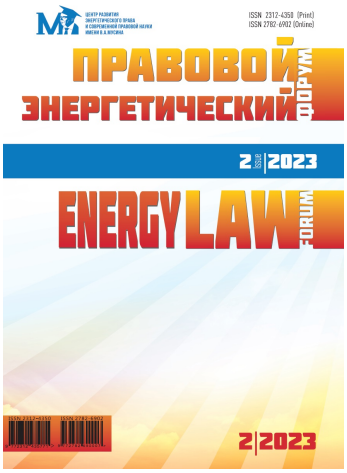

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Energy Sector and Justice: Modern Problems of Turbulence and Legal Regulation

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Аннотация

The article deals with the problems of modern legal regulation in the energy sector of the Russian economy which is characterized by serious turbulences. This situation implies difficulties in the effective functioning of the mechanism of justice. The necessity of definitive goal setting at the basic level both in legal regulation of the energy sector and in judicial activity is proved. Suggestions of a fundamental nature — in essence and in form — are made. The need to really take into account the “green” impact on our economy, first of all, when determining the strategic goals of its development, is also important with regard to the problem discussed in this article. It is noted that the judicial policy should to become a benchmark for the improvement of the mechanism of justice in the energy, basic, crucial for the state sector of the economy with turbulent regulation.

Ключевые слова: energy law, turbulence of legal regulation, mechanism of justice, codification of energy legislation, codification of legislation on courts and judges

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1 The starting point of the problem reviewed in this article is the opinion expressed in the scientific, legal and other literature: in the last century there has been an unprecedented complication of literally all social processes, beyond the boldest predictions and expectations, which every day become more spontaneous, unpredictable, uncontrollable and unmanageable, which is apparently their specific characteristic, a peculiarity of this stage of historical development. And this is accompanied by the rapid emergence of a large number of completely new, mostly global problems, which make the world extremely dangerous, question the possibility of further normal existence of entire countries and peoples, and sometimes pose a threat to the very existence of civilization, the preservation of humanity in the spiritual and biological sense [1].

2 It is already clear now that the turbulence, both in international political and economic relations, as well as in social relations within our country, aggravated during the COVID pandemic, has intensified even more since February 24, 2022, the beginning of the Special Military Operation. This includes the economy, the basis of which is undoubtedly the energy sector.

3 As a result, the turbulence of statutory regulation in the economic field of our state, which is accelerated by the rapidly changing situation in general and in the military-industrial sector of our state in particular, has increased dramatically. Suffice it to say that in just one day, on March 3, 2023, President Putin signed both original Decrees, such as Decree No. 138 on Additional Temporary Economic Measures Related to the Circulation of Securities [2] and Decree No. 139 on Certain Issues of Activities of Business Entities Involved in the Implementation of the State Defense Order [3], and Decrees developing the previously adopted Decrees: Decree No. 95 (as amended on March 3, 2023) on the Temporary Procedure for Fulfilling Obligations to Certain Foreign Creditors dd. March 5, 2022 [4] and Decree No. 81 (as amended on October 15, 2022, as amended on March 3, 2023) on Additional Economic Measures to Ensure the Financial Stability of the Russian Federation dd. March 1, 2022 [5]. However, this turbulence of legal regulation in the energy sector of our economy began at the end of last year 2022. These are, in particular: Decree of the President of the Russian Federation No. 723 on the Application of Special Economic Measures in the Fuel and Energy Sector in Connection with Unfriendly Actions of Some Foreign States and International Organizations dd. October 7, 2022 [6], Decree of the President of the Russian Federation No. 943 on the Application of Special Economic Measures in the Sphere of Natural Gas Supply in Connection with the Unfriendly Actions of Some Foreign States and International Organizations dd. December 22, 2022 [7], and Decree of the President of the Russian Federation No. 963 on the Application of Special Economic Measures in the Fuel and Energy Sector in Connection with the Establishment by Some Foreign States of the Ceiling Price for Russian Oil Products dd. December 27, 2022 [8].

4 Special attention (with regard to the problems reviewed in this work) should be paid to the aforementioned Decree No. 139 dd. March 3, 2023, adopted as its preamble

states: “In accordance with Article 8 of Federal Constitutional Law No. 1-ФКЗ on Martial Law dd. January 30, 2002”. At the time of completion of this article, martial law is declared on the territory of the Lugansk and Donetsk People’s Republics, Zaporozhye and Kherson regions from October 19, 2022. However, it is not mentioned neither in the title of the Decree, nor in its text. It means that this Decree has been adopted against the possibility of the necessity to declare martial law in other regions of the Russian Federation.

