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Eko Nur Cahyo

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THE APPLICATION OF STRICT LIABILITY ON CORPORATION OF FOREST AND LAND FIRES ON THE PERSPECTIVE OF ENVIRONMENTAL LAW AND FIQH AL-BIAH

(An analysis of decision Number:456/Pdt.G-LH/2016/PN Jkt. Sel)

Eko Nur Cahyo¹, Nizham Mahmudi Muttaqin²

eko.nurcahyo@unida.gontor.ac.id,

nizhammahmudi@mhs.unida.gontor.ac.id

Abstract

Problems related to environmental damage is a hot topic discussed today. Aside from being concerned with the basic needs of all humanity, environmental degradation goes hand in hand with economic and technological advancements which are expected to lead to human benefit and prosperity. One of the efforts made to provide environmental protection is to adopt the application of Strict Liability in Anglo Saxon countries in solving cases of environmental damage caused by corporations. According to the principle of strict liability, the claim is not based on an element of error but is based on the impact of the defendant's actions. One example of a forest and land fire that was successfully decided based on Strict Liability is the decision number: 456 / Pdt.G-LH / 2016 / PN Jkt Sel. On the other hand, environmental problems are also closely related to spiritual issues. As a living solution, Islam provides views through Muslim scholars regarding environmental issues with the inception of the idea of Al-Biah Fiqh. The approach taken through Maqasid Syariah, by combining hifdz al-biah as a matter of dharuriyat. This was supported by Mustafa Abu Sway and also Ali Yafie. The results of this study indicate a paradigm difference between the more reductionist environmental law and a

¹ Lecturer of Islamic Economics Law Department

² Graduated student of Comparative Laws

more holistic environmental law. But even so, Strict Liability can be adjusted with *fiqh al-biah* with several conditions.

Key words: *Strict Liability, Environmental Law, Fiqh al-Biah, Maqasid Sharia*

Abstrak

Permasalahan terkait kerusakan lingkungan merupakan topik yang hangat diperbincangkan dewasa ini. Selain karena menyangkut kebutuhan mendasar dari seluruh umat manusia, kerusakan lingkungan bertolak dengan kemajuan ekonomi dan teknologi yang diharapkan menimbulkan kemaslahatan dan kesejahteraan manusia. Salah satu upaya yang dilakukan untuk memberikan perlindungan lingkungan ialah dengan mengadopsi penerapan *Strict Liability* dalam negara Anglo Saxon dalam penyelesaian kasus kerusakan lingkungan yang disebabkan oleh korporasi. Menurut prinsip *strict liability*, gugatan tidak didasarkan pada unsur kesalahan melainkan didasarkan atas dampak perbuatan tergugat. Salah satu contoh kasus kebakaran hutan dan lahan yang berhasil diputuskan berdasarkan *Strict Liability* ialah putusan nomor: 456/ Pdt.G-LH/2016/PN Jkt Sel. Di sisi lain, permasalahan lingkungan juga berkaitan erat dengan persoalan spiritual. Sebagai solusi hidup, islam memberikan pandangan melalui cendikiawan muslim terkait persoalan lingkungan dengan dicetuskannya gagasan *Fiqh Al-Biah*. Pendekatan yang dilakukan melalui *Maqasid Syariah*, dengan menggabungkan *hifdz al-biah* sebagai persoalan *dharuriyat*. Hal ini didukung oleh Mustafa Abu Sway dan juga Ali Yafie. Hasil dari penelitian ini menunjukkan adanya perbedaan paradigma antara hukum lingkungan yang lebih reduksionis serta *fiqh lingkungan* yang lebih holistik. Namun meskipun demikian, *Strict Liability* dapat disesuaikan dengan *fiqh al-biah* dengan beberapa syarat.

Keywords: *Strict Liability, Hukum Lingkungan, Fiqh Al-Biah, Maqashid Syariah*

INTRODUCTION

Humans are *caliphs* on earth.³ In carrying out their duties as caliphs, humans are given reason by Allah S.W.T. With that reason, human beings weigh and determine their behavior. In *Mantiq Science* for example, humans are called the term “*Hayawan Natiq*” or animals that have common sense.⁴ Although Al-Ghazali belongs to the Hayawaniyyah class, Al-Ghazali argues that humans have two traits that make it an amazing creature, namely science and will. With knowledge he fosters, and creates something, while the willingness to achieve a goal is what makes him able to control lust and is always in full consideration in attitude.⁵ Furthermore, with this intellectual ability, humans should be able to manage and carry out their roles as caliphs and provide maximum benefits for other creatures, such as from animals, plants, and even environment.

Environmental damage needs special attention. In addition to being a place to live, environment also has direct contact with natural resources that are the primary needs in human life. Therefore damage to the environment will also have an impact on all beings around it. The environment can be understood as a unity with all things such as space, power, state, and living beings, including humans and their behavior, which affect nature itself. The continuity of livelihood and welfare of human beings and other living creatures. As a *caliph*, humans should try to manifest their faith for maintaining the environment properly and correctly according to Allah S.W.T. orders, because every creation in the sky and on the earth has its own function and purpose. Allah says in the Al-Qur’an of Surah Al-Rum [30] verse 8:

“And why don’t they think about themselves? God does not make the heavens and the earth and what is between them but with the correct and determined time. And indeed many of mankind absolutely reject the meeting with their Lord“

³ Al-Baqoroh verse : 30

⁴ M. Kholid Muslih, *Worldview Islam (Pembahasan Tentang Konsep-konsep Penting dalam Islam)*. (Ponorogo: UNIDA Gontor Press, 2018) p.137

⁵ Abu Hamid Muhammad bin Muhammad Al-Ghazali, “*Intisari Filsafat*,” Translated By Rus’an, (Jakarta: PT. Bulan Bintang, 3rd Ed, 1989) : p. 1

Islam has regulated about life either in general or in particular which includes life's tangible object and abstract, past and future events, as well as matters related to the duties and roles of Allah S.W.T creatures in the world. The environmental damage is the cause of human failure as a caliph in finding and applying solutions contained in Islamic teachings or commonly known as *sharia*.

