

ENERGY JUSTICE: UNDERSTANDING THE “ETHICAL TURN” IN ENERGY LAW AND POLICY

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I. Introduction

Over the past decade, there has been an explosion of scholarly interest in the concept of energy justice. Barely mentioned prior to 2010,¹ since then there have been several books, journal special issues, conferences, and research programmes, as well as numerous articles devoted to the discussion and promotion of energy justice. Explicitly interdisciplinary in nature,² the concept has attracted the attention not only of legal scholars, but also geographers, sociologists, philosophers, political scientists, and others.³

Energy justice scholars argue that “the global energy system is replete with extreme injustices and asymmetries”,⁴ which are to be found throughout the energy lifecycle, from production to transportation to consumption and waste disposal, and in relation to all energy forms. Injustices can arise both from having *too much* energy (the environmental and social burdens imposed by waste, over-consumption, and pollution) and from *not having enough* energy (lack of access to modern forms of energy, under-consumption, and poverty).⁵ Thus energy justice is proposed as a key organising concept for academic research into energy issues, providing “an opportunity to develop new crosscutting social science research agendas on exploring where injustices occur [and] developing new processes of avoidance and remediation.”⁶

But the ambitions of energy justice scholars are not purely academic.⁷ Energy justice is also recommended as a guiding principle for energy decision-makers at all levels – from regulators and policy makers, to energy firms, to individual consumers⁸ – and, it is claimed, can supply energy law as a legal discipline with a unifying normative underpinning that it has hitherto lacked.⁹ For its proponents, the practical implications of energy justice are radical. For Heffron *et al*, it offers a new way of balancing the familiar energy trilemma of security, affordability, and sustainability according

¹ The first use of the concept in an academic context was in L. Guruswamy, ‘Energy Justice and Sustainable Development’ (2010) 21 *Colo J Intl Env’t L & Pol’y* 231, although there were some earlier (albeit limited) uses in activist literature – see R.J. Heffron and D. McCauley, ‘The Concept of Energy Justice Across the Disciplines’ (2017) 105 *Energy Policy* 658 at 659.

² Heffron and McCauley, *ibid*, at 662.

³ See N. Creutzfeld *et al*, *ESRC Just Energy: Literature Summaries: Energy Justice* (2018), available at: <https://esrcjustenergy.files.wordpress.com/2018/12/literature-summaries-energy-justice.pdf>.

⁴ B.K. Sovacool and M.H. Dworkin, *Global Energy Justice: Problems, Principles and Practices* (Cambridge: Cambridge University Press, 2014) 377.

⁵ B.K. Sovacool *et al*, ‘Energy Decisions Reframed as Justice and Ethical Concerns’ (2016) 1 *Nature Energy* 16 at 16

⁶ K. Jenkins *et al*, ‘Energy Justice: A Conceptual Review’ (2016) 11 *Energy Research and Social Science* 174 at 176. See also D. McCauley, *Energy Justice: Rebalancing the Trilemma of Security, Poverty and Climate Change* (London: Palgrave Macmillan, 2018) at v.

⁷ Heffron and McCauley, *above n?*, at 661-2.

⁸ See, e.g., Sovacool and Dworkin, *above n?*, at 25-6.

⁹ R.J. Heffron & K. Talus ‘The Evolution of Energy Law and Energy Jurisprudence; Insights for Energy Analysts and Researchers’ (2016) 19 *Energy Research and Social Science* 1 at 8-9. See also R.J. Heffron *et al*, ‘A Treatise for Energy Law’ (2018) 11 *JWELB* 34 at 42, where energy justice is proposed as one of seven core principles of energy law.

to principles of justice and equity, rather than economic efficiency.¹⁰ Similarly, Sovacool *et al* argue that “[t]he incorporation of considerations of justice into energy policymaking will alter how we view entire energy systems, with concerns such as equity and equality of distribution becoming more predominant, while other concerns, such as profit-maximisation, receding (sic) in importance”, requiring the development of “new business models and regulatory paradigms”.¹¹

What we might call the “ethical turn” in energy law and policy thus appears to be highly significant, both in terms of ushering in new ways of thinking about energy systems and their relationship to fundamental questions of social ordering and political values and also – at least potentially – in terms of its practical implications for their organisation and governance. This chapter aims to assist in understanding the ethical turn in two main ways. First, it seeks to account for the rise to prominence of energy justice and to understand what its advocates hope to achieve. Second, it explores what is meant by energy justice, elucidating the dimensions of justice employed in the literature, the theories of justice which are advanced, and who are to be regarded as the agents of energy justice (in other words, how the concept is to be operationalised in practice). The chapter concludes by assessing the potential and current limitations of energy justice as a guiding principle for the future development of energy law and policy.

II. Why Energy Justice?

Many of the issues which concern energy justice scholars have been discussed for some time, without being specifically labelled as questions of “energy justice”.¹² For example, promoting universal access to energy systems was a key motivation for the post-war expansion of electricity and gas grids in Europe and North America, while securing access to modern energy services for all has been acknowledged as being central to the achievement of the Millennium Development Goals adopted by the United Nations in 2000.¹³ The oil crises of the 1970s focused attention on questions of equity and inter-generational justice in relation to allocation of scarce resources,¹⁴ as well as raising the profile of issues of affordability and fuel poverty. Similarly, the social and environmental injustices caused by energy developments, such as hydro-electric dams or resource extraction operations, have been widely recognised and debated.¹⁵

However, the sustained focus on energy justice can be attributed to a boom in social science scholarship on energy issues – again over the past decade – in a field hitherto dominated by engineers

¹⁰ R.J. Heffron *et al*, ‘Resolving Society’s Energy Trilemma through the Energy Justice Matrix’ (2015) 87 *Energy Policy* 168 at 169.

