

THE CONCEPT OF FRANCHISING IN THE INDONESIAN CIVIL LAW AND ISLAM

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Abstract

The franchise concept is an agreement between the franchisor and the franchisee. This means that the franchisor, as the patent owner of the trademark, has the right to receive a certain amount of royalties or fees to be paid by the franchisee based on legal provisions. Franchise agreements are regulated in Indonesian civil law with regard to special rights to trademarks. While in Islamic law, the franchise agreement is actually a development of a form of cooperation (*syirkah*). This research uses the library research method, where data sources come from laws and other secondary data. The results of this study indicate that a franchise agreement under civil law, which refers to Article 4 of Government Regulation No. 42 of 2007 on Franchising, states that every franchise agreement of any kind must be made in writing by the parties. The existence of a franchise agreement is an innominaat contract. Innominaat contracts are contracts that arise, grow and develop in practice. From the perspective of Shari'ah economic law, franchise agreements belong to the group of shirkah (partnership) and the law is permissible. In addition, the franchise agreement involves the cooperating parties, namely the franchisor and the franchisee. Meanwhile, the franchisor's capital consists of intellectual rights in the form of company names, logos, systems and methods, which are owned and developed by the franchisor.

Keywords: Aceh, Concept, Copyrights, Civil Law, Franchise, and Islam

Abstrak

Konsep Waralaba merupakan suatu konsep perjanjian antara *franchisor* dengan *franchisee*. Artinya, franchisor sebagai pemilik paten atas merk dagang memiliki hak yang didasarkan kepada ketentuan perundang-undangan untuk mendapatkan sejumlah previlage atau biaya yang harus dibayarkan oleh franchisee. Perjanjian Waralaba telah diatur dalam hukum perdata Indonesia tentang hak khusus terhadap merk dagang. Sedangkan dalam hukum Islam, perjanjian Waralaba sebenarnya merupakan pengembangan dari bentuk kerja sama (*syirkah*). Penelitian ini menggunakan metode kepustakaan (*library research*), yang mana sumber data berasal dari undang-undang dan sejumlah data sekunder lainnya. Hasil penelitian ini menunjukkan bahwa perjanjian bisnis Waralaba menurut hukum perdata, yang merujuk pada Pasal 4 Peraturan Pemerintah No. 42 Tahun 2007 tentang Waralaba, dijelaskan bahwa setiap perjanjian bisnis Waralaba apapun bentuknya harus dibuat secara tertulis oleh para pihak. Eksistensi dari perjanjian bisnis Waralaba adalah sebuah kontrak innominaat. Kontrak innominaat merupakan kontrak-kontrak yang timbul, tumbuh, dan berkembang di dalam praktik. Dilihat dari sudut pandang hukum ekonomi syariah, perjanjian Waralaba termasuk kepada kelompok *syirkah* (persekutuan), dan hukumnya dibolehkan. Selain itu, perjanjian Waralaba melibatkan para pihak yang bekerjasama, yaitu pemberi pemberi Waralaba (*franchisor*) dan penerima Waralaba (*franchisee*). Sedangkan modal dari pemberi Waralaba adalah hak intelektual dalam bentuk nama perusahaan, logo, sistem, dan cara-cara yang dimiliki dan dikembangkan oleh *franchisor*.

Kata kunci: Aceh, Konsep, Copyrights, Hukum Perdata, Franchise, dan Islam

INTRODUCTION

As ever-changing creatures, humans have always evolved with the times. This is especially true in the current era of globalisation, with its various products impacting the invention of various information devices, which have shown significant influence on the development of human behaviour.¹

Everything is now developing rapidly. This can be seen in various fields, such as science and technology, development, and economic progress. Economic progress can be seen from the number of people who try businesses, both existing, developing, and creating new businesses. This

¹ Imam Mustofa, *Contemporary Fikih Studies*, (Yogyakarta: Idea Press, 2017), p, 1

is due to the current globalisation, which encourages people to think hard to move forward. "Business" comes from the English word "business", which means business activity. In general, the term "business" is often interpreted as "endeavour".²

All business activities carried out regularly and continuously by a person or entity, namely collecting goods or services and facilities for sale, exchange, or rent for profit. Business with a franchise system is one of the new things and is widely done by modern society.³

Franchise is a system of marketing or distribution of goods and services in which a parent company (franchisor) grants an individual or other small or medium-sized company (franchisee) the exclusive right to operate a certain business system in a predetermined manner, for a certain time, and in a certain location.⁴ According to Article 1 Item 1 of Government Regulation No. 42 Year 2007 on Franchising, the definition of Franchising is as follows:

"Franchise is defined as a special right owned by an individual or business entity to a business system with business characteristics in order to market goods and/or services that have proven successful and are utilised and/or used by other parties based on a Franchise agreement."⁵

Franchising, or franchising, is basically an agreement on how consumers obtain goods and services. The franchisor for a certain period of time grants a licence to the franchisee to carry on the business of distributing goods or services under the franchisor's identity name within a certain area. The business must be run in accordance with the standards set by the franchisor. The franchisor assists the franchisee; in return, the franchisee pays an initial fee and royalties.⁶

² Richard Burton Simatupang, *Legal Aspects of Business*, (Jakarta: Rineka Cipta, 2007).

³ Fahmi Amri Nasution, Nisrul Irawati, and Chairul Muluk, 'The Effect of Dividend Policy, Liquidity, Profitability and Company Size on Debt Policy through Financial Performance in Palm Oil Plantation Listed Companies', *Journal of Madani Society* 2, no. 2 (2023), <https://doi.org/10.56225/jmsc.v2i2.255>.

⁴ C. Fahmi et al., 'THE ROLE OF LOCAL GOVERNMENT IN MAINTAINING COFFEE PRICES VOLATILITY IN GAYO HIGHLAND OF INDONESIA', *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 8, no. 1 (2023), <https://doi.org/10.22373/petita.v8i1.168>.

⁵ See Government Regulation No. 42 Year 2007 on Trade.

