

ISLAMIC LAW PERSPECTIVE ON FRANCHISE BUSINESS

Budi Prasetyo¹

ABSTRACT

Franchise is a type of modern business that offers and promises profits. On the one hand, there are legal provisions issued by the government authorities to regulate franchise business activities. On the other hand, to protect Indonesian people, predominantly Muslim, it is necessary to study the clarity of franchise businesses viewed from the perspective of Islamic law. Ijtihad as the third source of Islamic law provides the opportunity for the development of Muslims' idea in the face of all problems in globalization era, including determining the law of franchise business based on Islamic law.

Keywords: Franchise Business, Law

Introduction

Islamic law is the law of the God who created this universe, including human beings within it. The law also includes all of His creation. There are the clear ones, as written in the Qur'an, and there are also the implicit ones behind the written law in the Qur'an. In addition, after the explicit and implicit ones, there are laws of God which are hidden in the Qur'an. The implicit and hidden laws must sought, explored and discovered by qualified humans through their reasoning. The explicit laws have the nature of *zhanni* (the words or phrases denoting more than one meaning which may be interpreted by different people in different meanings) in al-Quran and al-Hadith. The laws of God which are implied and hidden behind *lafaz* or the words in al-Qur'an and al-Hadith are human's *ijtihad* which are eligible to contribute without limits to follow and direct the development of human society, to determine the laws and address various issues that arise as a result of the created times, science, and technology.²

Ijtihad is the mind of the human mind who qualifies to strive and endeavor with all the capacity available in him; to understand the fundamental rules of the laws contained in the Qur'an and the rules of common laws contained in the Sunnah, and to formulate them into the outlines of law that can be applied in a particular case or those which the settings are not contained in the two main sources of Islamic law.

Ijtihad as a third source of Islamic law provide opportunities for the development of Muslim thought in the face of all the problems in globalization era. New different types of businesses have has emerged and spread around the world including Indonesia. One type of new businesses that also promises to offer multiple profit is franchise.

According to Article 1 of the Government Regulation No. 16 of 1997 on Franchise and Article 1 of the Decree of the Minister of Industry and Trade No. 25 9 / MPP / Kep / 7/1997 on Provisions and Procedures for Registration of Franchise, the definition of Franchise is: "a binding in which one party is given the right to utilize and or use the intellectual property rights or inventions or hallmark of the businesses owned by another party to a reward based on the requirements set by the other party in the provision and sale of goods or services"³

Meanwhile, in general, a Franchise Contract is the granting of rights by a franchisor to a franchisee to use the business peculiarities or identifiers in trade / services in the form of products and cultivated forms including corporate identity (logo, brand, company design, the use of marketing plans, providing an extensive assistance, the time/ moment / operating hours, apparel, and employee appearance), so the business distinguishing characteristic or identifiers of the trade/ service owned by the franchisee are the same as those owned by the franchisor.⁴

From the two definitions above, they show the two parties in Franchise Contract; Franchisor and Franchisee. Franchisor is a party or parties who gives the permission to another party (franchisee) to use his/ her business particularities and specifications (characteristics identifier). Franchisee is a party or parties who gets the permission or license as a franchisee from a franchisor to use the business particularities or specification of the franchisor.

¹ Budi Prasetyo, SH., M.Hum, Lecturer, Faculty of Law, Untag Semarang

² H. Mohammad Daud Ali, *Hukum Islam : Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia* (Islamic Law: Introduction to Islamic Legal Sciences and Procedures in Indonesia). PT. Raja Grafindo Persada, Jakarta, 2004, p. 124.

³ Suharnoko, *Hukum Perjanjian: Teori dan Analisa Kasus* (Contract Law: Theory and Case Analysis), Jakarta, Kencana, 2004, p. 84.

⁴ Suhrawardi K. Lubis, *Hukum Ekonomi Islam* (Islamic Economic Law), Sinar Grafika, Jakarta, 2000, p. 174.

