TO FRAME OR NOT TO FRAME …

Normative Alignment and Institutional Resilience in Legal Governance of the European Energy Transition

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THE CHALLENGE

Energy Trilemma
&
Energy Governance Shifts
towards the energy transition

1. affordability: public hierarchy ➞ competitive market
   incomplete: regulated market
2. reliability (geo-pol.) & sustainability (clim.change): ➞
   communities/civil networks in progress
THE 2\textsuperscript{nd} SHIFT

As shift towards Civil society networks…
Being a type of Institutional Environment (IE)

What scope for actor form, relations & behaviour – as institutional alignment (i.e. new constraints & opportunities as new mode of energy governance)

What resilience of IE versus community energy initiatives as ‘government or firms in disguise’?

Or is this type of reducing NIMBY-ism OK?
THE INST. ENVIRONMENT (IE)

Williamson: ‘setting rules of the game’ twrds
- choosing *style of play* (collective choice)
- actual *play of the game* (operational)

Scott: (context of) *rules & requirements* to which individual organisations must conform

IE = ‘*habitat*’ / ‘*organisms*’ = actors/organisations

IE = structure of opportunities and constraints that project *patterns* of behaviour
THE INST. ENVIRONMENT (IE)

Dual character
- empirically observable patterns (strategies, norms)
- legally prescribed patterns (legal rules)

Three ideal-type modes
- of coordination of interaction
- of type of dominant purposive interest
- of type of actors / actor relations
- of dominant type of consent
THE INST. ENVIRONMENT (IE)

So, in greater detail of ideal-types...

<table>
<thead>
<tr>
<th>Environment → Characteristics</th>
<th>Public hierarchy</th>
<th>Competitive market</th>
<th>Civil society</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dominant interest-type</td>
<td>Public</td>
<td>Private/self</td>
<td>Common/Community</td>
</tr>
<tr>
<td>Dominant actor-types</td>
<td>Government v. citizens (gov’t-gov’t)</td>
<td>Buyers and sellers (B2B/B2C)</td>
<td>member-member (v. non-members)</td>
</tr>
<tr>
<td>Dominant relation-type</td>
<td>Command &amp; control</td>
<td>Competitive contracting</td>
<td>Voluntary cooperation</td>
</tr>
<tr>
<td>Legitimacy of outcomes</td>
<td>Voice</td>
<td>Exit</td>
<td>Loyalty</td>
</tr>
<tr>
<td></td>
<td>Distributive justice</td>
<td>Commutative justice</td>
<td>Collective justice</td>
</tr>
<tr>
<td>Basic prescriptive rules</td>
<td>Servient government, rule of law democracy, human rights</td>
<td>Autonomy, fair competition &amp; consumer protection</td>
<td>Autonomy, free association / assembly; voluntarism</td>
</tr>
</tbody>
</table>

... and recognising hybrids....
Dual hybrids: e.g. regulated markets
Trial hybrids: ‘social dialogue’ (energy covenants)
THE INST. ENVIRONMENT (IE)

Mode of governance
As constraints & opportunities of actors in Collective action situations (Ostrom)

What when different modes of energy governance?
- IE conflicts: prosumerism & unbundling; separation grid management – production & sales
- IE fragmentation / imbalance (esp. legitimacy, ineffectiveness; inefficiencies)
- with resp. to managing energy trilemma
- as general IE policy objectives (‘big society’)

UNIVERSITY OF TWENTE.
LEGAL INSTITUTIONS (LI) PERSPECTIVE

Actor forms, actor relations, IEs as LI?
Normative alignment/resilience!

LI regimes of rules about patterns of behaviour
- **recognition** ‘world-to-word’ (emp. obs. pattern)
  - conceptualise (constitutive rules)
- **prescription** ‘word-to-world’
  - instantiate (institutive rules)
  - operate (consequential rules: ‘regulation’)

e.g. adulthood, monument, contract, permit, ownership, tradable right, legal persons, IE
## Table 3 - Three Orders of Legal Institutions

