

ENERGY LAW: BETWEEN CHALLENGES AND OPPORTUNITIES FOR LAW PROFESSIONALS

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ABSTRACT

Energy law is a specialized branch of law, with its own principles and rules, which we can define as the set of rules that regulates matters concerning electricity, hydrocarbons, energy sources, energy efficiency, among other issues, establishing rights and obligations for each of the activities carried out. Energy is important due to the multiple benefits it brings to the citizens quality of life, and the opportunities it offers to many professionals. Among the professionals to highlight within the branch of energy law, we can mention lawyers, who are a fundamental piece in the development of both legal and regulatory standards, in advising both public institutions and private sector agents, in carrying out procedures for the permits, concessions and other authorizations that are required for the development of the activities, and to present resources and actions for the benefit of the users. Lawyers are gaining importance within the energy sector, which is very complex and competitive, and as the years go by, other activities that represent new challenges are being developed. Energy law is based on administrative law; therefore, it is based on principles such as legality, due process, transparency, among others, however, it also has structural principles that are based on security of supply, coverage and accessibility, and socioeconomic and environmental sustainability.

Keywords: law, energy, electricity, hydrocarbons, energy sources, energy efficiency, regulation, energy transition.

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DEVELOPMENT

To enter the world of law, specifically in a specialized branch such as energy law, it is important to start with its definition, which is a subject debated in the doctrine, so we could point out that it is a set of rules and principles that regulate everything related to electricity, fossil fuels, their derivatives, energy efficiency and other energy sources, through the constitution of rights and obligations in the activities that are carried out. Its importance lies in knowing the regulations, rights and obligations in a sector so important for the benefits it brings to the country in the quality of life that citizens deserve.

Energy law is related to public law and private law, since it regulates the relationships of the parties involved in the energy chain, from the generation or production of energy to its consumption.

Energy law arises from administrative law, which regulates the activity of the State through its public institutions in its relationship with citizens, being in this case an essential public service whose structural principles are based on security of supply, coverage and accessibility, and socioeconomic and environmental sustainability.

In this sense, the Public Administration in Panama, made up of the *“set of state agencies and dependencies that are part of the Executive Branch, whose activity is aimed at achieving social welfare”*¹, has a fundamental role in ensuring that energy reaches every corner of the Panamanian people, which is why electricity and hydrocarbons, despite being developed with the participation of the private sector, have a regulatory public sector that regulates them, has a public regulatory sector that must guarantee the provision of the service in a continuous and efficient manner, where coverage and accessibility of energy is ensured with a *“diversified energy matrix capable of reducing costs, impact, vulnerability and dependence, in accordance with the expected demand.”*²

For the author Iñigo del Guayo Castiella, from the University of Almería, Spain, in his work *Concept, Contents and Principles of Energy Law*, refers to the development that this branch of law has undergone in recent years, making its definition indispensable, expressing the following:

The practical usefulness of a definition of energy law is scarce, but in the construction of a scientific system on a subject it is indispensable. The first objective of a definition of energy law would be to identify energy law within the law, to distinguish it from other disciplines, particularly those within which it was developed, before being born as an autonomous subsector of the legal

¹ Article 201 of Law 38 of July 31, 2000.

² Article 2, numeral 1 of Law 43 of April 25, 2011.

system. The second objective of a definition would be to contribute to a better and more detailed determination of its contents. The recognition of a new scientific discipline implies the recognition not only of the existence of its own rules, but also of specific principles.³

Taking into account the objectives to build a definition, Energy law is that part of the legal system that establishes the rules for the final supply of energy to its users to be safe, economically efficient and environmentally sustainable. Logically, it is made up of public law and private law rules, which have to do with the regulation of energy activities (Del Guayo Castiella, Iñigo, 2020).⁴

For Dr. Luis Ferney Moreno, in his paper “Towards a sustainable energy law, unified and global”,

We could say that before 2012, energy law contained a dispersed set of disciplines, composed of mining law, oil law, gas law and electric energy law, for which there was no synergy or principles that grouped them together. These disciplines were unified around the word energy law, but each one following its own path, and always claiming its own independence (González Márquez, 2017).