Basically, Franchise is an contract on the method of good and service distribution to consumers. Franchisor, within a certain period, licenses franchisee to conduct the business in the distribution of goods and services under the name and identity of the franchisor in a particular area. The business must be executed in accordance with the procedures and ways set forth by the franchisor. The franchisor provides assistance to the franchisee. As the return, the franchisee pays the amount of money in the form of initial fee and royalty.⁵

On the one hand, there are legal provisions issued by the government authorities to curb the activities of franchise businesses. On the other hand, to protect the people of Indonesia who are predominantly Muslim, it is necessary to study the legal clarity of franchise business from the viewpoint of Islamic law.

Based on the description above, this paper formulated the problem as follows:

"How is the Islamic legal perspective on franchise?"

DISCUSSION

Basic Concept of Franchise Business

Basically, there are three major components in franchise system, i.e.: first, *franchisor* as the party who has the system or methods in running a business; second, *franchisee* as the party who gives *franchise* or the system from *franchisor* so that he has the right to run the business in developed ways; third, *franchise* as the system of method of business. It is the business knowledge or specification of *franchisor* sold to *franchisee*.

Franchise can be distinguished in two forms, namely product and trade franchise and business format franchise.⁶ Products and Trade Franchise is the simplest form of franchise. In Products and Trade Franchise, Franchisor gives the right to Franchisee to sell the products developed by the Franchisor accompanied by granting the permission to use the trademark of the Franchisor. For the permission to the use of such trademarks, Franchisor usually gets a kind of royalty payments in advance, and then Franchisor gains the profit through the sale of the products franchised to the franchisee. In this very simple form, Products and Trade Franchise often takes the form of agency, distributor, or sales license. The examples of this kind is the car dealerships of Auto 2000 from Toyota and gas stations by Pertamina.

Business Format Franchise is granting a license by one person to another party. The license gives the right to Franchisee for running the business by using the trademark or trade name of Franchisor and to use the whole package which consists of all the necessary elements to make a person who is previously untrained to be skilled in the business and to run it with continuous assistance based on the standards that have been predetermined. Business Format Franchise consists of:

- a. comprehensive business concept of the Franchisor;
 - b. the start-up process and training on all aspects of business management, in accordance with the concept of the Franchisor;
 - c. continuous assistance and guidance from the Franchisor.
- In franchise business, the items which can be requested from franchisor by franchisee are:
- 1) Brand name that includes logos, equipment, and others. Good franchisor also has the rules regarding the display / display of shopfronts well and in detail.
 - 2) Business operation system and manual. Every franchisor has systematic, practical and easy operating standards to apply, and they should also be set out in writing.
 - 3) Support in operation. Franchisor has a wider experience and has been fostering many franchisees, so he should have the capacity to provide support to new franchisees.
 - 4) Monitoring. Good franchisor supervises franchisees to ensure that the system provided is run properly and consistently.
 - 5) The incorporation of promotion/ joint promotion. This relates to the first element, that is, the problem of brand name socialization.
 - 6) Supply. This applies to a particular franchise, for example, for food and beverage in which the franchisor is also the supplier of food / beverage. Sometimes, franchisor also supplies the machines or equipment needed. Good franchisor usually helps franchisees to obtain sources of capital funds from investors (fund supply) such as banks although it is very rare.⁷

In general, franchisees need to pay the initial fees which are paid once, or sometimes once for a certain period, e.g. 5 years. Besides, franchisees usually pay royalties or a portion of the sales. The other variation is that franchisees need to buy capital goods or equipment from franchisor.

Franchise contract is a formal contract because it is specified in Article 2 of the Government Regulation No. 16 of 1997 to be made in writing in the Indonesian language. It is necessary as a protection to both parties involved in the Franchise Contract.

