

**LEGAL POLICY OF ISLAMIC COURT'S AUTHORITY IN
BIODATA CORRECTION OF MARRIAGE CERTIFICATE**

Thesis

By:

Khoirur Roziqin
NIM 12210002



AL-AHWAL AL-SYAKHSIYYAH DEPARTMENT

SHARIA FACULTY

MAULANA MALIK IBRAHIM

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2016

STATEMENT OF THE AUNTENTICITY

In the name of Allah (swt),

With consciousness and responsibility towards the development of science, the author declares that the thesis entitled:

LEGAL POLICY OF ISLAMIC COURT'S AUTHORITY IN BIODATA CORRECTION OF MARRIAGE CERTIFICATE

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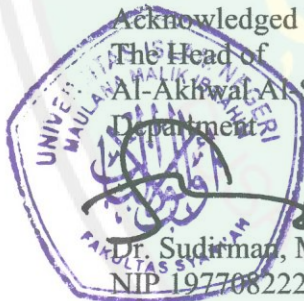
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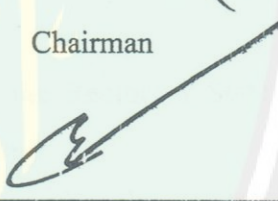
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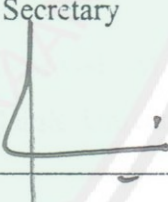
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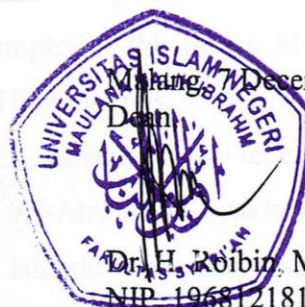
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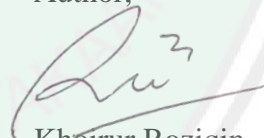
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Malang, 20 August 2016
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NIM 12210002

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ABSTRACT

Khoirur Roziqin, NIM 12210002, 2016. *Legal Policy of Islamic Court's Authority in Biodata Correction of Marriage Certificate*. Thesis. Al-Ahwal Al-Syakhsiyyah Department, Sharia Faculty, The State Islamic University Maulana Malik Ibrahim of Malang. Supervisor: Dr. H. Mujaid Kumkelo, M.H.

Keyword: Legal Policy, Islamic Court, Authority, Biodata Correction

Legal values that contained by chapter 32 verse (2) Religious Ministry Regulation No. 11 Year 2007 on Marriage Recording and chapter 93 President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration are contradicted each other. Both of regulations aim to regulate on biodata correction in marriage certificate. The contradiction is in authority form of which court that has competency to decide case of biodata correction. As the impact, it caused ambiguity of legal value and illegality of law for parties and civil registration officer.

Research approach that used in this research is statute approach which means obtaining legal material from any regulations that related to the object. The research is including into normative research. Primary legal materials are obtained from statutes that have relation with the subject and Islamic court decisions while the secondary from legal theory of law scholars on their books.

The result of this research states biodata correction in marriage certificate is Islamic Court absolute authority without objection and contradiction. While some phrases on President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration indicate an interpretation that can caused dualism of authority. Therefore the writer suggests a change of chapter 1 verse 21 with an interpretation of UPTD Implementer Institution is a Unit Pelaksana Teknis Dinas Implementer Institution that shortened as UPTD Implementer Institution unit in sub-district level which provides civil recording services with certificate publishing authority except marriage recording of muslim. The suggestion aims to prevent dualism of absolute authority along with misuse of legal standing by district court on its authority of biodata correction on marriage certificate as occur nowadays.

ABSTRAK

Khoirur Roziqin, NIM 12210002, 2016. *Politik Hukum Kewenangan Pengadilan Agama dalam Permohonan Perubahan Biodata Akta Pernikahan*. Skripsi. Jurusan Al-Ahwal Al-Syakhsiyya, Fakultas Syari'ah, Universitas Islam Negeri, Maulana Malik Ibrahim Malang. Pembimbing: Dr. H. Mujaid Kumkelo, M.H.

Kata Kunci: Politik Hukum, Pengadilan Agama, Kompetensi, Perubahan Biodata

Norma hukum yang terdapat pada pasal 32 ayat (2) Peraturan Menteri Agama No. 11 Tahun 2007 tentang Pencatatan Nikah dan pasal 93 Peraturan Presiden No. 25 Tahun 2008 tentang Persyaratan dan Tata Cara Pendaftaran Penduduk dan Pencatatan Sipil bersifat kontradiktif. Kedua peraturan di atas sama-sama mengatur tentang perubahan biodata akta perkawinan. Kontradiksi tersebut berupa kewenangan bagi pengadilan yang berwenang memutus permohonan perubahan biodata. Sebagai dampaknya akan menimbulkan dualisme kewenangan absolut pengadilan.

Pendekatan penelitian yang digunakan pada penelitian ini adalah pendekatan peraturan perundang-undangan (*statute approach*) dengan jenis penelitian normatif. Bahan hukum primer didapatkan dari peraturan perundang-undangan yang berkaitan dengan objek penelitian serta beberapa putusan Pengadilan Agama sedangkan teori-teori hukum berbagai pakar digunakan sebagai bahan hukum sekunder.

Hasil penelitian ini menyatakan bahwa dasar hukum Pengadilan Agama dalam kewenangan absolut perubahan biodata akta pernikahan mendukung tanpa ada kontradiksi. Sedangkan beberapa frasa pada Peraturan Presiden No. 25 Tahun 2008 tentang Persyaratan dan Tata Cara Pendaftaran Penduduk dan Pencatatan Sipil menunjukkan interpretasi yang dapat menimbulkan dualisme. Sehubungan dengan itu penulis mengusulkan perubahan pada pasal 1 ayat 21 dengan interpretasi UPTD Instansi Pelaksana sebagai satuan kerja di tingkat kecamatan yang melaksanakan pelayanan pencatatan sipil dengan kewenangan menerbitkan akta kecuali untuk akta pernikahan bagi orang islam. Usulan ini bertujuan untuk mencegah dualisme kewenangan absolut serta penyalahgunaan dasar hukum oleh Pengadilan Negeri dalam kewenangannya tentang perubahan biodata akta pernikahan seperti yang terjadi saat ini.

ملخص البحث

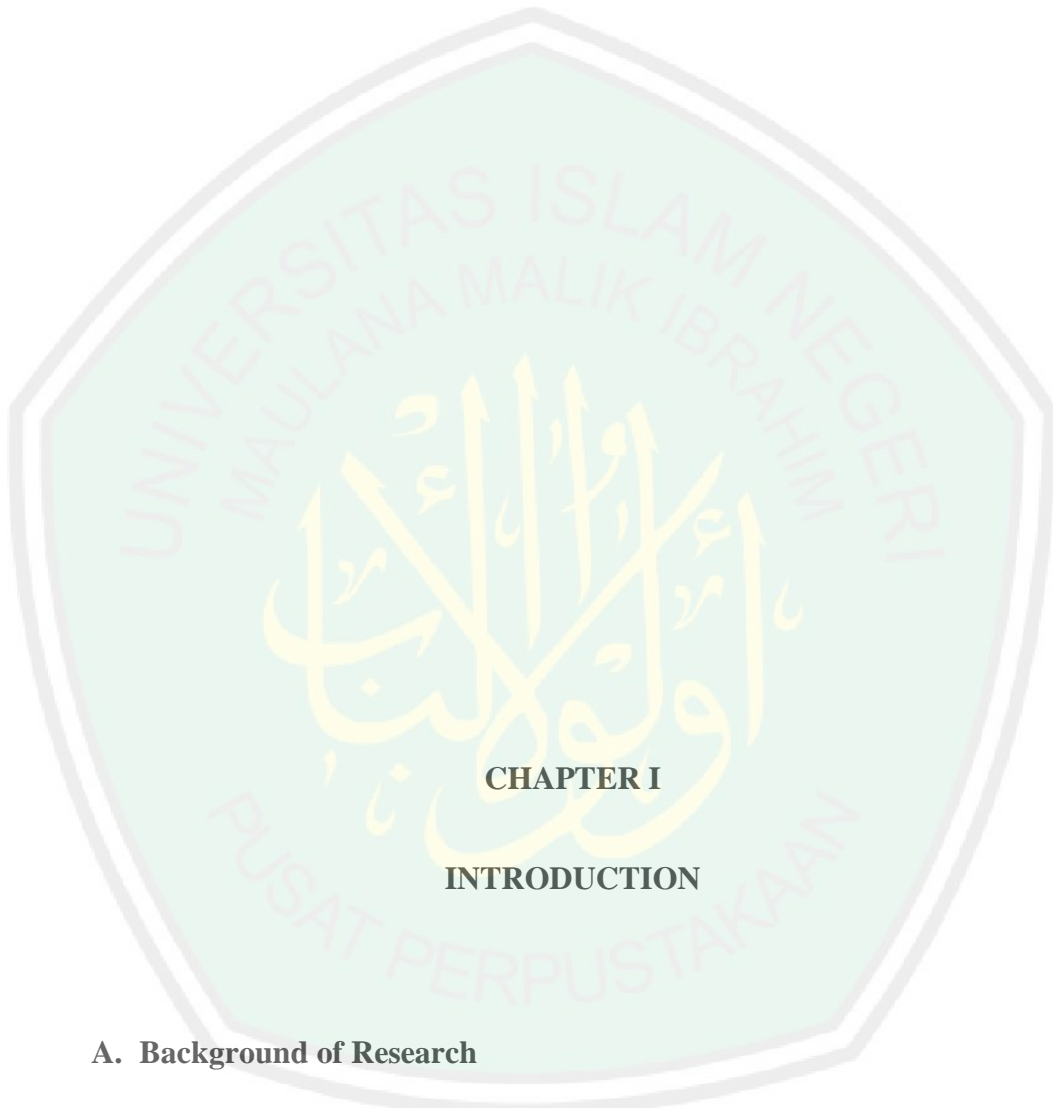
خير الرازيين, 12210002, 2016. سياسة القوانين سلطة المحكمة الدينية لطلب تغيير البيانات الشخصية في وثائق النكاح. البحث الجامعي. قسم الأحوال الشخصية. كلية الشريعة. جامعة مولانا مالك إبراهيم الإسلامية الحكومية مالانج. المشرف: الدكتور الحاج مجاهد كمكيلو الماجستير.

الكلمات الرئيسية: سياسة القوانين، المحكمة الدينية، الكفاءة، تغيير البيانات الشخصية.

المعيار القانوني التي مكتوب في الفصل 32 الفقرة 2 من تنظيم الوزارة الدينية الرقم 11 السنة 2007 عن تسجيل النكاح والفصل 93 من تنظيم رئيس الجمهورية الرقم 25 السنة 2008 عن شروط وأسلوب تسجيل المواطن وتسجيل المدنيين المتناقضة. ينظم كلا التنظيم المذكور عن تغيير البيانات الشخصية في وثائق النكاح. المتناقضة السلطة لمحكمة التي لديها السلطة لتقرر استحلاف تغيير البيانات الشخصية. وللأثر، سيثير الازدواجية السلطة المطلقة للمحكمة.

المدخل المستخدم في هذا البحث هو المدخل التشريعات (*statue approach*) مع البحث المعياري. وُجدَ المواد القانونية الأساسية من التشريعات المتعلقة بأغراض البحث وكذلك بعض من أحكام المحكمة الشرعية. أما أُسْتُخدم النظريات القانونية من القانوني للمواد القانونية الثانوي.

ذكرت نتائج البحث أن الأساس القانوني للمحكمة الدينية في السلطة المطلقة لتغيير البيانات الشخصية في وثائق النكاح يدعمه دون التناقضات. ويدلّ بعض الفصل في تنظيم رئيس الجمهورية الرقم 25 السنة 2008 عن شروط وأسلوب تسجيل المواطن وتسجيل المدنيين التفسيرات التي تسبب الثنائية. وبالنظر، يقترح الباحث التغيير في الفصل 1 الآية 21 مع التفسيرات الإدارة المنفذين كوحدة العمل في المستوى المناطق الفرعية (UPTD)، التي تحقق مرفق المدنيين مع السلطة ليصدرَ الوثائق إلا الوثائق النكاح للمسلمين. تهدف ليمنع ازدواجية السلطة المطلقة وإساءة الأساس القانوني من المحكمة الحكومية في سلطته عن لتغيير البيانات الشخصية في وثائق النكاح.



CHAPTER I

INTRODUCTION

A. Background of Research

Indonesia is a law state. As the consequences there should be three basic elements, those are: basic statute or constitution that contains rules about relation between government and citizen , separation of power among state institutions, rights protection of freedom for citizen.¹ One of the characteristics of central *rechstaat* idea is admission of human rights

¹ Nikmatul Huda, *Hukum Tata Negara Indonesia*, Jakarta : PT. Raja Grafindo Persada, 2005, p. 74

protection based on freedom and equality principle. By the existence of basic statute or constitution will guarantee constitutional rights by freedom and equality principle. Separation of power is created to avoid misuse of power or basically violence of equality in human rights.

Legality principle is one of most important basics in law state, the substance of this principle is to order every action of state institutions should be based on written statute.² Without clear legal standing, any institutions has no authority to do any action that can influence or change law status of person or institution.

According to Montesquieu state institutions are divided into three, executive, legislative and judicative.³ State institution is any institution formed by order of statute. Influence of *trias-politica* doctrine is reflected by common scientific explanation about division of institution to those.

Judicative institution has task to maintain the law based on procedure as written in the statute, as consequences supreme of law because Indonesia is law state. Islamic court is the only one judicative institution which only available for citizen who believes on Islam. In progress to fulfill its duty and main function, Islamic Court has certain competences which separated into two kinds, those are relative and absolute.

