

CHAPTER FOUR

DIFFERENT ENTITLEMENTS TO RIGHTS AND DUTIES BETWEEN WOMEN AND MEN UNDER ISLAMIC FAMILY LAW (FEDERAL TERRITORIES) ACT 1984: DISCRIMINATORY OR JUSTICE?

4.1 Introduction

The previous chapter has examined the philosophy and principles of justice and equality between sexes uphold by Islamic law within the framework of Islamic human rights. It is found that the principle of gender justice in Islamic jurisprudence is not necessarily by having similar rights and duties between women and men. In other word, gender equality can be achieved whenever biological, physical, psychological and physiological differences are acknowledged between women and men as complementary rights and the balance of roles in a family and society. In addition to that, it is traced that human rights in Islam consider individual conscience and Islamic morality as a major element of human rights since it influences the intellectual and behavioural of people. Therefore, it shows that the element of individual conscience and religious rights and duties are important to be acknowledged in the principle of human rights in order to avoid discrimination.

On the other hand, the issues of gender equality under Islamic Family Law (Federal Territories) Act 1984 (IFLA) have to be further inspected since IFLA is not only based on the substance principle of Islamic law but also contains the procedural matters which is formed suitable with the current situation. Therefore, further investigation has been under scrutiny since gender consciousness and movement on the rights of women appeared everywhere and influenced the laws and practices of the community. It is argued that understanding gender equality in conformity with the declaration of human rights and changes in the roles and functions of women and men in Islamic family law modern society are said to be the impetus for the reformation of IFLA. This chapter choose the provisions of IFLA which has been highlighted by the women's rights movement as discriminatory against women.

Consequently, this chapter is going to analyse whether IFLA discriminates against Muslim women principally or procedurally. The investigation is made whether different rights and duties of women and men as allocated in some of its provisions are discriminatory or not. The investigation are on gender issues which has been highlighted under the provisions of IFLA on: i) minimum age of marriage; ii) person of other religion; iii) consent of wali in marriage; iv) polygamous marriage; v) divorce; vi) maintenance and vii) custody and guardianship. The analysis of this chapter starts with understanding the status of women in Islam generally and specifically on the development of Islamic family law in Malaysia. It is intended to illustrate that Islam from the very beginning concentrates on the principle of justice and equality between women and men based on complementary nature which is not disadvantageous women. Therefore, in order to maintain justice, any unjust or

unbalance treatment on women which disadvantageous women have to be reformed either through culture or law in accordance with Shari'ah principle.

This chapter also examine the attributes of IFLA in regulating the rights and duties of women and men with relates to marriage and family relationships. It is intended to compare with the attributes of rights uphold by feminist jurisprudence whether they are harmonised. This is to demonstrate whether the language used under the provisions of IFLA or the principle of law applied by IFLA or the customary practice of the community which caused the demands on the reformation of law and culture and CEDAW's Committee allegation that IFLA is not inline with the object and purpose of CEDAW.

The important part of this chapter is on the critical analysis made on the provisions of IFLA which provide different entitlements of rights and duties between women and men in marriage and family relationships. The analysis made to consider that IFLA uphold the principle of justice and equality not necessarily in the context of similar rights and duties between women and men in all spheres of life. IFLA by having the attributes of collective rights and duties which is based on the religious aptitude of Islamic morality considers the balance and complementary rights and duties between women and men in marriage and family relationships for building the nations. IFLA is not only regulates the individual rights of only women but also men and their children. The entitlements of rights and duties under IFLA is based on the biological nature of human beings for the ideal and balance in nurturing human beings.

The analysis is made to deliberate that different entitlements to rights and duties of women and men under the provisions of IFLA are equal to justice and not contrary with the meaning of equality uphold by CEDAW which acknowledge the differences in sexual and cultural or religious affiliations in establishing justice for women compared to men. However, it does not mean that it is also same in the application and practice. This study will demonstrate that the provisions of IFLA is based on the principle of gender justice in Islam in which biological, physical, psychological and cultural differences between people are acknowledged in accordance with the concept of Islamic human rights which differentiate women dignity and rights compared to men in maintaining justice. Moreover, this chapter is going to critically analyse the provisions of IFLA on different entitlements of rights and duties between women and men based on the principle of *maqasid as-Syar'iyah* and collective rights or *maslahah* in order to serve for better Islamic family law which not disadvantageous women.

4.2 An Overview on the Status of Women before and after Coming of Islam

Before the advent of Islam and the teachings brought by the Prophet Muhammad spread throughout the world, women were placed in low status. Women are made mistresses, prostitutes, female children killed and buried alive and women are not eligible to inherit property. However, Islam comes fully to protect the rights of all people regardless of gender, race and age. The incarnation of Islamic principles can be translated from the purpose of the Shari'a revealed to mankind as a whole.

Islamic law elevated the status of women by abolishing the cultural norm of killing their daughters alive during the pre-Islamic period. Before the coming of

Islam, the act of killing daughters for fear of humiliation, dishonor and poverty has been condemned in Islamic traditions. It is clearly stated in the Hadith of the Prophet where the Prophet said “*if anyone has a female child, and does not bury her alive or slight her, or prefer his male children to her, Allah will bring him to paradise*”.

In another perspective, before the coming of Islam, women are not given rights to hold property. But Islam has decreed women with financial rights in the form of *mahr* or marriage gift²² upon marriage, maintenance²³ from husband and inherit the property²⁴. All these rights are alienated by the Quranic verses that describe such laws which consider as complete reform to the old practice during the pre-Islamic period in which the *mahr* was treated as the property of either the guardian or the husband (Al-Qurtubi, n.d:23). With the coming of Islam, *mahr* is given solely for women’s rights as a gift which symbolizes love and affection and the fulfillment of sexual needs through a valid marriage (Mek Wok Mahmud, Najibah Mohd Zin & Nora Abdul Hak, 2016:46).

Another important issues on the unequal rights of women and men in Islam is on the role of men as *wali* in determining the girl’s marriage or custodial guardianship of children. Before the coming of Islam, a father consider his daughter as selling good to get money. But in Islamic law, the role of men as *wali* or guardian is more than to provide outer maintenance but also inner maintenance for children women and men as long as the children is under his guardian. This however, is seen as patriarchal in the human rights discourse even though this is some of the responsibility imposed on every father and respective person appointed as *wali* in Islam for empowering women

²² Al-Quran, An-Nisa’ 4:4

²³ Al-Qur’an, At-Talaq 65:6

²⁴ Al-Quran, An-Nisa’ 4:7

not only in the private but also in public spheres of women's life because of women's dignity and rights are different with men.

Before the coming of Islamic law, women are regarded to have lesser right in divorce as the unilateral rights of divorce vested on men. It was practically common with the culture of pre-Islamic period where the husband could divorce his wife whenever he wanted and as many time as he wished (Ibn Kathir, 1997:289). Islamic law has changed this common practice by limiting the number of *talaq* into only twice, with the condition of good release, which may allow the parties to reconcile and the third time will be the final²⁵. Unilateral *talaq* is given not absolutely for the rights of husband through unjust treatment or even in the state of disadvantageous against women. It must be with the condition of justice or in the right manner approved by Shari'ah.

The practice of polygamy also one of the modification version of pre-Islamic period where men could take an unlimited number of wives. After Islam has come, the practice was changed on the basis of *maslahah* (public interest) in order to encourage social justice in helping girls who were left as orphans and women who had become widows²⁶. In order to avoid exploitation on this girls and widows, the law permitted Muslim to take more than wife with a proviso that justice be done in terms of maintenance and conjugal rotations. Otherwise they are advised to practice monogamy (Mek Wok Mahmud, Najibah Mohd Zin & Nora Abdul Hak, 2016:219). Nowadays, in this country, polygamous marriage is still permissible but with some requirements and considerations. Through this method, illegal marriage is hoped to be

²⁵ Al-Quran. Al-Baqarah 2:229-232

²⁶ Al-Quran. An-Nisa' 4:2-3

reduced in order avoid problems happens on subsequent and existing wives with regard to the rights in property and maintenance of children.

The prevalent notion of the superiority of the male over the female in Malay society was regarded as the norm and had never been questioned until the early twentieth century by the reformist scholars (Zanariah Noor, 2007:124). The primary role of men within the context of the family is that of providers, whereas the role of women in normal circumstances is the management of domestic affairs and upbringing of children. Regarding marital relations, it is emphasized the domestic role of the women as wives and mothers. Women and men are reminded to obey reciprocal rights and duties between them in order to maintain harmony and well beings of the homes by parents and religious scholars or authority. The application of the stipulated rights and duties however depends on the moral and religious consciousness of both parties. In other words, there was no legal protection or remedies provided if the parties especially the wives (who historically been disadvantageous by men) if there is problems with regard to errant husband in marriage.

Hence, in the Malay community, the misconception on the status of women among Muslim society had been criticized by Azharites who had been influenced by Muhammad Abduh's thoughts during their academic years in Cairo (Routledge, 2000:102-103). It is believed that to improve the nation it is imperative to improve the condition of women. It has been spreaded over through journal publications and novels (El-Muhammady, 1992:56). Journal *al-Huda* (1931-1934) attempted to bring reformation from other Muslim countries such as Egypt closer to Malay society. Their critiques are on the backwardness and rigidity of Malay society and advocated the necessity of women's involvement in the progress of society and stressed on the

importance of women in developing the nation (Al-Ikhwan, 1926:63). This trend has been led by women's rights group in Malaysia who has taken an egalitarian approach on the notion on the concept of gender equality, justifying their arguments with the reinterpretation of Quranic verses and rejecting the patriarchal gender notion in Islamic law (Zanariah Noor, 2007:131).

4.3 The Customary Practice of Malay Muslim Women in Marriage

Most of the countries which practices Shari'ah law are not purely incubated into their practice what Islam has teach. As Islamic family law is the regulation based on the Islamic jurisprudence which include both Shari'ah (divine law) and Fiqh (human reasoning by Islamic jurists) methodological sources, and as most of the scholars put religion under cultural category, this section is aimed to evaluate whether the customary practice of the society or the substance of Shari'ah law discriminates against Muslim women in Malaysia.

Family law are practiced fully and executed in the daily life of the Muslim community in Malaysia since the 12th century when Islam was introduced to Malaysia (Raihanah Abdullah, 2007). For Muslims, family affairs are closely related to their way of life. This is due to its connection to areas like marriage and divorce, and matters arising therefrom, such as maintenance, matrimonial property, custody and the relationship between children and parents. This is because matters pertaining to Islamic family law are practiced fully and executed in the daily life. These laws provide for the administration of marriages, the rights of a wife, protection for those who are victimised in the family institution and the punishment for those who commit matrimonial offences. Since women are primarily engaged with family affairs, the

provisions of IFLA are enacted to protect women and children in marriage based on the principle of justice and human dignity in Islam. It was noted that the primary objective of IFLA was to prevent the higher rate of divorce cases among Muslims in Malaysia

IFLA had gone through several amendment for the betterment of the law and Muslim practice in marriage. It is contended that from the mid 1980s until now, the development of IFLA in socio-legislative approach has began as a way to examine issues pertaining to Islamic family law. The writings and studies have focused on protection for and assurance of women's and children's rights pursuant to the requirements of the United Nations Convention, guaranteeing and protecting the rights of women and children (Raihana Abdullah, 2007). IFLA deems with the rights and duties of wife and husband. It deals with human of different sexual function. Islamic law places women as essential as men²⁷ for the continuation of species and in the civilisation of nations by providing different entitlements in their rights and duties by taking into consideration the biological, physical and psychological nature of women. Moreover, Islamic law is particular with biological differences in determining the roles pertaining to gender. Generally, women and men have equal rights as human being but they have different entitlements to the rights and duties in enjoying this life because of their established differences. Thus, the different entitlements to the rights and duties create a balanced life for both genders in developing family institution.

²⁷ Al-Quran. Surah Al-Ahzab 33:35 "For Muslim men and Muslim women, for believing men and believing women, for devout men and devout women, for true men and true women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give charity, for men and women who guard their chastity, and for men and women who engage in God's praise, for them has God prepared forgiveness and great reward"

Several studies suggest that the role of women is prescribed by the society they are socialised in and their religion. In Asian countries such as Malaysia, women are strongly committed to family responsibilities prescribed by their gender role (Kalthom Abdullah, Noraini M. Noor and Saodah Wok, 2008). Particularly in customary practice of Muslim Malay women, the role of women as homemaker is almost universal. The Muslim Malays regard wife as '*ibu rumah*' or '*orang rumah*' which refers as being nucleus of the family to show that women have important roles in the development of family institution. In spite of that, the nicknames given for a wife by their husband as they are who manage the house explicitly explains the position of a woman which she should undertake when she gets married that is to be the manager of the house while the husband working outside. It is also narrated in the Hadith of the Prophet that women are the manager of the husband's household. Household chores like preparing meals for the family, cleaning, washing, ironing, and taking care of babies and children have always been regarded as women's responsibilities in the Muslim Malay community. Islamic law however, does not impose all these works to be the wife responsibilities. Muslim married women are considered as not an ordinary woman (Nik Salida Suhaila, 2013:103) whenever she is married because marriage contract comes with special spiritual, physical and psychological relationship. This relationship is not for the individual interest but it comes with collective rights and duties to manage the small unit of the society that is a family.

There are several reasons why women occupied a subordinate and subservient role position in the customary practice of Malay Muslim society. The economic, social and political problems were the tendencies why women do not have equal

opportunity or *de jure* equality with men. Lack of knowledge and opportunity provided or the ignorance of their rights and duties are the most crucial problems on women being disadvantage in their life (Abdul Walid Hassan, 2016). Historically, young women have no access to school as well as to work in the public sphere. The access to school is limited as women are allowed to study at the primary school. It is not only the primary education but also the religious school is limited for women to access. Normally, young women are assisting their parents at home. It has been the society's perception that a woman's place is in the home because they are not given equal opportunity to participate in the public sphere except for certain religious ceremony.

The notion, '*no matter how educated a girl is, she eventually ends up in the kitchen*', had, at one time, greatly influenced the minds of the Malay parents, to the extent that daughters were deprived of their chances of getting good education until the reformation on the minds of the Malays on the importance of knowledge not only for men but also for women. In fact, Islamic jurisprudence through the saying of the Prophet S.A.W. has promotes the importance of knowledge for both women and men throughout their life. Therefore, it is agreed that women awareness on the important of knowledge in economic, politic and social sectors would improve their status in all aspects of life.

According to Islamic law, the husband should treat his wife with love, tenderness, in a good manner and give his wife protection in all aspect of life. Islamic law teaches that a wife has a duty to respect all the commands of the husband in the matters which are not against the commands of God. Therefore, in the case of violence against women in marriage, the Muslim wives have right to take legal action

against their husbands to protect themselves. For example Section 127 of IFLA on ill-treatment of wife provides that any person who ill-treats his wife or cheats his wife of her property commits an offence and shall be punished. Women protection for violence at home has been provided also under civil law provisions such as Penal Code, Women and Girls Protection Act 1973 and Domestic Violence Act 1994.

Though the Malays generally recognise the women's position in the management of the family, they still subscribe to the idea that women should not take over the role as the family head from men. In Islamic law, manhood of husband is traced whenever a husband is responsible to maintain the wife and the family members with kind and good manner. The concept of *qiwamah* or superiority of men in marriage covenant was applicable only within the context of household as argued by Muhammad Abduh, Qasim Amin & al-Hadi (1961). Superiority here means responsibility of husband to protect wife and children and it is important especially in the raising up of children. This concept of superiority of men is considered as to balance the natural role of mother towards the children whereby both should be responsible in raising up the children. However, this concept is not strict to Muslim family only but also to the other non-Muslim family. Therefore, the men in the family should be respected as the breadwinner and as the head manager in the family institution. As influenced by Islamic law, the Muslim Malays practice the dominant position of the men in marriage and family relation on the value of 'respect' for the accommodations, advices, assistances given by the head.

However, some of the husbands misuse the power and misunderstood the meaning of *qiwamah* and act against the general value principle of Islamic law which the wife should be treated with a good manner. Muhammad Abduh (2005) criticized

the misconception of the status of women among Muslim society by saying that in order to bring forth a new vibrant ummah, it was crucial for Muslim society as a whole to reform the prevailing customs regarding women which is against the general principle of Islamic value. He acknowledges that women and men have mutual rights and duties and equal in responsibility and accountability to God. He also argued that Qur'an says men are a degree above women noting that distinction is necessary in order to avoid discord, for every social unit needs leader. It is not to put women inferior to men or to accord men power to disadvantage women. Thus, it is argued that this misconception is crucial to be eliminated and one of the efforts of the government is through the ratification of CEDAW.

