

Application of the Precautionary Principle in Judge's Legal Considerations for Pollution Cases in Islamic Law Perspectives

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Abstract: In industrial activities, the precautionary principle in protecting the environment is very important. This research examines how judges use the precautionary principle in making legal decisions in cases of environmental pollution. This research is a doctrinal qualitative with a normative juridical approach. Based on the research findings, the Panel of Judges in the decision of the North Jakarta District Court Number: 735/PDT.G-LH/2018/PN.Jkt.Utr determined that PT. HAYI has carelessly disposed of B3 waste from textile industry activities. In that decision, the Panel of Judges expanded the understanding of the Precautionary Principle, from the level of management and preventive policies to the level of repressive dispute resolution. The judge has also changed the Rio Declaration which is only morally binding to a hard law which is directly used as a source of law in deciding a case. This development is a paradigm shift in environmental justice from homocentric to ecocentric. In Islamic Law, the precautionary principle is related to the concept of *ihitiyâth* (prudence) and correlates with *sadd al-dzari'ah*, namely the maximum effort to suppress everything that can be a means of prohibited things to avoid the amount of damage. Within the framework of Usul Fiqh, avoiding damage is a priority step rather than reaping benefits.

Keywords: *precautionary principle, pollution, judge's legal considerations, ihtiyâth*

Abstract: Dalam kegiatan industri, prinsip kehati-hatian dalam melindungi lingkungan sangatlah penting. Penelitian ini mengkaji bagaimana hakim menggunakan prinsip kehati-hatian dalam membuat putusan hukum pada kasus pencemaran lingkungan. Penelitian ini adalah kualitatif doktrinal dengan pendekatan yuridis normatif. Berdasarkan temuan penelitian, Majelis Hakim dalam putusan Pengadilan Negeri Jakarta Utara Nomor: 735/PDT.G-LH/2018/PN.Jkt.Utr menetapkan PT. HAYI telah ceroboh membuang limbah B3 dari kegiatan industri tekstil. Dalam putusan itu, Majelis Hakim memperluas pengertian asas kehati-hatian, dari tataran manajemen dan kebijakan preventif ke tataran penyelesaian sengketa secara represif. Hakim juga telah mengubah Deklarasi Rio yang hanya mengikat secara moral menjadi *hard law* yang langsung digunakan sebagai sumber hukum dalam memutus suatu perkara. Perkembangan ini merupakan pergeseran paradigma keadilan lingkungan dari homosentris menjadi ekosentris. Di dalam Hukum Islam, prinsip kehati-hatian terkait dengan

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konsep *ih̄tiyāth* (kehati-hatian) dan berkorelasi dengan *sadd al-dzari'ah*, yaitu upaya maksimal untuk menekan segala sesuatu yang dapat menjadi sarana dari hal-hal yang dilarang untuk menghindari besarnya kerusakan. Dalam kerangka Ushul Fiqh menghindari kerusakan adalah langkah prioritas daripada menuai keuntungan.

Kata kunci: prinsip kehati-hatian, pencemaran, pertimbangan hukum hakim, *ih̄tiyāth*

Introduction

An Ecosystem Tragedy, written by Rachel Carson in 1962, depicts a lonely world in spring. The silence occurred because the butterflies, bees, and birds that used to sing and fly among the trees had disappeared. Carson found the cause was the use of synthetic pesticides on farms. These pesticides not only kill crop pests but also destroy birds, butterflies, bees, and other insects that help pollinate crops. Carson wants to remind the world about the dangers of various toxic wastes happening today.¹ The book was later rewritten by Mitchell and friends.

Carson's writings are currently proven by the existence of various pollution and environmental damage caused by human activities. Based on data from the last 5 (five) years, starting from 2015-2019, the area of land contaminated with hazardous toxic waste, commonly called B3 waste, has increased quite significantly in Indonesia. In 2015 the area of land contaminated with B3 waste was 211,359.2 m² with a total tonnage of that had to be recovered of 501,470.4 tons. In 2019 the area of land contaminated with B3 waste became 840,024.85 m² with a total tonnage of B3 waste and land contaminated with B3 waste that had to be recovered amounting to 890,316.44 tons. The pollution and damage data have an impact on human life and this is related to the fulfillment of people's rights in the environment.

The Republic of Indonesia's 1945 Constitution explicitly states that a good and healthy environment is a fundamental right of all Indonesians. This provision is found in Article 28H of the 1945 Constitution of the Republic of Indonesia, stating that "every person has the right to live in

¹ Charles Mitchell, Juliet Dinkha, and Aya Abdulhamid, "The Silent Spring," *Contention*, 6.1 (2018) <<https://doi.org/10.3167/cont.2018.060105>>.

physical and spiritual prosperity, to have a home and a good and healthy environment, and to obtain health services." As a result of demonstrating the importance of the environment to human life, the right to the environment is incorporated into the framework of human rights.

The right to the environment then serves as the foundation for the development of Law No. 32 of 2009 on Environmental Protection and Management (UUPPLH) and other laws and regulations. The state, the government, and all members of society are responsible for environmental protection and management. Legislative obligations are critical in preventing pollution and environmental damage. These efforts are carried out following the principles of prudence (precaution), environmental democracy, decentralization, and recognition and respect for local and environmental wisdom in planning, utilization, control, supervision, and law enforcement.

The government is concerned about pollution and environmental damage because of the constitution and legislation mandate regarding the people's right to a good and healthy environment. One manifestation of this concern is the role of the courts in taking progressive decisions against polluters. The decision of the North Jakarta District Court Panel of Judges Number: 735/PDT.G-LH/2018/PN.Jkt.Utr., granting the Ministry of Environment and Forestry (KLHK) lawsuit, is a progressive decision. The Panel of Judges determined that PT How Are You Indonesia (HAYI) was proven to have polluted the Citarum River Basin (DAS) and ordered PT HAYI to pay material compensation for the pollution-related losses.

The Panel of Judges used the Precautionary Principle in adjudicating environmental pollution cases, which is unusual in this case. The Precautionary Principle arose from the 1992 Rio De Janeiro Declaration, which was issued by the United Nations Conference on Environment and Development (UNCED) in Brazil from June 3 to June 14, 1992. The Declaration's principles emphasize that "the precautionary approach shall be widely applied by States according to their capabilities to protect the environment." Where there is a risk of serious or irreversible damage, a lack of complete scientific

certainty shall not be used to delay cost-effective measures to prevent environmental degradation."

