The Women's Convention and Malaysian Laws on Muslim Women's Rights: The Possibility of Harmonisation.

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ABSTRACT

My thesis critically examines whether Malaysian laws on Muslim women's rights are harmonious with the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention). I argue that the interpretation of *'equality'* is the key to constructing the possibilities of harmonisation. In my conceptual analysis of rights in Islamic and international legal jurisdictions and declarations and in feminist discourse, I argue that both Islamic and international legal jurisprudences present rights as an instrument for equality among human beings. I argue that the principles of equality according to the Islamic jurisprudence and feminists' standpoint are harmonious. I argue that Malaysia has taken appropriate measures, including laws, policies, administrative decisions and programmes, to eliminate women's disadvantages based on the principal areas of concern and recommendations made by the CEDAW in its Thirty-Fifth Session. However, there are a few areas that need specific improvement for the betterment of the laws, policies, administrative decisions and programmes in securing Muslim women's equality rights. I explore whether reservation of Article 16 (1) (a), (c), (f) and (g), pertaining to different entitlements to rights for women and men in Muslim marriage and family relations entered by the Malaysian Government to ensure the prevalence of *Shariah* practised in Malaysia, renders Malaysian Muslim women's rights laws irreconcilable with the principle of equality underpinning the Women's Convention. I argue that Malaysian laws may become harmonious with the Women's Convention through a womanist interpretation of *Shariah*, and the empowerment of the rights-bearer within the Women's Convention's wider objectives.

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Nik Salida Suhaila Nik Saleh
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ABBREVIATIONS AND ACRONYMS

AIDS	Acquired Immune Deficiency Syndrome
AIM	Amanah Ikhtiar Malaysia
CA	Contracts Act 1950 (Act 319)
CDHRI	Cairo Declaration of Human Rights in Islam
CEDAW	United Nations Committee on the Elimination of Discrimination Against Women
CFI	Centre for Inquiry
CHR	Commission on Human Rights
CIA	Central Intelligence Agency
CLJ	Current Law Journal
CPC	Criminal Procedure Code (Act 593)
CRC	Convention on the Rights of the Child
CSW	Commission on the Status of Women
DVA	Domestic Violence Act 1994 (Act 521)
DWD	Department for Women's Development
EA	Evidence Act 1950 (Act 56)
FMM	Federal Malaysian Manufacturers
GRB	Gender Responsive Budget
HAWA	Women's Affairs Secretariat
HIV	Human Immunodeficiency Virus
HPA	Hire Purchase Act 1967 (Act 212)
HRC	Human Rights Council
ICCPR	International Covenants on Civil and Political Rights
ICESCR	International Covenants on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICT	Information and Communication Technology
IFLA	Islamic Family Law (Federal Territories) Act 1984 (Act 303)
ILO	International Labour Organisation
ITA	Income Tax Act 1967 (Revised 1971) (Act 53)
MDGs	Millennium Development Goals
MDS	Malaysian Department of Statistics
MEF	Malaysian's Employers Federation
MGGI	Malaysia's Gender Gap Index
MIEHRI	Meeting of International Experts on Human Rights in Islam
MLJ	Malayan Law Journal
NACIWID	National Advisory Council on Integrating Women in Development
NAP	National Action Plan
NGOs	Non-Governmental Organisations
NHMS2	Second National Health and Morbidity Survey
NKRAs	National Key Result Areas
NPW	National Policy on Women
OIC	Organisation of Islamic Cooperation
SIS	Sisters in Islam
SMIDEC	Special Assistance Scheme for Women Entrepreneurs under the Small and Medium Industry Development Corporation
SUHAKAM	Human Rights Commission of Malaysia
SVP	Social Visit Pass

SWD	Social Welfare Department
TIP	Trafficking in Persons
UDHR	Universal Declaration of Human Rights
UIDHR	Universal Islamic Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Social and Natural Science, Culture and Communication
UNICEF	United Nations Children's Fund
USM	Universiti Sains Malaysia
WAO	Women's Aid Organisation
WAVe	Women Against Violence Campaign
WCC	Women's Centre for Change
WEF	Women Entrepreneurs Fund

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND AND CONCEPTUAL FRAMEWORK OF THE STUDY

Malaysia[1] acceded to the United Nations (UN)[2] Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention)[3] on 5 July 1995 with reservations[4] of Article 2 (f), Article 5 (a), Article 7 (b), Article 9 and Article 16. In the Conference on *'Human Rights in Malaysia: The Last 10 Years*[5]*'* in 2009, recommendations were made to the Government of Malaysia to discuss the reservations, improve enforcement of laws, enact laws for prevention of infringement of Muslim women's rights and amend relevant inequality laws. Even though the Government withdrew a few reservations on 6 February 1998 (Article 2 (f), Article 9 (1), Article 16 (b), (d), (c) and (h)) and on 19 July 2010 (Article 5 (a), Article 7 (b) and Article 16 (2)), it did not consider it necessary to withdraw a reservation of Article 16 (1) (a), (c), (f) and (g). I note that after

[1] Malaysia was originally known as Malaya until 1963 when the Peninsular, Sarawak, Sabah and Singapore merged to form a single nation. However, Singapore left in 1965

[2] The United Nations (hereinafter UN) is an international organization whose stated aims are facilitating cooperation in international law, international security, economic development, social progress, human rights and the achieving of world peace. The UN was founded in 1945 after World War II to replace the League of Nations, to stop wars between countries and to provide a platform for dialogue. It contains multiple subsidiary organizations to carry out its missions. Online: http://www.un.org/en/aboutun/index.html. Retrieved on 12/03/2009

[3] Adopted at New York on December 18, 1979; entered into force on 3 September 1981. GA Res. 34/180, 34 UN GAOR Supp. (No. 710.46) at 193, UN Doc. A/34/46 (1979). Online: http://www.un.org/women watch/daw/cedaw/. Retrieved on 12/03/2009 (hereinafter Women's Convention)

[4] Reservations are declarations made by State Parties to a treaty, certain provisions of which, they do not accept as binding on them. The meaning of reservation may be found in the Vienna Convention on the Law of Treaties 1969 which states: *'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State'* (Article 2 (1) (d). Reservations are allowed so long as they are not incompatible with the object and purpose of the treaty. Incompatible reservations may be challenged by other State Parties. Online: http://www.un.org/womenwatch /daw/cedaw/reservations.htm. Retrieved on 12/03/2009

[5] This Conference was organised in conjunction with the Malaysian Human Rights Day on September 9, 2009

the first withdrawal of reservations in 1998 and the second in 2010, it seems that the Government is still unable to tolerate the withdrawal of reservation of Article 16 (1) (a), (c), (f) and (g) concerning marriage and family relations of Muslims. This situation has inspired me to study whether this reservation, in actual fact, produces gender inequality between Muslim women and men.

Kamal Malhotra, the United Nations Resident Coordinator, in his opening remarks of the 2010 UN Development Programme (UNDP) Asia-Pacific Human Development Report on Gender, has promised that the UN in Malaysia will continue advocating the withdrawal of all Malaysia's reservations to the Women's Convention. Malhotra also proposed legal reforms to reduce or eliminate the number of contradictions existing between the civil and *Shariah*[6] legal systems in Malaysia. This contradiction, according to him, *'hampers progress on gender equality achievement in the country'* (Malhotra, 2010: 4). However, Malhotra's allegation that *Shariah* practised in Malaysia causes gender inequality might be due to his lack of understanding of how substantive equality works for Muslim women's rights in the Malaysian local context, a theme I thoroughly examine in this thesis. The Retired Chief Judge of Malaya, the Honourable Tan Sri Siti Norma Yaakob, underlined in her opening address the relationship between Islam, justice and equality;

'It is my belief that Islam accords women equal rights with men. …… like many Muslims, I do not believe that Islam, which abhors injustices, treats women any less than it treats men. Women, like men are vice-gerents on earth, equal in the eyes of Allah and it is our collective responsibility to ensure that principles of justice and equality are reflected in our laws[7]*.'*

[6] *Shariah* means '*way*' or '*path'*, which refers to the sacred law of Islam

[7] Opening speech at the International Conference on *'Legislations and Mechanisms to Promote Gender Equality'*, Kuala Lumpur, 28 August 2006

Musawah's[8] Statement to the Committee on the Elimination of Discrimination against Women (CEDAW) has submitted that the *Quran*, Islamic-based laws' objectives, human rights standard and gender relations are governed by equality principles (Musawah, 2009). Therefore, according to Musawah, all laws must be changed to ensure equality, a suggestion I found similar to the view of Malhotra. Musawah also understand the value of rights, the concept and principle of equality according to Islam and the Women's Convention differently. Musawah has claimed that '*religious-based law'*, referring to *Shariah* for Islamic family laws in Muslim countries, cannot justify inequality (Musawah, 2009: 7). This is indicative of Musawah's lack of understanding that *Shariah* differs from state to state and that it is problematic to argue that *Shariah* renders gender inequality between Muslim women and men in all Muslim states. By correlating inequality with the notion of equality equating to differences and substantive equality in marriage and family relations of Muslims, Musawah has also limited its interpretation of equality.

Likewise, the CEDAW, after considering Malaysia's combined initial and second periodic reports, was also of the opinion that Malaysia needs laws directed specifically at reflecting substantive equality of women with men because current laws did not sufficiently protect women's rights (U. N. Doc. CEDAW/C/MYS/CO/2, 2006: para 8). The Committee proposed that all provisions in the Women's Convention be incorporated into Malaysian laws and that the Government ensure that the laws are fully enforced. This is among the reasons why Sisters in Islam (SIS)[9], the independent non-governmental organisation which believes that Islam upholds the principles of equality, justice, freedom and dignity, insists

[8] Musawah is a global movement of women and men who believed that equality and justice in the Muslim family are necessary and possible. It was launched at a Global Meeting in Kuala Lumpur, Malaysia in February 2009, bringing together over 250 participants from 47 countries including 32 countries that are members of the Organization of Islamic Cooperation (OIC). See Online: http://www.musawah.org. Retrieved on 04/05/2009

[9]See Online: http://www.sistersinislam.org.my/index.php?option=com_frontpage&Itemid=1. Retrieved on 16/07/2009

on new Islamic family laws based on female-male equality, and it explains why they are accused of trying to interpret Islam according to Western norms. Othman's (1997) idea of *'cultural mediation*[10]*'* in Malaysia, to be achieved by revisiting and reinterpreting Islamic teachings and texts that are authentic and locally persuasive, might address SIS's suggestion. However, even though my thesis offers a way of mediating the Malaysian laws on Muslim women's rights with the Women's Convention, I shall not engage with the theory of reinterpreting Islamic teachings and texts.

My thesis will contribute to an understanding of the principles of equality from the Women's Convention and Malaysian laws. I will argue that reservation entered by the Government of Malaysia will not disadvantage Muslim women if the reservation does not have an effect or purpose of denying women's exercise and enjoyment of all rights to the same extent as men. I argue that different entitlements to rights for women and men are not necessarily a distinction that amounts to discrimination, because equality is not only about sameness. I analyse whether Muslim women's rights are protected according to the interpretation and practice of gender equality in the Malaysian local context which is harmonious with the Women's Convention. Calling for cultural eradication of any practice without fully understanding how the practice enhances gender identity in some cultures could lead to the violation of other people's valued way of life (Sachedina, 2009: 138). Indeed, reservations do not necessarily mean the rejection of women's rights protection and equality; however, understanding the principles of equality under the Women's Convention is important in order to accommodate the practices of other traditions and those of the West.

[10] This term was coined by An-Naim. See An-Naim, Abdullahi. 1999. 'The Cultural Mediation of Human Rights' in: Bauer J. R./Bell D. A. (ed.), *The East Asian Challenge for Human Rights.* Cambridge

This analysis seeks to highlight the issue that dissimilar entitlements to rights for Muslim women and men in Malaysia pertaining to their personal laws, which are rights to enter into marriage, maintenance, polygamous marriage, dissolution of marriage, guardianship of children and rights to choose a family name, a profession and an occupation, have become subsumed under the notion of inequality for women. It also highlights the need to unravel this allegation by justifying these formal and substantive equalities from the Malaysian Muslim women's rights laws' perspective. In my thesis, I draw upon Jaising (1996) to define personal laws, which refer to particular laws governing people because they belong to a particular religion, race, caste, sect or tribe. It is important to emphasise here that, even though dignity and justice are considered integral parts of human life, people still differ on what constitutes equal dignity and justice. Even between Muslims, there are different views on how to administer and achieve equal dignity and justice (Mir-Hosseini, 2003: 34).

Hence, my core analysis in this study is to examine whether Malaysian laws on Muslim women's rights are harmonious with the Women's Convention. According to Ahmad (2005: 9), there are two ways of resolving this conflict: one can either make the national laws comply with the international laws or redefine cultural understandings that would mirror compatibility. In this analysis, I will demonstrate that the Malaysian laws affecting Muslim women's rights are partially compliant with the principle of equality espoused by the Women's Convention. At the same time, I will attempt to prove that religious and cultural understandings of equality are crucial for the purpose of constructing harmonisation between national and international legal regimes. First, I analyse whether Malaysia has taken all appropriate measures, including laws, policies, administrative decisions and programmes, to eliminate Muslim women's disadvantages based on the

principal areas of concern and recommendations of the CEDAW in the concluding comments made against Malaysia following the Thirty-Fifth Session in New York from 15 May to 2 June, 2006, and based on the application of equality informed by the Women's Convention. I consider whether, in the Malaysian *Shariah* local context, the reservation of Article 16 (1) (a), (c), (f) and (g) is against the object and purpose of the Women's Convention. This is important considering that *Shariah* has been alleged to be a tool justifying gender inequalities in Malaysia. I examine the application of Muslim personal laws and their implications for Muslim women's rights in Malaysia.

Second, I argue that the lack of understanding of the equality principle from the Islamic perspective and the Women's Convention's standpoint among the CEDAW and women's movements in Malaysia is the reason why the reservation to Article 16 (1) (a), (c), (f) and (g) of the Women's Convention has been posited as the main cause of gender inequality. I argue that Mayer's imputation that the application of *Shariah* leads to serious breaches of international human rights (Mayer, 1995: 64-65) was based on a lack of understanding of the concept of equality in Islam. Though formal equality is important, I argue that it is essential to guarantee that the effect of its implementation will avoid inequalities.

The problem in examining whether Malaysia's reservations are incompatible with the object and purpose of the Convention is that there is no single objective criterion to determine whether any reservations are compatible with the object and purpose or not. Thus, I argue that substantive equality is the principle of the Women's Convention that State Parties must uphold in all legislations concerning rights and equality. Based on the conception of equality that will be discussed in Chapter Three, I answer the question of whether the particular reservation entered by the Government of Malaysia makes Muslim

women's rights laws in Malaysia incompatible with the Women's Convention. I argue that different entitlements to rights for Muslim women and men in marriage and family relations' laws do not necessarily render Muslim women unequal because this approach of divergence of rights entitlements may have been conducted purposely to uphold equal dignity and justice between sexes. I argue that, by reinterpreting the concepts of rights and equality, Malaysian laws on Muslim women's rights are capable of harmonisation with the Women's Convention.

In terms of family laws for Muslims, Malaysia applies a plural legal system in which no single family law system applies to the whole country (Abdullah, 2007: 514). As Malaysia has 14 states, there are 14 different Islamic Family Law Enactments; however, the basic principle of all Enactments is almost the same in all states within the Federation, with a few differences in the wordings and practices as well as the implementation. In this thesis, I will mention the Islamic Family Law (Federal Territories) Act 1984 (the IFLA) specifically wherever there is a reference to such legal provisions, as well as comparing it with the other State Enactments (laws that are passed by State Authorities) whenever necessary.

1.1.1 Malaysian *Shariah*: A Distinct Character

In this thesis, it is important to understand that Malaysian laws are mainly based on the common laws, as a result of the colonisation by Britain, and rights enshrined in the Malaysian Federal Constitution reflect a heavy Western influence (Tan and Thio, 1997: 514). *Shariah* plays a small role in the country and has jurisdiction in Muslim personal matters only. As well as having a limited jurisdiction, *Shariah* practised in Malaysia has, in fact, absorbed the principles of English common laws that are reconcilable with Islamic

principles (Mohamad, 2008: 6), and both have more commonalities than differences, which has given Malaysian Islamic-based laws a distinct character. The Former Chief Justice of Malaysia, Dato' Abdul Hamid, stressed that, even were *Shariah* to be implemented as the only legal system in Malaysia, a majority of the existing laws would remain[11]. This presents an opportunity to develop a common understanding of the principle of gender equality concerning Muslim women's rights, despite different provisions being applied in Malaysian statutes compared to those of the Women's Convention.

I trace that, rather than trying to understand how Muslim countries or countries with majority Muslim populations interpret equality in gender, or how different entitlements to rights between sexes in Islam could result in equal outcomes in terms of dignity for women and men, the human rights actors are more likely to critique the practices themselves, such as polygamous marriage, dissimilar entitlements to rights to enter into marriage and dissimilar roles and duties in marriage and family relations. This is what has been claimed by Sally Engle Merry (2004: 14) as a reason for *'resistant ethnic nationalism that attributes its problems to human rights'*.