There are no standardise practice or custom of Muslim under Shari'ah law because Islamic jurisprudence acknowledges the differences of customs and understanding in accordance to the situation as long as within Shari'ah principle. In Islamic law, there are certain fix rulings and there are also certain unfix rulings but unfix ruling must not against the general precepts of Shari'ah. In fact, this situation shows on the flexibility of Islamic law and acknowledgement of difference in its concept of universalism. It shows that justice can only be achieved by acknowledging differences and considering 'collective rights' as priority in ruling. The primary duty of women to take care children is considering the interest of the whole family as such also the responsibility of men to work and maintain the financial aspect. This shows that different entitlements to rights and duties of women and men in marriage and family relation are for the interest of the whole family members. For example, in polygamous marriage in Islam, the collective interest of the family members which

include the first wife and children and also the future wife will be taken into consideration for the permission of polygamy.

Therefore, it is traced that discrimination against Malay Muslim women in marriage are not because of the substance principle of Shari'ah law but the ignorance or misconception in understanding Shari'ah law by the community which influences their practice. It is arguable that male domination through the appointment of *wali* in Islamic marriage and family relation is because women historically are being disadvantage and men with their nature of physical and psychological strength are the right person to become women partner for their empowerment especially in public sphere. In the global arena of gender mainstreaming, for the establishment of justice, men should not restricted their roles only in public sphere but men should extend their roles in the private tasks with women. It is because men's failure to share private tasks with women is among the most significant factors inhibiting women's ability to success in public life (Zeenath Kausar, 1995). In Islamic jurisprudence, men are not prevented to do the household whereby the Prophet Muhammad also helping his wife doing household works.

From the above situation, cultural factors influencing gender relations (including the need to modify traditional roles of Malay women and men in the family and society to eliminate gender bias and the need to remove gender stereotypes) is also one of the crucial factors in championing gender equality (Suhakam's Report, 2010). Therefore, religious and cultural understandings of gender equality in its rights context are crucial for the purpose of constructing harmonisation between national and international legal regimes (Nik Salida Suhaila Nik Saleh, 2013:5).

4.4 The Concerns of Women's Rights Movement on Gender Equality

The movement of women's rights and liberation in Malaysia began as a political and social project in the 1920s by the male Malay Muslim reformers and writers, Syed Syekh Al-Hadi and Zainal Abidin Ahmad, better known as Za'aba (Alicia Izharuddin, 2013; Nik Salida Suhaila Nik Saleh, 2013; Zanariah Noor, 2007). The first stage of the reformation for women's rights was obtaining equal educational opportunity as men since women were not given an equal opportunity in education as men. As a result, female literacy rate has increased from 78.5 percents in 1990 to 92.6 percents in 2015 (Hua, 2017). In spite of the reformation in education, there were also active women's anti-colonial organisations, but nearly all of them were divided along ethnic and ideological lines (Alicia Izharuddin, 2013).

The issue of women's rights in Islamic family law was first deliberated around the year 1960 in the writings of Ahmad Ibrahim and Mehrun Siraj (Raihana Abdullah, 2007). Ahmad Ibrahim discussed the question of the status of women in family law according to the Islamic Administration Enactment, whereas Mehrun Siraj asserted that legislations in the 1980s represented a big step towards strengthening the administration of the Islamic family law. He and several other writers welcomed legislations related to Islamic family law and concluded that they would remedy the administration and in some way the position of women in Islamic family law.

Besides academicians and politicians who strive to address the legal issue of women's rights in Islamic family law, the role of Women NGOs who work hand-in-hand with government agencies in promoting women's rights issues cannot be underestimated (Suhakam, 2010:2). Many non-governmental organisations (NGOs)

were set up to defend women's rights issue in economic, social, political and legal aspects. Women's rights issues have been highlighted by NGOs and government agencies after independence, but they became aggressively involved after the government of Malaysia ratified CEDAW in July 1995.

One of the active women NGOs who frequently defends Muslim women's rights and has been influential on the public policy in Malaysia is Sisters in Islam²⁸ (SiS) (Zanariah Noor, 2007). Amongst their objective of establishments are to strive for gender equality in all aspects of life. For instance, Sisters in Islam (SiS) was established to discuss women issues vis a vis a number of studies and activities. One of SiS long term objective that relates to this research is to reform laws and policies within the framework of justice and equality and to eliminate injustice and discrimination against women by changing mind sets that regard women as inferior to men. SiS also concerns on debating issues pertaining to Islamic Family Law that is said to be discriminatory against women.

²⁸ The group first assembled in 1987 within the Association of the Women Lawyers (AWL) when several women lawyers and their friends came together under the Association's *Shariah* subcommittee to study problems associated with the implementation of new Islamic Family Laws that had been legislated in 1984, and enforced in 1987. The group was composed of lawyers, academics, journalists, analysts, and activists, and many women confided in them their marital problems and the difficulties they faced when seeking legal redress from religious authorities. These early meetings focused on problems with the law and its implementation, and the solutions needed to remedy shortcomings within the system. Empowered by their knowledge, the women were compelled their findings with the public in an effort to break the dominant belief that Islam discriminated against women. A prime opportunity arose in 1990 when, in the case of *Aishah Abdul Rauf v. Wan Mohd Yusof Wan Othman*, the Selangor Shariah Appeals Court decided that the husband did not have the right to take a second wife as he had not fulfilled the four conditions under Islamic Family Law that sought to ensure that justice would be done. The judgement "and the ensuing debate on the right of men to enter polygamous relations" encouraged SiS to write letters to the editors of all the major newspapers as a strategy for an alternative voice to be heard in the public space. Searching for a name, the group sign their first letters as 'Daughters of Islam', naming themselves after a group they met at a women's meeting on 'Reading the Qur'an for Ourselves' in Karachi, Pakistan. Their letter was published the next day in the English-language daily, *The Star*, to immediate enthusiastic response. So ground breaking was the group's views that a rival English-language daily, the *New Straits Times*, also sought to publish the same letter. The *New Straits Times*, however, would publish only the original letters and requested that the group modify the content of the original letter and the name of the group. And so it was that in 1990, 'Daughters of Islam' became 'Sisters of Islam'.

The other active group that was established to defend women's issues in Malaysia is The Joint Action Group for Gender Equality (JAG) which is a coalition of non-governmental organisations that work towards gender equality. It was formed in 1985 as the Joint Action Group against Violence against Women (JAG-VAW) by the Association of Women Lawyers (AWL), Malaysian Trades Union Congress (MTUC) Women's Committee, Selangor and Federal Territory Consumer's Association (Women and Media Section), University Women's Association, and Women's Aid Organisation (WAO) (AWAM Website, 27 June 2016). Over the years, JAG has spearheaded multiple campaigns and legal reform efforts, leading to such milestones as the 1994 Domestic Violence Act and the inclusion of 'gender' under Article 8 (2) of the Federal Constitution in 2001. Their contributions in highlighting issues such as non-discrimination against women as a whole, equal pay for equal work, increased engagement of women in decision-making positions, and greater integration of women in national development have been enormous (Suhakam, 2010:3).

In 1985, the women's groups undertook an audit of the laws and submitted a memorandum on review and reform of gender discriminatory laws to the government. From this list, the women's groups, decided to concentrate their limited resources on those urgent reforms required in relation to violence against women (VAW) from a needs and later, rights perspective (Zarizana Abdul Aziz, 1995:). The VAW campaign emphasised providing immediate and effective redress for survivors of sexual and domestic violence. This resulted in a long campaign for legal reforms on rape, domestic violence and sexual harassment which spanned the better part of the 1980s to 1990s. Amendments to the rape laws were introduced in 1989 and the Domestic Violence Act was passed in 1994 (enforced only in 1997). Although the government

has promised amendments to the employment laws to address sexual harassment and many discussions had been held by the women's groups with governmental agencies as well as stakeholders, to date no legal provision on sexual harassment has been proposed in Parliament.

The women's rights movement in this country condemn that convenient cultural and religious excuses are offered to explain the lack of acceptance of the principle of the universality of women's human rights. It is claimed that women's human rights groups in Malaysia, have since the CEDAW review in 2006 submitted more than ten memoranda to the government, attended numerous meetings with the Ministry of Women, Family and Community Development and issued many press statements calling for the full and effective implementation of the CEDAW Convention. However, there have been only a few government policy changes on paper.

In 2005, it has been argued by the women's rights movement through Malaysian NGO Alternative Report assessing the Government's progress in implementing CEDAW 2012, that parliament passed the Islamic Family Law (Federal Territories) (Amendment) Act 2005, which contained several provisions discriminatory to women. The said discriminatory elements included:

1. The right of the husband to claim a share of his existing wife's assets upon his polygamous marriage (section 23(9));
2. Making polygamy easier for men (section 23(3) and 23(4) (a)). In the original 1984 law, a proposed polygamous marriage had to be shown to be "just and necessary". The 2005 amendments changed this to "just or

necessary”, thereby reducing the husband’s burden of proof to justify a polygamous marriage in court;

3. Forcing a wife to choose maintenance or division of harta sepencarian (matrimonial assets) upon a husband’s polygamous marriage (section 23(9) (a)). This provision could be abused by husbands, as a husband who is going to marry a new wife would be able to seek the sale of the matrimonial home and divide the proceeds;
4. Extending the wife’s right to fasakh divorce to the husband (section 52(1)); and
5. A husband can now get a court order to stop his wife from disposing her assets (section 107A).

Other than that, a founding member and former executive director of SiS, has alleged that the current IFLA contains a large number of provisions that explicitly or implicitly discriminate against Muslim women (Zainah Anuar, 2007). The allegations made included; i) the minimum age to enter into marriage is not similar between women and men, which eighteen for men and sixteen for women; ii) a women, regardless of her age, can only marry with her guardian’s consent, whereas a man does not need to get the consent of a guardian; iii) a Muslim man can marry a non-Muslim woman but a Muslim woman cannot marry a non-Muslim man; iv) a man can enter into marriage with multiple wives (up to four) but a woman can only have a monogamous marriage; v) a woman is supposed to obey her husband and she can lose her right to maintenance if she fails to do so; vi) a man can divorce his wife at will outside the court but a woman must go to court and obtain a judicial divorce; and

lastly vii) she alleged that custody and guardianship of women and men are determined separately.

Therefore, critical analysis of these provisions are needed so that the objective of law to maintain justice is achieved. The analysis is also important to rectify the concept of gender equality which has often been mistakenly understood as having similar rights and duties between women and men. This misunderstanding attempts to develop a prejudice among women and men (Nik Salida Suhaila, 2012; Abd. Rashid, 1998:10-11) and the positive messages of the womanists has been misunderstood, just like the attempt to discredit and misrepresent Islam thus leading to the negative impact on reformation act to improve the status of Muslim women in the legal system and culture. In fact, the rights and duties of Muslim women provided under IFLA are differ compared to Western women on different background of law, religion and culture but not its objective. The concept of gender equality based on the concept of sameness would probably discriminatory if the substantive differences are not to be considered in maintaining justice and equality. Further than that, it is against the vision of MWFC in achieving gender equality, whereby the goal of the ministry is to develop a prosperous society through the sharing of responsibility which not necessarily achieved through sameness.

4.5 The Appraisal of Islamic Family Law (Federal Territories) Act 1984

Early historical documents have proven that Islamic family rules have been applied in Malacca since the early times. These laws are said to reflect the patterns and advancement experienced by the ancient Malay community. These laws contained 18 clauses that related specifically to Islamic family principles. These rules were adopted

directly from the principles of the *Shafi'īyy* school of thought which was predominantly followed, in spite of a number of mixed cultural influences. Even the presence of Western colonization was unable to separate family affairs in the Malay community from Islamic influences. Thus, it is evident rules pertaining to the Islamic family law which cannot be separated from the Malay community because the application of the laws was a personal matter. It does not impact on colonial interests or even on the non-Muslim community when compared to other areas of Islamic law, such as contracts, torts, criminal penalties, and commerce (Raihana, 2007).

Evidence also exists, showing that the British colonial authorities had codified several pieces of legislation related to family matters. This legislation focused mostly on administration, and also on marriage and divorce registration. This can be seen for example in the first family law being enforced in the Straits Settlement namely the 1880 Muhammadan Marriage Ordinance. According to M.B. Hooker, this law had many shortfalls, and as such, several amendments were introduced to streamline its provisions. Perhaps because these had limited scope, the Muslim community did not encounter any difficulties in complying with these Islamic family rules. Moreover, there were many books in old Jawi written by regional Islamic scholars on the subject of Islamic family law based on the *Shafi'īyy* schools (Raihana Abdullah, 2007).

Malay Muslim family affairs are closely related to their way of life and customary practices of each state. The provisions of the Islamic family Law among the states might differ in the provisions and applications as matrimonial cases are under the jurisdiction of each state. Thus, the law relating to marriage and family relations under Islamic family law of each state is mostly influenced by their differing customs. Islamic religion however, has no objections to a mixture of different cultures

as one context of different acknowledged by Islamic jurisprudence is on cultural differences between people. It is stated that Islamic family law in the Muslim countries which were drawn from the same sources could however be interpreted differently in certain aspects because of different intellectual knowledge and educational background regarding gender relations (Zanariah Noor, 2007). It might be on the part of a person who has authority or any person in the community as a result of the different traditional practices.

Islamic Family law comprises of Islamic legal rulings with regard to the rights of women and men in marriage and family relationship. Matters pertaining to Islamic family law have been practiced fully and executed in the daily life of the Muslim community in Malaysia since the 12th century when Islam was introduced to Malaysia (Raihana Abdullah, 2007). As provided by Nine Schedule of Malaysian Constitution, Muslim personal law is under the state authorities. Even though each state has its own Islamic family law, but they actually follow similar precepts of Shari'ah with multiple customary practices within the scope of Shari'ah principles in accordance with Muslim jurists. Hence, until to date there is no single family law Act that applies to the whole country even though for Muslims. It shows the unic and flexibility of Islamic jurisprudence whereby Shari'ah guides all Muslims with fundamental principles, while at the same time Shari'ah acknowledges the multiple cultural diversity among human beings within the scope of Shari'ah fundamental guidelines.

The situation of the Islamic community in Malaysia has been constantly changing. The awareness of Muslim on gender equality in Islamic perspective has been causes to the reviewal, reformation and amendment of law addressing several

problems occurring the relationship between women and men in marriage and family relationships. In the early 1980s, the reformation to Islamic family law in Malaysia has began. It is led by Professor Ahmad Ibrahim to examine and investigate the provisions of Islamic family law of each country based on the dynamic Shariah principle of law suitable with the modern Muslim life (Rahimin Affandi, Faizah & Norhayati (2008:9). It is argued that the methodology used for the reformation of law should based on the authoritative sources of Islamic law, more open minded in accepting the different view of Muslim jurist as long as do not contradict with Shari'ah in order to decrease the higher rate of divorce which causing higher social problems and to prevent women and children from violence (Ahmad Ibrahim, 1986:175).

Malaysia's reform in 1980s produced considerable efforts to 'clarify, reform and codify' (Ahmad Ibrahim, 1987: 56) the Shari'ah and to improve its administration (Raihanah Abdullah and Soraya Khairuddin, 2009:31). Various high-level committees were tasked with these objectives and with studying the experience of other countries in implementing Shari'ah. Islamic Family Law (Federal Territories) Act 1984 has been enforced in the Federal Territory on 29th April 1987. It is more precise and detailed than its predecessors. These laws provided for the administration of marriages, the rights of a wife, protection for those who are victimized in the family institution and the punishment for those who commit matrimonial offences.

The reformation on IFLA started with the efforts to examine the differences between the provisions of Islamic family law enactments of each States in order to be inline to each other (Syeikh Ghazali Abdul Rahman, 1992). IFLA has been arranged and classified into ten divisions which are i) preliminary ii) marriage iii) registration

of marriage; iv) penalties and miscellaneous provisions relating to the solemnization and registration of marriages v) dissolution of marriage; vi) maintenance of wife, children and others; vii) guardianship of children; (viii) miscellaneous (ix) penalties and x) general. The enforcement of this law or act could only be realised with the roles of Syariah Court, Pejabat Pendaftaran Nikah Cerai dan Rujuk and other units which responsible to manage, administer and enforce the provisions of IFLA within the authority given in that provisions.