The Precautionary Principle is then concretized through Law Number 32 of 2009 concerning Environmental Protection and Management (UUPPLH). Explicitly, Article 2f UUPPLH states that environmental protection and management is carried out based on the precautionary principle. The elucidation of Article 2f UUPPLH reads "*That uncertainty regarding the impact of a business and/or activity due to limited mastery of science and technology is not a reason to postpone steps to minimize or avoid threats to environmental pollution and/or damage*".²

The precautionary principle is the idea of being responsive to conventional environmental policies which consider that efforts to prevent or mitigate environmental damage can only be carried out if the risk of an activity having an environmental impact occurred.³ Strictly speaking, this principle states that every business that has an impact on the environment must first provide proof of the impact of its business activities on the environment scientifically, as well as methods for dealing with it. This concept is to show the prudence of the business actor.

This precautionary principle is closely related to Islamic teachings relating to human behavior in dealing with nature. Both behavior towards nature and behavior towards fellow human beings have certain consequences for nature. There are at least 2 (two) things how Islam talks about this problem.⁴ *First*, respect for nature. In QS. al-Anbiya:107, Allah SWT said "*and we did not send you, but to (become) a mercy to the universe*". *Rahmatan lil 'alamīn* is not just an Islamic motto but is the goal of Islam itself.

² Andri G. Wibisana, "The Development of the Precautionary Principle in International and Indonesian Environmental Law," *Asia Pacific Journal of Environmental Law*, 14.1–2 (2011): 169–202.

³ Franky Butar Butar Muhammad Fikri Alan, Zulharman, "Precautionary Principle in Hazardous Waste Management Post," *Bina Hukum Lingkungan*, 6.7 (2021) <<https://doi.org/DOI: http://dx.doi.org/10.24970/bhl.v6i1.141>>.

⁴ Eko Asmanto, "Revitalisasi Spiritualitas Ekologi Perspektif Pendidikan Islam," *Tsaqafah*, 11.2 (2015): 333 <<https://doi.org/10.21111/tsaqafah.v11i2.272>>.

Second, moral responsibility for nature. Because humans were created as caliphs (responsible persons) on earth, and humans are an integral part of nature, moral responsibility is closely related to the principle of respect for nature. Following God's word in QS. al-Baqarah: 30, "Remember when your Lord said to the angels: Verily, I will make a caliph on earth." This fact alone gives rise to the moral principle that humans bear responsibility for the universe as a whole, as well as its integrity, as well as its existence, and sustainability.

Several studies on the Precautionary Principle have been carried out, including by Gill,⁵ Akins⁶, Rodriguez⁷, Rocha⁸ and Wibisana⁹. The research results show that there are still problems related to scientific uncertainty and the precautionary principle. Gills conducted research in India and found that addressing scientific uncertainty within an environmental framework required a standardized scale of law arranged in a hierarchy of certainty levels that could be used by lawyers and the judiciary. Meanwhile, Akins sees that the precautionary principle to overcome environmental degradation must always be related to local culture. Research from Rodriguez discusses theories that approach the principle of risk and caution with the theory of environmental justice and its implications in the context of environmental pollution conflicts, then Rocha studies the interaction between environmental compliance companies facing pollution traps, where most companies do not internalize

⁵ Gitanjali Nain Gill, "Precautionary Principle, Its Interpretation and Application by the Indian Judiciary: 'When I Use a Word It Means Just What I Choose It to Mean-Neither More nor Less' Humpty Dumpty," *Environmental Law Review*, 21.4 (2019): 292–308 <<https://doi.org/10.1177/1461452919890283>>.

⁶ Ashli Akins and others, "The Universal Precautionary Principle: New Pillars and Pathways for Environmental, Sociocultural, and Economic Resilience," *Sustainability (Switzerland)*, 11.8 (2019) <<https://doi.org/10.3390/su11082357>>.

⁷ Zenaida Luisa Lauda-Rodriguez and Wagner Costa Ribeiro, "Risk, Precautionary Principle and Environmental Justice in Mining Conflicts," *Desenvolvimento e Meio Ambiente*, 51 (2019): 154–79 <<https://doi.org/10.5380/dma.v51i0.59821>>.

⁸ André Barreira da Silva Rocha and Gabriel Meyer Salomão, "Environmental Policy Regulation and Corporate Compliance in Evolutionary Game Models with Well-Mixed and Structured Populations," *European Journal of Operational Research*, 279.2 (2019): 486–501 <<https://doi.org/10.1016/j.ejor.2019.05.040>>.

⁹ Wibisana, "The Development of the Precautionary Principle in International and Indonesian Environmental Law."

their negative pollution externalities and auditors do not examine companies. Meanwhile Wibisono writes that many critics simplify the term precautionary with 'uncertainty' as 'risk', for that the Indonesian Court played a very important role in the adoption of this principle and developing it for environmental protection.

Based on this background, it is interesting to study the Precautionary Principle further. The uniqueness of this research is how to implement the Precautionary Principle in the judge's legal considerations, and then how the Judge develops the Precautionary Principle in the case of Hazardous Toxic/B3 waste pollution in the Citarum River, with a focus on the study of the Court Decision number: 735/PDT. G-LH/2018/PN.Jkt.Utr. The author will also examine the application of the precautionary principle in the view of Islamic law. This is because the principles of environmental management and ethics contained in Islamic teachings have been poured into several articles in the world's agreements and conventions related to environmental management.

Research Methods

This research is qualitative in nature and doctrinal, namely conceptualizing law as a norm. This research does not only examine law from the perspective of statutory regulations but also covers broader aspects which include the norms that exist in the legal considerations of judges in deciding cases in court, as well as sources that can be traced through the literature.¹⁰ The object of this research is the implementation of legal principles, namely the precautionary principle for cases of environmental pollution in the legal considerations of judges.

