

## CHAPTER SIX

### CONCLUSION AND RECOMMENDATIONS

#### 6.1 Research Findings

Through this research, it is found that IFLA is not entirely incompatible with CEDAW in empowering the rights of women. In another word, IFLA is not necessarily discriminatory against women since it is found that it upholds the principle of substantive equality by acknowledging sexual and cultural differences like CEDAW. The most important tools to constructively harmonised between IFLA and CEDAW is by understanding the philosophy, principle, procedure and objective of gender justice or gender equality or non-discrimination uphold by IFLA and CEDAW. Throughout this thesis, it is found that the concept of difference uphold by IFLA is universal to all human beings since it upholds the principle of gender justice and human dignity in providing different entitlements to rights and duties between women and men in accordance to human nature (conscience, biological, physical, psychological, spiritual) and nurture (social and cultural). These conditions could not be regarded as discrimination against women. Conversely, if these differences are not to be acknowledged in a daily life of women it will cause non-enjoyment of life, and then could be considered as discrimination against women.

In this research, it is traced that the issues surrounding the misunderstanding on the concept of gender equality under IFLA and CEDAW is due to a lot of misunderstanding due to different legal background and culture. It is not only caused by dualist of Malaysian legal systems but it also due to misunderstanding on the meaning of 'gender' and 'equality' itself by different community. Gender is always be misunderstood as sex in Malay Muslim community in which under Islamic law, sex of human beings cannot be changed. In spite of that, equality is always interpreted as similar rights and duties in which it is not defined as justice. From another point of view, other community or people does not understand the principle of Islamic family law and how it operates in the judicial system and tends to make a conclusion by only referring to the practice and behaviour of individual Muslim in general. They do not understand the principle of gender justice or equal right and duties between sexes in Islamic jurisprudence.

In the perspective of CEDAW, most of the people do not aware that compliance to the provisions of CEDAW is to eliminate discrimination against women from individual tyranny whether it happens in private or public spheres. That is why CEDAW interpretes the meaning of discrimination as direct and indirect discrimination to ensure that women are not disadvantageous by law and practice of individual person. Due to the fact that violence against women also happens in private and public spheres, the law on gender justice or non-discrimination in gender suitable with Malaysian context is needed to be enacted. With the guidance on the meaning of discrimination under CEDAW, it is hope that any stereotype culture on the inferiority of women compared to men which is not contradict with Shari'ah principle including the case of violence against women could be eliminated through the enacted law.

Besides, by referring to this interpretation of discrimination in Malaysian context, unpractical legal systems on the procedural matters which is disadvantageous women can be considered to be amended under any provisions of law. Last but not least discrimination against women could be happened if similar treatment given to them and gender equality could not also be achieved if major differences among people are not be acknowledged.

#### **6.1.1 The Harmonious Attributes of Rights in Islamic and Feminist Jurisprudences**

Throughout this research, it is traced that IFLA and CEDAW can be constructively harmonise in preventing and empowering the rights of women based on the attributes of rights uphold by Islamic and feminist jurisprudences on rights. Feminist critiques on rights stated that individualism is the key criticism and argue that the danger of individualism becomes significant when the subject of human rights covers only an individual and not the community. Feminist also argue that women's rights are not just concerned about what happens to the female population in any given society or across all societies but they are about the meaning of those experiences in the lives of women. Feminist also emphasise that duties, whether active or passive, are correlated with rights. Since rights represent autonomy and duties are responsibility, the concept of duties might serve to balance the notion of rights. Feminist critiques also argue that the law's absence devalues women and their functions especially in private sphere, or it assumes that women are simply not important enough to merit legal regulation. All these critiques made by feminist on rights seems harmonious with the attributes of IFLA which found in this research and will discuss later.

In this research, it is found that there are five harmonious attributes of rights in Islamic and feminist jurisprudences which will guarantee gender justice in which the differences among human beings are acknowledged. The first attributes of rights is the attributes of collective rights which prevail over individual rights. In guaranteeing gender justice, collective rights which consider the interest of the community which not only concerns on the specific groups of person is one of the basis of non-discrimination. For example, the law which is regulated for the preservation of the community interest is much better than the law which is regulated to protect only an individual interest or rights. Usually, whenever the law protects the rights of the community, it will also protect the rights of individuals in that community.

The second attributes of rights which will guarantee gender justice is the attributes of cultural rights which should be acknowledged in the meaning of universalism. It is due to the fact that human beings around the worlds have major differences in the form of sex, religion, culture, legal background and geography. All of these major differences if not being acknowledged would discriminate people because human beings are the living creatures who have feelings, needs, functions, abilities and disabilities which different from each other in the context of individual rights and collective rights. The two important concepts of differences which are differences of sex and culture are imperative to be acknowledged to eliminate discrimination against women and also men. It was found that biological, physical and psychological differences between women and men have scientifically proven that the differences exist due to human nature.

The third attribute of rights which will guarantee gender justice is the attribute of rights which comes with duties. It is because rights represent autonomy whereas

duties are responsibility, the concept of duties might serve to balance the notion of rights. In the context of human relationship and life transaction, it is important to recognise that every individual has the obligation and duty of care toward others. If all people only claiming on their rights without performing duties, they will not be able to enjoy this life within the principle of brotherhood and human dignity. The attributes of rights and duties is not only necessary for women but to achieve justice for all members or groups or classes of people; there must be rights and duties imposed on them. It may be the duty of women towards men and also the duty of men towards women in accordance with their suitable functions and roles in the society. In the context of gender justice, the attributes of rights and duties is imperative between women and men due to the fact that women and men are complementary each other especially in balancing their rights and duties in marriage and family relationship.

The fourth attribute of rights in guaranteeing gender justice is the attribute of rights which cover both private and public rights. It is because human beings women and men interact with each other within private and public spheres. It is argued that women biological nature is more suitable with private sphere. It is due to women's huge involvement in the domestic sphere in taking care of children and developing the community. The transaction of women in domestic sphere is highly regulated by customs and laws, therefore, strengthening the law within the private and public spheres for the protection of women is imperative in strengthening women's rights. Since women historically are been disadvantageous by men, the attributes of rights which will guarantee gender justice for women and men is by strengthening the law in private and public spheres.