Currently, various countries are now beginning to realize the dangers of environmental damage, therefore they are trying to hold international conferences to build agreement and find solutions to environmental problems. Among them are the Declaration of Stockholms (1972).⁶ World Charter for Nature (1982)⁷, the Declaration of Rio De Janeiro (1992)⁸, as well as followed up by countries by creating regulations in the form of laws and government policies so that the results of the declaration can be practiced in the jurisdictional order at the national level like what Indonesia has done.

In regards to environmental problems, several Indonesian law rules have been arranged to be used as solutions and to provide legal certainty. One of which is Law No. 4 in 1982 concerning Provisions on the Principles of Environmental Management, which was later amended

⁶ The Stockholm Declaration is a declaration made at the Human Environment conference held by the United Nations in 1972. In this declaration there are 26 basic points about environment and humans. simply the content of the conference is human rights (Principle 1); human resource management (Principle 2 to Principle 7); the relationship between development and the environment (Principles 8 to Principle 12); development planning and demographic policies (Principles 13 to Principle 17); science and technology (Principles 18 to Principle 20); state responsibility (Principles 21 to 22); compliance with national environmental standards and the spirit of cooperation between countries (Principles 23 to Principle 25); and the threat of nuclear weapons to the environment (Principle 26). See on <https://www.hukumonline.com/klinik/detail/ulasan/cl3824/generasi-deklarasi-stockholm-di-indonesia> . accessed at 23 of March 2019

⁷ The World Charter for Nature was adopted by the United Nations member nation-states on October 28, 1982. It is the principle "principles of conservation by which all human conduct affects nature is to be guided and judged." There are 5 major focuses in the world charter for nature namely: respect for nature, compromise on life on earth, protection of unique environments and endangered species, sustainable management, protecting nature from the dangers of war. See the United Nations General Assembly (28 October 1982). "World Charter for Nature". United Nations. Retrieved 25 August 2013.

⁸ The Rio de Janeiro conference was held on June 3 to June 14, 1992. The conference discussed a number of issues including: Systematic oversight of production patterns, Alternative energy sources that replace fossil fuel use, New dependence on public transportation systems to reduce exhaust emissions vehicles, and water scarcity. https://en.wikipedia.org/wiki/Earth_Summit accessed on 23 of March 2019

4 by Law No.23 of 1997 concerning Environmental Management, and amended again with Law No. 32 of 2009 concerning Environmental Protection and Management. The Environmental Law stipulates the procedures for resolving environmental disputes, how to complain about environmental disputes and other matters related to accountability in environmental disputes involving individuals and corporations.

1 Based on data from the Ministry of Environment and Forestry, there has been an increase in the amount of land and forest damage caused by human activities. In 2017 the total area of fires in all regions of Indonesia reached 165,483.92 hectares, and this number increased in 2018 reaching 510,564.21 hectares.⁹ However behind the magnitude of the damage, the seriousness of the government has not been proven in making policies related to environmental protection. The weak policies from the government is not the only cause of the environmental damage. Environmental law enforcement is also considered to be less serious in punishing perpetrators of environmental destruction especially damage caused by corporate activities. At least there are eleven companies that have not paid compensation for losses suffered by the state.

The eleven companies that committed violations and received sanctions are: 1) PT Merbabu Pelalawan Lestari (IDR. 16.2 trillion) illegal burning cases 2) PT National Sago Prima (IDR. 1.07 trillion) forest and land fires cases 3) PT Jatim Jaya Perkasa (IDR. 491 billion) land fires cases 4) PT Waringin Argo Jaya (IDR. 466, 5 billion) land fires cases 5) PT Kallista Alam (Rp. 366 billion) land fires cases 6) PT Ricky Kurniawan Kertapersada (IDR. 191 billion) forest and land fires cases 7) PT Bumi Mekar Hijau (IDR. 78 billion) land fires 9) PT Waimusi Agroindah (Rp.29 billion) land fire cases 10) PT Palma Utama (IDR. 22.3 billion) land fires cases 11) PT Argo Growing Gemstones Abasi (in court proceedings) land fires cases 12) PT Surya Panen Subur (in court proceedings) land fires cases.¹⁰

In the destruction of the environment carried out by corporations, there is a principle called the principle of strict liability. L.B Curzon, a legal expert from the UK divides at least three reasons for the application of

⁹ sipongi.menlhk.go.id accessed on 25 of March 2019

¹⁰ <https://www.jawapos.com/nasional/politik/17/02/2019/soal-karhutla-greenpeace-11-perusahaan-belum-bayar-denda-sepeser-pun/> accessed on 24 of March 2019

Strict Liability. They are: 1) The need for legal certainty, 2) The difficulty of finding evidence related to environmental destruction, 3) The magnitude of the danger caused to people's lives. The approach taken in environmental law according to Curzon must pay attention to the welfare aspect or *masalah* for the community.¹¹ According to the principle of strict liability, it is enough that the facts of victims' detriment are used as the basis for demanding criminal responsibility for the perpetrators in accordance with the "*res ipsa loquitur*" adage in which the facts have spoken for themselves. The principle of error as generally followed by criminal law (no liability without fault) is set aside in the application of this principle with the terms and conditions stipulated in the law, so that it can be said that strict liability is *Lex Specialist* in the application of environmental law.¹² One example of a decision that uses the principle of strict liability in criminal corporations in a forest and land fires case is Decision Number 456 / Pdt.G-LH / 2016 / PN Jkt. Sel. In this decision, PT. Waringin Agro Jaya (WAJ) is subject to Strict Liability for fires covering 1,626.53 hectares in Ogan Komerang Ilir district of South Sumatra Province. In this decision, the panel of judges charge the defendant with absolute liability.

Different from western perspective, in Islamic perspective science is not against religion.¹³ Both must be in synergy to making a good life of human being. In the view of Islam, humans are given reason as a means of carrying out their duties as *caliphs* on the earth. Humans with the ability to think not only must be able to read the verses of *qauliyah* in the text, but also make the *qauliyah* verse as the basic capital of reading the verses of *kauniyah* that exist in nature. So that the thoughts produced by humans will be able to answer the problems that are present and prohibit the possibility in the future.

