

## **ISLAMIC FAMILY LAW IN MALAYSIA AND RESERVATIONS INTO ARTICLE 16 OF CEDAW**

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Malaysia has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1995 with several reservations. Among the reservations made are Article 16 of CEDAW in which the article stated that women should have the same rights with men in marriage and family relations. It was contended that the reason for the reservation made is due to the contradictory element of this article with the application of Islamic law or Shariah. Therefore, this study examines the position of Islamic Family Law (Federal Territories) Act 1984 (IFLA) and CEDAW. It is to determine whether Article 16 of CEDAW contradicts with the provisions of IFLA. This study also scrutinizes whether the reservations entered by Malaysia under Article 16 are in line with the object and purpose of CEDAW which is to eliminate de facto and de jure discrimination against women. This study explores whether the provisions under IFLA and CEDAW on the equality between women and men in marriage take into consideration different biological function of women and men. The methodology used in this study is qualitative method by referring to the discussion of previous articles, official reports and official website on women's rights. It is found that IFLA and CEDAW could be harmonised in acknowledging biological differences between women and men. However, the wording of same rights under Article 16 contradicts with the concept of gender equality under IFLA which is not necessarily to be achieved through the concept of sameness. Therefore, the reservations made by Malaysia into Article 16 of CEDAW are necessary to uphold de facto equality between women and men in marriage. The reservations are in line with the object and purpose of CEDAW through substantive equality. IFLA and CEDAW are harmonised in acknowledging different biological nature of women and men and application of substantive equality. Thus, it is suggested that the word 'same' under Article 16 should be replaced with the word 'equal' in order to accommodate the differences between women and men. In spite of that, gender equality in the context of Malaysia is critically needed to be defined in order to eliminate discrimination against women legally, socially and economically.

*Keywords: gender equality; Islamic family law; women's rights; reservations; sustainable society*

### **THE POSITION OF IFLA AND CEDAW IN MALAYSIAN LEGAL SYSTEM**

One of the most serious problems encountered in the 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 into some provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on the basis of general reservations and repugnancy to national laws and customary practices such as Islamic Law. However, the vast number of reservations entered does not mean that CEDAW is rejected or impossible for harmonization with Malaysian national laws to eliminate discrimination against women.

Islamic Family Law (Federal Territories) Act 1984 (IFLA) comprises of Islamic legal rulings with regard to the rights of Muslim women in marriage and family relations. It is based on religious rights and duties in accordance with revelation. However, the life of individual Muslim and community, their culture and preference are different mostly influenced by different level of belief and choices of customary practice and understanding of religious responsibility. Moreover, the rights and duties of women and men in marriage and family relations are mostly influenced by their biological nature.

With regard to legal background, 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. Besides, Article 3 (1) provides that Islam is the religion of the Federation and serves as a core element

of Malay identity and culture. As Malaysia operates a separation power of the government which are the federal government and the State government, the 9th Schedule of the Malaysian Federal Constitution provides that Muslim personal law is under the state authorities where each fourteen (14) states has different Islamic family law which might differ slightly in the provisions and applications of law. Even though each state has its own Islamic family law, but they actually follow similar precepts of Shariah with multiple customary practices within the scope of Shariah principles in accordance with Quran Sunnah and Muslim jurists. It shows the flexibility of Islamic jurisprudence whereby Shariah guides all Muslims with fundamental principles, while at the same time Shariah acknowledges the multiple cultural diversity among human beings within the scope of Shariah fundamental guidelines.

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. 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 which is founded on the basis of Shari'ah and Islamic jurisprudences. However, 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.

### **The Core Provisions Of Cedaw**

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. Discrimination informed by Article 1 of CEDAW referring to “any distinction, exclusion, restriction made on the basis of sex”. According to Steiner and Alston (2000:179), one of the vital characteristics of Article 1 of CEDAW is its reference to ‘effect’ as well as ‘purpose’. The measurement of “effect” means whether the act disadvantageous women whereby the measurement of “purpose” is whether it protects women.

Article 2 represents what has been aptly described as the “core of the Convention”. The article enshrines the following basic obligations of the State parties in implementing the Convention:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

In Article 3, CEDAW gives positive affirmation to the principle of equality by requiring to State Parties to take, in all fields in particular in the political, social, economic and cultural field, all appropriate measures including legislation to ensure the full development and

advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. Temporary special measures are mentioned under Article 4 of CEDAW. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory as provided under Article 4 (2).