⁶ Gemala Dewi, et al, *Islamic Law of Association in Indonesia*, (Jakarta: Kencana, 2005), pp. 173-174

Of course, agreements are used to franchise. Basically, agreements are consensual; however, there are some agreements that require more than just an agreement before they can be considered valid.⁷

A franchise agreement is a collection of terms, conditions and obligations that a franchisor makes and intends for its franchisees. The franchise agreement includes provisions on the rights and obligations of the franchisee, location requirements, training requirements, franchisee fees, the duration of the franchise agreement and other extensions that govern the relationship between the *franchisor* and the *franchisee*.⁸

Indonesian law governs franchise agreements. Everyone knows that in law there is a principle referred to as "Freedom of Contract", which means that parties can do whatever they want as long as it is not against the law, custom, decency, or other matters relating to public order. In fact, as stated in Article 1338 Paragraph (1) of the Civil Code, a legally made agreement has the same legal force as a law. Therefore, the parties (franchisor and franchisee) have legal force over the franchise agreement made by them.

Regarding the Franchise business agreement procedure, Article 5 of Government Regulation No. 42 Year 2007 stipulates that before making an agreement, the Franchisor must include in writing and correctly, at least regarding:

- a) names and addresses of the parties;
- b) types of Intellectual Property Rights;
- c) business activities;
- d) rights and obligations of the parties;
- e) assistance, facilities, operational guidance, training and marketing provided by the Franchisor to the Franchisee;
- f) business area;
- g) the term of the agreement;
- h) procedures for payment of rewards;
- i) ownership, change of ownership and heir rights;
- j) dispute resolution; and

⁷ Alvita Novanilia and Elza Syarief, 'QUO VADIS PENYELESAIAN PERKARA KEPAILITAN DAN PENUNDAAN KEWAJIBAN PEMBAYARAN UTANG (PKPU) PADA LEMBAGA KEUANGAN SYARIAH', *Journal of Law and Policy Transformation* 6, no. 2 (2022), <https://doi.org/10.37253/jlpt.v6i2.6315>.

⁸ Iwandi Iwandi, Rustam Efendi, and Chairul Fahmi, 'THE CONCEPT OF FRANCHISING IN THE INDONESIAN'S CIVIL LAW AND ISLAM', *Al-Mudharabah: Jurnal Ekonomi Dan Keuangan Syariah* 4, no. 2 (2023), <https://doi.org/10.22373/al-mudharabah.v5i2.3409>.

- k) procedures for extension, termination and termination of the agreement.⁹

However, from the perspective of the form of the franchise agreement (franchising), it can be said that the agreement is actually a development of cooperation (shirkah). This is due to the fact that with a franchising agreement, a cooperative relationship is automatically established between the franchisor and the franchisee for a certain period of time. The purpose of this co-operation is for the benefit of both parties.¹⁰

A Franchise is a form of agreement, the contents of which grant special rights and authorities to the Franchisee. Franchising is a reciprocal agreement because the Franchisor, as well as the Franchisee, are both obliged to fulfil certain achievements. Franchising requires the principles of openness and prudence. This is in accordance with the pillars and conditions of the contract according to Islamic law and the prohibition of "gharar" (uncertainty) transactions.¹¹

A Franchise Agreement is a formal agreement. This is because the Franchise agreement is required to be made in writing. This is necessary as a form of protection for both parties involved in the Franchise agreement.¹³ This is in accordance with the written principle (kitabah) contained in Q.S. Al-Baqarah: [2] verse 282 which means as follows:

"O you who believe, when you do business not in cash for a fixed time, write it down. and let a scribe among you write it down truthfully. and let not the scribe be reluctant to write it down as Allah teaches him, but let him write it down, and let the debtor estimate (what will be written down), and let him fear Allah his Lord, and let him not reduce any of his debts. if the debtor is of weak mind or incapable of estimating, then let his guardian estimate truthfully. and witness it with two witnesses from among men. If the debtor is a man of weak mind or incapable of estimating, then let his guardian estimate honestly. and if there are not two men, then a man and two women of witnesses whom you are pleased with, so that if one forgets, the other may remind him. And do not be reluctant to give

⁹ Kevin Kogin, *Legal Aspects of Franchise Contracts*, (Jakarta: PT. Tatanusa, 2014), pp, 36-37

¹⁰ Muhammad Adil Maulana and Abdullah Kelib, 'Kedudukan Bank Syariah Dalam Penyelesaian Sengketa Melalui Arbitrase (Studi Perbandingan Indonesia Dan Malaysia)', *Notarius* 16, no. 1 (2023), <https://doi.org/10.14710/nts.v16i1.42790>.

¹¹ Jamal. Khairunnas and Derhana Bulan Dalimunthe, 'Corak Pemikiran Hasbi Ash-Shiddieqy Terhadap Fiqh Indonesia (Antara Moderasi Dan Purifikasi)', *Akademika: Jurnal Keagamaan Dan Pendidikan* 16, no. 1 (2020).

evidence when called upon; and do not be weary of writing down debts, small or great, until the time for paying them is reached; that is more just in the sight of Allah, and more corroborative of testimony, and nearer to avoiding doubt. (Write down your dealings), unless it is cash trade which you carry on among yourselves, then there is no sin on you (if you do not write it down. and testify when you buy and sell; and do not make it difficult for the writer and the witness. if you do (so), then surely that is an unrighteousness on your part. and fear Allah; Allah teaches you; and Allah knows all things". (Al-Baqarah: 282).¹²

The above verse is the longest verse in the Qur'an. It speaks, among other things, of the recommendation or, according to some scholars, the obligation to write down an agreement and witness it in the presence of a trusted third party (notary), emphasising the need to write down even a small agreement, along with the amount and time.¹³

Islamic law's view of contracts (agreements) is different from that of positive law. Without regard to religious values, a contract is considered valid under positive law if it occurs on a voluntary basis between the parties concerned, although it must be within the limits of propriety. This is in contrast to Islamic law, which emphasises religious values. So, the freedom of people in making contracts and conditions cannot deviate from the provisions of religious teachings, even though the parties concerned have declared voluntarily.¹⁴

