



CHAPTER I

INTRODUCTION

A. Background of Research

One of the arising phenomena in the Muslim world on the 20th century is the existence of the family law reforms, which predominantly occurred in Muslim countries.¹ Family law is a basic of Islamic sharia and characteristic of the structure and ethos of Islamic civilization for centuries. In addition, the Islamic Family Law is an area where Islamic law is still applied in almost every countries in the Islamic world.²

¹ Atho'Mudzhar, *"Hukum Keluarga di Dunia Islam Modern Studi Perbandingan dan Keberanjakan UU Modern dari Kitab-Kitab Fikih"* (Jakarta: Ciputat Press, 2003), p. 10

² J.N.D. Anderson, *Hukum Islam Di Dunia Moderen*, translated by Machnun Husain, Edition. I (Yogyakarta: Tiara Wacana, 1994), p. 100.

In modern era, Islamic law differentiated by the provision of classical *fiqh* books. Many Islamic countries in the world are trying to produce and reform various constitutions and code, which regulate in some state, including family law. In this reformation, some efforts are focused on the issues of personal status, which are still governed by Islamic law. The majority of Muslim countries perform a version of the family law that has been codified.

Islamic law reforms carried out by the Islamic countries are a great changing that are unprecedented in the last century. Generally, the substance of family Code in the modern world move out the classical *fiqh* discourse construction and it tries to solve the problem of inequality of rights in both man and woman in Islamic family law, so that the marital rights of women are recognized.³

The first reform of family law was carried out by Turkey when issuing the *Ottoman Law of Family Rights (Qanun al-Huquq qarar al-'Â'ilah al-'Usmâniyyah)* in 1917.⁴ After that Turkey was followed by Lebanon in 1919, Jordan in 1951, Syrians in 1953⁵ and also Tunisia in 1956. Until 1996, in Middle-East countries there are only five States remaining that have not

³M. Atho Mudzhar. 1998. *Membaca Gelombang Ijtihad: Antara Tradisi dan Liberas*. Yogyakarta: Titian Ilahi Press. p. 12-13.

⁴Tahir Mahmood, *Family Law Reform in the Muslim World* (Bombay: N. M. TRIPATHI PVT. LTD, 1972), p. 17

⁵Tahir Mahmood, *Family Law Reform*, p. 73 and 93

reformed family law, including which were still in the process of drafting. These countries are Emirates, Saudi Arabia, Qatar, Bahrain, and Oman.⁶

The reformation of Islamic law is unique and different, if it is viewed from one country to another country, generally it can be classified into three groups. First, the country that does not reform Islamic law and still applies the existing laws in the books of *fiqh* in accordance to their religious Scholars. Country that included in this category, for example is Saudi Arabia. Second, the country that leaves the Islamic law and replaces it with a secular law, it commonly applied in Europe, and Turkey is one of the countries in this category. Third, the country that reforms the Islamic law by combining Islamic law and secular law, the country that included in this category are Egypt, Tunisia, Iraq, Syrians, Indonesia and others.⁷ In the history of these reforms, Tunisia is the most radical country in the building of Islamic law. In addition, if it is compared to other Arab countries, the legal reform in Tunisia is more revolutionary.

Tunisia is an Islamic country which has the official name of the Republic of Tunisia. The capital is Tunis, located in North Africa. The country is bordered by Algeria in the west, in the north and east by Mediteranian, and with Libyan in southeast. The 10 million people country's population are concentrated in the north, 98% of the majority of the Tunisian population are

⁶Dawoud El Alami dan Doreen Hinchcliffe, *Islamic Marriage and Divorce of The Arab World*, (London, The Hague, Boston: Kluwer Law International, 1996), p. 4.

⁷J. N. D. Anderson, *Hukum Islam Di Dunia Moderen, Alih Bahasa Machnun Husain*, edition I (Yogyakarta: Tiara Wacana, 1994), p. 83

Muslim.⁸ Previously Tunisia was a region of the Ottoman Government from Ottoman Empire. In 1883, Tunisia became the French protectorate based on *La Marsa* treaty, and in 1956 Tunisia gained independent status with Habib Bourguiba as the first president, who oversaw 23 provinces.⁹

Bourguiba built the state with some efforts as consolidation of power, taking forward steps and implementing strict policies, etc. In this country, one of the most radical product of reform is about polygamy. The provision of polygamy law which is applied in Tunisia is far different from another modern family law in some Islamic Countries in the world. Tunisia which is known as a moderate country stated that polygamy practice is prohibited clearly in the Tunisian Code of Personal Status in article 18 years 1956.¹⁰ This provision has been implemented since the government of President Bourguiba period.

