

CHAPTER I

INTRODUCTION

A. Background

According to Statista¹, Halal food is the second largest sector of global halal industry with 36% share of the global market after Islamic finance. The global halal food market reached a value of US\$ 1.4 Trillion in 2017 and it is projected to keep rising and will be reaching US\$ 2.6 Trillion in 2023.² Meanwhile, in Indonesia as a country with the largest Muslim population, its citizen has spent US\$ 170 Billion on halal food. Indonesia contributes 13% to the global Muslim population.

It is very important in Indonesia that halal food is regulated soundly. Halal is important for them as they try to live with this principle. Halal is an Arabic word meaning permissible and refers to a set of rules in Islam teaching commanding permissible and prohibited activities varies not only in food and drink. For meat to be considered halal, the animal must be slaughtered in a way that obeys to certain rigorous procedures, or else it is deemed “haram” or unlawful. Adamec stated that the term halal refers to any object or an action which is permissible to consume, use, or engage according to the Sharia Law.³

¹ Statista, “Global Halal Market – Statistic & Facts,” <https://www.statista.com/topics/4428/global-halal-market/>, accessed 27 February 2019.

² PRNewswire, “Global Halal Food Market 2018-2023: Market Value is Projected to Reach US\$ 2.6 Trillion”, <https://www.prnewswire.com/news-releases/global-halal-food-market-2018-2023-market-value-is-projected-to-reach-us-2-6-trillion-300684262.html>. Accessed 27 February 2019.

³ Ludwig W. Adamec. *Historical Dictionary of Islam*, (Maryland: Scarecrow Press, 2019) p.23.

In *al-Quran*, Allah has instructed mankind to consume halal and wholesome food, as it is seen from a verse stating:

يَا أَيُّهَا النَّاسُ كُلُوا مِمَّا فِي الْأَرْضِ حَلَالًا طَيِّبًا وَلَا تَتَّبِعُوا خُطُوَاتِ الشَّيْطَانِ

إِنَّهُ لَكُمْ عَدُوٌّ مُّبِينٌ

Translation: “O mankind, eat from whatever is on earth (that is) lawful and good and do not follow the footsteps of Satan. Indeed, he is to you a clear enemy”. (Q.S. Al-Baqarah [2]:168)

According to the 2013 Global Islamic Finance Report, there are four phases of halal evolution. It was based on the trust at the first phase. Halal certification is in the second phase. In the third phase, there is an assurance that the entire supply chain is compliant with Sharia Law which is audited and certified by an Islamic Certification Authority. The fourth phase refers to the halal value chain where Islamic food multinational companies can control the entire supply chain from farm-to-fork.⁴

Indonesia as the biggest Muslim country, has spent US \$ 170 Billion for halal food. Data from Assessment Institution of Food, Drugs and Cosmetics Majelis Ulama Indonesia (hereinafter called LPPOM UI) shows that the demand for halal

⁴ Global Islamic Finance Report. Taken from Michelle Limente et al, 2017, “Disabling Labelling in Indonesia: Invoking WTO Laws in the Wake of Halal Policy Objective”, *World Trade Review*. p.2.

certification had increased from 8.175 unit with 127.286 total products to 17.398 unit with 204.222 products in 2018, amounted 114% increase.⁵

The other indicator to conclude that halal food certification is important can be seen from the haram food case that sparks anger among Muslim citizens in Indonesia. one of them are Ajinomoto case. It was known that pork enzyme was one of the ingredients of Ajinomoto.⁶ Other case that spark restlessness was meningitis vaccine back in 2009.⁷ The following elaboration has shown us the consumer protection through halal certification is crucial in Indonesia.

Indonesia has passed Halal Act in 2014. It seems that Indonesian government aims to enter phase three of halal evolution. This Act requires mandatory Halal labelling and certification on a wide scope of products, it varies from goods and/or services that are related to foods, beverages, as well as consumers good that are worn, used, or utilized.⁸ Halal Act will come into its force this year since its issuance on 2014.

The Law Number 33 of 2014 Concerning Halal Product Assurance faces challenges and problems in its implementation. One of them is the lack of derivative, technical and supporting regulations regarding the implementation of halal assurance in Indonesia. it is indeed, that Government Regulation of Halal Act

⁵ Data sertifikasi halal LPPOM MUI Periode 2011-2018. http://www.halalmui.org/mui14/index.php/main/detil_page/59/25045. Accessed on 2 July 2019.

⁶ Ma'ruf Amin et al., *Himpunan Fatwa Majelis Ulama Indonesia*, (Jakarta: Sekretariat MUI, 2010), p.62.