IFLA 1984 has catered for jurisprudential matters of Islamic family laws and not against the fundamental precepts of Shari'ah in marriage and family laws. The legislators in enacting IFLA had based on the principles of justice posited on human reasoning within the scope of Shari'ah. Since customary practices of Malay Muslim are mostly influenced by the Islamic religion, even though Islamic jurisprudence does not limit it for example, the minimum age of marriage but it is arguable that the age of a person consists of experience, knowledge, property, confidence which are important aspects in performing responsibilities in the family institution. Furthermore and the most important thing to be righteously applied in the process of reformation of IFLA which allegedly to be reformed is to differentiate the matter of Shari'ah (God's way) or *fiqh* (human understanding) while *Sharī'a* is regarded as immutable and *fiqh* is the diverse body of legal opinions that is the product of human reasoning and engagement with the foundational sources of authority in Islam, the Qur'an and the Sunnah (Moustafa, 2013).

It has been contended that the examination and investigation for the reformation of IFLA is focused to eliminate the negative elements positioned on women such as on the low-intellectual capacity of women, the subordination status of

women in the family institution and the allegation made that women are the cause of disasters happened in the society which have been misunderstood by the community (Rahimin Afandi, Paizah & Norhayati, 2008:11). In order to consolidate the Islamic Judiciary System, legislation was introduced. Among them is through the efforts made by the legislators (Technical Committee of Civil and Shari'ah Law) for the reformation of Islamic family law. There are two basic methods of reformation on the provisions of IFLA. Firstly, on the basis of Islamic legal rulings and secondly, based on the fiqh rules in the form of procedural and managerial matters to enforce IFLA. Both kinds of reformation can be seen through i) the marriage course on the concept of marriage in Islam which the course is mandatory for Muslim couples before enter into marriage contract, ii) rules on the promise of marriage, iii) consent of marriage and the role of wali, both are considered important iv) maintenance provider in the family institution, v) strict rules on divorce, vi) Talak ta'lik, vii) equal rights to divorce, viii) strict rules for polygamy, x) rules on the conversion during marriage, xi) matrimonial property (Syeikh Ghazali Abdul Rahman, 1992)

Among the amendment which has been made into IFLA for the sake of women is on Section 2 which define *Hukm Syarak* as *Hukum Syarak* according to the recognized Mazhab. This definition will definitely shows that IFLA applied the method of *takhayyur* in maintaining justice which not stick only to Mazhab Shafie. While in the case of wali mujbir unnecessarily force the marriage, then paragraph 13(b) of IFLA is amended by substituting for the words if wali cannot be find or wali is death or refuse to give consent without reasonable reason. Another important amendment made on IFLA for the empowment of women in marriage is Section 23. Section 23 (1) states that no man during the subsistence of a marriage shall, except

with the prior permission in writing of the Court, contract another marriage with another woman.” (b) by inserting after subsection (1) the following subsection: (1A) A marriage contracted without the permission of the Court under subsection (1) shall not be registered under this Act unless the Court is satisfied that the marriage is valid according to Hukum Syarak and the Court has ordered the marriage to be registered subject to section 123. This is intended to avoid the increase of illegal marriage which will disadvantageous women.

Most of the jurists in Islamic jurisprudence argue that the notion of gender equality between women and men in Islamic law is by considering sexes and culture. Therefore, as women and men differ biologically and culturally, the roles, duties and responsibilities in their daily life are influenced by biological functions and their faith. It is believed that the purpose of having biological differences does indeed assist women and men to perform their rights and duties towards each other in the most systematic division which take into consideration their capability and functions. In spite of that, it can be argued that different entitlement to rights and duties is in accordance with the biological roles balancing human needs in the family and the society. The roles between a wife and a husband in a family institution should not be based on the basis of similarity as a marriage relationship has close relations with sex, reproductive functions and religious responsibilities. These three factors could be important determinant factors for the basis of discriminations, if they are being treated similarly.

Therefore, understanding the concept of gender equality in order to avoid any discrimination on women as to confirm the declaration of human rights and CEDAW has become the impetus of this research. Perhaps, the modifications made by the

legislators on the provision of IFLA based on the method of analogical reasoning (*qiyas*) and consensus (*ijma'*), the consideration of the public interest (*maslahah*), and a variety of other legal concepts and tools are crucial to be developed to constitute the field of Islamic legal theory (*usul al-fiqh*) by considering the globalisation situation, as Malaysia is moving forward as a developed country which is involved with multi-ethnic population from different cultures and backgrounds of other communities around the world.

Malaysia, which is preserved by its Federal Constitution as an Islamic State, and as a member of OIC, the role of *mujtahid* or Islamic intellectual whereby in Malaysia the opinion of *Mufti* (individual *ijtihad*) and the decision of '*Majlis Fatwa Kebangsaan*' (collective *ijtihad*) are important and necessary in matters of law and religion. Early jurist who had formed independent opinions never claimed finality to their opinions and even admitted the possibility of errors whereby they encouraged other scholars who were qualified to practice *ijtihad* to form their own conclusions based on their own knowledge and abilities. However, it is important to highlight that the *mujtahid* in this situation is the person who is the expert on that matter which he or she is qualified to practice *ijtihad* and influence others. Thus, accepting opinions concerning legal rules without knowledge or through *taqlid* doctrine (Ali Muhammad al-Jurjani, 1903) even though it caused stagnation in Islamic jurisprudence is better than influenced others based on the false fundamental precept of Shari'ah.

Basically, the implementation of Islamic family law reforms in Muslim countries are carried out within the framework of the principles of *siyasa shar'iyah* (judicious policy) which accorded the ruler the right to make administrative regulations in public interest or *maslahah* (Zanariah Noor, 2007:136). It can be

illustrated through the principle of social justice and by applying *maqasid as-Syar'iyah* in the reformation of IFLA which will be discussed in Chapter Three.

4.6 Critical Analysis on the Issues of Substantive Equality under the provisions of IFLA 1984

The formation of IFLA is based on the principle of social justice to protect family institution since it is regulated to review legislation on polygamy and divorce which has been practiced based on the individual interest. Since justice in Islamic jurisprudence is subjected to the rights of God and the rights of human beings, the implementation of justice through human reasoning should not against the Holy Qur'an and Hadith of the Prophet Muhammad (P.B.U.H). As Islamic law uphold the principle of justice, equal rights and duties between sexes, moral aptitude for preservation of human dignity, the concept of gender justice under IFLA not regulated within only formal equality but also substantive equality. Therefore, grounded on the principles of justice, equality between sexes and the concept of difference in Islamic jurisprudence, IFLA gives women and men different entitlements to rights and duties to achieve five detrimental objectives of Shariah within it attributes of rights.

4.6.1 The Issue of Minimum Age of Marriage

Marriage relationship is important in Islam. It is not a simple contract but a contract of life between two sexes which comes with responsibilities, love and respect. Section 8 of IFLA provides the different minimum age of marriage for women and men. It is stated that minimum age for men is eighteen and for women is sixteen. It means that a woman or man who attain this age does not need to apply for marriage application to Court but the marriage can be solemnized through form application and marriage

course. If in the case where underage marriage has to be solemnized, then the application should be done to Court by the parent together with the affidavit. Later, the parent will be called for hearing and the Court will decide whether the underage marriage is necessary or not (Abdul walid Hassan, 2016:7). The practice of underage marriage is considered as discriminatory against women. It is because the forced marriage practice normally ends up in an abusive relationship or divorce (Mek Wok, Najibah, Nora, 2016:44). In this situation, the legal position of women in marriage has to be clearly protected in line with the purpose and intent of Islamic law.

Historically, women have limited access to public sphere such as going to school due to economic, social and political factors at that time. This factor puts them in the state of unequal opportunity with men in getting knowledge and having formal job and finally women children at the early age, have been arranged for marriage by their parents. This had happened for the past forty years ago. However, it has been changed nowadays where it is stated that the average marriage ages for both genders have been rising from 25.6 and 22.1 in 1970 to 28 and 25.7 in 2010 for men and women respectively. On the other hand, the number of applications for Muslim child marriages between 2005 to 2015 was 10,240. The annual average of applications for Muslim child marriages recorded by the Department of Shariah Judiciary Malaysia between 2005 to 2010 is 849, while the annual average for 2011 to 2015 is 1,029 (Rohani Abdul Karim, Malaymail 14 April 2017).

In Islamic jurisprudence, there is no specific age of marriage discussed in the Holy Quran and Hadith of the Prophet. It is also contended that since there is no specific number of age to marry in Islamic law, the age was standardised by the UIDHR and CDHRI to be sixteen for women and eighteen for men. However, it does

stated that women and men slaves or unslaves have the same rights to enter into marriage²⁹. Moreover, in the Holy Quran, it is specified that the capacity to marriage in Islam relates with the capacity to manage the property³⁰ or the interpretation of the ‘full womanhood’ and ‘full manhood’ in Islam³¹ relates with their biological nature or reproductive function. It is not valued from the number of age but the capacity to manage the property wisely and the sexual capacity or maturity which relates with biological, physical, emotional and cultural factors. Even though there is no limitation of age to enter into marriage in Islamic law, the legislation on the limitation of age to marry is important to achieve the objective of marriage. The objective of marriage cannot be achieved if marriage is ended with divorce or quarrel or broken family which resulted to the social problems of the children. Therefore, the provision on the minimum age of marriage should be decided by the State suitable with the nature and nurture of society in accordance with *maslahah*.

It is argued that whenever men can legally enter into marriage contract two years older than women, it is to make sure that men as the head of the family have to have the physical, biological and psychological capacity to marry. At the age of eighteen, men in the context of the Malaysian culture and regulation, have completed secondary school and could apply for better work and could among others apply for

²⁹ Al-Quran. Surah An-Nur 24:32 “And marry the unmarried among you and the righteous among your male slaves and female slaves. If they should be poor, Allah will enrich them from His bounty, and Allah is all-Encompassing and Knowing”

³⁰ Al-Quran. An-Nisaa’ 4: 6 “And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgement, release their property to them. And do not consume it excessively and quickly, [anticipating] that they will grow up. And whoever, [when acting as guardian], is self-sufficient should refrain [from taking a fee]; and whoever is poor - let him take according to what is acceptable. Then when you release their property to them, bring witnesses upon them. And sufficient is Allah as Accountant”

³¹ Al-Quran. Yusoff. 12:22 “And when Joseph reached maturity, We gave him judgment and knowledge. And thus We reward the doers of good” & Al-Quran. Al-Qasas. 28:14 “And when he attained his full strength and was [mentally] mature, We bestowed upon him judgement and knowledge. And thus do We reward the doers of good”

driving licence in order to maintain the family members. In contrast with men, women naturally have possibility to become pregnant and become mother by having sexual relations after having first menstrual bleeding. Thus, it is argued that if IFLA permits women at the age of sixteen to legally enter into marriage contract due to the fact that women naturally reach sexual maturity earlier than men which could reveal them for disadvantaged situations. It is stated that the minimum age of marriage seemed to follow the Hanafi doctrine on the presumption of puberty which has been introduced in the earlier statutes and was maintained in the amendment of Islamic Family Law in 2000s (Zanariah Noor, 2007:143)

It is stated under the same provision that the syariah judge could grant permission in writing for underage marriages under certain circumstances. It means a syariah judge has given authority to give consent in writing for the relevancy of underage marriage in consideration of justice. Under certain circumstances where it is required, for example in the case of underage but it is considered obligatory for a woman and man under Islamic legal ruling to enter into marriage, the application has to be made to syariah judge for marriage permission. In order to avoid the increment of out of wedlock baby or baby dumping in this country, and also as is suitable with the cultural situation in Malaysia, Malay women, by application in court, may enter into marriage below the age of sixteen with the permission of the syariah judge in writing³².

There will be a court procedure where they must go to the court and apply for consent to marry (Orzala Ashraf Nemat & Jawed Nader, 2006). In practice, the Shariah judges will exercise their wide discretionary powers to consider all relevant

³² Section 8 of IFLA

factors before deciding whether or not to approve underage marriage. This includes looking at physical signs showing puberty such as menstruation in the girl, and also the level of maturity in both the child bride and groom to be (Malaymail, 14 April 2017). It shows that Islamic law has connection between human dignity and rights and reproductive health as contained in many provisions of CEDAW formulating rights that have direct and indirect bearing upon women's sexual and reproductive health. Under IFLA, in the preservation of collective rights, the State has the authority to control this practice if it would cause harm or disadvantageous against people or a group of people just like women. For example, the Syar'ie judge or Syariah Court has to give some guidelines for the couple to be responsible in marriage to each other. It is not only in terms of physical signs of puberty that the court has to satisfied for the application of underage marriage but also the intellectual knowledge of couples and the responsibility of *wali* on their rights and duties in marriage and family relation matters.

It is said that protection of human dignity is one of the primary objectives of Shari'ah law. Human dignity relates with human sexuality or reproductive function. The protection of human dignity in Islamic law not only covers before marriage, but it also happens during and after marriage. IFLA promotes collective rights and duties without neglecting individual rights. While preserving human dignity and rights in marriage, it is not only given individual rights perse but individual rights is given as long as it is not infringe the rights of public. For instance, there are limitations in sexual intercourse even after legalise marriage. It is prohibited to have intercourse during wife's menstruation and afterbirth periods. Moreover, actions and behaviours such as abortion (other than for medical risk to the pregnant woman) and

homosexuality are also strictly forbidden; contraceptive use is permitted for birth control under certain circumstances which do not harm women. All these kind of protection is some kind of protection of women and men sexual health. For example, the decision of Muzakarah Fatwa Committee of the National Council for Affairs The 28th Islamic Religious Malaysia held on 29 February 1991 has decided that the Norplant System for family planning, healthy life, education and happiness is permissible subject to Decision of 12th Muzakarah at 20th January 1977³³. It indicates that Islamic law is not unchallengeable with regard to the number age of marriage between women and men. It could be changed for better happiness, healthiest family life as long as it does not contradict with the fundamental Shari'ah principle.

4.6.2 The Issue of Person of Other Religion

Another issue on the differences of rights of women and men under the provision of IFLA is Section 10³⁴ is regarding persons of other religions. In this provision, Islamic jurisprudence prohibits both women and men to enter into marriage with a non-Muslim in accordance with primary sources of Shari'ah as stated in the Qur'an which means:

“Do not marry idolatresses (al mushrikāt) till they believe; and certainly a believing maid is better than an idolatress even though she would please you; and do not marry idolaters (al Mushrikīn) till they believe (hata yūminū), and certainly a believing slave is better than an idolater, even though he would please you. These invite to the Fire, and Allah invites to the Garden and to forgiveness by His grace, and makes clear His revelations to mankind so that they may remember”³⁵.

³³ Kompilasi Pandangan Hukum Muzakarah Jawatankuasa Fatwa Bahagian Hal Ehwal Ugama Islam, JAKIM, 2015, pg 107

³⁴ (1) No man shall marry a non-Muslim except a Kitabiyah.

(2) No woman shall marry a non-Muslim.

³⁵ Al-Quran. Al-Baqarah 2:221

The verse clearly stated that interfaith marriage is forbidden in Islam but the exception is given only for men to marry a *Kitābiyah*, not idolatress. In Islamic law, protection of religion and collective rights become the primary objective in the context of '*maqāsid Shar'īyyah*'. Some of the jurists argue that the non-Muslim women cannot become the mother of the Muslim believers. It is due to the object of marriage in Islam is to civilise the nations whereby biologically women do have primary duty in private sphere to take care of children. Women have the big role in developing nation. In spite of that, how would a couple in a marriage institution with different belief and way of life could enjoy their life together. In spite of that, a random survey made by Debate.org on 13th May 2016 on whether religion is important in relationship find out that sixty three percent claimed that religion is important in a relationship.

The Islamic marriage objective for women and men is not only to enjoy sexual relations but to fulfil the necessities of human nature, leading to life-time co-operation between them with love and compassion. It is claimed that inter-religious marriage causes many problems to the social life whenever a wife and husband or even children do not enjoy their life together. Marriage life is a physical and spiritual togetherness of the spouses who can share similar views on religion, morality and household management. It consists of the collective rights which include the rights and duties of mother and father for the benefit of the children. Since a woman or mother in Islamic jurisprudence is important asset to civilize the nations, the jurists stresses that the Muslim believers cannot marry women of non-believers.

The concept of religious freedom under Islamic law is the same with that of Christianity and Judaism, which emphatically advocates for the absence of compulsion in religion (Nora Abdul Hak, Roslina Che Soh, Azizah Mohd & A. Umar

Alkali, 2016:125). The idea of apostasy as a crime under the aboved Quranic verse clearly shown the act of intolerance on the part of Jews as they persecuted and killed the Messengers of Allah sent to guide people to the right path of Allah³⁶. In another perspective, the role of men as the head of the family or protector has a positive object because Islamic law stresses the meaning of 'manhood' as the responsibility of men rather than power of men over women. The responsibility of men who physically stronger than women shows that Islam emphasises on the protection of true religion and faith which started within a family institution. Islamic jurisprudence on this matter is not contradict with the belief and practice of other religions in appointing men as the head of the family.

