**Journal of Progressive Law and Legal Studies**
E-ISSN 2986-9145 E-ISSN 3031-9242
Volume 2 Issue 02, May 2024, Pp. 152-162
DOI: https://doi.org/10.59653/jplls.v2i02.845


# Legal Certainty In Financial Disputes Case Resolution Progressive Legal Perspective

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*Received: 09-04-2024* *Reviewed: 20-04-2024* *Accepted: 10-05-2024*

## Abstract

Pure Legal Theory (The Pure Theory of Law) is a positive legal theory. However, it does not discuss positive Law that applies in a particular legal system; it only discusses general legal theory. Hans Kelsen's presentation of Pure Legal Theory aims to explain the nature of Law and methods of making Law rather than explaining what the Law should be or the best way for Law to be created. This writing uses descriptive legal research, in which the author uses a normative juridical research type using the Library Research data collection method. This research aims to determine how the legal certainty and protection of the parties in mediating the resolution of Sharia financial disputes, a comparison of progressive legal analysis of Hans Kelsen and Satjipto Raharjo's legal theory in resolving Sharia financial disputes. Based on the research and discussion results, a picture is obtained that legal certainty (rechtssicherheit) Legal certainty is the certainty of laws or regulations; all kinds of methods, methods, and so on must be based on laws or regulations. Within legal certainty, there are positive laws and written laws. Normative legal certainty is when a regulation that regulates it clearly and logically is created and promulgated. Progressive Law wants to return the Law to the right track (on the right track). For this reason, Satjipto Rahardjo thinks that legal breakthroughs are needed (legal breakthroughs, not legal breaking) in law formation and enforcement.

**Keywords:** Financial Disputes, Legal Certainty, Progressive Legal Perspective

## Introduction

The founder of legal theory in the study of Law is known as Hans Kelsen. The magazines "Revue internationale de la theorye du droit International" and "Zeitscrift fur Theorie des Rechts" as proof; these magazines were founded in 1926, so at that time, the term used was "legal theory" and not "Allgemeine Rechtslehre." The reason the name "legal theory" is used is that it provides boundaries so that there are no debates that give rise to

uncertainty about "justice," "reasonableness," and "natural law." In other words, legal theory is seen as "positive legal theory" (Mertokusumo, 2012).

According to the figure of legal positivism, Hans Kelsen, Law is a system of norms, namely a system based on imperatives (what should be or das sollen). According to him, norms are also part of the results of the deliberative philosophy of human thought. Norms will remain norms if that is what is desired; the basic foundation is environmental morality and good values. The only true Law for Hans Kelsen is positive (which means what the Law is), not natural Law (Finch, 1979).

A "pure" theory (the pure theory of Law) is free from other elements of several traditional theories; a pure theory also does not depend on the analysis of morality and relevant facts. According to Hans Kalsen, at that time, the prevailing legal philosophical values had been contaminated with political ideology and morality and had also experienced a reduction due to existing science. Meanwhile, the Law must be pure from outside elements that are not juridical. This model is the pure legal theory Hans Kelsen put forward as his methodological principle. Every applicable Law should be pure from non-juridical matters, such as sociological, political, historical, and even ethical elements. According to Hans Kelsen, understanding his pure theory of Law is a theory of legal cognition (theory of legal knowledge). Kalsen also often repeats that the only goal of the pure theory of Law is cognitive (objective knowledge), so this is what makes Hans Kalsen a legal positivist thinker because of his consistency in pure legal theory (Kelsen, 1935).

