

IMPLEMENTATION ISSUES WITH THE 1974 MARRIAGE LAW AND THE COMPILATION OF ISLAMIC LAWS

Abdul Wahab Abd. Muhaimin

Institute for Quranic Studies Jakarta
Jl. Ir. H. Juanda 70, Ciputat, Jakarta
E-mail: wahabmuhaimin@gmail.com

Abstract: *Implementation Issues with the 1974 Marriage Law and the 1991 Compilation of Islamic Laws.* Whether we appreciate it or not, the 1974 Marriage Law and the 1991 Compilation of Islamic Laws (KHI) pertaining to marriage do take into account shariah (Islamic law) into some extent. This is because both bodies of laws say that marriage disputes throughout the country are to be resolved by Religious Court judges. Since shariah and *fiqh* act as a guide for these judges in such disputes, both can be said to be in effect within the framework of national law. However there are still have shortcomings when it comes to implementating both. In order to overcome these, there is a vital need to adopt a supplementary law, such as the Religious Judicature Material Act, which will soon be deliberated in parliament.

Keywords: marriage, wife-initiated divorce, husband-initiated divorce

Abstrak: *Implementasi Isu Pada UU No. 1 Tahun 1974 tentang Perkawinan dan Kompilasi Hukum Islam.* Diakui atau tidak, UU No. 1 Tahun 1974 tentang Perkawinan dan Kompilasi Hukum Islam pada praktiknya telah memperhitungkan hukum Islam pada batas-batas atau bagian tertentu. Hal ini dikarenakan kedua perangkat hukum tersebut mengatakan bahwa sengketa perkawinan di seluruh negeri harus diselesaikan oleh hakim Pengadilan Agama. Sejak hukum syariah dan fikih bertindak sebagai panduan bagi para hakim dalam perselisihan tersebut, keduanya dapat dikatakan berlaku dalam kerangka hukum Nasional. Namun pada implementasinya, kedua hukum tersebut masih memiliki kelemahan. Untuk mengatasi ini, adalah kebutuhan penting untuk mengadopsi hukum pelengkap, seperti Hukum Terapan pada Peradilan Agama, yang akan segera dibahas di parlemen.

Kata Kunci: perkawinan, cerai gugat, cerai talak.

Introduction

Marriage, the legal contract between two spouses, is legitimised not only through the Qur'an and the Hadith, but also, following its adoption into Law 1 of the Marriage Act of 1974 and the Compilation of Islamic Law (KHI), through positive law in Indonesia. But marriage has long been practiced by the Muslim community in Indonesia, well before the introduction of these two normative foundations in the form of positive law. Many consider that such a form of marriage has not necessarily been rendered illegitimate as a result of the inception of these new positive laws.

Nevertheless, it is clear that from a national standpoint, these two foundations form the *sine qua non* for marriage between Indonesian Muslims, and are particularly important for resolving complications arising from marriage. However, having three different

layers of legitimacy for resolving such complications play no small part in further complicating the legality of these issues, and thereby how such issues should be judged. But on the other hand, without these foundations, the resolution process runs the risk of being seen as illegitimate. This in turn runs the risk of being treated as not having authority, and therefore not being ineffective. Legal grounds are needed for non-litigious reasons, like legitimating the act of marriage, and for judges to settle complications arising from marriage through the litigious court process. Religious Court Judges have been aided greatly by the legal foundations that The Marriage Law and the KHI provide, in resolving disputes about marriage and other matters related to marriage in court. But there are still weaknesses, not the least of which being the uncertainty that can arise from their co-existence, a point not lost on many Muslim scholars.

Review of the Marriage Law and the KHI

As legal products, the Marriage Law and the laws about marriage contained in the KHI are not without weaknesses. Following controversial drafting processes, the two positive laws—*sui generis* for Muslims, who constitute the majority of the country—have been established in Indonesia for some time now. But the social context into which they were introduced is very different then from what it is today. For these laws to maintain efficacy, they need to be adaptive to their contemporaneous social context. So if they are obsolete, or not amenable to adaption, this is a serious weakness. Nevertheless, a few good aspects—from both secular and Islamic perspectives—of the two positive laws are as follows:

First, the Marriage Law is essentially a codification of laws mostly derived from the Quran, Hadith, and conclusions reached by *fiqh* jurists that have been introduced to national legislation. Positive marriage laws can also therefore be categorized as being synonymous with Islamic marriage laws, because all of the contents of the former are in accordance with, or not contrary to, the latter. Accordingly, it is Islamic marriage law that is binding for litigants in Religious Courts in Indonesia.

