

# The Principle of *Pacta Sunt Servanda* in *Fintech* Transactions is Reviewed Through The Perspective of *Ushul Fiqh*

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## Abstract

*The principle of Pacta Sunt Servanda as part of the legal principle, which is commonly described as “agreement as applicable to the author” carries its own implications in the practice of society, where the public must perform the agreement consistently, consequent, and full of responsibility. No exception in transactions in Financial Technology (Fintech), the applicability of this principle to be a reference for both parties to equally believe that the transaction process (lending) between them can be held accountable in terms of moral-ethical laws. The purpose of this research is to describe the validity of the pacta sunt servanda of the agreement on Fintech and describe the pacta sunt servanda basis reviewed through the study of ushul fiqh to soften a concrete solution against legal problematics that exist on Fintech. The methods used in this study are juridical-normative. The results of the research show that with the trend of ease carried by the Fintech can erode the essence of the principle of the law itself, and create a destructive mindset which is an agreement of the regarded as administrative terms that need to be met when conducting transactions on Fintech, so that various provisions inherent to the unreached Fintech agreements. In addition to the absence*

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of strict supervision in the process of Fintech transactions facilitate the occurrence of fraud against the initial purpose of granting Fintech funds by the loan recipients.

**Keywords:** *Fintech, Principle of Pacta Sunt Servanda, Ushul Fiqh.*

## Introduction

In the era of digitization and smoothness of access to technology and information becomes a central necessity that can not be separated in people's lives. Technology seems to be seen as a tool to achieve the level of welfare for some circles, this is due to the advancement of technology will have a positive impact on human activities, such as: (1) As a means of effective production process, distribution, and consumption of a product; (2) As a means of developing and ease communication between individuals in the social sphere; (3) As a means of human ease of access to the resources; and (4) As a container for human beings to find solutions to the problems of everyday life. The development of technology that has brought a significant influence to the life, has caused many aspects of life that are affected, as one aspect that is affected by the development of this technology is the economic aspect, marked the emergence of Financial Technology (*Fintech*).

According to The National Digital Research Centre (NDRC) of Ireland, it defines *Fintech* as "innovation in financial services" or "innovation in financial services".<sup>4</sup> While according to Bank Indonesia *Fintech* is defined as a joint result of financial services with technology that eventually change the business model from conventional to moderate, which initially in pay should be face-to-face and bring a number of cash, can now make long-distance transactions by making payments that can be done in a matter of seconds.<sup>5</sup> *Fintech* is not part of the form of services provided by banking, but rather the form of a new business model, service products provided by *Fintech* companies help the community in carrying out financial transactions without requiring accounts like banking in general. So that people do not need to use personal identity in carrying out financial transactions.<sup>6</sup>

<sup>4</sup>Ernama Santi, "Pengawasan Otoritas Jasa Keuangan Terhadap Financial Technology (Peraturan Otoritas Jasa Keuangan Nomor 77/Pojk.01/2016)," *Diponegoro Law Journal*, Vol. 6 No. 3, 2017.

<sup>5</sup>Bank Indonesia, *Financial Technology*, source: <https://www/bi.go.id/id/edukasi-perlindungan-konsumen/edukasi/produk-dan-jasa-sp/fintech/pages/default.aspx>, retrieved 16 September 2019.

<sup>6</sup>Tri Inda Fadhila Rahma, "Persepsi Masyarakat Kota Medan Terhadap Penggunaan

Based on classification by Bank Indonesia *Fintech* divided into four kinds, consisting of: (1) Peer-to-peer lending and crowdfunding; (2) Market aggregator; (3) Risk management and investment; (4) Payment, clearing, and settlement.

For these classifications based on the research report on The Australian Center for Financial Studies, Indonesian people use the most widely-used peer-to-peer lending *Fintech*. Peer to peer lending is the practice or method of lending money to an individual or business and vice versa, preceded by filing a loan to the organizer who connects between lenders with borrowers or investors online, the advantage of this type of *Fintech* provides an easy way for everyone to obtain a source of financing quickly and simply. As a result of the ease of *Fintech* transactions this type resulted in the number of people who borrow funds increase, even the distribution of loans has reached Rp 25.92 trillion in January 2019 and this number has increased by 14.36% if compared to December 2018.<sup>7</sup>

Furthermore, in *Fintech* transactions the basic peer-to-peer lending transaction is the agreement made by the parties that are poured in the form of electronic documents. The agreement in *Fintech* transactions applies as the basis for the determination of the rights and obligations of the parties and has a position as proof of the validity of transactions made by the parties. Although this agreement is a concrete form of binding between the parties, in fact, many irregularities occurring in the substance of the *Fintech* agreement, the denial of the substance of the treaty is often referred to as "tort". In article 1238 of the book of the Civil Law of tort is defined as, "*The debtor is negligent, when it is by warrant or by a deed that is declared negligent, or for his own perdition, is if it stipulates, that the owe shall be deemed negligent by the passage of the allotted time.*"

Default in *Fintech* occurs where the parties do not execute the contents of the agreement as appropriate, the correlation of this default has an effect on the existence of the legal principle of the agreement, especially the principle of *pacta sunt servanda* that becomes in *Fintech* transactions.