The fifth and the last attribute of rights which will guarantee gender justice is, the rights which is defined within the classification of nature and nurture of the community. It is due to different belief and culture of the community which influence their law and practice. In the context of IFLA and CEDAW, there is a major different on the classification of nature and nurture. In general term of international jurisprudence, nature is defined as biological structures and its processes whereas nurture refers to sociocultural influences. However, in Islamic jurisprudence the classification of nurture which relates with social relationships such as roles, rights, duties, cultures in the context of gender must not go beyond the classification of nature which is known as the rights of God. The classification of nature and nurture in Islamic jurisprudence affects the legal ruling (hukm) in the performing of rights and duties of Muslims women and men in marriage and family relationships. The rights and duties under IFLA is based on Islamic sources of law which is primarily divine in nature without sacrificing the human intellect. Whenever IFLA is formed based on Shari'ah legal ruling, the provisions on the rights and duties of women and men are based on their primary rights and duties. The provisions on different entitlements of rights and duties between women and men under IFLA do not necessarily deprive or restrict or exclude the rights of women but it is intended to balance the rights and duties of women and men in a family institution within the concept of complementariness and primary duty. Their social roles, rights and duties must be in accordance with nature in order to avoid discrimination.

### 6.1.2 The Harmonious Principle of Substantive Equality under IFLA and CEDAW

In this research, it is discovered that equality does not necessarily by having similar entitlement of rights and duties but equality might be in the form differences whenever it is ensuring that all have equal access or opportunity to achieve equal results. It is traced that both CEDAW and IFLA applied substantive equality to achieve gender equality or in other words to achieve *de jure* and *de facto* equality of women with men. The concept of balance and complementariness in marriage and family relationship or collective rights and duties should not be regarded as discriminatory since all family relationship should be carried with love, respect and duty of care to each other. This could be realised by prioritising the duty suitable with their nature and nurture. The duty of care is not necessarily by restricting the rights or abolishing the rights because in Islamic jurisprudence, rights and duties are not independent legal concepts. Rights and duties are developed from the Islamic legal norm called '*hukm*' (legal ruling) which is normally transported in the form of a sanction, command or prohibition aimed at regulating human conducts. Rights and duties are therefore, mediums through which the law functions. Thus, the law will often place a duty on one party which conversely confers a right on another through the same injunction.

It has also been discovered that both IFLA and CEDAW consider the differences among human beings are the fundamental elements for gender justice. Both have agreed that sexual and cultural differences are crucial determinants in determining gender justice. In the application of law, both IFLA and CEDAW applied substantive equality in spite of formal equality to avoid discrimination against women. This is because women are different with men and having different biological

roles and functions which amount to different entitlements to rights and duties. Women in the West and in the East are different in nurture, whereby the difference between them should be considered in determining the right and ideal definition of 'gender equality'. It is justified in consideration of their abilities and disabilities on the current situation and of different person. Therefore, they are still differences, but the dissimilarities do not indicate that they contradict each other, as they are similar in concepts and principles of law and biological nature.

The harmonisation of IFLA and CEDAW does not mean that all of the principle and application of law and belief would be the same. CEDAW acknowledges the different of culture between people. Thus, it gives freedom of individual conscience in terms of faith as Muslim consider the absolute power of God and the interconnection of the rights of God in the whole breath of Muslim life to achieve justice. Even having different belief and faith, both IFLA and CEDAW share similar ultimate goals to protect the individual from the misuse of power by the State and to protect the community from the infringement of rights by irresponsible individuals. Since both Islamic and feminist jurisprudences agree that rights have correlativity between 'duty' and 'morality' and consider both as the integral components in the discourse of human rights, IFLA and CEDAW could be constructively harmonise on the concept of gender equality addressed by both jurisprudences

It is found that in achieving gender equality, there are three fundamental principles uphold by CEDAW to eliminate discrimination against women. They are: i) principle of substantive equality; ii) principle of non-discrimination; and iii) principle of State obligation. It is argued that CEDAW has used a corrective approach by applying substantive equality to women's human rights. The substantive standard of



equality is applied to address discrimination based on gender difference and differential treatment against women. It is traced that the principle of substantive equality uphold by CEDAW is harmonious with the principle of gender justice uphold by IFLA in which both acknowledge the differences in sexual and cultural aspects of people to achieve de jure and de facto equality of women with men. CEDAW in Article 4 (2) stated that “Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory”. General Recommendation No. 24 (20th session, 1999) also stated that “For the benefit of States parties and those who have a particular interest in and concern with the issues surrounding women's health, the present general recommendation seeks to elaborate the Committee's understanding of Article 12 and to address measures to eliminate discrimination in order to realize the right of women to the highest attainable standard of health”.

Therefore, different entitlements of rights and duties between women and men under the provisions of IFLA are not contrary with the aim of CEDAW which is not only to protect women from infringement of laws but also to realise the highest attainable standard of women's health. Women and men need each other to pursue this life. Balance of rights and duties between women and men in their private and public spheres will influence standard of women's health. The principle of gender justice which is in accordance with the concept of complementariness which is suitable with their biological nature is the most ideal and universal principle of gender equality. It is found that the concept of difference uphold by IFLA is consistent with the principle of substantive equality under CEDAW.

It is found that IFLA upholds the principle of gender justice and human equality not only by considering sameness but also by acknowledging the major differences among people. This indicates that IFLA uphold the principle of gender justice or non-discrimination by applying substantive and formal equality just like CEDAW. Meanwhile CEDAW defines discrimination as direct and indirect discrimination. It can be occurred through law or practices of the individual or the state. Therefore, discrimination in the context of CEDAW can be occurred through procedural laws or customary practices of the community which would disadvantageous women. Discrimination which is defined under CEDAW includes the state of prevailing gender relations and the persistence of gender-based stereotypes that affect women due to their major differences with men. Hence, in Islamic jurisprudence, the implementation of justice is commanded to all persons, individual or state irrespective of sex, race, culture and geographical factors. Islamic jurisprudence strives towards gender equality based on the five fundamental rights of human beings which are the protection of belief or individual conscience, the protection of life, the protection of dignity and lineage, the protection of wealth and the protection of intellect. All of these fundamental rights of human beings are considered as primary objective of Shari'ah in maintaining justice individually and collectively.

Under the provisions of IFLA, the principle of different entitlements of rights and duties between women and men such as on different age of marriage under section 8, the rights and duties of wali under section 7 and 13, polygamous marriage under section 23, dissolution of marriage under part V, maintenance under part VI, custody and guardianship under part VII of IFLA are given based on different

biological, physical, psychological and physiological nature of women and men. The differences between them are acknowledged within the principle of justice and human dignity in the context of Islamic jurisprudence. The Holy Qur'an expresses the relationship between women and men to each other akin to a body and its garments (Al-Qur'an, 2:187). Without garments, a body is meaningless and without a body, the garments are meaningless. It includes the rights of God and the rights of human beings which is IFLA acknowledges the major differences between women and men which affect their roles, rights, duties and priorities for the balance life. It is found that IFLA in its principle of justice and equality is inconformity with the object and purpose of CEDAW that is to eliminate disadvantageous situation against women.