The country which is populated with the majority of Maliki adherent not only imposed by the ban of polygamy, but it is also reinforced by the presence of crime over the imposition of sanctions imprisonment and/or fines for the polygamist.¹¹ In this case, Tunisia became the first Islamic country that had prohibited the practice of polygamy by imposing strict sanctions/penalties in North Africa. This provision in Tunisian State is considered too far out of the sources of Islamic law.

⁸ Reeva S. Simon dkk. 1996. (Ed.), *Encyclopedia of Modern Middle East*. New York: USA. p. 1974-1976

⁹ John P. Entelis, "Tunisia" dalam Jhon L. Esposito dkk. (ed), *The Oxford Encyclopedia of The Modern World*, IV (New York: Oxford University Press, 1995), p. 236.

¹⁰ Tahir Mahmood, *Family Law Reform in the Muslim World* (Bombay: N. M. TRIPATHI PVT. LTD), p. 101

¹¹ Atho'Mudzhar, *Hukum Keluarga di Dunia Islam Modern Studi Perbandingan dan Keberlanjutan UU Modern dari Kitab-Kitab Fikih* (Jakarta: Ciputat Press, 2003), p. 88.

As we know, polygamy has been performed in Muslim society based on the verse of the Qur'an. It has been established in the QS *An-Nisa* 'which mentions permission for Muslims to practice polygamy':¹²

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 (3)

"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). (Q.S an-Nisa':3)

Although the polemic about polygamy can not be regarded as a new thing, but this discussion is sensitive for women particularly, so this topic is always interesting to be discussed.

Polygamy often associated with gender issues, which is an inequality between men and women. The study of gender is not only an effort to understand women or men separately, but also to know how to put both women and men within the context of a social system that become an integral part in it. It is also stating positions between men and women equally in access, participation, control and benefits in life activities either family, community, nation or state.¹³ Building the gender equality and equity are difficult to be done quickly, because they still experience constraints that

¹² Q.S *an-Nisa*' (4): 2-3

¹³ Mufidah Ch, *Psikologi Keluarga Islam Berwawasan Gender* (Malang: UIN-Malang Press, 2008), p.18.

derived from the legitimacy of cultural construction, interpretation of religion, and political policy.

If we look at the practice of polygamy, many negative impacts more often oppress the rights of women. So that many practice of polygamy that is assessed gender bias. It is further strengthened by the presence of several requirements of polygamy such as justice that is stated that no one cannot do the justice for his wives, unless the polygamy performed by Muhammad.¹⁴

If we understand the prohibition of polygamy in Tunisia above, actually Tunisia wants to raise and protect the dignity and rights of Tunisian women. But since the politic upheaval has happened after the Arab spring revolutions that recently occurred in Tunisia and in same time the election victory of *an-Nahdha* party -one of Islamic party in Tunisia-, which have an impact to demand re-amendment of secular laws, especially about provisions of prohibition for polygamy. When polygamy has been forbidden by government, it expressly received some demand from the *salafi* community. The *salafi* asks to re-legalize polygamy, because it contradict to the sharia principle. So, This case about polygamy law in Tunisia makes the writer feel interested to do research entitled **Dynamics of Tunisian Polygamy Law in Gender Perspective.**

B. Scope and Limitation

Limitation of the research carried out in order to focus on the problems that are examined in this study and to focus on the point at issue. In terms of

¹⁴ Q.S *an-Nisa'*(4): 129

the focus, the research is conducted in accordance with the country of Tunisia, while in the terms of the problem, the study is associated with the dynamic of Tunisian polygamy law in gender perspective.

C. Statement of Problem

Based on the background of research above, the writer formulates some statement of the problems as follows:

1. What is the description of the dynamics of polygamy laws in Tunisia?
2. How can gender perspective perceive the dynamics of polygamy laws in Tunisia?

