand

¹⁴ Ibid.

¹⁵ Daniel Kahneman, Paul Slovic and Amos Tversky (eds), *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge University Press 1982) 83.

¹⁶ Herbert A Simon, ‘Invariants of Human Behavior’ (1990) 41 *Annual Review of Psychology* 1, 9.

¹⁷ Daniel Kahneman, *Thinking, Fast and Slow* (Penguin Books 2012) 86.

¹⁸ Ibid 87.

¹⁹ Ibid.

up to the powerful, but it's also given them new ways to crush and silence dissent. More information was supposed to mean a more informed debate, but we seem less capable of deliberation than ever.²⁰

In this surfeit of information, knowledge is lost. One of the mechanisms to cope with information overload is selectivity, both self-selection and selection by media algorithms. Self-selection can be unconscious or conscious. Sourdin refers to the way we listen as an individual: messages are received through perceptual filters made up of preconceived notions, ideas and beliefs, then processed through preliminary channels such as a visual or auditory channel.²¹ The listener's cultural bias also affects listening ability.²² People can also consciously select the information sources that reinforce their views.²³ There is also selection by others. Algorithms record and learn from people's internet searches and previous selections of information to feed information that is likely to be wanted by those people.

But this selectivity promotes confirmation bias. People's preconceptions and prejudices are reinforced by the selective information that they receive.

There are, therefore, a variety of psychological, cultural and socio-economic factors driving people's attitudes and behaviour, and their conceptions of identity, citizenship and citizen-state relations. Smith and Pangsapa suggest that 'modes of citizenship regulate the production of meaning on entitlements and obligations and general 'subject positions' in

²⁰ Peter Pomerantsev, *This is Not Propaganda* (Faber & Faber Ltd 2019) 4.

²¹ Tania Sourdin, *Alternative Dispute Resolution* (5th ed, Thomson Reuters 2016) 245.

²² *Ibid* 248.

²³ George Marshall, *Don't Even Think About It* (Bloomsbury 2014) 28.

which individuals can invest their identities'.²⁴ George Marshall explains that people's social identities have 'an extraordinary hold over their behaviours and views'.²⁵

The cultural beliefs, intuitive responses and information selectivity of followers of populist leaders are exploited by populist leaders. Deeper cultural narratives are used to override public reason. This cultural driver may also explain the appeal of charismatic populist leaders. Zaretsky draws on Freudian mass psychology to explain the bond between the leader and his or her followers:

Freud showed in his book on mass psychology that in democratic societies the charismatic bond may rest on an appeal to frustrated or unfulfilled narcissism. The followers idealise the leader as they once – in childhood – idealised themselves. For this to work, the charismatic leader has to possess not only exceptional qualities but also the typical qualities of the individuals who follow him, in a 'clearly marked and pure form' that gives the impression 'of greater force and of more form of libido'. The charismatic leader thus appears as an 'enlargement' of the follower, completing the follower's self-image rather than, as in other forms of charisma, being out of reach.²⁶

²⁴ Smith and Pangsapa (n 5) 68, referring to the writing of Michel Foucault in *Power/Knowledge Selected Interviews and Other Writings, 1972-1977* (Harvester Press 1980) and Michel Foucault, 'The Subject and Power' in Hubert Dreyfus and Paul Rabinow (eds), *Michel Foucault: Beyond Structuralism and Hermeneutics* (Harvester Press 1982).

²⁵ Marshall (n 23) 25.

²⁶ Eli Zaretsky, 'Trump's Charisma' (*London Review of Books Blog*, 27 June 2019)

<<https://www.lrb.co.uk/blog/2019/june/trump-s-charisma>> accessed 3 September 2019. See

Typically, the beliefs projected on to the leader involve not a nostalgia for a past that existed, but for a future that has not happened. People believe they are entitled to a certain future but that future did not happen, engendering resentment and anger.²⁷

The populist leader crafts a personalised connection with followers by appealing to certain cultural values but sidelining other values, selecting and manipulating the information provided and encouraging intuitive rather than reasoned judgments.

2. Personalising Politics

Populist movements employ personal attacks as part of their strategy.²⁸ Populism embraces the politics of division by feeding people's fear of 'the other'. The other is anyone who is perceived not to be one of 'us'. Politics and governance is framed in the binary terms of 'us' and 'them': 'It is us against them' or 'you are either with us or against us'. Political theorist Hannah Arendt, referring to tribal nationalism or patriotism, rallying concepts oft invoked by populists, suggests:

Politically speaking, tribal nationalism (patriotism) always insists that its own people are surrounded by a "world of enemies"- "one against all"- and that a fundamental difference exists between this people and all others. It claims its people to be unique,

also Cas Mudde and Cristobal Rovira Kaltwasser, *Populism: A Very Short Introduction* (OUP 2017) 66.