¹¹ B.K. Sovacool *et al*, ‘New Frontiers and Conceptual Frameworks for Energy Justice’ (2017) 105 *Energy Policy* 677 at 689.

¹² K. Jenkins *et al*, ‘Energy Justice: A Policy Approach’ (2017) 106 *Energy Policy* 631 at 631.

¹³ Y.O. Omorogbe, ‘Promoting Sustainable Development through the Use of Renewable Energy: the Role of Law’, in D.N. Zillman *et al* (eds), *Beyond the Carbon Economy: Energy Law in Transition* (Oxford: Oxford University Press, 2008) 41-5.

¹⁴ See, e.g., I. Illich, *Energy and Equity* (London: Calder and Boyars Ltd, 1974); D. Maclean and P.G. Brown (eds), *Energy and the Future* (Lanham: Rowman and Littlefield Pub. Inc., 1983).

¹⁵ E.g., the displacement of 1.3 million people, the loss of archaeological and cultural sites, and ecological changes caused by the construction of the Three Gorges Dam in China, or the widespread environmental despoliation and human abuses consequent upon oil extraction in the Niger Delta

and economists.¹⁶ Social scientists have sought to foster a fuller, more human-centred understanding of energy systems as more than merely technical mechanisms for the delivery of units of energy at the lowest possible cost.¹⁷ Instead, emphasis is placed upon the fundamental importance of access to adequate energy services – and of the circumstances in which energy is produced, transported, consumed and disposed of – to fulfilment of the conditions of human flourishing.¹⁸ Thus, “how we distribute the benefits and burdens of energy systems is pre-eminently a concern for any society that aspires to be fair.”¹⁹

In addition, social scientists emphasise the complexity of energy decision-making, as involving psychological, behavioural, ethical, and socio-political aspects, as well as technical and economic considerations.²⁰ Hence, Sovacool *et al* point out that:

Energy system interventions are about more than technology and economic development; they are about political power, social cohesion, and even ethical and moral concerns over equity, due process, and justice. Energy systems can be reconceived as a political, deliberative challenge involving the satisfaction of competing preferences; a social dilemma pitting, at times, the climatic and development goals of energy security or improved resilience against the pressing needs of marginalized and vulnerable populations; and a moral quandary revolving around how energy burdens and benefits are fairly, or unfairly, disseminated.²¹

The increased social scientific interest in energy issues can in turn be attributed to two main, interconnected factors. The first is a rejection of – or disillusionment with – the promise of neo-liberal energy policies that satisfactory energy decisions can be made through the operation of impersonal market forces. Energy justice scholars point to the failure of neo-liberalism to deliver an effective and balanced, long-term energy system.²² Moreover, the persistence of oligopoly and monopoly, as well as an ongoing heavy regulatory presence, underlines the continued importance of human decision-making. As Sovacool and Dworkin put it:

Utility managers, system operators, business leaders and ordinary consumers do not function merely like automatons that rationally calculate price signals and change their behavior to optimize benefits and minimize costs. Instead, they are embroiled in a complicated social and cultural environment that is shaped by and helps to shape technological changes, rituals, behaviors, values, attitudes, emotions, and interests.”²³

The second important factor is the global transition towards a low-carbon energy system. Again, the extensive government intervention necessary to secure the energy transition has re-emphasized the importance of political choices in the design and development of energy systems, and hence of the criteria according to which they are made. Indeed, addressing perceived injustices has often proved to be instrumentally necessary as a condition of securing public acceptance of low carbon energy

¹⁶ See B.K. Sovacool, ‘What Are We Doing Here? Analysing Fifteen Years of Energy Scholarship and Proposing a Social Science Research Agenda’ (2014) 1 *Energy Research and Social Science* 1; G. Frigo, ‘Energy Ethics: A Literature Review’ (2018) 6 *Relations: Beyond Anthropocentrism* 177.

¹⁷ Sovacool *et al* (2016), above n?, at ???.

¹⁸ R. Gillard *et al*, ‘Advancing an Energy Justice Perspective of Fuel Poverty: Household Vulnerability and Domestic Retrofit Policy in the UK’ (2017) 29 *Energy Research and Social Science* 53 at 54.

¹⁹ Sovacool, above n?, at 15.

²⁰ Frigo, above n?, at 178.

²¹ Above n? (2016) at ???

²² McCauley, above n? (2018), at 3.

²³ Above, n? at 363.

policies. This has helped to focus attention on²⁴ those left behind by the energy transition (i.e., workers and communities dependent upon fossil fuel industries),²⁵ as well as those excluded from its benefits and/or who bear a disproportionate share of its burdens (such as communities which bear the amenity costs of low carbon generation, without sharing its financial benefits,²⁶ or which are affected by new power lines, whilst themselves being unable to access the grid).²⁷ Energy justice scholars point out that “simply decarbonizing the *status quo* ... is not energy justice”.²⁸ As Eisenberg states:

a world with low carbon emissions does not somehow transform into a utopia. A shift to a clean-energy economy stands to perpetuate or exacerbate current patterns of inequity. Those patterns could specifically relate to low-carbon industries, for instance, through land theft to develop wind and solar farms, forced labor to extract the natural resources necessary to create solar panels, or impositions of health hazards from biomass fuels. The patterns could also arise in other contexts in the low-carbon world, such as through inequitable access to clean energy.²⁹

