



## **CHAPTER II**

### **THE CONCEPT OF POLYGAMY AND GENDER**

#### **A. Historical Background of Islamic Family Law Reform in Tunisia**

Tunisia is a Muslim Arab country located in the Maghreb region. In 1956, Tunisia has attained the status of an independent nation and later, in 1957, became a Republic. Under the Constitution of Tunisia Islam is the state religion.<sup>1</sup> Tunisia also has the official name that is the Republic of Tunisia in which Tunis is the capital city that placed in North Africa. The population reached approximately 10.732.900 people.<sup>2</sup>

The country is bordered with Algeria (Algeria) in the west, north and east are the Mediterranean, and in southeastern is Libya. The country has official

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<sup>1</sup> *The Constitution of Tunisia*, 1959, article 1, and see Tahir Mahmood, *Muslim Family Law Reform*, p. 99

<sup>2</sup> Statistik Penduduk (seluruhnya), [http://statistik.ptkpt.net/\\_a.php?\\_a=penduduk\\_usia&info1=3](http://statistik.ptkpt.net/_a.php?_a=penduduk_usia&info1=3), was accessed on 16 March 2014.

language, that is Arabic, and French is the second dominant language used in education and business area. Almost 98% people here are Muslims.<sup>3</sup> In the religion field, Maliki is more dominant scholar used in Tunisia that contributes to create Tunisian family law and also gives contribution to the positive law in this the country.

Maliki's scholar has a big role in the beginning of official laws enforcement that is recognized after Tunisia was formed. This country was a kingdom Charthage in 814 BC. Then the Kingdom Charthage got the Islamic influence from companion of the Prophet named Uqbah bin Nafi ra. As a consequence of the dynasty transition who leads Islam, then several dynasties appeared, such as Aghlabian dynasty (767-910), Fatimids (910-973), Iirdah (973-1062), Almohads (1159-1228), Hafsiyah (1230-1574), etc. Almost all of them claimed as heredity of Turk that brings Hanafi scholar in Tunisia.<sup>4</sup> Finally after dominated by Ottoman Empire, and Turkish government adopted Hanafi officially, thus Hanafi scholars were also influenced in Tunisia.

In 1883, Tunisia became French Protectorate by *La Marsa* Convention.<sup>5</sup> The arrival of French colonization began in the early 16th century, when French experienced economic difficulties and realized that by conquering Tunisia, French would able to solve the problem. In 1957, Tunisia became

<sup>3</sup> Reeve S. Simon dkk. (Ed.), *Encyclopedia of Modern Middle East* (New York: USA, 1996). p. 1974-1976

<sup>4</sup> "Mengetahui Sejarah Tunisia", <http://www.bimbie.com/sejarah-negara-tunisia.htm>, was accessed on January of 12, 2014.

<sup>5</sup> John P. Entelis, "Tunisia" in Jhon L. Esposito dkk. (ed) *The Oxford Encyclopedia of The Modern World*, (New York: Oxford University Press, 1995), IV, p. 236.

independent country with the first president was Habib Bourguiba who mentioned as "*the father of his country*", with supervised 23 provinces.

The historical background of reformation and codification of Islamic family law in Tunisia was not too different from Egypt and other Middle Eastern countries. With the influence of two scholars born in Tunisia (Maliki and Hanafi scholars) gave consequence that particular cases had to be decided according to the legal system that is adopted by the parties which bring a lawsuit to the court. Therefore, in judicial institution, there are two judges, that is Hanafi and Maliki scholars who have authorities against each jurisdiction.<sup>6</sup>

Tunisia has reformed and codified family law after the country gained its independence. In the late forties, some prominent Tunisian jurist thought that by a fusion to the Maliki and Hanafi scholars so new Islamic law about family law could be developed that was appropriate with the development of social situation and condition in Tunisia. A group of jurists prepared a comparative account of the law under the two scholars and published it under the title *Laihat Majallat al-Ahkam al-Syar'iyah* (Draft Law Islamic Law). Later, the government set up a committee under the supervision of *Shaikh* of the Islamic country, Muhammad al-Ja'it for planning official laws. *Shaikh* of Zaytunah University, Tahir bin'Ashur also participated in the committee's deliberations. *Lai'hat* and the family legislation in Egypt, Jordan, Syria, and the Ottoman Empire were used as their sources. The committee submitted the draft of the Code of personal status to the government. Eventually it was enacted under