Fiqh al-biah is one of the new breakthroughs among Muslim scholars who are extremely needed today. It is part from the fact that the whole world is experiencing a natural resource crisis as an impact of economic capitalism and developmentalism which makes development a

⁶ N.H.T. Siahaan. *Hukum Lingkungan dan Ekologi Pembangunan, Second Edition*, (Jakarta: Erlangga. 2004) p.316-317

¹² <https://www.hukumonline.com/berita/baca/lt5aa77cdf71ead/strict-liability-jurus-ampuh-hukum-lingkungan-menjerat-korporasi-tanpa-buktikan-unsur-kesalahan> accessed on 3 of April 2019 In article 88 of the Act on the environment, to explicitly describe strict liability as *lex specialist* in environmental lawsuit.

¹³ Ali Yafie. *Merintis Fiqh...*,p. 38

primary goal that often results in long-term damage to the environment. The basics of environmental *fiqh* are already included in the Qur'an, such as the word of God about the creation of heaven and earth.¹⁴

Fiqh Al Biah is an idea to ensure the achievement of *maslahah* which is currently being held by the contemporary Muslim scholars. *Fiqh Al Biah* is a new terminology in the science of *fiqh*.¹⁵ However as part of Shariah science, *fiqh al biah* can be the right solution in dealing with environmental problems. Case of applying Strict Liability of forest fires by PT. Waringin Agro Jaya (WAJ) is considered necessary to be used as material for discussion and research to review the extent to which *fiqh al biah* as it is in conventional environmental law can be present and provide solutions in creating justice not only in philosophical and sociological forms, but also to contribute in providing input in a juridical order.¹⁶ Musthafa Abu-Sway said "For if the situation of the environment keeps deteriorating, there will ultimately be no life, no property and no religion. The environment encompasses the other aims of the *Syari'ah*"¹⁷

Ibnu Rusyd in his book "*Bidayatul Mujtahid wa Nihayatul Muqtasid*" explained that cases and legal events cannot be limited because they will continue and increase, while normative texts are very limited even though it is impossible to address the infinite (*waqiah*) with the limited (*nash*).¹⁸ Therefore giving a review of *fiqh al-biah* in the matter of enforcing environmental law in this way is the application of the principle of strict liability in the decision of Decision Number 456 / Pdt.G-LH / 2016 / PN Jkt. Sel. is a progressive step amidst the stagnation of the community paradigm about the science of *fiqh* itself.

¹⁴ Al-Hijr (15) verse 85

¹⁵ <http://kalsel.muhammadiah.or.id/artikel-fikih-lingkungan-dalam-perpektif-islam1-sebuah-pengantar-detail-289>. accessed at 4 april 2019

¹⁶ *Fiqh al-biah* began to be developed and examined further by muslim scholars and Islamic organizations in indonesia as well. include a describes the belief of the importance of environmental management through the Fatwa Indonesian Ulama Council about forest fires is still forbidden No: 128/MUI-KS/XII/2006. the fatwa explained about the ban on burning the forests however and did not give consideration toward some form of implementation of the enforcement of environmental law. so this research aims to be the first step in a review of Islamic law in the juridical realm. See on sipongi.menlhk.go.id/cms/images/files/10246

¹⁷ Mustafa Abu-Sway, *towards an Islamic Jurisprudence of the Environment: Fiqh al- Bī'ah fī al- Islām*, <http://homepages.iol.ie/~afifi/Articles/htm>. 1998

¹⁸ ابن رشد. *بداية المجتهد و نهاية المقتصد*. (سورابايا: الهداية. (دون السنة)) ص. ٢

THE DECISION NUMBER : 456/Pdt.G-LH/2016/PN Jkt.Sel

Based on the decision number: 456 / Pdt.G-LH / 2016 / PN Jkt.Sel there has been cases of forest and land fires involving the Indonesian Ministry of Environment and Forestry (KLHK) as plaintiffs against PT WARINGIN AGRO JAYA (WAJ) as defendants. Based on the decision, the plaintiff who is a state institution obtain disadvantages caused of fires that was originated from the defendant's land. Then it asks the court to give a verdict against the defendant's law and use the principle of Strict Liability in compensation for the event. On the other hand, the defendant felt that he had not committed an unlawful act because the fire was caused by fishing activities carried out by the community by burning or called *Lebak lebang* and is not caused by the plaintiff so that it could not be categorized as illegal. In addition, the application of the principle of Strict Liability in damages compensation is considered burdensome due to extreme weather conditions which make it difficult to recover so that it can also be classified as a force majeure.

From the panel of judges' consideration, it was found that it was based on the observation of Terra Aqua MODIS satellite issued by NASA of USA that they are fires originated from the defendant's land and palm oil mill on July 7 2015 and continued until October 30, 2015. The land is located in Kandis Village, Ulak Pianggu, Keman Baru, Ulang Kemang, Jungkal Serdang, Belanti, Jermun Ulak Pampangan District and Padang Island Sirah Pampangan District, Ogan Komering Ilir Regency, South Sumatra Province with the following border: deles river as northern border, rawang sibumbang as southern limits, rawang tanjungtabuantelukajo as western border, and komering river as eastern border.

The fire of an area of 1,626.53 hectare affected the surrounding land damage. The fires also have an impact on the emergence of respiratory disorders for the people of South Sumatra in particular and also the people of Malaysia and Singapore. It disrupted aviation traffic and other immaterial losses.

In this case the panel of judges does not impose criminal liability against the law on the defendant but focuses more on the responsibility for compensation for losses with the principle of Strict Liability. The decision number: 456 / Pdt.G-LH / 2016 / PN Jkt.Sel is one of decisions that uses the principle of Strict Liability as the principle of its loss responsibility.

Even though legally strict liability has been regulated in Article 88 of Law Number 32 of 2009, decisions in practice rarely apply this principle in view of the difficult conditions of its determination.

STRICT LIABILITY AS AN INSTRUMENT

Strict Liability implies that liability arises immediately at the time of the act without questioning the lawsuit.¹⁹ According to the theory of Strict Liability, if the action of a legal subject is classified as Ultrahazardous, then he must replace all losses incurred even though he has acted very carefully to prevent such harm or loss, Even though it was done accidentally.²⁰ In short, the application of the principle of Strict Liability only requires the defendant's assumption or knowledge to demand criminal liability.²¹

In the application of the Strict liability, the subject of the law is a corporation with an emphasis on the element of occurrence of an offense which is detrimental not to the causality of an error.⁴² In the case of criminal acts of environmental damage caused by corporate activities in Article 88 of law number 32 in 2009, it has explicitly regulated Strict Liability.