Thus, she argues, “the shift to a low-carbon economy is an opportunity to rectify the injustices of the fossil fuel economy, and to not do so, or to allow inequalities to worsen, would itself effectuate injustice.”³⁰

A further way in which the energy transition is important in understanding the rise of energy justice is through the increased prominence it has given to the environmental aspects of energy production and use, and hence to environmental law and regulation. In fact, there is general agreement that the concept of energy justice developed out of earlier debates about environmental and climate justice.³¹ According to Bickerstaff *et al*, the concept of energy justice provides a way of bounding and separating out energy-specific issues from the broader concerns of environmental and climate justice discourses,³² although it also enables focus on consumption and access issues, and not merely the environmental injustices arising from energy production and transportation. Jenkins argues that this makes energy justice a smaller scale and more strategically impactful concept than either environmental or climate justice.³³ She also claims that, because energy justice, in contrast to

²⁴ See, e.g., N. Healy and J. Barry, ‘Politicizing Energy Justice and Energy System Transitions: Fossil Fuel Divestment and a “Just Transition”’ (2017) 108 *Energy Policy* 451.

²⁵ See, e.g., Healy and Barry, *ibid*; J. Bethem, ‘Life within Energy Policy’ (2018) 6 *Relations: Beyond Anthropocentrism* 69 at 79 – 81; A.M. Eisenberg, ‘Just Transitions’ (2019) 92 S. Cal. L. Rev. 273.

²⁶ See e.g. A. McHarg, ‘Community Benefit Through Community Ownership of Renewable Generation in Scotland: Power to the People?’ in L. Barrera-Hernandez *et al* (eds), *Sharing the Costs and Benefits of Energy and Resource Activity: Legal Change and Impact on Communities* (Oxford: Oxford University Press, 2016).

²⁷ See, e.g., the substantial public opposition to the Beaulieu to Denny transmission line in Scotland – T. Brian, R. Dent and R. Jackson, *Beaulieu to Denny: Report of the Public Local Inquiry* (Edinburgh: Scottish Government, 2009).

²⁸ Healy and Barry, *above n?*, at 457. See also McCauley, *above n?*, at 69.

²⁹ Eisenberg, *above n?*, at 282.

³⁰ *Ibid* at 280.

³¹ D. McCauley *et al*, ‘Advancing Energy Justice: the Triumvirate of Tenets’ (2013) IELR 107 at 107.

³² K. Bickerstaff *et al*, ‘Introduction: Making Sense of Energy Justice’, in K. Bickerstaff *et al* (eds), *Energy Justice in a Changing Climate* (London: Zed Books, 2013) at 2. N.b., McCauley and McCauley have subsequently attempted to reintegrate energy justice with environmental and climate justice under the umbrella term of “just transition” – D. McCauley and R. Heffron, ‘Just Transition: Integrating Climate, Energy and Environmental Justice’ (2018) 119 *Energy Policy* 1.

³³ K. Jenkins, ‘Setting Energy Justice Apart from the Crowd: Lessons from Environmental and Climate Justice’ (2018) 39 *Energy Research and Social Science* 117 at 119.

environmental and climate justice, has largely developed as an academic rather than activist concept, this gives it greater conceptual rigour and clarity, which in turn increases its likelihood of successfully influencing policy.³⁴

This greater exposure to environmental law and justice discourses has also proved to be influential with energy lawyers, who have been inspired to supply their own discipline with a set of philosophical precepts similar to those underpinning environmental law – its own “moral compass”³⁵ – and for whom notions of justice have obvious appeal. Co-option and development of the concept of energy justice helps to signal the maturing of energy law as a distinct legal discipline.³⁶ The emphasis on *energy* justice promises to supply a set of normative principles suitable to the specific circumstances and challenges of the energy industries, whilst the stress on energy *justice* emphasises the relative autonomy of energy law from developments in energy practice,³⁷ and hence that it has its own contribution to make to the successful resolution of problems posed by energy systems.³⁸

III. What is Energy Justice?

Given the academic origins of energy justice, it is reasonable to expect a high degree of theoretical sophistication in the development and use of the concept, as well as critical reflection on the challenges of its deployment in practice. In this section, I discuss, first, the particular forms (or “dimensions”) and theories of justice employed by energy justice scholars. In other words, what analytical distinctions do they draw when discussing energy justice, and what normative theories do they advance as to what constitutes justice or injustice in relation to the outcomes of energy decision-making? I also consider the range of decision-makers who are, or might be, subject to obligations to act in accordance with principles of justice (the “agents” of energy justice), and some of the practical issues which arise in seeking to operationalise the concept.

A. The Dimensions of Energy Justice

Justice is a multi-faceted concept. It may be concerned with the substance of how people are treated, or the procedures by which decisions affecting them are made. It may be backwards- or forwards-looking; concerned either with how the circumstances in which people find themselves arose; or focused upon the impact of those circumstances in terms of peoples’ ability to flourish and realise their goals. It may be assessed over different temporal and geographical scales. And it may be concerned with the treatment of individuals, or of the groups to which they belong, or even of non-human subjects.

The dimensions of justice most frequently discussed in the literature on energy justice are the “triumvirate of tenets” identified by McCauley *et al* in 2013.³⁹ These are:

1. *Distributive* justice, which concerns both the “distribution of costs, or how the hazards and externalities of the energy system are disseminated throughout society” and the “distribution

³⁴ Ibid at 119-20.

