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Research report within the context of the project:

Making Environmental Regulation Work for the People

PROPER AND LAW ENFORCEMENT: A CRITICAL ASSESSMENT ON THE IMPLEMENTATION OF ENVIRONMENTAL RATING IN INDONESIA

Research and report

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Supervision

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Summary

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This paper focuses on how in Indonesia various regulatory approaches relate to one another. It focuses on the regulatory programme PROPER in which the Ministry of Environment and Forestry monitors and rates the environmental performance of industries and discloses the result in the form of a color code to the public; red and black mean a company is in compliance. The programme exists parallel to the Command and Control type of regulation in which in principle the districts are responsible for monitoring industries located within their territory and enforcement. The Ministry categorizes PROPER as an economic instrument. The author argues that by qualifying the programme as such, it is wrongfully used to justify the lack of and inconsistency in enforcement when the violating behavior is detected.

The author challenges the common view in Indonesia concerning the relation between Command and Control type of regulation -in which the government sets the norms, monitors the compliance and enforces the law-, and other forms of regulation in which the government uses other regulatory approaches or non-state parties play a role, such as using economic or voluntary instruments. In Indonesia it is often assumed that Command and Control conflicts with, and is even inferior to, alternative regulatory approaches. The author challenges this assumption, arguing that the various regulatory approaches can and should complement one another, as each approach has advantages and disadvantages. It is the task of policy makers to seek the most effective combination of regulatory approaches in a particular context. The author makes this argument by referring to the regulatory literature, and particularly to Gunningham et. al's idea on 'Smart regulation'.¹

The paper discusses the various regulatory instruments provided by the Environmental Management Act of 2009 (EMA 32/2009). Command and control type of regulation can be found in the provisions on standards (environmental quality standards and environmental damage standards) and licensing, monitoring and enforcement. These are interconnected. The EMA 2009 furthermore provides 'economic instruments' which

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¹ The author dedicates a substantial part of his paper to the discussion of literature on regulatory approaches. He does this because this literature is hardly known among the Indonesian audience while it can provide valid input for the discussion on regulation of environmental issues.

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are divided into three categories, namely planning of development and economic activities, environmental funds and ‘incentives and disincentives’. The Ministry classifies PROPER as an economic instrument that is based on incentives and disincentives.

The Ministry claims that PROPER offers an alternative for the failing monitoring efforts at local government level. By classifying PROPER as an economic instrument, it is considered to be separated from Command and Control type of regulation. According to the author, the Ministry uses this to justify the lack of enforcement when (severe) violations are detected within the context of PROPER, as enforcement is part of Command and Control. The author argues that PROPER is however a mixture of various regulatory approaches that depends on both the response from society and the market, as well as the government as a regulator. Thereby it should be considered complementary to –instead of opposing– Command and Control type of regulation and its monitoring and law enforcement arrangements.

PROPER has considerable potential as a regulatory programme, but several adjustments need to be made to make it complementary to other regulatory approaches and thereby optimally effective.

PROPER can be a source of information on the how companies behave. This can sort an effect in several ways. Consumers may avoid buying products or services from violating companies. However, to have this effect the government must invest in educating consumers to become more environmentally aware. The government itself could set the example by making policies that discourage the government consuming products and services from incompliant companies. Market actors – such as investors and banks– should be strict in not providing financial means such as loans to these companies. To have this effect, in announcing the ratings, the government should emphasize the incompliant companies rather than primarily praising the well-rated companies as is currently the practice.

The rating process of PROPER is insufficiently transparent and the credibility of the assessment is questionable, not in the least because it depends to a considerable extent on self-assessment by the companies. The author points out that PROPER has the potential to provide information that can be used to legally challenge violators, and even the government for not taking enforcement measures.

Furthermore, the government must integrate ‘regular’ monitoring of industries (*pengawasan*) with PROPER. Currently, the observations made within the PROPER context are only considered an indication, and are not evidence, necessary to take enforcement measures. Such integration should also reduce the dependency on the self-assessment by the companies.

Finally, the government should be more explicit and consistent in how it will respond to violating behavior, and particular how law enforcement will occur when companies have been found to be incompliant.

This paper was prepared and written as part of the Making Environmental Regulation Work project, supported by Dutch Rule of Law Fund Indonesia, managed by IDLO. The project aims to improve the environmental framework and its implementation in Indonesia, by strengthening regulatory capacity of government, and enhancing the capacity of civil society and scholars to hold the government accountable. The full article is available in Indonesian Language (upon request).