

When Ethical Principles and Legal Requirements Collide: Constitutional Diversity Perspective

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Abstract

The article is a critical study of the interaction of state law and moral diversity with a case study of the Halal Product Assurance Law (Halal Act) of Indonesia. This is a distinctive case, in which constitutional requirements and religious doctrines and pluralistic social community values cross. The Halal Act in effect brushes up against the core nature of a law that balances morality with religion in a modern constitutional democracy and in effect challenges religious freedom in Indonesia as well as the issue of constitutional neutrality. This paper explores the issue of the Halal Act through legal analysis, constitutional interpretation, and sociopolitical contextualization and the author believes that the enactment of the Halal Act challenges compliance to religious freedom in the Indonesian state as well as the notion of constitutional neutrality. It highlights the way in which the law may discriminate the non-Muslim minorities, the secular communities and even the divergent interpretations in the Islamic domain as well. In the context of the constitutional pluralism framework, the study is an attempt to point out that regulation by law must contend with the complex challenges of meeting various normative orders without undermining the fundamental value of inclusion and equality of democratic practices. The paper also balances how research findings reflect on the relevance of the same in Southeast Asia in general and other multicultural countries where such issues are also a source of contention between religious laws and the rule of law. It ends up by suggesting a more consultative process of law making that embraces the plurality of law and moral ecosystem of Indonesia without interfering with the integrity of the constitution and human rights.

Keywords: Halal Certification Law, constitutional pluralism, Indonesia legal system, religious regulation, moral diversity, legal-religious conflict, multicultural constitutionalism, human rights in Islamic law.

1.Introduction

Indonesia is a fast changing democratic state characterized by complex pluralism, and as such, it is in a place struggling to balance between religious morality and the requirement of the constitution. In the context of its evolving transitional democratic path, the 2014 Halal Product Assurance Law, by being one of the most contentious pieces of legislation in living memory, bears all the hall of same duality of standardization in regard of law and cultural-religious diversity in the country. Even though this law only entails the enforcement of halal certification of products within the public market, the implications of the law expound well beyond the realm of regulatory standards to touch on the issue of constitutional theory, identity politics, and international law(1).

In this paper, the motivation behind the enactment of the Halal Law in Indonesia is not treated merely as a law of faith itself; rather, it can be seen as a representation of a nation, clawing at its own identity as a mosaic of beliefs: a constitutional non- religious entity wrestling with its traditional Islamic values of morals. The result is that a superposition in forces is produced-between the international legal regimes focused on liberalizing trade, protecting individual rights and by the local legitimate demands driven by the expectations of morality-culture horizons, constitutional compacts, and national-building histories on the second-order agenda.

Instead of rejecting the Halal Act as either a one-sided imposition of religion or as a type of protectionism strategy, the discussion places the Act in the wider philosophical adjacent of constitutional pluralism, that is, the coexistence of a multiplicity of sources of law that transverses different countries. Although the legal mainstream scholarship has often been inclined on the Western non-religious liberal paradigms, Indonesia offers a reverse example: three kinds of legal frame works under which spiritual and civil values are not only supplementary but also constitutionally integrated.

The case study of Indonesia as a country that is a member of the World Trade Organization (WTO) and a country with its own ideological grounded nation based on the Pancasila providing a system in anchoring the belief in one divine authority is a complex situation(2). The case of the Halal Law can be seen as the best illustration of the so-

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called problem of coordination of global law and local constitutional ideas. It reveals a continuing conundrum: how does a sovereign state need to retain international giveances and at the same time still uphold culturally-religious authenticity and democratic legitimacy?

The Indonesian Constitutional Court recognizing the constitutionality of the law in 2019 provides even stronger status to the embeddedness of religion constitutionalism in the governance of the country. In this case, the religious values do not appear as an infringement of the secular freedoms but vital demonstrations of the national legal and moral identity. The Court revisited the requirement in the halal in that it was the duty of the state to give effect to the religious rights of the Muslim citizens and all the time arguing that it does not require the non-Muslim citizens to adhere to it. In such a way, religious accommodation is defined as the expansion of the state duty, rather than a violation of the secular standard.

