

Human action and the law – implications for environmental policy

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Summary

The aim of this paper is to discuss the importance of the law as a way to change environmental action through: a) clarifying the historical role of the law in environmental policy; b) discussing different interpretations of the way the law influences human action, and c) clarifying the role of the law regarding the present ‘turn to the market’ in environmental policy. The main emphasis is on b) and c). Regarding b) I elaborate on two different interpretations – i.e., understanding the law in cost-benefit/calculative versus deontological terms. Research points towards the latter being very important for making the law function effectively. Regarding c) it is observed that the law is crucial for making the ‘the turn to the market’ effective. Hence, there is a potential conflict here as the market supports the cost-benefit logic. This conflict is analyzed both theoretically and using data from various markets for environmental services.

Extended abstract

The aim of this paper is to clarify implications of the law as a way to change environmental action. More specifically the aim is to:

1. Clarify the historical role of the law in environmental policy – a short overview
2. Discuss different interpretations of the way the law influences human action
3. Clarify the role of the law regarding the present ‘turn to the market’ in environmental policy

The law is important with regards to environmental issues in two distinct ways. First, the law defines rights to resources. Next, the law defines rules and reactions regarding cost-shifting following from the use of these resources. These may be defined as conditions for the right held in the first place – note Honoré (1961), where one of his 11 elements for full ownership is the prohibition of harmful use. Nevertheless, this is a ‘requirement’ hardly specified as a general provision for ownership. Rather, which actions are termed ‘harmful’ and how responsibility is determined is fought out in various contextualized ‘political battles’. The relationship between the general rules regarding protection of property and the specific rules using the law to protect the environment is very important for a complete understanding of the role of the law for the state of the environment.

Historically, environmental policy has very much been centered on the law. In this part of the paper, I will give a brief overview of the development of legal regulations in the field from the establishment of protected areas starting in the 19th century to the regulation of various polluting

substances progressing mainly from the 1960s. This will mainly be done to set the stage, for points 2 and 3, which will represent the core of the paper.

Regarding the interpretation of the role of the law for human action, I will first note that the law is oriented at defining what is right or wrong to do, linking sanctions to breaking what is prescribed or prohibited. The basis for the law is the legitimated right of states to command its citizen as institutionalized through the court system. The ‘logic of the law’ can nevertheless be understood in two different ways. The evaluation of the law may follow a cost-benefit assessment – individual or calculative rationality (Vatn 2009). The law is followed if expected costs of punishment is higher than the expected gains of breaking the law and vice versa. An alternative understanding regards the law as morally right and it is followed because it defines what is appropriate – social or deontological rationality (March and Olsen 1995; Vatn 2009). This is the normative content and effect of the law.

The paper discusses the validity of these claims linking it to empirical – e.g., Tyler (1990); Sunshine and Tyler (2003); Tyler et al. (2014) – and theoretical – e.g., March and Olsen (1995); Bernstein (2005) – studies. These assessments point towards the role of the normative content of the law and its legitimacy in the society as a key explanatory variable in understanding its efficacy. However, what is legitimate actions and reasons for actions will vary across societal contexts. I therefore will expand this understanding including theories on plurality of human motivations/rationality (e.g., Hodgson 2007) and the idea of institutions as rationality contexts (e.g., Vatn 2009).

Regarding the role of the law concerning the present ‘turn to the market’ in environmental policy, I intend to do three things as linked to the above:

- a) Clarify the importance of the law for the responsibility of taking environmental action
- b) Offer an overview of various markets for environmental services and the role the law plays in creating and maintaining these markets
- c) Discuss the normative implications for the law being used in a setting like the market where individual calculative rationality is the fundamental basis for action

With respect to a), I will specifically emphasize how rules like ‘no harm’ and the ‘polluter pays principle’ are typically operationalized in environmental policy in general and what the ‘turn to the market’ seems to implicate in that respect. Regarding point b), I will look at the importance of the law for systems like payments for environmental services; certification, carbon markets and biodiversity offsets. A general conclusion seems to be that the effectiveness of these systems taken together depends crucially on the rights and responsibilities defined – i.e., the law. The markets created may actually reduce the effectiveness ensured by legal regulation, while increase cost-efficiency.

The experience from the above assessment is that in a market setting, the law is very much interpreted in cost-benefit terms – point c). I argue that this is so, because in this arena individual calculative rationality is strongly legitimated. Two implications follow from this. First, the efficacy of the ‘turn to the market’ depends on the efficacy of the law in that specific context. Second, the efficacy of the law – given this context – is limited by the logic of the market. Implications of both points for environmental policy will be discussed.

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