

# The voluminous energy transition legal framework in France and the question of its recognition as a branch of law

Romain Mauger

Groningen Centre of Energy Law (GCEL), Faculty of Law, University of Groningen, Oude Kijk in't Jatstraat 26, 9712 EK Groningen, the Netherlands



## ARTICLE INFO

**Keywords:**  
Energy law  
Energy transition legal framework  
Autonomy of a branch of law  
Criteria

## ABSTRACT

From 2012 to 2017, the legal production related to the energy transition was massive in France. Although the Energy Transition for Green Growth Act of 2015 is the flagship legislation of this period on this eponymous topic, many other acts directly or indirectly concerning the energy transition were adopted and carried provisions contributing to its legal corpus. Additionally, this legal production was accompanied by an extensive process of public participation, an unusual practice in French energy law and policy building.

The emergence of a voluminous legal corpus concerning the organisation of a transition from fossil and fissile fuels to renewable energy sources in France has led the author to ask the following question: To what extent may the voluminous energy transition legal framework recently created in France result in the emergence of a new autonomous branch of law?

To answer this question, this article presents various sets of criteria for the recognition of an autonomous branch of law and uses the cases of the emergence of energy law and of the interrelations between environmental law and climate change law to analyse the potential qualification of the energy transition legal framework.

## 1. Introduction

'In 2015, in France and Germany at least it is exceptional to go a single day without seeing or hearing those words: "energy transition" ...' (Guerry, 2016). On the western bank of the Rhine river, the term *transition énergétique* (energy transition) has become widely used since the election of François Hollande at the Presidency of the Republic in 2012. The term has been used to showcase public participation events, public policies, ministers' actions and energy-related acts.

Prior to this transition from fossil and fissile fuels towards renewable energy sources, France experienced a fast transition of its electricity sector in the 1970s and 1980s to reduce its dependency on oil products after the first oil-shock. This resulted in the completion of fifty nuclear energy reactors in merely fifteen years (Sovacool, 2017). According to Grubler (2010), this transition was made possible by the combination of a top-down organisation, the significant financial means of the publicly-owned energy company EDF, and a great regulatory stability. The role of an adapted and stable legal framework enforcing a clear and focused energy policy thus seems to be an important component for the implementation of a national-scale energy transition.

This article presents a description of the legal production process concerning the energy transition in France from 2012 to 2017 and its results, after which it analyses the latter through the lens of various sets

of criteria for the recognition of the autonomy of a branch of law as established by French academic literature. Additionally, the cases of the emergence of energy law and the interrelations between environmental law and climate change law are used to assess the possible existence of an energy transition law as an autonomous discipline or as a sub-discipline in France. Finally, the conclusion presents the main results of the study and proposes complementary research.

## 2. A growing energy transition legal corpus supposedly based on a legislative co-building process

The energy transition legal framework creation was first marked by an attempt to root public participation and legislative co-building into its process, with mixed results. Besides that, five years (from 2012 to 2017) of legislative frenzy has translated into a plethora of provisions to organise the energy transition. The majority of these were grouped into two main acts dedicated to the transition, while the rest was grouped into several other acts focusing on other topics.

### 2.1. Public participation and legislative co-building

Historically, the French energy policy – marked by a dominant share of nuclear power in electricity production<sup>1</sup> – was designed by a

E-mail address: [r.j.g.mauger@rug.nl](mailto:r.j.g.mauger@rug.nl).

<sup>1</sup> Varying between 71.6% and 77% during the period of 2012–2017 (RTE, 2018a).

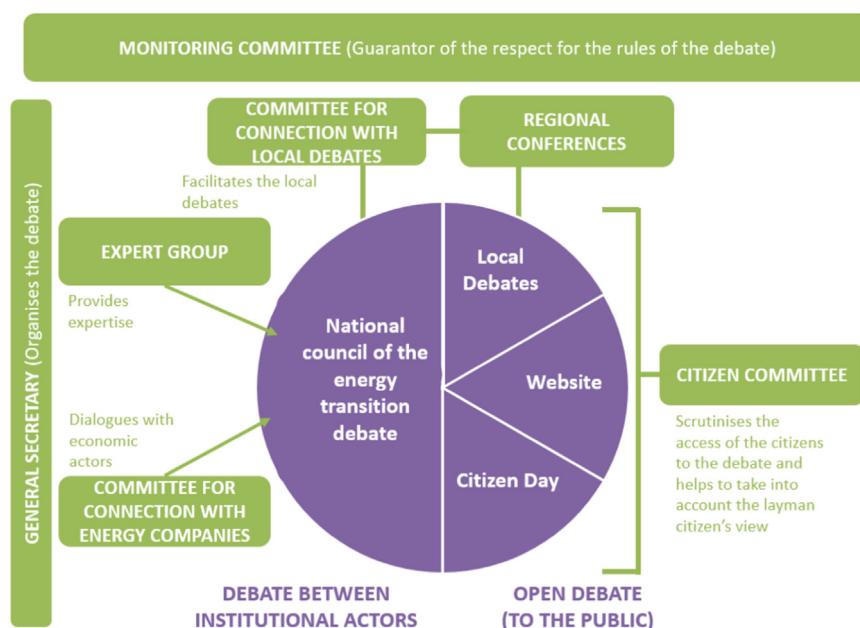


Fig. 1. Architecture of the bodies of the DNTE (Ministère de l'écologie, du développement durable et de l'énergie, 2013b).