This issue also relates with the determination of child's religion in cases of unilateral conversion to Islam as the parent who is awarded custody will have a better chance to decide on the religious upbringing of children. The Syariah Court gives preference to the religious status of the custodian, as it is one of the important criteria in Islamic law, although the issue of religion is for the custodian in Islamic jurisprudence is subjective. This is quite understandable as the issue of faith is fundamental for Muslims (Najibah Mohd Zin, 2012:244). The case of *Subashini Rajasingam v Saravanan Thangathoray & Other Appeals* illustrates the situation and the correct decision made due to separate jurisdiction of Muslim spouse and non-Muslim spouse after conversion. It is argued that, the best interest of the child as a mechanism to decide on religious upbringing would be the best solution to the extent that both parents will be scrutinised by the judge to decide on their competency to look after the child. This approach sound practical in an ordinary cases but may lead

³⁶ Al-Quran, Ali Imraan 3:21

to tug-of-war if the parents fail to compromise. Then, in this situation, Islamic jurisprudence will not be against the rule of justice to decide on the basis of *maslahah* especially the interest of minor children who are in need of both parents in spite of a divorce.

4.6.3 The Issue of Consent of *Wali*

Undoubtedly, marriage is a way to preserve dignity, family institution and descent of both husband and wife. Thus, it shall be contracted in a harmonious, happy and legally recognized. Unauthorized parental removal of children for marriage or runaway marriage couple is strongly condemned as these acts may invite problems especially in hard times like incidence of marriage breakdown and other marital disputes (Anis Shuhaiza & Nor 'Aza, 2010).

A conflict on the issue of *wali* in Islamic marriage is whenever a *wali* or guardian which could be a father or grandfather and above can force the marriage of women. Section 2 of IFLA states that '*Walī Mujbir*' means the father or paternal grandfather and above who have the authority to solemnise the marriage. Under Shafie schools of law, a father and paternal grandfather as *wali mujbir* (forceful guardian) can give his virgin daughter in marriage without prior consent from the daughter. For girls before attaining puberty, a *wali* can solemnize marriage without prior consent but the girls should not be given to the husband until attaining the age of puberty. For girls who have attained the age of puberty, a *wali* is required to inform his daughter on the marriage and still can force the marriage if the three conditions are fulfilled. They are i) no revivals or war between *wali* and his daughter; ii) the bride is in state of equal social status or *kufu*' with the girl; iii) the bride is in the financial

ability to pay *mahr* or maskahwin to the future wife. If these conditions are not fulfilled, the marriage is not legal and cannot be solemnised (Al-Syirbaini, 1994:246).

As-Shafī'yy jurist opines in his book *Al-Umm*, a woman cannot solemnise her own marriage, and if solemnisation is made without the permission of *walī*, the marriage is not valid (Mohammad Azam Hussain & Alias Azhar, 2015). However, it does not mean that a woman does not have her own choice or right in a marriage. Women, as well as men have similar rights in a marriage, but special measures are provided by Shari'ah to protect women before and after marriage, through the authority of *walī*. On the other hand, Hanafi jurists argue that the requirement of *walī* in a marriage is only in a case of the marriage of child or insane person. However, the duty of a *walī* is important in a marriage because a *walī* is an authorised person who will be responsible towards a party in a marriage institution, such as children and also a wife who would be depending on him on material and spiritual needs if anything happens in the marriage

It is contended that in Malaysia, nearly all the provisions under the Islamic Family Law Act and Enactments are enacted to protect the rights of women together with children in line with Islamic jurisprudence whereby men are considered as the protector of women (Noraini Hashim, 2015). Section 7³⁷ of IFLA stated that *walī* has to be presence for the solemnization of marriage. On the other hand, Section 13 (a) provides that consent from *walī* of the woman is required in a marriage contract. It

³⁷ (1) A marriage in the Federal Territory shall be in accordance with the provisions of this Act and shall be solemnized in accordance with Hukum Syara' by -
 (a) the wali in the presence of the Registrar;
 (b) the representative of the wali in the presence and with the permission of the Registrar; or
 (c) the Registrar as the representative of the wali.
 (2) Where a marriage involves a woman who has no wali from nasab in accordance with Hukum Syara', the marriage shall be solemnized only by the wali Raja.

means that even though a *wali* can give his virgin daughter in marriage without prior consent from the daughter, in every marriage of the girl below sixteen have to get permission from the Syariah judge. However, for the marriage of women of sixteen years and above, solemnization of marriage can be made after getting consent from a *wali* in the marriage (Syh Noorul Mdihah Syed Husin & Tengku Fatimah Muliana Tengku Muda, 2011:13). The role of the Syarie judge is to investigate from the both sides in every aspects to ensure the marriage is entered with justice. The fiqh methodology of *saddu zara'i'* is used in this provision to avoid any violence against children since they are normally weak and small and having no access to seek justice. The role of *wali* is still appropriate because it is suitable with the Malay Muslim culture whereby a girl is inappropriately left behind her family or her *wali* in the preparation of marriage or any matters related to it (Mahmood Zuhdi, 2006:375).

The discussion on the rights and duties of *wali* in Islamic marriage is best illustrated in the case of *Syed Abdullah al-Shatri v Syarifah Salmah* [1959] 1 MLJ 137. In this case, the daughter refused to the forced marriage contracted by her father. The father applied the court's order for his daughter to accept the marriage and forced her to live with the husband. The court decided that the marriage without the consent of the virgin daughter was valid. However, the husband was advised to divorce the wife since she did not agree to the marriage and already had the choice of her future husband. It was regarded as an accepted principle of Islamic law among the jurists and the public. The discussion and decision of this case is based on As-Shafi'iyy school of thought on the roles, rights and duties of *wali* which has to be implemented under IFLA. However, the requirement on the consent of *wali* for the validity of marriage is not only based on Shafi'e's school of thoughts but also Maliki jurist. This case

designates the rights and duties of *wali* and how the role of *wali* should be implemented for the empowerment of women in marriage and family relationship.

This is not only about the power or authority of men or *wali* but the mutual responsibility of children and parents in ensuring happiness, good relationships and choosing a right and suitable husband for her entire life. The role of *wali* in Islamic marriage should not be looked into restrictive perspective but has to be look at protective perspective on biological and historical contexts of being women. The three conditions stated above on the force marriage by a *wali* indicates that a *wali* has huge responsibility to protect the dignity and rights of the daughter to ensure that she enjoy this life with a suitable life partner without any fraud, violence and is conducted with full honourable manner. This valuable rules could be applied with justice to avoid persistent perception and critiques on the harsness of Shari'ah law with regard to the rights of women in marriage.

Thus, *wali*'s consent in marriage does not mean that a *wali* can force a marriage without the consent of both parties to the marriage. A *wali mujbir* is chosen from among the eldest person in a family who has blood relationship and most experienced in life, and would be the one who could best advises and guides the woman in her married life. It is considered that the consent of *wali* for a validity of marriage as 'a safety measure in the interest of the girl herself' and thus a protective right for the girl (Baderin M.A., 2010:296). Meanwhile in the globalisation era where a woman is actively involved in the private sphere, the role of *wali* becomes more relevant and crucial for the protection of women's dignity and rights (Mohammad Azam Hussain & Alias Azhar, 2015).

Section 13 (b) of IFLA states that the Syar'iah Judge having jurisdiction may granted his consent thereto as *wali Raja* in accordance with Hukum Syara'; such consent may be given wherever there is no wali by nasab in accordance with Hukum Syara' available to act or if the *wali* cannot be found or where the *wali* refuses his consent without sufficient reason. The power given by IFLA on *wali raja*³⁸ is intended to ensure that women entered into marriage without any fraud, force marriage and with honourable manner with the implementation of justice without prejudice. If *wali mujbir* manipulates his rights, then the girl has the right to enter into marriage through *wali raja*. The role of *wali* as the authorised maintainer, guardian and protector for women, a *wali* should not to restrict the freedom of women in marriage but to ensure that women could enjoy their marriage life with happiness present and future. Therefore, since there is no provision on the rights and duties of *wali mujbir* under IFLA (Mimi Kamariah, 1992:35), it is argued that the rights and duties of *wali mujbir* has to be specifically provided such as the three conditions in the case of *Syed Abdullah al-Shatiri*. It is intended to empower women with justice by the role of *wali mujbir* because it is relevant and beneficial to avoid discrimination against women.

The role of *wali* is also imperative in the situation where a husband fails to maintain his wife and children due to going missing or is irresponsible, which caused the wife and children suffer in terms of economic, health, safety and education, then a *wali* authorised by law should be the one who will be responsible to maintain or to protect the wife and the children. It shows that the role of a *wali* in an Islamic

³⁸ *Wali* authorised by the Yang di-Pertuan Agong, in the case of the Federal Territories, Penang, Sabah and Sarawak, or by the Ruler, in the case of any other States, to give away in marriage a woman who has no *wali* from *nasab*.

marriage is not based on individual rights but on collective rights. Islam does protect the society as a whole through a systematic hierarchy in a family institution through the functions of a *wali* in order to make sure the disadvantaged group like women and children will be protected physically, mentally and spiritually from any harm or violence. Therefore, IFLA does not discriminate women but instead protect them with the special guidance from the Creator who always knows what is best for His Creations.

The question arises on why it is only a man who is the father or paternal grandfather and above can be a *wali* or primary natural guardian in Islam? The answer to this question can be held based on biological and historical factors of being women. It is contended that women historically being disadvantageous and need assistance from men in their life (Haron Din, 2008:29). However, it is not a state of competition between women and men especially in marriage which has to be filled with love and mutual responsibility. In social life, women and men are complementary each other with some different function due to their differences in biological, cultural and religious rights and duties. The Holy Quran says:

“Men are the protectors and maintainers of women, because God has made some of them to excel others, and because they support them from their means”³⁹

Al-Qurtubi defines the word ‘*qawwam*’ as the attribute of man as a leader in marriage and manifested as the rights of God. It shows that the authority of a man in terms of responsibility is higher than that of a woman suitable to their nature of creation as man where he is competent physically, mentally and spiritually to be the protector in the family institution (Rahimin Affandi et.al, 2008 & Hammudah, 1985).

³⁹ Al-Quran. An-Nisaa’ 4:34

In spite of that, the Islamic concept of maintenance includes the basic necessities of life in terms of material and spiritual maintenance. The prophet s.a.w. said which means:

“He is the guardian (leader) of the family and it is responsible for those under his charge, and his wife is a keeper (manager) in the household of her husband and children, and liable for those under dependents” (Hadith Al-Bukhari).

The above Hadith of the Prophet evidently mentions the role of wife and husband in marriage. Both are mutually responsible in marriage for the balance and happiness life. In another verse, the Qur’an clearly states that *“O, Believers Save yourselves and your dependents from the fire whose fuel are humans and the stones”*.⁴⁰ This verse shows that a *wali* has a collective rights and duties in the family institution to bring them with happiness and tranquility. However, the authority of *wali* is not absolute whenever a *wali* manipulates his duties as *wali*, then the State has the authority to ensure justice is implemented based on the attributes of collective rights.

The above arguments indicate that the role of *wali* is not discriminatory against women if it is implemented with justice. Different entitlement of rights and duties between women and men on the role of *wali* is due to a man has a primary duty in managing the family maintenance (materially and spiritually) while a woman has a primary duty to take good care of the children in the private sphere suitable with their nature. Their primary duties however, do not restrict their conduct in carrying out the collective responsibilities toward the family members with mutual understanding. The relationship between a wife and husband acquire the balanced rights and duties in accordance to biological, psychological and physical nature of being a woman and a

⁴⁰ Al-Quran. At-Tahrim 66:6

man. Thus, the rights and duties as acquired by Shari'ah suited with their nature and nurture are just and equal and not discriminate against them. This division of rights between women and men in marriage also not contradict with the rights and duties of wife and husband in other religions like Christian, Buddhism, Hinduism, Judism and others which acknowledge men as the head of the family (Syed Qutb, 2000).

4.6.4 The Issue of Polygamy

Section 23 of IFLA provides on the rules for polygamy. It become the most controversial gender issues around the world which it seems to be unjust for women to be practiced. It is claimed as unjust and discriminatory against women whenever women do not have any rights to avoid this kind of marriage entered by the errant husband. It is claimed that the requirement for justice and equal treatment was not legalised, assuming that it was a matter of moral conscience of the husband (Zanariah Noor, 2007:143). Besides, it is also noted that the unrestricted practice of polygamous marriages by errant husbands create major sufferings among the women that led to the destruction of the family institution which is the important institution for Muslims.

It is contended that polygamy is not an Islamic exclusive practice (Mansur Isa Yelwa, 2016:75). It also has been discussed that there are two types of marriages in Islam; i) monogamy: one man married to one woman and ii) limited polygyny (known as polygamy in Islam): one man married to two, three or at the most four wives. In Islam, the ideal marriage is the monogamous form of marriage as has been highlighted in the quranic verse on polygamous marriage. Limited polygyny is a provision approved by Islam for exceptional circumstances only; and that also with many stringent conditions. Islam did not invent the system of polygamy. It existed

long before Islam came into the scene of world events. It is believed that early Jews and Christians were polygamous (Mansur Yelwa, 2016:75). The Bible says that Lamech, the grandson of Adam, “took unto him two wives: the name of the one was Adah, and the name of the other Zillah.” Many holy personalities of the Bible had many wives or concubines at the same time (Maha A.Z. Yamani, 2008:9).

The fact on the Prophet of Abraham who married Sarah and Hajar has stated in the Quran. Abraham was first blessed with a son through Hajar whom he named Ismael, and then he was blessed with another son through Sarah whom he named Isaac. It is same with the Prophet of Jacob while he had four wives and concubines: Leah and Rachel (both were Jacob’s cousins), and he also had Bilhah and Zilpah (both were slave-girls gifted to Jacob by his wives). It is from these four ladies that Jacob had twelve sons who became ancestors of the Twelve Tribes of Israel. Furthermore, the earliest recorded human laws, the Hammurabic legal code in 1752 BC and the Babylonian code, both contained protective clauses in favour of the second wife and her off spring, indicating that polygamous marriage was in presence this far back (Abu Ameenah, Bilal Philips and Jameela Jones, 2005:14). Thus, polygamy has existed from the earliest days of human history.

Misunderstanding on the concept of polygyny or polygamous marriage in Islam is due to the failing of people or the law to highlight the true historical background and the legal ruling of Islamic law which permits men to practice polygamy with the implementation of justice. The Quranic verse below mentions on the polygamous marriage or polygyny in Islam:

“And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear

*that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice]*⁴¹.

From this verse, polygamous marriage is only permissible for men up to four wives in the implementation of justice. It is clearly stated in the verse that the requirement for polygamy is by implementation of justice, if justice cannot be implemented then just marry one woman only. It has been argued by jurists that justice in the context of polygamy has to be looked in the form of material or immaterial or both (Haris Hidayatollah, 2015). Polygamy is permitted on the condition of justice (Mawdudi) and Abd 'Ati has observed that polygamy in Islam is no more and no less than that of a permissible act, which like any other act lawful in principle, it becomes forbidden if it involves unlawful things or leads to unlawful consequences or injustice. In this case, if a man is unable to do justice, he has no right to avail himself of this conditional permission. Justice here means the husband would be able to maintain his family in matters of living expenses, social contact and other aspects of marital relationship (Zeenath Kausar, 2008) including spiritual elements to guide into the right path as examined by syarie judge as just and necessary which does not cause harm to the existing wife. This indicates that polygamous marriage in Islam is not founded on the principle of individual rights but polygamous marriage through the history and Sunnah of the Prophet is founded on the principle of collective rights to upgrade the status of women in a society.

