

CHAPTER ONE

INTRODUCTION AND BACKGROUND OF THE STUDY

1.1 Introduction

This chapter starts with the conceptual framework and main features of this study. It highlights the nature of different legal backgrounds of Islamic law in Malaysia with international law. Misunderstanding on the attributes of rights and cultural application of different people contribute to the conflict between the application of international law under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) with Malaysian domestic law under Islamic Family Law (Federal Territories) Act 1984 (IFLA) which is based on Shari'ah law.

Further discussion of this chapter includes the research objectives which is detrimental for the findings. The literature review is discussed in this chapter in which the major references covering the analytical arguments made by several scholars in the areas of legal harmonisation, rights and duties, justice, equality, gender, Islamic family law and non-discrimination issues and policies. Another important section of this chapter is the discussion on the research methodology used in this study. This chapter also highlights the outline of all the chapters of this thesis to provide a clearer understanding of the research. Last but not least, the significant of research is deliberated as the conclusion of Chapter One.

1.2. Background and Conceptual Framework of Research

1.2.1 Malaysian Dual Legal Systems and the Reservations into CEDAW

A post independent Malaysia practices parliamentary democracy and constitutional monarchy with a written constitution. Article 4 (1) of the Malaysian Federal Constitution 1957 clearly states that the Constitution is the supreme law of the land. In the implementation of justice in a plural society, Malaysia operates a separation power of the government which are the federal government and the State government in accordance with a written constitution. It provides for a fusion of power between the legislature and the executive, and independent judiciary. In spite of that, the Ninth Schedule of the Constitution provides that List I is a Legislative List, List II is a State List and List III is a Concurrent List. It shows that in their respective spheres of authority, each level of government is deemed superior and the other may not interfere. It states clearly powers enumerated in the State List include matters of Muslim law regulating marriage and family relations such as provided by IFLA.

Malaysian Federal Constitution 1957 founded on the basis of religion. Whenever Islam serves as a core element of Malay identity and culture in a plural society, Article 3 (1) of the Constitution clearly states that Islam is the religion of the federation but other religions may be practiced in peace and harmony throughout the federation subject to Article 11 (4) to propagate it. With regard to the authority of the State legislature, Article 74 (2) empowers the legislature of the State to make laws with respect to any of the matters enumerated in the State List. This include the various States enactments and act with relates to marriage and family relations matters legislated by the States including IFLA. However, in the implementation of any

treaties made with other countries, Article 76 (1) empowers the Federal government to make any law including laws on the State list for the whole or any part of the federation for the purpose of implementing such treaties.

Malaysia is a dualist state. Under the dualist theory, international law or treaties regulate the relationship between states whereas national law regulates the rights and duties of individuals within a state. Since Malaysia is considered as a dualist state, the international treaty such as CEDAW not regulates the personal matters of individuals within a state of the Malaysian government. However, IFLA which is enacted by the state regulates personal matters of Muslim women and men in marriage and family relations which is founded on the basis of Shari'ah and Islamic jurisprudences. Thus, the regulations of the treaty or CEDAW can only be considered as guidelines as long as it is not incorporated into domestic law or IFLA. It is contended that for international law to be applicable in the national legal order, it must be transformed into national law by means of national legislation (Abdul Ghafur Hamid @ Khin Maung Sein, 2016:234). Due to this reason, the process of harmonisation of law is important to solve conflicts of law by conforming to the domestic laws to those of these treaties.

At the international level, Malaysia as a member of United Nations (UN) has ratified CEDAW in compliance with UDHR in eliminating discrimination against women. In spite of that, as a member of Organisation of Islamic Cooperation (OIC), they are two declarations which provide an overview on Islamic perspective of human rights which are Universal Islamic Declaration of Human Rights (UIDHR) and Cairo Declaration of Human Rights in Islam (CDHRI). All these provisions on human rights share similar objective of law that is to achieve justice to all people without

discrimination. However, the context of discrimination is different due to different understanding and application of law, religion and culture. It is argued that the primary objective of CEDAW is to fully address and specifically detail what defines sex discrimination from the perspective of equality between women and men which is based on Western civilisation. Hence, Malaysia as the signatory party to CEDAW, is obliged to prohibit discriminations against women and to ensure equality between both sexes as per its objective (Nasharuddin Mat Isa, 2016).

However, Malaysia with different legal foundation constitutionally and practically and Western foundation base of CEDAW principle facing difficult situation in fully ratifying CEDAW without reservations. It is due to the fact that the interpretation of gender justice in Islamic jurisprudence not in the context of similar rights and duties between women and men but by acknowledging their differences in nature and nurture. That is why Malaysia had waited sixteen years before she decided to sign and ratify CEDAW. The government of Malaysia declares that Malaysia's accession of CEDAW is subject to the understanding that the provisions of CEDAW do not conflict with the provisions of the Islamic Shari'ah law that has been practiced in Malaysia and the Federal Constitution of Malaysia 1957. Moreover, it has been argued that apparently the Malaysian government reserves Article 16 of CEDAW based on the premise that it contradicts religious law on family relationships for Muslims and indicates that the full compliance to CEDAW would cause major reform to the existing family law.

At the same time, CEDAW Committee challenges Islamic laws that are no longer practicable due to the social changes in Muslim societies and lack of religious understanding which permits thorough revision to those laws (Najibah Mohd Zin,

2012). CEDAW Committee also claimed that the reservations made by Malaysian government into Article 16 of CEDAW are contradict with the object and purpose of CEDAW. In another perspective, it was noted that the argument given by the Malaysian government on reservations are too general which controversial and impact the overall obligations undertaken by States under the treaty (Shaheen Sardar Ali, 2000). Due to this, studying the principle of gender equality under IFLA and reviewing on the reservations made by Malaysian government into Article 16 of CEDAW are important so that misunderstanding on the issue of women's rights and gender equality between IFLA and CEDAW could be resolved.

It would be a challenging task for the government to regulate the personal laws for Muslims and non-Muslims in line with CEDAW where certain provisions are based on different culture, custom, social practices and religion (Najibah Mohd Zin, 2012). But the government of Malaysia, is striving to champion gender equality or to eliminate discrimination at national and international levels through laws and policies to be streamlined with gender issues or non-discriminatory elements based on the universal principle of justice and moral values applied by all people in this country.

In constructing harmonisation between IFLA and CEDAW, it is argued that the process of harmonisation is not to transform the whole application of law but it is necessary to ensure that justice is uphold for everyone including women and violence is prevented without discrimination against women. It is noted that harmonisation between IFLA and CEDAW could be realised through the principle of human dignity and justice (Sayed Sikandar Shah Haneef, 2016:23). But it is important to clarify whether the meaning and attributes of equality and non-discrimination under CEDAW and IFLA on the rights of women are harmonious since they have differences in the

foundation of religion and the emergence of the law. The attributes and context of equality and non-discrimination are crucial to be examined to ensure that both laws uphold justice for all people by acknowledging their differences in nature and nurture.

