Introduction to *Research Handbook on Energy, Law and Ethics*

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Our mission in creating this *Handbook* was to guide the reader through an area of law that has become increasingly complex and contested in recent years. It is also an area where ethical considerations have taken on a prominent role for legislators, regulators, courts of justice, investors and civil society at large. Energy law has always been highly contentious, but in the contemporary era it has become an arena where competing claims are arbitrated or litigated on an unprecedented scale. As a result, ethical frameworks are increasingly necessary in the design of adequate regulatory and investment frameworks.

The *Handbook* intends to help researchers consider ethical perspectives so as to understand and navigate the contemporary energy law landscape. To achieve this objective, we have relied on an interdisciplinary approach, supplementing scholarship and expertise from academia with contributions by legal practitioners and officials in international organisations, acknowledging the breadth of experience needed to deal with the wide range of issues at stake, including the international and intranational distribution of wealth, peace and war, the economic development of the South, the exploitation and protection of the natural environment, access to technology, the struggle to limit climate change, and the theories of energy justice that extend into the meta-legal fields of philosophy and sociology. A key underlying theme in the *Handbook* is the need for *intergenerational equity* given the very real prospect that one group of the Earth’s tenants will knowingly bequeath a ruined planet to countless generations of successors.

The diversity of our contributors was also an unexpected by-product of the Covid-19 lockdown, which gave some of the editors and contributors the opportunity to conduct a year-long experiment in civic voluntarism. This was the Scotia Group, which was set up as a contribution from the international civil society to the agenda of ‘COP26’, the annual meeting of the parties to the United Nations Framework Convention on Climate Change, which was held in Glasgow in November 2021. The discussions that took place within Scotia helped to illuminate many of the areas dealt with in this book, and reflected our suspicion that, as with excellence in most things, we become better at ethics by education, discussion and, most impactfully, practice.

**THE DUAL NATURE OF THE ENERGY INDUSTRY**

Any survey of the ethical underpinnings of energy law must start by explaining why the production, distribution and consumption of energy give rise to questions and issues that extend well beyond the usual concepts dealt with by the common and civil law traditions, such as
ownership, obligation and contract. It must account for the ‘ethical turn’ in the subject, which has broadened the debate far beyond the usual remit of commercial law.\(^1\)

Although ethical theories are intrinsic to jurisprudence, and so underpin legal practice in the abstract, it is generally rare for ethical questions to take centre stage in actual litigation. Nor is it usual for industrial and environmental policy-making to run into legal challenges based on ethical arguments. Both, however, have been true of the energy law in the past five years, and this reflects the equivocal part that the energy industry has played in human history over the past 200 years or so.

It was the development of hydrocarbon energy – first as coal, then as oil and gas – that grounded the possibility of modern industrial civilisation. The industrial revolutions of the late-eighteenth and nineteenth centuries were steam-driven and coal-powered, and that sudden surge in available energy has fuelled global economic expansion ever since. It is access to fossilised sunlight that, more than any other factor, has been the necessary condition for the Capitalist commodity-based market economies that we have come to accept as necessary to human flourishing. And its exploitation has followed a model characterised by rules and regulations that emanate from a fundamental tension between a delivery system based on private ownership and public regulation. And yet, just as we celebrate the heroic, world-historical role of the energy industry, it is revealed with ever greater degrees of scientific certainty, to be a leading cause of an environmental catastrophe of a magnitude that is, as yet, unknown.

As with any industry, energy is made up of three basic divisions: production, distribution and consumption. All of these have had a tumultuous 120-year history. If we consider production, we see the geopolitical shocks caused by the collision of politics and geology. The unequal distribution of hydrocarbons has exercised a dramatic influence on world history since the beginning of the 20th century, much of it played out as a struggle for control over resources and markets. Other, apparently more benign, forms of energy have created problems of their own. The development of nuclear power has brought frightening environmental risks and (very) long-term disposal problems; hydroelectric power has damaged ecosystems and forced mass displacements. From the point of view of distribution and consumption, we have to consider and balance the grossly unequal access to energy between different populations\(^2\) and the need to develop transportation and heating systems that can run on green electricity, hydrogen, and other renewable energy sources. In short, all parts of the energy industry show a double-sided nature, and this means that the questions of contract and the ownership and control of resources that once dominated energy law no longer capture the scope of the modern subject. In the future, the clear need to drive a transformation in the energy system will broaden the subject still further.