Pure Legal Theory (The Pure Theory of Law) is a positive legal theory. However, it does not discuss positive Law that applies in a particular legal system; it only discusses general legal theory. Hans Kelsen's presentation of Pure Legal Theory aims to explain the nature of Law and methods of making Law rather than explaining what the Law should be or the best way for Law to be created. Hans Kelsen's Pure Legal Theory is a theory of legal science and not a matter of legal policy (Absori & Achmadi, 2017; Nurhadi, 2019). The 21st century is digital, so digital thinking is required. Humans should be aware of the implementation of state laws to ensure legal certainty and achieve legal justice and universal benefits in society. Existing laws do not exist in a vacuum but live in a dynamic human nature. Therefore, it is necessary to enforce state laws, which are human needs that require information and public services. So, the consequence is that infrastructure must be prepared for tort programs and outreach, not just relying on legal fiction as a special characteristic of positivism theory (Kelsen, 1935).

Such situations require professional Human Resources (HR) so that the implementation of state laws meets expectations. So, HR based on spirituality is necessary by recruiting HR based on morality, namely education with national and international standards, because HR requires enthusiasm and a background for enacting this Law. There is a need for a paradigm shift in law enforcement; Sinzheimer said the Law does not move in a vacuum or abstract space; However, it is in the social order of society, so there are effects from enacting the Law. (Nurhadi, 2019).

The issue of the efficiency of legal regulation is very important, as well as the perspective and pattern of thinking; it is necessary to review the relationship between Law

and social factors and forces outside it. According to Robert B. Seidman, every Law, once issued, will change, either through normal changes or through the methods adopted by the bureaucracy when acting in the political, economic, social, and other fields (Turiman, 2010).

The development of society and its increasingly complex structure requires legal regulations that follow the development of society. All aspects of life today have regulations in Law. Law plays an important role in modern society's social life frameworks social life (Nurhadi, 2019).

With the shift in the role of Law (state law), the paradigm of power used in law enforcement in Indonesia needs to be changed or amended with law enforcement based on a moral paradigm. The ideal moral paradigm must have a set of values that are egalitarian, democratic, pluralistic, and professional in building civil society. It is very important to strive for a paradigm shift to restore the authenticity of Law to provide happiness for everyone." (Turiman, 2010).

In his thinking, Satjipto Rahardjo is always concerned about the orientation of Law in delivering happiness, not the other way around. The orientation of legal thinking like that, in the Preamble to the 1945 Constitution, is textually formulated: "to form an Indonesian state government that protects the entire Indonesian nation and all of Indonesia's blood and to advance the general welfare, educate the life of the nation, and participate in implement world order based on freedom, eternal peace, and social justice." (Turiman, 2010).

By the description above and the development of science and technology in the global era, as well as the development of "paradigms" as part of the development of the philosophy of science, there appears to be a need to test the relevance of Hans Kelsen's thoughts on development law and Satjipto Rahardjo's concept of progressive Law. One of the Sharia economic dispute cases was registered at the Tasikmalaya City Religious Court on February 1, 2016, with registration number 175/ Pdt.G/2016/PA.Tmk regarding a lawsuit for breach of contract. The Bank acted as Plaintiff against Defendant I and Defendant II. The case is that between Plaintiff and Defendant on April 25, 2014, they agreed and agreed to enter into a Murabahah Financing agreement by providing financing capital to Defendant I amounting to Rp. 64,400,000,-. In contract no. 2790/PEM/MBA/04/2014. Defendant I is required to make principal and margin payments of Rp. 1,788,889/month, after the agreement had been running for seven months; the Defendant had failed to pay his debt obligations since December 25, 2014. The plaintiff had sent a summons or notification letter to Defendant I and Defendant II to complete his obligations to the plaintiff immediately but still did not carry out its obligations. As a result of Defendant I's breach of contract, Plaintiff faced material losses amounting to 51,717,777,- and immaterial losses estimated at 100,000,000,-. So, the Plaintiff filed this case with the Tasikmalaya City Religious Court.9 The petite of this case is:

1) Accept and grant the Plaintiff's claim in its entirety;
2) Declare by Law the Al-Murabahah Financing Agreement No. 2790/PEM/MBA/04/2014, which the Plaintiff and Defendant I agreed upon, is valid and has legal force;
3) Declare that all deeds relating to statements and guarantees for the quo Murabahah

Financing Agreement are valid and have legal force;