⁷ Zulham, *Peran Negara dalam Perlindungan Konsumen Muslim terhadap Produk Halal*, (Jakarta: Kencana, 2018). p.2.

⁸ Article 1, Law No, 33 of 2014 concerning Halal Product Assurance Act

implementation has been enacted at the time this thesis is written. The Government Regulation Number 31 of 2019 concerning Implementing Regulation on Law No. 33 of 2014 Concerning Halal Product Assurance was enacted on 3 may 2019, 6 months before Halal Act came into effect. However, Halal Act faces many skepticisms regarding the effective implementation in 17 October 2019.

Not only that problem, Halal Act has been considered also discouraging the ease of doing business in Indonesia for those involved in selling related products. Whoever involved, whether domestic or foreign trader or entities has to conform with the unnecessary burdensome and costly requirement for the certification and labelling of Halal product.

This argument did not come without any reason. In 2014, a note issued by the European Union's delegation to Indonesia, Brunei Darussalam, and ASEAN expressed such concern. It stated that a number of provisions in the Halal Act demonstrate the far-reaching and draconian nature of the law and the potentially high burden it will create on business.⁹

Another problem also arises from the perspective of international trade. Every single foreign trader or entities wishes to export the related product is obliged to mark them with halal labeling and receive halal certification recognition from Halal Product Assurance Organizing Agency. The implementation of this rule becomes an issue and raising question whether this Halal Act fall under definition of

⁹ See the notes by European Union Delegation to Indonesia, Brunei Darussalam and ASEAN, *Indonesia: Law on Halal Product Guarantee*, Ref. Ares (2014)3356597, <http://polishcosmetics.pl/2014-Indonesia-Law.pdf> accessed 6th March, 2019. See also Michelle Limente et al., *Op. cit.* p.3.

technical regulation in Technical Barrier to Trade Agreement (hereinafter called TBT Agreement) under General Agreement of Tarif and Trade (hereinafter called GATT).

In April 2018, the committee of Technical Barrier to Trade in WTO has circulated the communication requested by European Union delegation. The communication is regarding the statement of European Union to the committee on technical barrier to trade regarding Indonesia – Halal Product Assurance Law No. 33 of 2014. The statement reiterated serious concerns regarding Indonesia Halal Act. The statement also recalled that under Article 2.2 TBT Agreement, technical rules should not be more trade restrictive than necessary to fulfill a legitimate objective.¹⁰

Indonesia as member of World Trade Organization (WTO) has the obligation to conform and adjust with the regulation due to the commitment of Indonesia on the agreements fall under the realm of GATT, especially TBT Agreement. In the Specific Trade Concerns (STCs) sub section previously raised concerns on WTO document G/TBT/M/74, the representative of US, Brazil, and Australian together with EU expressed such concerns regarding the implementation of this law.¹¹ Those members requested that Indonesia notified the draft

¹⁰ Committee on Technical Barrier to Trade, *Indonesia – Halal Product Assurance Law NO 33 of 2014*. G/TBT/W/496. 19 April 2018 (18-2438). P.1/2

¹¹ WTO, Committee on Technical Barriers to Trade, *Minutes of Meeting of 20-21 June 2018*. G/TBT/M/74. 14 September 2018.

implementing regulation to the TBT Committee prior to finalization to allow for comments.¹²

This research aims to examine the right of Indonesia as Members of WTO to protect the public moral in Indonesia regarding the protection of religious practice of consuming halal food and on the other side the compliance not to impose measures that arbitrarily discriminate other members in the context of international trade.

Meanwhile, this research also aimed to identify how Islam regulates halal food. This is due to the urgency of knowing whether the spectrum of Halal Act really represents how Islam regulates halal food or Halal Act is just an instrument that contains unnecessary clauses and deviates far from what Islam intends to regulate halal food. This research looks further on how Halal rules are based, it is from the Quran and hadiths.

There is no explicit statement regarding what *mahzab* is used behind the regulation of Halal Act. However, *mazhab syafi'i* and opinions from *jumhur ulama* are to be believed to be the basic of halal food rule in Halal Act. This method is called *talfiq* in Islamic terminology. The method used by *ulama* to compile rules from Islamic scholars besides suitable to the public good of the people subjected to the matter.¹³ This research further will analyze whether this assumption is true

¹² *Ibid.*

¹³ Sopa, *Sertifikasi Halal MUI, Studi atas Fatwa Halal MUI terhadap Produk Makanan, Obat-Obatan, dan Kosmetika*, Cetakan I, (Jakarta: Gaung Persada Press Group, 2013). p. 206.

regarding *tafiiq* as used behind Halal Act. Then this research will conform the congruency between this Islamic thought and Halal Act as legal norm.