“Every person whose actions, business, and / or activities use B3, produce and or manage B3 waste, and or that pose a serious threat to the environment are absolutely responsible for the losses incurred without proving the element of error.”²²

L.B. Curzon in his Criminal Law describes actuality and benefits from the principle of Strict Liability. According to Curzon, the principle is needed with regard to :

- 1) The importance of guarantees to comply with certain important rules needed for public welfare. This guarantee can provide legal certainty to the community. Indirectly, the emergence of collateral causes

¹⁹ Muhammad Akib, *Hukum Lingkungan Perspektif Global dan Nasional*, (Jakarta:PT Raja Grafindo Persada,2014), p. 181

²⁰ Mas. Achmad Sentosa. *Penerapan Asas Tanggung Jawab Mutlak di Bidang Lingkungan Hidup, dalam Undang-undang Nomor 23 tahun 1997 dan Permasalahannya*, (Jakarta, Indonesia Republic Supreme Court Judicial Technical Development Project. 1998) p. 125

²¹ Roeslan Saleh, “*Pikiran-pikiran Tentang Pertanggungjawaban Pidana*”, (Jakarta. Ghalia Indonesia. 1982) p. 23

²² Article 88 of law number 32 in 2009

makes the entrepreneur to be obliged to know the existence of laws governing the system of accountability.

- 2) Evidence of errors is very difficult to obtain for violations of regulations relating to community welfare. The evidence is lost or destroyed. Then, it is necessary to have Strict Liability in addressing a case so that people's welfare can be indirectly fulfilled.
- 3) A high level of social danger due to these actions. These dangers can cause social turmoil within the body of the community itself it is of course very dangerous because it can cause material and in-material losses. Law must provide preventive action before the turmoil occurs for the sake of the survival of the nation and state.²³

From the opinion of Curzon, it can be concluded that in the case of environmental damage the evidence is very difficult. On the other hand, legal guarantees and compensation for environmental damage must be immediately resolved to avoid increasing the impact of damage. In addition, current technological developments often cause harm to victims. Application of Strict Liability can at least be a guarantee of for the protection of victims' rights.

THE HISTORY OF STRICT LIABILITY

The history of implementation of strict liability in environmental disputes cannot be separated from the events of the *Rylands v Fletcher* (1868). Fletcher filed a lawsuit against his reservoir which exploded and flooded Fletcher's mine near him. The event caused a loss of damage worth £ 937 (equivalent to £ 80,800 in 2016).²⁴

In this case, the plaintiffs were the owners of a mill. After obtaining approval from the steadfast owner who is adjacent to him, the defendant creates a reservoir to supply water to the mill. The defendant has employed workers and engineers who are competent in making the reservoir. Meanwhile the defendant was not directly involved in making the reservoir. The know of defendant between the reservoir and the plaintiff's land was apparently connected to the tunnel which caused

²³ Muhammad Erwin. *Hukum Lingkungan...*, p.114-115 Quoted in L.B Curzon, *Criminal Law*, Mac Dinald and Evans, Plymouth, 1997 p.317-318

²⁴ UK Retail Price Index inflation figures are based on data from Clark, Gregory (2017). *"The Annual RPI and Average Earnings for Britain, 1209 to Present (New Series)"*. *Measuring Worth*. Retrieved November 6, 2017

some of the reservoir water to flood the plaintiff's land.²⁵

The majority of governments supports Rylands. However, Bramwell B. argued that the plaintiff had the right to enjoy his land free from water disturbances, and as a result the defendant was guilty of violations and the assignment of interference. Bramwell's argument is affirmed, both by the Treasurer Court and the House of Lords, which leads to the development of "Rules in the Rylands v Fletcher"; that "a person who for his own purposes carries his land and collects and saves there everything that might cause damage if escaped, must keep it in danger, and prima facie responsible for all damage which is a natural consequence of his escape".²⁶

From this case we can draw the conclusion that the caution of the defendant is not an excuse to avoid responsibility for environmental damage. Therefore the implementation of Strict Liability principle is effective and practiced in other countries such as United States of America, Canada, India, Australia, the Netherlands and Indonesia.

CORPORATION AS LEGAL SUBJECT

Prof. Abdulkadir Muhammad in his book explained what is meant by legal subjects it is a supporter of rights and obligations called people. Meanwhile the definition of people in legal concepts includes humans and legal entities. Humans are the subject of law according to biological concept, as natural phenomena, as creatures of God that are equipped with reason, feeling, and will meanwhile legal entities are legal subjects according to juridical concepts, as symptoms that live in society, as bodies of human creation based on law, who has rights and obligations as humans.²⁷

From the beginning, the concept of corporation as a legal subject was introduced in civil law. There are two kinds of Legal Subjects in the sense of civil law, namely:

- a. *Naturlijk Person* or natural person²⁸

²⁵ Andri G. Wibisana. *Penegakan Hukum...*, p. 48-49

²⁶ Bohlen, Francis H. "The Rule in Rylands v. Fletcher Part I". Vol 59:5: University of Pennsylvania Law Review and American Law Register February in 1911 p. 300

²⁷ Abdul Kadir Muhammad, *Hukum Perdata di Indonesia* (Bandung, Citra Aditya Bakti, 2014). p.23

²⁸ Article no. 1329 of Civil Code Book as known as KUHPerdata

b. *Recth*person or legal entities²⁹

From the Article, we can conclude that on the basis of granting rights from the state to corporations it causes them to be burdened with responsibilities such as humans.

Whereas according to the purpose of civilization, the civil legal entities are classified into three types, namely: a) legal entity that aims to make a profit, b) legal c)entity that aims to fulfill welfare.³⁰ legal entity with ideal purposes, such as legal entity in education, religion, social organizations, and foundation institutions

In the history of Islamic development several legal entities are known. Seen from the history of Islamic civilization, generally corporations in Islam are corporations that are public or a corporation which is formed by the government. For example, a corporation in the form of *Baitul Maal* which was established by Rasulullah PBUH in the second year of the *Hijrah* when carrying out the government in Medina. Even the purpose of *Baitul Maal* is not purely for profit, but it is a legal entity to guarantee the welfare of the Islamic community through the tasks and functions it has.