4) Declare that the Defendants have committed a breach of promise (default);
5) Sentenced the Defendants jointly and severally to pay off Defendant I is the entire obligation of Plaintiff, namely Rp. 51,717,777,-
6) Sentencing the Defendants (Defendant II) to hand over a salary cessie in monthly installments of Rp. 1,788,889,- in the name of Defendant I to the Plaintiff.
7) Sentenced the Defendants according to Law to pay forced money amounting to Rp. 1,000,000- for every day if the Defendants fail to comply with the contents of this decision.
8) Declare the validity and value of the previous confiscation that has been placed on the goods in question: land and buildings, which are located on Jalan Permata Indah 3 No.9 Rt.07/03, Tugujaya Village, Cihideung District, Tasikmalaya City.
9) States that this decision can be implemented first, even if there is a rebuttal (verzet), appeal, or cassation.
10) Sentencing the Defendants to pay the court costs incurred in this case. The contents of the verdict are as follows:
    a. Declaring the Plaintiff's claim unacceptable
    b. Sentenced the Plaintiff to pay the costs of this case in the amount of Rp. 381,000,-. In this case, the judge's legal considerations took over the opinion of legal experts that the lawsuit must contain formal requirements: the identity of the Parties, posita, and petite. (Mertokusumo, 2009).

The complaint must be made carefully, concisely, concisely and clearly. In this case, the judge's consideration was regarding the identity of Defendant I's existing address.

## Literature Review

According to (Hasanah et al., 2021), Sharia economic disputes can occur between people and banking and non-banking institutions, between institutions, and between people and people who are bound by economic ties. If the Judicial Body examines this dispute, the material legal sources that can be used are the Compilation of Sharia Economic Law, Legislation related to Sharia Banking and Non-Banking Institutions, and the Agreement made by the parties. Meanwhile, the formal source of law used is procedural law in the General Courts except as regulated in special legislation. Law enforcers, especially judges, in examining and adjudicating Sharia economic disputes are not only fixated on written rules that have been codified; in various cases, there are local economic customs that must also be taken into consideration. Progressive legal teachings that place "law for humans" and "substantive justice" align with the goal of As-Shari in creating law, namely for the benefit. So, using the progressive

legal paradigm in resolving Sharia economic disputes is appropriate. The urgency of progressive law in resolving Sharia economic disputes includes:

- A new paradigm for legal discovery.
- Reconstructing the passive role of judges into active ones.
- Supporting mediation as an alternative dispute resolution in Sharia economic disputes.

The big agenda of progressive legal ideas is to place humans as the primary centrality of all legal discussions. The concept of "best law" must be placed in the context of holistic integration in understanding humanitarian problems. Thus, the idea of progressive law does not merely understand the legal system in a dogmatic nature but also aspects of social behavior in an empirical nature. So, it is hoped that we will see humanitarian problems as a whole and be oriented towards substantive justice (Putra & Rahayuningsih, 2023). Sharia's economic disputes, which continue to increase, require an appropriate legal paradigm. The urgency and relevance of progressive law in resolving Sharia economic disputes are: 1) As a new paradigm for legal discovery by judges in deciding Sharia economic disputes. 2) Construct the role of judges to be active in examining and adjudicating sharia economic disputes. 3) Relevant to mediation as a progressive effort to find a win-win solution in a dispute.

According to (Utomo, 2020), The implementation of the agrarian reform agenda is part of improving the structure of control, ownership, use, and use of land. However, the resolution of agricultural conflicts still needs to be fully resolved. There needs to be regulatory arrangements in completing agrarian reform that provide justice for communities in disputes, whether between communities and companies or communities and the government. For this reason, there must be a resolution to agrarian conflicts prioritizing humanity. It is hoped that the application of progressive law will provide recommendations for resolving agrarian conflicts in Indonesia so that progress can be made from year to year in resolving agrarian conflicts actively resolved by the government (Sujono & Nugroho, 2023). The study results in the progressive law perspective provide legal considerations for agrarian conflict cases as progressive law aims at substantial justice without ignoring the provisions of positive law. This is by the function of law, namely to protect the interests that exist in society as per the theory of law as a tool of social engineering which looks at elements of legal reality regarding the operation of law in society and as a tool to renew (engineer) society towards resolving agrarian conflicts. Completely. Progressive legal studies, by prioritizing the rights of people who are intimidated, create opportunities for law enforcers to resolve agrarian conflicts that prioritize human rights, especially for people in the lower middle class.

