

CHAPTER THREE

THE PHILOSOPHY OF DIFFERENT RIGHTS AND DUTIES BETWEEN WOMEN AND MEN IN ISLAMIC PERSPECTIVE OF HUMAN'S RIGHTS

3.1 Introduction

In the previous chapter, the attributes of rights in the feminist international jurisprudence has been discussed by considering the formation and objective of CEDAW. The discussion highlights that commonalities exists between the attributes of rights based on the feminist critiques' views and Islamic jurisprudence on rights, in which they acknowledge the differences between people in maintaining justice and equality for the collective goods. Hence, this chapter focuses on the key points in understanding the philosophy and attributes of Islamic family law within Islamic human rights framework as they influence the meaning and substance of the principles of IFLA with regard to the rights of women.

Women in the West and women in the East originate from the same process of human creation. All of them might share similar needs and preferences due to their biological nature. However, in reality, they come from different ways of life due to the differences in religion, belief, race, culture, ability and disability which make them different. Therefore, this chapter examines the concept of.

'difference' applied by the Islamic jurisprudence based on its primary and secondary sources. A comparison is made within a scientific view on the biological, physical and psychological nature and differences of being female and male to highlight that Islamic law is the law of nature. This concept of difference is aimed at considering that Islamic jurisprudence has a common understanding with and corresponds to the international jurisprudence on the importance of acknowledging the differences in human beings to facilitate the implementation of justice.

This chapter analyses the differences of women and men in biological, physical, psychological and cultural aspects according to Islamic perspective and science to also prove that in spite of similarities between the two genders, they are in fact different. In order to understand the concept of gender justice or equality under IFLA, the principle of justice in Islamic jurisprudence is investigated. The discussion of justice highlights the principle of social justice to demonstrate that while maintaining justice, Islamic jurisprudence acknowledges the diversities among human beings. The implementation of justice in Islamic law is carried out by understanding the objective to be achieved through laws. Therefore, this chapter examines the principle of *maqasid syar'iyah* as a tool of justice in order to prove that Islamic law does not violate human dignity and rights. The implementation of justice in Islamic jurisprudence is consistent with human needs and preferences in life. It also considers that the methodological approach of Shari'ah which is both immutable and flexible is in line with the principle of justice and equality which accommodates the differences among human beings in nature and nurture.

This chapter also examines the relationship between rights, duties and moralities in Islam to understand the context of gender equality in Islamic perspective.

To show that Islamic jurisprudence upholds the principle of gender equality based on the philosophy of equal rights and duties in Islamic marriage, understanding women's rights in the context of human rights in Islam is critical since IFLA and other international instruments on human rights in Islam do not separate between the rights of women and men. Their rights are collectively considered in the sources and formation of Islamic human rights law. Therefore, Islamic human rights which is based on the attributes of rights in Islam is also analysed in this chapter so that comparison will be made with CEDAW and UDHR on international jurisprudence on rights.

3.2 The Concept of Difference in Islamic Perspective

In Islamic jurisprudence, Allah the Almighty has created humans with a variety of differences in terms of their sexes, religions, languages, colours, interests, perceptions as well as abilities and disabilities. These differences are normal and they are obvious evidences of the Almightyness and Omnipotence of Allah. Allah SWT said in the Qur'an:

“And if your Lord had willed, He could have made mankind one community; but they will not cease to differ” (Qur'an, Hud, 11:118)

“And of His signs is the creation of the heavens and the earth and the diversity of your languages and your colours. Indeed, in that are signs for those of knowledge.” (Qur'an, Rum, 30:22)

“O mankind, verily We have created you from a single (pair) of a male and a female, and have made you into nations and tribes, that you may know each other. Verily the most honoured of you in the sight of God is the most righteous.” (Qur'an, An-Nisaa', 4:21)

The above verses indicate that Islamic law acknowledges the major differences in human beings in terms of their sexual, language, national, skin color

and cultural features. Islamic jurisprudence acknowledges the differences among human beings, not only with regard to sexual differences, but also differences of beliefs (Raghib As-Sirjani, 2013:6). Thus, these differences cannot be seen as a symbol of enmity between people, but they are created by Allah as His Signs and Power and for people to know each other. This is the reality that happens among all people around the world and can be universally accepted. This is also a sign of the guided choice by Allah the best way to be followed in dealing with difference. In another perspective, Islamic jurisprudence views the differences of faith among human beings as the right of the individual human being¹¹. This concept of difference reaffirms the need for social cooperation and mutual assistance among people in order to achieve justice even though they are different.

People around the world, regardless of whether they are Muslims and non-Muslims, live in communities which consist of at least different sexual nature. Their sexual difference influences the reproductive functions and roles of being either female or male. Correspondingly, the functions of hormones also influences the psychological, physical and physiological properties which would establish gender functions, roles, needs, abilities and disabilities. All of these are the justifications for the differences of roles, rights and duties which exist between women and men around the world and in specific regions. The differences between them should be acknowledged and should be considered as complementary to their needs and preferences.

Due to this universal concept of difference under Islamic jurisprudence, Shari`ah has been claimed to provide a direction in establishing a suitable way of life

¹¹ Al-Qur'an, Yunus 10:99 "And had your Lord willed, those on earth would have believed, all of them together. So, will you (O Muhammad SAW) then compel mankind, until they become believers."

for all eras and regions. This can be achieved by understanding its objectives and principles. Human beings around the world live based on two foundations: intellect and interest. However, due to space and time gaps that exist among people, the priority in enjoying this life can be divided into three: i) matters which are very essential, ii) matters which fall as needs to overcome hardship in life, and iii) matters which are complementary or those considered as embellishments to signify the interest for improvements.

In the perspective of Islamic methodology and sources, the concept of difference can be perceived in the context of intellectual and cultural differences. It represents the concept of unity within diversity in Islamic jurisprudence. The fact that Prophet Muhammad teaches his followers ways to deal with the religious sources (the Qur'an and Hadith) and encouraged the companions to apply the methodology of *ijtihad* (rational/human reasoning) even in his presence clearly implies that differences in ideology are expected and permissible.

Muslims are allowed to resort to rational reasoning when facing a situation about which a clear religious text was not revealed. However, human rational cannot go against the fundamental principle of Shari'ah law on the rights of Allah although human intellect is used as a source of wisdom across the world. In other words, Islamic jurisprudence considers that it is essential and necessary to use rational reasoning methods to regulate and control the nurture rules pertaining to human life. This is a proof of the flexibility of Shari'ah in dealing with different people, situations, and cultures. Allah SWT says:

“Allah intends for you ease and does not intend for you hardship and [wants] for you to complete the period and to glorify Allah for that [to] which He has guided you; and perhaps you will be grateful.” (Qur’an, Al-Baqarah 2:185)

In the context of human rights, it is asserted that claiming Islam as fully consistent with human rights is problematic, as many rights given in Islam are based on sex, but the idea that it makes human rights in Islam inconsistent with international standard is unacceptable (An-Naim, 2009). This is because human rights in Islam is in accordance with the biological nature of human beings which is universal to all human beings. The different entitlement of rights according to sex in Islam might result in the equality of dignity and justice for being women and men. Indeed, certain rights are given specifically and purposely to women and men to ensure equal dignity and justice as Islam appreciates biological differences (Sheriff, 2007). The concept of difference under Islamic jurisprudence shows that Islam is not monolithic in nature, but under certain circumstances, it is flexible and universal based on the needs and ability of human beings in accordance with their nature and nurture.

The acknowledgement of the concept of difference is important in determining the rights and duties of women and men in marriage and family relation because it relates with the balance of roles between both genders for the collective rights. It is also linked with the ability and disability of being women and men due to their biological and cultural differences. Under Islamic law, sex and gender differences are interconnected and it might be hereditary in terms of belief system, biological features and social construct. Although these may be similar or different with another community, more importantly, the rules pertaining to gender equality in Islamic jurisprudence is in accordance with biological and cultural factors as they have an

integral reactive effect in balancing the roles of women and men to complete their needs and preferences (Adeeb Aqeel, 2006).

3.3 Women Nature in the Quran and Science

The coming of Islam 14 centuries ago has elevated the status of women in social, economic and political domains from their wretched state during the pre-Islamic era. However, with the dimming of Islam in the 19th and 20th centuries, much of this knowledge and Islamic practices with respect to women's rights were not developed to fulfil their role in contemporary Muslim societies (Mek Wok, Najibah & Nora, 2016: 197). This situation leads to the misunderstanding of the textual context of law on the rights of women. This misunderstanding can be overcome by understanding the concept of difference in Islamic jurisprudence, namely by studying the status of women as stated in the Qur'an and Sunnah of the Prophet.

Qur'an is the highest constitution of Muslim. It is the sources of knowledge, sources of laws, sources of rights and duties and considered as the primary source of all aspects of the Muslim life. Qur'an is claimed as the book of Signs. It is not just a book of science because it deals with not only science, but the whole aspects of this life here and hereafter. Muslims as well as non-Muslims agree that the Qur'an is the Arabic literature par excellence – that is the best Arabic literature on the face of the Earth (Zakir Naik, 2007:7). The first surah revealed is Surah al-'Alaq which refers to human creation. Sayid Qutub stated that "the first verse of Surah al-'Alaq has generally mentioned one of the attributes of Allah, that is to create and starting the creation" (Zulkifli Al Bakri, 2012:8). The first word or command of the Creator is iqra' which means "to read" in the name of the Creator. This command is a general

command for both women and men. Reading through makrifatullah (by knowing the Creator and its creations and purpose) has been argued as the most important aspect in achieving success and happiness in life.

In the scientific perspective, human studies include the philosophical, biological, social and cultural aspects of human life. The field of human sciences aims to expand the understanding of the human world through a broad interdisciplinary approach. It encompasses a wide range of disciplines – including history, philosophy, genetics, sociology, psychology, evolutionary biology, biochemistry, neurosciences and anthropology (Wikipedia, 2018). It is the study and interpretation of the experiences, activities, constructs and artefacts associated with human beings. The study of the human experience is historical and current in nature. In a scientific view, biology has the most precise system of classification in nature and involves few social and political factors in western philosophy; nevertheless, even in biology, a considerable disagreement exists as to the criteria for differentiating species, behind which lies different philosophies of science (Holmstrom, 1999). On the other hand, taxonomists state that there is no such thing as overall similarity. For example, the creation of human beings with their organs all in pairs such as the brain, testis, ovary, hands, legs, eyes and ears except for the head, heart and belly button is the evidence that women and men have similarities and differences, whereby they are complimentary to each other just like their organs.