On the other hand, in the history of the *Umayyads* also known as the *diwan barid* (Post Office) it is different from *Baitul Maal* whose purpose is to fulfill the welfare of the community, the post office legal entity is an ideal legal entity to support government performance.

In line with the development of civilization and institutional systems in Islam, legal entities or profit-oriented corporations began to be known including *Shariket Hayriye* (Sea Freight Company) during the Ottoman Caliphate. *Shariket Hayriye* was a time when the Muslims owned joint stock company which was founded in 1851. In *Shariket Hayriye* Sultan Abdulmecit held the largest share of the corporation in which the rest was owned by high-ranking Turkish officials and a small portion was owned by private financier of Armenian descent.³¹

From the previous explanation, it can be concluded that corporations in Islamic civilization have struggled with civilization with their duties, functions, rights and obligations so that they can be categorized as legal subjects.

²⁹ Article no. 1654 of Civil Code Book as known as KUHPerdata

³⁰ *Ibid* p.26

³¹ David Lendes, *Bankers And Pashas: International Finance And Economic Imperialism in Egypt*, (Cambridge: Harvard University Press, 1958), p.149-154

THE PROBLEMS OF APPLICATION OF STRICT LIABILITY

In the application of strict liability in Indonesia, there have been several problems that have caused the difficulty of implementing this system. There are at least two fundamental problems in the implementation of the strategic liability system, namely: first, combining strict liability and act against the law in the lawsuit without clearly defining the difference between both of it, and secondly there is a mistake in understanding of strict liability itself.

The first problem is the incorporation of strict liability and act against law in a lawsuit without clearly defining the difference between both of them. As discussed earlier, the Ministry of Environment in the lawsuit asked the judge to decide the responsibility for environmental damage carried out by PT. Waringin Agro Jaya as an illegal act and Strict Liability. Before the ruling of Decision number: 456 / Pdt.G-LH /2016/ PN Jkt.Sel was born, there were several other cases that combined strict liability with illegal acts in the lawsuit in court. Some of these cases include: Walhi's decision v. Freeport (2001)³², Minister of Environment v, Kalista Alam³³, Minister of Environment and Forestry v PT. Jatim Jaya Prakasa³⁴, and also the decision of Mandalawangi (2003).³⁵ If reviewed other court decisions relating to environmental damage involving accountability by act against the law and strict liability at the same time, most plaintiffs do not properly understand the scope of the strict liability lawsuit. There are still many who associate strict liability with the element of error as is done in proving legal actions. Even though both are different things. Besides, proving illegal acts is explained in details but it is different from proof of strict liability that has not been maximized. Therefore, the judge's decision is always in the form of accountability of act against the law and excludes strict liability in accordance with the dominance of liability against the law rather than strict liability in the plaintiff's lawsuit.

The second problem is that there is a mistake in understanding the liability in strict liability itself. As explained in the previous chapter,

³² Walhi v Freeport Indonesia Company, PN. South Jakarta No. 459/PdtG/2000/ PN Jkt.Sel. (PN. Jkt.Sel 2001)

³³ Minister of Environment v. PT. Kalista Alam, Supreme Court of the Republic of Indonesia No. 651 K/Pdt /2015 (Supreme Court 2015)

³⁴ Minister of Environment and Forestry v, PT Jatim Jaya Prakasa, PN North Jakarta No. 108/Pdt.G/2015/PN JKT.Utr. (PN. Jkt.Utr.2016)

³⁵ According to The Decision no. 1794 K / Pdt / 2004 (Supreme Court of 2004)

understanding strict liability is a legal product adopted from the command law legal system. In addition, strict liability is also an anti-thesis of system tort liability. Therefore, it is not true to equate these two systems or include parts of tort liability into strict liability. There are at least two mistakes in understanding strict liability in its application to environmental law in Indonesia.

First, the view that strict liability is part of a lawsuit against the law. This statement can be proven in the case of the Minister of Environment v. Kalista Alam in which the plaintiff wants to impose liability in strict liability based on the illegal acts committed by the defendant.³⁶ In addition, in the lawsuit of the Ministry of Environment and Forestry, it is not explained in details what constitutes the basic elements in the strict liability lawsuit.

Secondly is the assumption that strict liability is the principle of reversing proof of error (*Res Ipsa Loquitur*). In Article 30 paragraph (1) Government Regulation number: 45 of 2004 concerning forest protection it is explained that the holder of the forest utilization permit is responsible for the forest fires in his working area. Furthermore, in paragraph (2) of the same Article, it is explained that the form of responsibility of the permit holder includes criminal liability, civil liability, paying compensation, and administrative sanctions. Actually, in the Article it implicitly explains that *Res Ipsa Loquitur* is a form of reverse proof or burden of proof to the defendant.

If *Res Ipsa Loquitur* is understood as a reverse proof, then strict liability has a different meaning from *Res Ipsa Loquitur*. In the strict liability the burden of proof remains with the plaintiff. At least the strict liability claim must include three basic elements, namely³⁷:

- 1) The defendant's activities are included in Abnormally Dangerous. If referring to the Chief Justice of the Supreme Court Decree No. 036 / KMA / SK / II / 2013 Concerning Guidelines for Handling Environmental Cases, what is meant by Abnormally Dangerous is environmental damage whose impact is potentially irreversible and

³⁶ Supreme Court. Decision Number: 16 / Pdt.G / 2017 / PN. Mbo p. 23-24

³⁷ Andri G. Wibisana. *Penegakan Hukum...*, p.144

/ or the components of the environment affected are very broad. Activities classified as causing harm are also usually marked by the obligation to issue an environmental impact analysis (AMDAL) on the business.

- 2) There is a loss suffered by the plaintiff.
- 3) There is causality which explains that the plaintiff's loss is caused by the defendant's activities.

