

PROJECT PROPOSAL

Temitope Tunbi Onifade

WORKING TITLE

Law, society, and the regulation of low carbon economies

THE PROPOSED PROJECT

To address growing concerns that emissions reduction commitments might not meet desirable cumulative emissions reduction targets,¹ countries might need to drastically adjust their economic systems. Low carbon economy (LCE) is a policy agenda that has already emerged at the international level to guide how countries transform their economic systems. However, even where countries successfully formulate and legitimate it, LCE faces challenges. Some of these challenges appear where the choice of law, as a regulatory instrument, in policy decision-making impacts the implementation of LCE mechanisms.

During decision-making, most countries and their subnational entities choose law as the regulatory instrument for driving LCE. The choice of law has predominantly taken the form of legislation. For example, the UK's Energy Act 2013 and, in Canada, British Columbia's Greenhouse Gas Industrial Reporting and Control Act 2016 as well as Ontario's Climate Change Mitigation and Low Carbon Economy Act 2016, among others, are recent legislations. To be clear, this is not to say that some countries and their subnational entities do not employ other policy instruments, for instance national plans and strategies, as precursors to, in place of or together with law. As an example, the province of Alberta in Canada has recently released a Climate Leadership Plan 2016. However, recent evidence has shown that the momentum of employing law is rising.²

For implementation, most countries and their subnational entities design their respective laws to provide for economic mechanisms. These mechanisms are diverse, and seem to vary across low carbon technologies. Nevertheless, popular ones across the board include certification and labelling, trading, taxation, and their hybrids. Most governments employ these mechanisms alongside other non-economic mechanisms. These may also vary. Many non-economic mechanisms have developed along the lines of standards, mandates, reporting, codes, and the hybrids of these.

Overall, it appears that law is the most desirable driver of LCE, and is often used to introduce and manage economic and non-economic implementation mechanisms. Being the most desirable driver, how countries and their subnational entities effectively use law to drive LCE implementation depends on how smoothly it works. This leads to two major issues.

Research Issues

One issue is that LCE laws together with their implementation mechanisms, as part of the low carbon regime, often arrive at a terrain already dominated by the carbon regime, including

¹ See, for example, Joeri Rogelj et al, 'Paris Agreement Climate Proposals Need a Boost to Keep Warming Well below 2 °C' (2016) 534 Nature 631.

² See Michal Nachmany et al, *The 2015 Climate Legislation Study* (London, Brussels and Chemin du Pommier: Grantham Research Institute on Climate Change and the Environment, The Globe Legislators Organization and Inter-Parliamentary Union, 2015).

laws and implementation mechanisms whose design and functionality have revolved around carbon sources. As new “entrants,” LCE regimes would need to fit into the existing carbon regimes or, where there is political will, replace them. Depending on the circumstances, this may or may not be a smooth ride as they could be accommodated or resisted.

Evidence shows that the introduction of LCE regimes has faced resistance in some countries. For instance in the UK, the existing regime supporting coal and gas, as sources that ensured energy security and affordability, were resistant to new low carbon regimes which would boost renewable energy to mitigate climate change.³ Many countries are currently working to avoid or address similar problems. In fact, this is a major focus of legal and policy scholarship under one of the biggest international LCE projects, the Deep Decarbonisation Pathways Project.⁴

Another issue is that, because LCE laws employ economic mechanisms which invariably rely on business for implementation, their implementation ought to be subject to market forces. This is because business is more at ease with the market system. However, given that these laws also position the government as the ultimate authority directing how economic mechanisms drive LCE as a matter of public policy, the variables that affect their implementation go beyond market forces. For one, governments consider more than just profit in public policy. It is common for government to intervene to prevent business from passing along costs to citizens. At the same time, business expects government to stay away so that there is room for market forces to maximise returns. These different approaches of government and business could be problematic.