While Article 16 (1) (a), (c), (f) and (g) of CEDAW relate with the personal law of Muslim women and men which have different primary rights and duties compared to Western couple in marriage relationship, then the reservations made are necessary and not discriminatory against Muslim women whenever it is made for the balance roles and functions in a family institution for developing the nations or civilisations and not disadvantageous the affairs of Muslim women. This constructive harmonisation can be realised if their differences are acknowledged by applying *fiqh* or *ijtihad* (human reasoning) within the framework of social justice in Islam and the universal principles and moral values applied by both jurisprudences. It is because, justice and equality can be achieved by acknowledging the differences in nature (hereditary) and nurture (culture) not necessarily in the context of similar. The most important elements that should be incorporated in the concept of gender equality is implementing fairness and justice, equal rights and equal opportunities specific to an individuals' needs and giving each person what belongs to him or her (Nurulbahiah Awang & Nik Salida Suhaila Nik Saleh, 2015: 6).

1.2.2 A Conflict of Understanding between CEDAW and IFLA on the Meaning of Gender Equality

Generally, IFLA are perceived to be incompatible with CEDAW whenever its provisions provides different entitlements of rights and duties between women and men which seems as discriminatory against women. For example, in the issues of

legal and judicial status towards polygamy, the division of rights and duties with regard to maintenance, the unjust pronouncement of divorce outside court, the guardianship principle with regard to marriage and custody of children, the minimum age of marriage and the issue of different religion in marriage and family matters.

In discussing gender issues, the first thing that has to be understood is the meaning of the term 'gender' itself. Since it is argued that gender is an issue of culture, but it relates very much with sexes (Corsini, 1999), the interpretation of gender would be different by different community. Gender masculine and feminine identities are constructed through complex and continuous socialisation processes, affected by various factors including social class and ethnic groupings (Kimmel, 2000). Even though most of women are oppressed around the world but in reality, their way of life, the custom and their application of law are not similar since they have different belief, custom and law which influence their individual conscience and duty to society. Thus, the differences in human beings obviously affect the meaning, context and scope of gender.

Constructing harmonisation between IFLA and CEDAW on the concept of gender equality can only be realised if 'gender equality' is clearly defined in its rights context. It is argued that while the pressure to remove all reservations is mounting, the possibility of its removing has to be measured in accordance with the religion, culture and law of the community which considered as substantive differences. As all human beings originated from the same nature of creation, constructing harmonisation on gender equality could be realised through understanding the universal principles needed by all people in this life which are through the elements of justice and human value or morality.

In contrast, the definition and scope of gender equality in a similar context of different people is against the rule of nature and nurture and effect the norm and social structure of certain human civilization and will probably tend to discrimination. Therefore, the term 'gender equality' in Islamic jurisprudence is crucial to be understood in Islamic concept and gender equality should not replace the biological function of human beings to be women or men (Anuar Ramli, 2012). The concept of gender equality should be defined in a harmonious way which includes social benefit, not individual, and not infringe on other's rights of human beings including their freedom of conscience. Thus, 'gender equality' should be defined based on biological, physical, psychological natures and their roles and functions in a society of certain community which could balance the rights and duties of women and men in the society.

Understanding the classification of nature and nurture in Islamic jurisprudence is relevant because it acknowledges the differences of human beings. It can also be used to examine whether there are elements of prejudice or stereotypes or discrimination on women within the Islamic principle or Muslim practice. It is contended that the classification of nature refers to biological factor (Arief Budiman, 1982) and also anatomy factor¹ consists of the rights of God which cannot be changed such as sex of human beings. However, the classification of nurture could be relative, impermanent and subject to change since it is the social construction of the community and more symbolic on the learning process within a society or culture. Thus, gender which is based on culture can be changed and in Islamic perspective it must be in accordance with human nature (biological and rights of God). It shows that

¹ Anatomy factor relates to the belief in the Creator (Anuar Ramli, 2012 & Nasaruldin Umar, 1999)

the primary different on the attributes of rights in Islamic and Western jurisprudences is on the absolute rights of God. Under Islamic jurisprudence, an individual person however, does not have absolute freedom to challenge the rights of God. In the contrary, the customary practice of people could be changed if it violates the public rights (the rights of God) (Mohammad, 2003) which normally is given for the collective rights.

As Malay Muslim community are different social custom, religion, law and culture with those of the West, the different interpretations towards what constitute gender equality becomes crucial determinant. An-Naim (2009) asserted that claiming Islam as fully consistent with human rights is problematic, as many rights given in Islam are based on sex, but the idea that it makes human rights in Islam inconsistent with international standard is unacceptable. It is because human rights in Islam is in accordance with the biological nature of human beings which is universal measure to all human beings. The different entitlement of rights according to sex in Islam might result in the equality of dignity and rights for being women and men. Indeed, certain rights are given specifically to women and men purposely to ensure equal dignity and justice as Islam appreciates biological differences (Sheriff, 2007).

In determining the concept of gender equality, Islamic jurisprudence teaches that in the sight of God, women and men are equal, but they are not necessarily identical (Abdul Monir Yaacob, 1999:189). There are some differences of biological roles, physical abilities, potentials, ambitions, wealth and disabilities appeared between women and men. Therefore, gender issues such as polygamy, age of marriage, guardianship and custodial, maintenance provider and so on in Islamic perspective should be looked into the context of human rights based on the

classification of nature and nurture of the community. It should be looked into the sources, principles and history of the law and the community. Such as the issue of gay, lesbian, bisexual and transgender (LGBT), the interpretation of gender equality in these issues should be looked into the sources and foundation of these rights in the suitable context of the community in order to maintain justice.

The conflict between IFLA and CEDAW is traced also due to misunderstanding on the meaning of equality. Generally, equality is understood as sameness or state of equilibrium. However when it comes on the issue of gender, acknowledgement of the differences between them are crucial determinants for establishing justice. In Islamic law, all people are treated the same in the sight of God except the merit of piety, and the only criterion which God applies is the criterion of goodness and spiritual excellence. Allah S.W.T. says *“O mankind, verily We have created you from a single (pair) of a male and a female, and have made you into nations and tribes, that you may know each other. Verily the most honoured of you in the sight of God is the most righteous”*². This verse means that the difference in race, colour, sex or social status is merely accidental by nature to make humans complement each other. These elements do not affect the true position of a human being in the sight of God. Yet none of these sexual differences can establish a status of superiority of one over the other except for fair and complementary rights and duties. It is also stated in the Quran that all human beings are given guided choices of which are the best way to be followed. In another perspective, the difference of faith among human beings is the right of individual human beings³. It means that every

² Al-Qur'an. Al-Hujuraat 49:13

³ Al-Qur'an. Yunus 10:99 *“And had your Lord willed, those on earth would have believed, all of them together. So, will you (O Muhammad SAW) then compel mankind, until they become believers”*

individual has freedom of conscience and belief which if it is infringed, it would amount to discrimination.