3.3.1 Biological Nature of Women

More than 1,400 years ago, the Holy Qur'an confirmed in an accurate scientific manner that the creation of women is similar to men, who are developed from a

sperm-drop mixture (*nutfah amshaj*) and that they have been given hearing and sight¹², except in the creation of Adam as the first human being who was created from clay¹³. The Qur'an mentions that the creation of human being originates from when the 'sperm' and 'ovum' are mixed in the female uterus¹⁴. This points out that from the beginning of creation, both women and men go through a similar process of creation but with different elements and functions to complete their predetermined life to ensure the existence of the human species. In spite of this, the Qur'an has mentioned that Hawa have been created from Adam to accompany him whereby this relationship is blessed by Allah's mercy¹⁵. Qur'an also states that the female body has been created in such a way that it is the safest place for the development of the foetus in the uterus¹⁶, in accordance to its function. Other than that, Qur'an also states that women carry the role as the mother to breastfeed their children for about two years¹⁷. This role also relates with women's sexual and social function in the family and society.

Biologists found a similar discovery stated in the Qur'an, whereby the foetus in the mother's womb is covered by three (3) layers of coverings, which are the mother's abdomen¹⁸, the uterus wall and the amniotic membrane. In a fundamental reference text in the field of embryology, it is clearly stated that the life in the uterus has three stages: i) pre-embryonic: the first two and a half weeks, ii) embryonic: until the end of the eighth week, and iii) foetal: from the eighth week to labour (Keajaiban

¹² Al-Qur'an. Al-Insan 76:2 "Indeed, We created man from a sperm-drop mixture that We may try him; and We made him hearing and seeing"

¹³ Al-Quran. As-Shad 38:71-74 "(Remember) when your Lord said to the angels: "Truly, I am going to create man from clay". So, when I have proportioned him and breathed into him of My [created] soul, then fall down to him in prostration. So, the angels prostrated - all of them entirely. Except Iblees; he was arrogant and became among the disbelievers".

¹⁴ Al-Quran, At-Thariq 86:5-7 "So let man observe from what he was created. He was created from a fluid, ejected. Emerging from between the backbone and the ribs."

¹⁵ Al-Quran. An-Nisaa' 4:1

¹⁶ Al-Quran. Al-Mursalat 77:21-23

¹⁷ Al-Quran. Al-Baqarah 2:233

¹⁸ Al-Quran. Az-Zummar 39:6

Al-Qur'an, 2016). This is an irrefutable evidence that women differ with men in their biological nature.

Women and men do have a distinct nature and their biological feature and this is a crucial determinant that defines the person's identity in becoming a female or male through the biology or the sex of the person. In order to determine their roles as female or male to enjoy this life collectively and personally, their biological nature should primarily be considered to eliminate discrimination. Scientifically, once a person attains puberty, their reproductive functions are activated. Women achieve puberty when they get menstrual bleeding for the first time. Muslim jurists opine that this usually occurs at the age of nine to twelve years old. Upon this event, women can already marry. According to science, the process of menstruation is women's biological preparation by nature for pregnancy. During this period, the uterus grows a new lining (endometrium) to get ready for a fertilized egg. In reality, it can be observed that women gain puberty earlier than men and they are most likely by nature to be preparing themselves for womanhood. Under Islamic legal ruling, an individual becomes responsible to fulfil religious rights and duty once he or she attains puberty. At this age, every person become responsible for what he or she does. The reproductive function of women is totally different with men due to the different functions of hormones that develops in their body which allows them to become pregnant, give birth to a child and breastfeed it. This reproductive function of women makes their role in a family institution more meaningful as only women are equipped these fundamental functions.

The sex difference of human beings is contended as a genetic process which is caused by the existence or non-existence of certain chromosomes (Nicholson,

1997:5). Scientist has no way of determining the sex of the foetus in the womb at the early period of pregnancy. Human chromosomes were found to derive from the female ovum and the male sperm. The female ovum and the male sperm contain of twenty-three (23) chromosomes. Each chromosome contains the genetic instructions that make a significant contribution to the development of each part of its body. Even though both women and men have similar sex hormones, but the hormones differ in terms of their characteristics in becoming XX or XY which affects the determination of a person's sex. For example, a male baby has more testosterone in his blood vessels, but this is not the same for a female baby (Nicholson, 1997:9). All these differences affect their roles and duties later in life as well as the way they think, feel and act (Nicholson, 1997). In Islamic jurisprudence, the determination of the sex of a human being is the right of God.

Since the biological nature is related to the reproductive function, the role of women in marriage and family relation often plays an important explanatory function (Nancy, 1999). Therefore, biological difference or sex difference explains the functions of being female and male. In completing their preordained life, it is unjust to assign the social roles of women based on the biological function of men and it is inappropriate or unsuitable for women to hold the social function of men based on men's physical and psychological features. Therefore, determining gender roles or social roles must be done in accordance with each gender's biological nature and reproductive function.

Women in the West and women in the East have no difference in terms of reproductive function. They are all equal in nature of their creation but sometimes they are assigned with different identity due to women's cultural and religious

affiliations which affect their rights and duties. They share similar biological needs, abilities and disabilities in accordance with their own way of life which affect their roles in a society. As happiness is purely subjective, fundamentally, most humans, including women require certain basic primal biological needs to be fulfilled in accordance to a universal and ongoing impression of well-being. It also has been argued that those who emphasise biological differences between the sexes as critical to their social roles and their natures usually maintain that the biological differences cause psychological differences, and these in turn determine their respective social roles (Bardwick, 1971).

3.3.2 Psychological, Emotional and Physiological Nature of Women

As biological factor influences psychological attributes of women and men, it is linked with the function of the heart and the brain. According to Aubele, Wenck and Reynolds (2012), the heart and the brain are unique structures built for the individual. The brain can counteract emotional and behavioural problems for individuals and is the tool to create a more fulfilling satisfactory life.

In spite of that, studies have shown that the reproductive function is affected by a small area in the brain called the hypothalamus. The hypothalamus functions as a control centre for many functions of the autonomic nervous system, and it affects the endocrine system due to its complex interaction with the pituitary gland (which control visceral functions, body temperature and behavioural responses such as feeding, drinking, sexual response, aggression and pleasure) (Encyclopaedia Britannica, 2017). Therefore, since women have a different reproductive function compared to men, it will affect the system which relates to it. Despite that, studies

found that a genetic factor affects the carriage or potential for development, namely the formation of physical characteristics as compared to the intellect. The differences do not show gaps in intelligence between women and men (Nicholson, 1997:118) but they signal the needs and preferences of women in continuing their life based on their natural function.

Research shows that females appear to have greater needs to be close to people than males. It also has been contended that women are more dependent on other people compared to men. It has been argued that since women do not develop in a 'vacuum' as men do, their personality development is different. Women's feelings, needs and preferences make them close to people and more dependent to other people, especially men. In Islamic law, the role of men as wali is regarded as the protector and it is deemed as important to empower women due to their psychological nature. In spite of that, their personality development is not only influenced by their sexual roles and functions but also by social relations within the family, neighbours, community and country they live and grew up in (Yusoff Abas & Nor Izam Alias, 2010:51).

In another perspective, the Qur'an has described the blood circulation system that affects the physiology of human beings (Zakir Naik, 2007:57). It is argued that thirteen centuries before, what happens in the intestines was not known. Thus, the notion that organs are nourished by the process of digestive absorption found in the description of the production of milk in cattle is strikingly similar to what research in modern physiology has discovered. Scientists found that chemical reactions influence the intestines and from there, substances extracted from food pass into the blood stream via a complex system, sometimes by way of the liver, depending on their chemical nature. The blood transports them to all the organs of the body, among

which are the milk-producing mammary glands. Therefore, emotional developments in the body of women are also affected by the blood circulation. For example, the emotion of a mother during pregnancy and breastfeeding is affected by the hormones that develop in the mother's body. Scientists found that the hormones in women's body naturally develop to create milk and to stabilize the physical, psychological and emotions of a mother (Nicholson, 1997).

Some psychologists believe that women do have similar capabilities as men, but they have different needs and ambitions (Nicholson, 1997). Thus, the needs and ambitions of women which can be said to affect the ability and disability of women in certain situations are also influenced by the blood circulations system. Since women naturally can produce milk for their babies and they menstruate as well as give birth in relation to the blood circulation process, it will affect the women's psychological health and emotion at the prescribed times. Even though this does apply at all times, and not to all women, they do indeed need special treatment which are not similar to men during these particular times.

In the context of intellectual performance and personality attributes, women were found to have similar intellectual and personality with men except only during the prescribed times when the blood circulation system in women's body affect them psychologically which in turn can affect the intellectual performance and personality of women. Zakir Naik alleged that adrenaline produces a psychological state very much like the condition of extreme fear; yet, subjects injected with it became euphoric when around another person who acted very angry. Thus, even if the differences in sex hormones between women and men affect brain functioning, some psychologists contend that it would not necessarily bring about consistent emotional and

behavioural differences between women and men. Thus, it may be asserted that the physiological differences do not always affect the emotional functions of women but may probably affect them in situations during which the hormones are functioning such as pregnancy, milk production or menstruation.

3.3.3 Physical Nature of Women

Women are created by God and their creation and growth differ with men physically and materially (Mahmud Saedon, 1999:189; Yusof Abbas & Nor 'Izam Alias, #:37).

The physical appearance of females at birth is slightly similar with males except for their genitals. But female's physical appearance differs more obviously from male after puberty (Nicholson, 1997:45). The earlier years' smooth growth is suddenly affected by increased female or male sex hormones. It causes the internal environment of the body to change to accentuate the feminine or masculine reproductive maturity. Research found that more than thirty percent of men are physically stronger than women and the physical development of women and men is affected by the sex hormones (androgen and oestrogen) which exists in human body (Nicholson, 1997:41-42).

