

PARAMETERS OF THE ENERGY LAW POLICY

DOI 10.18572/2410-4396-2020-2-63-69



Andrey G. Lisitsin-Svetlanov

Doctor of Law, Professor

Member of the Russian Academy of Sciences

■ svetlanov@just.ru

Considering inevitable new challenges facing the legislator and structures responsible for the foreign policy, it is essential to determine law policy parameters both on the national level and internationally. One of the tasks at hand is to determine parameters of the energy law policy. An efficient law policy cannot be developed simply by adopting a number of regulations consistent with the tasks established by strategies and doctrines. In this case, a systemic approach is required combining adoption of public and private law regulations with striking a balance between private and public interests by law. These conditions have to be fulfilled for energy law, the core of regulation in the power sector. What is the strategic role of energy law in ensuring effective market relations? It would be naive to believe that market relations are self-sufficient. The market as a form of existence of economy is self-sufficient only when the law guarantees that its existence is free of misuse, unscrupulousness, monopolization, and collusions, including price fixing. Thus, regulation of both private law and public law relations is an objectively necessary prerequisite for existence of the market as such.

It is also evident that Russian energy law needs a focus to ensure not only national security, but foreign policy interests, since the cumulative potential energy capacity of Russia exceeds the demand of its population of 140 to 150 million people, and real international relations tend to become increasingly conflict-ridden rather than aspiring to equal cooperation in a multipolar world.

Keywords: energy law, energy strategy, energy law science objectives, energy law and order.

Development of public relations in each country and globally is a continuous process. The changing world we live in poses new challenges for the society, but it is not unusual. What is important is how the society responds to these challenges. Now, when most countries believe themselves to be states governed by the rule of law, it is natural to raise the issue of development of law as a public relations regulator.

Law as a social phenomenon is rather conservative. Development and implementation

of new institutions meeting the new requirements is a process that objectively requires time and overcoming certain controversies: those between different classes, social groups, elites, traditions, stereotypes, etc.

Considering inevitable new challenges fraught with these controversies facing the legislator and structures responsible for the foreign policy, it is essential to determine law policy parameters both on the national level and internationally. One of the tasks at hand is to determine parameters of the energy law policy.

In the Russian Federation, energy law policy parameters require certain corrections. It can be explained as follows.

First, the energy sector as an integral part of the country's economy is still at the stage of transition to sustainable market relations.

Second, the position of Russia as the owner of a unique variety and quantity of energy resources requires continuous efficiency monitoring of legal regulation of the energy markets, and creation of the corresponding law institutions to ensure their development and interaction.

Third, there is a general trend toward technologically advanced and environment-friendly production that has to be wholeheartedly addressed by the Russian energy industry based on hydrocarbons and nuclear power. In the current state, it requires a major upgrade, not only in terms of technology and the environment, but also in terms of legal regulation of the corresponding markets.

Forth, the Russian energy sector was initially linked to the foreign energy market and is receptive to all its fluctuations and non-economic factors. Disruptiveness emerging at the international level is taking a toll on the country's economy as a whole. The main task of legal regulation is to strike a balance between interests of energy companies the activities of which are largely related to the export market, and the national public interests associated with adequate energy supply for the population that sees energy resources as their national treasure.

Principles of law policy development, as well as the regulatory framework of the 90s were changed materially by the Energy Strategy of Russia for the period up to 2030 approved by Decree of the Government of the Russian Federation No.1715-p dated November 13, 2009, and subsequent regulations. Objectives of legal regulation in the energy sector have been repeatedly addressed by legal studies and not without reason. [1]

The draft New Energy Strategy approved by the Government of the Russian Federation [2] covers the period up to 2035 and is designed to consider both deficiencies of the previous plan and economic, technical, political, and social changes in the country and the world. It should also be noted that two Energy Security Doctrines

of the Russian Federation were adopted a year before, enacted by Decrees of the President of the Russian Federation No. Пп-3167 dated November 29, 2012, and No. 216 dated May 13, 2019, respectively. Both doctrines are primarily designed to ensure energy security of Russia and protect it from external threats relying on secure economic stability of the country.