Thus, my contribution to this critique is to explore how equality informs Malaysian Muslim women's rights laws and compare this with the principle of equality underpinning the Women's Convention. In this thesis, I argue that, even though the Malaysian Government entered reservation to Article 16 (1) (a), (c), (f) and (g) of the Women's Convention, the Malaysian laws on Muslim women's rights are capable of harmonisation

[11] Dato' Abdul Hamid demonstrated that *Shariah* and civil laws are complementary by giving the example of the Chapter on Introduction in the book '*Napoleon and Islam'* written by David Moussa, that 97 per cent of the Code Napoleon was taken from the rulings of Imam Malik and that a study made in Pakistan some time ago has shown that only about 10 per cent of the laws then in force in Pakistan which were based on English common laws contradict *Shariah*. See Mohamad, Abdul Hamid. 2003. 'Harmonisation of *Shariah* and Civil Law in Malaysia: Present Reality and Future Actions'. Paper presented at the *International Conference on Harmonisation of Shariah and Law.* 20-21 October 2003. Malaysia: Kuala Lumpur

with the Women's Convention. I argue that the harmonisation is not solely based on full incorporation of the Women's Convention's provisions into the state laws but might be possible even if several reservations are entered, provided that women are secured equal rights with men. Through this thesis, I will answer the following questions:

i) Does the concept of *'rights'* exist in Islam? Do international and Islamic human rights jurisprudence and declarations share similar meanings and principles of rights? What are the feminist critiques of the theory of rights? In what ways might rights inform gender equality? How do the Universal Declaration of Human Rights (UDHR)[12], the Universal Islamic Declaration of Human Rights (UIDHR)[13] and the Cairo Declaration of Human Rights in Islam (CDHRI)[14] address rights?

ii) How do Islamic jurists and feminists address equality? Are the concepts of equality informed by the Islamic jurists and by feminists harmonious? In what ways do the UDHR, UIDHR and CDHRI differ regarding the application of gender equality? How has the feminist standpoint on equality informed the Women's Convention?

iii) Is woman a legal subject in Malaysia? How is equality recognised and constructed? Does this create formal and substantive equality? How do

[12] The Universal Declaration of Human Rights (hereinafter UDHR) was adopted by the UN General Assembly in its resolution 217 A (III) of 10 December 1948. See Online: http://www1.umn.edu /humanrts/instree/b1 udhr.htm. Retrieved on 11/12/2009

[13] The Universal Islamic Declaration of Human Rights (hereinafter UIDHR) was adopted on 19 September 1981 by the Islamic Council in Paris. See Online: http://www.alhewar. com / ISLAMDECL.html. Retrieved on 03/12/2009. The UIDHR was written by representatives from various Muslim states such as Saudi Arabia, Egypt and Pakistan under the auspices of the London-based Islamic Council, a private organisation affiliated with the Muslim World League. See Mayer, A. E. 2007. *Islam and Human Rights.* 4th. Ed. Boulder, Colorado: Westview Press

[14] The Cairo Declaration of Human Rights in Islam (hereinafter CDHRI) is a Declaration of the Member States of the Organisation of Islamic Cooperation (OIC) adopted in Cairo in 1990, which provides an overview of the Islamic perspective on human rights and affirms Islamic *Shariah* as its sole source. Its purpose is to be '*general guidance for Member States [of the OIC] in the field of human rights'*. This Declaration is usually seen as an Islamic response to the Universal Declaration of Human Rights (UDHR). See Online: http://www.arabhumanrights.org/publications/regional/islamic/cairo-declaration-islam-93e.pdf. Retrieved on 03/12/2009

Malaysian laws, policies, administrative decisions and programmes enhance and empower women's rights to equality? How does Malaysia respond to the concluding comments made against Malaysia by the CEDAW in its Thirty-Fifth Session in New York?

iv) Is the reservation of Article 16 (1) (a), (c), (f) and (g) against the object and purpose of the Women's Convention? How do different entitlements to rights to enter into marriage, rights and responsibilities during marriage and at its dissolution, right to guardianship and personal rights between sexes inform equality of outcomes?

The idea is that, were the Malaysian laws and the Women's Convention to be harmonised, this conflict between international and Malaysian domestic laws could be resolved. Moreover, the constructive harmonisation of the Malaysian laws with the Women's Convention would be a progressive move towards the harmonisation of *Shariah* and civil laws in Malaysia.

The first set of questions is addressed in Chapter Two. I engage in a conceptual analysis of rights in international and Islamic human rights jurisprudences and apply this analytical debate to explore the ideals of gender equality rights and Muslim women's rights laws in Malaysia in Chapters Four, Five and Six. First, I apply the introductory concept of *'rights'* from Mohammad (2003) to argue that *'rights'* exists in Islam and that the notion of *'rights'* is not a foreign concept in the Islamic tradition. Next, I draw upon Lacey's (2004) and Mohammad's (2003) understanding of *'rights'* to argue that international and Islamic human rights jurisprudences share similar meanings and principles of rights. I explore feminist critiques of the theory of rights in international jurisprudence. From the theory

that rights are individual entitlements, I consider the critique that individual entitlements are not absolute (Lacey, 2004). Through my analysis of the subject of the image of rights, I argue that the framework of non-absolute individual entitlements constructs a value of interest, rights as a neutral product and wider coverage of rights, which limits the gendered nature of rights. Therefore, I argue that rights could inform gender equality should rights reflect the protection of both individual and collective interest, constitute an unbiased legal product, and cover public and private spheres. I explore how the UDHR, the UIDHR and the CDHRI address rights of human beings in an attempt to grasp an idea that is capable of reconciling international and Islamic human rights instruments on the notion of rights. My intention is to critically review existing formulations of the principles of rights in the Western-based[15] and Islamic-based traditions as they have important implications when applied to Muslim women's rights in Malaysia. I argue that both jurisprudences present rights as an instrument for equality among human beings.

My second set of questions is addressed in Chapter Three, which explores how Islamic jurists and feminists address equality. I draw upon the feminist idea that *'equality should not be reduced to sameness'* (Fletcher, 2002: 149) and relate it to Islamic jurists' understanding of equality as a *'matter in its proper and valid context'* (Bakar, 2003: 4). I argue that these principles of equality according to Islamic jurisprudence and feminists' standpoint are harmonious. Equality is guaranteed by laws, not necessarily just by securing similar rights for women and men, but also by taking into consideration whether the disadvantaged groups will be the beneficiaries of affirmative actions and special measures which could guarantee equal outcomes. However, by focusing on the application of gender equality in the UDHR, UIDHR and CDHRI, I show that the Western-based and Islamic-

[15] Modern human rights laws derive primarily from Western philosophical thought. See Charlesworth, Hilary and Chinkin, Christine. 2000. *The Boundaries of International Law: A Feminist Analysis*. Juris Publishing

based Declarations are congruent in privileging the male as a legal subject but differ regarding women's and men's rights in marriage and family relations.

My third set of questions is considered in Chapter Four and Chapter Five, which explore the notion and application of equality under the Malaysian laws, policies, administrative decisions and programmes. I study the Malaysian laws on human rights and Muslim women's rights in order to analyse how rights and equality inform the laws. I argue that according to the Malaysian laws, woman is a legal subject. I note that various policies should supplement legislations to secure gender equality and protect disadvantaged groups. I argue that the interpretation of *'equality'* is the key to constructing the possibilities of harmonisation between the Malaysian laws on Muslim women's rights and the Women's Convention. I argue that the laws governing the rights of Malaysian Muslim women apply the same principles of equality as those rooted in the Women's Convention. I will consider whether Malaysia has taken all appropriate measures in securing gender equality and empowering Muslim women based on the concluding comments of the CEDAW made against Malaysia in its Thirty-Fifth Session in New York, which could make it congruous with the tenet of the Women's Convention.

My final set of questions is addressed in Chapter Six, which analyses whether reservation of Article 16 (1) (a), (c), (f) and (g) pertaining to different entitlements to rights for women and men in Muslim marriage and family relations entered by the Malaysian Government to ensure the prevalence of *Shariah* practised in Malaysia renders Malaysian Muslim women's rights laws irreconcilable with the Women's Convention. I argue that different entitlements to rights for women and men in Muslim marriage and family relations in Malaysia do not necessarily render women unequal to men, because this divergence of

rights entitlements might be made purposely to uphold equal dignity and justice between sexes.

In this thesis, my key argument is that withdrawal of the reservations is not the only solution for harmonisation if formal equality or similar entitlements to rights between sexes will not guarantee gender equality. I argue that the women's rights (or gender rights) claims made in Muslim communities must take religious, social and economic relations into consideration. Attempts at understanding the conceptualisation of women's rights in Muslim communities must therefore be a holistic analysis which resists the essentialising and imposing of predetermined interests on actors. While agreeing that Islamic textual sources are flexible, I locate my idea on the contention that changing them is not the only way to reconcile the Women's Convention with Malaysian Islamic-based laws. In other words, even though textual sources may be reinterpreted, they do not necessarily have to be subjected to change to fulfil current demands on rights.

Analysing the extent of consistencies of Malaysian laws on Muslim women's rights with the Women's Convention is important to ascertain whether the Malaysian domestic laws provide parallel legal protection for Muslim women in Malaysia as the Women's Convention does for women globally. It is significant to show that, in Islam, the concept of women's rights as understood in the modern paradigm is not a foreign notion. This research justifies the need for reservation entered upon provisions related to marriage and family relations of Muslims to ensure gender equality based on the interpretation of equality in Islam, the Women's Convention and the Malaysian local context.

1.2 HARMONISATION: FORM OR SUBSTANCE?

In order to draw out the harmonisation of Malaysian laws with the Women's Convention, I explore the meaning of harmonisation as that term has been used in relation to laws. Generally, in my research, I describe harmonisation as an engagement or method of complementing which brings about an agreement and reconciliation. An attempt at harmonising the different concepts to achieve or develop *'common universal understanding that ensures the full guarantee of human rights for every human being everywhere'* is still a demanding enterprise given the complexity and diversity of human society (Baderin, 2003: 2). The Former Chief Justice of Malaysia, Dato' Abdul Hamid Mohamad, revealed in his paper on *'Harmonisation of Shariah and Civil Law in Malaysia: Present Reality and Future Actions'* that to harmonise laws, attention must be paid to the substance of the laws, rather than just the form. In other words, different laws or legal systems might be harmonised if they operate coherently and do not generate inconsistent outcomes. Islamic criminal laws in Malaysia, for instance, might be harmonious with civil criminal laws even though the two systems introduce different kinds of punishment to prevent criminal activities, since they are both protecting society's peace and harmony[16]. Dato' Abdul Hamid's conception of harmonisation is particularly helpful in developing my argument in this thesis in the context of ensuring consistent principles of laws rather than their provisions.

The most important notion is that the principles of justice and fairness should be the basis for any laws to achieve harmony (Abdul Rashid, 2003: 3). In a theory of justice, Rawls

[16] See detailed discussion on harmonisation of Islamic and civil criminal laws in Malaysia in Awang, Abdul Rahman and Mohamad Yunus, Mohamad Ismail. 2003. 'Harmonisation of *Shariah* and Civil Law: A Special Reference to the Concept of Punishment'. Paper presented at the *International Conference on Harmonisation of Shariah and Law.* 20-21 October. Malaysia: Kuala Lumpur

(1972: 4) emphasised justice as the first value of social institutions, which provides a way of assigning rights and duties and defines the appropriate distribution of the benefits and burdens in the basic institutions of society. In Islam, too, both textual sources of *Shariah*, which are the *Quran* and the Prophetic tradition, have stressed the adherence to justice and fairness (Bakar, 2003: 4). This means that, to be harmonised, laws do not necessarily have to be uniform, a point addressed by Sir Anthony Mason, the Former Chief Justice of the High Court of Australia: '*harmonisation of rules does not necessarily mean uniformity of rules'* (Mason, 1999: 3). Mason explained that the most common method of harmonising rules is by drafting an international treaty (convention) at a diplomatic conference. The convention is then opened to accession by nation states, though accession may be subject to reservations. There are two ways of harmonising rules. First, as Mason explains, one can harmonise by changing the treaty. Second, one can harmonise by interpreting rules that appear to conflict in light of each other. This second form of harmonisation usually requires appealing to the values which inform the rules.

In this study, I explicitly conceptualise harmonisation as a compatible objective or outcome which implies a high level of mutuality between both legal instruments, regardless of different perspectives and viewpoints. My approach adopts the equality principles of the Women's Convention and compares it with the Malaysian understanding of equality. Even though the Women's Convention and Malaysian laws on Muslim women's rights might be different on the surface, I will show that they share similar principles of equality, which could implies a high level of mutuality between both legal instruments. In constructing harmonisation between *Shariah* and other laws, identification of the existing laws which are said to be contrary to *Shariah* must be carried out first (Mohamad, 2003: 9). By observing contrasting provisions stipulated in the international

and Islamic declarations of human rights and women's rights, I am able to ascertain whether the differences could be harmonised based on their interpretations and principles. This is important for the study of Muslim women's rights in the Women's Convention and Malaysian laws, prior to establishing commonalities between the two legal dogmas.

1.2.1 Constructing Harmonisation between the Women's Convention and the Malaysian Laws on Muslim Women's Rights: A Literature Review

Throughout my study of various literatures on gender and human rights in Islam and international law[17], I have discovered that some of these have been confined to case-studies conducted in Islamic countries such as Pakistan[18] and Bangladesh[19] and secular countries such as India[20]. To date, there has been no research exploring the possibility of

[17] Some works on women's rights in Islam and international law include Venkatraman, Bharati Anandhi. 1995. 'Islamic States and the United Nation Convention on the Elimination of All Forms of Discrimination against Women: Are the *Shariah* and the Convention Compatible?' in the *American University Law Review*. Vol. 44; Ali, Shaheen Sardar. 1998. *Equal before Allah, Unequal before Men? Negotiating Gender Hierarchies in Islam and International Law*. Ph.D Thesis. University of Hull, UK; Ali, Shaheen Sardar. 2000. 'Development of the International Norm of Non-Discrimination on the Basis of Sex: An Evaluation of Women's Human Rights in Islam and International Law' in A. Stewart (eds.) *Gender, Law and Social Justice*. London: Blackstone; Hamid, Abdul Ghafur. 2006. 'Reservations to CEDAW and the Implementation of Islamic Family Law: Issues and Challenges' in *Asian Journal of International Law. Vol. 1. No. 2*; Mayer, Elizabeth A. 2006. 'Islam in the Context of the Contentious Politics of Women's Rights in Contemporary Middle Eastern and North African Societies'. Draft paper presented at the *Meeting of International Experts on Human Rights in Islam*. 17 May. Kuala Lumpur: Malaysia; Musawah. 2011. *CEDAW and Muslim Family Laws: In Search of Common Ground*. Sisters in Islam

[18] See, for example Ali, Shaheen Sardar. 1995. *A Comparative Study of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Islamic Law and the Laws of Pakistan.* Peshawar: Shaheen Printing Press; Ali, Shaheen Sardar. 1997. 'A Critical Review of Family Laws in Pakistan: A Women's Perspective' in R. Mehdi and F. Shaheed (eds.) *Women Law in Legal Education and Practice in Pakistan.* Copenhagen: New Social Science Monographs; Ali, Shahen Sardar. 2000. *Genders and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* The Hague: Kluwer Law International; Ihsan, Fatimah and Zaidi, Yasmin. 2006. 'The Interplay of CEDAW, National Laws and Customary Practices in Pakistan: A Literature Review' in Ali, Shahen Sardar (ed.). *Conceptualising Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of CEDAW in Bangladesh, India and Pakistan.* UNIFEM

[19] See, for example, Islam, Mahmuda. 2006. 'CEDAW and Bangladesh: A Study to Explore the Possibilities of Full Implementation of CEDAW in Bangladesh' in Ali, Shahen Sardar (ed.). *Conceptualising Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of CEDAW in Bangladesh, India and Pakistan.* UNIFEM

[20] See, for example Hasan, Z and Menon, R. 2004. *Unequal Citizens: A Study of Muslim Women in India*, New Delhi: Oxford University Press; Ali, Shahen Sardar (ed.). 2006. *Conceptualising Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of CEDAW in Bangladesh, India and Pakistan.* UNIFEM; Singh, Kirti, Musharraf, Sumaiya and Mollah, Maimoona. 2006. 'Inching Towards Equality: Application of CEDAW and Muslim Personal Law in India' in Ali, Shahen Sardar (ed.).

harmonising the Malaysian Muslim women's rights laws with the Women's Convention. The existing literature has concentrated on areas of discrimination and its proposed solution which related to the denial of women's equal rights with men due to several reservations entered upon the Women's Convention by the Government of Malaysia. However, there was a study on the compatibility of the general *Shariah* with the Women's Convention by Venkatraman in 1995. In his research on *'Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination against Women: Are the Shariah and the Convention Compatible?'*, Venkatraman discovered that *Shariah* practised in majority Muslim states and the Women's Convention were not compatible and claimed that Islamic countries have entered into substantive reservations to the Women's Convention on the grounds that *'religion only served to perpetuate the stereotype that Islam institutionally subjugates women'* (Venkatraman, 1995: 2011). This application of Islamic principles, according to Venkatraman, overshadowed the quality of Islam. Venkatraman suggested that reserving countries should work towards compliance with the Women's Convention. On the other hand, the Convention must also divest itself of *'culturally insensitive or unworkable language'*. However, this research is specific to the practice of *Shariah* in Morocco, Tunisia, Egypt and Pakistan.

Hamid (2006: 154-155), in his paper on '*Reservations to CEDAW*[21] *and the Implementation of Islamic Family Law: Issues and Challenges'*, has drawn a conclusion that constructing harmonisation of the Women's Convention with *Shariah* is totally dependent on the extent to which the Women's Convention can accommodate the *Shariah* applied in Muslim countries and to what extent Muslim countries are prepared to accept the liberal interpretation of the Islamic family law. This means that the difficulty of

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[21] The term *'CEDAW'* applied in this paper was referred to the Women's Convention

harmonising the two could be solved either by withdrawing all reservations to show the acceptance of the liberal interpretation of Islamic textual sources or by modifying the Women's Convention so that it complied with Islamic principles. Hamid did not pay attention to the principle of the Women's Convention; he only looked at the extent of the reservations entered, and whether or not they contradict the object and purpose of the Convention. Similar to Hamid's finding, Islam (2006), who analysed the possibilities of full implementation of the Women's Convention in Bangladesh, argued that withdrawal of reservations could create an *'enabling environment'* of possibilities of full ratification of the Convention by the Government of Bangladesh.

I trace that the findings accorded by Venkatraman, Hamid and Islam were based on their research methodology which is rooted in the provision per se; however, their work lacks an analysis of the meanings and principles of equality in both the international and the states' local contexts, which might be able to harmonise the differences. My argument is that neither of the solutions would be the better choice, since harmonisation can be achieved not necessarily by forcing one party to accommodate another, or vice versa, but by synchronising both of them to achieve one consensus standard. This could be done by matching up their concepts, nature or principles even though they provisionally differ.