Second, the Marriage Law and the KHI on marriage treats husbands and wives as equal, and protects their right to equality in domestic and social life. There is nothing separating a man from a woman in the eyes of Allah, only their level of piety.

Third, the rights and obligations of husbands and wives contained from articles 30 to 34 of Marriage Law are arguable. Sajuti Thalib breaks them down into five things: first, the ability to love, sympathize and build a caring and peaceful relationship between themselves and with their community. Second, the husband is obliged to be the head of the family and the wife is obliged to be a housewife. Third, their place of residence is to be provided for by the husband and both he and his wife must live in that one residence. Generally it is the husband who is obliged to provide a permanent residence, but in certain circumstances the residence can be provided for together. Fourth, paying for the cost of living is the preserve and responsibility of husband, but the wife also has to help out her husband by supplementing those costs. Fifth, the woman is responsible for managing the affairs of the household and is obliged to oversee spending for household costs responsibly.¹

Martiman has a slightly different view on what

¹ Sajuti Thalib, *Hukum Kekeluargaan Indonesia, Berlaku Bagi Umat Islam*, (Jakarta: UI Press, 1982).

these rights and obligations are: first, love one another; second, respect and appreciate one another; third, be faithful to one another; fourth, be mutual in giving and receiving physical and spiritual support to one another; fifth, for the husband, make a living for his children and wife, protect his wife and provide for all the necessities of household life, as far as he is physically able to; and sixth, for the wife, organise the best possible household.²

Busthanul Arifin adds that while articles 30 to 34 of the Marriage Law say that husband and wife share equal status, each spouse has different functions and responsibilities in order to achieve their shared objective of a happy household and a tranquil, loving and compassionate family. Not only that, Arifin argues that these marriage rights and obligations have the capacity to adjust to changes in society, such that if they are deemed no longer fair they can be changed so that they don't undermine the stability of that relationship.³ Yahya Harahap reiterates this view, adding that while decisions need to be conferred together, the wife is entitled to pursue social status outside of the household environment and the husband cannot stop her from doing so.⁴

In the KHI, the rights and obligations of husbands and wives are listed in more detail than they are in the Marriage Law; it arguably just elucidates and confirms those provisions. These are contained in from articles 77 to 83 (inclusive). Articles 77 and 78 set out the spouses' rights, article 79 concerns the status of husband and wife, article 80 concerns the obligations of the husband, article 81 deals with the place of residence, article 82 is about obligations of the husband towards multiple wives (polygamy) and article 83 relates to the obligations of the wife. The KHI also goes into more detail with matters that are only explained generally within the Marriage Law, for the exact needs that have to be fulfilled by the husband, which include *kiswah* (clothing), shelter, food, nursing expenses, and paying for the children's education.

Article 80 is based on Allah, who says, "Men are *qawwâm* of women" (surah al-Nisa [4]: 34). If we translate *qawwâm* as "leader" then this forms the basis for the view that only the husband is entitled to be the leader of the family (even though both spouses have

² Prodjohamidjojo Martiman, *Hukum Perkawinan Indonesia*, (Jakarta: Indonesia Legal Center Publishing, 2002).

³ Busthanul Arifin, *Pelembagaan Hukum Islam di Indonesia, Akar Sejarah, Hambatan, dan Prospeknya*, (Jakarta: Gema Insani Press, 1966).

⁴ Yahya Harahap, *Hukum Perkawinan Nasional*, (Medan: Zahir Trading, 1975).

equal rights). However not everyone agrees that this is how *qawwâm* should be translated, and thus why and if so how wives should be led by their husbands.

When translated simply as 'leader', Rasyîd Ridhâ argues that the reason men are *qawwâm* is because God has given them both *quwwah* (strength) and *qudrah* (ability). Their superior business acumen is due to their ability to fully commit to making a living without being hampered by the reproductive process (menstruation, pregnancy and childbirth), as women are. It is implied that the term refers purely to their right to power.⁵ But while this may explain *why* men assume leadership in family context, it doesn't justify that leadership for any other reason than that it is a God-given right, where that is justification enough.