A detailed elaboration of issues associated with the energy sector development described in these documents allows us to assert that they establish certain parameters of technical and economic development of the energy sector of economy. As for the security doctrines, in some cases, they also establish the areas that require legal regulation of the planned measures to ensure energy security. It should also be noted that the strategies are approved by Government decrees, while the doctrines are enacted by decrees of the Russian President, i.e., imperative regulations. Their provisions are parameters for state administration bodies requiring them to act within the prescribed course. However, provisions of these documents are of a program nature and cannot ensure the enforceability thereof independently. Any program document can only be implemented with adequate legal regulation of the relations described in it. Therefore, strategies and doctrines should be regarded as the first step towards development of law policy parameters. An efficient law policy cannot be developed simply by adopting a number of regulations consistent with the tasks established by strategies and doctrines. In this case, a systemic approach is required combining adoption of public and private law regulations with striking a balance between private and public interests by law. These conditions have to be fulfilled for energy law, the core of regulation in the power sector.

As V.V. Romanova justly noted that legal regulation of public relations in the energy sector is performed by various sources of law by analyzing which we could determine the current balance in application of specific sources of law, formulate proposals on improvement of legal regulation. [3]

International treaties are the most important source of energy law. Examples are described below. Universal ones include conventions executed to regulate issues arising due to damage,

for instance, Prevention of Major Industrial Accidents Convention dated June 22, 1993, and Vienna Convention on Civil Liability for Nuclear Damage dated May 23, 1963. Bilateral treaties include intergovernmental agreements on cooperation in the energy industry. [4]

Energy law policy parameters arise for a reason. The point of origin of the current legal system of regulation of the economy as a whole and its energy sector in particular was the Constitution of the Russian Federation of 1993. From the entirety of constitutional regulations establishing regulation parameters in the energy industry, we should mention the provisions of Article 7 “Social State” and Articles 8 and 34, provisions supporting competition, preventing unfair competition and business activities involving restrictive practices.

Thus, in order to improve energy law policy parameters, we need to establish basic objectives of industry-specific legal regulation in the four sectors mentioned above in accordance with provisions of program documents and the Russian Constitution.

The key challenge of Russia’s policy in the energy sector is to develop market relations. This priority is due to both general tasks in terms of creation of Russia’s market economy and peculiarities of relations specific to the energy sector.

The basic principles of market economy formation established in Articles 8 and 34 of the Russian Constitution are of particular importance for the present-day Russia because they had been considered alien to the Russian legal system for over 70 years. Since adoption of the Constitution, state legal construction has been evaluated in different ways: from the critical or critically constructive to exaltedly positive or eulogistic points of view. Privatization that extended to the energy industry has become the focal point of critical evaluations. At the beginning, liberal economy ideas were praised by those believing in the omnipotence of a free market dominated by private law relations created by the freedom of contracts. This resulted in economy offshoring that extended to the energy sector, leading to a national security threat. Then, as a counter to the existing situation, state corporations and government-owned corporations emerged and eventually achieved dominance in the economy.

Thus, the market-based economy model established by the Russian Constitution that includes energy sector relations collided with industry-specific laws which are to a certain extent contrary to the very idea of market relations. Weighing the resultant controversies, we have to admit that constitutional principles are appropriate. However, if we take a look at the problems, especially from a critical point of view, we will see that they belong to industry-specific regulation, even more so to law enforcement.

What is the strategic role of energy law in ensuring effective market relations? It would be naive to believe that market relations are self-sufficient. The market as a form of existence of economy is self-sufficient only when law guarantees that its existence is free of misuse, unscrupulousness, monopolization, and collusions, including price fixing. Thus, regulation of both private law and public law relations is an objectively necessary prerequisite for existence of the market as such. As stated by V.V. Romanova, one of the crucial areas of state regulation in the energy sector are antitrust regulation and state regulation of prices (tariffs) in the energy sector. [5] The antitrust regulation is necessary, because without it any market, especially a developing one, will become first a bazaar with its specific atmosphere, concepts, and traditions, then wilderness.

An analysis of operations of the Federal Antimonopoly Service of Russia, as well as developed regulatory proposals point at parameters of the law policy related to the need to develop not only the nationwide Russian market, but also regional ones, as well as the need to overcome monopolistic tendencies among state unitary enterprises and state corporations where possible at the moment. This law policy should extend to the energy sector of economy as well.

The variety of energy markets, their fundamental value for all Russian economy sectors determine the importance of improvement of such energy law institution as tariff regulation. Specific issues of tariff regulation as applicable to each energy sector are being discussed both by experts and within the government-business dialog. However, the emerging situation is peculiar in the fact that the assumptions made predetermine the core condition of agreements between subjects of

the corresponding relations. The Russian legal system has seen many cases when regulation of private law issues was delegated to the executive branch. When it comes to tariffs, including those of the energy sector, the Federal Antimonopoly Service acts as the regulator.