The data collection technique used in this study was a literature study by carrying out an inventory and analyzing legal literature materials related to the issues studied in the research. The literature is in the form of a Judge's decision, namely the Decision of the Panel of Judges of the North Jakarta District Court Number: 735/PDT.G-LH/2018/

¹⁰ Farah Syah Rezah Nurul Qamar, *Metode Penelitian Hukum: Doktrinal dan Non-Doktrinal*, 1st edn (Jakarta: CV. Social Politic Genius (SIGn), 2020), p. 52.

PN.Jkt.Utr., Law Number 32 of 2009 concerning the Protection and Management of the Environment (UUPPLH), International Convention namely the Declaration of Rio de Janeiro, Brazil 1992, the result of the United Nations Conference on Environment and Development (UNCED, and Islamic Law. Analysis techniques used in this research are the method of analysis of interpretation and legal interpretation. This analysis technique is used to understand the text in the object of research. The text is in the form of a series of signs that are arranged systematically in the decisions of judges in courts, legislation, conventions, and Islamic law.¹¹

Results and Discussions

Theories and Regulations Regarding the Precautionary Principle

Several theories about the precautionary principle have been put forward to date. Most relate to prevention, risk, theory of contingency, uncertainty, and cost. The existence of uncertainty often makes the precautionary principle a controversy when it becomes the basis for implementing policies. The precautionary principle is considered too excessive in looking at risk from a raw material, technology, or activity.¹²

The controversy about the precautionary principle is also based on the stigma that this principle was born due to a "lack of knowledge", "lack of scientific evidence", and "lack of measurement" about the existence of a hazard and risk.¹³ This makes the precautionary principle considered contrary to the development of an all-sophisticated era, as well as increasingly sensitive and modern measuring instruments and the availability of proven theories. Some think that now everything

¹¹ Chunuram Soren, "Legal Research Methodology: An Overview," *Journal of Emerging Technologies and Innovative Research (JETIR)*, 8 (2021): 1–44 <<https://www.jetir.org/view?paper=JETIR2110354>>.

¹² Organization for Economic Cooperation and Development (OECD), *Understanding and Applying the Precautionary Principle in the Energy Transition, Understanding and Applying the Precautionary Principle in the Energy Transition*, 2023 <<https://doi.org/10.1787/5b14362c-en>>.

¹³ Jonathan B. Wiener, "Learning to Manage the Multirisk World," *Risk Analysis*, 40 (2020): 2137–43 <<https://doi.org/10.1111/risa.13629>>.

has calculated all the risks and that everything can be measured or proven scientifically. Nevertheless, through appropriate presentation and moderation in analogy and application, the precautionary principle can still be accepted and used in various countries.

The precautionary principle explains that even if there is no certainty about the possibility of environmental damage, prevention of damage must still be done.¹⁴ Freeston and Hey¹⁵ stated that "*The essence of the precautionary principle is that once a risk has been identified, the lack of scientific proof of cause and effect shall not be used as a reason for not taking action to protect the environment*". This precautionary essence is then described by Kriebel in the form of elements in the application of the precautionary principle as follows:¹⁶

1. Once a threat has been identified. If a loss has been identified, this could happen.
2. When there is a risk of severe or irreversible damage. If a serious threat exists or cannot be recovered, the consequences will have a long-term impact on the environment. The extent of serious and irreversible damage is unknown and must be assessed on a case-by-case basis.
3. The absence of scientific certainty. If there is a lack of ability to predict the consequences or impacts that will occur. As a result, there is uncertainty or certainty about the magnitude and scope of the impact that will occur.

Timothy O'Riordan¹⁷ and Tanza¹⁸ stated that throughout the late 1970s and early 1980s, this notion of care and prudent practice had been

¹⁴ Terje Aven, "A Risk and Safety Science Perspective on the Precautionary Principle," *Safety Science*, 165 (2023): 106211 <<https://doi.org/10.1016/j.ssci.2023.106211>>.

¹⁵ David Freestone and Ellen Hey, "The Precautionary Principle and International Law. The Challenge of Implementation," *International Environmental Law and Policy*, 31 (1996) <<https://doi.org/doi:10.2307/2954171>>.

¹⁶ David Kriebel and others, "The Precautionary Principle in Environmental Science," *Environmental Health Perspectives*, 109.9 (2001): 871–76 <<https://doi.org/10.1289/ehp.01109871>>.

¹⁷ O'Riordan, Timothy, and Andrew Jordan. "The Precautionary Principle in Contemporary Environmental Politics." *Environmental Values*, 4.3 (1995): 191-212.

¹⁸ Tanja Rechnitzer, "Unifying 'the' Precautionary Principle? Justification and Reflective Equilibrium," *Philosophia*, 50.5 (2022): 2645–61 <<https://doi.org/10.1007/s11406-022-00582-0>>.

expanded into six basic concepts in the precautionary principle. The six basic concepts of the precautionary principle include:

1. Preventative anticipation, or taking action before scientific evidence is available.
2. The protection of ecological space or environmental room (protecting ecology) conveys that the tolerance margin should not be approached, let alone exceeded.
3. Proportionality of response cost-effectiveness of margins of error, the proportionality of response or cost-effectiveness of the margin of error to demonstrate that the degree of severity of the chosen action is not prohibitively expensive when compared to dealing with the risks that arise.
4. The duty of care owed to those who propose change, the obligation to care, and the responsibility to prove for those who propose.
5. Advancing the cause of intrinsic natural rights.
6. Repaying past ecological debt.

All of these interpretations are not formally sanctioned by international law or common practice. Currently, precautionary measures are taken when there is sufficient scientific evidence, based on a reasonable cost-effectiveness assessment, and delays in treatment could result in irreversible nature or represent a loss to future generations. In substance, the precautionary principle is widely applied to chemicals that have the potential to be toxic, persistent, or bioaccumulative.

UNESCO¹⁹ published a book on the precautionary principle linked to a scientist's code of ethics. One of the topics in this book is the element of the precautionary principle for policymakers and scientists which includes:

1. The precautionary principle is used when there is significant scientific uncertainty about the hazard's causality, magnitude, probability, and nature.

¹⁹ Alberto Alemanno, "The Precautionary Principle," *The Handbook of EEA Law*, 2015: 839–51 <https://doi.org/10.1007/978-3-319-24343-6_38>.