In Islamic jurisprudence, the sign of attainment of the age of puberty for women is whenever women menstruate for the first time. Normally, women attain puberty earlier than men and this affects their physical growth as youths. On the other hand, the sign of puberty for men is whenever men ejaculate for the first time. The level of an individual reaching the age of maturity affects a person's life. For example, male and female hormones appear in both sexes but female hormones, namely progesterone is more likely to be in women's body than men. Oestrogen affects the

development of uterus, chest and waist which are the dominant parts that change in women's body, while testosterone influences the development of penis, shoulder and hair, the dominant parts that change in men's body due to puberty.

The changes in the body size and shape, muscle, fat, skin, energy, stamina and reproductive competency (Yusof Abas & Nor 'Izam Alias, 2010) of women gradually prepare them for their roles and function to be an adult. All these changes activated by the hormonal growth after puberty would be the reason why women's dignity and rights are different with men after puberty and marriage. Women's dignity and rights after puberty and marriage in Islamic jurisprudence are in tandem with their biological, physical and psychological appearance to provide them the necessary protection they deserve. All the differences in appearance also indicate that women and men are complementary in building the nation and civilisation with their respective strengths and abilities. They are equally responsible in managing and empowering the nation with their primary and secondary roles and functions.

3.3.4 Women, Religion and Culture

Religion is a great spiritual system and it is closely related with the way of life of human beings. In Islamic jurisprudence, religion is defined as the way of life which consists of principles, values and laws of how human beings should pursue this life individually and collectively. Religion is also defined as any cultural system of designated behaviours and practices, world views, texts, sanctified places, ethics, or organisations that relate humanity to the supernatural or transcendental (Wikipedia, 11th August 2017). Every religion of the world has some general principles or values which they share in this world for the welfare of a society (Sadia Rehan, 2013). Since

religion is considered as a great spiritual system, it is important for the individual conscience to be considered as part of the attributes of universal human dignity and rights.

In Islamic jurisprudence, acknowledgment of the difference of faith and culture is not a new concept. Difference of faith and culture is a natural concept because it occurs throughout life, anywhere and anytime. Women are created equally with men and are given the same purpose of creation. The purpose of the creation of human being in this world is to bring civilisation to the nation based on the rules of the Creator. Baderin (2001) argued that Islam gives liberty to a human being through the Guided Book in order to encourage him/her to develop himself/herself and seek perfection through piety and righteousness to enhance his/her inherent dignity. Islamic law derived from the Qur'an and Hadith of the Prophet indicates that in the creation of humans, there is an element of soul which is given by God before his/her birth, accompanied by the psychological reaction (feeling or emotion).

Even in the absence of a biological explanation, a variation according to culture strongly suggests that there is a social explanation (Nancy, 1999). It is contended that if there is any connection between sex roles and psychological characters (whatever the direction of the causation), then one would expect further research to reveal that psychological sex differences vary cross-culturally. This would offer dramatic evidence in favour of environmental factors as the primary determinant of psychological differences. The most important fact argued by Nancy (1999) is that the significance of the biological differences depends on social and historical facts, and this is further maintained in every society by complicated social practices.

As highlighted earlier, the freedom of individual conscience in Islamic jurisprudence teaches that human beings are united in life but not united in religious cultural affairs. Even though every religion differs in defining religious rights and duties, it is maintained that the idea of ethics of care is based on a set of principles of morality (Walker & Wall, 1997). The cosmopolitan feminism tends 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 (Reilly, 2007). Meanwhile, whenever Islamic jurisprudence stresses on the rule of duty which leads to the preservation of basic rights, it inculcates the sense of responsibility in the minds of society. It teaches individuals the value of humanity and morality. The value of morality and humanity which consider human needs and preferences in nature promoted by Islam and feminist jurisprudences show that they could be possibly harmonised.

God has created women and men as His vicegerents, both having rationale and virtue. As such, both are treated equally by God in terms of their duties and responsibilities towards this role. This lays the foundations of their essential equality as human beings as vicegerents of God on Earth, regardless of their different roles in society. In other words, women and men are given equal opportunity with different roles, rights and duties to achieve equal result. Islam does not put women with difficulty but provides women the rights and duties which are suitable with their biological, physical, psychological and physiological abilities.

In Islamic jurisprudence, as vicegerent of God in this world, human beings have rights and duties towards it, as long as they do not violate the rights of God (public rights). It does not restrict the act of human beings on what is commanded and

refrain from what is forbidden by God. Freedom of individual conscience relates with the rights and duties towards God, and the rights and duties towards human beings which determine the sense of right or wrong in individuals' behaviours. The value and quality of 'soul' for Muslim women and men is thus determined by their faith to the rights and duties imposed by their religion, namely by doing what is commanded by God and refraining from what is forbidden.

3.4 The Principle of Social Justice in Islam

Justice or *al-'adl*, *al-insaf*, *al-qist* or *al-haqq* (the arabic terms) is one of the basic principles embodied in the divine revelation of the Quran and the Sunnah. Generally all these terms mean justice, fairness, equity, equality, fair minded, rightness and correctness. In the implementation of justice, it relates with the rights of God and the rights of human beings. Justice is close to equality in the sense that it creates a state of balance in the distribution of rights and duties among people, but they are not identical. There are so many verses in the Quran deal with justice. Among others are showing that justice is an obligation of Islam and injustice is forbidden. :

“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)

“O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness. And fear Allah; indeed, Allah is Acquainted with what you do” (Quran Al-Ma'idah 5:8)

“We have already sent Our messengers with clear evidences and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice...” (Quran Al-Hadid 57:25)

“O you who believe! Stand out firmly for justice, as witnesses to Allah, even if it be against yourselves, your parents, and your relatives, or whether it is against the rich or the poor...” (Quran An-Nisaa' 4:135)

The Quranic standards of justice transcend considerations of race, religion, color, and creed, as Muslims are commanded to be just to their friends and foes alike, and to be just at all levels. The Quran also refers to particular instances and contexts of justice. One such instance is the requirement of just treatment of orphans. God says:

“And approach not the property of the orphan except in the fairest way, until he [or she] attains the age of full strength, and give measurement and weight with justice...” (Quran 6:152, also see 89:17, 93:9, and 107:2)

Fair dealings in measurements and weights, as mentioned in the above verse, is also mentioned in other passages where justice in the buying, selling, and by extension, to business transactions in general, is emphasized. There is an entire chapter of the Quran, Surah al-Mutaffifeen (‘The Detractors in Giving Weights,’ 83) where fraudulent dealers are threatened with divine wrath.

References to justice also occur in the context to polygamy. The Quran demands equitable treatment of all wives. The verse of polygamy begins by reference to orphaned girls who may be exposed to deprivation and injustice. When they reach marriageable age, they should be married off, even if it be into a polygamous relationship, especially when there is inequality in the number of men and women, as was the case after the Battle of Uhud when this verse was revealed. But, as the Quran states:

“If you fear that you can not be just, then marry only one...” (Quran 4:3)

Thus, justice represents moral rectitude and fairness, since it means things should be where they belong. Justice would be applied in all the transactions which

relates to rights and duties. One of the Quranic meanings of *haqq* is 'justice'. Therefore, the discussion of justice is important in analysing the fair entitlements of rights between women and men as justice in any legal system is concerned with the correct implementation of rights and duties (Kamali, 1993:357). In addition, it is crucial to discuss the concept of social justice as all declarations of human rights law in Islamic and Western jurisprudences at international level place the element of brotherhood or human relations as one of their important elements¹⁹.

Justice and equality are the basis of Shari'ah because it is divine in origin and its rules comprises of the fundamental principles of religion, morality, and economic transaction (Mahmassani, 1987:84). These rules are deeply engrained in the heart of people, inasmuch as the adherence to them is pleasing to God and to humankind. It must be borne in mind that in Islamic jurisprudence, the concept of justice must firstly be in accordance with faith and morality, and secondly, with the social relationship, in accordance with the value, principle and morality (Mohd Azizuddin Mohd Sani, 2002). In other words, in Islamic jurisprudence, the idea of justice, equality and the value of morality are based on religion, in accordance to the divine law and moral value principles which are not against the divine revelation (Qur'an and Sunnah). In the Islamic worldview, justice denotes placing things in their rightful place or rights and duties to which that person is entitled (Hashim Kamali, 1993). It also means giving others equal treatment. In Islam, justice is also a moral virtue and an attribute of human personality, and it is not contrary with the traditional concept of justice summarised in Justinian Digests taken from the Roman Ulpian that justice is "*those*

¹⁹ The first sentence of foreword section in UIDHR is "Islam gave to mankind an ideal code of human rights fourteen centuries ago. These rights aim at conferring honour and dignity on mankind and eliminating exploitation, oppression and injustice" whereas UDHR, Article 1. 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.

[that] are the commandments of law, to live uprightly, not to harm others, and to give to each person what belongs to him” (Burke, 2009:16).

Justice in Islam covers human equality by visualising the adjustment of all values, of which the economic is but one (Sayyid Qutb: 2000:47). Sayyid Qutb further explained that economic equality, to be precise, is the equality of opportunity that are combined with the freedom to develop one’s talents within the boundaries set by the higher purpose of life. Islam does acknowledge a fundamental justice among all, but it leaves the door open for the achievement of excellence through hard work, just as it relies on the balance of values that are other than the economic. This is because Islam does not demand a compulsory economic equality in the narrow literal sense of the term. Therefore, justice in Islam connotes equilibrium in society since different individuals have different methods of gaining their livelihood. Islam admits the reasonable causes of these differences as being differences in strength and in endowment.

It is often argued that the material aim of Islamic law is to uphold public or societal regulation and thus it contradicts the individualistic nature of Western philosophy of human rights. Under Islamic law, Shari’ah indicates necessary virtues that must prevail in human society. Due to the fact that human beings do not live as isolated entities but as part and parcel of a community, they need others in completing their lives. Thus, the principle of social justice is the best principle to establish justice due to the diversities among human beings. This may be explained by the fact that society is actually made up of a collection of individuals. Thus, by giving priority to the collective rights in enacting laws, there are social veils which when lifted, reveal nothing but individuals (Baderin, 2001:66-67).