The current regulation system existing in this area clearly needs to be changed; however, it also creates complex and controversial tasks with regard to legal measures for their implementation. Back then, a certain degree of energy market monopolization by corporations with significant state participation noted by the Federal Antimonopoly Service was corrected by Federal Law on Natural Monopolies No. 147 dated August 17, 1995. This Act was amended several times until 2017. This Act, along with subordinate regulations, authorized the Federal Antimonopoly Service to establish tariff regulations, including those in the energy sector. As mentioned above, the mission of the Federal Antimonopoly Service is to develop both the All-Russian and regional markets.

The past quarter of a century has changed economy management conditions significantly and posed new challenges in tariff regulation. Currently, different tariffs apply in different constituent entities of the federation. According to the Federation Council's assessment delivered by its Chairperson V.I. Matviyenko, different tariffs adversely affect the investment appeal and the entire economy of some regions. With this in mind, it was proposed to adopt a unified state pricing policy. [6] From a strictly legal viewpoint, unified federal price regulation as terms of any business or consumer contract is in line with Article 71, Clause (o), of the Russian Constitution: "The jurisdiction of the Russian Federation includes:... civil law..."

However, we can hardly assume that differentiation of electrical power tariffs is the only reason of controversies in the investment appeal and economic development of Russian regions. [7] Russia's hugeness, geographical, climatic, demographic variety, etc. are the objective cause of its inhomogeneous economic development. Therefore, pricing policy issues, as well as mechanisms for calculation of specific prices, should be approached cumulatively in the context of ensuring existence of a fair market.

It must be recognized that the Law on National Monopolies adopted at the time when a market was declared, but did not actually exist, outlived its usefulness. However, to develop a comprehensive method of addressing the issue and determine the legal grounds of operation of the federal executive authority establishing a new unified state pricing policy, one must consider that new regulation will be put in place in the existing regions at different stages of economic development with very different levels of energy availability.

Adoption of an "isolated" law establishing a unified state pricing policy for the electrical power industry could result in a new set of challenges for other constituent entities of the federation while failing to resolve all the issues of energy market pricing.

Expanding exchange trade to include energy resources as planned by the Federal Antimonopoly Service can become an additional factor stimulating development of regional energy markets. However, exchange trade expansion can have a favorable result, if we strike a legal balance between the two very different legal mechanisms: exchange trade, i.e., a classic market institute, on the one hand, and pricing as permissible regulation restricting freedom of contracting, on the other hand.

Pricing issues in the energy sector are also related to another fundamental problem of the Russian legal system. This refers to Article 7 of the Constitution defining Russia as a social state. The meaning of a social state is described rather concisely in Article 7 of the Constitution. Both its parts focus on meeting social needs and observance of rights of the citizens. Nothing in this article allows for implementation of differentiated regulation for different regional markets or consumer statuses, in particular, in terms of tariffs. However, the very essence of "sociality" in legal regulation implies the need to consider social factors in public relations which are demonstrably multifaceted. Therefore, Article 7 of the Constitution creates a basis for implementation of different tariffs in industry-specific laws depending on specific characteristics of the region and consumer status. This issue is of particular importance for heat supply regulation. It seems that the idea to implement a unified state pricing policy requires serious legal research.

All the above problems can only be resolved if taken together, by combining private and public law regulation, as is consistent with the intention of energy law. In this regard, the experience in research and teaching in the field of energy law as a complex legal discipline accumulated by the Energy Law Center of the Saint-Petersburg State Economic University, MSAL, and the MSU Law Faculty is worth noticing. **As for foreign experience**, noting a long history of doctrinal studies of energy law, its prominent place in university courses and the regulatory framework of national energy law, with regard to Europe and EU energy law, it should be pointed out that challenges of Russia's energy law science, professors, students, and the legislator are much bigger and more complex. It is caused by objective factors. This phenomenon of our country is due to the fact that, unlike other states, Russia has the entire spectrum of energy resources. For instance, Germany focuses its legal regulation in the energy law sector only on gas supply and electrical power supply / gas energy and electrical energy. [8]

Considering the significance of a natural link between issues of subsoil use and the entire range of energy resources for Russia, the main weakness, or "gap", of legal regulation in the energy sector is the state of subsoil use legal regulation.

Currently, issues of subsoil use in the context of energy law are covered by comparative law literature to a certain extent. [9] As for the existing laws on subsoil use, they are clearly inconsistent with economic, political, or social needs of Russia. The categorical nature of this statement is supported by a mere comparison of the effective laws with the Mining Charter of the Russian Empire.