Article 5 (b) provides that all appropriate measures are also to be taken by the State parties to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of women and men in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

CEDAW covers three dimensions on the situation of women. Broadest attention is given to the legal status of women which include the rights of women to vote, to hold public office and to exercise public functions as provided for under Article 7. Moreover, it also covers the issue of exploitation of women for prostitution under Article 6. Article 10, 11 and 13 respectively affirm women's rights to non-discrimination in education, employment and economic and social activities. Article 14 of CEDAW covers the recognition of significant role and contribution of rural women which warrant more attention in policy planning and Article 15 asserts the full equality of women in civil and business matters. Lastly, the most relevant provision of CEDAW to this study is Article 16 which deals with the issue of marriage and family relations. It is contended that Article 5(a) and Article 16 are among the controversial provisions which CEDAW becomes one of the main UN human rights treaties with the highest number of reservations made by States parties which are 90 States out of 189 State parties.

### ***Article 16 of CEDAW***

Article 16 provides that States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women,

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Originally, Malaysia has fully reserves Article 16 in which it provides that women and men should have the same rights in all matters related to marriage and family relations. However,

Malaysia does not consider itself bound by the provisions of Article 16 of the aforesaid convention (Arik Sanusi, 2016) due to the fact that reservations to these Articles are significant to Muslim society as Shariah law is one of the major sources of law in which the application might be different with Western culture and application. According to Shariah law, women and men have different role in accordance with their biological function. The provision under Article 16 on the sameness of rights between husband and wife was one of the factors that Malaysia had waited sixteen years before she decided to sign and ratify CEDAW. That is why 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.

### **Malaysian Reservations into CEDAW**

Malaysia's original reservations to CEDAW took place on 5<sup>th</sup> July 1995 once it has ratified CEDAW. However, after examination and investigation is made on the reservations, then on 6<sup>th</sup> February 1998, Malaysia notified the Secretary-General of its withdrawal on the reservations in respect of Articles 2 (f), 9 (1), 16 (b), 16 (d), 16 (e) and (h) of CEDAW of a partial withdrawal as follows: "The Government of Malaysia withdraws its reservation in respect of article 2 (f), 9 (1), 16 (b), 16 (d), 16 (e) and 16 (h)." The reservations covered Articles 2 (f) in which the state party has to condemn discrimination against women in all its forms and undertake all appropriate measures to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

At the same date, the Government of Malaysia notified the Secretary-General that it had decided to modify its reservation made upon accession as follows: "With respect to article 5 (a) of the Convention, the Government of Malaysia declares that the provision is subject to the Syariah law on the division of inherited property." It also reserves Article 5 (a) of CEDAW which urges the state party to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

"With respect to article 7 (b) of the Convention, the Government of Malaysia declares that the application of said article 7 (b) shall not affect appointment to certain public offices like the Mufti, Shariah Court Judges, and the Imam which is in accordance with the provisions of the Islamic Shariah law." "With respect to article 9, paragraph 2 of the Convention where the States Parties shall grant women equal rights with men with respect to the nationality of their children, the Government of Malaysia declares that its reservation will be reviewed if the Government amends the relevant law." Besides, Article 9 of CEDAW on the provision that the states parties shall grant women equal rights with men to acquire, change or retain their nationality also has been reserved by Malaysian government.

"With respect to article 16 Clause 1(a) and paragraph 2, the Government of Malaysia declares that under the Shariah law and the laws of Malaysia the age limit for marriage for women is sixteen and men is eighteen." The number of age in marriage is not against the main precept of Shariah, thus it can be considered to be amended.

Meanwhile, within 1998 to 18th July 2010, the reservations into Articles 5 (a), 7 (b), 9 (2), 16 (1) (a), (c), (f) and (g) and Article 16 (2) were maintained. Afterward, on 19th July 2010, the Government of Malaysia, notified the following: "..., the Government of Malaysia, [...] withdraws its reservations in respect of articles 5 (a), 7 (b) and 16 (2) of the Convention; ...." Therefore, the remaining reservations into CEDAW are on Article 9 (2) and 16 (1) (a), (c), (f) and (g). In relation to article 11, Malaysia interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only (Note 70, Chapter IV.8, Multilateral Treaties Deposited with the Secretary-General). After that, there was no more withdrawal made by Malaysian government into the reservations of CEDAW.

### ***Justifications on the Reservations of Article 16 of CEDAW***

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. 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.