Conversely, Ali (2000), in her research on '*Gender and Human Rights in Islam and International Law'* which used the example of Pakistan to demonstrate the discrepancy between theory and practice of Islam and its laws, has drawn a conclusion that women's rights in Islam could be brought into line with the Women's Convention. Ali (2006: 277) wrote: *'women's rights in Islam are not entirely irreconcilable with current provision of international human rights instruments emanating from the UN'.* However, according to

Ali (1998 and 2000), the monumental entity of the Islamic legal tradition must be fully utilised. Therefore, the textual foundations could be reinterpreted to accommodate current needs and standards and remain up to date (Zafrullah Khan, 1967: 14). The divergence of gender and human rights in Islam and international laws, according to Ali (2006: 281), pertains to the privileges of men in family matters concerning the rights to divorce and polygamous marriage and the right to chastise a disobedient wife. However, Ali has marked that these men's privileges could be easily taken away from them because the rights are dependent on generous limitation. Interestingly, apart from the idea that the struggle for equality within Islam needs an in-built dynamism in the basic sources of *Shariah* to evolve an interpretation of the *Quran* and the Prophetic tradition compatible with gender equality, Ali has contributed the idea that the struggle for equality in Muslim societies must come from within those societies. However, I argue that, without understanding the notion and principles of equality according to the Women's Convention and comparing its conception with any particular local context or societies to explore their divergence or convergence, the endeavour for equality would be meaningless, because, as stressed by Abdul Aziz (2005: 3), equality is a value system regulated by a society.

Mayer (2006), who has compared the perspectives of different Muslim countries based on political make-up in terms of national interpretations of how Muslim women's rights are translated into government policies, seems to support the earlier argument that Islamic textual sources are flexible. She expressed various reservations about the process of interpreting the Islamic sources undertaken when the Muslim countries entered into the Women's Convention. Mayer has noted the direction of reassertion of Muslim support for women's rights, for instance political change in Morocco which proposed legal reform to meet the standard of international human rights laws, treating the values of international

human rights and Islam as essentially harmonious. This argument was based on the fact that Morocco had withdrawn all the reservations entered earlier.

I have noticed that the similarity between studies on Malaysia and those on other Muslim countries such as Pakistan and Bangladesh concerns the legal systems, which Ali (2006: 267) described as three fragile layers that regulate Muslim women domestically. The first layer is the Federal Constitution, followed by state enactments and, thirdly, custom, culture and tradition. The difference, which I categorised into three aspects, is that, firstly, while Ali (2006: 267) has found that these layers of legal systems undermine women in Pakistan and Bangladesh, Malaysia has proved otherwise. In my analysis of Muslim women's rights under the Women's Convention and Malaysian laws and policies in Chapter Four, Chapter Five and Chapter Six, I trace that the Federal Constitution, state enactments and custom are not the instruments being used by the Government of Malaysia to undermine Muslim women. The Malaysian Federal Constitution formally guarantees equal rights and freedom irrespective of gender, whereas Acts, Enactments and Government policies guarantee the substantive equality of women. Not only have these policies and appropriate measures, including administrative decisions and programmes, empowered Muslim women by giving them equal outcomes for justice and dignity, but custom, culture and tradition, which are incorporated in Islamic Family Law Enactments of all states, also empower women, for instance the right of a wife to jointly acquire property.

Secondly, while a common finding in Pakistan and Bangladesh is the states' distance from the familial sphere of life (Ali, 2006: 268), I argue in Chapters Five and Six that, in Malaysia, the state intervenes in private spheres, notably passing laws which prohibit domestic violence. For instance, the Domestic Violence Act (Act 521) (DVA) was

enforced in 1994 to provide protection for battered wives and other victims of domestic violence[22] (Official Portals of the Attorney General's Chambers of Malaysia). Finally, let us consider the progressive interpretation of Islamic textual sources. I note that, in regard to the appointment of Muslim women as *Shariah* Court Judges, the prohibition of forced marriage, the age limit to enter into marriage contract and women's rights to dissolve marriage as explored in Chapter Six, Malaysia favours *Ijtihad*[23], as stressed by Ismail, Abd Rahim and Mohd Dahlal, (2009). Pakistan also gives preference to *Ijtihad,* although Bangladesh does not favour *Ijtihad* (Ali, 2006: 269-270).

Kamaruddin (2006), who studied Muslim women's rights laws in Malaysia and the Women's Convention from an Islamic perspective, did not thoroughly analyse the standard of legal protection and government policies to compare them with the international standard. Therefore, the purpose of ascertaining the level of implementation of the international convention in the context of Muslim society in Malaysia seemed unachievable. Kamaruddin has concluded that, as a result of the amendment of Article 8 (2) of the Federal Constitution in 2001, '*all existing laws are being reviewed to ensure gender equality'* (Kamaruddin, 2006: 12). However, until 2010, few legal efforts had been made to ensure gender equality. Regarding the issue of harmonisation of the Malaysian laws on Muslim women's rights with the Women's Convention, Kamaruddin considered that legislation and amendment of various laws synchronises Malaysian laws with the

[22] According to Article 2 of the Malaysian Domestic Violence Act 1994 (Act 521), domestic violence refers to the commission of any of the following acts: *'(a) wilfully or knowingly placing or attempting to place, the victim in fear of physical injury (b) causing physical injury to the victim by such act which is known or ought to have been known would result in injury (c) compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain (d) confining or detaining the victim against her will or (e) causing mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim'*

[23] Literally, the term *'ijtihad'* implies striving hard or strenuousness, but technically it means exercising independent juristic reasoning to provide answers when the Quran and Prophetic tradition are silent on a particular subject. See Ali, Shaheen Sardar. (ed.). 2006. *Conceptualising Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of CEDAW in Bangladesh, India and Pakistan.* UNIFEM. p. 9

Women's Convention, at the same time defending Malaysia's reservations[24] to the Articles that are in consonance with *Shariah* practised in Malaysia (Kamaruddin, 2006: 26). She proposed further examination of the reservations premised on *Shariah* to ascertain the rationale behind them and suggested comparative studies on other Muslim countries which do not enter reservation to learn the best practice of the countries concerned.

While examining the Malaysian Government's sensitivity to gender equality, Siraj (2009) suggested that many amendments made to the Islamic family laws so far have guaranteed equal rights for Muslim women and men and are in line with the Women's Convention's requirement for gender equality (Siraj, 2009: 9). I, however, am dissatisfied with this opinion, as Siraj did not set out in detail which amendments she was referring to (or all of them) and did not justify why Islamic-based Malaysian laws need to be amended to render them fully harmonised with the Women's Convention and not otherwise. On the other hand, I agree with Siraj that proper understanding by the authorities of the sources of *Shariah* is needed to justify the view that Islam promotes substantive equality between the sexes (Siraj, 2009: 15).

Recently, Musawah (2011) has searched for common ground between the Women's Convention and Islamic family laws by exploring how Muslim countries and countries with significant Muslim minorities engaged with the Convention's process and how the CEDAW addressed issues of Islamic family laws and practices. Musawah reported on research into State Parties' justification for their failure to implement the Women's Convention with regard to family laws and practices. The research reviewed 44 countries with Muslim majorities or significant Muslim minority populations that reported to the

[24] At that time, Malaysia had yet to withdraw Article 5 (a), Article 7 (b) and Article 16 (2)

CEDAW from 2005 to 2010, including Malaysia. Musawah and Venkatraman (1995) note that many State Parties justified their law and practices by claiming that they are based on unchangeable Islamic textual sources. On the other hand, Musawah recognised the compatibility between the concepts of equality and justice in Islam and those of the Women's Convention (Musawah, 2011: 1). Interestingly, I trace that Musawah was intending to rethink the relationships between equality, human rights, justice and Islam and was attempting to open a new, constructive dialogue where religion is no longer an obstacle to gender equality.

However, in Musawah's idea for a proposal to promote in-depth engagement in search of common ground between the Women's Convention and the Muslim family laws, no recommendations were made to demonstrably understand the meanings and principles of equality from the Women's Convention's perspective and compare them with the understanding and practice of equality in Muslim countries even though, as mentioned earlier by Ali (2006) and Abdul Aziz (2005), the struggle for equality must come from within those societies. In the absence of detailed historical knowledge of social conditions of each country, Sally Engle Merry (2006: 132) has claimed that the CEDAW treats all countries more or less the same, thus creating a fundamental dilemma for human rights practice. In analysing the *'disjunctures between global law and local justice'* and taking India and Fiji as case-studies, Merry found that the different global visions of justice and specific visions in local contexts cannot be reconciled unless the CEDAW recognises the alternative conception of social justice and accepts ways in which local arrangements can promote human rights, particularly those relating to gender equality rights. I find that Merry's vision of reconciliation is parallel with Mohamad's (2008: 6) idea for harmonisation of laws; i.e., to construct harmonisation, uniformity of legal substance is

more important than similarity of form. Having said that, I argue in my thesis that understanding equality and how it works in upholding justice for women and men from the Women's Convention's perspective and in Malaysian laws on Muslim women's rights might be one way of accommodating the tensions between global and local justice for women in Malaysia.

1.3 THEORY OF RIGHTS AND EQUALITY IN THE JURISDICTION AND THE UDHR, UIDHR AND CDHRI

In view of the endeavour to explore the inconsistencies of the Malaysian laws on Muslim women's rights with the Women's Convention and how to harmonise them, I engage in a conceptual analysis of rights in international and Islamic human rights jurisprudences in Chapter Two and apply this analytical discourse to explore the ideals of gender equality and Muslim women's rights in Malaysia in this thesis. I analyse primary and secondary documents and materials. I apply the introductory concept of *'rights'* from Mohammad (2003) to argue that the notion of *'rights'* is not a foreign concept in the Islamic tradition. Within the analysis of whether rights in Islam are harmonious with rights derived from Western thought, I draw upon Lacey's (2004) and Mohammad's (2003) ideas of rights to argue that international and Islamic human rights jurisprudences share similar meanings and principles of rights.

I study feminist critiques of the theory of rights in international jurisprudence in an attempt to explore a wider understanding of this concept from women's perspective and how their critiques informed the Women's Convention. Through my analysis of the image of rights' subject, I argue that the framework of non-absolute individual entitlements constructs

values of interest, rights as neutral product and wider coverage of rights, which limits the gendered nature of rights. I argue that the concept of rights is not a gendered product biased in favour of men or only covering the public sphere if the idea of rights is constructed to consider the collective interest which stresses the correlative relationship between rights and duties and non-absolute rights. This is to ensure that the rights of all human beings are equally distributed.

I explore how the UDHR, UIDHR and CDHRI address rights of human beings in an attempt to grasp an idea that reconciles international and Islamic human rights instruments on the notion of rights. The analysis method adopted in this study aimed at understanding the UDHR, UIDHR and CDHRI more clearly according to the UN reports, written books, journal articles, paper presentations and other written sources by international and Western scholars and, in some cases, other scholars whose works were related to this study. My intention is to critically review existing formulations of rights in the Western-based and Islamic-based instruments as they have important implications when applied to Muslim women's human rights in Malaysia. I argue that both jurisprudences present rights as an instrument for equality among human beings.

For that reason, I argue that the notion of equality of rights which considers substantive equality rather than merely formal equality must be properly understood and applied to ensure that all human beings are guaranteed equal access to justice. In Chapter Three, I analyse the idea of equality which will be employed in this thesis. I trace whether Islamic human rights jurisprudence shares similar meanings and principles of equality with feminists' standpoint. I argue that both traditions' notion of equality, that equality should not be reduced to sameness (Fletcher, 2002) is harmonious. The basic premise of the

argument is based on the similar discourses of formal and substantive equality, and that similarity of legal treatment does not necessarily denote equality: if a woman is in a different position from a man to begin with, then treating them with total similarity will simply perpetuate the differences between them. Therefore, I argue that an extended equality model which focuses on the subordinated group is rather significant in this analysis of gender equality. The central inquest of this model is into the *'disadvantage'*, i.e. whether the laws contribute to the subordination of women (disadvantaged group).

Anirudhan and Siva (2007) demonstrated that gender discrimination arose from the inequalities faced by women by reason of their gender. That is why Anirudhan and Siva proposed gender-sensitivity, abolishing all discriminatory practices against women by guaranteeing equal access and equal opportunities on the political, social, economic, civil and cultural fronts and recognising physical, biological and physiological differences between women and men to overcome this problem. Here, Anirudhan and Siva also stressed both formal and substantive equality, considering that equality could also be achieved by treating women and men according to their differences, not just their sameness. This is similar to what Zaitoon Othman, the President of the Malaysian Muslim Lawyers' Association, pointed out earlier, i.e. that women and men have different roles and responsibilities, and their entitlements in laws reflect that. Because Islam treats women and men differently but equally, Zaitoon admitted that, *'in some ways, Islamic law is even more advantageous than civil law'* (Hong, 2006).

Through my focus on the application of gender equality in the UDHR, UIDHR and CDHRI, I argue that the Western-based and Islamic-based Declarations are congruent in privileging the male as a legal subject, but they differ pertaining to the entitlements to

rights for women and men in marriage and family relations. I explore how feminists' standpoint on equality has informed the Women's Convention and analyse whether the application of equality in the UIDHR and CDHRI is harmonious with the principle of equality under the Women's Convention. I argue that the application of equality in the sense that *'a situation is unequal if like situations are treated differently or different situations are treated similarly'* (Smith, 2003: 185) in the UIDHR and CDHRI is concordant with the principle of equality under the Women's Convention. Based on the conception that different entitlements to rights for women and men might result in equal dignity and justice, I define equality, which refers to formal and substantive equality, to mean *'equal in accessing formal opportunity to achieve fundamental interest in living a life for individual and community and equal in securing and achieving the greatest happiness in life for individual and community ending up with equal dignity and justice for all as the outcome',* not '*putting things in the same place'* or '*giving something of the same amount to different people'*. Because the above-mentioned notion of rights and principles of gender equality in Islam underpinning the UIDHR and CDHRI is reconcilable with the Women's Convention, one might ask whether the equality rights of Muslim women in Malaysia are concordant with the Women's Convention.

1.4 POSITIVE ATTENTION TO WOMEN'S RIGHTS IN MALAYSIA[25]

In this section, I introduce my study on the positive attention to women's rights in Malaysia. Feminists' writings are relevant and applicable in Malaysia (Ahmad and Baljit,

[25] Part of this Section is published in the International Journal of Business, Humanities and Technology. See Nik Saleh, Nik Salida Suhaila. 2012. 'A Brief Study on the Positive Attentions to Muslim Women's Rights in Malaysia' in *International Journal of Business, Humanities and Technology.* Vol. 2. No. 2. pp. 163-172

1989; Stivens, 2003: 128-130); however, even though the idiom *'feminism*[26]*'* is not necessarily synonymous with '*Western Feminism*[27]*'*, there has been a prevalent avoidance of the term *'feminism'* (Mohamad and Koon, 1994). In a study of inter-related historical, legal and practical issues regarding gender and justice from the transmission of Egyptian reformism to Malaysia through the Azharites[28], I have found not a single instance of the word *'feminism'* being used. The reason for this was that the influence of Western Women's Liberation which was synonymous with '*Western Feminism'* has developed Malaysian women's movements which carried a similar message and theme to Western's women's rights (Abd. Rahim, 2001: 7), which was not totally acceptable in the Malaysian Muslim local context. Stivens (2003: 129) has also found several reasons for this distancing, which vary from the avoidance of a '*Western'* agenda to libertarianism.

Moreover, Muslims regarded the feminist approach as distorting Islam. According to Ahmad (2007: 4), a Malaysian feminist and lawyer, many Muslims regarded the feminist approach as *'an attempt to discredit and misrepresent Islam or that it stands for enmity between women and men'*. Feminists' idea of gender equality has been mistakenly understood as trying to develop prejudice among women and men (Abd. Rashid, 1998: 10-11). That is why women's movements in Malaysia were more comfortable using the word *'womanism'* instead of feminism. This is supported by Ng, Mohamad and Hui's (2006) study on women's movements in Malaysia in which they explained the reasons for the inability of feminism to play a key role in reforming society in Malaysia. According to

[26] *'Feminism'* refers to the struggles of the women's movement in Europe, United States and the colonised countries in the 19th and early 20th centuries. See Ng, Cecilia, Mohammad, Maznah and Hui, Tan Beng. 2006. *Feminism and the Women's Movement in Malaysia: An Unsung (R) evolution.* London and New York: Routledge

[27] The concept of feminism was neither originated, imported nor imposed by the West on the Third World Countries, as debates on women's rights were held as early as the 18th century in China and later in India, Iran, Turkey, Egypt, Japan and Malaysia. See Jayawardeena, Kumari. 1986. *Feminism and Nationalism in the Third World*. London: Zed Press

[28] See Noor, Zanariah. 2007. 'Gender Justice and Islamic Family Law Reform in Malaysia' in *Kajian Malaysia*. Jil. XXV. No. 2

them, one of the reasons for the distancing from feminism was that feminist movements in Malaysia did not engage with Islam and Islamic intellectuals regarding women's rights until the late 1980s. Also, feminist organisations did not incorporate the Islamic paradigm in their early incarnations. In fact, until the early 1990s, feminist projects remained unapproachable and untouched by Muslim professionals. This cannot be totally ignored as there are bases and reasons why the public at large reject the notions of feminism.

Therefore, as rightly opined by Ong (1996), the strategy of pursuing women's rights through a process of cultural dialogue is one of the best ways of working in the local context. Margot Badran wrote in 2002 that feminisms are produced in particular places and are articulated in local terms. According to Badran, feminisms are scattered globally and the claim that feminism is Western is essentialist in nature. Martha Nussbaum (2000: 7) has correctly proposed a course of feminist practice that is *'strongly universal, committed to cross-cultural norms of justice, equality, and rights, and at the same time sensitive to local particularity, and to the many ways in which circumstances shape not only options but also beliefs and practice,*', similar to Venkatraman's (1995) idea that I mentioned earlier. Othman (1998: 176) stressed further that to even define Malaysian Muslim women's rights and freedom, one needs to consider a cultural and political battlefield of modern Islamisation and cultural relativism. As Malaysia has 14 states with different administrations of Islamic family laws, thus, not only cross-cultural approaches, but, state's inter-cultural engagement with different Islamic jurisprudential views as a means of addressing some of the areas of tensions on Muslim women's rights in Malaysia is essential.