In 1992, Russia adopted the Law on Subsoil Resources containing 52 articles. Over 28 years, more than fifty amendments have been adopted, but the result has little in common with Russia's needs. In contrast, the Mining Charter of the Russian Empire was a single codification act of legal regulation containing more than one and a half thousand paragraphs.

Multiple energy resources need to be thoroughly examined for their potential use not only from the present-day standpoint, but from the technical perspective as well. Technical development will not be strictly national. In the

current situation, advancement of technology crosses borders quickly. New technologies will not only transform the existing energy sectors, but will create new energy sources. Modernization of the energy industry as a sphere of economy will definitely require flexible legal regulation considering both technical and economic factors. At the same time, new legal challenges will arise for both national and international regulation. Therefore, modernization of the energy industry in states with various energy resources will be different. For Russia as a multi-resource country, issues of optimal regulation of the corresponding markets are of particular importance. A present-day example may be law of a number of countries that stopped using nuclear power. For Russia with its nuclear power technology level superior to those of some countries of the "nuclear club", such self-restriction would be inappropriate. Energy law science objectives in terms of development of one of the key institutions of this law branch (nuclear law) considering the requirements and opportunities of further nuclear power development have been described by V.V. Romanova in a monograph on problem issues and trends of legal regulation in the sphere of nuclear energy use. [10]

Diversification of national regulation of relations in the energy sector also reveals certain common parameters. These include environmental safety issues, including development and implementation of "green technologies". Natural science researches in the energy sector show the need to address issues of power capacity increase, power saving, power accumulation, deep conversion of raw hydrocarbons, development of hi-tech gas turbine equipment, environmentally friendly nuclear power. Russian R&D advancements in these areas are ample and impressive; however, their practical application in industrial technologies faces an insurmountable obstacle: lack of a technological implementation mechanism. Solving this problem is related to the necessity of a major change in innovation relations and relevant legal regulation. This problem was made definitive 18 years ago, but has not been resolved yet.

It would seem that, apart from innovation regulation improvement currently addressed

primarily by technology developers, it is also necessary to adopt laws not to stimulate, but to urge companies to develop implementation activities while ensuring preservation of investments. In this regard, energy law is closely linked to corporate law issues in the energy sector.

Forth, energy market development in terms of its legal regulation cannot be positively divided into national and foreign economic regulation. In this area, public and private regulation is becoming increasingly important. In terms of profitability, international business projects can be more beneficial to energy companies, at least in terms of pricing. However, we must remember that the issue of national energy industry development and population preferences with respect to energy resources is actual implementation of its social function by the state. Shortcomings in keeping the right balance of interests in this regard become clear and will be rectified by the state in some form. The question is what legal mechanisms will be used to address the corresponding issues. Considering that the distinguishing feature of leading energy companies is major state participation, companies' policy can be promptly adjusted via their management bodies. However, this does not mean that relevant legal regulation is unnecessary. In this regard, we should pay attention to evaluation of the current situation in both legislative and executive branches. At a meeting with Russian Prime Minister M.V. Mishustin, Chairman of the Federation Council V.I. Matviyenko said: "People react vehemently, when they see that we implement large-scale gas transportation projects for foreign consumers... whereas some Russian settlements have been waiting to be supplied with gas for decades, having to use wood, coal, anything, just like 100 years ago." [11]

The problem of fuel and electricity prices and tariffs remains pressing. This issue is discussed not only nationally, but globally as well. In the first case, this means justification of a potential increase in prices and tariffs inside the country, in the second, fairness of differentiated pricing on the national and international markets. This problem is particularly sensitive within the Union State the legal framework of which are clearly underdeveloped. In the energy sector, these core

issues of development are now being solved based on intergovernmental and interdepartmental agreements. Considering that in this case we are speaking not about traditional regional cooperation, where such agreements are rather common, but about relations in the Union State, this regulation method is closer to manual control based on situational mutual decisions rather than enactments of competent authorities of the Union State.

Development of a law policy for each new historical period of the state's economic development implies reliance on the past experience and, considering global economic processes, experience of other countries. However, foreign experience should be considered in conjunction with Russian specifics. The country's size and geography are what makes the energy sector across Russia is blessed to bear regardless of any world market trends, including "digital" ones.

Development of foreign law policy parameters requires Russia to select a particularly balanced approach, because it is one of the largest energy producers and consumers at the same time. This fact was not considered when Russia signed the Energy Charter which essentially reflects interests of importer countries. Notably, such countries as the USA, China, and India did not sign the Charter. However, Russia's ill-considered decision to sign Energy Charter Treaty and Protocol on Energy Efficiency and Related Environmental Aspects in 1994 has already cost the country dearly, even though ratification of the document was blocked, suggesting that the Charter does not apply to the Russian Federation.