## Research Methods

The type of research used in this research is normative legal research methods or library legal research (study approach). Namely, legal research was carried out by reviewing library materials, namely primary and secondary data. The legal materials are arranged systematically to make concluding the problems studied easier. In approaching this problem, the normative Judicial approach method was used.

This approach is an approach to applicable laws and regulations. The legislative approach examines all statutory regulations related to the content of the Law being handled. The normative juridical problem approach is used to approach statutory regulations (statute approach); this approach examines statutory regulations related to the legal regulations of the problem being studied. A conceptual approach is also used to look at legal concepts related to existing problems

## Results and Discussion

### A. Concept of Legal Certainty and Protection of Parties in Sharia Financial Dispute Mediation

Indonesia's readiness to create and perfect legal instruments for implementing alternative dispute resolution methods must be based on legal certainty and protection to accommodate the parties' interests. The government must develop a vision for changing community patterns and behavior regarding alternative dispute resolution methods.

Roscoe Pound argued that Law is not for oneself and one's own needs but for humans, especially for human happiness. This is to the theory put forward by Roscoe Pound, namely, Law as a tool of Social Engineering, which states that Law is a tool of reform for society carried out in a planned and calculated manner (Nuryadi & Sh, 2016). Building a country with a plan means changing and renewing the old society into a better society. Thus, developing countries cannot possibly be oriented toward the past (looking backward) but must be oriented toward the future (looking forward). So, the rules and legal institutions in planned development must be able to deliver the desired society (Munthe, 2013). Based on the theory put forward by Roscoe Pound, Law must be able to become a tool for reforming society and forming a maximum social structure.

Laws formed within the development framework need to be adapted to legal objectives. According to Soebekti, the purpose of Law is "the law serves the goals of the state, namely bringing prosperity and happiness to its people. The law serves the purpose of the state by providing "justice" and "order." Justice is usually symbolized by a balance of justice, where everyone must get the same share under the same circumstances (Pranadita, 2018; Sodiq, 2014)

According to Gustav Radbruch, in enforcing the Law, there are 3 (three) elements which are the objectives of the Law which must be taken into account:

1. Legal certainty (rechtssicherheit) Legal certainty is the certainty of laws or regulations; all kinds of methods, methods, and so on must be based on laws or regulations. Within legal certainty, there are positive Laws and written Laws. An authorized institution writes written Law, has strict sanctions, and is valid, as marked by its promulgation in a state institution. Legal certainty is a question that can be answered normatively rather than sociologically. Normative legal certainty is when a regulation that regulates it clearly and logically is created and promulgated.
2. Usefulness (Zweckmassigkeit) The operation of Law in society is effective or not. In terms of utility value, Law is a tool for photographing societal phenomena or social realities that

can benefit or be effective for society.

3. Justice (Gerechtickeit) In justice, there are philosophical aspects, namely legal norms, values, justice, morals, and ethics. Law is a developer of the value of justice if justice is also the basis of Law. Justice has a normative nature as well as a constitution for Law. Justice is the moral basis of Law and, at the same time, the benchmark for a positive legal system. With justice, a rule deserves to become Law.

In addition to the matters described above, the Law must also be able to protect the parties regarding the implementation and results of dispute resolution through the alternative route they choose. Legal protection is a narrowing of the meaning of protection; in this case, it is protection by Law only. The protection provided by Law is also related to the rights and obligations that humans have as legal subjects in their interactions with fellow humans and their environment. Humans have the right and obligation to act as legal subjects.