²⁷ Fintan O'Toole quoted in Nick Miller, 'Land of Hope and Glory Not So Hopeful (or Glorious) Anymore' *The Sun Herald* (Sydney, 18 August 2019) 24; Fintan O'Toole, *Heroic Failure: Brexit and the Politics of Pain* (Head of Zeus 2019).

²⁸ Pomerantsev (n 20).

individual, incompatible with all others, and denies theoretically the very possibility of a common mankind long before it is used to destroy the humanity of mankind.²⁹

Theresa May, in her final address as Prime Minister of the United Kingdom, observed that:

Populist movements have seized the opportunity to capitalise on that vacuum. They have embraced the politics of division; identifying the enemies to blame for our problems and offering apparently easy answers. In doing so, they promote a polarised politics which views the world through the prism of ‘us’ and ‘them’ – a prism of winners and losers, which views compromise and cooperation through international institutions as signs of weakness not strength.”³⁰

Personalisation can also occur where there is perceived to be a challenge to people’s beliefs or values. Arguments that challenge people’s beliefs or values are perceived as a personal attack on them. People become fearful and angry and retaliate by making personal attacks on those seen to be attacking them. There is no intellectual engagement with the arguments based on evidence and reason. In this game, they play the person, not the ball. The attacks are personal and pointed, derogatory and denigrating.

This personalisation of the attack undermines respect for the people attacked as persons, as centres of intelligence and for their dignity as individuals.³¹ Where people being

²⁹ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973) 227.

³⁰ The Rt Hon Theresa May, 'The State of Politics' (Chatham House, London, 17 July 2019) <<https://chathamhouse.soutron.net/Portal/DownloadImageFile.ashx?objectId=3180>> accessed 3 September 2019, 5.

³¹ Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016) 10.

attacked speak knowledgeably and with expertise, the attack focuses on that knowledge and expertise. They are denounced as ‘elites’ who are out of touch with community feeling of ‘the people’.³² Insofar as these denigrated elites occupy positions of authority, such personal attacks undermine the legal, political and economic institutions that are foundations of good governance and democratic societies. The label of ‘elites’ is indiscriminately and uniformly applied to disparage those with whose arguments populists disagree. There is no engagement with the strengths or weaknesses of the arguments; the arguments are denigrated because they have been made by ‘elites’. This too is dehumanising and disrespectful of the people labelled as ‘elites’.

In these personal attacks, winning the battle is more important than the means by which that outcome is achieved. It is a battle between people, not of ideas and arguments. Unsurprisingly, the attacker does not pursue Habermas’ model of moral argument, ‘which subordinates the eristic means to the end of developing intersubjective conviction by the force of the better argument’.³³

This point about the personal battle explains the power of populist leaders. Zaretsky suggests that ‘the charismatic leader’s power rests on beating rivals in competition, rather than on knowledge or right of inheritance; the charismatic leader is always an expert in struggle’.³⁴ This struggle not only personalises the attack on the rival, it also personalises the attacker. The attacker makes the attack personal, everything is about himself or herself. Zaretsky again observes that ‘charismatic leaders demonstrate that they are personally

³² Mudde and Kaltwasser (n 26) 5-6.

³³ Jurgen Habermas, *The Theory of Communicative Action Vol 1*, ‘Reason and Rationalisation of Society’ (translated by T McCarthy, Beacon Press 1984) 35-36.

³⁴ Zaretsky (n 26).

responsible for their decisions in a way that the bureaucrat, or party leader in the parliamentary system, is not'.³⁵ This enhances their appeal in the eyes of followers.

3. The Seduction of the Slogan

Politicians prey upon people's preconceptions and prejudices. Election campaigns are characterised by seductive slogans. Slogans are framed in language appealing to the populace. In the penultimate Australian election campaign, the conservatives' slogans screamed 'Dump the tax' (referring to the carbon tax intended to reduce carbon emissions), 'Ditch the witch' (referring to Australia's first female Prime Minister) and 'Stop the boats' (referring to boats bringing refugees, including climate change induced migrants).

