

## CHAPTER FIVE

### A COMPARATIVE ANALYSIS ON THE IMPLEMENTATION OF CEDAW IN MUSLIM COUNTRIES: MALAYSIA & MOROCCO

#### 5.1 Introduction

It is contended that the implementation of secular human rights standards presents particular difficulties in Muslim States where most people perceive international human rights as reflections of 'Western' values and norms, hence both culturally and religiously alien. However, through the analysis of the previous chapters, both Islamic and feminist jurisprudences are harmonious in upholding the principle of gender equality between women and men through substantive equality. In fact, they share a common attributes of rights in eliminating discrimination against women even with some different of application and principle due to different belief, culture and legal background of the community.

Therefore in this chapter, the principle of women's rights under international Islamic human rights instruments such as UIDHR and CDHRI are scrutinised and compared with UDHR and CEDAW so that the conflict of law on women's human rights and gender equality under Islamic and international regimes could be settled with harmonious solution. Through the analysis, the divergences and convergences

between them are traced but the most important thing to be highlighted is on the harmonious objective of UIDHR, CDHRI, UDHR, CEDAW and IFLA in upholding justice. Therefore, the law with regard to human rights should consider their differences in order to correct the inequality of roles, stereotypes and the unbalance relationship between women and men in that particular society. In the context of Muslim, *de facto* and *de jure* equality of Muslim women with Muslim men should consider the Islamic legal rulings pertaining to gender.

This chapter also highlight the bona fide intention of Malaysian government in ratifying CEDAW to eliminate discrimination against women. This chapter also analyse the reservations entered by Malaysia due to literal meaning of Article 16 of CEDAW in which women should have the 'same' right with men. This meaning is contradict with the principle of gender justice under IFLA which also acknowledge the differences between women and men. This chapter also examine the reason behind reservations made by other Muslim countries including Malaysia so that it will be upgraded for clear understanding of other States members.

It is intended to show that the reservations entered is not because Shari'ah or Islamic law principle is contradict with the object and purpose of CEDAW in eliminating discrimination and violence against women. But, the reservations entered are due to the different gender application between Muslim women and Western women which should be acknowledged in order to eliminate discrimination. In order to show the bona fide intention of Malaysian government on gender equality, the analytical argument is made based on the activities, programmes and amendmend of laws on the rights of women in preserving the women's status in this country which is based on the principle of substantive as well as formal equality. Another important

matter which is highlighted in this chapter is on the analysis of the provisions of CEDAW on monitoring implementation of CEDAW by States parties in order to know to what extent the State Parties are bound to implement the provisions of CEDAW in their domestic laws. It is due to the fact that the reservations made by Malaysian government on CEDAW has been misunderstood as incompatible with the object and purpose of CEDAW. In spite of that, the principle of '*pacta sunt servanda*' is examined. These two factors are crucial to be understood so as constructive harmonisation between IFLA and CEDAW is realised in a positive development since IFLA and CEDAW harmonise in applying the principle of substantive equality.

As a comparison among Muslim states who progressively reformed their law on the rights of women, this chapter examines the reservations entered by the State of Morocco. It is to understand the approach taken by Morocco in applying CEDAW while at the same time Shari'ah principle is upheld. Besides, the Modawana law of Islamic State of Morocco is regarded as a model. Even though, the culture of Morocco is not similar with the multiple religion, culture and ethnic groups of Malaysian society, but its development of law on the rights of women is progressively improved within the primary sources of Shari'ah law. Thus, the provisions of Morocco Modawana law can be the best model to be referred since it is based on the similar basic foundation of Shari'ah.

## **5.2 International Human Rights Instruments: A Comparative View on the Rights of Women in Islam and Western Jurisprudence**

It is argued that current state practice of Muslim States lends credibility to the emerging universality of principles of international law including human rights norms

(Shaheen Sardar Ali, 2000:219). Muslim states have since the inception of United Nations, actively collaborated in drafting human rights instruments, such as Universal Islamic Declaration of Human Rights (UIDHR) and Cairo Declaration of Human Rights in Islam (CDHRI). The UIDHR was presented as response to the exclusion of Muslims from the domain of human rights as propounded in Universal Declaration of Human Rights (UDHR) and to argue that there is indeed a human rights tradition in Islam. The UIDHR focuses on the idea of freedom and insists that this is a fundamental right given by God and no one could take it away from human beings (Mawdudi, 1976:14). In 1990, the Organisation of Islamic Cooperation (OIC) has formed the CDHRI on its basis is similar to UIDHR (Achilihu, 2010:86) which provides an overview on the Islamic perspective of human rights and affirms the Quran and the Prophetic tradition as its sole sources through an official Islamic forum. The purpose of its formation is to be general guidance for member states of OIC in the field of human rights. However, CEDAW is formed to preserve women's rights due to the exclusion of women under the provisions of UDHR in imposing their rights for the similar achievement to men. CEDAW is created by considering the differences between women and men. It 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.

The similarities on the formation of UDHR, CDHRI, UIDHR and CEDAW is all instruments are man made law which formed to control the behaviour of human beings either individually or collectively. However, UDHR and CEDAW is based on Western foundation of civilisation whereas UIDHR and CDHRI are based on Islamic jurisprudence or Shari'ah sources in its principle. On the other hand, the divergence between UIDHR and CDHRI is, CDHRI presents a State perspective or collective

rights and duties of States whereas the UIDHR is a non-State perspective or individual rights and duties (Mas'ud, 2007:96). CDHRI represents that fundamental rights and universal freedom are an integral part of the Islamic religion and every person is individually responsible and the community are collectively responsible for their safeguard (Preamble of CDHRI). However, both provisions of UIDHR and CDHRI consider that when it comes to the marriage and family relationships, collective rights is prevail over individual rights.

On the other hand, UDHR is not a treaty but a common standard of achievement of individuals to all nations. It establishes the objects of human rights and the first international legal effort to limit the behaviour of States and press upon them duties to their citizens (Nik Salida Suhaila Nik Saleh, 2012:158). But, the most important thing is UDHR, CEDAW, UIDHR and CDHRI share similar objective and principle of human rights in their achievement (result) of the preservation of human rights. This has been agreed by Tabandeh (1970) that most of the UDHR's provisions are also inherent in Islam. It is argued that the most important areas of commonalities between UDHR, UIDHR, and CDHRI is on the principles and outcomes, whether the implementation of it results in fairness and justice to all people (Nik Salida Suhaila Nik Saleh, 2012:160).

It can be seen in Article 19 of UIDHR that it is stated that "every person is entitled to marry, to found a family and to bring up children in conformity with his religion, traditions and culture". It has been clearly stated that all women and men should carry the responsibility in conformity with religion and culture which is universal for human beings. Article 19 (h) of the said declaration provides for sharing obligations and responsibilities within the family which is clearly defines the concept

of Islamic marriage and family institution which also universal for all women and men around the world. Whenever it is compared to CDHRI, Article 1 of CDHRI laid down the principle of equality and non-discrimination by stating that:

- (a) All human beings form one family whose members are united by their subordination to Allah and descend from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations. The true religion is the guarantee for enhancing such dignity along the path to human integrity.
- (b) All human beings are Allah's subjects, and the most loved by Him are those who are most beneficial to His subjects, and no one has superiority over another except on the basis of piety and good deeds.

