

RESEARCH ARTICLE

When Law and Morality Collide: The Indonesia's Halal Act Case for Constitutional Pluralism

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Abstract: One of the most debated questions in contemporary legal discourse is the fraught relationship between law and morality. Despite the enormous amount of energy that has been devoted to this question, most of, if not all, the available works have failed to take into account the fact that today's legal questions have become increasingly bound to be both international and domestic in nature. To make matter worse, the prevailing debate has largely been discussed within the purview of the developed and relatively secular domestic legal setting of the West. It is arguable that they have effectively ignored both the nuances of the question and the interface between international and domestic legal systems have become increasingly important in today's effort to understand the current legal position. Against this background, this paper is a unique attempt to bring the resulting irreconcilable tension as a result of the growing pressure of the globalization of law on the one hand and the popular demand to maintain national (legal) identity on the other to the fore of the debate. Going further, this paper provides the first attempt to provide a viable theoretical respond to such a challenge. With Indonesia's 2014 Halal Act as a case in point where collision between international and domestic norms is conceivable, this study highlights the urgency to reconcile the pressure for the globalization of law on the one hand and maintaining the national identity on the other. In so doing, this paper advances a proposal that presses for more acknowledgment of the role of domestic constitutional ordering in the process of international legal development.

Keywords: law and religion, globalization of law, constitutionalism, law and development, Islam

Introduction

As a democracy in transition (Horowitz, 2013), Indonesia has embarked on many alternative paths in its attempts to translate the international obligations that it has accepted. In particular, the available discussion has exclusively focused on the domestication of international human rights norms

(Iskandar, 2016a). Clearly, this domestication mode has strongly correlated with the way in which the Indonesian legal system has domesticated norms in the court room (Butt, 2014; Iskandar, 2014). It is important to note that Indonesia's peculiar way of the recognizing foreign laws, particularly international laws, does not stop at the area of human rights law. More specifically, the most recent example of this

push and pull is Indonesia's promulgation of the 2014 Halal Act and later partially modified by the Omnibus Act, which in essence mandated that every product carry a certification that indicates that its production process was "halal" or suitable for mass consumption in line with Islamic laws. Without a "halal" certification attached to it, products will be regarded in "noncompliance" and as a consequence "would face sale bans" (Jefriando & Suroyo, 2019). Undoubtedly, this controversial law has faced public backlash culminating in a constitutional movement, arguably from non-Muslim populations (Rahajeng & Syukra, 2015; REQNews, 2019). Regardless of its merit, it is clear that this Halal Act should be seen as yet another example of exceptionalism in the Indonesian model of foreign laws interception.

As a constitutional response to the resulting controversy, in its most recent decision numbered 8/PUU-XVII/2019, the Indonesian Constitutional Court signaled a clear affirmation of the constitutional legitimacy of the Halal Act as a legitimate expression of Indonesia's distinct model of (religious) constitutionalism (Iskandar, 2019). According to the court's legal reasoning, the adoption of legislation that aims to standardize halal products is an implementation of the state's legal obligation owed to its populations. More specifically, the court viewed that the government effort to provide assurance of halal is simply another constitutional interpretation to support the right to religious freedom. Another recent decision from the court asserting the constitutionality of the Omnibus Law provides has unequivocally suggested that halal certification is unquestionable (Hadyan, 2020). Odd as it may be, it is important to note, Indonesia has its own notion of religious freedom, which protects the sanctity of orthodox religious ideas, while not protecting the individual normally found in liberal (Western) legal systems (Iskandar, 2016b, 2019). According to the court, the constitutionality of the Halal Law is also supported by the fact that it is not meant to be forced on non-Muslim populations. In sum, the court suggests that it is unreasonable to claim that the legislation contradicts the 1945 constitutional provisions protecting religious freedom (*Putusan Nomor 8/PUU-XVII/2019*, 2019). All told, from the standpoint of the domestic law, the Halal Act is constitutionally valid.

The Indonesian Constitutional Court decision further hints at the recent institutional development where the executive branch is no longer the predominant player in

determining the domestication of various international norms. Seen as thus, the constitutionalizing of the Halal Act is a case in point that confirms the emerging existence of other players that are influential in determining the translation, or to be more precise "substantiation," of Indonesia's international legal obligations. Obviously, this illuminates the fact that the domestication process is largely beyond the control of the executive branch. In fact, since the democratization process started in 1998, it is no longer uncommon to find the Indonesian Constitutional Court creating policy through its decisions. As such, it is no exaggeration that the constitutionality of the Halal Act can be read as a call to review the interrelationship between international legal obligations and domestic implementation.

Taking the above into account, from the standpoint of legal enforcement, I argue that it is difficult, if not a pointless exercise, to ascertain whether the Halal Act conforms with international law. Even when the Halal Act contravenes Indonesia's legal obligations as a member of the World Trade Organisation (WTO) system, it does not mean it will lead to the law's modification, let alone abolition. For one thing, the Indonesian constitutional system does not recognize and in fact disregards the separation thesis (Iskandar, 2019). Evidently, Indonesia has consistently rejected the delegation of religious matters to the private sphere (Iskandar, 2016b). For what it is worth, Indonesia has universally been considered as a consolidated democracy (Davidson, 2009; Webber, 2006). Then again, to reiterate, the Halal Act is not merely a product of democratic deliberation but is no less important as its constitutionality has been confirmed by the Constitutional Court of Indonesia. Consequently, any "external" pressure will become less valid and risk accusations as yet another exercise of "legal imperialism" (Kayaoglu, 2010).

Given this relationship, this paper brings into sharp relief that Indonesia's acceptance of the Halal Act as constitutional points to a deeper problem with the process of the domestication of international norms. In other words, the constitutionality of the Halal Act presents what one might call "the coordination problem" between international and domestic legal systems. From that standpoint, this paper is the first that attempts to present a holistic discussion on "the coordination problem" between domestic and international legal systems, particularly in the case of Indonesia. Should

one look beyond Indonesia, it is an undeniable fact that there is no constitutional system that can be described as universally accepted. Even within the setting of the European Union as the world's most integrated region, so-called constitutional pluralism is a reality (Jaklic, 2014). In light of this diversified constitutional reality, it is unsurprising that a burgeoning body of comparative constitutional scholarship has flourished. Furthermore, this discrepancy cannot be separated from the theoretical supposition that underpins international law itself and fails to recognize the contemporary reality where constitutional pluralism is the order of the day. Hence, this paper argues that the genesis of the Halal Act deserves our attention in that it unveils the inadequacy of the international legal system, which hasn't changed since the introduction of the Westphalia treaty back in 1648 as the bedrock of today's international relations (Hershey, 1912; Osiander, 2001).