On the other hand, al-Thabarî interprets *qawwâm* to mean 'legally liable' or 'guarantor', since the husband is responsible for protecting his wife in order to fulfil his obligations to her and Allah.⁶ In a similar vein, Muḥammad Asad, a contemporary Quranic commentator, understands the word to refer to 'to take full care of', both in a physical and moral form.⁷ There are also scholars who interpret *qawwâm* as simply meaning protector, like Abdullah Yusuf Ali for example.⁸ These interpretations all emphasize the right to lead because of their responsibilities as husbands, rather than because they possess more natural power than women. Leadership is still a God-given right, but the justification for it is because it gives them the ability to protect women, and therefore the responsibility to do that.

Interpreted in this way, *qawwâm* is very much in keeping with the fundamentals of the Marriage Law and the KHI. It is also the justification for polygamy; if each wife can be treated equally by their husband, for instance in terms of financial security to cover the cost of living for the family, then since the husband is fulfilling his obligations as such in each instance, polygamy can be seen as a perfectly justifiable practice. If this justice cannot be done for more than one wife then it is not allowed. If the Marriage Law and the KHI were to treat *qawwâm* in the Ridhâ sense of the word, perhaps polygamy, regardless of any responsibility to be fair across the board, still would be acceptable. The fact that it is not suggests that *qawwâm* is not treated in

such a way here.

In this sense, many Muslim scholars see polygamy as a man's duty to care for women, and in turn the children, as they are deemed to require it, insofar as he is able to provide such care; critics, meanwhile, view the practice as really just a way to legitimize the opposite, that is female duty to supposed male need. Closing the door on polygamy for men who can fulfill the necessary pre-requisite of fairness to each wife runs the risk of opening the door to adultery. The latter can destroy a family, whereas the former, done fairly, can strengthen it. The Marriage Law, and the KHI in a little more detail, outline this view: four wives maximum, on the condition that the man can prove he is able to act justly to all of them. For the wife's part, polyandry is not condoned because it obscures the line of descent.

Fourth, the Marriage Law and the KHI clarify the complex issue of the legality of assets that belong to two spouses and or their offspring. In Indonesia, the allocation of the assets of a household can correspond to a society that practices patrilineal, matrilineal or bilateral descent. Moreover, differences are found in how income in a marriage is managed. Since the division of these assets, also called joint property, is implemented after divorce, provisions regarding this property can safeguard the wife against being left with no assets. This is a distinct probability without such provisions, as providing the income to acquire these assets is the husband's role. It is also an unfair prospect, as while her role contributes to the sum value of the family, of which joint property is a part, it does not necessarily contribute income. And since value can be more easily equated to income, and thus the husband, she would struggle to receive any fraction of this value following divorce without special provisions.

Neither syariah nor *fiqh* recognizes mixed property between husband and wife. Even the dowry is treated as the individual property of the husband after the marriage has taken place. Only if the husband and wife (in a non-polygamist household) mutually consent for the dowry to be joint property does it become so. These provisions are therefore important as a guide to settle issues arising from divorce, especially if the husband is a polygamist. For instance, if a husband who continues to second, third or fourth marriages, any joint wealth he shares with an existing wife must not be mixed with that of any new wives arbitrarily, but must be accounted for in a way that doesn't cause confusion.

Fifth, one of the articles in the KHI deals with female pregnancy as a result of adultery, a common occurrence in Indonesia. Based on deliberations by Islamic scholars

⁵ Muḥammad Rasyîd Ridhâ, *Tafsîr al-Manâr*, (Mishr: al-Hay'ah al-Mishriyah al-'Âmmah li al-Kitâb, 1973).

⁶ Al-Thabarî, *Jami' al-Bayân*, (Bayrût: Dâr al-Fikr, 1988).

⁷ Muḥammad Asad, *The Message of the Qur'an*, (Gibartar: Dâr al-Andalus, 1980).

⁸ 'Abd Allâh Yûsuf 'Alî, *Al-Quran: Terjemah dan Tafsîrnya*, Translated by Ali Audah, (Jakarta: Pustaka Firdaus, 1993).

about the various disadvantages (*mudharat*) and types of harm (*mafsadat*) emerging from this problem, the KHI says that the two adulterers are required to marry, without having to be wedded again (*tajdid al-nikâh*) after the baby is born.

