



Introduction

Energy is the lifeblood of any economy. Traditionally the domain of the nation-State, energy has been moving onto the European and global scene over the past two decades or so. 2015 marks a watershed. In March, the European Council adopted the Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Strategy in a 2030 perspective, launching the process of establishing the European Energy Union. In December of that year, the UN General Assembly agreed on the Sustainable Development Goals, also in a 2030 perspective, of which the seventh aims at universal access to modern energy. Both envisage the managed transition from a carbon-dependent to a low-carbon energy system, one of the most complex regulatory tasks ever undertaken, and one with far-reaching consequences. Energy has become a laboratory of international and European governance and law-making with which the State level is aligning itself.

This transition is taking place on the backdrop of rapid global change in the political economy, technology and economics of energy. In the political economy of energy, closed national markets dominated by a few vertically integrated players have been liberalised certainly in Europe but also elsewhere. Efforts at halting global climate change are coming down to choices on energy.¹ The 2015 Paris Agreement on climate change focuses clearly on decarbonising the global energy system. Poverty eradication, economic prosperity and competitiveness

¹ Intergovernmental Panel on Climate Change (IPCC), *Fifth Assessment Report on Climate Change (AR5)*, Synthesis Report (2014), 1, available at www.ipcc.ch. The linking between climate change mitigation and energy is explicit in EU and US policy-making. In adopting the 2030 Climate and Energy Policy Framework, the European Council stated that it would revert to it after the Twenty-First Conference of the Parties to the UNFCCC on a post-Kyoto Protocol (October 2014, EUCO 169/14). It is implied in China becoming a leading producer of renewable energy. Further, F. Wanga, H. Yinb & S. Li, 'China's Renewable Energy Policy: Commitments and Challenges', (2010) 38 *Energy Policy* 1872; E. Martinot, 'Renewable Power for China: Past, Present, and Future', (2010) 4 *Frontiers in Energy* 287.

depend on the price of energy.² Indeed, the very security of supply has arisen as a concern because of broader geopolitical changes between the principal exporters and importers of fossil energy, in particular the European Union. Technological advances have diversified the sources of energy beyond oil and gas, from renewable energy sources of the land and sea becoming a cost-competitive option³ to non-conventional fossil fuels and emergent sources such as methane hydrate.⁴ There have been advances in the long-distance transport and transmission of energy between centres of production and consumption, such as the liquefied natural gas technology for vessel-borne transport, high-voltage direct-current technology for electricity networks⁵ and the storage of energy. Finally, the commoditisation of energy carries with it the worldwide tradability of energy on institutionalised exchanges and over the counter.

This book focuses on the law underpinning the European Energy Union. While law accounts are most often and with full justification about understanding past and present, this book will explicate the trajectory of change in EU law placed in its international and national normative context over the medium and long term. It identifies the characteristic law formation for embedding the European Energy Union in international, EU and national governance and regulatory structures. It assesses the parameters, drivers and modalities for a concerted regulatory intervention by different normative orders, evaluates its legitimacy and discusses the paradigmatic quality of energy regulation for other fields.

² The United States may become energy self-sufficient by 2035, in large part thanks to shale oil and gas production; International Energy Agency (IEA), *Energy Policies of IEA Countries: The United States 2014 Review*, available at www.iea.org; and T. Curtis, 'Unravelling the US Shale Productivity Gains', *OIES Paper WPM 69* (2016). The comparative price of energy has been marked as a pressing concern in Europe; see D. Buchan, 'Costs, Competitiveness and Climate Policy, Distortions across Europe' (2014), available at www.oxfordenergy.org/wpcms/wp-content/uploads/2014/04/Costs-Competitiveness-and-Climate-Policy.pdf.

³ International Energy Agency, *Medium-Term Renewable Energy Market Report 2014: Market Analysis and Forecasts to 2020 and World Energy Outlook 2016*.

⁴ US Department of Energy, *Energy Resource Potential of Methane Hydrate* (2011), available at www.netl.doe.gov/File%20Library/Research/Oil-Gas/methane%20hydrates/MH-Primer2011.pdf; Ministry of Economy, Trade and Industry of Japan, *Strategic Energy Plan 2014*, available at www.enecho.meti.go.jp/en/category/others/basic_plan/pdf/4th_strategic_energy_plan.pdf.

⁵ ENTISO-E, *Offshore Transmission Technology* (2011) 24, available at www.entsoe.eu/resources/publications/system-development/north-seas-griddevelopment.