Against this backdrop, it seems reasonable for international legal reasoning to begin recognizing "constitutional pluralism," an acknowledgment that "there exists a range of different constitutional sites and processes configured in a heterarchical rather than a hierarchical pattern" (Iskandar, 2018a; Jaklic, 2014; Walker, 2002). By merely admitting constitutional plurality, however, one does not solve the problem of coordination between the progressive aspirations of creating an international rule of law on a domestic level and the realpolitik of international law that persistently demands state equality. Accordingly, this paper proffers that it is the agenda of the international legal community to clarify the jurisdictional limits of domestic courts. In that regard, the discussion in this paper is deliberately designed to take into account a broader look at a variety of extralegal matters that are of utmost importance to the socioeconomic dimensions of the national legal regime (Jackson, 1985). By taking into account surrounding sociopolitical developments, this paper will present a contextualized account of the emergence of Indonesia's distinctive national legal system (Iskandar, 2017; Lukito, 2012). Taking the conceptual framework that Iskandar (2019) has developed, this paper is the first to provide a critical investigation of the rationale of Indonesia's Halal Act and its position within the constitutional exceptionalism of the postcolonial Indonesia. With this background, this paper further argues that the case of the Halal Act reveals the inadequacy of the

current conceptual assumptions that underpin the domestication of international law. Further, Indonesia, as a self-professed religious democracy and hence different from the Western model, is a good starting point to present the case for a more culturally sensitive international legal regime.

To ground the discussion, the next section narrates the plausibility of a collision between the WTO as an international regulatory regime and Indonesia's Halal Act embedded in domestic legal regime as a result of "Indonesian condition." In so doing, the second section establishes an implicit argument in which the Halal Act can be deemed as a justifiable reason that falls within the ambit of public morality of the General Agreement on Tariffs and Trade (GATT) Art. XX(a). Next, the third section sets out the background, pointing toward the articulation of the exceptional nature of the postcolonial Indonesian legal system as it interfaces with the so-called globalization of law (Garth, 2008). The main goal of the second section is to elicit Indonesia's distinctive constitutionalism that enables religious values to seep into the public sphere. Next, the third section focuses on the contextualization of the Indonesian legal system as part of a broader sociopolitical condition, which gives way to the constitutionality of the Halal Act within Indonesia's constitutional system. In the fourth section, the discussion focuses on a set of conceptual challenges that Indonesia's constitutionalization of the Halal Act poses to the international legal system as a dated expression of the bygone era. Finally, the fourth section focuses on the ramifications of what is known as constitutional pluralism as an inevitable reality in order to improve the efficacy of international legal system. To understand these concepts, it is necessary to understand both the history and structure of Indonesia's constitutional system.

Indonesian Condition and the Plausibility of the Collision Thesis

In general, it is concluded that Indonesia is an active participant for multilateralism. As the chairperson of WTO's Trade Policy Review poignantly remarks, "Members praised Indonesia for its active participation in the Multilateral Trading System and its improved commitments through the ratification of the Trade Facilitation Agreement whose full implementation

was still under way” (*Concluding Remarks by the Chairperson*, 2020). However, as this section will further elaborate, this positive remark of Indonesia’s active participation is very likely will be marred by its reluctance to do away with the Halal Act. For reason that I will explicate soon, it does not take long for this “prophecy” to materialize.

Indeed, Indonesia’s decisive response to the WTO’s decision in the Indonesia-chicken case that confirms, among others, halal-based argument cannot be maintained to impose chicken import restriction is simply noncompliance (“Indonesia to Maintain Rules on Chicken Imports as WTO Dispute with Brazil Continues,” 2021). On its face, Indonesia’s defiance seems to be related with the failure in recognizing the economic rationality of the Indonesia-chicken case. For instance, this has misled an economic legal analysis to oversimplify “Indonesian condition.” Obviously, this oversimplification cannot be separated from the overgeneralization assumption that ignores the particulars but emphasizes similarity. With this construct in mind, the Halal Act is nothing more but Indonesia’s protectionist impulse. Furthermore, the convenient conclusion is that “the motive behind Indonesia’s import restrictions...can be linked to protectionist political-economic motives and are most likely due to a self-sufficiency objective and the legal requirements attached to it” (Rigod & Tovar, 2018).

Should one look deeper into the particulars, Indonesia’s stubborn decision to defend the Halal Act reveals a more profound logic of explanation. In a word, to understand it, it is important to dabble into what one might be called as “Indonesian condition” or the nature of jurisprudential politics in Indonesia. What constitutes as Indonesian condition is essentially a combination of a host of religiocultural factors that contribute to Indonesia’s distinctive sociological profile as a new state comprising old societies (Anderson, 1983). By being “a new state comprising old societies,” Indonesia has unsurprisingly preserved its long-standing tradition in keeping the sacred and profane as inseparable. It is these religiocultural orientation that provides the fuel for the sustenance of Indonesia’s Halal Act.

What is more, Indonesia’s unwavering commitment to the inseparability of the sacred and profane has elicited a number of political maneuvers that resulted in the enactment of various religion-inspired legislations. It is not entirely clear whether they are based on pure

religious motivations, but one can confidently conclude that the resulting institutionalization is irreversible, if possible at all.

Considering that religion has been fully entrenched, the trajectory of Indonesian legal development has been muddling through between the literalist and moderate embrace of Islamization. It is within this framework that one can develop a more sober understanding the context why the Halal Act emerges and prevails.

With the above presupposition that rejects the motivation for the institutionalization of the Halal Act is Indonesia’s protectionist impulse in mind, it seems reasonable to further argue that the institutionalization of the Halal Act is a legitimate measure that a WTO member can adopt. To be specific, it is perfectly in line with the spirit of GATT Article XX(a) that allows its member to give priority to a number of important sociological values and interests over trade liberalization, market access, and/or discrimination rules.

