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Abordagem dos Direitos Humanos na Aplicação da Legislação Ambiental com base na Lei nº 23/2009

Human Rights Approach in Environment Law Enforcement based on Law Number 23/2009

Enfoque de derechos humanos en la aplicación de la ley medioambiental basado en la Ley número 23/2009

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Resumo

O indivíduo tem os mesmos direitos de ter vida de prosperidade, incluindo o direito de ter uma vida saudável. Nesta pesquisa, o objetivo do estudo é discutir sobre a aplicação da legislação ambiental com base na Lei número 32 de 2009 sobre Proteção e Gestão Ambiental baseada em direitos humanos. Usando os resultados encontrados que a punição administrativa é uma maneira rápida e apropriada para parar a violação no ambiente. É devido a punição é dada sem passar por processamento judicial. A punição administrativa é referida à violação não à pessoa. Além disso, a imposição de punição administrativa não se destina a punir o infrator, mas é mais preocupação para a recuperação da situação (reparatoir).

Palavras-chave: punição administrativa; lei ambiental; direitos humanos; direito legal

Abstract

Individual has the same rights to have prosperity life including the right to have healthy life. In this research, the objective of the study is to discuss about the enforcement of environmental law based on Law Number 32 of 2009 about Environmental Protection and Management based on a human rights. Using The results found that the administrative punishment is a quick way and appropriate to stop the violation in environment. It is due to the punishment is given without going through court processing. Administrative punishment is referred to the violation not to the person. In addition, imposition of administrative

punishment is not aimed to punish the violator, but it is more concern to the recovery the situation (reparatoir).

Keywords: administrative punishment; environment law; human rights; legal right

Resumen

El individuo tiene los mismos derechos a tener una vida de prosperidad, incluido el derecho a tener una vida saludable. En esta investigación, el objetivo del estudio es discutir sobre la aplicación de la ley ambiental basada en la Ley Número 32 de 2009 sobre Protección y Gestión Ambiental basada en los derechos humanos. Uso Los resultados encontraron que el castigo administrativo es una forma rápida y apropiada para detener la violación en el medio ambiente. Se debe a que el castigo se da sin pasar por el proceso judicial. El castigo administrativo se refiere a la violación, no a la persona. Además, la imposición de castigos administrativos no tiene como objetivo castigar al infractor, sino que preocupa más a la recuperación de la situación (reparatoir).

Palabras clave: castigo administrativo; derecho ambiental; derechos humanos; derecho legal

1. Introduction

The right of individual to have prosperity life is dealing with the human right, including the right to have healthy life. The idea of "three generations of human rights" is proposed by Karel Vasak as France Law Expert (cited in Lubis, 2009) including are:

1. The first generation from civil rights and politics (liberte);
2. The second generation from social and culture rights (egalite)
3. The third generation from solidarity rights (fraternite)

The third generation is interconnecting and re-conceptualizes the value demands which relates to the previous human rights generation. There are six of human rights that are being accused, namely:

1. The right of self-determination in politic, economy, social, and culture;
2. The right of economic and social establishment;
3. The right to participate and use "heritage of mankind" (earth-space resources, information and scientific, technical and other advances; as well as traditions, locations and cultural monuments;
4. The right of peace;

5. The right of healthy and balance environmental life;
6. The right of natural disasters support (Lubis, 1993).

These human rights are put into Universal Declaration of Human Rights especially about life level which regulates in Article 25 as, "each individual has right to live healthy and in good conditions for him/her own self including food, clothes, home, and health care and social business, and so forth" (Baut et al., 1988).

The regulation of live level is also dealing with the right to live healthy especially in environment. This condition is explained in more details in International Covenant Economy, Social and Culture 1996, Part III, Article 11:

1. The participant country of this agreement is acknowledged the right of individual for an adequate standard of life including food, clothes, and house and continues condition improvement and so forth.

Part III, Article 12:

1. The participant country of this agreement is acknowledged that the right of each individual to enjoy the high standard of physical and spiritual health, and so forth.
2. The provisions in International Covenant Economy, Social and Culture 1996 is put in details into Law Number 39 of 1999 about Human Rights in the Article 3 and 5.

Article 3 Verse (1): Everyone is born free with the same dignity and equality, also blessed and conscience to live in a society, nation, in the spirit of brotherhood.

Verse (2): Everyone has right for acknowledgement, guarantee, protection, fair legal treatment and legal certainty in rule of law.

Verse (3): Everyone has right for human rights protection and freedom without discrimination.

Article 5 Verse (1) Everyone is acknowledged as individual that have right to accuses, get treatment, and same protection based on human dignity in the rule of law.