Pankaj Mishra analyses the recent explosions of resentment by the disaffected in society: 'Those who perceive themselves as left or pushed behind by a selfish and conspiratorial minority can be susceptible to political seducers from any point on the ideological spectrum, for they are not driven by material inequity alone.'³⁶

George Orwell, the novelist scarred by totalitarian regimes in and after the Second World War, observed that 'Political language... is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind'.³⁷ So too with current populist regimes. Political language makes lies sound truthful and the truth sound false. Truth is defamed as 'fake news'.

³⁵ Ibid.

³⁶ Pankaj Mishra, *Age of Anger: A History of the Present* (Allen Lane 2017).

³⁷ George Orwell, 'Politics and the English Language' in George Orwell, *George Orwell: Essays* (Penguin Books 2000) 359.

Theresa May identified this coarsening of public debate, where ‘some are losing the ability to disagree without demeaning the views of others.’³⁸ The personalisation of political debate threatens democratic values.³⁹ We lose the capacity for open and reasonable debate, undermining the principle of freedom of speech. The barrage of personal threats and ‘tribal bitterness’ does not only threaten the realm of public debate but gives way to a more sinister future. As May warned: ‘Words have consequences and ill words that go unchallenged are the first step on a continuum towards ill deeds – towards a much darker place where hatred and prejudice drive not only what people say but also what they do’.⁴⁰

The poet T S Eliot mused in his poem *Four Quartets* that ‘humankind cannot bear very much reality’. Hannah Arendt saw slogans as protecting people from reality: ‘Clichés, stock phrases, adherence to conventional, standardised codes of expression and conduct have the socially recognized function of protecting us against reality.’⁴¹ The reality of climate change, and its causes and consequences, are hard for humankind to bear. An ‘inconvenient truth’, as Al Gore said. Governments and vested interests conspire to deny this reality.

4. Disconnection from Environmental Problems

Why does chanting slogans and repeating falsehoods work? Why don’t people see the puffery and propaganda of the populists for what they really are? There are multiple reasons, some of which I have identified in the previous sections. The slogans resonate with people’s cultural

³⁸ May (n 30) 4.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Hannah Arendt, *The Life of the Mind: Volume I Thinking* (Harcourt Brace Jovanovich 1977) 4.

values and beliefs. The falsehoods confirm people's prejudices and biases. People favour intuitive thinking over rational decision-making. To these reasons may be added explanations concerning people's disconnection with the reality of environmental problems.

First, most of humanity, especially people living in urban areas, is separated from nature. Without connection to nature, people do not recognise their interdependence with the environment.⁴² People no longer can verify or deny, by their direct personal observations, populist claims concerning the state of the environment or the impact or lack of impact of actions or policies on the environment.

Secondly, many environmental impacts are indirect, not direct, consequences of actions or policies. There is a long chain of causation between a cause and its effects. A well-known illustration is the indirect effects of using the insecticide DDT on bird health and mortality.⁴³

Thirdly, there is often a time lag between a cause and its effects. A cause may not have an immediate, acute effect but instead a chronic effect that is only manifest many years later.

Fourthly, there is the tyranny of small decisions, each individually not significant but cumulatively significant. The global problem of climate change is a good illustration. Climate change is caused by myriad greenhouse gas emissions from individual sources, each source

⁴² Helena R Howe, 'Making Wild Law Work – The Role of 'Connection with Nature' and Education in Developing an Ecocentric Property Law' (2017) 29 JEL 19, 33-36.

⁴³ As graphically explained by Rachel Carson in her seminal book, *Silent Spring* (Houghton Mifflin 1962).

contributing a small proportion relative to the global total of greenhouse gas emissions, but cumulatively they are destabilising the global climate system.⁴⁴

Fifthly, many actions and policies affect the commons – communal natural resources such as the air, seas, rivers, forests and wildlife. Exploiters of the commons derive far greater benefits than they suffer burdens because whilst benefits are enjoyed individually burdens are shared collectively.⁴⁵ Climate change is an example of this effect on the commons.

The remoteness and indirectness of the connections between the causes of harm to the environment and their effects on the environment mean that people do not readily discern the falsity of populist claims that actions or policies do not have the impact that they in fact do have or have an impact that they in fact do not have.

5. The Regression of Environmental Governance

These shifts in ideology and attitude impact on political governance, including environmental governance. All branches of government have become what Lord Denning referred to as ‘timorous souls’, not the ‘bold spirits’⁴⁶ that are needed to tackle environmental problems, including the existential climate crisis.