Indonesia’s Distinctive Constitutional System

As a postcolonial state, Indonesia was born out of defiance of international law (Iskandar, 2016a; Sastroamidjojo & Delson, 1949). As a commentator described it more subtly, “[t]he coming into being of the Republic of Indonesia was a complicated affair” (Hyde, 1949, p. 956). From the domestic law’s point of view, however, the legal legitimacy of Indonesia is said to be sourced from the preamble of the mythical 1945 Constitution, which in turn legitimizes the year of 1945 as its starting point (Iskandar, 2016a). However, despite its insistence that it achieved independence in 1945 as a symbol of anti-international law, Indonesia, at the same time, “claims to be a sovereign state and asserts that by virtue of the Linggardjati Agreement the Netherlands has recognized it as a *de facto* government of an independent state” (Sastroamidjojo & Delson, 1949, p. 346). Needless to say, this inconsistency is among many features that eventually served as the bedrock of what we now know as the Indonesian national legal system.

The complicated nature of the emergence of the Republic of Indonesia is, among other things, a confirmation that law is largely a product of much larger sociopolitical forces that shape most human relations. That said, it is the multitude of political

factors that guides the process of legal recognition of the Republic of Indonesia as a legitimate member of international community. This situation has greatly influenced Indonesia's ambiguous stance on the legal status of international law. In fact, it has not been unusual for Indonesia to take a different stance on its international legal obligations (Iskandar, 2011, 2016a). More importantly, this ambivalent attitude toward international law is also common among its civil society members (Iskandar, 2011). Hence, it is common among many novices to Indonesian legal studies to simply suggest that Indonesian domestic laws' relationship with international law is an utter "convenient confusion" (Andrews, 2016).

To recognize its nuance, making sense of the trajectory of the national legal system's development is arguably the best starting point. It is worth recognizing that the national effort of devising a nationalistic legal system started with the revolutionary government of Sukarno (Iskandar, 2011). At its heart, the main objective of this model was to achieve the stated goals in the preamble of the 1945 Constitution (Lubis, 2003). The implication is that this is a radical break from the preindependence legal system that it inherited from the colonial government (Juniarto, 1996). Symbolically speaking, the act of proclaiming Indonesia's independence from the yoke of colonialism is the ultimate symbol that colonial laws had been abolished (Rinardi, 2017). It begins with the resurrection era to realize the anticipated national law that reflects Indonesian national identity (Lukito, 2012). This has paved the way for another uncanny project called "Islam Mazhab Indonesia" or the national school of Islamic law (Hooker, 2008).

The above historical experience has no doubt been very influential in the development of Indonesia's postcolonial national legal system. To some extent, the frustration of many foreign commentators in understanding this should not be surprising. Accordingly, it is common to describe that the Indonesian legal system has been nothing but a chaotic jumble of contradictory laws. It is inescapable for "[m]any Indonesian observers [to] view [that the utilization of] strict legal analysis as useless in the Indonesian context" (Bell, 2001, p. 3). Similarly, in his recent observation, Ellis more perceptively claimed that "[m]uch of [Indonesia's] debate [on constitutional drafting] has thus been confusing to participants and observers alike, in that the arguments

over questions of substance have been paralleled by divisions over issues of symbols, language and perception" (2011, p. 2).

In this regard, Indonesia's constitutional system has consistently interpreted many international obligations as voluntary and ratified in a wayward manner (Iskandar, 2016). One way in which this judicial activism has been legitimized has been defined as "religious constitutionalism" (Iskandar, 2019). According to this constitutional mode, the principle of the belief in One God is of paramount importance (Iskandar, 2016b). Make no mistake, however, Indonesia has consistently denied it is a theocratic state (Kamarudin, 2013). Likewise, Indonesia has also persistently decried secularism as the only available alternative to an Islamic state (Team Viva, 2018). As the former chief of the Indonesia's Constitutional Court put it, the standard line that describes the Indonesian solution to this apparent contradiction is that "Indonesia bukanlah negara agama, dan juga bukan negara sekuler, tetapi *religious nation state* atau negara kebangsaan yang berketuhanan [Indonesia is not a theocratic state, and not secular state, but a religious nation state or Godly nation state]" (Team Viva, 2018).

It is within that philosophical framework that all legal questions have been debated. Thus, it should not be difficult to conceive that, in the words of Article 2 of Law No. 48 of Indonesia on the Power of the Judiciary, "Peradilan dilakukan demi keadilan berdasarkan Ketuhanan Yang Maha Esa [the adjudication is exercised on behalf of Justice based on the Monotheistic God]" (Ali, 2015). While the phrase "on behalf of Justice based on the Monotheistic God" itself is seemingly a mere continuation of the colonial Dutch's "In naam der Koningin," in today's Indonesia, it has been ascribed with a different notion (Mertokusumo, 1983). Furthermore, as a widely revered judicial figure has insinuated, "Apakah arti atas nama Tuhan Yang Maha Esa dalam setiap hakim memutuskan perkara, namun pertanggungjawabannya sang hakim bukan kepada Tuhan Yang Maha Esa [What is the point of having the Monotheistic God in every judicial decision?} {It is none other than the idea that} {every Indonesian} Judge can {only be held} accountable {to the Monotheistic God}]" (Ali, 2015). In other words, Indonesian judges are seen as acting as divine representatives, meaning that every decision rendered is on behalf of the monotheistic God (Ali, 2015). Additionally, a less obvious function of the

invocation of a Monotheistic God is to provide a strong assurance that the court, on behalf of the promisor, will enforce agreements and the promise to fulfil their contractual obligations (Jaman, 2018).

