

CHAPTER III
DYNAMICS OF TUNISIAN POLYGAMY LAW
IN GENDER PERSPECTIVE

A. The Dynamic of Polygamy Law in Republic of Tunisia

1. Pre-Independence Era (before 1956)

The development of law in the Republic of Tunisia has begun before independence when the country was still under the influence of Islam spread by Uqbah bin Nafi' RA. Islam was introduced to the public where Tunisia was a Charthage kingdom which believes in animism.¹ At that time, Tunisia was led by a dynasty of kings (Bay, Pasyaor Dey titled).²

¹Tim, *ensiklopedia Bangsa dan Negara* Jilid 1 (Jakarta: PT. Grolier Internasional Inc, 2000), p. 88.

² Philip K. Hitti, *History of The Arabs*, ed. Tenth revision, translated by R.Cecep Lukaman Yasin dan Dedi Slamet Riyadi (Jakarta: PT. Serambi Ilmu Semesta, 2005), p. 909.

In 1930 the family law was applied in Tunisia based on Islamic Shari'ah. In the history of Tunisia, since the beginning of Islam was introduced, the majority of the people are Sunni Muslim Tunisia (*Malikiyyah*). Maliki scholar not only has contributed more dominantly in the field of religion in the formation of Tunisian family law, but also has given color to the substance of the legal positive law.

Besides Maliki's scholar, the influence of Hanafis scholar has taken an effect after the Ottoman Empire dominated formally in Tunisian territory. Consequently the provisions of the laws at that time were based on the both of scholars until the judicial institutions appeared by the two judges.³

After the reign of the Ottoman Empire ended, in 1883 Tunisia was the French political domination that brought Tunisia as a French Protectorate by *La Marsa* Convention⁴. The French colonization influenced in the field of law. During this period, the legal culture of Tunisia suffered westernization widespread. Civil Law, Criminal Law, Commercial Law, and Criminal Procedure enforced until in 1956 clearly illustrated of the principles of jurisprudence and French Civil Law.⁵

Dynamically, polygamy legal developments which occurred in this state run together with social change in Islamic societies. The history of Islamic law obtain the phase of development toward the various views in the establishment

³Atho' Muzdhar, *Hukum Keluarga di Dunia Islam Modern Studi Perbandingan dan Keberlanjutan UU Modern dari Kitab-Kitab Fikih* (Jakarta: Coputat Press, 2003), p. 85.

⁴John P. Entelis, "Tunisa" in Jhon L. Esposito dkk. (ed) *Oxford Encyclopedia of The Modern World*, (New York: Oxford University Press, 1995), IV, p. 236.

⁵Tahir Mahmood, *Personal law in Islamic Country* (New Delhi: Academy of Law and Religion, 1987), p. 151.

of Islamic law. Relating of the provisions of polygamy law, Tunisia has allowed a husband to have a maximum of four wives. This is due to several factors:

a. Understanding of Religious Factors

The earlier period of Islam coming to Tunisia became one factor of Tunisian community to get simple understanding of the provisions of laws that contained in the sources of Islamic law. The influence of imam madzhab became very dominant at the time. In polygamy case, the societies have got provisions of law based on the text of *the holy Qur'an* or *the Hadits* as the main guideline for Muslims. Classical scientists (*fuqaha*) and Imam madzhab agreed that polygamy was legal or permissible (allowed) with several conditions. It is based on the word of God in Q.S *an-Nisa'* verse 3:⁶

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”

While Hadits is often raised include:

“From Ibn Umar: that Ghailan ibn Salamah when converted to Islam, he has 10 wives (who merried in jahiliyah period), the Prophet commanded him to choose four of them as wives.”

⁶ Q.S. *an-Nisa'* (4): 3

⁷ at-Tirmidzi, *Sunan at-Tirmidzi*, juz II (Dar al-Fikr: Beirut, 1994), p. 368.

According to the *Salafi* community in Tunisia (conservative), the verse and *the Hadits* above served as justification for the permissibility of polygamy in Islam. Polygamy for a man was allowed with a maximum limit of up to four wives. Various reviews of *fiqh* tended to give more consideration about the requirement that must be fulfilled by the husband who wants to practice polygamy such as the material ability and obligation to be fair for his wives.⁸The emergency conditions that are faced by the wife such as sterility, sick, could not serve her husband as an obligation becomes important and the main requirement that must be considered.

Regarding the practice of multiple wives, various opinions come from the scholars (*Salafi*) in understanding the essence of the surah *an-Nisa'* : 3 above. Multiple wives marriage is a marriage which is allowed in Islam on the condition that it is not easy, which is the ability to do justice. In fulfilling a fair criterion of the marriage itself still get a wide variety of debates. Among the priests scholars such as Imam Malik and Hanafi who have a major influence in Tunisia, they emphasize justice is still within the limits of the material needs or *lahiriah*. In fact, in a multiple wives marriage, not just material needs is must be fulfilled but also the immaterial needs (*bathiniyah*). In this case, *bathiniyah* needs still not able to be done, as some scholars said that the matters relating of heart (*bathiniyah*) is Allah affairs.

⁸Wahbahaz-Zuhaili, *al-Fiqh al-Islami wa Adillatuh*, juz VII (Dar al-Fikr: Damaskus, 1997), p. 6669-6670.

b. Socio-cultural Factors

Islam comes in social life where men had control over women. Women are considered as inferior position than men. Patriarchal culture still dominates the Tunisian society that eventually brings discrimination and inequality between men and women. Tahar Haddad who is the nationalist intellectual in Tunisia, made a loud and clear call for reformation in publishing polemical book entitle *Women in Law and Society* (1930). He is part of the reforming movement. In his book, Haddad described the position of women in Tunisian society at the time as a social plague and complained that women were treated no better than dogs⁹.

c. Political factors

In the 18th century Europe was experiencing the Renaissance era. The spirit of imperialism and capitalism began to be disseminated to all regions of the world including the Islamic countries in North Africa. Ottoman kingdoms just concentrated on the expansion of the power territory. So, the emphasize was focused on the field of military progress.

In 1820 Tunisia conditions was unfavorable for its people. Ottoman Empire and France protectorate were coloring the political power in Tunisia. Justice and oppressions (injustice) occurred depend on who hold the position at the time. If the governor who was ruled fair, so people felt fair. But if the governor who ruled it was an unjust, the people feel unjust.¹⁰ In another side,

⁹ M.M. Charrad, *Policy Shifts: State, Islam, and Genderin Tunisia, 1930s-1990s*, (Summer: Oxford University Press, 1997), p. 292.

¹⁰ A. Mukti Ali, *Alam Pikiran Islam Moderat di Timur Tengah* (Jakarta: Djambatan, 1995), p. 192.

in judicial institution, there are two judges namely from the Maliki and Hanafi scholars that have authorities against each jurisdiction.¹¹

d. Economic Factor

Since the entry of European imperialism brought a new understanding in the economic system of capitalism.¹² Backwardness utilizing of the advanced technology caused lagging economic happen in Tunisia.¹³ The majority community is still living as farmer olives etc.

The existing of patriarchy culture caused the women have a value commodity for men. Previously, in the tradition rural, many of them were farmers olive that perform polygamous marriages. It was because if a man having more than one wife, it would be very helpful to work and save money if they needed additional workers. In this case, the women became one of supporting the social status of man in the society.¹⁴

e. Education factor

Madrasah as education institutions developed and was held in the mosques or *dar al-Kuttab*. In this school was taught the sciences of the Qur'an and the Arabic language.¹⁵ Philosophy and science period development began to stagnate, so it does not produce new Muslim scientists.¹⁶ The door of *ijtihad* (interpretation) closed and replaced with tradition, *taklid*, *bid'ah* and *khurafat*.