5 But the most important thing is the content of this Decree. It is unusually harsh. Thus, this Decree of the President of the Russian Federation establishes that if business entities, which are the main performers of deliveries of products (works, services) under the state defense order or performers participating in deliveries of products (works, services) under the state defense order, fail to fulfill their obligations under the state contract (contract), including failure to take measures to ensure the delivery of products (works, services) under the state defense order, until martial law is lifted: a) the rights of members (shareholders) of such business entity and the powers of its governing bodies are suspended; b) upon the proposal of the Ministry of Industry and Trade of the Russian Federation, a management organization is appointed to exercise the powers of the sole executive body of such business entity and, to the extent necessary to fulfill obligations under the state defense order, the powers of the general meeting of shareholders or the board of directors (supervisory board) of the company. The Government of the Russian Federation is instructed to: a) establish a working group under the collegium of the Military-Industrial Commission of the Russian Federation on the activities of business entities participating in the fulfillment of the state defense order during the period of martial law; b) approve the working group regulation which stipulates, inter alia, that this working group shall evaluate the activities of business entities participating in the fulfillment of the state defense order and form an opinion on issues related to the suspension of the rights of members (shareholders) of such business entities and the powers of their governing bodies and the appointment of the management organization; and c) approve the composition of the working group. It is established that on the basis of the decision of the working group the relevant regulatory legal act of the Ministry of Industry and Trade of the Russian Federation shall be issued.

6 One can comment or even criticize the provisions of this decree t from different perspectives, but there is no doubt that:

7 - It is objectively conditioned by a harsh necessity.

8 - Its effect (if necessary) will be extensive and deep legislative and other regulatory activities with subsequent adjustment of the existing laws and regulations, which, of course, should be preceded by appropriate scientific study of this adjustment, and it is not a one-time event. And by all means, in the described turbulent conditions, we should not set aside as irrelevant an ancient canonical rule, which can be translated from the language of the Bible as follows: the law is made for man, not man for the law.

9 And at the same time in the context of the above-mentioned adjustments, it is impossible to deny, or even temporarily lose sight of, the fundamental, overarching goals of the development of our society, even though they are not only not formalized, but also not scientifically formulated. The scientific literature states that humanity has its

own peculiarities of evolution, which in the “goal perspective” can be divided into all the past development, which was “aimless”, i.e. spontaneous and chaotic, and still remains mostly so, and the future is a new, as yet unrealized global development, which can and should stop being only spontaneous and move to a “sustainable trajectory” [9]. At the same time, shifting the focus to the future can lead to a real temporal revolution in many spheres of activity, which can be called a “futurorevolution”, or, more modestly, a process of futurization [10].

10 Therefore, the following thought of the same authors is important and interesting: “The principle of temporal integrity acts as a kind of “law of conservation of time”, which reflects the need to take into account the interrelations and quantitative parameters of the three tempo-worlds. When applied to any human activity, in conjunction with the law of conservation of energy, this means that an emphasis on one tempo-period (concentration of effort, energy and resources on it) leads to less attention being paid to other tempo-worlds. And this leads to “temporal disharmonization” of any activity and objectively requires its optimization with respect to all three tempo-worlds” [11].

11 What does this mean when applied to the problem discussed in this paper? There are at least several consequences, both near and sometimes distant (it is not clear how distant) in time. These are the following, from today’s perspective, the truth is that everything in this sphere can change at any moment, and even drastically. So, these are: the presence of the state of emergency in four constituent entities of the Russian Federation and the absence of it in other constituent entities of the Russian Federation means that the above-mentioned Presidential Decree No. 139 dd. March 3, 2023 is intended to impose severe sanctions on the business entities, which are the main performers of deliveries of products (works, services) under the state defense order or performers participating in deliveries of products (works, services) under the state defense order, which have violated their obligations.

