CHAPTER TWO

THE ATTRIBUTES OF RIGHTS AND PRINCIPLE OF GENDER EQUALITY IN FEMINIST JURISPRUDENCE

2.1 Introduction

The right understanding on what are the attributes of rights uphold by the individual person and the state leads to positive effects on the development of society and provisions of law at national and international levels. Since this research covers the legal harmonisation process between women's rights law in Islamic and international jurisprudences, understanding the attributes of rights of both jurisprudences would help in the development of law on women individually and collectively. However, negative implications would happen if different people or different individual or different community including different women misunderstood the attributes of rights uphold by individual or the State especially whenever they are based on different culture, religion, law and custom.

In order to understand the intention in spite of the emergence of CEDAW, it is imperative to examine the historical background and the development of international human rights law that is UDHR. The discussion includes the internalisation of human rights law including the women's rights movement and the basis of women's revolution. Moreover, women's activities nowadays are not limited to the private sphere but also cover the public sphere. Therefore, this chapter identifies the substance provision of CEDAW on gender quality and non- discrimination.

It includes the investigation on the object and procedural matters of CEDAW for constructing harmonisation with the provisions of IFLA.

It is contended that the primary objective of human rights in Islamic and international jurisprudences is to protect human dignity and justice (Ali, 2000; Baderin, 2001). Hence, exploring the common attributes of rights in both jurisprudences is crucial for the process of legal harmonisation. To acquire a view on women's needs and be the best instrument that represents the voices of women who seeks their own rights, namely at international level via CEDAW, the feminist's[7] critiques on the attributes of rights are analysed in this chapter. Whereas, the attributes of rights in Islamic jurisprudence is indirectly compared in searching for a common attributes of rights uphold by IFLA and CEDAW for constructing harmonisation.

This chapter also examines and compare the meaning and context of equality and its relationship with justice and rights. More importantly, this chapter investigates the concept of gender equality uphold by CEDAW including the meaning of discrimination through its provisions. The analysis of this chapter is based on the provisions of CEDAW, reports, cases which accommodates the differences among human being. This is seen as important so that the discussion on the issues of 'rights' can be a product of 'justice' to all parties, irrespective of sex, gender, religion, culture and the law of the country.

[7] For further understanding on feminist and feminist jurisprudence, it is argued that femionist is any theory derives from female experience which is contrary with the dominant male perception of reality (Patricia A. Caint, Berkeleys Women LJ.). However, feminist jurisprudence means a method and as the critiques of objectivity in epistemological, psychological, social as well as legal terms. It relies on gender identity which is complex and social culturally determined (Ann C, Scalest, Yale LJ).

Although IFLA and CEDAW are based on distinct religious and cultural foundation, there is a need to analyse whether both jurisprudences share similar universal principles and attributes of rights which is applicable for all human beings. In discovering these similarities, this study can continue with in-depth discussions in the following chapters to seek the compatibility in the meaning of gender equality applied by IFLA and CEDAW. It has been argued that Islamic and international law on human rights are not totally different and can still be meaningfully discussed, provided that the concept of international human rights can be convincingly established from within the themes of Islamic law rather than expressing it as a concept alien to Islamic law (Baderin, 2001:73).

2.2 The Historical Background and Evolution of International Human Rights Law

Historically, the internationalisation of human rights is seen as a process which began with the Western Enlightenment and emerged to a great extent in political conflicts in the 18th and 19th centuries in Great Britain, namely between Great Britain and its American colonies and in France (Taylor, 1991; Hunt, 1996). International human rights notions today have a direct lineage from the Declaration of Independence, the United States Constitution and the Declaration of the Rights of Men and Citizen (Sassen, 1996:90). Samuel P. Huntington (n.d) said that "*the Essence of the West is the Magna Chart*" and UDHR is based on the Bill of Rights of America and France which have been approved in the year 1789. Huntington further stated that the foundation of UDHR is based on Western Enlightenment and it was made to address the rights of superior and inferior human beings. His claim was based on the foundation of UDHR which covers the rights of the King and the civilians, which is

based on secular-liberal theoretical underpinnings, which rejects the notions of religious authority (Nasharudin Mat Isa, 2016).

The UDHR's policies, concerning human rights have always been in support towards liberal individualist tendencies, as purpoted in American and French Constitutions that are largely based on the worldviews of Marxism: "*...the so called rights of man as distinct from the rights of citizens are simply the rights of a member of a civil society. That is, of the egoistic man, of man separated from other men and from the community*". With that, the emergence of the UDHR can be traced to lean towards only the Western philosophy, and its definition on the element of brotherhood is arguably not universal because in reality people around the world are from different religions, cultures and civilisations. If that is so, it could discriminate others of different beliefs, cultures and foundations of civilisation. In other words, it will tend to discrimination if the interpretation of rights in the provisions of UDHR does not acknowledge the differences of human beings in nature and nurture.

According to Tun Abdul Hamid Mohamad, the former Chief Justice of Malaysia, UDHR is the first statement that was made after World War II on 'human rights'. Representative from many countries gathered after WWII came to the view that the cause of the war was made possible by the denial of democratic principles of dignity, equality and mutual respect to be accorded to all human beings, and by the propogation, in their place, through ignorance and prejudice, of the doctrine of the inequality of men and races (Raja Aziz Addruse, 1989). It has been critiqued by Said Rajaie Khorassani that UDHR is a 'secular understanding of Judeo-Christian tradition'. The development of human rights law is often described in terms of "generations" (Charlesworth, 1995). The "first" generation of rights covers civil and

political rights, the "second" generation of rights means economic, social and cultural rights, and the "third" generation ecompasses group or peoples' rights. From the women's perspective, the development and definition related to human rights are built on typically male life experience. It is also argued that the international human rights law, which is said to have reached, at the very least, its third stage, however still has a few fundamental issues that are still unresolved, which is the aspect of universal and cultural-relativism of international human rights laws and practices (Nasharuddin Mat Isa, 2016).

UDHR was adopted by the General Assembly (GA) on 10 December 1948 without dissent. It proclaimed as "*a common standard of achievement for all peoples and all nations*". This standard is the yardstick by which to measure the degree of respect for, and compliance with, international human rights standards. Thus, UDHR is not a treaty. In order to reinforce the moral and political impact of the Universal Declaration, the UN adopted a number of treaties which are International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), which both adopted in 1966, later known as International Bill of Rights.

In the field of international treaties, Malaysia is a party to several important international humanitarian law treaties, among which include the 1949 Geneva Conventions and its subsequent Additional Protocols (1977). In terms of UN human rights treaties, Malaysia has only ratified three of the main international human rights law instruments, and with certain number of reservations (UN Documents-Malaysia Report 2013). The three conventions are CEDAW, 1989 Convention on the Rights of

the Child (CRC), and most recently 2006 Convention on the Rights of Persons with Disabilities (CRPD).

Due to the claimed that UDHR is un-Islamic, western-based (Arkoun, 1994), therefore, UIDHR and CDHRI were established to furnish the exclusion of Muslims such as lack of cultural and religious contexts of Muslim societies (Mas'ud, 2006:3; Dacey & Kaproske, 2008:4) from the international human rights instruments propounded in the West and to argue that there is indeed a human rights tradition in Islam. As Malaysia is also a member of OIC, it has adopted Universal Islamic Declaration of Human Rights (UIDHR) in 1990 and Cairo Declaration of Human Rights in Islam (CDHRI). Both OIC Conferences are influenced by Islamic religion and culture. Its aim to serve Member States of OIC as guiding principles in human rights issues (Nik Salida Suhaila, 2013:44; Rehman, 2010:367-368).

Human rights treaties differ from other international treaties due to certain distinctive characteristics. The most important difference was identified by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. The gist of the rule is human rights treaties are of the interest to States' citizen, not the State itself. It is contended that the ICJ effectively established a two-tier test. First, the State party could object to a reservation but not necessarily find it incompatible with the treaty. Alternatively, the State could go beyond simply objecting and hold that the reservation goes against the object and purpose of the treaty.

2.3 The Emergence of CEDAW: Its Object and Procedure

The exclusion of women in the UDHR was the impetus to the formation of CEDAW. Since equality means fairness and justice, CEDAW acknowledges the differences between women and men in imposing their rights for the similar achievement. A dramatic increase in the development of human rights discourses by feminists worldwide can be seen in the 1993 Vienna Human Rights Conference and the 1995 Beijing Women's Conference. Activists and critical legal theorist sought to transfer the assumptions, discourse and goals of the international human rights movements and by implication, the power structures of the states and international organisations (Hilsdon & Martha, 2000). Those involved in such struggles were drawing on long-circulating, quintessentially modern ideas about democracy, rights, equality and justice. Such ideas have formed part of the constitution of their social orders, no less than those of modernity in the west.

The first step towards CEDAW were taken in 1963, when the General Assembly (GA) adopted resolution 1921 (XVIII) in which it requested the Economic and Social Council to invite the Commission on the Status of Women (CSW) to prepare a draft declaration that would combine in a single instrument international standards articulating the equal rights of men and women (Marijke De Pauw, 2013). Its provisions are far-reaching, covering all aspects of women's life, from their political participation and public life to education, employment, health, and even marriage and family life (Marijke De Pauw, 2013). The ongoing work of CSW is influenced by the continuing pressure of women's, academic and research organisations (Steady, 1995). Evidently, CSW is aware that UDHR does not

comprehensively protect women's rights in the declarations of human rights under its term of equality.

This can be observed in one of the claims made by the feminists which declared that statements of rights in UHDR are indeterminate and thus highly manipulative both at the technical and a more basic levels (Charlesworth, 1994). In order to eliminate any kind of unjust treatments on women, 'culture differences' has assumed an ever-increasing importance in debates about human rights, being invoked by a range of opponents of human rights claims (Bunch, 2013). Consequently, on 7th November 1967, UN General Assembly adopted the Declaration on the Elimination of Discrimination against Women which has united all of the international principles of gender equality between women and men. Then, through Resolution 34/180 1979, UN General Assembly adopted CEDAW which was enforced on 3rd September 1981 (Abdul Ghafur Hamid @ Khin Maung Sein, 2009; Mohd Radzi Harun, 2008).

CEDAW's meaning of discrimination against women as stated in Article 1 referring to "any disctinction, exclusion, restriction made on the basis of sex". Article 2 represents what has been aptly described as the "core of the Convention". The article enshrines the following basic obligations of the State parties in implementing the Convention:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public

institutions the effective protection of women against any act of discrimination;

(d) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

In Article 3, CEDAW gives positive affirmation to the principle of equality by requiring te State Parties to take, in all fields in particular in the political, social, economic and cultural field, all appropriate measures uncluding legislation to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. Temporary special measures are mentioned under Article 4 of CEDAW. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory as provided under Article 4 (2).

Article 5 (a) of CEDAW is considered as the most sensitive provisions which provides that "States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

Article 5 (b) provides that all appropriate measures are also to be taken by the State parties to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of women and men in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

CEDAW covers three dimensions on the situation of women. Broadest attention is given to the legal status of women which include the rights of women to

vote, to hold public office and to exercise public functions as provided for under Article 7. Moreover, it also covers the issue of exploitation of women for prostitution under Article 6. Article 10, 11 and 13 respectively affirm women's rights to non-discrimination in education, employment and economic and social activities. Article 14 of CEDAW covers the recognition of significant role and contribution of rural women which warrant more attention in policy planning and Article 15 asserts the full equality of women in civil and business matters. Lastly, the most relevant provision of CEDAW to this study is Article 16 which deals with the issue of marriage and family relations. It is contended that Article 5(a) and Article 16 are among the controversial provisions which CEDAW becomes one of the main UN human rights treaties with the highest number of reservations made by States parties which are 90 States out of 189 State parties[8].

Article 17 of CEDAW also establishes the Committee in its position in order to inform its procedure. The major function of the Committee is to review the reports which must be submitted by the State parties every four years. It consists of legislative, judicial, and administrative measures the State has taken during that time period in implementing the provisions. The major function of the CEDAW Committee is to review the reports that must be submitted by the state parties consisting of the legislative, judicial and administrative measures the state has taken during the time period in implementing the provisions mandated in the previous Articles of the Convention (Abdul Ghafur, 2006 & Article 18, CEDAW). Once the Committee has reviewed the reports, they make recommendations and suggestions

[8] United Nations viewed on https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en22nd January 2018

which they must report to the General Assembly through the Economic and Social Council (Article 21). The Secretary-General then submits these reports to the Committee on the Status of Women to keep them abreast of the situations within each of the ratifying States (Article 17). All of the procedural matters above are provided to achieve the main object and purpose of CEDAW, which is to eliminate all kinds of discriminations against women to achieve *de jure* and *de facto* equality among women and men within the state authority.