¹¹ Tahir Mahmood, *Personal Law in Islamic Countries* (New Delhi: Tri Pathi, 1987), p. 151.

¹² Ratna Ningsih, *Khairuddin At-Tunisi dan Reformasi Islam di Tunisia (1810-1889)*, Thesis, (Depok: Universitas Indonesia, 2009), p. 54.

¹³ A. Mukti Ali, *Alam Pikiran Islam Moderat*, p. 192.

¹⁴ Christina Jones, *Women Under Islam (Gender, Justice and The Politics of Islamic Law)* (New York: I.B Tauris, 2011), p. 42.

¹⁵ Ratna Ningsih, *Khairuddin At-Tunisi dan Reformasi Islam*, p. 58.

¹⁶ Hasan Basri M. Nur, *Islam, Masa Lalu, Kini dan Esok* (<http://m.serambinews.com/news/islam-masa-lalu-kini-dan-esok>), was accessed on 13 December 2013

In this case, one of Tunisian reformer is Khoiruddin at-Tunisi propose start to learn about the progress of modern science and education that have occurred in Europe.

In the pre independence of Tunisia period, there were some characteristics could indicate the differences of the following period. They were the tendencies of the majority of Tunisian people who still followed the law based on imam madzhab, they are Imam Maliki and Imam Hanafi. So gave the impact the existence of permission of polygamy in Tunisia. In addition, patriarchy culture caused suppression forthe Tunisian women's rights, and the presence of French protectorate influence appeared of westernization of civil law whichbecame the forerunner of emerging of the family law reform in Tunisia.

2. Post-Independence Period of Tunisia (1956-2011)

The establishment of law in Tunisia its mean development of national laws, actually has been gone since 1957, when the Code of Personal Statutes (*Republique Tunisienne / مجلة الأحوال الشخصية*) has been applied. In the historical of law, it could be concluded that the current law was influenced by political forces.

Tunisia as an Islamic state should be able to uphold the values of Islam in the legal produce that has been made. Law is more familiarly called as CPS (Code of Personal Statutes)¹⁷, it is seen as a very secular Islamic law. Reform of the existing legal provisions in the Tunisian CPS enforced much different

¹⁷ M.M Charrad, *Policy Shift: State, Islam, and Gender in Tunisia, 1930s-1990s*, (Summer: Oxford University Press, 1997), p. 294.

from the classical Islamic law in the country that is defined in the state that has majority of population are Maliki adherents. Until many critics raise and claim the Tunisian family law contrary with some traditional Muslim practices (Islamic Shariah).¹⁸

If we examine more closely, in fact Islamic marriage law enforce in Tunisia, not close from the provision is established by the Shariah, but modern scientists more emphasize to perform re-interpretation of the texts or doctrines of Islamic law by looking at the social context that happen behind *asbabunnuzul* of the verses.¹⁹ So, they can form of the legal provision suitable the demands of the times.

Likewise about polygamous marriage, in any discussion of the marital law, polygamy is always becomes the hottest topic and emerge controversy. Although polygamy is an issue that has been long debated by Islamic scientists, because of the discussion about this kind of marriage sensitive especially for women, so that is always becomes an interesting topic to be discussed. Therefore, in the world of Islamic marital laws, polygamy becomes the hottest issue that never misses to be studied. Many of them who enact the provision of laws that are different from the legal provisions set out in the *Qur'an* or *Sunnah*.

With the enactment of the Code of Personal Statutes of 1957 make a radical changing in interpretation of Islamic law that deals with family and

¹⁸ Atho' Mudzhar, *Hukum Keluarga di Dunia Islam Modern Studi Perbandingan dan Keberlanjutan UU Modern dari Kitab-Kitab Fikih* (Jakarta: Coputat Press, 2003), p. 84.

¹⁹ Mufidah Ch (eds), *Isu-Isu Gender Kontemporer Dalam Hukum Keluarga* (Malang: UIN-Maliki Press), p. 66.

sets a new thing for further development. Tunisian Islamic family law in the CPS (Code of Personal Statutes) contains the rule of law more gender responsive. In the CPS, family law protects and maintains the rights of women by viewing to raise dignity of Tunisian women that are not easily abused by men. Thus, Tunisia is recognized by worldwide as the leading country to protect the rights of women in the laws.²⁰

Finally, through the Code of Personal Statutes of 1956, article 18, President Bourguiba expressly prohibits the practice of polygamy in Tunisia. Habib Bourguiba was a Tunisian ruler was known western educated, and he has a way of thinking and willingness westernized. Thus, it has emerged a strong assumption about the secularization of Islamic law made by the Tunisian ruler at that time. Through the Code of Personal Statutes Article 18, which prohibits polygamy in Tunisia, which reads :²¹

1. *Quiconque, étant engagé dans les liens du mariage, en aura contracté un autre avant la dissolution du précédent, sera passible d'un emprisonnement d'un an et d'une amende de 240.000 francs ou de l'une de ces deux peines seulement, même si le nouveau mariage n'a pas été contracté conformément à la loi.*
2. *Encourt les mêmes peines, quiconque, ayant contracté mariage hors des formes prévues par la loi n° 57-3 du 1er août 1957 (4 moharem 1377) réglementant l'état civil, conclut une nouvelle union et continue la vie commune avec son premier conjoint.*
3. *Encourt les mêmes peines, le conjoint qui, sciemment, contracte mariage avec une personne tombant sous le coup des dispositions des deux alinéas précédents.*

²⁰ M. Charrad, "Tunisia at The Forefront of The Arab World," in Fatima Sadiqi and Moha Ennaji (ed.) et.al., *Women in The Middle East and Nort Africa (Agent of Change)*, (USA: Routledge, 2011), h.105.

²¹ *Code Du Statut Personnel*, Publications de l'Imprimerie Officielle de la République Tunisienne year 2012 article 18, p. 10.

English version was translated by Tahir Mahmood²²:

1. *plurality of wives is prohibited. Any person who being already married and before the marriage is lawfully dissolved, marriage again shall be liable to imprisonment for one year or for a fine of 240.000 malims/franc, or to both, even if the second marriage is in violation of any requirement of this Code.*
2. *Any person who has married in violation of the provision a laid down in Law No. 3 of 1957 relating to organization of civil status and contracts a second marriage while living in matrimony with the first wife shall be liable to the same punishment*
3. *A person who knowingly marries someone liable to punishment under the forgoing clauses shall also be liable to the same punishment*

In article 18 of the Code of Personal Status of 1957 above is expressly and officially the Tunisian government established that polygamy is forbidden by imposing sanctions on offenders who marry more than one wife. The criminalization of the practice of polygamy in Tunisia imposed as a form of threat and reward for violators of the Code.

The provisions of banning polygamy get variety responses in Tunisia. For an Islamic traditional (conservative) society and a high knowledge of Islamic science, so the Code raises some of kinds of reaction like deep regret toward the government's way of thinking. In addition, in the community get influence by the imperialist culture and community of women's organizations, the Code of prohibition of polygamy has received a warm welcome, and has been considered as a forward step and effort to get freedom for the women in Tunisia.²³

²² Tahir Mahmood, *Personal law in Islamic Country*, (New Delhi: Academy of Law and Religion, 1987), p. 156-157.

²³ Musthafa As-Siba'y, *Wanita di Antara Hukum Islam dan Perundang-Undangan* (Edition. 1., Bulan Bintang: Jakarta, 1977), p. 155.