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<sup>6</sup> Tahir Mahmood, *Personal Law in Islamic Countries* (New Delhi: Tri Pathi, 1987), p. 151.

the title of *Majallat al-Ahwal Al-Syakhshiyyah* (Code of Personal Statutes) in years 1956.<sup>7</sup>

*Majallat* itself consists of marriage legal materials, divorce, and child take care that is different from the classical Islamic legal provisions previously (scholar of Maliki and Hanafi). From the reform and codifying family law, there are two controversial legal aspects in society at that time, they are legal divorce by court and prohibition/abolition of polygamy. Under the leadership of President Habib Bourguiba, Tunisia became the first Arabic state that prohibited polygamy in North Africa.

In the further developments, *Majallat* or the Law Code of Personal Statutes 1956 has undergone several changes, additions, and further modified through amendments the Act until 1981. The Code consists of 170 chapters that written in 10 volumes which are considered comprehensively enough. This law has undergone seven amendments during the period 1958-1966, through Law no. 70/1958, 77/1959, 41/1962, 1/1964, 17/1964, 49/1966, and the last time the Code was amended in 1981 (Law no. 7/1981),<sup>8</sup> which introduced some important modifications of previous legislation. Although it is based on Maliki madzhab generally, this law is possible to incorporate some of the principles from other Islamic scholars.<sup>9</sup>

<sup>7</sup> Tahir Mahmood, *Personal Law*, p. 152.

<sup>8</sup> Tahir Mahmood, *Personal Law*, and also see supra note 8. Tahir Mahmood present selection of articles from the Codde and their Enflish translation is based on Government of Tunisia, *Majalah al-Ahwal al- Shakhsiyah* (Mulhiq al-Halat al Madaniyah, al Walayah wa'l-Tabanni)- Tunis, 1986.

<sup>9</sup> Atho' Mudzhar, *Hukum Keluarga di Dunia Islam Modern* (Ciputat Press: Jakarta Selatan), p.86

From the explanation of history of reformation and codification family law in Tunisia above, there are some reasons of the codifying and enforcement of new Tunisian law, namely:<sup>10</sup>

1. Avoiding conflict between the Hanafi and Maliki scholars;
2. Unifying the court becomes national courts, so there is no longer difference between religious court and state court;
3. Establishing a modern legislation, as a reference of the judges;
4. Unifying view of society generally as consequence of the differences view from the classical scholars;
5. Introducing new legislation accordance to the demands of modernity;

This Code applies for all citizens of Tunisia, especially after reached an agreement from France on July 1, 1957. From the various reforms contained in the new law, there are two things in the first time that got a negative response from a number of the *Salaf* community that is prohibition of polygamy and legal divorce by judge. The Following is a summary of the major provisions of the Tunisian Code of personal status, 1956:

## **1. Marital Laws**

### **a. Marriage Age**

Men and women in Tunisia can freely marry on the completion of twenty years age.<sup>11</sup> A girl who has completed her 17 year old can, however validly marry with the permission of her guardian, and if such a girl wishes to marry but her guardian does not permit her to do so,

<sup>10</sup> J.N.D. Anderson, “*The Tunisian Law of Personal Status*”, in the International and Comparative Law Quarterly, 7 April 1985, p. 262.