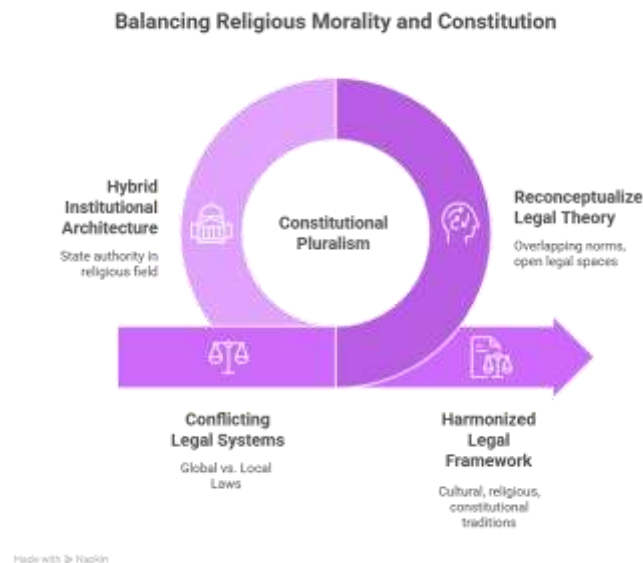


FIGURE 1 Balancing Religious Morality and Constitution

Through its behavior following the legality concerns, especially by trade partners and international rights organizations, the kind of response Indonesia has given to legal issues like the WTO case regarding import of poultry, indicates the moral strength that it has in terms of holding onto its national moral economy(3). As an example, such a nation as Indonesia is very reluctant to in line its food import regulations with the international standards, which demonstrates that legal sovereignty may easily be prioritized over the global legal harmonization when it comes to matters of the national identity and religious ethics.

The western mercantile take on the domestication of international law faces challenge also in this paper. It argues that legal positivist based models, i.e., those that preach the absolute division of law and morality, do not reflect the socio-legal truth of most postcolonial pluralist societies such as Indonesia. The Halal Act is a case study in the interpretation and application of legal norm on a system which is not liberal secularistic but one which attracts religious constitutionalism. Contrary to the Western models, where individual rights are put on the same level with collective religious identity, the legal culture in Indonesia incorporates and considers the collective religious demands into the system of constitutional provisions.

This article therefore proposes a re-conceptualization of the international legal theory to fit the scenario of constitutional pluralism. By identifying several and overlapping sets of norms, this approach perceives a plurality of normative systems, of different sets of norms, within a given polity and across legal systems established internationally. As opposed to expecting one common interpretation of the law, the constitutional pluralists propose open-ended legal spaces with bargained differences in the cultural, religious, and constitutional traditions. This very architecture of the institution of the Halal Law, which refers to the Ministry of Religious Affairs (MRA) to the Majelis Ulama Indonesia (MUI) and the Halal Product Assurance Agency (BPJPH) depending on each other, indicates the hybrid nature of legal character in Indonesia(4). These institutions execute state authority in the religious field, which creates hybrid administrative boundaries along with religious ones. Although this arrangement may be characterized as different deviation to the secular legal norm by some external observers, in legal and cultural imagination of Indonesia, it is the form of constitutional morality in legitimate existence.

2. Legal Opposition and Cultural Sovereignty

The involvement of Indonesia to multilateral economic institutions, especially the World Trade Organization (WTO) has been a long standing attribute of the country with regards to being a country that is notable in the globally trade platform. The country is always known to have ratified the Trade Facilitation Agreement and other liberalization mechanisms and on the surface, the country conforms to the normative approaches of open markets and harmonized regulation. Nevertheless, this has been a collaborative illusion that is getting more tangled thanks to its domestic laws such as the 2014 Halal Product Assurance Law challenging international regulatory expectations.

This is somewhat the more complicated story of legal change in Indonesia in its internal dimension as yet unknown outside its borders other than through international recognition of its reform of policy. Halal certification of a wide range of goods and services through the Halal Act has been challenged within the world trade forums. Another notable case of such a conflict was in the WTO case between Indonesia and Brazil on importation of poultry. In such instance, the defense of Indonesia on religious and ethical matters including the halal standards was not finally accepted by the Appellate Body of WTO. However, the Indonesian government has chosen to uphold its regulatory position which indicated its perseverance of domestic sovereignty to morals instead of foreign dictated trade commitments(5).

The misconception of this visible resistance, in economic literature is commonly viewed as an act of protectionism, thereby being instigated by self-sufficiency or trade favoritism, motives. These interpretations, however, fail to take into consideration the more structural and ideological sources of regulatory behavior in Indonesia. It is easy to lapse Halal Law to an economic instrument whose purpose is focused on the act of importation restriction. This is because one would completely disregard the lived experience and the jurisprudence thinking that guides legislative choices in Indonesia. There emerges the necessity of looking further to both understand the actual cause by looking into what can be termed as the Indonesian condition; a certain coating of sociopolitical threads in which religion, nationalism and legal identity are commensurately inseparable.