Relative competence is authority of Islamic court which in same kind and grade, deference of other courts in same kind and grade. In the other word, this competency is based on authority's location of courts.

² Nikmatul Huda, *Hukum Tata Negara Indonesia*, Jakarta : PT. Raja Grafindo Persada, 2005, p. 78

³ Jimly Asshidqie, *Perkembangan & Konsolidasi Lembaga Negara Pasca Reformasi*, Jakarta : Sinar Grafika, 2010, p. 30

Whereas absolute competence is authority of court based on kind of case or kind of court or grade of it.⁴

Absolute competence of Islamic court as written in article 49 and 50 Act No. 7 Year 1989 about Islamic Court which revised into Act No. 3 Year 2006 including marriage, inheritance, wasiat, hibah, zakat, sedekah and Islamic economy.

Beside absolute competence which written in Act No. 3 Year 2006 on Islamic court, correction of marriage certificate biodata was propose to Islamic court. For example case No. 0111/Pdt.P/2015/PA.Prob that proposed to Islamic court of Probolinggo⁵. Judicative institution for Muslim in Probolinggo received this case based on the main task of judge based on article 10 section (1) Act No. 48 Year 2009 on Judicial Power, declared:

“Courts is prohibited to refuse case for checking, judging and deciding that proposed to it by reason there is no law or ambiguity, but have to check and decide it.”

This article is one of the dynamic forms of Islamic court competence to check, judge and decide a case. This case is proceed from people administrations need, generally to complete certificate of birth, the other to complete requirement for haji registration. Because dissimilarity among authentic certificate, can make one of those certificates lost its legality.

⁴ Erfaniah Zuhriah, *Peradilan Agama Indonesia (Sejarah Pemikiran dan Realita)*, Malang : UIN-Malang Press, 2008, p. 199,204

⁵<http://putusan.mahkamahagung.go.id/putusan/downloadpdf/80b2a1b392bb4bdc3e0effcd66ce0b4f/pdf> accessed at 18 October 2015

Beside of that, also based on article 34 section (2) Religious Ministry Regulation No. 11 Year 2007 on Marriage Recording, declared :

“Changes related to biodata of husband, wife or wali have to base on decision of Court in the certain district.”

Meaning of word “Court” in article above is Islamic court like what was explained in article 1 section (5) Religious Ministry Regulation No. 11 Year 2007 on Marriage Recording :

“Court is Islamic court or Mahkamah Syariah”

Biodata correction is changes of name, place or birth date, citizenship status. Kantor Urusan Agama has authority to do those corrections on certificate of civil registration, especially marriage certificate. Certificate of civil registration is a latter or official recording which made by state officer of civil registration about events that effect on legal status of person. Marriage certificate is authentic certificate that published by officer who has authority because marriage legal event between a man and women as husband and wife with purpose to build happy, timeless and eternal household based on belief in the one true God as mentioned in Act No.1 Year 1974 on Marriage.

A years after Religious Ministry Regulation No. 11 Year 2007 on Marriage enforced, government enforce new President Regulation (Perpres) No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration, to be exact article 69 *jo* 92 section (2) which

contradict with Religious Ministry Regulation No. 11 Year 2007 on Marriage that referred:

- (1) *Marriage recording based on decision of court is doing in Implementer Institution to be recorded into population database.*
- (2) *Marriage recording as mentioned in section (1) can be proceeding by showing court decision.*

Recording of marriage as mentioned in article above may interpret as recording after *isbath nikah* decision by the court, recording after decision of rujuk after *talaq raj'i*, recording of divorce which has decide by the court, including biodata correction in marriage certificate.

Whereas what was meant by court in article 69 is referred in article 93, as written below:

- (1) *Recording report of biodata correction is doing in Implementer Institution or UPTD which published those civil registration certificates.*
- (2) *Biodata correction record as mentioned in section (1) can be proceed by fulfilling these requirement :*
 - a. *Copy of district court decision of biodata correction;*
 - b. *Copy of civil registration certificate;*
 - c. *Copy of marriage certificate for those who was married;*
 - d. *Copy of family certificate; and*
 - e. *Copy of ID card (KTP).*

Implementer institution is government section in city/regency which has responsibility and authority to do civil registration services, whereas implementer institution who has charge to do civil administration services for marriage, divorce and rujuk in district range is KUA specially for who belief on Islam..

Biodata correction as mentioned in article 93 section (2) President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration not only for marriage certificate, but for another authentic certificate which refer from article 105 section (2) President Regulation above, those are birth certificate, dead birth certificate, marriage cancelation certificate, death certificate, adoption certificate, child admission certificate, child authentication certificate, citizenship certificate and other legal events.

Both regulations which contradict each other are in unequal position on statute hierarchy structure. Statue No. 12 Year 2011 on Formation of Statute regulate hierarchy structure of Act in article 7 section (1) as mentioned below :

- Kinds and structure of statute hierarchy formed of:*
- a. Basic Statue of Republic State of Indonesia 1945;*
 - b. Decision of People's Consultative Assembly;*
 - c. Act/Government Regulation as substitute of Act;*
 - d. Government Regulation;*
 - e. President Regulation;*
 - f. District Regulation of Province; and*
 - g. District Regulation of City/Regency.*

If the article is observed more carefully, President Regulation position is in point (e) or numerically is in fifth grade after Basic Act of Republic State of Indonesia 1945. So, President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration is in fifth grade in structure of statute. However, Ministry Regulation

doesn't mentioned directly in article 7 section (1), but mentioned in article 8 section (1) as :

“Kinds of regulations which not mentioned in article 7 section (1) including regulation that decided by People’s Consultative Assembly, House of Representative, Regional Representative Board, Supreme Court of Indonesia, Constitutional of Indonesia, Indonesian Supreme Audit Institution, Judicial Commission of Indonesia, Indonesian Bank, Ministry, Unit, Institution or commission in equal position that formed by acts or government on on order of Acts, Provincial House of Representative, Governor, Municipal House of Representative, Regent, Head of Village or in one grade.”

Substantially article 8 section (1) mean that any regulation which unmentioned in article 7 section (1) are regulation decided by state institutions above. Ministry is one of institutions which has authority to make regulation, including Ministry of Religious who has enforced Ministry of Religious Regulation No. 11 Year 2007 on Marriage Recording, but its position in statute hierarchy is under President Regulation.

Related to the problem above, the writer has purpose to do advanced research about competence of biodata correction in marriage certificate is belong to Islamic Court as mentioned in Ministry of Religious Regulation as happen today or District Court that refer to President Regulation

B. Statement of Problem

Based on background of problem above, the subject matter of this research as mention below:

1. How Islamic Court uses the legal standing for biodata correction in marriage certificate authority?
2. How does legal synchronization on absolute authority of Islamic Court related to biodata correction authority?
3. How legal policy's view of Islamic Court's authority related to biodata correction in marriage certificate?

C. Objective of Research

From formulated statement of problem above, this research aims to:

1. Describe how Islamic Court uses the legal standing for biodata correction in marriage certificate authority.
2. Describe how does legal synchronization on absolute authority of Islamic Court related to biodata correction authority
3. Explain how is legal policy's view of Islamic Court's authority related to biodata correction in marriage certificate

D. Significance of Research

1. Theoretical significance
 - a. Giving thought contribution for legislative institution to formulate better statute in the future.

b. As thought contribution for judges of Islamic Court in process of checking, judging and deciding case of biodata correction in marriage certificate.

2. Practical significance

a. Become legal standing and guide for implementer insitution to do civil administration service of marriage recording.

b. Guide for citizen who has business to do biodata correction in marriage certificate

E. Operational Definition

1. Marriage certificate

Marriage certificate is authentic certificate which published by implementer institution that has authority in certain district about legal event of marriage between a man and women as husband and wife with purpose to build happy, timeless and eternal household based on belief in the one true God as mentioned in Act No.1/1974 on Marriage.

2. Court competence

Competence of court is authority of court to receive certain type of case and authority in certain jurisdiction district it can hold with direct order of valid statute (*ius constitutum*).

3. Biodata correction

Biodata correction is changes of name, date of birth, address, belief or citizenship in civil certificate that recorded certain legal event of person.

F. Theory of Legal Policy

According to Billford legal policy is part of law study that focused on changes of valid positive statute to be revised. So it can be more appropriate with development of social condition by argued : *De rechtspolitiek onderzoekt, welke veranderingen in het maatschappelijk leven te voldoen. Zij zet de oontwikkelingsgang der rechts orde voort. Want uit vroege rechtsstelsels ontwikkelde "Jus Constitutum" tracht zij het "Jus Constituendum" of het recht der toekomst op te bouwen*⁶. (Legal policy examine what kind of changes that should be execute in positive statute, in order to fulfill the new requirements and needs of people. Because it try to reform old adopted ius constitutum into new ius constituendum for future).

Utrecht has same opinion with Billfroid in definition of legal policy as effort to make norms that will determine how people should take steps. It investigate any changes should make for positive statute become appropriate with social reality (*sociale wekelijkhed*).⁷

In other hand, M. Mahfud give more simple and applicative definition about legal policy, that is official legal policy about law that will apply in the future as well as formulate new statute or modify old statute with new substitution in order to reach state goal.⁸

⁶ Beelefroid, JHP, *Inleiding tot de Rechtswetenschap in Nederlands*, Dekker Van Veght, Nijmegen : Utrecht, 1952, p. 18

⁷ Utrecht, *Pengantar dalam Hukum Indonesia*, Pradnya Paramita, Jakarta, 1961, p. 53

⁸ Moh. Mahfud, *Politik Hukum di Indonesia*, Rajawali Pers, Jakarta, 2010, p. 1

Legal policy can be divided into two dimensions; the first one is legal policy as basic reason of why certain statute was regulated. Second one is purpose or reason behind certain regulation enforced.

Legal policy doesn't just discuss about regulation for the future, but also regulation or statute that running today. In other word, legal policy is science which has practical purpose to make positive regulation can be formulate better than before and also giving a guidance for legislative, implementer of regulation and executor of court decision.

Constitutionally, Indonesia is not Islamic state but Pancasila state, with the result that people who belief on islam cant apply whole teaching of islam, as well as order or prohibition in islam. Therefore, Mahfud said Muslim doesn't need to debate about *kafir*, *zalim* or *fasik* because their incapacity to apply islam teaches, because Islam followers is bounded their selves into national law that every regulation and rule should be enforced by following procedure legislatively, especially for public regulations which has resources from western, culture, civil and islamic law.

Studying of Islamic law and its relation with Religious institution we have to quote C. Snouck Hurgronje, especially about Islamic legal policy of Hindia-Dutch Government which complicated in *Adatrechthundel* and *Pendecten van bet Adatrecht* book. Compilation of Snouck writing give prior at policy which made by Dutch government also suggestions that he made to face muslim development in Indonesia. One of his suggestions is giving freedom for muslim to do Religious activity, particularly praying, zakat, mosque building and social activity.

G. Previous Research

As long as writer experience, there some research that has some similarities with this research but has different object research like explained below:

Thesis that written by Khusnia Isro'i under tittle "*Tinjauan Hukum Islam Terhadap Perubahan Biodata Dalam Akta Nikah (Studi Terhadap Decision Pengadilan Agama Yogyakarta Nomor : 0058/Pdt.P/2011/PA. Yk)*"⁹. The research used normative approach which mean explaining the object with library research. Writer discuss about Islamic law perspective about biodata correction in Islamic Court decision of Jogjakarta. This thesis aims to find judges consideration in the decision by doing synchronization with Islamic law theory. Even variable "biodata correction in marriage certificate" become focus in the thesis which written by Isro'i has similarity with this thesis, but it has different perspective. This thesis aims to synchronize and analyze based on positive statute in Indonesia that regulate Islamic court competence in biodata correction in marriage certificate. .

Beside it, thesis that written by Faeshol Ghozali under tittle "*Implikasi Hukum Kesalahan Biodata dalam Akta Nikah (Tinjauan Yuridis dan al-Qowa'id Al-Fiqhiyyah terhadap Perkara Perbaikan Kesalahan Biodata di Pengadilan Agama Semarang)*"¹⁰. The thesis aims

⁹ Khusnia Isro'i . "*Tinjauan Hukum Islam Terhadap Perubahan Biodata Dalam Akta Nikah (Studi Terhadap Penetapan Pengadilan Agama Yogyakarta Nomor : 0058/Pdt.P/2011/PA. Yk)*". (Thesisi, Published, Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2012)

¹⁰ Faeshol Ghozali. "*Implikasi Hukum Kesalahan Biodata dalam Akta Nikah (Tinjauan Yuridis dan al-Qowa'id Al-Fiqhiyyah terhadap Perkara Perbaikan Kesalahan Biodata di Pengadilan Agama Semarang)*". Thesis, published, IAIN Walisongo, 2013)

to explain how legal implication if biodata in marriage certificate recorded incorrectly. Data source obtained from document and Islamic Court decisions of West Semarang and interview result from judges. Incorrect biodata record can cause administrative disadvantages for person. Therefore, the writer explain how does legal impact caused by incorrect biodata recording with positive law and *qowaid fiqhiyah* perspective. But this research will be more focused on contradiction of legal norm which regulated islamic court competence of biodata correction.

H. Research Method

Research method that used in this thesis will be explained below:¹¹

1. Kind of Research

Kind of this research is normative. That is viewing object by legal-formal or norm perspective. Legal-formal means competency of biodata correction in marriage certificate should belong to Islamic court or district court. Every order that contains by positive regulations which has been applied in social life.

2. Research Approach

Approach type on this thesis is statute approach. It means the main tool of analyzer is hierarchy of law and principles of legal drafting. Statutes are made by legislative authorities or certain

¹¹ Menurut Hadari Nawawi, metode penelitian atau metodologi research adalah ilmu yang memperbincangkan tentang metode-metode ilmiah dalam menggali kebenaran pengetahuan. Hadari Nawawi, *Metode Penelitian Bidang Sosial*, Yogyakarta: Gajah Mada University Press, 1991, p. 24.

institution that received attribution authority to make certain regulation. So, the statute can be product of legislation or regulation.