The definition of rights is not defined properly, yet the core of right itself is a demand (claim) and its relation to law. In this case, Louis Henkin in his wrting entitled The Rights of Man Today, stated:

> *"...human rights are claims asserted recognized "as of right", not claim upon love, or grace, or brotherhood or charity : one does not have to earn or deserve them. They are not merely aspirations or moral assertions but, increasingly, legal claims under some applicable law."* (Hadjon, 2007).

In the further development, there is also a new term namely fundamental rights, including legal rights and moral rights. Certain rights can be defined fundamentally not because of its constitutional characteristics (Hadjon, 2007), it means that it places in the constitution or basic rules. According D. L. Perrot in his writing, *The Logic of Fundamental Rights* stated:

....nevertheless these rights are legally basic in the sence that their existence and content of many other lesser legal rights of system. (Brigde, 1973).

Maurice Cranston also divides the two rights into legal rights and moral rights:

a. *General positive legal rights* is right that applied by everyone provided by constitution and enforced by the court.
b. *Traditional legal rights,* is the pure rights of society which is changed and abolished by a regime.
c. *Nominal legal rights,* is proposed by democratic country and put into Constitution in a form of freedom to move, speak and gather, in fact the authorities emphasized citizens to conduct these rights.

These rights are merely formalism on papers, hence it cannot including into a country which has, respect and protect by positive legal rights.

d. *Positive legal rights of specific classes of persons*, special rights for certain people and is exclusive including doctor, lawyer, religionist, politician, statesman, Indonesian armed forces and others.

   These rights are dealing with special task from these certain groups, hence it has privileges characteristic.
e. The positives legal Rights of a single person is a right provided based on status or position in which the person is special such as Presiden, King, Prime Minister and so forth (Cranston, 1983).

Meanwhile, *moral rights* are right arranged in oppose including:

a. *The moral Rights of one person only,* is a set of moral rights which is appeared from facts due to position, task, profession of an individual. These rights can be juridical or moral. In addition, it should be aware that moral rights must not be respect or understood by all people, since the enclosed characteristic.
b. *The moral Rights of specific groups of people* is a set of rights owned by a group due to his/her certain roles. The right of parents to children, baby caregivers for their care baby. The moral rights are not provided by positive law, but it developed from moral principal or nature.

c. *The moral Rights of all people in all situation.* In this kind of rights, the truth human rights are in the position in which the right is for all people it has no concern on the position, status, wealthy of individual. Human rights are owned by human cause we are human (Cranston, 1983).

James W.Nickel explain in detail several elements including:

1. Each of rights identifies a party as owner. The term of ownership or condition of possessions are rights which may limited enough to be treated by one person (an example of the right of someone who is called by his favorite name) or wide enough to cover all humanity.
2. The rights which are relating to a freedom or luckiness. A right as luckiness such as accepting wages in an employment contract. Meanwhile, right as freedom such as constitutional right to speak up.
3. A right is set fully to identify a party or parties who should be participated in providing a freedom. These parties are responsible person. In this case, people can claim toward certain parties.
4. The weight of a right has to do with the question of whether a right can sometimes be defeated by other considerations and cases of conflict. Facie prima right is defined as not absolute right which is facing some considerations. These rights weight is not determined fully. Further, mentioning a prima face does mean that stating the right truth, rather it is more confirming that the right is true right which sometimes can be defeated by other considerations (Cranston,1983).

In manifesting these rights is needed intervention from government which manifests the law state modern. The law country modern here can be defined as the mixing between law state concept and welfare state. The law state is a state which place law as a high base in the administration of the State or government. Meanwhile, the welfare state concept is placing the state role not merely limited in orderliness caretaker as like in Nachtwakerstaat concept but the state is also involving in the whole aspects of public life to manifest the society welfare.

Thus, regarding to the explanation above, the researcher's objective in this article is to discuss the way environmental law enforcement based on Law Number 32 of 2009 about Environmental Protection and Management based on a human rights approach.

2. Methodology

This study used descriptive qualitative methodology using normative approach. Descriptive qualitative methodology used to discuss the environmental law enforcement on human right. Normative approach used to analyze the effectiveness of Law Regulation. Hence, the data were taken from Law Regulation Number 32 year 2009 and the other related law regulation and regulation based on the human right.

3. Discussion

3.1 Environmental Law Enforcement

The regulation of Environmental Controlling has been started from 1982 with the appearance of Law Number 4 about Living Environment (UULH). Then, it is amendment with Law Regulation Number 23 of 1987 about Living Environment Controlling and Law Regulation Number 32 of 2009 about Protection and Management of the Environment. However, the existence of these laws does not give any impacts on the offender. It is a common view in which there are a lot of offenders of environmental pollution especially cause by the industrial waste.