³⁵ Heffron and Talus, above n? at 4-5.

³⁶ Ibid at 2.

³⁷ Heffron *et al*, above n?, at 36.

³⁸ See *ibid* at 4.

³⁹ Above n?.

of benefits, or how access to modern energy systems and services is distributed throughout society”.⁴⁰

2. *Procedural* justice, which Walker and Day define, following the Aarhus Convention,⁴¹ as requiring access to information about energy issues, meaningful participation in energy decision-making, and access to legal procedures for obtaining redress or challenging decision-making processes.⁴²
3. *Recognition* justice, which requires acknowledgment of and respect for “the various needs, rights and experiences”⁴³ of those affected by energy decisions (for example, the greater amounts of energy required to satisfy the basic needs of particular social groups, such as elderly or disabled people),⁴⁴ and for attention to be paid to “which parts of society are privileged or ignored”⁴⁵ (for example, the tendency to dismiss those opposed to windfarm developments as NIMBYs).⁴⁶

To these three tenets, Heffron and McCauley add a fourth – *restorative* justice – which they define as a duty to rectify injustices arising from energy decision-making.⁴⁷ However, a range of other justice concepts can also be found in the literature. For instance, the idea of *corrective* justice may be employed to demand that those who harm the environment through energy-related activities be made to take responsibility for their actions,⁴⁸ or that those whose rights or legitimate expectations are overridden by the transition to a low carbon energy system be compensated for their losses.⁴⁹ Notions of *inter-generational* justice are invoked to insist that attention is paid not merely to the consequences of energy decision-making for current populations (*intra-generational* justice), but also to the effects on future generations of, for instance, atmospheric pollution or resource depletion.⁵⁰ Ideas of *international* or *global* justice are used to demand that we view questions of energy justice on a global scale and not merely on a national scale, for instance that we should work to secure universal access to modern energy services, and to ensure that the risks associated with energy production and use are not exported from wealthy countries to poorer ones.⁵¹ This may be regarded as one aspect of a broader notion of *spatial* justice, which emphasises the geographic dimensions of inequality and inequity, both within and beyond nation states, highlighting, for instance, the “clear geographic patternings associated with energy poverty, as well as the geographically embedded and contingent nature of its underlying causes.”⁵² Finally, some authors argue that attention should also

⁴⁰ Sovacool *et al*, above n? (2016), at ???

⁴¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 450, 1998.

⁴² G. Walker and R. Day, ‘Fuel Poverty as Injustice: Integrating Distribution, Recognition and Procedure in the Struggle for Affordable Warmth’ (2012) 49 *Energy Policy* 69 at 72.

⁴³ Gillard *et al*, above n?, at 54.

⁴⁴ See, e.g., *ibid*, at 54-5.

⁴⁵ McCauley, above n?, at 18.

⁴⁶ Jenkins *et al*, above n? (2016), at 177.

⁴⁷ Above n1, at 660-1. In subsequent work, restorative justice replaces recognition justice as the third of a new “triumvirate of tenets” – McCauley and Heffron, above n?, at 1.

⁴⁸ E.g., Sovacool *et al*, above n? (2016), at ???; J.D. Schneider, ‘Review of: L. Guruswamy (ed), *International Energy and Poverty: The Emerging Contours*’ (2016) 37 *Energy L.J.* 193 at 195.

⁴⁹ See, e.g., Eisenberg, above n?, at 308.

⁵⁰ See, e.g., Sovacool and Dworkin, above n?, ch 9.

⁵¹ See, e.g., Sovacool and Dworkin, above n?, *passim*; McCauley, above n?, ch 1.

⁵² S. Bouzarovski and N. Simcock ‘Spatializing Energy Justice’ (2017) 107 *Energy Policy* 640 at 640.

be paid to *inter-species* equity and other *non-anthropocentric* notions of justice (such as *bio-centrism* and *eco-centrism*).⁵³

These various dimensions of energy justice are often assumed either to relate to different aspects of energy decision-making,⁵⁴ or to be complementary and mutually reinforcing.⁵⁵ For instance, Gillard *et al* argue that recognition injustice (lack of recognition or mis-recognition) is manifested in two ways: “through social structures and institutions that ignore, misrepresent or reinforce inequalities, and through social processes that limit possibilities for expression and ostracise minorities.”⁵⁶ In other words, lack of recognition of the needs or interests of specific groups tends to lead to them being under-represented in debates and policy decisions, and hence to the perpetuation or exacerbation of the inequalities they face.⁵⁷ Similarly, Heffron and McCauley claim that restorative justice provides a “uniting aim” of energy justice, because it forces decision-makers to engage with justice concerns and to consider the full range of issues identified by other justice principles, as these identify the areas where restorative action would be required and the costs involved in doing so.⁵⁸

Clearly, however, it cannot always be the case that the different dimensions of justice co-exist harmoniously; sometimes they will be in tension or conflict with one another – something that is not always fully acknowledged in the energy justice literature. For instance, procedural justice may sometimes be in tension with distributive and recognition justice. An emphasis on participation and voice may serve to further empower the already powerful and articulate at the expense of vulnerable groups, and it may be particularly difficult to give adequate recognition to the needs and interests of those distant in time and space, such as future generations or international groups.⁵⁹ Similarly, apparently fair procedures may have the effect of legitimising substantively unjust results, for instance where disadvantaged communities are empowered to “choose” to host a nuclear waste disposal site through a competitive bidding process. There are also important trade-offs and tensions between *intra*- and *inter*-generational justice. For instance, Sovacool *et al* point out that protecting the interests of future generations would suggest slow depletion rates for natural resources, whereas considerations of intra-generational distributive justice might require us to maximize the use of resources to facilitate access for the poor and vulnerable.⁶⁰ Similarly, while it is obvious that global responsibility for energy-related climate change is unevenly distributed, it might be argued that we all share a responsibility to future generations to mitigate further harms.

