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Legal Protection "Substantive Rights for Environmental Quality" on Environmental Law Against Human Rights in the Constitution in Indonesia

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ABSTRACT--Environmental law is a field of law called functional law, which is a field of law that contains the provisions of state administrative law. Because if we look at the third, both UULH 1982, UULH 1997 and UUPPLH 2009, contain norms of laws that fall into the field of state administrative law. Therefore, in all aspects, environmental law will always intersect with basic human rights, both administratively. Rights and problems are a problem that is almost a hot topic that is discussed all the time, how not, because the issue of rights is a problem that directly affects the identity of human beings as rights holders. Meanwhile efforts to uphold and recognize human rights continue to be endeavored to guarantee the protection and recognition contained in various constitutions, both in international and national (Indonesian) regulations. Included in the effort to accommodate the rights to the environment and the rights of the environment itself. For the size of Indonesia, 3 (three) environmental laws have evolved that try to raise the norms of individual rights and social rights into the formulation of their articles, either by adopting (ratifying) the results of international meetings or by exploring for themselves environmental awareness of the community, or sometimes through jurisprudence. Apart from the existence of these efforts, in reality still at the level of implementation, sometimes there are still rights that are violated (including environmental rights), especially regarding community rights.

Keywords: legal protection, substantive right, human rights environmental law

I. INTRODUCTION

The right to life as the most natural right can never be achieved unless all basic rights that are needed when humans live such as "the right to work, eat, house, health, education, and culture" can be fulfilled (adequately) and available (available)) for everyone. In line with this fundamental objective, an international human rights instrument was formed to provide protection to individuals or groups about economic, social and cultural rights as set out in CESCR 1966. The International Covenant on Economical and Social Rights (hereinafter abbreviated to CESCR) was compiled and agreed as part of the International Human Rights Law (The International Bill of Rights) with the intention is to protect human rights so that humans can live as fully, free, secure, protected and healthy people. The CESCR broadly recognizes the right to work, the right to education, the right to a decent life, the right to a healthy environment, the right to cultural development, etc.

Precisely on October 3, 2009 through the Ministry of Law and Human Rights Act No.32 of 2009 concerning Protection and Management of the Environment. This Law is considered as a refinement and complement to the existing Law, No. 23 of 1997 concerning environmental management. Furthermore, Law No. 32 of 2009 becomes a new hope for environmental sustainability. The strengthening and idealism of the new law is seen by some as a breakthrough that is very philosophically based and not too excessive especially political, even more so that this law is an incarnation of the constitutional guarantee given by the 1945 Constitution (amendment).

One classic problem that is trying to be "recycled" in this new law concerns the rights inherent both to humans as individuals and as a social community, as well as environmental rights themselves. In the 1945 Basic Law Article 28 paragraph (1) states that every person has the right to live in prosperity physically and mentally, to live and to get a good and healthy environment and to have health services. The mandate of the 1945 Law clearly views that the need for a healthy environment is a human right. The state is obliged to provide protection and guarantee a healthy environment, therefore the state must have strong authority in managing and protecting the environment. The constitutional basis clearly inspires (requires) how the state needs to make complex rules oriented far ahead.

Given the importance of this problem, it can be seen that in addition to Indonesia,

constitutional rights and obligations related to the environment are also contained in various constitutions of the countries of the world, for example South Africa (1996), Angola (1992), Armenia (1995), Netherlands (1983), Bhutan (2008), Brazil (1988), Chile (1980), Ecuador (2008), Philippines (1987), Ghana (1992), India (1976), South Korea (1987), Nepal (2007) , France (2006), Portugal (1976), Spain (1978), and so on. In fact, of these countries there are several countries that have strong protection of their environment, by including them in their constitutions. The Ecuadorian Constitution, for example, gives rights to the environment as subject to legal equality with human rights. Therefore many parties are stating the term "The Real Green Constitution" to the state of Ecuador

With regard to these constitutional rights, Indonesia has issued three similar legal products containing rights in relation to the environment. However, when compared between the three, the new law (UUPPLH 2009) has given a greater portion of these rights, namely by recognizing the existence of eight eight rights, which include substantive rights and procedural rights. It is hoped that the formulation of more rights will further guarantee environmental sustainability as well as protection of individual and community rights as well as the rights of the environment itself.

II. RESEARCH METHOD

This type of research is normative legal research, which is conducted to find solutions to legal problems, so the results of this study are conducted to provide a prescription of what should be about the problems raised and can be applied in legal practice. The approaches used in this study include the statute approach, the conceptual approach, and the analytical approach.