I trace that Malaysian women scholar activists have progressively explored the relationships between feminist theory and practice. There was only one publication on feminism and women's rights before 1970, but this figure increased to three between 1970 and 1980 and eight between 1981 and 1989 (Ngah, 2007: 388). Ngah found that higher awareness of women's rights in the post-1990s era resulted in a huge body of writings on this subject, with 81 publications between 1990 and 2004, which was equivalent to 2.2 per cent of the total publication productivity between 1970 and 2004. Even though studies on equality only started after 1990, women's rights and feminism have been the subjects of research since 1970 (Ngah, 2008: 7). The range of literature on women's studies (Muslim and non-Muslim) in Malaysia denotes that women's situation in Malaysia is receiving active and positive attention from scholars and women's movements, to study their rights and protection. However, there is a lack of research about the legal protection of women in Malaysia apart from a few studies on family, criminal and employment laws[29].

1.4.1 Legal Protection of Women in Malaysia: New Law for Equality?

I trace that interest in the study of equality and the Women's Convention increased the number of publications only after 2005[30]. In Malaysia, until 2005, while formal equality or

[29] There were 76 publications on the legal status of women in the family, four publications on criminal laws and ten publications on employment laws between 1970 and 2004 in Malaysia. See Ngah, Zainab, A. 2008. 'Growth and Pattern of Women's Studies in Malaysia as Reflected by Generated Literature' in *Library and Information Science Research Electronic Journal.* Vol. 18. Issue 2

[30] See for example, Abdul Aziz, Zarizana. 2005. 'Developing the Doctrine of Equality-Sameness and Differences'. Paper presented at the *13th Malaysian Law Conference*. Kuala Lumpur: Malaysia; Ahmad, Salbiah. 2005. 'Gender Equality under Article 8: Human Rights, Islam and Feminisms'. Paper presented at the *13th Malaysian Law Conference*. Malaysia: Kuala Lumpur. Kamaruddin, Zaleha. 2006. 'Towards Harmonisation of the International Human Rights of Women in Malaysia'. Draft paper presented at the *Meeting of International Experts on Human Rights in Islam*. Kuala Lumpur; Archer, Brad. 2007. 'Family Law Reform and the Feminist Debate: Actually Existing Islamic Feminism in the Maghreb and Malaysia' in *Journal of International Women's Studies*. Vol. 8; Abu Bakar, Zainur Rijal. 2008. *The Reservations and Declarations on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).* Persatuan Peguam Syarie Malaysia; Abdul Aziz, Zarizana. 2008. 'Mechanisms to Promote Gender Equality in Malaysia: The Need for Legislation' in *WLUML. Dossier 29*; Siraj, Mehrun. 2009. 'Human Rights in Malaysia: The Last 10 Years'. Paper presented at the *Human Rights in Malaysia: The Last 10 Years Conference* in conjunction with Malaysian Human Rights Day 2009. 9 September. Kuala Lumpur, Malaysia

de jure equality could be created by the laws and constitutional reforms, the issue of *de facto* equality or substantive rights still lagged behind (Bhatt, 2005) among women's movements and, according to Ahmad (2005), remained unexplored. Moreover, the specific content of *'equality'* is not properly defined in the Malaysian Federal Constitution (Ahmad, 2005: 4) except for what has been understood from Article 8 (1) of the Federal Constitution that *'all persons are equal before the law and entitled to equal protection of the law'*. From the feminist viewpoint as discussed earlier, the legal response to gender discrimination has to promote substantive equality (Amirthalingam, 2003: 7).

Later, Abdul Aziz (2008), who has taken a close look at the interpretation, application and adjudication of gender equality in Malaysia, offered a view of equality that is compatible with Islamic ideas and the Women's Convention's principle on equality; she stated that substantive equality is as important as formal equality (Abdul Aziz, 2005: 2; 2008: 80-81), the principle of equality which I shall draw upon in my analysis of equality as adopted in Malaysia in Chapter Four. Abdul Aziz explained that, '*in addressing the issue of equality, the Women's Convention firstly addressed formal legal equality by requiring equal treatment of men and women. However, if equal treatment yields disparate results, then the law should look at ensuring equality of opportunity and removing barriers to women's advancement'* (Abdul Aziz, 2008: 81).

Based on this conception of equality, my central argument in this research is that, according to Islam and the Women's Convention, gender equality laws might be the first recourse to ensure equal treatment of women and men; however, if equal treatment brings unequal results, then the laws should play their role to ensure equal outcomes and remove barriers to the advancement of either women or men. I consider substantive equality and

the accommodation of differences to be just as important as formal equality and the recognition of sameness. Substantive equality pertains to all rights of Malaysian Muslim women, especially rights to enter into marriage, maintenance, polygamous marriage, dissolution of marriage, guardianship of children and rights to choose a family name, a profession and an occupation will be explored in Chapter Six.

1.5 OUTLINE OF CHAPTERS

Chapter One introduces this research as based upon the critiques of the Government of Malaysia's standpoint in reserving Article 16 (1) (a), (c), (f) and (g) of the Women's Convention, which is related to marriage and family relations of Muslims. The discussion indicates how understanding the principle of equality underpinning the Women's Convention and Malaysian laws on Muslim women's rights could be a basis for constructing harmonisation between the Women's Convention and Malaysian laws. I provide the general themes and background to the discussion, as well as the issues and the conceptual framework of the study. I explore the method of research regarding the harmonisation of laws and indicate the importance of synchronising the substance of the laws, rather than just the form. I highlight the purpose, literature review, objective, significance, scope, outline and methodology of the research.

Chapter Two discusses the jurisdictional background of rights in international and Islamic human rights jurisprudences and deliberates conceptual analysis of rights in the international and Islamic human rights instruments underpinned by the UDHR, UIDHR and CDHRI. I discuss feminist viewpoints of rights in an attempt to explore a wider understanding of this concept from women's perspective and how their critiques informed

the Women's Convention. The Chapter aims to critically review existing formulations of rights in these diverse traditions to prove that Islamic human rights jurisprudence and feminist discourse share similar meanings and principles of rights. I trace how the concept of rights is not a gendered product biased in favour of men or only covering the public sphere if the idea of rights is constructed to consider the collective interest which stresses the correlative relationship between rights and duties and non-absolute rights. I explore how the UDHR, UIDHR and CDHRI address rights of human beings in an attempt to grasp an idea that might reconcile international and Islamic human rights legal instruments on the notion of rights.

In Chapter Three I examine the jurisdictional background of equality in Islamic human rights and feminist debates and reflect on the conceptual analysis of gender equality in the international and Islamic human rights instruments underpinned by the UDHR, UIDHR, CDHRI and the Women's Convention. I aim to review existing formulations of the term *'equality'* in these diverse traditions and to trace how the notion of equality is shared in the international, Islamic human rights and feminist points of view. I argue that similarity of legal treatment does not necessarily denote equality because, if a woman occupies a different position from a man to begin with, treating them with total similarity will simply perpetuate the differences between them. I then trace how an extended equality model which focuses on the subordinated group is rather significant in this analysis of gender equality. The central inquest of this model is into the *'disadvantage'*, and whether the law contributes to the subordination of women (disadvantaged group). I consider how the UIDHR and CDHRI are irreconcilable with the UDHR pertaining to the different entitlements to rights in marriage and family relations between Muslim women and men. I then trace how the Women's Convention addresses gender equality. I argue that, even

though the UIDHR and CDHRI are not entirely harmonious with the UDHR on the application of equality (that equality should not be reduced to sameness), the UIDHR and CDHRI are reconcilable with the Women's Convention.

I consider the historical background of the Malaysian legal system and Malaysian laws on human rights in Chapter Four. I trace how Islamic textual sources have been part of the Malaysian legal system. I present an analysis of equality in Malaysia, as provided under the Federal Constitution and reinforced by statutes and Government policies, to determine a clear method of analysis in exploring whether Malaysian laws on Muslim women's rights can be harmonised with the Women's Convention. I examine whether woman in Malaysia is a legal subject. I explore the development of Muslim women's rights in Malaysia in an attempt to trace whether Malaysia has been committed to gender equality as informed by global standards underpinning the Women's Convention. I argue that the interpretation of *'equality'* is a key to construct the possibilities of harmonisation between the Malaysian laws on Muslim women's rights and the Women's Convention. I configure that Malaysian laws provide and secure equal dignity and justice for Muslim women's rights and that equality is not only formal but also substantive. I examine how Muslim women's disadvantages are taken into consideration while securing their equal dignity and justice.

Next, in Chapter Five, I consider the extent to which the Government of Malaysian takes into consideration or responds to the concluding comments made against Malaysia by the CEDAW in its Thirty-Fifth Session in New York. I examine whether Malaysia is taking all appropriate measures, including laws, policies and administrative decisions and programmes, to uphold equality for women. The main documents related to the CEDAW processes were studied for approaches and arguments used by the three main entities

involved in the reporting process: the CEDAW, the Government of Malaysia and non-governmental organisations. The documents studied were as follows: general recommendations of the CEDAW; Malaysia's introductory statement to the CEDAW; Malaysia's combined initial and second periodic reports; the CEDAW's list of issues and questions and Malaysia's responses to the list; the summary records of the constructive dialogue between the CEDAW and Malaysia; the CEDAW's concluding observations; and the shadow report and the oral statements of non-governmental organisations and women's groups. This Chapter also adopted an analysis of the fundamental liberties of Muslim women in Malaysia by virtue of its Constitution and statutes and women's rights in Islam according to Islamic Family Law Enactments and the written sources of respected scholars. I argue that the Government of Malaysia has taken positive steps to empower Muslim women, and has legislated and emended laws to secure gender equality. However, to achieve congruity with the tenet of the Women's Convention, there are a few areas that need specific improvement for the betterment of the laws, policies, administrative decisions and programmes in securing Muslim women's equality rights.

Furthermore, the Malaysian government reserved Article 16 (1) (a), (c), (f) and (g) pertaining to different entitlements to rights for Muslim women and men in marriage and family relations in order to ensure the prevalence of *Shariah* practised in Malaysia. But does this render Malaysian Muslim women's rights laws irreconcilable with the Women's Convention? In Chapter Six, I analyse whether, in the Malaysian *Shariah* local context, the reservation of Article 16 (1) (a), (c), (f) and (g) goes against the object and purpose of the Women's Convention. I argue that it is difficult to determine whether Malaysia's reservations are incompatible with the object and purpose of the Convention because there

is no single objective criterion to determine the matter[31]. I argue that justice for women must not only be secured by laws, but must also be seen in equality of outcome. I argue that the reservation pertaining to marriage and family relations in Malaysia will not render Muslim women's rights laws in Malaysia incompatible with the Women's Convention provided that a few areas which treat women *'less favourably'* are improved.

In the final Chapter, I conclude by explaining how an understanding of the substance and principle of gender equality may contribute to the constructive harmonisation between *'local and international'* and *'Western-based and Islamic-based'* legal standards of Muslim women's rights protection. I suggest that the notion of equality must be understood from its substance, not its form. I propose that the meaning, concept and principle of equality according to the Women's Convention and *Shariah* practised in Malaysia must be widely understood by and conveyed to people. I argue that the application of different entitlements to rights due to gender in marriage and family relations of Muslims in the Malaysian local context is to uphold equality by allocating and securing special measures for women as a disadvantaged group. I recommend that Malaysian feminists avoid the reflection of Western attributes attached to them by engaging Islamic organisations and individuals with their ideas and projects. I suggest that Malaysian society should be aware of any kind of gender inequalities that have been occurring or might occur. The most important point is that Muslim women themselves are able to differentiate between objective and patriarchal or impartial and male-biased laws, regulations or even social structures. Through this analysis I propose that the theory of feminisms in Malaysia is as important as it has been valued in other countries. It has been proved throughout the world

[31] Here, I do not include Article 9 (2) in my analysis as the reason for reserving this Article is not its non-conformity with *Shariah*, but with Article 14, Article 15, Article 24 (4), Article 26 (2) and Second Schedule Section 1 (d) of the Federal Constitution

as well as in Malaysia that legal reforms and women's empowerments have been underpinned by feminists' struggles towards equality.

I offer the view that the wording of Article 16 (1) (a), (c), (f) and (g) of the Women's Convention must be amended from '*same rights'* to *'equal rights'* to synchronize it with the principle of equality under the Convention itself. Having acknowledged that the principle of equality in the Women's Convention is harmonious with the application of equality in the UIDHR and CDHRI and the principle of equality in Islam informed by human rights scholars, one might ask why the majority of Islamic nations reserve this Article. The answer is that the wordings used in this Article are not consistent with the Convention's principle of equality. '*Same rights'* is not similar in wording and meaning to '*equal rights'*. As I argue throughout this thesis, similar is not necessary equal; therefore, women might be disadvantaged in the marriage and family domain should they be given similar entitlements to rights as men.

1.6 RESEARCH METHODOLOGY

The very nature of this enquiry places it in the genre of doctrinal research, as it seeks to know and understand the legal position of Muslim women's rights in Malaysia and how Malaysian laws on Muslim women's rights might be harmonised with the Women's Convention. The first step was to conduct a literature review to establish the existing state of knowledge, set out the research questions and undertake a library-based data collection; in order to observe the application of the concepts in theory and practice, the textual research was compiled before any documents were analysed. In trying to provide answers to the pertinent research question on the legal protection of Muslim women's rights in

international and Malaysian laws, the *'studying up'* approach was beneficial. *'Studying up'* means studying the powerful, their institutions, policies and practices rather than focusing only on those whom the powerful govern (Harding and Norberg, 2005).

The literature review, books, periodicals and articles in the bibliography, form a part of the academic writing into which they were absorbed. Some of these were available in the Keele University library. Interlibrary loans were used to acquire books from other libraries in the United Kingdom. Much Malaysian literature was accessed from the Malayan Law Journal (MLJ) and Current Law Journal (CLJ) websites, although I also visited the law libraries in Malaysia, especially the International Islamic University of Malaysia Library, the Islamic Science University of Malaysia Library, the Malaysian National Archives Library, the Human Rights Commission of Malaysia Library and the Official Portals of Attorney General Chambers of Malaysia to gather the information needed for the study.

The scope of this study provides for an analysis of the complementary and contrasting jurisprudence of Malaysian Muslim women's rights laws (underpinned by Islamic textual sources and common laws) and the Women's Convention. Apart from the Malaysian Federal Constitution and the Women's Convention, this research is limited to an exploration of the UDHR, UIDHR and CDHRI and Malaysian statutes. Recent developments in discourses of Malaysian Muslim women's rights, constitutional studies, *Shariah* governing women and the international covenant on Muslim women's rights have all influenced this study. Because the study is trying to concentrate on Islamic parameters on marriage and family relations in Malaysia, and as Malaysia's reservation of Article 16 (1) (a), (c), (f) and (g) of the Women's Convention is due to the inconsistencies of marriage and family relations with *Shariah,* it is important to examine in depth the rights

provided for Muslim women in the Malaysian statutes and the Women's Convention, which will involve the analysis of Islamic legal principles and the situation of Muslim women in Malaysia. Government policies, country reports, non-governmental organisations' (NGOs) reports and women groups' reports as well as the relevant government documents are thoroughly examined; all of them have been analysed in order to understand the issues related to Muslim women's rights protection in Malaysia and the Women's Convention.

An inherent difficulty in collecting information about the Malaysian law's agenda to protect women was that the legal information on some websites had not been updated and I faced difficulties in accessing some websites. I overcame this problem by contacting persons from whom the information could be acquired via emails and telephone, and dealt with them personally. They were the Director of Corporate and User Services Division, Department of Statistics, Malaysia and Madam Dharliza Dris, an officer at the Attorney General's Chambers Malaysia. My comparative studies of the UDHR with the UIDHR and CDHRI and of Malaysian Muslim women's rights laws with the Women's Convention were based on the theoretical and legal aspects in responding to the agenda for the protection of women. Three main stages were involved in the process of comparison; the descriptive phase, the identification phase and the explanatory phase. The first phase was used for describing the concepts of rights and equality and provisions of human rights in the UDHR, UIDHR and CDHRI and also the concepts of Muslim women's rights in the Women's Convention and Malaysian laws. I used the second phase to identify the similarities and differences in understanding rights and equality from the international and Islamic human rights declarations and how Muslim women's rights are protected under the Women's Convention and Malaysian laws. Lastly, I used the third phase to provide a

critical and comparative analysis between the Women's Convention and Malaysian laws in matters relating to marriage and family relations of Muslims. These three stages were essential in assisting and guiding me to outline the structure of this thesis.

CHAPTER TWO

THE CONCEPTUAL ANALYSIS OF RIGHTS IN THE INTERNATIONAL AND ISLAMIC HUMAN RIGHTS INSTRUMENTS: TOWARDS PRINCIPLES OF GENDER EQUALITY

2.1 INTRODUCTION

In this Chapter, I discuss the jurisdictional background and engage in a conceptual analysis of rights in international and Islamic human rights jurisprudences in an attempt to explore a wider understanding of rights and the principle thereof. First, I consider whether *'rights'* exists in Islam. If the concept of human rights does not exist in Islam, an analysis of whether Muslim women are guaranteed rights as humans would indeed, be fruitless. I apply the introductory concept of *'rights'* as described by Mohammad (2003) to argue that the notion of *'rights'* is not a concept foreign to the Islamic tradition; as Ali (2000: 15) has said, the term '*haqq*' has always existed and translates into the English term *'rights'*. In the analysis of whether rights in Islam are harmonious with rights in Western terms, I draw upon Lacey's (2004) and Mohammad's (2003) ideas of rights to argue that international and Islamic human rights jurisprudences share similar meanings and principles of rights. I argue that the *'rights'* concept may be reinterpreted to consider collective interest which stresses the correlative relationship of rights and duties and non-absolute rights.