3. Analyzing Data Method

This research will use descriptive-analyzing with explaining and analyzing legal policy that written in the positive statue which regulate procedure of biodata correction in marriage certificate. According to the type of the research, it can be categorized as qualitative research which means any data will describe in this research will not be obtained from statistic and numerical data.

4. Collection Data Method

Due the research used library source, therefore collection method that will be used is inventory method¹², which means writer will gather any regulations directly or indirectly related with the object from primary source or secondary source.

5. Source of Data

- a. Primary data, are Act No. 7 Year 1989 on Islamic Court that revised by Act No. 3 Year 2006, Act No.48 Year 2009 on Judicial Power, Regulation of Religious Ministry No. 11Year 2007 on Marriage Recording, Act No. 1 Year 1974 on Marriage, President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration, Act No. 12 Year 2011 on Formation of Act.

¹² Sutrisno Hadi, *Metodologi Research*. Grafika. Yogyakarta, 1980 p. 38

- b. Secondary data, one of them is Munir Fuady book's with title "Teori Besar (*Grand Theory*) Dalam Hukum" that contained about grand theories about law, one of them is vertically and horizontally norm synchronization that become solution when there is statute that contradict each other in hierarchy of law¹³. Book authored by Baghir Manan entitled "Hukum Positif Indonesia", the writer quote lot of source of legal principle like *lex specialis derogat legi generalis* and *lex superiori derogat legi inferiori*.¹⁴ And principle of legal drafting or statute that writer need as main tools of analysis comes from Aziz Syamsuddin book under title "Proses dan Teknik Penyusunan Undang-Undang (edition-2)"¹⁵

I. Structure of Discussion

Chapter I contains general description about background of problem, statement of problem, objective of research, significance of research, research method, abbreviation and some theories related to the object.

Chapter II review theories and concepts of legal policy in Indonesia about court competence, further in this chapter will discuss about statute hierarchy and these will be used as analyze tool to describe the object of research.

¹³ Munir Fuady, *Teori Besar (Grand Theory) Dalam Hukum*, 2013, Kencana, Jakarta, p. 124

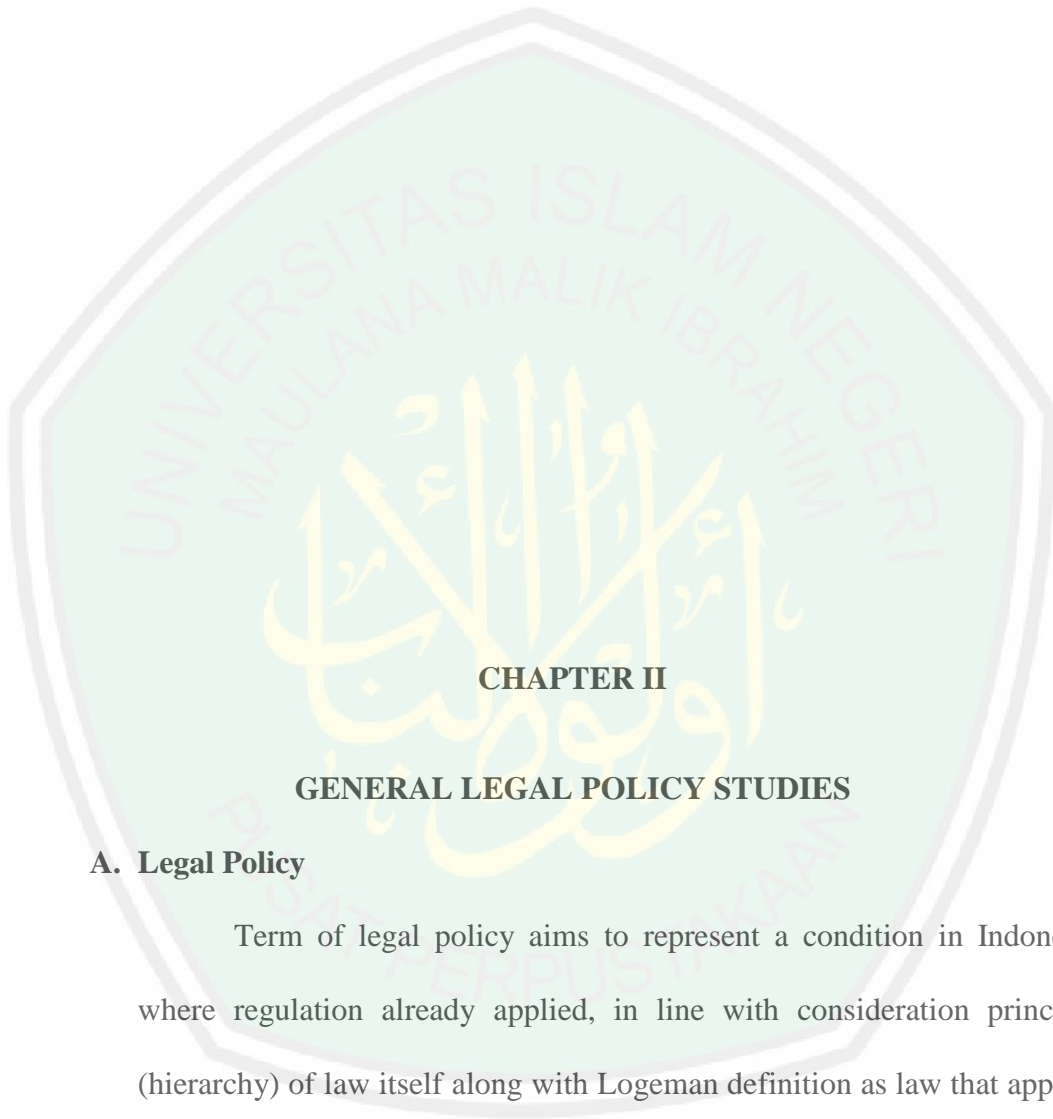
¹⁴ Bagir Manan, *Hukum Positif Indonesia*, FH UII Press, Yogyakarta, 2004, p. 56

¹⁵ Aziz Syamsuddin, *Proses dan Teknik Penyusunan Undang-Undang (Edisi-2)*, Sinar Grafika, Jakarta Timur 2014. p. 36

Chapter III contains problem analysis using theory that describe before about legal standing Islamic court competence in biodata correction and contradictive norm trough synchronization of norm.

Chapter IV will be filling by conclusion of study analysis in previous chapter, so the problem solution will be show clearly. Also some suggestion so the mistake that ever crated before will not be repeat in the future.





CHAPTER II

GENERAL LEGAL POLICY STUDIES

A. Legal Policy

Term of legal policy aims to represent a condition in Indonesia where regulation already applied, in line with consideration principle (hierarchy) of law itself along with Logeman definition as law that applied here and present. Whereas older interpretation of legal policy is regulation which made or regulated by state through the government and executed by certain officer who has given an authority.¹⁶

Legal policy has *double movement* principle. The principle means legal policy as framework to formulate recent policy of law by authorized

¹⁶ Abdul Latif, Hasbi Ali, *Politik Hukum*, , Sinar Grafika, Jakarta, 2010, p. 21

institutions state but it also used to criticize regulation product which has been regulated before.¹⁷

Law in view of legal policy is a tool that works together with regulation system in order to reach certain purposes of nation or wills of Indonesians people. Therefore, every discussion of legal policy used to begin with restatement of nation purposes.¹⁸

Descriptions above show that object of legal policy are law. The law which will enforced in the future, or already enforced in the past, or being enforce today. A tool to approach and analyze the object of legal policy is practical science not theoretical science. In other word, existence of legal policy shows the law of legal policy in specified state.¹⁹

The objects of legal policy studies are mentioned below:

1. Process of value finding and aspiration growth assessment in society by the authorized government to formulate necessary legal policy.
2. Debating and formulating process of norm from the aspirations into a draft of bill by Executor Government who has charge to formulate the legal policy.
3. Authorized executor government who in charge to formulate and enforce the legal policy.
4. Any regulation that contains legal policy.

¹⁷ Imam Syaukani , A. Ahsin Thohari, *Dasar-Dasar Politik Politik Hukum*: Rajawali Pers, Jakarta . 2013, p. 51

¹⁸ Moh. Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi*, Rajawali Pers, Jakarta. 2011, p.17

¹⁹ Ahmad Muliadi, *Politik Hukum*. Akademika: Padang. 2013. p. 10

5. Factors are causing and determining such legal policy, as well as present or future.
6. Realization of the regulations as the implementation of legal policy of a nation.

The six objects are going to be main discussion in legal policy analysis. In this case, the policy in general term used to recognize how the process in the six phases to produce an regulation as the result of legal policy that math and needed by the social framework.²⁰

Legal policy is very important related with legislation process (*rechtsvorming*) and norm discovery (*rechtsvinding*) that practice-functional through theologies-constructive description method. It means legal policy as science stand on its own. Its existence give theoretical-academic base in regulation drafting to find and form more suitable for society in history, philosophy, culture, value, norm way.²¹ In other hand, the science may become useful for legislative institutions to form better regulations, effective and non-contradictive and become guidance for courts as law reinforcements.²²

B. Legal Policy of Islamic Courts

Islamic court was built in places nearby District Court, because in order to execute its decisions Islamic court needs “*executor verklaring*”

²⁰ Imam Syaukani , A. Ahsin Thohari, *Dasar-Dasar Politik Politik Hukum*: Rajawali Pers, Jakarta . 2013, p. 53

²¹ Imam Syaukani , A. Ahsin Thohari, *Dasar-Dasar Politik Politik Hukum*: Rajawali Pers, Jakarta . 2015, p. 43

²² Imam Syaukani , A. Ahsin Thohari, *Dasar-Dasar Politik Politik Hukum*: Rajawali Pers, Jakarta . 2015, p. 50

from District Court.²³ The statement based on *staatsblad* 1882 No.153 which applied since 1 August 1882. The *Staatsblad* above is Dutch Decision who was limiting the main competence of Islamic Court and makes the first admission of Islamic Court existence as one of judicature institution in Indonesia at once.²⁴

Since a long time ago the government keep underestimate and look down the existence if Islamic Court in society face. Pre-Independence it was so difficult to find Islamic Court in capital city. Even exist; the condition is miserable compared to District Court that looks luxurious and mighty. Also the infrastructures inside are so poor and useless due the lack of expenditure budget. Usually, it was a big green table only used to be a session of court in one or two small room.

Obviously there was a weakening effort of Islamic Court competences by legal-policy was made by the government. Those efforts are related with political compromise of legislator and Ministry of Justice who wanted the Mahkamah Syari'ah in difficult position to make an action.

The difficulties are indicated in Government Regulation No. 45 Year 1957 on Islamic Court in Outside Java-Madura chapter 4 verse (1) and (2) that contain “*Every case according living law is decided by formulation of Islamic law.*” It means, the chapter is similar with colonial

²³ Daniel S. Lev, *ISLAMIC COURTS IN INDONESIA : A Study in the Political Bases of Legal Institutions*, University of California Press, Berkeley, Los Angles, 1980, p. 145

²⁴ Erfaniah Zuhriah, *Peradilan Agama Indonesia : Sejarah Pemikiran dan Realita*, UIN Malang Press, Malang 2009, p. 83

theory of custom law. Which teach Islamic law is enforceable if it has been penetrate and involve in society habitually.

For the law expert who has more passion on Islam, of course they hope the formulation may open the door to eliminate the custom. But, it also has other interpretation. With term “*living law*” may interpreted by custom furthermore with personal consideration of District Court judges along with their authority to determine which law and value should be applied in society.²⁵ In other hand the majority of District Court judges likely against Islamic teaching and Islamic Court, it cause term “*living law*” is more likely interpreted as not Islamic law. Finally, competence of Islamic Court depends on will of society wheatear to propose to Islamic Court or District Court.

It seems theory of “*receptie*” founded by Snouck Hurgonje since more than twenty years ago is unfortunately being resisted by the government. The theory said, he law that lived in Indonesia is origin-Custom Law. There some Islamic teachings that penetrate, the Islamic teaching should become the custom or received by the custom before it become enforceable.²⁶

C. Theory of Islamic Law Validity

Islam was received by Indonesian long ago before the colony came.

When the Dutch was came to Indonesia (Hinda belanda), they watched the reality that Indonesian has their own law. The law came from Religious

²⁵ Daniel S. Lev, *ISLAMIC COURTS IN INDONESIA : A Study in the Political Basess of Legal Institutions*, University of California Press, Berkeley, Los Angles, 1980, p. 149

²⁶ Erfaniah Zuhriah, *Peradilan Agama Indonesia : Sejarah Pemikiran dan Realita*, UIN Malang Press, Malang 2009, p. 86

that Indonesian believe, like Islam, Buddha, Jewish, beside local custom law.²⁷

Even though at the beginning arrival of Dutch (who believes in Christianity) in Indonesia doesn't means to intervene the Religious law, but as the time running they have to do it due to colonial business. They can avoid to intervene the value that lives in the society of indigene:

a. Receptio in Complexu Theory

The aims of Receptio in Complexu theory is that for everyone has to obey their own Religious rule. For who believes in Islam, have to obey Islamic rules. So for who believe in other Religious, have to obey their Religious rules. The theory born from thoughts of Dutch scholars, like Carel Frederik Winter (1799-1859) the elder of legal issue of java, Salomon Keyzer (1823-1868) the linguist and sociologist of Hindia Belanda. Receptio in Complexu theory was founded and named by Lodewijk Willem Chrstian van den Berg (1845-1925) an expert of Islamic law, politic, advisor oh Hindia Belanda government for east language.²⁸

b. Receptie Theory

Then appear a new theory against Receptio in Complexu, that is Receptie (Receptive) theory. According receptie theory, Islamic law isn't automatically valid for muslim. Islamic law is valid for muslim, when it has been received and become their tradition.