In employing the concept of social justice, Sayyid Qutb (2000) underlined that there are three (3) foundations to establish justice in Islamic law. They are:

1. Freedom of Conscience/Religion
2. Formal and Substantive Equality of Human Beings
3. Collective Rights and Duties to Society

3.4.1 Freedom of Individual Conscience

Islamic law has a basic theory of the universe, of life, and of humans. The idea of 'social justice' in Islamic law is interconnected with this basic theory. In Islamic jurisprudence, every question of law is a matter of conscience, which means moral sense of right and wrong especially as affecting behaviour (The Oxford Dictionary of Current English, 1992:177). Therefore, absolute freedom of conscience, which gives individuals the absolute right or freedom is one of the foundations that are required to establish justice in Islamic jurisprudence. It relates to the spiritual element that exists in the human soul, mind and heart which all human beings (women and men) have as they are similar creation. In legal terms, it can be regarded as '*mens rea*' or intention. Human conscience can be the moral values or ethics that every individual person has. As Islamic jurisprudence ties with laws, ethics, duties and morality, the foundation of human conscience forms the principle of religion itself. For example, no man will claim justice by law unless he has first claimed it as just by instinct and by the practical methods of his or her belief that ensure the preservation of his or her instinct. Therefore, it can be argued by giving priority in preservation of public rights that Islamic jurisprudence also acknowledges individual freedom as early as the eleventh

century based on Al-Mawardi's thought in his famous work, *'The Principle of Government'* (Breiner, 1992).

The implementation of absolute freedom of conscience has a close connection with an individual's belief or faith. Bielefeldt (2000) noted that the generations after Hegel and Jellinek (1985) and Troeltsch (1911) believed that the Protestants emphasise on the individual free conscience as a precondition of authentic faith for the recognition of individual human rights. In spite of that, Valentilo Cattelan (2009) argued that in the current globalisation of legal studies, international law is progressively losing its monolithic centrality in favour of a reality of legal pluralism (Glenn, 2004; Merry, 1988). He further contended that Islamic law on the other hand, embodies the theory of justice stemming from the divine omnipotence in the creation of reality and centred in the fundamental concepts of *hukm*, 'rule', 'decree', and *haqq*, 'right' as 'real' and 'true'. In the context of duties and obligation of the individual Muslim however, he or she has the liberty in choosing to act or not to act in accordance to the fundamental concept of *hukm*. Generally, the only duty that all individuals Muslim have is to enforce right or truth and to forbid wrong.

The importance of religion in moulding individual conscience in Islamic jurisprudence has also been noted by Santillana (1926), as narrated by Cattelan (2009), whereby in Islam "every question of law is also as a matter of conscience, and jurisprudence is based on theology". It can be traced that Islamic law is primarily concerned with the principles of moral value, which influences the individual conscience, even though it is sometime not enforceable in the courts of law. In Islamic jurisprudence, the principle of human dignity and rights has close relation with the value of morality and ethics as the guidelines for Muslims to think, to act or not to act

as the basis of its legality. Thus, the Islamic theory of justice (*'adl*) reflects the cultural postulates of the Islamic religion, upholding the absolute sovereignty of God in creating reality (Cattelan, 2009). Therefore, human rights principles which Cranston (1973) has described as 'a universal moral right, something which all men, everywhere at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human' could only be obtained by acknowledging the different conceptions of law and the different historical experiences of the societies with the same value of humanity. Allowing people a full cultural expression (language, religion, culture and ethnicity) is an important development end in itself because culture, tradition and religion are important facets of identity and sense of belonging.

Freedom of conscience relates with faith and belief. In Islamic jurisprudence, everything depends in any instant, on the complete free Will of God (Chehata, 1965:7-8) and the way of life in all aspects that is "being rightly guided" (Netton, 1989:24-25), as codified in the Holy Qur'an and Hadith of the Prophet (peace be upon him). Islamic law teaches what have to be prioritised by human beings in their social life. Shari'ah law teaches that material luxuries is not a guarantee of happiness, while internal faith to the One God, Allah. Happiness is not based on material luxuries but by preservation of good deeds among the creatures with the guidance from the Almighty Creator. The sources of law in Islam are not only passed from human to human, but primarily from the Creator (Cattelan, 2009) to his creation, the human person. While God is the only Creator, human beings become responsible by 'acquiring' (*kasb, iktisab*) and 'performing' the action created by God (Gimaret, 1980; Watt, 1985; Frank, 1983).

The application of rights and duties in Islam are also influenced by individual conscience. The classical and post-classical Islamic jurists unanimously agreed on the division of rights into *Haqq Allah* and *Haqq al-'Abd*. *Haqq Allah* refers to an act of devotion²⁰ or religious worship or something that is for the interest of the community at large. The right of God consists of values without which the achievement of civil society is unfeasible. It is called *Haqq Allah* because the violation of such right endangers both the offender and the society (Mohammad, 2003:268). Respect for such right is the duty of every individual as well as the state, and its violation is the cause of liability in this world, and blame in the hereafter. Rules involving the rights of God or the rights of man may deal with the interest of all subjects, irrespective of their legal capacity. But when a wrong is committed or it is a matter of personal liability, Muslim jurists suggest that since both are under *Haqq Allah* and *Haqq al-'Abd*, contractual promises and penalties are to be imposed on legally competent persons only. Therefore, this classification of rights affects the implementation of rights and duties of women and men in Islam.

Not only in Islam, the Christian view also perceives freedom of conscience as one of the luxuries of life, and that to turn towards the Lord's Kingdom of Heaven and to spurn the life of this world is the true way of guaranteeing to man his freedom and to the soul, its happiness (Sayyid Qutb, 2000:53). Briffault (1994) as argued by Mohd Fuad Yeoh (2008:53) viewed that the idea of freedom which developed in Europe was inspired by the Holy Qur'an. He claimed that:

“The ideals of freedom for all human beings, of human brotherhood, of the equality of all men before the law, of democratic Government by consultation

²⁰ The right of God is one, which cannot be waived and forgiven by anybody, any state or individual while the right of man is one that can be waived and forgiven by the victim or his relatives. See Mohammad (2003).

and universal suffrage, the ideals that inspired the French Revolution and the Declaration of Rights, that guided the framing of the American Constitution and inflamed the struggle for independence in the Latin American countries were not inventions of the West. They find their ultimate inspiration and source in the Holy Qur'an. They are the quintessence of what the intelligentsia of Mediaeval Europe acquired from Islam over a period of centuries through the various channels of Muslim Spain, Sicily, the Crusader; and of the ideals propagated by the various societies that developed in Europe in the wake of the Crusades in imitation of the brotherhood associations of Islam".

On the other hand, the view of Communists are different with a view of Islam whilst the Communists view that economic freedom alone satisfies the need for freedom of conscience. Meanwhile, Sayyid Qutb (2000:54) asserted that both Christian and Communist views are true, but they are not the whole truth and it is believed that the truth is the need of human life at most time when humans must submit to their needs and demands which relates to what has been created by the Creator, where material necessities are important but do not always predominate. In spite of that, it is contended that disregarding the material needs of life or refusing them is not always a better way. Further, economic freedom alone cannot satisfy the need for freedom of conscience; instead it produces another form of tyranny. Therefore, freedom of conscience becomes the most important element in the implementation of justice because every individual has their exclusive rights in order to exercise his or her own choices with the guidance from the Creator, in preservation of the principle of brotherhood.

3.4.2 Formal and Substantive Equality of Human Beings

Complete equality of human beings according to Sayyid Qutb is another foundation of justice in Islam. The concept of human equality in Islamic jurisprudence is rooted in the conscience (in the form of moral value, ethics or culture) and is safeguarded by Shari'ah law. The concept of equality in Islamic jurisprudence refers to equality in the

oneness of origin and growth in the eyes of the Creator. In fact, every human being has similar origins and has equal opportunity of growth to succeed in this world and in the hereafter. Shari'ah teaches that no man is superior to a woman and no race is more powerful than another as they are all of human descent and equal in nature (Sayyid Qutb, 2000:73). During its early period, Islam taught the unity of human race in origin and in history, in life and in death, in privileges and in responsibilities, before the law and before Allah and in this world and in the world to come; it proclaimed that there is no virtue except in good deeds and no nobility except in piety (Sayyid Qutb, 2000:70).

In his last sermon, the Holy Prophet (peace be upon him) reminded all human beings that women and men have equal rights and duties. With regard to sexes, Islamic law does not permit discrimination, except in some incidental matters connected to physical capacity, with customary procedure or with responsibility (Sayyid Qutb, 2000:73). Therefore, as the law is made for human beings from God, human equality is interrelated with the elements of human creations which consists of both spiritual and material features. The primary source of Islamic jurisprudence, the Qur'an, elaborates that the creation of human beings were from the elements of dust or soil, where every individual is created in the beginning from the lowly water. In spite of the similar origin, the reality of human divergence in sex, race, religion and colour are not manifested for the purpose of rivalry or enmity, but to develop mutual knowledge and establish a bond under the spirit of brotherhood among people for the enjoyment of life. In the eyes of the Creator, all human beings are equal and there can be no superiority except in piety. This signifies a complete equality among humankind. In other words, this concept of equality extends over all the human race

and transcends both patriotic and religious differences (Sayyid Qutb, 2000:69-78). Thus, Islam frees people from tribal and racial conflicts as well as any suspicion on discrimination among human beings or the superiority of one over another. Similarly, in the spiritual sphere, Islam does not distinguish sexes, races, colours and languages; instead every individual are all formally equal (Al-Qur'an, An-Nisaa' 4:123). The difference lies only in the ways to manage this life under the appropriate roles that human beings are assigned with, in accordance with their nature, to gain the ultimate victory. The enjoyment of the life and the human existence are not possible except by people getting together and cooperating to acquire their necessities in the private and public spheres. This shows that equality in Islamic law is universal and flexible, acknowledging both the sameness and at the same time, the differences of human beings in nature and nurture.