Business actors in the Franchise business, in addition to being bound by the fatwa of the existing laws in Indonesia, must also base their business activities on religious rules. Based on this, a research was conducted with the title "Franchising According to Civil Law and Islam

RESULTS AND DISCUSSION

Definition of Franchise

Franchise is a translation of the word *franchise*, derived from the word *wara* which means more and profit which means profit. Based on this literal meaning, it can be seen that a Franchise is a business that provides

¹²Department of Religious Affairs of the Republic of Indonesia, *Al-Qur'an and its Translations*, (Bandung: CV. Diponegoro, 2005), 37

¹³ M. Quraish Shihab, *Tafsir Al-Mishbah*, (Jakarta: Lentera Hati, 2002), 730

¹⁴ Ahmad Azhar Basyir, *Principles of Muamalah Law (Islamic Civil Law)*, (Jakarta: UII Pres, 2000), p, 108

more/special profits.¹⁵ According to Article 1 Item 1 of Government Regulation No. 42 Year 2007 on Franchising, the definition of Franchise is explained as follows:

"Franchise is defined as a special right owned by an individual or business entity to a business system with business characteristics in order to market goods and/or services that have proven successful and utilised and/or used by other parties based on a Franchise agreement."¹⁶

Franchising is a system of marketing or distribution of goods and services, in which a parent company (*franchisor*) grants to individuals or other small and medium-sized companies (*franchisees*), the privilege of carrying out a certain business system in a predetermined manner, during a certain time, in a certain place. In the Regulation of the Minister of Trade No. 12/M-Dag/Per/3/2006 on Provisions and Procedures for Issuing Franchise Business Registration Certificate, the definition of Franchise is explained as follows:

"*Franchise* is an engagement between a Franchisor and a Franchisee in which the Franchisee is granted the right to operate a business by utilising and/or using the intellectual property rights or inventions or business characteristics owned by the Franchisor in return for a fee based on the terms set by the Franchisor with an obligation to provide continuous operational consulting support by the Franchisor to the Franchisee".¹⁷

Based on the above description, it can be understood that a Franchise business is a business with the granting of rights granted by the Franchisor to the Franchisee to be run in accordance with the applicable provisions and rules.

1. Types of *Franchised* Businesses (*Franchise*)

According to the East Asian Executive Report, as cited by Salim HS, *Franchise* businesses are classified into three types, as follows:

- a. Product *Franchise*, a form of Franchise where the Franchisee only acts to distribute the products of its partner with area restrictions, such as Shell or British Petroleum fuel retailers.

15 Sri Redjeki Slamed et al, *Franchise in Indonesia*, (Jakarta, Journal Vol.8, 2011), p, 129

16 Adrian Sutedi, *Franchise Law*, (Bogor: Ghalia Indonesia, 2008), p, 12

17 *Ibid.* p. 14

- b. *Processing Franchise or Manufacturing Franchise*, where the Franchisor only plays the role of providing Knowhow, from a production process such as Coca Cola or Fanta drinks.
- c. *Business Format or System Franchise*, where the Franchisor already has a unique way of presenting products in one package, to consumers. Like Dunkin Donuts, KFC, Pizza Hut, and others.¹⁸

Based on the description above, it can be understood that there are several types of Franchises, namely, service franchises, goods franchises, and distribution franchises. There are also those who say that the types of Franchises are:

- a. *Product franchise*,
- b. *Processing franchise or manufacturing franchise*, and
- c. *Business format or franchise system*. In Indonesia itself, there has been a lot of growth in franchise businesses, ranging from franchises such as food, education, services, and health businesses.

2. Characteristics of a *Franchise Business*

The basic characteristics of a *Franchise*, according to Richard Burton Simatupang, include the following:

- a. There must be a written agreement (contract), which represents the equal interests of the *franchisor* and *franchisee*.
- b. *Franchisors* must provide training in all aspects of the business they are entering.
- c. *Franchisees* are allowed (under the control of the *franchisor*) to operate using the name/trademark, format and or procedure, as well as all good names (reputation) owned by the *franchisor*.
- d. *Franchisees* must make investments that come from their own sources of funds or with the support of other sources of funds (eg bank credit).
- e. *Franchisees* have the full right to manage their own business.
- f. *Franchisees* pay fees and or royalties to the *franchisor* for the rights they get and for the continuous assistance provided by the *franchisor*.
- g. The *franchisee* is entitled to obtain a certain marketing area where he is the only party entitled to market the goods or services he produces.

¹⁸ Salim H.S, *Development of Innominaat Contract Law in Indonesia*, (Jakarta: Sinar Grafika, 2010), p, 168

- h. The transactions that occur between the *franchisor* and *franchisee* are not transactions that occur between branches of the same parent company, or between individuals and companies they control.¹⁹

Meanwhile, according to Adrian Sutedi, the characteristics of the Franchise business from a juridical point of view are as follows:

- a. Basic elements
 - 1) There is the *franchisor*;
 - 2) There is the *franchisee*, and
 - 3) The Franchise Business itself.
- b. Product uniqueness
- c. Total business concept
- d. *Franchisees* use or sell products
- e. The *franchisor* receives fees and royalties.
- f. Management training and specialised skills.
- g. Trademark, patent or copyright registration.
- h. Funding assistance for *franchisees* from *franchisors* or financial institutions.
- i. Purchase of products directly from the franchisor
- j. Promotion and advertising assistance from the *franchisor*
- k. Site selection services by the *franchisor*.
- l. *Exclusive* marketing area.
- m. Quality control and uniformity.
- n. Contains elements of a particular brand and business system.²⁰

3. Terms of the Franchise Business Agreement

Franchising is a business agreement between two parties. As an agreement, it is certainly bound by the provisions in the Civil Code concerning agreements in Article 1313, the validity of agreements in Article 1320, and freedom of contract in Article 1338. Furthermore, for the validity of an agreement according to Article 1320 of the Civil Code, four conditions are required, namely: agreement of those who bind themselves, capacity to make an agreement, a certain thing, and a halal cause.²¹

¹⁹ Richard Burton Simatupang, *Legal Aspects of Franchising*, (Yogyakarta: 2016,), pp, 58-59.