The principle of gender justice under IFLA is similar with UIDHR and CDHRI on the notion of complementarity and balance between women and men. In this research, it is observed that CDHRI provides an ideal model of international human rights instrument on gender equality which can be achieved by acknowledging the differences in belief and culture through the spirit of brotherhood. CDHRI emphasises that rights must come with duties through its provisions with regard to the rights and duties of women and men in marriage. On the other hand, it is argued that UDHR can be considered as the most universal declaration of human rights if the provisions regarding mutual responsibility between women and men in marriage and family relationships under CDHRI are attributed to the declaration of international human rights, whereby women and men are maintain having similar rights with different entitlements to rights and duties as they are viewed as complementing each other in accordance with their biological differences. It is argued that UDHR cannot be a universal declaration on human rights if it does not consider the nature rights of

individual that is individual belief and conscience in the meaning of universalism. Non-acknowledgement of individual conscience or spiritual elements of human beings would probably cause unjust and lead to the discrimination of not only Muslim women but also non-Muslim women and men because they are in fact different biologically, physically, psychologically and culturally.

### **6.1.3 The Divergences and Convergences between IFLA and CEDAW on the Rights of Women**

Justice is one of the meanings of rights in Islamic jurisprudence and one of the universal principles of ethics applied by all people regardless of their religion, sex or race. Justice in Islamic jurisprudence is guided by the Creator, the Most Almighty, subject to the rights of God and rights of human. The implementation of justice is provided by the Holy Qur'an and Hadith of the Prophet Muhammad (P.B.U.H). It is contended that understanding the meaning of rights which relates with duty and morality are crucial in the implementation of justice and equality.

Islamic jurisprudence recognises a pluralistic interpretation of its sources. The complexity of Islamic law does not make it indeterminable because the differences in the opinions of the jurists and scholars of Islamic jurisprudence represent 'different manifestations of the same divine will' and are considered as 'a diversity within unity'. It shows that Islamic jurisprudence uphold justice by placing something in a suitable condition. In Islamic jurisprudence, there are the rights that cannot be changed (absolute right that is the right of God) and there are the rights that can be modified (non-absolute right that is the right of men) in accordance to the situation but still in alignment with Shari'ah principles, or otherwise recognised as Shari'ah

compliance. It indicates that the appreciation of differences is an important principle of Islamic law which is quite different from the assumptions of Roman law that is inherited by most of the European nations.

From this research, it is found that there are divergences and convergences between IFLA and CEDAW. It can be seen that the emergence of CEDAW is due to the exclusion of women in the UDHR. CEDAW is regulated to accommodate only the rights of women of their private and public spheres. CEDAW calls on states to ensure that women and men are given the same conditions for career and vocational guidance, for access to studies. In order to make sure that women are treated equally as men, CEDAW requires States Parties to enact legal guarantees of equality and to provide the means of fully enforcing them. It requires governments to guarantee women 'the exercise and enjoyment of these rights' (Article 3 of CEDAW). The provisions of IFLA, however regulate the rights and duties of both the wife and husband in a Muslim marriage and both rights and duties should be balanced and neutral. It contradicts with CEDAW's which is not to achieve gender neutrality because its primary aim and purpose is to rectify the needs of women which have not been catered by general the human rights law.

CEDAW has similar object with UDHR which is to limit the behaviour of States and press upon them duties to their citizens. CEDAW similar with UDHR is the non-state law. CEDAW requires the States Parties to provide women the rights or access to the use of rights through adjudicative procedures for justifying rights accessible, affordable and known. If in the case of different meaning and application of equality by different States, then the differences should be documented to be clearly applied by the State authority. It is differ with IFLA since IFLA is a state law

and formed to regulate the rights of Muslim women and men with relates to marriage and family relation matters. IFLA has the attributes of collective rights and duties rather than individual rights of women. In order to preserve the marriage and family institution, IFLA has the attribute of rights that must come with duties. IFLA provides the law in the notion of duties to balance the notion of individual rights. Women and men have the rights and duties towards each other in the form of complementariness not in the context of sameness for the balance rights and duties. It is more ideal and universal because it is suitable with the biological, physical, psychological and geographical nature of women and men.

Another divergence between IFLA and CEDAW is CEDAW legalises on the rights of women of their private and public rights CEDAW such as calls for action to eliminate discrimination in politics, law, employment, education, marriage and family matters and health care. However, IFLA only regulates the rights of women in their private sphere. IFLA provides for the administration of marriages and all matters related to marriage, the rights and duties of a wife and husband, 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, it is argued that the provisions of IFLA are enacted to protect women and children in marriage based on the principle of social justice or collective rights and human dignity in Islam. Gender roles as stipulated under the provisions of IFLA which acknowledge differences are in accordance with the principle of non-discrimination under Islamic law and do not contradict with the meaning of substantive principle applied by CEDAW.

Islamic law does not restrict women to act in the private sphere without being involved in the public sphere. In Islamic jurisprudence, men are considered as the protector for women's private and public spheres due to the historical background of women of being disadvantaged. In addition to that, women are facing some difficulties and disabilities during pregnancy, child birth and breastfeeding period. At this time, most of the women need help, special care and attention to stable their health and perform their duty to others. It is contended that IFLA has taken appropriate measures to protect women from being disadvantaged by irresponsible persons in the private and public spheres in accordance with these provisions. For example, Section 13 (a) provides that consent from *wali* of the woman is required in a marriage contract. The consent of *wali* in marriage does not mean that a *wali* can force a marriage without the consent of both parties to the marriage. A *wali* is chosen from among the eldest person in a paternal blood relationship. Normally those who have more experience in life, and would be the one who could best advise and guide the woman in her married life. *Wali* has an important role even before solemnisation of marriage, namely to ensure that the groom is a reliable and trustworthy person to be married to the bride and that he can carry out his obligations as a husband. This kind of measure is to ensure that women are being protected in the private and public spheres of life during and after marriage.

Lastly, the divergence of IFLA and CEDAW can be understood on the classification of nature and nurture. In Islamic jurisprudence, the nurture element must not go beyond the limit of nature, namely the religious principles and biological factors. It is because the rights and duties under provisions of IFLA is not only based on human intellect but it must be in accordance with the rights of Allah which is in

accordance with al-Quran and Sunnah of the Prophet in achieving the highest virtue in this world and hereafter. In determining the minimum age of marriage for instance, IFLA considers biological nature and customary practice of Malay Muslims. Shari'ah law does not precisely state the age of marriage for women and men. Even though women and men have equal rights in a marriage but in addressing the importance of their roles and duties in marriage and family relations, IFLA determines that the age of marriage for men is higher as they bear more responsibilities after marriage in taking care of the family. It is argued that if the state considers that it is more adequate, just and beneficial for both genders to have a similar age for marriage, then it is permissible and not against the precepts of Shari'ah.