In the issues of different entitlement of rights and duties between women and men under IFLA, the major different of gender roles between them is their sexual or reproductive function of being female and male. The reproductive function of female and male influences their psychology, physical and physiology which would determines their gender roles and function in a society. For instance in the issue of maintenance provider, men are considered as the primary maintainer in a family suitable with their physical and biological nature compared to physical and biological nature of women. In addition to that, the different of belief and culture among human beings is another crucial factors (Raghib As-Sirjani, 2013:6) to be considered since people around the world are not similar. The Qur'anic verse states that sexual and cultural differences, reminds Muslims, men and women, nations and tribes have been created in order that human being may know one another⁴. Thus, the difference in human beings is created by God for them to learn from each other, to harmonise between them and not to create enmity with the difference appeared. Thus, the concept of gender equality in Islamic perspective acknowledges the differences in human beings in terms of sex, culture, religion, law, geography which becomes the justifications for the ideal meaning of gender equality.

The concept of difference under Islamic jurisprudence shows that Islam is not monolithic in nature, but under certain circumstances, it is flexible and universal based on the needs and ability of human being in accordance with their nature and

⁴ Al-Qur'an, Al-Hujuraat 49:13 translation "O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted"

nurture. Misunderstanding on the concept of equality of rights, whether the concept of equality means 'similar' without acknowledging any 'differences' becomes the controversial issues among the philosophers especially among cultural-relativism and universalism. Thus, by understanding and acknowledging the classification of nature and nurture and acknowledge the major differences between people in the suitable context of the community, the provisions of IFLA on the rights of women is harmonious with CEDAW based on the principle of justice, women's needs and ability according to their biological, physical, psychological and physiological nature of being women.

1.3 Research Objectives

It is claimed that there are areas of Islamic law that are perceived to be incompatible with CEDAW on the basis that they discriminate the rights of women (Najibah Mohd Zin, 2012). However, it is argued that the basic principle and appearance of Islam is reformative, enjoining upon people equity and justice for all (Shaheen Sardar Ali, 2000). Therefore, the primary objective of this research is to consider whether the provisions of IFLA on the rights of women are harmonious with CEDAW. In order to consider that IFLA on the rights of women are harmonious with CEDAW, this research examines the attributes of rights uphold by Islamic and feminist jurisprudences through the sources of both laws.

Due to the fact that all human beings around the world are same in their creations and justice is considered as universal human need, the second objective of this research is to examine the meaning and principles of gender equality under IFLA and CEDAW whether it is harmonious and make a comparison between the principles

of equality under IFLA within Malaysian context with CEDAW. It is to disregard a lot of misunderstanding on the part of IFLA and CEDAW regarding their principle of gender justice and to consider that they are not entirely incompatible but can be constructively harmonised. It is because modern feminism corresponds not only with equal treatment in a similar context, but also to 'substantive equality'.

It is argued that religious, cultural and social understandings on women's rights in a suitable context are crucial for constructing harmonisation between national and international legal regimes (Nik Salida Suhaila Nik Saleh, 2013:5). Since Islamic family law demonstrates different structural family institution based on gender relations, which is claimed as patriarchy, the third objective of this research is to analyse the basis of different entitlements of rights and duties between women and men under the provisions of IFLA whether it upholds the principle of equality and non-discrimination which are not discriminatory against women.

Lastly, the fourth objective of this research is to review the reservations of Article 16 (1) (a), (c), (f) and (g) of CEDAW by Malaysian government to consider that the reservations are not discriminatory against women and harmonious with CEDAW. The critical analysis based on the doctrines of '*maqāsid shar'īyyah*' and '*maslahah*' is crucial. Hence, the analysis is hoped contributes to the positive reformation on the provisions of IFLA to empower women which is not contradict with Shari'ah principle and the object of CEDAW for the women's enjoyment of life.

1.4 Research Questions

Although the provisions of CEDAW and IFLA demonstrate some differences in the aspects of foundation of faith and application of law and custom between Islamic and

international human rights laws, this does not mean that they are not compatible at all in preserving women's rights. The differences between them can be meaningfully discussed and the universal principles of IFLA can be persuasively accepted within the themes of CEDAW rather than expressing them as concepts or interpretations that are alien to each other. Since the main objective of CEDAW is to eliminate any kind of discrimination against women and IFLA is enacted to protect the rights of women together with children in marriage and family relations in conformity with Islamic law (Noraini Hashim, 2015), the primary research questions are:

- i) What are the attributes of rights which would guarantee gender justice in Islamic and feminist jurisprudences and whether they are harmonious?
- ii) Whether the interpretation and principle of gender equality and non-discrimination in gender uphold by Islamic and feminist jurisprudences are harmonious?
- iii) Whether the principle basis of different entitlements to rights and duties of women and men under IFLA upholds the principle of gender equality and non-discrimination in gender under CEDAW?
- iv) Whether the reservations entered into Article 16 (1) (a), (c), (f) and (g) of CEDAW disadvantageous against Muslim women and how the provisions of IFLA and reservations to CEDAW need to be brought in line with CEDAW or vice versa?

1.5 Harmonisation of CEDAW and IFLA from the Perspective of Human Rights: A Literature Review

The research on constructive harmonisation of women's rights in Islam in the context of Malaysian law and CEDAW has been done in 2013 by Nik Salida Suhaila Nik Saleh entitled 'The Women's Convention and Malaysian Laws on Muslim Women's Rights: The Possibility of Harmonisation'. However, she did not specifically examine women's rights under the provisions of IFLA in its principle and philosophy of gender equality. Nik Salida Suhaila Nik Saleh (2013:92) discussed on the Malaysian laws and policies on women in general and its possibility of harmonisation with CEDAW. She has found that substantive equality is important as formal equality in achieving gender justice and both laws applied substantive equality as a measure to achieve *de jure* and *de facto* equality of women with men.

Other than that, Zanariah Noor (2007) has been discussed on the issue of gender justice and the reformation of Islamic family law in Malaysia in general. The article highlights the ideas of reformists regarding gender justice in Malay society which has increased the awareness as well as the interaction between Malay intellectuals with Western civilizations. She has discussed on the development of Islamic family law due to the awareness on women's rights based on the Egyptian reformists' thoughts. It also includes the critical analyzation on the amendment made through the fiqh rules which have been selectively codified. The transformation of fiqh rules to statutory law in the realm of family law were justified in the article on the principle of *siyasa shar'iyah* (judicious policy) to achieve *maslahah* (public interest) which enabled the rules to be changed, so as to conform with the changing of

modern Muslim society. However, this article does not make a comparison between IFLA and CEDAW on the concept of gender equality.

In the discussion of a legal harmonisation, it has been contended that there are no specific meanings of 'harmonisation of law', but the term 'harmonisation' comes from the root word 'harmony' which in adjective meaning 'to streamline', 'to customise', 'to match' and 'to mix' (Shamrahayu A. Aziz, 2015:3). The Former Chief Justice of Malaysia, Dato' Abdul Hamid Mohamad, revealed in his paper on '*Harmonisation of Shariah and Civil Law in Malaysia: Present Reality and Future Actions*' that to harmonise laws, attention must be paid to the substance of the laws, rather than just the form. In other words, different laws or legal systems might be harmonised if the substance or principle of law is commonly agreed. Therefore, in the context of harmonisation of IFLA and CEDAW on the rights of women, the right and ideal definition of harmonisation is 'the process of two or more laws, whether domestic or international, to be streamlined or harmonised together by considering the universal values and local circumstances on the substance of the laws' (Siti Zubaidah Ismail & Norbani Mohd Nadzeri, 2015).

