

The Precautionary Principle: From Theoretical Concept to Practical Application - The Case of Consumer *Protection

مبدأ الحيطة والحذر: من المفهوم النظري إلى التطبيق العملي
- حالة حماية المستهلك -

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Abstract:

The world has witnessed incredible technical advancements in practically every industry in recent years. Though this development has had many positive benefits, it has also led to the rise of some risks, such as the interaction between the customer and the intervening party, which puts the consumer's health and safety at risk and has prompted lawmakers to implement limitations. The consumer, who is the weaker party in the contractual relationship, has certain obligations that must be met. The most crucial ones are ensuring that the product is sound, providing security, and adhering to all legal and standard criteria.

Because it is founded on the precautionary principle, which may be adequate to contribute to achieving consumer protection, this study intends to address the principle that evolved from these needs for consumer protection.

Keywords: The consumer/ the precautionary principle/ the danger.

Introduction:

The economic field is one of the sectors that countries rely on the most to achieve growth. In doing so, they use several frameworks, including encouraging experienced contributors in their field of specialization to provide the best and highest quality products to meet the legitimate desires of the consumer. At the same time, they also seek to create a convergence between these stakeholders and consumers on the basis that this latter group, which constitutes the majority in countries, is considered a weak party in the contract in terms of knowledge and understanding of the subject matter of the transaction, especially since transactions between the parties to the contract are no longer limited to physical meetings. However, the possibility of concluding contracts in non-material fields has become established.

The scientific and technological developments have effectively contributed to the emergence of some unexpected risks associated with products, which result in several damages mainly related to the consumer's health, safety, and interests, as the consumer may be induced to conclude the contract without sufficient knowledge of the subject matter of the transaction or based on incorrect information provided by the intervening party in informing or advertising the product.

Based on this, the idea of establishing the rules of traditional civil liability as a basis for compensation for the damages suffered by the consumer has raised a multitude of issues on the grounds that compensation is made after the damage has occurred. Accordingly, the desire for a

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new legal principle based on prior protection of the consumer would reveal the damage before it occurs and take precautions against it, thereby avoiding uncertain damages.

This research paper is our contribution to enriching the precautionary principle and its applications in Algerian law. We will address the topic in an article titled 'The Precautionary Principle: From Theoretical Concept to Practical Application—Using Consumer Protection as a Model.' The research problem revolves around: "How does the precautionary principle contribute to consumer protection"?

Through this research problem, we will address the precautionary principle as stipulated in Algerian law, relying on the analytical approach at times and the descriptive approach at other times. In the first section, we will focus on the relationship between the precautionary principle and consumer protection. In contrast, in the second, we will address the impact of the precautionary principle on civil liability.

1- The Concept of the Precautionary Principle and the Justifications for Its Application:

1.1- The Concept of the Precautionary Principle:

Most researchers do not universally agree on a definition of the precautionary principle, as the latter is linked to the evolution of scholarly opinions and perspectives influenced by the various political, social, and cultural values prevailing in society.

Moreover, the difference in the expressions and terminologies used to convey the precautionary principle, as well as the confusion between it and some similar concepts such as vigilance, prevention, preparedness, and other synonymous linguistic terms, can prevent the adoption of a definition agreed upon by the various jurists and researchers in the field of legal sciences.

From a linguistic perspective, precaution or prudence refers to the measures and actions taken to anticipate or avoid potential harm and to mitigate its negative effects on individuals and property. It is thus considered an ethical act aimed primarily at respecting and protecting the environment and preserving healthy and sound lifestyles for individuals.

The emergence and prominence of this principle have been associated with the management of public policy in Germany, which was initially limited to the environmental field, where public authorities were required to exercise vigilance and caution in the context of protecting the environment during the conduct of various activities in the country. Subsequently, the use of this principle was generalized to the fields of consumer protection and public health preservation from the perspective of the need for society to regulate the risks associated with the uncertainty of the consequences of some human activities and the seriousness of the damages that the environment may cause.¹

Jurisprudentially, the precautionary principle is defined as the principle that requires not invoking the absence of scientific certainty when it comes to the harmful effects of activities to refrain from taking the necessary precautionary measures or delay their adoption to avoid potential damages.