The fact that Indonesia has had a postcolonial past development is what has led Indonesia into having an alternative model of legal sovereignty based on the concept of cultural and religious pluralism. The constitutional and institutional rules of the country do not view religion as a personal or voluntary issue, but as a foundation of the national life (6). Therefore, there is a distinction between sacred values and policy of the state that is quite frequently obscured. The legacy and the legacy of the religious principles in the field of state policy, especially, the Islamic norms result in the legal environment where the moral imperatives are regarded as the legalistic justifications of the state actions even in case when this step does not correspond to the global expectations.

In this sociocultural context, the Halal Law does not come as an aberration but an inevitable extension of Indonesia continuing to integrate religious morals into the civil governance. The political incentives behind this integration are strengthened by the fact that religious identity is a powerful mobilizer in the Indonesian electoral politics, and such legislation as the Halal Act is frequently backed by the powerful religious institutions and promoted through the support of the population. A culturally based version of legal representation that occurs more in a wish to express doctrinal rigidity, the law is more of a culturally constructed version of legal expression- where the lines between trade control and spiritual well-being are deemed at crossing boundary lines.

However, most significantly the Halal Law is not a unique instance of a religion inspired statute. It belongs to the wider pattern of what is known as normative localization where global governance norms are refashioned or opposed in accordance with local values and customs. In the case of Indonesia, this is localisation of the laws which conform to the international norms externally but reinterpreted internally using an ethical perspective. This phenomenon questions the existing belief in the international legal discourse that all the member states of the global institutions need to have the same way to regulate these issues.

Such conflict this tension the so-called collision thesis proposes an inevitable clash between the formal requirements of the international law and the lived moral order of the sovereign nations. In the Indonesian case, the Halal Law provides an instance of this conflict: WTO law would anticipate Indonesia to offer a neutral and non-discriminatory platform with regards to market access yet Indonesian law formulates religious certification as a limitation of the state, based on its constitutional requirement to honor the values within its principle ideology, Pancasila.

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Further, there is actually a legal basis, though often dismissed, that does uphold the exception based on the necessity to protect the public morals under Article XX (a) of the General Agreement on Tariffs and Trade (GATT) to clear legal paths that will justify such domestic laws. In this exception, it can be said that the act of Indonesia known as the Halal Act complies with the global trade guidelines but not because it is a breach but a right of the moral economy of this State(7). However, the question is, how morality is interpreted as this is a term that is used through secular or liberal presumption in international adjudication.

Collision thesis is inadequate therefore to denote the multivalent guise of the national legal rationale of Indonesia. Simply putting the case of resistance to legislation with religious laws to be tantamount to not following the law, global institutions may easily misjudge the symbolic meaning and domestic validity of religious legislations. More to the point, this binary logic is not of much help in considering the wider implications of the pluralism in the international legal system. Unless the international law opens up and focuses on more grounded realities of postcolonial, pluralistic societies, it is highly probable that it is going to face more opposition in the guise of moral and constitutional legitimacy.

3.Sacred Foundations and Sovereign Order

The constitutional identity of Indonesia is so rooted on its postcolonial genesis as a legal order that seems to represent a postcolonial symbol of political emancipation, spiritual devotion, and cultural exceptionalism at the same time. This complexity cannot be understood only in terms of the Western forms of constitutionalism which tend to be based on firm divisions between law, religion and governing. Instead, Indonesia provides a graphic example of a mixed constitutional culture where there are sacred values that are closely integrated into the legal system of the state.

The history of independence of the country was not only a political breaking off of the Dutch colonial rule, but it was also a normative statement of legal and spiritual self-determination. This schism prepared the ground to a new perspective of constitutionalism, which is established on 1945 Constitution, the huge symbolic and juridical foundation of the national legitimacy. Although the traditional definition of sovereignty in international law entails the recognitional aspect and resorts to treaty-making, the concept of self messaging employed by Indonesia starts with internal moral and historical discourse which focuses on its revolutionary experience and repudiation of externally placed norms (8).