12 It also limits (geographically, only in relation to the four constituent entities of the Russian Federation) the powers of the Working Group under the Military-Industrial Commission of the Russian Federation in terms of the activities of business entities involved in the implementation of the state defense order, whose powers include the evaluation of the activities of business entities involved in the implementation of the state defense order, formation of an opinion on issues related to the suspension of the rights of members (shareholders) of such business entities and the powers of their governing bodies, and the appointment of the management organization.

13 In addition, this restriction (except for the geographical area) is narrower than the powers of the said Working Group, the regulation and composition of which are approved by the Government of the Russian Federation, and therefore these powers should comply with federal laws.

14 Finally, this Working Group does not have the authority to make decisions that are binding on business entities and governing bodies: its decision is the basis for a normative legal act of the Ministry of Industry and Trade of the Russian Federation. This means that the highest level of authority of the Working Group in the hierarchy of normative legal acts is a departmental act.

15 In other words, there is a great “swing” of legal regulation in extreme conditions of the SMO, but it is obviously insufficient for justice-related activities, if - implicitly - based on the purposes of the mentioned Decree of the President of the Russian Federation No. 139 (and the other listed Decrees).

16 Professor Ye.P. Gubin correctly answered the question of whether we can speak about sanction (anti-sanction) legislation, sanction (anti-sanction) law: some authors believe that such law exists, while others deny the correctness of such concept. It seems that there is no reason to speak about sanction (anti-sanction) law as a branch or sub-branch of law. Such legislation institution as sanction (anti-sanction) law is only now being formed. It seems that its formation is only a matter of time. Such legal doctrine is necessary in view of the historical trends in the application of sanctions. The greatest interest for us is not the sanctions applied against our country, not the counter-sanctions, but the measures of economic and legal support of sustainable and stable development of the economy of the Russian Federation [12].

17 And here the objectives of measures of legal (as well as economic, social, etc.) support of life of our society in the conditions of the SMO (and, of course, later, after its completion) come to the fore. After all, it is well known that a well stated and set goal guarantees 50 % of success in its achievement.

18 This is fully true for the energy sector of our country’s economy, which is one of its fundamental pillars. It goes without saying that the ultra-long-term goals in the energy sector of our economy cannot be a “catch-up” game with foreign technologies. We should fully agree with A. Rozanov, Demidov Prize Laureate, Academician of the Russian Academy of Sciences, who believes: “Breaking through and eliminating the gaps in our economy (and, accordingly, in its energy sector and, consequently, in legal regulation — *M.K.*) ahead of time is possible only by relying on fundamental science. And there are three things associated with it: first, no one should prevent scientists from thinking in the direction they consider necessary; second, the allocated amount of money should be small, but stable and untouchable; and, finally, third, we should accept that half of the results of fundamental research will turn out to be “rubbish”, which is normal. On the other hand, the other half will be invaluable for the country, for the whole civilization, and it is possible that in a hundred years humanity will understand some of this “rubbish” [13].

19 Until recently, the main goal in the energy sector around the world was to achieve the so-called green performance. Our country was no exception here. Science, legislation and statutory regulation, law enforcement, including judicial practice, were focused on this goal...

20 But even now this issue has obviously not been disappeared from the agenda, even though it has lost its former prominence.

21 The following should be said about green energy. The author of these lines reviewed the modern terminological apparatus associated with the concepts of “energy” and “green” about a year ago [14]. And during this generally short period of time it became clear: the problems in the field of climate change and biota, and the resulting environmental, political, international, social and other problems, have dramatically lost their edge. Moreover, it is becoming increasingly clear that human activities have only a

minor influence on global warming, with all the negative consequences resulting from it, while the main effect comes from natural processes beyond human control and beyond the control of modern human civilization: solar flares, the frequency and magnitude of which are still unpredictable; greenhouse gas emissions, the most dangerous of which are methane emissions into the seas and swamps during the thawing of permafrost; volcanic activity [15], and much more.

22 At the same time, properly organized activities with these natural resources can bring (and in practice do) bring a serious positive economic effect [16]. In Iceland, for example, the extensive use of geothermal energy not only made it possible to abandon the construction of a nuclear power plant, but also increased the economy in general and, consequently, the well-being of society. In our country, this segment of the energy sector is clearly underdeveloped and lacks a more or less coherent regulatory framework. Meanwhile, according to Russian scientists, Russia has huge reserves of geothermal resources, the energy of which is probably 8–12 times greater than the potential of all hydrocarbon fuels [17].