The jurist KouriIysk Philip Viney Genévriöre defines it as the justification for a decision made by a public or private person involving specific measures related to an activity or product that is presumed to potentially pose a risk of harm to public health, whether for the consumer or the environment, in the present or future generations.²

The Algerian legislator has defined it in Article 3, Paragraph 6 of the Law on Environmental Protection in the Framework of Sustainable Development, as "the precautionary principle, by virtue of which the lack of available scientific and technical knowledge should not be a reason for

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delaying the adoption of effective and appropriate measures to prevent the risk of serious environmental damage, at an acceptable economic cost."³

In summary, the precautionary principle is a philosophical and legal principle that aims to take precautionary measures and actions from the perspective of making them prevent potential damages in the event of the absence of scientific certainty and the current scientific and technological knowledge's inability to provide solutions to some of the consequences of human activity. This should not justify delaying the adoption of preventive measures for the damage at an acceptable economic cost.⁴

1.2- Justifications for the Application of the Precautionary Principle

As it primarily refers to the activity aimed at predicting and anticipating future events, the beginnings of its application were associated with the environmental field in order to address the risks of natural disasters, and then its application spread to the fields of consumption and health in order to address health and consumption crises. However, the application of this principle requires the fulfillment of a set of conditions that constitute the legal justification for its adoption, which are as follows:

1.2.1- Absence of Scientific Certainty:

From the perspective that the available scientific knowledge may not be able to confront the effects that some human activities or some products may have on individuals. Therefore, we find that some products may potentially cause harm. Therefore, this should not be a reason for delaying the adoption of appropriate measures that would prevent the occurrence of potential damages and risks.⁵

1.2.1- Likelihood of the Suspected Risk:

That is, if the risk is certain, this is a foregone conclusion, and there is no room for the application of this principle. Three main features characterize the risk intended in this condition.⁶:

- It is a risk that is not scientifically certain:

That is, there is no scientific knowledge or data to confirm it, which does not mean that the possibility of risk does not exist but rather requires more research, analysis, and foresight.

- It is a potential or probable risk:

This means the existence of possible concerns and threats and raising concerns and doubts, such as the risk resulting from the consumption of a product due to its lack of safety or the possibility of its impact on health.

- The seriousness of the potential harm:

That is, the degree of the expected risk is considerable, and the damage is irreversible and irreversible, such as what happened with the crisis of HIV-contaminated blood in Europe, where a kind of distrust in European health products prevailed due to the magnitude of the damage caused by this incident.

.13- The Relationship between the Precautionary Principle and Consumer Protection.

The establishment of the precautionary principle by legislation was not direct, but the initial discussion was around precaution and the environmental field. Therefore, it is necessary first to determine the origin of the precautionary principle and then its concept, as follows:

1.3.1.- The Adoption of the Precautionary Principle by Legislations in the Field of Consumer Protection

The precautionary principle emerged within the domestic laws of states, gradually becoming widespread and reaching the international community, where international treaties and agreements were dedicated to it. However, everyone agrees that its origin stems from environmental protection.

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- **From Environmental Protection to Consumer Protection:**

Some experts believe that the American legislator was the first to include the idea of precaution within its domestic laws before it was incorporated as a principle in Germany in the mid-1980s. However, other parties believe that this principle was established earlier, in the Final Declaration of the Stockholm Conference in 1972. Others consider that the precautionary principle was addressed within the International Charter for Nature, convened by the United Nations General Assembly in Rio de Janeiro in 1992.⁷

Most authors suggest that the establishment of the precautionary principle was initially aimed at protecting the environment from damages resulting from technological development, which may be related to oil spills and nuclear explosions, leading to disturbances in the natural balance of the environment and life.

Only in the mid-1990s was the principle known outside the environmental field. Immediately after the emergence of damages affecting human life, i.e. human health, this principle expanded to include other areas beyond the environment, especially after the emergence of the so-called "animal meal" (meat and bone meal) that was suspected of contributing to the spread of mad cow disease. This product has been banned in Europe as animal feed since 1984.

