Indonesia's Environmental Law of 2009 and its administrative coercion provisions; A conceptual misunderstanding with large practical implications?

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When Indonesian environmental agencies are confronted with violations of the environmental law by industries, they often respond either by attempting to prosecute a violator criminally or by facilitating mediation between (alleged) violators and 'victims' of the environmental violation. Both approaches are hoped to lead to better compliance with environmental standards. Frequently however, appropriate redress for the environmental problem is not achieved and environmental standards continue to be violated.[2]

From a legal theoretical point of view it might not come as a surprise that (attempts) to criminally prosecute and mediate do not lead to a remedy for the environmental problems. After all, criminal sanctions primarily have a punitive character and indirectly might have a deterrence effect. However, they do not allow to directly halt a violation.[3] For example, imprisoning the director of a company does not guarantee that the committed violation is stopped, let alone that it stopped immediately after the violation is discovered. The criminal process often takes quite a long period of time.

When it comes to mediation, the agreed outcome between a violator and the affected citizens is also not necessarily aimed at improving environmental behaviour. The private parties involved might agree upon (almost) anything they want in order to settle their conflict. In Indonesian practice this often results in agreements on more job opportunities for affected citizens or other financial or benefits while the environmental violations might very well continue.[4]

On the contrary, the primary goal of administrative sanctioning is – in theory- to stop a violation from occurring as soon as possible. The responsible executive government body is given the authority to use these sanctions as 'tools' to be able to quickly take concrete actions itself and swiftly restore the situation to one in which no violation occurs. In the case of environmental violations this could mean closing an outlet that releases wastewater, or other measures that might interfere with the production process. The government body is given such strong powers in order to protect the general interests of its citizens.[5]

In Indonesia however, environmental agencies as being the government bodies that in principle are responsible for safeguarding the environmental interests of its citizens, seldom use

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[2] This paper is partially based on fieldwork conducted by the author. She observed the daily practices of the enforcement department of the environmental agency of the province of West Java during two months and conducted similar research at the agencies in East Java and North Maluku during several weeks. The paper is furthermore draws on an analysis of the Environmental Management Act of 2009 (Undang-undag 32/2009).

[3] See e.g. *Materieel Strafrecht (derde druk),* J. De Hullu (2006). Kluwer, Deventer.

[4] See e.g. 'Seeking Environmental Justice in North Maluku - How Transformed Injustices and Big Interests Get in the Way', d'Hondt, L. (2010). Law, Social Justice & Global Development Journal (LGD) 2010/1.

[5] See e.g. *Beginselen van de democratische rechtsstaat*, M.C. Burkens and H.R. B.M. Kummeling (2006), Kluwer, and *Algemeen bestuursrecht: een inleiding,* F.A.M. Stroink and R.J.N. Schlössels (2000), Tjeenk Willink, Zwolle.

administrative sanctioning to the fullest of its possibilities. Although warnings are quite often given, other administrative sanctions are hardly ever imposed. There are many reasons for this limited use. The economic importance of Industries that violate environmental standards is often so great that taking measures that interfere with the production process –as could be the case when for example administrative coercion would be imposed- is likely to lead to political resistance as well as protests by workers and others who are dependent on the industries directly for their income. Furthermore, administrative sanctioning is generally considered as a weak response to violations. Criminal sanctioning is regarded to offer a much tougher response.

When analysing the legal provisions on administrative sanctions in the Environmental Management Act of 2009, it is not so surprising that administrative sanctions are considered weak. In this paper we focus on these legal provisions, in particular on those concerning administrative coercion. We compare the Indonesian concepts of administrative coercion with concepts as understood in the Netherlands and conclude they differ in some substantial manners.

We discuss the most classic form of regulation which is 'command and control' regulation that is conducted by the government, and then take a small detour by exploring administrative sanctions in the form of administrative coercion and the daily fine. We continue by returning some of the main ideas underlying 'command and control' regulation, namely the position of the government regarding protecting general interests of society and the precondition that the government has to be accountable for its actions (or its failure to take action). Finally the paper focuses on a vital precondition to be able to hold the government accountable, that is a clear division of responsibility and authority.

The paper concludes that from a legal theoretical perspective the formulation of the provisions on administrative coercion in the Indonesian environmental law are quite problematic and in practice leave quite some room for confusion regarding the authority and responsibility of the government to swiftly halt violations. Reevaluating the basic concepts that underpin government responses to environmental violations would be beneficial to become more effective in dealing with violations of the environmental law in Indonesia.