1 The Argument of This Book

This book makes three closely allied arguments. First, through the European Energy Union, the European Union assumes responsibility for the social-State function of providing EU citizens with equal access to secure, sustainable and affordable energy as a public good. This responsibility legitimises the European Union in establishing rules-based network governance over energy, in Europe and worldwide. Second, the legal form of this rules-based governance is regulation of the European and global energy cycles. This regulation is centred on a legal regime that integrates international law, EU law and the national law of the Member States. The development of this regime is shaped by the lateral co-evolution of these normative orders and their progressive vertical integration over a time span stretching to the end of the century, for which 2030 is a critical milestone. Third, this European Energy Union in international law instantiates the broader institution of global regulatory law. This is a general account of the interstitial relations between international law, regional law and domestic law. It emphasises that global legal priorities trigger the powerful self-coordination within the network formed by autonomous normative orders.

2 Concept and Functions of the European Energy Union

The European Energy Union is a transformative political-legal project. Fulfilling the mandate of the Lisbon Treaty that inserted ‘energy’ as a policy and competence of the Union into the Treaty on the Functioning of the European Union,⁶ the European Council in March 2015 adopted

⁶ Treaty on the Functioning of the European Union, (2012) OJ C 326/47 (TFEU). The new Title XXI in Part III on Internal Policies consists of the sole Article 194 of the TFEU, which reads:

- 1 The context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:
 - (a) ensure the functioning of the energy market;
 - (b) ensure security of energy supply in the Union;
 - (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
 - (d) promote the interconnection of energy networks.
- 2 Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to

the strategy for establishing a European Energy Union. ‘Strategy’ is a category to gain analytical clarity on this process. The term is used in many disciplines and thus has many senses. At the most general level, strategy indicates decision-making under conditions of uncertainty. It has mostly been understood in an instrumental sense to align objectives with resources and a time frame.⁷ Lawrence Friedman’s sophisticated account points to the use of strategy in elucidating societal choices,⁸ but its usefulness for legal analysis has received little attention. Strategy understood in this sense connects the political system of society with its legal system. From the internal point of view of law, strategy elucidates the implications of political choices for law. It captures the connection between political impulses – context and governance – and the challenges arising and the design ideas and means of their realisation within the legal system. It thus elucidates the direction of legal change. The 2015 European Union energy strategy is the reference for policy and law-making on the European energy system for the medium term. The goal of energy supply security, a decarbonised energy system and economic competitiveness drives prioritising renewables within the overall mix, enabling network trade in energy Europe-wide, promoting private investment supplemented by public funding and proceduralising energy solidarity between the Member States. The implementing action includes EU policies ranging from the energy market, the environment and research and innovation to foreign policy, neighbourhood policy, trade and climate. The governance can be mapped as a rules-based network combining centralised EU and decentralised Member State policy and law-making on energy. The indispensable external aspect of this network

achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

- 3 By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

⁷ Strategy is also used in the sense of the decision-making relative to the legal positions of others; see A. Duff, ‘Law, Strategy and Democracy’, (2009) 26 *Journal of Applied Philosophy* 269; A. Vermeule, ‘Three Strategies of Interpretation’, (2005) 65 *San Diego Law Review* 312. For further discussion, refer to Chapter 1.

⁸ L. Freedman, *Strategy* (Oxford University Press, 2013), 607–29.

extends to the world beyond as the European Union prepares to closely cooperate on energy with third States.

In answering what this project is for, this book will argue that the new European Energy Union embodies the claim of the political system to determine the future structure of the energy system rather than the market. The design is a European concern, not just a national one. The European Union assumes the responsibility of guaranteeing the secure, sustainable and affordable supply of energy through policy, law and financial resources. Fulfilling this responsibility becomes a priority for the European Union's institutional framework in the current parliament, which had previously only considered the matter from the vantage point of other policies such as the internal market and the environment. Responsibility for the delivery of such energy then lies with the market. This lifts to the EU level a social-State function of providing equal access for all citizens to an essential public good, with the citizens controlling the consumption and production of energy. The ensuing transformation of the current energy economies of the Member States is a step change from the previous liberalisation that left these economies intact. This responsibility grounds governance of the energy system at the EU level in output legitimacy. However, the social-State function of providing this public good requires large-scale public and private investments and needs input from all concerned to be legitimate. The European Union becomes accountable to its citizens for the mode and extent of its regulatory intervention, which, in turn, requires ensuring their democratic inclusion at the EU and Member State levels.

The Energy Union aligns European public interest in its energy system with the global public interest in energy and shapes international law development. Thus, the European Union also assumes responsibility for bringing about rules-based energy governance worldwide, and for that it will be accountable not just to the citizens of the European Union but also to the international community of States and, ultimately, humanity.