The first case of mad cow disease appeared in the UK in November 1986, without knowing the cause until December 1987, when British experts concluded that the cause of the disease was the animal meal consumed by British cattle. Therefore, the UK banned its use, import, and consumption, and France followed the same approach. This ban shows that European countries have taken precautionary measures and thus applied the precautionary principle in the field of consumer protection. However, the evidence was not conclusive regarding the relationship between cattle disease and animal meal, as the results were based on mere potential hypotheses without absolute certainty, which was not scientifically confirmed until 1994.⁸

In addition to the scandal of contaminated blood and the public outrage it caused, it drew attention to these risks. The authorities were called upon to pay great attention to consumer protection, as the blood recipient is the citizen first and foremost, and the consumer is considered the weaker party. On this basis, it is clear that consumer protection is achieved by introducing the precautionary principle in order to better protect against the risks of substances and products that pose a real threat to their health and safety.⁹

- **The Establishment of the Precautionary Principle for Consumer Protection in Algerian Legislation:**

The new Algerian economic orientation adopted by the legislator after abandoning socialism was a driving force for adopting some principles that serve the consumer. The orientation towards attempting to reach the capitalist mindset and opening the field for private investors necessitated the need to protect the weaker party in the contractual relationship, which is the consumer. On this basis, the legislator, like other legislations, was obligated to adopt the precautionary principle, which was explicitly expressed in Law 09-03 dated February 25, 2009, related to the protection of the consumer and the suppression of fraud, or as amended by Law No. 18-09 dated June 10, 2018, in the first chapter of the fourth part entitled "Precautionary Measures and the Precautionary Principle."¹⁰

This law included numerous articles related to the precautionary measures to be taken and the persons and entities responsible for their implementation. It also established regulations, represented by Executive Decree No. 12-203 issued on May 6, 2012, related to the rules applicable in the field of product safety.

Therefore, the subject of consumer protection and ensuring their safety is one of the fundamental elements of the market system to achieve effective protection, and it is an

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international issue that goes beyond the level of a single country. For the consumer, it is necessary to provide every organized society with legal controls and mechanisms that regulate the relationships between the consumer and the business sector and to provide the expected safety in the product (goods and services) to face the technological developments that have turned all balances upside down in the era of globalization. This is what the legislator tried to organize through Law 09-03 on the Protection of the Consumer and the Suppression of Fraud, as amended and supplemented, where the idea of physical safety occupied the legal thought, which led it to adopt the principle of precaution and caution that is directly applicable without assigning an explicit text to impose its application. The principle is an auxiliary and complementary to the obligation to ensure safety.¹¹ Thus, the legislator has emulated the pioneering countries in organizing this principle in order to avoid the damages that may affect the consumer as a result of a product whose harms are not known at the time of its manufacture or the methods of its treatment before being presented to the consumer.

2- The Application of the Precautionary Principle in the Field of Consumer Protection and Modern Doctrinal Trends

2.1- The Application of the Precautionary Principle in the Field of Consumer Protection

The application of the precautionary principle requires knowing the conditions for its application as well as its scope:

2.1.1- Conditions for the Application of the Precautionary Principle

The conditions for the application of the precautionary principle are the absence of scientific certainty about the danger of the product, as well as the possibility of serious harm affecting the health, safety, and interests of the consumer as a result of the risk:

- Absence of scientific certainty about the danger of the product:

The idea of scientific doubt is referred to in various forms, such as the lack of scientific certainty, the lack of scientific certainty, the absence of scientific certainty, the lack of scientific certainty, the lack of technology, or the lack of certainty. The meaning of this condition is that the precautionary principle, or what some prefer to call the precautionary approach, is not used except in the absence of sufficient scientific evidence based on current scientific knowledge, which, if available, would provide sufficient data on the risk and the magnitude of the potential damage. The lack of scientific knowledge does not mean limiting it to a specific area; rather, in order to apply the precautionary principle, the current global scientific knowledge must not have definitive evidence regarding the risk and its potential consequences. Despite scientific progress and prosperity, it is unable to enumerate all the effects that some activities or products may produce on the individual. Therefore, we find that some products are suspected of causing harm. Therefore, this should not be used as a pretext to refrain from preventing their occurrence and taking the necessary measures.¹²