2.4 Feminist Critiques on Rights: A Comparative View with Islam

Women have not been the passive recipients of miraculous changes in laws and human nature. Their movements have started in 1848 after American Revolution. Like many amazing stories, the history of the Women's Rights Movement began with a small group of people questioning why human lives were being unfairly constricted. They started to struggle and critiques that women are treated unjustly in some areas of life including in the formation of law. Their arguments are "*all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness*".

It is argued that feminist critiques of international law are at very early stage (Charlesworth, 1994). At the most general level, feminist analysis of international law involves searching for the silences of the discipline. It means investigating the structures and the substance of the international legal system to see how women are incorporated into it. It offers a challenge to the implied liberalism of the dominant theories about the international law by asserting that international law has a gender and bias in favour of men (Charlesworth, Chinkin & Wright, 1991). In this research,

the feminist critiques on rights are classified into five categories which are on the issues of collective rights versus individual rights, cultural rights versus universalism, rights and duties versus rights only, private and public spheres versus public or private sphere only, nature and nurture versus nature or nurture only.

In Islamic law, while human beings must submit to God's commands, this does not mean that they have no inherent rights. The principle of legality is a fundamental principle of Islamic law, whereby all actions are permitted except those clearly prohibited by Shari'ah. In other words, Shari'ah law offers liberties to human beings under a guided law which prohibits them from violating public rights. Since Shari'ah law is aimed to protect the interest of human dignity as a whole, it does not violate the principle objective of international human rights law, which is to protect the individual interest of human beings.

2.4.1 Collective Rights versus Individual Rights

Feminist critiques on individual rights are triggered by the lack of gender equality (Friedman, 1997:2) or the gendered nature of international human rights law (Qureshi, 2012:352) which excludes women from the meaning of law. They argued that international human rights law ignores the specific concern of women and has only recently responded to women's problem (Qureshi, 2012:352). Friedman (1997) argued that '*law respects and reinforces the interest of particular groups in society, and these interests have always been predominantly male'*. The dominant theory pertaining to international law which deals with the structure by which the actors within it can pursue their vision of a good life is biased in favour of men (Charlesworth, 1994). It is also asserted that human rights law is a product of the

dominant half of the humanity, namely men. Therefore most of its instruments are framed in a language which reflects the interests, aspirations and values of those who have drafted them (Shazia, 2012:137).

Lacey (2004:38) claimed that 'individualism' is the key criticism and further asserted that the danger of individualism becomes significant when the subject of human rights covers only an individual and not the community. The domination of men as the actors within international law, as per Marx's argument originated from the 1789 French declaration which merely propagated the rights of an isolated and selfish individual. He said that "*the human rights of freedom is not based on the community of man with man, it is based on the separation of man from man. It is the rights of separation, the rights of an individual completely confined to himself*". The feminist critics of the individual nature of human rights such as Schmitt stated it as part of the disintegration which aims at subordinating state and politics either to an individualistic and private morality or to the primacy of economic calculation. They assumed that individual rights of men who acted within the human rights law would take over the state power in order to rule within their private interests.

In addition to that, feminists criticized that many of the major human rights treaties do not use feminine pronoun, whereby reinforcing the gender exclusionary trend of law (Qureshi, 2012:44; Alice, 2011:311). Andrew Byrnes (n.d) also observed the silence of the word sex or gender in defining the substantive content of individual rights in the practice of Human Rights Committee in considering individual complaints under the First Protocol to the International Covenant on Civil and Political Rights (ICCPR), or the fact that it could affect the choice of methods that

must be adopted by states to ensure that all individuals within their jurisdiction enjoy those rights equally.

Further, feminists argue that individualistic language that is in favour of men will subordinate women's position to men in the application of that law. A state that comprises human beings including women and men in a national context is a direct expression of human's interest (MacKinnon, 1989). Thus, women's responsibility towards the state if intentionally or unintentionally excluded from the meaning of the law will probably discriminate against them.

Feminist critiques cover on State and Non-State obligation. They have developed a more complex view of the state because of obligations; for example, the state is considered as a social process rather than as a legal category or set of institutions (Franzway, Court & Connell, 1989). From this analysis, it must be stressed that the state is not an expression of a single set of interests, but has its own complex set of power relations and issues that include gender (Charlesworth, 1995:3). Similarly, the criticism by Martti Koskenniemi (1989) that the international legal notion of statehood operates to permanently privilege particular voices and to silence others is not just an empty conviction. The criticism are intended to highlight the importance of ideal collective rights through which the state has been given the power to make sure that private interest of particular persons is avoided so that the collective interest of the community is preserved.

Feminists in their critiques of autonomous rights have stressed that equality refers to both substantive and formal equality. With regard to the exclusion of women in the international human rights law, Fineman (2004) stressed that non-autonomy

(non-absolute choice) or dependency is similar with equality as it is one of the elements of social justice under which gender justice can be achieved. As Fineman proposed, '*the goal of autonomy must be supported through an understanding of collective responsibilities for basic needs*' (Fineman, 2004). However, Nik Salida Suhaila (2013:67) argued that Fineman has to agree that autonomy (but not absolute autonomy) is also comparable with equality. She said that individuals are entitled to what might be called moral autonomy, as Hoffman, David and John (2003:10-12) said that individuals can rarely achieve such goals by themselves, but need to have some form of government because cooperation between individuals is often required.

Meanwhile, Fredman (2003:43) stated that in order *'to give all people, regardless of their sex, race or age an equal set of alternatives from which to choose and thereby to pursue their own version of a good life*', everyone must have equal autonomous rights according to their own interpretation of happiness and a good life. Krishnadas (2007:155) also contended that '*a collective identity which is based on basic needs and rights reflects a collective agenda for women and men against oppression and exploitation*', the result of which is to grant the individual person in the community their own version of a good life. Therefore, even though individual autonomy is recognised and could be legally entertained, it has to consider the arrangement of the state and its regulation of relationships with other societal institutions for the public good (Nik Salida Suhaila, 2013:67). If not, the absolute individual choice could jeopardise equality if the individual choice deny the interest of others.

Public rights are made based on collective interests, and individual rights are normally based on private interests. Public interests are rights that belong to citizens,

but are vested in, and represented by political entities, normally the State. Public rights cannot be represented by private citizens. However, a private citizen can represent himself in court based on his or her own interest and claim. Even though public rights prevail over private right, there must be a private right for a citizen to have a claim in order to protect himself from danger or injury. To have a private right of action, a citizen must be able to show that he or she has 'sustained or is immediately in danger of sustaining some direct injury' and not that he or she 'suffers in some indefinite way in common with people generally'.

Secular jurists on the other hand, in considering sexual liberty, view the principle of freedom for the individual without considering the increase in crime, immoral acts and waste of life, property and dignity. Whenever an immoral act is considered as an individual right, and individualism takes priority over communal values (not true humanism) as stated by Mohammad (2003), it seems that they are only concerned on the rights, and neglects the duties towards the community, as he or she is also part of the community. The spirit of brotherhood, collective rights or humanism is neglected whenever it concerns the individual rights alone. Therefore, it contradicts the principle of social justice and its fundamental elements, namely the spirit of brotherhood and sisterhood in human rights law.

The need to balance between individual or private rights and collective or public rights has been reiterated by the Inter Action Council[9] in its proposal for a

[9] "The Inter Action Council consists of about 25 former heads of state and government who have been addressing long-term global issues. The members (who endorsed the proposed Declaration) included Schmidt (Germany), Lord Callaghan of Cardiff (UK), Jimmy Carter (United States), and other former heads of state from such countries as Australia, Brazil, Costa Rica, Cyprus, Israel, Japan, Lebanon, Singapore, Thailand, and Zambia. The Council submitted the proposed Declaration to the UN Secretary General for consideration for its proclamation by the UN General Assembly as a `common standard for all peoples and all nations'. See Steiner, H., and Alston, P., International Human Rights in Context:

"Universal Declaration of Human Responsibilities" submitted to the UN in 1997. It states that:

> *"Without a proper balance, unrestricted freedom is as dangerous as imposed social responsibility. Great social injustices have resulted from extreme economic freedom and capitalist greed, while at the same time cruel oppression of people's basic liberties has been justified in the name of society's interests or communist ideals. Either extreme is undesirable. At present, with the disappearance of the East-West conflict and the end of the Cold War, humankind seems closer to the desired balance between freedom and responsibility. We have struggled for freedom and rights. It is now time to foster responsibility and human obligations."*

While individualism is an important aspect of international human rights, it is not the whole of it (Baderin, 2001:67). Stressing individualism in international human rights context often tends to portray that human rights totally segregates the individual from society. This is not wholly true as Baderin (2007) contended that human rights promote and protect the rights of a human being not only as an individual but sometimes as a member of a group against the excessive powers of the State. It does not actually set the individual aside from, nor place him totally above the society. It only guarantees that his/her rights are not infringed upon through excessive use of State power. Judge Weeramantry (1997) has also drawn attention to some important facts in the history of international human rights that clearly demonstrate the need to appreciate a more rounded and humanitarian view of human rights rather than a totally individualistic one. He noted that:

> *"On the eve of the fifth session of the General Assembly, in November 1950, a proposal was brought before the Third Committee by the representatives of Afghanistan and Saudi Arabia that the Human Rights Committee study in depth the problem of the right of peoples and nations to self-determination. The Saudi Arabian delegate drew attention to the fact, which Western proponents of human rights chose simply to ignore, that in the absence of an article containing the right to self- determination, colonial and mandatory*

Law Politics Morals (2"a Ed. 2000) p. 351. See the Inter Action Council Website at: http: //www. asiawidc. or. ip/iac/UDHR/EngDeci l. htm [15/2/2001].

> *powers would be merely encouraged to postpone indefinitely the establishment of equal rights among all nations."*

The learned judge thus concluded that:

> *"With the accumulated wisdom of the many years that have passed since then, we see how important this view has been to the future development of human rights. The ability to pinpoint this feature at that early stage and to have stressed its importance was no doubt attributable in the delegates mentioned to the more rounded view of human rights in their totality, which had been inculcated in them by the perspectives of Islamic jurisprudence. When eventually the right to self-determination came to be included in both Covenants (on Civil and Political Rights and Economic, Social and Cultural Rights) and became axiomatic, the countries of the Third World had taken human rights far beyond their traditional Western formulation. The contribution of the Islamic nations to this result was considerable and it is indeed the reverse of the truth for Western jurists to suggest that there was no doctrine of human rights in Islamic jurisprudence. In fact the Islamic concepts took the doctrine of human rights well beyond their Western formulation by reason of the more rounded and community-oriented attitudes of Islamic law."*

Viewed from these perspectives, it is argued that the balance that Islamic law maintains between the individual and the State does not constitute an irreconcilable deviation from international human rights principles as it is often portrayed by many writers on the subject. Thus, it seems that both Islamic and international jurisprudences systems recognise individual autonomy or private rights as far as it does not violate similar rights of others as individuals or as a community. The rights of society or collective good override private rights and yet the community is required to respect the personal autonomy of individuals and provide equal opportunity to all (Mohammad, 2003:324). Therefore, whenever the rights of the society are complied by respecting the personal autonomy of individuals by considering the differences between them in belief, culture as well as biological and physical natures, discriminations against them will be eliminated.

2.4.2 Cultural Rights versus Universal Rights

In response to human right law's self-proclaimed Universality and Neutrality, two major critiques have been developed which deny the truth of this assumption, namely feminist and cultural relativist (Qureshi, 2012:1), who have been actively involved in the criticisms on the notion of culture and universalism. The former was called Universalism and the latter was called Cultural Relativism or Cultural Imperialism. Cultural relativists argue that justice cannot be established for all humans around the world because in reality, they are from different cultures and rules of law. Pollis and Schwab (1979) argued that since human rights originated historically in Western Europe and North America, they are essentially connected to the cultural and philosophical concepts of the Occidental tradition. That is why the model of cosmopolitan feminism rejects the Western-centric, falsely universalised and undemocratic imposition of narrowly defined understanding of human rights (Reilly, 2007).

Culture is a contested terrain in many ways (Erturk, 2008:25); even in reality, human beings live in diversities of belief and culture. Universalism proponents critique that the adoption of the term Cultural Relativism is a 'soft moral option' for an obvious bad conduct and 'the invariable alibi of tyranny' (Qureshi, 2012 & Ignatief, 2006). It is argued that there is no basis of allegation to conclude that other religion or culture is full of tyranny and bad conduct. Hilary Charlesworth (1994) noted that essentialism or universalism is problematic because it is historical and confuses social relations with immutable attributes. From an international perspective, essentialism does not account for the historical and social differences between women of different cultures (Elizabeth Grosz). Opposing to essentialism, it is argued that

'*women are constituted as women through the complex interaction between class, culture, religion and other ideological institutions and frameworks. They are not women solely on the basis of a particular economic system or policy*'.