As long as it is asserted that common law and Shari'ah law have a common religious heritage of human rights, both laying great emphasis on rule of law, superiority of general law, independence of judiciary, precedents and custom as a source of law, the principle of natural justice, protection of life, freedom of property and equality of all humans (Dil Mohammad, 2006:2-4), comparative study of human rights in Shari'ah as provided by IFLA and women's rights under international human rights instrument like CEDAW may be helpful in similar development of human

rights jurisprudence in Muslim societies which had been under the colonial rule of other European countries.

In constructing harmonisation of IFLA and CEDAW, it is traced that modern feminism corresponds not only with equal treatment (similar treatment), which is commonly known as 'formal equality' in the feminist discourses, but also to 'substantive equality' which can be achieved through laws (Smart, 1989:140, Nik Salida Suhaila, 2013:92). Hence, the harmonisation of law on gender equality between IFLA and CEDAW even based on different foundation of religion, law, culture and background, it can be achieved by consensus on a set of universal human rights through 'neutral formulation' (An-Na'im, 1995:229). It means both jurisprudences have to seek out the possibility of harmonisation between both laws as long as it does not violate the fundamental principles of the laws.

Mahamad Naser bin Disa (2012:3-4) opined that Islam was discussing about the notion of human rights since the days of the Prophet's life as mentioned by the Prophet in his last sermon that reads "*There is no superiority for an Arab and non-Arab, the white man with a black man but piety to he just different*". He defines human rights as rights that were endowed by God as the Creator of human beings. It is not the result of human thoughts that has even been determined and defined by the Holy Qur'an and Sunnah. Human rights as expressed by Dr. Wahbah al-Zuhaily is acknowledging that assemblage of some natural rights possessed by a person, who is closely related to the existence of their nature: naturally certified though unrecognised or occupied by any power. It includes the right to life, equality, freedom in all its forms, civil and political rights, the rights of nations, the rights to independence, the rights to form an identity, right thought, right of religion, the right to learn, economic

and social rights, labour rights, the right to tenure, the right to health care, parenting rights, children's rights, the rights of adolescents and youths, family rights and the rights of the abode of others. He stressed that the principle of respect for the dignity of humanity and human dignity is the source of rights. The definition of human right according to Wahbah is almost the best definition because it is closely related to what human needs throughout his life according to their biological nature.

Due to the universal concept of human rights in Islamic law, it is contended that Islamic and international human rights law could be possibly harmonised through the doctrines of '*maqāsid shar'īyyah*' and '*maslahah*' because overall welfare of Shari'ah is to ensure the welfare of human beings and peaceful existence of the States (Mashood Baderin, 2001:99-100). Since women's rights are also part of human rights, it is conceded that IFLA and CEDAW could be constructively harmonised by analysing objectives of both laws within the principle of social justice which not covers particular group of people.

IFLA and CEDAW on the rights of women are provisionally differ and have different foundation of law, religion and custom. However, it is argued that women's human rights in Islam are not entirely irreconcilable with current formulations of international human rights instruments emanating from United Nations (Shaheen Sardar Ali, 2000:3). In this research, it is argued that both IFLA and CEDAW share a common principle of justice and human needs which could be operated coherently, thus not generating inconsistent outcome on the subject of law. The most important thing is the implementation of justice which acknowledges the differences among human beings, which should be the primary and underpinning basis for the harmonisation process of human rights laws. In the process of harmonisation of law,

the primary object is to establish justice by synchronising one consensual standard for the parties involved in the justification of law, regardless of their religion, race and custom in solving the conflict (Shamrahayu A. Aziz, 2015:3).

The controversial issue in the international discourse of human rights is whether universalism and cultural relativism can be harmonised in multi-cultural global environments (Sullivan, 2000:27), whereby it is noted that strong cultural relativism is maintained where the culture is derived from the values and morals of society. Strong cultural relativism maintains that culture derives solely the values and morals of society, while the universality of human nature and rights checks the potential for any extreme relativism. The impact of a culture on the shaping of individuals within it is both systematic and symptomatic, leading to the dominance of distinctive social types in different cultures. Thus, it can be argued that human nature and their beliefs are the major factors in determining and moulding the roles, rights and duties and behaviour of human beings. Therefore, the acknowledgement of the variety of the differences of role according to sex and culture is important to establish justice in society as it is in accordance with human nature.

Ali.S.S. (1998:46) said that Islam in spite of having gender hierarchy does not represent woman in a tyrannical manner. However, Islamic law enjoins that enjoyment of life in Islamic marriage is through fulfilling of rights and responsibilities between women and men. Therefore, whenever a husband who is considered as the head of a family, is responsible to maintain and to protect a wife, the rights and duties imposed on a husband will not put a wife inferior to a husband. The wife, instead is given a special place as women, as person to be protected. Thus, happiness or outcome in the married life will come naturally by fulfilling the rights and duties

imposed on them in accordance to their biological, physical and psychological nature as a human being.

With regards to the reservations of Article 16 (1) (a), (c), (f) and (g) of CEDAW by the Malaysian government, the major factor which should be highlighted in this research is the disparity between the theoretical perspectives on women's human rights, and its application to Muslim jurisdictions determined by elements of cultural practices, religious rights and duties, socio-economic realities and political expediencies on the part of governments (Shaheen Sardar Ali, 2000:4). This problem can be solved by the tolerance on the part of CEDAW to accommodate Muslim countries compliance to the most fundamental precepts of Shari'ah as well as the readiness on the part of the Islamic countries to accept the reformation of law on the rights of women as long as it does not affecting the most fundamental precepts of Shari'ah (Abdul Ghafur Hamid @ Khin Maung Sein, 2009).

Even though this country has ratified CEDAW to eliminate discrimination against women, it is not bound to apply the legal precepts in the Convention without examining the possible harmonisation of law between CEDAW and IFLA. It is imperative to understand the theories on the adoption and application of international law in the domestic legal system. They are 'the doctrine of incorporation' and 'the doctrine of transformation'. The doctrine of incorporation means any international law or treaty or conventions which has been accepted is automatically being regarded as the domestic law. Normally, the doctrine of incorporation of international law is clearly provided in the constitution of the country. On the other hand, in the doctrine of transformation, the international law which has been accepted or ratified is not automatically being part of domestic law (Shamrahayu, 2015:5).

