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Nadirsyah Hosen

University of Wollongong, hosen@uow.edu.au

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Recommended Citation

Hosen, Nadirsyah, "Euis Nurlaelawati, Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts" (2011). *Faculty of Law, Humanities and the Arts - Papers*. 1439.

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Abstract

Book review:

Euis Nurlaelawati, *Modernization, Tradition and Identity: the Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, Amsterdam University Press, Amsterdam, 2010, 304 pp.

Keywords

identity, tradition, modernization, nurlaelawati, euis, islam, hukum, legal, practice, indonesian, religious, courts, kompilasi

Disciplines

Arts and Humanities | Law

Publication Details

N. Hosen, 'Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*' (2011) 19 (1) *South East Asia Research* 157-159.

Euis Nurlaelawati, *Modernization, Tradition and Identity: the Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, Amsterdam University Press, Amsterdam, 2010, 304 pp.

reviewed by Nadirsyah Hosen, Senior Lecturer, Faculty of Law, University of Wollongong, Gwynneville 2500, NSW, Australia. E-mail: hosen@uow.edu.au.

doi: 10.5367/sear.2011.0038

Indonesia is neither a secular nor an Islamic state. Both terms have negative images in Indonesian society, and therefore their use has been avoided in legal and political arenas. Under the 1945 Constitution, Indonesia was designed to adopt a middle position: the *Pancasila*-based state, which begins with the principle of 'One Godhead', not only allows but also encourages religion to inspire Indonesian public life in the fields of humanitarianism, national unity, representative democracy and social justice.

However, this does not mean that Islamic law is not practised in Indonesia. In fact, an Islam-inspired agenda is welcome, to the extent that it corresponds with, and does not contradict, the *Pancasila*. T.B. Simatupang, a Protestant scholar, has stated that 'the *Pancasila*-state is responsible not only for ensuring religious freedom, but also for promoting the role of religions in society' (1996). It was in this spirit that the Department of Religious Affairs was founded in 1946. It supervises religious education, Muslim marriages, the Islamic courts (which deal with divorce and inheritance matters only) and the *Hajj* [pilgrimage]. It also has separate directorates for the other religions: Catholicism, Protestantism, Hinduism and Buddhism.

Indonesia recognizes religious courts as one of four components in the court system. The other three components are military courts, general courts and administrative courts. Before 1989, the decision of a religious court needed the fiat of a district court. However, based on Law No 7 of 1989, the position and the decisions of religious courts became equal to those of other courts. Religious courts were under the supervision of the Ministry of Religious Affairs, whereas general courts fell under the jurisdiction of the Ministry of Justice. However, pursuant to Law No 4/2004 on Judicial Powers that repealed Law No 14/1974 as amended by Law No 35/1999, the Supreme Court now assumes all

organizational, administrative and financial responsibility for all the four courts. This is known as the 'one-roof system' of the administration of justice, which is now under the Supreme Court.

The judges in religious courts use Law No 1 of 1974 for family law, plus Presidential Instruction No 1 of 1991 on the Compilation of Islamic Law (Kompilasi Hukum Islam – KHI), which covers marriage, divorce and inheritance. The connection between Law No 1 of 1974 and Presidential Instruction No 1 of 1991 is explained in Article 2 of Law No 1 of 1974. This states that 'marriage is valid if it follows the rule of religions'. It should be said that, for Muslims, Presidential Instruction No 1 of 1991 explains and expands upon Article 2 of Law No 1 of 1974.

Euis Nurlaelawati's *Modernization, Tradition and Identity* is the first book written in English that examines KHI and the religious court. Nurlaelawati explains that in 1953 (long before KHI), the sources of the religious court system were 13 books of Islamic law. At the legal-doctrinal level, Indonesian Muslims are generally followers of the Shafi'i school of thought [*madhhab*], although they recognize the existence of other *Sunni* schools such as Maliki, Hanafi and Hanbali. There have been different opinions within each *madhhab*, let alone amongst different *madhhabs*. So, which references should be used for judges and all parties in the religious court? One party might argue that his or her marriage is valid according to one school, whereas the judges might declare it as invalid based on other opinions. Therefore, the 13 books became the official references of the religious court in the period from 1953 to 1991.

Most of those books were written by scholars from the Shafi'i school, hundreds or even thousand of years ago. Some of the opinions they expressed were irrelevant or did not pertain to the present situation or to the problems associated with it. Furthermore, judges are expected to take cognizance of the other schools of Islamic law. When Islam came to Indonesia, there were other religions and many customary practices [*Adat*] in Indonesia. It could therefore be said that while Muslims in Indonesia follow the rule of Islam, as do all Muslims, Islam in Indonesia has some distinct differences in the way it is observed and followed on a daily basis.

Those traditions have become part of the identity of Indonesian Muslims, which might be different from the practice of Islam in the Middle East or in Africa. Nurlaelawati's title explains this background well through its use of the terms 'modernization', 'tradition' and

'identity'. It was to reconcile these three key terms that the KHI was created in 1991.

Nurlaelawati correctly points out that the KHI is not the first codification of Islamic family law in the Muslim world; others had already set up examples such as in the Ottoman Empire (1917), in Egypt (1920), Tunisia (1957) and Morocco (1958). The KHI used presidential instruction [*Inpres*] as a legal basis, and this is not the law. Nurlaelawati summarizes the debate on this legal status, and has also interviewed many judges from the religious court in her research. Some judges have complained that *Adat* [custom or tradition] is much more dominant than Shari'a in the KHI. This explains why in many religious court decisions, which Nurlaelawati closely examines, judges still quote the classical doctrine from Islamic law literatures – considered as a 'back-up' to their references to relevant provisions in the KHI. This 'back-up' allows judges greater authority, and certainly confidence, in issuing their decisions.

Nurlaelawati's *Modernization, Tradition and Identity* reveals that ambivalence towards the KHI leads to the conclusion that the KHI is still considered as an 'open' text. In 2003, the Department of Religious Affairs proposed a provisional draft on applied rules of law for the religious court [Rancangan Undang-Undang Hukum Terapan Peradilan Agama]. The draft was based on KHI materials and provisions. The main idea was to upgrade the legal status of KHI from that of Presidential Instruction to an Act. As a response to the draft above, in 2004, the Department of Religious Affairs Working Group on Mainstreaming Gender issued a counter-legal draft (CDI). It proposed at least 23 points that aimed not only to change or amend the Bill fundamentally, but also to reform Islamic family law based on the ideas of pluralism [*ta'addudiyah*], nationality [*muwathanah*], upholding human rights [*iqamat al-huquq al-insaniyyah*], democracy [*dimuqrathiyah*], public benefits [*mashlahat*] and gender equality [*al-musawah al-jinsiyyah*].

Nurlaelawati briefly points out how traditional Muslim scholars reacted angrily to the CDI, in the belief that such proposals to reform Islamic family law sat too far from Islamic legal tradition. Once again, the debate indicates that it is not easy to reconcile modernization, tradition and identity in Indonesia, and indeed in other countries either. This well written book is an invaluable resource for scholars and students in social sciences, human rights, theology and law, as well as for a broader audience engaged with social, political and religious affairs.