In the study of the *fiqh* of the implementation of the agreement (*akad*) is a necessity that is absolutely fulfilled by each individual,

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*Financial Technology*," *Jurnal At-Tawassuth*, Vol. 3 No. 1, 2018, 664.

<sup>7</sup>Ihya Ulum Aldin, *Tekfin Sudah Salurkan Pinjaman Rp 25,92 Triliun*, source: <https://katadata.co.id/berita/2019/02/27/januari-2019-tekfin-sudah-salurkan-pinjaman-rp-2592-triliun>, retrieved 16 September 2019.

the denial of the covenant (contract) is equal to the deeds of sin and denial of the law, as it is set in Qur'an surah al-Maidah verse 5 reads "O Believers, fill the *aqad* ...." as such is duly the validity of the principle of the *pacta sunt servoanda* is gaining more attention for the parties in *Fintech* agreements peer to peer lending, so that the benefits can be kept awake and realized in human life.

## Research Method

The research approach used in this paper is a normative research. The type of research is under descriptive qualitative. The type of data used is a secondary data. This research is also referred to as literature research or document studies, as this research is conducted or directed only on written regulations or other legal and written data materials. The data used consist of primary, secondary, and tertiary data. It is also stated to be a library research or document study because this research is mostly done on secondary data in libraries and journals and trusted information media. These secondary data can be private and public. In normative legal research, secondary data as information sources/materials can be primary legal materials, such as laws and regulations related to *Fintech*, regulation of the Financial Services Authority and Indonesia Bank regulation; secondary law materials, in the form of expert opinions, scientific papers, journals and the results of a study; and tertiary legal materials such as encyclopedias, dictionaries, and others.<sup>8</sup>

## The Existence of The *Pacta Sunt Servanda* Principle in The *Fintech* Peer to Peer Lending Agreement Reviewed Through Ushul Fiqh Study

The development of *Fintech* peer to peer lending is not separated from the various aspects of the background, such as the response of some communities in gaining access to lending services from conventional banking, The development of information and technology systems and the ease of access to this type of *Fintech*.<sup>9</sup>

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<sup>8</sup>Suratman and H. Philips Dillah, *Metode Penelitian Hukum* (Bandung: CV. Alfabeta, 2013), 44-45.

<sup>9</sup>Inda Rahadiyan, *Aspek Hukum dan Tantangan Pengaturan P2P Lending di Indonesia*, source: [https://www.researchgate.net/publication/328717455ASPEK\\_HUKUM\\_DAN\\_TANTANGAN\\_PENGATURAN\\_P2P\\_LENDING\\_DI\\_INDONESIA](https://www.researchgate.net/publication/328717455ASPEK_HUKUM_DAN_TANTANGAN_PENGATURAN_P2P_LENDING_DI_INDONESIA), retrieved 16 September 2019.

The presence of *Fintech* peer to peer lending is considered as a solution for everyone who wants to make loans quickly and easily without requiring a lot of requirements. According to data issued by the Financial Services Authority, the number of *Fintech* companies in Indonesia continues to experience a significant increase, in July 2019 *Fintech* companies have reached 127 companies. Due to the increasing number of *Fintech* companies and the high public response to the presence of such *Fintech* has encouraged the Financial Services Authority to issue arrangements on *Fintech* in the regulation of the Financial Services Authority No. 77 Year 2016 About Money Lending Services Based on Information Technology.

According to the regulations, there are two transaction mechanisms in the *Fintech* peer to peer lending, the first transaction between the lending (*Fintech*) organizer and the lender (investor). Transactions between lenders and recipients. The evidence of the two transactions is evidenced by the agreement that is then realized in the form of electronic documents.

Pursuant to Article 1 Figure 12 POJK No. 77 Year 2016, electronic document is interpreted, "*Any electronic information that is created, transmitted, transmitted, received, or stored in the form of analog, digital, electromagnetic, optical, or similar, which may be viewed, displayed, and/or heard on a computer or electronic system including but not limited to writing, sound, images, draft maps, photographs or the like, letters, signs, numbers, access codes, symbols or perforations that have meaning or meaning or understandable to the person who is able to understand it as mentioned in The Act No. 11 Year 2008 About Electronic Information and Transactions.*" This document applies as a condition of administration in transactions.