2. The obligation to conduct the scientific analysis. If it is based on fantasy or speculation, the precautionary principle cannot be applied. Reasons for concern can only be used to invoke the precautionary principle in circumstances that are reasonable or scientifically defensible.
3. The precautionary principle is used in situations where there are unknown risks and unknown and unmeasurable probabilities. This distinguishes it from the precautionary principle, which is used when there is a credible basis for measuring probability, risk management, risk level acceptance, and risk-maintenance activities.
4. The precautionary principle is frequently referred to as being limited to "unacceptable harm"; however, there are other more specific definitions of "danger" such as: "possible threatening impact on the life of future generations or other groups of people (e.g. residents of other countries)", "damage or harmful effects", "serious" hazard, "serious and irreversible damage", "global, irreversible and cross-border damage" generation. The existence of an expression of a moral judgment about "there is danger" is shared by the precautionary principle clauses.
5. An intervention is required before a possible hazard occurs, or before certainty about the hazard is known. In this case, the "wait and see" strategy cannot be applied.
6. The specified intervention must be proportionate to the level of protection and the magnitude of the potential harm. Some references state the need for cost-effective measures, while other references only talk about preventing environmental damage. Cost is only one of the considerations in assessing proportionality. Risk is difficult to reduce to zero. The complete ban may not be a proportionate intervention for potential risks in all cases, but, in some cases, the ban may be the only possible intervention for certain risks.
7. Interventions that can be used:
 - a. Measuring the limits of possible hazards.
 - b. Measuring the hazard content, namely limiting the scope of the hazard and improving hazard control.

8. There is a need for an ongoing systematic search for empirical evidence and better understanding (long-term monitoring and learning) to realize any potential for change by applying the precautionary principle to traditional risk management.

The use of the precautionary principle theory as a reference for writing in the international environmental field demonstrates that the precautionary principle can still be used and is relevant to be applied at this time. At the very least, the precautionary principle is used at the start of a problem until the element of risk measurement is discovered. Because of the sophistication of measuring equipment and rapidly developing science, the precautionary principle can be applied in a short time and then switches to the precautionary principle as an effort to protect the environment.

The principle of precautionary theory is also used in national laws and international conventions, one of which is as stated in the Rio Declaration which uses the principle of intergenerational justice.²⁰ The principle of intragenerational equity means that society and other life demands within one generation have the right to utilize natural resources and enjoy a clean and healthy environment in the sense that management is applied in fair access to common natural resources, air clean, clean water in the national water resources and the territorial sea. The state, therefore, must preserve and use the environment and natural resources for the benefit of present and future generations.

The principle of integration implies that the government or decision makers in carrying out or achieving the goals of protecting, restoring, and improving the quality of the environment, should consider the principles of sustainable development. Effective integration of economic considerations with the environment is a condition that must exist in every decision-making.

²⁰ Distr General, "The United Nations Conference on Environment and Development," *Journal of Architectural Education*, 46.3 (1993): 197–98 <<https://doi.org/10.1080/10464883.1993.10734558>>.

Likewise, Article 2f of UUPPLH-2009 National Law states that environmental protection and management are carried out based on the precautionary principle. UUPPLH-2009 is an umbrella for every law and regulation in the field of management of natural resources, environment, and spatial planning. Laws and regulations governing the management of natural resources, the environment, and spatial planning must be based on UUPPLH-2009 as a basic reference for the formulation of these laws and regulations. This means that any laws and regulations that regulate activities related to the environment must contain the precautionary principle.²¹

The precautionary principle in Islamic law is substantially guided by the al-Qur'an and al-Sunnah. In both sources of law, Allah orders Muslims to always avoid and prevent damage (*fasad*), which includes irresponsible exploitation or degradation of environmental resources. In addition, humans are required to be careful and responsible (precautionary principle) in managing this nature. This perspective is particularly clearly expressed in an Islamic belief that nature is subject to the human world. Humans, therefore, are allowed to manage, use and change the natural environment entrusted to them, to meet their survival needs. However, permission to use this environment must be accompanied by trust (*amânah*).²²

The concept of trust (*amânah*) emphasizes that the beneficiaries of natural resources are not only the current generation but also future generations. Verily everything created by Allah between the heavens and the earth is for the benefit of mankind, he has been ordered as the vicegerent of Allah (*khalîfah*) to avail such benefits and maintain the divine order. Because the benefits of these resources can be better explored if the ecological balance is maintained because the components are interrelated and interdependent.²³

²¹ Andri G. Wibisana, "Konstitusi Hijau Perancis: Komentar Atas Asas Kehati-Hatian dalam Piagam Lingkungan Perancis 2004," *Jurnal Konstitusi*, 8.3 (2016): 207 <<https://doi.org/10.31078/jk832>>.

²² Asmawati Muhamad, Abdul Halim Syihab, and Meguellati Achour, "Quranic Messages on Environmental Sustainability: An Expository Study of Its Relevance," *al-Bayan*, 17.1 (2019): 38–59 <<https://doi.org/10.1163/22321969-12340069>>.

²³ Aulia Rakhmat, "Islamic Ecotheology: Understanding the Concept of Khalifah and

Implementation of the Precautionary Principle in the Decision of the North Jakarta District Court Number: 735/PDT.G-LH/2018/PN.Jkt.Utr in the Case of B3 Waste Pollution in the Citarum River Basin

The judge's consideration is one of the most important factors in determining the value of a decision that contains justice (*ex aequo et bono*) and legal certainty, as well as benefits for the parties involved. This judge's consideration must be addressed both meticulously and cautiously. If the judge's consideration is not thorough, good, and careful, the High Court or the Supreme Court will overturn the judge's decision.

In the case of contamination of the Citarum River Basin (DAS) by PT. How Are You Indonesia (HAYI), the Panel of Judges is trying to realize a fair and beneficial decision, not only for the parties but also for the environment. The Panel of Judges in the decision of the North Jakarta District Court Number: 735/PDT.G-LH/2018/PN.Jkt. Utr used the Precautionary Principle in their legal considerations, as contained in the Law on Environmental Protection and Management Number 32 of 2009 and the Declaration of Rio 1992.