However, UDHR is short of consideration with regard to the acknowledgement of difference of nature and nurture of human beings. For example, it is stated under Article 1 and 2 of UDHR that:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

“without distinction of any kind, such as race, colour, sex, ...or other status”

Since then, CEDAW provides the provisions which will help to eradicate *de facto* inequality between women and men under UDHR. CEDAW provides the provisions which entitle women the same basic rights as men within their private or familial sphere of life which the dichotomy has no place in human rights discourse. CEDAW acknowledges the differences between women and men in nature and nurture. It can be seen in Parts I – IV which comprises of substantive provisions. For example Article 1 defines the meaning of discrimination against women. However it could be read together with Article 4 which provides for the possibility of affirmative action aimed at accelerating *de facto* equality between women and men. Article 10 – 14 covers economic, social and cultural rights of women. Article 10 deals with

education and Article 12 deals with equality in health care. Article 16 deals specifically with the matters of family law. It is found that discrimination against women uphold by CEDAW is direct and direct discrimination. It cannot be based only on the neutral provisions of the law but not disadvantageous women or unjust against women in practice.

On the other hand, Article 6 of CDHRI states that the primary rights and duties of women and men not in the form of formal rights and duties. This indicates that substantive equality is applied under CDHRI to achieve equality between women and men. Article 6 of CDHRI states:

- (a) Woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage.
- (b) The husband is responsible for the maintenance and welfare of the family.

On the other hand, Article 16 of UDHR generally states on the equality of women and men in the form of formal equality between women and men even though they are different in biological, physical, cultural and needs in enjoying this life. Article 16 of UDHR states:

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

It shows that Article 6 of CDHRI elucidated that this provision is more comprehensive in addressing how equality between women and men could be achieved through the recognition of the element of 'cultural' Islam which is

detrimental to the identity and personality of Muslim women. CDHRI promotes that gender equality could be achieved through the implementation of rights that must come with duties which acknowledge differences within the concept of complementariness not sameness. It is also clearly stated under Article 6 (b) of CDHRI that the husband is responsible for the support and welfare of the family and not the wife. It shows that Islamic jurisprudence considers women and men as naturally different in their biological nature, physical appearance and psychological development. On the other hand, Article 16 of UDHR can be regarded as too general because it provides an open interpretation of equality between women and men. Unfortunately, it is also open for liberalists to interpret equality on the basis of sameness, by rejecting differences between women and men naturally which will determine their function in the development of the society. However, both do make mention of the family as the fundamental institution in the society that needs to be protected by the society and the state law. This shows that public rights are given priority in the protection of law as well as in family matters.

Article 1 of CDHRI has different element as Islamic jurisprudence upholds Allah as the Most Superior entity and all humans are subordinate to Allah's rule which is not illustrated in UDHR and CEDAW. However, even though it has the element of God or the rights of God, CDHRI can be considered as the most universal provisions which provides how gender equality could be performed. It is contended that the provisions of UDHR will amount to discriminatory against human being because it does not provide the acknowledgement of difference between women and men in achieving justice. Even though it is stated under Article 1 of UDHR that all human beings are endowed with reason and conscience, but it does not clearly stated

how different reason and conscience of people should be acknowledged in maintaining justice. Therefore, it should be maintained that the provision of CDHRI is more ideal and universal in the implementation of justice and equality, on the basis of how differences of human biological nature and cultural diversity are acknowledged compared to UDHR.

It shows that UDHR, CEDAW, UIDHR and CDHRI is not incompatible at all. It is due to the fact that UIDHR shares twenty (20) themes and CDHRI shares fourteen (14) themes of rights respectively with those mentioned in the UDHR (Nik Salida Suhaila, 2012). CEDAW and CDHRI also uphold that acknowledging the differences of sex and culture is important in achieving gender equality. This indicates that UDHR, CEDAW, UIDHR and CDHRI can possibly be harmonised. The main purpose of having UDHR, CEDAW, UIDHR and CDHRI is to eliminate any kind of discriminations against all individual human beings from the tyranny or unjust treatment of the States. If equality is the goal of the UN and a prohibition of discrimination is at the foundation of UN's human rights policy (Smith, 2003:32-42) since 17<sup>th</sup> and 18<sup>th</sup> centuries, Islamic law from the very beginning since 1400 years ago uphold the principles of justice for all human beings and prohibits any kind of violence, oppression and immorality against human beings. The teaching has been allocated in the Holy Quran on the requirement of justice in all human transactions. *"Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded"* (Quran An-Nahl 16:90).

It is clearly stated under Article 1 of CDHRI that the true faith is the only guarantee for enhancing such dignity along the path to human perfection. Thus,

UIDHR and CDHRI are not against the needs of human life because they are still in line with the element of humanity and brotherhood within the concept of social justice which considers freedom of individual conscience in the provision of human rights laws. In spite of that, there is an absolute difference between both in terms of the supremacy and sovereignty of the Ruler. Where CDHRI acknowledges only the Creator has the Ultimate Sovereignty, UDHR acknowledges people as the supreme ruler (Abdul Hamid Mohamad, n.d.). Similarly, it has been postulated that the principle of human rights in Islam is not based on the domination of power of humans and it has not been approved after the war. The attributes of human rights in Islam are based on the concept of *ummah* (community), *mushāwarah* (discussions) and *basharīyyah* (human) (Saari Sungib, 2006) which is based on Shari'ah or the Islamic religion principle which is universal to all human beings.

It is important to highlight that in Islamic jurisprudence, community does not only signify the Muslim community; the universality in Islam establishes that all communities have rights through discussion among human beings, through which no one can hinder another from claiming and performing his/her rights on earth (Saari Sungib, 2006). In other words, even though human beings come from different faiths and cultures, they have the same needs; likewise, they are entitled with different rights and duties in order to ensure the existence of human species (Nicholson, 1997). Even though the principle of UDHR and CEDAW is different from UIDHR and CDHRI on the supremacy and sovereignty of the ruler, they could be harmonised through the element of brotherhood and human nature and nurture they promote.

Last but not least, UDHR can be the most ideal and universal declaration of human rights if the provisions regarding gender equality under CDHRI are attributed

to the declaration of international human rights. In this regard, women and men are entitled with rights and also duties even with different entitlements to the rights and duties as they are in fact different and complementary each other. If women and men's rights and duties are not organised or structured properly, then it would cause imbalance of human's life due to different abilities, competencies, priorities and needs of people in this world. In spite of having similarities, women and men have different roles in accordance to their biological, physical and psychological nature. It is thus not wrong to suggest that UDHR could become more universal if it considers the established differences between human beings to determine their rights and duties. This would probably lead to the non-discriminatory treatment of not only Muslim women but also non-Muslim women and men, because they are also in fact, different biologically, physically, psychologically and culturally.