Therefore, the law for muslim isn't Islamic law, but custom law.

²⁷ C.Snouck Hurgronje, *De Islam in Nederlandsch Indie*, alih bahasa S.Gunawan, *Islam di Hindia Belanda*,(Cet.II; Jakarta: Bhratara, 1983), p. 10.

²⁸ Sayuti Thalib,S.H, M.H, *Receptio A Contrario*, (Cet. III; Jakarta: Bina Aksara, 1982), p. 15

The theory declared by Cornelis van Vollenhoven and Christian Snouck Hurgronje.²⁹

In case there is civil case between muslim, the case will be held by judges of Islamic Law, but if the case on tradition the case will be held by district court as long as doesn't regulate by ordains. The thought of Snouck Hurgronje on Reseptie theory is in line with the statement about separation of Religious and politics. The thought is also linear with his suggestion to Hinda Belanda Government about legal policy of Islamic law. He suggests keeping neutral on worshipping activity and became aggressive on every anomaly of rebellion from Islam fanatic. Islam was viewed like a threat that needs to be restricted under tight monitoring.

c. Receptie Exit Theory

Struggle of Islamic scholar against the thought of Snouck Hurgronje, by make Islamic law dependence into custom is always running until Indonesia almost became independence Country. The struggle is indicated by appearance of Jakarta Charter (Piagam Jakarta) at 22 of June 1945. Jakarta Charter is draft of opening part of Undang-undang Dasar (constitution) of Republic Indonesia. It was arranged by and born caused nine big-man of Indonesia, eight of them are muslim.³⁰

²⁹ H.W.J.Sonius, dalam J.F.Holleman,an Vollenhoven on *Indonesian Adat Law*, Leiden: 1981, Lihat juga Bushar Muhammad, *Asas-Asas Hukum Adat*, (Jakarta: Pradnya Paramita, 1976), p.57.

³⁰ H.Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*, (Jakarta: Yayasan Prapanca, 1959), p. 279

Hazairin opinion of Islamic law in society framework is act as half of their faith. Furthermore, he is argued another issue that recklessly disturbing and challenging for muslim faith, that is Receptie theory. The theory which created by Dutch government aims to make barrier of islam civilization.³¹

d. Receptie a Contrario Theory

Sayuthi Thalib said in further analysis that there was another view which develop more than what was Hazairin said above. In several district that suspected has strong tradition, there was an indication of reversal Snouck Hurgronje theory.

For example in Aceh, the resident prefers every marriage and inheritance case are regulated based on Islamic law. If there was a other tradition that regulate it too, it may enforce as long as it doesn't against Islamic law. Therefore, there was a reversal theory of receptive theory. The theory that said customary law could be enforced as long as doesn't contrast with Islamic law. This was Syauthi Thalib found and named as Reseptio A Contrario Theory.³²

e. Existence Theory

As the continuance of Receptie Exit and Receptio A Contratio, according to Ichtijanto SA born a new theory named as Existence Theory.³³ The theory claimed existence of Islamic law on

³¹ H.Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*, (Jakarta: Yayasan Prapanca, 1959), p. 115

³² Sayuti Thalib, *Receptio A Contrario*, (Cet.III; Jakarta: Bina Aksara, 1982), p. 69

³³ S.A.Ichtianto, *Pengadilan Agama sebagai Wadah Perjuangan Mengisi Kemerdekaan Bangsa, dalam kenang-kenangan Seabad Pengadilan Agama*, Cet.I; Jakarta: Ditbinperta Dep.Agama RI,1985, p. 23

positive law of Indonesia. According this theory the existence form of Islamic law in positive law of Indonesia are : 1. Exist, by definition Islamic law as an integral part of positive law in Indonesia; 2. Exist, by definition there was independencies of Islamic law as one of positive law sources and admitted by constitution; 3. Exist in positive law, by definition Islamic norm teachings being a filter of every draft of regulation in Indonesia; 4. Exist in positive law, by definition as the main substance and material of positive law form.

D. Islamic Court Competence

Generally, competence of Islamic Court can be divided into two parts: *Relative Competency* and *Absolute Competency*. Relative competency related to jurisdicitive area while absolute competency related with who has right to propose their case to and kind of case.³⁴

In Undang-Undang Dasar Republik Indonesia Year 1945 (UUD 1945) Chapter 24 verse (2) is stated that Islamic Court is one of jurisdiction authority that under supervision of Supreme Court along with another jurisdiction, they are District Court, PTUN and Military Court. In this case, act as executor regulation of UUD 1945 given a strong base for Islamic Court competency. The competency aimed to Chapter 25 verse (3) Act No. 48 Year 2009 on Judicial Power *jo* Chapter 2 and 49 Act No. 3

³⁴ Jaih Mubarak, *Penyelesaian Sengketa Ekonomi Syari'ah Di Indonesia*, www.badilag.net, p. 1

Year 2006 on first change, and Act No. 50 Year 2009 on second change on Act No. 7 Year 1989 on Islamic Court, said that Islamic Court is one of the jurisdictional authority for citizen who believes on Islam in certain kind of case on marriage, inheritance, wasiat, hibah, wakaf, zakat, infaq, shadaqah, and economic syari'ah

After validation of Act No. 3 Year 2006 on first change of Act No. 7 Year 1989 on Islamic Court, expansion of Islamic court absolute competence done. Based on formulation of act, regulations of Islamic court absolute competence are took place in two places ; (1) Regular regulation that has general character written in second paragraph of the act on position of Islamic court; and (2) specific regulation that written in part of "Court competency".

Absolute competence of Islamic court that has general character said that Islamic court is one of judicative authority for the justice seekers from muslim on "specific civil case". Whereas in Act No. 3 Year 2006 is stated Islamic court is one of judicative authority for the justice seekers from muslim on "specific case". Term changes (from "specific civil case" become "specific case") show that Islamic court has better chance to investigate and decide more type of cases.

Islamic Court identity as inactive jurisdiction is just end constitutionally since the born of Act No. 14 Year 1970 on Main Judicial Power and restated at Act No. 7 Year 1989 on Islamic Court that legally

has equal position due other jurisdictional authority like District Court etc.³⁵, Even the competence of Islamic court no longer marriage only, but also dispute of inheritance, wasiat, hibah, dan shadaqah, and furthermore Islamic court penetrated into economic dispute, especially economic syari'ah that indicated in Chapter 49 Act No. 3 Year 2006 on first changes of Act No. 50 Year 2009 on second changes of Act No. 7 Year 1989 on Islamic Court.

As substance of chapter 49, 50, 51, 52 and 52A, Act No. 3 Year 2006 on change of Act No. 7 Year 1989 on Islamic Court, the duty and competency of Islamic court is as mentioned below :

Chapter 49	Islamic Court has charge and competency to investigate, decide and state cases in first division for muslim in cases of: <ul style="list-style-type: none"> a. Marriage; b. Inheritance; c. Wasiat; d. Hibah; e. Wakaf; f. Zakat; g. Infaq; h. Shodaqoh; dan i. Economic syariah.
Chapter 50	(1) In case occur a dispute of property or other dispute in cases as mentioned in Chapter 49, the object of dispute need decision of district court. (2) In case occur dispute of property as is mentioned in verse (1) where the legal subject is person who beliefs on islam, the case will decide by Islamic Court together with cases as mentioned in chapter 49..
Chapter 51	(1) Supreme Islamic Court has duty and competency to decide cases. (2) Supreme Islamic Court also has duty and competency to decide cases in first grade and final by deciding between islamic court in its jurisdictional area.

³⁵ Satjipto Rahardjo, "Pengadilan Agama Sebagai Pengadilan Keluarga", Prospek Hukum Islam Dalam Kerangka Pembangunan Hukum Nasional di Indonesia, Jakarta: PP. IKAHA, 1994, p. 301

Chapter 52	(1) Court may provide an information, consideration, and suggestion about Islamic law for Government in its jurisdictional area when asked. (2) Beside duty and competency that mentioned in Chapter 49 and Chapter 51, court may receive more competencies as long as regulated by the law.
Chapter 52A	Islamic Court provides istbat testimony of rukyat hilal to determine first date of hijriyah month.

Table 2.1 *Islamic Court Competency on Act No. 3 Year 2006 on Islamic Court*

E. Biodata Correction in Marriage Certificate

According to Act No. 1 Year 1974 a legal marriage is done under the rule on Chapter 2 verse (1) that is marriage that done under the believes of bride and groom and Chapter 2 verse (2) that means it is recorded on the civil certificate as the law order. Civil certificate is certificate that was made to proof an event; therefore it should be signature by the event subject. There are some requirement which should be filled before it admitted as official certificate, they are:

- a. The certificate should be signature;
- b. The certificate must contain details of an event related to agreement of the party;
- c. The made of certificate is in order to be as evidence.³⁶

The certificate is divided into two categories, they are ;

1. Authentic Certificate is a certificate that was made in front of competent authorities based on legal regulation to record the certificate.

³⁶ Viktor M. Situmorang dan Cormentya Sitanggang, *Aspek Hukum Catatan Sipil di Indonesia*, Sinar Grafika, Jakarta 1991, p.52.

2. Inauthentic certificate is a certificate that was made by the parties in or by general authorities.

Authentic certificate in legal definition has the perfect strength of evidence, it means if one of the parties admit that the event written on the certificate is truly happen the judge doesn't necessary to prove another evidences.³⁷

As one of an evidences, marriage certificate has two characters, they are:

- a. As the one evidence that has absolute legal standing.
- b. As complete evidence, it means beside the certificate may not necessary to be proven any more.

Marriage certificate is a big list of marriage regiter that contains as mentioned below (Chapter 12 Government Regulation No. 9 Year 1975) :

- a. Name, place and date of birth, belief/Religious, job, address of the couple, wali, parents of the couple, witness and the representative subject.
- b. Required documents as mentioned at Act No. 1 Year 1974 like marriage permission (Chapter 6), marriage dispensation (Chapter 7), polygamy permission (Chapter 4), permission from Hankam Ministry/Pangab for ABRI, and an agreement as refer to Chapter 29 of the Act.
- c. etc.

³⁷ Subekti, Pokok-pokok Hukum Perdata, PT Inter Masa, Jakarta, 1980, p .78.

Marriage certificate was made in two copies, the first one is stored in the recording office (KUA) where the marriage takes place whereas the second one is stored to the court where the marriage takes place. The second copy purpose to make marriage validation checking process become easier, just in case there was a dispute of divorce. Because a divorcing may only happen in front of session of case in the court and the divorce recording should be done by showing the decision from the court.

Husband and wife, each of them is given a copy of marriage recording that looks like marriage book with similar content. The record content in the marriage book just the important part of the marriage certificate that look necessary. Marriage certificate is complete legal evidence for every people who make agreement on it.

F. Hierarchy of Law

State form of a nation can be observed from its constitution. Constitution is the highest rank of law in law hierarchy and every regulation under its position are not allowed to be contrast against it. The law forming should base on and refer into higher rank of law in the hierarchy.

The hierarchy of law in Indonesia is recognized since the born of Act No. 1 Year 1950 on Formation of Statute that made by central government. In Chapter 1 Act No. 1 Tahun 1950 formulate as below:

Formations of statue are :

- a. Act/Government Regulation as substitute of Act;
- b. Government Regulation,

c. Ministry Regulation.

The next regulation on hierarchy of statute is in the appendix No. II of MPRS Decision No. XX/MPRS/1966 on Memorandum DPRGR about The Order of Law Source of Indonesia Republic and the formation of statute are :

- a. UUD RI 1945;
- b. Decision of MPR;
- c. Act/Government Regulation as substitute of Act;
- d. President Decision;
- e. And another organic regulation, like Ministry Regulation, President Instruction, Ministry Instruction, etc.

The continuance formation of statute is written at MPRS Decision No. XX/MPRS/1966 is substituted by MPR Decision No. III/MPR/2000 on Law Source and the Formation Order of Statute, it was mentioned in Chapter 2 :

- a. Undang-Undang Dasar 1945
- b. Decision of MPR RI
- c. Act
- d. Government Regulation as substitute of Act
- e. Government Regulation
- f. President Regulation
- g. District Regulation

As the time running there was another change of formation order of statute, then the Decision MPR No. III/MPR/2000 being invalid and

replace by Act. No. 10 Year 2004 on Formation of Statute that contain kind and formation order of statute in Chapter 7 verse (1) as mentioned below :

- a. Undang-Undang Dasar of Indonesia Republic Year 1945;
- b. Act/Government Regulation as substitute of Act;
- c. Government Regulation;
- d. President Regulation;
- e. District Regulation;
- f. District Regulation including:
 1. Province Regulation;
 2. City Regulation; and
 3. Village Regulation/or equal grade of regulation.

But finally the Act No. 10 Year 2004 is changed by Act. No. 12 Year 2011 on Formation of Statue in Indonesia as mentioned in Chapter 7 verse (1) below:

- h. Undang-Undang Dasar of Republik Indonesia Tahun 1945;
- i. Decision of MPR;
- j. Act/Government Regulation as substitute of Act;
- k. Government Regulation;
- l. President Regulation;
- m. Province Regulation; and
- n. City Regulation.

From all the changes above, Government regulation is consistently considered as most permanent legal source of Indonesia since year 1950 until the newest one.

G. Legal Norm Synchronization

Synchronization process is a harmonization and ordering effort of statute that already exist and formed to regulate same law action. The process of norm synchronization aims to observe the harmony or disorder from one statute against each other. The synchronization can be done in vertical or horizontal way. Vertical sync is an observation of legal norm against the higher or lower rank of statute while the horizontal sync is harmonization of a statute in equal grade oh hierarchy.