D. Objective of Research

From the problems in the background of the research that was mentioned above, the purpose of this research are:

1. To describe the dynamics of polygamy laws in Tunisia
2. To analyze the dynamics of Tunisian polygamy laws in gender perspective

E. Significance of Research

The results of this research expected to provide the following benefits:

1. Theoretically, the results of the research are expected to be useful for:
 - a. The development of science and expand the horizons of the reader's mind generally, especially for students who are interested in the field of Al-Ahwal Al-Syakhsyah about the issue of polygamy.
 - b. As a scientific paper, the result of this research is expected to be a reference for those who want to do research on family law reform in Muslim countries.

2. Practical results of this research can be used as a reference and source of information on how is the legal status of polygamy.

F. Research Method

In conducting this research, the writer use the following steps are:

1. Types of Research

This type of research is intended to explain the kind or type of research is used in this study.¹⁵ The Objects of problem will be studied in this research is The Dynamic of Tunisian Polygamy Law in Gender Perspective. This study implies a method which is based on legal analysis. Based on this object, the research uses kind of normative research. Accordance to Soerjono Soekanto, normative research is the research done by examining library materials or secondary data only.¹⁶ Accordance to Jhonny Ibrahim as library based, focusing on reading and analysis of the primary and secondary materials.¹⁷

2. Research approach

The approach method is used in a normative legal research will allow researcher to utilize the science findings of the empirical laws and other sciences for the benefit and the analysis and explanation of the law without changing the character of legal science as a normative science.¹⁸

¹⁵ Fakultas Syari'ah, *Pedoman Penulisan Karya Ilmiah Fakultas Syariah UIN Maulana Malik Ibrahim Malang*, (Malang: Fakultas Syariah UIN Maulana Malik Ibrahim Malang, 2012), p. 20

¹⁶ Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif* (Jakarta: Rajawali Pers, 1985), p. 18.

¹⁷ Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, (Malang: Bayumedia Publishing, 2010), p. 46.

¹⁸ Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, p. 300.

The approach used in this thesis research is collaboration of statute approach, historical approach and conceptual approach. The implementation of those approaches, firstly, historical approach is examines the background and development of the regulation of the legal issues is being faced¹⁹, namely the issue of polygamy in the country of Tunisia. Secondly, statute approach is used to examine how the substance of the legal ban on polygamous marriages in Tunisia in article 18 of the Code of Personal Status. Thirdly, conceptual approach is views and doctrines which are develop in the science of law, to find the ideas that gave born the concepts of gender and the principles of law that are relevant to legal issues.²⁰ The legal concept is developed in this research is how can gender perspective perceive dynamics of Tunisia polygamy laws.

3. Data Type and Legal Material

In a normative research, the data used is secondary data, namely the data obtained from the information that has been written in the form of a document that consists of 3 types:

- a. The primary legal materials: Family Law Act (*Tunisian Code of Personal Status*) in article 18 years 1957
- b. The secondary legal materials, supporting books such as: *Family Law Reform in The Muslem World*, Tahir mahmood, *Personal Law in Islamic Country*, Tahir mahmood, *Tunisian Family Law*, J.N.D

¹⁹ Pedoman Penulisan Karya Ilmiah Fakultas Syariah UIN Maulana Malik Ibrahim Malang, (Malang: Fakultas Syariah UIN Maulana Malik Ibrahim Malang, 2012), p. 21

²⁰ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2005), p. 95.

Anderson, *Women in the Middle East and North Africa (Agent of Change)*, Fatima Sadiqi and Moha Ennaji, *Women Under Islam (Gender, Justice, and the Politics of Islamic Law)*, Christina Jones-Pauly with Abir Dajani Tauqan, *Protection of Women's Rights Under The Sharia*, Dr. Ibrahim Ahmad Aliyu, *Women In Sharia (Islamic Law)*, Abdul Rahman I. Doi, *Muslim Women*, Freeda Hussain, *Islam Menggugat Poligami*, Siti Musdah Mulia, *Wanita di Antara Hukum Islam dan Undang-Undnag*, Dra. Chadidjah Nasution *Studi Perbandingan dan Keberanjakan UU Modern dari Kitab-Kitab Fikih*, M. Atho' Mudzhar dan Khoiruddin Nasution, *Psikologi Keluarga Islam Berwawasan Gender*, Mufidah, Ch, *Gender Equality in Tunisia*, Amel Grami, etc.

c. The tertiary legal materials: encyclopedia, dictionary, etc.