Comparing concepts of administrative coercion in Indonesia and the Netherlands

'Setiap penanggung jawab usaha dan/atau kegiatan yang tidak melaksanakan paksaan pemerintah dapat dikenai denda atas setiap keterlambatan pelaksanaan sanksi paksaan pemerintah'.

' Anyone carrying responsibility for a business and / or activities who does not implement administrative coercion can be fined for delaying the implementation of the administrative coercive sanction'.

(article 81, Environmental Management Act (EMA) 2009, (*Undang-Undang 32/2009*)

In the eyes of a lawyer trained in the Netherlands, this article on the administrative fine in the Indonesian Environmental Management Act (EMA) seems quite incoherent. Not so much because of what is stated about the fine, but rather because of what is inexplicitly said about administrative coercion. Unlike in the Netherlands, where administrative coercion refers to concrete actions undertaken exclusively by the government to halt a violation,[6] in Indonesia administrative coercion

[6] Article 5:21 Algemene wet bestuursrecht (General Administrative Law Act) of the Netherlands

apparently can also be executed by the violator, such as the company, and is not an authority exclusively bestowed upon the government. This article reflects or perhaps to some extent causes the hesitant attitude of the government to take concrete measures and limited use of the administrative powers that they have been provided with to protect general environmental interests.

To examine the implications of the Indonesian concept of administrative coercion further, we start by briefly looking at some basic conceptions of administrative sanctioning as commonly understood in the Netherlands, as well as in other parts of the world. We look at the term 'command and control' as the classic form of regulation that is entirely based on the administrative law framework and fully depends on the government.

' Command and control'

A term often associated with the administrative framework for regulation, also regarding environmental regulation is 'command and control'. It refers to the classic form of regulation in which the government is solely responsible and authorized for the norm setting, monitoring and law enforcement.

The government 'commands' by setting the norms and associated standards for behaviour. It does so by either making general regulations that concern all actors that have certain characteristics and therefore to whom the regulation is applicable, or by giving out individual licenses. Licenses allow specifying the norms, standards and requirements in individual cases.

Furthermore, the responsible government body is authorized to 'control', meaning it has to ensure that the subjects under its authority comply with these norms and standards. It does so by monitoring the performance of these subjects, and if they are not in compliance, the government has the authority to take measures in the form of imposing administrative sanctions to create a situation in which the law is no longer being violated.

Enforcing the administrative law by means of imposing administrative sanctions is relatively easy in comparison with criminal and private law enforcement. Unlike the latter two, administrative law enforcement does not require a court decision. Based on the information the government body has gathered through its monitoring, it may decide to impose an administrative sanction. Administrative sanctions can have very large consequences because in the case of environmental violations by industries, it might interfere with the production process. In particular administrative coercion can have severe consequences. The government itself takes measures to reach the goal of restoring the situation to one of compliance and it may do this immediately. In the case of environmental violations this could mean closing an outlet that releases wastewater, repairing an installation (and later send the bill to the violator) or taken other measures necessary to stop the violation. It is important to note that because the government is given such strong powers, their actions are, or at least should be, subject to strict requirements to prevent misuse of the government of these powers.

Keeping in mind that administrative sanctions can have such serious consequences, it is remarkable that in Indonesia administrative sanctioning is often considered to be a weak form of sanctioning. This is however not so surprising when we think back of article 81 and consider other provisions on administrative sanctions in the EMA. The Indonesian environmental law of 2009 acknowledges four types of administrative sanctions: the warning, administrative coercion, freezing

of the license and revocation of the license.[7] These are considered to be incremental regarding their rigorousness; the warning is the lightest sanction, revocation of the license the heaviest. In practice, when the government decides it wants to impose an administrative sanction, it writes a warning letter. If the violator does not improve its behaviour, this may be repeated another two times. Unlike what would happen in the Netherlands, the Indonesian environmental agency may then write another letter that states administrative coercion is applied. However, this letter does not accompany any concrete actions by the government to halt the violation. The letter in itself is considered to be the administrative coercion. This is fully in line with article 81 that suggests that the violator must implement the administrative coercion. This is a major difference with how administrative coercion is understood in the Netherlands, where administrative coercion refers to concrete actions to halt a violation.