Islamic jurisprudence which is in accordance with human nature provides that husband is primarily responsible to the inner and outer maintenance of the family members. It is the responsibility of husband to pay maintenance to the wives and children. The non-payment of maintenance is considered as an offence and recoverable as debts in Shari'ah court. The problems arise with regard to the rights of women and children in marriage nowadays is the failure or neglect of husband and *wali* to perform the duty as maintenance provider in a family institution. This problem will burden women with no income or low income to survive with their children. It is argued that Islamic family law on the role of *wali* should be strengthened to overcome this matter. It relates with the Islamic law on inheritance in which males are responsible as financial provider in protecting family institution rather than only individual enjoyment of the property.

Collective rights and duties in society are vital to make sure that individual freedom must be stopped if it would infringe the rights of others. Even though women



and men have different roles and functions as well as aspirations and needs, they are mutually responsible in society. Islamic law places women as essential as men<sup>76</sup> for the continuation of species and in the civilisation of nations in different roles and abilities. Generally, women and men have equal rights as human being as servant of God, but they have different roles and functions in enjoying this life because of their established differences. It is argued that in eliminating discrimination, Islamic law is particular with biological differences in determining the roles pertaining to gender. Thus, different entitlements to the rights and duties under IFLA provide an ideal balance system of family structure. It serves the family members with rules of priority in performing the rights and duties for the collective happiness. On the other hand, CEDAW is based on solely human intellect based on Western enlightenment.

Even though there are divergences between IFLA and CEDAW, both have commonalities in the objective of law. Both IFLA and CEDAW share similar historical background in the formation of law to protect the rights of women from disadvantageous situation due to different biological nature and nurture of women compared to men. Women in the West and women in the East come from similar creation. Their biological nature influences their physical appearance, psychological development and physiological process. They share similar human needs, abilities and disabilities due to their biological nature and process. Women around the world have similar reproductive functions and these biological nature affect their nurture of being women. It is because women normally experienced with menstruation, pregnancy, child birth, post natal condition and breastfeeding. All of these processes relate with

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<sup>76</sup> 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"

hormones which influence the biological, psychological, physiological process in women body. Women's sexual function determines their primary roles and functions in which men do not have the same. Due to this, all women need their differences with men to be acknowledged to enjoy this life.

Since IFLA provides different entitlements of rights and duties between women and men, it is not contradict with the meaning of equality informed by Article 1<sup>77</sup> and Article 4<sup>78</sup> of CEDAW. The attributes of rights uphold by IFLA through the authority of men as *wali mujbir* or family maintainer fix with the meaning of 'effect' and 'purpose' defined by CEDAW that is to protect women and this does not disadvantageous women. Besides, different entitlements to rights and duties between women and men in marriage do not constitute inequality as prescribed by CEDAW. General Recommendation No. 25 of CEDAW states that equality could be achieved by acknowledging differences in sex and culture because sameness would place women and men in the state of inequality. Other than that, IFLA purposely upholds the equality of outcomes by providing special measures to women in accordance with their nature and nurture as a disadvantaged group such as with the authority of *wali* either *wali mujbir* or *wali hakim*. It is argued that whenever the act or omission, which in accordance to the belief and culture, does not put women in the state of less

<sup>77</sup> 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

<sup>78</sup> 1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

favourable or disadvantage state; therefore, this does not amount to discrimination under CEDAW's provisions.

Therefore, IFLA, like CEDAW takes into consideration the biological as well as abilities and culturally constructed differences between women and men to guarantee that women receive an equal treatment with men. However, since the objective of CEDAW is to eliminate discrimination against women whereby the definition and scope of private and public spheres of Muslim women are differs even with men, the acknowledgement of difference in suitable context in accordance with the suitable coverage of rights is crucial determinant for gender equality. It is not only Islamic law differentiate the rights and duties of wife or husband in marriage but it is argued that other religions or cultures and sociologists also consider men as the most suitable head or primary protector in a family whereas women are the primary caretaker of children as feminists argue that women are entitled to the 'private world of the home and family' (Rifkin, 1993:416-417).

Therefore, it is shown that IFLA and CEDAW harmonise in applying the concept of substantive equality to achieve equal opportunity and outcomes in eliminating discrimination. But due to differences in the meaning and scope of private and public spheres of women, acknowledgement of their concept of difference is the most important aspect to construct the harmonisation between the concept of gender equality under IFLA and CEDAW. Therefore, the concept of gender equality which considers the differences in nature and nurture of human beings is the right and ideal concept of equality in order to establish maximum justice for all people.

#### 6.1.4 Reviewing Reservations into Article 16 (1) (a), (c), (f) and (g) of CEDAW

Through this study, it is traced the conflict of law between IFLA and CEDAW is due to the unic of Malaysian legal systems which acknowledge the diversity of religion, culture and ethnic of its citizen. Malaysia has bona fide intention and made continuous effort through legislative approach and government policies to streamline the domestic law on the rights of women in marriage and family relations with CEDAW. It is emphasised that even though it is claimed that reservations made by Malaysian government are incompatible with CEDAW, the reservations are necessary to protect women from disadvantageous situation and have the objective to empower women in women private and public spheres.

Regarding the reservations made by Malaysian government on Article 16 (1) (a), (c), (f) and (g) of CEDAW, it is imperative to specifically state the specific reasons behind reservation in order to avoid misunderstanding on the substance principle of gender justice in Islamic jurisprudence. It is generally stated that the reservations made by Malaysian government 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. The conflicting concepts of universalism from the universal natures of the human rights laws is the primary reason why Malaysia has yet to reserve CEDAW. It can be seen that the provisions of IFLA retain the different pattern of family structure regarding gender where women and men are given different rights and duties based on their biological nature, dignity and function in a society.

It is traced that the literal meaning of Article 16 (1) (a), (c), (f) and (g) of CEDAW is contrary with the rights and duties provided for women and men under the provisions of IFLA. The language used under these provisions indicate that women and men should have the 'same rights' in marriage, the 'same rights' in dissolution of marriage, the 'same rights' in custody and guardianship and the 'same rights' in choosing profession. This contradict with the principle of gender justice under IFLA, in which the rights and duties regarding gender relations is based on the complementary concept for the balance of rights and duties of women and men within private and public spheres. It is argued that Malaysian government has to put specific reason for each reservations of Article 16 (1) (a), (c), (f), and (g) of CEDAW. It includes the explanation on how it contradict with the philosophy of rights and duties between sexes in Muslim marriage and family relations.