The basis foundation of law applied by IFLA is Shari'ah jurisprudence which the sources and methodologies are based on Divine revelation that is Al-Quran, As-Sunnah and Islamic Jurists. The attributes of Islamic family law and its concept of equality are in accordance with the Divine revelation, namely Al-Qur'an and Al-Sunnah and juristic opinions. Islamic family law is based on human nature which acknowledge the sexual and religious or cultural differences in human beings. Instead of similarities, the different of sex, religion and culture or gender is the crucial factors to be considered in achieving equality. Islamic family law concept of equality is based on the nature of human creation which relates with biological roles and function, religious and spiritual obligations as well as reward and punishment. Islamic family law clearly shows that God creates women and men from a similar origin but with different functions in biology, psychology, physiology and their spiritual belief which influence the individual conscience and value of life.

The division of rights and duties under IFLA are based on the decree of ruling revealed by the Creator which is stated in the Holy Quran and Sunnah of the Prophet. Islamic moral values and principles influence the rights and duties of Muslims which is not against human nature. For example, only the adult competent women are obliged to fully cover their body. It is not obliged for children. It shows that the command of God for women after puberty is to protect their body or their dignity because the physical body of women will be changed after puberty. Besides, it is due to the fact that women reproductive functions are active after menstruation period which if it is not protected would disadvantage women. Islamic law has embodied the ideal and universal attributes of rights for both women and men which suitable with human nature and nurture. In the contrary, the basis foundation of law under CEDAW is originated from Western enlightenment which is mainly derived from Christian ethics and moral values which might be different in application and objectives.

CEDAW is aimed to protect the private as well as the public spheres of women from any kind of discrimination. It is different with IFLA which provides the rights and duties of women and

men within their private sphere. The meaning of discrimination under CEDAW covers direct and indirect discrimination. Indirect discrimination refers to partial discrimination which puts women in disadvantaged situation compared to their male counterpart. In contrary, IFLA acknowledges lawful or positive discrimination, namely by recognising different treatments given for those in different situations i.e. different roles and functions of women and men in accordance to their biological, physical and psychological appearances based on its sources. For example, Section 8 of IFLA on the minimum age of marriage shows that different entitlement of rights and duties between sexes are due to biological differences between women and men which affect their biological roles and priority in a society. If the different of age stipulated in article 8 on the age of marriage for women and men is done for women's rights and equality, it is in line with the object and purpose of CEDAW and Article 4. This research highlights that IFLA applied the concept of substantive equality in achieving *de facto* and *de jure* equality of women with men similar with CEDAW.

A number of studies contended that IFLA provides women with equal opportunity as men in accordance with their biological nature to achieve equal results similar to men within the principle of justice and moralities. Nik Salida Suhaila (2013:88) noted that advocates of Islamic standards defined equality as the complementary nature of roles played by women and men. The Human Rights Committee, in its general comment No. 28, acknowledges the "various forms of family". It has been confirmed by the Secretary-General that "families assume diverse forms and functions among and within countries". If it is so, different entitlements of rights and duties between women and men under IFLA are within the context of different acknowledged by CEDAW Committee since IFLA acknowledges diversities in family institution and function of its members.

Those differences are assigned purposely to establish a balance in their roles and equal outcomes of their dignity because women and men are similar but not identical (Mahmud Saedon, 1999:189). Islam recognises equality of women and men but not in absolute terms (Baderin, 2010:60-61). In order to avoid inequalities of human being in their dignity and justice, IFLA does not provide an equal treatment for women and men which is parallel to sameness as stated under article 16 of CEDAW. Instead, IFLA focuses on substantive equality to ensure gender justice and fairness and to promote a collective interest in marriage and in the family institution. Thus, it is still in the context of non-discrimination and gender equality described by CEDAW.

As provided by IFLA, Muslim women are not denied of the similar rights given to men in entering into marriage. Both are entitled to equal rights to start a marriage with different entitlements to roles and duties in accordance with their biological nature and nurture. For example, the biological nature of women makes it unsuitable for them to practice polygamy or to have more than one husband. Women cannot enjoy their married life with the practice of polygamy as it would yield many disadvantages to them. However, polygamy that is practiced by a responsible man would provide advantages to women because in marriage and family relations, men are responsible to protect women's private and public life. The abolishment of polygamy would cause serious emotional effect for women who cannot have children. In spite of that, polygamous marriage could assist the financial problems of the family if the purpose of marriage is based on humanity, love and brotherhood. It shows on different treatment caused by different biological nature and permissible under article 4.