Therefore, similar with the implementation of CEDAW in the context of Malay Muslim society, it is not to replace IFLA but as complementary. In another perspective, it is argued that the methods and relevant principles of Shari'ah can be positively employed to ensure the effective realization of human rights in Muslim States (Baderin, 2006:1). Since Islamic jurisprudence has the philosophy of balance and complementary rights and duties between women and men, IFLA can be an ideal and universal model to regulate the relationship between women and men in marriage and family relationship. It is argued that equality between women and men can only be achieved whenever women and men have rights to enjoy, as well as duties to perform based on the basis of integrity set by the religion and their biological function, but not in the context of sameness of rights of individuals. It is contended that CDHRI and IFLA provides an ideal concept of gender equality which can be

achieved by acknowledging differences within the spirit of brotherhood and humanity, namely by considering their differences in nature and nurture. However, CDHRI and UIDHR as well as IFLA lack of mechanism to effectively monitor the compliance of human rights in the Islamic countries in which human rights abuses are rampant.

### **5.3 The Application of CEDAW in Muslim States and Its Monitoring Procedure**

Islamic family law has become the symbol of Islamic identity and relates too much on the rights of Muslim women. However, Muslim States reveals the lack of uniformity in the administration of Islamic family law. It is noted that out of the 189 States parties to CEDAW, 57 States currently have reservation to CEDAW. Out of 57, only 25 Muslim countries have made reservations to CEDAW including Malaysia.

From the research made by Shaheen (2000:250), the reservations entered by Muslim States may be categorised as general, specific and justified on the basis of repugnancy to Islamic law and Shari'ah. The most controversial category is the general nature of reservations and impact the overall obligations undertaken by States under the treaty. Under general reservations, the reservations entered using justification of supremacy of religion, the constitution, cultural practices and entire ambit of substantive rights protected under CEDAW. However, specific reservations considered clearer and less objectionable than general reservations. The last category which is reserved on the ground of repugnancy with Shari'ah law is different between Muslim States. Most of the Muslim states cited that the religion of Islam as the primary cause behind the reservations.

Among Muslim states who reserves CEDAW under the basis of conflict with Shari'ah law are Bangladesh, Egypt, Iraq, Kuwait, Libya, Malaysia, Maldives and Morocco. However, Algeria, Indonesia, Jordan, Pakistan, Turkey, Tunisia and Yemen do not expressly mention it. It is argued that the reason for different justification for entering reservations are due to the absence of a unified interpretation of religious law, which in turn increases the discretion of individual States Parties.

The Kingdom of Bahrain reserves in these term: "with respect to the following provisions of the Convention...Article 16 in so far it is incompatible with the provisions of the Islamic Shari'ah". Libya on the other hand stated a general reservation citing that CEDAW cannot conflict with Islamic law having to do with "personal status derived from the Islamic Shari'ah" The reservations made by Iraq are on Article 2 (f) and (g) and Article 16. The term used is on the application of which is without prejudice to the provisions of the Islamic Shari'ah. The reservations of Brunei Darussalam within the terms "The Government of Brunei Darussalam expresses its reservations regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the official religion of Brunei Darussalam and, without prejudice to the generality of the said reservations, expresses its reservations regarding paragraph 2 of Article 9 and paragraph 1 of Article 29 of the Convention."

The Maldives stating that "The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of Islamic Sharia upon which the laws and traditions of the Maldives are found...". Saudi Arabia reserves CEDAW on the following terms "in case of contradiction between any term of the Convention and the

norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention". Saudi Arabia can be placed in the category of a Muslim state that strictly follows the classical Islamic law. There is no specific Islamic law statute in Saudi Arabia and family law matters are governed by classical Islamic law, in particular standard Hanbali fiqh.

From the reservations entered by Muslim States, it shows that the most reserves Article on the rights of women are in the area of Islamic family law. According to the Vienna Convention on the Law of Treaties, a state parties may object to a reservation made by another State party within 12 months of the notification of the reservations. From the report on the reservations and objections made by Malaysia in 1998 that it is stated "with respect to article 16.1 (a) and paragraph 2, the Government of Malaysia declares that under the Syariah law and the laws of Malaysia the age limit for marriage for women is sixteen and men is eighteen." In keeping with the depositary practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its notification (21 April 1998), that is to say, on 20 July 1998. In this regard, on the dates indicated below, the Secretary-General received from the Governments of France and the Netherlands the following communications relating to the said partial withdrawal.

France however on 20th July 1998 considers that the reservation made by Malaysia, as expressed in the partial withdrawal and modifications made by Malaysia on 6 February 1998, is incompatible with the object and purpose of CEDAW. France

therefore objects to the reservation. This objection shall not otherwise affect the entry into force of CEDAW between France and Malaysia. On the other hand, on 21st July 1998, the Government of the Kingdom of the Netherlands has examined the modification of the reservations made by Malaysia to article 5 (a) and 16.1. (a) and paragraph 2 of CEDAW. The Government of the Kingdom of the Netherlands acknowledges that Malaysia has specified these reservations, made at the time of its accession to CEDAW. Nevertheless the Government of the Kingdom of the Netherlands wishes to declare that it assumes that Malaysia will ensure implementation of the rights enshrined in the above articles and will strive to bring its relevant national legislation into conformity with the obligations imposed by CEDAW. This declaration shall not preclude the entry into force of CEDAW between the Kingdom of the Netherlands and Malaysia. Consequently, the modification in question is not accepted, the government of France having objected thereto.

It is claimed that Malaysia as the State Parties are bound by the treaty and any failure to observe the treaty may constitute a breach of the treaty. However, it is important to be highlighted that multilateral treaty regimes including reservations entered by State parties at the time of ratification are presently governed by the Vienna Convention on the Law of Treaties, 1969 (VCLT) (Shaheen Sardar Ali, 2000:241). It is argued that traditionally, a reservation made subsequent to the conclusion of a treaty required the unanimous acceptance of all other treaty parties, unless the treaty otherwise provided (C.Redgwell, 1993:245-282). However, the Genocide Case marks the first major departure from the unanimity rule and thus an important juncture in the development of contemporary theory on reservations to multilateral treaties. Through the Advisory Opinion issued by International Court of

Justice (ICJ), it is declared that “an objection to a minor reservations should not have the effect of invalidating ratification”. It has been argued that making reservations to multilateral treaties is a well-accepted practice in international law (W.A. Schabas, 1996:472).

Since the purpose of human rights treaties is protection of individual and not the interest of the States, there has been different view given. It is argued that since the prohibitions to reservations are rare in human rights treaties and thus by inference, it is permissible (Shaheen Sardar Ali, 2000:243). Further she contended that the General Comment on issues relating to reservations made by Human Rights Committee (HRC) may be usefully employed as operational guidelines in addressing reservations by other treaty bodies including CEDAW. Thus, determination of compatibility or not with the object and purpose of the treaty is up to the CEDAW Committee not the parties objected into it.