As have been debated before, the meaning of universalism must include religion and cultural diversities between human beings (Salbiah Ahmad, 2005). Therefore, women's rights law must be vital to the sex, culture and experience of all societies everywhere as they are in fact different. Feminist theories are not just concerned about what happens to the female population in any given society or across all societies; they are about the meaning of those experiences in the lives of women (Scott, 2001; Maria & Elizabeth, 1999). Thus, they include women and men from multiple groups of human society with different sex, race, culture, abilities and disabilities. In describing the issue of different race, culture and religion etc., Maria and Elizabeth (1999) used the 'insider' and 'outsider' approach model. They contended that the understanding of the model is important, because in the genuine and reciprocal dialogue that takes place between 'outsider' and 'insider', both are outsiders and insiders with respect to each other. This approach is applied with respect to the differences between human beings as they all have equal rights to enjoy life within their own experiences of religion and culture. This also can avoid any misconception of right or wrong arising from any differences existing between them but must be within the moral value of each religion and culture.

To reconcile any problems resulting from 'differences', the most important principle to adopt is by acknowledging and respecting the 'differences' experienced by all women, in line with Donelly's (1984:400-402) notion that different regions or cultures have different concepts of human rights based on their respective moral

philosophies, and they have different approaches towards human rights issues. It has also been argued that substantive human rights standards vary among different cultures; therefore, tolerance and respect for their self-determination is necessary (Teson, n.d:896). Thus, it is said that as long as women are recognised as the partial component of law and the dignity of women is included as part of the interpretation of human dignity in human rights law, then women are free from any infringement of law.

In the discussion of cultural and universal rights, an outsider may believe what Huntington (1996) has claimed in his global map, namely that human rights as well as democracy, liberalism, and political secularism belong exclusively to the Western civilisation. He also asserted that the only way for people from other civilisations to have full access to human rights is to adopt essentially 'Western' values. As an outsider, it may be argued that to implicitly convert to Western civilisation is unjust as it may seem like the West has used its political power to force other civilisations to follow it. It seems that the freedom of individual conscience is not given at all just to fulfil the mission of the West. But, Fikentscher seems to defend that the West has a global mission to fulfil, and other civilisations also have a global mission in accordance to their choices and interest. Thus, cultural diversities should be acknowledged for the sake of justice; but the scope of culture should be formed by the State to ensure the public good.

Feminists argue that the issue of violence against women is truly universal, prevalent in all cultures and has been extensively documented. However, even though the term is general, the rights and duties are specific in each cultural context. Thus, the strategies to solve the problems are based on the foundation of different races,

cultures, beliefs, classes and sexual orientations. Teson asserted that what is viewed as moral and just in one society may be seen as a violation of human rights in another. Clifford Geertz's work in Java revealed a belief that 'to be human is to be Javanese'. It is unjust to claim Western culture around Javanese. Even masculinity or femininity is determined by the culture of the people. As it is argued that if there are truly human rights, then these have to be the rights of a particular people (Sullivan, 2000:27). In other words, the universality of human rights can only be acknowledged by all communities if the rights of different people are acknowledged by the declaration of human rights. Therefore, it is argued that the cultural value which is based on the moral value of the religion of the society is the emphasis today on recognising a compromise in the global arena of human rights in the process of harmonisation.

The issue of cultural rights and universal rights in international human rights law has been very intensely debated. It was contended by Baderin (2001:15) that people are generally confused with the meaning of 'universality of' human rights' and 'universalism in' human rights within the international human rights discourse. According to him, 'universality of' human rights refers to the universal quality or global acceptance of the human rights idea, while 'universalism in' human rights relates to the interpretation and application of the human rights idea. The appreciation of the distinction between the two concepts is very important for a realistic approach to the question of universalism in international human rights law.

Human diversity must be widely accepted and celebrated in the human rights discourse. Nasharudin Mat Isa (2016:24) in his writing noted that proponents of the universality of human rights have consistently argued and maintained that human rights are universal, and that aspects of culture, religion, gender or racial standards

cannot impede upon the primal being that constitutes the rights of human itself by virtue of being human. On the other spectrum, cultural relativists argue that the rights of human should also take into account the values of the community (the cultural norms and the values of the individual itself).

Baderin (2001) further noted that the theory of universalism states that human rights are the same (or must be the same) everywhere, both in substance and application. It seems to be against human nature or human diversity. Moreover, it is noted that this theory is mostly advocated by Western nations and scholars who present universalism in human rights through a strict Western perspective (Baderin, 2001:18). They reject any claim of cultural relativism and consider it as an unacceptable theory advocated to rationalise human rights violations.

Meanwhile, Sullivan (2000) discussed whether universalism and cultural relativism can be harmonised in multi-cultural global environments. As narrated by Sullivan (2000), strong cultural relativism is derived solely from the values and morals of society, while the universality of human nature and rights curbs the potential of any extreme relativism. The impact of a culture on the shaping of individuals within it is both systematic and symptomatic, leading to the dominance of distinctive social types in different cultures. However, he refuted the charge that all behaviour is ultimately genetic, by stating that the very expression of that genetic endowment which he claims is synonymous with 'human nature' is in fact, in great part, culturally moulded and determined (Sullivan, 2000:29). Therefore, the acknowledgement towards various differences of roles according to sex, religion and culture is important to establish justice in society as it is in accordance with human nature.

Sullivan (2000) further argued that human nature, at the individual, group and species levels, has a broad spectrum of possibilities which vary–partly due to specific cultures–within seemingly fixed psychological limits. Despite that, according to the contemporary argument derives from the natural rights tradition, a core of basic rights that are common to all cultures, despite the diverging ideologies that exist in the worlds is the biological basis of morality (Sullivan, 2000). The argument for some tolerance of cultural relativism is based on the undeniable variability and diversity of human nature within different cultural settings. In addition, there is an argument on the scope of 'universalism' which claims that justice cannot be established for all human beings around the world because in reality, they are different.

Therefore, in order to uphold justice for all in the context of the true meaning of universalism, 'universal universalism', it can be argued that it is just and necessary to acknowledge cultural rights in the meaning of universal rights. Furthermore, the true meaning of 'universalism' in itself includes culture, whereby universalism refers to the notion that human rights are universal and should apply to every human being which consider human dignity and rights. Therefore, for international human rights to become truly universal, it must acknowledge the element of cultural dependence, and that no specific moral principles can be made to apply to all cultures in the declaration. It should be entirely inalienable and wholly universal–but their interpretation and implementation has to be considered within the indigenous context to which they apply (Sullivan, 2000:49).

Article 31(2) of the International Covenant on Civil and Political Rights (ICCPR) provided that in electing members of the Human Rights Committee, "consideration shall be given to equitable geographical distribution of membership

and to the representation of the different forms of civilization and of the principal legal systems" of the State Parties (emphasis added). It is arguable that this recognises the need for an inclusive and multi- civilisational approach in the interpretation of the Covenant. The theory of cultural relativism is thus advocated mostly by non-western nations and scholars who contend that human rights are not exclusively rooted in western culture, but are inherent in human nature and based on morality (Baderin 2001). Thus human rights cannot be interpreted without regard to the cultural differences of peoples. Advocates of cultural relativism assert that '*rights and rules about morality are encoded in and thus depend on cultural contexts'* (Steiner, & Alston, 2000:366)

Even though it is claimed that human rights certainly did not develop in a cultural vacuum, Bielefeldt (2000) provided a good assumption based on Pollis and Schwab's argument which states that since human rights originated historically in Western Europe and North America, they are essentially connected and indeed confined to the cultural and philosophical concepts of the Occidental tradition (Bielefeldt, 2000). Moreover, it was held that international human rights was founded on Christian ethics and developed from Greek philosophy as well as Roman law in the seventeenth and eighteen century English, French and American revolutions. The importance of religion in moulding individual conscience was approved by Santillana (1926), as narrated by Cattelan (2009) by stating that in Islam, '*every question of law is also a matter of conscience, and jurisprudence is based on theology*'.

The implementation of international human rights law within Islamic human rights law, differences of religion and culture are not problematic as it has been claimed. The elements are actually closely related because normally, the social

practice of the Muslim society is influenced by their religious beliefs and culture, whereby Islam upholds the principles of justice, morality and responsibility. But sometimes, cultural practices of the society might be different from the fundamental principle of the religion. Cultural conflicts and differences emanating from this conflict are in part related to the dilemmas of modernisation and human diversities. It transpires in the transformation and modernisation of the human rights law as Graham Fuller and Ian Lesser have argued, whereby only a few in the Muslim world evade the imperative of modernisation in principle, while many raise legitimate questions concerning its impacts and consequences (Mahmood Monshipouri, 1998). It results in 'a curious mixture of unity and diversity' that greatly varies from country to country (all religions have such a spread). This situation leads to the confusion in deciding between culture and the principles of religion. However, the Muslim culture which is moulded within the fundamental precepts of Shari'ah (Divine revelation comprising the Qur'an and Sunnah) should be considered as Islamic culture.

Moreover, Shari'ah law covers all aspects of life including civil, political, economic and social rights of human being. Transactions in Islamic law such as the family law, monetary transactions, securities and disputes are often a made up of cultural norms which are merged with the formal Islamic law. All aspects of Shari'ah which form the fundamental backbone of human rights based on the concept of justice, human dignity and even solidarity are considered as the formal Islamic law. Since the protection and the enhancement of dignity of human being has always been a principle of Islamic political and legal theory, Islam is in essence, compatible with international human rights, as observed by Halliday (1995) as one of Islamic responses to international human rights debate. Since Islamic law also has its own

moral value including religious observances, criminal law and transactions, there is a need on the part of the Muslim world to acknowledge change by finding solutions to implement international human rights law by adapting Shari'ah ruling in a positive exploitation without violating its fundamental precepts (Abdul Ghafur Hamid @ Khin Maung Sein, 2009).

In the context of human beings as living creatures, Adeeb Aqeel (2006) argued that people live in the framework of culture, not just because they are human beings, but because they are living creatures. Human beings can undoubtedly balance between the aspects of their biological and social life within the context of specific cultural models. It relates with their rights and duties among human beings in the society. Mutual responsibility in the society is part of the human's social nature and its practice will be successful in most endeavours where a group of people of diverse skills and backgrounds can succeed. Therefore, it is contended that certain culture is moulded through religious beliefs and this is equally important in shaping individuals' conscience.

Since human conscience is considered as one of the absolute individual liberties given to human beings, separating cultural or religious belief as one of the elements that define universality of human rights is not universal within the true meaning of universalism. If the theory of universalism states that human rights are the same (or must be the same) everywhere both in substance and application, the adherence to international human rights would discriminate others of different beliefs and cultures. It is thus unfair and unjust to be applied by persons of different foundation of culture and religion. It has been also argued that the concept of universalism must take into consideration the basic human dignity, in accordance with

the differences of religious beliefs and cultures which acknowledge religion as the fundamental human conscience.

Religious faith has been held as the fundamental element that guides every individual person to be a true human being in the modernisation process of every civilisation. In other words, the interpretation of universalism in human rights discourse must acknowledge the differences in human nature (religion and biological) and nurture (social construct) of people as long as it is not against the rights of all human beings. Limiting the nature, character and potential of rights in ensuring justice to each and every different human being could be the basis of criticism of rights (Nik Salida Suhaila, 2013; Mohammad, 2003).

The aim of UDHR is to advance the goal of increasing peace and security in the international regime (Nik Salida Suhaila, 2012:158; Renteln, 1990:24-25). The UIDHR meanwhile focuses on the idea of freedom and insists that this is a fundamental right given by God that no one could take away from a human being (Nik Salida Suhaila, 2012:158; Mawdudi, 1976:14); this was held as being the primary precept of faith in the Islamic religion. Both jurisprudences have a common goal of increasing peace and security on 'essentially contestable concepts', which means that certain concepts exist and is recognised by a wide variety of people. In the analysis of universalism, some possible modes of inquiry can be applied to discover these 'core' rights, including Waddington's proposition for a natural scientific investigation into the biological basis of morality. Therefore, universalism in order to maintain justice must acknowledge the differences of sex, biology, religion and culture of the people. Thus, placing 'equal dignity and justice in accordance to the culture or belief of the people' is perceived as the right connotation of universalism in

the preamble of UDHR. But this does not mean that all rights are based entirely within culturally determined social rules, as there would be no acceptable definition of human rights (Sullivan, 2000).