<table>
<thead>
<tr>
<th>Orders of institutions</th>
<th>Legal institutions (placing in this table does not mean to suggest relations across levels)*</th>
<th>Characteristic</th>
</tr>
</thead>
<tbody>
<tr>
<td>1&lt;sup&gt;st&lt;/sup&gt; order</td>
<td>Legal Quality (e.g. public authority)</td>
<td>Attributes of and relations between objects &amp; subjects</td>
</tr>
<tr>
<td>1&lt;sup&gt;st&lt;/sup&gt; order</td>
<td>Legal Status (e.g. public good)</td>
<td></td>
</tr>
<tr>
<td>1&lt;sup&gt;st&lt;/sup&gt; order</td>
<td>P2P-relation* (e.g. contract)</td>
<td></td>
</tr>
<tr>
<td>1&lt;sup&gt;st&lt;/sup&gt; order</td>
<td>P2O-relation (e.g. ownership)</td>
<td></td>
</tr>
<tr>
<td>1&lt;sup&gt;st&lt;/sup&gt; order</td>
<td>O2O-relation (e.g. easement)</td>
<td></td>
</tr>
<tr>
<td>2&lt;sup&gt;nd&lt;/sup&gt; order</td>
<td>Legal Persons (e.g. associations, foundations, corporations) (public or private)</td>
<td>Personalization or Reification of legal relations</td>
</tr>
<tr>
<td>2&lt;sup&gt;nd&lt;/sup&gt; order</td>
<td>Legal Objects e.g. tradable private or public rights (following P2P/P2O/O2O relations)</td>
<td></td>
</tr>
<tr>
<td>3&lt;sup&gt;rd&lt;/sup&gt; order</td>
<td>Public Hierarchy (e.g. states, municipalities) ΩO2O</td>
<td>Contextualization of legal relations</td>
</tr>
<tr>
<td>3&lt;sup&gt;rd&lt;/sup&gt; order</td>
<td>Civil Networks (e.g. NGOs, communities) ΩP2P</td>
<td></td>
</tr>
<tr>
<td>3&lt;sup&gt;rd&lt;/sup&gt; order</td>
<td>Competitive markets (e.g. commodity markets) ΩP2O</td>
<td></td>
</tr>
</tbody>
</table>

* 1<sup>st</sup> order is logically conditional to 2<sup>nd</sup> and 3<sup>rd</sup> orders; existence of 3<sup>rd</sup> order institutions influences scope for other institutions within.
ACTORS AS LEGAL PERSONS AS LI

Organisations as LI-type of Legal Person

- Personification of relations towards collective decision-making in separate legal entity
  
  a. the existence of an internal decision-making process;
  
  b. the existence of practices that can be understood as external behaviour;
  
  c. the existence of behaviour of others that has bearing on the legal person.

3 types
ACTORS AS LEGAL PERSONS AS LI

legal persons (private & public varieties)

1. associations (personalised contracts) members communities
2. enterprises (personalised ownership) shareholders (private / public)
3. foundations (personalized objective) fund quangos

Hybrids: e.g. 1-2 Co-operative owner-members
IEs AS LI?

**constitutive** rules
- recognition upon evolution or design

**institutive** rules
- some esp. pub.entities … (by devolution)

**consequential** rules
- pub.hierarchy: democracy, rule of law, hum.rights
- comp.markets: competition law, cons.protection
- civ.networks: association, membership rights

- reg.markets: as comp.market + public values
Relevance of IEs as LIs across levels of action situations: from bottom left ➔ top top-right and ➔

<table>
<thead>
<tr>
<th>Action Situation levels</th>
<th>Activity / outcomes</th>
<th>Evaluation</th>
</tr>
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<tbody>
<tr>
<td>1. Operational level</td>
<td>➔ acting in accordance with rules ➔</td>
<td>desired energy service?</td>
</tr>
<tr>
<td></td>
<td>↑</td>
<td>↑ rules on legal liberties ↓</td>
</tr>
<tr>
<td>2. Collective choice level</td>
<td>➔ Instantiating 1st and 2nd order LIs ↑</td>
<td>← Evaluation</td>
</tr>
<tr>
<td></td>
<td>↑</td>
<td>↑ rules on legal abilities ↓</td>
</tr>
<tr>
<td>3. Constitutional level</td>
<td>➔ Instantiating inst. environments / 3rd order LIs ↑</td>
<td>← Evaluation</td>
</tr>
<tr>
<td></td>
<td>↑</td>
<td>↑ Conceptualisations/conventions ↓</td>
</tr>
<tr>
<td>4. Metaconstitutional level</td>
<td>Informal &amp; proto-legal practices ↓</td>
<td>← Appraisal</td>
</tr>
</tbody>
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IEs AS LI?