The importance of human equality in the establishment of justice is also supported by the statement by United Nation's (UN) Women Executive Director Phumzile Mlambo-Ngcuka at the High-level Thematic Debate on Advancing Gender Equality and the Empowerment of Women and Girls on 6 March 2015 at UN Headquarters in New York. She stressed that "*gender equality is a shared vision of social justice and human rights*". She further argued that there are many unsettled problems that emerge from the issues of differences; therefore, in acknowledging multiple diversities of human beings, a fair distribution of rights and duties among human beings needs to be pursued to achieve social justice. Therefore, it is believed that both jurisprudences agree that complete human equality can be achieved by acknowledging not only sameness of human beings, but also the differences among

them. In other words, they share similar vision of victory through the universal principles of justice and human dignity.

3.4.3 Collective Rights and Duties to Society

Mutual responsibility to society or collective rights and duties is the third foundation for the establishment of justice in Islamic jurisprudence that was conceptualised by Sayyid Qutb. Respect for justice and the protection of human life and dignity are the fundamental principles established in the Shari'ah teachings (Baderin, 2001). It is believed that the sources and methods of Islamic jurisprudence contain common principles of good governance and human welfare. By its own nature of religion, Islamic jurisprudence does not merely take into account material and economic factors nor divide humans into body and soul and does not distinguish intellectual and spiritual sides. Instead, it holds that the human being is essentially one body; its members are mutually responsible and interdependent to each other to enjoy this life.

In the previous section, it has been argued that Islamic and international jurisprudences share the same meaning of rights, where 'rights' correlate with duties and moralities in order to maintain justice for all parties. In Islamic jurisprudence, the argument that rights correlates with duties and moralities in upholding justice is based on the integration of *haqq* (right) and *hukm* (obligation). It links the rewards and punishments in this world and in the hereafter to all that they have done. According to Mohammad (2003) in his analysis of rights and duties, all rights and duties are derived from the religion by the commands of the Lawgiver. The commands that impose duties comprise obligations towards acts that are compulsory to be performed (*wajib*) as well as forbidden (*haram*). However, not all such commands impose duties

as some commands imply recommendations (*mandhub*) and permissions (*mubah*) which refer to liberties and rights. In other words, in Islam, Muslim has the right to guided liberty and choice which hinges on the rights of God or public good. It is the duty of every human being to preserve his/her own life and other people's life because the purpose of life is to benefit others. Therefore, it is maintained that it is impossible to establish mutual responsibility in society without the implementation of rights and duties based on religious moral values which influences the individual human conscience.

Both human rights in Islam and international laws place the element of brotherhood in their treaties. Both contended that the preservation of the element of brotherhood can only be achieved by giving priority for collective rights over individual rights which falls under the principle of social justice. This method is aimed to prevent the misuse of power by the individual persons who have authority over others. Speaking of justice, one must observe that it requires fair and equal application both on the part of the ruler and the ruled (Mohammad, 2003:107); the rules concern those that could regulate the relations between individual and the states. This is because the right of an individual is not in competition with others; since they both represent the (same) manifestation of God's Will, they are not separate portions of universal justice (Cattelan, 2009). Other than having duties towards others, human beings have a responsibility toward themselves. It means that every individual have freedom but with limitations and guidance of the religion, and belief in accordance with their needs and their responsibility in society.

Islam grants individual freedom in the most perfect form and human equality in the most exact sense (Sayyid Qutb, 2000). Society has its interest, human nature

has its claim and a value is attached to the aims of religion. Thus, Islam sets the principle of individual responsibility over that of individual freedom, and alongside them both, it sets the principle of social responsibility which makes similar demands on the individual and on the society (Sayyid Qutb, 2000). For example, a man has a responsibility towards his fellow men, towards his immediate family and also towards the society and so forth. Therefore, mutual responsibility in a society can only be achieved whenever all people are aware that their needs could only be obtained completely from another person through the implementation of rights and duties collectively. Thus, mutual responsibility of society is vital to make sure that individual freedom must be stopped if it would infringe on the rights of others. All of these are the elements that shape the ideal concept of equality between human beings, through which individual freedom must not be superior to public interest.

Finally, it has been discovered that international jurisprudence has a common view with Islamic jurisprudence, namely in acknowledging that freedom of conscience, complete equality of human beings and mutual responsibility in society are important elements of justice. In spite of that, all the three elements of social justice are in accordance with human nature; they protect human dignity and accommodate their needs based on the spiritual and material elements in the creation of human beings. Even though both Islamic and international jurisprudences are founded on different sources of law and different faiths and beliefs, both jurisprudences shares a common recognition of universal moral values and humanity's needs which makes it possible for them to be harmonised, namely in terms of the concept of right, equality and justice. Therefore, it is asserted that the implementation of rights and duties by acknowledging differences through the

principle of social justice could be the basis for establishing a common understanding on the universal and ideal attributes of human rights.

3.5 Correlativity between Rights, Duties and Moralities in Islam

Duties in Islamic jurisprudence imply both religious obligations (*ibadat*) and material liabilities (*mu'amalat*) (Mohammad, 2003:230). Shari'ah as the primary sources of Islamic law imposes imperative injunctions in the form of prescriptions or prohibitions which require positive or negative obligations on one hand, and correlatively, conferring an array of rights on the other (Baderin, 2001:93). In determining the correlativity of rights and duties, the explanation used by Hashim Kamali (1993), Mohammad Tahir (2003) and Nik Salida Suhaila (2012) on this matter is employed.

Mohammad (2003) stated that Arabs use *haqq* in reference to 'rights' as a correlative of duty, litigation and lawsuit (*khusumah*). Some jurists claim that the word *haqq* is neutral between right and duty. In other words, *haqq* is used in relation to the duties and obligations of a person towards others across all spheres of life. According to Mohammad (2003:305), every right coexists with different types of duties, depending on the nature of the relationship. Therefore, the word 'rights' or '*haqq*' in Islamic jurisprudence is used not only in connection with individual's rights but also to uphold justice for all human beings and God's creatures, depending on the nature of the relationship.

Mohammad (2003:230) also asserted that one may find that the sense of duty in Islamic law has a different but extremely effective influence on the minds of believers. The equivalent Arabic term of duty is *al-taklif*, which generally means the

demand of a burdensome act (Ibn Qudamah, 1981) or the inescapable demand of an encumbrance (al-Qarafi, Nafais) which includes all positive or negative prescription of law. Al-Qarafi defined that duty implies to a standard of conduct that is binding on citizens. These definitions of duty will include moral and legal duties whether they are primary and secondary.

Most jurists noted that Shari'ah legal rulings (*hukm*) subsume both rights and obligations. A Shari'ah legal ruling is the means towards justice while the fulfilment of *haqq* in its dual capacities of rights and obligation is predicated upon justice. Thus, the enforcement of Shari'ah legal rulings is expected to signify the proper fulfilment of rights and duties (Hashim Kamali, 1993). Abdul Aziz Said (1979), whose view was reiterated by Mohammad (2003), highlighted the element of duty when defining the Islamic concept of human rights by stating that Islam:

"...is a belief system predicated fully upon haqq, which is the Arabic word for right. But haqq is also truth. It is justice. It is duty. It is the word of the Divine. Haqq is God. The essential characteristic of human rights in Islam is that they constitute obligations connected with the Divine and derive their force from this connection."

In determining whether international jurisprudence acknowledges that rights must co-relate with duties, Nik Salida Suhaila (2012:155) highlighted Hohfeld's (1946) belief that rights as a claim are a demand to something and can be made of someone else who has active duties to perform or to provide something. Hohfeld claimed, as further emphasised by Nik Salida Suhaila that liberty is also part of the meaning of rights; it entails the freedom to do something which is supported by other rights and claims that other persons do not interfere with the exercise of that freedom (Hoffman, David & Rowe, 2003:7). She further explained the meaning of rights in both jurisprudences by applying to Lacey and Hart's (2004:32), in which rights

indicate 'will' or 'choice' which is specially protected from the interference of another freedom. Subsequently, the definition of 'rights' developed by Neil Mac Commick was confirmed by Lacey as having being built on Jeremy Benthan's concept of rights, namely as 'interest conception' on the automatic existence of rights when someone benefits from the performance of duties. Therefore, it can be concluded that the term 'rights' also implies 'duties' which relates to human interest and choice in international jurisprudence.

Nik Salida Suhaila (2012) further claimed that rights and duties are correlative and this notion was dominant among philosophers (Lyons, 1970:45; Martin & Nickel, 1980:165). Renteln (1990:138) often correlated rights with duties while Austin (1995:231) considered duties ground the rights and rights should exist only when others are bound or obliged by law to do or forbear towards or in regard of him. Orend (2002:21) stated that rights holder and duty bearers come together even though 'rights' place rights holder as a more dominant party than duty bearers who may ordinarily exercise their rights as they see fit. In addition to that, Clapham (2007) argued that the Bible also can be read to proclaim not only rights but also duties. However, Donnelly (2007:22) stressed more critically the relationship between rights and duties when he conceded that rights involve a special set of social institutions, rules or practices due to their enforceability which stands at the very foundation of political morality in this era.

Rights in Islamic jurisprudence also relates with moralities. In Islamic jurisprudence, *haqq* is a product of the divine *hukm* that is from Allah (the One and only God) which consists of the rights of God and the rights of human beings. Under international jurisprudence or Western common law, rights are 'powers conferred to

the person' derived from Christian ethics (Cattelan, 2009) that affects its application. In Islamic law, relationship with the Lawgiver exists because the Lawgiver grants rights to some, and imposes a duty to respect the rights of others (Mohammad, 2003:305). In addition, the Lawgiver also imposes duty on rights-bearer to not abuse his rights by harming other individuals. The Islamic jurisprudence, which is both a right-based and duty-based system, recognises the individual autonomy or private rights as far as it does not violate similar rights of others as individuals or the community. The rights of society or the collective good overrides private rights, yet the community is required to respect the personal autonomy of individuals, and provide equal opportunity for all (Mohammad, 2003:324). Therefore, whenever the rights of the society is compiled by respecting personal autonomy of individuals, any discrimination will be eliminated, through which equal opportunity can be given to all based on the differences between them in religion as well as those derived from sexual differences between women and men.