From a legal perspective, however, perhaps the most important potential conflict is that between distributive justice and corrective justice. While creative legal action to vindicate the rights and legitimate expectations of those harmed by energy decision-making may sometimes be used to improve distributive outcomes, the role of (unequally distributed) property rights in land, or in licences and concessions may act as a significant limit on the ability of governments and regulators to reorganise energy systems in the interests of distributive justice. Consideration of how such conflicts should be resolved is a surprising omission from a discourse which is proposed as a guiding principle for energy law.

⁵³ See, e.g., Sovacool *et al*, above n? (2017), at ???; G. Frigo, ‘Energy Ethics: Emerging Perspectives in a Time of Transition’ (2018) 6 *Relations: Beyond Anthropocentrism* 7 at 18.

⁵⁴ McCauley, above n?, at 90.

⁵⁵ Gillard *et al*, above n?, at 54.

⁵⁶ *Ibid*, at 55.

⁵⁷ *Ibid*, at 54.

⁵⁸ Above n?, at 660.

⁵⁹ Jenkins *et al*, above n? (2016), at 178.

⁶⁰ Above n? (2016), at ???.

B. Theories of Energy Justice

Theories of justice can help us to make sense of, and to resolve, conflicts and uncertainties as to what justice requires in particular contexts. Theories of justice offer differing interpretations of what constitutes, for example, distributive justice or procedural justice. For instance, distributive justice theories propose a range of different distributive principles (rights, needs or welfare, utility, desert), each of which may be interpreted in different ways (what counts as a right; what needs are morally relevant; how is utility to be measured; what behaviour is morally deserving, and deserving of what?).⁶¹ Particular justice theories may prioritise certain dimensions of justice over others. For instance, libertarian theorists such as Nozick or Hayek argue that it does not make sense to talk of social or distributive justice; for them, we can only meaningfully talk of justice or injustice in relation to individual actions, and so distributional patterns are just provided that they have come about as a result of transactions freely entered into, however unequal or otherwise “unfair” they appear to be.⁶² Theories of justice also help to guide us in determining which temporal frames or spatial scales are relevant, and how to prioritise conflicting rights, needs, interests, etc.

Different theories of justice may offer substantially different answers to particular energy-related questions. For instance, a desert-based theory might conclude that prosumers deserve to be rewarded for their contribution to the reduction of overall carbon emissions, even if green subsidies have a regressive effect on the energy poor and are thus contrary to a needs-based understanding of distributive justice. Similarly, rights-based or utilitarian theories might give radically different answers to the question of whether electricity and gas grids ought to be extended to remote, sparsely-populated areas.

So, which theories of justice do energy justice scholars advance?

In their 2014 book, *Global Energy Justice*, Sovacool and Dworkin draw upon a range of different justice theories in the Western philosophical tradition to illustrate and offer solutions to particular problems of the global energy system. In later work, Sovacool *et al* draw further inspiration from non-Western theories.⁶³ Although Sovacool and Dworkin acknowledge that the theorists they discuss do not always give compatible answers to justice problems,⁶⁴ they claim that justice is pluralist,⁶⁵ and that “the concept of justice may be less important for what it *is* than for what it *does*.”⁶⁶ In other words, “the concept of justice is a tool with multiple functions”.⁶⁷ These include improving decision-making, providing standards of justification beyond individual preferences, and helping to secure greater acceptance of decisions. Nevertheless, from these diverse theoretical foundations, Sovacool and Dworkin claim to derive eight principles of energy justice: the promotion of availability; affordability;

⁶¹ See generally, J. Lamont and C. Favor, ‘Distributive Justice’, in E.N. Zalta (ed), *Stanford Encyclopaedia of Philosophy* (Winter 2017 edition), available at <https://plato.stanford.edu/archives/win2017/entries/justice-distributive>; D. Miller, *Political Philosophy: A Very Short Introduction* (Oxford: Oxford University Press, 2003), ch 5.

⁶² See Sovacool and Dworkin, above n?, at 273-9; Lamont and Favor, *ibid*, at section 7.

⁶³ Sovacool *et al*, above n? (2017), at 678-80.

⁶⁴ Above n?, at 18, 355. See also Sovacool *et al*, above n? (2017), at 680-3.

⁶⁵ Above n?, at 374; see also S. Fuller and D. McCauley, ‘Framing Energy Justice: Perspectives from Activism and Advocacy’ (2016) 11 *Energy Research and Social Science* 1 at 6; McCauley, above n?, at 29; Jenkins *et al*, above n? (2016), at 180.

⁶⁶ Above n?, at 10.