The discussions about polygamy in Islam usually emphasised that it was not encouraged nor prohibited. It is simply an alternative for those who need more than one wife, for example a man with a high sexual drive. Polygamy in this case is considered as necessary to settle his feeling so that he could concentrate on fulfilling

⁴¹ Al-Qur'an. An Nisaa' 4:3

his duties in ibadah (religious duties which will be rewarded) (Zanariah Noor, 2007:143; Abd al-Wahab al-Sha'arawi:37-38). It has been argued by Muslim scholars and most of the jurists including As-Shafi'iyy on justifying the conditional permissibility of polygamous marriage such as demographic needs, economic factors, barrenness of the wife, chronic illness of the wife, higher sexual needs of men, e. t. c. (Ibn Qayyim, 1900:85-87; Al-Qaradawi, 1984:192-193; Baderin M.A., 2010:177-178). It has been stated also that polygamous marriage is not only permissible on the weaknesses of women, but Islamic law also recognises defects of the husband such as impotence, lack of semen or ejaculation during intercourse, lack of testicles and amputated sexual organ, all of which constitute grounds on which the wife may seek for the dissolution of the marriage not for polygamy. For example, al-Zaylani (1313AH:25), the twelfth century Hanafi jurist stated that since these defects defeat the very purpose of marriage i. e. satisfaction of sexual urge and procreation of children, the wife has a right to demand for a dissolution.

Then, is the provision of polygamous marriage under Section 23⁴² of IFLA discriminatory against women? The issue of polygamy under IFLA is on the absence

⁴² (1) No man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another woman nor shall such marriage contracted without such permission be registered under this Act: Provided that the Court may if it is shown that such marriage is valid according to Hukum Syara' order it to be registered subject to section 123.

[Subs. Act A902: s.9]

(2) Subsection (1) applies to the marriage in the Federal Territory of a man who is resident within or outside the Federal Territory and to the marriage outside the Federal Territory of a man resident in the Federal Territory.

(3) An application for permission shall be submitted to the Court in the prescribed manner and shall be accompanied by a declaration stating the grounds on which the proposed marriage is alleged to be just and necessary, the present income of the applicant, particulars of his commitments and his ascertainable financial obligations and liabilities, the number of his dependants, including persons who would be his dependants as a result of the proposed marriage, and whether the consent or views of the existing wife or wives on the proposed marriage have been obtained.

[Am. Act A902: s.9]

(4) On receipt of the application, the Court shall summon the applicant and his existing wife or wives to be present at the hearing of the application, which shall be in camera, and the Court may grant the permission applied for if satisfied -

of strict implementation of the law regarding polygamy and criticism on the existing law which had been handled improperly, contradicting with the spirit of the reformation of Islam Family Law enacted in 1980s (Zanariah Noor, 2007:146). It was reported that, Shariah Court of the state of Perlis had allowed every application for polygamy since 1993 (Nik Noraini Nik Badlishah, 1984:73-74). People claim that polygamy is unfair for women because it is an insult and an unjust for women and children. For example, SiS has made a research on polygamy claiming that the practice of polygamy throws families into emotional and economic turmoil. It is true that the first wife has to share everything (physical, material, emotional) with the new wife of her husband and it would affect their usual life. It looks unfair if the husband enter into polygamous marriage without her permission. It seems unfair if the husband neglects his responsibilities toward his family, but it is not because the nature of polygamous marriage on its substance of Islamic law.

Failure to follow the rules and procedure and ignoring many of the restrictions and conditions contained in the existing enactments by the officers had made

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- (a) that the proposed marriage is just and necessary, having regard to such circumstances as, among others, the following, that is to say, sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives;
- (b) that the applicant has such means as to enable him to support as required by Hukum Syara' all his wives and dependants, including persons who would be his dependants as a result of the proposed marriage;
- (c) that the applicant would be able to accord equal treatment to all his wives as required by Hukum Syara'; and
[Am. Act A902: s.9]
- (d) that the proposed marriage would not cause darar syarie to the existing wife or wives.
[Am. Act A902: s.9] (e) [Repealed by Am. Act A902: s.9](5) A copy of the application under subsection (3) and of the statutory declaration required by that subsection shall be served together with the summons on each existing wife.
- (6) Any party aggrieved by or dissatisfied with any decision of the Court may appeal against the decision in the manner provided in the Administration Enactment for appeals in civil matters.
- (7) Any person who contracts a marriage in contravention of subsection (1) shall pay immediately the entire amount of the mas kahwin and the pemberian due to the existing wife or wives, which amount, if not so paid, shall be recoverable as a debt.
- (8) The procedure for solemnization and registration of a marriage under this section shall be similar in all respects to that applicable to other marriages solemnized and registered in the Federal Territory under this Act.

polygamy being practiced inappropriately. This practice causes unjust and unequal treatment for women in polygamous marriage under IFLA. The cases of irresponsible husband does not only happen in polygamous marriage but also in monogamous marriages. This is the main contributor for the emotional and economic turmoil of the family members in the practice of polygamy. Abdul Monir Yaacub said that "...that most men entered polygamous marriage not out of emulating the Prophet's Sunnah (example) but for personal interest" (Raihanah Abdullah & Nurhayati Surbaini, 2011). It has been traced that an unfair polygamous marriage is caused by an irresponsible man who marry for his personal interest. An irresponsible husband is a person who fails to maintain or protect the spiritual and material needs of his family members, which might disadvantage women and children in the marriage institution. Thus, it is the behavior which should be firstly educated.

Islamic law teaches men to be the protector of women and not to control women and abuse their rights socially, economically and politically. In fact, the head of the family should be primarily responsible for the material and spiritual needs of family members, and must perform the duties and responsibilities as required by Shari'ah law. Shari'ah law under all circumstances does not approve the act of cheating, beating and any cruel acts. The basic principles of relationship between women and men in marriage are to love and respect each other and to protect the dignity of each other. It is a similar principle even in monogamous marriage. Therefore, it is contended that polygamous marriage does not discriminate against women but give women benefits such as in the case of infertility, illnesses, health problems, weak financial status and so on. In all these circumstances then, polygamy is needed, whereby the marriage is necessary and just and the persons affected in that

situations will get their rights, including the first and new wife and the children in that marriage. Thus, Shari'ah law gives rights for both woman and man in this matter in accordance with their strength biologically, physically and materially while preserving collective rights which is the primary objective, in spite of individual rights.

It has been stated that legalising justice and equal treatment in polygamy practice were evident in modern Islamic family law in Malaysia. The the amendments in the 2005 on the provision of Section 23 of IFLA has been criticised by SiS⁴³ that it loosened the conditions for polygamy. SiS argued that the requirement of the proposed marriage by the wording of 'just' or 'necessary' made it easier for men to practice polygamy. Section 23 (3) of IFLA provides that whenever a husband files to the Court on the practice of polygamy, the Court has to order a first wife or future wife to attend the Court. In sub section (4) of Section 23 of IFLA, it is stated that the Court may grant the permission if it is satisfied on four grounds; (a) that the proposed marriage is just and necessary, having regard to such circumstances as, among others, the following, that is to say, sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives; (b) that the applicant has such means as to enable him to support as required by *Hukum Shar'ah* all his wives and dependants, including persons who would be his dependants as a result of the proposed marriage; (c) that the applicant would be able to accord equal treatment to all his wives as required by *Hukum Shar'ah*; and (d) that the proposed marriage would not cause *darar shar'iyy* to the existing wife or wives.

⁴³ at the National Convention held on 18th October 2015

From the allocated provision, the permission for a polygamous marriage is neither the right of a husband nor the right of wife but the right of State which has been transferred to the syarie judge in order to uphold justice. It is argued that it should be for the State and not an individual to decide whether such social conditions exist which could necessitate taking more than one wife at a time (Nik Noraini, 1998). The Court will decide whether such polygamous marriage is permissible or not permissible with the valid reason as provided by Shari'ah law. Therefore, this provision has stated that women are given rights to inform the Court if the polygamous marriage would be unjust for them. However, if the wife has not been informed on the marriage of husband but the application of polygamous marriage is accepted through illegal procedure, then it would tend to discrimination. In this case, if justice cannot be implemented due to irresponsible person who violates the law, then it will defeat the objective of law that is to achieve justice for all people.

As a matter of fact, the Court will decide whether to give consent or not for the said men to practice polygamy. In the case of *Aishah vs Wan Mohd Yusof*, *Jurnal Hukum*, Vol. 7, p. 152. It was held that, while the defendant fulfilled the condition "necessary," but he failed to fulfill the condition for "just." His application to practice polygamy was rejected. However, in the case of *Mohd Izudin bin Mohd Ilias v Rozeta bt Hasan*, 2013, the court allowed the plaintiff's application to practise polygamy but with the condition that the husband must be just to his wives in matters such as food, shelter, clothing and overnight rotation with wives. Therefore, it is suggested that the syarie judge as the authorised person in the Court institution has to decide wisely and justly with regard to marriage and family cases based on the principle of justice and collective rights in all circumstances including polygamy. The application for

polygamy which fails to meet the above conditions will be refused by Court (Zanariah Noor, 2007:146). In this situation, the role of Court or Shar'ie Judge is important to distinguish between causing harm or (*darar shar'īyy*) and disobedient (*nushuz*) and read together Section 59 (2)⁴⁴ of IFLA in order to avoid unjust decision. It is argued that if the husband fail to support his wives and fail to treat them equally and just, the wives can go to court and make an application for maintenance or divorce and their acts in disobeying their husband are not considered as disobedient (Noraini Hashim, 2015).

Polygamous marriage might be mandatory, forbidden, recommended, undesirable and permissible according to Islamic legal ruling. It is stated that many contemporary scholars and jurists hold that the mere apprehension of not being able to deal justly between co-wives removes the permissibility of polygamy and advocates monogamy. They refer to the concluding sentence of the Quranic verse 4:3 which means “...*monogamy is nearer to prevent you from doing injustice*”. It is argued that monogamy is the rule and polygamy is an exception (M.A. Baderin, 2010:179). This view has been further argued based on the Quranic verse 4:129 which means, “*You will never be able to do perfect justice between wives even if it is your ardent desire...*”. It has been contended that this Quranic verse has confirmed that it is difficult for men to fulfill the requirement of justice among co-wives therefore the polygamous marriage is not recommended if it creates injustice for people.

⁴⁴ “Subject to Hukum Syara' and confirmation by the Court, a wife shall not be entitled to maintenance when she is nusyuz, or unreasonably refuses to obey the lawful wishes or commands of her husband, that is to say, inter alia -
 (a) when she withholds her association with her husband;
 (b) when she leaves her husband's home against his will; or
 (c) when she refuses to move with him to another home or place, without any valid reason according to Hukum Syara'.

It indicates that the principle of justice in the practice of polygamy is the vital condition. There are some State which criminalized polygamy in their law such as Tunisia, However, the prohibitory approach has been controversial under Islamic law which has been criticized as contravening the Quran (M.A. Baderin, 2010:180). In order to avoid unjust polygamous marriage, it could not be by abolishing the practice of polygamy but to provide for better laws which can prevent unfair polygamous practices. It can be realised through strict conditions in the provisions of law including strict punishment for those who is not fulfil the requirement of the law. If Tunisia criminalised polygamy with a sentence of one year's imprisonment, it could be the law who penalised the one who treated people unjustly through polygamy. If there is injustice among wives; or polygamy brings moral corruption to families; if the limits of law which should be respected are broken; if enmity erupts among members of one family and threatens to become public – in these cases it is acceptable for a ruler concerned about public welfare to prohibit polygamy, with or without conditions, according to his perception of what is best for the good of the community (Zanariah Noor, 2007:144).

In conjunction with the concept of difference in Islamic law, the practice of polygamy will disadvantageous women if similar entitlement to rights is given to woman to marry more than one husband at one time. Then, there would be an unbalanced and unjust family institution as it will cause prolonged argument about the legas status of the children born, inheritance matter of children and who should be a father to the child. It is because most of the rules in Islamic law are the outcome of the will to protect women and their dignity (Equitas, 2009:52). Polygamy is not practical for women but will disadvantageous women if it is permissible to be practiced.

However, if men were forbidden to practice polygamy, family institutions will not grow in a harmonious and natural situation, because the abolishment of polygamy will discriminate against women by eliminating their rights to enter into legal marriage. Islam sees marriage as an institution and protection against social risk (Equitas, 2009:51). Thus, Islam permits men to enter into marriage with more than one up to four to give justice to certain parties under certain circumstances.

Scientifically, it is contended that the law on polygamous marriage does not discriminate against women because it is permissible for men due to the biological nature of men, and it is not permissible for women because of the biological nature of women. In spite of that, if women demand similar rights with men to practice polygamy, it is against the nature of women and will discriminate against them and for Muslims, it is against *haqq Allah*. It is noted that treating woman as individual persons to practice polygamy just like man is discriminatory, as women would face the problems if they have relationships with more than one man. Thus, in the case of polygamous marriage, different behaviours, aspirations and needs of women and men are considered, valued and favoured equally.

Understanding polygamous marriage in its history and within the principle of justice and collective rights and duties will eliminate the discriminatory allegations of Shari'ah polygamy or polygyny. Islamic marriage and family institutions are concerned with the welfare of collective interests including children and women, not with satisfying the lust of an individual. With regard to the Islamic legal ruling of polygamy, it is an option and neither discouraged nor made obligatory. It is left to the husband's personal choice to decide and the wife's personal choice to accept under different situations. When the decision is taken, men who intend to practice polygamy

must make sure that he will be fully responsible for all his wives. He has to make sure that he will treat them equally and fairly. If the practice of polygamy causing unjust against the wife or wives, then there must be the law which could penalize them.

4.6.5 The Issue of Divorce

Women in Islam were claimed to have lesser right in divorce as the unilateral right of divorce vests in the men (Me Wok, Najibah & Nora, 2016:49). The common practice of husband to divorce his wife whenever he wanted during pre-Islamic period has been limited by Islamic law to be only twice for reconciliation and the third time will be final. Therefore, like other Muslim countries, divorce law reforms have taken place in order to safeguard the rights of the wife. The 1980s reforms of Malaysian Islamic Family Law limited the husband's rights of extra-judicial divorce, requiring him to pronounce *talaq* before a court. However, it does not affect the husband's right to divorce his wife by the way of *talaq* (Raihanah Abdullah & Soraya Khairuddin, 2009:43). Any divorce pronounced without court permission is a matrimonial offence and shall be punished.

In the Holy Quran, Allah says in Surah al-Baqarah verse 298-299 which means:

“Divorce (is permissible) only twice, then either maintain (them) in honor or let (them) go in kindness. And it is not lawful for you to take anything of what you have given them, unless both fear that they cannot keep (themselves) within Allah's bounds; and if you fear that they cannot keep (themselves) within Allah's bounds, it is no sin on either of them about what she gives up to get herself freed (from the wedlock). Those are Allah's limits; so do not transgress them. And, whoever transgresses Allah's limits -then these are they that are the (willful) wrongdoers.”

“O Prophet, when you [Muslims] divorce women, divorce them for [the commencement of] their waiting period and keep count of the waiting period,

and fear Allah, your Lord. Do not turn them out of their [husbands'] houses, nor should they [themselves] leave [during that period] unless they are committing a clear immorality. And those are the limits [set by] Allah. And whoever transgresses the limits of Allah has certainly wronged himself. You know not; perhaps Allah will bring about after that a [different] matter”.

Divorce is among the most abhorrence things permitted by Allah⁴⁵. It is permitted in Islam to avoid greater evil which might result from the continuation of the marriage (Nik Salida Suhaila Nik Saleh, 2013 & Ahmad, 1978:4). In conjunction with the most unlike things permitted by God and the rising number of divorce among Muslims, the regulations of divorce under IFLA should be properly manage with justice, honour and kindness. Thus, divorce if it is permitted in the absence of judicial and legislative control, (Anderson, 1959:51-52) will probably abusive against women. Due to this, the judicial and legal provisions of marriage including the matters of divorce under IFLA are enacted properly without discrimination.

In conjunction with the importance of marriage institution in Islamic, it is argued that divorce might be mandatory, forbidden, recommended, undesirable or permissible (Abdul Walid Abu Hassan, 2016:40) according to the circumstances to achieve the five objectives of Shari'ah. Divorce is not the individual rights given by Allah. It has been misunderstood to be practiced by husband with absolute freedom. However, it is permisibble whenever there is valid, just and reasonable cause for the dissolution. Divorce is permissible as the individual rights if the right given will not infringe the rights of others. Hence, in order to preserve the religion, life, property, dignity and descent, the collective rights should be firstly considered in divorce matters suitable with the attributes of Islamic rights.

⁴⁵ Hadith 1863. Sunan Abu Dawud. Dar al-risalah Al-A'lamiyah. 2009 AD/1430H

The dissolution of marriage or divorce are two different terms which indicate different meaning and effect in marriage and family relationships. In Islamic jurisprudence, the dissolution of marriage can be occurred either by the death of the parties to the marriage or by divorce (Mek Wok Mahmud & Rahmawati Mohd Yusoff, 2016). Under the provisions of IFLA, there are different types of dissolution of marriage given for women and men suitable with the conditions. It might be in the form of *talaq* or unilateral divorce, *khul'* or *tebus talaq*, *ta'liq*, *fasakh*, *murtad* and death. Before further discussion on the types of the dissolution of marriage given for women under IFLA, there needs for clarification on the terms which related to the dissolution of marriage such as the meaning of *darar syarie*, *pemberian*, *mas kahwin* and *hantaran*.