Banning of polygamy law cannot be separated from the influence of several factors of the banning of polygamy law in Tunisia. Here are the factors that influence them, namely:

a. Secular Ideology Factors

During the period Bourguiba and Ben Ali, Tunisia has followed the secular system. Tunisia is known as the secular State. Arab country that is strongly different from religion (formally state) in Arab countries. Bourguiba try to estrange and remove of all the religious identity from the public space. Included in this legislation, Bourguiba avoided as much as possible Islamic values. Religion is not necessary to enter or adjust the affairs of state. Islamic Education was marginalized, mosques was monitored and was restricted role. Including the permissibility of polygamy doctrine is not disputed by *Malikiyah* scholars. Thus, the prohibition of polygamy in Tunis, cannot escape from the frame of secularization project that was launched by Bourguiba. In other side, Ben Ali President also implemented the secular laws in period of his power.²⁴

b. Socio-cultural Factors

Look at the background of circumstance occurred in patriarchy culture at that time, in which the dignity of women was ignored and have not self-esteem. Women only became a commodity and goods satisfying sexuality of men. In a book entitled *Women in Law and Society*, Tahar Haddad, a Tunisian reformist scholars say that the position of a Tunisian woman at that

²⁴ Dede Permana Nugraha, *interview* (Facebook, 20 February 2014)

time as a plague and got no better treatment like an animal²⁵. In this case there is a subordinated position of women. This is a first step into the construction of injustice and gender inequality in Tunisia.

The subordination began from terms of women stereotype is considered as a weak human, emotional and unimportant presence in the community. In addition, it emerge the impression that man who practice polygamy only take of goodness. This opinion is held a strong enough by policy holders in Tunis in the early days of independence.

In the era of Ben Ali president, Tunisia become one of Islamic country that most modern and get a great freedom for a men and women. Ben Ali followed the step of Bourguiba to make secular moderate state in Tunisia.

c. Education Factor

Western thought was brought by Tunisian the authorities, indicating the influence of the way of thinking and willingness westernized. The provision of law about prohibition of polygamy is actually not independent of thought that became the basic reason that was advanced by some parties involved in making of rule.

In the papers of Mohammad Zaki explained that in fact, what has been done by Tunisia by implementing the CPS, could be seen from what the historical background of the emerge of the Code. Between the years of 1885 to 1912, approximately 3,000 children of Tunisia during the French colonial sent to study in Paris. In 1906 recorded 34,000 French people

²⁵ M.M. Charrad, *Policy Shifts: State, Islam, and Genderin Tunisia, 1930s-1990s*, (Summer: Oxford University Press, 1997), p. 292.

stayed in Tunisia and the number jumped to 144,000 in 1945. They introduced agriculture and modern education to the community of Tunisia. On the other hand Tunisian people also learn in Paris, after they returned in Tunisia, they made education reform through Zaituna and Sadiki College, which later gave emerge of Khalduniyyah College, which became the center of the movement of *The Young Tunisians*. So the breakthrough that was made by Tunisia, it seems nothing more than revolution of a new interpretation of the Islamic jurisprudence in various dimensions of community life.²⁶ So, in the post independence period, Tunisia hold the big reformation of legal provision, including CPS of 1956.

In Ben Ali era, there are many reforming of education that happened in Tunisia. Many schools and universities established, scholarship to get the best education for poor people, the changing period to get education in each level of study, etc.

d. Political Factors

After getting recognition of its independence from French protectorate in 1956, the first president Habib Bourguiba of Tunisia has issued controversial rules to replace the law of the Qur'an in the areas of divorce (repudiation), *hadhonah* (taking care of child) and marriage (including a ban on polygamy practice). Transition era and post- conflict situations of the independence of Tunisia, could provide a window of short opportunity to change and redesign constitution and laws that provide long-term impact

²⁶ Mohammad Zaki, "*Trend Kriminaslisasi dalam Hukum Keluarga di Negara-Negara Muslim*," *al-Risalah*, 1 (May, 2011), p. 31.

for peace , security and the status of different groups in society, including women. Tunisia is a moderate Arab state.

Tunisia is a moderate state. In the early period of independence brought Tunisia to the opportunity to modify legal provision of the pre – independence, in addition to making new laws, either criminal law or civil law.²⁷ The idea of western thinking was brought by President Habib Bourguiba with his powers. Finally, he issued the Code of Personal Status in 1956 and brought the spirit of gender to get better position and protect their rights for women.

e. Understanding of Religion

The influence of western ideas that have constructed of Tunisian students who had studied in Paris to got a modern education in the French protectorate era, it brought an impact of westernized thinking until form large scale reforms going on in Tunisia . It also gave impact the understanding of Tunisian society to understand of religious texts/doctrines contained in the sources of Islamic law, namely *the Qur'an and the Sunnah* to understand the essence of the law that is in it.

In this case, understanding of polygamy verse by President Bourguiba mention clearly stated that the ideas that prevailed in the past, at the present time is contrary to the human consciences. In the issue of polygamy that is now governed with the new law, he said that Islam has freed a human soul and asked to review the laws of religion / *ijtihad*

²⁷ Tahir Mahmood, *Personal law in Islamic Country*, (New Delhi: Academy of Law and Religion, 1987), p. 151.

(interpretation), so it could adapt to human progress that reached by human being.²⁸

Actually, this prohibition has a legal basis in several verses of *the Qur'an* that indicated as the basis of a polygamous marriage. The existing of legal provision in the *QS an-Nisa'* verse 3 stated that a man shall be married with one wife if believe is not able to do justice to his wives. In addition, in another verse, Allah also has explained clearly by experience and statement of the revelation in Surah *an-Nisa* verse 129 that justice could not be met.

f. Economic Factors

The Tunisian State as a newly independent country in 1956, Tunisia has to fight, keep peace and security. Economically, Borguiba saw that polygamy would incriminate for men who run it. In certainty, if this is happen, the impact will extend, for instance, the responsibility for the wives and children of polygamy will ignore, etc. Moreover, the Tunisian State is also one of the world's developing countries.

Tunisia can be considered as a leading example of the post-1956. The trend reforming based on the thing that was declared as the rights of Muslim countries, through their rulers to *ijtihad* (interpretation). Finally, Tunisia abolish polygamy rights through Article 18 of the Tunisian Code of Personal Law Statutes of 1956,²⁹ is based on a reinterpretation of Surah *an-Nisa* verse 3.

In determining of legal provisions of the banning, the Tunisian government

²⁸ N.D. Anderson, *Islamic Law in the Modern World*, Indonesia version: *Hukum Islam di Dunia Modern*, translated by. Machnun Husein, (Surabaya: CV. Amar press, 1991), p. 35.

²⁹ Tahir Mahmood, *Personal law*, p 156-157.

did not argue about the interpretation by limiting the number of wives in polygamy, but the government of Tunisia gave more concerned about the requirement of justice that also has many interpretations by the *Salafi scholars*. The justice in modern times is considered very difficult to bereached because not only equate justice with a living maintenance (finance support), but also with love and affection.