In Franchise Contract, compensation is recognized. It is generally known that there are two kinds of compensation that may be requested by Franchisor. The first is direct compensation in the form of monetary value (direct monetary compensation), and the second is indirect compensation in the form of monetary value or the compensation provided in the form of non-monetary value

⁵ Gemala Dewi, *Hukum Perikatan Islam di Indonesia, (Islamic Binding Law in Indonesia)*, Badan Penerbit Fakultas Hukum UI, Jakarta, 2005, p. 194, by *franchisor*.

⁶ Suharnoko, *Op. cit.*, p. 83

⁷ Gemala Dewi, *op. cit.*, p. 195

(indirect and non- monetary compensation). Direct Monetary Compensation is lump sum payment and royalties. Lump sum payment is an amount of money that has been calculated in advance to be paid by Franchisee at the time of granting a franchise contract agreed to be given to Franchisee. Meanwhile, royalty is a payment associated with a particular presentation which is calculated from the number of production or sale of goods or services produced or sold based on a Franchise Contract, accompanied by a binding of particular minimum or maximum amount of royalties or not.

Indirect and non- monetary compensation includes the profits as a result of the sale of capital goods or raw materials, which is one package with granting franchises, payment in the form of dividends or interest on the loan in case of Franchisor also provides financial assistance in the form equity or short-term and long-term loans, cost shifting or transfer of part of the costs which must be incurred by Franchisor, acquisition of the market data of the business activities conducted by a licensee, and so forth.

Compensation is allowed in franchise according to the Government Regulation (PP) No.16 of 1997 since it is just a reward in the form of direct monetary compensation. The provision of Article 2 of the Government Regulation No. 16 of 1997 confirms that franchise is held by a written contract between Franchisor and Franchisee, provided that the Franchise Contract is made in Indonesian and applies Indonesian law.

Article 3 paragraph 1 of the Government Regulation (PP) No. 16 of 1997 specifies that, before making the contract, Franchisor shall communicate to Franchisee in writing and properly, at least about:

- a. Name of Franchisor, along with his business activities; the information about Franchisor regarding his identity includes name and address or place of business, the name and address of Franchisor, the experience regarding the success or failure during the running of the franchise, the description of the Franchisee who ever and still perform the binding, and financial condition.
- b. The intellectual property rights or inventions or distinctive feature which is the object of the franchise;
- c. The requirements that must be met by Franchisee; the requirements to be met by Franchisee are the method of payment, compensation, marketing area, and quality control.
- d. The assistance or facilities offered by Franchisor to Franchisee; the information about the prospect of franchise activities, and it also includes the standards used in giving the description of the project.
- e. The rights and obligations of Franchisor and Franchisee; The assistance or facilities provided, such as, training, financial assistance, marketing assistance, accounting assistance, and guidelines.
- f. Termination, cancellation, and extension of Franchise Contract, as well as other things that need to know in order to implement Franchise Contract. Furthermore, Franchisor, by the government regulation, is required to give sufficient time to Franchisee to investigate and study the information presented thoroughly.

The Concept of Islamic Economic System

In an economic system, there are several sub-systems; production, consumption, distribution, and support / intermediaries. Among Muslims, it is appropriate that Islamic sharia law and norms color the interactions and transactions within and between the sub-systems so that they form an Islamic economic system. The laws and norms referred to above have two main principles extracted from the provisions of the Qur'an and the Hadith of the Prophet Muhammad, i.e.:

a. The Islamic view of treasure and economy:

- 1) The teachings of Islamic sharia view treasure as a trust from God Almighty, as jewelry of life, as a test of faith, and as a provision for worship.
- 2) Treasure should be obtained from lawful business and in a manner that is lawful. Islam forbids the search for treasure that can forget about death, *dzikrullah* (recollection of God), shalat (prayer) and zakat (charity), and to concentrate wealth only to a group of rich people only.
- 3) Islam also forbids illicit business, such as *riba* (usury), gambling, trading illicit goods, stealing, robbery, cheating in measures and weights, vanity and harmful ways, and bribery.

b. The Values of Islamic Economy:

- 1) Islam encourages its followers to fight for treasures in various ways as long as it follows the guidelines that have been set. The signs referred to, among others, are to find lawful and good treasures, not to use the way of vanity, not exaggerated, not to harm or be harmed, distanced from the element of *riba*, *maysir* (speculation), *gharar* (manipulation), and not to forget the social obligations in the form of charity, donation, and alms.
- 2) Islam encourages its followers to work and prohibits begging.
- 3) Each individual will get his/ her rights in accordance with his/ her contribution and do not take other people's rights.
- 4) Economic disparities must be overcome through, among others, the abolition of monopoly, assuring equal rights and opportunities to be active in economic processes, assuring the fulfillment of basic needs of life of each community member, carrying out the mandate of social economy insurance that is able to bear and help the poor.
- 5) Individual freedom is recognized as long as it is not conflicted with the interests of the larger social or the individual does not overstep the rights of others. Islamic economic system has the basic sense as an economic system that is based on Islamic sharia law and norms. Various definitions have been given on the economics of Islam, the one and the other, in principle, are not different. One of them is stated by Muhammad Abdullah Al-Arabi: "Islamic economics is a set of general economic fundamentals concluded by the Qur'an and Sunnah, and is an economic

building built on the foundation according to each environment and period".⁸

The advantage of the Islamic economic system is that the spiritual foundation is always an integral part of the practices of the interactions and transactions between individuals and institutions of economic actors. The problem of this system will occur when the values and norms of Islam are not fully implemented or only partially implemented.

The mechanism or the workings of the system is handed over to the economic actors. It is based on the principle of *muamalah*. When it is not prohibited prominently in the Qur'an and the Hadith of the Prophet Muhammad, it is allowed. The principle of *muamalah* areas is not like in worship. When there are no provisions in the al-Quran and al -Hadits, it is *bid'ah* (renewal) which is prohibited. Through this principle, the practices of economic activities will be filtered in accordance with Islamic provisions as stipulated in the Qur'an and Hadith.

Islamic Law Perspective on Franchise

When considered from the point of the contract held in franchise, it can be stated that the contract is actually the development of the forms of cooperation (*syarikah*). It is caused by the presence of the franchise contract, so franchisor and franchisee automatically form a cooperative relationship for a specified time (according to the contract). Such cooperation is intended to gain profits for both parties.

A franchise is a form of contract with the contents which give special rights and authority to Franchisee. Franchise is a reciprocal contract for both Franchisor and Franchisee are obliged to fulfill certain achievements. Franchise requires the principles of openness and prudence. This is in accordance with the pillars and the terms of the contract according to the Islamic law, i.e.: the Subject of Binding (Al-'Aqidain), Object of Binding (Mahallul 'Aqd), Objective of Binding (Maudhu'ul' Aqd), Ijab and Kabul (sighat al-'Aqd), and the prohibition of *Gharar* transactions (lack of clarity).

Franchise contract is a formal contract because Franchise Contract is required to be in writing. This is necessary as a form of protection for both parties involved in a Franchise Contract. This is in accordance with the principle of Written (*kitabah*) stated in QS. Al-Baqarah (2): 282.

Franchise involves the right to utilize and/or use intellectual property rights or invention or typical business or franchise granted for a reward based on the requirements and/or sale of goods or services. This is in accordance with the principle of respect for cooperation (*syirkah*) in the Principles of Islamic Civil Law.

Thus, it can be argued that the system of franchise does not conflict with Islamic law as long as the object of Franchise contract is not something forbidden in Islamic law (eg: the business of selling forbidden food or beverages). Then, the contract is automatically null and void according to the Islamic law is because it is contrary to Islamic law.

Besides, franchise business also has the benefits that play the important roles in enhancing the development of small and medium enterprises in Indonesia if the franchise activities, up to a certain degree, can use the goods of domestic production and to carry out activities that would not harm the interests of the employers of small and medium enterprises. Therefore, in terms of the benefits, franchise also has a positive value that can be justified according to Islamic law. Basically, franchise system is a good system to study for the franchisees when they can successfully be free from the franchisors. It is necessary because the costs paid are quite expensive and they can further establish their own business or even build a new Islamic franchise business.