The use of this Precautionary Principle is based on the judge's consideration in the *Judex factice* (the judge who examines the facts of the trial) that PT HAYI as the Defendant in the textile industry activities as a business venture, produces Hazardous and Toxic Material (B3) waste. Pollution in the Defendant's textile industry activities originates from the textile finishing process, the dyeing process for textile materials, as well as the Wastewater Treatment Plant or WWTP which treats wastewater from the production process to produce B3 waste, which includes used solvents (cleaning), dyes and pigments (containing heavy metals and hazardous chemicals), waste from finishing processes containing organic solvents, and sludge from the WWTP with main pollutant materials in the form of heavy metals (especially As, Cd, Cr, Pb, Cu, Zn), halogenated hydrocarbons (from

the Ethical Responsibility of the Environment,” *Academic Journal of Islamic Principles and Philosophy*, 3.1 (2022): 1–24 <<https://doi.org/10.22515/ajipp.v3i1.5104>>.

dressing and finishing processes), Pigments, color and organic solvent tensioactive (surfactant).

The Minister of Environment and Forestry of the Republic of Indonesia as the Plaintiff has assigned the KLHK (Ministry of Environment and Forestry) Verification Team, where based on the Minutes of Verification I, it was found that some of the wastewater coming out of the production process, which was not treated through a wastewater treatment installation or WWTP and directly discharged into the Cihujung river through underground pipes. It was proven that there was seepage of black wastewater from chemical processes leading to the river, and there was also a bypass directly to the river with a fairly heavy flow. Whereas based on the facts from Verification I and II that have been explained, it proves that Defendant has disposed of waste from textile industry activities directly into environmental media without going through the WWTP process.

Based on Plaintiff's arguments above, Defendant's business activities which are engaged in the fabric perfecting industry starting from the knitting, dyeing, printing, and garment processing processes produce Hazardous and Toxic Waste (B3), one of which is Sludge from WWTP containing heavy metals consisting of Arsenic (As), Cadmium (Cd), Chromium (Cr), Copper (Cu), Lead (Pb), Zinc (Zn) as regulated in Appendix 1 Table 2 list of B3 waste from sources specific Government Regulation PP No.85/1999 as well as in Appendix I Table 3 Government Regulation PP No. 101/2014.

Government Regulation Number 85 of 1999 concerning Amendment to Government Regulation Number 18 of 1999 concerning Management of Hazardous and Toxic Waste (hereinafter referred to as "PP No. 85/1999"), regulates waste from the textile industry with Code D213 as follows:

Table 1. Waste from The Textile Industries

Code	Type of Industry/ Activity	Activity Code	Source of Pollution	Source / Waste Description	Major Pollution
D213	Textiles	1711/1722	Textile finishing process	Sludge from WWTP contains heavy metals	Heavy metals (especially As, Cd, Cr, Pb, Cu, Zn)
		1721/1722	The process of dyeing textile materials	-Used solvent (cleaning) -	Halogenated hydrocarbons (from dressing and finishing processes)
		1723/1729	The process of printing textile materials	Fire retardant (Sb/organic bromine compounds)	Pigments, dyes and organic solvents
		1810/1820	WWTP that processes activity process effluent		Tensioactive (surfactants)

Table 2. List of Hazardous and Toxic Waste /B3 From General Specific Sources Government Regulation/PP No. 101/2014 also regulates Waste from the Textile Industry with Code 22 as follows:

	Type of Industry/ Activity	Waste Source	Waste Code	Waste Description	Hazard Category
D22	Textiles Cover the activities of bleaching and dyeing textile fibers, knitting yarns, fabrics, and textile goods, manufacturing waterproofing, coating, drying, or impregnating clothing	1. Bleaching, dyeing, and finishing processes for yarn and sewing thread	- A322-1	- Used solvent	1
			- A322-2	(cleaning) -	1
			- A322-3	Organic bromine	1
			- B322-1	compounds (Sb)	2
		2. Bleaching, dyeing, and finishing processes for fabrics	- B322-2	(fire retardant)	2
			- B322-3	- Dyestuffs and pigments containing heavy metals	2
				- Dyestuffs and pigments containing hazardous chemicals -	
				Waste from finishing processes containing organic solvents	
		3. Fabric printing processes, including pattern printing		- Sludge from WWTP	
4. WWTP treats the effluent of the textile activity process mentioned above.					

Article 1 points 13 and 14, Jo. contain provisions on pollution and environmental quality standards. Article 20 paragraph (1), (2) letters a and b of the UUPPLH Law on Environmental Protection and Management regulates as follows: "*Environmental pollution is the entry or inclusion of living things, substances, energy, and/or components into the environment by human activities in such a way that they exceed the established environmental quality standards,*" according to Article 1 point 14. Whereas Defendant should have disposed of the wastewater into the river first through the WWTP process, but because Defendant disposed of the wastewater directly into the river, the pollutant components contained in the wastewater that should have been caught in the WWTP in the form of sludge which is categorized as B3 waste are wasted directly into the river, so, in other words, the Defendant immediately disposed of the B3 waste into the river.

The defendant's act of throwing waste into the river has been included in the formulation of an act of environmental pollution/destruction. For companies that pollute the environment, because they produce waste, the Government has issued regulations prohibiting the disposal of waste into environmental media, as stated in Article 69 paragraph (1) letter a and e UUPPLH Environmental Protection and Management Law which stipulates: "Everyone is prohibited from: a. commit acts that result in environmental pollution and/or damage; e. disposing of waste to environmental media".

Based on the above data and facts, PT HAYI as the Defendant has entered into the formulation of Unlawful Acts/tort/*onrechtmatige daad* which is regulated in Article 1365 of the Civil Code which explains as follows: Article 1365 of the Civil Code "Any unlawful act that brings harm to other people, obliges who because of the mistake of issuing the loss, compensates for the loss." In this case, Defendant has committed an act prohibited by the Laws and Regulations, namely disposing of waste into environmental media which resulted in environmental pollution.

The Defendant's actions were imposed as an Unlawful Act/tort which harmed the affected community as stated in the Civil Code, the Defendant's actions also harmed the environment, so he should also be

held accountable for being prosecuted following the principle of absolute responsibility (strict liability) adhered to in the Law on Protection and Management of the Environment UUPPLH No. 32 of 2009, in which the Defendant must be responsible for environmental damage because the impact resulting from his business can pose a serious threat to the environment.