Considering the historical status of women of being disadvantaged and the intention of IFLA in providing special protection for women of their private sphere, the application of divorce by a wife is considered by the Court within the meaning of *darar syarie* in Section 2. In the provision, the meaning of *darar syarie* means "harm, according to what is normally recognised by Islamic Law, affecting a wife in respect of religion, life, body, mind, moral, or property". In this case, the authority of judge is needed to decide the case with justice, equal and without discrimination. This provision shows that IFLA puts a wife in an exclusive position of protection in marriage. This provision clearly indicates that IFLA is intended to protect women in marriage. Perhaps, if it is analysed within the attributes of collective rights, this provision may discriminate against men if the protection from harm is only for a wife. Therefore, it is necessary and appropriate to include the protection for the husband and children since there was also cases where a husband becomes a victim of abuse

marriage (Zubaidah Md Ismail, 2015)⁴⁶. It was stated that twenty (20) cases of marriage abuse are on husband's complaints of their wives which causing physical injury (Raihanah Abdullah, 2008).

The provision on the meaning of *darar syarie* has also been highlighted at the Brunei International Defence Exhibition Centre (BRIDEX),⁴⁷ regarding the amendment made to the meaning of *darar sharie* by saying that “*Although (these) new amendments are not gender-specific, the amendments actually provided steps in the right direction for the protection of not only women, but also their children and those who are dependent upon them against their aggressors*”, she said, adding that “*these new provisions can empower them to speak of their rights and to challenge the inequitable status quo*”.(Brunei Times, Thursday, April 12, 2012).

Another terms which has to be understood under the provisions of IFLA is the meaning of ‘*pemberian*’. As provided by Section 2, it is means “a gift whether in the form of money or things given by a husband to a wife at the time of the marriage”. From this definition, IFLA defines a special gift by a husband to a wife at the time of marriage as *pemberian*. Whether *pemberian* is similar with *mas kahwin* or different? In analysing this provision, reference is made to the explanation of deferred dower by Noraini Hashim (2015) in her conference paper, where she cited that “deferred dower can be defined as the obligatory marriage payment due under Islamic law by the husband to the wife at the time the marriage is solemnised...” Therefore, it is believed that the meaning of dower is ‘*maskahwin*’ in the Malay language or ‘*mahar*’ in

⁴⁶ Dato’ Zubaidah Md Ismail (2015) in her presentation on the Violence against Women (VAW) issues on 1st October 2015 at Putrajaya

⁴⁷ Speech by Datin Seri Paduka Hjh Hayati Pehin Orang Kaya Shahbandar Dato Seri Paduka Hj Mohd Salleh at the launching of the International Conference on ‘Rights of Muslim Women in the Modern World’ Brunei Times, Thursday, April 12, 2012.

Arabic. However, the term '*pemberian*' has different meaning and scope and not only refers to *mas kahwin* but also '*hantaran*'. It is important to highlight here that in Islamic law, '*maskahwin*' or '*mahar*' is clearly stated in the Quran as the sole rights of women upon marriage⁴⁸. The Prophet has recommended that *mas kahwin* has to be mentioned during the contract of marriage by saying that "*Give her dowry even only a piece of iron ring*" narrated by Bukhari Muslim (al-Syarbaini, 2014:286). Thus, it shows that *maskahwin* or *mahar* or dower has similar meaning and consider as a symbol or value of women dignity and status. On the other hand, *hantaran* is the customary practice of the Malays in a marriage either given for the bride or the bride's parents at the marriage ceremony. It is not the command of Shari'ah and neither it is prohibited by Shari'ah and is merely regarded as customary practice as long as it is practiced within Islamic value principle of justice.

Unilateral rights of divorce given for men always seen as discriminatory against women. This unilateral rights is given in the case where the rights of the family members is abused either spiritually or physically, then the husband as the head of the family has the unilateral rights to divorce his wife for collective rights. It does not means that a husband could dissolve the marriage inappropriately. The equal opportunity given for women and men under the provision of IFLA can be seen under Section 47 which gives both rights to women and men to apply for divorce. The reasons for the application on dissolution of marriage will be given to Court and it is the Court who decide whether the application is permissible or not (Abdul Walid Hassan, 2016:43).

⁴⁸ Al-Quran. al-Baqarah. 2:236 "There is no blame upon you if you divorce women you have not touched nor specified for them an obligation. But give them [a gift of] compensation - the wealthy according to his capability and the poor according to his capability - a provision according to what is acceptable, a duty upon the doers of good".

In Islamic jurisprudence, it has been discussed by jurists on the methods of equalizing or redressing inequality or abuse in marriage. It is either by 'equalising down' through a direct prohibition of polygamy or 'equalising up' through lowering the rights of those advantaged (M.A Baderin, 2010:181). In upholding justice, all the schools of Islamic jurisprudence allow for 'suspended repudiation' (*ta'liq at-talaq*) and/or 'delegated repudiation' (*tafwid at-talaq*) (Wahbah Az-Zuhaily, 1997:6935-6941). 'Suspended repudiation' means the husband stipulates at the time of marriage that marriage becomes repudiated if he does certain things unfavourable to his wife. The second doctrine of 'delegated repudiation' is whenever a wife is vested by the husband during the marriage contract with the right to divorce herself should there arise circumstances unfavourable to her. Regarding this matter, it is explained by the jurists that the Prophet S.A.W. had in obedience to the Quranic injunction (Surah Al-Ahzab, 33:28) empowered his wives to choose between living with him or a separation; the wives choose the Prophet and so the marriage was not dissolved.

Thus, a wife or women have rights to make stipulations in the marriage contract. It is possible for reasons of public welfare, to enact that women shall be specifically informed of these rights during the marriage contract, and has discretion either to use it or not (Baderin, 2010:182). This stipulated rights has been applied by IFLA under Section 49⁴⁹. It is illustrated that a wife is given right to apply for divorce

⁴⁹ (1) Where the husband does not agree to voluntarily pronounce a talaq, but the parties agree to a divorce by redemption or *cerai tebus talaq*, the Court shall, after the amount of the payment of *tebus talaq* is agreed upon by the parties, cause the husband to pronounce a divorce by redemption, and such divorce is *ba-in sughra* or irrevocable.

(2) The Court shall record the *cerai tebus talaq* accordingly and send a certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

(3) Where the amount of the payment of *tebus talaq* is not agreed upon by the parties, the Court may assess, in accordance with *Hukum Syara'*, the amount, having regard to the status and the means of the parties.

(4) Where the husband does not agree to a divorce by redemption or does not appear before the Court as directed, or where it appears to the Court that there is a reasonable possibility of a reconciliation, the

by *khul'* at any time with full of choices on the condition that she has to make payment which called as *tebus talaq*. It also has been stated that the wife has to give back all the *mahar* and *pemberian* given to her upon her marriage (Hammudah 'Abd al 'Ati, 1985). According to Shafi'e jurist, *khul'* is an applied divorce by giving back something while pronounce *khul'* (Sunan al-Baihaqi, Noor Aziah Mohd Awal, 2006:61). There are three conditions which dissolution of marriage by *khul'* is permissible which are; i) if a wife does not love her husband due to his bad behavior in accordance with *syara'* and the possibility of being *nushuz*; ii) if both agree to dissolve the marriage; iii) if the husband abuse the wife (Abdul Walid Hassan, 2016:47). Therefore, Islamic jurisprudence does not limit the rights of women to dissolve the marriage. This rights is given for women and men suitable with their conditions and needs by considering collective rights. The Court shall examine whether marriage should be ended by divorce in certain circumstances provided by Shari'ah. Since the law itself cannot justify the multiple conditions of people, the power of Court or Judges is an imperative measurement for maintaining justice.

In Section 50⁵⁰ of IFLA, women are also given rights to dissolve a marriage under different method, by '*ta'liq*' that is through a promise expressed by the husband soon after solemnization of marriage in accordance with *Hukum Shar'a*.⁵¹ In consideration of absolute rights of husband to pronounce divorce, women also have rights to apply for divorce whenever husband neglect their responsibilities as

Court shall appoint a conciliatory committee as provided under section 47 and that section shall apply accordingly.

⁵⁰ (1) A married woman may, if entitled to a divorce in pursuance of the terms of a *ta'liq* certificate made upon a marriage, apply to the Court to declare that such divorce has taken place.

(2) The Court shall examine the application and make an inquiry into the validity of the divorce and shall, if satisfied that the divorce is valid according to *Hukum Syara'*, confirm and record the divorce and send one certified copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

⁵¹ Section 2 of IFLA

promised in '*ta'liq*'. *Ta'liq* is not only a matter of rights, but it promotes the duties and responsibilities of a husband in a contract of marriage. *Ta'liq* is meant for the protection of women for example in the situation where the husband is missing for four consecutive months and do not provide maintenance for that period or neglect his wife, so that the wife can apply for divorce by method of *khul'* as a consequence of the breach of the *ta'liq* under Section 50 of IFLA. *Ta'liq* is a kind of protective measure provided by IFLA for a woman in marriage to ensure that a husband is responsible to maintain the wife in the form of material aspects.

Under other circumstances, if a wife is not happy with the marriage and the marriage institution cannot stand anymore, a wife can apply for the dissolution of marriage under any grounds provided in Section 52⁵² of IFLA. This section gives

⁵² (1) A woman married in accordance with Hukum Syara', shall be entitled to obtain an order for the dissolution of marriage or fasakh on any one or more of the following grounds, namely - (a) that the whereabouts of the husband have not been known for a period of more than one year; (b) that the husband has neglected or failed to provide for her maintenance for a period of three months; (c) that the husband has been sentenced to imprisonment for a period of three years or more; (d) that the husband has failed to perform, without reasonable cause, his marital obligations (*nafkah batin*) for a period of one year; (e) that the husband was impotent at the time of marriage and remains so and she was not aware at the time of the marriage that he was impotent; (f) that the husband has been insane for a period of two years or is suffering from leprosy or vitilago or is suffering from a venereal disease in a communicable form; (g) that she, having been given in marriage by her wali Mujbir before she attained the age of baligh, repudiated the marriage before attaining the age of eighteen years, the marriage not having been consummated; [Am. Act A902: s.16] (h) that the husband treats her with cruelty, that is to say, inter alia - (i) habitually assaults her or makes her life miserable by cruelty of conduct; or (ii) associates with women of evil repute or leads what, according to Hukum Syara', is an infamous life; or (iii) attempts to force her to lead an immoral life; or (iv) disposes of her property or prevents her from exercising her legal rights over it; or (v) obstructs her in the observance of her religious obligations or practice; or (vi) if he has more wives than one, does not treat her equitably in accordance with the requirements of Hukum Syara'; (i) that even after the lapse of four months the marriage has still not been consummated owing to the wilful refusal of the husband to consummate it; (j) that she did not consent to the marriage or her consent was not valid, whether in consequence of duress, mistake, unsoundness of mind, or any other circumstance recognized by Hukum Syara'; (k) that at the time of the marriage she, though capable of giving a valid consent, was, whether continuously or intermittently, a mentally disordered person within the meaning of the Mental

woman the right for 'self-redemption' if she cannot enjoy her married life with her husband. It is noted that the provisions of fasakh under Section 52 of IFLA has been managed completely after 1980s (Abdul Walid Hassan, 2016:55) considering different entitlements of rights and duties between women and men in marriage and family relations matters. This provision clearly shows that women have similar rights with men to obtain order from Court for divorce, but in a different way or with different entitlements to rights suitable with their primary rights and duties in marriage and family relations. For the dissolution of marriage under this section, the applicant has to present in court the proof and reason for the application. It is based on the opinion of jurists whenever it is argued that the dissolution of marriage through fasakh can be made in the case of apostacy, maintenance abandonment, missing, physical and psychological disabilities or disease (Wahbah Zuhaili, 1984:509-535). Besides, Section 53⁵³ provides the presumption of death of a husband of a woman in

Disorders Ordinance 1952 [Ord. 31 of 1952] in the case of the Federal Territory of Kuala Lumpur, or the Lunatics Ordinance [Sabah Cap.74] in the case of the Federal Territory of Labuan, and her mental disorder was of such a kind or to such extent as to render her unfit for marriage;

[Am. Act A828: s.5]

(1) any other ground that is recognized as valid for dissolution of marriages or fasakh under Hukum Syara'.

(1A) Any person married in accordance with Hukum Syara' shall be entitled to obtain an order for the dissolution of marriage or fasakh on the ground that the wife is incapacitated which prevents sexual intercourse.

[Ins. Act A902: s.16]

(2) No order shall be made on the ground in paragraph (c) of subsection (1) until the sentence has become final and the husband has already served one year of the sentence.

(3) Before making an order on the ground in paragraph (e) of subsection (1) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of six months from the date of the order that he has ceased to be impotent, and if the husband so satisfies the Court within that period, no order shall be made on that ground.

(4) No order shall be made on any of the grounds in subsection (1) if the husband satisfies the Court that the wife, with knowledge that it was open to her to have the marriage repudiated, so conducted herself in relation to the husband as to lead the husband reasonably to believe that she would not seek to do so, and that it would be unjust to the husband to make the order.

⁵³ (1) If the husband of any woman has died, or is believed to have died, or has not been heard of for a period of four years or more, and the circumstances are such that he ought, for the purpose of enabling the woman to remarry, to be presumed in accordance with Hukum Syara' to be dead, the Court may, on the application of the woman and after such inquiry as may be proper, issue in the prescribed form a certificate of presumption of death of the husband and the Court may on the application of the woman make an order for the dissolution of marriage or fasakh as provided for under section 52.

[Subs. Act A902: s.17]

order to avoid any problems with regard to the validity of marriage contract with the husband if the wife is to remarry. All of these laws are aimed at the protection of women in marriage and indicates that women are given equal rights with men in the dissolution of marriage.

It is contended that the effects on the dissolution of marriage are different according to different methods of dissolutions. It is regarding the effect on receiving *mahr* or *mas kahwin* under Section 57⁵⁴, *mut'ah* or consolatory gift under Section 56⁵⁵ and *nafkah iddah* under Section 59 (1) read together with Section 61 and 65 (1) of IFLA. In another words, upon divorce the wife by application to court entitle for deferred *mahr*, deferred marital gifts, accommodation, maintenance during reconciliation period, consolatory gifts, matrimonial property, custody and maintenance of children (Noraini Hashim, 2015). These provisions exclusively mention women's rights in financial and custodial matters upon dissolution of a marriage. It shows that women have equal rights and access for justice and compensation if unjustly divorced by her husband.

Another important provision where women are not denied similar rights with men is in the distribution of property as allocated in Section 58. It offers that women are entitled to the division of *harta sepencarian* of any assets acquired by women and

(2) A certificate issued under subsection (1) shall be deemed to be a certificate of the death of the husband within the meaning of paragraph 14 (4) (b).

(3) In the circumstances mentioned in subsection (1), a woman shall not be entitled to remarry in the absence of a certificate issued under subsection (1), notwithstanding that the High Court may have given leave to presume the death of the husband.

(4) A certificate issued under subsection (1) shall be registered as if it effected a divorce.

⁵⁴ Nothing contained in this Act shall affect any right that a married woman may have under Hukum Syara' to her *mas kahwin* and *pemberian* or any part thereof on the dissolution of her marriage.

⁵⁵ In addition to her right to apply for maintenance, a woman who has been divorced without just cause by her husband may apply to the Court for *mut'ah* or a consolatory gift, and the Court may, after hearing the parties and upon being satisfied that the woman has been divorced without just cause, order the husband to pay such sum as may be fair and just according to Hukum Syara'.

men in their marriage by their joint efforts or sale of assets. Sub section (4) of the same section provides that even in the situation where a woman is not a party to the assets, the Court may decide to divide the property in accordance to the welfare of the family by looking at her role of looking after the home or caring of the family. It is stated in this section that the court shall incline towards equality of division. These provision clearly stated substantive equality applied by IFLA in the division of the property upon divorce even a wife is not directly contribute in the payment of the asset.