<sup>11</sup> Article 5 as amended by Law No. 1 of 1964

the case shall be decided by the court. The court may also authorize the marriage of a boy below the age of twenty or a girl below the age of seventeen, if there are grave reasons for that.<sup>12</sup>

**b. Marital agreement**

Tunisia Act 1956 gives a chance for the marriage requirement *khiyar al syarat*. If there is content of the agreement that is violated, then the party who feel harmed can submit demand dissolution of marriage.<sup>13</sup>

**c. Invalid Marriage**

Beside a bigamous marriage, following marriage shall also be invalid (*fasid*) under the Tunisian law:<sup>14</sup>

- a. a marriage with a condition which is contrary to the essence of the marriage, (article 3)
- b. a marriage without the consent of either spouse, (article 21)
- c. a marriage contracted before attaining puberty or to which there is any other legal impediment, (article 5)
- d. a marriage within any of the prohibited degrees, and (article 15-17)
- e. a marriage with a woman observing *'idda*. (article 20)

**d. Polygamy**

Polygamy is prohibited. Everyone who have already married and before the marriage is lawfully dissolved, remarriage shall be liable to

<sup>12</sup> Tahir Mahmood, *Muslim Family Law Reform*, (Bombay: N.M. TRIPATHI PVT. LTD, 1972.). p. 100-106

<sup>13</sup> Atho' Mudzhar, *Hukum Keluarga Islam di Negara Muslim*, (Ciputat Press: Jakarta Selatan), p 88.

<sup>14</sup> Tahir Mahmood, *Muslim Family Law Reform*, p.101

imprisonment for one year or for a fine of 240.000 *malims*, or both of them, even if the second marriage is in violation of any requirement of this Code.<sup>15</sup> The Amendment Law of 1964 settled the controversy by including bigamous marriages in the list of invalid (*fasid*) marriage.<sup>16</sup>

#### e. Divorce

In Tunisia, a divorce can be surely valid and effective only if it is decided by the court (Article 30-32). While in article 19 of Law 1956 of Tunisia declares that a man is forbidden to remarries his ex-wife who has been triple divorced (*talaq bain kubra*). Previous Article 14, mentions triple divorces become permanent impediment to the marriage.<sup>17</sup>

#### f. Maintenance of Wife

A wife is allowed to maintenance personal property that is used as living cost with purpose to requested replace of the husband. The amount of it depends on the husband's ability as well as a reasonable living cost in that moment. It must be paid if the husband has been *dukhul* and has *baligh*..<sup>18</sup>

#### g. Adoption Child

Guardianship and adoption consist of the provisions of law in 1958. This law consists of 60 chapters divided into 3 chapters, they are public guardianship, *kafalah*, and adopted children. Ordinances,

<sup>15</sup> See *Code of Personal Status 1957* article 18

<sup>16</sup> Tahir Mahmood, *Family Law Reform in the Muslim World*. (Bombay: N. M. TRIPATHI PVT. LTD, 1972), p. 101

<sup>17</sup> Atho' Mudzhar, *Hukum Keluarga Islam di Negara Muslim*, p. 90

<sup>18</sup> See *Code of Personal Status 1957* article 41

regulations, and requirements of adoption described briefly in article 9-16.

#### **h. Take Care Child (*hadhanah*)**

It has arranged in five chapters, namely chapters 56-60. These articles explain, among others:

- 1) If the child has a property, then the cost of maintenance is taken from that property. But if he does not have the property, then the cost of maintenance is taken from his father's property (Article 56).
- 2) During the marriage takes place, the maintenance of the child is the responsibility of both parents (Article 57).
- 3) A person who is entitled to maintain the child must be adult worthy and able to take care of maintenance tasks and the child is free from communicable diseases. (Article 58).
- 4) If a guardian woman embraces other religion from the religion of the child's father, he is only allowed to take care until the child reaches five years old (Article 59).
- 5) The father and the other guardian should maintain and provide education to the child (Article 60).

#### **B. History of Polygamy**

In the pre-Islamic period, there is no provision about the number of women who may be married. So the man can marry as they want. The



Arab societies have a polygamy habit, but before Islam come; Arab society does not know about divorce.<sup>19</sup>

Many Centuries before Islam, human societies in different parts of the world knew and practiced polygamy. In the Arabian Peninsula itself longtime before Islam, people often practiced polygamy without limits. Some histories explain, after the polygamy verse has been revealed that limits the number of wives only four, ie Surah *al-Nisa* '(4): 3, then the Prophet Muhammad immediately order to all the men who have more than four wives to take divorce for his wives. So that man can only have a maximum of four wives. Therefore, al-Aqqad who is Egyptian scholar, concluded that Islam does not teach polygamy, think it positively, moreover to oblige it. Islam only allows polygamy with the very stringent requirements.