Furthermore, this research also aimed to identify how other countries, mostly European countries, regulate halal certification and labelling. This is due to the importance of finding similarity in the procedure. Until today there is no single definition worldwide accepted and binding regarding what constitutes Halal and its processing procedure. This can lead to the likelihood that halal labelling is being abused by irresponsible parties aiming merely the profit motive. The argument of halal labelling being abused is appealing. It is well known that other Islamic product such as Islamic banking services or products were being abused. This rises the same question on how Islamic a halal labelling is?

Many countries are regulating halal food arguing that it is to protect customer. Customer protection is arguably one of the arguments that sparks the use of halal labelling to protect those who adheres to Islamic value to consuming halal food. As has been mentioned before halal food has huge market and it brings potential profit from the economic standpoint. However, abuse of halal label is a real threat haunting Muslim in regards of the conformity with Islamic law. For the sake of the profit, consumers are afraid that halal label being attached to the product is not really Islamic, the procedures behind the halal label deviate from Islamic law.

This research aims to highlight this issue on the urgency of having international-bonded definition of halal and its procedures. This is also to protect the customers from the halal label being abused merely for the profit motive. In a nutshell this research will scrutinize the Halal Act from the stand point of WTO

Law, Islamic Law and International Law. The findings then will be used to compare and examine whether the existence of Halal Product Assurance Act can be legitimated from the perspective of National, International and Islamic Law.

B. Research Question

According to the background that has been elaborated before, therefore this thesis proposes these four research questions:

1. What are the potential problems and challenges of halal certification according to Halal Act?
2. How is the application of TBT Agreement Article 2.1 on Halal Act?
3. Can Halal Act be justified using GATT protection of public moral concept?
4. How Halal Act comply with Islamic Law?

C. Research Objective

According to the above research questions, therefore this thesis proposes these four research objectives:

1. To find out the readiness and challenges faced by Halal Act.
2. To find out the application of TBT Agreement Article 2.1 on Halal Act.
3. To find the justification of Halal Act from GATT concept of public moral protection.
4. To find out the compliance of Halal Act with Islamic Law.

D. Research Originality

This section aims to ensure that this research has its originality in the topic covered. One way to distinguish the originality is by doing a comparison with previous researches conducted in similar topic. The comparison then will be

resulting with what differentiates this research with previous research conducted in similar topic. The differentiations resulted from the comparison will be the originality of this research. Here are several previous researches in similar topic:

1. Dissertation from KN. Sofyan Hasan (2014), Sriwijaya University, titled:

Studi Sertifikasi Halal Produk Pangan Dalam Hukum Positif di Indonesia.

This research concluded that the halal certification process has been carried out by LPPOM MUI. However, the current state of Indonesia halal regime lack of legal framework and legal protection, meaning that the uncertainty is there. Therefore, he concluded that Indonesia needs to enact a Halal Act which brings legal certainty in halal certification regime.¹⁴

2. An article from R. Rajesh Babu (2018) titled: “WTO and the Protection of

Public Morals.” published in Asian Journal of WTO & International Health Law & Policy. This article concludes that the determination of what constitutes public moral is left to the interpretation of WTO Members.

However, The Panel and Appellate Body seems to limit the possibility of arbitrary interpretation by Members by incorporating two tests; necessity test and availability of less trade restrictive alternative measure test.¹⁵

3. Dissertation from Zulham (2018), Universitas Indonesia, titled: “Peran

Negara dalam Perlindungan Konsumen Muslim Terhadap Produk Halal.

This research concludes that (a) Halal concepts in Islamic law can turn out

¹⁴ K.N. Sofyan Hasan, *Sertifikasi Halal dalam Hukum Positif; Regulasi dan Implementasi di Indonesia.* (Yogyakarta: Aswaja Pressindo, 2014)

¹⁵ R. Rajesh Babu. “WTO and the Protection of Public Moral” *Asian Journal of WTO & International Health Law & Policy* September, 2018.

