

University of Groningen

Lessons from Law for the Conceptualization of Sustainable Energy Democracy

Fleming, Ruven; Huhta, Kaisa; Reins, Leonie

Published in:
Sustainable Energy Democracy and the Law

DOI:
[10.1163/9789004465442_015](https://doi.org/10.1163/9789004465442_015)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2021

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Fleming, R., Huhta, K., & Reins, L. (2021). Lessons from Law for the Conceptualization of Sustainable Energy Democracy. In R. Fleming, K. Huhta, & L. Reins (Eds.), *Sustainable Energy Democracy and the Law* (pp. 303-312). (Legal Aspects of Sustainable Development; Vol. 26). Brill/Nijhoff. https://doi.org/10.1163/9789004465442_015

Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Lessons from Law for the Conceptualization of Sustainable Energy Democracy

Ruven Fleming, Kaisa Huhta and Leonie Reins

1 Introduction

What is sustainable energy democracy and how should it be understood from a legal perspective? This book has undertaken a journey around the globe, putting these questions into the contexts of different jurisdictions as well as various subdisciplines of law, such as energy law, trade law, environmental law and private law.

The introductory chapter hypothesized that the concept of sustainable energy democracy comprises two fundamental aspects: sustainability and democracy. Both concepts feature in this book's chapters in various legal contexts. In the legal hierarchy of norms, sustainable energy democracy functions as an objective for law and policymakers, rather than as a principle or rule. In that sense, it can be characterized as a normative vision of what the energy sector should become and a general source of orientation for decision-makers. However, this rather abstract and broad objective requires further concretization through principles and, ultimately, through rules, which the preceding chapters identify and assess.

Using examples from various jurisdictions, the analysis set out in this book highlights concepts and tools that, when taken together, facilitate insights into sustainable energy democracy in law, what it amounts to and with what legal measures it can be pursued in practice. The examples discussed also showcase, however, the abundant challenges to be faced in this endeavour.

This concluding chapter summarizes the book's main findings in two parts. First, it discusses the concepts and tools that emerge from the analysis carried out in this book and highlights the opportunities and challenges involved in their implementation. Second, it identifies four overarching themes that are likely to become the most contentious matters for the future development of sustainable energy democracies from a legal perspective.

2 Concepts and Legal Instruments to Facilitate Sustainable Energy Democracy

This book has analysed and highlighted concepts and tools that shine light on the legal dimension of sustainable energy democracy. This section revisits the most relevant of these concepts – decentralization, energy citizenship and energy communities – thereby pinpointing some of the legal instruments that can be used to facilitate sustainable energy democracy.

Decentralization refers to a shift from a centrally planned, financed and operated energy system to a distributed model where activities are shared between an increasing number of parties. In other words, it is a system in which citizens and energy communities actively participate across the entire energy value chain. It allows greater participation from individuals, of societal actors and, when based on renewable energy sources, contributes to the sustainability dimension of energy democracy. The challenges of decentralization relate to individuals and communities taking on more financial, operational and legal risk when they become more active in competitive energy markets. In addition, decentralization processes are open to criticism as to whether they are sufficiently inclusive. In other words, decentralization may not facilitate participation for all but instead result in giving new opportunities to the affluent few while leaving behind the struggling many. Practical legal instruments that facilitate decentralization should not only regulate different organizational structures, such as cooperatives, but also ensure that the resulting complexity introduced into energy systems is adequately addressed.¹

Energy citizenship refers to increasing the influence of individual citizens in the energy sector. It may present itself in the form of energy prosumerism or participation in energy communities, but also more broadly in terms of increased decision-making powers in different segments of the energy value chain. For example, it can involve the active participation of citizens, through individual and collective action, in the development of technologies, energy solutions, facilities, entrepreneurial ventures and projects aimed at expanding energy access.² There are, however, challenges involved in facilitating energy citizenship. In particular, it is necessary to determine whether, and to what extent, the complex technological energy system should be exposed to decision-making by citizens who, as non-experts, do not necessarily understand the issue at hand to an adequate degree.³ The legal frameworks for