International law, on the other hand, which is based on the Western common law establishes that rights derive from either moral principles or the will of the legislature without taking into account the right of God. The concept of morality in common law proceeds on separation between religion and law, in contrast with Islamic law. Under such secular (the separation of religion and law) percept of morality, the principal characteristic of moral rights is the feeling of guilt, remorse and shame. However, in Islam the psychological feeling and spiritual guilt is connected to the fear of God in violation of the right of God (Sayyid Qutb, 2000).

Therefore, both jurisprudences acknowledge correlativity of rights with moral values. The difference in the correlativity of 'rights' and 'moral values' in Islamic and

international jurisprudences is on the coverage of ‘rights’ and ‘duties’ which includes the ‘rights of God’ and the ‘rights of man’ in Islamic jurisprudence which influence the transactions among Muslims. However, a right, whether it is *haqq Allah* or *haqq ‘abd*, is legal if it could be enforced or recognised by a court of law; otherwise it is moral (Mohammad, 2003). Muslim jurist like Al-Sabuni has also distinguished moral rights from legal rights on the basis of judicial recognition. This is done only for the sake of proof and judicial recognition, and not in the law itself, since Islam unifies moral values, laws and religion.

3.6 The Philosophy of Equal Rights and Duties between Sexes

The concept of gender equality between women and men in marriage is in accordance with the philosophy of equal rights and duties between sexes in Islamic jurisprudence. Its foundation of equality has been stated in the primary sources of Islamic jurisprudence earlier than the United Nations Charter and CEDAW or other civilisation. In pre-Islamic period, women have been described as having no rights and many practices that concerned women personal affairs to domestic relations were subject to discrimination. However, on the coming of Islam, women’s rights have been recognized on the matter of equality with men.

There are many verses in the Quran cite and emphasise very clearly the equality between women and men. For example, surah al-Ahzab verse 35 states that:

“Indeed, the Muslim men and Muslim women, the believing men and believing women, the obedient men and obedient women, the truthful men and truthful women, the patient men and patient women, the humble men and humble women, the charitable men and charitable women, the fasting men and fasting women, the men who guard their private parts and the women who do so, and the men who remember Allah often and the women who do so - for them Allah has prepared forgiveness and a great reward”.

Equal opportunity of women and men to enjoy this life can be seen also through another surah, An-Nisa' verse 32 which means:

“And do not wish for that by which Allah has made some of you exceed others. For men is a share of what they have earned, and for women is a share of what they have earned. And ask Allah of his bounty. Indeed Allah is ever, of all things, Knowing”.

Focusing on the rights and duties of Muslim women with regard to marriage and family relations, it is influenced by the concept of marriage in Islamic jurisprudence. Marriage in Islam is not only governed between a wife and a husband, but the marriage is a collective relationship that governs all family members including father, mother, siblings and children. Besides, marriage in Islam is considered as one of ‘*ibadah*’ (Al-Qur’an, Ar-Rum, 21; Noor Aziah Mohd Awal, 2006) which composes the religious rights and duties among all family members. Therefore, Islamic marriage is not just a contract between two parties, but it has legal rules which include private and public rights. It relates with the right of God and the right of humans which is either competent or not competent.

According to the Shāfi’iyy jurists, marriage or nikah means ‘*aqd*’ (in the true meaning) and sexual intercourse in the makna majaz which is used in the Qur’an and Hadith (Muhammad Khatib al-Syarbaini, 2014:5). The dictionary of ‘*Lisan Al Arab*’ or ‘The Tongue of the Arabs’ defines the Arabic word ‘*zawaj*’ (marriage) as ‘association and coming together’. The word *zawwaja* in Arabic is used to refer to bringing two things together. The term is used in the Holy Qur’an in the same sense, for example of bringing together or of being together. It is through marriage that the paternity of children is established and relationship and affinity are traced (Rahim, 1995:275). Mulla defines marriage (nikah) as ‘a contract which has for its object the

procreation and legalising of children' (Mannan, 1995). In Islamic legislation: In Al-Kanz, the term *nikah* (marriage) is defined as 'a purposeful contract for obtaining and possessing enjoyment'. It is argued that the enjoyment of life here means both possess the enjoyment of life through marriage physically, mentally and spiritually. In Fath Al Mu'in, it is defined as a 'contract leading to permissibility of having sexual relationships, using the term *nikah* or *tazwij* (marriage). The clearest explanation on the meaning of marriage is the definition of marriage defined by Muhammad Abu Zahra as 'a contract leading to permissibility of having a common life between a man and a woman in a manner that fulfils the necessities of human nature, leading to life-time co-operation between them, and defines the rights and duties of each one of them'.

These prerequisites of marriage show that marriage is an important matter and relates to the right and duties of women and men to fulfil the necessities of human nature for their enjoyment of life. Thus, before one gets married, he or she must have the capacity to marry. As for Muslims, there are five essential elements to be fulfilled in order to have a valid marriage recognised by Islamic law, which is male, female, consent from the 'wali' (for women), the two witnesses and the "akad nikah" or the marriage vows.

Marriage is a sacred contract between women and men. The objective of marriage in Islam is not only for material enjoyment of life between two sexes but it includes the enjoyment of life in spiritual elements for collective goods. According to a Muslim biologist, marriage is intended to protect human dignity, to extract the dangerous liquid in the human body and to enjoy the life (sexually and psychologically) (Muhammad Al-Khatib Al-Syarnbaini, 2014:7). Further, the

objective of marriage according to Mawdudi is not just a legal means of sexual satisfaction for a woman and a man who become wife and husband, but the Qur'an has referred to marriage as 'hisn' which means a 'fort' in Arabic (Zeenath Kausar, 2008). It implies that both the women and men, who get married, are fortified. Hence, the objective of marriage is also the preservation of moral chastity.

Marriage not only satisfies the sexual urges of both woman and man, but also protects them from immorality, indecency, illness and all kinds of illicit sexual relationships. It does not only protect the individual but also protect the public at large. Certain categories of persons which categorised under the legal rulings of Muslim marriage are the evidence that the concept of Islamic marriage is aimed to avoid any immoral and illicit sexual relationship. It shows that Islamic law gives the individual liberty in marriage in accordance with their nature as long as it does not violate the public rights. Marriage is aimed to civilise human beings with a beautiful and harmonious relationships in accordance with their nature. In addition to that, Islamic marriage guides women and men on how to continue life in a balanced, ideal and systematic system with different entitlement of rights and duties.

The individual and collective rights are preserved through the concept of Islamic marriage and illustrated through the legal ruling on marriage which has been categorized by Muslim jurists in the situation below. Marriage can be mandatory, forbidden, recommended, undesirable and permissible for Muslim.

1. If the person is badly in need of getting married and feels certain that he would commit adultery if he does not get married, and he has the qualification required by syara' to enter into marriage; in this case marriage is mandatory and obligatory for him.

2. If the person feels the necessity of getting married, and he has the qualification required by syara' to enter into marriage, and feels certain that he would be just and fair to his spouse, and feels that he is likely to commit adultery if he does not get married, then in this case marriage is mandatory for him.
3. If the person does not have the ability to marry, and he is certain that he will do wrong or unjust to his spouse, in this case, marriage is prohibited for him.
4. If the person feels that he is likely to do wrong to his spouse, marriage is undesirable for him.
5. If the person is in the medium position, i.e. he has the ability to marry, but at the same time he is able to control of his will power, and does not fear falling in adultery, marriage in this case is recommended for him; he will be rewarded for doing it, but he will not be held accountable for not doing it (Ala'Eddin Kharofa, n.d.).

The establishment of a marital relationship between a wife and husband in Islam is based on love, compassion and respect for each other to promote the functions of human civilisation. All these value principles are prescribed in the primary sources of Islamic law. The Holy Qur'an expresses the relationship between women and men to each other akin to a body and its garments (Al-Qur'an, 2:187). Without garments, a body is meaningless and without a body, the garments are meaningless. This symbolises the closeness of the two sexes in the material and spiritual senses. They are lifelong partners and the relationship as partners in life determines the rights and duties of women and men in marriage. These basic value principles in Islamic marriage are universal values in human relationships. Women

and men in spite their differences have equal rights to enjoy this life collectively with different entitlement of rights and duties in completing their preferences.

The spouses are meant to enjoy peace and tranquillity in each other's company suitable with their nature and nurture. While Islamic law protects family relations between a wife and a husband, and maintains clearly the rights and duties of both through nature and nurture, Islam blesses this relationship with love and tenderness (Fathi Osman, 1996). Islamic jurisprudence teaches that a morsel of food that a husband may put in his wife's mouth in happy moment or when she is too busy to care about eating, is a good deed that is urged and rewarded by God. A husband and wife are the closest of companions. Each derives strength from the other and each act as a shield for the other.

Islamic jurisprudence considers the marriage institution as an important matter which is valuable for Islamic civilization. The Prophet says that marriage is one method of completing the religious duties. Besides being a way of life, the Prophet P.B.U.H says, "Marriage is a tradition of ours". In addition to that, Al- Ghazali, the famous Muslim jurist pronounced the concept of marriage as that:

"...there is comfort for the soul, and it gives it strength to perform acts of worship. This is because the soul is likely to suffer from boredom and avert from right as it goes against its nature; so if it is compelled to do what is against its nature for a long time, it will feel bored, and may rebel; but if it is given pleasure and comfort from time to time, it will regain strength to resume activity in worship. In the good company of woman, man finds the comfort that removes his distress; virtuous people should seek comfort with permitted things. This is why the Qur'an describes this relationship as one of tranquillity"

It shows that, marriage according to Islamic law is not just a civil contract, but a sacrament divinely ordained and determined in accordance to religious beliefs and

biological functions. It is argued that the contract of marriage in Islam, though essentially contractual in nature, has religious overtones and undertones, in that, the broader outline of the marriage contract is divinely determined (Shaheen, 2000:158). Besides that, Muslim jurists appear to regard the institution of marriage as based on the nature of *cibadah* or devotional acts and *mucāmalah* or transaction dealing with human being. Therefore, the concept of marriage in Islam must adhere with the rights of God which consists of rights that cannot be changed (nature) and the right of men which consist of rights that can sometime be changed (nurture).