Second, I explore the feminist critique of the theory of rights in the international jurisdiction and analyse whether *'rights'* as a legal subject, is gendered. I examine how the principle of rights may be reconstructed for the purpose of upholding gender equality

should *'rights determine the identity of the rights-bearer'* (Krishnadas, 2007: 161). From the theory that *'rights'* are an individual entitlement, I consider the critique that individual entitlements are not absolute (Lacey, 2004). Through my analysis of the image of rights' subject, I discover that the framework of non-absolute individual entitlements constructs a value of interest and a wider coverage of rights, which limits the gendered nature of rights. Non absolute individual entitlements of rights might construct a value of interest rather than only a value of choice. This framework erects a wider coverage of rights by considering collective rights rather than only individual rights. Collective rights balance the rights of individuals as human beings, that no person will be prioritised over the other and that no persons will be given rights as human beings that are denied to others. Thus, it is able to limit the gendered nature of rights by avoiding the maleness of rights, because individualism is synonymous with patriarchal nature of rights. This theoretical review develops a framework to analyse whether rights could inform equality. This framework will be a tool for my analysis of whether Malaysian laws, policies, administrative decisions and programmes secure Muslim women's equal (formal and substantive) rights in Chapters Four, Five and Six. I argue that rights could inform gender equality should they reflect an unbiased legal product which considers collective interests and covers the public and private spheres.

Third, I critically examine how the conception of rights informs the international and Islamic human rights underpinned by the UDHR, the UIDHR and the CDHRI in an attempt to grasp an idea that reconciles international and Islamic human rights instruments on the notion of rights. I argue that both jurisprudences and all three Declarations present rights as an instrument for equality among human beings. This is important for my analysis of human rights laws in Malaysia in Chapter Four, as the sources of the Malaysian human

rights laws are common laws and the Islamic texts (*Quran* and the Prophetic tradition). I explore the existing data provided in the works of leading scholars, their conceptual implications and, often, their reinterpretation as a method of obtaining the answers to the above questions.

The complementary nature of the international and Islamic human rights idea is understandable, given that almost all Islamic nations are signatories to the UDHR, the International Covenants on Civil and Political Rights (ICCPR)[32] and the International Covenants on Economic, Social and Cultural Rights (ICESCR)[33], and have contributed actively to their formulation (Dacey and Koproske, 2008: 9). Brems (2001: 289) considered that the CDHRI conforms to the *'genre of a human rights declaration'* and counted this aspect as one of universality. This is supported by Rehman's (2010: 357) argument that the UIDHR and CDHRI are influenced by international human rights instruments. Here, I start my study by briefly explaining the UDHR, UIDHR and CDHRI to obtain a legal picture of these three Declarations and to consider how, in the eyes of legal scholars, the UDHR is complementary to the UIDHR and CDHRI, before continuing with a study of the jurisdictional background of rights. Next, I explore feminist critiques of rights and examine the concept and principles of rights under the UDHR, UIDHR and

[32] The ICCPR was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16th December 1966. It is a multilateral treaty adopted by the UN General Assembly on December 16, 1966, and in force from March 23, 1976. It commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. As of September 2011, the Covenant had 72 signatories and 165 parties. See Online: http://www2.ohchr.org/english/law /ccpr.htm. Retrieved on 11/10/2011

[33] The ICESCR was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16th December 1966. It is a multilateral treaty adopted by the UN General Assembly on December 16, 1966, and in force from January 3, 1976. It commits its parties to work toward the granting of economic, social, and cultural rights to individuals, including labour rights and rights to health, education, and an adequate standard of living. As of July 2011, the Covenant had 160 parties. A further six countries had signed but not yet ratified the Covenant. See Online: http://www2.ohchr.org/english/law /ccpr.htm. Retrieved on 11/10/2011

CDHRI. Since I take the view that the UDHR is capable of harmonisation with the UIDHR and CDHRI, my further concern is to show how they might complement one another.

2.2 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR), THE UNIVERSAL ISLAMIC DECLARATION OF HUMAN RIGHTS (UIDHR) AND THE CAIRO DECLARATION OF HUMAN RIGHTS IN ISLAM (CDHRI)

On 10 December 1948, the Universal Declaration of Human Rights (UDHR), among others, was adopted by the UN General Assembly[34] at Palais de Chaillot, Paris, as a response to tremendous pressure to include an international bill of rights in the Charter of the UN (Morsink, 1999: 1; Smith, 2003: 38; Rehman, 2003: 54). Thirty-three years later, the Universal Islamic Declaration of Human Rights (UIDHR) was adopted by the Islamic Council in Paris on 19 September 1981 (Mawdudi, 1976: 14; Rehman, 2010: 357 and 362). Nine years after the UIDHR was adopted, 56 Member States of the Organisation of Islamic Cooperation (OIC)[35] created the Cairo Declaration of Human Rights in Islam (CDHRI) in Cairo; this, according to Achilihu (2010: 86), is similar in basis to the UIDHR. Its aim was to serve Member States of the OIC as guiding principles in human rights issues (Rehman, 2010: 367-368). If the UDHR was adopted to protect the *'human rights part of the conditions for peace at the end of the World War II'* (Morsink, 1999: 1), the UIDHR and

[34] UN General Assembly was established in 1945 under the Charter of the UN. It occupies a central position as the chief deliberative, policymaking and representative organ of the UN. Comprising all 192 members of the UN, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by the Charter. It also plays a significant role in the process of standard-setting and the codification of international law. The Assembly meets in regular session intensively from September to December each year and thereafter as required. See Online: http://www.un.org/en/ga/about/index. html. Retrieved on 12/03/2009

[35] The Organisation of Islamic Cooperation (OIC) which was formerly known as the Organisation of Islamic Conference is a permanent delegation to the UN. Currently, there are 57 Islamic state members of OIC and Malaysia became a member in 1969. See Online: http://www.oic-oci.org/member_states.asp. Retrieved on 25/11/2010

CDHRI were presented as a response to the perceived exclusion of Muslims from the domain of human rights as propounded in the West and to argue that there is indeed a human rights tradition in Islam. Apart from the reasons for adoption, in this Section I proceed with the legal analysis of the UDHR, UIDHR and CDHRI and to consider how, in the eyes of legal scholars, the UDHR is complementary to the UIDHR and CDHRI.

The UDHR aimed to advance the goal of increasing peace and security in the international regime (Renteln, 1990: 24-25). The task of writing the UDHR was given to the Commission on Human Rights (CHR), which worked on the drafting project from 27 January 1947 to 10 December 1948 (Morsink, 1999: 4; Rehman, 2003: 54). Although it has a strong moral force, (Smith, 2003: 38-40), the UDHR is neither a treaty nor legally binding although it sets out a common standard of achievement for all nations (Rehman, 2003: 57; Waltz, 2004). It establishes the objects of human rights and was the first international legal effort to limit the behaviour of states and impress upon them their duties to their citizens (Sohn, 1968; Unesco, 1973; Morsink, 1999). According to Humphrey (1967: 55), together with various human rights conventions, it was considered a *'respectable body of international human rights laws'*. A number of Articles in the UDHR express vital human needs, leaving the exact margins of interpretation and enforcement to the individual states (Douzinas, 2000).

Similar to the idea of rights and duties as generally stated in the UDHR and as part of the intentions of the UDHR's drafters[36], the UIDHR, which stressed the correlative relationship between rights and duties, focused on the idea of freedom and insisted that this was a fundamental right given by God which no one could take away from a human being

[36] The discussion on *'rights and duties'* among UDHR's drafters is thoroughly explored by Morsink, Johannes. 1999. *The Universal Declaration of Human Rights: Origins, Drafting and Intent.* University of Pennsylvania Press. pp. 239- 280

(Mawdudi, 1976: 14). The UIDHR was written by representatives of various Muslim states such as Saudi Arabia, Egypt and Pakistan under the auspices of the London-based Islamic Council, a private organisation affiliated with the Muslim World League (Bielefeld, 2000: 105; Rehman, 2010: 362; Mayer, 2007). Arkoun (1994: 106) has submitted that all 23 Articles of this Declaration are based on verses of the *Quran* or on selections from official *Sunni* compilations of *Hadith*.

I submit that the CDHRI, which was adopted in 1990, provides an overview of the Islamic perspective on human rights and affirms the *Quran* and the Prophetic tradition as its sole source (Article 24). Its purpose is to act as general guidance for Member States of the OIC in the field of human rights (Rehman, 2010: 368). The CDHRI presents a state perspective whereas the UIDHR has a non-state perspective[37] (Mas'ud, 2007: 96). The CDHRI believes that fundamental rights and universal freedom are integral parts of the Islamic religion; every person is individually responsible and the community is collectively responsible for their safeguarding (Preamble). Technically, as Mas'ud explained, it is quite difficult to compare the UIDHR and the CDHRI due to their different approaches. However, according to Mas'ud, both documents show a basic concern for human rights from a Muslim perspective. Hence, they are not totally contradictory of each other and, apparently, the CDHRI was not intended to denounce the UIDHR or to replace it.

Interestingly, even though the UDHR was described by the UN representative of the Islamic Republic of Pakistan, Said Raja'i Khorasani, as un-Islamic (Dacey and Koproske, 2008: 6), Western-based (Arkoun, 1994) and failing to take into account cultural and religious contexts of Muslim societies (Mas'ud, 2006: 3; Dacey and Koproske, 2008: 4),

[37] It was mentioned earlier that the UIDHR was written by representatives from various Islamic states under the London-based Islamic Council

Al-Awabdeh (2005), in his dissertation on the '*History and Prospects of Islamic Criminal Law with Respect to the Human Rights*', contended that there is no general theory or even a single definition of human rights according to the views and attitudes of the Islamic world as opposed to the opinions of the West. The content found in the CDHRI is also not totally new, for it has incorporated almost all essential human rights as stipulated in the UDHR (Mas'ud, 2007). Earlier, Tabandeh (1970) agreed that most of the UDHR's provisions are also inherent in Islam.

Furthermore, Baderin (2001; 2003), while formulating a synthesis between Islamic and international human rights laws underpinning the ICCPR and ICESCR, has argued that the scope and application of Islamic and international human rights do not create *'a general state of dissonance'* between them, especially if the concept of human rights is not established as a concept foreign to *Shariah*. Mary Robinson, the then High Commissioner for Human Rights, agreed that Islam is entirely consonant with the principles of fundamental human rights. In her address in the OIC Conference Symposium on 15 March 2002, she said:

'No one can deny that at its core Islam is entirely consonant with the principles of fundamental human rights, including human dignity, tolerance, solidarity and equality. Numerous passages from the Quran and sayings of the Prophet Muhammad will testify to this. No one can deny, from a historic perspective, the revolutionary force that is Islam, which bestowed rights upon women and children long before similar recognition was afforded in other civilisations. Custom and tradition have tended to limit these rights, but as more Islamic states ratify the Convention for the elimination of discrimination against women, ways forward for women are being found and women are leading the debate. And no one can deny the acceptance of the universality of human rights by Islamic states'.

Political scholars also accept that there is some commonality between the UN human rights instruments and Islamic human rights instruments. The Pakistani Ambassador to the UN Human Rights Council, for instance, has claimed that the CDHRI is complementary to the

UDHR, not an alternative (Dacey and Koproske, 2008: 16). I trace that employing similar principles would be relevant to reconcile Islamic and international human rights, a method which I employ in this Chapter, in an analysis of the complementary principle of rights under the UDHR, UIDHR and CDHRI, and in Chapter Three, in an analysis of the concept of gender equality from the Islamic viewpoint, in feminists' debates and in the three Declarations. Baderin alleged that '*the methods and relevant principles of Shariah can be positively employed to ensure the effective practical realization of human rights in Muslim states'* (Baderin, 2006: 1).

Even though Mas'ud's (2006: 7) comparative studies of the UDHR, UIDHR and CDHRI found that there is a difference between Western-based and Islamic-based declarations, he revealed that the area of common ground between these three Declarations is larger than the area of differences. According to Mas'ud, the UIDHR and the CDHRI share 20 and 14 themes of rights respectively with those mentioned in the UDHR. The conflicting themes, Mas'ud observed, were on freedom of thought and expression, protection of life, penal laws, marriage, and the holding of public office. Conversely, I note that these conflicting themes do not mean that the rights mentioned in the UDHR are not covered in the UIDHR or CDHRI or otherwise, but that the rights mentioned above are not specifically restricted in the UDHR. I argue that, even though rights in the UDHR are not specifically restricted as they are in the UIDHR and CDHRI, the rights of human beings as stated in the UDHR are not absolute or, in other words, restricted. Hence, in principle, the UDHR, UIDHR and CDHRI are capable of harmonisation in terms of non-absolutism of rights. Having understood the background of the UDHR, UIDHR and CDHRI, my further concern in the next Section is to examine whether the meanings and principles of rights in the Islamic and international jurisdictions are harmonious.

2.3 INTERNATIONAL AND ISLAMIC JURISDICTIONAL BACKGROUND OF *'RIGHTS'*[38]

In this Section, I consider whether *'rights'* exists in Islamic traditions and analyse how the international and Islamic legal principles share similar meanings and principles of rights. I argue that exploring the Islamic jurisdictional background of the term *'rights'* will help us to understand whether *'rights'* exists in Islamic traditions. I apply the introductory concept of *'rights'* described by Mohammad (2003) to argue that the notion of *'rights'* is not a foreign concept to the Islamic tradition. In the analysis of whether rights in Islam are harmonious with rights in Western thought, I draw upon Lacey's (2004) and Mohammad's (2003) ideas of rights to argue that international and Islamic human rights jurisprudences share similar meanings and principles of rights. This is specifically important in analysing the application of human rights in the post-colonial Malaysian legal context, which will be discussed in Chapter Four.

In investigating the theories of legal rights, Lacey (2004) has analysed four influential attempts to construct the framework of rights. Starting from the most analytic level, Lacey demonstrated Hohfeld's appeal to rights, which are claim, liberty, immunity and power. Most human rights scholars have defined rights from these four separate perspectives which might be revealed from Hohfeld's idea. Analytically, research on rights that draws significantly on Hohfeld has been conducted by, among others, Berlin (1969), Lyons (1969; 1970), Feinberg (1970; 1973; 1980), Flathman (1976) and Raz (1986). According to

[38] Part of this Section is published in the American International Journal of Contemporary Research. See Nik Saleh, Nik Salida Suhaila. 2012. 'A Conceptual Analysis of Rights in the International and Islamic Human Rights Instruments' in *American International Journal of Contemporary Research*. Vol. 2. No. 4. pp. 155-164

Hohfeld (1946), rights as a claim are a demand to something, and can be made of someone else who has active duties[39] to perform or to provide something. Liberty is also part of the meaning of rights, meaning a freedom to do something '*which is supported by other rights, which is claims that other persons do not interfere with the exercise of that freedom'* (Hoffman, David and John Rowe, 2003: 7). I challenge Orend's (2002: 21) view that rights referring to liberty '*may survive and flourish only in an environment where there is no duty'.* This idea derives from the emphasis on correlating the term '*rights*' only with active duties. It is critical at this point to recognise that not only active but also passive duties could provide the rights claimed by someone. Here, the duty bearer's responsibility is to prevent interference with the exercising of freedom by others. I will consider in Chapter Four that Malaysian laws on human rights provided in Article 5 to Article 13 of the Federal Constitution grant rights as a claim and liberty.

In terms of immunity, rights denote an exemption from challenge when doing something or from having a legal status altered (Jones, 1994: 24-25). Duty bearers have responsibilities to ensure that the rights holders achieve their aim of rights by not challenging their act of doing something (passive duties). An interesting example of colonial or Western jurisprudence's influence in Malaysia is the public constitutional right of immunity. In the United Kingdom, elected members of public legislatures are exempt from being sued for anything they might say during debates in the legislature (Article IX of the Bill of Rights 1689). The same is expressed in Article 63 of the Malaysian Federal Constitution. This exemption was intended to encourage the maximum freedom of expression during legislative debates, in the hope that such will ultimately enhance the public good (Bari and Shuaib, 2006: 127). Finally, rights, as drawn from Hohfeld, also mean power to do

[39] The same was named '*perfect duties'* by Hodgson, Douglas. 2003. *Individual Duty within a Human Rights Discourse*. Ashgate Publishing Ltd. p. 31

something or to create a legal relationship which affects other people. Likewise, the duty bearer has a passive responsibility not to restrain other people's power to do something.

Secondly, Lacey demonstrated rights defended by H. L. A. Hart as *'will'* or *'choice'*. According to Hart, Lacey (2004: 32) wrote: *'the essence of rights is choice or agency: a right is a specially protected choice to interfere with another's freedom'*. The third appeal to rights was developed by Neil MacCormick, which Lacey confirmed as having been built on Jeremy Bentham's concept of rights as *'interest conception'*. I believe that this interest conception guarantees the automatic existence of rights when someone benefits from the performance of duties. The final view of rights defended by Ronald Dworkin, which Lacey claimed was built on the interest theory, is *'rights as trumps'*. This meaning of rights, which seems to make the rights holders winners or deciders, confers the power to force duties to be fulfilled when claims of rights are made. That is why Lacey (2004: 33) considered this idea of rights as *'trumping background considerations'*.

I believe that Mohammad (2003), who analysed the terms '*rights'* and *'duties'* in common laws and Islam, has proved that the concept of rights is clearly identified by the *Quranic* verses and the Prophetic tradition. Mohammad has explained that Muslim jurists have devoted independent titles to the concept of rights, such as civil obligation (Al-Sanhuri, 1954), property of a deceased individual (Al-Kabashi, 1984), and nature and restrictions of rights (Al-Durayni, 1984). According to Mohammad, Al-Durayni examined rights in contexts where they are restricted by the public good whereas Husayn and Al-Sariti (1992) explained in detail the concept of rights and how it differs from liberty. Uthman and Al-Sharanbasi (1986) explained the meaning of *haqq*, bearers of rights and its classification

and Al-Sabuni (1979-1980), Badran (1965) and Qasim (1982) also set out the meaning of *haqq,* its subject matter and its sources (Mohammad, 2003: 4-10).