23 With regard to the problem considered in this article, it is also important to really take into account the "green" impact on our economy, first of all, when determining the strategic goals of its development.

24 The real activities of the human community at the present stage of its development (and there is more to come) occasionally create situations that did not exist before and, consequently, there was no necessary legal regulation in this area. However, conflicts requiring judicial intervention have arisen, are arising, and will arise, and the longer it lasts, the more they will arise.

25 An example is case No. A-40-124668/17-71-160Ф [18], in which the Ruling of the Moscow City Commercial Court of March 5, 2018 (apparently a simple arbitration case of bankruptcy of an individual) with the claims of the plaintiff being the financial manager of debtor-citizen Ts. against this debtor: a) to include the contents of a cryptocurrency wallet located online at ... with the claimed identifier ... in the bankruptcy estate of citizen-debtor Ts.; b) to oblige citizen-debtor Ts. to provide the financial manager with access to the cryptocurrency wallet (to transfer the password), the asserted claims were dismissed. In essence, the problem in this case was to determine the legal nature of cryptocurrency: to decide whether it is property or not.

26 At the time of the court hearing in this case, the legislation of the Russian Federation does not define whether cryptocurrency is money or quasi-money, whether cryptocurrency should be considered as property, fiduciary (fiat) money, electronic money, currency, a financial instrument or securities, what is the concept and legal nature of cryptocurrency.

27 At the same time, transactions with cryptocurrency effected by Russian citizens and organizations are not prohibited by the laws of Russia. The Ruling is a detailed seven-page substantive arbitration and judicial act, which reasonably substantiates the following conclusion: cryptocurrency is not legally circulating property that can be charged.

28 This Ruling of the Moscow City Commercial Court was appealed by the debtor's financial manager to the court of appeal within the term established by the Commercial Procedural Code of the Russian Federation. The Ninth Arbitration Court of Appeal reached a different conclusion, which was directly opposite to the Ruling of the first-instance court. Ruling No. 09АП-16416/2018 of May 15, 2018, canceled the Ruling of the first-instance court of March 5, 2018, the disagreement between Ts. and his financial manager was resolved, and the court ordered Ts. to provide the financial manager with access to the cryptocurrency wallet (transfer the password) to replenish the bankruptcy estate [19].

29 That means that the arbitration court of appeal said: cryptocurrency is property. Thus, each of these two judicial instances substantiated and adopted a judicial act regarding the legal affiliation of cryptocurrency with property, with each of these two judicial acts directly opposing the other.

30 And if the Ruling of the arbitration court of appeal on this case is appealed to the cassation instance, it is possible that this court will issue a third judicial act, also reasoned and also diametrically different from the first two acts, on the subject of these disputed relations. The same applies to the supervisory instance.

31 What is extremely important here is the fact that we are not talking about some narrow and practically rare offense. In fact, the subject of the disputed legal relations is a certain type of property, and property relations are the foundation, the cornerstone of all private law, which has been studied by legal science over the past millennia, as they say, inside and out, repeatedly and universally.

32 But the classic manifestation of the so-called "black swan effect" brought to life a qualitatively new phenomenon, cryptocurrency, relating to property law. And it turned out that in relation to cryptocurrency we have practically no legal regulation on which to rely, if necessary, justice when considering a specific judicial dispute; there is no relevant judicial and, in general, other law enforcement practice, there is no necessary scientific research, etc. In the author's opinion, the reference in both judicial acts to the possibility of using both analogy of legislation and analogy of law in the course of legal proceedings in both cases is not constructive here. It is easy to use such references in scientific research and educational process, but in judicial proceedings when considering arbitration disputes (and the author has a great experience here) such references are almost always applicable in both opposite meanings.

33 After all, the court in the course of legal proceedings in a particular case cannot stop the process for lack of the necessary law or suspend it until such law is adopted. The absence of the necessary law cannot serve as a basis for postponing the consideration of a case even for a short period of time.

34 And it turns out that the court (the judge) has a way: by its decision on the case they are considering to create a legal rule establishing whether cryptocurrency is property or cryptocurrency is not property. And this is not the court establishing a legal fact, this is judicial (judge's) law (rule) making in its classic manifestation in the sphere of law of property, a sphere of great importance for society.