4. Legal Materials Collection Methods

Methods collection data are described in working order, tools, and ways of collecting primary legal materials, secondary and tertiary. The materials collection method that is used by the writer is documentation method. The method of collecting primary legal materials, secondary and tertiary in the normative study conducted by the writer in this thesis, among other the determination of legal materials, legal materials inventory and assessment of relevant legal materials.

Primary legal materials are obtained by literature on legislation (Tunisian Code of Personal Status) relevant to the issues until know the

legal concept of polygamy law in Tunisia. Secondary legal materials are obtained through books, documents, reports the results of research, papers, scientific journals, and articles related to the problems studied. Tertiary legal materials are obtained by quoting directly from the dictionary, glossary directly related to the issues raised researcher. In the other hand, interview is one of legal materials collection methods can support documentary technique in this thesis and also has the function to get legal materials are needed.

5. Legal Materials Processing Methods

In the data processing section explained about the administrative procedure and legal materials analysis, according to the research approach is used. Data management is usually done through the steps of editing, classifying, verifying, analyzing, and concluding.

Editing is the process of correcting or re-checking the data was obtained. Classifying is the process of grouping all of the data. All data were obtained, read and explored deeply then classify as needed. In this case, similar data was obtained then classified into groups according to the period of the development of law. Verifying is the process of re-checking of the validity data in the study, so that data can be recognized and to be continued on the next stage of data processing. After the data was collected, then analyzed to got the conclusion, in the form of legal materials analysis technique is content analysis, namely an integrative method of analysis and conceptually inclined to be directed to find,

identify, process and analyze legal materials to understand the meaning, significance and relevance.²¹

Legal materials are obtained in normative legal research in literature study described and correlated between the material legal with other legal materials, and it can be presented in writing systematic in order to answer the problems that have been formulated. How legal materials processing is performed inductively attract concrete conclusions from a problem that is specific to the problems of general abstract.

Furthermore, the existing of legal materials analyzed descriptively by classifying materials according to the sub-legal aspects of the same material and then interpret to give meaning on each sub-aspects and their relationship one another. Descriptive research is research that aims to construct a picture or portrait of an issue about the pattern and problematic.²² After that all aspects of analyzed to understand the significance of the relationship between one aspect and another aspects of the subject matter of research conducted inductively, so gives an overview of the results fully.

G. Previous Research

In this research, the writer does not deny the existence of similar research results, but not identically. After holding of the study of the research results, the writer gets some research results that are similar to the writer's theme. The results of these studies are:

²¹ Burhan Bungin, *Metode Penelitian Kualitatif Aktualisais Metodologi Ke Arah Ragam Varian Kontemporer*, (Jakarta: PT.RajaGrafindo Persada, 2007), p. 203.

²² Endang Poerwanti, *Dimensi-Dimensi Riset Ilmiah*, (Malang: UMM Pers,1998), p 26.

1. Shova Oliviatie,²³ graduation from UIN Maulana Malik Ibrahim Malang in 2010 with the title "*Praktik Poligami Perspektif Aktivis Hizbut Tahrir Kota Malang*". In this study, researcher revealed that Hizbut Tahrir Community thinks that polygamy law is *mubah* or permitted. Their perspective about polygamy is based on al-Qur'an Surah *an-Nisa*:3. Hizbut Tahrir Community sure that polygamy is one of the solution around marriage problems. Not only that, they argued that a husband can mary with another wife whether his wife still in good condition. Finally, they concluded polygamy is free of requirements. In other hand, there are two arguments related with the polygamy practice in perspective of Hizbut Tahrir's Malang Community. First, we have to ask permission to religious court as regulate in KHI and marriage regulations No. 1 1974 if we want to do polygamy practice. Second, without asking permission or the wife and religious court because by doing permission process will lack the space of polygamy practice. Then, the results is sexual act will be increase.
2. Khoiruddin Nasution, Professor and a Vice Dean in Academic Affairs of Shariah Faculty The State Islamic University of Sunan Kalijaga of Yogyakarta²⁴ under the title *Indonesian Islamic Family Law*, In this study, researcher revealed the idea that Indonesian Islamic Family Law is included in the group that restricts the possibility of polygamy with some variations. This group seems to be majority of Muslim countries. While