In Indonesia, when the violator still does not take measures itself after it received the 'administrative coercion' letter, the government body concludes that the administrative law framework has been ineffective and the case needs to be dealt with within the criminal law framework, which in principle is the *ultimum remedium*.[8] In many cases it appears that officials even consider imposing the weak administrative sanctions as an inconvenient barrier before they can proceed with the criminal prosecution. The fact that many officials do not consider that administrative coercion means that the government will take concrete measures explains why administrative sanctions are considered a weak response to violations.

Administrative coercion (*bestuursdwang*) and daily fine (*dwangsom*)

In the Netherlands, the government body may, instead of imposing administrative coercion (*bestuursdwang*), impose a daily fine (*dwangsom*). This latter entails that for a each certain period of time, for example a day or week, that a violation continues, a fine is imposed. The amount of the fine adds up until there is a situation of compliance and thereby mount up to a considerable amount of money. The daily fine is intended to stimulate the violator to itself take measures to end the violation as soon as possible.

The goal of administrative coercion and the daily fine is similar; halting the violation as soon as possible. Therefore, in the Netherlands, administrative coercion and the daily fines are alternatives for one another. The government is not allowed to impose both types of sanctions at the same time but must choose which sanction it finds most appropriate in a certain case. In practice imposing a daily fine is often easier then applying administrative coercion. After all, the daily fine only requires that the government continuously monitors whether a situation of compliance is already achieved. The government does not have to undertake the often very complicated concrete actions that are required for administrative coercion.[9]

In Indonesia, the environmental law does not appear to allow for a sanction in the form of a daily fine. When we again take a look at article 81, we see that the fine is not an alternative for administrative coercion, but it can be imposed only after the administrative coercion has been imposed. This in itself is remarkable because imposing administrative coercion, meaning that the government itself takes concrete action to reach a situation of compliance, should imply that the law

[7] Article 78, EMA 2009

[8] EMA 2009, Elucidation, General, point 6, (Undang-undang 32/2009, Penjelasan, umum 6)

[9] See e.g. *Milieurecht (zesde druk),* Ch.W. Backers, P.C. Gilhuis, N.S.J. Koeman (eds) (2006), Kluwer. p. 272 e.v., 398.

is already no longer being violated. However, considering that in Indonesia administrative coercion does not necessarily refer to concrete government action, this makes sense to some extent, although since a daily fine is a sanction that can be imposed rather easily, it is regrettable the EMA does not provide for such a sanction.

Protection of general interests and accountability

After having discussed some of the main characteristics of the administrative framework for regulation, we now will pay attention to what can be expected of the government with regard to the classic 'command and control' approach to regulation. In particular in Indonesia, it appears that the government rather randomly decides which monitoring activities it employs and how they follow up on cases where allegedly violations occur. A clear policy on proceedings is often lacking and practices differ considerably at different environmental agencies. Thereby it is hard to know what can be expected of the government with respect to what extent it will protect the general environmental interests of its citizens.

The philosophy behind the 'command and control' approach towards regulation is that the government is just given authority to protect the general interests as laid down in regulations. It has the responsibility and therefore the obligation to execute the task bestowed upon it to ensure that laws are not being violated. At the same time, in recent decades the 'command and control' approach has received substantial critique because of the growing awareness that the government has too little capacity to conduct all the required norm setting, monitoring and enforcement tasks.

Nevertheless, although it has been widely acknowledged that the government might not be able to fully safeguard compliance by all subject under its authority, at least in the Netherlands it is commonly understood that when a government body does not execute the task given to it by society, it must be able to account for this. Executive bodies usually have discretionary power, meaning they have room to decide if, when and how they will respond in certain cases. However, policy that clearly states the guidelines regarding if and how the executive body undertakes certain action (or not) must underlie the decisions and actions of the government. The policy may for example state that priority is given to monitoring a certain type of industries (and thereby other kinds of industries are subject to less intensive monitoring) or certain protocols might provide details on how the government will respond in cases with particular characteristics. The reason to have clear policies on these matters is to prevent the government from behaving randomly and unpredictable. If these policies are lacking it become difficult to create transparency on the choices of the government regarding its actions. Thereby chances for inconsistent government behaviour and corruption increase because it is hard to hold the government accountable.

In the Netherlands, the responsible government body is to be held accountable for its performance. The head of the government body or the political leader under which the government body functions, or example a minister, is politically accountable for what the government body does or does not do. When he or she is not able to justify the government body's behaviour it can expect to be confronted with this by parliament who might demand an explanation, as well as by voters who in the next election might prefer to give their vote to another candidate. In some cases the government is even held financially accountable when damage occurs as a result of insufficient performance by the responsible government body that thereby executed its task of protecting the general interests of society inadequately. This creates an important incentive for the government to execute its tasks as good as possible and be transparent in its decisions and actions.