⁶⁷ *Ibid*.

due process; access to information; sustainability; intra-generational equity; and responsibility.⁶⁸ To these eight principles, Sovacool *et al* add a further two: resistance to injustice; and intersectionality.⁶⁹

While the principles presented may have a certain intuitive appeal, it is fair to say that they are poorly grounded, and the links between particular theories of justice and the energy policy prescriptions derived from them are sketched with only the broadest of brushes. The lack of coherence between the different justice theories discussed is also problematic from a functional perspective. First, it runs contrary to the central purpose of the concept of justice, which – according to Miller – is to treat individuals in a non-arbitrary way; this requires, at a minimum, consistency of treatment both between people and over time.⁷⁰ To invite people to decide energy issues in terms of justice, rather than some other standard such as efficiency, does not in fact achieve justice in this formal sense if justice theories are treated as a pick and mix from which decision-makers can choose at will. Secondly, lack of coherence limits the persuasive power of arguments about energy justice. For instance, a libertarian who is convinced by Sovacool and Dworkin’s appeal to Nozick to argue for an end to energy subsidies⁷¹ is unlikely to be convinced by their appeal to Rawlsian welfare liberalism to justify social pricing.⁷² Finally, without a robust theoretical foundation, the appeal to justice as a set of decision-making tools is likely to be met with the response, “why these tools, and not others?” This is particularly unsatisfactory where energy justice is offered as an alternative to market-based decision-making, since the free market is underpinned by its own theory of justice (*i.e.*, one which emphasizes individual freedom and choice, and the belief that free competition maximizes social utility).

Other scholars do make greater efforts to ground their claims about energy justice in a coherent philosophy. The most frequently invoked theories are the arguments of welfare liberals like Rawls and Sen to the effect that primary goods (including access to energy) should be distributed in such a manner as to secure the greatest benefit to the worst off (Rawls) or to afford each individual equal capability to achieve valued functioning, including the ability to live a fulfilling life, as well as to satisfy basic human needs (Sen).⁷³ This is often combined with an appeal to cosmopolitan justice theories, to insist that energy justice be addressed at a global scale.⁷⁴

These theories are, of course, controversial. For example, though inspired by Rawls’ theory of justice, Rawls himself rejected the cosmopolitan claim that it makes sense to address distributive justice questions on a global scale, arguing for a narrower understanding of international justice, based on a more limited set of obligations to respect fundamental human rights and to assist people in countries without well-ordered systems of government.⁷⁵ Guruswamy bases his call for international action to help what he calls the “energy-oppressed poor” on this narrower understanding of international justice,⁷⁶ while Schneider argues that appeals for global energy justice would make more practical

⁶⁸ Ibid, at 366-71.

⁶⁹ Above n? (2017), at 687-8.

⁷⁰ Miller, above n?, at 76.

⁷¹ Above n?, ch 8.

⁷² Ibid, ch 7.

⁷³ See, e.g., Walker and Day, above n?, at 70; Gillard *et al*, above n?, at 54; McCauley, above n?, at 11-7.

⁷⁴ See, e.g. Heffron *et al*, above n?, at 170; Sovacool and Dworkin, above n?, at 372-3; Sovacool *et al*, above n? (2016), at ???; McCauley, above n?, at 13, 39.

⁷⁵ J. Rawls, *The Law of Peoples* (Cambridge, MA.: Harvard University Press, 1999). See generally M. Blake and P.T. Smith, ‘International Distributive Justice’ in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition), available at: <https://plato.stanford.edu/archives/spr2015/entries/international-justice/>; Miller, above n?, ch 7..

⁷⁶ Above n1, at 258-65.

headway if based on utilitarian arguments that all nations benefit from alleviating economic deprivation.⁷⁷

The fact that justice theories are controversial is not, of course, a reason to reject the claims of energy justice scholars. Hall rightly notes that universal understandings of justice are difficult to attain because they require “shared interpretations of the right or good”.⁷⁸ Moreover, to dismiss calls for change on the basis that there is no consensus is, implicitly, to defend the justice of the *status quo*.⁷⁹ Nevertheless there are still a number of questions that need to be addressed and fully worked-through before there can be said to be a fully-developed and comprehensive theory of energy justice.

Important issues include:

1. How are energy needs to be understood, and what relevance do matters like cultural factors affecting levels of energy use⁸⁰ and the role of individual choice have for the determination of basic needs?
2. What implications do welfarist principles have for the organisation of energy systems: how much role is there for the operation of energy markets; are principles other than need (such as utility, desert, or inter-generational equity) relevant to energy consumption decisions beyond the basic minimum?
3. How relevant are principles of distributive justice to energy justice questions other than issues of access and affordability? Does equality demand public ownership of energy resources? Is the amelioration of environmental harms best understood as involving questions of distributive rather than corrective justice?
4. How far should property rights and other vested interests be regarded as a legitimate brake on energy system reforms?

C. The Agents of Energy Justice

As was noted in the Introduction, energy justice is intended to be more than an academic discourse, providing a critical standard against which to measure current energy decision-making. It is also intended to *change* the way in which those decisions are made in practice.⁸¹ Indeed, as was also noted above, one of the advantages claimed for energy justice over environmental and climate justice is its greater potential for influencing policy; the latter two discourses being regarded as having failed to make much practical impact.⁸² A fully-developed theory of energy justice thus needs to consider *to whom* energy justice arguments are directed, and *how*, and *to what extent*, justice-related considerations can be embedded in practical decision-making. Practical implementation needs to be addressed not simply as a question of political *strategy*; as Jenkins recognises, “even with ... well planned tools, energy justice is likely to encounter contested, tricky and political dilemmas and

⁷⁷ Above n?, at 195-6.

⁷⁸ S.M. Hall, ‘Energy Justice and Ethical Consumption: Comparison, Synthesis and Lesson Drawing’ (2013) 18 *Local Environment* 422, at 428-9; see also McCauley, above n?, at 90.

⁷⁹ Lamont and Favor, above n?, section 1.