²³ Shova Oliviatie, *Praktik Poligami Perspektif Aktivis Hizbut Tahrir Kota Malang*, Thesis (Malang: Universitas Islam Negeri Malang, 2010)

²⁴ Khoiruddin Nasution, *Polygamy in Indonesian Islamic Family Law* (Yogyakarta, Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2008)

Turkey, Tunisia and that Druze Sect in Lebanon, are the only countries which prohibit polygamy completely. Furthermore, concern with the application of laws and its effect to social life is still debatable among scholars. Some scholars view that it gives a positive effect, while some others are in contrast.

3. Muhammad Zaki Saleh²⁵, Lecturer at the Sharia Faculty in IAIN Sultan Taha Saifuddin of Jambi, in 2006 under the title "*Trend Kriminalisasi Dalam Hukum Keluarga Di Negara-Negara Muslim*". In this study, researcher revealed the idea that the inclusion of components in the criminalization of polygamy becomes inherent part of the reform of family law in modern Muslim countries. It is part of the basic spirit implementation of family law in modern Muslim countries to protect the rights and improve the dignity of women. Influence of the ideas are conceived and initiated by a number of modern muslim jurist in reinterpreting the source of Islamic doctrine/*nash* become other side of the state to enforce a provision out of the conception of classical literatures. Collaboration between *ijtihad* (interpretation) that carries of *maslahah* and *siyasah sharia* principles become an important trend in the development and implementation of Islamic law in the modern Muslim country.

²⁵ Muhammad Zaki Saleh, *Trend Kriminalisasi Dalam Hukum Keluarga Di Negara-Negara Muslim* (Bandung: Paper was presented on Annual Conference Kajian Islam Lembang forum, 2006)

4. Amel Grami,²⁶ “*Gender Equality in Tunisia, British Journal of Middle Eastern Studies*”, the researcher revealed that change in family law is considered as a significant index of social change in the Middle East. It is a barometer of the internal debate within Islam, and an illustration of the capacity for Islamic reform. It is also highly indicative of the role of the state’s legal policy in matters of gender and the family. Historically it was men who acted as commentators of the religious texts as well as legislators, jurists and judges and political actors. Men determine the rights or the lack of rights for women. There are, however, a number of social, psychological, and economic traditions which govern the thinking of most Muslims and which are particularly effective of woman’s status and role in Islamic society. Understanding these, can help us understand the issues which affect male and female status and roles, and how we should react.

From some of the researches that have been presented above, there are similar areas that studied in family law in Muslim countries. However, in substance, a lot of differences, especially on the aspects studied.

In the first study explained about practice of polygamy is viewed from the Indonesian *Hizbut Tahrir* activist perspective in Malang. While in the second researcher talked about Indonesian Islamic Family Law included in the restrict possibility of polygamy with several different variations with other Muslim countries. In addition, in the third study describes about the subject of criminalization trends inherent in family law

²⁶ Amel Grami, *Gender Equality in Tunisia, British Journal of Middle Eastern Studies* (London: Routledge, 2008)

reform in Muslim countries. While the presentation of the four previous study elaborated on the changes in family law that is considered as a significant index of social change in the Middle East with the existing gender equality in Tunisia. Hence, in this research, the writer gives more focus on the dynamics of Tunisian polygamy laws in gender perspective.

H. Discussion Structure

The discussion in this study will be broken down into four chapters are systematically hierarchy is that started from the first chapter, the discussion in this range in the introduction chapter: background of research, scope and limitation of research, statement of problem, objective of research, significance of research, research methods, previous research, and discussion structure.

In Chapter II contains juridical concepts as the theoretical foundation for assessment and analysis of issues contained some discussions of the historical background of family law reform in Tunisia, history of polygamy, polygamy in Islam, contextualization against text of Islamic family law, justice in polygamy, definition of gender, concept of gender and gender equality in Islam, understanding and techniques of gender analysis.

Then in the next chapter III contains of the results of research and analysis are contained discussion of the dynamics of family law in Tunisia and legal analysis of the dynamics of Tunisian polygamy law in gender perspective.

Later on chapter IV contains closing consist of a conclusion of the research that has been done and the suggestions that will be given to provide input to the research that has been described.

