

Legal challenges at the end of the fossil fuel era: Shaping energy futures through legal intervention

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LEGAL CHALLENGES OF A CLEAN AND JUST ENERGY TRANSITION

Lea Diestelmeier - University of Groningen

While the concept of justice has a long-standing tradition across disciplines, it emerged rather recently in the context of the energy sector¹ and even more recently in relation to the energy transition.² Underlying the application of the justice concept to the energy transition is the concern that the shift of the transition necessarily implies shifts of costs benefits, and opportunities to participate and to be heard, corresponding to the three dimensions of distributional, procedural, and recognition justice. This shift requires considering complex equity questions, essentially “it boils down to who gets what, and the processes and procedures that govern how we decide the principles of that distribution.”³

Finding answers to these questions is necessary for achieving a “clean and just” energy transition, which also requires identifying and solving legal challenges.⁴ In particular, legal challenges can be organized in three (non-exhaustive) themes:

- (i) The *role of markets* and their capacity to facilitate a clean and just energy transition needs to be critically assessed. In the EU energy sector the liberalization of the energy sector has been guiding legal reforms. It is about high time to consider and evaluate whether and to which extent the forces of the market have to be balanced with other (public) objectives.
- (ii) *New ownership constructions* have to be designed and implemented as renewable energy sources are, in principle, available to all. An example are energy communities which combine public and private ownership at the small-scale local level. A pressing question concerns the role and tasks of energy communities especially for a *just* energy transition.
- (iii) The *division of competences* between (national) courts and the public and the private sector has to be re-aligned. Courts are taking a special role in holding states and private companies accountable for taking insufficient action to protect the climate, as, for example, in the recent rulings *State of the Netherlands v Urgenda* and *Milieudefensie et al. v Royal*

¹ Darren A McCauley and others, ‘Advancing Energy Justice: The Triumvirate of Tenets and Systems Thinking’ (2013) 32 International Energy Law Review 107; Benjamin K Sovacool and Michael H Dworkin, ‘Energy Justice: Conceptual Insights and Practical Applications’ (2015) 142 Applied Energy 435; Kirsten Jenkins and others, ‘Energy Justice: A Conceptual Review’ (2016) 11 Energy Research and Social Science 174.

² Noel Healy and John Barry, ‘Politicizing Energy Justice and Energy System Transitions: Fossil Fuel Divestment and a “Just Transition”’ (2017) 108 Energy Policy 451; Raphael J Heffron and Darren A McCauley, ‘What is the ‘Just Transition’?’ (2018) 88 Geoforum 74.

³ Benjamin K Sovacool and Michael H Dworkin (n 1), 437.

⁴ Ruven Fleming, Kaisa Huhta, and Leonie Reins (Eds.) (2021). *Sustainable Energy Democracy and the Law*. (Legal Aspects of Sustainable Development; Vol. 26). Brill.

Dutch Shell. This highlights the need to clarify the responsibilities for achieving a clean and just energy transition.

Taken together, these three themes show the need to rebalance public and private interests in the energy sector, which, in turn, asks for a more prominent role for legal science. However, for a successful clean and just energy transition it is necessary to establish and maintain a continuous exchange with other disciplines. Legal challenges are thus not only found *within* legal science, but also in an interdisciplinary dialogue.