



Energy Justice and Energy Law—An Approach to the Differences Between Both Concepts

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Abstract This chapter contains a brief set of reflections on the relationship between energy law and energy justice. There is the need to move towards a new energy system. This need is based on evident exigencies of energy justice. Justice is not only a driver for transition, but also an ideal future situation whereby justice rules the relation between the various agents of the energy system. In that context, law should not be an obstacle to the transition, but rather a useful instrument. This means that the energy transition needs a new law, which reflects the moral content of energy justice.

Keywords Energy justice · Energy law · Energy transition · Legal obstacles · Legal instruments

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5.1 INTRODUCTION

These brief reflections on the relationship between energy law and energy justice have their starting point in the distinction between justice as a moral virtue and justice as a value that has to be implanted in society. Roman jurists defined justice as the constant and perpetual will to live honestly, do no harm to anyone, and give each his or her due. That Roman tradition was picked up in the Middle Ages by, among others, Thomas Aquinas. This definition refers to justice as a moral virtue (will or *voluntas*), but also includes its axiological aspect (what belongs to each one or *his or her due*).

When humanity faces the enormous challenge of stopping global warming and fighting climate change, the idea of energy justice emerges in the scientific community, as a complement to or as a challenge to the current energy law. Why? The answer is simple. Energy law is the set of techniques to implement a certain idea of energy justice in society. This idea of justice is not the one held by the authorities called upon to apply the law at any time (national or local governments, or judges), but rather the idea that has been embodied in the legal rules (parliamentary acts or delegated legislation), approved by those who have the democratic representation of society.

5.2 ENERGY LAW AS A POTENTIAL OBSTACLE

It happens that current energy law does not adequately reflect the values, ideas and aspirations that are condensed in the ideology of the fight against climate change. From this perspective, current law becomes an obstacle to achieve these aspirations. To the extent that the current law responds to a centralized, carbonized and supply-based electricity system, it becomes a hindrance to implement the new decentralized, decarbonized and demand-based paradigm. As a summary of this idea, it can be said that current law condenses the ideas of the system born one hundred years ago, but a new law is needed to implement the new system. This is where energy justice appears, as a condensation of new ideas about a new energy system. The need to protect vulnerable consumers at a time of increasing and unaffordable electricity bills is one of the clearest examples of how energy justice pushes to the modification of existing laws: prior to

the crisis, every single consumer not paying its bills will be deprived from supply, but not any longer, in relation to some vulnerable consumers.¹

The field of energy justice is open to debate, because there are many different ideas about what is fair and what is not fair. This debate will lead to writing the legal rules in accordance with the idea that, within the democratic processes, has prevailed. In the field of law, the debate has another meaning, because it is aimed at interpreting what the law establishes, but such a debate is premised, among the participants in the debate, that the law establishes a single just solution. The constitutionally competent bodies (the Administration, the judges...) will have the last word in the debate.

Given the urgency of climate goals, energy justice presses the law to change. In this dynamic, the idea of energy justice contains within it aspirations that go beyond the need to change regulations to decarbonise the energy system. It goes further because it also tries to influence the distribution of the burdens and benefits derived from the new energy production technologies and, above all, it tries to influence the justice of the legal relationships established under prior law. On this issue, I include some reflections below.

5.3 CONCLUSION—NEW RELATIONSHIPS NEEDED FOR ENERGY LAW AND JUSTICE—COMMUTATIVE JUSTICE AND DISTRIBUTIVE JUSTICE

Thomas Aquinas distinguishes between commutative justice (*iustitia commutativa*) and distributive justice (*iustitia distributiva*). The former governs the relationships between individuals, while distributive justice governs the relationships between the community and the individual, for an equitable distribution of burdens. Normally, when the scientific literature refers to energy justice, it is thinking of distributive justice, with its various dimensions (social, restorative, procedural, etc.²).

There is a certain forgetfulness of the commutative or bilateral aspect of justice in recent scientific legal literature. Commutative justice implies

¹ Guayo, I. del, Godden, L., Zillman, D.N., Montoya, M.F., and González, J.J. (editors). (2020). *Energy Justice and Energy Law*, OUP, Oxford.

² Heffron, Raphael J., and De Fontenelle, Louis. (2023). Implementing energy justice through a new social contract. *Journal of Energy & Natural Resources Law*, 41:2, 141–155, <https://doi.org/10.1080/02646811.2023.2186626>.

the equality of the parties in an agreement and requires that contracts be respected, and that individuals be bound to fulfil their obligations, the safeguarding of property rights and the freedom of trade. All these components of commutative justice can be included within a fundamental requirement of contemporary constitutionalism, which is legal certainty.

The growing call for energy justice seems to imply a direct commitment from public powers, from the State, in the form of new regulations and subsidies for the development of new technologies. Attention must be drawn to the need not to ignore or underestimate the commutative component of justice, which means as much as not underestimating the market and its efficient allocative capacity. This means that the push towards a new energy system should not eliminate the competitive component in the process. The European Union, for example, has presented a legislative package to decarbonise the gas industry and to promote hydrogen, but it is about promoting and creating a hydrogen market, where operators are invited to compete with each other, for the benefit of European citizens. In the same way, in the process of decentralization of the energy system, the energy communities must have the leading role in the future, but their appearance and development must not be done in such a way that the members of the community have competitive advantages over those who still they have not become integrated into one.

In short, as in so many other moments in history and in other energy transitions, it is important to maintain a balance between various aspects, so that the law is not an obstacle to the transition, and so that the search for justice does not generate new injustices. An inventory of emerging injustices from the transition can be drawn. For example, it is necessary to reformulate the policy in favour of renewable energies, since the current model is generating negative social and environmental impacts. A horizontal model must offset the current vertical model (large renewable plants), including the promotion of individual and/or self-generation of electricity.

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