The above process validates the country to apply and maintain the reservations of Article 16 of CEDAW if ratifying such law would be unjust or less favourable to the Muslim women in Malaysia. However, any provisions under IFLA which seems discriminatory against women are hope to be reformed for the empowerment of Muslim women in this country. This can be realised through the transformation of *fiqh* rule to statutory law in the realm of family law is within the framework of *siyāsah shar‘īyyah* and *maslahah* (Zanariah Noor, 2007:121). She further stated that Islamic Family law in the Muslim countries which were drawn from the same sources could be interpreted differently in certain aspects because of different intellectual knowledge and educational background regarding gender relation. It is the result of the traditional practice followed by the community. Thus, the law which relates to marriage and family relations which are under the Islamic Family law of each state are mostly influenced by different customs.

One of the most serious problems encountered in implementation of human rights treaties is the vast number of reservations and declarations entered by the States parties. Malaysia is among the Islamic States that had entered into reservations of CEDAW on the basis of general reservations and repugnancy to Islamic Law and Shari’ah. The reason for this lack of consistency in invoking Shari’ah is due to the absence of a unified interpretation of religious law which increases the discretion of individual state parties (Ali S.S., 2000). Thus, it is argued that there must be gender equality guidelines from the State Parties which provides interpretation and scope for the implementation of CEDAW in order not to be discriminatory against Muslim women.

Mohammad Tahir Mohammad (2003:305-319) has discussed on correlativity of rights and duties and the relationship of rights and obligations with *hukm*⁵. He noted that rights coexists with different type of duty depending upon the nature of relationship whether between the subject and the Lawgiver, or between the right holder and another party (Hashim Kamali, 1984). Yet some jurists have accepted the existence of absolute duties which support their arguments with the existence of duties, which are owed to God, animals, community, self regarding duties, and duties owed to the State (Austin & Paton, n.d). Rights and duties are the subject matter of the *hukm* and they come under the sub-heading of *mahkum bihi* which is the conduct of competent person (*mukallaf*). *Hukm taklifi*⁶ contains relations between one individual and another individual, and the relation between man and God. Every text of the Qur'an and Sunnah relating to the rights and duties, prescribes a standard of human behaviour or qualifies it with terms and conditions called *hukm*. He said that in the context of private rights, it is true that *hukm* is more general than rights, but it may be less than convincing to say that *hukm* has wider application than obligation because it has different level of implementation. Thus, understanding the relationship of rights with *hukm* is very important hence this research is going to discuss the rights and duties of women and men in an Islamic marriage under IFLA which correlates with *hukm*.

⁵ *Hukm* is an Arabic word or it can be translated as *shar'ah* legal ruling. *Hukm* is defined as the standard of behavior of a legal person established by recognised legal sources (*adillah*) of Islam that either defines or declares its qualification and conditions. See Mohammad (2003) page 321. It is divided into two main varieties. *Hukm taklifi* and *hukm wad'iyy*. There are five types of *hukm* that are 'wujub' (it is called "duty" where the communication of the Lawgiver demands performance of an act emphatically), 'nadb' (where the demand is not so binding and it requires commission of an act, it is "recommendation"), 'ibahah' (in the case the communication of the Lawgiver does not demand performance or omission of an act, that is to say, the text provides an option, for the legally competent person either to act or otherwise, it indicative of permissibility), 'karahah' (if the requirement of non-emphatic demand is the omission of an act then it is disapproval, 'hurmah' (if the emphatic demand is for the omission of an act, it is prohibition). See Mohammad Tahir, 2003. p. 27

⁶ *Hukm taklifi* is the defining rule that determines rights and duties of individuals by requiring the commission or omission of an act, or giving an option to do or refrain therefrom. Ibid.

The concept of social justice in Islamic jurisprudence is developed through freedom of individual conscience, complete human equality and mutual responsibilities in society (Sayyid Qutb, 2000:52-92). This principle does not contrary with international jurisprudence on justice since the emergence of social justice in international law can be seen from the philosophy of Rawls (1999) who said that justice is the first virtue of social institution. It relates with the relationship between women and men in a society without neglecting individual rights. It can be argued that the discussion of social justice is imperative to this research in searching for the attributes of rights uphold by both jurisprudences in eliminating discrimination against human beings.

In the discussion of rights, duties and morality, it is argued that all people have obligations (Walker & Wall, 1997:273). These obligations to be truly effective must be freely chosen and self-enforced. Feminine jurisprudence with its ethics of care does not always respond uniquely to women, in fact the proper term should be humanist. They further argued that the idea of an ethical of care is based on a set of principles of morality that are meant to extend beyond a "domain of special relationship". Those relationships are not only based on different of cultures but also genders. This argument is important for this thesis to show that some feminists also acknowledge obligations from an idea of ethics of care derived from the principles of morality. Feminist also acknowledge the different of cultures and genders in the implementation of obligation and duty of care based on the principle of morality.

In conjunction with the relationship between rights, duties and morality, international law share a common understanding whenever it is said that Shari'ah is an intrinsically duty-oriented legal system wherein the notion of obligation, or

concern for the rights of others, plays a more prominent role compared to that of right (Mohammad Hashim Kamali, 2006:2). Therefore, Shari'ah law imposes women and men with duties and obligations to protect the society as a whole rather than concerns for individual rights in the objective of law. Marriage in Islam is mainly, but not purely, in the nature of a civil contract. A Muslim marriage is essentially a contract between the parties, but it is a contract with significant religious, moral and spiritual overtones (Nik Noraini Nik Badli Shah, 1998:4), which considers all physical, biological and psychological nature of human beings. The parties to a marriage contract, though they have the right to modify or vary some of the terms, may not nullify the essential characteristics of a marriage. Thus, Muslim marriage transactions as provided under IFLA are full with duties and responsibilities in order to protect the rights of the family members including women as wives, children and men as husbands.

With regard to the correlation between rights and duties, Nik Salida Suhaila Nik Saleh (2012:157) argued that Islam and the West share similar definition of rights which both have to do with rights and duties or responsibility. In Western jurisprudence, there was no difference between 'rights' and 'duties' and the term 'rights' was implying 'duties'. Clapham (2007) argued, just as in the Quran, the Bible also proclaim not only on rights but also duties. The view that rights and duties are correlative used to be dominant among philosophers. Accordingly, Nik Salida Suhaila (2012) further argued that it is important to develop the new formulations for feminist demands that rights must be followed with duties. It is important that this finding support the concept of right as 'duties' in Islamic and international jurisprudences on its definition which is compatible to each other, both having to do with responsibility.

Nur Syakiran Akmal Ismail (2015:38-54) addressed that gender mainstreaming in Malaysia was established as a global strategy for the promotion of gender equality, as indicated in the Platform for Action adopted at the Fourth World Conference on Women in Beijing in 1995. The standard of achievement however must be clearly outlined so that the path of gender-related progress can be monitored. This is a crucial part to be established since the notion of gender equality is always misinterpreted by people and hampers the goal and values of gender mainstreaming in the Malaysian context.

Therefore, to implement CEDAW in Malaysia, chief amongst the concerns to be addressed in the new legislation of gender equality is the definition and understanding of gender equality, both formal and substantive (equality of opportunity, access and results) (Zarizana, 2008:90). Special attention must also be given to the attributes of rights, the meaning and scope of discrimination, both direct and indirect discrimination, permissible and non-permissible discrimination suitable with the universal principles of gender equality modelled by IFLA. Discrimination itself must be defined in broad terms and must exclude special provisions on differences between genders due to sexual differences in human beings.