²⁰ Adrian Sutedi, *Franchise Law*, (Bogor: Ghalia Indonesia, 2008), pp. 50-51

²¹ Chairul Fahmi, 'The Application of International Cultural Rights in Protecting Indigenous Peoples' Land Property in Indonesia',

a. Agreement of those who bind themselves

The agreement of those who bind themselves means that in order for an agreement to be considered valid by law, both parties must agree on what is regulated by the agreement.

The agreement of those who bind themselves contains two meanings, as follows:

- 1) The people who make the agreement must agree or agree on the main matters and other conditions to support the agreement on the main matters.
- 2) What one party wants is also wanted by the other party, either expressly stated.⁴⁸ Based on the description above, it can be understood that the agreement of those who bind themselves means that in the agreement there must be a conformity of will statements between one or more people with other parties.

b. Capacity to enter into an agreement

Capacity to enter into an agreement means that the party entering into the agreement must be a person who is authorised by law to enter into the agreement. The authority to act is only considered wrong by the law when the agreement is made by the following people:

- 1) Adults
- 2) Persons not placed under guardianship
- 3) A person who is not prohibited by law from doing certain acts.

c. Regarding a particular matter

Regarding a certain matter, namely that the agreement must be about a certain, clear matter, and which is justified by law. According to Syaifuddin, the point about a certain matter means that in making an agreement, what is being promised must be clear so that the rights and obligations of the parties can be applied.

d. A lawful cause

A lawful cause means that an agreement must be made with a purpose or reason that is in accordance with applicable law.

According to Syaifuddin, the criteria or measure of a halal cause are:

- 1) The agreement made must not be contrary to the law.

<https://doi.org/10.1177/11771801241235261> 20, no. 1 (8 March 2024): 157–66,
<https://doi.org/10.1177/11771801241235261>.

- 2) The agreement made does not conflict with decency
- 3) The agreement must not be contrary to public order.

4. Principles of Franchise Business Agreements

Principles of Business Agreements The principles of business agreements are regulated in the Civil Code, which has at least five principles that need attention in making agreements, as for the principles needed to make an agreement between the two parties, namely:

a. Freedom of contract principle

The principle of freedom of contract is a consequence of the enactment of the principle of contract as governing law. The principle of freedom of contract is a principle that teaches that the parties to an agreement are in principle free to make or not make an agreement, as well as their freedom to regulate the contents of the agreement themselves. The principle of freedom of contract is contained in Article 1338 of the Civil Code, which contains normative provisions, as follows:

- 1) All agreements made legally shall be valid as laws for those who make them.
- 2) The agreement shall be irrevocable other than by agreement of both parties, or for reasons which the law provides as sufficient for that purpose.
- 3) Agreements must be performed in good faith.

Based on the above description, it can be understood that the principle of freedom of contract is valid if it fulfils the requirements determined by laws and regulations, public order, and decency.

b. Principle of Legal Certainty (*Pacta Sunt Servanda*)

The principle of legal certainty (*pacta sunt servanda*) is that an agreement made legally by the parties binds the parties in full according to the contents of the agreement. The full binding force of the agreement made by the parties is considered by the law to be the same as the binding force of a law.

c. Consensualism Principle

The principle of consensualism is that the parties agree or agree on the promised performance. With the principle of consensualism, it means that the agreement exists since there is an agreement on the main thing. According to Munir Fuady, what is meant by the principle of consensualism of an agreement is that if an agreement has been made, then it is fully valid and binding, even in principle written requirements are not required by law, except for certain types of agreements, which do require written requirements.²²

The principle of consensualism is contained in Article 1320 paragraph (1) of the Civil Code which requires an agreement between the parties to the agreement. Every agreement is binding on the parties who make it if they have agreed on the performance or subject matter of the contract.

d. Principle of Good Faith

The agreement in the agreement that is manifested orally or in writing with the signing of the agreement by the parties must be implemented with the principle of good faith contained in Article 1338 paragraph (3) of the Civil Code which contains imperative provisions, namely "the contract must be carried out in good faith". Subekti, as quoted by Syaifuddin, explained that good faith according to Article 1338 paragraph (3) of the Civil Code is one of the most important joints of the law of agreements, which gives judges the power to supervise the implementation of an agreement, so as not to violate compliance and justice. Regarding the applicability of the principle of good faith at the stage of making an agreement, it can be explained that if the implementation of an agreement creates an imbalance or violates feelings of justice, the judge can make adjustments to the rights and obligations contained in the agreement.

e. Obligatoir principle

Oblatoir principle is a principle that determines that if a contract has been made, then the parties are bound, but the attachment is only limited to the arising of rights and obligations. Meanwhile, the performance cannot be enforced because the contract of difference has not yet occurred. So, if it is a sale and purchase contract, for example, then with the contract alone, the property rights have not transferred, so there is only an obligatory

²² Chairul Fahmi, 'TRANSFORMASI FILSAFAT DALAM PENERAPAN SYARIAT ISLAM (Analisis Kritis Terhadap Penerapan Syari'at Islam Di Aceh)', *Al-Manahij: Jurnal Kajian Hukum Islam* 6, no. 2 (2012): 167-76.

contract. Property rights only transfer after the existence of the property contract or often referred to as handover.²³

The Concept of Franchising Under Civil Law

Franchise is the equivalent of the term *franchise*, which was first introduced by the Institute for Management Education and Development (LPPM). The term Franchise is a fusion or combination of the word "wara" meaning more or special and the word "profit" meaning profit, so that Franchise means a business that provides more or special profit.²⁴

Prior to the enactment of Government Regulation No.16 of 1997 on Franchising, which is now replaced by Government Regulation No.42 of 2007, the issue of Franchising was a big problem, because the *franchisor* had to rely on the agreement written in the cooperation contract. This means that both parties must be very careful and cautious about what is agreed upon. Protection from other provisions governing a Franchising cooperation can be assumed to be difficult to obtain, if any. *Franchising ethics* is a source that can temporarily guide whether the agreement has a fair and correct basis.