The common ground of universality between Islamic and international jurisprudences on 'human right' lies in the perception of human dignity based on human being's biological differences, collective rights and duties, with the implementation of social justice. In Islamic jurisprudence, Muslims are indeed commanded several times to do justice, and it is the integral and basic outlook of the Islamic philosophy (Nik Salida Suhaila Nik Saleh, 2013:74). Meanwhile, the measurement and guideline for establishment of the attributes of human rights cover the biological nature, physical appearance and psychological ability of human beings as well as the cultural practices of the society. While there may be some areas of differences in the scope and application of Islamic law and international human rights law, this does not make them irreconcilable (Baderin, 2001:336). In another perspective, the concept of difference applied by CEDAW is illustrated by Committee's view of General recommendation No. 25, on Article 4, paragraph 1 of CEDAW which stated that:

> "under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account".

Therefore, through this statement made by CEDAW's Committee, it is clearly stated that CEDAW acknowledges the concept of 'difference' in human beings to include sexual and cultural differences. The statement is not only acknowledges the difference

between women and men but also highlights that non-identical treatment is required in certain circumstances to achieve gender equality.

2.4.3 Rights and Duties versus Rights Only

Contemporary feminists feel that rights might not be the best 'instrument' to protect women from discrimination (Nik Salida Suhaila, 2013:104). This is due to one of the feminists' claims that statements of rights are indeterminate and thus are highly manipulative in both the technical sense and a more basic form (Charlesworth, 1995). Generally, rights have been criticised by cultural feminists as too abstract and impersonal, reflecting and endorsing a selfish and atomistic vision of human nature and an excessively conflicting view of social life (Fox-Genovese, 1991). However, understanding rights as a positive instrument is important, provided that the term 'right' is refined to the non-gendered product of law which considers the collective interest (Nik Salida Suhaila, 2013:106).

In the legal perspective, Smart (1992) critiqued that 'law is sexist' and 'law is male'. To support her position, Smart (1995:187) later argued that laws are sexist because they disadvantage women. Therefore, in applying to laws on rights such as human rights laws, 'rights' do indeed disadvantage women. Dawson (1993) highlighted that the objective masculine criteria of laws is due to the fact that they interact differently with women than with men. However, Smart (1989) was involved in a rather different engagement slanted at the level of theorising the 'malevolence' of both legal method and the institutions of laws. Although feminists reject the notion that 'objective' rules are important in the legal system (Scales, 1993:53-54), it has been conceded that legality has certain qualities of fairness in the system but they do

not necessarily depend on objectivity (Nik Salida Suhaila & Wan Abdul Fattah, 2013:104). Rather, Scales' (1993) suggestion to discard the habit of equating most noble aspirations with objectivity and neutrality is a rather important way of departing from 'male-mirror neutral law'. However, the quality of the legal system is not compromised. Smart (1992: 31) has also rightly discovered that laws 'can be put right such that all legal subjects are treated equally'. Finlay (1989) has examined how laws are characterised by maleness from their claim to be authoritative, objective and rational.

As Hohfeld (1946) stressed in his book, '*Fundamental Legal Conceptions as Applied to Judicial Reasoning*', a right is a fair claim that remains justified even when the rights holder is not actually making a verbal claim. This abstractly demonstrates Hohfeld's emphasis that duties, whether active or passive, are correlated with rights (Nik Salida Suhaila, 2013:54). Because rights represent autonomy whereas duties are responsibility, the concept of duties might serve to balance the notion of rights. In another perspective, liberty is part of the meaning of rights, meaning the freedom to do something 'which is supported by other rights, which is claims that other persons do not interfere with the exercise of that freedom' (Hoffman, David & Rowe, 2003). This meaning does not constitute only the claiming of rights but also the duty from the other person. The duty bearer's responsibility is to omit interference with the exercise of the freedom of others.

Bender (1992), while reviewing the standard of care required in tort laws for the 'reasonable person', found that this is another example of male naming and acceptance of the implicit male norm. Since the laws have been crafted 'patriarchally', the way they frame issues, define problems and credit speech clearly

excludes women, as highlighted by Busby (1993) and Chen (1997). Thus, women are not considered as 'legal persons' in legislation and as having rights as subjects in law. Who the laws recognise as being capable of having rights and duties is defined by the concept of the legal person or legal subject (Cornell, 1992:123- 124). Therefore, it seems that women are not recognised as having rights and obligations as subjects in laws in the perspective of the feminists. It must be maintained that the term 'rights' has a close relationship to obligation. In the context of human relationship and life transaction, it is important to recognise that every individual has the obligation and duty of care toward others (Walker, 1997; Wall, 1992).

Feminists are in the position to help develop the 'caring neighbour' standard due to the 'different voice' of people (Cornell, 1992:272). Baier argued that vulnerable future generations do not choose their dependence on earlier generations. He defined care as '*a felt concern for the good of others and for community with them*' (Baier,..). It is asserted that feminine jurisprudence, with its ethics of care (as opposed to the ethic of rights), is one in which discretion and individual circumstances take the force in a judicial decision. The duty of care is not always a response unique to women. As Prof Bender noted that instead of the term 'feminine', the proper term should be 'humanist'. Therefore, the meaning of rights which connotes duties is not only necessary for women but to achieve justice for all members or groups or classes of people; there must be rights and duties imposed on them. This may be the duty of the women and also the duty of men in accordance with their suitable functions and roles in the society.

The idea of ethics of care is based on a set of principles of morality that are meant to extend beyond a 'domain of special relationships'. Relationships upon which

those principles would be based differ not only among cultures, but as the feminist voice theory itself asserts, between genders (Walker & Wall, 1997). It has been established that freedom of conscience is one of the fundamental elements of social justice which is important to establish justice. As conscience is normally generated by the moral value of individuals, the duty and obligation are also grounded on the belief of individuals. In spite of having individual freedom, every individual also has a responsibility toward others in the community.

Andrew Byrnes in a discussion of rights and duties noted that the general obligation 'to respect' and 'to ensure' as well as the obligation to prevent, remedy or punish violations by private individuals has been examined in the context of specific rights under the general human rights treaties. For example, at the time ICCPR was drafted, it was contemplated that the state has the obligation not merely to refrain from taking life under circumstances not consistent with the Covenants, but that the obligation to ensure enjoyment of that right includes a duty to protect life against the action of private persons. He argued on the importance of the term 'duty' in the context of public rights, but the discrimination against women is not restricted to actions on behalf of the governments, but also in the private sphere between husband and wife. Therefore, it can be argued that the legal interpretation of rights with regard to the relationship of husband and wife should be interpreted as the obligation which connotes rights and duties in order to ensure enjoyment of rights that include a duty to protect women in the provision.

In this discussion of rights and duties, the model of cosmopolitan feminism is focused on, which Niamh Reilly (2007) has described as a commitment to critically reinterpret universal human rights in the context of democratically grounded,

emancipatory political projects. Cosmopolitan feminism does not assume that women are united by a common gender identity or common experience of patriarchal oppression across regions and other boundaries. Therefore, the direction and content of feminist practice is determined in cross-boundary dialogues within and across women's movements. Moral cosmopolitanism refers to accounts that retain a commitment to treating all human beings with equal concern within the global frame. This is based on the idea of universality of human rights which underpins human freedom. Kant as mentioned by Niamh Reilly was the principal originator of cosmopolitanism in 'Perpetual Peace' which aimed to promote peace among nations and foster mutual respect among individuals by virtue of their common humanity, namely by embracing some form of discourse ethics (Held, 2002; Linklater 1998).

Cosmopolitan rights entail a universal entitlement and duty to engage in free and open dialogue with others from different cultures and contexts, enabled by the human capacity to '*present one self and be heard within and across political communities*' (Reilly, 2007; Held, 2002). Such Kantian values flow from the idea that all persons are equal moral, reasoning and autonomous beings. Consequently, everyone is entitled to be treated with equal concern and not as a means to an end, and equally, everyone has a duty to treat others in the same way. Donnelly (2007) stressed more critically on the relationship between rights and duties in stating that rights involved a special set of social institutions, rules or practices due to its enforceability which stands at the very foundation of political morality in this era. Therefore, it is proved that the feminists acknowledge the duty of care, obligation and consciousness for others to affirm women's rights and also to examine women and men's beliefs about the world and how their actions may affect the rights of others. In other words,

rights are non-absolute and they correlate with duties within the theory of different voice addressed by feminists.

Theoretically, a right-based theory places emphasis on some individual interest and recognises the autonomy of persons. The duty-based theory on the other hand, exhibits concern for the promotion of something which is of interest to the community as a whole (Mohammad, 2003:85). A common view in the discourse of rights in general and human rights in particular is that Islamic law is only a system of duties that does not recognise the idea of rights. Hashim Kamali has described this view as a 'persistent misunderstanding of Islamic law' on the subject of rights (Baderin, 2001:41). Although Islamic law emphasises the concept of duty, this does not seem to defeat the concept of rights within the system.

In Islamic jurisprudence, rights and duties are not independent legal concepts. They are both developed from the Islamic legal norm called '*hukm'* (legal ruling) which is normally transported in the form of a sanction, command or prohibition aimed at regulating human conducts. Rights and duties are therefore, mediums through which the law functions. Thus, the law will often place a duty on one party which conversely confers a right on another through the same injunction.

Turning to the Quranic sources of Shari'ah, the term *haqq* is also used to means truth, certainty, justice or right. The classical and post-classical jurists agree that the legal sources of Shari'ah consist of the rights of God (*huquq Allah*) or the rights of men (*huquq al-ᶜibād*). The word '*haqq*' is understood in its literal sense, which implies to both rights and duties, depending on the consequent preposition (e.g. *lahu*, or ᶜ*alayhi*), as mentioned in the primary sources of Islamic jurisprudence in the

same sentence. This means that Islamic jurisprudence implies the concept of rights and duties in daily life, especially in legal jurisdictions connected to contracts or agreements between human (Mohammad, 2003). In Islamic jurisprudence, all rights and duties have deep foundations in moral obligations, as Hashim Kamali (1993) argued that ethical volunteerism is a 'pattern of relations between the Lawgiver and the recipients of law'. Submission to the will of God and His Law, and thus recognising duties as the primary foundation of the Islamic legal system does not negate the recognition of rights and principle of justice within Islamic law.

Baderin (2010:46) contended that in line with the general principles of Islamic law, rights are further subjected, as objects of law, to three conditions. Firstly, the right must be identifiable. It must not be ambiguous to the extent that it cannot be legally determined. Secondly, the right must be executable. It must be accomplishable within the human capacity. No right may be demanded that is not within the power of whom there is either the positive or negative obligation to its fulfilment. Thirdly, the right must be lawful within the Shari'ah principle and not prohibited by it. In light of the above principles, Breiner (1992) had notably asserted that the Islamic legal theory reveals "*a highly developed awareness of...rights and obligations, a combination of which enables Islam to formulate a system which would seek to safeguard the rights of individuals to an extent that was not common in the legal thinking of many cultures and civilisations*".

It indicates that claiming of rights alone without performing duties will probably increase the sense of being 'individualistic' in a society. This is parallel to Lacey's (2004) view that individualism is the key criticism in the critiques of rights. Individualism is the negative sense that opposes to the sense of love and caring. This

behaviour is against the elements of brotherhood and humanity as conveyed by human rights law. Mohammad (2003) is correct when he said that restricting justice to the concept of rights alone is an over simplification and in fact prejudicial to justice. If the concept of rights is defined without including duties, human beings would not develop in accordance with the value of human dignity. Thus, achieving gender equality within the context of rights alone is discriminatory because in reality, the enjoyment of life is best achieved whenever human beings complement each other. If they persistently claim rights without performing duties, it will result to an uncivilised or problematic society with a great deal of discrimination.

The importance of implying the concept of rights that must come with duties is that it inculcates the sense of responsibility in the minds of society. It teaches individuals that duties come first and claims later (Mohammad, 2003). Even though this is not imposed in legal documentation, if everyone is aware that duties comes first and claims rights later, society can develop in a more civilised manner. Other than that, the correlation of rights with duties is imperative to achieve a balance of rights and duties between women and men due to their biological differences. This is to ensure a harmonious life for the benefit of the whole family and human existence in general. Thus, in family transactions, each member, regardless of their gender, does not have the same roles; in fact, they are bound by different duties based on their primary roles suitable to their biological, physical, emotional and social conditions.