Polygamy is permissible with the implementation of justice. In the practice of polygamy as provided by IFLA, the court will determine whether the man applied is qualified to enter into a polygamous marriage. As the primary condition required by the Holy Quran in the permissibility of polygamy is “justice”, IFLA provides that the court has to consider whether it is just and necessary for the polygamy to be practiced in that situation. Special measure has been taken to protect the rights of women in polygamous marriage under IFLA. However, a total abolishment of polygamy will lead to the violation of public right and in Islamic law this violates the right of Allah the Almighty and hence is considered as a sin. Thus, this indicates that Islamic legal rulings with regard to the rights and duties of women and men in marriage and family relations are in accordance with human nature and nurture and principle of justice. It is based on what is needed by human beings in accordance with their circumstances. In Islamic legal rulings, a person with a different background is not entitled to a similar treatment given to others as the collective interest should be considered above the individual interest to avoid discrimination.

IFLA, like CEDAW acknowledges biological, political, social and cultural differences and applied the substantive standard of equality to address discriminations based on gender difference and differential treatments against women. CEDAW recognises that discrimination probably happens if the state fails to consider the differences in sexes, religion, culture, biological, political and social fields between women and men; such acts or omission of distinction, restriction or exclusion of a person amount to discrimination unless there are special measures in place that guarantee the rights of disadvantage people to achieve equal results, similar to those of the advantaged group (Nik Salida, 2013). Since both IFLA and CEDAW consider the differences in human beings especially in gender, it is proof that IFLA is not contradict the object and purpose of CEDAW.

Islamic jurisprudence also guides Muslims in terms of equal participation in rights and duties between women and men in public and private spheres. For example, in the private sphere of life, when a woman and a man enter into marital bond, they bring into existence an important social unit called family. Like any other successful and wonderful social unit in this world, this social unit requires a systematic management. In the family social unit, Islamic jurisprudence has chosen men as the head of the family who carry out active duties in the public sphere whereas women run active duties in the private sphere. Therefore, equality for women must be seen from private as well as public spheres suitable to both genders as Muslim women nowadays enjoy equal rights with men in public sphere but being discriminated through customary practice.

As mentioned earlier, in determining equal rights and duties of women and men, two distinctions need to be made, namely the religious and social spheres (Noraini Abdullah, 1984). In the religious sphere, the rights and obligation of women and men are exactly the same except in situations which result from biological process. In the social sphere, men are positioned a degree higher because they bear the obligation to maintain the family, hence carry more roles outside the home. Meanwhile, women are more versatile in the private sphere as they have the special roles of caring for children from pregnancy until birth. With regards to the rights and privileges of a woman in her capacity as a mother, the concept of child care as a joint parental and social responsibility is deeply rooted within the Islamic tradition. While breastfeeding and its duration are recommended in Islam, the modalities are to be decided by “mutual consultation” of both parents. If the mother is unable to fulfil her duty, the father is under the obligation to make the alternate arrangements and vice versa. However, for life maintenance

to the child, the father is still bound to feed, maintain, or provide for the nursing of the child. This example which has been mentioned in certain Qur'anic verses points to the hierarchy of non-discriminatory rights (Shaheen, 2000).

Thus, IFLA considers collective rights and duties when it comes to marriage and family relations. In Islamic jurisprudence, marriage and family life are important because a marriage contract is considered as a kind of worship or 'ibadah'. It is not just a contract between women and men to live together but a sacred contract which comes from divine law and thus is connected with the right of Allah and the rights of human. The sacred contract comes from the explicit purpose of marriage with regard to the nature and nurture of human beings. Islamic law believes that through marriage, the conducts of human beings which are linked to sex will be blessed and controlled. The contract between a wife and a husband in Islamic marriage is sanctified because it consists of religious rights and duties which make them meaningful to each other through a relationship based on love and sharing. Therefore, in a marriage, an individual person is not an isolated entity but is a part and parcel of all the family members which normally consists of a husband, a wife and their children. The head as well as all other members of the family are collectively responsible to protect the identity of the family with different entitlements to the rights and duties based on their function in nature and nurture.

In addition to that, IFLA protects women in the marriage institution with a special measure via the role of men as walī and primary maintainer. It does not mean that IFLA neglects the rights of men but the priority is given for the protection of women because of their biological, physical and psychological nature during periods of disabilities which place them in situations that require such protection in the preservation of collective rights. As argued by Baderin (2001), whenever collective interest is given the priority, it does not mean that the individual's interest is lacking; on the other hand, discrimination would be eliminated by considering collective rights rather than the individual's. Lacey (2004) argued that individual entitlements is not absolute and individualism is the key point of criticism. In this light, collective right is primarily considered as establishing social justice. Therefore, different entitlements to the rights and duties between women and men under certain provisions of IFLA are equal to protect the collective rights of family members, especially the disadvantaged ones, namely women and children.