The process of synchronization is making the substance of statute being harmony and doesn't contrasting each other, beside supplementing each other and more lower the hierarchy, it should be more specific the substance.³⁸

Synchronization purpose is to make an absolute legal standing. Absolute legal standing came from the obvious and specific substance of regulation that free from multi-interpretation. So the sector that regulated by the regulation can do the duty and give efficient and efficient service to society.

Synchronization process of statute can be done in two methods, they are :

³⁸ www.perpustakaan.bapennas.go.id/lontar/filefiledigital/1330881-255b_konten_255D.pdf
diakses 7 Juni 2015

a. Vertical Synchronization

The aim is to make sure a regulation doesn't contradict each other in one sector of law.

The sync analysis based on hierarchy of law and should pay attention chronology of regulation forming also attribution function of statute.

b. Horizontal Synchronization

Analyzing every regulation that regulate one similar sector in equal position of hierarchy. Horizontal sync also need into chronology analysis related to the regulation in law hierarchy.

Generally synchronization process begins with collecting any regulation that related to the issue of regulation forming. Then the chronology and substance analysis may be proceeding.

Ideally, Harmonization should be done when statute forming progress.³⁹ Harmonization of norm relates with two important aspects:

1. Harmonization of norm at legal draft with:
 - a. Pancasila;
 - b. Undang-Undang Dasar Indonesia Republic Year 1945/
vertical harmonization;
 - c. Acts/ horizontal harmonization;
2. Principles of statute drafting and legal drafting:

³⁹ Aziz Syamsudin, *Proses dan Teknik Penyusunan Undang-Undang (Edisi-2)*, Sinar Grafika, Jakarta Timur 2014, p.38-40

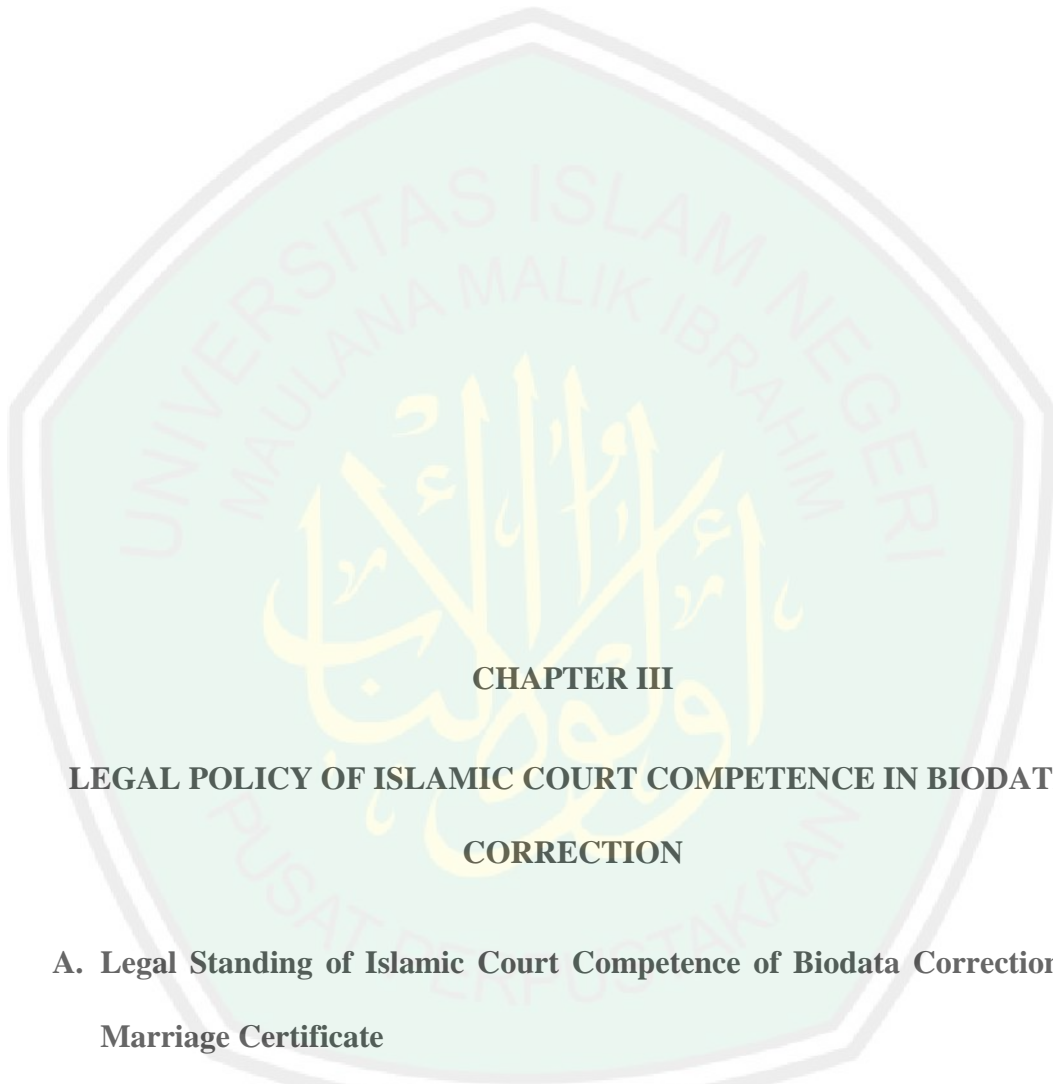
- a. Principle of “specific purpose” that is every legal drafting should have clear purposes that will be a target to be achieved.
- b. Principle of “Institutionary and Legal Authority” that is every kind of regulation should be made by authorities institution or legislative institution which has competence base on statute. The regulations may become cancelled or invalid by the name of law if was made by non-authorities institution or non-legislative institution.
- c. Principle of “suitability among kinds, hierarchy and substance” that is in legal drafting process the substance or material should be suitable with the kind and grade of hierarchy of law.
- d. Principle “executable” that is every legal forming should always care on effectiveness of regulation in society philosophically, legally, sociologically.
- e. Principle of “usage and effectiveness” that is every regulations are made because it is really needed by society and useful in order to set up better living legal environment.
- f. Principle of “clarity of formulation” that is every regulations are using easy understanding diction and terminology along with obvious word usage so doesn’t make any possibilities to be multi-interpretative regulation.
- g. Principle of “openness” that is every phases of legal forming should be transparent in public. Including planning phase,

drafting phase, discussion phase, and validation phase of legal forming be to be transparent and opened for public.

3. And other principles of legal forming that explained before by Aziz Syamsuddin.⁴⁰



⁴⁰ Aziz Syamsudin, *Proses dan Teknik Penyusunan Undang-Undang (Edisi-2)*, Sinar Grafika, Jakarta Timur 2014, p. 41



CHAPTER III

LEGAL POLICY OF ISLAMIC COURT COMPETENCE IN BIODATA CORRECTION

A. Legal Standing of Islamic Court Competence of Biodata Correction in Marriage Certificate

Competence or authority in administration law definition is specific authority which given by government directly or indirectly through statute to specific institution of state. At least there are three components that affect the authority of institution, they are (a) Government that gives authorities; (b) Specific authorities/competences that given into specific state institution; and (c) The institution that execute that competences.

Islamic Court is one of the state institutions in judicative sector. The execution of its competences needs to be independent and non-intervene able by anything, even president. It aims to keep the neutrality that will make a collective justice for everyone. Competences of Islamic Court are written in the statute, as well as acts, president instructions, president regulationa, ministry regulations, etc.

Decision of the court needs to be based on statute. It aims to make the decision fulfill the requirement of justice and transparency of norm for the party. The legal standing should be clearly written in the body of decision for every court, including District Court, Military Court, PTUN Court and Islamic Court.

One of the Islamic Court competencies that want to discuss by the writer is biodata correction in marriage certificate. From several decision of Islamic Court which has been collected there were some conclusion of legal standing that used by judges to decide that case, they are :

Decision Number	Jurisdictive Area	Year of Decision
0099/Pdt.P/2010/PA.Pas	Pasuruan	2010
0253/Pdt.P/2010/PA.TA	Tulungagung	2010
0178/Pdt.P/2013/PA.Sit	Situbondo	2013
1002/Pdt.P/2013/PA.Sby	Surabaya	2013
120/Pdt.P/2013/PA.Spg	Sampang	2013
0002/Pdt.P/2015/PA.Spg	Sampang	2015
0051/Pdt.P/2015/PA.Bkt	Bukit Tinggi	2015

0114/Pdt.P/2015/PA.Sit	Bukit Tinggi	2015
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Table 3.1 *Decisions list on biodata correction lawsuit*

Every decision should have clear and valid legal standing based on positive law that regulate on its competencies. The legal standing reflects legal consideration that used by judge board to decide a case. Here some legal standing that used by judges in decisions above.

1. Chapter 2 Acts No. 1 Year 1974 on Marriage

Chapter 2

- (1) The marriage is valid if it's done under the beliefs of the bride and groom.*
- (2) Every marriage event should be recorded as the statute order.*

This chapter explains that marriage should be done with the procedure of bride and groom belief. In this case, the husband and wife are muslim, it means Islamic Court has competency to decide the case for those who believe in Islam, especially in marriage cases.

The second verse suggests recording the marriage that refers to verse (1) in civil registration office. The recording purposes to build order in civil registration and to keep the right of every family member being fulfilled.

2. Chapter 4 and 5 Islamic Law Compilation

Chapter 4

Marriage is valid when it's done under Islamic law as mentioned by Chapter 2 verse (1) Act No. 1 Year 1974 on Marriage.

Chapter 5

(1) in order to keep civil registration order every marriage of muslim should be recorded.

(2) Marriage Recording as mentioned in verse (1), execute by Pegawai Pencatat Nikah as regulated in Act No. 22 Year 1946 jo Act No. 32 Year 1954.

Chapter 4 is explainer of Chapter 2 verse (1) Acts No. 1 Year 1974 on Marriage that mentions before. Valid marriage on islam is fulfill the requirement including wali, witnesses, akad, etc. the marriage that occur under Islamic law and fulfilled all the requirement are not valid, but it was done in front of local Pegawai Pencatat Nikah (PPN) and recorded in local KUA, refers to Chapter 5 verse (1).

3. Chapter 1 and 34 verse (2) PMA No. 11 Year 2007 on Marriage Recording

Chapter 34

(1) Biodata correction is done by crossing the wrong text without removing the original and rewrites the correction right next to PPN signature and KUA stamp.

(2) Correction related to biodata of husband, wife and wali have to attach court decision where the marriage recorded.

Procedure that was written in verse (1) is the correct way to execute a biodata correction for authorized officer who works in KUA. The correction is executed by PPN of KUA where the marriage recorded.

Legal standing of Islamic Court competency is located in verse (2). Word "court" is interpreted as Islamic Court; it refers into general clause of this regulation.

4. Chapter 49 verse (1) and 89 verse (1) Act No. 7 Year 1989 on Islamic Court

Chapter 49

(1) Islamic Court has charge and competency to investigate, decide and state cases in first division between muslims in case of:

- a. Marriage;*
- b. Inheritance, wasiat and hibah which under Islamic law;*
- c. Wakaf and shodaqah.*

Chapter 89

(1) The cost of marriage case demand to plaintiff or petitioner.

Word “marriage” (Chapter 49) in several decisions above is used by judges to restate that marriage means lot of case related to it. For example divorce, talaq, rujuk, wali, nafaqoh, hadhonah, isbat, dispensation of marriage, private properties, including biodata correction in marriage certificate.

In other hand, Chapter 89 regulated who was demanded to pay the bills of case in Islamic Court. The chapter uses to determine who have to pay the cost of session, including in second division or in supreme division. Who demand to pay the bill is plaintiff or petitioner (the party that propose the case to Islamic court).

5. Chapter 5 verse (1) President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration

Chapter 5

(1) Civil biodata recording of Indonesian as mentioned in Chapter 4 verse (1) may proceed after meet these requirement:

- a. Covering letter from RT and RW;*
- b. Civil certificates that already owned:*
 - 1. Birth certificate;*
 - 2. Diploma;*
 - 3. Family certificate;*
 - 4. Population register certificate;*
 - 5. Copy of marriage certificate; or*
 - 6. Copy of divorce certificate.*
- c. Covering letter from tribe chief, especially for isolated community.*

From that decision, the writer found a regulation of civil registration that was used by judges of Islamic Court to give pre-requirement as evidence in session of biodata correction in the court. The parties have to prove the originality of the evidence using testimony in front of the judges. The evidences are birth certificate, diploma, family certificate, population register certificate, copy of marriage certificate, and copy of divorce certificate.

6. Chapter 52 Act No. 23 Year 2006 on Civil Registration

Chapter 53

(1) Recording of name changes need the decision from local District Court in order to be executable.

(2) Recording of name changes as refer to verse (1) should be reported to Civil Registration Office that record that certificate; at least 30 days since the decision are approved by the court.

(3) Based on the report of verse (2), Civil Registration Officer make side note in the civil registration and copy of civil registration.

The decision of biodata correction using verse (3) Chapter 53 as one of its legal standing. To be exact on procedure and requirement of civil certificate correction this is done by Civil Registration Officer, in this case Pegawai Pencatat Nikah.

Surprisingly, verse (1) and (2) on same Chapter yang are not attached. In other word, judge board uses the regulation partially. Because only using one verse from specific chapter of one act.

7. Chapter 5 verse (1) Act No. 48 Year 2009 on Judicial Power

Chapter 5

(1) Judges and constitutional judges have to research, obey and understand the values of norm and sense of justice that alive in society.

(2) Judges and constitutional judges must have good, honest, fair, professional integrity and personality and have enough experience in law cases.