It is opined that reservations into Article 16 (1) (a), (c), (f) and (g) of CEDAW can be fully withdrew if the language used in that provisions is defined as substantive equality not only formal equality. If it is remained stated as the meaning of only sameness, then only matters with regard the age of marriage under IFLA can be considered to be reviewed and amended for the sake of justice. Applying only formal equality as stated in Article 16 in the multiple culture and legal background of people of member's states will disadvantageous women of the state. However, constructive harmonisation between IFLA and CEDAW could also be realised if some provisions under IFLA are amended within the principle of justice and equality uphold by CEDAW which is not contrary with Shari'ah. It can be referred to Mudawana Law of Morocco on the issue of minimum age of marriage, polygamy, divorce, maintenance and custody and guardianship. The approach used by State of Morocco in reformed

Mudawana law shows that Islamic legal ruling has a flexible methodology in finding solutions with regard to the rights of women and acknowledging multiple background of people, as long as the precept of collective rights is observed.

## **6.2 Proposed Solutions for Constructive Harmonisation of IFLA and CEDAW**

In this research, it is considered that legal harmonisation between IFLA and CEDAW is intended to improve the law which can be applicable to women without abolishing the fundamental principle of law, morality and belief. Eventhough the law relating to the rights of Muslim women in Malaysia is already completed, it is claimed that women are usually being disadvantaged by the customary practice and unpractical legal system which gives negative impact on them. In order to empower the rights of Muslim women suitable with the Malaysian context, there are some proposed solutions which could be considered at national and international discourse.

As Islamic law is the law of nature that encapsulates the division of rights and duties based on human's biological nature and given that Islamic culture is influenced by Islamic religion, every single rights and duties of human is interrelated with religion and linked to human biological nature. Islamic law and Islamic culture are two different things whereby 'Islamic culture' is developed through the practices of Muslim communities with different understandings and thus could vary across time and place, whereas Islamic law or Shari'ah is the revelations of law by God and sometimes it is precisely stated, entailing that the original rule cannot be changed. In other words, the fundamental precept of Shari'ah cannot be transformed or changed but a matter of culture could be transformed or changed in accordance to the situation

within the principles approved by Shari'ah. Furthermore, in the situation where cultural practice of the community is against the principle of Shari'ah, that practice is required by Shari'ah to be transformed or amended for the benefit of every community or for the collective interest within the framework of social justice.

#### **6.2.1 The Need for Amendment of Certain Provisions of IFLA**

It is stated that the amendment to the provisions of IFLA has been made three times in 1992, 1994 and 2001. It is almost happened for the past sixteen years. Thus, in order to provide a better law which consider the current situation of women's problem and issues in this multiple-ethnic of people in this country, the role of mujtahids which are expert in matters of law and religion is necessary to understand the context of human rights in Islamic perspective to be harmonised with global issues pertaining women in order to release the conflict between IFLA and CEDAW. As the provisions of IFLA are primarily referred to the Quran and Hadith, these two sources do not specify the details. They only contain some rulings and indications that lead to the cause of these rulings.

The current research found that the substance principles applied by IFLA are equal, just and harmonised with the object and purpose of CEDAW. IFLA intends to eliminate any kind of discrimination against women in marriage and family relations. However, there are some provisions which partially discriminate against women on the procedural matters which could disadvantage women in certain situations.

Section 8 of IFLA states that the minimum age of marriage for women is sixteen. Within Malaysian education system, women at the age of sixteen are still schooling in form four. The big examination is in the form five which normally

women and men are offered for better job and salary with the result. In spite of that, there is evidence that early/ child marriages can cause children physical, sexual, emotional and psychological abuses. Since there is no clearly specific age of marriage for women and men in Islamic jurisprudence, the minimum age of marriage can be decided by the State suitable with social, economic and political situations in Malaysian context. Most importantly, justice is upheld and neither of individual women and men are deprived of their rights in enjoying this life. If it is compared with Morocco Mudawana law, it is stated that the age of marital consent for women and men is similar that is at the age of eighteen. The age of marital consent means that women and men at the age of eighteen have exclusive freedom in matrimonial decision. In spite of that, it is clearly stated the purpose of marriage in order to remind the spouses on the rights and duties after solemnisation of marriage contract and they have reciprocal rights and duties. If the minimum age of marriage between women and men under IFLA is to be reformed at similar age for both, Article 16 (1) (a) of CEDAW still could not be withdrawn because women do not have the same right as men in practising polygamous marriage.

The issue on the minimum age of marriage are interconnected with the issue of the consent of *wali* under IFLA. In Islamic jurisprudence, the duty of a *wali* is important in a marriage because a *wali* 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 shows that Islamic jurisprudence uphold the attributes of collective rights prevails over individual rights. The role of *wali* is not the individual rights but it is about collective rights and duties in the institution of marriage. 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 and men. 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. Therefore, instead of only the requirement of *wali* pertaining to the solemnization of marriage included in IFLA, it is proposed that there must be provided an enforcement of law to ensure the performing of the duties of *wali*.

It is claimed that the practice of polygamy throws families into emotional and economic turmoil. However, polygamy is permissibile in Islamic law with the condition of justice. Section 23 (3) clearly stated that an application shall be made to the Court in the prescribed manner accompanied by a declaration stating the grounds on which the proposed marriage is alleged to be just and necessary. However, there is no enforcement of law if the husband neglects the responsibility or abuses the wives or the children. Thus, it is recommended that the new form of *ta'liq* should be made during the solemnisation of subsequent marriages after the husband is given the Court's permission to practice polygamy in order to protect the wives and the children. This is needed because there are many cases where husbands neglect the maintenance of their wife(s) and children in the polygamous marriage. It is argued that *talik* can be made after solemnisation of marriage (Abdul Walid Abu Hassan, 2016:50) and therefore, *talik* can be an alternative for the wife and husband in the presence of the Court Registrar or syarie lawyer to be more equitable to all parties even in the case of polygamous marriage. It is also suggested the Registrar or syarie lawyer has to modify the content of *talik* or applied *tafwid talik* in the first marriage in order to protect the welfare of the wives and children collectively. This kind of

modification does not change on the substance of Islamic marriage but is still within Shari'ah jurisprudence in maintaining justice in the practice of polygamous marriage. In the Mudawana law of Morocco, it retains that polygamy is impermissible if the wife previously required that the husband not marry a second wife (*tafwid ta'liq*). It is also cited in the Mudawana law of Morocco the verse of the Holy Quran on the important principle of polygamy that is “if you fear being unfair, marry only one man”.