1 Chapter 4.

2 Chapter 5.

3 Chapter 3.

energy citizenship are dependent not only on sectoral or energy-specific legal frameworks, but also on more fundamental legal and institutional structures that either facilitate or restrict democratic participation in general.⁴ In addition to constitutional structures, elements of sustainable energy democracy can be governed by legal instruments that do not necessarily focus on energy at all. For instance, international trade law⁵ and legal frameworks relating to circular economies⁶ can be influential in governing sustainable energy democracy in practice and can exert a direct influence on the rights and duties of energy citizens. On a more practical level, the challenges include reducing the regulatory complexities faced by citizens in this area, as well as the restrictions in existing legal frameworks for public participation. Practical legal means by which to encourage energy citizenship include removing these regulatory barriers and facilitating public participation in energy decision-making.⁷

Energy communities are groups of individuals, households or businesses that jointly participate in one or more activities in the energy sector. Energy communities are an example of an organizational structure that can facilitate decentralization. The analyses set out in this book show that definitions of energy communities vary.⁸ Members of an energy community may be various different actors, such as natural persons, households, local authorities and small enterprises. The challenges faced by energy communities are often similar to those faced by energy citizens. They also relate to whether and to what extent the law allows the private and the public sector to be involved in and add to or form an energy community. Furthermore, it is not self-evident that the existence of energy communities generates a more sustainable and democratic energy sector. In fact, research has established that 'community energy does not, in itself, generate progressive or regressive effects; it is the way that it is mobilised and enacted that matters'.⁹ Practical legal instruments to facilitate energy communities and small-scale renewable energy projects involve, for example, clearly defining the roles and responsibilities that exist within energy communities and with respect to the role of such communities in the energy system as a whole.¹⁰

4 Chapter 13.

5 Chapter 8.

6 Chapter 7.

7 Chapter 5.

8 Chapter 6.

9 Emily Creamer and others, 'Community Energy: Entanglements of Community, State, and Private Sector' (2018) 12(7) *Geography Compass* 4.

10 Chapters 6 and 12.

3 Contentious Overarching Themes

Building on the central concepts and legal instruments of sustainable energy democracy (such as decentralization, energy citizenship and energy communities discussed above) four overarching themes and legal challenges concerning its development can be identified. The discussions in this book reveal that these overarching themes are likely to become the most contentious legal matters in the pursuit of sustainable energy democracy: there is an abundance of potentially significant friction between different approaches taken to facilitate sustainable energy democracy. In other words, different thinkers propose different routes for the achievement of sustainable energy democracy and the choices that are being made heavily influence the resulting legal frameworks, and sometimes the attainment of the objective itself. Precisely what these legal frameworks should look like is subject to debate on the part of those discussing sustainable energy democracy. Four main debates emerge from this book as being controversial yet decisive for the legal design of sustainable energy democracies. These are the role of markets and market mechanisms, the issue of ownership, the appraisal of community benefits and balancing global against local approaches. These issues are discussed in turn below.

3.1 *The Role of Markets and Market Mechanisms*

Do market mechanisms help or hinder sustainable energy democracy? What is the role of energy markets in the transitioning energy sector? The analyses set out in this book show that the role of markets and market mechanisms in a sustainable energy democracy is not straightforward. The conceptual foundations of sustainable energy democracy, as discussed in Chapter 2, can be read as highly critical of the role of markets and sceptical as to whether they are able to positively contribute to delivering sustainable energy democracy. The chapter questioned the democratic nature and ability of markets to provide fair and equitable access to energy for all players. A very different approach was taken in Chapter 4, which went as far as to describe the existence and functioning of markets as a precondition for facilitating sustainable energy democracy while managing the complexity that emerges from decentralization. Looking beyond the EU, Chapter 11 also focused on this friction, albeit in terms of the legal concepts adhered to by indigenous peoples. It highlighted that some in the indigenous community argue that the unique practices, philosophical underpinnings, economic perspectives, and approaches to energy production and use that are demonstrated by indigenous communities offer

a challenge to prevalent energy market models.¹¹ However, the chapter takes a cautious approach to this approach, arguing that the extent to which indigenous concepts and values can be manifested within legal systems founded on Western concepts of property and ownership is uncertain.

This friction between the roles that can, or should, be allocated to markets and market mechanisms illustrates that law has to cope with the fact that the concept of sustainable energy democracy is a moving target. There is no consensus on what sustainable energy democracy should or should not include. This poses a considerable challenge to (energy) *law*. It seems that deciding on the role of markets and market mechanisms is a task for individual jurisdictions, which have to establish the legal instruments for implementing sustainable energy democracies that dovetail with their individual (national) (legal) traditions and values. Whether or not to rely on markets and market mechanisms is a key decision in the establishment of a legal framework for sustainable energy democracy that policymakers should make at the outset.