Since its independence the God Indonesian legal system has been trying to strike a balance between the colonial legacies of the legal system on the one hand and the dream of building a native jurisprudence, one that can represent the values, customs and beliefs of the country, on the other hand. Legal nationalism was an undertaking in the work of the revolutionary government during the leadership of Sukarno, whose aim was to do away with the vestiges of the Dutch legal systems and replace them with ones that portrayed the Indonesian way. Not only did the legal pluralism exist as a tolerated phenomenon but it was also welcomed by the state, which had to take into consideration the varieties of traditions, such as the Islamic legal principles, indigenous (adat) law, and national legislation.

The process resulted in what has been termed as the religious constitutionalism in Indonesia by legal analysts. Central to it is that which holds there is a supreme divine power (Ketuhanan Yang Maha Esa) as a pillar of the constitution, but does not attach itself to theocratic rule. In contrast to the Western liberal democracies in which religion and law are strictly in a separation, Indonesia has a formalization of religion as the source of state legitimacy and preserving its definition as a republic. The outcome is not a secularist or theocratic constitutional regime, but rather a religious nation-state, a kind of mixed constitution, which both respects spiritual authority and democracy at the same time.

This is a strong and weak point of this position due to its conflicting nature. It is on one hand able to accommodate religious values into the governance of the population and give it a sense of authenticity of culture as well as social harmonization. Counter-intuitively, however, it makes it difficult to formulate a proper relationship between the nation and the international law particularly in situations where its moral or religious principles seem to come in conflict with the international expectations concerning the trade, human rights, freedom of thought, and belief.

The functioning of the Indonesian judiciary, most importantly the Constitutional Court, can be regarded as one of the most eloquent statements of the religious constitutionalism in the country. There has been the regular interpretation by the Court concerning aspects of the constitutions to continue holding the state accountable to religious values, not as a form of burden on the individual freedoms, but a constitutional necessity to maintain

moral order. Law No. 48 on Judicial Power Article 2 is one of the most relevant ones because it requires that court judgments should be passed in name of justice founded on a belief in the Almighty God. Contrary to what is implied by the symbolic aspect of this formulation, this formulation strengthens the realization that there is a moral and divine responsibility attached to the exercise of judicial authority(9).

This process has been completely opposite of the western legal positivism wherein something is considered legal based on its formal validity and not its moral content. One aspect of the Indonesian legal system that can be found in the legal system of other countries in the region as well, is the presence of coincident moral and legal reasoning, culminating in what some have labeled the overlapping legal and extralegal norms. Through this, religious-based law is common where laws regulating the behavior of the people e.g., marriage, clothing styles or food certifications, are often religiously based but enforced by state machinery.



FIGURE 2 Foundations of Indonesian Constitutionalism

The ministry of religious affairs (MRA) and the Majelis Ulama Indonesia (MUI) is the institutions manifestation of this kind of management. The organizations have extensive state money and powers and are in charge of religious education, interreligious communication and of halal certification procedures. According to what might be considered a contradiction in their existence within the liberal constitutional tradition, in Indonesia they are regarded as the fundamental upholders of religious harmony and national morality.

It is under this constitutional culture, that the Halal Act was thought up and legitimized. In the judgment of the Indonesian Constitutional Court regarding the law, the court did not consider it a danger to religious freedom as perceiving it at its best would be a realization of the duty of the state to facilitate Muslims so that they can live in light of their faith. The Court, at the same time, underlined that the law does not compel the non-Muslims, which is why it is portrayed in a way that it offered universal protection, and not a sectarian imposition.

This legal argument shows how the Indonesian model has a particular logic to it: instead of the view that religion is a personal issue that the state may not enter, it treats the state as a central actor that ensures religious existence. This dream is based on an Indonesian philosophy in general, the Pancasila belief in God, as an ideal of the nation, but not an individual.

Nonetheless, this model has not gone without criticism. Since the 1940s, international observers have been unable to make sense of the nature and extent of religious constitutionalism in Indonesia on the same axis as normative constructions of secularism, pluralism and individual rights in the globalized world. However, perceiving Indonesian framework as secular western is to fail to understand. The Indonesian legal imagination is not one between sacred or secular or individual and the collective. It is an interlaced constitutionalism aiming at a balance between spiritual integrity and democratic processes in governance(10).

This is an incomplete construction of the constitution that is maintained by an idea of popular appeal to the moral right of the state and its institutions. Accordingly, the interference of a state into religious processes including absconding of the halal verification process is not regarded as the violation of the rights, but as the responsible

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behavior of the state towards the population. It shows the anticipation that the law should not just be a regulatory mechanism but one by which the national values can be cultivated.