This is also often to be happened that each of offender has reprimanded in writing by the Environmental Impact Management Agency, yet the effort to repair and control the waste is not even change. Thus, it is necessary to have a shared understanding between waste producers as polluters and law enforcement officers who have been given the authority to enforce environmental law. Efforts should be made to increase capacity to law enforcement officers. In addition, it also needs understanding of environmental polluters and high awareness of them is expected.

Several efforts has been performed for the sake of law upholding especially Law number 32 of 2009 about Protection and Management of Environment as well as the implementation of these regulation. It is hoped that these regulation can create clean and healthy environment which is to be the individual rights to enjoy.

Law must be enforced to perform effectiveness which is dealing with law awareness. Lawrence M. Friedmann stated that the law awareness of the law enforcers will be influenced toward law effectiveness (Zuckerbrot, 2018).

The factors which influence law enforcement are (Soekanto, 1983):

1. The law factors themselves

2. The law enforcement factors including the parties who form or implement the laws.
3. Facilities and mediums factors
4. Society factors, including the environment in which the law applicable
5. Cultural factors, as a result of the work of copyright and a sense that is based on human intention in the life association.

Abdoel Gani is also stated law factors as follow:

Every legal regulation needed and or imposed on the social members is advised if the regulation stated to fulfill several conditions. These requirements are required since people want to get a guarantee that the legal regulations will be adhered to by the community, so that it does not cause many difficulties in its enforcement.

3.2 Supervision and Application of Punishments

In the making of such law regulation, it is needed to fulfill several requirements so that the regulation can be implemented. Van der Vlies convey several general principles of well regulation, namely:

1. The principle of clear purpose
2. The principle of right institution
3. The principle of regulation necessary
4. The principle that regulation can be implemented
5. The principle of consensus
6. The principle of clear terminology
7. The principle that legislation is easily recognizable
8. The principle of similarity
9. The principle of legal certainty
10. The principle of legal implementation based on individual circumstances
11. The principle of respecting reasonable expectations.

Besides Van der Vlies, CG Howards and RS Mumner also convey several requirements so that law can be more effective, including:

1. Must be well designed
2. Prohibit but not dictated
3. The punishments should be in line with the violated law
4. The burden of punishment should not be overload
5. The possibility of observing, and investigating acts which violates the law.

6. The law which contains of moral prohibition is more effective than law that in line with moral values
7. The law enforcer should do its own job well.

As a guideline, there is also Law Number 12 of 2011 concerning Establishment of Legislation. In establishing legislation must be based on the principle of the formation of good legislation which includes:

a. The clarity of purpose: every formation of legislation must have clear objectives to be achieved
b. The appropriate of such organization or institution: every regulation must be made by an authorized institution or official who forms legislation. The legislation can be canceled or null and void by law, if it is made by an unauthorized institution / official.
c. The conformity between its kind and material: the making of regulation should be concerned on the appropriate content materials with the kind of regulation
d. It can be implemented: every formation of law regulation should be measured the affectivity if it is implemented in public philosophically, juridical, and sociologically.
e. The usefulness: every regulation made because it is needed and useful in controlling the life society, nation and state.
f. The clarity of formula: every regulation must meet the technical requirements for the preparation of legislation, systematics, choice of words or terminology, and its legal language is clear and easy to understand, hence it will not cause various kinds of interpretations in its implementation.
g. The openness: in the process of regulation implementation start from planning, preparation, organization, and discussion should be transparent and open. Therefore, all level of society have chance to provide advice in the regulation making process.

Afterward, the content materials of regulation should be consisted of several principles:

a. Protection: each material contained in the legislation must function to provide protection in order to create public tranquility.
b. Humanity: each material contained in the legislation must reflect the protection and respect on the human rights of every Indonesia citizen.
c. Nationality: each material contained in the legislation must reflect characteristic of Indonesia society which is pluralistic by keeping the principal of Indonesia.
d. Family: each material contained in the legislation must reflect deliberation to reach consensus in every decision making.

e. Archipelago: each material contained in the legislation must pay attention to the importance of Indonesian society and is the part of law system based on Pancasila.
f. Unity in Diversity: each material contained in the legislation must pay attention to the diversity of population, religion, ethnicity and class, specific conditions of the region and culture, especially those concerning sensitive issues in the life of the community, nation and state
g. Fairness: each material contained in the legislation must reflect fairness proportionally for every Indonesian society without exception.
h. Equal position in law and government: each material contained in the legislation must not contain of things that make different based on background including religion, race, ethnic, gender, and social status.
i. Legal order and certainty: each material contained in the legislation must cause legal order in society through the guarantee of legal certainty.
j. Balance and harmony: each material contained in the legislation must reflect balance and harmony between individual, society, and national concern.