Malaysia as a State parties to CEDAW has to understand the provisions on monitoring the implementation of CEDAW in Part V. It is stated that the implementation of CEDAW by the State parties is monitored by CEDAW's Committee, namely concerning the elimination of discrimination against women to guarantee their enjoyment of those rights. Although the Committee has no power to determine that the reservations are incompatible and null and void, its reporting system is a form of scrutiny and public censure, and States making reservations especially Islamic countries are under constant pressure to withdraw or amend the incompatible laws and practices due to the objection made by other States parties. In order to avoid the constant pressure, it is contended that clear understanding on what

is intended by CEDAW's Committee on the meaning of enjoyment of rights under the provisions of CEDAW is imperative.

In the implementation of CEDAW, Article 2 (d) of CEDAW states that adequate measures have to be adopted by the State in order to modify or abolish existing laws, regulations and practices which constitute discrimination against women. In spite of that, Article 5 (a) of CEDAW provides that the State parties shall take all the appropriate measures to modify social and cultural patterns of conduct of women and men, with a view to achieve the elimination of prejudices, customs and all other practices that are based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles for women and men. Therefore, it is traced that some modification or amendment has continuously been made in IFLA to provide special protection for women from any discrimination.

The principle of equal rights and duties between women and men in marriage and family relationships which has been misunderstood by people for example through the role of wali as the primary guardian and maintainer has been illustrated through the power of the Court through the rights given to Syarie Judge to interfere if the individual rights on the role of *wali* infringe the rights of others. It has been practiced a long time ago and continuously been practiced as has been stated under the provisions of IFLA. It is argued that the authority of *wali mujbir* and *wali raja* is to empower the rights of women both in private and public spheres and it is in conjunction with Article 2 (d) of CEDAW which it is to ensure that women get equal protection of rights with men not only in private but also in public spheres.

Streamlining IFLA to CEDAW has invited considerable discussion where the basis of the law is religious law and customary practices of the community. However,

it does not necessarily incompatible at all. CEDAW in Parts I-IV provides the substantive provisions to eradicate de facto inequality between women and men whereas IFLA comprises the principle of Islamic law with regard to the rights and duties of women and men in marriage and family relationships. Both laws aim at achieving gender justice through substantive equality in spite of formal equality due to sexual differences between women and men. Both have the same objective to eliminate discrimination against women through different approach due to different culture, religion and legal system. In Malaysia, the focus of gender equality is to guarantee equal sharing of resources, information, opportunities and benefits of development for both women and men, and to integrate women in all sectors of development in accordance with their capabilities and needs so as to enhance their quality of life, eradicate poverty and eliminate illiteracy, and ensure a peaceful and harmonious and prosperous nation (National Policy on Women 1989).

Since CEDAW only provides the individual rights of women to develop the international legal norms of non-discrimination on the basis of sex, it is different with IFLA which has the attribute of collective rights and duties of women and men in marriage and family matters. Therefore, some of the provisions of IFLA seems to be incompatible with CEDAW on the basis that they discriminate the rights of women whenever it infringe the collective interest of the family members. For example, entitlement of polygamous marriage, dissolution of marriage, maintenance in marriage, custodial and guardianship and the role of wali in marriage are regulated based on collective interest. All these matters are falls under the rights of marriage and the obligation within marriage life which has to be balanced between women and men for guaranteeing the enjoyment of marriage and family life. It has to be

understood that IFLA with the attributes of collective rights and duties does not deprive the individual rights of women but giving them a suitable entitlements of rights and duties to protect the marriage and family institution.

#### **5.4 Bona Fide Intention of Malaysian Government in Entering Reservations to CEDAW**

Malaysia's original reservations to CEDAW took place on 5<sup>th</sup> July 1995 once it has ratified CEDAW. The reservations covered Articles 2 (f) in which the state party has to condemn discrimination against women in all its forms and undertake all appropriate measures to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. It also reserves Article 5 (a) of CEDAW which urges the state party 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. Besides, Malaysia also reserves Article 7 (b) at the beginning in which the states parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies. Besides, Article 9 of CEDAW on the provision that the states parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband also has been reserved by Malaysian government.

With regard to Article 16 of CEDAW, originally Malaysia has fully reserves this article in which it provides the meaning of equality between women and men in marriage and family relation matters. It is contended that Malaysia does not consider itself bound by the provisions of Article 16 of the aforesaid convention (Arik Sanusi, 2016) due to the fact that reservations to these Articles are significant to Muslim society as Shariah law is one of the major sources of law in which the application might be different with Western culture and application. The provisions of Article 16 provides that women and men have the same rights in marriage and family relations matters such as, (a) the same right to enter into marriage; (b) the same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) the same rights and responsibilities during marriage and at its dissolution; (d) the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

However, after examination and investigation is made on the reservations, then on 6<sup>th</sup> February 1998, Malaysia notified the Secretary-General of its withdrawal on the reservations in respect of Articles 2 (f), 9 (1), 16 (b), 16 (d), 16 (e) and (h) of CEDAW of a partial withdrawal as follows: "The Government of Malaysia withdraws its reservation in respect of article 2 (f), 9 (1), 16 (b), 16 (d), 16 (e) and 16 (h)." At the same date, the Government of Malaysia notified the Secretary-General that it had decided to modify its reservation made upon accession as follows: "With respect to article 5 (a) of the Convention, the Government of Malaysia declares that the provision is subject to the Syariah law on the division of inherited property." "With respect to article 7 (b) of the Convention, the Government of Malaysia declares that the application of said article 7 (b) shall not affect appointment to certain public offices like the Mufti Shariah Court Judges, and the Imam which is in accordance with the provisions of the Islamic Shariah law." "With respect to article 9, paragraph 2 of the Convention, the Government of Malaysia declares that its reservation will be reviewed if the Government amends the relevant law." "With respect to article 16.1 (a) and paragraph 2, the Government of Malaysia declares that under the Shariah law and the laws of Malaysia the age limit for marriage for women is sixteen and men is eighteen."

Meanwhile, within 1998 to 18<sup>th</sup> July 2010, the reservations into Articles 5 (a), 7 (b), 9 (2), 16 (1) (a), (c), (f) and (g) and Article 16 (2) were maintained. Afterward, on 19<sup>th</sup> July 2010, the Government of Malaysia, notified the following: "... the Government of Malaysia, [...] withdraws its reservations in respect of articles 5 (a), 7 (b) and 16 (2) of the Convention; ...." Therefore, if those articles infact withdrawn, the remaining reservations into CEDAW are on Article 9 (2) and 16 (1) (a), (c), (f) and

(g). In relation to article 11, Malaysia interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only (Note 70, Chapter IV.8, Multilateral Treaties Deposited with the Secretary-General).

After that, there was no more withdrawal made by Malaysian government into the reservations of CEDAW. But recognition and commitment of Malaysia in ratifying CEDAW has been brought into the provision of the Malaysian Federal Constitution in July 2001. The government of Malaysia agreed to amend Article 8 (2) of the Constitution by including 'gender' as a basis for non-discrimination. After the amendment, Article 8 (2) provides that:

"Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment".

However, Article 8 (5) of the Malaysian Federal Constitution also provides that "This Article does not invalidate or prohibit any provision regulating personal law; any provision or practice restricting office or employment connected with the affairs of religion, or of an institution managed by a group professing any religion, to persons professing that religion".