3. Revolution Era (2011-present)

Current condition of the development issues that occurred in Tunisia regard to the prohibition of polygamy until the writer has completed her research shows that there was the issue about re-legalized of polygamy lawsuit by the Islamic militants (conservative) Tunisia since 2012. This period is characterized by the presence of several factors, namely:

a. Social Factors

The existence of large-scale of demonstrations and riots occurred as the impact of the Arab revolution (Arab Spring) stricken in the State of Tunisia. It is named as the Arab Spring because it occurred in the Arabian peninsula and began to look glowing in the spring.³⁰ This revolution took place in Tunisia since December of 2010 last year which gave wide impacts to almost all sectors of life, not except on the field of Islamic family law in Tunisia, namely the prohibition of polygamy. The freedom era stricken in Tunisia provides an opportunity for the public to

³⁰ Geopolitik Arab Spring: Tunisia dan Suriah, http://angela-n-a-fisip10.web.unair.ac.id/artikel_detail-49639-GeoGeo_Geopolitik%20Arab%20Spring:%20Tunisia%20dan%20Suriah.html, was accessed on 13 January 2014

begin bravely speak out in public. They began speak up about their disappointment toward the government's performance, so it looks a lot massive demonstration that was colored kinds of riots, violence and other anarchy until brought many injuries and died victims. The disappointment in the field of family law is more perceived by Islamic conservative community against the secular rule of law such as the prohibition of polygamy.

In Tunisian state, there are the big groups that live in the society, they are modernist and Islamist community (*salafi*). They life together with any different opinion, one of them is the Islamist community did not want to implement the provision of law based on secular laws/modern laws. They feel that Tunisia is one of Islamic country, so they must implement of law suitable with the source of Islamic law. But in fact, secular laws more dominate implement in Tunisia. Hence, it is one of the cases that caused the legal discourse about legalizing of banning polygamy emerge in Tunisia. In addition, many spinsters and alleged prostitution and infidelity increased.

b. Political Factors

Arab revolution (Arab Spring) that was refers to a situation where the government did not get the sovereignty from citizen. It was because citizen felt dissatisfied by the government performance. The government has acted arbitrarily in enforcing regulations. Corruption was rampant and emerging problems. This miserable encourage public

began to try overthrow government and demand a new government. Tunisia is a country which has an important role in the Arab revolutions. This revolution occurred when the dictator powers led by President Ben Ali, who has declared an emergency circumstance over the Country at that time. Until there was legal lawsuit to re-arrangement the new constitution after Arab revolution was happen. In other hand, the impact of election which has been won by *an- Nahda* (Islamist party), the era also change. It has changed the circumstance of Tunisian state from the secular into Islamic law (back to Islamic shariah) One by one, the laws were made during the Bourguiba and Ben Ali were considered un-Islamic, discourse to be re-amended.

c. Religious Understanding Factors

Religious understanding of the conservatives and modernists Tunisian are different and caused many conflicts. Understanding of the conservatives toward the Islamic Shariah should be enforced perfectly against textual interpretation led to conflict with the secular laws that is western thought in Tunisia. The disappointment of the Islamic conservative who insist that banning polygamy is a secular product that opposed to the Islamic Shariah. As we know, this state has declared in the constitute on that Islam is the official religion in the country.

d. Economic Factors

The numbers of unemployment and poverty that occurred causes the existing of demo that invite the solidarity of public. High food prices and high inflation led to the economic crisis in Tunisia.³¹ It is one of the factor of Arab spring.

Adel Elmi, the head of the Moderate Tunisian Association for Awareness and Reform, which was previously known as the Commission for the Promotion of Virtue and the Prevention of Crime, said on the radio that marriage law should be changed and proposed amendments to the family law of Tunisia (*Majallah al ahwal as syakhsiyyah*). The secular law product is considered the most progressive family law by Habib Borguiba President in the Islamic world, instead got negative response from the public. She said that polygamy practice permit in Islam and must be legalized if it is considered become one of the best needs for the community.³²

The freedom era emerged in Tunisia until now. A golden opportunity to amend all the old rules were considered incompatible with Islamic Shari'ah is sued again. Some Islamic parties and religious organizations, who are the most spirit to propose this amendment.

³¹ Dylan Aprialdo Rachman, Paper Fenomena Arab Spring, https://www.academia.edu/3812208/Paper_Fenomena_Arab_Spring, was accessed on 10 January 2014.

³² muslimdaily.net, Organisasi Islam Minta Tunisia Legalkan Poligami, www.muslimdaily.net/berita/internasional/organisasi.html#Uy7L-ahdXbY, was accessed on 10 January 2014.

According to them, the prohibition of polygamy does not bring benefit to Muslims in Tunisia. The opposite situation happened instead, the various social issues was emerging. For example, infidelity, unregistered marriage (*Zawaj 'urfi*), the phenomenon of the increasing number of divorces and spinsters. Accordance to Dede Permana in his article said that they quote the results of a survey that are launched by a national newspaper recently, said that 80% of husbands and 68% of wives in the city of Tunis claimed dishonest in marriage. They also refer to the data that in 2010, there were 16 thousand marriages and divorce cases 9100.³³ The main causes of divorce namely domestic violence, illness, a wife who is not a virgin in the first night, and the third party in the marriage. There are many other arguments that they convey to support the permissibility of polygamy in the country of 98% are Muslims. However, until now that issue still become legal discourse unresolved in Tunisia.

B. The Dynamics of Tunisian Polygamy Laws in Gender Perspective

Study about gender not only attempts to understand women or men separately, but also to know how to put them in the context of a social system in which become an integral part in it. In Islam, the concept of gender equality becomes a substantive part of the universal values of Islam through revelation (*Qur'an and Hadith*). In Islamic doctrine, men and women have an equal position to get rights and obligations as a slave of Allah except their faith by

³³ Dede Permana Nugraha, Larangan Poligami Digugat Kembali, http://permana.blogspot.com/2013_03_01_archive.html, was accessed on 22 December 2013

Allah: ³⁴“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)

The dynamics of polygamy laws in Tunisia will be an interesting discussion if perceived by the gender perspective. Because there is dynamics of polygamy law revolution happen in the country of 98% Maliki adherent. In other hand, the discussion of polygamy law is always controversial, interesting and invite sensitive side of women in it.

The implementation of polygamy law in Tunisia under the provisions of Islamic law base on the Maliki and Hanafi scholars provide a legal practice of polygamy. In this case the permissibility of polygamy law is based on interpretation of the text of *the Qur'an* in Sura *an-Nisa* 'verse 3:

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 تَعْوِلُوا (3)

“And if you fear that you will not deal justly with the orphan girls, 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)³⁵

While the hadith is often raised includes:

³⁴ Q.S al-Hujurat(49): 13

³⁵ Qur'an, <http://quran.com/4/3>, was accessed on 13th of March 2014

"From Ibn Umar: that Ghailan ibn Salamah when converted to Islam has 10 wives (who married at the jahiliyah time), the Prophet ordered him to choose four of them as wives."³⁶

Actually, those legal basis above should be re-interpreted, not only as a moral imperative, but also as a precedent condition for polygamy law, it means that no one is allowed for a second marriage except until proven his ability to apply egalitarian where the wives are treated fairly. But looking at the modern condition, social and economic, the fairness is so hard to do (impossible). Justice itself also contains various definitions that are difficult to understand directly, and by looking at the economic condition of the Tunisian citizen is still a lot of poorness and unemployment.³⁷

In gender perspective actually do not talk about polygamy is bad thing and prohibition of polygamy is good thing in marital case, but we talk about relation between man and woman (spouse) in marital relation. Gender perceive that marital problem of polygamy is a form of gender inequality and injustice. Indicator of gender equality in polygamous marriages is hard to set. Moreover, the culture of the patriarchal family system emerged in Tunisia.³⁸

The assumption about the position of men is higher than women would cause a negative impact on women. Indications of subordination form of women would hamper of participation access, control, especially the relation

³⁶ at-Tirmidzi, *Sunan at-Tirmidzi*, juz II (Dar al-Fikr: Beirut, 1994), p. 368.