Experimentation with IEs as LIs across levels of action situations: bottom left ➔ top top-right and ➔

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<td>1. Operational level</td>
<td>‒ Default (reg. market) energy service practice ➔ Experimental (civil network) renewable energy projects</td>
<td>Experimental knowledge Comparing outcomes X &amp; Y</td>
</tr>
<tr>
<td></td>
<td>↑ Legal liberties default licenses X</td>
<td>↑ Legal liberties experimental licenses Y</td>
</tr>
<tr>
<td>2. Collective choice level</td>
<td>‒ Arranging default market settings</td>
<td>‒ Arranging experimental project settings</td>
</tr>
<tr>
<td></td>
<td>↑ Legal abilities regarding X (EA -not DSEG)</td>
<td>↑ Legal abilities regarding Y (EA &amp; DSEG)</td>
</tr>
<tr>
<td>3. Constitutional level</td>
<td>EA default rules X (regulated market)</td>
<td>EA experimental rules (civil networks)</td>
</tr>
</tbody>
</table>
THREE NARRATIVES

ECPR Montreal: High-Pippert and Steve Hoffman on ‘Community Solar Programs and the Democratization of the Energy System’

ECPR Montreal: Julie MacArthur, discussing ‘Power Play: Transformation and co-optation in Community Energy Policy’

- Dutch EA/DSEG ‘legislated experiments’ on community energy initiatives. Also discussed by Diestelmeier and Lammers
WHAT NARRATIVE BEHIND THE 2\textsuperscript{nd} SHIFT?

The 1st shift... attempted
WHAT NARRATIVE BEHIND THE 2\textsuperscript{nd} SHIFT?

A choice between 3

1. Support existing EnGov-mode
2. Shift to new EnGov-mode
3. Shift in other Gov-mode

Tested against Dutch EA experimental arrangement
WHAT NARRATIVE BEHIND THE 2\textsuperscript{nd} SHIFT?

Dutch EA experimental community projects

- grid operation: RM - separate from market transactions on production & supply $\Leftrightarrow$ XP: combination is permitted

- electricity generation: RM no license; potential capacity man’t; XP communities as organisations may generate.

- electricity supply: RM under license MinEA; XP license to exp, ipso jure licence to supply but limited customers (not as comp.market) Sft 2 rather than 1
WHAT NARRATIVE BEHIND THE 2\textsuperscript{nd} SHIFT?

Dutch EA experimental community projects
On organisations

- associations & co-operatives (hybrid) only
- avoid grounds for permit refusal
  - no supply to non-members (or LP under control)
  - generation only by (LPs of) association
  - no say by outside producers / suppliers
  - full control by gen.assembly of members
  - members ability short/long term costs
- 80\% or more of customers = private consumers
POSSIBLE FURTHER ANALYSIS ON LPs

Possibly broaden the research into 3 functional LP characteristics & IE fit…. Considerable flexibility!

<table>
<thead>
<tr>
<th>L. persons</th>
<th>Association</th>
<th>Foundation</th>
<th>Corporation</th>
</tr>
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<tr>
<td>L. Pers charact</td>
<td>Public hierarchy</td>
<td>Civil network</td>
<td>Competitive market</td>
</tr>
<tr>
<td>Gov’t mode</td>
<td>Public task</td>
<td>Community service</td>
<td>Profit / efficiency</td>
</tr>
<tr>
<td>Mission of ….</td>
<td>Public authority</td>
<td>Volunteers / professionals</td>
<td>Investors / shareholders</td>
</tr>
<tr>
<td>Control by ….</td>
<td>Public good/interest</td>
<td>Community interest</td>
<td>Competitive advantage</td>
</tr>
</tbody>
</table>

...
CONCLUSIONS FOR NOW

Dutch EA-XP best fits Shift 2 (but may change)

Such a shift does offer opportunities
.. but also ‘clear’ constraints: no legal capture

IEs matter: require alignment; resist ill-framing

Uncertain what ‘informal influence’ is still available
Empirical research?

View from balcony: Hybridity of Shifts 2-3?