The amendment to Article 8 (2) of the Constitution to include gender as the basis of non-discrimination shows the *bona fide* intention of Malaysian government to uphold equality in gender and eliminating discrimination against women in this country. However, the context of gender equality in this dualist country which is Islamic country under the Constitution and majority of citizens are Muslims might not

same with the context of gender equality in CEDAW's provisions. This Article 8 (2) only states that discrimination in gender is prohibited without specifically define the meaning and context of discrimination in which gender equality may bring to various interpretations (Salbiah Ahmad, n.d) by different background of people due to different belief, culture and interest of people.

Until now, the remaining reservations into Article 16 (1) of CEDAW which has been held as stated below:

- (a) the same right to enter into marriage,
- (c) the same rights and responsibilities during marriage and at its dissolution,
- (f) the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount, and
- (g) the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

The provisions of Article 16 (1) (a), (c), (f) and (g) of CEDAW provides that women and men should have the 'same rights' and responsibilities in marriage and family relations to achieve gender equality. The term 'same right' under the provisions of Article 16 literally means women and men should have similar rights instead of substantive equality applied by CEDAW. It is argued that the CEDAW Committee has consistently concluded that the elimination of discrimination against women requires State parties to provide for substantive as well as formal equality (General Recommendation on Article 16 of CEDAW, 2013, para. 8). This can be achieved when the State parties examine the application and effects of laws and policies and ensure that they provide for equality in fact, accounting for women's disadvantage or exclusion. Substantive equality is not defined within the context of

sameness or similar of rights but substantive equality is applied to achieve justice for people suitable with their condition by acknowledging their establish differences.

The principle of *'pacta sunt servanda'* or the rule that 'treaties are binding on the parties and must be performed in good faith' is stated under Article 27 of Vienna Convention on the Law of Treaties that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In spite of that, Article 28, paragraph 2, of CEDAW adopts the impermissibility principle contained in the Vienna Convention on the Law of Treaties. It states that a reservation incompatible with the object and purpose of the present Convention shall not be permitted. It indicates that although at the first place, reservations can be entered, it cannot against the central principles uphold by CEDAW and to general international law. As such they may be challenged by other States parties. However, The Advisory Opinion issued by the International Court of Justice (ICJ) declared that "an objection to a minor reservation" should not have the effect of invalidating the ratification (The Genocide Case, ICJ). It is a well accepted practice in international law. It is argued that the reservations entered by Malaysia government are not disadvantageous Muslim women in achieving gender equality and protecting the status of women in marriage and family relation matters. Thus, the treaties are performed in good faith to achieve its objective.

The principle of good faith is illustrated in the case of *Exchange of Greek and Turkish Populations (1925)* PCIJ Reports Series B, No. 10, 20 in which the World Court decided that "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken". It is argued that the 'dualist theory' assumes

that international law and national law are two separate legal systems which exist independently of each other. International law regulates the relationship between States whereas national law regulates the rights and duties of individuals within a state. Thus, for international law to be applicable in the national legal order, it must be transformed into national law by means of national legislation (Abdul Ghafur Hamid, 2016:234).

Substantive equality will consider the differences factors among human beings in order to maintain justice. Therefore, the comment made by CEDAW Committee that the reservations of the Malaysian government into Article 16 is contrary with the object and purpose of CEDAW is not right as different entitlements of rights and duties are given for Muslim women and men in marriage relationship is to makesure that they enjoy their marriage life with just and balance. It is because true gender equality in Islamic jurisprudence is through the notions of complementariness and balance not sameness.

Hence, the literal meaning of Article 16 contradicts the principle of substantive equality under CEDAW. It is also incompatible with certain rights and duties of women and men in Islamic marriage and family relationships which regulates different entitlements of rights and duties based on the concept of difference and complementariness and priority in marriage and family relationships for the enjoyment of life. Therefore, if Articles 16 (1) (a), (c), (f) and (g) of CEDAW are defined within the meaning of only formal equality, it will discriminate Muslim women and men since their rights and duties are due to their biological, physical and psychological differences which affect their roles and functions.

The coverage of law under IFLA regulates the rights and duties of Muslim women and men in marriage and family relations based on Islamic legal rulings. The basis foundation of law applied by IFLA is Shari'ah jurisprudence which the sources and methodologies are based on Divine revelation that is Al-Quran, As-Sunnah and Islamic Jurists. The attributes of Islamic human rights and its concept of equality under the provision of IFLA are in accordance with the Divine revelation, namely Al-Qur'an and Al-Sunnah and juristic opinions. It consists of the rights of God and the rights of human beings and non-human beings. The rights of God which are considered as public rights will prevail over individual rights but the individual rights is permissible as long as it is not infringe the public rights. Islamic human rights which are based on human nature acknowledge the sexual and religious or cultural differences in human beings. Instead of similarities, the different of sex, religion and culture or gender is the crucial factors to be considered in achieving equality. Islamic concept of equality is based on the nature of human creation which relates with biological roles and function, religious and spiritual obligations as well as reward and punishment. Islamic jurisprudence clearly shows that God creates women and men from a similar origin but with different functions in biology, psychology, physiology and their spiritual belief which influence the individual conscience and value of life.

The division of rights and duties under IFLA are based on the decree of ruling revealed by the Creator which is stated in the Holy Quran and Sunnah of the Prophet. Islamic moral values and principles influence the rights and duties of Muslims which is not against human nature. For example, only the adult competent women are obliged to fully cover their body. It is not obliged for children. It shows that the command of God for women after puberty is to protect their body or their dignity

because the physical body of women will be changed after puberty. Besides, it is due to the fact that women reproductive functions are active after menstruation period which if it is not protected would disadvantage women. Without the command of God to cover the body and to protect their dignity, women are more open for disadvantageous situation. Shariah jurisprudence has embodied the ideal and universal attributes of rights for both women and men which suitable with human nature and nurture. In the contrary, the basis foundation of law under CEDAW is originated from Western enlightenment which is mainly derived from Christian ethics and moral values.

CEDAW is aimed to protect the private as well as the public spheres of only women from any kind of discrimination. It is different with IFLA which provides the rights and duties of women and men within their private sphere. The meaning of discrimination under CEDAW covers direct and indirect discrimination. Indirect discrimination refers to partial discrimination which puts women in disadvantaged situation compared to their male counterpart. In contrary, IFLA acknowledges lawful or positive discrimination, namely by recognising different treatments given for those in different situations i.e. different roles and functions of women and men in accordance to their biological, physical and psychological appearances based on its sources. For example, Section 8 of IFLA on the minimum age of marriage shows that different entitlement of rights and duties between sexes are due to biological differences between women and men which affect their biological roles and priority in a society. This research highlights that IFLA applied the concept of substantive equality in achieving *de facto* and *de jure* equality of women with men similar with

CEDAW. Therefore the reservations to Article 16 (1) (a), (c), (f) and (g) of CEDAW is not contrary with the object and purpose of CEDAW.