(3) Judges and constitutional judges have to obey ethic code and behavior guidance of judges.

Word "judges" in verse (1) Chapter above interpreted as judges in every sector of courts, including District Court, Military Court, PTUN Court and Islamic Court. Verse (2) explains the main duty of judges. As well as in cases that has defendant (voulentir) or hasn't by searching legal norm in each court sector. Not only by researching the legal norm, but also following the procedure in the regulation related with its

competencies along with using legal principles and pay attention on sense of justice for the parties.

Legal consideration which used by the Judge of Islamic Court

B. Norm Synchronization of Statute on Biodata Correction of Marriage Certificate

1. Legal Contradiction Analysis

Contradiction meaning is a conflict between two things against each other. Legal contradiction is the conflict or opposition of two ideas which are the subject of one and the same proposition. It is the logical incompatibility between two or more propositions. It may cause legal uncertainty and has impact in its applications.

Legal contradictions seem to be found in various regulations due the amount of regulation which used in Indonesia. In order to identify obvious opposition of both regulations, it should be identified through word to word analysis. The analysis result will be used to reformulate synchronized chapter in synchronization process.

Content of regulation can be viewed into two ways. First, contains the actor of certain action in general norm and abstract dimension. Second the action that performed by the actor in abstract and concrete condition. The main issue of this research contains both of elements.

Observation result of writer has concluded that the chapters that related to the issue is chapter 1, 68 and 93 of President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil

Registration. Chapter 1 contains general definition of specific terms used in the regulation. Chapter 68 explains recording and procedure of marriage by KUAKec specifically. Chapter 93 about biodata correction procedure along with those pre-requirement.

Chapter 68

1. *Data result of recording by KUAKec on marriage event is distributed to Implementer Institution to be recorded into population database.*

Data result of recording: Recording data result is a marriage record data which made by KUAKec about legal event of person especially marriage.

KUAKec : Is shortened version of Kantor Urusan Agama Kecamatan which is a working unit that provides recording of marriage, divorce and rujuk in sub-district level for muslim.

Implementer Institution: Is a government unit (perangkat pemerintah) in city/regency level which has responsibility and duty to provides civil administration record.⁴¹

Population Database: Is a sensitive data and/or aggregate data which specifically structured as

⁴¹ Verse 1 Point 6 President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration

the result of recording activity of civil administration.⁴²

2. *Data result of recording by KUA/Kec as mentioned in verse (1), is not used to publish the copy of certificate.*

Publish the copy of certificate: Is an activity to publish certain certificate after the parties have qualified all the requirements. It is performed by authorized institution as mentioned by regulations.

Chapter 93

1. *Recording report of biodata correction is doing in Implementer Institution or UPTD which published those civil registration certificates.*

Implementer Institution: Is a government force in sub-district level which has responsibility and duty to provide civil administration record.⁴³

UPTD Implementer Institution: Unit Pelaksana Teknis Dinas Instansi

Pelaksana that shortened as UPTD Instansi

Pelaksana is a unit in sub-district level

⁴²Chapter 1 verse (9) Act No. 24 Year 2013 on Population Administration

⁴³Chapter 1 verse (6) President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration

which provides civil recording services with certificate publishing authority.⁴⁴

Published : Means publishing certain certificate that related to legal event of person that performed by authorized institution.

Civil Registration Certificates: Is an official certificate that published by Civil Officer (Petugas Pencatat Sipil) that has legal power as authentic evidence.⁴⁵

2. *Biodata correction record as mentioned in section (1) can be proceed by fulfilling these requirement :*
- a. *Copy of district court decision of biodata correction;*
 - b. *Copy of civil registration certificate;*
 - c. *Copy of marriage certificate for those who was married;*
 - d. *Copy of family certificate; and*
 - e. *Copy of ID card (KTP).*

Biodata Correction record : Is correction of name in an certificate that mismatch with another civil certificate of a person. It performed by civil officer that has charged based on acts.

Copy of marriage certificate: Is copy of official of certificate of marriage that held by husband and wife.

⁴⁴ Chapter 1 verse (21) President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration

⁴⁵ Chapter 1 verse (7) President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration

Copy of civil registration certificate: Is a copy of official certificate that published by Civil Officer (Petugas Pencatat Sipil) that has legal power as authentic evidence.⁴⁶

Chapter 68 verse (1) states that recording data of KUAKec about marriage should be given to Implementer Institution. Chapter 67 before contains about marriage procedure for non-muslim. Implementer institution as mentioned is general term of this regulation is government unit in city level. Government unit including Municipal Legislative Assambly (DPRD), Municipal Secreariat, Municipal Institutions, Municipal Implenter Institutions, Subdistrcit and Village.

Furthermore, verse (2) describes the data that given to implemeter institution by KUAKec is not mean to be published but to be recorded in population database. KUAKec as UPTD Implementer Institution⁴⁷ has certain authority to publish copy of marriage certificate. It has duty to provide civil services related to marriage, divorce and rujuk.

Implementer Institution as mentioned above is Religious Ministry whiches one of government unit (*perangkat pemerintah*). The statement in line with the content of Act of National Affairs that explain Ministry is

⁴⁶ Chapter 1 verse (7) President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration

⁴⁷ Chapter 1 verse (1) Religious Ministry Regulation No. 39 Year 2012 on Organisation Form and Job Description of Kantor Urusan Agama

a government unit that has specific task and authority to contribute the government works.⁴⁸

So the writer can conclude that KUAKec is a UPTD Implementer Institution that has authority to publish and record legal event of muslim including marriage, divorce and rujuk. Even KUAKec has more authority in another regulations, but the writer quotes the authority that contained by this regulation as mentioned above.

Chapter 93 regulates about biodata correction on civil certificate including birth, death, marriage, divorce, adoption, etc. Verse (1) states that biodata correction is executed by Implementer Institution or UPTD Implementer Insitution that has authority to publish it. KUAKec as well as Civil Registration Office has both authority to publish certain civil certificate. Specifically KUAKec has auhority to publish marriage certificate for muslim while Civil Registration Office has authority to publish marriage certificate for non-muslim.⁴⁹

Verse (2) of same regulation giving pre-requirements to do biodata correction procedure, including (a) Copy of district court decision of biodata correction; (b) Copy of civil registration certificate; (c) Copy of marriage certificate for those who was married; (d) Copy of family certificate; and (e) Copy of ID card (KTP). These pre-requirements aims to prevent similar mistake that people have done before. Court decision clarifies that the biodata correction which people propose is well

⁴⁸ Chapter 1 verse (1) Act No. 39 Year 2008 on National Affairs

⁴⁹ Chapter 2 Verse (1) and(2) Government Regulation No. 9 Year 1975 ex Executor of Act No. 1 Year 1974 on Marriage

synchronized with another certificate. Copy civil registration certificate means to prove that the mistake of biodata is real, by handover the certificate that contains biodata mistake to the implementer institution or UPTD implementer institution and receive the well corrected certificate.

Word-to-word analysis results few conclusion. First, Religious Ministry is a government unit that takes place in city/regency level which means it may interpreted as Implementer Institution. Second, KUAKec is a UPTD Implementer Institution⁵⁰ of Religious Ministry. Third, Chapter 93 verse (1) contains phrase “UPTD Implementer institution may interpreted as KUAKec in this case which publish certain certificate of civil registration. Forth, biodata correction of certificate that published by KUAKec need district court decision in order to executes by the publisher. Fifth, authority of biodata correction law suit may propose to district court which contradiction in vertical way against Government Regulation No. 9 Year 1975 ex Executor of Act No. 1 Year 1974 on Marriage and PMA No. 11 Year 2007 on Marriage Recording.

2. Civil Registration Executor of Biodata Correction

Civil registration executor is state institution that takes place in city/regency. In other hand, there was an UPTD Civil registration executor that has same duty and authority but in smaller area radius. In process of marriage recording for muslim, the officer who in charge is

⁵⁰ Chapter 1 verse (1) Religious Ministry Regulation No. 39 Year 2012 on Organisation Form and Job Description of Kantor Urusan Agama

Kantor Urusan Agama (KUA) in sub district. KUA duties is recording legal event that can affect legal status of person, especially marriage.

In development of institutional and historical KUA and Islamic Court are born under one Ministry supervisor, which is Religious Ministry. As the effect some of regulations that were made by Religious Ministry give pair duty to these institutions to service the business of muslim, especially in marriage recording

After the policy of *one roof system* that united the entire court sector under supervisor of highest judicial power that is Supreme Court financially and organizationally. The policy is validated by Act No. 3 Year 2006 and then Islamic Court is no longer under supervisory of Religious Ministry organizationally, either KUA.

Marriage recording for muslim is done by Pegawai Pencatat Nikah as mentioned in PMA No. 11 Year 2007 Chapter 2 verse (1). In next verse state that Chief of KUA is act as PPN. Similar regulation also found in verse (20) President Regulation No. 25 Year 2008 claims that "*Kantor Urusan Agama Kecamatan, further is spelled by KUAKec, is institution unit that has charge to execute recording of marriage, divorce, talaq, and rujuk in subdistrict level for civilian who believes on Islam*".

Both of regulation interpreted KUA as institution unit that has charge to execute recording of marriage, talak, cerai and rujuk for muslim. Both of them regulate on civil registration recording, but PMA regulate more specific in marriage. And president regulation regulates

more general not just on marriage, including citizenship, death certificate, birth certificate, etc.

3. Authority Distribution on Marriage Recording on Government Regulation No. 9 Year 1975 ex Executor of Act No. 1 Year 1974 on Marriage

Indonesia as a law state has to separate the authority among its state institutions. The separation means giving different specific duty and task to serve the public and maintenance the stability of the county. For example National Legislative Assembly (DPR) has task and authority to legislate regulations in various sector. The duty is given by the direct order of constitutions.

As regulation executor of Act that contains general clause, this regulation received attribution competency from higher Act. This kind of competency used to explain more specific what was regulated in the Act, by considering the heterogeneity of need from society. Especially, for marriage regulation that should be done under certain differ Religious law.

The writer prefers to clarify the general clause that contained by Chapter 2 verse (3) Government Regulation No. 9 Year 1975 as quoted below:

Chapter 2

(3) Without ignoring principle of special law validity for marriage procedure based on various regulations, the marriage procedure has to follow regulation under Chapter 3 until Chapter 9 this Government Regulation.

The chapter purpose to give superior validity in marriage recording sector. This regulation regulates marriage procedure for muslim on non-muslim.

Rules that contain in Chapter 3 until Chapter 9 on this Government Regulation are about procedure of marriage. Including delivery process of marriage will, until announcement that the marriage is legally valid by the name of positive law.

Verse (1) and (2) are more important to discuss. Because both of them have big impact to procedure of marriage recording in legal way:

- (1) *Marriage recording for muslim under Islamic law is executed by Civil Officer as mentioned in Act No. 32 Year 1954 on Recording of Marriage, Talak and Rujuk.*
- (2) *Marriage recording for non-muslim under their own neither Religious law nor Islam is executed by Civil Registration Officer in Civil Registration Office as mentioned in various statutes about marriage recording.*

Clear conclusion of different legal source can be obtained if we read two verses above. Legal sources of marriage recording for muslim and non-muslim are different. Legal source for muslim marriage recording comes from Act No. 32 Year 1954 on Recording of Marriage, Talaq and Rujuk. And legal source for non-muslim marriage recording comes from various regulations on civil registration.

Formulation above impacted on procedure of marriage recording for muslim and non-muslim are divided. So, the legal source of them is also different neither in Civil Registration Office in city/regency or Kantor Urusan Agama in subdistrict level.

Act No. 32 Year 1954 on Recording of Marriage, Talaq and Rujuk as the source of marriage recording for muslim people only contains 4 chapters. The chapters mentioned below:

Chapter 1

Act of Republic Indonesia at 21th November 1946 No. 22 Year 1946 about recording of marriage, talak and rujuk is valid for areas but Java and Madura.

Chapter 1A

Statement of biskal gripir police judges that mentions in Chapter 3 verse 5 Act No. 22 Year 1946 is changed into Panitera Pengadilan Negara.

Chapter 2

Any regulations that needed to execute the order of Chapter 1 this act are made by Religious Ministry.

Chapter 3

This act is valid since the day of legalization.

Chapter 2 is the important point to discuss in this subject. It states that Religious Ministry has attributive competency to excite recording of marriage Talaq and Rujuk in entire areas of Indonesia. The ministry are authorized to make regulation because this competency.

Theoretically an authority could be granted from regulation through three ways. They are attribution, delegation and mandate.⁵¹ Attribution means giving specific authority/competency by central government to state institution through. Here where the new authority appears.⁵²

⁵¹ Ridwan H. R, *Hukum Administrasi Negara Edisi Revisi*, RajaGrafindo Persada: Jakarta, 2010. p. 141

⁵² Sadjjiono, *Memahami Beberapa Bab Pokok Hukum Administrasi*, LaksBang: Yogyakarta, 2008. p. 51

Furthermore, the legislators who have authority to give attribution authority are divided into:

- a. *Original legislator* is the central legislator institution. In this case is MPR for constitution former and DPR along with government are former of regulations while DPRD who has authority to form district regulations.
- b. *Delegated legislator* like President that has legal authority and able to form government regulation that could grant another competency to certain institution state.

Religious Ministry receives indirect attribution from Act No. 1 Year 1974 on Marriage and become delegated legislator. Religious Ministry is in one of Ministries under Indonesia government in religious sector. Religious Ministry is led by a Minister of Religious that refers to President Regulation No. 83 Year 2015 on Religious Ministry. The attribution is authority gift to make any regulation related to the marriage recording in purpose to make an order of civil registration for muslim. To make it happen, the Act No. 32 Year 1954 is built by removing irrelevant regulations and gives the authorities of marriage recording to Religious Ministry.