In providing a wide explanation of the meaning of the term *'haqq'*, Mohammad explained that the word is legally relevant if used in the sense of rights vis-à-vis a duty, property, ownership, share, an allocation and desert, an exclusive or preferred interest, and justice. According to Mohammad, the texts of the traditions of the Prophet Muhammad show that the word '*haqq'* is used in different contexts including rights and other related concepts. This demonstrates that the term *'haqq'* in its literal as well as religious forms is vague; however, such ambiguity may be clarified by the context in which *'haqq'* is used.

The word '*haqq'* occurs around 287 times and has about 18 different meanings in the *Quran* (Mohammad, 2003: 64-65), of which the most common are '*certainty', 'conformity to reality', 'truth'* and *'justice'* (Said, 1979: 63). It also means '*appropriate'* and '*suitable*' and is sometimes used in reference to easements such as drinking and watering rights and rights of way. Arabs used '*haqq*' for *'rights'* as a *'litigation'* and *'lawsuit'* (Mohammad, 2003: 64). According to Mohammad's explanation, which I found similar to the term *'rights'* in English as revealed by Hohfeld, Hart, MacCormick and Dworkin, the word *'haqq'* is commonly used in different sets of meanings such as '*liberties'* and '*options to do or not to do something'*, '*privileges to specific interests', 'incumbent and mandatory', 'authentic'* and '*benefits'*. It also connotes *'power'* as in cases of rights of owners and guardians to use and dispose of their property[40], and it could mean *'immunity'* from certain liabilities.

[40] This is the same as an exclusive assignment. See Mohammad, Mohammad Tahir. 2003. *Rights and Duties*. Ilmiah Publishers

Therefore, I argue that *'rights'* exists in Islam as *'itself'* and as correlative with duties. As Ali (2000: 15-16) has stressed, *'rights'* is also the established meaning of the term in Arabic in the sense of a '*claim right'*. This is supported by the literal, legal and juridical meaning of the term *'rights'* which always stressed responsibilities rather than entitlements (Zafrullah Khan, 1967: 13-14). Zafrullah Khan suggested, as an example, a marriage contract; Islam regards marriage as a civil contract, imposing mutual duty and obligation on both parties, rather than stressing claims to rights or power (Zafrullah Khan, 1967: 39). This is specifically important for my analysis of the rights and responsibilities of a Muslim wife and husband during marriage and at its dissolution in Chapter Six. I will argue that the husband's *'superiority'* in marriage and family relations is not because he has or can claim more rights than his wife, but because he has more duties and responsibilities to perform.

Here, it is noteworthy to show that, for a long time in Western jurisprudence, there was also a correlative relationship between '*rights'* and '*duties*'. Similarly to the *Quran*, Clapham (2007: 5) argued, the Bible can also be read as proclaiming not only rights but also duties. Renteln (1990: 138) always correlated rights with duties and Austin (1995: 231) considered that duties ground the rights. Orend (2002: 21) stated that the rights holder and duties bearer come together even though *'rights'* position the rights holder, as a more dominant party than the duties bearer, as they may ordinarily exercise their rights as they see fit. Donnelly (2007: 22) stressed the relationship between rights and duties more critically when he conceded that rights involve a special set of social institutions, rules or practices due to their enforceability which stands at the very foundation of political morality in this era. Without those systems that support the application of human rights protection, it would be important only on paper.

Even though Hohfeld's analysis has been used to refute the logical correlativity doctrine of rights and duties (Lyons, 1970), I argue that the correlation can always be found if the division between *'active'* and '*passive'* duties is understood. As Hohfeld (1946) stressed in his book '*Fundamental Legal Conceptions as Applied to Judicial Reasoning'*, a right is a fair claim that remains justified even when the rights holder is not actually making a verbal claim. This abstractly demonstrates Hohfeld's emphasis that duties, whether active or passive, were correlated with rights. Because rights represent autonomy whereas duties are responsibility, the concept of duties might serve to balance the notion of rights.

Hence, in describing various classes of claims and responsibilities, I argue that the combination of Hohfeld, Hart, MacCormick and Dworkin's analyses as demonstrated by Lacey (2004) provides a framework similar to that of Islamic scholars in which to place various human rights, ranging from economic, social and cultural rights to civil and political rights as well as the more controversial third generation or group rights. It is obvious that, in both Western and Islamic jurisprudences, the term *'rights'* has been analysed in depth, resulting in a certain degree of refinement. In Malaysia, where legal sources have originated from the West as well as from the *Quran* and the Prophetic tradition[41], Muslim jurists too have felt the need for a conceptual articulation of '*haqq*' and have therefore tried to devise a comprehensive definition of '*haqq*' in Islam.

I note that rights may not be a biased concept for international acceptance of the human rights idea. The international and Islamic-based human rights jurisprudences, as such, have embodied similar meanings of rights and duties to protect and promote values and ideals that reaffirm the basic rights of human beings. Next, I explore feminists' critiques of rights

[41] Please refer to the detailed discussion in Chapter Four

in the international jurisdiction. I examine how the principle of rights may be reconstructed for the purpose of upholding gender equality.

2.4 FEMINIST CRITIQUES OF THE THEORY OF RIGHTS IN THE JURISDICTION

2.4.1 Rights as Product: Gendered or Neutral?

In this section, I consider whether *'rights'*, as a legal subject, is gendered. I argue that the term *'rights'*, which denotes a claim, power, liberty, immunity, choice and interest as explained earlier, does not discriminate against anyone, or specifically, for the purpose of this thesis, women. However, any discrimination of whether it is impartial or biased, or kind or cruel, will depend on the application of the term as a product of laws. For Smart (1989), rights languages, if properly defined and employed, would empower women, as rights could be claimed by everyone irrespective of gender; they could also be extended to claim gender equality and they could construct laws as the centre of political campaigns. A proper definition of *'rights'* is particularly important for my later analysis of how rights might inform equality. One of the most important aspects of *'rights' talk'* to explore is feminists' perceptions of rights, such as those of Charlesworth (1994) on male-biased rights, of Kingdom (1991) on correlative rights and duties, and of Kiss (1997) who proposed to construct an affluent understanding of rights to ensure that people understand rights and that they work for gender justice. Generally, rights have been criticised by cultural feminists as too abstract and impersonal, reflecting and endorsing a selfish and atomistic vision of human nature and an excessively conflictual view of social life (Fox-Genovese, 1991).

Contemporary feminists have felt that rights may not be the best *'instrument'* to protect women from discrimination. According to Kiss (1997: 1-2), international women's movements have even reached a consensus that human rights are subordinating women. Even though the social and legal benefits women derive from rights cannot be totally denied, a few feminists have argued that rights do not have a positive image at all (Fox-Genovese, 1991; Rifkin, 1993) and may even be detrimental (Smart, 1989: 139). I trace that feminists from legal backgrounds have argued that rights obscure male dominance, while other theorists have alleged that the rights approach reinforces a patriarchal status quo and abandons women's rights. Charlesworth, (1994: 65) for instance, has alleged that many feminists have claimed that laws are part of male domination and patriarchal institutions. Here, I explore the criticism that rights are a sexist or gendered product within the compass of laws and language.

Two phases of reflection of feminist theory to identify the development of the idea of how laws on rights are gendered can be understood from Smart's statements '*law is sexist'*, and '*law is male'* (Smart, 1992). To support her position, Smart (1995: 187) argued that laws are sexist because they disadvantage women or treat men better than women. Smart has explained that women being disadvantaged in marriage and divorce by allocating to them fewer material sources and as *'sexually promiscuous'* by judging them by inappropriate standards. As legal subjects, women being disadvantaged by denying their equal opportunities, or by failing to recognise the harm done to them because the harm advantaged men (Smart, 1995: 187-188). According to Smart (1995: 189), law is male because majority lawmakers and lawyers are male, thus, Smart referred to MacKinnon's idea that *'ideals of objectivity and neutrality which are celebrated in law are actually masculine values which have come to be taken as universal values'* (Smart, 1992: 32).

Therefore, when applying to laws on rights, such as human rights laws, *'rights'* do indeed disadvantage women. This is particularly important for my analysis in Chapter Five, which explains how the former Malaysian laws disadvantaged women. Finlay (1989) has examined how laws are characterised by maleness from their claim to be authoritative, objective and rational[42]. She stressed that, even though law presents itself as gender-neutral, analysis reveals that law is far from that. Interestingly, what is regarded as objective in society reflects a set of assumptions that are valued above competing considerations and are considered by many feminists to be '*masculine*' (MacKinnon, 1987) and reproducing bias in favour of men (Lacey, 1995). Thus, it is perhaps easy to say that this analysis suggests that objective criteria applied in laws are masculine and feminists consider the rejection of these criteria essential for a legal system to work.

Dawson (1993) highlighted that the objective masculine criteria of laws derive from the fact that they interact differently with women than with men. However, Smart (1989) was involved in a rather different engagement slanted at the level of theorising the '*malevolence*' of both legal method and the institutions of laws. Although feminists reject the notion that *'objective'* rules are important in the legal system (Scales, 1993: 53-54), I would concede that legality has certain qualities of fairness in the system but they do not necessarily depend on objectivity. Rather, Scales's (1993) suggestion to discard the habit of equating most noble aspirations with objectivity and neutrality is a rather important way of departing from '*male-mirror neutral law';* however, as I mentioned above, the quality of the legal system is not compromised. Smart (1992: 31) rightly discovered that laws *'can be put right such that all legal subjects are treated equally'.*

[42] Many feminists have argued that binary opposites such as objective/subjective, rational/emotional, good/bad and active/passive construct an understanding of difference. See Smart, C. 1995. *Law, Crime and Sexuality: Essays in Feminism.* Sage Publication

I trace that the subordination of women in the eyes of the law has proved that laws may be gendered and can be used to deny women their rights. Daly (1991), for instance, has examined the laws of female foot-binding, suttee and circumcision to provide evidence revealing the extent to which women's rights to choose have been denied and they have traditionally been controlled by men using laws. Meanwhile Barnett (1997), in her analysis of the relationship between feminist theories on rights and laws, asserted that the maleness of every field of laws and legal practices are established when the laws are themselves gendered and that they reflect the sexual characteristics of men, who have created them, regardless of whether they are developed through the courts under common laws or enacted in legislative provisions.

Feminists who have sought to prove that laws are sexist and gendered also rest their analysis on the question of '*legal personhood'* or '*sui juris'*. Dawson (1993: 47), while discussing legal personhood based on the case of *The Queen v. Crosthwaite*[43]*,* has stressed that '*women*' were not included within the meaning of *'persons'* entitled to hold public office under the Towns Improvement (Ireland) Act 1854. In addition, Donovan and Wildman (1980), who analysed the idea of the '*reasonable man'* in the criminal laws context of self-defence of provocation, discovered that the standard of the '*reasonable man'* applies only to white middle-class male techniques for self-defence and reactions to provocation. According to Donovan and Wildman, the standard fails to account, for example, for any behaviour that may be described as culturally female.

[43] (1867) 17 Irish C. L. R. 463

Similarly, Bender (1992), while reviewing the standard of care required in tort laws for the '*reasonable person'*, found that this is another example of male naming and acceptance of the implicit male norm. Since the laws have been crafted *'patriarchally'*, the way they frame issues and define problems and the speech they credit, according to Busby (1993) and Chen (1997), clearly excludes women. Thus, women were not considered '*legal persons'* in legislation and were not recognised as having rights as subjects in law. Who the laws recognise as being capable of having rights and duties is defined by the concept of the legal person or legal subject (Cotterrell, 1992: 123-124). Therefore, from this point of view, women were not recognised as having rights and obligations as subjects in laws. In my exploration of the application of gender equality laws in Malaysia in Chapter Four, I examine whether women in Malaysia are *'sui juris'* and I will analyse in Chapters Five and Six, the ways in which Malaysian women's rights laws were gendered (prior to amendments of the laws) and are currently gendered.

In the sphere of international laws, Stamatopoulou (1995: 36) has stressed that, for feminists, the UN has failed to declare all women's human rights concerns to be part of international human rights laws and has failed to integrate women's human rights into the mainstream human rights agenda. Women's rights issues have been considered insignificant in international laws' responsibility for human rights due to the failure of covenant makers to recognise the normative male model of traditional human rights formulation (Charlesworth, Chinkin and Wrights, 1991: 613). Because of this failure to include women's lives, feminist analysis has proceeded to explore the tacit commitments of obviously so-called *'neutral'* principles of international laws and how male perspectives are established in them (Charlesworth, 1993: 1). Charlesworth demonstrated the way states institutionalise the patriarchal family both as the qualification for citizenship and public

life and also as the basic socio-economic unit. Based on her analysis, men have dominated in the public sphere of citizenship and political and economic life because the formation of the state depended on a sexual division of labour and the relegation of women to the domestic sphere. As a result, the functions of the state were identified with men.

If the state is patriarchal, the international and national laws codified for human rights protection may also be patriarchal. The major sources of international laws, as set out in Article 38 of the Statute of the International Court of Justice, conventions and customs are the product of state action (Charlesworth, 1993). I will not deny Cook's (1993: 93) contention that women's exposure to disadvantages originated in acts of private persons and institutions but this social construction of discrimination could be removed by human rights laws as instruments of societal change. However, if the law itself is also disadvantaging women, expressly or implicitly, this is the most crucial aspect that women's movements need to address. In Chapter Five, I will analyse the ways in which a number of legal provisions in Malaysian statutes and policies, administrative decisions and programmes disadvantage women by the patriarchal nature of laws. I will analyse in Chapter Six whether the reservation of Article 16 (1) (a), (c), (f) and (g) has been due to the different interactions of Malaysian laws on Muslim women's rights with women and men which bring about women's disadvantage.

From the compass of language, Poovey (1992) has argued that feminist post-structuralists have accused rights language of being bound up with *'socio linguistic hierarchies of gender'* and with the *'outdated patriarchal fiction of a unitary self'*. According to Kiss (1997: 2), feminists have contended that the rights language cannot adequately express women's experience, be it from moral or political parts of life. This might be due to the

exclusion of women's experience and recognition in the rights debate. Consider, for instance, the application of rights for gender equality; even though not generally approached as a problem of language, there is a connection between language (Jong, 1993: 74-75), male domination, gender and the suppression of women (Busby, 1993: 76-77). According to Busby, in the early development of the English language, the pronoun *'he'* referred to both female and male because there was no separate pronoun for female and *'he'* did not signify either the female or the male gender. When the word '*she*' was introduced, it referred only to female, but the pronoun '*he'* continued to refer to both female and male. Later, the ambiguity of '*he*' was resolved by formulating two principles of grammar: firstly, a pronoun must be in the same gender as the noun to which it refers; and, secondly, when a referent is either of indeterminate sex or of both sexes, it shall be considered masculine (Busby, 1993: 77). Busby has shown that it is more natural to place the male before the female, as man may be first in the natural order or more important. This *'unintended language priority'* given to males in the language of rights and statutes, denotes that the term *'rights'* used in the legal sphere is gendered.

Therefore, a commitment to gender corrective language[44] in all UN works would be a way of reducing the overtly masculine culture of international law-making (Charlesworth, 1995: 110) if women's rights laws are to be transformed into a single, universal, legal instrument shared with men. This means that *'man'* must not be taken to represent *'human'* (Charlesworth and Chinkin, 2000: 17). As pointed out by Hevener (1987), this will avoid the victimization of men, allow a women-centred solution without referring to male actions and standards, and prescribe an active public policy to achieve fairness. This is particularly important for my analysis in Chapter Three of whether the language of rights and equality

[44] Designed to address specific practices that oppress women but not men or that are of much greater importance to women than to men

under the UDHR, UIDHR and CDHRI is patriarchal and whether different interactions of the legal provisions with women and men under the three Declarations bring about women's disadvantage. Throughout my analysis, I will consider whether Malaysian laws on Muslim women's rights disadvantage women by the legal languages, which are patriarchal.

2.4.2 Subject, Object and Coverage: Towards Gender Equality

In this Section, I examine whether the feminist and Islamic human rights discourses share similar principles justifying human rights. Even though feminists have criticised liberal rights, their idea is to invite women's rights debaters to rethink rights, not to reject them, so that rights will not marginalise women's choices and interests. This is due to a few feminist writings on rights debates, as I analysed earlier, which seem to criticise the role that rights play rather than the term '*rights*' itself. I note that limiting the nature, character and potential of rights in ensuring justice for each and every different human being could be the basis of criticisms of rights. In fact, I trace that there are pieces of evidence which denote that struggles for the right *'rights'* have helped women to achieve significant gains over the past centuries. For instance, from Mary Wollstonecraft to the drafters of the Women's Convention, feminists have made demands for rights to ensure gender equality and justice (Kiss, 1997: 1).

Therefore, for the purpose of my thesis, I argue that it is important to understand rights as a positive instrument, provided that the term *'rights'* is refined to a non-gendered product of laws which consider collective interest. Even though rights have been criticised by feminists in terms of the meaning, nature and use of rights, here I focus my analysis on the feminists' critique of rights from three perspectives; subject of rights, object of rights and

rights' coverage. In this analysis, I consider the subject of rights as individual and collective and the object of rights as choice and interest which interrelated with the absolute and non-absolute power of rights. I argue that the feminist and Islamic human rights discourses on subject and object of rights and rights' coverage share similar principles justifying human rights. During this discussion, some points may overlap due to the correlative nature of the subject and object of human rights that I have analysed.

2.4.2.1 Image of Rights' Subject: Choosing Agent or the Value of Interest?

The subject of human rights, according to Lacey (2004: 34), depended on whether rights operated in terms of an image of freely choosing an agent capable of asserting claims or an image of accommodated groups in which their interests or the benefits to them are valued. In simple terms, the subject of human rights is either an individual or a community (Jones, 1994). It was during the 19th century, after collective political rights were enlarged, that a genuine concern for the rights of the individual developed internationally (Luard, 1967: 9-10).

In the feminist debate on the critique of rights, Lacey (2004: 38) explained that *'individualism'* is the key criticism. According to Lacey, the danger of individualism occurs when the subject of human rights is only the individual and not the community; thus the object of rights could be conceived of as individual property and collective interest or goods would therefore be disregarded. As feminists have argued, 'individual' might be limited to man or to a certain class of people. For instance, within the familial relationship, individualism might conceal men's superiority over women. To reconstruct rights from this perspective and to ensure that rights do not favour just one person or class, I therefore

agree with Lacey (2004: 48-50) that both the individual and the collective interest should be considered the objects of rights.