35 By the way, such situation has developed quite recently, in another judicial jurisdiction: a criminal one. As it was said, Russia passed the first sentence for P2P trading on a crypto exchange, reports Forbes. P2P trading is a direct purchase and sale of cryptocurrency by users without intermediaries. According to the criminal case files, the crypto exchange user received money stolen by fraudsters for the transaction. The court considered that the defendant participated in a criminal scheme, so it passed a two-year suspended sentence. It was also noted that cryptocurrency transactions in Russia are not regulated by law. At the end of last year, the Central Bank said that it tolerates such transactions, but only as an experiment and only for exporters. This is necessary so that companies can pay for export shipments in cryptocurrency, as it is not yet subject to sanction restrictions. It was also said that cryptocurrency is used in the domestic market: they use it to make investments and settlements. In the best case, transactions are carried out on a foreign exchange, which is subject to the jurisdiction in which cryptocurrency transactions are permitted; in the worst case, they use telegram channels and other platforms, which are not regulated, and secure these transactions only by their popularity among people [20].

36 In the energy sector, the situation can also change significantly in certain areas. For example, there are modern technologies that make is possible to process coal in such a way that it becomes a fuel that, when burned, does not leave ashes, reduces the emission of harmful substances into the air by 90 %, produces almost no smoke, reduces the emission of benzopyrene into the air to almost zero, reduces the emission of carbon dioxide by 20 %... In general, it is close to the fact that a boiler plant runs on natural gas. This technology is cost effective, but it requires a lot of upfront investment. It is easier to produce hundreds of thousands of tons for export (where some countries process it and sell the processed product to European countries with a decent profit). There is no violation of the law here, because there is practically no legal regulation. But if there were a statutory goal of the highest level, the courts, taking it into account, could administer “green” justice when considering cases of this category.

37 In the energy sector of the economy, the situation could also change drastically as a result of other scientific and technological advances. We are talking about the international thermonuclear energy program, in which 35 countries, including Russia, have been participating for 30 years. For us it is TOKAMAC in the science city of Troitsk, where an international thermonuclear reactor is being built. The problem is technically very complicated: the plasma inside the reactor shall be heated to 200 million degrees. On the other hand, mankind will get an unlimited source of cheap, safe, and clean energy. And there is hope that research in this area is in its final stages.

38 But at the same time, it means that we will not need (or will need in a limited way, incomparable with today’s need) coal, hydrocarbons, hydropower, wind and solar energy, etc. This means (and this is the main point of this article) that the entire set of modern legal regulations in the energy sector (and a number of other sectors) of the national economy will no longer be necessary (or will require very serious adjustments).

39 And also (probably unfortunately) numerous legislative and other regulatory acts in this sphere will not be in demand, including the mechanism of justice, at least not to the same extent as today. And many scientific and practical developments in this

sphere, including international practice, will (again, unfortunately, but this is inevitable) lose their significance [21].

40 As the well-known Kazakh scientist Professor S.F. Udartsev (Judge of the restored Constitutional Court of the Republic of Kazakhstan) has rightly pointed out, the development of AI, robotics, neural networks, AI and Internet-brain integration technology, genetics, cloning, growing and 3D printing of human organs, etc. may lead to changes in the role, capabilities, and prospects of man in terms of new types of subjects of law [22].

41 In this correct, but very cautious in form, statement, we can safely replace the words "may lead" with "will necessarily lead"; this is the inevitable tread of scientific and technological progress of human civilization. And in order for this "may lead" not to have catastrophic (even if only negative) consequences, a great role is assigned to law, which should properly respond to the ongoing development of the society in this vector. And the role of justice is especially great when it comes to new types of legal subjects.

42 In the present conditions, the judicial legal policy should change abruptly. According to A.V. Malko, A.Yu. Salomatin, and V.A. Terekhin, judicial legal policy is a special type of legal policy, which is expressed in scientifically substantiated, consistent and systematic activity of state bodies and officials, civil society institutions aimed at the formation and implementation of strategies and tactics for improvement of the judicial system in order to increase the effectiveness of judicial protection and ensure the rights and freedoms of individuals, interests of the society and state [23]. The said judicial policy should, first of all, become a reference point for improving the mechanism of justice in the energy sector, the crucial sector for the state with turbulent regulation of the basic sector of the economy. And we are not talking about the proposals of the scientific community to improve the legal regulation of certain parts of the mechanism of justice. There is no lack of them, both private and general, close or far-reaching. For example, in a monograph published in 2006, the author made a number of proposals to improve all three components of the mechanism of justice, including the economic one: court organization, court procedure, and judicial status; and a significant part thereof has not lost its relevance at the present time [24].