The application of substantive equality under IFLA is illustrated by Section 8 where it is stated that the minimum age to enter into marriage for women is sixteen whereas men is eighteen. In Islamic jurisprudence, there is no limitation of age of marriage. However, the primary objective of marriage in Islam is for obtaining and possessing enjoyment. Therefore, in obtaining and possessing enjoyment in marriage life, any disadvantageous situation should be avoided. Thus, the difference in the age of marriage between women and men is not problematic as long as it is just and equal in accordance with the nature and nurture of Malay Muslim community. Therefore, the reservation made into Article 16 (1) (a) due to the provision of Section 8 of IFLA which provides different age of marriage is not necessarily discriminatory against women. However, it may be disadvantageous Muslim women if at the age of sixteen, women are being restricted of their rights to going to school or even getting education.

Even if the State authority feels that the age of marriage should be up or down for the sake of justice in order to avoid disadvantageous situation against women, then the reservations entered are not necessarily discriminatory against women. Therefore, the reservations made by Malaysian government into Article 16 (1) (a) is aimed to protect women from discrimination if the sameness of rights is acquired by law in the meaning of that Article.

The provision of IFLA which relates with Article 16 (1) (c) can be scrutinized in Section 59 of IFLA which declares the power of court to order a husband on matters pertaining to the maintenance of wife. It is based on the rules in Islamic

jurisprudence that a husband is a primary maintenance provider in marriage. However, this provision does not deny the rights of women to maintain the family in certain circumstances. The provision of Section 59 highlights that men are primarily responsible to maintain the family not women and the court has power to order the husband to give maintenance to the wife. It shows that Islamic law considers the difficulties facing by women in situations where they bear the duty to provide care for children, difficulties during pregnancy and labour as well as difficulties during the nursing of the children and also during menstruation period. Correspondingly, the responsibility of men to be a primary maintainer in a marriage is for the balance rights and duties between women and men which is in accordance with biological, physical and psychological capabilities of men and women in nature. This argument is the basis of the reservation made to Article 16 (1) (c) in which a wife and husband do have different rights and responsibilities during marriage based on their abilities in nature and nurture.

Muslim women do have different methods of dissolution of marriage compared to Muslim men. For example, under Section 49 women have right to dissolve the marriage by method of *khul'* in which she has to make the payment to dissolve the marriage. Section 50 provides that women also have right to dissolve the marriage through the method of *ta'liq* (husband breach his promise made through *ta'liq*). Under Section 52 of IFLA, women do have rights similar opportunity as men to apply for divorce under the stipulated grounds which is called as *fasakh* method. All these provisions are the reasons for reservations of Article 16 (1) (c) in which women do not have the same rights as men in dissolution of marriage. The different methods of dissolution also caused by the biological nature of women which different

with men which affect the rights of the foetus in case the wife is pregnant. Women and men in Islamic marriage have different primary duty for the collective rights and duties. It relates with the duties and responsibilities as mother and father in a Muslim family. Thus, gender roles as stipulated under the provisions of IFLA which acknowledge differences are in accordance with the principle of non-discrimination under Islamic law and do not contradict with CEDAW because it is not disadvantageous women.

The efforts of Malaysia government to eliminate gender inequality can also be seen through laws or regulations which have been legislated or reformed to streamline with gender equality under CEDAW. For example, in 1999, amendment was made to the paternalistic Guardianship of Infants Act 1961 (GIA), which originally vested guardianship of a child in the father. The amendment gave both parents equal rights and duties with regard to their children, especially on matters pertaining to custody and upbringing. The amendment aimed primarily to cater the problem faced by single mothers in dealing with administrative issues pertaining to immigration and school registration. This law does not apply to Muslims in Malaysia;

In 1999, a Code of Practice on the Prevention and Eradication of Sexual Harrasment in the Workplace was launched. Though the code was not legally binding, it sends a clear message on how society views sexual harassment. The absence of legislation means that women have no legal means to seek redress in sexual harassment cases. To date, there is no single act being passed on gender discrimination and the effort is underway to include provisions on sexual harassment in relevant labour laws, namely the Employment Act 1955, the Industrial Relation Act 1967 and the Occupational Safety and Health Act 1994;

In conjunction with the ratification of CEDAW, the Domestic Violence Act 1994, finally enforced in 1996. It was formulated to deal with violence within the household. It may include domestic servants, although there is no provision expressly addressing this. This act is currently under revision to expand the definition of domestic violence, provide victims with maximum protection and allow them the right of compensation. There is also a proposal to criminalise domestic violence. The Anti-Trafficking in Persons Act was also passed in 2007 and marital rape was made an offence and incorporated into the Penal Code in 2008.

Malaysia's commitment to CEDAW for equality of rights between women and men not only can be seen through laws but also with the establishment of various policies with regard to the rights of women public office. From the 1980s and 1990s, continuing into the early years of the 21<sup>st</sup> century proved to be ground-breaking years for women (Suhakam's Report, 2010:3). According to Suhakam's Report, not only did Malaysia see the appointment of the first female judge, but also the first female Director-General of Education as well as the appointment of a few female Secretary-Generals of Ministries. In the diplomatic service, a few female ambassadors, were appointed since the 1980s whereas in the political arena, there have been a number of female ministers in the Cabinet since 1969.

Pursuant to the *fatwa* issued in 2006, which allows for the appointment of female judges in the Syariah courts, the state of Kelantan has already appointed three female judges as *sulh* officers (mediation officers in court) with the power to serve as Syariah judges. The Syariah judiciary of the Federal Territories in 2010 appointed two female judges to serve in the Syariah courts of the Federal Territories.

The recent government policy of employing at least 30 percent of women in the decision-making positions in the public sector indicates a positive development which has been introduced in 2004. In 2016, 35.8 percent of women officers were appointed and contributed in decision-making positions (Hua, 2017). Other than that, beginning 2010, the authority in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya agreed to appoint women as judges at the Shari'ah Courts. This is based on the National Fatwa Committee Council ruling that a woman can be appointed as a Shari'ah judge except in matters concerning Hudud and Qisas (Mohamed Azam Mohamed Adil & Noor Huda Roslan, 2016).

The establishment of the Ministry of Women Affairs in January 2001 with the appointment of a lady minister specifically to look into issues concerning women, the family and the community (official website of MWFC, 26 October 2016). It has been implemented in accordance with the document entitled '*Platform for Action for the Development of Women towards the Year 2000*', namely for the '*establishment of a full-fledged ministry that demonstrates the government's commitment to raise the status of women in this country*'. The latest reorganization of MWFC now oversees four (4) agencies under its direct jurisdiction. They are the Department for Women Development (JPW), the Social Welfare Department of Malaysia (JKMM), the National Population and Family Development Board (LPPKN) and the Social Institute of Malaysia (ISM).

MWFC is entrusted with the responsibility to promote and raise public perception on the importance of the role of women and family institution in contributing towards the developmental agenda of the nation. The Ministry is also responsible for the creation and promotion of community and social awareness

programmes as well as the progression of the nation's social development objectives aspects especially those relating to social welfare, in line with the "Caring and Developed Society", emphasized in the nation's *Wawasan 2020*<sup>73</sup> (Vision 2020). The vision<sup>74</sup> of this ministry is to achieve gender equality, family and community development as a caring and prosperous basis of a fairly developed country whereas the goal of this ministry is to develop a prosperous society through the sharing of responsibility.