The provisions of IFLA with regard to women's rights governs the rights and duties of women specifically in the private sphere but CEDAW aims to eliminate any discrimination against women both in private and public spheres. CEDAW is provided to ensure women's equality with men and to rectify the fact that general human rights standards have not catered adequately for the needs of women. However, IFLA is regulated in order to guide women and men with regard to their rights and duties in marriage or their private sphere. Even though the coverage of IFLA regulates the private sphere, it covers both the rights and duties of women and men. It has been discovered that because women have disabilities due to their biological nature, the provisions of IFLA have more protection for women to ensure that women are not being disadvantaged by men. Since IFLA caters both the rights and duties of women and men in marriage and family relations, the provisions of IFLA should be gender-neutral, unlike those covered in CEDAW.

IFLA also protects the private and public spheres of women in marriage with a special measure, which is the application for permission to marry in Section 16 (1). It is provided that the permission to marry should be made to the Registrar of the kariah masjid in which the woman



is a resident. This is intended to protect women from being disadvantaged by irresponsible persons. Islamic jurisprudence protects women while considering their nature of disability with the role of men as walī or protector and primary maintainer of women in marriage and family relation. In spite of this, the state has provided an appropriate measure for women in the case where the walī or husband acts in an inappropriate manner in the marriage and in the family institution. 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. In addition to that, walī has an important role even before solemnisation of marriage, namely to ensure that the groom is 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 after marriage. In addition, IFLA provides another appropriate measure to protect women in marriage, namely through the role of the state whereby the Shari'ah judge has the jurisdiction in accordance with Hukum Shariah in cases where a woman has no walī by nasab to act on her behalf or the walī cannot be found or the walī refuses to give his consent without sufficient reasons. This provision is important in cases where a walī misuses his power as the guardian to force marriage or refuses to give his permission to a woman to marry with an unreasonable cause. IFLA also provides a specific provision under Section 37 which provides that any persons who uses any force or threat or commits an offence shall be punished with a fine not exceeding one thousand ringgit or an imprisonment not exceeding six months or both. This provision is applicable for all persons including the walī. Thus, this provision, even if it seems patriarchy, clarifies the roles of walī in marriage and family relation to ensure that they are carried out justly. This is necessary to make sure that women are continuously protected and attains happiness before, during and after marriage, not only in private but also in public spheres.

IFLA does not only protect women from an irresponsible walī but also from an irresponsible husband. The rights in dissolution of marriage are not given to only men but also to women in various circumstances as provided by IFLA under Part V. For example, the dissolution of marriage should be validated by the Court. The duty of the Court is to control any kind of discrimination against women while the court construes the case before declaring the validity of a divorce. The Court has to balance the preservation of the marriage contract and the protection of women against the abuse of men in accordance with Hukum Sharca. As argued before, Islamic law considers that violence against women as one type of discrimination against women and this is why divorce is permissible in the Islamic law, even within a minimal permissibility to protect women against violence. The arguments justify the reservation made to Article 16 (1) (c) of CEDAW as women need different types of dissolution of marriage compared to men in order to achieve an equal result.

The provisions of IFLA in relation to the rights and duties of men as walī and the primary maintainer in marriage are in accordance with Article 4 of CEDAW. The role of men as walī and the primary maintainer is a sort of a special measure and is seen as a positive patriarchy because it aims at protecting women from discrimination considering their nature and nurture. In this sense, IFLA is in tandem with Article 5 of CEDAW whereby it provides an adequate measure by power of the court to ensure that women are not disadvantaged by an irresponsible walī and husband.

Due to their biological role as a mother, women in both the West and the East are equally responsible for the care and nurturing of children while the husband is considered as the primary breadwinner and the head of the family. Thus, even though women and men do not

have similar rights, they are complementary to each other in performing their duties and responsibilities with different entitlement to rights and duties according to their functions to develop the nation. It is contended that if women are only concerned with claiming their rights by ignoring their duties towards the family and the society, it may lead to social problem in the society and the failure to civilise the nation.