These three elements become the burden of proof of the plaintiff which is the fundamental difference between strict liability and Res Ipsa Loquitur. In addition, Vivienne Harpwood³⁸ explained that the conditions for applying the doctrine of Res Ipsa Loquitur are divided into three, namely:³⁹ 1) Losses are something that is difficult to prove (unknown cause), 2) that losses occur due to lack of caution or negligence, 3) That the defendant holds full of control about what happens. From these three elements we know that Res Ipsa Loquitur is also part of tort liability, or practices the principle of liability based on fault

THE SOURCE OF ENVIRONMENTAL DAMAGE

Nowadays, we are faced with environmental problems that are not over. One of the causes of the failure of humans in environmental management is the dominance of western science and paradigm towards existing environmental protection policies and systems. In the western view, secularization is needed to achieve a modernization.⁴⁰ Secularization in the west by many historians is believed to originate from the Christian teaching itself. For example in the Gospel of Matthew XXII:21 recorded the words of Jesus:⁴¹ "Affairs of the Emperor Leave Only to the Emperor, and the Affairs of God Submit to God." As a result, humans are seen as an independent existence so that they have freedom in determining all their

³⁸ A Professor Of Healthcare Law of Cardiff University

³⁹ Vivienne Harpwood, *"Principle Of Tort Liability"*, 4th Ed. (London: Cavendish Publishing Limited. 2000). P.144-145

⁴⁰ Syamsuddin Arif in his book *"Islam dan Diabolisme Intelektual"* explained that there are at least three basic characteristics of modernity, namely: 1) differentiation of social structures and functions which impact on the emergence of pluralism and relativism, 2) Privatization of religion to ensure a more organized and guaranteed life, 3) the dominance of science and technology compared to mythology and mysticism. See Syamsuddin Arif, *"Islam dan Diabolisme Intelektual"* (Jakarta: Selatan. Institut For the Study of Islamic Thought and Civilization, 2017) p.62-63

⁴¹ *Ibid* p.65

behaviors for the sake of progress. In addition, Rene Descartes through his famous statement ‘*Cogito, Ergo Sum*’⁴² also contributed to the understanding of reality which excludes all forms of doubt or things of an abstract nature including what is in the realm of spirituality. The impact of this thought is that nature is seen as a machine. For Rene Descartes, the goal of science is the mastery of nature so that humans can become masters or owners of their own nature.⁴³ This kind of paradigm is also called Anthropocentric or human is a measure of truth itself. The understanding that separates religion from science has an impact on the creation of overlapping laws in which dichotomic or reductionist and do not holistic.

The anthropocentric paradigm on one hand promotes development and the economy, but on the other hand it also causes environmental damage that affects both the present and future generations. Therefore the world government begins to change the shape of its environmental legal policies that were originally oriented to humans to be environmentally oriented. There are two phases of the development of environmental law, namely Classical Environmental Law (before the Stockholm declaration) and Modern Environmental Law (after the Stockholm declaration). The Classical Environmental Law phase is oriented towards environmental use (use oriented law), and Modern Environmental Law is oriented towards the environment itself (environmental oriented law).⁴⁴ From these two phases, we can see that there has been a paradigm shift in law enforcement from anthropocentric to biocentric. Hence, previously the nature of right turned into the right of nature. One of the most obvious examples of the biocentric paradigm is the legalization of rivers in New Zealand as legal subjects.⁴⁵

ISLAMIC VIEW OF FOREST AND LAND FIRES

Forest is an ecosystem that has various lives on it. Such as humans, plants, animals, and microorganisms. Forests contain many resources needed by humans starting from water, plants, even air resources.

⁴² In simple terms, it means I think then I am there

⁴³ Fritjof Capra. “*Titik Balik Peradaban*” (Yogyakarta: Benteng. 1999) p. 63

⁴⁴ Muhammad Erwin. “*Hukum Lingkungan dalam sistem perlindungan dan pengelolaan lingkungan hidup di Indonesia*, 4th Ed., (Bandung: PT. Refika Aditama. 2015) p.10

⁴⁵ <https://www.aljazeera.com/news/2017/03/zealand-river-world-legal-person-170316091153248.html>. Accessed on 15 of March 2019

In Islam, the forests can be classified into vacant land, or commonly known as *fiqh* as *al-mawat*. Preserving and utilizing forests are something that is permissible in Islam as long as this is done rationally and proportionally. The government as the organizer of the system in a country may grant forest management permits to individuals or corporations as long as they do not have a negative impact on the forest.⁴⁶

In the life of nation, the role of the government is very important in making rules regarding the management of this forest. At least the forest in its utilization can be classified into two types, namely: first, natural resources that are related to a broad audience such as water and air, and secondly resources that can be utilized for commercial needs.

The first can be classified as natural resources that are haram for personal or corporate ownership because they cover the needs of many people.¹³⁰ Whereas the second is that natural resources can be owned on condition of government permission. This is based on the *hadith* of Rasulullah (PBUH):

“There is no right to anyone except what his Imam has determined”

If we review the function of forest land, the land used by PT. Waringin Agro Jaya is a land that can be used as long as it has received permission from the government. This was proven through the deed of establishment of the defendant Number 06 dated June 12, 2007 which was changed to the deed of establishment Number 03 dated July 10, 2015. However, in its utilization the activities of PT. Waringin Agro Jaya caused a fire in his work area even though Allah strongly condemned the environmental destruction in general and the forest specifically.

Allah Said in Holy Qur'an :

وَلَا تُفْسِدُوا فِي الْأَرْضِ بَعْدَ إِصْلَاحِهَا وَادْعُوهُ خَوْفًا وَطَمَعًا ۚ إِنَّ رَحْمَتَ اللَّهِ قَرِيبٌ مِّنَ الْمُحْسِنِينَ

Meaning:

“And do not cause damage on the face of the earth, leave (Allah) repair it and pray to Him with fear (will not be accepted) and hope (will be granted). Surely the grace of God is very close to those who do good”

⁴⁶ وهبة الزحيلي، الفقه الإسلامي وأدلته، الجزء ٥ (قاهرة: دار الشروق: .٢٠٠٢) ص. ٢٤٥-٣٤٥

In his interpretation, al-Qurthubi says that the prohibition in this verse applies absolutely. That is, God forbids humans from destroying this natural ecosystem, either a little or a lot.⁴⁷ Meanwhile the fire in the working area of PT. Waringin Agro Jaya is based on the decision of the South Jakarta district court number: 456 / Pdt.G-LH / 2016 / PN Jkt. Sel included in the activity which poses a serious threat, causing the judges to issue strict liability decisions in the case. In general, related to forest fires, the Indonesian Ulema Council as the highest Islamic institution has issued *fatwa* No. 30/2016 regarding the rules for burning forests and land, explaining that acts of forest burning are punishable by illegality. Furthermore, in number 3, the general provisions contain a sentence stating that sanctions are adjusted based on the impact of the damage caused. It can be concluded, even though the burning of forests is punished forbidden, but sanctions for damage have not been explained in detail.