According to Phillipus M. Hadjon, legal protection for the people is a preventive and repressive government action. Preventive legal protection aims to prevent disputes from occurring, which directs government actions to be careful in making decisions based on discretion, and repressive protection aims to prevent disputes from occurring, including handling them in court.

## B. Application of Satjipto Rahardjo's Progressive Legal Theory in Sharia Financial Dispute Resolution

In analyzing the concept of Satjipto Rahardjo, a professor of legal sociology in Indonesia, he constructed society as a normative order created from a process of social interaction and the wisdom of social values. There are nine concepts of Progressive Legal Theory that he offers, namely:

1) The Law rejects the tradition of analytical jurisprudence or rechtsdogmatiek and various schools of understanding, for example, legal realism, freirechtslehre, sociological jurisprudence, interresenjuris-prudenz as in Germany, natural law theory and critical legal studies.
2) Law rejects the understanding that order only applies to state institutions and power.
3) Progressive Law aims to protect the people towards ideal justice in the Law.
4) The law rejects technology as a basis for legal theory because it lacks a conscience.
5) Law is an institution that aims to lead humans to a life of justice, prosperity, and happiness.
6) Progressive Law is Law that is pro-people and Law that is pro-justice
7) The basic assumption in progressive Law is Law for humans, for a wider and greater society. If there is a complicated and large problem, then the Law is reviewed and corrected, not vice versa.
8) Law is not an absolute and final institution but always depends on humans seeing and

using it.

9) Law is always at the forefront (Law as a process, Law in the making). In this case, progressive legal methods require empathy and courage. The progressive method of Law provides a large portion for creating new creativity based on justice and society's need for the Law. Suppose the nine concepts of Satjipto Rahardjo's progressive legal theory above are applied one by one to facts in society. In that case, it is certainly felt that they can provide a sense of justice and answers to problems that exist in society. The operation of Law in society can be felt and fulfills the necessary sense of justice (Turiman, 2010).

Law enforcers who determine the content of laws will actively involve empathy, values, courage, and so on, The idea of the progressive theory of Law is human. According to Satjipto Rahardjo, Law is progressive. It is to test the threshold of legal power in upholding justice in society (Rahardjo, 2006).

Noer Jameel's opinion is that justice that is created is not justice according to the text of the Law. However, true justice arises from the level of intelligence and wisdom of thinking of law enforcers, in this case, a judge (Jameel, 2014).

Based on the 9 (nine) concepts mentioned above, progressive Law wants to return the Law to the right track (on the right track). For this reason, Satjipto Rahardjo believes that legal breakthroughs (legal breakthroughs, not legal breaking) or breakthroughs in the formation process are needed. And law enforcement.

In practice, the application of progressive Law has areas for improvement. Law enforcers who are also humans in implementing progressive laws have caused many losses because there are no controls or controls that can be used as indicators or guidelines (Rahardjo, 2006).

The Sharia bank wants the settlement to be in the District Court. 18 The problems in the operationalization of Sharia banks ultimately prompted the disadvantaged community to conduct a judicial review of the Sharia Banking Law. Finally, on August 29, 2013, there was Constitutional Court Decision Number 93/PUU-X /2012.

Based on this case in Sharia banking practice, it appears that resolving legal problems is not enough to be resolved solely by rules alone; it requires synergistic efforts between the law enforcement structure and legal institutions, legal substance, and culture. In this case, the application of legal culture is reflected in the application of the values desired by the parties; in this case, the Constitutional Court Decision decided to abolish the explanatory part of Article 55 of the Sharia Banking Law for the sake of justice and resolution based on the historical interpretation that the competence for resolving sharia economic, legal disputes lies with the Religious Courts (Warassih et al., 2005).