In the first time of Islam, the custom of polygamy is not necessarily abolished. However, after the polygamy verse was revealed, the Prophet changed it radically that is suitable with the instructions of essence of verse. First, restricting and limiting the maximum number of women, a man may have as his wives at one and the same time to only four. In the history of Thabit ibn Qays said:

*"When I embraced Islam had eight wives. I deliver it to the Prophet and he said: "select from those four people" similar history of Ghailan ibn Salamah Al-Thaqafi explained that he had ten wives, the prophet said:" choose four and divorce the other person.*

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<sup>19</sup> Hammudah Abd. Al'ati, *The Family Structure In Islam*, Terj. Anshari Thayib, "Keluarga Muslim", (Surabaya: PT Bina Ilmu, 1984), p. 12

Second, establish strict requirements for polygamy, that is must be fair, justice to and among the wives. The heavy requirements have been determined for the permissibility of polygamy and almost certainly no one is able to fulfill it. It means that Islam tighten the polygamy requirements until no man can arbitrary against his wives as before. Thereby, it can be seen that polygamy practice in Islam is very different from the practice of polygamy before.

### C. Polygamy in Islam

Etymologically, polygamy comes from the *Greek*, *polus* or *poly* means many and *gamein* or *gamos* means marry or marriage. Linguistically, polygamy is a marriage that has more one male or female.<sup>20</sup> Polygamy can be divided into polygamy and polyandry. While in the *Kamus Ilmiah Populer* book said that polygamy is a marriage between two persons or more, but it tends to be meant as one husband marry with more than one wife, which is usually called polygamy.<sup>21</sup> Whereas, woman polygamy have been called polyandry<sup>22</sup> (the practice of a woman marry with more than one man).

Based on the definition above, it can be concluded that polygamy is the bond of marriage in which one party has / marry with some of the opposite sex at the same time. Under Islamic marital jurisprudence,

<sup>20</sup> Dewan Redaksi Ensiklopedi Islam, *Ensiklopedi Islam*, Jilid 4, (Jakarta: PT. Ichtiar Baru Van Hoeve, 1994), p. 107.

<sup>21</sup> Pius A. Partanto dan M. Dahlan al-Barry, *Kamus Ilmiah Populer*, (Surabaya: Arkola, 1994), p. 606.

<sup>22</sup> Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia, Edisi Kedua*, (Jakarta: Balai Pustaka, 1996), p. 776.

Muslim men are allowed to practice polygamy under Islam, that is, they can have more than one wife at the same time, up to a total of four. Polyandry, the practice of a woman having more than one husband, by contrast, is not permitted. The legal basis for the permissibility of polygamy to four wives is described by Allah:<sup>23</sup>

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 أَذْنَىٰ 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)”<sup>24</sup>*

The majority of people believe that this verse brings to the suggestion to polygamy. However, if it is observed in *asbabun nuzul* of these verses, relating to the maintenance of the orphan's property and must be fair to wife. One of *mufasssir* is al-Jashash<sup>25</sup> he mentioned that Surah *an-Nisa* ‘is a legal continuation of the next verse.

If the guardians of the orphaned female worry or afraid cannot do justice to the orphans, then he (the guardian) should not marry female orphaned who is under the guardianship: but he shall marry another woman who pleased him, one wife to four, with the condition that he is able to do justice for his wives. And if he fear could not do justice to his

<sup>23</sup>Q.S. an-Nisa’ (4): 2-3

<sup>24</sup>Qur’an, <http://quran.com/4>, was accessed on 12 March 2014

<sup>25</sup>Al-Jashash, *Ahkam al-Qur’an* (Beirut: Dar al-Kitab al-Islamiyah, tt)

wives, then he may only marry one, and even he must not do evil (*dzalim*) against one's wife. If he is still afraid, then he should not marry her, but he had to suffice himself with his female slaves.<sup>26</sup>

Islam sees polygamy brings more risk/*madharat* than benefits. Because of human being (human nature) have a jealous character, covet and pleasure to complain. The characters will easily arise with high levels in a polygamous family life. Thus, polygamy can be a source of conflict in family life, conflict both husband-wives and children of his wives, or the conflict between the wife and each of her children.<sup>27</sup> Therefore, the origin of the law in Islamic marriage is monogamy.