43 But today the proposals of legal science in one or another particular and/or specific area of the mechanism of justice are not enough due to the turbulence of the legal regulation of economic relations. This is especially true for the energy sector, which, as we have said, is the basis, the foundation of the economy. Proposals are needed to take into account this turbulence. Here we can propose the following.

44 For the energy sector of the economy - development and adoption of the Energy Code of the Russian Federation. It is hard to imagine how our economy would have developed and how the domestic mechanism of justice would have coped if the Tax Code of the Russian Federation had not been adopted in time. In the mid-1990s, the author of these lines had the "pleasure" of considering tax disputes in the commercial court when there was a huge number of federal and regional tax laws and other normative legal acts that were far from perfect and contradicted each other. The tax police also contributed to this legal confusion. The General Part will play a decisive role

in this future Energy Code of the Russian Federation; the reasons for this are obvious with a little imagination.

45 For the mechanism of justice it is development and adoption of the Code of the Russian Federation on courts and judges (perhaps with the addition: and on judicial community bodies). In this case, it would be desirable, although unusual and requiring an unconventional approach, that this Code should take the form of a federal constitutional law, which would ensure its stability (after all, the current law on judges has undergone more than fifty amendments, some of which seem to have been opportunistic in nature). Here (in the General Part) it is also necessary to formalize the provision on specialization of judges as narrowly as possible: after all, a judge, who has been dealing with a certain category of cases for a long time, becomes a high-level professional, obviously higher than a judge who has recently been transferred or newly appointed to deal with cases of this category. This is particularly important in the energy sector due to its importance for the society and economy, and the imperfection of energy legislation which means the imperfection of judicial practice.

46 In the energy sector of our country's economy, both mentioned codifications of legislation will have a synergistic effect. Especially if the general parts of both codes will proclaim the main goal: ensuring justice.

47 At the same time, it is obvious that this goal can hardly be achieved in its entirety without a radical change in the mechanism of staffing the judiciary. We should switch from examining external factors of a judicial candidate (without abandoning them) to examining psycho-socio-physiological factors, first of all, to determining the candidate's predisposition to administer fair justice (or, on the contrary, to preventing corrupt candidates from entering the judiciary). Psychodiagnostic research is carried out here and there, but as an experiment (already for more than a quarter of a century) and on "a voluntary basis". And there should be both legislative support, which determines the access of a candidate to the judiciary, and corresponding material, resource, organizational, and personnel support.

48 Undoubtedly, we cannot do without a significant correction of the constitutional provisions, including Chapters 1 and 2 of the Constitution of the Russian Federation, and, consequently, without the development and adoption of a new Constitution of the Russian Federation. There are many gaps and ambiguities in these chapters, for example, Part 2 of Article 9 of the current Constitution of the Russian Federation states: "Land and other natural resources may be in private, state, municipal, and other forms of ownership." What does this mean? It means nothing! It is easier to write that land and other natural resources can belong to anyone. And one possible interpretation is that they may belong to no one, so someone will say: originally it is mine. But the more interesting question is who owns undiscovered mineral deposits? And if they belong to the multinational people of the Russian Federation (and this is the right answer!), do they belong only to today's people or to future generations?

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Energy Sector and Justice: Modern Problems of Turbulence and Legal Regulation

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Abstract

The article deals with the problems of modern legal regulation in the energy sector of the Russian economy which is characterized by serious turbulences. This situation implies difficulties in the effective functioning of the mechanism of justice. The necessity of definitive goal setting at the basic level both in legal regulation of the energy sector and in judicial activity is proved. Suggestions of a fundamental nature — in essence and in form — are made. The need to really take into account the "green" impact on our economy, first of all, when determining the strategic goals of its development, is also important with regard to the problem discussed in this article. It is noted that the judicial policy should to become a benchmark for the improvement of the mechanism of justice in the energy, basic, crucial for the state sector of the economy with turbulent regulation.

Keywords: energy law, turbulence of legal regulation, mechanism of justice, codification of energy legislation, codification of legislation on courts and judges

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