Islamic jurisprudence guides Muslims on equal participation of rights and duties of women and men in the public and private spheres, in accordance with their biological nature. For example, in the private spheres of life when a woman and a man enter into marital bond, they bring into existence an important social unit called a family. Like any other successful and wonderful social unit in this world, this requires a systematic management in such a social unit. In the family social unit, Islamic jurisprudence has chosen men as the head of the family. As mentioned in the Holy Qur'an: 4:34, making man as the protector and the maintainer in no way indicates that man is superior to woman (Maulana, 1995:81). This choice is based on a man's capacity to manage rather than on his superiority. Man is the protector (the head of the family) suitable with the nature of men who are stronger in the physical sense and more aggressive in action.

However, men do not experience with pregnancy, giving birth and nursing children like women. Thus, the biological nature of women is suitable for childcare whereby uterus in the body of women has become the first home for every human (Yusof Abbas & Nor'Izam Alias, 2010). The experience of women on this matter

become the reason why women need different entitlement of rights and duties compared to men. This biological nature experienced by women and men around the world needs to be emphasised and universally accepted for the harmonisation process in achieving gender equality in a suitable context.

The relationship between wife and husband under Islamic law is a form of responsibility and a duty, and not a superiority or privilege. In spite of the full equality of women and men as individuals and as spouses, it is fair that a man is a person who is primarily responsible for sustaining his wife during the pregnancy and subsequent natal care. In this regard, a husband has more responsibilities that he should fulfil with kindness and generosity. All of these values have been mentioned by the Holy Qur'an and the Hadith of the Prophet:-

“Men shall take care of women with what God has bestowed on the former and with what they have to spend of their possessions”

“And the rights of the wives (with regard to their husbands) are equal to the obligations that they have (toward their husbands), but men have a precedence (in responsibilities)”

All of these rules and regulations are the guidance for all human beings. This teaching guides us to act correctly according to the biological human nature which also influencing their physical and emotional tenderness. A wrong mind set that Islam has chosen men because of his superiority leads to the misunderstanding on the true teachings of Islam on the meaning of equality and collective rights and duties between women and men in marriage according to their differences. Collective rights and duties of a husband and wife as acquired by Islamic law which in accordance with nature and nurture should be practiced in an acceptable way and without bitterness so that it would amount to the meaning of justice and equality under CEDAW.

In Islamic jurisprudence, a prerequisite for rights and duties of husband in marriage institution is the ability to provide for what is needed by the family members to continue the life. Besides, the duty of a wife is to obey the husband as long as it is not against the rights of God. It means that the entitlement to rights and duties between a wife and a husband in Islamic marriage institution is in accordance with human necessity, human ability and religious duty towards the interest of the community. Since marriage institution is within the public rights, Islamic state is therefore responsible for facilitating the marriage institution (Fathi Osman, 1996). The state is responsible to improve the marriage institution with the right and ideal mechanism for the better life of the community.

From the above explanations, it shows that the Islamic concept of equality between women and men in marriage is not discriminatory against women even though they are not entitle with similar rights and duties. The philosophy of equal rights and duties is ideal and universal which comes out in a unique spiritual, physical, psychological and legal relation which gives comfort to the soul, physical and psychological needs of human beings. As women and men are the God's creation and the God knows the best for the creations, therefore acknowledging differences between them is equal to justice. Islamic law promotes women and men in marriage and family relationships with the rights and duties suitable with their nature and nurture. Therefore, it is true whenever it is contended that women and men create their own culture or social life through their understanding of the process of co-existence with nature and through exploiting nature and the best cultural model made by human beings must therefore begin from their belief through the law of nature (Adeeb Aqeel, 2006).

3.7 Human Rights in Islam

Religion is a great spiritual system and every religion of the world has some general principles or values they share for the welfare of the society (Sadia Rehan, 2012). Rights of people are the manifestation of human dignity and moral values which are closely linked to religion and belief. The concept of human dignity and moral values of the Muslim life is based on the Shari'ah principle. Hashim Kamali (1993:355) noted that rights may be proprietary or personal, utilitarian or moral, but they almost always relate to the dignity of the individual and his or her quest for a just social order.

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In Islam, sexual differences between women and men are the indicator for moral values and human dignity which influences their rights and duties. The concept of human rights in Islamic jurisprudence is based on the elements of trust and obligation (which comes from Islamic moral value) towards God and man. Scholars affirmed that Islamic law is a system of duties, of ritual, legal and moral obligations (Schacht, 1970), all of which are sanctioned by the authority of the same religious command (Hashim Kamali, 1993). Mohammed Arkoun (1994:108) held that:

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“Islamic thought always included a discourse on the rights of God and the rights of man (huqooq Allah/huqooq adam) with the former having primacy and priority over the latter... The respect of human rights is an aspect of and a basis condition for respecting the rights of God.”

Islamic law operates on the premise that God commands humans to act or not to act towards Him and other people in certain ways.

Shari'ah principle affirms that the nature of human's existence and the rights of God as the Creator exist in parallel with the element of the individual's rights and

his equality before God (Nasharuddin Mat Isa, 2016:42). The sources of rights and obligations in Islamic jurisprudence derive from the communication of the Lawgiver (which covers all aspects of life i.e. legal, moral, politics, education, economic and social). Therefore, Islamic legal rulings are also the sources of rights, obligations and moral values. All jurists agree that the texts of Qur'an and Sunnah are the sources of Islamic legal rulings which affect the individual's conscience and his way of life. Thus, in defining human rights and women's rights in Islam, religious belief and cultural values must be taken into consideration to achieve justice. If not, the law will discriminate their life. It has been argued that limiting the nature, character and potential of rights in ensuring justice to each and every human being could be the basis of the criticism of rights (Nik Salida Suhaila, 2013:62). Hence, cultural value which is based on the moral value of the religion of a society has become the emphasis today on recognising a compromise in the global arena of human rights principles and practices towards carrying out the process of harmonisation.

In Islamic jurisprudence, there are no absolute rights except the rights of God. However, in practice, where the collective rights of society and the private rights of an individual or a class of individuals merge in the same act, the collective interest is apparently more important, and in such circumstances, Shari'ah gives priority to the interest of society. This is called the prevalent right of God. The prevalent right of God is illustrated by the prohibition of suicide, wasting of property and so forth (Baderin, 2001). On the other hand, where an act violates both the right of God and the right of man, but the consequences of the violation are more detrimental to the victim or his relatives, the priority then is given to the right of man. The significance

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of the classification of both rights is evident in both substantive and procedural or the primary and secondary rules of law.

Islamic jurisprudence gives 'rights' in accordance to human dignity based on the nature of human creation. Since the sexuality of women and men is different and this affects their cognitive, physical, physiological as well as spiritual aspects which in turn determine their needs to enjoy this life, different entitlements to rights and duties are necessary to ensure equality of outcome. Equality of outcome represents the enjoyment of life. Islam is particularly concerned about special groups like women and makes certain that its laws do not contribute to the subordination of women. Islam has upgraded the status of women 1,400 years ago by giving women the same rights as men as human beings who have rights to enjoy this life. Women and men are created from the same process, with similarities and differences suitable to their rights and duties as well as their roles and functions in a society.

Islam is the religion of nature which has been revealed by the One and Only Creator; it comprises matters of faith, the way of life as well as noble values and principles for humans to live a good life. Human dignity and its moral values are always integrated with science. Thus, claiming Islam as being fully consistent with human rights is problematic, as many rights given in Islam are based on sex; but the notion that human rights in Islam is inconsistent with international standards is unacceptable (An-Naim, 2009). This is because the different entitlements of rights according to gender in Islam are based on human nature and this might result in the equality of dignity and justice. This relates with an aspect of the science of human nature that was put forward by John Stuart Mill (1873) which involves certainty and uncertainty of human development, including 'thoughts, feelings and actions'. Indeed,

certain rights are given specifically to women and men purposely to ensure equal dignity and justice as Islam appreciates biological differences (Sheriff, 2007:1).

In international jurisprudence, a traditional Confucian, for example, might see this issue of order and rights as a question of 'good manners' (Hashim Kamali, 1993:355). He further noted that while Islam values obligation, the West itself stresses rights. Islam emphasises virtue and dignity through moral rectitude, while the Western tradition posits freedom to avoid the outcome of tyranny. Islamic law does not restrict women in freedom of speech, personal choice and propriety rights. Women in Islam have the right to agree or disagree with a marriage which may be disadvantageous to them. Their name will remain as it is after the marriage and they are not forced to change their name after marriage. All these examples of freedom given by Islam to women indicate that women are granted the rights to enjoy this life by giving importance to their own interest and need.

The provisions of law under IFLA on the rights of Muslim women and men in marriage and family relations are in accordance with the sources of Islamic jurisprudence. The primary sources of Islamic jurisprudence are the Holy Qur'an and As-Sunnah (divine revelation), and secondary sources of Shari'ah are derived namely through the methodology of *Ijma'* (consensus) and *Qiyas* (analogical reasoning), which are methods of human reasoning. These methods of human reasoning, however, are made within the substance principles of Shari'ah which is mostly in line with its objectives of (*Maqasid As-Syar'iyyah*). In Islamic jurisprudence, any enacted law must conform to divine revelation first (Shari'ah), and rational fundamental (*fiqh*) second (Mohammad, 2003:103). Thus, any matter of human rights is determined by referring to the primary sources and true human values, whereby the great and

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common welfare of humanity is preferred over the well-being of select groups, as well as individualism which is balanced in a manner that does not violate the rules of Shari'ah.