To create an Islamic franchise system, the sharia value system is required as a business moral filter that aims to avoid distortions of business moral (moral hazard). The filter is a commitment to stay away from the 7 (seven) abstinence (*Maghrib*), i.e.:⁹

- 1) Maysir; all forms of speculation and gambling that terminate real sector and unproductive.
- 2) Sacrilegious; the business practices in violation of decency and social norms.
- 3) Gharar; all transactions which are not transparent and unclear so that they potentially harm one of the parties.
- 4) Haram; the object of the transaction and business projects which are forbidden by the sharia.
- 5) Riba; all forms of currency distortions which are the commodities by charging additional amount of money (interest) on credit or loan transaction.
- 6) Ihtikar; the hoarding and monopoly of goods and services for the purpose of playing the price
- 7) Dangerous; all forms of business transactions that harm individuals and communities as well as contrary to the benefit.

The majority of Indonesian people are in Islamic religion, so it is appropriate that the laws, norms, signposts of Islamic law to stay away from the abstinence of *Maghrib* color the interactions and transactions in franchise business activities to form a system of Islamic Franchise.

CONCLUSION

Franchise contract, from the perspective of Islamic law, is the development of *syarikah* (cooperation), *kitabah* (principle of writing) as a form of protection to both parties, *syirkah* (principle of appreciation) as a form of respect for intellectual property rights, and in accordance with the prohibition of *Gharar* transactions (lack of clarity) namely the presence of the principles of

⁸ Gemala Dewi, *op. cit*, p. 222

⁹ Gemala Dewi, *op. cit*, p. 199-200

openness and prudence. Thus, we can conclude that franchise system is not contrary to Islamic law as long as the fields of Franchise business, the systems, and mechanisms of the cooperation are in accordance with Sharia principles and the absence of any sharia abstinence in franchise business.

SUGGESTION

To protect Indonesian people, who are predominantly Muslim, franchise business activities should refer to the provisions of the general laws issued by the government authorities and the provisions of Islamic law.

A franchise contract needs to adopt the values of the Islamic economy, such as not to harm or to be harmed, resulting in the balance of the parties and the balance between Franchisor and Franchisee.

REFERENCES

- Ali, Muhammad Daud*, Hukum Islam: ' Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia (Islamic Law: 'Introduction to Law and Administration of Islamic Law in Indonesia), **6th Edition, 11th Publishing, PT Raja Grafindo Persada, Jakarta, 2004.**
- Basyir, Ahmad Azhar*, Asas-asas Hukum Muamalat (Hukum Perdata Islam) (Principles of Muamalat Law (Islamic Civil Law)), **revision edition, UII Press, Yogyakarta, 2000.**
- Dewi, Gemala*, Hukum Perikatan Islam di Indonesia (Islamic Binding Law in Indonesia), **Badan Penerbit Fakultas Hukum UI, Jakarta, 2005.**
- Hasan, M. Ah*, Berbagai Macam Transaksi dalam Islam (Fiqh Muamalat) (Several Kinds of Transaction in Islam), **Raja Grafindo Persada, Jakarta, 2003.**
- Lubis, Suhrawardi K.*, Hukum Ekonomi Islam (Islamic Economic Law), **Sinar Grafika, Jakarta, 2000.**
- Mas'adi, Ghufron A.*, Fiqh Muamalah Kontekstual (Contextual Fiqh Muamalah), **Raja Grafindo Persada, Jakarta, 2002.**
- Suharaoko*, Hukum Perjanjian Teori dan Analisa Kasus (Contract Law: Theories and Case Analysis), **Kencana, Jakarta, 2004.**

Budi Prasetyo¹⁰

¹⁰ Budi Prasetyo, SH., M.Hum, Lecturer, Faculty of Law, Untag Semarang