4. Legal Validation Through Sacred Mandate

Religious regulation by the Indonesian state is not a recent trend as the state is committed to religious regulation via an institutional and philosophical perspective that is deeply ingrained in the legal and administration system. This arrangement culminates at its core with a brand of constitutional order that authorizes, and in truth, promotes the direct oversight of the state of the religious life. This is most evidently and clearly seen in the making and legal protection of the 2014 Halal Product Assurance Law more commonly known as the Halal Act. Answering this question exposes more precisely not only to the extent to which the law is within the constitutional order in Indonesia not only on account of adherence on the national provisions of law, but also on the account of being instituted in deeper layers of ideological mechanism, that of constitutionalism of religion.

Such a policy concerning the governing of religious life in Indonesia is not new since it has been institutionalized by specially set institutions. The most important one of them all is the Ministry of Religious Affairs (MRA) which is a powerful state body involved in controlling a broad range of religious activities which includes registration of marriages and religious education, as well as the management of hajj pilgrimage. The MRA has one of the largest ministerial budgets and since the year 2000 it has outspent even the Ministry of Education, a clear sign of the emphasis attached to religious control in national policy.

The Majelis Ulama Indonesia (MUI) is the working arm of the MRA that serves as a quasi-official Islamic platform but which operates as both one that provides a moral authority and another one that acts as a technical agent in issues relating to Islamic compliance. The MUI is not an official state organization but exercises a lot of power, being seen as an (informal) state-affirmed theological advisor. It is under this mandate that the MUI has come up with the National Sharia Council, a body that has come to gain prominence in determining Islamic norms in finance, trade and, most importantly, halal certification of products.

In this institutional environment, the Halal Act did not arise in the empty air. Instead, it is the end of decades of religious bureaucracy and ideological harmony of the sacredness of religious values in social life. The law requires a variety of consumable goods and services, halal certification in their production and stipulates that businesses must strive to meet the Islamic requirements with regards to product purity legally. Even though technically it provides the possibility of exemptions or phased introductions, the prevailing logic in it is still that of national standardization of religious morality.

That is what sets this law apart with other laws based on faith is the extent to which the judicial support. In April 2019, the Constitutional Court of Indonesia issued a landmark ruling in the form of Decision No. 8/PUU-XVII/2019, the court ruled to sustain the constitutionality of the Halal Act. The rationale behind the decision of the Court was revealing: it was able to represent halal certification not as a religious imposition but as a constitutional declaration of the right to religious freedom. In the opinion of the Court, the law does not hinder the practice of the Faith by Muslim consumers but, to the contrary, the law provides opportunities to practice the Faith. It was not in the least coercive, but was given out as protective.

To avoid criticisms of religious coercions especially by the non-Muslims of Indonesia and other Muslims across the world, the Court focused on the fact that mandatory provisions in the law were targeted towards the producers not the consumers. It demanded that there is no infringement to the rights of the non-Muslim citizens by the law, since it neither religiously imposes them to practice nor outlaw it as an act that criminalizes the individual persons. It was on this difference that the Court was able to declare that the law matches the Article 29 in the dotted Constitution of 1945 that assures the freedom of religion and in the same breath declaring the responsibility of the state in ensuring that it upholds the belief in the Almighty God as a national value.

Notably, the ruling also saw a transition in the position of the executive in settling legal norms bearing on international commitments as well as internal values of religious nature. The decision indicated that the court system has become an important player in determining the cross point between the standards of religion and the standards of constitutionality, especially the Constitutional Court. This trend reinforces the fact of decentralization of the normative authority in the Indonesian legal law where the judicative is becoming the dominant force in the determination of the meaning of legal and moral obligations.

With regard to the procedure implementation, there is the establishment of the Halal Product Assurance Organization Agency (BPJPH), which ensures the enforcement of the law. The BPJPH is only a positivizing

agency with religious verification being required by the MUI. Particularly, all halal certification needs to be approved by a fatwa (legal opinion), given by the MUI, to make sure that religious requirements are followed. Although the Omnibus Law in 2020 offered some experiments in the administrative field, such as the ability to other Islamic bodies to engage in certification, it still does not interfere with the centrality of the MUI.