With regard to the concept of *maqasid as-Shari'ah*, the view of Nasharudin Mat Isa (2016) is employed to understand the Islamic principle of human rights. Generally, the concept of *maqasid as-Shari'ah* is viewed as a branch of knowledge that deals with the challenging questions pertaining to Islamic rules and regulations on the question of why. Literally *maqasid* means objectives. Technically, it means the purpose and wisdom behind the enactment of all or most of the Shari'ah rulings which relates to the specific objectives that are designed to achieve specific benefits or *maslahah* for people in their daily activities (Ibn Ashur, Muhammad Tahir, 2004). The rules of *maslahah* or public interest, shows that the ultimate goal of rights is to benefit the community first, followed by the individual, which is already applied for the benefit of the community. The *maqasid* functions as a method to create and promote goodness, to reject evil or falsehood and to ease hardships for the betterment of communities and individuals. The overriding consensus of scholars and jurists in Islam have classified *maqasid* to three main branches, namely (i) essential or basic needs, (ii) the complementary needs, and (iii) the luxuries. The most valuable and fundamental objectives of Shari'ah which falls under the first category are the preservation of religion, the protection of life, the protection of dignity, lineage or offspring, the protection of intellect and mind and the protection of property and wealth, all of which can be regarded as the basic and essential human rights in Islam.

These five elements represent what is viewed as the core necessities of an individual's rights in the context of Islam. Another two branches, which are

complementary and luxuries are guided by the rulings and principles of Islam. Among those five fundamentals, the most contentious is the sanctity of the individual's religion, whereby in the context of *maqasid*, one's religious belief is a vital part of his or her rights, for Islam views it as a nature. Even in the spread of Islam, its conversion is never to be forced but to be of the individual's free will and choice. In terms of preservation of the religion, the *tawhidic* essence towards Allah SWT essentially ensures that women as well as men shall render it upon himself to never enslave himself or be enslaved to none other than Allah the Almighty alone.

The second right under the *maqasid* is the soul (life), wherein the protection of rights to one's life as well as others is of paramount honour; the taking of one's life for unjust reason is prohibited (*haram*) and this covers the act of taking one's own life. Islam places an important value towards the sanctity of life to such extent that acts of suicide and euthanasia are prohibited. Similarly, the preservation of individual's intellect which differentiates human beings to other creatures of God does not merely signify the prohibition of alcohol in the traditional sense as viewed by some current modern rights movements; but this also serves towards ensuring the protection of the rights to education for all human beings with no discrimination.

The other fundamental right of the individual within the *maqasid syariyyah* is protecting the rights of his/her offspring (good name) which centres on not only the upbringing of his/her family, but also on the safeguarding of the honour of one's lineage, the prohibition from slandering the individual and his family unit. These are established as a basis of a healthy society which relates around the sanctity of marriage, preservations of moral purity through not only prohibitions of adultery and

fornication, but also restriction on free mixing of the sexes in public and private quarters. This rule has been mentioned in the Holy Qur'an²¹.

In the discussion of preservation of wealth as one of the rights of the individual, not much debate is anticipated as material wealth serves as the basis of an individual's resources and representing the community's economy which most human beings hold dear. Nevertheless, Islam indicates its realistic view towards nature-value and protects the wealth of an individual to the point of compassion in the shape of the *Zakah* in order to share the wealth with those less fortunate. The concept of Shari'ah law is to ensure that no oppression or discrimination takes place and to eradicate all kinds of stealing, embezzlement, monopoly and usury in the name of human rights.

In the implementation of Shari'ah law, Muslim jurists have tried to maximise the preservation of the value of human life to the extent that even remote causes of its destruction are prevented, such as the legal ruling (*hukm*) on sexual liberties. For instance, in Islamic jurisprudence, it is a public duty to prevent adultery or even close-proximity in society. Muslims are given sexual liberties as private rights, but if the liberties given impair collective rights, public rights will be enforced to protect the interest of the community. This shows that Islamic law prioritises collective rights in order to prevent further harm or bad implications for an individual as well as the community. Baderin (2001:65) highlighted that the Qur'anic terminology for virtue in that regard is *ma'ruuf*, which literally means 'well known' or 'universally accepted'. Virtue, as dictated by the Shari'ah, is thus projected as a universally recognisable value. Maududi (1980) has argued in that regard that human conscience has some sort of 'uniform verdict in favour of certain moral qualities as being good and declared

²¹ Al-Quran, Surah Al-Isra' 17: 28

others as bad'. Renteln (1990) also expressed a similar view in her cross-cultural study on human rights by maintaining that values that all cultures share do exist. Therefore, it seems that human rights which give priority only to individual rights will probably discriminate people or be unjust to some groups of people. The Shari'ah, on the other hand, aims at preserving and enhancing human dignity through a balance between liberty of the individual, on one hand and protection of the general social order, on the other. This balance, when properly maintained, prevents an unqualified defence of individual rights that may have negative consequences on other individuals and on society at large.

Some Western commentators such as Sachet (1970), Gibb (1955) and Siegman (1964) who claimed that Islam does not recognise the idea of an individual having inherent rights, fundamental or otherwise, have commented that Shari'ah does not recognise rights but only obligations (Mohammad Hashim Kamali, 1993). Hashim Kamali (1993) further argued that Islamic jurisprudence is concerned with the relations between the Lawgiver and the recipient of law, which is inspired by the ideals of unity and integration rather than duality of their respective interest. He commented that modern constitutional law and constitutionalism as such, champions the rights of the citizen when dealing with the ever-expanding power of the state. For example, Malaysia practices constitutional monarchy and parliamentary democracy which upholds both individual liberty and state power.

Meanwhile, Dawam Rahardjo argued that the state is responsible for the liberty of individuals through the determination of civil rights and human rights. If liberty of rights is not offset by the power of the State, it becomes an anarchy (extreme individualism) (Budhy Munawar-Rachman, 2010:13). Therefore, extreme

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individualism will probably cause injustice and discriminate others. Thus, in order to establish justice, individual rights must not go beyond public or collective rights whereby the duty of the state is to control individual rights. Collective rights will protect public rights, whilst individual rights are being protected. Thus, collective rights or public rights will never supplant individual rights or private rights.

Under Islamic jurisprudence, for example, Section 72 of IFLA, it is provided that it shall be the duty of a man to maintain his children. However, Section 73 of IFLA provides that the Court may, at any time, order a man to pay for the maintenance of his children. It means that where the duty is primarily for the enforcement of the rights of particular individuals and though it incidentally affects public interest, the obligation is private. However, where a duty primarily protects public interest and simultaneously affects the private individual indirectly, it is deemed as public (Mohammad, 2003). Thus, the protection of public interest primarily will not infringe the rights of individuals, but the protection of individual interests primarily and most probably will infringe on the rights of others.

However, individual rights exist in the situation where infringements towards one's legal right can be committed by another individual (Zarizana Abdul Aziz, 2008). For example, a wife or a husband has rights and duties towards themselves and their family such as their children, their parents and siblings. In other words, in relation to marriage and family institution, a wife and a husband, also have collective rights and duties for the preservation of the family and the society, in spite of having private rights. To build the ideal concept of equality between women and men, collective rights must be considered as the subject of legal rights rather than individual rights per se. In the research on '*Human Rights and Islamic Legal Reform*',

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the individual is recognised in Western society as a member of 'homogeneous' community; this denotes that individual rights rely on the non-violation of other's rights (Safi, 1998:5). Mookherjee (2011) opined that to safeguard the 'well-being of all human beings', there are forms of self-determination which seems essential. Both individuals and family units must be given independent rights to provide for the needs of their members. Yet, justice is not only for an individual or a family, but also for the interests of the community and social institutions as a whole.

3.8 Concluding Remarks

Shari'ah law believes in a balanced view of both nature and nurture in human behaviour, where the concept of nature (*fitrah*) includes not only the biological and instinctual unconscious aspects of behaviour, but also the spiritual, moral and psychological aspects based on their creation. This chapter observed that Islamic jurisprudence upholds the principles of gender justice by acknowledging the differences between people.

It was found that divinely and scientifically, Islamic and feminists agree that differences in sexual nature and culture (religion) are the fundamental elements to be recognised to attain the ideal concept of gender equality. Islamic primary sources do not contradict with science in acknowledging biological, physical, psychological and cultural differences between people. The analysis showed that both views share a similar notion that sexual and cultural differences are the crucial determinants in establishing gender equality. However, in Islamic jurisprudence, religious belief and moral values of the individual is a kind of human rights. If not recognised, it will infringe one's rights as a human being. It is argued that the biological nature is the

primary factor that should be taken into account in determining just and suitable roles in the society with regards to gender relation. However, Islamic law which was established through divine revelation 1,400 years ago is more precise and comprehensive in guiding people on ways to pursue the relationship between genders, namely by acknowledging the biological and cultural differences. Therefore, it is believed that the best cultural model in establishing the ideal concept of gender equality must begin from the true belief in God through the law of nature (Adeeb Aqeel, 2006).

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In examining the principle of justice and equality in Islamic jurisprudence, it was found that Shari'ah law, through its philosophy of rights and duties between women and men, is more comprehensive and precise in dividing a balanced rights and duties for women and men, in accordance with their nature and nurture. It was also found that the concept of marriage in Islam does not only protect the individual's interests but the collective interest of the family and the society to promote the functions of human civilisation. The analysis revealed that the philosophy of equal rights and duties in Islamic marriage are not necessarily discriminatory against women even though it provides different entitlements to rights and duties between women and men. Islamic philosophy on human rights is not against the moral values and principle of human dignity and rights. Its philosophy is universal in regulating the rights and duties among people since it is the manifestation of human dignity and moral values which is needed by all human beings, including women and men.

In spite of that, it is traced that Islamic sources of law pertaining to rights of women and men are not separated and they are always regarded as complementary for a balanced life as human being. Women and men in Islam have the same status of

individual rights with regard to conscience, property, life, dignity and intellect. All these elements are considered as detrimental in Islamic human rights notion which have to be primarily considered to maintain justice and to establish the basis of discrimination. Women and men have similar opportunities to those rights, suitable with their roles and functions in family and society under the principle of justice. Therefore, the method of Islamic human rights which is based on the principle of *maqasid syar'iyah* and collective rights or *maslahah* are the best way to correct the inequality of roles, stereotypes and the unbalanced relationship between women and men in the family institution and society. However, in achieving *de facto* and *de jure* equality of Muslim women and Muslim men, the Islamic legal rulings pertaining to gender have to be taken into consideration.