STRICT LIABILITY REVIEWED BY *MAQASID SHARIA* APPROACH

In strict liability, there are conditions that must be met, namely: a) actions that have a large and important impact on the environment, b) the use hazardous and toxic materials (B3), c). Produce of B3 waste.⁴⁸ In cases involving the Ministry of Environment and PT. Waringin Agro Jaya, environmental damage is included in actions that have a large impact on the environment. Thus if referring to Number 3 in the general provisions of *fatwa* Number: 30/2016 Indonesian Ulema Council (MUI), legal regulations should be made that differ between those that cause damage and can be repaired and which cause damage but cannot be repaired or commonly known as damage with serious threat. Izzudin Ibn 'Abdussalam in his *Al-Qowa'id Al-Kubro (Qawaid al-Ahkam fi Islahil al-Anam)* said that: "when the cause that brings *mafsadah* is strong, then the sin becomes greater than sin due to a mild cause."⁴⁹

Strict liability arises as an answer offered by the legal system of modern environment as an alternative in dealing with environmental

⁴⁷ Abi Abdillah al-Qurthubi, *al-Jami' Li Ahkam al-Quran*, Vol. IV (Beirut: Dar al-Fikr) p.227

⁴⁸ Environmental Law 1997 article 35 paragraph (1)

⁴⁹ العزین عبدا السلام، القواعد الكبرى (قواعد الأحكام في إصلاح الأنام). (دمشق: دارالقلم: ٢٠٠٢) .

damage with serious threats. Hence, if it refers to the rules of ‘*al-Muhafadzāt ala al-qadīm al-salih wa al-ahdz bi al-jadīd al-aslah*’, it might be that *strict liability* will get a place in the realm of *fiqh* especially *fiqh al-biah*.

Generally in the sharia *maqasid* discourse, contemporary clerics refer largely to the *maqasid sharia* theory that divides *maqasid sharia* into five basic components: keeping the religion (*Hifdz ad-din*), guarding the soul (*hifdz an-nafs*), keeping the minds (*hifdz al-aql*), guarding the offspring (*hifdz an-nasl*), and guarding the property (*hifdz al-maal*). Yusuf al-Qardhawi explained that maintaining ecological preservation is something that needs to be done to support the achievement of the *maqasid*. Indirectly,⁵⁰ Yusuf al-Qardawy suggested that the regulations need be made to protect the environment from the damage which in this case is forests.

In synergy to Yusuf al-Qardawy, the former leader of Indonesian Ulama Council Ali Yafie progressively entered the element of preserving the environment into the *maqasid sharia* so it became ‘*kulliyat al-sit*’ with the following composition: 1) religious protection (*hifdz al-din*) 2) soul protection (*hifdz al-nafs*), 4) protection of sense-protection. 5) offspring protection (*hifdz al-nasb*), and 6) environmental protection. (*hifdz al-biah*).⁵¹ The logical consequence of adding such elements is the increased legal norm in the field of environmental law enforcement.

Although both agreed on the obligation to maintain the environment, both of them differed in positioning the urgency of environmental problems. If we look at the story of the Imam Syafi’ for *qaul al-qadim* (old opinion) and *qaul al-jadid* (new opinion), you can conclude that there are legal differences between Iraq and Egypt. Although these two *qaul* (opinions) are produced by the same person, but the different place and condition have the impact the law. This is also in line with the rule ‘*al-hukmu yataghayyuru bitaghayyuril amkinah wal azminah*’ or it can be interpreted that the law changes in line with changing circumstances and conditions. In this case, the author took Ali Yafie’s opinion which included *fiqh al-biah* as part of *kulliyat al-sit* or *dhoruriyyat al-sit*. This is based on the reason that Ali Yafie is a contemporary Indonesian scholar and is also a former chairman of the Indonesian Ulema Council (MUI). So that

⁵⁰ يوسف القرضاوي، رعاية البيئة في الشريعة الإسلامية. (قاهرة، دار الشروق. ١٠٠٢). ص. ٩٣

⁵¹ Ali Yafie. *Merintis Fiqh Fiqh Lingkungan Hidup*, (Jakarta, Ufuk Press. 2016) p. 225

the Islamic *maqasid* study is adjusted to the environmental conditions in Indonesia

In addition, the case of environmental damage is fairly complicated to prove even often used by unscrupulous individuals to avoid the amount of losses due to damage caused. The lack of integrity in law enforcement in this country is also very embarrassing. The researcher assesses that strict liability is not a law that is contrary to Islamic law since it has the same goal, namely to create an environment that can be used for life even after the damage. However Strict Liability is also not a perfect system so it needs to be refined on several lines, namely:

- 1) Strict liability lawsuit should be combined with a lawsuit against law by explaining both difference in detail. This is based on the rule: '*maa laa yudroku kulluhu la yutroku kulluhu*'.
- 2) Strict liability is not understood as accountability without limits of compensation because the government as *ulul amri* also has responsibility for compensation for its negligence in coordinating the corporation which in this case is PT. Waringin Agro Jaya.
- 3) If forest fires are damaged that poses a serious threat and is carried out intentionally, then the sanctions given will be in the form of seizure of all corporate assets and the death penalty for the perpetrators of the damage. This is based on the argument "Whoever kills a human being, not because that person (kills) another person, or not but because it causes damage on the face of the earth, then as if he has killed humans completely. And whoever changes life as a human being, it is as if he has changed all humans life.

There has been many damages that have already been done to make people think and find solutions to current environmental problems. Providing a review of *fiqh al-biah* in environmental law is a progressive step that can be taken. The 45th vice president of the United States once said "*The more deeply I explore the roots of the environmental crisis that hit the world, my conviction is that this crisis is nothing but a manifestation of the spiritual crisis.*"⁵² Therefore, the paradigm of environmental law must be directed towards the paradigm of a holistic one that not only emphasizes material aspects but also immaterial aspects such as religious involvement in the realm of environmental law enforcement.