Within this framework, international legal norms must go through necessary adjustments in order to be implemented at the domestic level. In this vein, it is important to understand how Indonesia has negotiated the constitutional adaptation and, in turn, implementation of international human rights norms (Iskandar, 2016a, 2016b). As previously noted, this constitutional deviance was inevitable, as Indonesia has vigorously introduced “a new concept of justice as distinct from the colonially imposed Themis-like figure” (Iskandar, 2016a, p. 727). More specifically, “[t]his...post-colonial [idea of] justice is officially confirmed by the 2011 Ministerial Regulation on the Logo of the Indonesian Ministry of Justice and Human Rights that positively stated ‘pengayoman... mean[s] nurturing and protecting all Indonesians in the area of justice and human rights’” (Iskandar, 2016a, p. 728). This inevitability has primarily been enabled through a complex web of calculations among the political elite and, to a certain extent, driven by embedded cultural codes that have led to, among other things, the inculcation of the oxymoronic “religious constitutionalism” (Iskandar, 2019).

As a consequence, the Indonesian model of constitutionalism, as discussed further in the next section, enables the proliferation of various laws that confound many foreign observers. In fact, it should be admitted that the logical operation of Indonesian legal reasoning is “distinct” in every sense of the word. One of the most glaring examples from the Indonesian model is that there is no clear line separating law and morality (Iskandar, 2011). As Indonesia’s eminent constitutional lawyer himself put it, Indonesia’s 1945 Constitution is “a very Godly constitution” (Asshidiqie, n.d.). This is inapposite to Western legal traditions, where it is essential to accept the central assumption that there is a bright line between legal and nonlegal matters, establishing the rule of law (Dyzenhaus & Ripstein, 1996). This distinctive feature of the Indonesian model has, in turn, legitimized a further conflation of legal and extralegal reasoning (Junadi, 2012). This constitutional interpretation has given the green line to introduce laws that explicitly regulate citizens’ private lives, including religious affairs.

The Constitutionality of Indonesia’s Halal Act

As it has been held constitutional for the state to meddle in the affairs of its citizens’ private lives, Indonesia has the so-called Ministry of Religious Affairs (MRA), a dedicated ministerial level office, which specifically deals with the innumerable issues of religious affairs (Biro Humas Data dan Informasi Kementerian Agama, 2019; Bruinessen, 2018). Coupled with the well-funded MRA, the Council of Islamic Scholars (Majelis Ulama Indonesia, better known as “MUI”), a state-sponsored institution that specifically assists the government in its affairs with the various needs of the Indonesian Muslim community, is Indonesia’s other important pillar in the management of the nation’s religious life (Seo, 2013). The state’s governing of religious life has been a long-standing practice, dating back to the preindependence era, specifically during the Japanese occupation (Benda, 1955). It was, however, 1947 that saw the establishment of MRA “to build [social and political] harmony in [the midst of religious] diversity” that makes “one of its duties was [to] improv[e] religious life” (Rosada, 2016).

Considering the quotation from the president of the State Islamic Jakarta in the previous paragraph that explicitly stated the nature and objective of the MRA, one of the most plausible answers that related to the Indonesian model of exceptionalism legitimizes the accommodation of administering religions, aspiring to “improving religious life” (Rosada, 2016). One of the most visible consequences of these aspirations is that the actual amount budgeted for the MRA along with its bureaucracies is “far larger and more pervasive than those in most states that define themselves as Muslim or Islamic and formally recognise Islamic [and it is certain that they]... have kept increasing over time and are of comparable magnitude with those of the countries’ military establishments” (Bruinessen, 2018, pp. 1–2). This substantial financial commitment makes perfect sense, as the MRA is responsible for virtually all kinds of religious affairs. It’s hardly surprising that Bruinessen (2018, p. 2) finds that “a larger share of the total education budget” went to the MRA, compared to what the Ministry of Education and Culture has received. Then again, it is important to note that in Indonesia, religion is seen not merely as a matter of personal affairs but as a matter of national security (Bruinessen, 2018).

Meanwhile, the MUI is a relatively younger institution established in 1975. Perhaps, the establishment was coincident with the ascendance of the militaristic New Order regime that desired a unification of competing Muslim voices in Indonesian society. Thus, the MUI started off as an institution that did not concern itself with the practical aspects of being a correct Muslim (Prodjokusumo, 1990). Responding to the growing interests and needs of the population, the MUI has positioned itself as the foremost articulator of many pressing questions that directly respond to commercial interests of Muslims (Ichwan, 2013). Along this line, the MUI established the MUI's National Council of Syariah (Dewan Syariah National-MUI), which oversees the implementation of any decisions of the MUI's goal of a robust Islamic economy in Indonesia.

For what it is worth, the institutionalization of the personal aspect of Islamic law is perfectly matched with the theoretical framework of what it means to be a "religious constitutional" state (Iskandar, 2019). As part of this philosophy, as discussed in the previous section, the constitutionality of any piece of legislation is not only considered from the legalistic viewpoint. Instead, the practice of the Constitutional Court has consistently shown that, for a legal product to be considered as constitutional, it must also pass an ideological test that assesses its "socio-cultural soundness," which of course, is defined by Pancasila (Iskandar, 2019). It is in this image that the draft Law of Inter-Religious Harmony was conceived (Subiyantoro, 2011). Taking the model of "religious constitutionalism" as Indonesia's constitutional order, naturally, it is not difficult to foresee that laws that accentuate religious values, such as the Halal Act, can easily be legitimated.

In light of the above, the Halal Act is not extraordinary and can be easily and predictably the result of the "hard work" of the MUI (DetikFood, 2014). Meanwhile, the Minister of Religious Affairs supervises the overall process. For the technical aspects, an agency known as Badan Penyelenggara Jaminan Produk Halal (BPJPH) is responsible for the implementation of the act. With recent adoption of the Omnibus Law, however, the BPJPH may involve various Islamic organizations to be involved in the certification process (Omnibus Law, 2014, art. 1[10]). For what it is worth, the process of certification still reflects the predominant role of the MUI. That said, in order for a product to be certified by

BPJH as conforming to "halal" requirements, it must receive an endorsement from the MUI. Interestingly, the MUI certifications are only granted after a lengthy process by the BPJH that exhaustively inspects every stage of the production (Kementerian Komunikasi dan Informatika Republik Indonesia, 2014).