Division of authority, a precondition for accountability

This brings us to an important precondition to ensure that the administrative law scheme for command and control regulations functions well, meaning that licenses are given out correctly, monitoring is sufficient and appropriate measures are taken in the case of violations. This precondition is a clear division of authority. It serves not only to create an efficient division of tasks that the government as a whole is to carry out and prevent that more government bodies invest time and energy in doing the same job. It also allows holding a government body accountable when it does not properly execute its tasks. When more government bodies are or may be responsible and thereby accountable for the same particular case, this creates the possibility for a government body to escape from the responsibility to protect the citizens' general interests that it is to safeguard. After all, it becomes easy to blame another government body for the insufficient government performance, or adequate handling on a concrete case might be obstructed by meetings or disagreements on how to handle a particular case.

In Indonesia, the issue of division of authority regarding environmental matters has been problematic since the first environmental law was enacted in the early 1980s. At that time Indonesia had a highly centralized government structure. Problems occurred due to the overlapping and conflicting regulations that were spread out over various sectors involved, such as the departments of mining and forestry. The ministry of environment then had no executing powers and was to coordinate the efforts of the other sectors. Although today the ministry and environmental agencies at lower administrative levels have more administrative powers, sectoral incoherency and conflicting interests still are problematic.[10] However, since the government structure became decentralized, more unclarity arose regarding which administrative level is responsible and authorized in a certain case. In particular in cases of transboundary environmental impact, and the transfer of authority due to second line enforcement in practice leads to unclear responsibilities and authorities between the various administrative bodies. Remarkably, many officials do not seem to perceive this as a problem. They seem to prefer to deal with cases in which violations take place by involving as many government bodies as possible to be able to put pressure on a violator to change its behaviour. Despite the rather far-reaching decentralisation process, involving bodies of a higher administrative level - such as the province (when in fact it is a case to be dealt with at district level) and the ministry - is a popular way to handle cases. Apparently the old hierarchic structures are still very present in today's Indonesia. One can imagine that not only does this lead to an enormous burden on the higher levels of government, one could even argue that the dependence on these higher levels makes the lower levels less active to themselves take responsibility. After all, they are not likely to be held accountable if they fail their task. Taken the situation in which many government bodies are involved and it remains unclear which of these carries the final responsibility makes it for the Indonesian citizens difficult to know which government body they can expect to protect their interests and hold it accountable when it fails its task.

[10] 'Decentralized environmental management' N. Niessen (2006). In: *Environmental Law in Development; Lessons from the Indonesian Experience* (eds. M. Faure and N. Niessen). Edward Elgard Publishing. 'Consequenses of Decentralization: Environmental Impact Assessment and Water Pollution Control in Indonesia' A. Bedner (2009), Law and Policy, vol. 32, issue 1, January 2010, p 38-60.

Conclusion: Back to conceptual basics

The approaches frequently chosen by environmental agencies to respond to violations, namely facilitating mediation or attempting to criminally prosecute a violator, often do not lead to the halting of the violation. From a legal theoretical view this is not surprising since criminal sanctioning and the agreed outcome of mediation are not primarily aimed at halting a violation. Imposing administrative sanctioning is primarily aimed at this goal but is seldom used to the fullest of its potential by Indonesia's environmental agencies.

The paper concludes that one of the reasons for this is that the formulation of the provisions on administrative coercion. The interpretation of the concept not only differs considerably from the concept of administrative coercion as understood in the Netherlands. It leaves quite some room for confusion on what authorities the government has and should use to swiftly halt violations. Furthermore, the fact that the law does not provide for a daily fine seems a missed opportunity to be able to more effectively deal with violations.

The paper finally concludes that for the administrative law framework to function well, the responsible government bodies should be accountable when they fail their task of protecting general environmental interests. Accountability should function as an incentive for the government to set norms properly, monitor sufficiently and take adequate measures to halt violations. A clear division of responsibility, and the authority given to the responsible government body to be able to execute its tasks, is a vital precondition to be able to hold a particular government body accountable. Steps towards such a clearer division are urgently required in Indonesia.

Returning to the basic conceptions and philosophies behind different types of responses might help to evaluate and discuss what in fact are or could be more effective approaches to violations of the environmental law in Indonesia.

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