Islamic jurists argue that gender equality means acknowledgement of human dignity and rights between women and men equally in economic, political and social aspects including their roles, rights and duties in marriage and family relationships (Najibah Mohd Zin, 2012). Even though, it is stated in the Quran that men are given priority than women only due to men's responsibility in marriage and family relations matters, it does not mean that women do not have equal rights to men but women are different with men in their social functions due to their sexual differences. Moreover,

it is wrongly claimed that Muslim women are being disadvantaged by the customary practice and unpractical legal system due to discriminatory elements under Shari'ah law. Somehow, the customary practice of Muslims and unpractical legal procedure are due to the literal interpretation of the Quranic verses which causes the negative impact governing the rights and duties of women and men. Therefore, the use of contextual analysis supported by sociological aspects of law and *maqāsid al-Shari'ah* in understanding the sources of Islam in discussing women's issues, is necessary to achieve fair consideration and understanding.

The rights of women not only covers their private sphere but Islamic jurisprudence also guides on the eligibility of Muslim women in holding public office. This has been highlighted by Mohamed Azam Mohamed Adil & Noor Huda Roslan (2016:8). It is argued that private *wilayah* or private authority refers primarily to guardianship over the person and property of another (Hashim Kamali). Public authority refers to the women eligibility for public office. It is stated that there is a general consensus (*ijma'*) that support the view that only men are eligible for heading a state and prime minister but there is no explicit consensus of the learned record, whether written or verbal, nor there is a clear ruling in the sources to prevent equality even at this level other than that two posts. In the discussion of the eligibility of women as judge, Ibn Hazm al-Zahiri held that women are eligible for all other offices of government except the office of the head of state. He refers to the Quranic verses which generally mention the God commands to hand over the trusts to whom they are due and to maintain justice whenever judge between people (Al-Quran An-Nisaa', 4:58). Nevertheless, it is contended that women can only make judgements on cases

that can be managed by them and men as such could not made testimony such as in the case of giving birth and confirmation of birth.

Nasharuddin Mat Isa (2016:34-37) has argued that Malaysia has shown its willingness and commitment to implement the principles and provisions as enshrined by CEDAW. The government has progressively reviewed its position in accordance with the national laws, namely Shari'ah and the Federal Constitution of Malaysia. Nevertheless, this practice has led to a number of withdrawals of prior reservations towards the convention, which may be assumed as to have been scrutinised upon, concerning to its contradiction (if any) to both Islamic jurisprudence as well as the Federal Constitution. He added that as Islam has deeply entrenched as the religion of the federation as provided in the Malaysian Constitution, the conflicting concepts of universalism from the universal natures of the human rights laws is the primary reason why Malaysia has yet to sign or ratify a number of treaties. He further contended that the universality of human rights must be recognised alongside the existence of cultural relativities. These arguments are important to support that in the implementation of CEDAW with certain reservations to it particularly to Article 16 (1) (a), (c), (f), and (g) is due to the fact that Malaysian Muslim have deeply entrenched the Islamic religious rights and duties with regard to marriage and family relations matters. Therefore, to harmonise IFLA and CEDAW, the recognition of cultural diversities is important in the meaning of universalism of human rights law.

It is opined that the only way to achieve consensus on a set of universal human rights is through 'neutral formulation' (Abdullah An-Na'im, 1995:229). It means that both jurisprudences have to search the possibility of harmonisation between both laws as long as it does not violate the fundamental principles of laws. He has proposed

some general guidelines on the conceptual and methodological aspects of the process of internal transformation as it may apply to any religion, culture or ideology by excluding group(s) of human beings in order to eliminate discrimination. The key to any effort is the credibility of the advocates of universal human rights in the eyes of their own local constituencies. Further, according to Abdullah An-Na'im (1995:241), universality of human rights can also be enhanced through a cross-cultural dialogue to promote an over-lapping consensus on global moral foundations of these rights. Therefore, neutral formulation used as the methods in this research to harmonise CEDAW and IFLA is on the universal moral values and principles governing the rights of women and men in accordance with the individual belief, local culture and the law of local constituencies for equality of outcome.

1.6 Research Methodology

In order to answer the research questions, it is imperative that the methods and methodology utilised stand up to scrutiny. This thesis combines legal discussions and gender social aspects involving a hybrid of methods which focuses on the provisions of IFLA on the attributes of women's rights in Islam and the provisions of CEDAW on the attributes of women's rights at international level. This thesis encompasses qualitative research of a doctrinal and comparative nature. This involves both theoretical as well as practical levels of discussion on the principles and methods to achieve the ideal and universal concept of gender equality for all people of the community in their rights context. It is doctrinal whenever it examines the principles of law and historical background of CEDAW and IFLA whenever both come from different basis foundation of law, religion and culture on human rights. Additionally, the thesis adopts a comparative method, where appropriate, to investigate and

compare the attributes of rights, human creation and needs and the concept of gender justice uphold by Islamic and feminist jurisprudences. This study also using comparative method research in order to search for the harmonious principle of law between Islamic and feminist jurisprudences on the rights of women under the provisions of IFLA and CEDAW.

This thesis is a qualitative research because it involves reading, understanding and analysis on the text books, journals, reports, enactments and acts and also related cases on the issues of human rights, women's rights, family, society and gender issues with regard to the Muslim women in Malaysia and international feminist aspiration on women's rights. In understanding the issues of harmonisation of law at the international level, a lot of historical aspects should be read such as on the emergence of UDHR and CEDAW and feminist critiques on rights and gender in accordance with Western jurisprudence. It includes understanding the process and procedural matters of CEDAW application. On the other hand, in understanding the reality on the issues of gender equality under IFLA, it is investigated through having personal interview with the person who directly involved with the provisions of IFLA and Syariah Court matters involving women which are the Shari'ah Chief Judge of Selangor and the Shari'ah Chief Judge of Penang. The interviews are more on reality facing by women at the Syariah Court on the discriminatory issues. The experts' backgrounds and experiences in handling the cases on Muslim women in marriage and family matters will support the findings of this research through their recommendations and explanations.

Moreover, in order to get the primary sources in understanding the issues of women's rights and the reservations of CEDAW by Malaysian government, several

appointments have been set up with the International Division of Attorney General Ministry and Ministry of Women, Family and Community Development to get some informations on the current issues on Muslim women's rights. Even though the appointment has never occurred with the officer in charge at the International Division of AG, the slide report made by the Officer in Syariah Division, Encik Arik Sanusi assists this research in understanding the reasons for reservations on Article 16 of CEDAW. Besides, the informations shared by Encik Firdaus Azizan, one of the officers at MWFCDD might assist this research in understanding how the government of Malaysia tried to achieve gender equality in the Malaysian context through several programmes and policies.