Statistics show that the number of divorces in Malaysia has more than doubled in just eight years from 2004. In 2012, a whopping 56,760 divorces were recorded, which is equivalent to a marriage breaking down every 10 minutes (The Malaymail Online, December 2016). According to the statistics provided by the Shari'ah Judiciary Department Malaysia (JKSM), the number of Muslim couples who were getting divorced rose by 2.3 times from 20,916 in 2004 to 47,740 in 2012 and to 49,311 in 2013. Therefore, since divorce is the most abhorrence thing permitted by Allah, then the provision which is unjustly treated women in marriage needs to be amended. For example, Section 55A of IFLA permits a man to pronounce *talaq* outside the Court without the permission of Court. This provision is partially discriminating against women, namely in the occasion when an irresponsible husband misuses his power to divorce his wife outside the Court without just cause. It is clearly stated in the Quranic verse that ‘let her go in honour and kindness’ means that divorce should be practiced in well mannered through the mediator such as Syarie judge. It should not be made during angry or with emotional situation.

Divorce is not the individual rights given by Allah. It has been misunderstood to be practiced by husband with absolute freedom. However, it is permissible

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. Therefore, since this provision is a procedural matter relating to *fiqh* and not against the precept of Shari'ah, it is argued that the provision has to be reconsidered for amendment or annulment to avoid the misuse of power by irresponsible husbands (Mohd Naim Mokhtar, 2016). The remaining of Section 55A of IFLA would cause unjust situation of the wife in marriage then it should be repealed. This does not deny the rights of husband to pronounce divorce but it is a way to ensure that husbands does not misuse his power to pronounce talaq without valid reason which will indirectly discriminates women. By comparing it with the reformed Mudawana law of Morocco, in its principle, it has similar approach with IFLA since Section 47 clearly stated that divorce could be applied by a wife or husband by approval from judicial institution. However, Mudawana law also applied a mutual divorce without cause as long as no harm comes to the couple's children.

Similarly, in the case of '*cerai tebus talaq*' as provided by Section 49 (4) of IFLA, it is argued that if the Court waits for the agreement from the husband to dissolve a marriage in which the husband does not appear before the Court as directed, then the unjust treatment will remain happens to the wife because he does not agree to a divorce via '*tebus talaq*' without reasonable reasons. This procedural matter is also a matter of *fiqh* which should be reviewed and amended in order to maintain justice and equality between women and men in marriage and family relations. Another situation is in the case of *fasakh* under the provision of Section 52 of IFLA, when *syarie* judge in the previous decisions permitted an application of *fasakh* but a husband then is permitted to appeal to a higher Court under the Section

52 for the application of divorce made by a wife. This appears to be discriminatory against the wife, especially when the process of *fasakh* is delayed by the permission of Court with regard to the appeal. Thus, this provision needs to be amended in order to avoid any infringement against the rights of a wife.

Suitable with the attributes of collective rights of IFLA, Malaysian legislators have to consider the amendment under provision of maintenance under IFLA where there is no specific clause mentions about the primary duty of husband to provide inner and outer maintenance of the wife and children in marriage. The issue of maintenance is the main causes of family problems which resulted to the case of divorce and social problems among neglected children. Ignorance on the responsibility of the husband to maintain the family will burden the wife to bring up children in a good manner and at the same time the wife has to work to maintain the family. Islamic law puts the responsibility on men to work and maintain the family on the basis of collective rights and duties. It is not an individual rights of men perse. The double responsibilities of the wife to become a mother and a breadwinner at the same time will burden women's life and destroy the family institution especially whenever the husband fails to assist a wife in the household work. Due to different understanding or level of knowledge between people, it is suggested that the rights and duties of husband and wife should be clearly stated. For example in Mudawana law of Morocco, it provides that the husband must provide food, lodging, and financial support for the family members.

With regard to the issue of child custody and guardianship, IFLA provides the best division of duties of wife and husband upon the children. However, it is still lack of enforcement of law in the case where the children is neglected or abused sexually

or physically by family members who are given authority. In addition to that, the period of custody which is provided under IFLA stated that 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 hadinah, 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. It is suggested that the age of custodial rights would be amended to be fifteen such as applied in Mudawana law of Morocco. It could be at the same age between girls and boys to choose with whom he/she to live in. In Mudawana law, a mother can claim fee for guardianship she is giving to the minor in the court as long as she is divorced. It is not considered as salary or wage but a monthly fee that a mother can ask to receive for the child. It is due to the fact that children at this age still needs proper care and guidance to success in life here and hereafter.

In another perspective, the provision on 'darar syarie' has to be amended to protect not only women, but also men and their children and those who are dependent upon them, against any harm in marriage and family relationship. It is because, Islamic jurisprudence gives priority on the attributes of collective rights rather than individual rights as it is argued that giving priority to the collective rights in enacting the laws, they are social veils which when lifted reveal nothing but individuals. Therefore, in conjunction with the attributes of collective rights and non-discriminatory principle of Islamic jurisprudence on rights, there should be covered a husband and children in the meaning of darar syar'ie under Section 2 of IFLA.

Most of the provisions of IFLA protect women from being abused by irresponsible husbands. For example, Section 123 and 124 of IFLA are intended to

protect women from the misappropriation of power by the husband, through which the former provides that polygamy without Court's permission and the latter on the pronouncement of divorce outside the Court and without Court permission shall be punished with fine or imprisonment. Even ill-treatments of the wife in the form of cheating are punishable by law under IFLA. However, it seems that the types of punishments or penalties are inadequate to preserve Muslim women's dignity and rights. In spite of that, the amount of fine is too low and it is a small matter for a rich person to pay it. In another perspective, the penalties of imprisonment is not adequate for the husband or *wali* who is not performs his duty. So that, it is proposed that the penalties for imprisonment should be revised to penalties involving participations in religious programmes under JAKIM for six months or as fix as reasonable to empower men as the head of the family by giving them the understanding on their responsibility towards God and family members as required by Shari'ah. The same measures should also be imposed on Muslim women i.e. as covered in Section 129 of IFLA on penalties for disobedient wife. In addition, penalties in the form of fine, awareness on their rights and duties in religion and law are more important. In Islamic jurisprudence, it is not the material punishment that is needed to civilise the society, instead knowledge that can create the awareness of one's rights and duties and what is permitted and forbidden by the religion is far more adequate and important. This means that the objectives of the penalties imposed should be to empower women and men within religious values and morality.