Arkoun (1994) was of the view that Islamic thought always included a discourse on the rights of God (public or collective rights) and the rights of man (individual rights), with the former having priority over the latter. According to Arkoun, postclassical jurists defined the rights of God as those that are for the collective interest and the rights of man as those of the individual interest. According to the Islamic faith, the respect for human rights is an aspect of, and a basic condition for, respecting the rights of God, as Islam does not separate any aspect of life from religion (Arkoun, 1995; Weeramantry, 2007). As the division between rights of God and rights of man clearly indicates, the jurists have used '*haqq*' or rights for tangible and intangible property as well as benefits and interests owned by a particular person whereas it is only used to imply conceptual interests if the Lawgiver has validated them (Moosa, 2004: 5).

By looking at the relationship between the individual and the state, even though Islam considers collective rights, Schacht (1959: 139-140) argued that human rights in Islam are also individualistic in their entire structure, which I note is similar to the Western practice of human rights. To be individualistic is not simply to resist relationships of domination but also shows a *'capacity for action that specific relations of subordination create and enable'* (Mahmood, 2005: 18). Ali (2000: 33) has explained that Schacht challenged the view of many scholars of *Shariah,* who contended that there is strong element of anti-individualism in Islam, by claiming that the scholars had failed to look at the individual character of *Shariah* on laws of inheritance[45], *waqf*[46], contract and private property, which

[45] Similar to the concept of succession in English law

are well in line with the trend of contemporary Western legal thought. Moreover, the Former Minister of Religious Affairs of Islamabad, Dr. Ghazi, has also pointed out that *Shariah* is a complete system based on fundamental instructions which covered all aspects and details of individual and collective interests of the people[47].

Hence, the contents of international and Islamic human rights have focused on individual and collective rights, the relationship between the individual and the state, and the highest level of organisation in a society with the ability to control the lives of the members of that society. In the atmosphere of human rights, I argue in this thesis that collective rights balance the rights of all individuals as human beings, that no person (or man) will be prioritised over the another person (or woman) and that no persons will be given rights as human beings that are denied to others. Tabandeh's argument that non-believers '*are reckoned as outside the pale of humanity'* (Tabandeh, 1970: 17) might be due to his different understanding about the fact that a common standard of rights can be established for all people. In Islam, human rights are rights which all human beings should have (Hassan, 1982: 54), which make them human. Thus, a common standard of rights, which is entrenched in the humanness, belonged to every human being irrespective of religion.

I will analyse in Chapters Four, Five and Six whether Malaysian human rights laws underpinning the Federal Constitution and other statutes consider the collective interest. As Krishnadas (2007: 155) contended, *'a collective identity which is based on basic needs and rights reflects a collective agenda for men and women against oppression and*

[46] Similar to the concept of charitable trust in English law

[47] Dr. Ghazi said so in his talk entitled 'Islamic *Shariah* and the World Today' presented at the Eight Day Lecture Series on 01/12/2008, Islamabad. See Online: http://www.ips.org.pk/whats-new/76-lecture/488-islamic-shariah-and-the-world-today.html. Retrieved on 10/12/2010

exploitation'. Therefore, I argue that, to build the concept of equality among human beings, collective rights must be considered the subject of legal rights.

2.4.2.2 Can 'Choice' be an Instrument to Discriminate against Others?

Here, I find that there are strong relationships between individualism and collective rights (subject of human rights) and choice and interest (object of human rights). Choice or autonomy or '*self-rule'* is a similar concept to *'agency'*, a capacity to realize one's own interest without being weakened by other obstacles (Mahmood, 2005: 5-17). However, choice is not unconditional. The term that I shall be using to define unconditional choice and independence is '*absolute choice'*. This is a definite independence that prevents one from being influenced by others and allows one to refuse to be under obligation. I note that unrestricted rights cannot be possessed because social conditions need to be considered. As stressed from the feminist point of view by Kingdom (1991: 56-57), there is *'nowhere in the real world that absolute rights can be enjoyed'*.

On one side, I argue that, as rights holders, human beings are indeed autonomous and their individuality must be protected from infringement by others, by the family or by the state. Without autonomous capacity, the rights of human beings cannot even be addressed. As stressed by Mookherjee (2011: 62), even though feminists are suspicious of the idea of autonomy because of its male and individualistic value, *'it is plausible to retain a focus on autonomy in a feminist and multicultural theory of rights'.* Thus, non-absolute autonomy which considers individual as well as collective interest, as discussed earlier, might inform how the value of autonomy could be reconstructed for gender equality. Mookherjee argued that, for the *'well-being of all human beings'*, there are forms of self-determination that seem essential. Both individuals and family units must be given independence rights to

provide for the needs of their members. Yet, justice is not only for an individual or a family, but also for the interests of the community and social institutions as a whole.

Because the aim of equality, as stated by Fredman (2003: 43), is *'to give all people, regardless of their sex, race or age an equal set of alternatives from which to choose and thereby to pursue their own version of a good life',* everyone must have equal autonomous rights according to their own interpretation of happiness and a good life. Therefore, in my analysis of human rights underpinning the UDHR, UIDHR and CDHRI in this Chapter and Malaysian laws on human rights in Chapters Four, Five and Six, I maintain that, even though individual autonomy is recognised and can be legally entertained, it must not be unconditional, as it has to consider the arrangement of the state and its regulation of relationships with other societal institutions for the public good. In fact, individual choice is only possible when one is able to share the benefits and burdens with society at large.

Certainly, absolute individual choice could jeopardise equality. In other words, one cannot be independent if it means disadvantaging others. The very existence of an organised society is itself a benefit to the individuals living within that society (Sheriff, 2007: 9). Once the value of individual choice is recognised, a reason not to deny other people's interests will also be recognised (Griffin, 2008: 134). As Safi (1998: 5), in his research on '*Human Rights and Islamic Legal Reform'* pointed out, the individual is recognised in Western society as a member of a '*homogeneous'* community which denotes that individual rights depend on the non-violation of others' rights.

Fineman (2004), in talking about gender in general, has stressed that non-autonomy (non-absolute choice) or dependency is congruent with equality as it is one of the societal

circumstances under which gender justice can be achieved. Fineman did not mention absolute autonomy in her analysis of the myth of autonomy; she referred to autonomy as unconditional independence, which is why she asserted that only *'dependency'* is compatible with equality without taking into consideration a conditional autonomy. However, Fineman's proposal that '*the goal of autonomy must be supported through an understanding of collective responsibilities for basic needs'* (Fineman, 2004: 30) means that Fineman has to agree that autonomy (but not absolute autonomy) is also comparable with equality.

Having said that individuals are entitled to what might be called moral autonomy, I agree with Hoffman and Rowe (2003: 10-12) that individuals can rarely achieve such goals by themselves; they need to have some form of government because cooperation between individuals is often required. For instance, Malaysia's laws, as those of a state, have the ultimate say on what citizens are or are not allowed to do based on individual autonomy, yet they consider the public good. This is because autonomy, if suitably conceived, can be a tool for equality, as correctly stated by Mookherjee (2011: 73): a commitment to autonomy '*plays a special role in protecting the interests of potentially vulnerable individuals'.* Bearing in mind that, in Islamic human rights jurisprudence and feminist discourse, rights can be extracted from individual choice as well as public interests, it is also important to address the feminist critique of rights' coverage.

2.4.2.3 Rights' Coverage: Only Public Sphere?

Apart from viewing it as a biased legal product, feminists criticise the application of the term *'rights'* from the perspective of its coverage. Even though I categorise the coverage into three types; public and private sphere, individual choice and community interest, and

formal and substantive equality, my analysis in this Section only covers the first category since I have already discussed the individual choice and community interest earlier[48] and will discuss the formal and substantive equal rights later[49].

I trace that, while examining the effect of laws on the lived experience of women, feminist legal scholars have found that laws have restricted women's rights and freedom by limiting their participation in the public sphere. Rights talk in terms of the legal aspect, for instance, wrote Rifkin, (1993: 416-417) relegated women to the *'private world of the home and family'.* It has been said that women's freedom and equality are persistently compromised by customs and laws, something which does not happen to men (Peters and Wolper, 1995: 2). This is due to women's huge involvement in the domestic sphere, which is highly regulated by customs and laws; men are not subject to the same degree of regulation.

The meanings of the terms *'public'* and *'private'* depend on the purpose for which they are employed in this thesis, the private sphere is associated with managing household activities, acting as a wife, reproduction and the raising of children. In all societies, these activities have been treated as inferior and to be managed by women (General Recommendations No. 21, 13th Session, 1994: Comment para 11). In contrast, a broad range of activities outside the domestic sphere or public life is dominated by men, who historically have exercised the power to confine and subordinate women within the private sphere (General Recommendations No. 23, 16th Session, 1997: Comment para 8). Hence, men's failure to share private tasks with women is among the most significant factors inhibiting women's ability to participate in public life. In my analysis in Chapter Four, Five and Six, I analyse whether Malaysian laws and policies limit the '*world'* of Muslim

[48] See detail discussion in Section 2.4.2.1 and 2.4.2.2
[49] See detail discussion in Section 3.2

women in Malaysia to the private sphere. I argue that, even though the majority of women are still responsible for the domestic tasks, they are not entirely excluded from the public sphere due to special measures and affirmative actions secured by laws and policies to empower women in the public sphere.

Historically, Western-educated propertied men who first advanced the cause of human rights most feared the violation of their civil and political rights in the public sphere, which is the reason why this area of violation has been privileged in human rights work, much more so than in the private sphere (Bunch, 1995: 13). Human rights work has traditionally been concerned with *'state-sanctioned or condoned oppression'* which has taken place in the '*public sphere'*, or civil and political rights, away from the privacy to which most women are relegated, which is in economic and social rights (Peters and Wolper, 1995: 2). Although international human rights laws have challenged the discipline's traditional public and private dichotomy between states and individuals and are regarded as a radical development in international laws, Charlesworth and Chinkin (1993) have argued that they have in fact retained the profound gendered, public and private distinction. International laws seem to use the public-private divide as a convenient screen to avoid addressing women's issues (Engle, 1993: 143).

Other than that, feminists have argued persuasively that the *'public/private distinction is a false one and that the real question is not whether laws should apply to the private as well as the public, but rather, what types of private acts are and are not protected'* (Gunning, 1991-92: 238). Even though Gunning's idea may be correct, to determine the area in private life that has yet to be protected without proposing that all private spheres be regulated is complicated in terms of upholding justice for women. It seems to recognise

that laws do not have to intrude on certain areas in private life. This, too, may be correct. Again, however, we might ask which private life does not need to be protected? And who will decide that?

I argue that women's disadvantages will be endlessly neglected in those unregulated areas by reason of '*private life'*. For instance, women might be disadvantaged due to the denial of collective interest in the familial relationship. In this research, I will argue that collective interest could balance every person's choice, women and men to uphold gender equality. Polygamous marriages among Muslims, which will be examined in Chapter Six, are permitted under certain conditions, among which is the stipulation, that the existing wife and husband are guaranteed equal happiness and justice and that the possible disadvantages of the existing wife (or wives) will not be neglected. Also, as the lives of Muslims are governed by laws, be they public or private, these laws cover not only the application for polygamous marriage, but also the rights and duties of wives and husbands. Therefore, to determine whether the husband is following the rules or not, there must be, in the first instance, rules that regulate the husband's rights and duties, which could be considered the rules that regulate private life. Indeed, abolishing the distinction between public and private will not help if the public world of rules and rights comes to dominate everything (Campbell, 2006: 76). Women's rights strategy at this point should be to demand that laws intervene in the private realm and to propose greater public regulation of the private sphere of home and family.

In this thesis, I argue that the experience of those who will be affected by rights must be taken into account. Krishnadas (2007), in her analysis of the roles of rights in governing and shaping women's relationship with the reconstruction process, has argued that

women's rights to determine their lives' patterns are dependent upon the process of recognition. In fact, Krishnadas (2007: 139) has argued that *'the act of recognising local women's identities was dependent upon the different cultural, material and spatial frameworks in which women were recognised',* which broadens the understanding of the rights and recognition relationship. For instance, the prohibited working hours applied to women in industrial and agricultural undertakings between the hours of ten in the evening and five in the morning might ignore women's disadvantages, even though this *'patriarchal rule'* is intended to protect women's rights to safety. It is due to the need to work and earn salaries, as given to male workers. One can see that working in an industrial and or agricultural undertaking at night might not be suitable for women but, at the same time, their right to work cannot be denied. Here, an alternative must be offered to women who are supposed to work in industrial and agricultural undertakings during those hours; they could be moved to another area which is more suitable for them. In regard to the aforementioned points, if the experiences of female workers and women's autonomy are not taken into account, I would argue that a *'male's presumption'* that women's rights to safety are more important than their rights to work could be called amiss and wrong. For women, both rights are equally important and must be guaranteed by laws. Indeed, recognition is accorded not only by the local community which governs social structure but also by the laws, policies, administrative decisions and programmes. I will consider in my thesis how the laws, policies, administrative decisions and programmes have recognised Muslim women in Malaysia as rights bearers.

Knowing that the rights of human beings in these diverse traditions are correlated with duties and that the equal priority of collective and individual (or class) interests and autonomy could avoid dominant choice of rule or laws, the issue that needs to be

considered next is how rights inform the international and Islamic declaration of human rights, underpinned by the UDHR, UIDHR and CDHRI. The questions of whether rights in these Declarations convey the most critical element of rights, which are equal dignity and justice, and whether rights are correlated with duties and not absolute autonomy will also be answered. I argue that the values of equal dignity and justice remain the most important agenda in achieving gender-neutrality. Here, I trace that the added values which harmonise the UDHR with the UIDHR and CDHRI are the application of rights in these Declarations on issues of equal dignity and justice, the correlative relationship between rights and duties, and the non-absolutism of rights. This is important for my analysis of human rights in the Malaysian local legal context in Chapter Four, as the sources of the Malaysian human rights laws are common laws and the Islamic texts (*Quran* and the Prophetic tradition).

2.5 COMPLEMENTARY PRINCIPLES OF RIGHTS UNDER THE UDHR, UIDHR AND CDHRI[50]

2.5.1 Elementary Value of Rights: Equal Dignity and Justice

In this Section, I consider whether rights in the UDHR, UIDHR and CDHRI convey the most critical elements of rights, which are equal dignity and justice. I argue that the entire concept and content of the UDHR, UIDHR and CDHRI is to ensure justice and fairness for all human beings, which could be the keys that locate their justification of commonality. I agree with Sachedina (2009: 119), who offered the view that justice could be the major analytical tool leading to the recognition of universal morality from scriptural resources in

[50] Part of this Section is published in the American International Journal of Contemporary Research. See Nik Saleh, Nik Salida Suhaila. 2012. 'A Conceptual Analysis of Rights in the International and Islamic Human Rights Instruments' in *American International Journal of Contemporary Research*. Vol. 2. No. 4. pp. 155-164

Islam and its commanding influence over the deconstruction of discriminatory religious discourse. A perusal of the *Quran* on justice leaves no doubt that justice is integral to the basic outlook and philosophy of Islam, within or beyond the *Shariah*, and that there is no justice without gender equality (Musawah, 2011: 21).

I trace that the most elementary ideals and values of human rights expressed in the Preamble and the First Article of the UDHR are equal dignity and justice. The Preamble affirms that *'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.* Its principle of equal dignity for justice for all human beings is further explicated in Article 1 which expresses that *'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.* According to Smith (2003: 32 and 42), equality was the goal of the UN and a prohibition of discrimination is at the foundation of the UN's human rights policy.

The same is also stressed in the Islamic theory of human rights. As explained by Noor (2007: 130), Muslims generally understand that justice is a fundamental part of Islamic teachings. The UIDHR protects every person's equal dignity as stated in Preamble G (xiv) (b)[51], and the CDHRI states the same rights in Article 1 (a)[52] and Article 6 (a)[53]. I believe

[51] Preamble G (xiv) (b) of the UIDHR stated that '….*Therefore, we, as Muslim who believe in our obligation to establish an Islamic order, wherein every effort shall be made to ensure to everyone security, dignity and liberty in terms set out and by methods approved and within the limits set by the law do hereby, as servants of Allah and as members of the universal brotherhood of Islam at the beginning of the fifteenth century of the Islamic era, affirm our commitment to uphold the following inviolable and inalienable human rights that we consider are enjoined by Islam'*

[52] Article 1 (a) of the CDHRI stated that '*All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection'*

that the most transparent idea of equal dignity may be the one offered by Howard (1991: 81), that it is something granted at birth and is the *'particular cultural understandings of the inner moral worth of the human person and his or her proper political relations with society'*. Finding equal dignity as the inherent quality of the sacredness of human beings, Shestack (2000: 53) claimed that some religious philosophers believed that an entire rights system can flow from this concept. Many in the human rights field cite a concept of human dignity as the ultimate justification for human rights (Finnis, 1980; Vlastos, 1984: 41-76). For Muslims, the idea that all human beings are '*unconditionally equal'* in dignity through God's act of creation is stated in the *Quran* and is sufficient to confirm that all human beings are entitled to certain rights as part of their inviolable personhood (Sachedina, 2009: 115).

Kofi A. Annan, the Former UN Secretary General pointed out that human rights *'asserts the dignity of each and every individual human being, and the inviolability of the individual's rights'* (Kamali, 2006: 7). This characterisation of human dignity is in total harmony with the clear text of the *Quran*, and could also be said to manifest the basic Islamic outlook on the subject (Kamali, 2003). For Muslims, *Quranic* commentators have drawn the conclusion that physical and spiritual dimensions of dignity are natural rights of every human being regardless of race, colour and religion as they are endowed with dignity at the moment of birth (Kamali, 2002: 1). In numerous verses, the *Quran* speaks of dignity for humankind without distinction as to gender (Yaacob, 1986: 7; An-Naim, 1990b). Hence, because of their commitment to human dignity, it is only natural to say that the UIDHR and CDHRI are committed to the realisation of human rights, similar to the UDHR.