There is evidence affirming this. For instance, to advance public policy interests, the Spanish government controlled renewable energy retail rates, and the UK’s government attempted to cut tariffs under its small-scale feed-in-tariff system⁵ and continues to interfere under the contracts for difference.⁶ Since LCE laws empower the government to take those steps, some business stakeholders oppose them, because the laws ultimately disrupt the market.

Research Problem

These issues and the practical problems illustrating them point to the research problem the project will tackle: the limitations of law as a regulatory driver in LCE. Given the challenges of regime resistance and business opposition discussed above, among other potential problems such as weak regulation and regulatory capture, law as traditionally defined might not be adequate to drive LCE at a desirable speed. So, while law may remain the preferred driver of LCE, given its comparative advantages over other policy instruments at ensuring policy certainty, it might need help. Such help is unlikely to come from business. This is because, due to the influence of neoclassical economics, business is likely to prioritise profitability and efficiency over normative public policy goals, for instance equity, underlying LCE.

³ See Frank W Geels, “Regime Resistance against Low-Carbon Transitions: Introducing Politics and Power into Multi-Level Perspective” (2014) 31:5 *Theory, Culture & Society* 21.

⁴ Deep Decarbonization Pathways Project, “About” (nd) Deep Decarbonization (website), online: <<http://deepdecarbonization.org/about/>>.

⁵ Mészáros Tamás, Bade Shrestha, & Huizhong Zhou, “Feed-in Tariff and Tradable Green Certificate in Oligopoly” (2010) 38 *Energy Policy* 4040; Temitope Tunbi Onifade, “Global Clues for Choosing Suitable Support Systems for Renewable Energy in the Power Sector” (2015) 6:1 *Renewable Energy L & Policy* 25.

⁶ Temitope Tunbi Onifade, “Hybrid Renewable Energy Support Policy in the Power Sector: The Contracts for Difference and Capacity Case Study” (2016) 95 *Energy Policy* 390.

Society could help. This is because, as a value-driven entity, society might also, like government, prioritise normative public policy goals, if properly organised to do so. Society could control the behavior of business where law alone might not. The study proceeds on this rationale.

Research Question and Thesis

To address the research problem, the question that will guide my proposed project is: how could law and society work together in the regulation of LCE? To answer this question, my working thesis will be that society could support law in the regulation of LCE.

However organised within or across borders, society refers to an aggregate of people. This means that, since government and business are also run by people, they form part of society. As an aggregate of people, society could regulate through decision-making processes that influence the behavior of its constituent members, including those forming government as well as business. After all, far more decision-making powers rest with broader social circles in society, as against narrower political or business circles. Organised through social circles, for instance through families, friends, peer and interest groups, and the media, society thus has the capacity to mobilise more people within the social sphere, and influence decision-making to control the behavior of fewer people making up political and business circles.

Thus, society has a regulatory capacity—the normative decision-making power of people—that is not directly based on what we traditionally understand as law.⁷ Arguably, harnessing this regulatory capacity, especially across territories, could amount to the type of law captured by the emerging theory of transnational law. In any case, society could harness the capacity to control business,⁸ and as such could support law, as traditionally defined, in the regulation of LCE.

WHY THE PROJECT?

The literature on the regulation of LCE has focused on the use of government direct legal and administrative regulation, often described as command and control, and economic regulation, also usually backed by law. It largely neglects the possibility of peoples' direct regulation—the idea of regulating through society.

To address this neglect, the project will explore the possibility of regulation through society, an idea currently captured by the theory of transnational law, and how this could complement law as traditionally understood as a form of government regulation.

Literature Review

As a critical approach to the Westphalian sovereignty model, the literature on the role of society, as an aggregate of people constituting specific sectors such as business or government, in regulation is emerging. Generally, scholars from various disciplines discuss this role under the

⁷ See generally Barry Barton, “The Theoretical Context of Regulation” in Barry Barton et al, eds, *Regulating Energy and Natural Resources* (Oxford: Oxford University Press, 2006).