Besides, the existence of polygamous marriages is only allowed in an emergency situation, for example, getting barren wife. Then in a barren wife is based on medical information of laboratory results, the husband was allowed polygamy by requirement that he was really able to provide living maintenance for all the family and must really fair. There is no Islamic rule show polygamy should be implemented or forbidden absolutely. Finally Islam allows the practice polygamy still occur with certain considerations. It does not mean to reject, negate or recommend.<sup>28</sup>

Thus polygamy law is basically permissible (*mubah*), however it can lead to the *makruh* even become forbidden if injustice happen in the implementation, remember justice is very difficult in the context of polygamy. Prophet Muhammad also reminded for Muslims that polygamy

<sup>26</sup>Muhammad Rasyid Ridha, *Tafsir Al-Manar*, juz 4, ( Kairo: Al-Manar, 1367 H), p. 350.

<sup>27</sup>Masjfuk Zuhdi, *Masail Fiqhiyah*, (Jakarta: PT Toko Gunung Agung, 1997), p. 13.

<sup>28</sup>Muhammad Rasyid Ridha, *Tafsir al-Manar*, Vol 5 (Mesir: Darul Manar, 1374 H), p. 364-370.

has serious moral consequences as stated in his *Hadith* narrated by Abu Dawud, Tirmidhi, Nisa'I and Ibn Majah on the authority of Abu Hurairah R.A.<sup>29</sup>

عن أبي هريرة قال قال رسول الله صلى الله عليه وسلم ثم من كانت له امرأتان يميل مع

إحدهما على الأخرى جاء يوم القيامة و أحد شقيه ساقاة

Meaning: "Whoever has two wives (or more) and favours one (or more) over the other (s), he comes to the judgment day bent to one side"<sup>30</sup>

#### D. Contextualization Against Text of Islamic Family Law

Domination of cultural patriarchy often cannot be eradicated by religions that free man from all forms of oppression based on gender, religion, racial and ethnic. In the history of patriarchy, women seen as creatures of inferior are useless.

In responding the problems that continuously develop, two sources of *Holy Qur'an* and *Hadith* need intermediaries to convey moral messages and divine truth in a different context with the revelation. This process is often mentioned as an interpretation, in which it happens dialectical relation between text and context. Perspective as a product of the culture socialization little bit gives influence for its interpretations. Equality and equity of gender become an important part to provide strong foundation

<sup>29</sup> Ahmad bin Hanbal Abu Abdillah as-Syaibaniy, *Musnad Ahmad*, Juz 2 (Mesir: Muasasah, tt), p. 471.

<sup>30</sup> Dr. Ibrahim Ahmad aliyu, *Protection of Women's Rights Under The Shari'ah* (Selangor: Dakwah Corner Bookstore (M) Sdn Bhd, 2010), p 84.

and solid foundation to achieve the goal of marriage is *sakinah, mawaddah and rahmah* family.

Contextualization of Islamic family law is way to see and understand a text by looking at the outside-level of text without ignore social factors, cultures, and conditions of the society. In brief, contextualization of law is to dig the lesson and wisdom behind the text.<sup>31</sup>

While Islamic family law is also known as *al-Ahwal al-syakhshiyyah* or Code that controls personal problems. In English, this term is called as Personal Statute or Islamic Family Law.<sup>32</sup> As the focus discussion in family law field is marital and consanguinity. The laws have relating with the marriage issue, lineage, inheritance, guardianship, inheritance and child maintenance.

Generally, modern scholar string permissibility of polygamy. Even if there are some countries have prohibited polygamy, although there is possibility to do in particular case.