- The possibility of serious harm affecting the consumer's health, safety, and interests:

The serious harm requires that the risk be likely to occur and that it be serious and irreparable, which we will explain:

- The risk must be likely to occur:

The precautionary principle is based on the idea of the likely risk, as the risk lacks scientific certainty, meaning that there is no definitive scientific evidence of it among scientists and experts, due to the tremendous and rapid technological and technical development, as it may be difficult to discover many of the dangers that threaten human health. For example, the ideas of genetic modification are confined to laboratories. They are shrouded in much ambiguity, and reports indicate that the initial effects of genetically modified materials on human health will only appear twenty or thirty years from now until scientists can deduce accurate information.¹³

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On this basis, the risks in which the causal relationship between the incident and the damage it may cause is proven by conclusive scientific evidence are not subject to the precautionary principle under any circumstances, as this type of risk can be described as certain as long as it is possible to estimate the probability of its occurrence. However, the characteristic of the risk in the precautionary principle is that it is sudden, and its occurrence is always uncertain, but what is certain is the causal relationship between the potential accident and the expected damage. In contrast, the period in which the risk will occur remains unclear.¹⁴

In reality, the precautionary principle represents one of the unconventional solutions and constitutes an exception to the rule of the law's subordination to scientific and technological progress, as this principle did not arise as a reaction to scientific developments and the resulting intensive activities that lead to harmful environmental effects and require legal regulation to prevent their occurrence, but rather, on the contrary, it arose to remedy the lack of certainty or scientific evidence regarding these effects.¹⁵

- The risk must be serious and irreparable:

The risk taken into account in the idea of precaution is serious and irreparable, so the degree of danger is considerable, and the damage is irretrievable and irreversible.¹⁶ For example, if genetically modified materials spread in the environment and among consumers, their impact on human health would be difficult to treat. In addition, other damages arising from these materials, the cause of which is microscopic organisms that arise from genetically modified materials, may also exist.¹⁷

2.1.2- The scope of application of the precautionary principle

The health and safety of the consumer require the fulfillment of their legitimate desires by providing them with a product that is sound, safe, and does not pose any potential harm. The idea of consumer protection has traditionally been based on the principles of compliance assurance, warranty against hidden defects, and the obligation to provide information. These obligations primarily ensure economic damages under certain conditions. This has led to the necessity of establishing the obligation to guarantee safety, which ensures damages affecting the person, their security, and their material interests.

The obligation to guarantee safety has been defined based on its characteristics and nature. This requires identifying the person obligated to fulfill this commitment and the consumer whose material and moral interests are to be protected. Safety and security necessitate providing adequate guarantees to prevent exposing the consumer's health and safety to risk, as well as establishing specific rules aimed at protecting the victims, monitoring the stakeholders, and tracking those who do not comply with the legally recognized specifications and safety standards, the absence of health, environmental, and security requirements during the production and preparation of products, and the failure to follow up on the path of the product (the producer) after its presentation for consumption. These legal preventive mechanisms are meant to reassure the consumer about the credibility of the goods and services offered for consumption.¹⁸ Consequently, the obligation to guarantee safety plays a preventive role in combating product risks, making the precautionary principle a complementary and supportive tool for the safety obligation.

The scope of application of the precautionary principle is based on the necessity that the product offered for consumption be sound, especially if it is of a food nature, and safe, particularly the industrial product:

- The precautionary principle ensures a sound food product for the consumer:

The guarantee of product safety is an important obligation independent of the other known obligations (warranty against hidden defects, compliance). The purpose is to protect against risks that may be the subject of a warranty if they fall under what is called the risks of technological development or what some call the risks of scientific development.