Regardless of the political nature of the act, constitutionally speaking, the introduction of the Halal Act is without doubt within the framework of "negara hukum," Indonesia's equivalent of the Western notion of the rule of law. A recent decision by the Constitutional Court unequivocally confirmed its constitutionality. To support its conclusion, the court claimed that the act is not synonymous with any effort to indiscriminately implement Syariah law. Moreover, the court invoked "sociological factors" to justify the need of such law. It was, the court added, a legal translation of "the state's constitutional obligation to ensure the exercise of the right of society to have healthy life and the individual right to live their life according to their beliefs as it protected in the 1945 Constitution" (*Putusan Nomor 8/PUU-XVII/2019*, 2019).

The Halal Act, Constitutional Pluralism, and the Possibility of the Pluralist Foundation of International Law

At this point, one can safely argue that, at least from legal formal viewpoint, the Halal Act is constitutional. Aside from the claim that the Halal Act is "socio-culturally sound," the fact that its constitutionality has been upheld by the Constitutional Court presents is all the more reason for one to be assured that it is very unlikely, if not impossible, to overturn its constitutionality. As the previous section implied, it is important to note that the Indonesian model of constitutional exceptionalism does not necessarily mean that the commitment to religious freedom is absent. It is worth noting that the case for Indonesian constitutional exceptionalism is not uncommon (Hirschl, 2010). In fact, some have argued that this kind of constitutional exceptionalism is also a signal that there is a strong commitment from the state to achieve a "the peaceful coexistence" in the interest of a public good (Neo, 2017). Rather than the Halal Act is an aberration in constitutional development, a Harvard Critical Legal Scholar suggests that this model should be celebrated as it also contains "a modest normative

commitment to constitutionalism” (Tushnet, 2015, p. 391). From this viewpoint, it is clear that whatever law that the Indonesian legal system has produced must be not be seen as something that can be described as against the interest of its people (Law, 2017).

What is more, supposed that the WTO system, through its Appellate Body, WTO’s important element of the Dispute Settlement System, decided that the Halal Act must be repealed in the light of (secular) international norms that necessitate the impartiality of public institutions, the Indonesian government seems highly likely to disregard the decision. One obvious reason is that, as the previous section demonstrated, the institutionalization of religion has been deeply entrenched in Indonesia’s modern political system. In fact, if history offers any guidance, the WTO’s pressure may unintentionally provoke a series of consequences that could aggravate its already volatile political situation.

Against this backdrop, a burgeoning comparative constitutional scholarship advocates for a genuine recognition that there is such a thing called “constitutional pluralism” (Jaklic, 2014; Walker, 2002). Specifically, constitutional pluralism denotes a situation where competing claims of ultimate authority over particular legal issues must be taken into account (Sweet & Maduro, 2012). By admitting constitutional plurality, to be sure, one does not necessarily reconcile the progressive aspiration of creating an international rule of law on a domestic level and the *realpolitik* of international law that persistently demands state equality. Instead, constitutional pluralism is simply the recognition that at the end of the day the ultimate power is in the hands of each nation’s domestic legal system (Jaklic, 2014). Having said that, accepting the reality that there is a constitutional pluralism that underpins the mechanism of the domestication of international legal norms should be our starting point in constructing a response to further and deepen the interstate integration through (international) law.

Unfortunately, the international legal system does not recognize constitutional plurality. Instead, international law sees the state as a unitary entity (Crawford, 2006; D’Aspremont, 2014). That is, it eschews the mechanical complexity behind the notion of state. Admittedly, this simplified conception of state provides a practical benefit to advance the interests of individuals (Waldron, 2011). It is very likely that this simplification reflects the idea of statehood

that prevailed during the signing of the Treaty of Westphalia. Back then, the will of the state was no more than an expression of the “sovereign.” Or, in today’s parlance, it is where the executive is the only available branch. It signifies that the idea that separation of powers or checks and balances is nonexistent. As one commentator rightly put it, the Westphalian era of international relations “cannot be understood on the basis of realist or constructivist premises” (Teschke, 2002). Rather, “the proprietary and personalized character of dynastic sovereignty was predicated on pre-capitalist property relations. Dynasticism, in turn, translated into historically specific patterns of conflict and cooperation that were fundamentally governed by the competitive logic of geopolitical accumulation” (Teschke, 2002). Furthermore, Teschke argues that “the decisive break” in the evolutionary of international system is the rise of England as the first modern state—not the act of signing the Treaty of Westphalia (2002).

It seems reasonable to further claim that it is this simplified conception that undergirds the current international legal doctrine that to determine whether the domestic law of a particular country conforms with its international obligations must solely be judged from the perspective of the international order (Franck, 1995; Scobbie, 2002). Despite its explicit recognition of the “need for positive efforts designed to ensure that developing countries, and especially the least developed amongst them, secure a share of growth in international trade commensurate with the needs of their economic development,” the same argument can also be directed at the Marrakesh Agreement that established the WTO. As far as international law is concerned, the reality of constitutional pluralism is not existing. By detaching itself from the reality on the ground, international law adopts an either-or position. This means that it eschews the possibility of more nuanced legal reasoning, which can help determine the hard cases such as those of Indonesia’s Halal Act. In its current model, international law can only provide acceptance or rejection. Apparently, this model is based on an assumption that recognizing constitutional pluralism implicates “a destabilising effect, blocking the path towards a more integrated and perhaps constitutionalised global order” (Krisch et al., 2020).

Interestingly enough, as a recent case study of conflicts at the interface between economic governance and human rights suggests, instead of “enhanc[ing]

the potential for friction because actors lack a jointly accepted reference point for settling their disputes and are instead free to pursue diverging paths with reference to norms in their favour,” that the pluralism of the domestic constitutional orders may also open a pathway for change in an otherwise rigid structure of international legal order should be acknowledged (Krisch et al., 2020, p. 344). Furthermore, it is believed that this “diachronic” approach signals genuine acceptance of “[normative] conflicts as part of social processes that define the relation between different norms over time” (Krisch et al., 2020, p. 344). Admittedly, this approach will never be a straightforward process. Rather, there will be a number of complications as a result of prolonged uncertainty and tension. In the long run, however, this approach can lead to genuine convergence, consolidation, and widespread acceptance of a common legal regime.

