

# Path dependence in the legal system: implication for the development of wind power

The research concerning of the role of the legal system in the transformation of the energy system is continued at the University of Luleå. The aim of the next step is to analyse the legal implementation of wind power in Sweden on the basis of presumed path dependence.

Institutional path dependence means that decisions made in the past affect future choices. As the core of the formal institutional framework – the legal system – is characterised by a path dependence, implication is that changes are sometimes difficult to make. Since the planning and location of energy installations, such as windmills, typically involves application of legal rules that to various extents are coloured by path dependence, the transformation of the energy system may prove difficult. A more sustainable energy system thus depends e.g. on the design of the institutional framework and whether the law is promoting or counteracting the diffusion of renewable energy technology such as wind power. The aim of this work has been to analyse the legal implementation of wind power in Sweden on the basis of presumed path dependence. The work illustrates that the path dependence of the legal regimes affecting wind power development in some instances is significant and that policy implementation therefore may be seriously hampered. The purposes for which expropriation of land is possible in Sweden were for example founded in the early 20<sup>th</sup> century, a time in which very few thought of producing energy by harnessing wind. Although time has changed, the regulation remains and the rules are – if not hampering – at best neutral vis-à-vis wind power development. The resource management provisions under the Environmental Code also show clear signs of institutional path dependence; regardless of repeated criticism from e.g. the Council of Legislation regarding the rules applicability the system persists and continues to confuse both legal scholars and practitioners. The municipal planning monopoly and right of veto is another feature of the Swedish institutional framework that produces self-reinforcing sequences that are hard to breach. And without municipal consent, energy policy, and particularly wind power policy, is very difficult to implement. Although the institutional path dependence suggests a complex and complicated situation, the norms, expectations, traditions, customs etc. that constitute the social structure in which the law is embedded can change, and so can the law. A few recent court cases demonstrate that the law can in fact be applied in favour of wind power development even facing preservation interests. This may be a sign of a necessary change happening.

## Path dependence theory

The general idea of path dependency suggests that choices made in the past affects (constrain or expand) the subsequent range of possible or reasonable choices. A decision to take a left instead of a right turn at a crossroads might forever foreclose the possibility to explore what was down the road from the right turn. Not necessarily because the right turn option is no longer there, but because it would be too costly (time, gasoline etc.) to go back. The choice to take a left turn will thus to some extent control also were we go from there.

According to Hathaway (Hathaway 2003) three strands of path dependence theory can be identified: increasing returns path dependence, evolutionary path dependence and sequencing path dependence. Each of these three strands has implications for the course and development of the legal system.

The term self-reinforcing sequence is used by Mahony to describe the type of path dependence where an institutional pattern is produced by increasing returns (utility or benefit) and states that: “With increasing returns, an institutional pattern – once adopted – delivers increasing benefits with its continued adoption, and thus over time it becomes more and more difficult to transform the pattern or select previously available options” (Mahony 2000, p. 508).

Pierson argues that the general notion of path dependence, defined as the casual pathway by which decisions affect future choices, should be limited to “positive feedback”, or self-reinforcement, since it implies that with time the relative benefits – the increasing returns – of maintaining some feature of the system increases.

Hathaway, O.A. (2003). “Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System”

Mahony, J. (2000). “Path dependence in historical sociology”

Pierson, P. (2000). “Increasing Returns, Path Dependence,



*For further information:*

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