#### **E. The Justice in Polygamous Marriage**

Justice is one of the most important moral and political concepts. The word comes from the Latin *jus*, meaning right or law. The *Oxford English Dictionary* defines the “just” person as one who typically “does what is morally right” and is disposed to “giving everyone his or her due,” offering the word “fair” as a synonym. But philosophers

<sup>31</sup> Mufidah Ch (eds), *Isu-Isu Gender Kontemporer Dalam Hukum Keluarga* (Malang: UIN-Maliki Press), p. 66

<sup>32</sup> Muhammad min Summa, *Hukum Keluarga Islam di Dunia Islam*, (Jakarta: Raja Grafindo Persada: 2005), p. 17.

want to get beyond etymology and dictionary definitions to consider, for example, the nature of justice as both a moral virtue of character and a desirable quality of political society, as well as how it applies to ethical and social decision-making. Typically the article considers not only their theories of justice but also how philosophers apply their own theories to controversial social issues for example, to civil disobedience, punishment, equal opportunity for women, slavery, war, property rights, and international relations. For Plato, justice is a virtue establishing rational order, with each part performing its appropriate role and not interfering with the proper functioning of other parts. Aristotle says justice consists in what is lawful and fair, with fairness involving equitable distributions and the correction of what is inequitable. For Kant, it is a virtue whereby we respect others' freedom, autonomy, and dignity by not interfering with their voluntary actions, so long as those do not violate others' rights. Rawls analyzed justice in terms of maximum equal liberty regarding basic rights and duties for all members of society, with socio-economic inequalities requiring moral justification in terms of equal opportunity and beneficial results for all; and various post-Rawlsian philosophers develop alternative conceptions.<sup>33</sup>

In polygamy case generally, modern scholars tighten permissible of polygamy, not only question the wisdom behind institutionalizing polygamy, but even try to prohibit it by giving an interpretation of the

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<sup>33</sup> Western Theory of Justice, <http://www.iep.utm.edu/justwest/>, was access on 20 January of 2014



Qur'anic provisions concerning. It in the process of giving their erroneous interpretation they argue that marriage to more than one wife is restricted to the ability to do justice between wives by virtue of surah *an-Nisa*':4 and that this justice, by virtue of surah *an-Nisa*:129 is not possible because it is beyond human capability. Therefore, such marriage is unlawful. They even hypocritically and foolishly argue that the only just and civilized form of marriage is monogamy. As a result of this, a number of countries with Muslim majorities have officially prohibited or severely restricted polygamy.

The scholars have different opinion about the justice issues that must be owned by a husband who wanted to practice polygamy. Hanafiyah scholar stated that the reference to do justice is the problem clothing, food, and socially only, not in a sexual relationship problems or *bathiniyah*. Thus Hanafiyah scholar in the fairness issues that must be implemented by a husband is fair in the matter distribution of the material or the cost of living,<sup>34</sup> is not about immaterial matter.

In different expressions, Fazlur Rahman said that the ability to have more than one wives is an exception in particular circumstances. In previous time, the permissibility of polygamy arose because of the war has happened, many orphans and widows have been abandoned by parents and her husband.

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<sup>34</sup> Rifyal Ka'bah, *Hukum Islam di Indonesia*, (Jakarta: Yarsi, 1999), p. 32.



In other side, Muhammad Abduh instead stated that polygamy is forbidden. Polygamy may only be undertaken by a husband in certain cases, such as the inability of a wife to pregnancy or childbirth.<sup>35</sup> After quoting the word of God in *An-Nisa: 3*, he notes that Islam permits polygamy with charge ability to serve fairly. From this condition, according to Abduh can be specified into three conditions, namely:

- a. permissibility of polygamy accordance to the conditions of the demands of the times.
- b. justice requirements is a condition that is very heavy.
- c. a husband who does not carry out the requirement of polygamy, monogamy should do.

For Abduh, polygamy is an act that is forbidden when the purpose is just for fun, but if the reason because of the demands of the times or emergency, then possible chances are allowed to do. So, Abduh can not be classified into wrong interpretation of polygamy verse.