In order to promote awareness and provide education relating to human rights in Malaysia, the Human Rights Commission of Malaysia (SUHAKAM)<sup>75</sup> was established by Parliament under the Human Rights Commission of Malaysia Act 1999, Act 597. Another functions of SUHAKAM as set out in Section 4 (1) of the Act are to advise and assist Government in formulating legislation and procedures and recommend the necessary measures to be taken. The purpose of SUHAKAM also to recommend to the Government with regard to subscription or accession of treaties and other international instruments in the field of human rights including the matters or conflict arises with regard to CEDAW application. It is also stated under section 4 (4) of the Act that regard shall be had to the Universal Declaration of Human Rights 1948 (UDHR) to the extent that is not inconsistent with the Federal Constitution. This means that whatever rights and liberties on women not mentioned in Part II but referred to in the UDHR and CEDAW must be considered, provided that there is no

<sup>73</sup> <http://www.epu.gov.my/web/guest/wawasan-2020-1991-2020> In 1991, 2020 (W2020) was introduced with the objective of becoming a developed nation by the year 2020 with its own mold. W2020 outlines the roadmap to achieve developed nation status by targeting an economic growth rate of 7 percent per year until 2020

<sup>74</sup> <http://www.kpwkm.gov.my/visi-misi-dan-objektif>

<sup>75</sup> SUHAKAM is Suruhanjaya Hak Asasi Manusia in Malay language. Its English name being The Human Rights Commission of Malaysia. SUHAKAM was established by the Parliament under the Human Rights Commission of Malaysia Act 1999, Act 597.

conflict with the Constitution of this country (Official Portal Human Rights Commission of Malaysia, 17 June 2016).

### **5.5 Reformation of Muslim Women's Rights Law: The Example of Morocco**

In some other Muslim countries, legislation and judicial decisions to promote women's rights have been based, in significant part, on CEDAW (Abdul Ghafur Hamid, 2016:243). Finding inspiration from Morocco's successful legal transformation, Malaysia has also tailored a text on *Guide to Equality* to address the specific needs of Malaysian women. This action has been taken in 2005 and the Islamic family law act has been considered to be amended. In this section, the analysis is made on the reformation of Muslim women's rights law in Morocco but not Tunisia or Turkey which are more radical and secular.

Morocco is the Maghreb nations of North Africa in which an influential Islamic feminist movement has successfully lobbied for family reform (Brad Archer, 2007:49). This has been adopted as a model for Malaysia's increasingly enthusiastic demands for gender equality. It is stated that the reformation of the family law in Morocco shortly following the crowning of King Muhammad VI in 1999. It is codified in Moudawana (Mayer, 1995:434). In 2001, the King has intent to pay heed to the demands of reformists in eliminating violence and poverty which come to the consideration of reforming Moudawana (Pitman, 2004:4). The discourse was informed by a progressive Quranic interpretation which emphasized gender equality and domestic harmony. Finally, in February 2004, King Muhammad IV enacted Morocco's new family law.

With regard to the reservations entered by Morocco into article 2, the Government of the Kingdom of Morocco express its readiness to apply the provisions of this article provided that: They are without prejudice to the constitutional requirement that regulate the rules of succession to the throne of the Kingdom of Morocco. They do not conflict with the provisions of the Islamic Shariah. It should be noted that certain of the provisions contained in the Moroccan Code of Personal Status according women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic Shariah, which strives, among its other objectives, to strike a balance between the spouses in order to preserve the coherence of family life.

With regard to article 15, paragraph 4, the Government of the Kingdom of Morocco declares that it can only be bound by the provisions of this paragraph, in particular those relating to the right of women to choose their residence and domicile, to the extent that they are not incompatible with articles 34 and 36 of the Moroccan Code of Personal Status.

With regard to reservations made into article 9, paragraph 2, the Government of the Kingdom of Morocco makes a reservation with regard to this article in view of the fact that the Law of Moroccan Nationality permits a child to bear the nationality of its mother only in the cases where it is born to an unknown father, regardless of place of birth, or to a stateless father, when born in Morocco, and it does so in order to guarantee to each child its right to a nationality. Further, a child born in Morocco of a Moroccan mother and a foreign father may acquire the nationality of its mother by declaring, within two years of reaching the age of majority, its desire to acquire that

nationality, provided that, on making such declaration, its customary and regular residence is in Morocco.

With regard to article 16, the Government of the Kingdom of Morocco makes a reservation with regard to the provisions of this article, particularly those relating to the equality of men and women, in respect of rights and responsibilities on entry into and at dissolution of marriage. Equality of this kind is considered incompatible with the Islamic Shariah, which guarantees to each of the spouses rights and responsibilities within a framework of equilibrium and complementary in order to preserve the sacred bond of matrimony. The provisions of the Islamic Shariah oblige the husband to provide a nuptial gift upon marriage and to support his family, while the wife is not required by law to support the family.

Further, at dissolution of marriage, the husband is obliged to pay maintenance. In contrast, the wife enjoys complete freedom of disposition of her property during the marriage and upon its dissolution without supervision by the husband, the husband having no jurisdiction over his wife's property. For these reasons, the Islamic Shariah confers the right of divorce on a woman only by decision of a Shariah judge.

With regard to article 29, the Government of the Kingdom of Morocco does not consider itself bound by the first paragraph of this article, which provides that 'Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. The Government of the Kingdom of Morocco is of the view that any dispute of this kind can only be referred to arbitration by agreement of all the parties to the dispute.

## 5.6 The Reformed Mudawana Law of Morocco

In the state of Morocco, the new body of law instituted several significant changes, including the raising of the marriageable age of women to 18 and the abolishment of the obligation of obedience. While polygamy is remained stated legal under the new law but its practice is greatly restricted by a set of conditions so rigorous as to render it virtually unfeasible. It has been noted that in framing the Islamic family law reform in Morocco, the arguments are based on four sources of authority which are Quranic principles, national constitutional law, international human rights law and sociological studies investigating interactions within Morocco families structure (Brad Archer, 2007:56). There are two instruments of change which have been relied on in the transformation of Islamic family law in Morocco which are “*One Hundred Measures*” and “*The Guide to Equality in the Family in the Maghrib*”.

The reformed Mudawana defines marriage as “a legal contract by which a man and a woman consent to unite in order to have a common and lasting marital life”. The stated goal of marriage is to create the foundation of a stable family. Understanding the objective of marriage is seen as crucial factor in giving impact on the successful marriage. The objective of marriage is not only for sexual satisfaction but comes with duties and responsibilities between human beings. That is why it is stated that women and men under Mudawana law have reciprocal rights and duties.

With regard to polygamous marriage, the Moroccan Code of Personal Status of 1957 took a middle course between Syria and Tunisia. It is not prohibited polygamy like what has been done by Tunisia but provides conditions for polygamy in which the wife can challenge a polygamous arrangement not the judge. However, there are several modifications made in the reformed Mudawana law of Morocco.

