

**DYNAMICS OF TUNISIAN POLYGAMY LAW
IN GENDER PERSPECTIVE**

Thesis

**By:
AyyusSahidatulChusnayaini
Student ID Number 10210053**



**AL-AHWAL AL-SYAKHSHIYYAH DEPARTMENT
SHARIA FACULTY
THE STATE ISLAMIC UNIVERSITY OF
MAULANA MALIK IBRAHIM
MALANG
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MALANG
2014**

STATEMENT OF THE AUNTENTICITY

In the name of Allah (swt),

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

DYNAMICS OF TUNISIAN POLYGAMY LAW IN GENDER PERSPECTIVE

is truly the writer's original work. It does not incorporate any material previously written or published by another person. If it is proven to be another person's work, duplication, plagiarism, this thesis and my degree as the result of this action will be deemed legally invalid.

Malang, 27th of March 2014

The writer,
materai

Ayyus Sahidatul Chusnayaini
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APPROVAL SHEET

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DYNAMICS OF TUNISIAN POLYGAMY LAW IN GENDER PERSPECTIVE

The supervisor states that this thesis has met the scientific requirements to be proposed and to be tested by the Thesis Board of Examiners.

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MOTTO

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَاثَ وَرُبَاعَ فَإِنْ خِفْتُمْ

أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَلِكَ أَدْنَىٰ أَلَّا تَعُولُوا

And if you fear that you will not deal justly with the orphan women, then marry those that please you of (other) women, two or three or four. But if you fear that you will not be just, then (marry only) one or those your right hand possesses. That is more suitable that you may not incline (to injustice)¹

وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ فَلَا تَمِيلُوا كُلَّ الْمَيْلِ فَتَذَرُوهَا كَالْمُعَلَّقَةِ وَإِنْ تُصْلِحُوا

وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ عَفُورًا رَحِيمًا

"And you will never be able to be equal (in feeling) between wives, even if you should strive (to do so). So do not incline completely (toward one) and leave another hanging. And if you amend (your affairs) and fear Allah - then indeed, Allah is ever forgiving and Merciful²

¹ Q.S an-Nisa' (4): 3

² A.S an-Nisa' (4): 129

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All praise due to Allah, the Cherisher and Sustainer of all the worlds. There is neither might nor power but with Allah the Great, the Exalted. With only His grace and guidance, this thesis entitled “Dynamic of Tunisian Polygamy Law In Gender Perspective” could be completed, and also with His benevolence and love, peace and tranquility of the soul. Peace be upon the Prophet Muhammad (saw) who had brought us from darkness into light, in this life. May we be together with those who believe and receive intercession from Him in the day of Judgement. Amin

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7. Staff of the Sharia Faculty of The State Islamic University of Maulana Malik Ibrahim Malang. The writer express gratitude for all their support and co-operation during the course of completing this thesis.
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Hopefully, by imparting what has been learned during the course of study in the Faculty of Sharia of State Islamic University of Maulana Malik Ibrahim of Malang, it will benefit all readers and the writer herself. Realizing the fact that error and weakness is impartial to being human, and this thesis is still far from perfection, the writer appreciates constructive criticism and suggestions for the improvement and betterment of this thesis.

Malang, 27th of March 2014

The writer,

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TRANSLITERATION GUIDANCE

A. General

Arabic transliterate into Indonesian writing (Latin), Arabic language support is not translated into Indonesian.

B. Consonant

ا	= not symbolized	ض	= dl
ب	= b	ط	= th
ت	= t	ظ	= dh
ث	= tsa	ع	= ‘ (apostrophe)
ج	= j	غ	= gh
ح	= h	ف	= f
خ	= kh	ق	= q
د	= d	ك	= k
ذ	= dz	ل	= l
ر	= r	م	= m
ز	= z	ن	= n
س	= s	و	= w

ش = sy

ه = h

ص = sh

ي = y

Hamzah (ء) is often denoted by alif , when located at the beginning of the word in transliteration following the vowel , not represented , but if it is located in the middle or end of the word , it is denoted by a comma above (') , turned by a comma (') for a replacement emblem " ع " .

C. Vocal , length and Diphthong

In each Arabic writing in the form of vocal *fathah* Latin inscription written with "a" , *kasrah* with " i " , *dlommah* with " u " , while the length of each reading is written in the following way :

Vowel (a) leght = â example قال become *qâla*

Vowel (i) leght = î example قيل become *qîla*

Vowel (u) leght = û example دون become *dûna*

Especially for reading *ya ' nisbat* , it should not be replaced with an "i " , but still written with " iy " in order to describe *ya ' nisbat* an end . So the diphthong sound, *wawu* and *ya '* after *fathah* are written as " aw " and " ay " . Consider the following example:

Diphtong (aw)= و example قول become *qawlun*

Diphtong (ay) = ي example خير become *khayrun*

D. Ta'marbûthah (ة)

Ta' marbûthah (ة) transliterated as " t " if it is in the middle of word, but if *ta' marbûthah* are located at the end of word, it transliterated as " h " for example الرسالة للمدرسة become *al - risalat li al-mudarrisah* , or in the standing among two word that in the form of *mudlaf* and *mudlaf ilayh*, it transliterated as *t* which is connected with the next sentence, for example في رحمة الله become *fi rahmatillâh*.