The statute approach is carried out by examining all laws and regulations relating to the legal issues being studied. Researchers need to look for legis ratios and the ontological basis for the birth of laws on natural resource management both oil and gas and minerals. capturing the philosophical content that is behind it. Understanding the philosophical content behind the law, will be able to conclude whether or not there is a philosophical conflict between the law and the issues at hand.

The conceptual approach moves from the views and doctrines that develop in the science of law. With the conceptual approach (conceptual approach), researchers will find ideas that give birth to legal notions, legal concepts, and legal principles that are relevant to the issue at hand. Understanding of these views and doctrines is the basis for researchers in developing a legal argument in solving the issues at hand.

The analytical approach (analitical approach) is useful for interpreting logically, systemically and consistently where a more detailed and in-depth study of data is collected. Secondary data collected in this study is processed, analyzed and concluded conclusions using a judicial jurisdiction method.

III. FINDINGS AND DISCUSSION

A. Components of the Right to Environment

Actually the right to the environment is not a stand-alone right but there are derivative rights that will determine the extent to which the quality of the rights to the environment can be fulfilled. There are two aspects that make up the right to the environment, namely procedural aspects and substantive aspects.

The procedural aspects are defined as derivative rights from procedural rights to the environment or are supporting elements in realizing the fulfillment of the rights to the environment substantially. The procedural rights to the right to the environment are regulated internationally by the Aarhus Convention 1998 and have been adopted in separate statutory regulations or related to the environment in Indonesia [1], namely the right to information, the right to participate in decision making and the right to access justice.

The right to information is the first pillar of the procedural rights of the right to the environment. The right to information in Article 2 of the Aarhus Convention includes the right of everyone to obtain and disseminate all forms of information relating to environmental issues. In Indonesia, Law no. 14 of 2008 concerning Public Information Openness.[2] can be the basis of legitimacy in requesting information related to environmental issues, a project plan or even an environmental impact analysis document that is very useful in conducting environmental advocacy. Without information, environmental advocacy will only move in a dark and full of assumptions, whereas an environmental advocacy is often associated with scientific data and studies. After the formation of the Information Commission, the failure to obtain public information related to environmental management can be the basis for filing information disputes with the government responsible for that information.

While the substantive aspect of the right to the environment refers to the types of derivative rights that are substantive / material. In this case the right to life, the right to obtain a decent standard of living and the right to health, the right to obtain intra and anter generational justice. The right to obtain a decent standard of living as stated in Article 11 of the Convention on Economic, Social and Cultural Rights which reads, “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. "Here, a good and healthy environment is considered as supporting the fulfillment of the right to an adequate standard of

living. The right to health in its realization does not only take the form of access to health care but also includes protection from environmental damage and pollution, such as radioactive contamination, water and food pollution.

Substantive aspects related to inter-generational and intra-generational justice are specific features of the right to the environment. Intra-generational justice is the equitable distribution of natural resources among the current generation. This is antithetical to the fact today that people in developed countries who make up less than 20% of the total world population consume more than 80% of the natural wealth owned by the earth, while 80% of the world's population consumes less than 20% of the wealth of the earth. This inequality is the most important challenge in realizing intra-generational justice. In addition to fair distribution of justice among the inhabitants of the earth, the current generation also has an obligation to guarantee the availability of the wealth of the earth for future generations. This is commonly referred to as inter-generational justice which requires an equitable distribution of natural resources so that future generations do not inherit a damaged earth and are unfit for habitation.

IV. CONCLUSION

A. Legal Protection Legal Protection "Substantive Right to Environmental Quality" on the Environment for Human Rights

Environmental law is a field of law called functional law, which is a field of law that contains the provisions of state, criminal and civil administration law. Because if we look at the third, both UULH 1982, UULH 1997 and UUPPLH 2009, contain norms of laws that fall into the fields of state, criminal and civil administration law. Therefore, in all aspects, environmental law will always be in contact with basic human rights, both administratively (eg building permits / residential rights), civil law (related to the right to obtain compensation), and criminal implications various regulations in the environmental field, closely related to the provisions contained in various articles in the midst of society, for example the practice of applying rights, obligations and community participation in environmental management.