After the requirements of making a good constitution, hence it is needed to control and provide administrative punishments. The control is regulated in Article 71 Law Number 32 of 2009 about protection and management of living environment. Ministers, governors, and regent are having authorized to control in delegating officials/technical institutions which responsible in the field of protection and living environment management.

The environment controller officials has authorized as follow:

a. Monitoring
b. Request information
c. Copy from documents and or make necessary note
d. Enter to certain place
e. Photograph
f. Record audio visual
g. Get sample
h. Check the installations and or transportations
i. Stop certain customers

In implementing its task, the controller officials of living environment can coordinate with the civil servant investigating officers.

From the explanation above, punishment can be defined as importance part and place in the closing section from law constitution. The definition of punishment in the administrative law is power tool which has public law characteristic used by government as reaction toward non-compliance on law administration norms.

Thus, from the definition, it can be drawn the elements as follow:

- Power tool (matchsmiddelen)
- Public law characteristic (publiekrechterlijke)
- Use by government (overheid)
- As reaction toward non-compliance (reactie op niet-naleving)

Meanwhile, some of punishments can be described as follow:

a. Administrative punishment including government compulsion (bestuursdwang); revocation of favorable decisions; forced money (dwangsom); administrative fine (administratieve boete)
b. Criminal punishment

The functions of administrative punishment are:

- Refer to the action (to stop the violation)
- Reparatoir characteristic (restore its original state)

Furthermore, talking about bestuursdwang, it is can be defined as coercion of the government, namely the authority of the state administration in situations where there is a violation of administrative legal norms to end the situation by taking a concrete action. The existence of illegal act causes encouragement for the administration of government to react on condition due to the violation. The reaction is aimed to create public order. If it is compared with criminal law, administrative punishment are primarily oriented directly to actions that can prevent the objectives achievement, meanwhile criminal punishment focus more on the preparatory.

Bestuursdwang is not an obligatory to be implemented but a free authority (vrijevoegheid). In implementing the authority, the state administration is provided a freedom to choose whether using the authority or not.

Notwithstanding, the implementation of bestuursdwang can be conducted directly, but bestuursdwang should be preceded by warning. The warning must following some requirements such as:

a. clear description of facts or actions that violate certain legal rules
b. clear designation of which law is violated
c. consideration on the reason of forced administration needs to be done
d. a clear description of what should be done so that the administration is not carried out
e. the term of the order must be done

f. addressed directly to those who did
g. estimated costs if forced to administer

Article 76 Law Number 32 of 2009 about Living Environment Protection and Management has established administrative punishment including:

a. written warning
b. government coercion
c. freezing of environmental permits
d. environmental permit revocation

The revocation of environment permission is performed if the person in charge and or the activity do not conducting government coercion.

The government coercion can be in form such follow:

a. Temporary suspension of production activities
b. Transfer of production facilities
c. Coverage of sewage or emission drains
d. Demolition
e. Confiscation of goods or tools that have the potential to cause violations
f. Termination of all activities or
g. Other actions aimed at stopping violations and actions to restore environmental functions

The government coercion can be given without warning if the violation can cause:

a. Serious threatening for human and environment
b. The greater and wider impact if the pollution and / or destruction is not immediately stopped and / or
c. Greater losses to the environment if the pollution and / or destruction are not immediately stopped.

Every person in charge of the activity who does not conduct government coercion can be subjected to pay fine for the late of punishment implementation of government coercion.

4. Final Considerations

The administrative punishment is a quick way and appropriate to stop the violation. It is due to the punishment is given without going through court processing. The imposition of administrative punishment can directly performed by the state administration institution. The administrative punishment has direct role to stop violation. Besides that, administrative

punishment is referred to the violation not to the person. In addition, imposition of administrative punishment is not aimed to punish the violator, but it is more concern to the recovery the situation (reparatoir). However, the administrative punishment can be obtained with other punishment as like criminal punishment. Meanwhile, kinds of administrative punishment are:

- bestuursdwang (government coercion) or called as administrative enforcement, executive coercion
- the withdrawal advantageous decision
- forced money (dwangsom)
- administrative fine

5. Suggestion

Environmental protection and management begins with the initial step by socialization. Besides the dissemination of regulations on the environment, supervision and punishment must be more enforced in the hope that it can raise the awareness of employers (industry parties) to comply with the law and the general public to participate in obtaining their rights to good environmental conditions.

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