Most legislatures have not progressed, but instead have often regressed, the legal protection of the environment, contrary to the principles of the environmental rule of law of

⁴⁴ *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257, [515]-[516].

⁴⁵ Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

⁴⁶ *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 178, although using the descriptions in another context.

non-regression and progression.⁴⁷ Illustratively, there are few legislatures that have enacted strong climate change legislation to implement the Paris Agreement and achieve its long-term temperature goal.⁴⁸ An example of regression is the NSW Parliament passing the *Environmental Planning and Assessment Amendment (Sydney Drinking Water Catchment) Act 2017* to reverse the effect of the decision of the NSW Court of Appeal in *4nature Incorporated v Centennial Springvale Pty Ltd*⁴⁹ and retrospectively validate the development consent for a coal mine that would adversely affect water quality in the Sydney drinking catchment.

Executive governments have failed to execute environmental laws, by not upholding and enforcing the laws or, worse, openly disobeying the laws. In the US, a New York Times analysis identified 84 environmental rules and regulations being rolled back under the Trump

⁴⁷ See, United Nations Environment Programme, *Environmental Rule of Law: First Global Report* (2019)

<https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y> accessed 3 September 2019, 151; IUCN, *World Declaration on the Environmental Rule of Law* (2017)

<https://www.iucn.org/sites/dev/files/content/documents/world_declaration_on_the_environmental_rule_of_law_final_2017-3-17.pdf> accessed 3 September 2019, 4; Michel Prieur, 'The Principle of Non-regression in Environmental Law' (2012) 5(2) SAPIENS 53.

⁴⁸ Some examples of legislation implementing the Paris Agreement include, *United Nations Paris Agreement (Implementation) Act No 3 2016* (Papua New Guinea) and *Lov om klimamål (klimaloven) 2018* [Climate Change Act] (Norway).

⁴⁹ (2017) 95 NSWLR 361.

administration.⁵⁰ For example, by Executive Order 13771, ‘Reducing Regulation and Controlling Regulatory Costs’, President Trump directed all agencies to repeal at least two existing regulations for every new regulation made.

Such thoughtlessness in making and executing environmental laws by the legislative and executive branches of government undermines the rule of law and impedes good governance.

The judiciary fares better, but not by much. There are judicial decisions upholding the environmental rule of law, but they are thin on the ground. One possible explanation for their scarcity is that judges too risk bending in the direction of the prevailing political wind. The criticisms of elites and their ideas do not stop at the doors of the courthouse. Judges are subject to the slings and arrows of outraged governments, media, and citizenry.⁵¹ It takes courage to act in the face of fire, to make unpopular decisions that will result in public denunciation of the decision and decision-maker.

⁵⁰ Nadja Popovich, Livia Albeck-Ripka and Kendra Pierre-Louis, '84 Environmental Rules Being Rolled Back Under Trump' *The New York Times* (29 August 2019) <<https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html?mtrref=www.google.com&assetType=REGIWALL>> accessed 5 September 2019.

⁵¹ An example in the UK is the Daily Mail article labelling judges who were to decide the Brexit case, *R (Miller and another) v Secretary of State for Exiting the European Union* [2016] WLR(D) 564, as ‘enemies of the people’. See, James Slack, 'Enemies of the People' *Daily Mail* (4 November 2016).

The fear of harsh and public criticism of judicial decisions can, unfortunately, influence individual judicial decision-making. Of course, judicial independence and impartiality demands that judges need to be able to decide cases on the evidence before them in accordance with the law without influence or pressure from any external source.⁵² But the external influence can be subtle. Especially in cases involving highly politicised issues, the fear of being the target of political, media and public criticism can make the safe, less controversial decision more attractive.

That the allure of the comfortable over the controversial is real was recognised in the famous dissent of Lord Atkin in the war time case of *Liversidge v Anderson*: ‘I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive.’⁵³ Similarly, the schism in judicial decision-making in US courts on climate change cases⁵⁴ is reflective of different judicial attitudes to the so-called ‘political question’ and, perhaps, the political persuasions and outlooks of the judges.

⁵² Brian J Preston, ‘The Enduring Importance of the Rule of Law in Times of Change’ (2012) 86 Australian Law Journal 175, 180-181.

⁵³ [1942] AC 206, 244.

⁵⁴ See the different rulings of US federal courts on the justiciability of climate change actions discussed in Brian J Preston, ‘Climate Change Litigation Part 1’ (2011) 1 Carbon and Climate Law Review 3, 5-9.