³⁷ Jarmud, http://alisarjuni.blogspot.com/2013/05/kriminalisasi-poligami-dalam-hukum_20.html, was accessed on 3 January 2014

³⁸ M.M. Charrad, *Policy Shifts: State, Islam, and Gender in Tunisia, 1930s-1990s*, (Summer: Oxford University Press, 1997), p. 290.

in decision taking role.³⁹ The Subordination in a polygamous marriage would lead the position of wives in the household becomes part of husband's life. Stereotype image of women as weak human, emotional, irresponsible, and dependent on men considered fair if the wife accepts unfavorable treatment from her husband. This condition is causing vulnerable domestic violence. On the one hand, wives have no power to put them self equally with their husband position, In addition, the dependence of wife psychologically getting bigger on the husband.

Likewise, marginalization occurs in the household as an impact of the subordination of women in polygamous marriages. Marginalization form appears for example, in the case about regulate economic necessity and utilization of human resource in the household. Double burden can happen to wives who do not get the deserved treatment by their husband, and conversely, a husband as the breadwinner for the family, in the context of polygamous marriage, has to fight harder to complete all the needs of his wives and his children. So it will emerge double workload that is could be disproportionate because of many needs that must be completed.

In polygamy, the ability aspect to do justice is guaranteed indefinite to accountable. Fairness in the giving of material need may be fulfilled, but in household life, immaterial necessity is also one of the necessities for a wife. In this case, many polygamists cannot create the justice. Many wives who are experience psychological barriers such as the inconvenience of wife's

³⁹ Mufidah Ch, *Psikologi Islam Berwawasan gender* (Malang: UIN Press, 2008),. p.15.

life in the susceptible condition with hostility, injustice, and conflict. Among the wives often appear jealousy and scramble the attention of husband which led to the position of the smaller wives (dwarf), hanging down, hegemony.⁴⁰ So it can bring the relation between husband and wives become deficient. Thus, the problem of polygamy becomes more complex if emerge the things that can interfere the stability of family life. Therefore, when the basic conditions cannot be met then Tunisian polygamy law briefly declared that polygamy is forbidden. Many polygamist deviate the wisdom of polygamy.

In the post independence period, the dynamics of polygamy law start to show very radical changing. Polygamy is prohibited by Article 18 CPS of 1957 which states:

“plurality of wives is prohibited. Any person who being already married and before the marriage is lawfully dissolved, marriage again shall be liable to imprisonment for one year or for a fine of 240.000 malims/franc, or to both, even if the second marriage is in violation of any requirement of this Code.”

The basic of prohibition polygamy that is used by Government of Tunisia according to John L. Esposito stated that polygamy as slavery, like an institution that has unacceptable majority of mankind everywhere and forever. Polygamy is just allowed during the development or transition of the Muslims era, but forbidden during development or civilized society. Additionally, the requirement for polygamy contained in Qur'an is ability to do justice for wife, while the historical fact has

⁴⁰ Mufidah Ch, *Psikologi Keluarga*, p. 240.

proved that just Prophet who is able to do justice for his wives.⁴¹ In addition, the ideal of the Qur'an about marriage is actually monogamous.

Here, according to Esposito, Muhammad Abduh views on polygamy verses to be a reference for Tunisian government in establishing the banning of polygamy law. According to Abduh, *al-Qur'an* gives permission for a man about having wives more than one has been seriously limited by the Qur'an itself. Thus, the ideal marriage of Qur'an is monogamy. Moreover, the requirement is proposed for husbands to do justice for all his wives is a condition that is very difficult, even impossible for realized it fully.⁴²

In *Tafsir al-Manar* book, Muhammad Abduh also explained that whoever was contemplating two verses in Surah *an-Nisa'* that permissible of polygamy practice in Islam was a narrow rule as if it was forced situation, which was only allowed to do with an ensure requirements that he was able to do justice and would avoid by torturing. However, perceived once again about the mistakes that arose as a result of polygamy at the present make polygamy was very difficult to be done. Because polygamous households invite bad atmosphere that would not calm and would not implement any rules in it. Instead the husbands with several wives will break down the household, as hostile to one another, then arose the children who were also become hostile to each

⁴¹ Norman Anderson, *Law Reform in the Muslim World* (London: The Athlone Press, 1976), p. 63.

⁴² Khoiruddin Nasution, *Riba dan Poligami*, (Yogyakarta: Pustaka Pelajar, 1996), p. 84.

other. Thus, polygamy propagated from the individuals into houses and from houses into the nation.⁴³

If we look at the history of polygamy itself, in the early of Islam, polygamy had a lot of benefits. But in present time, the impact of polygamy divide the wives, the children, their parents, and their families to promote hostility and hatred to each other. The husband with unwise manner, always follow the willingness of the wife that is most beloved; and thus, spread the moral damage among the extended family.

In this case, the Islamic thinkers by reformist also contribute in prohibition of polygamy law in Tunisia. As presented by the emancipation of women movement in Tunisia, Tahir al Hadad (1899-1935), in his very popular book in Tunis, *Our Women in the Shariah and Society (Imroatuna fi al-Sharia wa al-mujtama')*. Tahir Hadad said that polygamy is a form of ugliness contained in the previous Arabs *Jahiliyah* era (*Sayyiah Min Sayyiat al-Jahiliyah al-Ula*). Hadad describe the phenomenon of Arab men at the time that often married with more than one woman, even too many (unlimited). The wives were got unfairly and arbitrarily treated. Islam came to eradicate this behavior by sending the rule gradually (*tadarruj fit tasyri'*), the first limitation is the maximum number of women who made to be wife are up to 4 people. Then Islam requires fair manner among the wives, the impossibility can be realized by the husband.

⁴³Musthafa As-Siba'y, *Wanita di Antara Hukum Islam dan Perundang-Undangan*, (Edition I; Bulan Bintang: Jakarta, 1977), p. 149.

Thus, in Haddad view, polygamy has no basic in Islam, and actually Islam intend to eradicate polygamy. Haddad also considers that polygamy was not in line with the *maqasid* (goals or purposes) of marriage itself, to realize *the sakinah mawaddah wa rahmah* family for every spouse. Those three things would be realized if husband just pour affection for one wife.⁴⁴

Amel Grami, in her research result mentioned that Bourguiba established laws and asked official muftis (religious men who often interpreted the Qur'an) to justify them according to tradition and Islamic Law. Tunisian legislation recognizes monogamy only. But the Qur'an speaks explicitly of polygamy, allowing up to four wives plus all the servants that one may have (4, 3). The verse in question goes on to say: 'but if you fear that you will not be equitable (ta'dilu), then marry only one'. Verse 129 of the same chapter explicitly says: 'And you have it not in your power to be equitable between wives, even though you may wish (it)'. Thus, the Qur'an authorizes up to four wives, adding however that if a man fears not being fair, he must limit himself to one. And further ahead it states that a man cannot be fair.

Bourguiba concluded: 'In fact, the Qur'an wished to guarantee monogamy. But keeping in mind the weakness of Arabs, their state of mind and the customs of the time, it temporarily authorized polygamy, subordinating it to a practically unattainable condition'.

⁴⁴ Dede Permana nugraha, Larangan Poligami Digugat Kembali, http://an-Nisa'permana.blogspot.com/2013_03_01_archive.html, was accesswd on 22 December 2013.

