



Original research article

The evolution of energy law and energy jurisprudence: Insights for energy analysts and researchers

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ABSTRACT

Energy law is gaining prominence among legal subjects. In the three spheres of academic, professional and public life, there is an increasing realization of the potential importance of energy law. The underlying objective of this paper is to contribute to the creation of a theory of energy law through advancing what this should encompass. Energy law has addressed particular issues in the energy sector but it has not had a holistic view of the sector, in particular, concerning the issue of energy waste management, which remains a serious problem. The conditions for a more holistic approach to manage energy resources are emerging and in the future it may be expected that energy law will have a core theoretical framework. This framework is important as it will in essence provide energy law with a 'spirit' or a *raison d'être*. The theory proposed here is on the *Evolution of Energy Law* and the centre-point of this theoretical perspective is that to-date there have been *Five Stages in the Evolution of Energy Law*. In understanding what have been the key stages (or drivers) in the development of energy law it will give the energy law scholar an understanding of the motivation(s) behind the formulation of energy law.

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1. Introduction

In very simple terms, "energy law" concerns the management of energy resources. In 1996, Adrian Bradbrook defined 'energy law' as '[t]he allocation of rights and duties concerning the exploitation of all energy resources between individuals, between individuals and the government, between governments and between states' [1]. This definition looks at energy law from a functional perspective, which is to say that it examines its objective: that of regulating the exploitation of energy resources. As such, it examines energy law and regulation separately in respect of each type of energy carrier. Defined in this manner, there is no "energy law", but many "energy laws", one for each type of energy carrier.

Another way to look at this question is to distinguish "energy law and policy" from "resources law and policy" [2]. This distinction rests essentially on the idea that energy law and policy are about markets, security of supply and efficiency. It is about government policies aimed at securing energy sources at the least possible cost, including social cost. Contemporary energy law often relies, at least to some extent, on markets to achieve this. Resources

law and policy, by contrast, is about the strategies used by governments to maximize revenue and exercise sovereignty. It is also related to a country's more general development policies, such as industrial policy. The role of governments and the public sector is more central in this area of law and policy. This distinction can be defended from the point of view that the objectives of resources law and policy are somewhat similar, regardless of whether one refers to petroleum or hard minerals, or even other valuable natural resources like diamonds.¹ The distinction is made as the drivers behind the two are different. One essential difference between the two is that energy policy in this sense is about security of supply, whereas resources policy is about security of demand. Similarly, the role of sovereignty considerations are different. While present in both energy and resources sectors, it is perhaps more accentuated in case of resource policy.

While these definitions and distinctions are useful in conceptualizing energy law and helpful in explaining what energy law is, these are still relatively simple definitions and disguise that energy law is probably one of the more complex areas of law. It demands

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E-mail addresses: r.heffron@qmul.ac.uk, raphael.heffron@gmail.com (R.J. Heffron).¹ Of course, petroleum, or energy products more generally, are strategic resources and this has an impact on the policies concerning energy. However, the argument still stands as most of the policy considerations are still very similar regardless of the resource in question.

that a scholar in the area engage with other disciplines like, for example, politics, economics, geography, environmental sciences and engineering.

In this article, we consider energy law to encompass the entire energy value chain, including upstream, midstream and downstream energy law and policy. In line with the definition provided by Professor Bradbrook, we accept that there is no singular body of law called “energy law” but that energy law is related to a specific energy carrier. However, the regulation of all energy carriers and energy activities can together be seen as “energy law”. At the core of energy law is the regulation of energy related rights and duties of various stakeholders over energy resources over the energy life-cycle. Climate change law and policy, environmental law and policy, land use and land use planning are not considered to form part of energy law but are related areas of law that border and interact with energy law and policy.

Defining energy law as the regulation of energy related rights and duties of various stakeholders, and moving away from the energy law/resources law distinction, allows for considering the entire energy value chain when discussing energy law and its drivers. This is important as any approach to energy law, and in particular that of this article, must consider all areas of the energy life cycle from extraction to production to operation to consumption and waste management for all energy sources.