The application of progressive Law has not been able to provide a sense of justice for some people because, in progressive Law, there are weaknesses, which, of course, must be found for solutions and improvements for improvement in the future. In its application, progressive Law also remains based on existing laws. However, in this case, the Law is interpreted broadly. It even pays attention to the values that develop in society, which can also

be explored from the values in the Pancasila principles. In its implementation, courage, intelligence, intelligence, and for those who will make decisions and determine them. In resolving Sharia banking disputes, what is used is not only existing agreements (syariah contracts) but also legal politics, legal sociology, legal philosophy, and even legal psychology in order to answer the problems faced by the community observing and interested in sharia economic law (Arinanto, 2011).

Turiman, based on the concept of the Pancasila paradigm of berthawaf, explains that the First Principle becomes the light that illuminates the other four principles, namely Belief in the Almighty Godhead, as representing the "God Spot" point of God/Spiritual Quotient (SQ), illuminating the human being. Humaneness. Spiritual Quotient (SQ) is the human ability to understand the best meaning and value in life as well as the fundamental goals (vision) of things in life and human life as a caliph on earth ) it answers the most basic questions: "Who am I"? "Why was I born?"

For humans who live in a country called the Indonesian national state which upholds unity, namely the Indonesian Union, representing Intellectual Intelligence (IQ) within a popular framework led by wisdom in representative deliberations as representing emotional intelligence. /Emotional Qentient (EQ).

In realizing social justice for all Indonesian people as a form of creative intelligence or Creativity Quotient (CQ), when translating the content contained in existing regulations and legislation, it is not permitted to conflict with the values of Pancasila as a philosophy, divine values and nobility, humanity, unity, democracy, and justice (Turiman, 2010).

Comparison of the Relevance of Hans Kelsen's Thoughts on Progressive Legal Concepts in Resolving Sharia Financial Disputes. Based on the explanation above, it is stated that the interpretive or constructivist paradigm can be called a denial of the positivist paradigm. For this reason, the constructivist paradigm was chosen in this discussion. Hans Kelsen's theory states that Law must be pure from foreign, non-juridical elements. It should be reconstructed to meet the community's expectations, and the Law works to help the community solve its problems (Musjtari, 2013).

The understanding of relative truth and Reality is a constructivist theory; this theory applies according to the context and is specifically relevant to people's social behavior. Constructivism theory rejects generalization theories that attempt to produce odd descriptions. The constructivist paradigm originates from the belief that Reality exists and varies.

The existence theory of Reality is a diversity of subjective mental constructions that exist within humans (society), which are based on social experience, religion, culture, and other value systems and are relative. So, in understanding the interpretive paradigm or constructivism, the Reality that existed at that time is analyzed so that it cannot be generalized (Gunawan, 2022; Nurhadi, 2019).

The relevance of Hans Kelsen's thoughts about Law for developing progressive legal concepts is to complement and perfect the operation of Law in society. In order to create balance or harmonization between das sollen and das sein. In this case, developing a

progressive legal concept still requires control from Hans Kelsen's thoughts on Pure Legal Theory.

## Conclusion

Based on the analysis above, the conclusion is that resolving Sharia financial disputes from a progressive legal perspective is relevant to Hans Kelsen's thinking about Law to develop a progressive legal concept, namely to complement and perfect the operation of Law in society. In order to create balance or harmonization between das sollen and das sein. In this case, developing a progressive legal concept still requires control from Hans Kelsen's thoughts on Pure Legal Theory, which states that the operation of the Law can be outside the Law, principles, or norms ("rule-breaking").

Its implementation still takes into account existing laws. In this case, the definition of Law is broad. The priorities used as guidelines are statutory regulations and Customary Law by the problems faced. Whereas in the implementation of progressive Law, there are still weaknesses in the human aspect, therefore the synergy of implementing the Law by paying attention to the values that apply between the parties, in this case, can be extracted from the values contained in the Pancasila principles and the capabilities which include 5 (five) ) intelligence namely SQ, AQ, IQ, EQ and CQ. Sharia financial dispute resolution in progressive legal theory is done in two ways: by litigation and non-litigation.

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