As can be seen, progressive interpretation can allow for much adaptation. The meaning of the verse on treating wives 'fairly' is not in the sense of 'equal justice as is the interpretation of many Muslims but in the sense of duty affection and sexuality: polygamy foresaw equal shares of sexual enjoyment, the same number of nights. So it is possible to read verses in a more liberal sense by emphasizing the contexts in which these verses occur. Bourguiba encouraged scholars to try to open the gates of interpretation (ijtihad) and to seek further understanding of the spirit of the Qur'anic text in order to produce jurisprudential texts based on values of equality.⁴⁵

The Tunisian reading of the Qur'an outlaws polygamy while in all other Islamic countries, polygamy is still a man's prerogative. The Tunisian interpretation of the Qur'an shows that Islamic sources are interpreted through two cultural patterns; an Arab cultural base pattern that is patriarchal and a western cultural base pattern that supports gender equality.

Theologically, Islam perceives that polygamy is a contextual concept that is followed by very heavy qualification, namely justice. That qualification is a defense effort of Tunisian government to avoid the discrimination against women of polygamous marriage. Many polygamy practices deviate the principles of justice that has been defined by the Qur'an to makes access in social reality as a carelessness

⁴⁵ Amel Grami, *Gender Equality in Tunisia British Journal of Middle Eastern Studies*. London: Routledge, 2008. p.352

of responsibility actions and domestic violence that creates stigma against polygamy itself.

If we look at the cultural aspects, as Esposito said that polygamous marriages occurred in pre-Islamic society was a form of slavery. While the historical aspects, we can observe in *the asbabun nuzul* (occasions or circumstances of revelation, refers to the historical context in which Quranic verses were revealed) in surah *an-Nisa'* (Women) verse 3, it is relating to the maintenance of the orphan's property and the obligation to be fair for her, not talking about polygamous marriages. As Allah SWT decree in surah *an-Nisa'* (women) 2-3.⁴⁶

وَأْتُوا الْيَتَامَىٰ أَمْوَالَهُمْ وَلَا تَتَّبِعُوا الْحَيْثَ بِالطَّيِّبِ وَلَا تَأْكُلُوا أَمْوَالَهُمْ إِلَىٰ أَمْوَالِكُمْ إِنَّهُ كَانَ حُوبًا

كَبِيرًا (2) وَإِنْ حِفْظُهُمْ إِلَّا تُقْسَطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثَلَاثَ

وَرُبَاعَ فَإِنْ حِفْظُهُمْ إِلَّا تَعَدَّلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَلِكَ أُذُنِي إِلَّا تَعُولُوا (3)

“And give to the orphans their properties and do not substitute the defective [of your own] for the good [of theirs]. And do not consume their properties into your own. Indeed, that is ever a great sin. And if you fear that you will not deal justly with the orphan girls, 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':2-3)

After polygamy verse was revealed, then the Prophet do a phenomenal/radical change in accordance with the directions of the verses content. A fundamental change was done by the Prophet in relation with two

⁴⁶ Q.S an-Nisa'(4): 2-3

things. The first is the number of wife from an unlimited number to limited just four wives. This restriction is felt very heavy, because in previous time men had already familiar with many wives, then they were demanded to choose only four wives and divorce the other. Secondly, in requirement of polygamy, the man/husband should be able to be fair. Previously, polygamy didn't have any requirement, including the requirements of justice. As a result, many of polygamy practices brought misery and suffering for women.

Thus, the essence of verse emphasizes a warning to mankind in order to avoid unfairness or discrimination. To think about the difficulty to be fair that contained in the next verse sound of surah *an-Nisa* ': 129, actually the verse contain more threat of polygamy than allowing it.⁴⁷ In this case, only Prophet Mohammad as the exception is proved able to do justice to his wives. The following verses Q.S *an-Nisa* 'verses 129 decree:

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

وَإِنْ تُصْلِحُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا (129)

"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 Merciful." (Q.S an-Nisa ':129)

In recalling that the importance of fairness in polygamous family is very heavy and impossible to do in modern era, so making restrictions on the number of women who can be married is a sign of the prohibition on

⁴⁷ Musda Mulia, *Pandangan Islam Tentang Poligami*, (Edition.1, Jakarta: Lembaga Kajian Agama dan Gender, 1999) p. 49.

polygamous marriages. Polygamy without based on the fairness will give the various forms of violence and confusion both within the family or society. A husband who is practice polygamy without ability to uphold fairness, he will treat arbitrarily their wives and children. Therefore, the writer argues that the prohibition of polygamy that has been established by the Government of Tunisia is an evidence the progress and the success of Islamic law in applying re-interpretation of Islamic doctrine toward the provision of laws in contemporary era to prevent negative impact of polygamy.

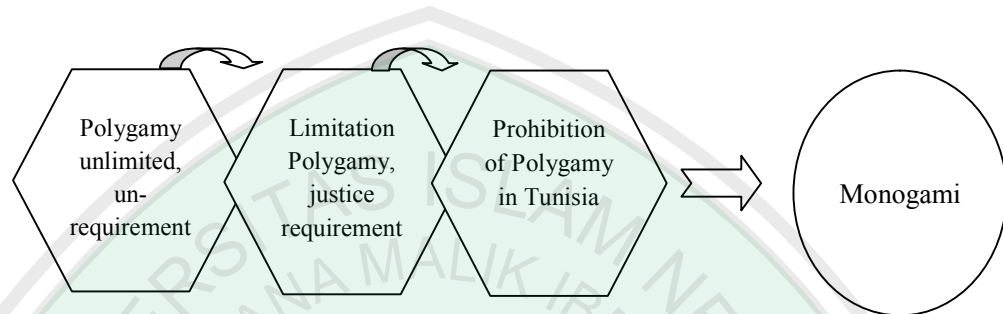
In fact, the prophet Muhammad practiced polygamy, but he did not bless his son in law to practice polygamy. It is associated with the fairness that should be done in polygamy, which not everyone will be able to do so, including Ali ibn Abi Talib. As Allah says in surah *an-Nisa'* (4):129.

In polygamous case, the logical argument that can be used is how could a man can marry and share his love for more than one woman? What kind of *Sakinah* (peace or serenity) family that would be formed in it? Besides what kind of fairness that would be upheld to build the household of a father and more than one mother? Perhaps in the material dimension level, the man can fight it, but who can be fair in the immaterial level (*bathiniyyah*)⁴⁸ especially in this modern time with condition of family that is easy to have a conflict.

Thus, polygamy can be a source of conflict in family, both conflict between husband with his wives and children of his wives, or the conflict between the wife and the children respectively. Therefore, the germinal of the

⁴⁸ Quraish Syihab, *Wawasan Al-Qur'an: Tafsir Maudhu'i atas Perbagai Persoalan Umat*, (Bandung: Mizan, 1996), p. 111.

marriage in Islamic law is monogamy. Extremely, we can conclude that Islam wants to slowly remove the tradition of polygamy, despite not being directly contained in *Qur'an and Sunnah*. It can be affirmed with a graphic illustration as follows:



In the context of gender equality and equity in marriage is based on several indicators such as the husband and wife have equal access in domestic life, getting balanced role in the household, accepting equal authority and responsibility, and getting equal benefits in the household. In the gender perspective, monogamous becomes an option that facilitates to build *sakinah mawaddah wa rahmah* household, as well as health in physical and spiritual for husband and wife.⁴⁹

The relation between husband and wife (spouse) in a monogamous marriage can be implemented based on *mu'asyarah bi al-ma'ruf* (well-mannered marital relationship) principle. Monogamy marriage can build relationship in a positive interaction pattern, harmony with a peaceful mood, which is also indicated by equilibrium of rights and obligations on both of

⁴⁹ Mufidah Ch, *Psikologi Keluarga Islam Berwawasan gender*, p. 238.

them. So, *Sakinah mawaddah wa Rahmah* family (peaceful place to grow love and compassion) can be realized as an ideal family.⁵⁰

The prohibition of polygamy is accommodated in the Code, it can provide a real protection for women to be able to defend the rights of discrimination, violence and injustice by husband. Prohibition of polygamy in Tunisia at least can prevent acts of violence occurred in the polygamous marriage that is very susceptible toward conflict and minimize the practice of polygamous marriages itself in Tunisia.