The environment itself, in accordance with the 2009 UUPPLH understanding, includes the human element and all of its behavior, therefore, humans as environmental subjects have a vital role which includes rights and obligations as well as participating in environmental sustainability. This role is tried to be raised in the formulation of articles, both by the UULH 1997 and UUPLH 2009. For example the right to environmental information is a logical consequence of the right to participate in the community in environmental management

Regarding the rights contained in various formal forms indicates that the issue of rights has its own place, so that the issue of this right always adorns the pages of human life history, so that at the moment these rights are felt to need to get an adequate portion.

In accordance with Article 65 paragraph (1) to paragraph 5 a fact can be found that the rights that are achieved in the environmental sector are:

1) the right to a good environment and, the right to environmental education,
2) the right to access information, access to participation and access to justice in fulfilling the right to a good and healthy environment,
3) the right to submit proposals and / or objections to business plans and / or activities that are expected to have an impact on the environment,
4) the right to play a role in environmental protection and management
5) the right to make complaints due to alleged pollution and / or environmental damage.

After the 2009 UUPPLH came into force, there were eight recognized rights, which in addition to re-accommodating the rights that existed in the previous law, a new right was added in the form of "the right not to be criminally or civilly prosecuted in fighting for the right to a good environment. and healthy "

The rights mentioned above can be grouped into two types of rights namely [3], *first, substantive rights (substantive right to environmental quality) in the form of rights to a good and healthy environment; second, procedural rights which include; access rights, participation rights and participation rights.*

Among the rights contained in UULH 1997 there are several fundamental rights, namely:

a. The right to a good and healthy environment

The beginning of the right to a good and healthy environment has also been stated in Article 28 of the Human Rights Charter as an inseparable part of the RI MPR Decree No. XVII / MPR / 1998 concerning human rights which states: "every person has the right to a good and healthy environment" Furthermore, on August 18, 2000 the second amendment to the 1945 Constitution formulated the intended rights in article 28 H paragraph (1) states: "Every person the right to live in physical and spiritual prosperity, to live, and to have a good and healthy living environment and the right to obtain health services "[4].

In 1999 Law No. 39 of 1999 concerning Human Rights was issued, Article 9 paragraph (3) emphasized*: "Every person has the right to a good and healthy environment*. [5] This is also set forth in Article 5 paragraph 1 UULH 1997 and further deepened the meaning of the foundation of the

philosophy of the right to a good and healthy environment in the UUPPLH 2009. Recognition of the right to a good and healthy environment in our country cannot be separated from international influence as part of the State in this world. Internationally, environmental rights are contained in principle 1 of the Stockholm Declaration which reads:

"*Man has the fundamental right to freedom, equality and adequate conditions of ufe, in an environment of a quality that permits a ufe of digrity and well being any has bears a solemn responsibility to protect and improve the environment for present and future generations ....*" [6]

The right to a good and healthy environment, as a subjective right as stated by Heinhard Steiger C.S [7], is the most extensive form of protection for someone. So in this case the right to a healthy and good environment, as a basic right of someone who must be protected to get an environment that can affect the survival of humans and other living things that are protected from pollution and damage to the environment in a healthy and good manner.

What are these rights? Before the amendment, the 1945 Constitution did not recognize the right to a good and healthy environment, the right was only introduced in the UULH which was adopted from developed countries which had already stated these rights in their legal regulations. Therefore there are two things that must be considered, namely:

1) in terms of their form and content, these rights are classic human rights, which require that the authorities avoid interference with the freedom of individuals to enjoy these rights.
2) in terms of how it works, the rights are social in nature, because they are at the same time balanced by the necessity for the government / authorities to outline policies and take actions that encourage increased efforts to preserve the environment.

b. The right to obtain Environmental Education Law UUPPLH 2009 confirmed in Article 65 paragraph (2), namely:

"Everyone has the right to get environmental education, access to information, access to participation, and access to justice in fulfilling the right to a good and healthy environment".[8]

Even though the purpose of the environmental Education right was not formulated in the Explanation, the core of the existence of the right can be listened to from the remarks of the State Minister of Environment in the Event of Granting Environmental Award, the opportunity stated:

"In line with this, the central, provincial, district and city governments have the duty and authority to provide education, training, guidance and appreciation in an effort to achieve environmental preservation. The Adiwiyata program launched in February 2006 is an implementation of Environmental Education in elementary and secondary schools, in accordance with the national program, which is an effort to develop the nation's character through character education. Through environmental education the teacher will be more innovative and creative, while students will be more concerned, able to articulate opinions, able to think in an integrated manner and their performance will increase. The competencies mentioned above are some of the characters that should be developed to be good citizens."