Islamic law is primarily concerned with the principles of values and morality which forms human dignity even though it is not enforceable in the courts of law. In Islamic jurisprudence, these principles of human rights and dignity has a close relation

to these values of morality and ethics as the guidelines for Muslim to think, to act or not to act as the basis of its legality. Thus, the penalties imposed by IFLA have to uphold the principles of human rights and dignity which relates with Islamic legal rulings. The knowledge and awareness of every members of the family on their rights and duties in accordance with Islamic values and morality are primarily needed to create a noble individual conscience in order to guide them to think and to act righteously. The right individual conscience is important to reflect the cultural values of Islam which uphold the absolute sovereignty of God in creating reality (Cattelan, 2009).

In the customary practice of Malay, it might include a special gift by a wife to a husband in returns of husband's gift. Thus, in order to uphold justice for a wife, who normally contributes in the form of pemberian during marriage to a husband, and acknowledging the customary practice in this country, it is proposed that this provision should include the word 'or by a wife to a husband at the time of the marriage'. Arguably this amendment might be useful in the case of a divorce, whereby a woman or a man is married without betrothal, then either party might claim for the pemberian given to any party during marriage. As long as pemberian is considered as the customary practice of Muslims and not fall under the command of Shari'ah, then to uphold justice, it is necessary to include in the provision "... pemberian by a wife to a husband" even though the explicit meaning of pemberian in this section is meant to protect women in marriage.

Other than the provision which partially discriminate against women under IFLA, the provisions with biased-language used in the context of administration office should also be taken into account. In Section 21 (2), Section 26 (1), Section 27,

Section 31 (3), Section 33 (2) and Section 44 of IFLA, it is stated that the Registrar is referred to a man as the term used is 'him'. In an interview session with the Chief Syarie Judge of Selangor, Dato' Naim Mokhtar on 7<sup>th</sup> April 2016, he noted that the position of the Registrar is not only for men but also for women. Gender biased language under IFLA does not affect the substance of law but it does in the English version of IFLA. Even though the version that is usually referred is the original Malay language version, the English version of IFLA is also frequently consulted by most people at all levels. This gender biased language in the texts cause misunderstanding on the right implementation of Islamic law under the provision of IFLA even though it does not relate to rights and duties of the wife and husband in marriage.

#### **6.2.2 The Need to Strengthen Women's Policy for Social Reconstruction**

It is stated that the problems faced by the Malaysian government in achieving gender equality is found in cultural and tradition social constructs (Kazgan, 1982 & Shahrizat Jalil, 2008). Women are often portrayed as the followers and supporters and not as leaders or equal partners at home or outside the home. As gender is socially constructed, the underlying aim of the principle of gender equality is the extinction of the disabilities that are imposed on women based on cultural definitions of her role in society and not merely the discrimination based on her biological-reproductive capacity or other biological traits (Salbiah Ahmad, 2005). In addition to that, women's ability to exercise rights is shaped not only by social constructions on sex differences, but also factors such as class, race, ethnicity, the role of the state in constructing gender ideologies and relations of power.



Since CEDAW and IFLA are harmonious in its substance of law on the meaning of rights and its attributes as well as the principle of gender equality, the significant efforts on the part of the Malaysian government and the women's rights movements to organise talks and awareness programmes are imperative to educate the public on the right concept of gender equality for cultural and social reconstructions. However, these must be handled by experts of that particular area in order to avoid the misunderstanding towards the positive message of the womanist notion, which is to eliminate any kind of discrimination against women from a wrong patriarchal practice and stereotypical gender roles of women and men which place women in disadvantaged positions. The social and cultural reconstructions are needed to achieve balance roles, rights and duties between women and men since women nowadays do not only play an important role in the private sphere but have also become an important asset in the economic, political and social developments domains of the society at national and international levels. The implementation of gender mainstreaming which involves changes in both 'internal' organisational and 'external' operational procedures is one of the policy taken by the government to meet the goal and values of gender equality to be truly understood in the right context by all people whereby its goal is not to compete against men but to achieve a balance in the rights and duties for the successful life.

It has been discovered that the problems of gender inequality are influenced by the customary practices of the society in private and public spheres. For example, there are vestiges of the perception that a husband has the absolute power over his wife after marriage. Most of the Muslim women misunderstood the meaning and context of *nushuz* (disobedient act) towards the husband. Sometimes, Muslim married

women are not aware that they have the right to protect themselves from the act of violence and discrimination done by their own husband. Therefore, to avoid this kind of perception among women, it is argued that the right understanding on the rights and duties of wife and husband is crucial to be delivered through education, knowledge and awareness programmes to transform the cultural and social practices of the society to be inline with the fundamental precepts of Shari'ah. The act of violence against the wife or children is not inline with the Shari'ah principle even it is commanded that the wife should obey her husband after marriage.

There are several Muslim cultural and customary practices that have been traced to be against the fundamental precepts of Shari'ah and require social reconstruction. In the private sphere, the right understanding and awareness on the rights of women in law and practice is importance to be delivered for women and men. It is because, whenever men are considered as head of the family, women are always regarded as the subordinate to men which sometimes put them in the state of disadvantaged situation. Therefore, Muslim women have to gain knowledge and understand their rights and duties in marriage and family relations in accordance with religion and law. For example, women cannot be charged of being *nushuz* (disobedient) if they try to escape or protect themselves from any violence done by their husband. Therefore, the right understanding on the collective rights and duties based on the Islamic legal rulings is crucial for the balance of marriage and family life. The awareness on the rights of women is not to override the duty of men as the head of the family, but to avoid the act of violence and tyranny from irresponsible husband or individual person.

It is argued that legislation is not the complete solution. The government has to eliminate structural discrimination in all fields, including political, economic, social, and based on the suitable context of genders' nature and nurture to correct the wrong practices in the community. It is suggested that in gender mainstreaming programmes on women's public sphere, the government in forming its policy should take into consideration the primary duties of women in the private sphere to determine the best protection measures that are in line with women's interest by considering the collective interest for the protection of family institution. It has been argued that the empowerment of the role of men in the private sphere is crucial to strengthen the family institution for the protection of women's rights. It is not easy for women to balance both duties in public as well as private spheres without the special measures taken by the government in order to balance the roles and function of women and men in public and private spheres. It is proposed that the government should consider the policy to preserve women's private roles such as to provide Malaysian Maid Academy among the educated and skilled persons to help working women to achieve a high level of performance in the public sphere without neglecting their primary roles in the private sphere. It is proposed that a women driver is provided by the government to accompany the female executives for outstation assignments. It is also suggested that 'maid allowance' or 'part time maid' is provided for women to manage the house and children while working mothers manage the work outside the home when it deems necessary.