to be mandatory, if formulated with command sentences both in language and meaning. (b) With regard to the *massive and credential product*, because Muslim consumers cannot test and validate product quality, the role of the state is to regulate and establish certification bodies and label the halal products. (c) The results of comparisons with other countries are the (1) certification bodies and halal/*kosher* labeling are voluntary, the level of state intervention is only limited to information regulation, (2) halal/*kosher* certification bodies are public institutions, (3), the relevant institutions issue guidelines and standards the certification and labeling process, (4), supervision of certification and labeling is carried out by the supervisory institution not by the organizer of halal/*kosher* certification and labeling, (5), law enforcement certification and halal/*kosher* labeling of administrative sanctions and criminal sanctions, is a control on misleading information. (d) analysis of several decisions relating to halal labels, there is a misinterpretation of the norms of the formulation of Article 8 paragraph (1) sub (h) Law of Consumer Protection, which regulates the inclusion of halal labels. Also found was the judge's clarity in his decision to distinguish between information and standards.¹⁶

4. An article from Hannif Ahamd & Nasarudin Abdul Rahman (2018) published on Asian Journal of WTO & International Health Law & Policy titled: "*Halal Food, Market Access and Exception to WTO Law: New Aspect*"

¹⁶ Zulham, *Peran Negara dalam Perlindungan Konsumen Muslim terhadap Produk Halal*, (Jakarta: Kencana, 2018).

Learned from Indonesia—Chicken Products. This research concludes that the halal measure will not be the concern of Muslims or Muslim countries alone. The need to further develop the WTO jurisprudence on halal measures is becoming imminent. Regarding the case, this research concludes that enacting halal measure will not necessarily consistent be inconsistent with GATT/WTO rules. And the status of halal measure is still unclear whether it falls under TBT or SPS.¹⁷

5. Michelle Limenta, Bayan M. Edis and Oscar Fernando on their paper titled *Disabling Labelling in Indonesia: Invoking WTO Laws in the Wake of Halal Policy Objectives*. This research focuses on the element of Halal Act that is unnecessary and burdensome as well as WTO issues regarding the TBT Agreement. Furthermore, public moral is used as the legitimate objective by Indonesia government to impose Halal Act. My thesis will elaborate more with the Islamic perspective of Halal Act and also the comparison with how halal practices is regulated in European Countries.¹⁸

E. Thinking and Theoretical Framework

This research uses syllogism as the thinking framework. Which means deductive logic will be carried out to examine the issue covered to fruit the conclusion. For the first research question regarding the content of Halal Act, this research will examine the feasibility of the mandatory clauses to be implemented

¹⁷ Haniff Ahamat & Nasarudin Abdul Rahman, “Halal Food, Market Access and Exception to WTO Law: New Aspects Learned from *Indonesia-Chicken Products*” *Asian Journal of WTO & International Health Law & Policy*. September, 2018.

¹⁸ Michelle Limente et al., “Disabling Labelling in Indonesia: Invoking WTO Laws in the Wake of Halal Policy Objective”, *World Trade Review*. 2018.

without adding more cost that needed. The principle is to ease the business activity not hampering it. If it turned out that the content of Halal Act adds unnecessary burden or cost, then the it will conclude that Halal Act is burdening the domestic and foreign trader.

The second research question is examining the legitimacy of Halal Act existence against the rule of WTO. The use of syllogism is salient here, the premise major will be the WTO rule in TBT Agreement and the premise minor will be the clauses in Halal Act. The conclusion will be resulted from deducting the premise major and premise minor whether clauses in Halal Act conforms with the WTO rule in TBT Agreement.

The third research question is regarding the conformity of Halal Act with GATT Article XX(a), principle of public moral protection. In this section, WTO jurisprudence regarding the application of public moral protection is conducted, to, in the end, determine whether halal measure can be justified using Article XX(a) protection of public moral.

The forth research question is regarding the compliance of Halal Act with Islamic Law principles. The discussion stems from the justification of problematic Halal Act clauses using the principle of *maslahah mursalah*. the next discussion will be elaborating how the determination of halal is conducted according to Halal Act.

After the explanation of theoretical framework, the next is the brief discussion on the relevant theories that will be used in this thesis:

1. *Maslahah Mursalahah*

According to the etymology or language, the word ‘*maslahah*’ comes from the Arabic language *al-maslahah* and has been standardized into Indonesian into the word *maslahah* which means benefit or something that contains benefits, or something that brings good or brings benefits and/or rejects damage. According to the original language, the word *maslahah mursalah* comes from the word *saluha, yasluhu, salahah*; means something that is good, proper, and useful. Whereas the word *mursalah* means to be free, not bound by the arguments of religion that allow or prohibit it.¹⁹

This theory is used to see whether the determination in determining halal and haram as stipulated in the Halal Act is in accordance with the method of legal discovery in determining halal and haram in Islam from the perspective of *maslahah-mursalah*. The principle of utility or *maslahah mursalah* is in all forms of law, both Islamic law and positive law (in the sense not based on revelation). This theory will be used to see whether when the *istinbath* method is used in all processes for determining the halal and haram products, as stipulated in the Halal Act, the terms of the *maslahah* have represented the process.