Law is the most formal manifestation of government policy. Without legal protection, there is no help or refuge for women when they face discrimination that influenced all aspects of their lives, which are including security, happiness, welfare, peace, loyalty and affection. Legal reforms are needed to realize gender equity that can be viewed by the perspective that eliminates the dichotomy between public and domestic areas. So, it can produce more fair regulation (code) for the husband and wife.⁵¹

If we observe, the banning of polygamy law in Tunisia is not only stopping the banning of polygamous, but also giving punishment for the person who is breaking them. This prohibition applies for all citizens without any discrimination both men and women. Even in 1964, the Tunisian government is not only punishing the perpetrators of polygamy (polygamist),

⁵⁰ Mufidah Ch, *Psikologi Keluarga Islam Berwawasan gender*, p. 178.

⁵¹ Shelby Quast, *Justice Reform and Gender*, translated by Catherine Muir (Jakarta: IDSPS Press, 2008), p. 5.

but also considering that polygamy included as an invalid marriage.⁵² Tunisia is one of the Islamic State in the North Africa that prohibit and impose criminalization of polygamous marriages. The provision is clearly contained in the CPS 1957 article 18 applied throughout the Tunisian citizen without exception.

In the *Kamus Besar Bahasa Indonesia* (Big Dictionary of Indonesian Language) book, criminalization means the process of behavior showing, in previous time do not considered as a criminal incident, but later is classified as a criminal act by the public.⁵³ Thus the criminalization of polygamy is understood as a gesture to categorize polygamy practices/actions as a criminal offense (crime), which is threatened with certain criminal forms, both imprisonment and/or fine.⁵⁴ This is a novelty for the Islamic world and one of the characteristics in the family law in modern Muslim countries.

The entry of the components of the criminalization in polygamy case becomes part of inherent in the reform of family law in modern Muslim countries. It became part of the implementation of the basic spirit of family law in modern Muslim countries that protect the rights and increase the dignity of women. Influence of the ideas is conceived and initiated a number of figures in the modern Muslim scholars on reinterpreting the Islamic doctrine/texts becomes the other side of how the state can enforce the provision to come out of the conception of classical literatures. Collaboration

⁵² Tahir Mahmood, *Muslim Family Law Reform*, h. 101, see also article 21as amended by law no. 1 of 1964

⁵³ Tim Depdikbud, *Kamus Besar Bahasa Indonesia*, Edisi III, (Balai Pustaka: Jakarta, 2001), p. 600.

⁵⁴ Andi Hamzah, *Asas-Asas Hukum Pidana*, (Rineka Cipta: Jakarta, 1991), p. 5.

between *ijtihad* (interpretation) that is carries of *maslahah* (benefit/interest) principle and *siyasaah Sharia* principles become an important trend in the development and implementation of Islamic law in the modern Muslim country.⁵⁵

In the State of Tunisia, the criminalization of polygamy has been enforced, it is proven in the research of M. Charrad who is an associate professor of sociology at the University of Texas at Austin and an award-winning author whose work focuses on political, sociology, comparative history, gender politics and the Middle East and also give concern in Tunisian case said that the police arresting men who practiced polygamy by claiming that they had married one wife according to the new law (which required a marriage certificate) and another wife according to the old law (which did not require a written certificate).⁵⁶ Abolition of polygamy is implemented with the aim to complicate and limit the space of polygamy practice. If we look at the marital code in the CPS contained in article 3, the Tunisian State adheres the principle of monogamy marriage it means that a husband can only have one wife and conversely a wife can only have one husband in one time. In the CPS of article 18 Tunisian government explicitly prohibits polygamy and impose penalty for offender. Relating with the criminalization of polygamy in Tunisia, Article 18 states:⁵⁷

⁵⁵ Zaki Saleh, Muhammad . "Trend Kriminalisasi Dalam Hukum Keluarga Di Negara-Negara Muslim". *Paper*. Presented on forum "Annual Conference Kajian Islam Lembang". Bandung, 2006.

⁵⁶ M.M. Charrad, *Policy Shift: State, Islam, and Gender in Tunisia 1920s-1990s*, (Summer: Oxford University Press, 1997), p. 297.

⁵⁷ Tahir Mahmood, *Personal Law in Muslim Countries*, (New Delhi: Academy of Law and Religion, 1987), p. 156.

“plurality of wives is prohibited. Any person who being already married and before the marriage is lawfully dissolved, marriage again shall be liable to imprisonment for one year or for a fine of 240.000 malims, or to both, even if the second marriage is in violation of any requirement of this Code.”

From the article above, we can understand that the Tunisian State enforces the provision marriage laws in consistent with the principle of monogamous marriage. The provision of polygamy prohibition is different thing in the Islamic world, especially in the marriage area. It is become a controversy in development of marriage law in Islamic world.

In the article above also contained the substance that no man who is able to marry with woman to be the second, third or fourth wife. Imprisonment for one year and / or a fine of 240,000 *malim / franc* become a serious barrier for polygamist in Tunisia. So there is no gap of the husband to practice polygamy before the first marriage has ended. In this case, feminist spirit to protect the rights of women as an evident in provision of Tunisian family law is clear.

Prevention of polygamous marriages in Tunisia does not stop in the CPS of article 18 of paragraph 1 above, there is the next verse which can complicate the implementation of polygamous marriages in Tunisia. The provision of punishment is known in criminalize of the polygamy practice not only applied for the offender, but also for the supporter party or organizer. This is stated in the Code of Personal Status:⁵⁸

⁵⁸ Tahir Mahmood, *Personal law in Islamic Country* (New Delhi: Academy of Law and Religion, 1987), p. 157.

Article 18 paragraph 2

Any person who has married in violation of the provision a laid down in Law No. 3 of 1957 relating to organization of civil status and contracts a second marriage while living in matrimony with the first wife shall be liable to the same punishment

Article 18 paragraph 3

A person who knowingly marries someone liable to punishment under the forgoing clauses shall also be liable to the same punishment

Article 3

No marriage shall be concluded without the consent of both spouses, it is essential for the validity of a marriage that two eligible witnesses be present and the dower be specified

Sound of the code in the article above is very clear. The Tunisian Code is very careful and detail in enacting the prohibition of polygamy. Threatening is imposed for the supporters who are dare to held polygamous marriage have some aims to anticipate and make difficult space of the illegal polygamy practice happen in society. The party is the person who has been married someone for the next wedding, while the first marriage before is lawfully dissolved. This has been shown in the provisions of Tunisian Code of Personal Status article 18 paragraph 3. So that they will think several times to held polygamous marriages secretly, because of the threat of punishment and sanction by the Tunisian government applies also for the parties who are involved.

From the provisions of the Code of Personal Status above it has been clear that his passion to protect the rights of Tunisian women not only be a picture and a blur of government Habib Bourguiba president. It can be seen

obviously in their Family Code legislation. Moreover, if we observe in the CPS, there is no special category that regulate about exceptions as a requirement to hold a polygamous marriage. So that no reason for a husband to practice polygamy. Moreover, this code also is imposed to all citizens without exception in Tunisia. The opportunity to build up monogamous marriage is visible in that legislation/code.