On the other hand, Section 55A⁵⁶ seems to permit a husband to pronounce divorces outside Court without Courts' permission. This provision probably disadvantages woman if husband misuses the right to pronounce *talaq* out of Court without reasonable reason. It is contended that this provision might partially discriminate against women whenever irresponsible husband misuse his power to divorce his wife outside the Court without reasonable cause. For example, a husband divorces his wife through 'whatsapp' because his wife does not prepare him breakfast. However, it is also provided under Section 45⁵⁷ that a husband has to get the

⁵⁶ (1) Notwithstanding section 54, a man who has divorced his wife by the pronouncement of talaq outside the Court and without permission of the Court, shall within seven days of the pronouncement of the talaq report to the Court.

(2) The Court shall hold an inquiry to ascertain whether the talaq that was pronounced is valid according to Hukum Syara'.

(3) If the Court is satisfied that the talaq that was pronounced is valid according to Hukum Syara', the Court shall, subject to section 124 -

(a) make an order approving the divorce by talaq;

(b) record the divorce; and

(c) send a copy of the record to the appropriate Registrar and to the Chief Registrar for registration.

⁵⁷ Section 45. Extent of power to make any order. Save as is otherwise expressly provided, nothing in this Act shall authorize the Court to make an order of divorce or an order pertaining to a divorce or to permit a husband to pronounce a talaq except -

(a) where the marriage has been registered or deemed to be registered under this Act; or

(b) where the marriage was contracted in accordance with Hukum Syara'; and

(c) where the residence of either of the parties to the marriage at the time when the application is presented is in the Federal Territory.

authorisation from Court to pronounce a '*talaq*⁵⁸' which is to avoid the misuse of unilateral divorce given to husband. These two provisions seem contrary to each other and contradict with the provision of Section 49 which provides that a husband's right to dissolve the marriage cannot proceed without the court's intervention and restrictions (Nik Salida Suhaila Nik Saleh, 2013:239).

Thus, based on the substance of law, women have equal rights with men in the dissolution of marriage under IFLA. However, sometimes procedural matters are burdensome on women and will probably disadvantage women. For example, the repeatedly adjourned cases in Court relating to divorce because of the absence of the parties without no valid reason especially husband or lawyers whenever their attendance is vital to the court decision will put women at a disadvantaged situation. For example what has happened in case *Khairul Anuar bin Kamaruddin v. Aida Melly Tan Mutalib [2008] 1 ShLR*. In this case, a wife as respondent has waited for more than seven years to dissolve the marriage. The period of seven years is not reasonable and has become a burden on the material, mental and emotion of the respondent, who is a woman in this case. Therefore, amendment or improvement is necessary on procedural matters of divorce within the objective of Shari'ah such as on the reasonable period of hearing cases in Court.

4.6.6 The Issue of Maintenance

Among the issues of gender imbalance between women and men is regarding the coverage of rights between women and men of their private and public spheres. Being women and men with differences in the creation biologically, physically and

⁵⁸ Arabic term for Divorce or dissolution of marriage

psychologically affects their function of life. The differences in nature indicate that they are complementary each other. Thus, it is impossible for women and men to have similar rights and duties for the enjoyment of life within their private and public spheres. *Nafkah* or maintenance in Islamic law relates with the economic transaction which mostly done within a public sphere. If both women and men regard the economic well being as the primary duty in life, who will manage and guide the future generations? Maintenance provider relates with a person who work for the survival of the family. In Islamic jurisprudence, maintenance provider is placed upon men or husband as the head of the family. In the globalization era, whenever women are actively involved in the public sphere, the balance rights and duties between them of their private and public spheres are vital which has been divided by Islamic law.

The issue of *nafkah* in Islamic jurisprudence deals with the responsibility of men to provide material aspects of the family members. The role of men as the head of the family or protector and the primary maintainer in Islamic marriage has a positive object because Islamic law stresses the meaning of ‘manhood’ as the responsibility of men rather than power of men over women. The Quranic verse describes the meaning of ‘manhood’ is stated in surah An-Nisa’ 4:34 which means:

“Men are the protectors and maintainers of women because Allah has made one of them excel over the other, and because they spend out of their possessions (to support them). Thus righteous women are obedient and guard the rights of men in their absence under Allah's protection. As for women of whom you fear rebellion, admonish them, and remain apart from them in beds, and beat them. Then if they obey you, do not seek ways to harm them. Allah is Exalted, Great”.

The Prophet S.A.W. also teaches on the duty of man in marriage and family relation whereby he said which means:

*“He is the guardian (leader) of the family and it is responsible for those under his charge, and his wife is a keeper (manager) in the household of her husband and children, and liable for those under dependents”.*⁵⁹

Therefore, the above Quranic verse and Hadith of the Prophets provide that a man is the one who bears the primary duty to maintain wife and children and it is not imposed on woman. Maintenance provider is a matter of priority and responsibility for the balance of rights and duties of wife and husband in marriage. It is due to the fact that men do not have biological, physical and psychological distraction during menstruation, pregnancy, birth and nursing baby. The responsibility of men as mentioned in this provision shows that Islam emphasises on the protection of five objectives of Syariah especially on the protection of the family in dignity and lineage. Men have duties in marriage to provide maintenance in accordance to Islamic concept of maintenance which includes material and spiritual maintenance (Zulkefli Abd Ghani, 2003). Islamic jurisprudence on this matter emphasises the role of a husband as the head of the family and a husband who will be responsible to God if he does not remind and educate his family members to the right path.

Section 59⁶⁰ of IFLA provides that the Court has jurisdiction to order a man to pay maintenance to his wife or former wife. In Islamic legal rulings, only a man as stated in the provision is compelled to maintain the family. It means that only men are responsible to work to maintain the family. It is not restrict the rights of women to

⁵⁹ Hadith. Al-Bukhari

⁶⁰ (1) The Court may, subject to Hukum Syara', order a man to pay maintenance to his wife or former wife.

(2) Subject to Hukum Syara' and confirmation by the Court, a wife shall not be entitled to maintenance when she is nusyuz, or unreasonably refuses to obey the lawful wishes or commands of her husband, that is to say, inter alia -

(a) when she withholds her association with her husband;
 (b) when she leaves her husband's home against his will; or
 (c) when she refuses to move with him to another home or place, without any valid reason according to Hukum Syara'.

(3) As soon as the wife repents and obeys the lawful wishes and commands of her husband, she ceases to be nusyuz.

work and maintain the family. However, as the interpretation of 'rights' must come with 'duties', IFLA reminds the duties of being a wife in the family as the assistant to the husband in the management of the family especially on the welfare of the children. As the assistant to the husband, women primary duty is to make sure the physical and psychological aspects of husband are well manage by the wife. It includes the responsibility as a mother which exclusively given to women in nature and men do not have the same. Therefore, in the situation where the welfare of the children is abused, for example whenever children do not properly managed or guarded, there must be the law provides to makesure justice is uphold for the children. This can be seen through the attributes of collective rights of IFLA on the division of maintainance provider for men and custodial of young children for women in marriage and family relationships.

Maintenance in Islamic jurisprudence can be classified into three conditions based on the rights and duties in marriage, family relationship and possession/ownership (Muhammad al-Khatib al-Syarbaini, 2014:811). In the case of marriage, maintenance is given in the cause of the rights and duties of husband and wife in the cause of sexual relationship. The responsibility of husband to pay maintenance to the wife is mandatory unless the wife is *nusyuz* according to *syara'*. The meaning of *nusyuz* according to Shafi'e jurists is whenever a wife does not follow the command of the husband as long as it is in accordance with Shari'ah law. Whenever a wife is *nusyuz*, then she does not entitle with maintenance from the husband. However, it is argued that the act of women penetrating for the protection from errant husband cannot be regarded as *nusyuz* if the Court satisfies that the act is

reasonable and necessary for a wife to protect her life within the meaning of *darar shar'ie* under Section 2 (Noraini Hashim, 2015).

Section 14⁶¹ of IFLA states that a divorcee is prohibited to enter into marriage to any other person other than man from whom she was last divorced before the expiry of the period of *'iddah*⁶² in accordance to *Hukum Shar'a*'. This provision is specifically given to women because only women experience menstruation period, pregnancy which is totally differ with men. In conjunction with the objective of Shari'ah law to protect the life, dignity and family lineage, this provision is imperative for women even after divorce. In the discussion of the type of women under IFLA, there are differences of meaning between the term of *anak dara*⁶³ (virgin), *perempuan*

⁶¹ (1) No woman shall, during the subsistence of her marriage to a man, be married to any other man.

(2) Where the woman is a janda -

(a) subject to paragraph (c), she shall not, at any time prior to the expiry of the period of *'iddah*, which shall be calculated in accordance with *Hukum Syara'*, be married to any person other than to the man from whom she was last divorced;

(b) she shall not be married unless she has produced -

(i) a certificate of divorce lawfully issued under the law for the time being in force; or

(ii) a certified copy of the entry relating to her divorce in the appropriate register of divorce; or

(iii) a certificate, which may, upon her application, be granted after due inquiry by the Syariah Judge having jurisdiction in the place where the application is made, to the effect that she is a janda;

[Am. Act A902:s.2]

(c) if the divorce was by *ba-in kubra*, that is to say, three *talaq*, she shall not be remarried to her previous husband, unless she has been lawfully married to some other person and the marriage has been consummated and later lawfully dissolved, and the period of *'iddah* has expired.

(3) If the woman alleges she was divorced before the marriage had been consummated, she shall not, during the ordinary period of *'iddah* for a divorce, be married to any person other than her previous husband, except with the permission of the Syariah Judge having jurisdiction in the place where she resides.

[Am. Act A902:s.2]

(4) Where the woman is a widow -

(a) she shall not be married to any person at any time prior to the expiration of the period of *'iddah*, which shall be calculated in accordance with *Hukum Syara'*;

(b) she shall not be married unless she has produced a certificate of the death of her late husband or otherwise proved his death.

⁶² *'iddah* means the waiting period for woman who has been divorced or widower in order to allow her to marry to another man or to determine her uterus or to comply with the perfection of worship (such as the prohibition of woman to go to Mecca for performing Hajj or Umrah), or to get rid of her sadness as she pines for her husband. See Abdul Walid Abu Hassan. 2016. *Hak-Hak Wanita Menurut Undang-Undang Keluarga Islam di Malaysia*. p. 98. See also Mughni Al-Muhtaj, juzuk 3, p. 384.

⁶³ means a woman who has not had sexual intercourse whether she has been married or not.

yang diceraikan suami⁶⁴ (divorcee) and perempuan yang kematian suami⁶⁵ (widow) in Islamic marriage. They have different entitlement of rights which have different effect in the distribution of the maintenance and property after dissolution of marriage. Table 1 below indicates different categories of women upon the dissolution of marriage with different period of 'iddah for the protection women's dignity, status and rights. It is the requirements stated for women before contracting another marriage which comes with another rights and duties as a wife or mother.

Table 1: Women Category and 'Iddah Period

Category of Women	Period of 'Iddah
Women having a regular menstrual period and have been consummated in marriage	3 consecutives periods as elaborated in the Quran ⁶⁶
Women who are menopaus	3 months Qamariyah
Women who are not yet having menstrual period or no menstruation	3 months Qamariyah ⁶⁷
Women with regular menstrual periods but not yet consummated in the marriage	No 'iddah period
Pregnant women	Up to childbirth or aborted
A widow	4 months 10 days ⁶⁸

Source: Abdul Walid Abu Hassan 2016

⁶⁴ means a woman who has married and divorced after consummation.

⁶⁵ a woman whose husband has died.

⁶⁶ Al-Qur'an, Al-Baqarah 2:228

⁶⁷ Al-Qur'an, Al-Talaq 65

⁶⁸ Al-Qur'an, Al-Baqarah 2:234

This period of *‘iddah* is intended to specifically provide protection for women and children on their rights and dignity after the dissolution of marriage. This regulation is intended to make sure the rights to life, property, lineage of children even in the womb of the mother is given without any discrimination. Upon dissolution, there is possibility of woman to get pregnant after consummation. In this case, Islamic law protects the woman, the baby in the womb and the society at large with the guarantee of rights although the relationship between a wife and a husband is over after the pronouncement of *talaq*. A father is still responsible to maintain the life of his children even after divorce whereas a mother is responsible to take care of her children since from the time the foetus lives in the womb of the mother.

In Islamic jurisprudence, it is clearly defines in the Quran on the equal rights and duties of women and men in life⁶⁹. Similar with other rights, the rights of maintenance are given considering collective rights rather than individual rights suitable with biological, physical and psychological nature of women and men. The priority of rights is for the collective benefit that is for the benefit of all the family members. It is argued that women have primary rights and duties within their private sphere which include the family and the community around them (Mohd Naim Mokhtar, 2016:101). However, when it comes to the discussion on the balance of right and duties for the civilization of nations, then women is more suitable to work within private sphere of their family and community. Mawdudi has stressed the role, necessity, and significant of women for civilisation. That is why Islamic law

⁶⁹ Al-Quran, An-Nisa’ 4:32 “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”

demonstrates that wifehood and motherhood as a symbol of higher and special status of women and not as the causes of oppression.

However in another issue, the question arises whether a wife is still entitled to the right of maintenance from the husband if she refuses to perform the household duties? In other words, would refusal to perform the household duties amount to the meaning of *nushuz*? Muslim jurists have different views with regard to the extent of duties of women to manage the household. The first view of the jurists said that it is the responsibility of the wife to do the household job. The second view from Maliki jurists, Shafi'iyy jurists, Abu Hanifah jurists and Zahriyy jurists said that the wife is not fully responsible to do the household job (al-Mughniyy, Ibnu 'Abidin, Rawdat at Talibin, Muhammad Ya'qub Talib, 2015:93-96). Muslim jurists unanimously agree that a wife who refuses to perform the household duties shall not be considered as *nushuz*. The only factors that will amount to *nushuz* are: i) when the wife refuses to follow the husbands' migration without *shar'iy* conditions; ii) leaving the house without the husbands' consent and without syarie reason; iii) a wife who prevents husband from entering their homes; iv) refuse to perform sexual relations or be intimate without valid syar'ie reason; and v) refuse to travel with the husband.

They argued that the marriage contract is aimed at enjoying the sexual life (*istimta'*) and not to render service or force labour. However, when the wife voluntarily does housework it shows a morally high character towards the husband if she does it for Allah's sake, for which she would earn rewards in the hereafter. Thus, this view indicates that women do not entitle with nusyuz if they do not do the household job and still have rights to maintenance. In the case where a husband does not provide maintenance for a wife, then the application can be made to the Court for

maintenance under Section 59 of IFLA. However, it is said that the only duty of the wife towards the husband is to take care of their husband's biological, psychological and physical needs. But how would it be if both a wife and a husband are working outside? Who will be responsible to manage the household?

Traditional Muslim jurists have not discussed further on the household duties of wife and husband. However, they discuss on the right of maintenance on the issue of a working wife. The Muslim jurists argue based on the Quranic verse in Surah An-Nisa' verse 34 and the *hadith* of the Prophet that if a wife works with the permission of a husband, then a wife has right to the maintenance. However, if a wife works without a husband's permission, and a wife knows her husband does not permit it, meaning she has disobeyed her husband, she is not entitled to maintenance (Muhammad Ya'qub Talib, 2015:162-163).

It is specifically provided under IFLA that a divorced wife has the right to accommodation⁷⁰. Therefore, the husband must resume his responsibilities on his wife's rights like giving maintenance or *nafkah* and the wife cannot leave the house until the *'iddah* period ends or otherwise only leave out of fear of maltreatment. In the case of maltreatment, the wife may leave the house with the permission or by the order of the court. In the case of *Noor Bee v Ahmad Shanusi [1980] JH 63*, although there is no provision specifically stated on the rights of food under IFLA, the court held that the husband must pay for the maintenance of the wife during her 87 days of reconciliation period, in terms of daily food and accommodation because the divorce is a revocable divorce and the wife is not *nushuz* or disobedient. In this case, it shows that there is justification for the Court to establish justice which is important for the

⁷⁰ See Section 71 of IFLA. Right to accommodation.

parties in action. It is thus impossible to specifically state the rights of person in the form of law because different situations need different solutions and different entitlements of duties and responsibilities. The most important thing is justice can be given for the aggrieved party without being unjust to the other party.

Islamic jurisprudence provides guidance for women and men beyond their knowledge as sometimes we do not know which the best decision for us. Although IFLA does not give women and men the same rights in all circumstances, but both have similar opportunities to that right with different entitlements due to their differences. Its objective is to make sure that they are meant for each other and complementary to each other. Both have equal rights with different entitlements of rights subject to their biological and physical abilities and culture based on their belief on the rules of God. In the provision regarding maintenance in Islam, it is the symbolic pledge in the specific monetary form which brings with it the responsibility that a man has for the upkeep of his wife and children. This does not mean that Muslim women cannot work and maintain the family but the duty to maintain the family is on the shoulders of a husband. In the situation where a wife disobeys her husband without valid reason according to Shari'ah, her rights and dignity for maintenance is over until she repents and obeys the lawful wishes and commands of her husband in accordance to Hukum Shara'.