3 Regulation

The legal form that this rules-based governance of energy takes is regulation. This is public good regulation, in which public authorities issue legal directives to enlist all holders, both public authorities and private stakeholders, for the intended outcome. Such regulation is the objective of the European Energy Union Strategy, which also defines the means to achieve it. The European Energy Union Strategy aims at the eventual

regulation of the entire energy cycle and energy system within the territory of the European Union and beyond. This regulation will be based on formal law-making through the resources of international law, EU law and national law. These normative orders co-evolve to form the tiers of a single integrated legal regime that sustains the regulation of the European and global energy systems.

4 Co-evolution

International, EU and national laws of the Member States co-evolve in their respective provision on energy. This co-evolution concerns first the design of a *constitutional* order of energy in the sense of the fundamental enabling and constraining of rules of a normative order. These rules determine the boundaries of regulatory action on energy, albeit with a degree of stability and bindingness that is specific for each normative order. Within these boundaries, each normative legal order then develops a *regulatory* programme comprised of normative parameters, drivers and modalities to bring about transformation of the energy system. This programme produces the administrative law-type rules on energy. Finally, each normative order *opens* itself to the others. Each exchanges the closed autonomy of a separate normative order for the chance to influence external normative processes in line with its own constitutional/regulatory design.

5 Integration

Each of the co-evolving normative orders is by itself inadequate and must work with the others to achieve effective regulation of the energy cycle. This requires vertical integration of the regulatory processes. The vertical integration of these autonomous normative orders turns on three ideas – responsibility, normativity and conceptual unity. *Responsibility* determines what each normative order is to do. This book will argue that international law provides the normative impetus and legal certainty for trade and international energy cooperation. EU law provides the principles and mechanisms of cross-border cooperation, which national law of the Member States and affiliated States then implements. *Normativity* designates the second idea that across the multi-tiered rule-making, the bindingness of the law needs to be secured. This calls for consistent rule-making. It also calls for a material normative hierarchy with international law at its apex. Finally, *conceptual unity* of the regulatory action in

international law, EU law and national law, needs to be secured. Energy citizenship means inclusion in the political process at EU and Member State levels, equal access and the freedom to act as self-determining consumer and producer of energy. Yet it is human dignity that overcomes the exclusivity of this citizenship, generating the unifying concept for all three normative orders.

6 Global Regulatory Law

Global regulatory law, as a branch of global law, is an institution of the law outside the State, the idea of which is to protect the public interest of humanity through the regulation of global value cycles. To reach every point of the globe, it works through a network of mutually reinforcing normative orders. This institution is not law-generating by itself but relies on the rule-making capacity of international law, regional law and national law. On the regional tier, the European Union is joined by others such as the Association of Southeast Asian Nations (ASEAN), and on the national tier, universal participation is the aim. This global regulatory law forms incrementally, sector by sector, in response to the global legal priorities and accompanying strategies for meeting societal challenges. Doctrines of global public law and multi-tiered normativity give effect to this order, adapted to the subject matter.

7 A Holistic View of EU Law

Strategy, governance and regulation of the European Energy Union reflect a methodology of multi-tiered regulation, a matter that has received rather less attention than its political-science cousin multilevel governance. The plea of this book is for a methodological change. This is the plea for a *holistic interpretation* of EU law within an international normative environment, one that emanates from a common perspective on shared priorities. Contemporary legal scholarship is ideally internationally contextualised to build a broad interpretation of the developing relationship between EU law and international law. This is critical for a European Union whose self-perception is that of a global actor, whose policies now all have an external dimension,⁹ which has pledged to respect international law, and whose internal law-making increasingly

⁹ Article 3(5), 21 of the TEU; Article 205 of the TFEU.

serves to implement international legal precepts. But this normative environment also comprises national law of the Member States and of affiliated third States. This book will recast the fundamental conception of the relationship between international law, EU law and national law. Instead of isolation and conflict mitigated by some porosity, it ought to be characterised as mutual reinforcement in providing order. In this account, international law, EU law and national law form a whole, and none can be understood outside this context. This holistic methodology is future orientated. The integration of normative orders is not a historic or present given but increases along a time line stretching into the future. Allied with the first therefore goes the second plea for a methodology that accounts for the temporal dimension of EU law, as well as international law and national law. Processes of legal change should be seen from the intended future endpoint, and existing law must be understood in that light. This entails a re-weighing of the sources. The organs and materials of the law-making process come into focus. This highlights the role of the European Commission in proposing legislation, whereas the traditional focus has been on the Court of Justice of the European Union and its case law. This book introduces and uses strategy as an analytical category to elucidate the choices that drive such legal change. It defines the regulatory objective and intended law development, instruments and procedures.