In fact, the agreements made in the first and second stage *Fintech* transactions are equally subject to the prevailing positive laws in Indonesia. The implications of this agreement in *Fintech* can be interpreted as in the Civil Code. Which is according to the provisions of Article 1313 of the Law of the Civil Code agreement is interpreted as, "*Deeds where one person or more bind himself to one or more people.*"

M. Yahya Harahap defines a treaty as a legal relationship involving the law of wealth between 2 (two) or more persons, who entitles one party and obligations to the other on an achievement.<sup>10</sup>

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<sup>10</sup>M. Yahya Harahap, *Segi-Segi Hukum Perjanjian* (Bandung: Alumni, 1986), 6.

While Setiawan explained the treaty is a legal action where one or more people bind themselves or bind themselves to one or more.<sup>11</sup> Those the covenant is a legal act that means a deed deliberately committed to cause a law, with which one or more persons bind himself or bind one another, meaning that it is ready to exercise the right and obligations because any agreement will create an alliance or bind the parties to fulfill the promised rights and obligations. *Fintech* agreements require real deeds performed by the parties (organizers, providers, and beneficiaries), thereby resulting in both the fulfillment of the rights and obligations of each party.

The agreement made by the parties based on the agreement made by both parties, shall result in binding to the parties, giving rise to the legal responsibility of the parties to exercise its rights and obligations, "*All agreements which is made legally valid as a law for those who make it*" (Section 1338 of The Civil Code), it must also be based on a policy that supports the agreement is the legal principle. According to Satjipto Rahardjo, the legal principle can be interpreted as being considered by the legal community in question as basic truth or fundamental truth, because through legal principles that are the ethical and social considerations of society entering into Law. Thus, the legal principle becomes a kind of resource for living the law with ethical values, morals, and social society.<sup>12</sup> The legal principle serves as a guideline or orientation direction based on where the law can be executed. In relation to the *Fintech* agreement, the legal principle has a fundamental role in providing directives for the parties to apply the substance of the agreement by following the construction required by law.

The existence of the principle of law after the development of *Fintech* in recent years began to be degraded and ruled out, concentrated principles in the law of agreement consisting of the principle of the *pacta sunt servanda*. In Article 1338 of The Civil Code, *pacta sunt servanda* is stated as, "*All agreements made valid as required by law for those who make.*" The resolution is in accordance with the meaning that: (1) The agreement is the law for the parties who made it; (2) To imply that the breach of the obligations contained in the

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<sup>11</sup>Setiawan, *Pokok-Pokok Hukum Perikatan* (Bandung: Alumni, 1979), 4.

<sup>12</sup>Satjipto Rahardjo, "*Peranan dan Kedudukan Asas-Asas Hukum dalam Kerangka Hukum Nasional*," Seminar dan Lokakarya Ketentuan Umum Peraturan Perundang-Undangan, Jakarta, 2000.

agreement is an act of violating a promise or default.<sup>13</sup>

Relegated and disallowed this principle in the implementation of *Fintech* transactions can not be separated from the weak supervision of the company's organizers on the agreement done by the parties involved, the lack of ability of the parties to suppress the other party in the event of a denial of the substance of the agreement and the lack of individual obedience to the legal obligations it has to bear, so that this results to the parties who do not obey the substance of *Fintech* agreements as should. Another consequence of the weakness of this principle is influential also on the other legal principle of the principle good intention, this is because the principle of *pacta sunt servanda* is one of the basic norms in the law and is closely related to the principles good intention for to obey the treaty.<sup>14</sup>

In Islamic studies the basic existence of *pacta sunt servanda* is recognized and confirmed in the Qur'an surah al-Maidah verse 1 that reads "O believers, fill the *aqad-aqad* ..." and surah al-Isra verse 34 which reads "... and fill the promise, indeed the promise is definitely held accountable." Thus, it can be explained that the existence of the principle of the *pacta sunt servanda* from the *fiqh* perspective is required to exist.

### Efforts to Resolve Legal Problems on *Fintech* Transactions Peer to Peer Lending through the Thought of Principles of *Fiqh* (*Sad adz-Dzari'ah* and *Fath adz-Dzari'ah*)

Legal problematics relating to the implementation of the substance of *Fintech* agreements created by the parties in the unlikely presence of non performance of contract. The occurrence of disclosure practices on the substance of *Fintech* agreements peer to peer lending is caused due to the weak side of the supervision of *Fintech* transactions and this is the main factor why the existence of the principle of *pacta sunt servanda* in *Fintech* agreements become excluded. In spite of the basic position of *pacta sunt servanda* that has been reflected in the provisions of Article 1338 (1) of Civil Code, that the pledge is binding as the law has a strong position as the foundation of the parties to exercise rights and obligations. So to

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<sup>13</sup>Harry Purwanto, "Keberadaan Asas *Pacta Sunt Servanda* dalam Perjanjian Internasional," *Jurnal Mimbar Hukum*, Vol. 21 No. 1, 2009, 162.