Franchising business practices in Indonesia have occurred before 1995, but the term Franchise only appeared for the first time in Law No.9 of 1995 concerning Small Businesses, namely in Article 27 letter d which states, that Franchising is one of the partnership patterns. What is meant by the Franchise pattern is stated in the Explanation of Article 27 letter d which reads:

"Franchising is a partnership relationship in which the franchisor grants the right to use its licences, trademarks, and distribution channels to the franchisee with the assistance of management guidance".²⁵

To implement the provisions on Franchising as contained in Law No.9 of 1995, the Government issued Government Regulation No.42 of 2007 on Franchising. This is confirmed in the "considering" consideration number 4 of the Government Regulation, which means that Law No.9 of

²³ Muhammad Raja Pramudita et al., 'Resesi Ekonomi Dan Implikasinya Dari Perspektif Hukum Dagang Pasca Pandemi Tahun 2023', *Nusantara: Jurnal Pendidikan, Seni, Sains Dan Sosial Humaniora* 1, no. 01 (2022).

²⁴ Adrian Sutedi, *Franchise Law*, (Bogor: Ghalia Indonesia, 2008), p. 4

²⁵ Kevin Kogin, *Legal Aspects of Franchise Contracts*, (Jakarta: PT. Tatanusa, 2014), p. 34

1995 is one of the bases for the formation of the Government Regulation. However, the definition of Franchise in the Government Regulation is far different from the definition of Franchise in the Explanation of Article 27 letter d of Law No.9 of 1995. Article 1 point 1 of the Government Regulation states that "Franchise is a special right owned by an individual or business entity to a business system with business characteristics in order to market goods and/or services that have proven successful and can be utilised and/or used by other parties based on a Franchise agreement".

The legal basis for the establishment of Government Regulation No. 16 of 1997 did not refer to Law No. 9 of 1995. Currently, Government Regulation No. 16/1997 has been revoked based on the provisions of Article 20 of Government Regulation No. 42/2007 on Franchising.

1. Franchise Agreement

Chapter II of Government Regulation No. 42 Year 2007 regulating Franchise agreements states as follows:

Article 5: The Franchise Agreement shall contain at least the following clauses:

- a. Names and addresses of the parties
- b. Types of intellectual property rights
- c. Business activities
- d. Rights and obligations of the parties
- e. Facility assistance, operational guidance, training and marketing which the Franchisor provides to the Franchisee
- f. Business area
- g. Term of the agreement
- h. Procedure for payment of benefits
- i. Ownership, change of ownership and heir rights
- j. Dispute resolution; and
- k. Procedures for extending, terminating and closing the agreement.²⁶

In order for the agreement made by the parties to be valid, the following must be fulfilled:

- 1) There is an agreement from the parties who make the agreement. This means that to make an agreement there must be no coercion, no

²⁶ Article 5 of the Government Regulation of the Republic of Indonesia No. 42 Year 2007 on Franchising, pp. 3

- fraud, and no oversight. If there is an agreement made with disagreement then the agreement can be requested for cancellation.
- 2) The parties must be capable (authorised) to act in law. This means that the parties making the agreement must be capable (wenang) to make an agreement. This means that people who are capable (wenang) are adults, people who are not under guardianship (curatele) such as people who are brain sick, dark eyes, drunkards, gamblers, and so on.
 - 3) Something specific. This means that the object of the agreement, for example, what type of Franchise agreement, food, restaurant or so on. If this cannot be determined, the agreement is null and void, meaning that the agreement is invalid.
 - 4) A lawful cause. This means that the agreement is made not contrary to Law, religion, public order, and decency. If this is not lawful, meaning that it is against the law, religion, public order and decency, then the agreement made is invalid.²⁷

These four conditions must be fulfilled. If they have been fulfilled, then the agreement is called a valid agreement. If the agreement is made legally, it applies as a law to the parties who make it (Article 1338 of the Civil Code).

Before the Franchisor and Franchisee sign the Franchise agreement, the Franchisor must submit an offering prospectus to the Franchisee. The offering prospectus must be written in the Indonesian language and if the prospectus is written in a foreign language it must be translated into Indonesian. The prospectus contains written information about the Franchising business, in the offer according to Article 7 paragraph (2) of Government Regulation of the Republic of Indonesia Number 42 of 2007 concerning Franchising, stipulates:

- 1) Franchisor identity data;
- 2) Franchisor's business legality,
- 3) History of business activities;
- 4) Franchisor's organisational structure;
- 5) Financial statements for the last 2 (two) years;
- 6) Number of business premises;
- 7) List of Franchisees; and
- 8) Rights and obligations of Franchisor and Franchisee.

²⁷ Mudassir Mathar, *Legal Aspects of Franchising in Indonesia*, (Bandung, 2019), p, 7

Before the Franchisor submits the offering prospectus to the Franchisee, the prospectus is first registered with the Ministry of Trade through the directorate of Trade Business Development accompanied by a photocopy of the offering prospectus and a photocopy of business legality. Once registered, the Franchisor receives a Franchise Business Registration Certificate (STPUW) which is a requirement for Franchisors and without this letter the business can be closed. Once a Franchise agreement is signed, it must be registered with the Ministry of Commerce. This registration obligation is in the hands of the Franchisee accompanied by a photocopy of the business legality and a photocopy of the Franchise agreement. Franchisees who have registered the Franchise agreement will receive a Franchise Business Registration Certificate (STPUW). The things contained in the Franchise agreement, among others:²⁸