Since 2010, energy law has been transformed. Initially, thanks to the introduction of the objectives of the principle of sustainable development and measures against climate change, it became a sustainable energy law; then, because of the energy transition, it evolved into a more unified energy law and, finally, because of the internationalization of regulation, it became a global energy law.⁵

Energy is an issue of high impact in the national context due to its incidence in the economic, social, political and cultural spheres, which entails important challenges as it is a dynamic sector that involves sensitive issues such as public utility, new technologies, climate change, taxation, among others. The energy sector, due to its constant advances, requires the support of professionals who assist in the development of robust regulatory and institutional regulations, facing the scenarios that arise with the energy transition. From this perspective, legal professionals have a valuable opportunity to contribute in the development of proposals covering the regulatory framework governing energy-related activities, as well as the requirements for the necessary authorizations or permits and the safeguarding of fundamental rights.

3 Del Guayo Castiella, Iñigo. Concept, Contents and Principles of Energy Law. Journal of Public Administration, University of Almeria, Spain, 2020, p.312.

4 IBID, p.313

5 Moreno, Luis Ferney. “Towards a sustainable, unified and global energy law”, 2021, Accessed at <https://www.ambitojuridico.com/noticias/especiales/hacia-un-derecho-de-la-energia-sostenible-unificado-y-global>

Article 3 of Law 43 of April 25, 2011, which reorganizes the National Energy Secretariat and dictates other provisions, refers,

For the purposes of this Law, the energy sector includes public and private persons, companies and the activities carried out by them, whose purpose is the study, exploration, exploitation, production, generation, transmission, transportation, storage, distribution, refining, import, export, commercialization and any activity related to the electricity sectors, hydrocarbons, petroleum, its derivatives, coal, natural gas, biofuels, hydraulic, geothermal, solar, wind, biomass, nuclear and other energy sources.

From the foregoing legal excerpt, we can evidence that energy involves two important sectors of the country, the electricity sector that involves activities such as generation, transmission, distribution, commercialization and final use of electricity, and the hydrocarbons sector that involves the introduction, storage, import, distribution and commercialization of fossil fuels, their derivatives and biofuels, as well as export, refining, exploration, among other related activities.

Both sectors are governed by their institutional and regulatory frameworks, which are, for the electricity sector, the Unified Text of Law 6 of February 3, 1997, and for the hydrocarbons sector, Law 8 of June 16, 1987, and Cabinet Decree No. 36 of September 17, 2003. Although it may seem complex due to the technical component involved in both sectors, there is a great opportunity for lawyers to be able to operate within such a competitive sector, in the performance of the procedures to obtain the corresponding authorizations, the filing of actions and appeals in order to safeguard rights, and in the debate that entails legal proposals that finally materialize in a normative framework, whether legal or regulatory.

In the electricity sector we must highlight the importance of the Single Text of Law 6 of February 3, 1997, which dictates the Regulatory and Institutional Framework for the Provision of the Public Electricity Service, ordered by Law 194 of 2020, published in the Official Gazette No. 29325-A, whose object according to Article 1 is the following:

This Law establishes the regime to which the activities of generation, transmission, distribution and commercialization of electric energy will be subject, for the provision of the public electricity service, as well as the regulatory and coordination activities consisting of expansion planning, integrated operation of the national interconnected system, economic regulation and oversight.

Article 2 of the aforementioned Law states:

The regime established in this Law, for the rendering of the public electricity service, has as

its purpose:

1. To promote the supply of the demand for electric energy services and the community's access to them, under criteria of economic efficiency, financial viability, quality and reliability of service, within a framework of rational and efficient use of the country's diverse energy resources.
2. Establish the legal framework that encourages economic efficiency in the development of generation, transmission and distribution activities, as well as in the use of electric energy.
3. Promote competition and the participation of the private sector as basic instruments to increase efficiency in the provision of services, by means of the modalities deemed most convenient for this purpose.