Religious Ministry has specific unit institution to implement the task of marriage recording for society order. The unit is Kantor Urusan Agama in sub district level. Ministry of Religious legislate such a regulation namely PMA as the consequences of attribution of authorities to record marriage civil registration. And give the task into KUA that

administratively and organizationally under supervisor of Religious Ministry. In definition of delegation where certain government institution distributes its own competency to the other institution and distributed competency isn't longer being distributor competency. KUA as the receiver of competency while Religious Ministry as competency distributor and delegated legislator.

In other hand, the recording of marriage for non-muslim is done by civil registration office in city/district level. It's done by direct order of Government Regulation No. 9 Year 1975 as executor of Act No. 1 Year 1974 on marriage.

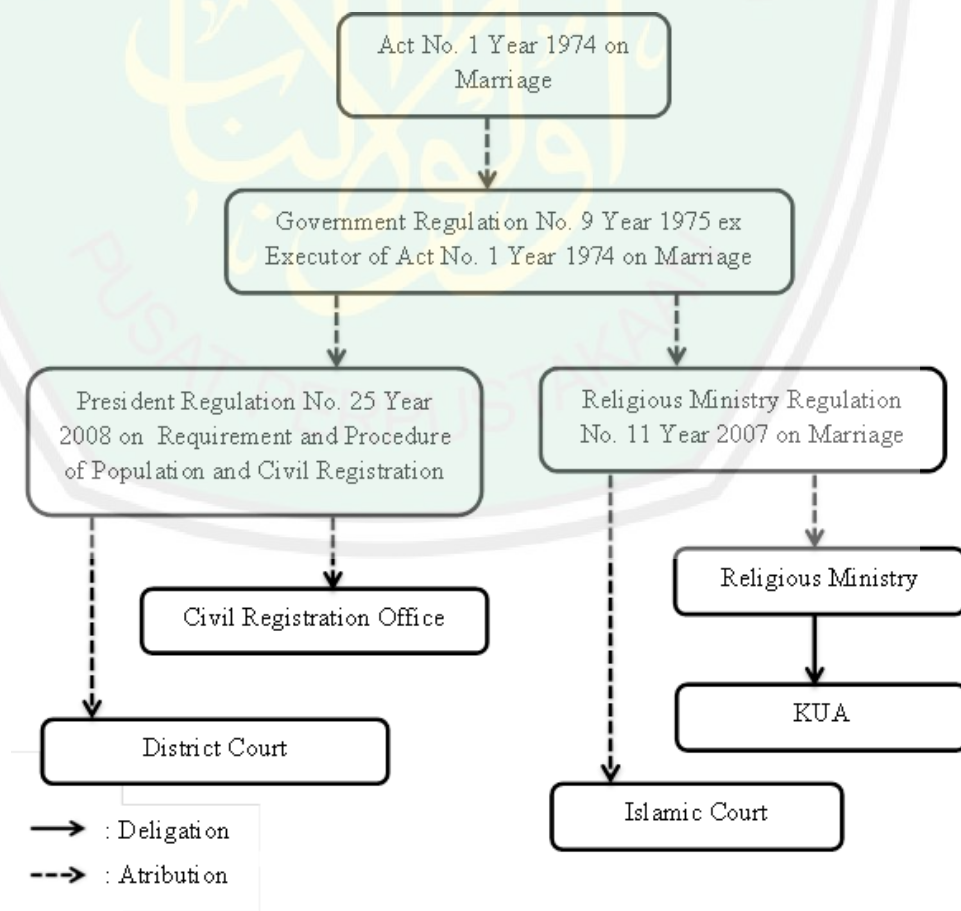


Chart 3.1 Authority order of marriage recording competency

The attribution order for civil registration office is clear enough as written in Government Regulation No. 9 Year 1974. Phrase of “*Marriage recording for non-muslim under their own neither Religious law nor Islam is executed by Civil Officer in Civil Registration Office as mentioned in various statutes about marriage recording*” there are no other interpretation for this verse but that. It doesn't like the authority of Religious Ministry that given through another regulation.

Then the legal sources used by Civil Registration Officer in Civil Registration Office are different with PPN in Kantor Urusan Agama. Legal source of Kantor Urusan Agama is PMA that legislated by Rligion Ministry whereas Civil Registration Officer uses any regulation that related to marriage civil registration in various position of statute hierarchy. The sources usage is in line with substance of verse (2) of chapter above: “*executed by Civil Officer in Civil Registration Office as mentioned in various statutes about marriage recording*”. For example Act No. 23 Year 2006 on Population Administration Recording and Government Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration.

4. Legal Norm Synchronization

Norm contradiction may caused chaos in real human social life. Especially for civil administration sector that has verious complicated procedures and pre-ruqirement. Problem which created by civil

administration mistake might not give direct disadvantage. But certain condition civil recording mistake can caused unpreventable problem.

Norm synchronization is required to eliminate or prevent legal contradiction among regulation. The contradiction might be found in vertical way or horizontal way. Both of the contradiction has different way to resolve.

Principle *lex specialis derogat legi generalis* is interpretation principle used to clarify that more specific regulation (*lex specialis*) eliminates more general regulation (*lex generalis*).⁵³ The principle uses to determine which regulation is being uses when there are two or more regulations regulates same law action in one sector.

In order to use this principle there are some pre-requirements that should be fulfilled before, they are:

1. Any clauses in more general statute are remaining valid, except when there is more specific regulation that used to;
2. Statutes that more specific should equal in position of hierarchy of law along with more general regulation (Act against Act or Government Regulation against Government Regulation);
3. Regulations that more specific must be in same sector (rezim) along with more general regulation. For example Book of Trading Law and Book of Civil Law are in same sector, regulate about civil contract.

⁵³ Bagir Manan, *Hukum Positif Indonesia*, FH UII Press, Yogyakarta, 2004, p. 43

Norm contradiction that was found in Chapter 34 verse (2) Chapter *jo* 1 verse (5) Ministry Religious Regulation No. 11 Year 2007 on Marriage Recording and Chapter 69 *jo* 93 verse President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration could be resolved with this principle.

Firstly the writer will make sure that both of the regulations regulate same legal action in one sector by explaining the substance of every chapter in both regulations.

Chapter 34 verse (2) Religious Ministry Regulation No. 11 Year 2007 on Marriage Recording states:

- (1) *Biodata correction is done by crossing the wrong text without removing the original and rewrites the correction right next to PPN signature and KUA stamp.*
- (2) *Correction related to biodata of husband, wife and wali have to attach court decision where the marriage recorded.*

Word “court” in the second verse means Islamic Court that refers to Chapter 1 verse (5) Religious Ministry Regulation No. 11 Year 2007 on Marriage Recording that state:

“Court is Islamic Court or Mahkamah Syar’iyah.”

And then for the next regulation in Chapter 93 President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration as mentioned below:

1. *Recording report of biodata correction is doing in Implementer Institution or UPTD which published those civil registration certificates.*
2. *Biodata correction record as mentioned in section (1) can be proceed by fulfilling these requirement :*
 - a. *Copy of district court decision of biodata correction;*
 - b. *Copy of civil registration certificate;*
 - c. *Copy of marriage certificate for those who was married;*
 - d. *Copy of family certificate; and*
 - e. *Copy of ID card (KTP).*

Both of regulations regulate same legal action, which is name correction. Religious Ministry Regulation uses phrase “*correction related to biodata*” it may interpret as changes of name, date and place of birth, name of parent, wali or address, when the President Regulation uses phrase of “*biodata correction record*” that has same interpretation with phrase of Religious Ministry Regulation.

The implementation of both regulations on biodata correction executes by civil registration officer. Formulation of chapter in Religious Ministry Regulation, to be exacts in verse (1) mentions that Pegawai Pencatat Nikah as civil registration officer that take place in KUA while President Regulation uses phrase of “*Civil Registration Executor or UPTD Civil Registration Executor*”. As explained before that Civil Registration Executor is state institution that takes place in city/regency. It can only be interpreted as Civil Registration Office. In other hand, there was an UPTD Civil registration executor that has same duty and authority but in smaller area radius and has authority to validate and publish a legal certificate that can’t be interpreted as Civil Registration Office but Kantor Urusan Agama.

One more important thing to be discussed and be main object of this thesis is both of the regulations regulate to attach court decision in order to execute biodata correction procedure. The attachment is requirement to validate that the biodata correction is not a mistake anymore. Religious Ministry Regulation uses sentence “*court decision where the marriage recorded*” that means court that has authority to decide the case of biodata correction is the court in city/subdistrict where the marriage is recorded.. Court in this regulation is Islamic Court. And then the President Regulation explicitly states “Copy of district court decision on biodata correction;” as a requirement of biodata correction procedure in Civil Registration Executor or UPTD Civil Registration Executor.

Based from explanation above can be concluded that both of the chapter regulate same legal action of one sector which is done by Civil Registration Executor or UPTD Civil Registration Executor. Even it is same, but Religious Ministry Regulation is more specific than President Regulation, remembering it was ministry regulation and as executorial organic statute.

For the next phase both of chapters going to be analyzed through *lex specialis derogat legi generalis* principle. One of principle requirements is both of contradiction norm should be in equal position of law hierarchy. President Regulation has higher grade in hierarchy of law than Religious Ministry Regulation. Then norm of *lex specialis* that

Religious Ministry Regulation contains can't eliminate norm of *lex generalis* in President Regulation.

In other perspective principle of *lex superiori derogat legi inferiori* that means statute that has higher rank in law hierarchy can eliminate statute in lower rank, in case there is contradiction of norm among them.⁵⁴ The principle perhaps can resolve the problem but the writer has different view. Remembering the position of Religious Ministry Regulation is not in main hierarchy of law but in secondary category of hierarchy that means impossible for Religious Ministry Regulation to eliminate President Regulation that in fifth rank of law hierarchy.⁵⁵

But the principle usage can't be accepted, because even both of regulation regulates one legal action in one sector and different rank of law hierarchy but the usage of those regulation are different. President Regulation used to regulated the marriage recording for non-muslim citizen while Religious Ministry Regulation aims to regulate marriage recording for muslim that married under the Islamic law.

Both of regulations has same attribution competency from one same statute, which is Government Regulation No. 9 Year 1975 as executor of Act No. 1 Year 1974 on Marriage. If both of statutes come and made from one same Act, then *lex superiori derogat legi inferiori* principle is unusable. Because technically no one of them are more

⁵⁴ Bagir Manan, *Hukum Positif Indonesia*, FH UII Press, Yogyakarta, 2004, p. 56

⁵⁵ Chapter 7 (1), Chapter 8 (1) Act No 12 Year 2011 on Formation of Statue in Indonesia.

superior to other. The difference only about the form of statute, while the usage of them is already categorized as explained before even it was in one sector.

The result of contradiction legal analysis above is going to used to synchronize the legal norm in various regulations to resolve authority complication among court. The main problem found by writer is the phrase Implementer Institution and/or UPTD Implementer Institution. In order to harmonize the legal contradiction writer has made some solution.

Implementer Institution explained as Is a government unit in city/regency level which has responsibility and duty to provide civil administration record.⁵⁶ Phrase provides civil administration record including marriage, divorce, death, adoption and birth. Those five legal event is a important event in people life that should be well recorded by the authorized institution. The legal events affect legal status of person related to his right and duty. Marriage and divorce legal event in Indonesia regulation divides into two sectors. For muslim under authorities of Religious Ministry and non-muslim under authorities Civil Registration Office. The verse does not mention the separation specifically.

Chapter related to biodata correction quotes the biodata correction execution occurs in Implementer Institution that published the civil administration record, for muslim in the KUA and for non-muslim in

⁵⁶Chapter 1 verse (6) President Regulation No. 25 Year 2008

Civil Registration Office. Both of them need different court decision in order to be executed.

Therefore, as long as Chapter 1 verse (21) President Regulation No. 25 Year 2008 interpreted as UPTD Implementer Institution is an Unit Pelaksana Teknis Dinas Implementer Institution that shortened as UPTD Implementer Institution unit in sub-district level which provides civil recording services with certificate publishing authority except marriage recording of muslim it doesn't cause contradiction with another regulation.

C. Legal Policy of Biodata Correction in Marriage Certificate

1. Legal Policy of Legislation

Rule of law principle (*het rechtszekerheidsbeginsel*) in legal forming process is very important. Statement of I.C Van Der Viles above is in line with principle of legal forming in Act No. 12 Year 2011 on Formation of Statute, which is clarity of formulation. The principle mean that is every regulation are using easy understanding diction and terminology along with obvious word usage so doesn't make any possibilities to be multi-interpretative regulation.⁵⁷

Once again the writer wants to restate both regulations before due its interpretation impact to Islamic court competence. Therefore, the regulations will be explained below.

⁵⁷ Aziz Syamsudin, *Proses and Teknik Penyusunan Act (Edisi-2)*, Sinar Grafika, Jakarta Timur 2014, p.34-36

Chapter 34 verse (2) Religious Ministry Regulation No. 11 Year 2007 on Marriage Recording states:

- (1) *Biodata correction is done by crossing the wrong text without removing the original and rewrites the correction right next to PPN signature and KUA stamp.*
- (2) *Correction related to biodata of husband, wife and wali have to attach court decision where the marriage recorded.*

Word “court” in the second verse means Islamic Court that refers to Chapter 1 verse (5) Religious Ministry Regulation No. 11 Year 2007 on Marriage Recording that state:

“Court is Islamic Court or Mahkamah Syar’iyah.”