'minuscule super-elite of engineers' (Schneider, 2013). However, between 2012 and 2015, different governmental initiatives attempted to switch from a top-down approach to a more bottom-up process by increasing civil society's participation in the design of the Energy Transition Towards Green Growth Act (hereafter Energy Transition Act) and more broadly by enhancing their knowledge of energy transition among the population. Two main tools were used to achieve this: environmental conferences and the National Debate on the Energy Transition (DNTE). Additionally, the Ministry promoting the draft of the Energy Transition Act called for its co-building with Opposition Members of Parliament.

### 2.1.1. Environmental conferences and the National Debate on the Energy Transition

Environmental conferences took place in 2012, 2013, 2014 and 2016, gathering six parties (employers' and workers' unions, environmental non-governmental organisations (NGOs), local representatives' associations, state authorities and parliamentarians) for an annual two-day conference where President Hollande and various ministers explained and submitted drafts of environmental policies for debate (Ministère de la Transition écologique et solidaire, 2016). One of the main topics discussed in those meetings was energy, especially measures fostering the transition towards renewable energy sources and energy efficiency. Among the declarations made at the first conference in September 2012, the Government committed to organise the DNTE and provided some elements regarding its rationale, method and institutions (Ministère de l'écologie, du développement durable et de l'énergie, 2012).

The DNTE is a public participation process that took place from November 2012 to July 2013 and which was aimed at nourishing a draft law on energy transition. Its *ad hoc* institutions were composed of committees and councils involving experts, energy companies, NGOs, citizens and members of the Government (see Fig. 1). The roll-out of its events (encompassing public meetings and open days at energy facilities) and the governing principles of the debate and of its bodies were detailed in a ministerial circular comprising a charter of the DNTE (Ministère de l'écologie, du développement durable et de l'énergie, 2013a). As a result of this process and due to conflictual positions between the different groups of representatives constituting the National council of the energy transition debate, illustrated by a temporary

blockade of the process by employers' unions (Le Billon, 2013), a list of fifteen issues was adopted instead of recommendations, a less compelling notion (Conseil national du débat, 2013). While the main objectives and measures of this list were incorporated into the draft of the Energy Transition Act, some were not. One of the best examples of this can be found in issue 10, which concerns a resilient, diversified, balanced, competitive, and renewable-energies-oriented energy mix. One of its bullet points requested from the lawmaker to integrate into the act the capacity for the state authorities to decide to decommission a nuclear electricity production facility for energy policy reasons. In 2018, this has still not happened (Mauger, 2018).

### 2.1.2. A proclaimed legislative co-building of the Energy Transition Act

The draft of the Energy Transition Act was debated in Parliament from September 2014 to July 2015 (Légifrance, 2015). In the explanatory document motivating the choices made in the first draft of law submitted to the *Assemblée nationale*, the importance of a 'co-building' process is highlighted in contrast with a 'top-down idea of public policy making', although the document acknowledges it 'does not erase all the differences of opinions [but claims that it] respects all the actors' (Légifrance, 2014). However, the implementation of this legislative 'co-building' based on the respect for the Opposition's voice failed as soon as the Government decided to use the tools of the *parlementarisme rationalisé*.<sup>2</sup> For the Energy Transition Act, it took the shape of the *procédure accélérée*<sup>3</sup> and the *temps législatif programmé*,<sup>4</sup> two ways to strictly limit the debates over proposed articles and amendments. Additionally, the adopted act contains 48 authorisations to the Government for adopting *ordonnances*,<sup>5</sup> a procedure in which the Government writes the law and only requires a pre-authorisation and a final validation by Parliament. As a whole, the promised co-building fell short of expectations created by the above-mentioned explanatory document for the draft of law.

<sup>2</sup> All the tools that the Government can use directly or through its majority group at the *Assemblée nationale* and/or *Sénat*) to limit the legislative or control powers of the Parliament.

<sup>3</sup> French Constitution, 4 October 1958, art. 45.

<sup>4</sup> *Règlement de l'Assemblée nationale*, February 2018, art. 49.

<sup>5</sup> French Constitution, 4 October 1958, art. 38. For more details on *ordonnances*, see Steiner (2010).

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