This energy question is commonly conceptualised as a ‘trilemma’, in which policy-makers must negotiate the incommensurate claims of the nation state, the population and the environment. The main tension here is between national economic and geopolitical forces that compete for profits and access to an increasingly scarce resource, and the concerned citizens and non-governmental groups that have appointed themselves representatives of the silent

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parties in the trilemma: the environment and, as yet, unborn generations. It is the playing out of this contest that has given rise to energy justice as a field of study in its own right. Since some ethical accounting seems to be required to bring the struggle within the domain of due process and the rule of law, rather than leaving it to be decided by the manoeuvring of profit and power-seeking actors, what the essays in this volume explore are the principles and considerations that constitute energy ethics as a new field.

Equally important is the consideration of religious belief, which has always played (and will continue to play) an important role in shaping popular attitudes towards Creation and the future development of energy ethics in different regions. The notions of stewardship, care for the wellbeing of others, compassion for the poor, a distrust of economic growth at the expense of environmental and non-material goods, respect for nature, and a sensitivity to the value of a thriving environment are, in our opinion, strengthened by a sense of spiritual worth. These ideas are found in, among others, Christian, Islamic, Judaic, Hindu and Buddhist traditions, and exert a diffuse but pervasive influence on the debate. We suggest that they make a definite contribution to civic processes and human rights, and thus to the ethical bases of energy law.

THE STRUCTURE OF THE BOOK

This Handbook is divided into 24 chapters and ten policy documents, which are grouped into four parts. The first part aims to explain the main vectors of energy law and ethics and to give a conceptual overview of the issues that it addresses, with special attention to ideas of distributive justice, energy justice and environmental justice. Part I also introduces the contemporary social matrix in which these ideas are embedded, with particular regard to the growth of environmental activism that has resulted in a number of landmark legal judgments.

Part II addresses the main ethical factors in financing energy projects, bearing in mind that an estimated $120 trillion may be needed to finance the transition to a global net zero carbon economy and reach the UN’s sustainability goals. The emphasis in this part is on the role of international financial institutions and sovereign wealth funds. Special attention is given to analyses of the environmental, social and governance standards that are becoming a standard feature of energy finance arrangements, as formulated, for example, by the Equator Principles. Another subject taken up in this part is investment litigation and arbitration, and we also consider knowledge-sharing and the ethical drivers and challenges of energy efficiency law.

Part III gives a wider view on some of the topics that are likely to dominate policy-making and the legal debate in the energy sector. The main subject in this part is climate change mitigation, based around cutting carbon emissions, and climate change adaptation, which is concerned with preparing societies to deal with harsher natural environments. Here we have sought to present some of the original ideas that have emerged from both developed and developing countries. We also consider the ethics of water use, the question of whether human rights law can be extended to the domain of energy access, and the issues that surround technology transfer. There is also a chapter on China’s energy law and policy, and the impact of its Belt and Road Initiative.

Part IV is an addendum containing a case study of energy, law and ethics in practice, based on the Scotia process we referenced above. This part is policy orientated. As such, the chapters describe the Process and contain the Group’s different policy outputs proposed to the UNFCCC. The Group’s Communiqué was included as an epilogue on Intergenerational Justice.

The Scotia Group is a global network of internationalists and leaders in law, politics, academia and business that was convened following a 2021 meeting of the Institution Quraysh for Law and Policy, a civil society body set up to promote the global rule of law. The aim was to provide policy inputs to COP26 based on the belief that the human race had nine years left to halve its carbon emissions (the ‘T minus 9’ principle) if it was to prevent runaway climate change. This section outlines the Scotia Group’s progress since its inception, and ties together Scotia’s mission, methodology and outputs, and what effect they had on COP26. At the end of many hours of debate and seven online meetings, Scotia ended with a set of eight policy proposals intended to remove political and legal blocks to effective climate action, and to argue for a multi-trillion-dollar international investment effort, on the same scale as the Marshall Plan for European reconstruction. Since several of the contributors to this book were involved in Scotia, as part of its Inception Commission and as members or fellows, its inclusion here is intended to provide an applied perspective to the theoretical issues addressed in the first three parts.

It is, perhaps, worth dwelling for a moment on the period immediately after the end of the Second World War, since it was in the aftermath of that cataclysm that a new world order was founded, with a comprehensive institutional structure for global governance and George C Marshall’s European Recovery Programme as one of history’s few examples of large-scale coordinated action that was able to address a continent-wide crisis.