This strict liability provision is a *Lex Specialise* in Lawsuits regarding Unlawful Acts/torts in general as referred to in Article 88 UUPPLH No.32 of 2009, which states as follows: "Any person whose actions, business, and/or activities use Hazardous and Toxic Substances /B3, generates and/or manages B3 waste, and/or which poses a serious threat to the environment is responsible for the losses that occur without the need to prove elements of guilt".

Because the Judge uses the precautionary approach as stipulated in the 1992 Rio Conference, absolute responsibility (Strict Liability) is applied in this case, namely "To protect the environment, the precautionary approach shall be widely applied by States according to their capabilities." *Where there is a risk of serious or irreversible damage, a lack of complete scientific certainty shall not be used to delay cost-effective measures to prevent environmental degradation.*" The use of this principle results in changing civil liability from unlawful acts/torts to strict liability.²⁴

The principle of absolute liability (strict liability) in this case, refers to the decision of the previous Judge, namely that strict liability has been applied in the District Court Decision. Bandung No. 49/Pdt.G/ 2003/PN. Bdg., which was confirmed by the RI Supreme Court Decision No: 1794K/Pdt/2004 (Mandalawangi Decision). Whereas, based on the Mandalawangi Decision, the Court applied the principle of prudence which resulted in changing civil liability from Unlawful Act to absolute responsibility, furthermore the proof of the element of guilt (liability based on fault) as the argument of the Plaintiff's Lawsuit so that the

²⁴ Andri G. Wibisana, "The Many Faces of Strict Liability in Indonesia's Wildfire Litigation," *Review of European, Comparative and International Environmental Law*, 28.2 (2019): 185–96 <<https://doi.org/10.1111 /reel.12284>>.

Defendants are declared to have committed an Act Against The law becomes irrelevant because with the application of the "precautionary principle" accountability becomes strict/absolute "Strict liability".²⁵

The Bandung District Court decision which was also corroborated by the decision of the Supreme Court of the Republic of Indonesia stated that the *Judex Factie* Court at the Court of First Instance had correctly applied the law, namely in applying the precautionary principle and absolute accountability. The Supreme Court of the Republic of Indonesia stated that the prudential principle has the status of "ius cogen", namely a legal principle that has the strongest normative strength so that other principles or regulations that conflict with it will be deemed null and void.

The Supreme Court also confirmed that, in enforcing environmental law, judges must always be bound by the principles of environmental policy which include: - Substantive Legal Principles - Principles of Process - Principles of Justice That, environmental principles that need to be the basis for judges' considerations in examining and adjudicating an environmental case are the principle of prevention of environmental hazards, the principle of prudence, the principle of polluters paying, and the principle of sustainable development.

Based on the considerations mentioned above, the precautionary principle and absolute accountability are used in cases of pollution related to B3 waste by PT YAHY. The judge based on the provisions of Article 87 paragraph (1) Jo. Article 90 paragraph (1) UUPH, namely "Every person in charge of a business and/or activity who commits an unlawful act in the form of environmental pollution and/or damage that causes harm to other people or the environment is obliged to pay compensation and/or take certain actions", The judge uses the *in dubio pro natural* principle, namely prioritizing environmental protection in his decision. Punish Defendant to pay environmental damages to Plaintiff in the amount of Rp. 12,199,882,947,- (twelve billion one hundred ninety-nine

²⁵ Imam Mulhadi, "Perkembangan Prinsip *Strict Liability* dan *Precautionary* dalam Penyelesaian Sengketa Lingkungan Hidup di Pengadilan," *Mimbar Hukum*, 25.3 (2014): 416–32.

million eight hundred eighty-two thousand nine hundred and forty seven Rupiah) to the Government.

Development of the Implementation of the Precautionary Principle in the Legal Considerations of Judges in Cases of Environmental Pollution

In the case of PT HAYI Hazardous and Toxic Waste Pollution by PT HAYI, the judge's consideration has broadened the understanding of the precautionary principle. The expansion of this meaning is a precautionary transformation from the level of management and policy to the level of dispute resolution. Initially, the Precautionary Principle was interpreted as preventive concerning environmental management in sustainable development, namely development that meets the needs of the present while taking into account meeting the needs of future generations, based on sustainable development.

The concrete form of the precautionary principle in sustainable development in Indonesia based on UUPPLH 2009 is in the form of Environmental Impact Analysis (AMDAL), Strategic Environmental Assessment (KLHS), and Environmental Risk Analysis (ARL). The EIA/AMDAL instrument is, every planned activity or business that is expected to have a large and important impact on the environment is examined carefully and in-depth for possible negative impacts.

In the case of an activity plan where technology or science is not available that can eliminate or minimize the risk of negative impacts that will be caused by an activity and/or business, environmental considerations are a consideration that must be prioritized by policymakers. The precautionary principle requires that environmental interests must always be considered in any policies related to environmental utilization and management.

It is a development and expansion of the meaning of the precautionary principle when judges implement it not only in the context of managing sustainable development, in the form of considerations and policies in development but at the level of dispute resolution in court. The judge has made the precautionary principle the norm to test the truth. Based on this, the precautionary principle is not only preventive but also repressive in nature.

Observing the North Jakarta District Court judge's considerations, we can learn a new legal principle in the environmental field, that the precautionary principle has reduced the *dubio pro natura* principle. Judges have been out of the box from the principle that has been often used in environmental cases, in which judges when faced with doubts always implement the *in dubio pro reo* principle as a guideline, namely if the judge is in doubt about something in a case then he must decide in favor of the accused.²⁶ As a result, the application of this principle to environmental case decisions causes the Defendant/Polluter to often escape compensation claims. Whereas in the case of B3 waste pollution by PT HAYI, the Judge applied a different principle, namely the principle *in dubio pro natura*, namely the Judge when facing doubts in environmental pollution cases, prioritizes the interests of environmental protection in his decision.

In dubio pro natura principle is a fundamental feature of court proceedings involving environmental disputes. Previously, defendants in environmental cases frequently avoided compensation claims because judges, when faced with doubts, always applied the *in dubio pro reo* principle as a guideline. Along with the paradigm shift from homo-centric to eco-centric, *In dubio pro reo* principle in environmental justice has been replaced by the principle of *in dubio pro natura*.