Indeed, some have even gone further by arguing that a “constitutionalist position” can be applied in the context of a decentralized legal system such as international law (Sweet, 2009). Building on his previous publication, showing rigid distinctions between “things legal” and “things political” is untenable (Sweet, 1994), Sweet argues that some basic understanding of concepts such as constitutionalism and constitution can be applied in the context of international governance (Sweet, 2009). In this vein, it is important to note that the notion of constitution must be broadly understood as “any basic norm that allows actors to overcome collective action problems, and thus to build stable forms of cooperation, will appear to be constitutive of a community” (Sweet, 2009, p. 624). Moreover, he also points out that, to a certain extent, legal pluralism, a condition where multiple legal orders exist at the same time, has also prevailed in many national constitutional systems (Sweet, 2009). Suffice it to say, it is possible to achieve a more integrated legal system without any need to discount the fact of constitutional pluralism, albeit it may be achieved rather slowly.

This more gradual domestication of international legal norms, I believe, will increase the legitimacy of international law itself in the eyes of non-Western states. Any insistence that there can only be one “correct” way of implementing international legal obligations only aggravates the already thin support for unconditional acceptance of international law beyond the Western hemisphere. Again, Asian countries are

important cases in point in this regard (Chesterman, 2016). For instance, the Association of Southeast Asian Nations (ASEAN), as the only institutionalized transnational body in the region, has become a political statement against the Western-backed liberal order (Iskandar, 2018b). In his 2019 American Society of International Law’s Grotius Lecture, an eminent postcolonial scholar presented his rebuke that “international legal knowledge is exclusively produced in the West for consumption and governance of the Third World” (Gathii, 2020). Additionally, this could also be interpreted as a clear signal that we are about to enter a new phase of the development of global that is more attuned to our (messy) pluralist reality.

Conclusion

Considering the above, it should be clear that the case of Indonesia’s Halal Act presents a hard case for the current model of the domestication of international legal obligation that is based on a rigid separation between law and morals (Green, 2008; Hart, 1983). To be specific, the current theoretical model of the domestication of international legal obligation is modeled after the legal positivism that primarily aims to conceptualize a modern legal system that can be distinguished from the traditional models that are common in non-Western worlds (Hart, 1997). In consequence, this model tends to be exclusivist, that is, isolating, if not annulling, other nonconforming legal systems. Considering Indonesia’s “religious constitutionalism” (Iskandar, 2019), the Halal Act is simply Indonesia’s expression of being one of the nonconforming legal systems. Meaning, it seems unrealistic to expect Indonesia to invalidate its Halal Act. Naturally, the Halal Act may arouse a serious controversy that can lead to Indonesia’s disobedience. Considering Indonesia’s record in its engagement with international law, the outcome of Indonesia’s disobedience is supposedly unsurprising. Then again, the fact that there is no such thing as an agent that exercises public authority at the international level has made the rule of law become far more difficult to be implemented and, therefore, less incentive for Indonesia to comply.

What is more important is that the Halal Act can be an epitome of the long-running tension between international law’s aspiration as the universalizing

force on the one hand and the stubborn empirical reality where diversity is the norm on the other hand. Should we really be serious about deepening the project of integration through law being able to go beyond the Western hemisphere, it seems reasonable to call for a more realistic approach in the domestication of international legal obligation. One particular “solution” is for the international legal regime to admit constitutional pluralism as one of its foundational principles. Admittedly, this is not a surefire way of getting to the ideal condition as it can be understood as legitimizing each and every state to follow their own peculiar understanding of what obligation should entail from participating in an international agreement. However, admitting constitutional pluralism can also be read as a preliminary step toward a more genuine integration between domestic and international legal systems. Meaning, this act of acknowledgment, at this preliminary point, is simply a reassertion that there is a necessary link between the two legal systems. Over time, it is expected that explicit acknowledgment can encourage further dialogue at both domestic and global levels in the hope it can deepen and entrench international norms as the ultimate goal.

References

- Ali, M. Y. S. (2015, July 12). *Mengenang Bismar: Irah-Irah, Kepala Putusan yang Bermakna Sumpah*. HukumOnline. <https://www.hukumonline.com/berita/baca/lt55a26de809417/irah-irah--kepala-putusan-yang-bermakna-sumpah/>
- Anderson, B. R. O. (1983). Old state, new society: Indonesia's new order in comparative historical perspective. *The Journal of Asian Studies*, 42(3), 477–496.
- Andrews, S. (2016, October 26). *Convenient confusion: Indonesia's incorporation of international law*. The Jakarta Post. <https://www.thejakartapost.com/academia/2016/10/26/convenient-confusion-indonesias-incorporation-of-international-law.html>
- Asshidique, J. (n.d.). “Tuhan” dan Agama dalam Konstitusi: Pergesekan antara Ide-ide “Gody Consitution” versus “Godless Constitution.” Retrieved January 7, 2022, from http://www.jimly.com/makalah/namafile/130/Tuhan_Dalam_Konstitusi.pdf
- Bell, G. (2001). The new Indonesian laws relating to regional autonomy: Good intentions, confusing laws. *Asian-Pacific Law & Policy Journal*, 2(1), 1–44.
- Benda, H. J. (1955). Indonesian Islam under the Japanese Occupation, 1942-45. *Pacific Affairs*, 28(4), 350–362.
- Biro Humas Data dan Informasi Kementerian Agama. (2019, May 2). *Kementerian Agama Republik Indonesia*. <https://kemenag.go.id/>
- Bruinessen, M. van. (2018). The governance of Islam in two secular polities: Turkey's Diyanet and Indonesia's Ministry of Religious Affairs. *European Journal of Turkey Studies*, 27(1), 1–26.
- Butt, S. (2014). The position of international law within the Indonesian legal system. *Emory International Law Review*, 28(1), 1–28.
- Chesterman, S. (2016). Asia's ambivalence about international law and institutions: Past, present and futures. *European Journal of International Law*, 27(4), 945–978. <https://doi.org/10.1093/ejil/chw051>
- Concluding remarks by the chairperson*. (2020, December 9). [Intergovernmental organization]. Trade Policy Review: Indonesia. https://www.wto.org/english/tratop_e/tptr_e/tp501_crc_e.htm
- Crawford, J. (2006). *The creation of states in international law*. Oxford University Press.
- D'Aspremont, J. (2014). The international law of statehood. *Connecticut Journal of International Law*, 29, 201–224.
- Davidson, J. S. (2009). Dilemmas of democratic consolidation in Indonesia. *The Pacific Review*, 22(3), 293–310. <https://doi.org/10.1080/09512740903068354>
- DetikFood. (2014, September 26). *Inilah Rangkuman Hasil Pengesahan UU Jaminan Produk Halal*. Detik.Com. <https://food.detik.com/info-halal/d-2702716/inilah-rangkuman-hasil-pengesahan-uu-jaminan-produk-halal>
- Dyzenhaus, D., & Ripstein, A. (Eds.). (1996). *Law and morality: Readings in legal philosophy*. University of Toronto Press.
- Franck, T. (1995). *Fairness in international law and institutions*. Oxford University Press.
- Garth, B. G. (2008). The globalization of the law. In G. A. Caldeira, R. D. Kelemen, & K. E. Whittington (Eds.), *The Oxford Handbook of Law and Politics* (Online). Oxford University Press. <https://doi.org/10.1093/oxfordhb/9780199208425.003.0014>
- Gathii, J. T. (2020, July 25). *The promise of international law: A third world view* [Grotius Lecture]. 2020 Virtual Annual Meeting of the American Society of International Law, Washington, DC. <https://poseidon01.ssrn.com/delivery.php?ID=585094117064086104069071029029122006057009006016027026022113114010088068024100124087011017111035041046097082006025095125013015024090078032077002099083017123102087030081040022077066118107004114123008088064111089116087069011011120024003117086031113124&EXT=pdf>
- Green, L. (2008). Positivism and the inseparability of law and morals. *NYU Law Review*, 83(4), 1035–1058.
- Hadyan, R. (2020, January 21). *Kemenag: Omnibus Law Tidak Hilangkan Kewajiban Sertifikasi Halal*. Bisnis.Com. <https://ekonomi.bisnis.com/read/20200121/12/1192454/>