1.1. *Energy law as an independent academic or legal discipline: why does it matter?*

Why does it matter that we consider energy law as an independent academic discipline? Or, to be broader, why do we need specific legal disciplines? One easy and obvious answer is that academic Chairs and Professorships are usually, though not always focused on a specific discipline. In order to have Chairs in Energy Law, we need to have a discipline. The same general proposition can also be expressed by suggesting that we may use distinctions between various legal disciplines in order to claim specialist knowledge and expertise over a particular legal domain and forming various “knowledge communities” [3]. This allows the research and practice to focus on a particular field of law or around a particular area of societal interaction.

But this is not the only driver behind the need to identify energy law as a separate legal or academic discipline. Lawyerly thinking likes to define and structure things. Structuring the normative reality allows identifying the drivers and particularities of a given legal discipline. This in turn, facilitates the interpretation of this body of law. What is more, it also allows better and more coherent identification of future directions of energy law as well as drivers of these future changes.

Further, Judges need to adjudicate on energy law issues and they need to understand the normative aims of this particular legal field. Currently, the energy law community does not have this ‘body of knowledge’ that can be referred to and used to guide decision-making. This is part of the aim of this paper in building this knowledge, mode of thinking, or to some degree an ‘energy jurisprudence’.

What, then, are the particular features of energy law? One particularity is the linkage with other areas of law. Energy law is not an autonomous area of law, it is very much linked to other legal disciplines. There are numerous regulations that can be seen as part of energy law or part of environmental law (one example would be guidelines on the trans-European energy infrastructure) [4]. The interpretation of these instruments must take into consideration both energy law and policy and environmental law and policy objectives. This also means that in these overlapping areas, one legal instrument can be claimed by both energy lawyers as well as environmental lawyers. And ownership of a particular law and

policy area or issue area can even be claimed by a wider group of disciplines like energy, environment, climate change, international law, arctic law and so on.

This interaction and various interlinkages with other fields of law, means that energy law has always been influenced by other legal disciplines. Examples of these influences are visible throughout this article. One could call this broader area of interaction between various fields as ‘governance’ of energy resources and energy systems. However, this should be kept separate from the more narrow definition of ‘energy law’.

Another example of the specific features of energy law is the integration of various national legal and regulatory systems through the factual interlinkages of various levels of the energy value chain. In this sense, one of the particularities of energy law is in its international or transnational character. This will be further discussed in the next section and an example of such specific features would be the connection with national sovereignty.

1.2. *Emergence of energy law*

There are hundreds of different industries, only a few of which have spawned professional and academic sub-disciplines. The energy industries have been among the most dominant industries of the twentieth century – the lifeblood of the modern economies, fuelling both industrial and private consumption [5]. The energy industry lies behind all societal functions. In the words of the Court of Justice of the European Union (discussing petroleum): ‘Petroleum products, because of their exceptional importance as energy sources in the modern economy are of fundamental importance for a country’s existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them’ [6]. Given this fundamental importance of petroleum products and energy more generally, coupled with the economic value that this industry and its activities represents, it is little wonder that energy law and international energy law have emerged as academic disciplines and as areas of specialization among practitioners. Similarly, it is unsurprising that it has led to the emergence of international institutions and international practices, and has contributed to international law in a general sense [7].

In 2016, energy law is still considered by many to be a new area of law. It appears not to have the established academic literature base of other legal disciplines. However, to say that energy law and energy regulation would be recent phenomena is to misunderstand what energy law is. It has been in existence in different forms for over a century. In the 1800s and early 1900s, there was legislation to manage specific energy sectors such as coal and oil. These energy sources are known as fossil fuels (along with gas) and form one of the two main categories of energy sources. The other category is low-carbon energy sources, which have been in development since the end of the Second World War (1945) and consist of nuclear energy, hydropower, wind, solar, biomass and several other minor renewable energy sources.

Energy has always been a central area of the global economy. Energy was central to the developments prior to industrialization, but with industrialization, access to energy sources became a central question for industry and governments around the world. Since then, energy has in part driven countries to war² and to peace,³

² Many academic sources indicate that the energy resources and the control of these have played a role in the outbreak of war – more recently in particular in Asia, Africa, and in earlier centuries in Europe.

³ The European Union being the most central example. The objective of the European Coal and Steel Community Treaty was to pool and jointly control the coal and steel resources in the Ruhr area to prevent future wars.

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