Education on the environment itself can be done with several things, namely:

1) Giving awards to schools that care about the environment;
2) Invite everyone including school children to want to understand and change behavior to have an awareness of caring for the environment
3) Teach practical things for daily life. The main thing in environmental education is to incorporate the values of environmental awareness in each student, through developing environmental habits;
4) Assessing environmental problems, but also must be able to offer solutions and practical things we can do to improve the environmental problems we face.
5) Instilling environmental ideology, the values to always love the environment. [9]

c. Right of Access to Information and Right to Participate

According to Koesnadi In Hamzah [10] , in accordance with the explanation of Article 5 paragraph (2) the right to environmental information is a consequence of the right to participate based on the principle of openness and is therefore related to the problem of information. decisions, issues of legal protection assistance and democratizing decision making

Regarding the contents stipulated in Chapter III Article (5-7) UULH 1997, the right to access information is basically that everyone has the right to obtain complete, accurate and up-to-date information for various purposes related to the problem of his participation in environmental management. Access to this information is divided into two types, namely the right of people to get information and public officials are obliged to provide information without having to be preceded by requests from the public (access to information for certain), the right of people to receive information and public officials are obliged to

provide and provide information when there is a request from the public (active information access). [11]

The right to information and the right to participate in environmental management is known as participatory rights [12]. This is regulated in the 2009 UUPPLH Article 65 paragraph (2) to (5). These rights carry the consequence of the recognition of the State of the community's participation rights. Therefore, based on the aforementioned articles above, community participation can be carried out among others by submitting proposals, suggestions and objections or submitting complaints to authorized officials, also possible through Article 70 which gives the community the right to; supervise providing advice, opinions, proposals, objections, complaints, and convey or report information. [13]

Although the recognition of these rights is normatively the adoption of Principle 10 of the Rio 1992 Declaration which emphasizes the importance of democratization and community participation in environmental management, it remains that the government in this case has a concern, that environmental management cannot be done in part / partial in the sense of being managed by the government itself, because environmental management will be in direct contact with the community, sometimes even the effects of various forms of environmental management are actually felt by the community.

d. The right not to be prosecuted criminal or civil in fighting for the right to a good and healthy environment

This right is a new right formulated in the 2009 UUPPLH, precisely in Article 66 which states that everyone who fights for the right to a good and healthy environment cannot be prosecuted criminal or civilly sued [14]. One of the things behind the affirmation of the recognition of this claim is motivated by a variety of cases of reporting pollution and damage by the public, which is actually being sued back by those suspected of committing pollution and damage. [15] This clearly gives a traumatic impression to the public who want to starve for pollution or environmental damage.

It is worth noting, that in the development of environmental law in Indonesia in addition to originating from the development of legislation is also possible through court decisions [14] . Two court decisions that can be seen as important decisions (landmark decisions) are the first of the Central Jakarta State Court decisions in the WALHI case against PT IIU, the Minister of Industry, the Minister of Forestry, the Minister of the Interior, the Minister of the Environment and the Governor of North Sumatra Province in the District Court Central Jakarta. The panel of judges in the case interpreted the right to sue from the concept of community participation in environmental management which was indeed recognized in the UULH 1982 (Decision on the case of Walhi versus PT IIU No. 820 / Pdt / G / 1988)

Second is a lawsuit by Dedi and his friends (as many as eight people including Dedi) against the President of the Republic of Indonesia, Minister of Forestry, Perum Perhutani, West Java Provincial Government and Garut Regency Government in Bandung District Court. The District Court panel of judges in their deliberations (No. 49 / Pdt.G / 2003 / PN.BDG, August 28, 2003), among others, said that the state had responsibilities in environmental management. The responsibility of the country is carried out by a government led by the President of the Republic of Indonesia, but because the President has formed the Minister of Forestry, the full management of forestry has become the responsibility of the Minister of Forestry. The Minister of Forestry has given authority to Perum Perhutani of West Java to manage the forest area of Mount Mandalawangi [16].