Law 6 of 1997 establishes that *“the generation, transmission, distribution and commercialization of electricity destined to satisfy primary collective needs on a permanent basis are considered public utilities of public utility.”*⁶

Law 6 of 1997 arose when the administration of the then President of the Republic, Ernesto Pérez Balladares, decided to privatize the Institute of Hydraulic Resources and Electrification (IRHE) in 1997.

One of the reasons for this privatization process was that the necessary investments to increase capacity had not been made due to excessive state bureaucracy and lack of financing. In fact, the State did not have the financial capacity to meet the investments required by the electricity sector.⁷

The Government decided to transfer the financial and operational responsibility for the electricity sector to the private sector, with the exception of the transmission activity, which remained in the hands of Empresa de Transmisión Eléctrica, S.A. (ETESA), which is a corporation with 100% state capital.

Law 6 of 1997 established that the National Authority of Public Services (ASEP), formerly the Regulatory Entity of Public Services, would be the regulatory entity of the public electricity service, establishing among its functions, to regulate the exercise of the activities of the electric energy sector to ensure the availability of an efficient energy supply, capable of supplying the demand under social, economic, environmental and financial viability criteria, as well as to promote

⁶ Article 3 of the Unified Text of Law 6 of 1997, ordered by Law 194 of 2020.

⁷ Retrieved from <https://www.ensa.com.pa/preguntas-frecuentes/preguntas-generales/por-que-privatizaron-el-irhe>

competition among market agents and intervene to prevent abuses of dominant position.

In addition, it is responsible for overseeing and controlling compliance with the laws and administrative acts to which those providing the public electricity service are subject and sanctioning violations thereof; establishing the general requirements to which electric utilities must submit in order to access and make use of the transmission and distribution public service networks; establishing the criteria, methodologies and formulas for setting rates for public electricity services, in cases where there is no free competition; approving the sales rates for the public electricity service, granting concessions and licenses, etc.

Regarding concessions and licenses, we must emphasize that concessions or contracts are granted to hydroelectric and geothermoelectric generation companies, as well as to distribution companies, and licenses are granted to photovoltaic (solar), wind and thermal generation companies. For all these procedures, the role of lawyers in advising companies is essential, so it is imperative to know the regulations, and to defend their rights against any sanctioning procedure that may arise both in administrative and judicial proceedings.

In this year 2022, Law 6 of 1997 reached its 25th anniversary, which entails an exhaustive analysis of possible changes required in the market scheme, taking into account the evolution of our society and the new technologies that are being developed. To this end, Law 6 of 1997 initially contemplated that the country's energy policy would be carried out through the Energy Policy Commission, which was part of the Ministry of Economy and Finance; however, in 2007 the National Energy Secretariat was created under Executive Decree No.176 of September 17, 2007, and subsequently it was created through Law 52 of July 30, 2008. The National Energy Secretariat was left with the attributions and functions of the Energy Policy Commission of the Ministry of Economy and Finance, and the National Directorate of Hydrocarbons and Alternative Energies of the Ministry of Commerce and Industries.

The National Energy Secretariat is reorganized by Law 43 of April 25, 2011, which in its Article 1 states,

The National Energy Secretariat, hereinafter the Secretariat, is reorganized as an entity of the Executive Branch, attached to the Ministry of the Presidency, governing the energy sector, whose mission is to formulate, propose and promote the national energy policy in order to ensure the security of supply, the rational and efficient use of resources and energy in a sustainable manner, according to the national development plan and within economic, competitive, quality and environmental parameters.

Article 3 of Law 43 of April 25, 2011, establishes, among other things, “that the National Energy Secretariat is responsible for the management of the energy sector”; and Article 5, It establishes functions related to the planning and strategic planning and policy formulation of the energy sector, the development of a guiding and regulatory framework for the sector, the monitoring and analysis of the behavior of the energy sector, the promotion of the plans and policies of the sector and the research and technological development and administrative order.

The National Energy Secretariat will develop these functions under the subordination of the Executive Branch and with the participation and due coordination with the public and private agents that participate in the sector.