As argued by Baderin (2010:56), if the concepts of duty and rights are operated separately, the fulfilment of duties will automatically guarantee rights, but the claiming of rights does not automatically guarantee rights. Conversely, he further emphasised that the non-fulfilment of duties automatically denies rights, but the non-

claiming of rights makes no difference. Therefore, people cannot say that Islamic law is unjust for its believers just because the objective of the rights to maintenance is for the benefit of human generally. Women and men will enjoy their life whenever they feel that they are meant for each other. This shows that both have the rights to maintain the family by taking into consideration their capabilities in nature and nurture. Here, it can be said that the Islamic family law is more systematic in managing the rights and duties of women and men in marriage and family relations because the entitlements of rights and duties of the wife and the husband are in accordance with their biological functions, abilities and cultural differences.

Surprisingly, it has been argued that for a long time in Western jurisprudence, there was also no difference between 'rights' and 'duties' and the term 'rights' also implied 'duties' (Nik Salida Suhaila, 2012:157). In considering whether rights in UDHR, UIDHR and CDHRI are correlated with duties, Nik Salida Suhaila (2012) found that the relationship between rights and duties can be seen in the provisions of UIDHR and CDHRI. However, UDHR speaks about rights in the sense that freedom, justice and world peace are the basis of inalienable rights secured for every human being. She further argued that nowhere in the UDHR, the correlations of rights with duties were mentioned except only in Article 29 (1) which in its general form states that every person has duties to the community. However, this does not make these declarations irreconcilable because even though the relationship of rights and duties is not specifically mentioned in the UDHR, the generality of Article 29 is seen as a reference of rights and duties to the whole provisions.

2.4.4 Private and Public Spheres versus Private or Public Sphere Only

The discussion on the public and private spheres relates with the coverage of rights. It has been said that women's freedom and equality are persistently compromised by customs and laws, and this does not happen to men (Peters & Wolper, 1995). This is due to women's huge involvement in the domestic sphere which is highly regulated by customs and laws, while men's are not. In spite of that, the 'public,' is perceived by some feminist critics as the domain of the white, upper-middle class heterosexual male. This means that women in cities, both western and non-western, simply cannot use public spaces such as streets and parks, especially when alone. In addition to that, feminist legal scholars have found that laws have restricted women's rights and freedom by limiting their participation in the public sphere. Another critique made on rights from the legal aspect states that women are entitled to the 'private world of the home and family' (Rifkin, 1993:416-417). Therefore, strengthening the law within the private and public spheres for the protection of women is imperative to strengthening women's rights.

The dualism between public and private spheres of action has been identified as a key feature of Western liberal thought (Qureshi, 2012; Chinkin, 1999; Horwitz, 1982; June, 1424). For example, the construction of state along the lines of public or private distinction, combined with patriarchal values is seen as a major impediment in the women's enjoyment of their human rights (Qureshi, 2012; Celina, 1994). Historically, Western-educated propertied men who first advanced the cause of human rights had most feared the violation of their civil and political rights in the public sphere, which is the reason why this area of violation has been privileged in human rights work, unequal with the private sphere (Bunch, 1995). Human rights work has

traditionally been concerned with 'state-sanctioned or condoned oppression' which has taken place in the 'public sphere', or civil and political rights away from the privacy to which most women are relegated, namely in relation to economic and social rights (Peters & Wolper, 1995:2). Although international human rights laws challenged the discipline's traditional public and private dichotomy between states and individuals and are regarded as a radical development in international laws, Charlesworth and Chinkin (1993) argued that they have in fact retained the profound gendered, public and private distinctions.

Feminists' concern with public or private dichotomy in Western legal thoughts are made of two different aspects: (i) the way that the law has been used to exclude women from the public sphere – from professions, from the marketplace and from voting, and (ii) a more basic form of the dichotomy, between what is considered the business of law and what is left unregulated (Charlesworth, 1995). Some feminist jurists argue that '*the law's absence devalues women and their functions, or it assumes that women are simply not important enough to merit legal regulation. For example, the lack of regulation of rape in marriage supports and legitimates the power of husbands over wives*'. Charlesworth (1995) argued that the lack of direct state intervention in the name of protection of privacy can thus disguise the inequality and domination exercised in the private sphere. In Western domestic legal system, the distinction is drawn between public and private spheres; it supports the sexual violence on which patriarchy is based and creates a '*space into which the law's ordinary protection against violence will not be allowed to penetrate*'.

Some feminist legal scholars have found that laws have restricted women's rights and freedom by limiting their participation in the public sphere, whereas rights

talk from the legal aspect, for instance, Rifkin, (1993:416-417) relegated women to the 'private world of the home and family'. It has been said that women's freedom and equality are persistently compromised by customs and laws, whereas this does not happen to men (Peters & Wolper, 1995:2). This is due to the huge involvement of women in the domestic sphere, which is highly regulated by customs and laws, and also by their physical and biological ability, unlike men who are not subjected to the same degree of regulation. The feminists, thus, acknowledge that primary duty of women is within the private sphere. Therefore, for some kind of protective measure, the law which regulates marriage and family relations should provide more protection for women rather than men.

However, what women's narratives uncovered is that their rights to use are denied even in the private sphere (Fenster, 2006) and some feminists have argued persuasively that the 'public or private' distinction is a false one, and that the real question is not whether laws should apply to the private as well as the public, but rather, what types of private acts are and are not protected' (Gunning, 1991-92:238). Feminists also insist that these divisions are invoked largely to justify female subordination and exclusion and to conceal the abuse of human rights at home from the public sphere (Bunch, 2013). This means that one must look at the right to use from both the private and public perspectives in order to fully understand the roots of the abuse of the right to use.

It has been argued that international laws seem to exploit the public and private spheres as a convenient screen to avoid addressing women's issues (Engle, 1993:143). Other than that, feminists have argued persuasively that the 'public or private distinction is a false one and that the real question is not whether laws should

apply to the private as well as the public, but rather, what types of private acts are and are not protected' (Gunning, 1991-92:138). Even though Gunning's idea may be right, to determine the area in private life that has yet to be protected without proposing that all private spheres be regulated is complicated in terms of upholding justice for women. It seems to recognise that laws do not have to intrude on certain areas of private life.

A large amount of work has been dedicated to different definitions and perspectives of 'private' and 'public' (Fenster, 2006), namely: their cultural orientation (Hilary Charlesworth, 1994; Fenster, 1999b), their associations (at least the public space) with the political sphere (Cook, 1994; Yuval-Davis, 1997), their roots in Western liberal thought and the different forms of patriarchy (Pateman, 1988 & 1989), and their feminist perspectives. It is argued that the meaning of the terms 'public' and 'private' depends on the purpose for which they are employed (Nik Salida Suhaila, 2013:69). Normally, the private sphere of women is associated with managing household activities, acting as a wife, reproducing and raising children. These activities have been treated as inferior and to be managed by women (General Recommendations No. 21, 13th Session, 1994: Comment para 11). In contrast, a broad range of activities outside the domestic sphere or public life is dominated by men, who historically have exercised the power to confine and subordinate women within the private sphere (General Recommendations No. 23, 16th Session, 1997: Comment para 8). Hence, men's failure to share private tasks with women is among the most significant factors that inhibit the women's ability to participate in public life.

It is contended that women are more comfortable with the private sphere because it is easy for them to preserve their dignity, moral rights and duty. All these activities encompass the features of women that men do not have which are suited to their biological, physical and psychological nature, hence making women susceptible to any violence in the public sphere. However, Islamic law permits women to engage in activities outside the home, with men in the family as leaders in the role of father before marriage and husband after marriage to take care of their women in both private and public spheres. The tenet that prescribes men as the leader in a marriage and in family relations is intended to protect women, not to restrict their rights. This is due to the fact that women are different with men and are easily disadvantaged in private or public spheres. The discrimination against women would happen not because there is no existing law to protect women, but the lack of awareness and knowledge on their own rights among the individual woman and the community.

In Islamic jurisprudence, whenever women are disadvantaged in private and public spheres, the particular leader (which is normally the father or husband) will be responsible in terms of ensuring their dignity and security. This is why the role of *walī* in Islamic law is important in a marriage and the family relationship. Islamic family law act provides the duty of *wali* in marriage with the special measure in order to maintain justice for women, whereby there is the person authorised by State (Syar'ie Judge) to make sure that women are not infringed by the unjust treatment of *wali* during marriage. On the parts of Malaysian laws, there are various laws do protect women in both the private and public spheres through regulations for Muslims and non-Muslims such as Malaysian Penal Code, Guardianship of Infants Act 1961, Code of Practice on the Prevention and Eradication of Sexual Harrasment in the Workplace

1999 which give impact on Employment Act 1955, the Industrial Relation Act 1967 and Occupational Safety and Health Act 1994, Workmen's Compensation Act 1952, Domestic Violence (Amendment) Act 2017 (Act 521), and Law Reform (Marriage and Divorce) (Amendment) Act 2017. All these laws have been reformed to protect women from discrimination in their private and public spheres.

Women might be disadvantaged due to the denial of collective rights and duties in the familial relationship such as in the raising of the children where both mother and father are working and both are committed to the rules and regulation of the company. Therefore, it is argued that private sphere is not only dominated by women, but in the globalised world whereby women are also actively involved in the public sphere, it demands that men should be actively involved in the private sphere to achieve the balance of rights and duties. Since women and men have the same share of rights, the government would have to ensure that in the working sectors, policies have to consider the rights and duties of women in their private and public spheres.

Under Islamic jurisprudence, the discussion of private and public spheres are debates over the eligibility of women in holding public office under the rubric of '*wilayah'*[10]. One maintains that women and men are equal only in the domain of private authority (*wilayah khassah*) but not in respect of that which involves the exercise of public authority (*wilayah 'ammah*). Private *wilayah* refers primarily to guardianship over the person and property of another because of some deficiency in the legal capacity of the latter. It has been argued by the proponents of this division in regards to women's rights, that women can be legal guardians and may be employed

[10] *Wilayah* is the Arabic word which is defined as the authority of one person over another person or persons which renders the latter bound by the decision of the former without any need for prior agreement.

as teachers and nurse as well as ministers, judges and political leaders. On the other hand, with regard to the eligibility of women to hold public office, Hashim Kamali highlighted that there is a general consensus (*ijma'*) that supports the view that only men are eligible to head a state and be the prime minister. However, there is no explicit consensus (*al-ijma' al-Sarih*) to prevent equality of women with men to become heads of state and prime ministers (Mohamed Azam Mohamed Adil & Noor Huda Roslan, 2016:8-11).

The issue of appointment of women as Shari'ah judges relates with the division of private and public spheres of Muslim women. Most scholars opine that women are strictly forbidden to be appointed as judges. However, it has been argued that women may become judges in matters in which they are admissible as witness, which practically cover all matters except prescribed penalties (*hudud*) and just retaliation (*qisas*) (Mohamed Azam Mohamed Adil & Noor Huda Roslan, 2016). The analogical reasoning used in the arguments that contended that women are eligible to be judicial officers or the heads of state is the original case on 'witnesses'. The Quranic verse in surah al-Baqarah verse 282 mentions that women are provided with *ahliyah al-Syahadah*, similar to men. They are able to testify in the court proceeding on cases which can be made as testimony by them. Ibn Hazm al-Zahiri argued based on a Quranic verse that God commands generally to all people to hand over trusts (*al-amanat*) to whom they are due, and when judging with people, carry it out with justice (Al-Quran An-Nisaa' 4:58). Thus, it envisages that everyone, including women and men, are both qualified to become trustees, repositories of *amanat* and witnesses as well as judges in court.

Krishnadas (2007), in her analysis of the roles of rights in governing and shaping women's relationship with the reconstruction process, has argued that women's rights to determine their lives' patterns are dependent upon the process of recognition. In fact, Krishnadas (2007:139) argued that 'the act of recognising local women's identities was dependent upon the different cultural, material and spatial frameworks in which women were recognised', which broadens the understanding of the rights and recognition in a relationship. For instance, the prohibited working hours applied to women in industrial and agricultural undertakings between the hours of ten in the evening and five in the morning might ignore women's disadvantages, even though this 'patriarchal rule' is intended to protect women's rights to safety. Therefore, as women are more involved in nature's role in the private sphere than men, and that the public sphere poses more possibility of infringement of women's rights, the law to protect women's rights must cover the preservation of women private as well as public sphere of life.

2.4.5 Nature and Nurture versus Only Nature or Nurture

In analysing the feminist critiques on the nature and nurture process, the analysis made by Eagly and Wood (2013) in '*Nature and Nurture Debates: 25 Years of Challenges in Understanding the Psychology of Gender*' is employed. These issues are no doubt important and absorbing to the general public as well as scientists (Eagly & Wood, 2013) and also has to be considered in the formation of law with relates to human relationship or gender issues. In analysing the state of the nature and nurture debates, it is vital to understand the terms in their broadest meaning, whereby, nature refers to biological structures and processes and nurture refers to sociocultural influences. Socialisation, on the other hand is understood as a '*process by which*

individuals acquire social skills or other characteristics necessary to function effectively in society or in a particular group' (American Psychological Association, 2013). It is a prominent nurture explanation of sex differences (Eagly & Wendy, 2013).

