

State Responsibility of the Environmental Law

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Abstract. The essential reason of the environmental law ineffectual implementation is the failure of the responsibility and accountability of the state, which has the sovereignty power from people. The essay focuses on the state responsibility theory, and contends that the theory of popular sovereignty, the protection of fundamental rights of human and rule of law is the basis of the state responsibility of the environmental law, which is also the legislation basis of it. Then the essay analyses the fact that the state or competent authorities' responsibility in national legal system of environmental law, and point out that there are three significant measures for advice the future law in order to strengthen the system of responsibility and accountability with the purpose of improve the implement of environmental law, which consist of the suggestion of The Improvement of the Environmental Law and Standards, the suggestion of The Requirement of the Entrepreneur's Protection Obligation and the suggestion of The Improvement of the Accountability System of State.

Introduction

It is in a crucial situation that the ineffective implementation of environmental law in China for decades, as some scholars described in their book saying "a numerous number of legislation with insufficient achievement, the high level of environmental contamination without a high level of efficiency of environmental protection."¹ This is not desirable for public increasing concerning on environmental issues, for example the pollution or the event caused by environmental problems. All of these contradiction circumstances were brought by the lack of the responsibility and accountability of state, which is essential issue be disputed in basis of today's environmental law.

The significant theory of environmental law is sustainable development, which be concerned the basis of legislation and value of environmental law to protect environment. Since the sustainable development theory enrich for years which emphasizes the benefit of human beings and the interest of ecologic environmental, for the serving of the social system between individuals and the order of nature, as a measure for protection of both intra-generation and inter-generation. And the resources, which has been preserved as a public wealth for contemporary generation and the coming generations, should be possess by human being and other living beings, while each living beings would have the fundamental right of enjoying the fine condition of nature environment and using the plentiful resources of environmental resource reasonable.

The Duty of the State to Protection of Environment

The situation of the damage and the hazard threat to our living circumstance has disturb and change the traditional legal duty of the state and national system of law, and improve the framework of the basis

¹S.Q. Cai, the Science of Law of Hebei, 2008-03, P17, (In Chinese)

theory of legislation to apply the obligation and responsibility to the competent authorities including the accountability to the public officials.

The original relationship for the administrative department and the individuals has to be two-sides relationship, with a guidance that the intervene measure performed by the power of authorities should be the mildest and as less as possible of the effective of the approach in order to play to be the safeguard of the social and economy instead of their controller. As a new type of environmental problems and events which frequently emerge for years have caused the loss or damage of the health and life of residents and raised the public awareness of protection and restoration by the measures taken by the competent authorities and the support brought by financial payment. As a result the development improve the primary understanding of protection of the freedom to that the state has to choice appropriate ways to intervene the social and the economy relationship to prevent the damage or the loss of environment. This is the most significant progress of the law in the last decades.

The Authority of the Popular Sovereignty. As the CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (CPRC) describe that “All power in the People's Republic of China belongs to the people.”, the sovereignty of people principle have been an essential principle to be applied by the people in China, which give the reflection of the people determining their political affairs according to the CPRC. That means people not only can participate the operation of the authorities to control the power of state and the conformation of the process how to make a determination of the public policy, but can also share the achievement of the social development and supervise the process of the implement of the state department which authorized by the people. Therefore, as an authorized subject by the collective concept of the people, the state have to use the sovereignty which owned by the people, make the sovereignty useful and effective for the people who owned the power, and use the power properly to the people.

The theory requires any department of the country cannot exercise the power by their intention, and the competent authorities who authorized by the people should meet the requirement of the people by legal measures, for the collective concept of people unable to use the power of sovereignty directly and concretely. The consequence of the theory of the popular sovereignty are the state be responsible for the people and should fulfill the obligation or design an effective accountability system to undertake the obligations. It is very noticeable that the obligation mentioned above is the first-responsibility, while the accountability is the second-responsibility.

The Protection of the Fundamental Rights of Human. The fundamental human rights are also a collective concept for its comprehensive and numerous contents, such as the right to life, health, living, development, environment etc. And it has been the objective of legal content as a common view in countries. Individuals cannot use the fundamental right directly. Therefore there should be a powerful organization which authorized by collective people and regulated by the law to protect the rights as it is the objective of the law. So the public institutions have the responsibility to protect and promote the fundamental right especially against illegal interference on people. This is coming to a comprehensive protection duty of the state.