Since the process of harmonisation between the law on the rights of women under IFLA and CEDAW is new and the information is not easily found, I do attend several conferences on women and Roundtable Discussions on Women consists of the experts, officers from the Ministry of Women, Family and Community Development and agencies as well as NGOs at several local universities within 2015 till 2017 such as organized by Centre for Women of University Islam Malaysia. The information is considered primer as the person presented at the conferences and roundtable discussions are the experts and officers from the ministry and agency related to women.

The scope of this research is to compare and analyse Islamic and feminist jurisprudences on the substance of rights on women under IFLA and CEDAW in order to construct the harmonise concept of gender equality in its right context in accordance with the needs of human beings biologically, physically, psychologically and culturally in order to establish justice. The substance of women's rights in Islamic jurisprudence is investigated through the primary and secondary sources of Islamic

law. The reading and understanding is made on the contextual meaning of al-Quran and Hadith of the Prophet and Muslim jurists. The analysis is made which come to the findings on the complementary and contrasting jurisprudence of Malaysian Muslim women's rights laws (underpinned by IFLA) and reservation to Articles 16 (1) (a), (c), (f) and (g) of CEDAW. This research however is limited to an exploration of IFLA in the scope of differences of rights and duties of women and men in marriage and family relations which have the same objective of CEDAW that is to provide women with the enjoyment of life suitable with their nature and nurture. Recent developments in discourses of Malaysian Muslim women's rights, government policies on gender equality, Shari'ah precepts governing women and the international covenant on Muslim women's rights have all influenced this study.

1.7 Chapter Outline

Chapter One is an introduction chapter. This chapter focuses on the background and conceptual framework of the research. The chapter discusses the conflict of law in the implementation of CEDAW within Malaysian dual legal systems and background of people which leads to some reservations. This chapter also highlights the misunderstanding on the concept of 'gender' and 'equality' by the community. This chapter also try to differentiate between religious rights and duties with those provided by culture which is changeable when unnecessary and thus unreasonable to be practiced. Due to these differences, it is important that the concept of gender equality have to be understood in the right context. This chapter also discuss on the research objectives together with the research questions to further understand what is going to be studied throughout this research. In order to get information on the conceptual framework of the research, this chapter discusses the literature review on

the harmonisation of IFLA and CEDAW from the perspective of international human rights. This chapter also includes the research methodology employed in this study and the significant of research.

In the following chapter, Chapter Two, it examines the development of the international framework on human rights law. It is intended to understand the emergence and purpose of CEDAW regulations. In this chapter, it focuses on the theory of justice and the feminist critiques on rights in order to evaluate the attributes of rights in international feminist jurisprudence. The argumentation focuses on the attributes of rights discussed in the feminist discourse and indirectly it is compared with the attributes of rights in Islamic jurisprudence. As this research is aimed to preserve women's rights based on Shari'ah jurisprudence and CEDAW's regulation, the analysis on the attributes of rights in this chapter considers not only civil and political rights, but also critiques on rights in the context of different of religions and cultures. The comparison is made on both jurisprudences' concepts of rights and principle of justice by acknowledging the differences between people. It is intended to show that there exist commonalties between the basic principle of women's rights in Islam and feminist's view. In addition to that, this chapter examines the evolution on the theory of justice and equality and procedural matters uphold by CEDAW on gender equality. The meaning and application of formal equality and substantive equality are analysed in this chapter. This is intended to highlight that substantive equality is important to be applied as much as formal equality in the implementation of justice especially between women and men. This chapter also highlights the meaning and scope of discrimination acquired by CEDAW in understanding the meaning of equality and non-discrimination. Through the comparison and analysis,

the discussion seeks to find whether Islamic and feminist jurisprudences are harmonious on the fundamental principle of gender equality by acknowledging differences.

In Chapter Three, the discussion focuses on developing the legal framework on IFLA from the perspective of Maqasid as-Syar'iyah. It evaluates the concept of 'difference' in accordance to Islamic divine revelation and science perspective. The discussion includes both concepts of differences in nature and nurture. It is important to include the discussion on the different sexual nature of women and men which influences the gender's perspective in Islamic jurisprudence. In this chapter, the argument on whether women are really distinct in nature and nurture biologically, psychologically, physiologically, physically and culturally are analysed in order to examine women's roles, abilities and needs in accordance with Islamic Divine revelations and scientific views. The basis for the concept of gender justice under IFLA are framed upon the fact that biological nature of women is different from men, in line with nature of the creation of human beings which in turn affects their different roles, abilities and needs in life. This chapter also discusses the principle of social justice which is considered as the basic theory for establishing just and equal rights and duties which acknowledges different sexes and background of people. In order to understand the philosophy of equal rights and duties in marriage and family relations matters, the concept of marriage in Islam, the correlativity between rights, duties and moralities and human rights in the perspective of Islam are examined through the sources of Islamic jurisprudence.

Chapter Four provides one of the most fundamental analyses of research. It starts with the status of women before and after coming of Islam and the customary

practice of Malay Muslim women in marriage in order to have an overview on the status of women in Islam generally and Malay Muslim women particularly. This chapter also addresses the concerns of women's rights movement on gender equality in Malaysia. All these issues affect the development of Islamic family law and the implementation of IFLA and the reformation into its provisions. This chapter critically analyses the issues on different entitlements of rights and duties between women and men under the provisions of IFLA within the perspective of Maqasid as-Syar'iyah and the attributes of rights in Islam. The inconsistencies exist between IFLA and CEDAW such as on the issues of the minimum age of marriage, person of other religion, consent of *wali* in marriage, polygamy, divorce, maintenance, custody and guardianship which claimed as discriminatory against women are analysed through the principle of justice, complementary nature, balance and equal rights and duties between women and men for the enjoyment of this life. It evaluates whether the different duties and responsibilities of a wife and a husband under IFLA discriminates against Muslim women in Malaysia. Since gender equality or gender justice can be achieved by acknowledging the differences among human beings, this research is aimed to prove that different entitlements to rights and duties between women and men under IFLA is not necessarily discriminatory against women.

Chapter Five analyses the principle of women's rights under international Islamic human rights instruments such as UIDHR, CDHRI, UDHR and CEDAW to highlight the divergences and convergences between them. This chapter also highlights the bona fide intention of Malaysian government in ratifying CEDAW with reservations in order to eliminate discrimination against women within Malaysian context. It is intended to show that the reservations entered is not because Shari'ah or

Islamic law principle is contradict with the object and purpose of CEDAW in eliminating discrimination and violence against women. But, the reservations entered are due to the different gender application between Muslim women and Western women which should be acknowledged in order to eliminate discrimination. Another important matter which is highlighted in this chapter is on the analysis of the provisions of CEDAW on monitoring implementation of CEDAW by States parties in order to know to what extent the State Parties are bound to implement the provisions of CEDAW in their domestic laws. As a comparison among Muslim states who progressively reformed their law on the rights of women, this chapter examine the reservations entered by the State of Morocco.