In its role as the governing body of the energy sector, the National Energy Secretariat submitted for consideration of the Executive Branch, the Strategic Guidelines of the Energy Transition Agenda, which were approved by the Cabinet Council through Cabinet Resolution No. 93 of November 24, 2020, which includes eight national strategies, among them, five different national strategies to be formulated and approved, which are: universal access, rational and efficient use of energy, electric mobility, distributed generation and innovation of the national interconnected system (SIN); two of the hydrocarbon sector, which are: Panama as an Energy Hub and modernization of the regulatory framework; and a cross-cutting strategy which is institutional strengthening: Panama as an Energy Hub and the modernization of the regulatory framework; and a cross-cutting strategy which is institutional strengthening.

The Energy Transition Agenda represents a roadmap for decision making that will make the energy sector more dynamic in the face of the great challenges involved in achieving a cleaner economy free of polluting emissions, as proposed at a global level and which constitutes significant technical, political, social and economic efforts.

Although the question may arise, what role would a lawyer have in the Energy Transition Agenda?, the answer is interesting as it identifies a great opportunity for legal professionals to contribute in the analysis of the current regulations taking into account the opportunities for improvement that may arise for the benefit of the sector, in advising private companies and public sector institutions, in the debate that although initially technical, has an important legal component that is embodied in a strictly enforceable standard.

In a sector as complex and competitive as the energy sector, one could have the perception

that lawyers do not have greater participation, which is quite the opposite, since there are many opportunities to develop, which implies knowing the regulations and gaining experience in the processing. Any lawyer can get involved in the subject and there is much that could be contributed to improve the current procedures which, like any other administrative procedure, are governed by the principles of legality, due process, transparency, efficiency, effectiveness, publicity and uniformity. We should also mention that in all processes the citizen has the right to effective administrative or judicial protection, from which are derived his rights of free access to the jurisdiction, to the presentation of legally foreseen resources and to be resolved in a reasonable time based on the law.

Legal professionals can contribute with our knowledge and experience in the elaboration and updating of normative and regulatory frameworks, be facilitators with public institutions and market agents to present ideas and projects, as well as support to shape the necessary legal instruments and make all these strategies and actions a reality. The technical staff is aware of the work performed by lawyers in the sector, so they request legal criteria to make proposals viable.

We cannot fail to mention the great opportunity that lawyers have within the hydrocarbons sector, which through Cabinet Decree No.36 of September 17, 2003, establishes the regulatory framework for the development and operation of activities related to the industry and commercialization of petroleum products in the Republic of Panama. In this sector, the regulatory public institution is the National Energy Secretariat, which issues the permits and registrations to carry out activities related to fuels, such as service stations, yard pumps, fuel and gas transporters, importers-distributors of fossil fuels, their derivatives and biofuels for the domestic market or for electricity generation, hydrocarbon analysis laboratories, users of Fuel Free Zones, petroleum product recycling plants, lubricant plants (oils and/or greases), petrochemical plants, biofuel plants, barges that supply fuel, among others.

As it can be observed, there are many procedures to obtain the authorizations for the activities related to hydrocarbons, taking into consideration that such products must meet the technical specifications in terms of quality required by the country. For all these procedures we lawyers have a substantial participation, since we not only advise our clients, but we also process the necessary permits, which entails a resolution by the regulatory institution that may be subject to challenge.

From all this journey through the energy sector, we can conclude that legal professionals have a privileged task in the interpretation and application of the regulations on the activities to be carried out in both the electricity and hydrocarbons sectors. There are always opportunities, it is a matter of studying, learning from those who have the experience and advancing within the legal

debate that entails the multiple changes that are required with the energy transition for the benefit of the country.

For many the energy sector represents a great challenge because of the technical component involved, which could give the perception that it is a sector only for engineers, but no, lawyers also have a place to occupy. If we were asked today, why do you think there are so few legal professionals in this sector? I would answer that it is due to a lack of knowledge of the wide range of opportunities that the energy sector offers to legal professionals.

At present, we lawyers have stood out, taking into account that important management positions in Panamanian public institutions in the energy sector are occupied by lawyers, which shows that the profession does not limit us; on the contrary, it opens doors for us because of the indispensable nature of our work.

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