Last but not least, it is proposed that the five attributes of rights which have been discussed in Chapter Two and the philosophy of equal rights and duties between sexes which has been discussed in Chapter Three of this study would be the

frameworks or guidelines or policies for the government of Malaysia and their agencies and any women's rights group in promoting and exercising the concept of gender justice to achieve *de facto* and *de jure* equality of women with men.

### **6.2.3 The Need for New Law on Substantive Equality**

The ignorance and misunderstanding on the meaning of non-discrimination based on only formal equality, the wrong application of the notion of gender equality and multiple practices of Malaysian citizens due to the multiple religions, beliefs and cultures and needs in the country have amounted to various understanding on the scope of gender discriminations. Thus, there is an urgent need for a new law on substantive equality to be enacted in Malaysia to avoid misinterpretation of discrimination not only against Muslim women, but in the wider context of Malaysian community.

Both IFLA and CEDAW promotes gender equality by acknowledging major difference among people. There are divergences and convergences between IFLA and CEDAW in which there must be a solution for constructing harmonisation between them. CEDAW requires States Parties to enact legal guarantees of equality and provide the means to fully enforce them by requiring the government to guarantee women 'the exercise and enjoyment of these rights'. It is found that for practical realisation of women's equality in gender which is just and suitable within Malaysian context, there is need for new law on gender justice based on agreed principle of justice in the Malaysian community and the highest law of the land. Thus, to reduce the case of making unjust decisions on the issue of discrimination against women in the court of justice, the new law on gender equality could strengthening the

understanding of the judiciary on the elements linked to the harmonious concept of gender equality in Islamic and international jurisprudences.

This new law is aimed to clearly interpret the meaning and scope of discrimination or non-discrimination by including direct discrimination, partial discrimination, positive and lawful discrimination based on the differences between women and men in nature and nurture within the five attributes of rights and principle of maqasid as-Syar'iyah. It is contended that the aim of equality is to give people an equal set of alternatives from which they can choose from to pursue their own version of a good life; thus, treating different people similarly will deny them of their choice for a good life. Therefore, the new law on gender justice have to consider the major principles agreed among different background of people by acknowledging the major differences between them in order to achieve justice. Since Islamic law could accommodate the object and purpose of CEDAW by acknowledging differences in nature and nurture, the concept of difference which is detrimental to the context of Malaysian Muslim women should be documented as the new law. It is traced that, the harmonious transactions with non-Muslims is achieved on the basis of the meaning and concept of gender equality, whereby all human beings, regardless of their differences, are all united in their demand for justice and human needs and dignity

It is also argued that there is need for a new law on substantive equality is due to the fact that the interpretation of gender in the context of Malaysian Muslim citizen is different due to their cultural difference. It also has been contended that the meaning of equality is not clearly interpreted and the meanings and principles of equality have not been properly understood. Normally, it is understood as similar in rights. Therefore, the new law on gender justice which applies the principles of

justice, complementary nature and balance rights and duties between women and men is the ideal model to empower the rights of women in marriage and family relations. It is hence proposed that the new law on gender equality which in accordance with the Islamic nature and nurture should be enacted to avoid any unjust interpretation and decision made by the individual, community, Court of justice or a judiciary system on the concept of gender equality proposed by CEDAW.

#### **6.2.4 The Need to Rebrand Muslim Feminism in Malaysia**

It is proposed that women's rights groups in Malaysia who represent Muslim women's cause and who are also the most influential feminist advocates of public policy rebrand the local feminist movement in accordance with the identified five attributes of rights within the Malaysian context. This is because the attributes of rights adopted by the liberal feminist groups are developed from the influences of Western Women's Liberation which carry along similar messages and themes of Western women's rights which are not suitable for the positive development of women's rights in Malaysia. Thus, to establish the right and ideal concept of gender equality, social and cultural contexts that are based on religion, biological, psychological and physical nature of human beings are the fundamental considerations. It has been stated that positive social change that does not sacrifice values and religious beliefs is the direction aimed by the regulators in bringing any transformation of laws on gender equality within the concept of Shari'ah and *fiqh* to achieve justice. Thus, it is crucial for the women's rights group in Malaysia to understand the classification of nature and nurture which has been discussed in this research and the concept of difference under IFLA and CEDAW so that the

application of gender equality would not discriminate against Malay Muslim women in this country.

In order for the Muslim women's rights movements to protect Muslim women in Malaysia, the subject of rights must be collectively considered. If not, it will result to the promotion of biased law that will eliminate justice. The Muslim womanists should promote the attribute of collective rights and duties in their awareness programme on women's rights. The need for rebranding the understanding of the concept of gender equality based on the concept of difference and complementariness between women and men is crucial, especially in marriage and family relationships. This is due to the nature of human beings who need each other in meeting the preferences of human existence. As marriage is a basic need of human beings and it is important to prolong human existence and preserving health (physically and emotionally), the implementation of rights and duties is important in inculcating the sense of responsibility in the consciousness of the society.

In order to avoid enmity between women and men, the law regulating their rights and duties must in accordance with their biological roles and functions and should not go against the fundamental precepts of Shari'ah. This can be achieved by applying the method of human reasoning or *ijtihad* in searching for conformity with the provisions of CEDAW. Since the primary *maqāsid* of Shari'ah is to preserve the religion from being neglected, the preservation of religion should be given the priority in every sphere of life. Islamic law permits the practice of *ijtihad* or individual freedom, but within the preservation of collective interest, it needs to take into consideration the public rights which include the rights of God. This shows that Islamic jurisprudence recognises individual autonomy or private rights as far as it

does not violate similar rights of others as individuals or as a community. The rights of society or collective rights and duties override private rights; yet the community is required to respect the personal autonomy of individuals, and provide equal opportunity for all.

Since Malaysia is a country which applied *Shafi'iyy* school of thought in their jurisprudence as provided by Malaysian Constitution but other schools of thought are not totally rejected. Thus, to prevent Malaysian Muslim from misunderstanding on the various schools of thoughts which can mislead the society, the effective Fatwa Institution is imperative to be established. It is argued that an individual or group who does not have an expert knowledge cannot take the matter of religion within the scope of Shari'ah frivolously and make their own *ijtihad* without fully understanding and seeking guidance from the recognised expert who has been approved by other experts in that particular area. It is suggested that the role of Fatwa Committee has to be empowered through media-massa and latest information technology to respond the issues of contemporary fiqh so that general public will not be misled by individual opinion. If this is not done effectively, it will mislead the society at large on the universality and flexibility of the Islamic jurisprudence. However, it is also traced that the inconsistencies of fatwas among the states weaken the fatwas' authority and confuse the public, who can simply move from one state to another to escape the binding effect of a particular fatwa.