### **Malaysia's Commitments in Achieving Gender Equality**

Malaysia's ratification of CEDAW took place in 1995. However, Malaysia's commitments in the protection of the rights of women in marriage and family relation matters has begun earlier. Islamic Family Law (Federal Territories) Act 1984 (IFLA) is the formal law that enacted purposely to protect the rights of women in marriage and family relation matters since 1984. It was enacted due to the raising number of divorce cases among Malay Muslim couples. In terms of law, there are enough provisions of law to protect women.

The huge decision made by Malaysian government in championing gender equality after ratification of CEDAW was the recognition on non-discrimination in gender under Malaysian Federal Constitution in July 2001. The government of Malaysia agreed to amend Article 8 (2) of the Constitution by including 'gender' as a basis for non-discrimination. After the amendment, Article 8 (2) provides that:

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

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

The amendment to Article 8 (2) of the Constitution to include gender as the basis of non-discrimination shows the *bona fide* intention of Malaysian government to uphold equality in gender and eliminating discrimination against women in this country. However, the context of gender equality in this dualist country which is Islamic country under the Constitution and majority of citizens are Muslims might not same with the context of gender equality in CEDAW's provisions or other countries. This Article 8 (2) only states that discrimination in gender is prohibited without specifically define the meaning and context of discrimination in which gender equality may bring to various interpretations (Salbiah Ahmad, n.d) by different background of people due to different belief, culture and interest of people. That is why Gender Equality Act is needed to define gender equality in the context of Malaysian citizen (Nur Hafilah & Asma, 2018).

In the implementation of CEDAW, article 4 (1) states that 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. General Recommendation 25 adopted by the CEDAW Committee makes clear that CEDAW aims to eliminate *de jure* and *de facto* discriminations. The Recommendation accords

that *de facto* or substantive equality is the strategy to ‘achieve equality of result and to redistribute resources and power between women and men’ (Rebouche, 2009). The limits of *de jure* or formal equality disappointed women’s rights in acknowledging differences from men as a source of continuing disadvantage, even where the law accords women and men the same rights and status. CEDAW has been offered as a lens through which to examine what serves women’s interests (Rebouche, 2009). CEDAW covers both equality of opportunity in order to achieve *de jure* equality and equality of outcome to achieve *de facto* equality, yet based on the same limited approach.

The principle of good faith is illustrated in the case of *Exchange of Greek and Turkish Populations (1925)* PCIJ Reports Series B, No. 10, 20 in which the World Court decided that “a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken”. It is argued that the ‘dualist theory’ assumes that international law and national law are two separate legal systems which exist independently of each other. International law regulates the relationship between States whereas national law regulates the rights and duties of individuals within a state. Thus, for international law to be applicable in the national legal order, it must be transformed into national law by means of national legislation (Abdul Ghafur Hamid, 2016:234).

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

Another commitments of Malaysia in achieving gender equality is by creating Ministry for women affairs from top to down levels, providing policy for women as policy maker and women as Syariah judges and leaders in administrative posts.

## CONCLUSION

IFLA governs the rights of Muslim women and men in marriage and family relations in Malaysia even before the ratification of CEDAW. In fact, the object and purpose of IFLA is to protect the rights of women in marriage. Thus, it is in line with the object and purpose of CEDAW to eliminate discrimination against women. Even though it would be a challenging task for the government to regulate 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 is striving to champion gender equality at national and international levels through laws and policies applied by all people.

In giving justification on the reservations of CEDAW provision, the principle of ‘*pacta sunt servanda*’ or the rule that ‘treaties are binding on the parties and must be performed in good faith’ is stated under Article 27 of Vienna Convention on the Law of Treaties that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

The faithful and wise justification is needed in reporting on the implementation of CEDAW since it is not against the main object and purpose of CEDAW.

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. 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 family have deeply entrenched the Islamic religious rights and duties which mostly based on biological differences between them. Therefore, the word same rights under Article 16 is contradict with the object and purpose of CEDAW whenever it against the fact that biological women are differ with men which affect their roles and functions in marriage and family relations matters.

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 because they are different in biological nature. The word stated under Article 16 is ‘the same right’ whereby under IFLA the rights and duties of women and men are not necessarily the same to be equal. The reservations made into this article are in accordance with the objective of CEDAW that is to protect women and to eliminate discrimination against women in marriage including application of substantive equality in achieving *de facto* equality with men.

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 of the people of the community. Therefore, it is suggested that gender equality and the meaning of discrimination under Malaysian context being incorporated into national legislation such as Gender Equality Act which define the meaning and scope of gender equality in the Malaysian context including law and customary practice.

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