Sixth, the Marriage Law is a doubly binding force for Indonesian Muslims, who, as stated in the Official Gazette, must follow national law and Islamic law. This is great from an Islamic perspective. Importantly, the state profits, due to having legislation that is seen as legitimate by enough people to have authority for all citizens to comply with it. Given this efficacy, Islam also profits, insofar as it meaningfully contributes to the state on the subject of the development of law, it demonstrates that Islamic teachings are fitting for any time and place, and state power makes it even harder for Muslims to shirk from the obligations they have to their faith when it comes to marriage.

Seventh, with the Marriage Law and the KHI on marriage, wives are safe in the knowledge that they have the right to apply for (wife-initiated) divorce to the Religious Court, if the husband is not responsible and cannot fulfill his obligations to her, or engages in domestic violence with her (*Kekeerasan dalam Rumah Tangga* [KDRT]) and or others.

Both legal frameworks, however, have some weak points, from both Islamic and pragmatic perspectives. First, within the Marriage Law a number of key terms in the general provisions aren't clearly defined, making it difficult to say conclusively what exactly those provisions mean. Furthermore not all of the problems associated with marriage are included in the two frameworks. For example, the issues of who can act as the *wali*, the nature of the marriage proposal, and the bride price, all of which are important to include in the books of *fiqh* and customary law, are not discussed in the Marriage Law.

Second, even though it has proven an effective reference point for Religious Court Judges throughout Indonesia, the KHI on marriage has no legally binding force because it is not included in the Official Gazette as a publication that fulfills the necessary requirements to possess such a force. Enacting Law 10 in 2004 on the formation of Regulatory Legislation saw a Presidential Instruction, on which the legitimacy of the KHI is based, no longer sufficient to make a publication like it legally binding.

Third, the words *perkawinan* and *pernikahan*, even though they essentially have the same meaning, aren't used in the KHI in the same way in which they are used in the Marriage Law. This is an unnecessary

inconsistency. Fourth, more importantly, the Marriage Law is yet to explicitly address wife-initiated divorce. Fifth, criminal sanctions do not cover violations of marriage provisions, except for a small section in the Government Regulation 9 of 1975 (Peraturan Pemerintah No. 9 Tahun 1975) on the implementation of the Marriage Law, which in any case is too brief and no longer appropriate for today's economic conditions. This means that violators of marriage provisions have the ability escape appropriate criminal sanction.

Sixth, in article 116 of the KHI on marriage, one of the reasons that can be cited for marriage breakdown is changing religion, or apostasy (*murtad*), because "that causes the occurrence of discordance in household". This phrase implies that apostasy does not in and of itself immediately render a marriage void, but simply that it contributes to the breakdown of marriage which can then be adjudged as void. In the instance of becoming apostate, if the marriage is not rendered void at precisely that point in time then the principle that Muslims must marry Muslims is undermined.

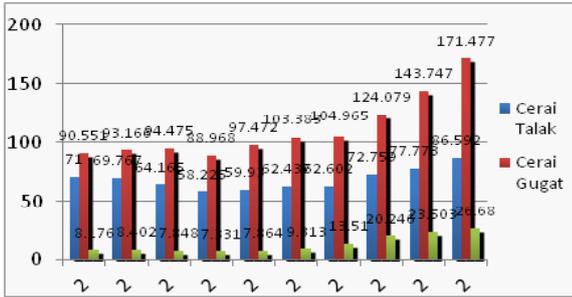
If the KHI's section on marriage is upgraded to become a HMPA bill and passed into law, with its weaknesses fixed, it will supplement these deficiencies in the Marriage Law effectively.

NTCR within the Marriage Law and the KHI

Since their respective implementations, the Marriage Law and the KHI have had an influence over the Muslim community in Indonesia. In addition to marriage itself, how re-marriage, husband-initiated divorce, and especially wife-initiated divorce (*Nikah, Talak, Cerai, and Rujuk*, or *NTCR*) are understood has also shifted. This is as a result of growth in legal awareness in the community. This is especially true of women where, in general, they have as much knowledge of their rights as laid out in the Marriage Law and KHI as men do theirs. Irrespective of one's economic background and education level, people can now access these rights, which before their codification were not really publicly known. Now, if a husband mistreats his wife, she knows she can apply for divorce to their local Religious Court.