These decisions then provide inspiration for lawmakers to formulate the environmental rights of environmental organizations into law, namely Article 38 UULH 1997. Besides that, various environmental cases give an indication of the recognition of community claim rights (populist action) based on a combination the interest to prevent pollution which is an interest that must be protected [17]

In addition, it cannot be denied that the existence of guarantees of the right not to be sued under Article 66 of the 2009 UUPPLH, in its implementation, remains a concern for some people. This relates to guarantees of protection that can be provided by the government in relation to reports / or lawsuits submitted by the public. Furthermore, the explanation given in Article 66 may cause concern for environmental activist groups, the explanation in question is [18] :

> *"This provision is intended to protect victims and / or reporters who take legal methods due to environmental pollution and / or damage.*
>
> *This protection is intended to prevent retaliation from being reported through criminal prosecution and / or civil lawsuits while taking into account the independence of the judiciary ".*

The final sentence which concludes with the explanation "... while still taking into account the independence of the judiciary, is considered the key sentence intended to break / break the promise of Article 66. It means that the enforcement of the protection rights as regulated in Article 66 must still be determined and tested again by the court. Whereas in court proceedings anything (anything)

is still possible including neglecting the application of Article 66 because the judge is free and has the absolute right to determine / drop his decision and is free to judge an action that can be categorized as environmental destruction or pollution, or related to the interpretation of "populist action" or "Class action" or the community's right to sue.

REFERENCES

[1] Asshiddiqie, J. 2009. Kini Saatnya ,Membumikan Konstitusi Hijau, Kuliah Umum dan diskusi publik yang bertajuk "Konstitusi Hijau dan Hak Asasi Manusia", sebagai bagian dari hak konstitusional warga negara dalam pengelolaan lingkungan hidup dan kekayaan alam di Indonesia, Sarekat Hijau Indonesia (SHI).

[2] Law No. 32 of 2009 Article 4 paragraph (2) states that "everyone has the right: (a) to see and know public information; (b) attend public meetings that are open to the public to obtain public information; (c) obtain a copy of public information through an application in accordance with this Law; and / or; (d) disseminating public information in accordance with laws and regulations "

[3] Takdir Rahmadi, *Hukum Lingkungan di Indonesia,* (Jakarta, Raja Grafindo Persada, 2011), h. 65

[4] Republik Indonesia UUD NKRI 1945 Pasal 28 H ayat (1)

[5] Republik Indonesia, Undang-undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia Pasal 9 ayat (3)

[6] United Nations, *Declaration on the Human Environmental, Annual Review of United Nations Affar,* dalam Supriadi, *Hukum Lingkungan di Indonesia, sebuah Pengantar,*(Jakarta, Sinar Grafika, 2005), h. 185

[7] Fatma Ulfatun Najicha, *Politik Hukum Pada Pembetukan Produk Hukum Perundang-Undangan Kehutanan.* Kebumen: Intishar Publishing, 2019

[8] Republik Indonesia Law No. 32 of 2009 Concerning Environmental Protection and Management Pasal 70 ayat (2) UUPPLH 2009

[9] Quoted from. Joint Decree of the Minister of Education with National Education Minister Number 04 / MENLH / 02/2010 and Number 01 / II / SKB / 2010 concerning *Environmental Education Working Group.*

[10] Hamzah, Andi, 2005, *Penegakan Hukum Lingkungan,* Jakarta, Sinar Grafika Harjasoemantri, Kosenadi, 1996, *Hukum Tata Lingkungan* , Jokjakarta, Gajah Mada UP Rahmadi, Takdir, 2011, *Hukum Lingkungan di Indonesia,* Jakarta, Raja Grafindo Persada

[11] Kelsen, H. 1978. Pure Theory of Law. Berkeley: University of California Press.

[12] Takdir Rahmadi, *Perkembangan hukum Lingkungan di Indonesia http://www.ptun-bandaaceh.go.id/publikasi/artikel/perkembangan-hukum-lingkungan-di-indonesia-penulis-prof-dr-takdir-rahmadi-sh-llm/* diakses tanggal 18 November 2012

[13] Opcit., Republik Indonesia Law No. 32 of 2009

[14] Ibid, Republik Indonesia Law No. 32 of 2009

[15] McGoldrick, D. 1996. *"Sustainable Development and Human Rights: An Integrated Conception",* The International and Comparative Law Quarterly. 45 (4), 796-801.

[16] Erwin, Muhammad, 2009, *Hukum Lingkungan Dalam Sistem Kebijakan Pembanhunan Lingkungan Hidup,* Bandung, Refika Aditama.

[17] Supriadi, 2005, *Hukum Lingkungan di Indonesia, sebuah Pengantar,* Jakarta, Sinar Grafika

[18] Wheare, K.C. 1975. *Modern Constitution.* London: Oxford University Press.