⁸⁰ E.g., Bouzarovski and Simcock (above n?, at 644) point out that energy poverty may be particularly stigmatizing in places such as the US where high levels of energy consumption is the norm, or in Scandinavian countries where a high value is placed on having a “cosy” home. On the other hand, accommodation of such cultural norms may perpetuate global inequality in the use of energy resources and legitimize over-consumption.

⁸¹ See, e.g., Sovacool and Dworkin, above n?, at 356; Jenkins, above n?, at 120.

⁸² Heffron and McCauley, above n?, at 662.

resistances.”⁸³ Practical considerations also need to feed back into the development of conceptual and normative arguments about energy justice, as persuasive normative precepts have to take into account the limits of what is practically possible, and to be sensitive to the constraints imposed by other, particularly institutionally-based, accounts of what constitutes legitimate decision-making.

Nevertheless, this aspect of energy justice is also under-developed. As Jenkins *et al* note, the discussion has tended to be abstract,⁸⁴ with only limited and patchy attention paid to questions of practical realization. To whom, then, might energy justice be addressed – who are the actors or agents who will effectuate energy justice (or continue to perpetrate injustices) – and what barriers might need to be overcome to ensure that they act in accordance with principles of justice?

1. Legislators, Regulators and Policy-Makers

The most obvious set of agents of energy justice are legislators, regulators and other policy-makers; reflecting its social science origins, energy justice is a heavily policy-oriented discourse. The issues which arise here concern, first, how to motivate policy-actors to respond to energy justice concerns. Secondly, and of particular relevance for lawyers, it is necessary to consider what legal, structural, and governance reforms might help to ensure that decision-makers *can* and *do* focus on considerations of justice.⁸⁵ This might include, for instance, reform of regulators’ statutory duties; new institutional structures to ensure a more holistic view of energy decision-making; and/or new structures and procedures for representing and consulting affected interests. Thirdly, work is required to identify what policy tools, processes and approaches are best able to capture the nuances of energy justice questions, in particular complex issues of recognition justice. For example, in their review of fuel poverty policy in the UK, Gillard *et al* point out that well-meaning but overly-simplistic policies are ineffective in reaching a large percentage of the fuel poor and that poorly-targeted policies may actually increase rather than reduce distributive injustice.⁸⁶

Heffron *et al* have proposed the adoption of an “energy justice metric” to be used in decision-making about the development of energy infrastructure.⁸⁷ This, they argue, would allow the justice implications of particular infrastructure proposals to be costed and fed into existing cost-benefit analysis models. It would include consideration, for example, of the political costs and benefits associated with energy security, costs imposed in terms of public health impacts and environmental pollutions, impacts on the cost of energy, loss of amenity, the risk of fatal accidents, and so on. However, the difficulties with this kind of technocratic, cost-benefit approach are very well known,⁸⁸ in particular the challenges of ascribing monetary values to questions of justice and problems of incommensurability, as well as the risk of impact assessments becoming no-more than “tick-box” exercises, which fail to dislodge pre-existing decision-making mindsets. In addition, cost-benefit analysis involves a utilitarian approach to decision-making which is at odds with the rights-based approaches that the authors have advanced in other work,⁸⁹ and which also does not seem to take account of demands for procedural and recognition justice.

⁸³ Above n?, at 120.

⁸⁴ Above n? (2017), at 633.

⁸⁵ *Ibid.*, at 632. For consideration of these questions in a related context, see A. McHarg, ‘Regulating for Sustainable Electricity Market Outcomes in Britain: Asking the Law Question’ (2013) 30 *Environmental and Planning Law Journal* 289.

⁸⁶ Above n?, at 55, 57-8.

⁸⁷ Above n?, at 172-5.

⁸⁸ See, e.g., R. Baldwin, M. Cave and M. Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford: Oxford University Press, 2nd edn., 2011), ch 15.

⁸⁹ See, e.g., McCauley, above n?, at 11-7.

If the challenges of embedding energy justice in policy-making at national level are significant, they become even more severe at the global level. Heffron *et al* call for the adoption of due process at all levels of energy decision-making, including the global,⁹⁰ but a major limitation on the implementation of cosmopolitan theories of energy justice is that there are currently no comprehensive institutions of global governance⁹¹ – and of course, very strong objections in the anti-globalization literature to their adoption.⁹² Taking cosmopolitan accounts of energy justice seriously thus requires attention to what legal instruments and structures would be necessary to deliver them, as well as how far it is possible – and legitimate – to overcome current barriers to global decision-making, especially those rooted in state sovereignty.

2. *Energy Businesses*

The definition of “energy decision-makers” is drawn widely by energy justice scholars to include not only formal policy-makers, but also a range of other actors, including those running or working in energy-related businesses.⁹³ Although businesses operate within a framework of laws and regulations which already embody judgments about what is the “just” or otherwise appropriate way for them to behave, these almost invariably leave considerable freedom for energy firms to act justly or unjustly. Justice-relevant decision-making may include, for example, high level decisions about how and where to invest in energy infrastructure; firm-level policies about the treatment of vulnerable customers; as well as “on the ground” decisions to be made by individual employees, for instance about how best to respond to a potential grid overload.⁹⁴

Again, there are important questions to be addressed about how and to what extent private businesses can be induced to act ethically, especially when maximising profits for shareholders is seen, in some quarters, as the overriding moral imperative for firm managers,⁹⁵ and hence there is a risk that businesses might engage in what might be termed “justice-washing” – i.e., the adoption of the language of energy justice, while actually continuing to act unjustly.⁹⁶ There are extensive academic debates on corporate social responsibility⁹⁷ which energy justice scholars need to engage with, as well as to consider whether alternative, not-for-profit business models might create more supportive conditions for the pursuit of energy justice.⁹⁸

3. *Individuals*

The prospect that individuals may not only be the beneficiaries of greater energy justice, but should themselves be regarded as agents of energy justice opens up further interesting debates. Hall draws attention to ideas of “ethical consumption”, which suggest that, once basic energy needs are satisfied, individual may have moral duties, for instance, to use less energy or use it more efficiently, to favour

⁹⁰ Above n?, at 170.