⁸ See generally Bettina Lange, Dania Thomas, & Austin Sarat, eds, *From Economy to Society? Perspectives on Transnational Risk Regulation* (Wagon Lane: Emerald, 2013); Bettina Lange, Fiona Haines, and Dania Thomas, eds, *Regulatory Transformations: Rethinking Economy-Society Interactions* (Oxford and Portland: Hart, 2015).

broad theme of “non-state actors” in decision-making.⁹ Specifically, some legal scholars discuss the role in terms of law, conceptualising it under transnational law¹⁰ or as a fallout from domestic and international law;¹¹ yet other legal scholars, mostly interdisciplinary ones, as well as social scientists understand the role in terms of governance, particularly the expansion of the concept of government into the idea of (new) governance,¹² including global governance and hybrid governance. There are also some scholars that look at this role from both law and governance.¹³ What unifies scholars across the board is their suggestion of bottom-up or decentralised approaches and the decline of the state in regulation, and their shift of focus to the role of society.

An evolving thread in this literature is on the role society plays in the regulation of diverse agendas, one of which is LCE. At the theoretical level, some studies have examined the role of the social sphere in these agendas, including LCE, based on the concept of embeddedness.¹⁴ At the practical level, few recent studies have examined the role of specific social circles in LCE, for instance interest networks¹⁵ and universities¹⁶ as constituents of society.

While the evolving literature lays the conceptual foundation and policy hints on the role of specific social circles in LCE, it does not currently provide a full picture of how society organizes itself, including the decision-making mechanisms it uses, to regulate business behavior that advances LCE. As such, there is no comprehensive study on the role of society in the regulation of LCE.

Contribution

The project will build on the existing studies to attempt a comprehensive discussion of the role of society, with three original contributions. It will shed light on: how society, however organised, could regulate, arguably amounting to law and governance; where society regulates, how this could support law, as traditionally understood as government legal prescription; and where regulation through society supports law, how to deal with the risks that could emerge.

⁹ See, for example, Bridget M Hutter, *The Role of Non-State Actors in Regulation* (London: London School of Economics and Political Science Centre for Analysis of Risk and Regulation 2006); David Armstrong et al, eds, *Civil Society and International Governance: The Role of Non-State Actors in Global and Regional Regulatory Frameworks* (London: Taylor and Francis, 2011); Peter Grabosky, “Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process” (2013) 7:1 *Regulation & Governance* 114;

¹⁰ See, for example, Galf-Peter Calliess & Peer Zumbansen, *Rough Consensus and Running Code* (Oxford and Portland: Hart, 2010); Carrie Menkel-Meadow, “Why and How to Study ‘Transnational’ Law” (2011) 1:1 *UC Irvine LR* 97.

¹¹ See, for example, Jean d’Aspremont, “The Politics of Deformalization in International Law” (2011) 3:2 *Goettingen Journal of International Law* 503.

¹² See, for example, RAW Rhodes, “The New Governance: Governing without Government” (1996) *XLIV Political Studies* 652; B Guy Peters & John Pierre, “Governance without Government? Rethinking Public Administration” (1998) 8:2 *Journal of Public Administration Research and Theory* 223.

¹³ See, for example, Julia Black, “Critical Reflections on Regulation” (2002) 27 *Australian Journal of Legal Philosophy* 1; Hanneke Van Schooten & Jonathan M Verschuuren (eds), *International Governance and Law: State Regulation and Non-State Law* (Cheltenham and Northampton: Edward Elgar, 2008).

¹⁴ Lange, Haines, & Thomas supra note 8; Lange, Thomas, & Sarat supra note 8.

¹⁵ Julie Ayling & Neil Gunningham, “Non-state Governance and Climate Policy: The Fossil Fuel Divestment Movement”, online: (2015) *Climate Policy* <<http://dx.doi.org/10.1080/14693062.2015.1094729>> accessed 3 November 2016.

¹⁶ Benjamin J Richardson, “Universities Unloading on Fossil Fuels: The Legality of Divesting” (2016) 10:1 *Carbon & Climate L Rev* 62.