It is becoming clear that, despite the vital role of the United Nations in coordinating the fight against global warming, the arrangements made in 1945 are not well suited to the task of dealing with our looming planetary crisis. On the other hand, the success of the European Recovery Programme does allow us to believe that a similar collective effort can be made to drive an energy transition, and thus hold global warming to the 1.5°C limit set in Paris in 2015. Former British Foreign Secretary Ernest Bevin said in 1949 that Marshall’s vision threw ‘a lifeline to sinking men’. That is the least that we can hope for. The most is, perhaps, best expressed by US Treasury Secretary Henry Morganthau, who spoke of ‘a dynamic world community in which the peoples of every nation will be able to realise their potentialities in peace’. In either case, we will have to invest on a scale and order of magnitude beyond the Marshall Plan, and carry it out with reference to the kind of ethical principles that are discussed in this volume.

THE ENERGY TRANSITION AND FURTHER AREAS OF RESEARCH

As well as being a guide to the expanded field of energy justice, this Handbook intends to play some part in enriching thinking about the law that relates to the energy transition. As such, we
have tried to cover the range of subjects that make modern energy law so distinctive, including the complex of issues that swirl around climate change and the transformation to sustainable systems, seen through the lenses of distributive justice, ethical finance and investment, international development and governance arrangements, as well as sovereignty, human rights, geopolitics and regulation. We hope that what has emerged is not only a set of lenses, but also a toolbox – a range of arguments that scholars, practitioners, negotiators and policy-makers can adopt, adapt, extend and improve, particularly when it comes to theorising the new law that will be needed to underpin the energy transition.

There will certainly be plenty of scope for further work: at the conclusion of this research project, we found ourselves with more questions than we started with. For example, much remains to be said on whether an equitable energy transition can be driven by companies competing in a market. If not, how great a role should public processes take? If the public authorities do take the lead, which of their policy levers should they pull, and how should they frame regulation and legislation? What is the role for the wider public – the citizen activists, NGOs and campaigning researchers who have played such a distinctive part in creating the field of energy ethics?

We also need research on how international legal instruments might encourage investment in cleaner and more resilient energy infrastructures and technologies, how ‘hard law’ provisions might be introduced to force states to meet their own commitments, and how we might make the most of voluntary arrangements such as the Paris Agreement and the United Nations’ Sustainable Development Goal 13 (covering climate action). We need research that addresses international investment treaty reforms and increases the emphasis on investor responsibility in the energy sector, and we need to clarify whether a multilateral legal instrument could establish legally binding provisions on investors.

We must be cognisant of the fact that every nation has its own energy trilemmas to solve, and those of African countries, for example, are radically different from European nations. We therefore require research into differentiated legal approaches as to how to manage the energy transition depending on an economy’s stage of development and access to financial resources.

On the question of climate change, legal scholarship has yet to determine the precise relationship between long-term environmental policy and short-term energy imperatives. How, for example, are we to evaluate the international responsibility and accountability of state and non-state actors? To what extent should governments be driven by economic motives, and to what extent should corporations be compelled to act in the public good through environmental, social and corporate governance (ESG) mechanisms? As the energy transition intensifies, further challenges will undoubtedly arise regarding energy security and economic costs, all played out against a background of more frequent environmental disasters and the emergence of new social movements and new technologies. This will undoubtedly focus more and more attention on the role of ethical systems in providing a legal framework in which disputes can be decided, and may even force them to adapt to meet the demand for more and more litigation – dedicated environmental courts, perhaps?

In terms of governance and continued popular politics, should scholarship look to the re-emergence of resource nationalism in certain regions of the world? And from an international organisation perspective, should we consider the establishment of a ‘World Energy Organisation’ responsible for coordinating diplomacy and rulemaking related to energy? Or should we revamp the mandates of the International Energy Agency, the Energy Charter...
Treaty, the International Monetary Fund and others? From a predictive standpoint, will digitisation transform the world’s energy system in the way that it has other sectors of the economy?

Finally, what type of international society do we want to build by 2050 and what changes would that require in the structures and practices of our political and legal systems? Although there was no unanimity among our editors and contributors on this, somewhat nebulous, question, what we all agreed was that much work remains to be done in the field of ethics, energy and law. We believe the present volume is the start of a conversation that will shape the future of our planet.