As mentioned above, the state have the power authorized by people and the obligation for protection the fundamental right. Meanwhile, Having the rights only exists when having a correlative of duty. The power of the states should have corresponded responsibility. Actually, it is no doubtful convince that the proper way to use people's sovereignty right is to protect and promote the fundamental right against the misuse of the power by regulated by the administrative law to ensure all the authority power operated in the track of the law.

This is means that the state have the responsibility of negative doing measure which do not intervene the use of fundamental right, and also have the responsibility in positive ways that take measure to protect the fundamental right or restrict the illegal ways of use fundamental right.

The Rule of the Law of the State. The rule of law also has comprehensive meanings. Actually it is a policy which emphasizes the regulation function of the law in a country where the law has a supreme

status. Aristotle concluded that “the rule of law embodied these two significances, one hand the law gain general subordinate and the other hand the subordinated law itself is good law.”²

As mentioned, the state have the sovereignty of people, at the same time, the state also have the obligation to protect the fundamental right. The correspondence of the power and the responsibility should be regulated by the good law made by state by operation of the authorized power of popular sovereignty with the purpose to protect and promote the fundamental right.

Coming into the environmental law, it is clear to formulate a consensus that we need the supervise and intervene by the state. In this case, the state cannot only be negative but would always be positive to provide the processing scheme to the environmental pollution which occurred, to deal with the environmental event which affect the environment and to take measure to assess the possibility of the risk of environmental damage or prevent the risk of danger or even against the threat to the circumstance of people. As “the freedom leaving to the competent authorities should be limited to the minimize level”,³ this is the basis of the environmental law on the responsibility of the state.

The Hard Position of the Responsibility of State

It is not the fact of the environmental law which are strictly observed and enforced, law breakers are punished. The responsibility of state does not suitable for the competent institutions in practices.

The Evaluation of the Achievement of the Local Government by Economic Indicator. There is a special evaluation system for each level department of state in China, for the purpose of promotion the economic development. The single evaluation system cause a puzzled situation that how to work out during the contradiction between the global ecology and the local economy. For example the approach to promote local economy development always is encouragements to the industrial factories which production may be ignore the environmental protection. That means on the purchase way to the speed of economy development, the local government have to make choice when the encouraged entrepreneurs’ action affect the environment in order to double the outputs.

In addition, the balance between the finance and affair were not appropriate for onerous affairs undertaken by governments at the grassroots levels not with suffice finance support. And the local government financial income make up almost on the local businessman’ mind. The officials and the competent authorities in this case have to sacrifice the benefit of environment under the pressure of this situation, and even ignore on several of public goods such as a qualified air condition.

The Requirement of the Entrepreneur’s Protection Obligation. Another hard situation is the over emphasis on entrepreneur’s obligation of protection environment. Although the manufactories have certain attributions on the bad environment and a common responsibility for the circumstance deterioration, which is a fair thing the manufactories or other benefited from the harmful action to environment have to bear obligations to elimination their affection. It is not appropriate to require the entrepreneurs in charge of public environment protection or take the responsibility of environment protection, which as a large part of local government duty.

The Requirement of the entrepreneur’s protection obligation caused by the unbalance status between the finance and affair in local government mentioned above, and also caused by the gap on the environmental law which implements not considerable in the regulations on requirement of the authorities lead to the lots of blank of responsibility of state.

Less Attention to the Obligation of the State. Obligation of the state mentioned on the theory of sovereignty of people is distinct to the first and second-responsibility. The second-responsibility is the legal responsibility that taken by the government or official who violate the first-responsibility by hardly fulfil its obligation or use the executive power inappropriate. This is the blank of environmental

² Aristotle: *“political science”*(MIT Press, 1963), P199, (In Chinese)

³ Friderich August Hayek: *“the road to Serfdom”*, (China Social Sciences Publishing House, 1997, P73), (In Chinese)

law in China, while the legal responsibility or proper accountability system as a system of implement of the executive power is an essential part of the environmental law to prevent the misuse or illegal use.

Meanwhile, during all general or special regulations contained in environmental law system, it is emphasized that the supervising and management of the competent authorities' obligation, which put the authorities as a controller of society or economy not a safeguard of freedom.

Finally the lack of suffice attentions on the obligation of the state due to the indefinite regulations of the law on the competent authorities or institutions' duty or responsibility.