1. As for the first contribution which is the crux, the study will examine how society could regulate by influencing business behavior in LCE. People could stimulate social values as regulatory drivers. This could motivate action or inaction that supports LCE which could then be actuated through diverse decision-making mechanisms.

While the Forest Stewardship Council certification scheme and similar initiatives exemplify regulation through society within the broader environmental decision-making area, there are relatively new schemes, operating within and across territories, showcasing this mode of regulation as specifically applicable to LCE. “Carrot Mob,” a mass-based non-governmental organisation (NGO), employs “buycotts” by organizing people to commit to shopping-sprees in favour of low emitting businesses, for instance those using clean energy, bringing them substantial returns. Also, “Equitable Origin,” a stakeholder-based NGO, certifies low emitting business projects, for instance those adopting green practices, bringing them social license. These new schemes show how society, organised through NGOs, could regulate carbon emissions independently through mechanisms such as “buycotts” and certification. However, this does not mean there are no other modes of organisation, for instance through universities or the press which are now mobilizing for low carbon divestment, and other implementation mechanisms, for instance Leadership in Energy and Environmental Design as well as Consumer Reports, both of which currently use rating to motivate low carbon business behaviour. Therefore, given the variety of implementation mechanisms represented by the diverse schemes, the study will identify the elements of decision-making in regulation through society. It will start with the most basic element, contract, which these decision-making processes seem to generally have, and then explore the possibilities of other elements.

As a further contribution on how society regulates, the study will examine whether regulation through society amounts to a new form of law, as understood in transnational law theories, or just governance, as envisaged by global and hybrid governance theories. It will show how aspects of regulation through society could satisfy the requirements of both law and governance.

2. The second contribution, on impact, flows from the first. If society could regulate, this could support the role law currently plays in driving LCE regimes. It could enhance the entry of LCE regimes into the existing carbon terrain, and advance relevant implementation mechanisms.
3. Then comes the third contribution dealing with the potential fallout. There might be new risks in LCE, not only to business but also to society, as current risk handling models undermine the regulatory potentials of society. These models are built on a presumption of traditional law-based regulation, not regulation through society. As such, they are not equipped for potential risks such as group domination in regulatory decision. Therefore, there might be the need for re-conceptualised risk handling in the regulation of LCE.

APPROACH TO ANALYSIS

With regards to the theory, I will rely on the concept of embeddedness to make a case for regulation through society. In terms of methodology, I will rely on legal and empirical data which do not require ethics approval, and analyse them with qualitative methods. Ultimately, I will draw on the strengths of my relevant training and experience in law and environmental policy in my analysis.

Theory

Like many law-related ideas developed from other fields, scholars are currently tracing the theoretical roots of regulation through society to other fields. A notable team has been examining the regulatory capacity of the social sphere based on ideas that have developed in economic sociology, particularly the concept of embeddedness.¹⁷ This concept was originally formulated by Polanyi, and later developed by other scholars, most notably Granovetter. It focuses on how economy and society relate, and which one embeds the other.

Based on the contributions of Polanyi and Granovetter as well as other relevant scholars on this concept, the theoretical orientation of the project will be that society embeds economy and, as a result, has control over it. If so, society could directly regulate businesses, as economic actors, by controlling their behavior. The project will contextualise this reasoning within LCE.

Methodology

The study will be theoretical, and will use legal and policy instruments as primary data sources. These instruments will come from relevant government websites. However, the study will also employ secondary empirical data, albeit for strengthening arguments rather than drawing conclusions. Being secondary, the empirical data will come from the climate change literature and the websites of organisations involved in climate activism and mobilisation. Overall, the study will back theoretical arguments with empirical evidence already in existence.

The study's theoretical approach is suitable for two major reasons. First, its contribution deals more with the conceptualisation of regulation through society and less on the verification of experience which would make empiricism unavoidable. Second, scholars and organisations involved in climate activism and mobilisation have been producing empirical evidence in support of how society is involved in LCE, so the contribution in this respect will only be to bring out the aspects of the involvement that amount to regulation and how they support the study's theory.