Another development is that the judge has made the Rio Declaration which is a soft law into a hard law. In simple terms, usually, hard law is defined as an agreement that has legally binding force, whereas soft law is only morally binding. North Jakarta Court Judges adopting soft law international law, used directly as a source of law in deciding a case is a big step in the search for justice.

The judge at the North Jakarta Court in deciding this pollution case did not use the law as the sole source of law but also used international treaty conventions, namely the 1992 Rio Declaration as a source of law in his legal considerations. The North Jakarta Court Judge in his legal

²⁶ United Nations Environment Programme, "Environmental Rule of Law," (2019): 1–306 <https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf>.

considerations reminded that the source of formal law in Indonesia is not only laws but also customs, conventions, treaties, jurisprudence, and doctrines which have the same position as sources of law.

The judge's decision at the North Jakarta District Court regarding the pollution of B3 Hazardous and Toxic Waste is in line with the progressive legal theory which requires judges to have courage in seeking and implementing substantive justice, even though it must be contrary to the law. The law must offer something more than procedural justice. A just law must recognize the will of the public and be committed to achieving substantive justice. The development of the precautionary principle which is reflected in the judge's judgment and judgment, as well as the use of the 1992 Rio Declaration to strengthen the judge's legal considerations, is a forward and progressive step in protecting the environment in court.

Implementation of the Precautionary Approach in Environmental Pollution Cases As A Legal Consideration from the Perspective of Islamic Law

In Islam, this precautionary principle is often referred to as *ihdiyâth*, which means vigilance and thoroughness.²⁷ According to Ibn Hazm,²⁸ *ihdiyâth* is an "effort to seek salvation" (*tholabu al-salâmah*). Imam al-Jurjâni explained that *ihdiyâth* is "taking care of oneself so as not to fall into sin" (*hifdz al-nafs 'an al-wuqû' fi al-ma'tsam*). Quoting Ibn Manzur's dictionary emphasized that *ihdiyâth* is an effort to guard something and choose something full of safety. *Ihdiyâth* can therefore be interpreted as an effort to protect oneself to maintain goodness (*maslahah*). In short, there needs to be caution in the management of natural resources so that they can always be under the umbrella of safety. This caution in the al-Qur'an is often emphasized in a tone so that humans do not harm nature.²⁹

²⁷ Zahari Mahad Musa, "Application of the Doctrine of *al-Ihtiyât* (Precaution Approach) in Estate Succession to *Khuntha* (Hermaphrodite) Community," *al-Qanatir International Journal of Islamic Studies*, 9.1 (2018): 11–26.

²⁸ Ryan, Cooper, and Tauer 2013.

²⁹ Mohd Hapiz Mahaiyadin and Muhammad Rahimi Osman, "Kerangka Fiqh Kepenggunaan dan Rekonstruksinya di Malaysia," *Journal of Contemporary Islamic Studies*, 1, 135–56.

In the al-Qur'an, many verses are emphasizing that humans do not destroy the earth and nature. Repeatedly Allah emphasized "*wa lâ ta'tsau fil ardi mufsidîn*" (do not roam the earth doing damage). There were at least 5 times: al-Baqarah (60), al-A'raf (74), Hud (85), al-Syu'ara (183), and al-Ankabût (36). In addition, 3 times Allah also emphasized "*lâ tufsidû fil ardhi*" (do not do mischief on earth), namely in Surah al-Baqarah (11), al-A'râf (56), and al-A'râf (85). In other words, Islam sees that nature is not just a machine with no sense of purpose.

From this, the conception of *ihdiyâth* (prudence) indeed has a correlative point with *sadd al-dzarî'ah*, the maximum effort to suppress everything that can be a means of things that are prohibited to avoid the magnitude of damage (*mafsadat*).³⁰ If there is an act that is alleged to have caused damage, then the said action should be prevented so as not to have an impact on damage. So, even though on the one hand these actions are not explained in the law in the Shari'a, on the other hand, the consequences of these actions can lead intermediaries to something that is prohibited in the Shari'a.

Within the framework of Usul Fiqh, one of the popular rules that stick is *dar'u al-mafâsid muqaddamun 'alâ jalbi al-mashâlih*. Avoiding damage is a priority step over reaping the benefits. Imam Al-Syatibi includes his discussion of *sadd al-dzarî'ah* in this rule (Abu Ishaq Ibrahim Ibn Musa Al-Syathibi, n.d.). Such a perspective is an anticipatory and preventive step. In this context, it can simply be understood as an effort to take precautions to avoid a decrease in the quality of the environment as a result of pollution. In other words, Environmental Impact Analysis (AMDAL), Strategic Environmental Assessment (KLHS), and Environmental Risk Analysis (ARL) in UUPPLH can be categorized as *ihdiyâth*.

Ihtiyâth in this case includes "environmental protection", as a development of *Fiqh al-Bî'ah* (Fiqh of the Environment), part of contemporary issues in Islamic studies which are based on various rules, regulations, and norms regarding environmental governance following Islamic teachings. Various "prohibition" verses in surah al-Baqarah (60),

³⁰ Hifdhotul Munawaroh, "Sadd al-Dzarî'at dan Aplikasinya pada Permasalahan Fiqih Kontemporer," *Jurnal Ijtihad*, 12.1 (2018): 63–84.

al-A'râf (74), Hūd (85), al-Syu'arâ (183), al-Ankabūt (36), al-Baqarah (11), al-A'râf (56), and al-A'râf (85) proportionately are also much easier to understand and implement when interpreted by the rule of *al-nahyu 'an al-syai' amrun bi dhiddihi*, all the prohibitions in the al-Qur'an to leave an action implies an order to do otherwise. "Repair" is the key word as the implicit message to most of the prohibitions about "do not destroy". The simple meaning in this context is that all efforts and movements towards sustainable development are not only an unavoidable priority but also normatively actually Islam has hinted at it long ago.³¹

This kind of framework of thought of earlier scholars not only emphasized human responsibility as caliphs on earth but also encouraged precautionary steps as a result of an attitude of responsibility. The interpretation that guides and demands this action is Islamic Eco-Spirituality. Explicitly the revelation emphasized that if passion (anthropocentric) is the reference in environmental management and exploitation, it can have an impact on the amount of damage to nature (QS. al-Mu'minūn: 71). In addition, excessive nature encourages indifference to the environment (QS. al-Syu'arâ': 151-152). Syafaatun³² emphasized that there is not only continuity between God, humans, and nature but also that ecological damage is the result of a spiritual crisis and low human religiosity.