The Absence of the Accountability. The absence of the accountability means not effective accountability system to the improper situation that the absence of the authorities' intervene or more attentions paid on government while less on other institutions, especially the Court to supervise or interpret the environmental law.

Another absence is the environmental second-responsibility of competent authorities' leading officials. A person in charge could not be charged with his error made during the work which should meet the public interest on environment improvement by leading the officials in the department. The absence of the accountability system especially the system of evaluation the person in charge may cause the defect implement and the adverse condition on environment protection.

Un-multiplicity Measures Adopted on the Environmental Protection. As mentioned above, the authorities in existing law of China put a role as a controller of society or economy not a safeguard of freedom protected by the Constitution. That have big effect on the way of regulation which is mainly used by administrative way but not a multiple way contained in the civil or criminal law. In addition there is also lack of the participated by the public to supervise or to take part in every process of the determination or policy making about the environment protection. The signal measures not a multiplicity measures adopted by the competent authorities on executive its power have cause the enforcement and implement of the environmental law in China is always not effective.

The Suggestion of the Environmental Law on the Responsibility of State

The Improvement of the Environmental Law and Standards. The basis of the state responsibility is the complete system of environmental law by which the competent authorities complied with during executive the power. This is also the significant procedure of the government transition from the management to the government with the purpose of service. The publish and come to force of the Environment and Protection Law in China could be seen as a basic law of environmental legal system, which improve the whole system of special law or environmental related legal files. However the effective ways to solve the problems existed in the environmental law system are the improvement to fill the gaps do not regulated or indefinite regulated, in particular the regulations about the responsibility of the state and the accountability of the authorities. Only use the legislation measure to improve or advise the environmental law can integration and harmonization the general law and the special law of environmental law system which would establish a considerable responsibility and accountability regulations for the state.

Another important ways to solve the problems existed in the environmental law on responsibility of the state is to confirm a set of standards for enforcement while the competent authorities executive the power. First on the list is to integrate the standards of environmental protection existed to set the target of the protection work of the state for decades. The next is to consider the standards objectively, which is not the powerful method to the environment by copying the standards of other countries not by the fact of development and the feather of environmental problems. The appropriated standards should be tested and assess by fully and cautious considerations in order to establish a system of standards which is on the ground of the situation of our environment and circumstance of life and regular adjusted or advised by the competent authorities through a cautious ways.

The Definition of the Content of the Responsibility of State. The implement of the environmental law which has put in force today is an equal important aspect of the improvement of the responsibility of the state. There are two suggestions on it. One is to speed up the competent authorities responsibility while define the enforcement and the power border between the departments. It should be clear to know before a administrative order or activity on a individual case that which one is the subjective of the responsibility and how much responsibility should be taken when the error caused by the public officials, especially the responsibility would involve the general officials or the person in charge of the department. This will be the evaluation of the performance and set a correct target guidance which made by the competent authorities themselves to improve their daily affairs.

The other suggestion is to define the forms of responsibility of the state and the public officials. It is vague described in the paper of environmental regulations by the words such as certain, some, etc. No one would know the forms of the responsibility before an administrative activity have made the loss of individuals. It is the cautions of why the competent authorities cannot executive the power effective and appropriated, because no one care about it and no one bear about it. The lack of the forms of responsibility cause the second-responsibility is hard to operate effective, and hard to meet the people's willing and concerning, which leads to more social contradiction. Therefore, to define the content of responsibility of state is crucial things to solve the problems that the ineffective executive enforcement of the government department by abiding the environmental law.

The Improvement of the Accountability System of State. The accountability system of the state have several problems mentioned above which may be the reason of the operation of the environmental law unexpected. In the consideration of the environmental problems and environmental events always have a long potential and unexpected time to happen and a huge loss, the integration and establishment of the accountability system of the stake have to be a crucial step which could not ignore any more time. In the practice of today's China, the accountability system is established by the authorities who will design and follow the arrangement of the accountability system at the same time.

This fact does not have the advantage on the supervising of environmental enforcement and the power of how to executive appropriate. So it is a urgent task for the state to improve the accountability system of the state, which strengthen the claims to each level of the administrative institutions and competent authorities. Every public official would take charge of his responsibility to protect the interest which regulated in the administrative law and protect the environment which attract public concerning. Only can the responsibility taken by the state effectively, the protection of environment will be thorough implement in the future.

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