Historically, the trends in research on sex differences and similarities had emphasised socialisation and learning as important causes (Bandura, 1977; Kagan, 1964; Mischel, 1966), while social personality psychologists had identified stereotypes, norms, identities and roles as the support of gender differentiation in cognition and social behaviour (e.g. Bem, 1974; Deaux, 1984; Eagly, 1983; Spence & Helmreich, 1978; Williams & Best, 1982). Despite this emphasis on nurture, Maccoby and Jacklin's (1974) influential review considered both biological and socialisation as potentially causal and raised questions about the consistency and quality of the evidence on sex differences and similarities.

In 1960's wave of feminism, they were firmly in the nurture camp. They argued on the failing of scientists to recognise the causes within the social context that ascribe the behaviour of women (e.g. Weisstein, 1968). Shields (1975) also challenged the views of Darwin and other earlier writers who portrayed women as inherently childlike, passive, intellectually deficient and motivated mainly by maternal instinct. In the feminist research at the early stage, gender then received far more emphasis than sex (Eagly & Wood, 2013). However, 1980s marked the end of this relative supremacy of nurture explanations of the psychology of women and men and the beginning of a powerful reassertion of nature. The evolutionary psychologists advocated for nature, as illustrated by Buss research (1989) on the mate preferences of women and men and the science of brain structure and hormones in relation to the

psychology of women and men (Hines, 1982; Green, 1991; Notman & Nadelson, 1991) as being the sources of the rise of the nature's influence in human behaviour. Although sceptics abounded, especially among feminists (Bleier, 1991), the hypothesis that prenatal and early postnatal androgens affect brain structure and subsequent behaviour had roots in earlier research (Money & Ehrhardt, 1972) and became well-accepted in the 1990s (Collaer & Hines, 1995). Researchers also focused attention on the ways that hormones activate behaviours, especially testosterone's relations to dominance and aggression (Mazur & Booth, 1998; Sherwin, 1988). Somewhat later, oxytocin became a focus of research, specifically concentrating on its relation to sex differences in stress-induced responses and bonding (Taylor et al., 2000). Therefore, all of these findings confirmed that women do need different treatment than men in certain circumstances due to their biological nature.

Therefore, it can be surmised that studies of socialisation would benefit more from approaches that apply the integrative stance of nature and nurture to develop mental processes as the psychology of human beings influences the act of the individual person. Moreover, several studies have found that biological mechanisms interact with social influences. Although psychologists who are partial to nature explanations continue to discount the influence of socialisation, they occasionally recognise some very specific processes that fit within the larger framework of evolutionary psychology (Campbell, 2012; Confer et al., 2010). Recently, the rise of nature theories in the context of continuing growth of nurture perspectives largely supports nature and nurture (Eagly & Wood, 2013). Moreover, since psychologists treat culture and biology not as separate influences but as interacting components of nature and nurture, it can be argued that the combination of nature and nurture in

determination on the ideal concept of gender equality is relevant and important to eliminate discrimination.

Although the discussions on 'gender equality' has been mistakenly understood as an attempt to develop prejudice among women and men (Abd. Rashid, 1998:10-11), the rights pertaining to them in accordance with the classification of nature and nurture is important to establish any conformity between the principle of gender equality in Islamic and international jurisprudences. Women, as a human being have sought to understand their nature, their own place in the scheme of creation and the purpose of their life (Zakir Naik, 2007:4) so that they will understand their roles and duties in accordance with their nature and nurture.

Gender analysis in the context of particular community is considered relevant and necessary to examine the different roles, duties and relationship between women and men based on the process of nature (hereditary) and the process of nurture (environment) of their community. It relates with theocentric and anthropocentric theories discussed by Baderin (2010:81). Theocentricism stands for having God as the central point of focus which places it under the classification of nature while anthropocentricism refers to having human being as the central point of focus which puts it under the classification of nurture. The former is a religious perspective while the latter is a secular one. Under the classification of nature of Islamic jurisprudence, the main and important effect is to instil an element of God-consciousness and religiosity in the duty to respect human rights. The Islamic commitment to human rights can thus be described as both religious and humanitarian. It is a dual relationship, one vertical between human beings and God, and the other horizontal between human beings themselves. The vertical relationship is the religious

commitment, which when fulfilled, strengthens the horizontal and humanitarian commitments.

The theory of nature and nurture plays important roles for the development of human beings as all human beings in this world are influenced by nature and nurture (Hammond, 2010). Theory of nature refers to the division and differences between women and men based on biological factor, which is the difference between the sex of males and females (Hammond, 2010; Arief Budiman, 1982). Classification of nature, as argued by Nasaruddin Umar (1999) and Anuar Ramli (2012) also includes the anatomy factor which relates to the belief in the Creator, who created human beings and has absolute rights. In the psychological science, nature refers to biological structures and processes while nurture refers to sociocultural influences.

The classification of nature and nurture with regard to rights and duties in Islamic jurisprudence opposes the critiques on the monolithic and patriarchal concept of Islamic law as claimed by some scholars. In Shari'ah jurisprudence, certain fundamental precepts of Shari'ah cannot be changed. The anatomy factor is part of it (Nasaruddin Umar, 1999 & Anuar Ramly, 2012). For example, the matters which relates to principles of faith, worship and moral value in Shari'ah cannot be changed to be against the fundamental principle of Shari'ah law. However, the matters which relate to the method of transaction and contract between humans can be changed as long as it does not violate the fundamental precepts of Shari'ah. Under Shari'ah jurisprudence, in spite of rights and duties to God, some rights and duties between human beings need human reasoning in finding solutions. Therefore, distinguishing between Shari'ah and *Fiqh* is significant for a proper understanding of Islamic law (Baderin, 2010).

The classification of nature and nurture are continuously debated in the psychology of gender. These issues are important and absorbing to the general public as well as scientists (Eagly & Wood, 2013). Nature and nurture debates are related with sex, gender and psychological research. Alizi Alias (2008) argued that Islamic law has mentioned in general that all things are created in (biological) pairs (Al-Qur'an, 51:49, 13:3, 36:36, 43:12). It has also specifically mentioned about the pair being male and female (Al-Qur'an, 53:45-46, 75:39, 76:2) and that both (chromosomes) are needed to develop an offspring. He further added that the importance of nature's role is further emphasised when the Qur'an says that Muslims are not encouraged to marry close kin (Al-Qur'an, 4:23), suggesting that genetic factors may influence physical and psychological features of the offspring. Therefore, biological aspect of women and men which are different in sexual hormones affect their entitlements of rights and duties even though they have similarity.

In Islamic jurisprudence, nurture elements can be seen in the transaction of human beings such as in economy, social as well as politics. It relates with the roles, functions and characters of women and men in all of their transactions. As al-Qaradawi stressed, the difference between women and men requires duties and responsibilities which are in accordance with their specific nature, requiring the interpretation of sex and gender to be clearly understood. 'Sex' is defined as the biological nature of sex or reproductive function of women and men, whereas 'gender' is the differences in women and men in social life such as woman is said to have feminine characteristics including gentle, emotional and nurturing, while men are said to be masculine because they are considered strong, rational and mighty (Anuar Ramli, 2012). The theory of nurture or the context of gender in Islamic

jurisprudence is important to interpret a social differences and reflects more on the learning process within a society on their culture but not on the principle of religion. It relates to the feminine and masculine factors developed in certain communities based on their belief and culture. According to this theory of nurture, the difference between women and men is purely relative, impermanent and subject to change. It is described by American Psychological Association 2013 as a process by which individuals acquire social skills or other characteristics necessary to function effectively in a society or in particular groups (Eagly & Wood, 2013). Therefore, it is not necessarily in the same characteristics of gender definition.

The discussion of nature and nurture is also important in the Western tradition as the main sources of human rights law are derived from Biblical idea which teaches humanitarian motifs in the European cultural history (Bielefeldt, 2000). Bielefeldt further narrated that according to the writings of Stoic philosophers, human spirit emerges from divinity. Jewish-Christian as well as Stoics have jointly formed the European natural law tradition. The concept of natural law has different connotations. On one hand, the natural law tradition claims an unconditional authority of some basic normative principles that are supposed to be prior to human legislation. On the other hand, the concept of natural law connotes independence from an exclusively theocratic foundation of society and law. However, the natural law tradition has often been listed as one of the most important sources of human rights in Western tradition. Even in the issue of inequality among human beings in their social and legal status, in medieval philosophy, the term dignity is mostly used in plural, indicating different dignities of people in accordance with their different ranks, order and estates in a feudal society (Bielefeldt, 2000).

Harding, in analysing the nature theory, broke with traditionalism when she asserted that moral and political loyalties have counted as part of the evidence for the best as well as the worst hypotheses in the natural sciences. For Aristotle, man is by nature rational. But he is not by origin, naturally virtuous. In his words, the virtues are engendered in us neither by nor yet in violation of nature; nature gives us the capacity to receive them, and this capacity is brought to maturity by habit. A virtuous man, through a careful training, develops a second nature ability to respond in the morally appropriate way to his circumstances. As in McDowell's interpretation of Aristotle, the virtue acquired by cultivating the appropriate second natures is not a place-holder for a set of dispositions to deploy some moral calculus. Virtue is not encoded in general rules, but embodied in capacities born of contingent histories: inculcated second natures.

It is claimed that international human rights law follows the anthropocentric approach. It has a secular approach that makes no direct reference to God which is the primary different with Islamic law. The commitment is only a humanitarian one and denotes the freedom and liberty of the individual human being at heart. Although international human rights law recognises freedom of religion as a human right, it does not consider religion as a basis for human rights. Human rights are rather considered as a social practice that arises from human action and not granted by God.

Both jurisprudences have discussed the classification of nature and nurture, and consider both as important in developing human life. It is contended that elimination of people's biological nature and nurture (sexual, religious and cultural factors) will result in discrimination, and will probably violate some people's value of life (Sachedina, 2009:138). Therefore, human rights law must acknowledge the

differences between women and men by taking into consideration the nature and nurture of a particular human being, whereby the nurture context must be in accordance with the nature of human beings. In another word, the biological and anatomy factors, if defeated, will affect the value life of people, and neglecting these factors can put them in an unjust situation and could be the basis of discrimination against human beings.

2.5 The Interpretation of Justice, Equality and Non-Discrimination

The principle of equality has been argued to be a fundamental hypothesis of a democratic society. It is well accepted that corollary exists between equality and non-discrimination (Grant & Evadre, 2007). However, equality has been claimed as a "treacherously simple concept" (Holtmaat & Rikki, 2004), yet a diverse spectrum of opinions exists as to what is equality and what should a society do to incorporate and promote this value. The traditional approach of national legal systems is to employ the concept of equality as a system of formal rules. On the other hand, the word "discrimination" has been alleged to import the notion of difference. In law, the term "discrimination" generally refers to the different treatment of an individual or a group of individuals which results in a disadvantage. It is contended that virtually all people live in a cultural and social environment formed by past, current and emerging forms of discrimination.

Therefore, understanding both formal and substantive equality is crucial in constructing harmonisation towards the concept of gender equality. In reality, human beings are made up of various groups of people with differing sex, laws, cultures, abilities and beliefs. Due to these differences, the concern is raised on how they

should be treated fairly or justly and not less favourably regardless of the society, situations and places they come from. In addressing the misunderstanding on the meaning of discrimination or inequality before the law, McHugh rationalised that "discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different." In spite of the misunderstanding on its meaning, the public are most probably not aware of the development of the concept of equality and non-discrimination in the application of law, which namely consists of formal and substantive equality. Therefore, the public should first be educated on the development, meaning and types of equality as they are always misunderstood (Aegidus, 1972).

One theory of justice in international jurisprudence has been established through the exploration of political philosophy and ethics by John Rawls, through which the author attempted to solve the problem of distributive justice (the socially just distribution of goods in a society) by utilising a variant of the familiar device of the social contract. From the subsequent theory known as "Justice as Fairness", Rawls stemmed two principles of justice. Firstly, society should be organised so that the greatest conceivable amount of liberty is given to its members and limited only by the notion that the liberty of any one member shall not infringe upon that of any other member. Secondly, inequalities, either social or economic, should only be acceptable if the worst off will be better off than they might be under an equal distribution. Finally, if there is such valuable inequality, this difference should not make it harder for those without resources to occupy positions of power such as the public office.