This holistic understanding may be formalised in a coordinate system whose abscissa denotes integration into the international normative environment and whose ordinate shows the development over time. The trajectory of the law development under the European Union's transformative projects, of which the European Energy Union is one, thus can be determined in close observation of the incrementally developing legal reality.¹⁰

8 Assumptions of Multi-Tiered Regulation, Integration and Global Regulatory Law

This book situates the European Energy Union against the background of multi-tiered regulation. Its legal directives are issued in international law, EU law and national law. The argument that these form the tiers of an

¹⁰ A. Halpin, in M. Del Mar & Z. Bankowski (eds.), *Law as Institutional Normative Order: Essays in Honour of Sir Neil MacCormick* (Ashgate, 2009), 45, 47: 'sound theory should be closely grounded in experiential reality.'

integrated legal regime rests on the assumption that they are commensurate and compatible. In making this assumption, I am following the work of Neil MacCormick on institutional normative order.¹¹ Broadly in the positive tradition, institutional normative order explains law from the process of production of legal rules, which passes from social practices to norms to the formalisation and authorisation of rules. These then fall on the functional tiers of substantive rules, rules on application and adjudication and further rule-making. Institutions of law then turn on ideas about the law that are supported by rules. Institutional normative order describes the law of the constitutional State. But it also describes law outside the constitutional State. This is clear enough for the European Union which has been converging towards a model of the constitutional State, but also for international law that is not housed in one central organisation. It also produces its rules in a cycle, through the stages of identification and planning, formalisation and authorisation, application, assessment and reform. Thus, international law, EU law and the domestic laws of Member States all constitute normative orders in a descriptive sense, and the differences between them are a matter of their institutional design.

9 Literature

There are fine, monograph-length accounts of European and international energy law, as well as of national energy laws. This book profits from these and discusses them throughout. However, it is perhaps useful to point out that the present account explores a line of inquiry that is not the focus of these treatments. This is an account of the European Energy Union and its legal order that is contextualised normatively and temporally.¹² This perspective explains the choice of material and the depth of inquiry. It is not designed to substitute for the detailed treatment that these other works provide of EU law, of international law or of the various national laws. This book also focuses on legal change, which it is keenly aware is being planned from an endpoint that lies in the future.

¹¹ N. MacCormick, *Institutions of Law* (Oxford University Press, 2007); and N. MacCormick, 'Concluding for Institutionalism', in *Law as Institutional Normative Order*. Further, A. Menéndez & J. Fossum (eds.), *Law and Democracy in Neil MacCormick's Legal and Political Theory: The Post-Sovereign Constellation* (Springer, 2011).

¹² V. Roeben, 'Governing Shared Offshore Electricity Infrastructure in the Northern Seas', (2013) 62 *International & Comparative Law Quarterly* 839.

This gives it necessarily a speculative character that works dealing with the law as laid down do not have.

The book makes, however, a number of general points, and for these other, non-energy-specific treatments are relevant. Joel Trachtman's influential account of international law also detects international regulation as the future, and he identifies such regulation as the outcome of the efficient exchange of jurisdictional resources between and among States.¹³ This book takes an analytical approach to the trajectory of international regulation and the elements that shape it. Trachtman's and mine are both explanatory yet different and complementary accounts of legal reality. Finally, the disorder of normative orders with which this book is also concerned has spawned excellent works such as *Constitutionalisation of International Law* and *Constitutional Pluralism in the EU*.¹⁴ The first aims at providing an attractive account for resolving normative conflicts in that disorder. The point of this book is to draw this discussion to the regulatory level where the innovative features of global law are being forged. By contrast to *Legal Pluralism* by Paul Schiff Berman,¹⁵ this is an account of public law, and while it is by no means exhaustive and non-statal law plays a role in commercial relations, public law is the important law on this and perhaps most global priorities and needs to be taken seriously as such.

10 Scope and Structure of This Book

This purpose and perspective entail a primarily legal methodology, which is, however, conscious of the context in which the development and interpretation of law are taking place and which is particularly true for a fast-developing area such as the European Energy Union.

The scope of this book depends on the use of its key term – *energy*. The term features in a broad range of disciplines. Policy and law have a fungible use of the term energy. In international law, the Agreement on an International Energy Program uses the term energy to describe the scope of cooperation of the Parties and the mandate of the International

¹³ J. Trachtman, *The Future of International Law: Global Governance* (Cambridge University Press, 2009).

¹⁴ J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalisation of International Law* (Oxford University Press, 2009); K. Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press, 2014).

¹⁵ P. Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press, 2012).