And then for the next regulation in Chapter 93 President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration as mentioned below:

- (1) *Recording report of biodata correction is doing in Implementer Institution or UPTD which published those civil registration certificates.*
- (2) *Biodata correction record as mentioned in section (1) can be proceed by fulfilling these requirement :*
 - a. *Copy of district court decision of biodata correction;*
 - b. *Copy of civil registration certificate;*
 - c. *Copy of marriage certificate for those who was married;*
 - d. *Copy of family certificate; and*
 - e. *Copy of ID card (KTP).*

Formulation that used by Religious Ministry Regulation clearly states that civil administration unit that has authorities of biodata correction is Kantor Urusan Agama where the marriage is recorded. The

task is executed by Chief of KUA as Pegawai Pencatat Nikah. Along with competency of Islamic court to decide biodata correction case for muslim people.

But President Regulation uses phrase “*Civil Registration Executor or UPTD Civil Registration Executor*” as the authority of civil registration officer. And point (a) of verse (2) state that the requirement of biodata correction is decision from District Court. In other word, District Court has competency to receive any cases of biodata correction from both muslim or non-muslim.

The phrase above can caused multi interpretation and take over Islamic Court competency of biodata correction, like what was written in Religious Ministry Regulation No. 11 Year 2007 on Marriage Recording. Because “*UPTD Civil Registration Executor*” is might interpret as Kantor Urusan Agama. Because in general clause of Government No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration is mentioned that KUA is one of UPTD Civil Registration Executor which mean Civil Registration Office and KUA has same position. With this interpretation case of muslim biodata correction needs a decision of District Court. The interpretation is against the substance of Religious Ministry Regulation also the statute that gives the attribution authority that is Government Regulation No. 9 Year 1975 as executor of Act No. 1 Year 1974 on Marriage.

Legally, both of regulations are made based on authority attribution of Act No. 1 Year 1974 on Marriage. The attribution authority

is made in purpose to make difference for marriage recording of muslim and non-muslim. The separation made through different regulation sector in different position of statute hierarchy.

Historically, Government Regulation No. 9 Year 1975 is legislated when entire court sector haven't affected by one roof system policy while Religious Ministry is supervising Kantor Urusan Agama and Islamic Court. Therefore, the substance of Religious Ministry Regulation contains pair-duty for Kantor Urusan Agama and Islamic Court.

Religious Ministry acts as delegated legislator to legislate regulations related to marriage recording, including biodata correction. The regulation namely PMA was made for administrative instruction for society and institution itself to execute civil registration in marriage of muslim.

Majority of muslim citizen in Indonesia is 87,1% of 237.641.326 people. It was the biggest country with muslim people in the world. The majority support the development of islamic law growth in Indonesia. Islamic Court was build to handle all the bossiness and needs for muslim. Even the country didn't apply full syariah law but gave certain authority for muslim.

Principle in Islamic Court namely Personality of Muslim that contained in Chapter 2 Act No. 3Year 2006. The principle means every party that could be proposed a case to Islamic Court is only muslim on specific civil cases that regulated in statute of Islamic Court Competencies.

This principle don't claim that muslim as party cant propose their cases to District Court. But for every specific case that was legally admitted by statute and were included into Islamic Court competency can only proposed into Islamic Court. Marriage is one of Islamic Court authority, which support the biodata correction of Marriage Certificates stated in Religious Ministry Regulation No. 11 Year 2007 on Marriage Certificate.

2. Legal Policy of Islamic Court Authority

Islamic Court is one of Judicial Powers that distributed into few kind of court in Indonesia. Each of court has their specific authority in various sectors. The separation aims to give the court focus and concentration to execute their authority. Every law state always has court to maintenance the justice among people.

Legally, the courts built by the order of constitutions of Indonesia (UUD 1945). But especially Islamic Court was existing since the colonialism era. It began in masjid with Kyai as judge till today. It was growing due supports from various direction.

After the independency of Indonesia Islamic Court was officially build under direct order of Act No. 1 Year 1961 and Act No. 19 Year 1964. Then Islamic Court was equal with four other Courts in Indonesia. Year 1974 Islamic Court has authority to handle marriage lawsuit by order of Act No. 1 Year 1974. The authority is developing more till today.

Authorities of Islamic Court mentioned in Act No. 3 Year 2006 on Islamic Court including marriage, inheritance, wasiat, hibah, wakaf, zakat, infaq, shodaqoh and economic syariah. Beside authorities that mentioned above there was also several authorities that mentioned in other regulations. In this case Religious Ministry Regulation No. 11 Year 2007 on Marriage Recording. The regulation gave authority to Islamic Court to handle biodata correction marriage certificate.

Legal basic means to establish authority distribution for among institutions give through various regulations in each rank in law hierarchy. Indonesia as state that using civil law. Regulations have the superior legal position in order to determinate justice and authority for each institution. Even president can't intervene the legal procedure. Then the actor that has biggest impact into regulation substance is the legislator for each regulation which they have made.

The contradiction which discussed before is made by different legislator and year. Religious Ministry Regulation No. 11 Year 2007 on Marriage Recording is made by Religious Ministry at 25 June 2007 and signed by Muhammad M. Basyuni as Religious Minister of Republic Indonesia while President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration made by President at 4 April 2008 and signed by Dr. H. Susilo Bambang Yudhoyono as President of Republic Indonesia at that time. If we observed more carefully both of the regulations are made by different sector. Even the

Religious Ministry Regulation is legislated one year earlier than President Regulation.

As the result of norm synchronization states that the regulation related to biodata correction in President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration on phrase UPTD Imlementer Institution cause misused legal standing of law suit authority of biodata correction by District Court. This happens in some case, where biodata correction of marriage certificate of muslim proposed to District Court. It occurs in lawsuit :

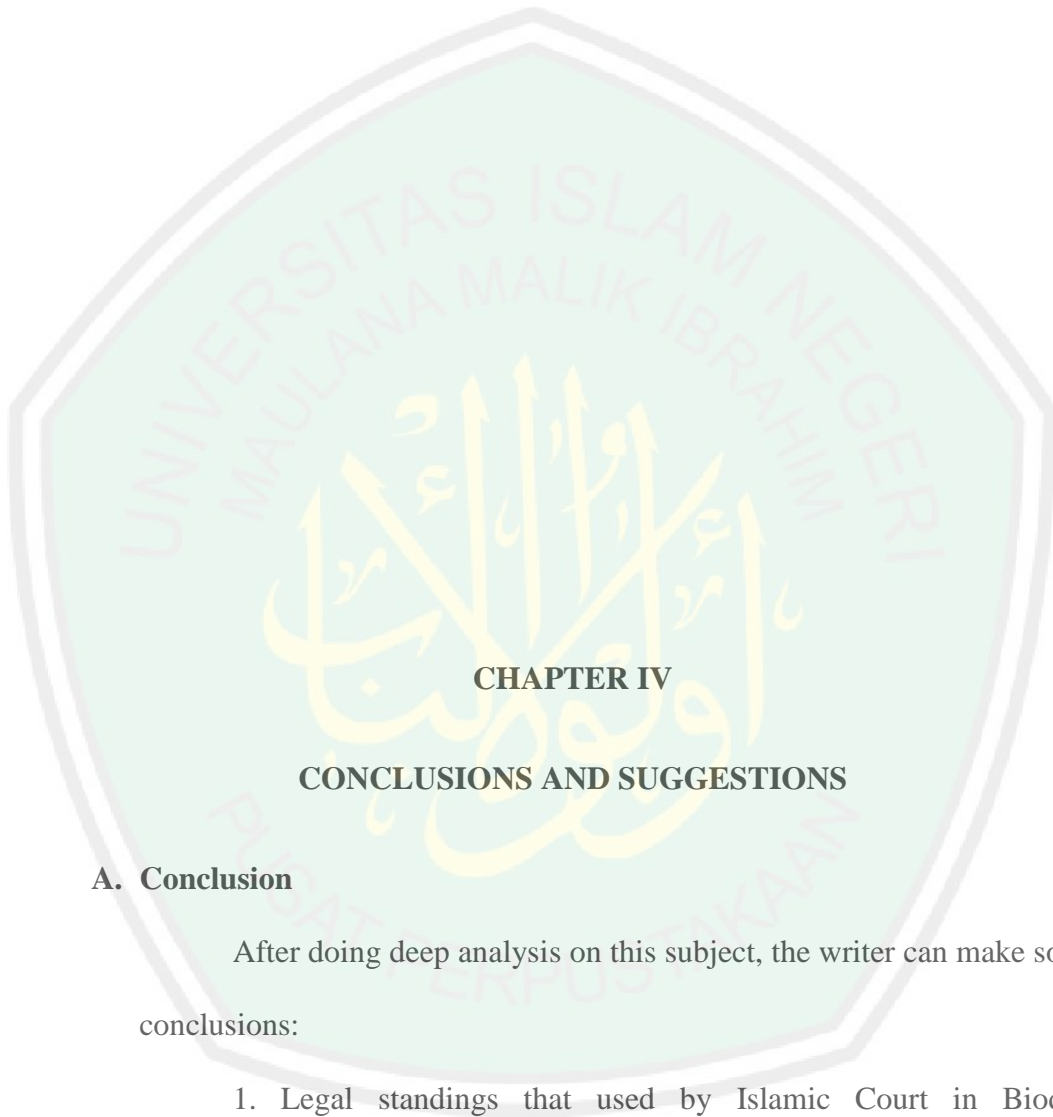
- a. Decision No. 06/Pdt.P/2014/PN.Wng
- b. Decision No. 42/Pdt.P/2010/PN.Kab.Prob
- c. Decision No. 613/Pdt.P/2013/PN.Kds
- d. Decision No. 656/Pdt.P/2013/PN.Mlg
- e. Decision No. 79/Pdt.P/2011/PN.Mlg

Those lawsuits were being proofs of existence legal standing misusage on biodata correction on marriage certificate of muslim by District Court. The lawsuits issued around 2010 and up, in other word after legislation of President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration.

Principle of muslim personality in Islamic Court is not a way to monopolize the auhority on muslim. It aims to maintenance necessity of muslim to practice their religion on many ways of life, including in marriage practice. Muslim marriage has different pre-requirements and procedure compared to other religion. Judges of Islamic Court knew well

all those islamic law/syaria law along with legal standing on Al-Qur'an and Hadits. This is a spesific way to establish among muslim on justice. Biodata correction of marriage certificate muslim was being the absolut authority of Islamic Court because of reasons.





CHAPTER IV

CONCLUSIONS AND SUGGESTIONS

A. Conclusion

After doing deep analysis on this subject, the writer can make some conclusions:

1. Legal standings that used by Islamic Court in Biodata Correction of Marriage Certificate are : (a) Chapter 2 Act No. 1 Year 1974 on Marriage, (b) Chapter 4 and 5 Islamic Law Compilation, (c) Chapter 1 and 34 verse (2) Religious Ministry Regulation No. 11 Year 2007 on Marriage Recording, (d) Chapter 49 verse (1) and 89 verse (1) Act No. 7 Year 1989 on

Islamic Court, (e) Chapter 5 verse (1) President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration, (f) Chapter 52 Act No. 23 Year 2006 on Population Administration Recording, (g) Chapter 5 verse (1) Act No. 48 Year 2009 on Judicial Power. The legal standing of Islamic Court is specifically states that the authority belong to Islamic Court with no abjection.

2. Legal synchronization analysis concludes as long as Chapter 1 verse (21) President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration interpreted as UPTD Implementer Institution is an Unit Pelaksana Teknis Dinas Implementer Institution that shortened as UPTD Implementer Institution unit in sub-district level which provides civil recording services with certificate publishing authority except marriage recording of muslim, it does not cause contradiction with another regulation.

3. Execution of Chapter 1 verse (21) President Regulation No. 25 Year 2008 on Requirement and Procedure of Population and Civil Registration by District Court is not appropriate. Lawsuit of biodata correction in marriage certificate is absolut authority of Islamic Court. Dualism of abolut authority was being occur in implementation of related regulation. It proves by these decisions Decision :

a. No. 06/Pdt.P/2014/PN.Wng

- b. Decision No. 42/Pdt.P/2010/PN.Kab.Prob
- c. Decision No. 613/Pdt.P/2013/PN.Kds
- d. Decision No. 656/Pdt.P/2013/PN.Mlg
- e. Decision No. 79/Pdt.P/2011/PN.Mlg

B. Suggestion

Based on conclusion that was found on this thesis, the writer offers some suggestions to fix and resolve the contradiction of norm that caused ambiguity of law:

1. Judges of Islamic Court are suggested to quote Government Regulation No. 9 Year 1975 as executor of Act No. 1 Year 1974 on Marriage as the legal standing of biodata correction competency. The quotation purposes to make Religious Ministry of Regulation No.11 Year 2007 on Marriage Recording usage as legal standing become stronger. Because its attribution authority refers on that Government Regulation.
2. Legislative authority need to make revision on statutes on civil registration recording. Especially on biodata correction, to ensure harmonization aspect and legal language are good and anti-multi-interpretation. Because the purpose of statute legislation is to neither make order in civil registration nor make ambiguity of norm and dispute of competence between courts sector.

3. Religious Ministry is recommended to complete the missing requirement for biodata correction in Religious Ministry Regulation No. 11 Year 2007 on Marriage Recording. So, Islamic Court judges are not refer to Act No. 23 Year 2006 on Civil Registration Recording on pre-requirement of biodata correction while investigation phase.



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Act No. 48 Year 2009 on Judicial Power

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Decision No. 0178/Pdt.P/2013/PA.Sit

Decision No. 0253/Pdt.P/2010/PA.TA

Decision No. 1002/Pdt.P/2013/PA.Sby

Decision No. 120/Pdt.P/2013/PA.Spg





APPENDIXES



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1	Friday, 22 January 2016	Proposal	
2	Saturday, 19 March 2016	Chapter I and II	
3	Monday, 20 June 2016	Review Chapter II	
4	Thursday, 21 June 2016	Chapter III and IV	
5	Wednesday, 22 June 2016	ACC Chapter I, II, III and IV	

Malang, 16 December 2016

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