In the theory of justice, Rawls argued for a righteous understanding of liberty and equality meant to be applied to the basic structure of a well-organized society. Principles of justice are sought to guide the conduct of the parties. These parties are recognised to face moderate insufficiency. They have ends which they seek to advance, but prefer to advance them through cooperation with others on mutually acceptable norms. To this end, Rawls offered a model of a fair choice situation (the original position with its veil of ignorance) within which parties would theoretically choose mutually acceptable principles of justice. Under such constraints, Rawls claimed that parties would find his favoured principles of justice to be especially attractive, winning out over varied alternatives, including utilitarian and right-tolerant interpretations.

Rawls made his final clarification on the principles of justice, which are: i) each person is to have an equal right to the most varied total system of equal basic liberties compatible with a similar system of liberty for all; ii) social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity. These principles are lexically ordered, and Rawls emphasised the priority of liberty. The first principle is often dubbed as the greatest principle of equal liberty or formal equality. Meanwhile, for the second principle, until (b), the difference principle and the final supplement in (b) is achieved, the equal opportunity principle attained is known as substantive equality.

Thus, the evolution of the theory of justice by Rawls considers the difference principle which needs to be prescribed due to social and economic inequalities to

provide (a), the benefit to the disadvantaged groups of society, consistent with the just savings principle. Rawls' claim in (a) asserts that the departure from equality of a list of what he calls primary goods—"things which a rational man wants whatever else he wants" (Rawls, 1971: 92) are justified only to the extent that they improve the lot of those who are worst-off under that distribution in comparison with the previous equal distribution. An important consequence of Rawls' view entails that inequalities can actually be just, as long as it is beneficial to the least advantaged. His argument for this position rests heavily on the claim that morally arbitrary factors (for example, the family one is born into) should not determine one's life chances or opportunities. Rawls also included the perception that a person does not morally deserve their inborn talents.

Over time and across societal needs, a new theory of justice in international jurisprudence emerged which differentiates between 'ordinary justice' and 'social justice'. 'Social justice' is a demand addressed to society as a whole and to the individual, and as such, it is a demand that can be met only by the state (Burke, 2009:5). The majority of Western jurists concentrate on the concept of rights and thus individual rights become the central idea of legal systems in the West (Mohammad, 2003:106). However, Rawls' (1999) theory of social justice maintains that individual rights are no longer the primary objective as basic structure of society has come to the forefront of the notion. Meanwhile, Burke argued on the connection of justice and responsibility because social justice is interrelated with ethics, stating that "where there is injustice, there is somebody responsible for it. And where there is no one responsible, there cannot be injustice". This shows that the even international jurisprudence acknowledges society as the primary subject in upholding justice.

Therefore, it can be concluded that both jurisprudences, the Islamic and international, share a common principle in relation to the theory of justice in the implementation of law in a social institution. This is because restricting justice to the concept of rights alone is an oversimplification and in fact prejudicial to justice. Justice requires the enforcement of what one claims together with what he ought to do. Justice, in other words, demands the enforcement of both right and duty.

Burke further stated that in the U.S., "the liberal theory of justice is justice demands equality of power in society". It relates to economic power, which entails that it is no longer merely unfortunate that some people should be poor and powerless while others are rich and powerful; this is unjust. Burke (2009:5) argued further that to construct social justice to become the basic principle of social order is to endorse the wholesale transfer of responsibility from the individual to the state. Most authors maintain that the emergence of social justice in international law can be observed in the philosophy of Rawls (1999), who held that justice is the first virtue of social institution.

Therefore, the principle of equality developed by Rawls is aimed at overcoming the concept of difference that exists among human beings. It represents the different meaning and contexts of equality by considering different beginnings, endings and conditions faced by people to establish justice. Equality in its literal meaning is the state of being equal, especially in status, rights, opportunities and results. It is also a synonym to fairness, equity, equal rights and duties, equal opportunity, access and results. Another meaning of equality refers to ensuring that individuals or groups of individuals are treated fairly and equally and not less favourably as well as specific to their needs, including areas of race, gender,

disability, religion or belief, sexual orientation and age (University of Edinburgh, 2013).

Hence, literally, equality can be defined as fairness or justice. But to notion of 'alike to be treated alike' is unfair for people of different sex, faiths, cultures, legal backgrounds and abilities as they are in fact different in nature and nurture in most situations. In this context, formal equality means treating women and men identically (such as ensuring that there are no laws which bar women from standing for public office), whereas substantive equality means taking steps that will make women and men equal, according to the conditions which apply to them in society (such as acknowledging that women's biological differences create different health needs which go beyond women's role in pregnancy and childbirth, or applying affirmative action for women) (Legal Assistant Centre, 2005).

The idea of formal equality, the most widespread understanding of equality as advocated by Aristotle defines it as "things that are alike should be treated alike"; but this cannot be implemented by itself to maintain justice. This is because, formal equality promotes individual justice as the basis for a moral claim to virtue and is reliant upon the proposition that fairness (the moral virtue) requires consistent or equal treatment. Within this view, as women and men are biologically different and socially differently situated, it is almost always possible to justify gender discrimination by applying formal equality alone. In those instances, 'likes treated alike' has sometimes been proven to be an unwieldy tool (Zarizana, 2008) because equality within the concept of sameness will discriminate against human beings due to their differences in nature and nurture.

Within the diversities of a modern society, the approach of formal equality is to ignore the personal characteristics of an individual altogether. For example, in respect to sexual discrimination, advocates of formal equality would disregard the persistent duty of being female or male due to their biological nature. Whilst the model of consistent treatment has a role in society, the variations and complexity of modern life and modern social relations makes the application of this approach a basis for inclusive non-discrimination laws and measures.

In order to overcome discriminations attributable to such existing differences, the concept of equality of opportunity embodies a departure from the traditional notion of formal equality or treating likes alike and vice versa. This view is partially based on a redistributive justice model which suggests that measures have to be taken to rectify past discrimination, because failing to do so would leave people and groups at different starting points. However, equality of opportunity is also partially based on a tolerant model as it seeks to limit the application of full redistributive justice. The flaw of focusing on equality of results has been argued to grant too much respect to utilitarianism at the expense of other systems of thought. The integration of these theoretical perspectives has led to a notion of equality which seeks to balance starting points, irrespective of a person's background or status. In practice, equality of opportunity is a permissive interpretation of the concept of equality and non-discrimination, allowing individuals from traditionally disadvantaged groups to receive special education or training, or encouraging them to apply for certain jobs (McCrudden & Christopher, 2003). Equality of opportunity recognises the narrow nature of formal equality and injects a substantive or functional element into its framework.

Equality of outcomes is a substantive conception of equality as it attempts to provide substance to the concept of equality. Unlike formal equality, which commands behaviour through applying rules and procedures consistently, equality of outcomes seeks to capitalise a certain moral principle (namely social redistribution) into the application of equality. This concept of equality manifests itself through a spectrum of policies and legal mechanisms in various jurisdictions. Practices such as reverse discrimination, positive discrimination and affirmative action are just a few which have been put forward to represent this concept. Specifically, positive discrimination can be concisely distinguished from positive action through the highlighted framework:

"Positive action means offering targeted assistance to people, so that they can take full and equal advantage of particular opportunities. Positive discrimination means explicitly treating people more favourably on the grounds of race, sex, religion or belief etc. by, for example, appointing someone to a job just because they are male or just because they are female, irrespective of merit."

The classification of formal and substantive equality is due to the insufficiency of formal equality because it fails to address societal structures that perpetually disadvantage women because of their difference to men (Ineke Boerefijn et al. eds., 2003). Substantive equality is portrayed as a departure from classic or formal equality (or treating likes alike) and from equal treatment (ensuring that laws or policies apply to everyone in the same way) (Rebouche, 2009). In the case of Turkey's Headcrafts, substantive equality is applied as laws and customary practices do not diminish women's access to societal goods or perpetuate discrimination. Substantive equality contradicts with the traditional view of equality, whereby everyone is treated alike

with an equality of results approach which focuses on 'equalising the starting point' by giving women equal access to the benefits of society.

According to the notion of substantive equality, biological differences and cultural or religious differences as well as any differences due to these factors are considered elements in determining whether justice is established in that situation. For example, substantive equality is applied in Beatrice a/p A.T. Fernandez v Sistem Penerbangan Malaysia [2004] CA, namely in Federal Court's refusal to grant leave for the appellant to appeal the Court of Appeal's decision. Her application was dismissed her as it was ruled that the term in the Collective Agreement did not infringe Article 8 inter alia on the technical ground that the amendment to Article 8 (2) which includes gender was made in 2001; the appellant was dismissed in 1991. The court further stated that:

"...in construing Article 8 of the Federal Constitution, our hands are tied. The equal protection clause in Clause (1) of the Article 8 thereof extends only to persons in the same class. It recognizes that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment. Regardless of how we try to interpret Article 8…we could only come to the conclusion that there was obviously no contravention".

In another current landmark case for gender equality in Malaysia, namely Noorfadilla v Government of Malaysia [2014] HC, the Shah Alam High Court awarded a woman RM300,000.00 in damages on 10 November 2014 for a breach of her constitutional right to gender equality after the government refused to employ her as a temporary teacher when she became pregnant. The court awarded Noorfadilla, a homemaker with four children, damages for the breach of Article 8 (2) of the Federal

Constitution which prohibits gender discrimination. The Shah Alam High Court ruled in 2011, that the government had discriminated against Noorfadilla and, in a landmark decision, held that CEDAW has the force of law in Malaysia as the country had acceded to the human rights treaty in 1995.

Another case that demonstrates formal and substantive equality is Ahin's case, involving the issue of the ban of headscarf in Turkey. In this case, international law supersedes national law when the two conflicted, and the Constitutional Court of Turkey has been described as 'progressive' in referencing CEDAW in its jurisprudence. Continued discrimination in law and gender segregation in Turkish society indicated the prevalence of de jure as well as de facto inequality. Reform strategies pursued by activists fared poorly until the 1990s when the gender equality movement's campaign to implement the provisions of CEDAW found support in Turkey's agenda to accede to the European Union. In the case of Ahin, the state's justification is one based on formal equality: the ban treats men and women equally because both sexes are denied the right to manifest certain religious beliefs. This explanation appears out of step with the CEDAW Committee's concern that laws respect women's substantive equality.

However, the Committee's Concluding Comment did not note this, and did not draw a conclusion about the effect of the ban. The Concluding Comment asked for "the State party to monitor and assess the impact of the ban on wearing headscarves and to compile information on the number of women who have been excluded from schools and universities because of the ban". Indeed, the type of substantive equality intended by CEDAW and resonated in Ahin's works at the behest of state power and its successful recognition depends on the state. Instead, the comment asked the

Turkish government to gather evidence of the ban's effect on women's equality. As demonstrated by the Court in Ahin's case, a state may claim that it is acting to further women's equality, but the failure to justify its actions using a litmus test of outcome or results may mean that women's rights are either narrowly or too broadly understood.

The social philosophy underlying this conception of equality reveals a democratic understanding of social justice and of the good life. In this regard, the moral worth of equality and non-discrimination is centred on its ability to provide equal outcomes for individuals or at the very least, a satisfactory outcome for the most disadvantaged groups. In this sense, equality of outcomes submits to a socialist agenda, notwithstanding one which has limits imposed on it by the central tenets of a liberal democracy. The application of this conception of equality is subject to strict scrutiny from classical liberalism which upholds that the distributive justice theory is repugnant to liberal democratic thought for it imposes too high a burden on the state and individual autonomy.

Hence, through its meaning, equality establishes and provides a pattern for building human relations. There is a need to consider a greater moral character, to invest in other moral principles and to form an ethical basis from which acceptable human relationships can be derived. The concerns regarding the previously highlighted equality models have led to the appearance of a human rights-based approach, wherein equality becomes the vessel for the delivery of more inspiring value-laden principles. The contemporary approach of bringing equality and non-discrimination agenda within a human rights framework has the effect of highlighting other conceptions of equality that is purely based on economic integrationist models

which seems to be largely neglected. This approach is based on dignity, but dignity in this paradigm is meant to reflect the universality, indivisibility and inter-relatedness of all human rights as understood in present-day interpretations. It proffers a theoretical distinction between treating people equally in the distribution of resources and treating them as equals, which suggests a right to equal concern, dignity and respect (Dworkin & Ronald, 1977).

2.6 Gender Equality in CEDAW's Perspective

Equality and non-discrimination are inter-connected. Misunderstanding on the meaning of equality drives the public to the misunderstanding on the meaning of discrimination or inequality. This section will involve an examination on how CEDAW which is based on international feminist jurisprudence applied substantive equality in the interpretation of gender equality based on the concept of difference. The emphasis here will be on how gender equality applied by CEDAW which acknowledge sexual and cultural differences to preserve the rights of women.