4.6.7 The Issue of Custody and Guardianship

Marriage and family institution comes with collective rights and duties. Women and men in marriage and family relationships cannot become individualistic especially when it deals with children who needs special care and attention from mother or

father. The issue of guardianship and custody of children relates with the issue of men as *wali* and maintenance provider in the Islamic marriage institution. This issue also relates with the biological nature of mother who is given the womb to carry the children and given breastmilk to breastfeed the children. Based on these different primary roles of being women and men, it is argued that to achieve equality in gender, it is not necessarily by having similar rights and duties. In developing human beings, it is not only by generating income but also by nurturing them with knowledge to generate their psychological, health, moral, potential and so on. Thus, a mother and a father should have equal rights and duties for a balance collective life which the division of rights between them do not prevent them from enjoying those rights.

The division of rights and duties between women and men in guardianship and custodial of children has been stressed in the Quranic verse as follows:

“Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing [period]. Upon the father is the mothers’ provision and their clothing according to what is acceptable. No person is charged with more than his capacity. No mother should be harmed through her child, and no father through his child. And upon the [father’s] heir is [a duty] like that [of the father]. And if they both desire weaning through mutual consent from both of them and consultation, there is no blame upon either of them. And if you wish to have your children nursed by a substitute, there is no blame upon you as long as you give payment according to what is acceptable. And fear Allah and know that Allah is Seeing of what you do”⁷¹.

Due to the different natural ability of women and men in biology, physical and psychological aspects, it influences the division of custody and guardianship under Islamic law. In fact, matters of custody and guardianship both are the rights of children. According to the principles of established Muslim jurisprudence, a father is

⁷¹ Al-Quran. Al-Baqarah 2:233

the first and primary natural guardian (*wali*) of a person and the property of the minor child, whereas custody (*hadanah*) is a right of the child and not of either of the parents, or any other person claiming through them. Thus, the basic consideration always is to provide the child the most natural, most considerate and most compassionate atmosphere to grow up as a better member of the society (Aayesha, 2014).

There are two important concepts to be understood thoroughly that is 'custody' and 'guardianship'. Though these terms are used interchangeably, both have different implications in law. Guardianship in Arabic language is termed as '*Wilayat*' which is equivalent with 'to protect' or 'to defend'. The term guardianship means companion and friend not enemy. Guardianship is the constructive possession of the child which deals with care of his or her person as well as property. On the other hand, the word custody in Arabic word is '*hadanah*'. *Hadanah* literally means 'training' or 'upbringing of the children' (Aayesha Rafiq, 2014). Custody relates with the natural ability of mother to take care of children with her natural ability of love, mercy and care. It is argued that the scope of custody or *hadanah* is bringing up children, protect, breed, or keep from harm or injury, provide with food, love and care and their necessities from when they are very young until they can manage themselves (Abdul Latiff Muda, 1997).

The terms custody and guardianship seems to have similar connotations, but it is often argued that guardianship is a superior right. It is due to the fact that the scope of guardianship is wider than custody in terms of times and nurturing process compared to custody. The biological nature of women makes her suitable to take care of children for nine months in the womb as the uterus in the body of women has

become the first home and the safest place for her foetus (Yusof Abbas & Nor'Izam Alias, 2010). The bonding time exist between mother and children for about nine months and the mother's milk which is produced from the blood circulation system of mother which sometimes affect their physiological and psychological development indicates that mother is the most honoured and suitable person to be given the custodial rights of the children if the conditions are fulfilled. In Islamic law, good morals, intelligence, maturity, freedom and proper mentality and all other capacities required to rear a sound, healthy child for a society are essential conditions for child custody. None with bad moral attitude has the rights to take custody of a child in Islamic jurisprudence. It seems that custodial rights refers more to the mental and psychological development of human beings.

Section 81 (1) of IFLA states the mother shall be of all persons the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution. The qualification of person that can carry on the task of custodian is prescribed in section 82 of IFLA namely that:

- a) she is a Muslim;
- b) she is of sound mind;
- c) she is of an age that qualifies her to bestow on the child the care, love, and affection that the child may need;
- d) she is of good conduct from the standpoint of Islamic morality; and
- e) she lives in a place where the child may not undergo any risk morally or physically.

While the disqualification of the right of custody of a woman is lost as stated in section 83 of IFLA which are:

- a) by her marriage with a person not related to the child within the prohibited degrees if her custody in such case will affect the welfare of the child but her right to custody will revert if the marriage is dissolved;
- b) by her gross and open immorality;

- c) by her changing her residence so as to prevent the father from exercising the necessary supervision over the child, except that a divorced wife may take her own child to her birth-place;
- d) by her abjuration of Islam; and
- e) by her neglect of or cruelty to the child.

However, if the Court opines that the mother is disqualified under hukum syara', then the right will be transferred into someone else as mentions in the provision of Section 81 (2), the maternal grandmother, how-high-soever; the father, the paternal grandmother, how-high-soever, the full sister, the uterine sister, the sanguine sister, the full sister's daughter, the uterine sister's daughter, the sanguine sister's daughter, the maternal aunt, the paternal aunt and the male relatives who could be their heirs as *'asabah* or residuaries provided that the custody of such person does not affect the welfare of the child.

Section 84 of IFLA clearly states the duration of custody which determines that; a) where the right of the custodian to the custody of a child terminates upon the child attaining the age of seven years, in the case of a male, and the age of nine years, in the case of a female, but the Court may, upon application of the custodian, allow her to retain the custody of the child until the attainment of the age of nine years, in the case of a male, and the age of eleven years, in the case of a female. After termination of the right of the custodian, the custody devolves upon the father, and if the child has reached the age of discernment/*mumaiyiz* (ability to choose good and bad deed), he or she shall have the choice of living with either of the parents, unless the Court otherwise orders.

In Islamic jurisprudence, a *wali* is a guardian, a friend or a companion (Aayesha, 2015) which means a person who protects someone and provide the inner and outer maintenance for life. While women are more suited for managing their

maternal duties in private sphere, men on the other hand as *wali*, has the legal duty in managing the family maintenance, which is in accordance with their biological, psychological and physical nature of men. It relates with the primary responsibility of men to provide material maintenance for children. The responsibility of men to maintain the children is considered suitable with the biological, physical and psychological nature of men. They are not experienced with pregnancy, giving birth and nursing children like women. Hence, it seems that guardianship refers to the physical and material development which also imperative for the development of children. Islamic law has put requirements and priority in custodial and guardianship of children based on the rule of nature and nurture.

Under Section 72 of IFLA, it is provided that it shall be the duty of a man to maintain his children. In addition to that, Section 73 of IFLA provides that the Court may at any time order a man to pay for the maintenance of his children. It is stressed under IFLA that maintenance is the duty of father to maintain children not a mother. These provision does not restrict the rights of women to maintain the family. 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 it also affects private individual indirectly, it is 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.

Maintenance is an important aspect for children to survive whether they are legitimate or illegitimate. Without parents, there would be no one to be by their side to take care of their education and future time (Hanisah, 2003 & A S Hornby, 1998).

Section 80⁷² of IFLA stipulated that a woman who neglects or refuses to maintain her illegitimate child other than a child born as a result of rape, may be ordered by the Court to pay monthly allowances for the child as the court thinks reasonable. Would this mean in Islamic jurisprudence, only the mother is responsible and has a duty to maintain their illegitimate children? In Islamic jurisprudence, there are arguments of jurists that whenever the man acknowledged that he is the father of the illegitimate child, and afterwards become the proprietor of the child, the child decent would be established and the child would be free (Abdullah A-Hammam Maulana Sheikh Nizam, 2000:174).

According to the law, this is when the biological father admits his adulterous act and confirms that the child born out of that act as his, by the process of *qiyafah* or is a proving of the person's *nasab* (paternity) based on apparent personalities between that person and another person (Hanisah, 2003 & Mahmud Saedon, 2000). Thus, it is proposed that Section 80 of IFLA should be amended in order to give justice for a woman in this situation, whereby in Islamic law, although a father is not responsible to maintain an illegitimate child, but by admission and confession on the adulterous act, the child should be entitled to the same rights from his or her father. Furthermore, it is better to put in this Section that "...or the Court may order the biological father of that child or the woman or her *wali* to make such monthly allowance...". Therefore, in a situation where there is an illegitimate child without knowing who the father is, even though it is not specifically stated as to who is responsible, her *wali*, the

⁷² (1) If a woman neglects or refuses to maintain her illegitimate child who is unable to maintain himself or herself, other than a child born as a result of rape, the Court, upon due proof thereof, may order the woman to make such monthly allowance as the Court thinks reasonable.

(2) [Repealed by Am. Act A902: s.25]

(3) A monthly allowance under this section shall be payable from the date of commencement of the neglect or refusal to maintain or from such later date as may be specified in the order.

government agency such as *baitulmal* (Al-Khatib) or zakat institution has to take care the issue of maintenance of illegitimate child as this is a public interest.

IFLA upon examination gives equal rights and duties for women and men with regard to family and marriage in accordance with their biological, physical and psychological roles. The division between the roles of women and men in Islamic law is shown by the role of *walī* or guardianship (the father or the paternal grandfather above or a person authorised by the Ruler) and the role of custody of children (maternal grandfather, or authorised person according to *Hukum Syar'at*). As stated in the provision of Section 81 (4), if there are several persons who are qualified and willing to take care of the child, the custody shall be entrusted to the one most virtuous who shows the greatest tenderness to the child, and where all are equally virtuous, then the senior among them in age shall have the priority.

To differentiate custody and guardianship in Islamic law depends on the age of maturity of children, and also the capacity of person who has the rights and duties of custody and guardianship on children. In Islamic jurisprudence, the majority of the jurists state that in such matters, the age of maturity of a child is at the age of seven whereas, the age of puberty relates with biological system of human being. It is argued that if the child is looked after properly and is happy with the mother, then the decision will be given based on the best interest of the children. Since, visiting rights are the shared rights of the father and mother, no child should be deprived of visiting rights from either of the parents.

It shows that IFLA urges the balancing and complementariness of rights between women and men in accordance with their nature and nurture. The principle of

IFLA is based on human equality suitable with the nature and nurture of women and men which favoured their differences. It is impossible that they could balance and enjoy their life without sharing these rights and duties equally. Formal equality in the context of sameness without considering biological, physical, needs and cultural nature of women and men could probably discriminate them. It is unjust to force a woman to be a man and to force a man to be a woman. They have their own strength in enjoying the life together though not with the same rights and duties but with different entitlements of rights and duties, which makes them appreciate each other and need for each other for their entire life.

4.7 Concluding Remarks

In this chapter, it can be concluded that IFLA does not necessarily discriminatory against women. Generally, the provisions of IFLA are reasonable and necessary to protect Muslim married women from disadvantaged situation. IFLA regulates the rights and duties of Muslim women and men in marriage and family relations based on Islamic religious principles which is founded under the Shari'ah sources and methodologies based on the Divine revelations, namely the Al-Qur'an and Sunnah of the Prophet P.B.U.H and the opinion of Muslim jurists. Under Shari'ah law, it consists of the rights of God and the rights of human beings which the rights of God (public rights) has priority over the rights of human (individual rights). It is argued that the provisions of IFLA are just and equal in nature and nurture of Muslim women and men which encompasses the ideal and universal rights and duties in marriage and family relations matters. IFLA upholds the universal principle of justice, equality and non-discriminatory treatment by acknowledging biological, geographical, legal backgrounds and belief of people.

IFLA from the early formation is drafted to ensure equal treatments of women with men in marriage and family relationship. It is argued that the reformation of laws made into Islamic family law in early 1980s is to prevent harshness or violence against women and children in marriage and family institution. It can be seen through the definition of *darar shar'ie* or harm which is specifically stated harm which affecting the wife in marriage. It also can be seen from the divorce law reform and several reformation on law regarding the requirements for polygamy and maintenance and joint property upon granting permission to polygamy.

Generally, IFLA upholds the attributes of collective rights and duties. It is not only about claiming on rights without performing duties. Both married women and men under the provisions of IFLA have equal rights even with different entitlements to rights and duties based on human dignity and the principle of brotherhood or *maslahah*. Even though it has the attributes of collective rights which prevail over individual rights, IFLA does not deny individual rights of women in marriage, divorce, custody and management of the property which is just and equal with men. For example, different entitlements to rights and duties under IFLA such as in the entitlement of guardianship, custodial for children, age of marriage, duty of maintenance and polygamous marriage are to preserve the collective interest of the family institutions based on their biological functions and needs. The facts suggest that, this difference is to make sure women and men benefit each other in completing their roles in enjoying this life collectively.

IFLA provides a comprehensive rules and guidance in regulating family members in order to preserve both the marriage and family institution. It is synonym with the general principle of Shari'ah that is to give justice for all by preserving the

public interest and preventing harm on individual. One of the most important objectives of Shariah is to protect the lineage that is by empowering the institution of marriage. The way that IFLA protects women is by providing women with suitable duties in accordance with their needs and abilities biologically, physically and psychologically which differ from men. It is by providing the general rules of law which is the best to protect the interest of the whole women and then the individual rights of women is preserved through the authority given by the State to the Court or Syari'e judge. For example, the rights of women in private and public spheres are preserved by IFLA through the rights and duties of men as *wali*. The intention of Shari'ah on the roles of *wali* is to make sure that women are being wholly protected in private and public spheres from any harm or discrimination. If a *wali* breach the rights and duties given, then the State has the authority through the Court to interfere in making the right and just decision. Thus, the provisions with regard to the rights and duties of *wali* under IFLA should be strengthened to empower women within private and public spheres to preserve the Muslim family institution collectively.

IFLA also contains the details rulings pertaining to biological, psychological, physical and social relationships including the rights of wife and husband, the rights of parents and children and the rights of relatives. The rights of custodial and maintenance are given based on biological role and function of being women and men. It is not restrict the rights of being women and men to hold the individual rights in custody and maintenance provider but the priority is given suitable with their capacity and ability. Moreover, it also regulates the financial aspect of all family members such as in the form of *mahr*, *nafkah*, matrimonial property and so on which is not only enforceable during the contract of marriage but also before and after

marriage contract. It is observed that IFLA specifically provides the ideal entitlements to rights and duties between women and men in marriage and family relation by considering biological nature and their biological roles in different context. IFLA specifically divides a balance and equal rights and duties for women and men through assigning their primary duties in accordance with their nature and nurture roles and functions without any exclusion of rights. In other words, IFLA applied substantive equality in spite of formal equality in achieving *de jure* and *de facto* equality of women with men.

It is contended that IFLA does not overrule the principle of justice and equality by providing different entitlements to rights and duties between women and men. It is because human dignity and rights is ideally described by acknowledging differences suitable with their classification of nature and nurture. If not, it will discriminate against them if their sexes, needs, abilities, cultures and religions are not to be considered. Since the roles, rights and duties of Muslim women and men in marriage and family relationships are influenced by Islamic religion, then Islamic religious principles is the ultimate objectives to be achieved. The formation of IFLA is based on the primary and secondary methodological sources of Islamic law, and it is not monolithic in nature thus not contrary with the principles of justice and equality applied by CEDAW which favour the non-identical of people that is by acknowledging the differences in sex and culture through substantive equality.

It is traced that the provisions of IFLA are within the attributes of rights which have been discussed in Chapter Two whereby its provisions aim at the protection of collective rights rather than individual rights whereby the development of family institution is the primary objective. It does not neglect the private rights of the

individuals in the institution to protect themselves from any violence. Other than that, IFLA protects both private and public spheres of women's life through the role of *wali*. It acknowledges the different opinion of jurists in its provisions suitable with the situation which is in accordance with the objective of Shari'ah. Furthermore, the applications of rights under IFLA come with duties which not exclude anyone from duty and responsibility to enjoy this life. Lastly, and most importantly the substance principles under IFLA are based on the classification of nature and nurture in the context of Islamic jurisprudence. The substance principle of Shari'ah applied by IFLA is already comprehensive regulating marriage and family relationships. However, there should be the law governed for individual person who breach the law which affect the society at large. This is not limited to the individual person which affected by marriage but also the individual person outside marriage or among the administration of the Court. Therefore, certain procedural matters which put women in disadvantageous situation should also be taken into consideration to avoid discrimination