Different with the provisions of polygamy in some other Islamic country, they still provide the space to held polygamous marriage with several requirements that must be met. On the other hand, it is becomes hard thing for man in Tunisia who wants to keep his marriage with the first wife who cannot give birth to descendants or unable to perform the obligation as wives, except by taking a legal divorce process by court. However, despite it all, this provision actually means as a firm step that has been selected by the Tunisian government to abolish polygamy practice and protect or fight of women's rights in Tunisia.

The article about polygamy ban illustrates the clarity that there is no weakness in women position, injustice or discrimination will emerge great concern for women in Tunisia. So, the practice of multiple wives is often indicated as a crime against humanity and a wide variety of negative effects can be avoided. It is because this kind of marriage is viewed as a marriage relation that caused many *mudaharat* (dangerous) than *masalahah* (benefit or interest)⁵⁹ and be difficult to bring to realize the equality and the equity.

⁵⁹ Musdah Mulia, *Islam dan Inspirasi Kesetaraan Gender* (Kibar Press: Yogyakarta, 2007) p.147.

Up to now, the rule of banning polygamy in Tunisia has never been amended, only there is additional clause that the polygamous marriages are included in one of the list of invalid marriages since 1964.⁶⁰ But behind it all, a lot of conflicts that has occurred between the conservatives (*Salaf*) with modernist community in Tunisia, bring many issues related to the ban on polygamy with some reasons like the increasing amount of infidelity and prostitution.

The disappointment comes as a response of Tunisian conservative community eventually led to the issue of re-amendment the provision of prohibition on polygamy that invite controversy in Tunisia. This situation became a discourse during the Arab spring accident on the year 2011 until now. Moderate Islamic country that brought the concept of gender to defend women's rights has been included in the provisions of law enforce in Tunisia since 1957. The moderate Muslims understand that the permissibility of polygamy in Islam associated with *illat* / reason / specific context and agree the banning of polygamy law for the context in Tunisia. Pros and cons indeed continued between agree and disagree about polygamy. However, the provisions of the law by conservative Islamic community consider that the prohibition polygamy contained in article 18 of the CPS is in contrary with the provisions of Islamic law and also do not make the fate of Tunisian women be better than women in other Arab countries.⁶¹ They feel that there is a shift of the gender concept to protect the women's right. The prohibition of polygamy

⁶⁰ Tahir Mahmood, *Muslim Family Law Reform*, p. 101.

⁶¹ Dede Permana Nugraha, "Larangan Poligami Digugat Kembali", http://an-Nisa'permana.blogspot.com/2013_03_01_archive.html, was accessed on 22 December 2013

in Tunisia brings the negative impact for women lately, because there is information around dishonesty, unregistered marriage and prostitution.

In a gender perspective, polygamy debate that surfaced in the community over the extent of the impact will devastate the women future and gives the freedom for a man to optimize his ability to make marital relation with several women. Remembering that the arguments is used by modern scholars is their tend characteristic to make more difficulty for the requirements of justice in the present, and realizing the desire a monogamous marriage and the assurance of a future generation. On the other hand, the argument of militant Islamic conservative tends to simplify the problem by using religious arguments to legalize polygamy.

Various cases of prostitution and infidelity become a major focus as a result of the ban on polygamy rules in order to realize the lawsuit legalized of banning polygamy. If we look at the state law, the lawgiver establishes the rule of law with the initial goal for the security, peace and prosperity for all its citizens. According to the writer, high amount of prostitution and infidelity are not entirely as a negative impact of banning on polygamy law. Monogamy is a form of gender equality marriage to facilitate the creation of *sakinah mawaddah wa rohmah* family.⁶²

As we look at more detail, actually polygamy is a matter of necessity. If someone had enough with one wife, then he will not have a second wife, third and so on. In this case to create a human life as a modern and civilized, one

⁶² Mufidah Ch, *Psikologi Islam Berwawasan gender* (Malang: UIN Press, 2008), p. 241.

indicator is the good moral that must be built in State. Thus in this case, the basic and the root of the problem are losing identity and integrity of the community which pointed with the moral decline.

Identity and integrity are becoming an important thing for society and state that have high civilization. Because of the state that lost their identity and low integrity like froth in the ocean that have no power. A great nation is a nation that has a high identity and integrity in the society. This parable can be applied in a household because of a nation is built from various household. If the members of the household have high identity and integrity (which is the head of the household being a good example), it will give the impact on the strength of the nation. The strength of the nation means the nation is already on a high civilization. So the issue of polygamy is not becoming something that should be debated, because the people already known which one is more beneficial in their life.⁶³ So the dispute that happen in the middle of national life about moral decadence that hit Tunisia currently, it is not about the controversy of polygamy. How to make the people of Tunisia be better, have a good moral and also make the government to have role models. In the long term is expected that the social life will be better. Prohibition of polygamy is re-interpretation product of the context from the several basic of polygamy law in Islam.

Therefore, in order to respond the discourse is expressed by the militant community about prohibition of polygamy in Tunisia related with the winner

⁶³ Muhsin Djoyodingrat, "Hukum Poligami", <http://pmiiwalisongopwt9.blogspot.com/2009/10/hukum-poligami.html>, was accessed on 10 January 2014

of the election from the Islamic faction, it is *an-Nahdah* party. The supporter of this party needs to implement Islamic Shariah and back to Islamic law. So, all the secular product of the provisions of law that was built in Bourguiba's era will be changing and replaced with Islamic law. In the brief, the Islamic militant demand the Tunisian government to make new amendment of law based on Islamic shariah. Hence, the government needs to be more assertive in reacting to this discourse.

In fact, polygamy is not forbidden by Islam, but it is also not recommended. Actually, polygamy is similar with the emergency exit in the airplane which should be opened in an emergency only.⁶⁴ If the state of Tunisia require the government to legalize polygamy and make it happen, then it is permissible. Because of the Tunisian government knows better what happen in social condition at that time. In addition, the government is one of the mediators must solve the various problems that occur in the State.

In this case, it does not mean that the writer supports the legalization of banning on polygamy in Tunisia fully, because every problem have definite way out despite should not realizing the goals of legalizing polygamy. However, if it is indeed necessary to re-amendment about ban on polygamy currently and should be legalized, it should become the last option and emergency condition in resolving the problem. Refer to the big impact of the Arab spring widely, at least it is not anymore a debate on the classical issue, especially about polygamy, while there are many others important issues that

⁶⁴ Anshori Fahmi, *Siapa Bilang Poligami itu Sunnah?*, (Bandung: Pustaka Iman, 2007)

must be faced and resolved by Tunisian government immediately such as corruption, unemployment, poverty, etc.

However, a legal policy is made by government in the CPS (Tunisian Family Law Act) not only give a positive response, but also negative responses too. So, any form of legal provisions that has been made, of course there are many pros and cons emerged from these provisions, because there is no provision that give all positive response, it is means no one perfect provisions in law. The government just wants to help in reducing the negative impact that happen in the society. Therefore, all the things are the discourses of law that have several aims to get *maslahah* (benefit or interest) for Muslims Tunisia in taking the good life in this world.

The greatest expectations from the Tunisian marriage law reform, polygamy still become as a legal asset that has a special interest in Islamic law practitioners. And it can be used as a guideline in the determination of Islamic law, it is not used as coup of enacting Islamic law that left from the provisions of Islamic law over the prohibition of polygamy as it has been applied in Tunisia.