Uninformed or, worse, deliberately damaging criticism of judicial decisions also has a systemic impact, undermining public confidence and trust in the judiciary.⁵⁵

Yet the seductive song of the sirens of Populism and Popularity is strong. There are too many judicial decisions upholding, and too few judicial decisions challenging, the hegemony of populist governments and vested interests in the exploitation of the environment. That a judicial decision upholding the law to mitigate climate change or adapt to the consequences of climate change, such as the *Urgenda* case⁵⁶ in the Netherlands, *Juliana* case⁵⁷ in the United States or the Rocky Hill mine case⁵⁸ in Australia, is seen to be revolutionary - judicial activism at work - is a sure sign that the judiciary elsewhere has been silenced by the fear of criticism for speaking out.

The judiciary, being institutionally and culturally averse to being seen to be political, eschews making decisions that may appear to involve judicial activism. However, as Indian novelist Arundhati Roy observes, the act of keeping quiet, of saying nothing, is itself as political an act as speaking out.⁵⁹ Either way, judges are taking an active stance.

The upshot is that environmental governance is regressing, not progressing. The environmental rule of law is in a worse state now than it has been for decades.

⁵⁵ The Hon Catherine Holmes, 'The Fight for Independence' *The Australian* (Australia, 14 June 2019) 3.

⁵⁶ *Urgenda Foundation v Netherlands* (The Hague District Court, C/09/456689/HA ZA 13-1396, 24 June 2015).

⁵⁷ *Juliana v USA* 217 F Supp 3d 1224 (D Or, 2016).

⁵⁸ *Gloucester Resources Limited v Minister for Planning* (2019) 234 LGERA 257.

⁵⁹ Arundhati Roy, *Power Politics* (South End Press 2001) 7.

The undermining of the rule of law has consequences. Some are self-evident in the matters I have so far raised. Public trust and confidence in the law, the legal system and legal institutions declines. Actions in defiance of the rule of law increase. One example, although particular, is the increase in the number of environmental activists being killed. A recent study, prepared on behalf of global environmental activist group Global Witness, found that at least 1588 people died between 2002 and 2017 while acting as environmental defenders. This group included indigenous people, community activists, lawyers and journalists.⁶⁰ Similarly, Human Rights Watch, in its World Report 2018, recorded that where support for the rule of law, human rights and democratic institutions falters, populism surges. Conversely, where the pushback against populist agendas is strong, populist advances have been limited.⁶¹

6. Pushing Back on Populism

But there is hope. There are ways to lessen the perils of populism. I will suggest five.

⁶⁰ Global Witness, *At What Cost? Irresponsible Business and the Murder of Land and Environmental Defenders in 2017* (24 July 2018)

<https://www.globalwitness.org/documents/19392/Defenders_report_layout_AW2_lowres.pdf> accessed 2 September 2019. The research has also been published in Nathalie Butt and others, 'The Supply Chain of Violence' (August 2019) 2 *Nature Sustainability* 742.

⁶¹ Human Rights Watch, *World Report 2018: The Pushback Against the Populist Challenge* (2018) <<https://www.hrw.org/world-report/2018/pushback-against-the-populist-challenge>> accessed 2 September 2019, 1, 2, 8.

The first way, as former US Supreme Court judge, William O Douglas, exhorted, is ‘to combat noxious ideas... with other ideas [and] to combat falsehoods... with truth.’⁶² This can be done in manifold ways. It can involve access to full data sets, rather than the cherry-picked facts relied on by populists; reliance on scientifically valid and peer-reviewed evidence, studies, reports and literature, rather than merely scientific literature that fits the political agenda of the day;⁶³ and deference to the opinions of authoritative institutions, such as in the climate science context, the Intergovernmental Panel on Climate Change (IPCC). It can also involve accessing a wider range of information, not only expert evidence and literature but also lay evidence such as public comments and submissions. The latter source of information may provide insights from people’s experiences and lessen people’s feelings of alienation and exclusion from governance.

Secondly, there is need to reconnect people with nature, enabling people to recognise their interdependence with and relational responsibilities to nature and understand the causal relationship between actions and policies and their environmental effects.⁶⁴ This reconnection needs to be personal and hence readily understandable. For example, the causal relationship between increasing greenhouse gas emissions by sources or reducing removals by sinks and extreme weather events affecting people and their property needs to be explained. People then will perceive that their lived experience is different to the puffery and propaganda of the populists.

⁶² Mike Wallace, Interview with William O. Douglas (Television Interview, 11 May 1958).