2. Protection of public moral

The use public moral was first addressed by U.S as a general exception to protect existing domestic restrictions on certain goods.²⁰ Free trade and public

¹⁹ *Ibid.*

²⁰ Mark Wu, (2008) “Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine”, 33(1) *YALE Journal of International Law*. p.215-219.

morality coexist in a precarious balance. On the one hand, the international trading system was founded on the principle of nondiscrimination. Countries should not disadvantage those that fail to share their geopolitical or religious views. On the other hand, the system was also founded on the notion that countries should not be forced to liberalize trade when doing so would threaten their public morality.²¹

The question is what does it mean by “necessary to protect public morals”? what scope is within this clause? For over fifty years, this question went unanswered, and in 2005, finally the WTO, for the first time, address this concept. In the case generally referred to as *US—Gambling*, the WTO recognized the right of the United States to ban internet gambling services on the grounds that such services violated American public morals.²²

The public moral exception to free trade was arguably important enough that the original drafters of the world trade “constitution” listed it as the first of several exceptions to the principles of providing unfettered access to trade privileges.²³ By far the most attractive possibilities to activist are expansive approaches that emphasizes the unilateral right of countries to delineate their own morals and/or the importance of transnational norms.

Also, the bifurcated approach, in which countries are given greater leeway to enact restrictions that protect their own citizens, but most concurrently meet more stringent requirements if they seek to impose restrictions that affect citizens in other

²¹ Mark Wu, *Op. cit.* p.215.

²² See Appellate Body Report, *United States—Measures Affecting the Cross -Border Supply of gambling and Betting Services*, WT/DS285/Ab/R, April 7, 2005).

²³ See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. Rev. 511 (2000). See also Mark Wu, *Op. cit.* p.215.

WTO members. This approach recognizes the right of countries to shape their own norms rather than have them imposed through trade leverage, but at the same time demands that those that make normative commitments actually follow them.²⁴

F. Research Method

1. Object of research

The object of the research is assessing the implementation of Halal certification in Indonesia according to Indonesia Halal Act from the perspective of Islamic Law, WTO Law, and comparing Indonesia Halal Act with how European Countries regulate halal food.

2. Sources

The object of the research is the primary legal material. In this research the primary legal material is the Number 33 of 2014 Concerning Halal Product Assurance, Agreement on Technical Barrier to Trade (TBT) General Agreement on Trade and Tariffs (GATT) 1994, Islamic Law, and Halal Regulations in European Countries and also relevant literatures such as books and journals.

3. Legal Material Gathering Method

The data collecting method is a library research. The steps are as follow, collecting all related books, journals, the review it, and writes it down into the writings.

4. Legal research Method and Legal Approach Method

This research employs normative legal research method using deductive-syllogism logical thinking. This research will identify and examine the facts or legal

²⁴ Mark Wu, *Op. cit.* p.249.

rules. Meanwhile the legal approaches method in this research are stature approach, conceptual approach, and comparative approach. These approaches are based on the object of the research which examines the Indonesia Halal Act from the perspective of Islamic Law, WTO Law, and European regulation on halal food.

5. Data analysis method

The data will be analyzed using qualitative analysis. The analysis will be carried out in the form of argumentation according to legal norms or rules and relevant thoughts regarding the subject matter.

G. Writing Systematic

This research will consist of 4 sections as follow:

1. CHAPTER I contains the background of the problem of why this research was conducted, what underlies the problems in this study to be interesting to study, the conflict between *das sein* and *das solen* like what is in the community so that the background of this research is conducted. Then the formulation of the problem contains a statement containing the research question. Next is the purpose of the study which contains the objectives of this study. Then the usefulness and benefits of research. After that the presentation of the research methods used in this study. Then proceed with a literature review to compare this study with the previous and final studies regarding the systematic discussion of this study.

2. CHAPTER II describes the general review of halal in Islamic law, then also discusses halal certification, also general overview of GATT/WTO law.
3. CHAPTER III describes the results of the analysis of the formulation of the problem in this study, which is related to the problem of the Halal Act in its application, and also how about the determination of halal and haram products according to the Halal Act and Islamic law. And also, the application of TBT Agreement on Halal Act as well as the justification of halal measure using protection of public moral concept according to the GATT Article XX(a).
4. CHAPTER IV contains conclusions and suggestions from this research.