The influence of the Marriage Law and the KHI can be demonstrated by charting the emergence of the NTCR cases in Religious Courts in Indonesia on a year-by-year basis, following their respective implementations. From 2000 to 2009 (inclusive), NTCR cases dominated proceedings in the Religious Court, particularly wife-initiated divorces. Data from the Religious Courts Body of the Supreme Court reveal this trend:

Graph 1
Case Data of Religious Jurisdiction
From 2000 to 2009

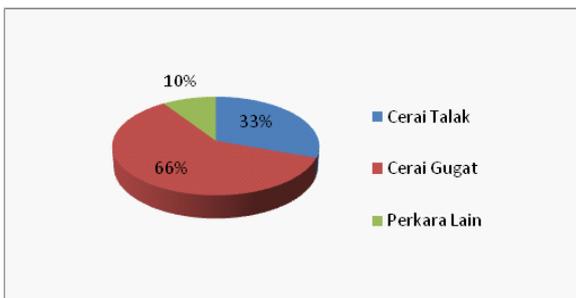


Source: Obtained from the Supreme Court, Religious Courts Body, 2009

Looking at the graph above, we see that divorce cases in the Religious Court system are increasing year by year. 161,672 cases of divorce – both wife and husband initiated - in 2000 shot up to 258,069 in 2009. That is an increase of just under 60%, which means an average increase of almost 6% each year.

Of those cases, wife-initiated divorce is far greater than husband-initiated divorce, especially from 2005 to 2009 where the annual percentage increase in that category averages to almost 45%. This distinction is at its starkest in 2009: with wife-initiated divorce cases reaching 171,477 and husband-initiated cases reaching 86,592, roughly two in every three cases were female-initiated. Further data about these two types of cases, and other ones, in 2009 is represented in following graph:

Diagram 1
Comparison of Case Percentages in 2009

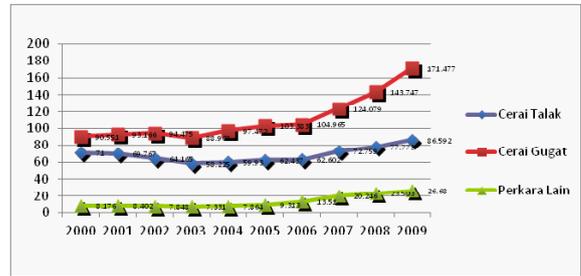


Source: Obtained from the Supreme Court, Religious Courts Body, 2009

With roughly two in every three of the 258,069 divorce cases being wife-initiated, and with divorce cases representing 90% of all cases, well over half of all cases see wives initiating divorces in 2009.

From 2000 to 2009, we see the following with divorce:

Graph 3
Case Data in the Religious Court
From 2000 up to 2009



Source: Obtained from the Supreme Court, Religious Courts Body, 2009

From this data, of the 1,930,527 cases of divorce that took place throughout Indonesia which were taken on by the courts, 1,112,583 were wife-initiated cases of divorce, compared with only 685,371 husband-initiated and 132,873 other cases. But the substantial difference between wife-initiated and husband-initiated divorce rates is also due to wife-initiated divorce being easier and quicker when compared to husband-initiated divorce. Some couples who have agreed to divorce therefore undertake a compromise so that the wife files for their divorce in the hope that the process is straightforward and settled more quickly.

Lawrence Friedman argues that there are three elements to a legal system—legal structure, legal substance, and legal culture—each of which needs to be compatible with one another for the system to work as it is intended to. In the case of wife-initiated divorce, the convergence of the implementation of it in the Marriage Law and the KHI (substance), awareness of that law (culture), and the relatively simple procedure in the Religious Court that that law affords (structure) all conspire to deliver a far greater number of wife-initiated divorce compared to husband-initiated divorce in the Religious Court. Therefore, even if the system works, the data coming from it doesn't necessarily accurately reflect the truth of the situation, in this case the true rate of wives initiating divorce of their own volition.