#### **F. Definition of Gender**

The word gender comes from English that means sex. Gender etymologically derived from English meaning of sex. Actually this meaning is uncertainty because gender is defined as sex. Whereas those words, gender and sex have different meaning.

Gender is an inherent both men and women are socially constructed, cultural or social relationships constructed between women and men are

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<sup>35</sup> Muhammad Imarah, *Al-Imam Muhammad Abduh*, (Al-Mujaddid Al-Islam, 1981), p. 24

varied and dependent on factors of culture, religion, history, and economics.<sup>36</sup>Wilson<sup>37</sup> and Elaine Sholwalter quoted Zaitunah<sup>38</sup> that gender is not just a distinction between men and women's views of the social construction of culture, but with more emphasizing on the concept of analysis in understanding and explaining something. So many associations word of gender with justice, equality and any other that have difficult meaning to be separated.<sup>39</sup>

While understanding of sex is an interpretation or division of two human sexes that are determined biologically are permanent and universal. Mansour Fakih said gender is an inherent nature of men and women who are socially and culturally constructed.<sup>40</sup>

To understand gender as a social construction, gender needs to be mapped in some contexts namely:

1. gender as a conceptual term, gender comes from a foreign language and difficult to get appropriate synonym so the person is unable to understand it exactly.
2. gender as a social phenomenon that is its differences are often used by society to construct men and women roles. Determining of labor based

<sup>36</sup> Sugihastuti and Siti Hariti Sastriyani, *Glosarium Seks & Gender* (Yogyakarta: Carasvati Book: 2007). p. 72.

<sup>37</sup> HT, Wilson, *Sex and Gender, Making Cultural Sense of Civilization* (Laden: 1998), p. 2.

<sup>38</sup> Zaitunah Subhan, *Rekonstruksi Pemahaman Jender Dalam Islam: Agenda Sosio-Kultural Dan Politik Peran Perempuan* (Jakarta: el-Kahfi, 2002), p. 13.

<sup>39</sup> Mufidah Ch, *Psikologi Keluarga Islam Berwawasan Gender* (UIN-Malang Press: 2008), p. 2.

<sup>40</sup> Mansour Fakih, *Isue-isue dan Manifestasi Ketidakadilan Gender, dalam Mukhotib MD., (ed.), Menggagas Jurnalisme Sensitif Gender* (Yogyakarta: PMII Komisariat IAIN Sunan Kalijaga, 1998), p. 3-4.

on gender over sex is not matter as long as each party does not harm or be harmed.

3. gender as a social consciousness is a determining its role that is not naturally but it is social construction result in the community.
4. gender as a social problem, where the division of gender rule bias is the source of patriarchy and matriarchy cultures that are potentially can emerge injustice either women or men. The following are some of the manifestations of gender inequality, namely:
  - a. stereotype: the sex labeling of men or women who are always negative connotation.
  - b. subordination: opinion/view is unjustice toward one of the sex based on gender stereotypes, led to the placement one of sex on the status, roles, and relation that is inequality and inequity.
  - c. marginalization is intentional or unintentional process against a particular sex of the other sex systematically by gaining access and benefits in life, it is the consequent of stereotypes and subordination.
  - d. disproportionate workload: imposition and or neglect one of sex to carry on the burden of excessive activity caused by standardization of productive-reproductive roles for men and women, then they have impact on the division of labor inflexible.

- e. violence based gender: the views of gender bias puts one sex in superior and more powerful than other sex, it has an impact on the hierarchical relationship, it is not equal and easy to create violence
- 5. gender as a concept for analysis: the concept of analysis is used by a scientist who gives regards on gender studying as a socio-cultural phenomenon.
- 6. gender as a social movement, it is used as a concrete effort to change of gaps status, roles and responsibilities, and also the utilization of resources between men and women that have impact on discrimination against women. Gender as social movement is called by feminism, which is awareness that women experience the oppression and try to help women to get their basic rights.