As for my data analysis, I will employ qualitative methods, specifically literature review along with case study and framework analysis. I will integrate the analysis into the introduction, methodology, theory, result and discussion, and conclusion sections of the study.

I will take the following sequential steps:

1. To build on existing knowledge rather than duplicate, I will start with a literature review which provides theoretical and practical justification for the project, showing the issues that scholars have addressed in the regulation of LCE, for instance regime resistance and business opposition of government regulation, and how these lead to another issue not clearly addressed, the limitations of law in LCE. This review is substantive since it will justify the research, and as such will be integrated into the introduction, theory, and result and discussion sections. I will also review the literature on the research methods I employ. This review will not be substantive as it will only show how things will be done, and as such will mainly appear in the methodology section of the thesis.
2. I will follow with the case study of Canada to contextualise the result of the literature review, limitations of law in LCE. This will appear mainly in the result subsection. I choose Canada because I have academic interests in the country, and because it has several laws and other regulatory instruments that are new and will make for potential timely lessons. My units of the case study will be Alberta, British Columbia and Ontario. I choose these

¹⁷ See Lange and others 'From Economy to Society?' supra note 8; Lange and others 'Regulatory Transformations' supra note 8.

units because they might showcase the limitations of law. They have recently introduced new low carbon instruments into their otherwise strong carbon regimes, and as such may experience regime resistance, and, as among the top emitters in Canada,¹⁸ they have big businesses that might challenge aspects of the new instruments. Since not much has been written about the newly introduced instruments and the limitations of law therefrom, examining them would be timely.

3. Then, for the framework analysis, I will apply the transnational business governance interactions framework¹⁹ to make the main contribution on how society could regulate, and how the aspects of this regulation amount to law as well as governance. This will appear in the discussion subsection. I choose the said framework because of its ability to reveal regulatory capacity and institutions. Knowing the regulatory capacity and institutions will facilitate my arguments on how regulatory mechanisms constitute law and governance.

I will build on the main contribution with the two other contributions. These contributions will also appear under the discussion subsection. As such, I will discuss how regulating through society supports the current role of law but also poses risks that need to be managed. I will develop key indicators of how regulation through society supports law, and a risk governance framework which could be used to manage the resulting risks.

After going through these sequential steps, I will draft the final version of the introduction and conclusion sections based on the work done. Finally, I will organise the study into chapters and make necessary revisions.

PRELIMINARY BIBLIOGRAPHY

LEGISLATION

Energy Act 2013 (UK), c32.

Greenhouse Gas Industrial Reporting and Control Act, SBC 2016, c29.

Ontario's Climate Change Mitigation and Low Carbon Economy Act, SO 2016, c7.

SECONDARY MATERIAL: BOOKS AND MONOGRAPHS

Armstrong, David et al, eds, *Civil Society and International Governance: The Role of Non-State Actors in Global and Regional Regulatory Frameworks* (London: Taylor and Francis, 2011).

Calliess, Galf-Peter & Peer Zumbansen, *Rough Consensus and Running Code* (Oxford and Portland: Hart, 2010).

Hutter, Bridget M, *The Role of Non-State Actors in Regulation* (London: London School of Economics and Political Science Centre for Analysis of Risk and Regulation 2006).

¹⁸ Environment and Climate Change Canada, "Canadian Environmental Sustainability Indicators: Greenhouse Gas Emissions" (2016) Environment and Climate Change Canada (website), online: <https://www.ec.gc.ca/indicateurs-indicators/18F3BB9C-43A1-491E-9835-76C8DB9DDFA3/GHGEmissions_EN.pdf>.

¹⁹ Burkard Eberlein, Kenneth W Abbot, Julia Black, Erol Meidinger, and Stepan Wood, "Transnational Business Governance Interactions: Conceptualization and Framework for Analysis" (2014) 8:1 Regulation & Governance 1.