But when this arrangement is not the case, this figure doesn't necessarily demonstrate that wives increasingly believe that their husbands aren't fulfilling their obligations to them and or respecting their rights, but rather that they are increasingly acting on that belief. On the other hand, husband-initiated divorce was mainly due to factors having to do with obligations not to him but to her, like apostasy. This is in no small part due to the fact that the procedure facilitated by the Marriage Law and the KHI has made it easier for wives to file for divorce today. It also shows that they have been able to learn what these rights are. Indeed, what wives

previously knew about divorce, that only the husband could file for it by way of *talaq*, can only be supplanted by knowing that such a legitimate procedure now exists. Unsurprisingly, five big Indonesian cities—Surabaya, Semarang, Bandung, Jakarta, and Makassar—where access to this knowledge is greater, accounted for 72% of cases of wife-initiated divorce in 2009.

Closing Remarks

The Marriage Law, which is now nearly 40 years old, is starting to draw criticism and calls for reform from the Judicial Review. Similarly, many still resent the fact that the KHI has no legally binding force. It is therefore timely that into this environment will soon come a new bill, the Religious Judicature Material Act (HMPA), to supplement the Marriage Law and the KHI. The emergence of the HMPA ushers in the prospect that the weaknesses in both frameworks can be amended appropriately. Not only that, it reaffirms that as far as the state is concerned, legal rule relating the subject of marriage is a *sine qua non* of Indonesian life, including Muslim life. □

Bibliography

- ‘Abd al-Hakīm, Abū Shuqqah, *Tabrīr al-Mar’ah fī Ashri al-Risalah*, Quwayt: Dār al-Qalam.
- ‘Alī, ‘Abd Allāh Yūsuf, *Al-Quran: Terjemah dan Tafsirnya*, translated by Ali Audah, Jakarta: Pustaka Firdaus, 1993.
- Abdurrahman, *Kompilasi Hukum Islam di Indonesia*, Jakarta: Akademika Pressindo, 1992.
- Arifin, Busthanul, *Pelebagaan Hukum Islam di Indonesia, Akar Sejarah, Hambatan, dan Prospeknya*, Jakarta: Gema Insani Press, 1966.
- Asad, Muhammad, *The Message of the Qur’an*, Gibraltar: Dar al-Andalus, 1980.
- Azra, Azyumardi, *The Indonesian Marriage Law of 1974 An Institutionalization of the Sharia for Social Changes, in Sharia and Politics in Modern Indonesia*, Singapore: ISEAS, 2003.
- Depag RI, *Naskah Akademik RUU HMPA Bidang Perkawinan*, Jakarta: Bimas Islam, 2004.
- Dimiyati, Khudzaifah, *Teorisi Hukum, Studi tentang Pemikiran Hukum di Indonesia 1945-1990*, Surakarta: Universitas Muhammad Surakarta, 2004.
- Friedman, Lawrence, *American Law: an Introduction*, second edition, New York: W.W. Norton & Company, 1998.
- Harahap, Yahya, *Hukum Perkawinan Nasional*, Medan: Zahir Trading, 1975.
- Inpres No. 1 Tahun 1991 (Kompilasi Hukum Islam [KHI])
- Aripin, Jaenal, *Peradilan Agama dalam Bingkai Reformasi Hukum di Indonesia*, Jakarta: Kencana Prenada Media Utama, 2008.
- Mahkamah Agung RI, *Laporan Tahunan Perkara Cerai Talak Cerai Gugat dan Perkara Lain*, Jakarta: Direktorat Peradilan Agama, 2000 -2005.
- Mahkamah Agung RI, *Laporan Tahunan Perkara Cerai Talak Cerai Gugat dan Perkara Lain*, Jakarta: Direktorat Badan Peradilan Agama, 2006 - 2009.
- Peraturan Pemerintah No. 9 Tahun 1975
- Prodjohamidjojo, Martiman, *Hukum Perkawinan Indonesia*, Jakarta: Indonesia Legal Center Publishing, 2002.
- Purbacaraka, Purnadi & Soekanto, Soerjono, *Aneka Cara Pembeda Hukum*, Bandung: Alumni, 1980.
- Ridhâ, Muḥammad Rasyîd, *Tafsîr al-Manâh*, Mishr: al-Hay’ah al-Mishriyyah al-’Âmmah li al-Kitâb, 1973.
- Thabarî, al-, *Jâmi’ al-Bayân*, Bayrût: Dâr al-Fikr, 1988.
- Thalib, Sajuti, *Hukum Kekeluargaan Indonesia*, Jakarta: UI Press, 1982.
- Undang-Undang No. 1 Tahun 1974 tentang Perkawinan