The opponents have asserted that this kind of structure entrenches the use of one religious interpretation in state affairs. This however in the context of Indonesian constitution is not only recognized as legitimate arrangement, but a very essential one at that. The jurism that motivates such a support of the Court is the national perception of the rule of law that is loaded with the sense of divine responsibility, an idea that is embodied in Indonesian judicial life. The delivery of court decisions, as is the case with Law No. 48, is said to be done in the name of justice, which is guided by Almighty God, an idea which incorporates a moralized version of lawfulness that vastly varies when compared to the secular positivistic approach.

Consequently, the Halal Act is not an aberration of regulation but the unsurprising manifestation of the hybrid legal identity in Indonesia: an ambivalent amalgamation of democratic pluralism, religious majoritarianism and constitutional tolerance to religious norms. It is by no means a deviation of the law, but rather a continuation of the anticipated progress of a legal methodology that does not view religion as a personalistic ideology, but as a provider of mutual worth and legal justification.

In addition, the model makes it more complex to criticism internationally with the assumption of universal secularism, or liberal neutrality. The demand that prohibiting halal regulation is a violation of neutrality is to misapprehend the primary nature of the Indonesian state in which neutrality is not determined by lack of attachment to religion, but by proportional representation and religious balance. Having the Halal Act through this perspective, it can be understood as a constitutional interpretation of the moral obligations imbibed in Pancasila in place of a violation of religious freedom.

5. Conclusion

Indonesian Halal Product Assurance Law has presented a very strong case study that can be applied to demonstrate how national law systems may demand to bear moral sovereignty at a time when legal globalization is increasingly rising. Being not just a regulatory tool related to food standards, the Halal Act is representative of the Indonesian constitutional self-understanding, one that combines the religious faith, the cultural identity, and the legal force into a harmonious juridical order. It refutes the common belief that contemporary constitutionalism should be guided by the secular-liberal model and thus proposes another strategy: the religious constitutionalism inside a pluralistic law system.

As demonstrated in this paper, such constitutional structure as the one in Indonesia allows and, in fact, legitimizes the state to intervene in issues that most other actors internationally would term as being private or ethical. In the light of its guiding ideology the Pancasila, Indonesia identifies a national vision in which one does not have the choice to believe in God since it is the core of official law. That ideal is reflected in the Halal Act that is driven by judicial confirmation and the institutional framework. It is an ideal example of a legal culture in which the distinction between a sacred duty and a civic one is permeable, and in which the sense of the law of its legitimacy is in part based upon its moral appeal to the citizenry.

Significantly, the Indonesian experience also begs a review of what happens when international law presses up close to home against domestic legal systems which are not so easily assimilated into the Western legal paradigm. The persistence of the project of requiring states to adopt one, secular set of legal rationality reproduces the forms of legal thought that are denied entry to the world as it exists today. The Halal Act is by no means the case of legal recession or religious encroachment, it is the illustration of constitutional pluralism, when various normative orders co-exist and sometimes collide, nonetheless they represent the happenings experienced by distinct societies.

Pluralism is something that international institutions like WTO may have trouble accommodating. Their normative models are usually based on ideas of liberal individualism and procedural neutrality, which in fact relegate to the side legal orders that feature more communitarian values, religious morals, or native practices. The example of Indonesia fighting against rulings of the WTO that diminish the importance of the halal requirement is no longer an economic-protectionism action but acts as defense of cultural and constitutional personality. This opposition showcases a deeper co-ordination issue between international law regimes and local legitimacy of law.

The international legal order can no longer afford to see such tensions as lapses in obedience hence must start treating these instances as an opportunity to recalibrate. Embracing the constitutional pluralism does not imply

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that the international legal system should cease to pursue its coherence. It implies being aware that coherence has to be dialogical rather than hierarchical. It has to enable differentiated implementation and the concern to cultural and constitutional particularity. By so doing, international law is able to evolve its Westphalian and state-centric foundations, and become a genuinely international legal project.

Drawing a conclusion, it is worth stating that the case with Indonesia and its Halal Act shows the shortcomings of the one-size-fits-all globalization of law. It renders the idea that law and morality should be entirely distinct in the present-day legal framework and shows how religious values may be enshrined in the Constitution without slipping into theocracy. The future of Indonesia and legal world, therefore, may be found in the embracement of a pluralist legal imagination, one that makes not diversity disturbing but recognizes such as a value source of normative richness and institutional resiliency. It is only after this that international law shall rightfully stand as legitimate in a constitutionally and morally diverse world.

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Conflicts of interest

The authors have no conflicts of interest to declare

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