⁶³ Wendy Wagner, Elizabeth Fisher and Pasky Pascual, ‘Whose Science? A New Era in Regulatory “Science Wars”’ (2018) 262 *Science* 636.

⁶⁴ Howe (n 42) 33-34, 36-38.

Thirdly, we need to be active in voicing and standing up for the values on which our legal and political systems are founded and the Enlightenment ideals. Theresa May cautioned that:

...the values on which all of our successes have been founded cannot be taken for granted. They may look to us as old as the hills, we might think that they will always be there, but establishing the superiority of those values over the alternatives was the hard work of centuries of sacrifice. And to ensure that liberal inheritance can endure for generations to come, we today have a responsibility to be active in conserving it. If we do not, we will all pay the price – rich and poor, strong and weak, powerful and powerless.⁶⁵

In doing so, we are appealing to people's better nature. Populism can appeal to people's worse nature, their fears and prejudices. But appeal can be made to people's better natures.⁶⁶

In this regard, Human Rights Watch suggested that:

Populists offer superficial answers to complex problems, but broad swathes of the public, when reminded of the human rights principles at stake, can be convinced to reject the populists' scapegoating of unpopular minorities and their efforts to undermine checks and balances against government abuse.⁶⁷

⁶⁵ May (n 30) 3.

⁶⁶ Zaretsky (n 26).

⁶⁷ Human Rights Watch (n 61) 15.

There needs to be a quest for the values that unite, not divide, people. There needs to be a ‘painstaking making out of common ground.’⁶⁸

Fourthly, there is a need to covet and proclaim the importance of reason in debate and decision-making. Lawyers and judges, by their speech and actions, need to uphold decision-making that is based on evidence, the scientific method and reason. Lon Fuller identified the hallmark of judicial adjudication as explicit rationality: rationality in both the presentation of reasoned arguments by the parties to the dispute and rationality in the determination of the dispute.⁶⁹ The giving of reasons for the decision establishes that the judge has understood and taken into account the parties’ reasoned arguments.⁷⁰

Judicial decisions adjudicating environmental disputes, especially climate change litigation, need to parade such explicit rationality.⁷¹ By so doing, the ideals of the Enlightenment, of empirical evidence, scientific method and reason, are re-asserted, encouraged and disseminated.

Reasoned public debate also facilitates increasingly rational responses. Individuals employ weak methods of decision-making without guidance, but adopt a more systematic and rational approach where the task domain is highly structured.⁷² Promoting reason and

⁶⁸ May (n 30) 4.

⁶⁹ Lon L Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 Harvard Law Review 353, 364-367.

⁷⁰ Ibid 388.

⁷¹ Brian J Preston, ‘Limits of Environmental Dispute Resolution Mechanisms’ (1995) 13 Australian Bar Review 148,158-159.

⁷² Simon (n 16) 9.

rationality strengthens and structures political debate, guiding people to make rational choices and reduce the influence of unconscious biases.

Waldron concludes his plea for thoughtfulness and reason in governance, by referring to Aristotle's observation in his *Politics* that 'the law is reason unaffected by desire':

But it is Aristotle's connection of law to reason that intrigues me, for it is not primarily a natural lawyer's connection between law and the eternal verities of reason but between law and the god-like activity of reasoning. We reason together using the forms, channels and points of departure that law provides, and when we celebrate being ruled by law what we are celebrating in large part is that sort of influence of reason in human affairs."⁷³

Fifthly, there is a need to support the establishment or reform of institutions that accommodate rival views, respect people who hold different views, and promote reasoned debate and decision-making. Waldron exhorts that 'institutions matter':

In legal systems and in nation-building..., it matters what processes we set up. Institutions make a difference, not just to the political game but, through the inclusiveness of the order they establish, to the security, prosperity and openness of the societies in which they are established.⁷⁴

These five ways are but starts in the process of pushing back against populist attacks on the ideals of the Enlightenment, the institutions that are the foundations of democratic society and the rule of law. Some days, when the strife and struggle seem overwhelming, it is

⁷³ Waldron, 'Thoughtfulness and the Rule of Law' (n 6) 11.

⁷⁴ Waldron, *Political Political Theory* (n 31) 7.

understandable to feel pessimistic. But in those dark days it is helpful to invoke Arundhati Roy's optimism: 'Another world is not only possible, she is on her way. On a quiet day, I can hear her breathing.'⁷⁵

⁷⁵ Arundhati Roy, *An Ordinary Person's Guide to Empire* (South End 2004) 86.