Firstly, it now requires judicial approval and not the husband discretion. Second, the husband must demonstrate the necessity of the second marriage and demonstrate that he can provide adequate resources to fairly and equally support two households. Third, retain that polygamy is impermissible if the wife previously required that the husband not marry a second wife. Lastly, it is cited the verse of the Holy Quran on polygamy that “if you fear being unfair, marry only one man”.

In the case of divorce, it is clearly stated that the provisions of Shari’ah require a husband to provide a mahr or dowry and maintenance to the wives. Therefore, in the reservations it is stated that for these reasons, the Islamic Shari’ah confers the rights of divorce on a woman only by decision of a Shari’ah judge. It is because it is clearly contradict with the provisions of Article 16 (1) (c) of CEDAW on the same rights on dissolution of marriage. In the Mudawana law, divorce by husband requires a judge’s permission and review. It is similar with the provision of divorce under IFLA which requires the Court’s permission under Section 45 of IFLA except the provision of Section 55A of IFLA which seems that a husband still permitted to divorce his wife outside court. The Mudawana law of Morocco also enforces that women have rights to ask for divorce for any abuse that she suffers by allowing the liberal admission of evidence. While mutual divorce without cause is available as long as no harm comes to the couple’s children.

With regard to the child custody, Article 173, 174 and 175 of Mudawana law address on this issue. Article 174 states that a woman may not remarry without losing custody of her children unless the husband is suitably removed from the bloodline, the husband is the child’s legal guardian, or she is the child’s legal guardian. Article 175 allows the mother to retain custody even if she remarries or moves away from the

husband, so long as the child suffers no harm. Finally, a woman will not lose custody of her children even if she remarries provided one of the four following situations applied: 1) the child is seven years old or younger or separation would harm the child; 2) the child has an illness or condition that makes caring for the child by anyone other than the mother impossible; 3) the spouse is the legal guardian of the child; or 4) the mother is the legal guardian of the child. Another reforms made is once a child turns fifteen, he or she may decide which parent to live with following a divorce.

With regard to the right of the child to the maintenance, Mudawana law provides that the husband must provide food, lodging, and financial support. In addition, the government created a special fund for children whose father could not provide for them due to *force majeure*. Another changes made in Mudawana law is on the time limit for resolving legal disputes from a divorce. It is aimed to decrease judicial inaction which cause a wife and a children to wait for years to receive the maintenance from the husband. It is provided that a judge must close the case in six months. Lastly, the government of Morocco increases the number of family courts in anticipation of an increased family court caseload.

It is stated that in Mudawana law, it is a provision that allows grandchildren from either a deceased son or a deceased daughter of a grandparent to receive an obligatory amount of the grandparent's estate. The reformed Mudawana also extends greater rights to women and children regarding paternity disputes. Children born out of wedlock receive legal recognition, and if an individual denies parentage, courts will use scientific testing to resolve the dispute. It is noted that while Morocco previously ratified the Convention on the Rights of the Child (CRC), which require

similar actions, the reformed Mudawana establishes these international principles in Moroccan domestic law for the first time.

### 5.7 Concluding Remarks

In this chapter, it can be concluded that IFLA has the attributes which common with the attributes of Islamic human rights instrument which are CDHRI and UIDHR. Since CDHRI and UIDHR are harmonious with UDHR in its principle and objective, IFLA also harmonious with UDHR in its principle of justice and human dignity. However, IFLA regulates the rights and duties of Muslim women and men in marriage and family relations matters. Different entitlement to rights and duties of Muslim women and men under IFLA due to different biological, physical and psychological nature of them is universal and failure to acknowledge this difference will probably caused for discrimination. Since then, the reservations made into Article 16 (1) (a), (c), (f) and (g) of CEDAW by Malaysian government are reasonable and necessary to protect Muslim married women from different context of law and culture which could disadvantageous them. Most importantly, women are preserved from direct and indirect discrimination through the provisions of law and customary practices.

Since Article 16 of CEDAW provides the rights of women in marriage and family relation and IFLA provides the rights and duties of Muslim women and men in marriage and family relation matters, a major difference discovered between IFLA and CEDAW is in the coverage of law, namely IFLA regulates the rights and duties of Muslim women and men in marriage and family relations based on Islamic religious principles whereas CEDAW is aimed to protect the private as well as public spheres

of women from any kind of discrimination based on Western determination of law and culture. Another difference between IFLA and CEDAW is the basis of the foundation of law, in which IFLA is founded under the Shari'ah framework of which the sources and methodologies are based on Divine revelations, namely the Al-Qur'an and Sunnah of the Prophet P.B.U.H and Muslim jurists as the philosophy of rights and duties. On the other hand, CEDAW is based on human ideology originated from Western enlightenment which is mainly derived from Christian ethics and moral values.

In examining the application of CEDAW in other Muslim countries, there are some reformation made by Muslim states which is suitable to be implemented in Malaysia. For example on the minimum age of marriage which is standardized at 18 years for women and men in Morocco. The amendment to this provision is not contradict with Shari'ah jurisprudence since there is no minimum and maximum age of marriage in Islamic jurisprudence. Besides, IFLA has put clearly the power and authority of Syarie judge to ensure justice is implemented between members of the family institution especially women. Under IFLA, the authority given for *wali* and Syarie judge can be considered as adequate and appropriate measures under Article 2 (d) and 5 (a) of CEDAW. Thus, the rights and duties of these two persons under the provisions of IFLA have to be empowered to ensure that there is no direct and direct discrimination against women.

Despite the differences between IFLA and CEDAW, some similarities are also observed in the context of nature of women creation as well as the women's need to enjoy life. Since the biological nature of women is similar whether they are in the West or the East, and considering that both IFLA and CEDAW are aimed to protect

women from infringements of law, both laws acknowledge biological differences between women and men by taking into account the *de jure* and *de facto* equality between women and men in establishing justice. It is observed that IFLA specifically provides the ideal entitlements to rights and duties between women and men in marriage and family relation while CEDAW provides the framework to be followed to make sure that there is no discrimination against women within their public and private spheres. However, the application of CEDAW is not as an alternative to IFLA but as complementary or improvement to protect the individual rights of women which is not highlighted in the provisions of IFLA.

In its notion of different entitlements to rights and duties between wife and husband with regard to marriage and family relations under IFLA, it is traced that the reservations made to Article 16 (1) (a), (c), (f), and (g) does not disadvantage women. In this respect, its concept does not contradict CEDAW's, namely with regard to *de facto* and *de jure* equality of women with men. However, Article 16 (1) (a), (c), (f), and (g) of CEDAW should be universally applied by multiculturalists country if the word 'same' is to be replaced with the most suitable word which constitutes the meaning of 'substantive and formal equality' which acknowledge the major differences between human beings around the world.

From the analysis made, Mudawana Law of Morocco is the best illustration of the reformed Muslim women's rights since it refers to the principle under the sources of Shari'ah. As long as it is permissible and not prohibited under Shari'ah, the traditional practice on the rights of women which is disadvantageous women are reformed under Mudawana law.