3.2 *Ownership*

The role of ownership rights and their legal design flows from and is related to the role of markets and market mechanisms. Who is allowed to own what in the energy sector and, more fundamentally, what is the function of ownership in a sustainable energy democracy? Is the purpose of ownership over energy assets the creation of communal or private benefits – or both? Chapter 6 explains that, while the newly introduced legal term of energy communities in the EU is extremely broad, there seems to be one common denominator between all energy communities: the term is often used to describe alternative forms of organizing activities in the energy sector in comparison with conventional large-scale industries.¹² The ownership structure of energy communities is accordingly often deliberately designed to exclude large energy companies. In contrast, Chapter 7 provides an example of ownership structures dominated by big energy companies but with the potential to contribute to sustainable energy democracy outcomes. It focuses on the example of waste and the

11 For example, the concept of a ‘common heritage’ stands out and has been recognized in international law: see the Convention for the Protection of the World Cultural and Natural Heritage of 1972, the Antarctic Treaty of 1959, the Outer Space Treaty of 1966, and the Moon Treaty of 1979, all of which reflect principles of common heritage, equal access and sharing of benefits.

12 Gordon Walker and Patrick Devine-Wright, ‘Community Renewable Energy: What Should It Mean?’ (2008) 36 *Energy Policy* 497.

concept of industrial symbiosis. In this context, a number of large energy companies working in slightly different areas (e.g. heat and electricity production) can, and in fact do, use their respective wastes and exchange them amongst each other to create more sustainable outcomes in the energy sector. However, Chapter 7 pointed out that industrial symbiosis may also occur amongst public players and the industry (e.g. municipalities running a waste incineration facility), so the lines between public and private ownership may become very blurry when one looks into the details.

The underlying question, however, remains as follows: how can new and self-defined 'alternative' ownership structures, such as energy communities, be created to foster sustainable energy democracy? As Chapters 6 and 12 note, wide variation in national designs and implementation is the likely outcome. This is not a problem per se, but it may lead to more fundamental incoherence in terms of seeking to arrive at an overall understanding of the role and tasks of energy communities and other ownership structures. Thus, national decision-makers should carefully consider the ownership structures used to facilitate sustainable energy democracy prior to their adoption and implementation.

3.3 *The Role of Community Benefits*

The third contentious overarching theme is the question of anticipated output of energy communities and community benefits. While several of this book's chapters¹³ agree that the general idea of community benefits is crucial to a sustainable energy democracy, considerable disagreement exists as to their concrete meaning and scope. Community benefits include sharing the advantages that accrue from energy projects within the community that hosts the project. These benefits can involve direct monetary compensation for individuals and businesses in the community but may also refer to increased decision-making powers for community members. Indirect benefits such as access to cheaper, cleaner energy may also be provided. Community benefits can help with promoting the social acceptance of energy projects by allowing the affected communities to reap some of the positive effects of the energy project. They can also facilitate energy citizenship by allowing citizens not only to participate in energy decision-making in their community but also to benefit from the positive effects of such decisions.

There are, however, five legal challenges associated with community benefits. The first issue is how to define the extent of a community (i.e. who is included and who is excluded) and how to reconcile mutually conflicting

¹³ See Chapters 4, 5, 6, 9, 10 and 13.

interests within it. Law does not often define the boundaries of a community with precision. The second issue revolves around how and when to address community benefits through legal means, as community benefits can take unexpected forms. For example, they can materialize in indigenous legal concepts¹⁴ in terms of indigenous understandings of the relationship between humans and the environment.¹⁵ Chapter 11 explored how exactly these kinds of benefits for indigenous communities can be moulded into legal instruments.

The third legal challenge concerning community benefits relates to who is responsible for providing them. While the classic idea is that privately owned companies seek to reduce local resistance to certain energy projects by providing community benefit agreements, Chapter 6 has shown that public players, cooperatives or energy communities may act in a similar way. A fourth legal issue follows, namely the implementation of community benefits, which may be done via voluntary or mandatory schemes. For example, community benefit agreements can take the form of legally enforceable private contracts between a prospective private developer of an energy project and the representatives of the community hosting the proposed project.¹⁶ Community benefits can also be state-driven schemes, which can involve new ways to allocate tax revenues or mandatory compensation for the loss of property value in the community that hosts the energy project.¹⁷ The scope and content of community benefits is highly dependent on the jurisdiction and the context of the individual project.