Most of the major human rights instruments all proclaim that women are entitled to enjoy the rights guaranteed on a basis of equality with men (Andrew Byrnes). CEDAW also has a goal for women to fight for equality to have access to education, jobs, and political power on the same basis as men (Brooks, 2002). CEDAW calls on states to ensure that women and men are given the same conditions for career and vocational guidance, for access to studies. This equality shall be ensured in preschool, general, technical, professional and higher technical education, as well as in all types of vocational training because of historical unbalance treatment on women in that sector.

As the primary international convention on women's rights, CEDAW summarises (and helped shape) the meaning of substantive equality. According to the General Recommendation No. 25, on temporary special measures which stated that:

> "a joint reading of articles 1 to 5 and 24, which form the general interpretative framework for all of the Convention's substantive articles, indicates that three obligations are central to States parties' efforts to eliminate discrimination against women. These obligations should be implemented in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men. Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination — committed by public authorities, the judiciary, organizations, enterprises or private individuals — in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties' obligation is to improve the *de facto* position of women through concrete and effective policies and programmes. Thirdly, States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions" (UN official websites, 2016)

Referring to the above stated provision, the elimination of discrimination against women uphold by CEDAW is based on the three fundamental principles which are: i) principle of substantive equality; ii) principle of non-discrimination; and iii) principle of State obligation (Nik Salida Suhaila Nik Saleh, 2013; Women's Aid Organisation, 2nd June 2017; Byres, 2002 & Facio & Morgan, 2009). All these three principles are seen to interact with each other to eliminate discrimination not only through formal equality but also by acknowledging the differences in human beings due to sexual and cultural differences between them (substantive equality).

Under CEDAW, equality is non-discrimination (Coomaraswamy, 1994:47) but it does not necessarily in the context of similar. Discrimination against women violates the principles of equality of rights and respect for human dignity. For

example, the 1992 General Recommendation of the Committee on the Elimination of Discrimination against Women describes gender-based violence as form of discrimination against women. Thus, CEDAW has used a corrective approach by applying substantive equality to women's human rights (Salbiah Ahmad, n.d). The substantive standard of equality is applied to address discrimination based on gender difference and differential treatment against women.

Article 1 of CEDAW defines discrimination against women shall mean;

> "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, social, cultural, civil or any other field".

It is demonstrated by Facio Morgan (2009) that they are six important attributes of Article 1 (Nik Salida Suhaila Nik Saleh, 2013). The first coverage of discrimination is the act or omission which arises from the distinction, exclusion or restriction of the person. It means that discrimination probably happens if there are the laws and practices which directly or indirectly discriminate against women and the state fails to overcome the issues.

Secondly, discrimination as prescribed under CEDAW may occur by the act or omission that has the 'effect' or 'purpose' of denying women's exercise and enjoyment of all rights (Facio and Morgan, 2009:10). From this type of discrimination, even if the rights appear to be gender-neutral, but if have a discriminatory impact, it could amount to discrimination. This kind of discrimination is also considered as indirect discrimination.

Thirdly, it is argued that CEDAW stress on the degrees of discrimination whereby it prohibits not only total but also partial discrimination (Nik Salida Suhaila, 2013; Facio and Morgan: 2009). It means that, it can be said to be partial discrimination if women are given rights to work but they do not have the right to use their money. It seems that partial discrimination is synonym with indirect discrimination. However, it is important to know that one of the principle targets in CEDAW is the equality of outcomes, and to achieve this target direct or indirect discrimination should be avoided.

The fourth issue concerned by CEDAW is on the phase of incidence of discrimination. Article 1 refers to the existence of rights as the 'moment of creation of laws that establish the right' as recognition, 'necessities for satisfying right' as enjoyment and 'active aspect of right' as exercise (Facio and Morgan, 2009:10). Thus, states' diminishing of recognition, enjoyment or exercise of women's rights goes against the principle of equality under CEDAW.

The fifth concerns of CEDAW is on the coverage of discrimination to eliminate any kind of discrimination against women in all aspects of life include political, civil, economic, social and culture. It includes the matters of religion, culture, sexual, geography, abilities and disabilities which such act or omission of distinction, restriction or exclusion of the person in that factors amounted to discrimination unless there are special measures to guarantee the rights of disadvantage people to achieve equal results similar to those of advantage group (Nik Salida Suhaila Nik Saleh, 2013 & Facio and Morgan, 2009). It has been argued that different treatment of women as compared to men is discrimination if that different treatment results in impairment or nullification of the rights and freedoms of people.

Lastly, the meaning of discrimination uphold by CEDAW can be determined in accordance with the object and purpose of law. Steiner & Alston (2000: 179) stressed that one of the vital characteristics of Article 1 is its reference to 'effect' as well as 'purpose', thus directing attention to the intentions and consequences of governmental measures to eliminate discrimination. General Recommendation 25 adopted by the CEDAW Committee makes clear that CEDAW aims to eliminate *de jure* and *de facto* discriminations. The Recommendation accords that *de facto* or substantive equality is the strategy to 'achieve equality of result and to redistribute resources and power between women and men' (Rebouche, 2009). The limits of *de jure* or formal equality disappointed women's rights in acknowledging differences from men as a source of continuing disadvantage, even where the law accords women and men the same rights and status. CEDAW has been offered as a lens through which to examine what serves women's interests (Rebouche, 2009). CEDAW covers both equality of opportunity in order to achieve *de jure* equality and equality of outcome to achieve *de facto* equality, yet based on the same limited approach.

It is clearly stated that there are direct and indirect discrimination highlighted by CEDAW. Direct discrimination against women is also highlighted in the 2006 International Covenant on Economic, Social and Cultural Rights (ICESCR) concluding observations to the Mexican report where the Committee censured the State for the practice in the textile industry produce whereby women were required to provide medical certificates proving that they were not pregnant in order to be hired or to avoid being fired. By contrast, Chile in its fifth report to the Human Rights Committee, detailed how it had amended its labour law to prohibit the 'making a woman's access to employment, mobility, promotion or contract renewal dependent

on her not being pregnant'. Another example of direct discrimination identified as equally problematic by CEDAW and constituting discrimination against the female child is the requirement in some States that pregnant girls be excluded from school, but interestingly not the boys who were responsible for the pregnancy. This damages the life chances of the girl whose right to education is curtailed unnecessarily.

It is contended that true equality is not simply about reversing the sexes and comparing, nor is it simply about passing laws that appear on the face of them to be gender neutral (Banda & Office of the High Commissioner for Human Rights: Women's Rights and Gender Unit, 2008). It is referred to the two recommendations below:

> "Recommendation No. 7 states that this definition of discrimination includes gender based violence – that is violence which is directed against a woman because she is a woman or which affects women disproportionately. It includes acts which inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender based violence may breach specific provisions of the Convention, regardless of whether those provision expressly mention violence".
>
> "Recommendation No. 8 states that gender based violence which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under specific human rights conventions is discrimination within the meaning of Article 1 of CEDAW. These rights include, inter alia the right to life, the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment and others. The debate about violence against women carried along the idea and inspiration to protect women from any wrongdoing in public and private life".

In order to make sure that women are treated equally as men, CEDAW requires States Parties to enact legal guarantees of equality and to provide the means of fully enforcing them. It requires governments to guarantee women 'the exercise and enjoyment of these rights' (Article 3 of CEDAW). What then is meant by 'exercise and enjoyment of these rights'? It means that women have access to the use of rights through adjudicative procedures for justifying rights accessible, affordable

and known. Enjoyment of these rights means actually experiencing the benefit of the right and or having the content of the right made real in one's life. The exercise and enjoyment of these rights obliges the government to go beyond mere statements in legal documents of its commitment to women's equality. It obliges governments to ensure through law and other means the practical realisation of women's equality to make it real in one's life. For instance, the government should put in writing the new legislation on gender equality which defines the attributes of rights and the scope of gender in the suitable context.

All these points should render CEDAW's embrace of substantive equality if application of formal equality does not establish justice for women as the disadvantage group in order to put them in equal outcome with men. On the other hand, to make sure that women have equal opportunity, CEDAW emphasises on the obligation of the States. For example, the Committee addressed the issue of violence against women in a general recommendation No.19 adopted at the 1992 session, that the primary aim of the Committee was to clarify the extent to which different forms of violence against women were in its view covered by CEDAW (in which the women's violence does not appear). Another issue was, the goal of the general recommendation to emphasise the overlap between the obligations of States Parties. In its discussion, the Committee characterised the violence against women as a form of 'discrimination against women as defined in Article 1 of CEDAW and noted that CEDAW obliged States Parties to eliminate all forms of discrimination, whether committed by public officials or private individuals'.

According to Salbiah Ahmad (n.d), special treatment or measures or affirmative action in women's favour that seeks to correct systemic or historical

disadvantage to women in order for women to achieve equality is not discrimination under CEDAW. Salbiah gave the example, a provision in the law which stipulates that a women's right to earn an income is subject to her husband's consent may arguably be a restriction of her (equal) right to earn an income. For example, the 1977 Philippines Code of Muslim Personal Law stipulates in Article 36 that the wife may with the husband's consent, exercise her profession or engage in occupation and business. This is a restriction and it is discriminatory against women and need special measures to make sure that women have equal opportunity and outcomes with men to work and earn an income. By this example, it can be argued that, women should be given rights to work by considering the collective rights of the family members. Salbiah noted that CEDAW employs special measures to protect the women's weaker position in relation to men by applying substantive equality approach, which employs special measures to correct gender traditionalism by expanding her choices. Special measures are found to be in place to overcome the structural, social and cultural disadvantage that women face.

In spite of formal and substantive equality in the implementation of justice for women, Part III of CEDAW states on the appropriate measures taken by states to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women in access to work, remuneration, social security, pregnancy and maternity, education, health care and living conditions. CEDAW extinguishes the split between public and private spheres. It addresses the family and obliges the government to eliminate discrimination by 'any person, or organisation or enterprise'. Thus legislation is not the complete solution. Taking appropriate measures also includes

designing and implementing programs or allocating resources. Thus, the governments are required to act and not just refraining from discriminating. The government has to eliminate structural discrimination (including the historical disadvantage of women) in all fields, including the political, economic, social and cultural field.

2.7 Concluding Remarks

In this chapter, it is understood that CEDAW has a goal for women to fight for equality in the private and public fields such as in education, jobs, political power, economic, health, marriage and family relationships on the same basis as men. CEDAW is considered as part of UDHR which has Western base foundation basis as "*a common standard of achievement for all peoples and all nations*". The primary intention in the formation of CEDAW is due to the fact that UDHR does not comprehensively protect women's rights in the declarations of human rights under its term of equality in all aspects of women's life, from their political participation and public life to education, employment, health, and even marriage and family relationships due to differences between women and men.

This chapter analyses feminist critiques on rights and consider that there are five attributes of rights concerns by feminist in the implementation of justice. They are; (i) collective rights which prevail over individual rights; (ii) the acknowledgement of different cultural rights in defining universalism; (iii) rights must co-relate with duties; (iv) rights must cover both private and public spheres; and lastly, (v) the acknowledgement of nature in the formation of nurture. There is no doubt that these five attributes of rights discussed in this chapter consider the diversities in human beings, their needs and preferences in biological, cultural,

religion and legal aspects, which could protect not only women but also men from discrimination. These attributes of rights have commonalities with the attributes of rights in Islam under the basis of justice for the collective goods.

It is found that CEDAW, in order to achieve *de jure* and *de facto* equality of women with men, uphold the principle of gender equality based on the three fundamental principles which are: i) principle of substantive equality; ii) principle of non-discrimination; and iii) principle of State obligation. Equality applied by CEDAW consists of formal and substantive equality in order to ensure that women around the world would not be distinctive in law, legal system and culture of the community. Both types of equality are developed through the theory of justice which aims to maintain equilibrium for people within their diversities. It is argued that human rights law to be universally accepted must acknowledge the nature of law, religion, culture, sex and abilities of people. In this chapter, it is traced that CEDAW in establishing justice for women applied substantive equality principle together with formal equality which can be seen through its provisions and decided cases.

This chapter trace that equality is non-discrimination. In understanding equality and non-discrimination principle uphold by CEDAW, it is found that CEDAW prohibits not only direct discrimination but also indirect discrimination. If the law provided seems to disadvantage women, it is considered as indirect discrimination even though the provision has neutral meaning. It can be concluded that CEDAW uphold the principle of justice and equality considering the differences in biology, physical abilities, background, roles, group of people exist among women and men around the world.