- 1) The right to use the trade name, trade mark, and goodwill of the franchisor.
- 2) The right to use the franchisor's designs, patents, work methods, equipment and product development.
- 3) The right to use all central service development activities to assist the franchisee. This includes training, consultancy, management, production, marketing, assistance in the design, implementation and costing of construction and equipment required to conduct business, central purchasing and distribution of goods/products at reduced prices, advertising and techniques in promotion, accounting bookkeeping and insurance planning.
- 4) The exclusive right to operate in a particular location or area without competition and other franchisees.²⁹

2. Legal Provisions of Franchise Agreement

Mandatory Clauses in a Franchise Agreement Article 5 of Government Regulation No. 42 Year 2007 describes the mandatory clauses in a Franchise business agreement, which are as follows:

²⁸ Husni Abdul Jalil, Bukhari Ali, and Al Muzammir Saputra, 'PATTERN OF NAZHIR WAKF DEVELOPMENT IN THE CITY OF BANDA ACEH', *Dusturiyah: Jurnal Hukum Islam, Perundang-Undangan Dan Pranata Sosial* 12, no. 1 (2022): 16-30, <https://jurnal.ar-raniry.ac.id/index.php/dustur/article/view/12371>.

²⁹ Hanita Mayasari, *Franchise Contracts in Legal Aspects and Implementation in Indonesia*, (Journal of the Faculty of Law, Surakarta University Vol. 6 No. 1 October 2021), pp. 26

- a. Names and addresses of the parties
- b. Types of intellectual property rights
- c. Business activities
- d. Rights and obligations of the parties
- e. Facility assistance, operational guidance, training and marketing provided by the Franchisor to the Franchisee.
- f. Business area
- g. Term of the agreement
- h. Procedure for payment of benefits
- i. Ownership, change of ownership, and heir rights
- j. Dispute resolution
- k. Procedures for extension, termination and closing of the agreement.³⁰

Based on the description above, it can be seen that the Franchise business agreement is an innominaat contract, namely a contract in writing, which arises, grows, and develops in practice due to the principle of freedom of contract. However, although it can be freely made and agreed by the parties, the substance of the Franchise business agreement has been clearly determined in Government Regulation No. 42 Year 2007 on Franchising.³¹

The legal provisions regarding Franchising as a form of agreement in the business world are also guided and subject to the provisions that apply to the validity of an agreement. Franchising is a form of agreement, which grants special rights and authorities to the franchisee, which can manifest in the form of: the right to make sales of products in the form of goods and or services using a particular trade name or trademark and the right to carry out business activities with or based on a business format determined by the Franchisor. Franchise business agreements must be carefully drafted so that the business cooperation that is carried out benefits both parties equally.

There are two causes of damages, namely damages for default and damages for unlawful acts. Damages for default are regulated in Book III of

³⁰ Kevin Kogin, *Legal Aspects of Franchise Contracts*, (Jakarta: PT. Tatanusa, 2014), pp, 36-37

³¹ Chairul Fahmi, 'The Impact of Regulation on Islamic Financial Institutions Toward the Monopolistic Practices in the Banking Industrial in Aceh, Indonesia', *Jurnal Ilmiah Peuradeun* 11, no. 2 (30 May 2023): 667-86, <https://doi.org/10.26811/peuradeun.v11i2.923>.

the Civil Code starting from Article 1243 of the Civil Code up to Article 1252 of the Civil Code, while damages for unlawful acts are regulated in Article 1365 of the Civil Code. Damages for unlawful acts are a form of compensation imposed on the person who caused the wrong to the injured party. The damages arise because of the wrongdoing, not because of the agreement. Compensation for default is a form of compensation charged to the debtor who does not fulfil the contents of the agreement that has been made between the creditor and the debtor. Regarding the conditions for cancellation of an agreement or contract, Article 1266 of the Civil Code states that the agreement must be reciprocal, there is a default, and its cancellation must be requested by a judge. In terms of compensation for losses, Article 1267 of the Civil Code states that the creditor can sue the debtor by fulfilling the agreement or cancelling it with compensation. In conclusion, it can be determined that the creditor can choose between the following demands:

- 1) Fulfilment of the agreement;
- 2) Fulfilment of the agreement comes with compensation;
- 3) Compensation only;
- 4) Cancellation of the agreement;
- 5) Cancellation with compensation.³²

Franchising According to Islamic Law

Franchising is a distribution system, where the first party, the *franchisor*, grants the right to the second party, the *franchisee*, to distribute goods/services at a certain time and area using the brand, logo, and operating system owned and developed by the *franchisor*.³³

Based on this understanding, it can be understood that the *franchisor* gives its property rights in the form of patents (although not property / capital) for the management of its company to the *franchisee*, so that the *franchisee* in its business is allowed to use the *franchisor's* company name, logo, operating system, and procedures and methods that have been determined by the *franchisor*, with a mutually agreed agreement. From the point of view of *sharia* (fiqh), this agreement is included in the group of *shirkah* (partnership), and the law is permissible.³⁴

³² Muhammad Imam Agrianto, *Implementation of Franchise Agreements According to Civil Law in Samarinda City*, (University of Samarinda, 2017), pp. 12

³³ Ahmad Wardi Muslich, *Fiqh Muamalat*, (Jakarta: Amzah, 2017), p. 622

³⁴ Chairul Fahmi, 'The Snouck Hurgronje's Doctrine in Conquering the Holy Revolts of Acehese Natives', *Heritage of Nusantara: International Journal of Religious*

There are two divisions of *shirkah* contained in the discussion of this Franchise including, *shirkah* tamlik (cause of ownership) and *shirkah* uqud (two-person contract) in business. This franchise is included in these two *shirkahs*, namely *shirkah* uqud (transaction), namely two people share in capital and profit. Both are equally capitalised, the difference is that in this case the *franchisor* capitalises on creative ideas including trademarks, logos, business management and labour such as business training that will be provided to *franchisees*. Likewise, the *franchise* is sufficient to capitalise on what will be franchised.