This is reminiscent of John Haught's apocalyptic eschatology, a perspective that puts forward that the universe is impermanent and is in the process of being destroyed. Because of this destiny, humans do not need to try too hard to save the earth from damage. This kind of paradigm encourages an attitude of less ecological empathy. The relationship between living things is biofeedback, are mutually dependent and influence each other.³³ Here it can be seen that Islam not only

³¹ Muhammad Roy Purwanto and others, "Islamic View Towards Environment Preservation," *KnE Social Sciences*, (2022): 11–15 <<https://doi.org/10.18502/kss.v7i10.11336>>.

³² Syafaatun Almirzanah, "God, Humanity and Nature: Cosmology in Islamic Spirituality," *HTS Teologiese Studies / Theological Studies*, 76.1 (2020): 1–10 <<https://doi.org/10.4102/hts.v76i1.6130>>.

³³ Scott A. Dunham, "The Ecological Violence of Apocalyptic Eschatology," *Studies in Religion*, 32.1–2 (2003): 101–12.

emphasizes that nature has value, but with this framework indirectly the spiritual dimension of Islamic ecological ethics participates in building a personality that is not arrogant, not hedonic, not unjust, and not cunning in the exploitation of nature.³⁴

In short, concerning environmental pollution cases, what was previously mentioned by Beale³⁵ with "society (industry) destroying the world", needs to be anticipated with a precautionary approach in massive environmental pollution cases as a hard law. In addition, this effort does not only need to be strengthened narratively in social media and digital public spaces with the encouragement of civil society ethical legitimacy as suggested by Bradshaw and Howard,³⁶ but also needs to take the side of state administrators politically, both in the realm of policy public as well as the judiciary in the decisions of judges.

Based on the ever-expanding interpretations of the prohibition against abandoning an act that results in harm, the use of the precautionary principle in legal considerations of cases of hazardous and toxic waste pollution by judges at the North Jakarta Court is very relevant to Islamic law. The order to do good and prohibit what causes harm is the judge's basis for considering punishment for those who commit acts that cause harm.

Adhering to a precautionary approach in court decisions is indeed a form of the strong morals and responsibilities of judges towards environmental sustainability and steps to erode the culture of desertion so that they can suppress, restrain and restrain those who are not only greedy in exploiting natural resources, but also expanding man-made environment that is not in favor of the environment.

In another case also the Judge is embodying a revelation of QS. al-Rūm (41), emphasizes that he is not only concerned with the fact that

³⁴ Muhammad Saiful Anam, "Konsep Environmentalism dalam al-Qur'an," *Jurnal al-Fanar*, 3.1 (2020): 41–56 <<https://doi.org/10.33511/alfanar.v3n1.41-56>>.

³⁵ Jack.G.Beale, *The Manager and the Environment: General Theory and Practice of Environmental Management (Environmental Sciences & Applications)*, 1st edn (Oxford: Pergamon Press (January 1, 1980).

³⁶ Samantha Bradshaw and Philip N Howard, *The Global Disinformation Order 2019 Global Inventory of Organised Social Media Manipulation*, University of Oxford (Oxford, 2019).

the damage to the earth is the result of human activities but at the same time refutes the people who follow John Haught's apocalyptic eschatology who are resigned to it. While being straightforward in dealing with what Munib³⁷ says is a "destroying society". When revelation forbids (*al-nahyu 'an al-syai'*) not to do damage, then the implemented step for the Judge to apply a precautionary approach in environmental pollution cases as a legal consideration is the implementation and contextualization of *amrun bi dhiddihi*, (namely an order to improve governance ecology) and can be categorized as a repressive step as well as an educative movement to promote sustainable development.

Thus, the actualization of the precautionary approach in environmental pollution cases as a legal consideration for judges on the one hand presents an awareness of the religious ecological movement which is a concrete step in implementing the precautionary norm in Islamic law. On the other hand, it is a step towards building a sustainable concept that is anticipatory-preventive in the context of management and repressive in dispute resolution.

Conclusion

The Panel of Judges in the decision of the North Jakarta District Court Number: 735/PDT.G-LH/2018/PN.Jkt.Utr applied the Precautionary Principle in their legal considerations. The judge judged *judex factie* the Defendant PT. How Are You Indonesia (HAYI) is not careful in disposing of B3 waste from textile industrial activities. The Panel of Judges strives to achieve a fair and beneficial decision, not only for the parties but also for the environment. The decision of the Panel of Judges at the North Jakarta District Court has developed the concept of the Precautionary Principle, in the form of an expansion of meaning, namely the Precautionary Principle which is commonly used from the level of management and policies that are preventive to the level of repressive dispute resolution as contained in UUPPLH

³⁷ Munib and others, "Conservation Environmental Sustainability in the Perspective of Islamic Legal Philosophy," *Samarah*, 6.2 (2022): 556–72 <<https://doi.org/10.22373/sjhk.v6i2.12411>>.

No. 32 of 2009. Another development is that judges have made the Rio de Janeiro Declaration 1992 which is a soft law that is only binding morally, to become hard law, used directly as a source of law in deciding a case. This development is a paradigm shift from homo-centric to eco-centric in environmental justice. Based on developments in this field of law, the judge's legal considerations considered that the defendant's lack of caution was very harmful to the environment and society, and the defendant was found guilty and sentenced to pay an amount of compensation. From the perspective of Islamic law, the use of the Precautionary Principle by the Judge is close to the concept of *ihdiyâth* (prudence) and has a correlative point with *sadd al-dzari'ah*, a maximum effort to suppress everything that it can be a means of things that are prohibited to avoid the magnitude of the damage. Within the framework of *Usul Fiqh*, avoiding damage is a priority step over reaping the benefits (*dar'u al-mafâsid muqaddamun âla jalbi al-mashâlih*).

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