⁵² Quoted in Alwy Shihab, *Islam Inklusif* (Bandung: Mizan, 1998) p. 166

CONCLUSION

Based on result of the discussions that have been described and presented in the previous chapter associated with a review of the application of strict liability to corporation on forest and land fires in perspective of environmental law and *fiqh al-biah* (analysis of decision number: 456/Pdt.G-LH/2016/PN Jkt Sel) it can be concluded as follows:

Strict liability is a form of accountability adopted from the command law legal system. In strict liability all elements of subjective and objective fault are ruled out. Meanwhile in the Indonesian law this principle also has legal legitimacy in Article 88 Law number 32 of 2009 concerning environmental management:

“Every person whose actions, business, and / or activities use B3, produce and / or manage B3 waste, and / or that pose a serious threat to the environment are absolutely responsible for the losses incurred without the need to prove the error element.”

According the law number 23 of 1997 there are 3 forms of activities that can be classified into strict liability: namely: a) actions that have a large and important impact on the environment, b) use hazardous and toxic materials (B3) and c) Produce B3 waste. In the decision number: 456/Pdt.G-LH/2016/PN Jkt. Sel. damages caused by PT. Waringin Agro Jaya is a serious threat so that it can be classified into actions that can be punished with strict liability.

The rationality of strict liability is : the importance of guarantees to comply with certain important rules needed for public welfare, the evidence of errors is extremely difficult to obtain, and the last is a high level of social danger due to these actions. For this reason, the approach to enforce environmental law after the Stockholm declaration directed at the pro-natural approach is preferred over pro justice.

There have been many cases of environmental damage which in the lawsuit included strict liability, but very few ended in strict liability decisions. There are two common mistakes that are often made, namely: First, combining strict liability with tort liability without distinguishing the two in details. The second is the assumption that strict liability is a reverse proof, whereas in the strict liability the burden of proof is plaintiff obligation.

To be decided as strict liability, The Plaintiff must be able to explain these three elements in the claim, namely:

- 1) The Defendant's activities are included in Abnormally Dangerous. If referring to the Chief Justice of the Supreme Court Decree No. 036 / KMA / SK / II / 2013 Concerning Guidelines for Handling Environmental Cases what is meant by Abnormally Dangerous "is environmental damage whose impact is potentially irreversible and / or the components of the environment affected are extremely broad. Activities classified as causing harm are also usually marked by the obligation to issue an environmental impact analysis on the business
- 2) There is a loss suffered by The Plaintiff
- 3) There is causality which explains that The Plaintiff's loss is caused by the Defendant's activities.

In his lawsuit, the Ministry of Environment and Forestry has succeeded in explaining the three elements so that they are qualified as a claim for strict liability. This decision should be appreciated and used as a reference for plaintiffs of environmental damage who want to apply strict liability as a form of responsibility for environmental damage that occurs.

Fiqh al-biah is part of the science of *fiqh* that examines environmental problems. Not many have introduced the terminology of *fiqh al-biah*, but in principle, the object of the study of *fiqh al-biah* in the form of environment has been discussed in Islamic civilization. The principles of environmental management are also included in the Qur'an and *hadith* and also the doctrine of Muslim scholars.

Rene Descartes in his famous statement "Cogito, Ergo Sum" also contributed to the understanding of reality which excludes all forms of doubt or things of an abstract nature including what is in the realm of spirituality. The impact of this thought is that nature is seen as a machine. Therefore for Rene Descartes, the purpose of science is the mastery of nature so that humans can become masters or owners of nature itself. This is what causes the birth of Strict Liability because the anthropocentric paradigm donated by Rene Descartes failed to create a sustainable environment so this paradigm is diverted towards the biocentric paradigm.

Different from the western paradigm which dichotomizes between science and religion, Islam actually presents life solutions through the

teachings of religion itself. In forest resources for example, in Islam the forest is classified into *al-mawat* or empty land. At least the forest in its utilization can be classified into two types, namely: firstly, natural resources that are related to a broad audience such as water and air, and secondly resources that can be utilized for commercial needs.

In the case of forest fires the area of PT. Waringin Agro, the judge gave a decision on the principle of strict liability. At least there are two problems that arise with the application of this system. The first is the status of the corporation as a legal subject, and the second is an element of error that is ruled out in applying strict liability.

The answer of the first question is, in the history of Islam the corporation has been known as the subject of law during civil matters such as: *Baitul Maal*, *Diwan Al-barid* (post office), and also *Shariket Hayriye* in the Ottoman Era in Turkey. The corporation in Islam divided into profit and non-profit purpose. If referring to the 3 basic elements in Islamic criminality are: 1) The perpetrators can be held accountable for his actions. 3) The actions taken are acts that can be subject to punishment. Criminal punishment is currently not understood as a prison sentence, but also can be understood as compensation for damage, therefore the corporation can be viewed as a subject of law.

The Second answer about strict liability excludes the element of error. Islam is very detailed in explaining the connection between mistakes against the consequences of law however so far the author has not found examples of cases in Islamic law that apply Strict Liability. Many are trying to find the closeness of Strict Liability with Islamic law but always end in conclusions matching Strict Liability with negligence or *khata* in Islamic law. It refers to the definition of Strict Liability which excludes the element of subjective and objective errors, then this opinion is not appropriate because negligence is part of a subjective error. The author assesses that strict liability is not a law that is contrary to Islamic law especially *fiqh al-biah*. Because both of them have the same goal, namely to create an environment that can be used for life even after the damage.

According to Ali Yafie's *Maqasid Syariah* which includes environmental protection (*hifdz al-biah*) into *kulliyat al-sit*, then the following recommendations will be produced:

- 1) The strict liability lawsuit should be combined with a lawsuit against the law, this is based on the rule: *maa laa yudroku kulluhu la yutroku*

kulluhu ‘

- 2) Strict liability is not understood as liability without limit of compensation
- 3) If forest fires are damaged that poses a serious threat and is carried out intentionally, then the sanctions given are in the form of seizing all corporate assets and granting death penalty if the damage is caused by intentional actions.

In relation to the materials being of the subject of this research believes that there are still many shortcomings and weaknesses because of the limited knowledge and lack of citation or references that have to do with the title of the thesis. It is expected to provide insights which will make the researcher able unearth more details and review more widely in future

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