- kemenag-omnibus-law-tidak-hilangkan-kewajiban-sertifikasi-halal
- Hart, H. L. A. (1983). Positivism and the separation of law and morals. In *Essays in jurisprudence and philosophy* (online). Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780198253884.001.0001>
- Hart, H. L. A. (1997). *The concept of law* (2nd ed.). Clarendon Press.
- Hershey, A. S. (1912). History of international law since the peace of Westphalia. *American Journal of International Law*, 6(1), 30–69. <https://doi.org/10.2307/2187396>
- Hirschl, R. (2010). *Constitutional theocracy*. Harvard University Press.
- Hooker, M. B. (2008). *Indonesian Syariah: Defining a national school of Islamic law*. ISEAS.
- Horowitz, D. (2013). *Constitutional change and democracy in Indonesia*. Cambridge University Press.
- Hyde, C. C. (1949). The status of the Republic of Indonesia in international law. *Columbia Law Review*, 49(7), 955–966.
- Ichwan, M. N. (2013). Towards a puritanical moderate Islam: The Majelis Ulama Indonesia and the politics of religious orthodoxy. In M. van Bruinessen (Ed.), *Contemporary developments in Indonesian Islam: Explaining the “conservative turn.”* ISEAS.
- Indonesia to maintain rules on chicken imports as WTO dispute with Brazil continues*. (2021, April 6). The Jakarta Post. <https://www.thejakartapost.com/news/2021/06/04/govt-to-maintain-rules-on-chicken-imports-as-wto-dispute-with-brazil-continues.html>
- Iskandar, P. (2011). Pemanfaatan Hukum Internasional dalam Tata-Kelola Migrasi Ketenagakerjaan di Indonesia: Sebuah Tinjauan Umum. In *Standar Internasional Migrasi Ketenagakerjaan Berbasis HAM* (pp. 3–65). Institute for Migrant Rights Press.
- Iskandar, P. (2014). Indonesia and international law: An interview with Indonesia’s Secretary to the Directorate General of International Treaties and Legal Affairs. *Indonesian Journal of International and Comparative Law*, 1(4), 1067–1075.
- Iskandar, P. (2016a). Constitutionalizing human rights universality in non-constitutional legal system: Decoding human rights brouhaha in Indonesia. *Indonesian Journal of International and Comparative Law*, 3(1), 3–42.
- Iskandar, P. (2016b). The Pancasila delusion. *Journal of Contemporary Asia*, 46(4), 723–735. <https://doi.org/10.1080/00472336.2016.1195430>
- Iskandar, P. (2017). The unbound postcolonial leviathan. *Asian Review*, 30(2), 103–123.
- Iskandar, P. (2018a). Indigenizing constitutionalism: A critical reading of “Asian” constitutionalism. *Indonesian Journal of International and Comparative Law*, 5(1), 3–42.
- Iskandar, P. (2018b). Non-citizen rights in ASEAN: The need to chart a new course. *Social & Legal Studies*, 27(2), 180–199. <https://doi.org/10.1177/0964663917746485>
- Iskandar, P. (2019). Religious constitutionalism: An interpretive reading. *Indonesian Journal of International and Comparative Law*, 6(1), 55–93.
- Jackson, M. C. (1985). Social systems theory and practice: The need for a critical approach. *International Journal of General Systems*, 10(2), 135–151.
- Jaklic, K. (2014). *Constitutional pluralism in the EU*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780198703228.001.0001>
- Jaman, K. A. (2018, May 9). Frasa “DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA.” Klinik Hukumonline. <https://www.hukumonline.com/klinik/detail/ulasan/cl6471/frasa-demi-keadilan-berdasarkan-ketuhanan-yang-maha-esa-dalam-hak-tanggung>
- Jefriando, M., & Suroyo, G. (2019, February 15). *Indonesia to postpone halal label deadline amid industry concerns*. Reuters. <https://www.reuters.com/article/us-indonesia-economy-halal/indonesia-to-postpone-halal-label-deadline-amid-industry-concerns-idUSKCN1Q40MZ>
- Junadi, Y. (2012). *Relasi Agama dan Negara: Redefinisi Diskursus Konstitusionalisme di Indonesia*. Institute for Migrant Rights Press.
- Juniarto. (1996). *Sejarah Ketatanegaraan Republik Indonesia*. Bumi Aksara.
- Kamarudin. (2013). Dimensi Sila “Ketuhanan Yang Maha Esa” dalam Perspektif HAM Islam. *Jurnal Agama Dan HAM*, 3(1), 163–178.
- Kayaoglu, T. (2010). *Legal imperialism: Sovereignty and extraterritoriality in Japan, the Ottoman Empire, and China*. Cambridge University Press. <https://doi.org/10.1017/CBO9780511730252>
- Kementerian Komunikasi dan Informatika Republik Indonesia. (2014, November 6). *UU No. 33/2014: Pemerintah Harus Bentuk Badan Penyelenggara Jaminan Produk Halal*. KOMINFO. <https://kominfo.go.id/content/detail/4240/uu-no-332014-pemerintah-harus-bentuk-badan-penyelenggara-jaminan-produk-halal/0/berita>
- Krisch, N., Corradini, F., & Reimers, L. L. (2020). Order at the margins: The legal construction of interface conflicts over time. *Global Constitutionalism*, 9(2), 343–363. <https://doi.org/10.1017/S2045381719000327>
- Law, D. S. (2017). Alternatives to liberal constitutional democracy. *Maryland Law Review*, 77(1), 223–244.
- Lubis, S. (2003). Pembangunan Hukum Nasional. In *Seminar Pembangunan Hukum Nasional VIII: Penegakan Hukum dalam Era Pembangunan Hukum Berkelanjutan*. Badan Pembinaan Hukum Nasional–Departemen Kehakiman dan Hak Asasi Manusia, Republik Indonesia.