- Lange, Bettina, Dania Thomas, & Austin Sarat, eds, *From Economy to Society? Perspectives on Transnational Risk Regulation* (Wagon Lane: Emerald, 2013).
- Lange, Bettina, Fiona Haines, and Dania Thomas, eds, *Regulatory Transformations: Rethinking Economy-Society Interactions* (Oxford and Portland: Hart, 2015).
- Nachmany, Michal et al, *The 2015 Climate Legislation Study* (London, Brussels and Chemin du Pommier: Grantham Research Institute on Climate Change and the Environment, The Globe Legislators Organization and Inter-Parliamentary Union, 2015).
- Van Schooten, Hanneke & Jonathan M Verschuuren (eds), *International Governance and Law: State Regulation and Non-State Law* (Cheltenham and Northampton: Edward Elgar, 2008).

SECONDARY MATERIAL: ARTICLES

- Aylingm, Julie & Neil Gunningham, “Non-state Governance and Climate Policy: The Fossil Fuel Divestment Movement”, online: (2015) Climate Policy <<http://dx.doi.org/10.1080/14693062.2015.1094729>> accessed 3 November 2016.
- Barton, Barry, “The Theoretical Context of Regulation” in Barry Barton et al, eds, *Regulating Energy and Natural Resources* (Oxford: Oxford University Press, 2006).
- Black, Julia, “Critical Reflections on Regulation” (2002) 27 Australian Journal of Legal Philosophy 1.
- D’ Aspremont, Jean, “The Politics of Deformalization in International Law” (2011) 3:2 Goettingen Journal of International Law 503.
- Eberlein, Burkard, Kenneth W Abbot, Julia Black, Erol Meidinger, and Stepan Wood, “Transnational Business Governance Interactions: Conceptualization and Framework for Analysis” (2014) 8:1 Regulation & Governance 1.
- Geels, Frank W`, “Regime Resistance against Low-Carbon Transitions: Introducing Politics and Power into Multi-Level Perspective” (2014) 31:5 Theory, Culture & Society 21.
- Grabosky, Peter, “Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process” (2013) 7:1 Regulation & Governance 114.
- Menkel-Meadow, Carrie, “Why and How to Study ‘Transnational’ Law” (2011) 1:1 UC Irvine LR 97.
- Onifade, Temitope Tunbi, “Global Clues for Choosing Suitable Support Systems for Renewable Energy in the Power Sector” (2015) 6:1 Renewable Energy L & Policy 25.
- Onifade, Temitope Tunbi, “Hybrid Renewable Energy Support Policy in the Power Sector: The Contracts for Difference and Capacity Case Study” (2016) 95 Energy Policy 390.
- Peters, B Guy & John Pierre, “Governance without Government? Rethinking Public Administration” (1998) 8:2 Journal of Public Administration Research and Theory 223.
- Rhodes, RAW, “The New Governance: Governing without Government” (1996) XLIV Political Studies 652.
- Richardson, Benjamin J, “Universities Unloading on Fossil Fuels: The Legality of Divesting” (2016) 10:1 Carbon & Climate L Rev 62.
- Rogelj, Joeri et al, “Paris Agreement Climate Proposals Need a Boost to Keep Warming Well below 2 °C” (2016) 534 Nature 631.

Tamás, Mészáros, Bade Shrestha, & Huizhong Zhou, “Feed-in Tariff and Tradable Green Certificate in Oligopoly” (2010) 38 Energy Policy 4040.

OTHER MATERIALS

Deep Decarbonization Pathways Project, “About” (nd) Deep Decarbonization (website), online: <
<http://deepdecarbonization.org/about/>>.

Environmental and Climate Change Canada, “Canadian Environmental Sustainability Indicators: Greenhouse Gas Emissions” (2016) Environmental and Climate Change Canada (website), online: <
https://www.ec.gc.ca/indicateurs-indicators/18F3BB9C-43A1-491E-9835-76C8DB9DDFA3/GHGEmissions_EN.pdf>.