E. Auxiliary and Lafadh al-Jalâlah

An auxiliary " al " (ال) is written in small letters, unless located in the beginning of the sentence , while " al " in *lafadh jalalâh* which is located in the middle of two word or being or become *idhafah*, it remove from writing. Consider the following examples:

1. Al-Imâm al-Bukhâriy said ...
2. Al-Bukhâriy in muqaddimah of his book said ...
3. *Masyâ' Allah kânâ wa mâlam yasyâ' lam yakun...*
4. *Billâh 'azza wa jalla...*

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ABSTRAK

Ayyus Sahidatul Chusnayaini, NIM 10210053, 2014. *Dinamika Hukum Poligami di Negara Tunisia dalam Perspektif Gender*. Skripsi Jurusan Al-Ahwal Al-Syakhsyiyah, Fakultas Syariah, Universitas Islam Negeri (UIN) Maulana Malik Ibrahim Malang. Pembimbing: Dr. Zaenul Mahmudi, MA.

Kata Kunci: Dinamika, Gender, Hukum Poligami, Tunisia

Dinamika hukum yang muncul di dunia muslim ditandai dengan keberanjakan undang-undang modern dari konstruksi kitab *fiqh* klasik. Poligami merupakan sebuah isu lama yang selalu mengundang kontroversi. Salah satu produk pembaharuan hukum keluarga yang radikal di Tunisia adalah tentang pelarangan hukum poligami. Negara Islam yang mayoritas bermadzhab Maliki ini memandang pembaharuan tersebut bertentangan dengan hukum Islam. Namun, apabila dilihat dari perspektif gender, pembaharuan ini membawa sebuah kemajuan hukum keluarga yang dapat melindungi hak-hak wanita Tunisia. Dalam penelitian ini, terdapat rumusan masalah yaitu: 1) Bagaimana dinamika hukum poligami di Negara Tunisia? 2) Bagaimana pandangan gender terhadap dinamika hukum poligami di Tunisia?

Adapun metode yang digunakan dalam penelitian ini adalah jenis penelitian normatif, dengan perolehan data yang bersifat deskriptif kualitatif. Sedangkan pendekatan yang digunakan adalah kolaborasi dari pendekatan historis, perundang-undangan dan konseptual. Data yang digunakan dalam penelitian ini adalah data sekunder yang diperoleh dari informasi yang sudah tertulis dalam bentuk dokumen

Hasil penelitian menunjukkan bahwa 1) dinamika hukum poligami sangat revolusioner di Tunisia. Beberapa faktor yang mempengaruhi dinamika tersebut, yaitu faktor pemahaman agama, faktor ideologi sekuler, sosial-budaya, ekonomi, politik-hukum, dan pendidikan. Dinamika ini dapat dilihat dari 3 periode perkembangan hukum yaitu: a) Periode sebelum kemerdekaan, poligami diperbolehkan dengan syarat adil dan batas maksimal 4 orang istri. b) Periode setelah kemerdekaan, poligami dilarang melalui pasal 18 *Code of Personal Status* 1957. Pelanggaran terhadap ketentuan ini mendapat hukuman penjara 1 tahun dan/denda 240.000 *malim*. Dasar larangan yang digunakan pemerintah Tunisia adalah bahwa poligami sebagaimana perbudakan, ideal *al-Qur'an* tentang perkawinan adalah monogami dan rujukan ayat poligami dari pandangan *ulama'* modern Mohammad Abduh. c) Sedangkan pada periode revolusi (sekarang) terdapat wacana isu pelegalan larangan hukum poligami di Tunisia. 2) Dalam perspektif gender, dinamika hukum poligami yang terjadi pada periode setelah kemerdekaan menunjukkan langkah maju Negara Tunisia dalam usaha melindungi hak-hak kaum wanita dengan melakukan interpretasi ulang terhadap konteks sosial dari ayat-ayat poligami dengan menyatakan bahwa hukum poligami dilarang di Tunisia.

ABSTRACT

Ayyus Sahidatul Chusnayaini, Student ID Number 10210053, 2014. *Dynamics of Tunisian Polygamy Law in Gender Perspective*. Thesis. Al-Ahwal Al-Syakhshiyah Department, Syariah Faculty, The State Islamic University of Maulana Malik Ibrahim of Malang. Supervisor: Dr. Zaenul Mahmudi, MA.

Key words: Dynamics, Gender, Polygamy Law, Tunisia

Legal dynamics arise in the Muslim world is marked by the construction of classical *fiqh* into modern laws. Polygamy is an old issue that always invites controversy. One of radical product on family law reform in Tunisia is about the prohibition of polygamy law. The Islamic country with Maliki scholar as majority of the adherent perceive that the reform contradict to Islamic law. However, when it is perceived by gender perspective, this reform brings the progression of family law that can protect the rights of Tunisian women. In this research, there are two formulations of the problem, they are: 1) What is the dynamics of polygamy law in Tunisia? 2) How can gender perspective perceive the dynamics of Tunisian polygamy law in gender perspective?