In the last chapter, Chapter Six, a conclusion is made based on the objective of the research that IFLA and CEDAW are harmonised in its substance of law by acknowledging differences of human beings within the principle of justice, balance and complementary rights and duties. In this chapter, it is concluded that the right understanding on the attributes of rights influences the application on the concept of gender equality and practices of individual and the community with regard to the rights of women. It is argued that understanding the substance or principle of rights to accommodate the concept of gender equality in its right context is important in order to construct the harmonisation of law between 'local and international' and 'Islamic-based and Feminist-based' legal standards for the protection of Muslim women's rights. It is suggested that the notion of equality must be understood by all levels of society for its substance or principle and not its form or custom. It is believed that a deeper understanding on the meaning, concept and principle of justice, equality applied by IFLA and CEDAW could solve the conflict that exists between these two

jurisprudences. By applying substantive equality on the application of different entitlements to rights due to differences of nature and nurture and the right interpretation of equality and gender, the provisions of IFLA and the reservations made by Malaysian government on Article 16 of CEDAW do not contradict with the object and purpose of CEDAW in terms of the substance concept of gender equality.

In the final chapter too, four recommendations are made to empower the rights of women in this country. The first solution is by reforming certain provisions under the provisions of IFLA which disadvantageous women in accordance with the principle of maqasid syar'iyah inline with the meaning of discrimination of CEDAW. The second solution is by strengthening the women's policy for social reconstruct which is also in accordance with maqasid syar'iyah with the provision of CEDAW as guidelines. The third recommendation is to enact the new law on gender equality so that the community understand the context and purpose of gender equality or gender justice in the right context. The last recommendation is the need to rebrand Muslim feminism in Malaysia within the attributes of rights uphold by Islamic jurisprudence. Muslim feminists in Malaysia should avoid the reflection of Western foundation notion of feminism to avoid misunderstanding of gender justice or gender equality. Last but not least, it is suggested that the law regarding to gender equality is to be enacted based on the five attributes of rights which have been discussed in Chapter Two in order to achieve gender equality acquired by CEDAW within the right context without neglecting the fundamental precepts of Shari'ah.

1.8 Significant of Research

Pursuant to Family National Policy which has been launched by the government in 2016, this research has significant contribution to the development and improvement of Islamic Family Law in this country to be in line with the international Women Convention that is CEDAW to eliminate discrimination against women. It has been stated in the policy that one of the method to be taken is by giving priorities on matters with regards to human rights and equality in the development of law and policy to ensure protection and safety and postulate gender equality culture in a family institution (Ministry of Women, Family and Community Development, 2018).

Therefore, the study on the harmonisation of IFLA and CEDAW on gender equality which focuses on human rights issue could assist the reformation of IFLA without neglecting the Shari'ah principle uphold as stated in the Federal Constitution. Even though it is claimed that the law regulating the affairs of women is already complete and comprehensive, however, the customary practice, procedural provisions and unpractical legal system which disadvantageous women are still exist and need to be reformed through law and culture within the classification of nature and nurture of the community. Therefore, this research finds out that for the development of the community at whole, IFLA could be the best model for the collective rights and duties of women and men in marriage and family relations. However, some amendments to IFLA should be made on indirect discrimination provisions or procedural matters under IFLA to reflect more protection and preserve gender equality culture in accordance with Malaysian context.

It has also been discovered that IFLA upholds universal attributes of rights which consider sexual and cultural differences between women and men in nature and nurture. Even though women and men are entitled to different rights and duties in marriage and family relations, both are equally responsible but do not need to necessarily fulfil similar rights and duties. Most importantly, both have equal access to achieve equal results. Besides that, IFLA also provides special measure for the empowerment of women before the law and culture in private and public spheres through the appointment of men as *wali* or the protector and a maintainer in a family institution. Having said that, a few areas under IFLA still requires modification and improvement on procedural matters in order to avoid disadvantageous situations to women.

In strengthening the rights of women under the provisions of law, it must be by empowering the role of men. It is due to biological disabilities of women in certain period whereby the strength of men is needed to support women to enjoy their life to the fullest. Men possess biological, physical and physiological strengths which are different from women. All these differences are imperative to prevent the dignity and rights of women whether in private and public spheres. Since men are assigned as the head of the family, their roles, rights and duties should be empowered under the provisions of law to ensure that they become the responsible leader of the family. Therefore, the provisions of law with regard to marriage and family relations should be enacted based on the collective rights of family members in order to eliminate discrimination.

This study contributes to the changes of social culture whenever policy and law should consider the different strengths, abilities and disabilities of women which

derived from their biological nature i.e. during menstruation, pregnancy, nursing and caring of children. All these situation have to be considered to ensure that women will enjoy their life to the fullest. Simultaneously, the law which consider these conditions should not limit women contribution in the public sphere and disregard their primary duty in the private sphere. By capitalising all family strengths and abilities while taking into account the disabilities faced by them, the provisions of law and policy could ensure the balance rights and duties between them in enjoying this life to the fullest. Sharing and caring of responsibilities are crucial in the practice of the family community as well as government policies by taking into consideration their needs as well as their primary rights and duties.

In spite of that, this research highlights five attributes of rights which should be considered as the basis of non-discrimination by not excluding women in the implementation of rights as agreed by the Islamic and feminist jurisprudences. These elements could be regarded as harmonious attributes of rights with regard to women's rights whereby IFLA is not totally differ with CEDAW but it could be harmonise within these attributes:-

- i) collective rights prevail over individual rights,
- ii) rights must come with duties,
- iii) acknowledgment of cultural rights in the definition of universal rights,
- iv) coverage of rights must include private and public spheres, and
- v) acknowledging law of nature in the formation of nurture.

The analysis of the right and ideal attributes of rights suitable to the Muslim women's context in this country, which takes into consideration their religion and

culture is imperative. In applying the principle of gender equality uphold by CEDAW, all levels of society should ensure that the above attributes of rights is consistent with the law, religion, need and custom of the people in the country in order to be universally accepted. Thus, understanding the attributes of rights, the philosophy and objective of law in the suitable context will influence the reformation of Islamic Family Law in Malaysia concerning women's rights.

This research suggests that the reservations made by Malaysian government is inline with the objectives of CEDAW while CEDAW applied substantive equality in eliminating discrimination against women by acknowledging sexual and cultural differences in achieving gender equality. Thus, the reservations made into Articles 16 (1) (a), (c), (f), (g) of CEDAW by Malaysian government are considered just and necessary to ensure that Muslim women enjoy this life through substantive equality. It is because, IFLA also acknowledges sexual and cultural differences to achieve justice for people. The most crucial characteristics of rights covered by IFLA and CEDAW are to protect women's dignity and provide justice in the spirit of meeting human needs, which takes into account the biological, physical and psychological nature of women and men through substantive and formal equality.

Since there are differences in biology, needs, social beliefs, religion, law and customs of human beings everywhere, acknowledging these differences is imperative for the purpose of constructing harmonisation between Islamic and international regimes particularly when dealing with human relationships, where legal rulings must be consistent with changes in time and circumstances. To overcome misunderstanding on the concept of gender equality or non-discrimination in a multi-cultural society, it should be interpreted in the context of enacted legislation.