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The precautionary principle stipulated in Law 09-03 on the protection of the consumer and the suppression of fraud is complementary and supportive of the obligation of safety, as the legislator dedicated the first section of the second chapter of this obligation. Article 4, paragraph I of the law above states: "Any stakeholder in the process of placing food products for consumption must respect the mandatory safety of these products and ensure that they do not harm the consumer's health." This indicates the legislator's desire to activate this principle, as confirmed by the inclusion of protective or precautionary rules that enable the consumer to avoid the dangers of products whose safety is controversial due to the lack of scientific certainty about the immediate or future risks of their consumption.¹⁹ This includes:

a. Microbiological specifications for food products: Paragraph 2 of Article 4 states that "the conditions and modalities applied in the field of microbiological characteristics of food products shall be determined by regulation."²⁰

" Bacteria are the basis and primary source of damage to food, and this regulation requires respecting microbiological standards and taking samples that provide information to decide on compliance or non-compliance with the required specifications according to Articles 36 and 7 of the decision.

b. Precautionary measures related to food additives: Article 8 of Law 09-03 on the protection of the consumer and the suppression of fraud states that "food additives intended for human or animal consumption may be incorporated. The conditions and modalities of their use, as well as the maximum authorized limits, shall be determined by regulation." The concepts of additives and supplements have been precisely defined, their types and use modalities have been determined, and the necessity of subjecting them to toxicity tests and evaluating their suitability has been emphasized.²¹

These measures are preventive and precautionary, as the legislator has obligated the stakeholders to comply with them to avoid harm to the consumer.

- The precautionary principle ensures a safe industrial product:

Industrial products are movable goods that are the subject of industrial or craft production and cannot be exhaustively listed, as there are industrial products that are characterized by their danger to the safety of the person handling them, in addition to high-tech (electronic) industrial products. Given their nature, if there is any doubt that they may cause damage, necessary measures must be taken to prevent them in accordance with the precautionary principle. The source of this idea is French jurisprudence²²

The Second Requirement: The Modern Jurisprudential Trend in Adapting Liability According to the Precautionary Principle

It can be inferred from the preceding that if personal tortious liability is based on the element of fault and objective liability is based on the element of damage, then today, in the face of this vast amount of developments, we are establishing a new liability, which is preemptive precautionary liability based on the element of risk.²³

Some jurisprudence has concluded that the function of civil liability should not be limited, but rather should work to eliminate future risks, meaning that the function of civil liability should evolve from the remedial or compensatory function to the preventive precautionary function. Accordingly, the concept of compensable damages must be expanded. On this basis, the judge is satisfied with the existence of a threat of the occurrence of risks without proving the damage, meaning extending the possibility for the subject judge to impose precautionary measures without the requirement of urgency or even the imminent nature of the occurrence of the damage.²⁴

Conclusion:

In conclusion of this research paper, it can be said:

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The precautionary principle is a new [‡]form or methodology that has imposed itself in the field of legal studies, starting from its narrow framework represented in the environment, reaching several other areas, such as consumer protection, due to its connection with the obligations of the intervening party, such as the obligation of safety, information. Still, the specificity of this principle has made it independent of the known obligations, as it does not relate to certain risks. Still, it is based on the uncertain risk, which has affected civil liability by contributing to the transition from the idea of avoiding damage to the idea of averting risk before it occurs.

Based on this, the most important results resulting from the application of the precautionary principle today can be summarized as follows:

It relates to several fields, and in consumer protection, it mainly concerns potential risks that affect the health, safety, and interests of the consumer.

It has become the cornerstone in building the outlines of preventive liability due to the shortcomings of the traditional rules of liability in absorbing the various legal problems posed by the rapid development that has encompassed various fields.

Among the recommendations we present in this research:

Although the Algerian legislator has addressed the precautionary principle in the fourth chapter of Law 03-09 on consumer protection and fraud control and has specified sanctions on the intervening party in case of non-compliance with the requirements of this law, the legislator must make the burden of proof on the intervening party and the owners of large projects to negate the potential danger, as it is the strong party on whom the duty of precaution and care falls, in contrast to the consumer who is considered a weak party.

The judiciary at all levels must apply this principle to establish liability for a breach of the duty of precaution.

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