The fifth and final relevant legal dimension focuses on the type of energy activity involved. The design and implementation of effective community benefits will vary widely depending on whether the energy activity is, for example, an onshore renewable energy installation on contaminated land or an offshore wind farm, as the discussions and examples in Chapters 9 and 10 highlight. This should be taken into account when defining community benefits as a necessary building block of the legal dimension of a sustainable energy democracy.

3.4 *Balancing Global Trade Rules against National Solutions*

A fourth overarching, contentious theme discussed in Chapters 8 and 5 is the issue of balancing global trade and global trade rules against national legal

14 Chapter 11.

15 See the discussion in D Throsby and E Petetskaya, 'Sustainability Concepts in Indigenous and Non-Indigenous Cultures' (2016) 23 *International Journal of Cultural Property* 119–140.

16 Chapter 9.

17 Chapter 10.

solutions and protectionism. The former seeks to remove trade restrictions and facilitate competition by creating a global set of rules, which are not necessarily able to facilitate sustainable energy solutions close to the citizen. The latter seeks to prioritize national legal solutions, national resources and locally produced products. Such approaches can take the form of local content requirements, for example, which refer to regulatory measures, contractual provisions, and policies that require energy market participants and operators to give priority to nationals, domestic companies and locally produced materials in the procurement of goods and services used for energy operations.¹⁸ They are permissible in specific circumstances under multilateral or bilateral trade rules but typically trade law is averse to the adoption of local content requirements.

It seems clear that local content requirements in the renewable energy sector are increasingly viewed as key to facilitating the energy transition.¹⁹ The last decade has seen a rise in the adoption of local content requirements and policies in bilateral and multilateral energy contracts. While they are advocated as helpful in creating local benefits, critics view increasingly sophisticated local content requirements as hindering rather than supporting global growth in renewable energy sources because they can create additional barriers to trade.²⁰ A similar debate applies to other trade restrictions, such as carbon border adjustment, as discussed in Chapter 8.

4 Final Thoughts

This book set out to ascertain the meaning of sustainable energy democracy for and within law. It established that sustainable energy democracy is an objective rather than a principle or rule and analysed this objective from

18 Famous examples include 'Buy American' provisions in the US, which typically require government contractors to purchase their supplies from American companies even if those supplies are more expensive than the same products purchased from non-American companies. See Buy American Act of 1933, Act of March 3, 1933, 47 Stat 1520 (codified, as amended, at 41 USC. §§8301–8305). See also T Meyer, 'How Local Discrimination Can Promote Global Public Goods' (2015) 95 *Boston University Law Review* 1937–2001; and D Olawuyi, 'Local Content and Procurement Requirements in Oil and Gas Contracts: Regional Trends in the Middle East and North Africa' (2019) 37(1) *Journal of Energy and Natural Resources Law* 93–117.

19 Cees Verburg and Jaap Waverijn, 'Liberalizing the Global Supply Chain of Renewable Energy Technology: The Role of International Investment Law in Facilitating Flows of Foreign Direct Investment and Trade' (2019) 2(1) *Brill Open Law* 101–139, 128–134.

20 Chapter 5.

different perspectives and in various contexts. Important concepts and legal instruments emerged from this exercise. These influence sustainable energy democracy in various legal frameworks. Overall, there are four contentious themes have been outlined in this final chapter that are key to the achievement of sustainable energy democracy in law: the role of markets, ownership, community benefits and the balance between national and international solutions.

Further research into the legal aspects of sustainable energy democracy should focus on these key areas, as they are likely to become key parameters in determining the legal design and implementation of sustainable energy democracy frameworks. Whether a society is able to make sure steps towards the objective of sustainable energy democracy will ultimately be determined by the sum not only of the broader issues summarized in this chapter but also the national choices and preferences and technical details. However, this book has shown that law is a key instrument by which to facilitate the objective of sustainable energy democracy on all these levels. Neither scholarly debate on sustainable energy democracy nor its practical pursuit can disregard questions of law. Consequently, the success or failure of sustainable energy democracies – whether taken as a societal objective or an academic exercise – depends on active measures being taken both in the realm of research and on the ground.