⁹¹ Jenkins *et al*, above n? (2017), at 631.

⁹² See, e.g., M.B. Steger, *Globalization: A Very Short Introduction* (Oxford: Oxford University Press, 4th edn., 2017), esp, chs 4 and 8.

⁹³ Sovacool *et al*, above n? (2016), at ???.

⁹⁴ See Sovacool and Dworkin, above n?, at 1-3.

⁹⁵ See M. Friedman, ‘The Social Responsibility of Business is to Increase its Profits’, *The New York Times Magazine*, 13 September 1970, available at: <http://umich.edu/~thecore/doc/Friedman.pdf>.

⁹⁶ For examples, see Sovacool *et al*, above n? (2017), at 686-7.

⁹⁷ For an overview, see J. Moon, *Corporate Social Responsibility: A Very Short Introduction* (Oxford: Oxford University Press, 2014).

⁹⁸ See R. Hiteva and B Sovacool, ‘Harnessing Social Innovation for Energy Justice: A Business Model Perspective’ (2017) 107 *Energy Policy* 631.

less polluting energy sources, or to avoid energy suppliers which engage in unethical business practices.⁹⁹

One question to be addressed here is if these are indeed moral obligations, or rather whether individual engaging in such practices are acting in a morally heroic manner – i.e., going beyond that which can reasonably be required of them. A second question is how to encourage ethical energy consumption, which is especially challenging for invisible, intangible, and instrumental products like electricity and gas.¹⁰⁰ Jenkins *et al* suggest that improved information disclosure might be a way of encouraging more ethical and sustainable consumption practices.¹⁰¹ Hall, however, argues that information strategies alone are not particularly effective in changing behaviour.¹⁰² She does, though, suggest that advancing duty-based ethical theories, which focus on motivations for ethical behaviour rather than upon distributional outcomes, might be a more fruitful avenue for energy justice scholars hoping to influence individuals' energy choices.¹⁰³

4. Courts

A final set of potential agents of energy justice is the courts. Curiously, although Sovacool *et al* include “jurists” in their list of energy decision-makers,¹⁰⁴ there has been no sustained discussion of the role of the courts in advancing energy justice. This is a major omission from the literature, given the proposed role for energy just as (one of) the guiding principle(s) for the future development of energy law.

As already noted, access to the courts is regarded as an aspect of procedural justice,¹⁰⁵ but what substantive duties on judges (if any) flow from energy justice principles? Do the courts themselves have a duty to facilitate access to justice, for instance by applying caps on litigation expenses as required by the Aarhus Convention for environmental litigation?¹⁰⁶ What scope is there for “energy justice litigation”, akin to climate change litigation? How creative should the courts be, taking account of principles of the Rule of Law and Separation of Powers, in developing new causes of action against governments and businesses to compensate victims of energy injustice and/or to advance distributive, procedural and recognition justice in energy decision-making? And how realistic is it to expect the development of a single, global set of guiding principles for energy law, given jurisdictional pluralism, varying patterns of litigation, the pull of precedent, and the myriad context- and case-specific factors which influence judicial decisions in particular disputes?

IV. Conclusion

The ethical turn in energy scholarship is an important and highly-suggestive development, albeit one which is yet to make much impact in practice. Energy justice scholars are right to call our attention to the many injustices which are embedded within or are perpetrated by existing energy systems, and to argue for more holistic and human-centred energy decision-making, which understands energy as a

⁹⁹ See Hall, above n?.

¹⁰⁰ *Ibid.*, at 431.

¹⁰¹ Above n? (2016), at 178

¹⁰² Above n?, at 432.

¹⁰³ *Ibid.*, at 433.

¹⁰⁴ Above n? (2016), at ???

¹⁰⁵ See text accompanying n?, above.

¹⁰⁶ Above n?, Art 9(5).

socially-embedded phenomenon calling for a politically- and morally-informed response and not merely a technological or economic one.

However, as this brief survey has sought to show, there is a long way to go before energy justice moves beyond a “motivational call to arms”¹⁰⁷ to become a coherent and fully developed philosophy or set of principles capable of guiding energy law and policy. Admittedly, the intellectual demands of developing such a theory are great – requiring engagement with centuries of reflection on what justice requires, and decades of academic debate on related questions such as the conditions of effective policy-making, the merits of globalization, the meaning of corporate social responsibility, or the limits of legitimate judicial creativity. Nevertheless, while the energy justice literature is still in its infancy, claims about the greater academic rigour and clarity of the concept, as compared to the related ideas of environmental and climate justice, do not always stand up to scrutiny. The discipline is marked by academic hyper-activity and hyper-innovation, seemingly driven by the desire to stake a claim in an exciting new field, rather than to engage in the hard intellectual graft of developing properly-grounded and defensible theoretical claims or thinking through the implications of securing just energy decisions in practice. Nevertheless, this means that there is much interesting work to be done, and a great deal for energy lawyers in particular to get their teeth into.

¹⁰⁷ Fuller and McCauley, above n?, at 3.