The method used in this study is the type of normative research, with descriptive-qualitative method for gaining of the data. The approach that is used in this research is a collaboration of historical, statute and conceptual approaches. The data used in this study is secondary data obtained from the information that have been written in the form of documents.

The results of research are 1) the dynamics of polygamy law is a revolution in Tunisia. There are several factors that influence the dynamics: understanding of religion; secular ideology; socio-cultural; economic; legal-political; and education. This dynamics can be seen from the third period of legal development, namely: a) the period of pre-independence, polygamy is allowed by condition, a fairness and maximum limit of 4 wives. b) The period after independence, polygamy is prohibited by Article 18 of the Personal Status Code of 1957. Trespassing this provision will punished by one year imprisonment sentence and / or fine about 240,000 *malim*. The Basic prohibition which used by Tunisian government is the thought that polygamy is as bad as slavery, because the ideal of *Kalam Qur'an* about marriage is monogamous, and as well as the modern thought of Mohammad Abduh about the verse of polygamy that become Tunisian government reference. c) Whereas, in the period of the revolution (nowadays) there are some issue about the discourse of law legalizing on banning polygamy law in Tunisia. 2) In a gender perspective, the dynamics of polygamy law that occurred in the period after independence indicates a progression of the effort from Tunisian State to protect the rights of women by undertaking the re-interpretation on social context of some verse of polygamy by arguing that the polygamy law is prohibited in Tunisia.

ملخص البحث

أيوس شاهدةا الحسينيين، 10210053، 2014، الديناميكية في قوانين تعدد الزوجات في دولة تونس في نظرية الجنس (gender)، بحث جامعي، كلية الشريعة، قسم الأحوال الشخصية الجامعة الإسلامية الحكومية مولانا مالك إبراهيم، مالانج. المشرف: الدكتور زين المحمود المحستير
الديناميكية، الجنس (gender)، تعدد الزوجات، تونس

الديناميكية القانونية التي تنشأ في دول المسلم تتميز بالتغيرات في قوانينهم من أحكام الفقه التراثي الإسلامي إلى الأحكام الحديثي المتأثر في الاحكام الغربية. تعدد الزوجات هي قضية القديمة التي تدعو دائما إلى الجدل. من نتيجة تجديد الاحكام القنونية في تونس هي وجود القانون تحريم تعدد الزوجات في مجلة الأحوال الشخصية. هذه الدولة معظمها المسلمون يتمذهبون بالمالكية في الأغلبية، رأى هذا التجديد جمهور العلماء انه يخالف الشريعة الإسلامية. ولكن، عند ما ننظر نظرية الجنس (gender)، هذا التجديد يجلب تقدم قانون الأسرة التي يمكن أن تحمي حقوق المرأة التونسية. في هذا البحث هناك مشكلتان، وهي: (1) كيف الديناميكية القانونية عن تعدد الزوجات في دولة تونس؟ و (2) كيف الديناميكية القانونية عن تعدد الزوجات في دولة تونس في نظرية الجنس (gender)؟
والأساليب المستخدمة في هذا البحث هي البحث المعياري. وأما المنهج المتبع فهو التركيبي بين المنهج التاريخي والقانوني والمفاهيمي (conceptual). البيانات المستخدمة في هذا البحث هي البيانات الثانوية التي تم الحصول عليها من المعلومات المكتوبة في الوثائق .

نتائج البحث هي (1) أن الديناميكية القانونية عن تعدد الزوجات هي التجديد الثوري (revolutionary) في تونس. هناك العديد من العوامل التي تؤثر على هذه الدينامية، مثل فهم الدين، والعوامل الأيديولوجية العلمانية الاجتماعية والثقافية والإقتصادية والسياسية والتعليمية. ويمكن أن نرى هذه الديناميكية من ثلاث فترات من تطوير القانون، وهي: (أ) فترة قبل الاستقلال، فيها يسمح تعدد الزوجات بشروط العدالة ويحد 4 زوجات، (ب) فترة بعد الاستقلال، فيها تحريم تعدد الزوجات كما ذكرت في المادة 18 في مجلة الأحوال الشخصية عام 1957. انتهاك لهذا الحكم يحصل على العقب في السجن لمدة 1 سنة و/ يغرم 240,000 م.م. الأساس المستخدم في الحكومة التونسية هو أن تعدد الزوجات من الاستعباد، و أن القرآن يدعو إلي الزواج بزوجة واحدة وهذا ما أكده "محمد عبده" في تفسير آية تعدد الزوجات . (ج) وأما في فترة الثورة (الآن) فهناك مسألة في قضية تصديق القانون عن تحريم تعدد الزوجة في تونس. (2) أما من نظرية الجنس (gender)، هذه

الديناميكية القانونية عن تعدد الزوجات التي وقعت في فترة بعد الاستقلال تبين خطوة من التقدم في جهود الدولة التونسية لحماية حقوق المرأة في إجراء إعادة التفسير السياقي الاجتماعي عن آيات تعدد الزوجة بتقويم القانون في تونس من حرمة تعدد الزوجات.