- Lukito, R. (2012). *Tradisi Hukum Indonesia*. Institute for Migrant Rights Press.
- Mertokusumo, S. (1983). *Sejarah Peradilan dan Perundang-Undangan di Indonesia Sejak 1942*. Liberty.
- Neo, J. L. (2017). Secularism without liberalism: Religious freedom and secularism in a non-liberal state. *Michigan State Law Review*, 2017(1), 333–370.
- Omnibus Law, Pub. L. No. 33, 33 (2014).
- Osiander, A. (2001). Sovereignty, international relations, and the Westphalian myth. *International Organization*, 55(2), 251–287.
- Prodjokusumo, H. S. (1990). *15 Tahun Majelis Ulama Indonesia: Wadah Musyawarah Para Ulama, Zu'ama dan Cendekiawan Muslim*. Sekretariat Majelis Ulama Indonesia Masjid Istiqlal Jakarta.
- Putusan Nomor 8/PUU-XVII/2019, Muhiidin ____ (Mahkamah Konstitusi Republik Indonesia 2019). https://mkri.id/public/content/persidangan/putusan/putusan_mkri_5350.pdf
- Rahajeng, K. H., & Syukra, R. (2015, January 28). *Pengusaha Keluhkan Sertifikasi Halal*. Berita Satu. <https://id.beritasatu.com/business/pengusaha-keluhkan-sertifikasi-halal/106345>
- REQNews. (2019, February 1). *Lagi, UU Produk Halal Diuji*. REQNews. <https://www.reqnews.com/news/267/lagi-uu-produk-halal-diuji>
- Rigod, B., & Tovar, P. (2018). *Indonesia – chicken: Tensions between international trade and domestic food policies?* [Working paper].
- Rinardi, H. (2017). Proklamasi 17 Agustus 1945: Revolusi Politik Bangsa Indonesia. *Jurnal Sejarah Citra Lekha*, 2(1), 143–150.
- Rosada, D. (2016, February 9). Harmony in diversity: A government policy and mutual effort of religious people in Indonesia. *Universitas Islam Negeri Syarif Hidayatullah Jakarta*. <https://www.uinjkt.ac.id/harmony-in-diversity-a-government-policy-and-mutual-effort-of-religious-people-in-indonesia/>
- Sastroamidjojo, A., & Delson, R. (1949). The status of the Republic of Indonesia in international law. *Columbia Law Review*, 49(3), 344–361.
- Scobbie, I. (2002). Tom Franck's fairness. *European Journal of International Law*, 13(4), 909–925.
- Seo, M. (2013). *State management of religion in Indonesia*. Routledge.
- Subiyantoro, R. (2011). *Rancangan Undang-Undang Kerukunan Umat Beragama: Naskah Sekretariat DPR R*. Pusat Kerukunan Umat Beragama Kementerian Agama Republik Indonesia. <http://simbi.kemenag.go.id/pustaka/images/materibuku/RUU%20KERUKUNAN%20DISKUSI%20KRITIS.pdf>
- Sweet, A. S. (1994). What is a supranational constitution? An essay in international relations theory. *The Review of Politics*, 56(3), 441–474.
- Sweet, A. S. (2009). Constitutionalism, legal pluralism, and international regimes. *Indiana Journal of Global Legal Studies*, 16(2), 621–645.
- Sweet, A. S., & Maduro, M. P. (2012). Constitutional pluralism and constitutional conflicts. *Law's Borders*, IV–2.
- Team Viva. (2018, August 23). *Mahfud MD: Indonesia Bukan Negara Agama, Bukan Sekuler*. Viva News. <https://asset.viva.co.id/appasset-2018/desktop-2018/img/icon-profile-team.png?v=5.13>
- Teschke, B. (2002). Theorizing the Westphalian system of states: International relations from absolutism to capitalism. *European Journal of International Relations*, 8(1), 5–48. <https://doi.org/10.1177/1354066102008001001>
- Tushnet, M. (2015). Authoritarian constitutionalism. *Cornell Law Review*, 100(2), 391–461.
- Waldron, J. (2011). Are sovereigns entitled to the benefit of the international rule of law? *European Journal of International Law*, 22(2), 315–343. <https://doi.org/10.1093/ejil/chr031>
- Walker, N. (2002). The idea of constitutional pluralism. *Modern Law Review*, 65(3), 317–359. <https://doi.org/10.1111/1468-2230.00383>
- Webber, D. (2006). A consolidated patrimonial democracy? Democratization in post-Suharto Indonesia. *Democratization*, 13(3), 396–420. <https://doi.org/10.1080/13510340600579284>