### **G. Gender Equality in Islam**

In Arabic language as the Qur'anic language does not mention the similar word about the word 'gender'. However, there are *al-dzakar* and *untsa*, the word *al-rijal* and *al-Nisa* 'which are commonly used to refer to men and women. In the Arabic tradition *al-dzakar* word means fill, pour, mention, remember. *Al-dzakirah* means learn, *al-dzikru* as plural form of *al-dzukur* meaningful man. *Al-dzakar* has connotes the issue of biological (sex) as opposed to the word of *al-untsa*, in English called male opposite female, used on the type of human, animals, and plants.<sup>41</sup>

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<sup>41</sup> Mufidah Ch, *Psikologi Keluarga*, p. 4.

The word of gender, exactly it is not found in *the Qu'ran*, but the word is seen near with the word of gender from the role function and relation with the word of *al rijal* and *an-Nisa* '. The word *al-rijal* is plural form of the *rajulun* interpreted by men. While the word *al-Nisa'* is a plural form of *al-mar'ah* means women who have mature or adult.<sup>42</sup>

The concept of gender equality and equity in Islam has indeed become a part of substantive of the Islamic universal values through revelation of *Qur'an and Hadith*. Men and women have an equal position between rights and obligations as a servant of God except faith by God. Speaking about the position of women, such the word of Allah SWT:<sup>43</sup>

*"O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted.(QS. Al-Hujurat: 13)"*<sup>44</sup>.

The verse describes the origin of human events from a male and female (man and woman) all at once talking about the noble of human, either as a male or female. It is based on the glory from their faith to God, not because of ancestry, ethnicity or sex.

Epistemologically, the process of establishing gender equity has been done by Muhammad not only in domestic area, but also almost throughout the aspects of community life. Thus, Muhammad SAW has started a new tradition in the view of women.<sup>45</sup>

<sup>42</sup> Mufidah Ch, *Psikologi Keluarga*, p. 5.

<sup>43</sup> Q.S *al-Hujurat*(49): 13

<sup>44</sup> Qur'an, <http://quran.com/49/13>, was accessed on 12 March 2014

<sup>45</sup> Mufidah Ch, *Isu-Isu Gender*, p. 14.

From this case, we can understand the various traditions of Islam are faced with all the form of regardless Arab women. If we examine more deeply, of course there is secret behind it all. Islam teaches how to view and treat women, then Muhammad put into practice, so it can realize unity and harmony both of them. Therefore, it is necessary to review of the interpretation toward the verses of *the Qur'an* and understanding of *the hadits* and contemporary approach. Reinterpretation has become a necessity in line with social changes that occur in society, the development of science and technology.

#### **H. Definition and Gender Analysis Techniques**

Gender analysis is a tool and technique that is appropriate to determine whether there is a gender issue or not by knowing the gender disparity. With the gender analysis is expected gender discrepancy can be identified and analyzed appropriately, so that it can be found contributing factors as well as the problem-solving steps.<sup>46</sup> Thus gender analysis is the process of analyzing the data and information systematically about men and women to identify and express the position, functions, roles and responsibilities of men and women, as well as the factors that influence.

This analysis is used to understand the social reality cannot capture the reality of power relations based on gender relations and potentially make oppression. Thus gender analysis actually responds at once to correct the social analysis tool that can be used to see through the reality of the social

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<sup>46</sup> Trisakti Handayani dan Sugiarti, *Konssep dan Teknik Penelitian Gender*, (Malang: UMM press, 2006), p 159.

relations toward men and women and also the consequences that was raised.

Gender analysis is especially important for making decision and planning as well as the academic researchers, because gender analysis is expected gender issues can be resolved or narrowed. So the gender conception program can be realized. The terms are used in the Gender Analysis include:

- a. Access is an opportunity or chance in obtaining or using a particular resource.
- b. Role is participation of person / group in an activity and or in making decisions
- c. Control is authority or power in taking decisions.
- d. Benefits are usability of the resource that can be enjoyed optimally.
- e. The indicator is a measurement tool that can show the statistical comparisons, trends or developments.
- f. Productive activities are the activities of the members of the community in order to earn a living.
- g. Reproductive activity is activities that are closely related to the maintenance and development of human resources as well as ensure continuity in the family. Community activities relating to the political and socio-cultural.