<sup>14</sup>Sam Suhaedi Atmawiria, *Pengantar Hukum Internasional* (Bandung: Alumnus, 1968), 58.



resolve the matter in Islam has been known as the rule of *fiqhiyyah*. Rule of *fiqhiyyah* as derivation of jurisprudence or Islamic law, are the common vertices of some Islamic legal issues that can be used by circles public or *Fuqaha* in search for solutions to the legal problems that arise in the community in various themes of both worship, *muamalah*, and issues of contemporary Islamic law.<sup>15</sup> With such a reality it is necessary to examine the question from the viewpoint of the rule of *fiqh* (*sad adz-dzari'ah* and *fath adz-dzari'ah*).

Related to the use of the word *adz-dzari'ah* in the method of determination of Islamic law, the Wahbah Zuhaili explained it in two forms (*sad adz-dzari'ah* and *fath adz-dzari'ah*), because when trained with the coverage of the discussion in the aspect of *sharia* law. Then the word *adz-dzari'ah* itself divided into two categories: (1) Inability to use these facilities, because they will lead to damage, by closing access to the bad (*sad adz-dzari'ah*); (2) The ability to use and take these facilities because it will lead to goodness, by opening the widest access to goodness (*fath adz-dzari'ah*).<sup>16</sup>

*Sad adz-dzari'ah* is a preventive method in order to safeguard bad possibilities and to prevent negative things from happening, this does not mean as an effort to curb, but as a means to achieve legal goals that are to realize the benefit and avoid damage.<sup>17</sup> If related to this problem, the first thing to pay attention to is the effort to prevent the occurrence of violations of the implementation of the substance of the agreement in the *Fintech* peer to peer lending. Whereas *fath adz-dzari'ah* is a method of meaningful results of means, tools and or referees that must be raised and used if the results of an act that uses such facilities, tools and or referees produce benefits and goodness, then if it is connected with the problem of *Fintech* the settlement efforts that have been applied so far to ensure the implementation of peer to peer lending *Fintech* transactions must be maintained and improved with relevant updates.

The following is the idea of a solution to prevent defaults in peer to peer lending *Fintech* transactions based on the *adz-dzariah fiqh* approach: (1) Open the widest access to the public regarding transparency ratio (non-performing loans) as a prevention of failure

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<sup>15</sup>Syamsul Hillal, "Qawâ'id Fiqhiyyah Furu'iyah Sebagai Sumber Hukum Islam," *Al-Adalah*, Vol. 11 No. 2, 2013, 141.

<sup>16</sup>Wahbah Zuhaili, *Al-Wajiz fi Usul al-Fiqh* (Beirut: Dar al-Fikri, 1994), 173.

<sup>17</sup>Nurdhin Baroroh, "Metamorfosis "Illat Hukum" dalam *Sad adz-Dzari'ah* dan *Fath adz-Dzari'ah* (Sebuah Kajian Perbandingan)," *Jurnal Il-Mazahib*, Vol. 5 No. 2, 2017.



to pay; (2) Conduct an audit of the track record of *Fintech* peer to peer lending loan recipients as mandated in Article 27 of The Financial Services Authority Regulation No. 77 Year 2016; (3) Preparing protection funds as prevention and mitigation of pay failures with the aim of minimizing investor losses in the event of default; (4) Require collateral guaranteed by the recipient of the loan to the *Fintech* company to guarantee payment obligations are met; (5) Take firm action against loan recipients who commit defaults; (6) Conduct on going supervision regarding borrowed funds to prevent misuse of funds; (7) Synergy with law enforcement officials to ensure the implementation of the substance in the *Fintech* agreement

## Conclusion

The existence of the principle of law after the development of *Fintech* in recent years has begun to be degraded and ruled out, specifically the principle of the *pacta sunt servanda*. This principle of degradation and overriding in the implementation of *Fintech* transactions cannot be separated from the weak oversight of the organizing company of the agreements made by the parties involved, the lack of ability of the parties to pressure other parties if there is a violation of the substance of the agreement and the lack of individual observance of the legal obligations bear. Given this reality, it is necessary to examine the problem from the standpoint of the *fiqh* (*sad adz-dzari'ah* and *fath adz-dzari'ah*) in order to find a solution that is solutive for solving the problem.

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