A significant parameter of Russia's law policy is ensuring energy security. This issue was reflected in both national strategies and doctrines, and scientific research. [12]

Noting national security problems related to the policies practiced by Western economies to use energy to achieve their political and economic goals, we should once again consider potential legal countermeasures.

Current Russian laws on foreign investments have been aimed at increasing the appeal of the national investment regime and preservation of foreign investments. History shows that not all countries share these values of investment laws.

The USA and EU widely use unfair competition practices, including those in energy projects. There are a lot of real-world examples of both speculative activities in the areas of environmental safety and restrictive sanctions in technology and project funding.

Therefore, it seems important for national energy security to supplement the existing investment laws with provisions to protect and ensure Russia's foreign-policy and foreign economic interests. This law policy parameter will also require some of the agreements on foreign investments encouragement and protection entered into by and between Russia and other countries to be revised.

It is evident that Russian energy law needs a focus to ensure not only national security, but foreign policy interests, since the cumulative potential energy capacity of Russia exceeds the demand of its population of 140 to 150 million

people, and real international relations tend to become increasingly conflict-ridden rather than aspiring to equal cooperation in a multipolar world.

Under these conditions, the remarkable amount of energy resources will only become a real blessing, when their potential is best realized on both national and international markets. With this in mind, Russia's presence on the international energy market in all energy sectors seems necessary, and to maintain its *strong presence*, Russia needs to become one of the initiators of rules governing behavior on these markets. More recent history shows that regulation in vitally important areas, including the energy industry, *cannot be likened to the dove of peace sitting solely on the private law branch*. Currently, the international law architecture is falling apart; the world needs a new energy law order. ■

References

1. Romanova V.V. Energy Law Order: Current State and Tasks / V.V. Romanova. Moscow : Yurist Publishing House, 2016. P. 255; Lisitsin-Svetlanov A.G. Problems of International Legal Regulation in the Energy Sector (On the Example of the Hydrocarbon Complex) / A.G. Lisitsin-Svetlanov // Energy Law Forum. 2014. No. 3. P. 15–17.
2. The Government of the Russian Federation Approved the Energy Strategy of Russia for the period up to 2035 // The Ministry of Energy of the Russian Federation. URL: <https://minenergo.gov.ru/node/17491>.
3. Romanova V.V. General Overview of sources of Energy Law. Energy Law. Textbook / Edited by V.V. Romanova, Doctor of Law. 2nd edition, revised and updated. Moscow : Yurist Publishing House, 2016. P. 33–34.
4. Romanova V.V. International Treaties as a source of Energy Law. Energy Law. Textbook / Edited by V.V. Romanova, Doctor of Law. 2nd edition, revised and updated. Moscow : Yurist Publishing House, 2016. P. 45–50.
5. Romanova V.V. Energy Law Order: Current State and Tasks / V.V. Romanova. Moscow : Yurist Publishing House, 2016. P. 255.
6. Matviyenko Proposed a Unified State Electricity Pricing Policy // TASS. <https://tass.ru/ekonomika/7860691>.
7. Non-economic Aspects of Economy. Unexplored Interrelation : Scientific and Journalistic Notes of Social Scientists : Collected Articles / Cross-Disciplinary Project Manager and Science Editor O.T. Bogomolov; Deputy Cross-Disciplinary Project Manager B.N. Kuzyk. Moscow : Institute for Economic Strategies, 2010. P. 796.
8. Säcker F.J. Energy Law as a Complex Branch of German Law / F.J. Säcker ; translated by Timofeyeva E.V. // Energy Law of Russia and Germany: a Comparative Law Study / edited by P.G. Lakhno, F.J. Säcker. Moscow : Yurist Publishing House, 2011. P. 88–106.
9. Energy Law of Russia and Germany: A Comparative Law Study / edited by P.G. Lakhno, F.J. Säcker. Moscow : Yurist Publishing House, 2011. P. 1076.
10. Romanova V.V. Current State and Tendencies of the Development of Legal Regulation in the Sphere of Nuclear Energy Use : Monograph / edited by V.V. Romanova. Moscow : Yurist Publishing House, 2017. P. 9–32.
11. Matviyenko Proposed a Unified State Electricity Pricing Policy // TASS. <https://tass.ru/ekonomika/7860691>.
12. Romanova V.V. Problems, Strategies Goals and Tasks of Legal Regulation of Energy Security : Monograph / edited by V.V. Romanova. Moscow : Yurist Publishing House, 2019. P. 14–49.