Types of Franchises in Islamic law, namely:

1. *Shirkah Amlak Shirkah al-Amlak*, is two or more people to own an object. This *Shirkah* is divided into:
 - a) *Shirkah* belonging to *Jabriyah* is a *shirkah* that occurs without the will of the parties concerned. For example, the inheritance becomes the joint property of the people who receive the inheritance.
 - b) *Ikhtiyariyah* property *shirkah*, which is a *shirkah* that occurs by the will of the parties concerned. For example, two people agree to buy an item and the item becomes their joint property.
2. *Syirkah Uqud* is a partnership between two or more people that arises by means of an agreement or contract (agreement), in which two or more people agree or agree that each of them contributes capital and they also agree on various profits and losses. *Shirkah* al-Uqud is broadly divided into *shirkah* amwal (financial), *shirkah* a'mal (operational), *shirkah* wujuh (good will), and *shirkah* Mudharabah.
3. *Shirkah al-wujuh*, which is a cooperation contract between two or more people who have no capital at all, but have reputation and prestige and are experts in business. They buy goods on credit and sell them for cash; the profits are shared: In this type of *shirkah*, the partners buy goods on credit, based on trust, and then sell the goods on credit for cash, thereby making a profit.
4. *Shirkah al-A'mal (al-Abdan)*, a contract of co-operation between two people of the same profession to accept a job together and share the profits of that job. ^[24] For example, the collaboration of two architects to work on a project or the collaboration of two tailors to accept a

Literature and Heritage 10, no. 2 (20 December 2021): 248–73,
<https://doi.org/10.31291/hn.v10i2.628>.

project to make school uniforms. The profit or reward received from the work is shared together according to their agreement. The ruling on the permissibility of *shirkah* of the four types of *shirkah* above, which has been agreed upon by the *fukaha* (*fuqaha*), is *shirkah 'inan*. The other three types of *shirkah* are still in dispute. Imam Maliki and Hanafi allow *mufawadhah shirkah*, while Shafi'i does not. Hanafi and the Maliki jurists allow *shirkah 'abdan*, but Shafi'i forbids it. Hanafi permits *shirkah wujuh*, Maliki and Shafi'i do not. The reason for the disagreement of the *fiqh* experts above, lies in terms of emphasis. For *fiqh* experts who emphasise the occurrence of *shirkah* lies in the mixing of capital or property, then *shirkah 'abdan* and *wujuh* are not allowed (this mindset is followed mainly by Shafi'i). For *fiqh* experts who emphasise the occurrence of *shirkah* lies in the effort (energy) either with capital or property or without capital, then the existence of *shirkah 'abdan* and *wujuh* is allowed (this mindset is followed mainly by Hanafi).

5. *shirkah 'inan* is a partnership between two people in property to trade together, and share profits or losses together.³⁵

The Franchise Agreement is a contract, so to make a contract or agreement in Islam, 4 (four) pillars must be fulfilled, namely: a) the subject of the contract (*al-aqidayn*); b) the expression of will (*shighat al-aqd*); c) the object of the contract (*mahallul 'aqd*); and the purpose of the contract (*maudhu'ul 'aqd*). The subject of the contract relates to the parties who make the contract, both individuals and legal entities. In this case, it relates to the competence of the parties, including (a) competence (*al-ahliyyah*), which is divided into the ability to accept the law (*ahliyyatul wujub*) and the ability to act legally (*ahliyyatul ada'*), (b) authority (*wilayah*), and representation (*wakalah*). The expression of will consists of *ijab* and *kabul*, which represent an agreement. *Ijab* (offer) is the first statement of intention in the form of an offer made by one party to another party to create a legal action. *Kabul* (acceptance) is a statement of will from the other party to accept the *ijab* conveyed by the offering party, thus creating a contract.³⁶

³⁵ Mayasari, R. E. *Franchising in the Islamic Legal System and Positive Law in Indonesia*, (Jakarta: 2019), pp 247-254.

³⁶ Norman Syahdar Idrus, "Legal Aspects of Franchise Agreements in the Perspective of Civil Law and Islamic Law", in *Yuridis Journal*, (Jakarta: Faculty of Law, National Development University "Veteran" Jakarta Vol. 4 No. 1, June 2017), p. 41.

The object of the contract can be in the form of objects (both movable and immovable objects, as well as tangible and intangible objects), the benefits of objects, services or work, or something else that is not contrary to sharia, provided that (a) the object of the contract can be delivered or can be carried out; (b) the object of the contract must be certain or can be determined; and (c) the object of the contract can be transacted according to sharia.

The purpose of the contract is the intention of the parties when making the contract in order to realise the main legal effect of the contract. The purpose of Franchising is to transfer ownership of the economic benefits of objects (intellectual property rights) by the Franchisor to the Franchisee. According to the fatwa of the Indonesian Ulema Council No.1/MUNAS VII/MUI/5/2005 on the Protection of Intellectual Property Rights, intellectual property rights are one of the huquq maliyyah (property rights) that receive legal protection (mashun) like mal (wealth), so that intellectual property rights can be used as an object of akad (al-ma'qud 'alaih), both mu'awadhah (exchange, commercial) contracts, as well as tabarru'at (non-commercial) contracts, and can be endowed and inherited.³⁷

A Franchise Agreement is an agreement that grants special rights and authorities to the Franchisee. The Franchise business agreement is a reciprocal agreement because both the Franchisor and the Franchisee are obliged to fulfil certain achievements. In Franchising, the principles of openness and prudence are required. This is in accordance with the pillars and conditions of the contract according to Islamic law and the prohibition of "gharar" (uncertainty) transactions.³⁸

The Franchise Agreement is a formal agreement. This is because Franchise agreements are required to be in writing. This is necessary as a form of protection for both parties involved in the Franchise agreement. A Franchise Agreement involves the right to utilise and/or use intellectual property rights or inventions or business characteristics or the Franchise is granted for a fee based on terms and/or sales of goods and/or services. This is in accordance with the principle of respect for labour in Islamic civil law principles.

³⁷ Muhammad Siddiq Armia et al., 'Post Amendment of Judicial Review in Indonesia: Has Judicial Power Distributed Fairly?', *Journal of Indonesian Legal Studies* 7 (2022): 525, <https://heinonline.org/HOL/Page?handle=hein.journals/jils7&id=529&div=&collection=>

³⁸ Enizar, *Economic Hadith*, (Jakarta: Rajawali Pers, 2013), p, 26

Thus, it can be argued that the *Franchising* system is not contrary to Islamic law, as long as the object of the Franchise agreement is not something that is prohibited in Islamic law (for example: the business of selling haram food or drinks), then the agreement is automatically void according to Islamic law because it is contrary to Islamic law. One of the reasons for the permissibility of Franchise business agreements is benefit. Franchise businesses developed in various places provide benefits to many people. Thus, many people are helped because they have business activities. This is included in the framework of ta'awun ala al-birri wa at-taqwa in accordance with the word of Allah in Surah Al-Mai'dah verse 2:

وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَىٰ وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ شَدِيدُ الْعِقَابِ

Meaning: "and help each other in (doing) righteousness and piety, and do not help each other in sin and transgression. and fear Allah, Verily, Allah is Severe in His punishment". (Q.S. Al-Maidah: 2)³⁹

In addition, this Franchise business also has benefits that are quite instrumental in increasing the development of small and medium enterprises in Indonesia, if the Franchise activities to a certain degree can use domestically produced goods and to carry out activities that will not harm the interests of small and medium entrepreneurs. So that in terms of the benefits of this Franchise business is also positive so that it can be justified according to Islamic law. Basically, the franchise system is a good system for learning for the *franchise*, if one day it succeeds it can break away from the *franchisor* because the fees paid are quite expensive and then it can set up its own business or even build a new Islamic *franchise* business.⁴⁰

To create an Islamic Franchise business system, a sharia value system is needed as a business moral filter that aims to avoid various business moral deviations (*moral hazard*). The filter is a commitment to stay away from the seven Maghrib (Western) taboos, namely:

- 1) *Maysir*, which is any form of gambling speculation that kills the real sector and is unproductive.
- 2) Immoral, i.e. business practices that violate decency and social norms.

³⁹ Ministry of Religious Affairs of the Republic of Indonesia, *Al-Quran and its Translation*, (Cet II: Makasar Halim, 2013), p, 63

⁴⁰ Gemala Dewi, et al, *Law of Engagement*, (yongyakarta, 2017), pp, 178-179

- 3) *Gharar*, which is any transaction that is not transparent and unclear, thus potentially harming one of the parties.
- 4) *Haram*, which is the object of transactions and business projects that are forbidden by sharia.
- 5) *Riba*, which is any form of distortion of currency into commodities by charging additional (interest) on credit or loan transactions and exchange/barter over similar ribawi goods.
- 6) *Ihktikar*, which is the hoarding and monopolisation of goods and services for the purpose of price gaming.
- 7) *Harmful*, i.e. all forms of transactions and businesses that endanger individuals and society and are contrary to the public good.

Based on what has been stated above, it can be concluded that the law of Franchising is highly dependent on the suitability of the *franchise* business field and the system and mechanism of cooperation with sharia principles and the absence of any sharia restrictions in the business. But in general, doing business through Franchising is a good way to try, because this method not only brings benefits to the parties, but also does not conflict with Islamic values.⁴¹

Based on the description above, it can be understood that the Franchise agreement is not contrary to Islamic law, however, the parties who will make a Franchise business agreement must always be guided by the objectives of Islamic economics, namely *maslahah*, by seeking all activities for the achievement of things that result in the existence of benefits for humans.

CONCLUSIONS

Based on the results of the above research, it can be concluded that *Franchise* is a translation of the word *franchise*, derived from the word *Wara* which means more and profit which means profit. Based on this literal meaning, it can be seen that Franchising is a business that provides more / special benefits. The Franchise business agreement according to positive law is regulated in Article 4 of Government Regulation No. 42 Year 2007 on Franchising, which explains that every Franchise business agreement of any

⁴¹ Chairul Fahmi, 'Revitalisasi Penerapan Hukum Syariat Di Aceh (Kajian Terhadap UU No.11 Tahun 2006)', *TSAQAFAH* 8, no. 2 (30 November 2012): 295–310, <https://doi.org/10.21111/tsaqafah.v8i2.27>.

kind must be made in writing by the parties. In Article 5 of Law No. 42 Year 2007, the Franchise agreement contains clauses at least: a) names and addresses of the parties, b) types of intellectual property rights, c) business activities, d) rights and obligations of the parties, e) facility assistance, operational guidance, training and marketing provided by the Franchisor to the Franchisee, f) business area, g) term of the agreement, h) procedures for payment of fees, (h) ownership, change of ownership and rights of heirs, i) dispute resolution; and j) procedures for payment of fees. Dispute resolution; and j) procedures for extension, termination and closing of the agreement.

Based on the provisions in article 4 of Government Regulation No. 42 Year 2007 on Franchising, in paragraph (1) which reads "Franchises are organised based on a written agreement between, the Franchisor and the Franchisee with due observance of Indonesian law" it can be explained that every Franchise agreement of any kind must be made in writing by the parties.

In the context of a Franchise agreement, the cooperating parties are the *franchisor* and the *franchisee*, while the capital of the franchisor is intellectual rights in the form of company names, logos, systems, and methods owned and developed by the franchisor. These rights, although not in the form of a price (*mal*), can be valued with property. The capital spent by the franchisee is property for business capital. From the point of view of Islamic economic law, Franchising belongs to the group of *shirkah* (partnership), and the law is permissible. Franchising includes *shirkah 'inan*. *Shirkah 'inan* is an alliance between two people in property to trade together, and share profits or losses together. To create an Islamic Franchise business system, a sharia value system is needed as a business moral filter that aims to avoid various business moral deviations (*moral hazard*). In the context of a Franchise agreement, the cooperating parties are the *franchisor* and the *franchisee*, while the capital of the *franchisor* is intellectual rights in the form of company names, logos, systems, and methods owned and developed by the *franchisor*.

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