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[53] Article 6 (a) of the CDHRI stated that '*Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage'*

2.5.2 Rights vs. Rights and Duties

As I argued earlier, Islamic and Western jurisprudences not only assigns extensive meanings and usages of the term *'rights'*, which is, the word '*haqq*' in Arabic, but also imply that the term *'duties'* is correlated with '*rights*'. In this Section, I consider whether rights in the UDHR, UIDHR and CDHRI are correlated with duties. I trace that the UIDHR lays emphasis on the same priority of rights and duties and states that every person shall perform obligations proportionate to his capacity (Preamble). In its Explanatory Notes 2, it is stated that *'each one of the human rights enunciated in this Declaration carries a corresponding duty'*. Further, in Article IV (c), this Declaration points up the rights and duties of every person to defend others' rights including community rights. Also, Muslims are guaranteed rights and duties to refuse to obey any command which is contrary to the laws (Article IV (e)) and to protest against oppression (Article XII (c)). The obligation to fulfil duties is mentioned again in Article XIX (c), which requires a husband to maintain his wife and children. Moreover, if parents are unable to perform their duties to their children, the community is responsible for fulfilling them at public expense (Article XIX (e)). Here, duties are a responsibility not only of the individual but also of a community. Motherhood, as such, is entitled to special respect and care by the family and public organs of the community (Article XIX (g)). The most interesting correlation of rights and duties can be seen from within the familial relationship, in which women and men have shared obligations according to their sex (Article XIX (h)).

Similarly to the UIDHR, I trace that the CDHRI also expressly guarantees rights corresponding with duties. In the CDHRI, Article 8 secures rights to enjoy legal capacity, but it must be in terms of both '*obligation and commitment'*. I find that the relationship

between rights and duties can be seen in Article 2 (a), (c) and (d), that every human being is given rights to life and duties to preserve human life. A state's duties also include exchanging prisoners of war and arranging visits for families separated by circumstances of war (Article 3 (a)). Other than entitlement to the protection of good name and honour, every human being's burial place is also to be protected, as this is a duty conferred upon the state and society (Article 4). It is also the duty of the state and society to remove all obstacles to marriage and ensure family protection and welfare (Article 5 (b)). While men are responsible for supporting their families (Article 6 (b)), women also have duties to perform (Article 6 (a)). Article 6 (a) stated that *'woman is equal to man in human dignity and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence and the right to retain her name and lineage'*. The language of duties is further stressed in Article 7 (a), which imposed on parents, society and the state the responsibility for maintaining the child's rights. Society and the state also have duties to provide education (Article 9 (a)), support the struggles of colonized peoples (Article 11 (b)), provide a clean environment that will foster everyone's self-development (Article 17 (a)), and provide medical and social care. The state must ensure a decent living for every individual (Article 17 (c)) and protect everyone from arbitrary interference (Article 18 (b)). Even countries sheltering refugees must ensure every person's protection until they reach safety (Article 12).

I note that the UDHR speaks about rights in which freedom, justice and world peace are the basis of inalienable rights secured for every human being. In its Preamble, a common understanding of rights and freedom is stated as being of the greatest importance for realizing these undertakings. Nowhere in the UDHR can I find any mention of the

correlation[54] of rights with duties; there is only the entitlement to rights and freedom set out in Article 1 and Article 2. Only Article 29 (1) in its general form states that every person has duties to the community. However, I argue that the substance of the UDHR intended to deal both with human rights and duties. Morsink (1999: 239-241) has demonstrated how the delegates at the Third Committee proceedings in drafting the UDHR were in conflict regarding the issue of whether to include a list of duties in the bill or whether the reference to Article 29 was adequate. Among the delegates who proposed that duties be included were those from Cuba, Latin America, China and Egypt. Others, such as the delegates from France and Belgium, were not against the proposal, but did not agree that the *'list of duties'* should be set out specifically as, for them, Article 29 was adequate. In the end, Morsink (1999: 240) explained, *'the majority of the drafters were satisfied that Article 29 was a sufficiently comprehensive statement on the duties a person has to the various communities of which he or she is a part. There simply was not enough time at the end to expand upon Article 29. All that could be done in the Third Committee was to edit it'.*

I trace that the correlative relationship between rights and duties is evident in the UIDHR and CDHRI, yet the same is not obvious in the UDHR. However, this does not make these Declarations irreconcilable because, even though the relationship of rights and duties is not specifically mentioned in the UDHR, the generality of Article 29 is seen as a reference of rights and duties to the whole provisions. As I will argue in Chapter Six that equal outcome is the substance of rights to gender equality, wives and husbands in Islam could have different entitlements to rights and duties. In other words, similar entitlements to rights and responsibilities for wives and husbands in certain situations during marriage may result in

[54] Correlativity refers to a relationship where a right is vested in one party (right holder) and a duty is imposed on another (duty bearer). See Mohammad, Mohammad Tahir. 2003. *Rights and Duties in Shariah and Common Law*. Kuala Lumpur: Ilmiah Publishers

inequality; therefore differences could secure equal dignity and justice. While wives perform their biological duties which cannot be performed by husbands, as persons in disadvantaged situations wives need a guarantee of a protected life such as rights to basic needs (clothing, food, shelter) to be provided by husbands.

As I mentioned earlier, claiming rights only may unbalance community (or family) justice, and may cause injustice to the duty bearers; therefore, the rights holders must also perform their duties to ensure that other people's rights are protected as well as theirs. That is why I argue in this research that, to ensure collective justice, rights must not be an individual absolute choice, because absolute rights are patriarchal in nature. Next, I explore whether rights in the UDHR, UIDHR and CDHRI are non-absolute, which would bring about justice for all human beings. The new understanding that autonomy is a positive instrument is important, provided that the term *'autonomy'* is refined to a moral or non-absolute autonomy which upholds gender equality.

2.5.3 Absolute vs. Non-Absolute Rights

I trace that a number of provisions in the UIDHR and CDHRI impose restrictions on certain human rights; this is done purposely to protect the public interest. The Centre for Inquiry (CFI), in an article to the UN of September 2008, wrote that the CDHRI's imposition of restrictions on nearly every human right was based on *Shariah* (CFI Defends Freedom of Expression at the UN Human Rights Council, 2008). This might not be questioned as the CDHRI provides human rights based on Islamic textual sources and limited to the Islamic principles. Apart from that, I contend, it is not intended to limit human rights, but, to ensure that rights and interests of the community are considered as well as individual choice. I argue that it may be incorrect to claim that there are elements

of anti-individualism in Islam due to the restrictive nature of Islamic human rights, as the provisions of the UIDHR and CDHRI explained earlier have shown that, as well as preserving the public good, *Shariah* also protects individual rights, similarly to the Western practice. Brems (2001: 249), for instance, admitted that the UIDHR is of an individual nature even though it still includes collective rights.

This can be seen in the UIDHR and CDHRI's provisions on rights to life (Article I (a) of the UIDHR and Article 2 (a) of the CDHRI), rights to own property (Article XVI of the UIDHR and Article 15 (b) of the CDHRI), freedom of thoughts and beliefs (Article XII (a) of the UIDHR and Article 22 (d) of the CDHRI) and equal access to public services (Article XI (a) of the UIDHR and Article 23 (b) of the CDHRI). The UIDHR further extended non-absolute rights to protection against exile (Article XXIII (b)) whereas CDHRI extended them to freedom of movement (Article 12) and rights to freely participate in cultural life (Article 16). Indeed, to ensure justice for all, the collective interests need to be considered as well as individual interests. Thus, I employ the non-absolute rights theory in my research to prove that this model is effective in upholding gender justice.

The UDHR, even though it does not necessitate restrictions on any particular rights mentioned in its provision, only affirms limitation of everyone's rights in general as determined by laws for the purpose of securing due recognition, respecting others' rights and meeting the just requirements of morality, public order and general welfare of society. I trace that it shares a similar principle with the UIDHR and CDHRI that rights are not absolute. Article 29 (2) stated *that 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of*

securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

I trace that, like the application of the relationship between rights and duties as discussed earlier; the difference between the UDHR and the UIDHR and CDHRI pertains to the generality of the restrictive nature of rights in the UDHR, which is only expressly mentioned in Article 29. However, this does not mean that the UDHR does not grant limited rights to the individual. In the Third Drafting Session of the UDHR, I note that the issue that arose was not whether rights were absolute or not, but whether to put the restricted provision of human rights at the beginning or at the end of the Declaration. Morsink (1999: 245-246) has analysed that some delegates proposed to keep the restricted clause with the other two *'basic announcements'*, which were Article 1 about *'all human beings being born free and equal'* and Article 2 which prohibits *'discrimination of any kind'*, and not in Article 29. Geoffrey Wilson, the British delegate, objected to the proposal to locate the provision dealing with the limitations on the exercise of rights at the end of the Declaration. According to Morsink, Mr. Wilson felt that the Declaration *'should avoid giving the reader the impression that the individual was granted unlimited rights'*, a view that was later supported by the USSR, Lebanese, Belgian and Egyptian delegates. However, from the above explanation, Article 29, which had invited various ideas and strategies for the application of human rights and duties and their non-absolutism, is one of the fundamental provisions in the UDHR. As rightly observed by the Beaufort of the Netherlands (Morsink, 1999: 249), an important idea that needs to be preserved is that *'the debate on Article 29 had shown that the rights of the individual were not absolute. It was necessary to define the restrictions demanded by respect for the rights of other individuals*

and of different social groups'. Thus, it is evident that restrictive rights are clearly employed in the Islamic-based and Western-based human rights instruments underpinned by the UIDHR, CDHRI and UDHR.

2.6 CONCLUDING REMARKS

I have argued that *'rights'* is not a foreign concept in the Islamic tradition. The Islamic-based human rights jurisprudence has embodied a meaning of rights similar to that of international human rights to protect and promote values and ideals that reaffirm equal dignity and justice for human beings. The subject (individual and collective) and object (choice and interest) of rights in the international and Islamic human rights doctrines also share similar principles justifying human rights. The international and Islamic human rights doctrines focus on the correlative relationship between rights and duties and the non-absolute autonomy of individual choice to enable the interests of the community to be considered; this balances the rights of every individual as human beings. I argued that the concept of rights might be reinterpreted to consider collective interest which stresses the correlative relationship between rights and duties and non-absolute rights.

I argued that the convergence principles of the Western-based and Islamic-based human rights Declarations take these perspectives; both provide entitlements to human rights which correlate rights with duties, and the contents of international and Islamic-based human rights instruments are non-absolute autonomy-based, be they general or specific, focusing on the relationships between the individual and the state and between individuals. This is to ensure that the rights of all human beings are equally distributed.

Through my analysis of the image of rights' subject, I argued that the framework of non-absolute individual entitlements constructs a value of interest and a wider coverage of rights, which limits the gendered nature of rights. This theoretical review developed a framework to analyse whether rights could inform equality. I traced that both international and Islamic jurisprudences and all three Declarations present rights as an instrument for equality among human beings. The tenets of justice and dignity, rights and duties and non-absolutism of rights are the principles that accommodate similar values of the human rights concept underpinned by the UDHR, UIDHR and CDHRI. I argued that the concept of rights in Islam underpinning the UIDHR and CDHRI is capable of harmonisation with the UDHR. I analyse the idea of equality that will be employed in this thesis in the next Chapter.

CHAPTER THREE

DIVERGING OR CONVERGING? THE CONCEPTUAL ANALYSIS OF GENDER EQUALITY IN THE INTERNATIONAL AND ISLAMIC HUMAN RIGHTS INSTRUMENTS

3.1 INTRODUCTION

In this Chapter, I discuss the jurisdictional background and provide a conceptual analysis of equality in Islamic jurisprudence and feminist debates in an attempt to explore a wider understanding of equality and its principles. I critically examine how the conception of equality informs the international and Islamic human rights instruments underpinned by the UDHR, UIDHR and CDHRI. I present an analysis of the principle of equality in the Women's Convention to consider whether the application of substantive equality (different entitlements to rights for women and men) in marriage and family relations in order to address gender disadvantages in the UIDHR and CDHRI is harmonious with the Women's Convention. This is particularly important for my analysis in Chapter Six of whether Malaysia's reservation of Article 16 (1) (a), (c), (f) and (g) of the Women's Convention concerning marriage and family relations due to its inconsistencies with *Shariah,* leaves Malaysian laws on Muslim women's rights in disharmony with the Women's Convention. I will consider whether, different entitlements to rights for Muslim women and men according to Malaysian laws in marriage and family relations render Muslim women in Malaysia unequal from men, based on the interpretation of equality under the Women's Convention discussed in this Chapter.

First, I draw upon Fletcher's (2002) and Bakar's (2003) ideas of equality to argue that Islamic human rights jurisprudence and feminist standpoints share similar meanings and principles of equality. I argue that an equality of rights that considers substantive equality rather than just formal equality could reconcile both traditions. The basic premise of the argument is founded on the discourses of formal and substantive equality, in that similarity of legal treatment does not necessarily denote equality because, if a woman is in a different position from a man to begin with, treating them with total similarity will simply perpetuate the differences between them. Minow's explanation about women's relationship to the workplace might describe how treating women with total similarity with men will simply perpetuate the differences between them. According to Minow (1991: 41), '*women's biological differences from men may be deployed to justify special accommodations at the workplace, such as safety protections against chemical damage to their reproductive systems, or maternity leave following childbirth'.* Hence, it is important to apply equality appropriately to ensure that all human beings are guaranteed equal access to justice. I argue that an extended equality model which focuses on the subordinated group is rather significant in this analysis of gender equality. The central focus of this model is on the *'disadvantage',* i.e. whether the laws contribute to the subordination of women (disadvantaged group).

Second, I consider whether both formal and substantive notions of equality inform the UDHR, UIDHR and CDHRI. I reflect on whether the UDHR shares similar application of the principles of equality with the UIDHR and CDHRI. I argue that the UDHR is harmonious with the UIDHR and CDHRI in terms of the *'language of rights to equality'*, but conflicting in terms of different entitlements to rights for women and men in marriage and family relations. Finally, I present an analysis of the principle of equality in the

Women's Convention, drawing upon Facio and Morgan (2009), to consider whether the application of substantive equality (different entitlements to rights for women and men) in marriage and family relations in order to address gender disadvantages in the UIDHR and CDHRI, although irreconcilable with the UDHR, is harmonious with the Women's Convention. I will argue that dissimilar entitlements to rights for Muslim women and men in the UIDHR and CDHRI pertaining to marriage and family relations are consistent with the extended equality model which focuses on the disadvantaged group to ensure equal outcomes. The same battle has been fought in the feminist debates against *'unequal'* liberal equality, which addressed the Women's Convention. Hence, throughout my analysis, I argue that, on the application of substantive equality, the UIDHR and CDHRI are not entirely harmonious with the UDHR, but are reconcilable with the Women's Convention.

3.2 BRIEF CONCEPTUAL ANALYSIS OF GENDER EQUALITY FROM ISLAMIC JURISPRUDENCE AND IN FEMINIST DEBATES

In this Section, I examine the jurisdictional background and provide a conceptual analysis of equality from Islamic jurisprudence and in feminist debates to search for a wider understanding of equality and its principle. I trace whether notions of equality from Islamic jurisprudence and in feminist debates are complementary to each other. I note that, according to Islamic human rights jurisprudence and feminist standpoints, equality is one of the most fundamental principles of human rights together with justice and dignity. Baderin (2003: 58), in his research on international and Islamic laws on human rights, quotes Justice Tanaka in the South West Africa Cases[55] that equality has been described as the *'starting point of all liberties'*. Griffin (2008: 39) has stressed that *'equality is a ground*

[55] [1966] ICJ Reports. p. 6

for human rights'. I note that equality and non-discrimination are the basis of international and Islamic human rights; as Rehman (2003: 269), McCrudden (2004) and Grant (2007) said, a corollary between equality and non-discrimination is well recognised. I will argue that, according to the Islamic jurisprudence and feminist debates, the meaning and principle of equality are capable of harmonisation.

The widespread understanding of equality today is based on liberal equality, that *'things that are alike should be treated alike'.* Non-discrimination is understood as formal equality (Kapur and Cossman, 1996: 178). As stressed by Smith (2003: 185), the usual rule that applies for equality is that *'a situation is unequal if like situations are treated differently or different situations are treated similarly'.* Wesson (2007: 751) and Ahmad (2005: 4) stated that this kind of equality relied upon the proposition that fairness requires similar treatment only. Liberal equality, which is drawn from the aforementioned maxim '*likes should be treated alike',* asserted by Fredman (2001: 154), is associated with *'neutrality',* individualism and autonomy. This might conflict with collective interest and equal distribution of social goods, as discussed in Chapter Two. Fredman (2003: 43) has stressed that the aim of equality is to give people an equal set of alternatives from which to choose to pursue their own version of a good life, thus, treating different people similarly will deny them their choice for a good life. Fredman has explained that this limited sense of equality which is correlated with neutrality is achieved by forbidding the state's preferences for any group (disadvantage group) but applying similar treatment by laws. Even though this sounds impartial to every individual, the insistence on a particular set of values based on the dominant power which set the choice might result in discrimination against disadvantaged groups. Fiss (1976: 107) has even claimed that the neutral value of similar treatment is merely an illusion.

Using the terms '*adl*' and '*ihsan',* the context of justice in *Quran* is also related to the idea of *'equality'* or '*balance',* defined by Fyzee (1978: 17) as *'to be equal, neither more nor less'*. Bakar (2003: 4), while stressing that the definition of *'adl'* related to equality in Islam, claimed that justice in Islam has been widely defined as *'to put a matter in its proper and valid context'*. Equality in Islam is not about the distribution of one thing into two portions of similar amounts without taking into consideration whether or not both parties need such portions or whether or not both parties' needs are similar (Yaacob, 1986: 82). This is consistent with the notion of equality stressed by Fredman (2003) earlier that equality is to give people an equal set of alternatives from which to choose to pursue their own version of a good life. Hence, equality could entail the distribution of things into dissimilar amounts; more importantly, equal distribution might lead to inequality.

I note that, for Muslims, Islam accords equal dignity to women and men, which could be based on similar or different entitlements to rights and duties. Proponents of Islamic standards defined equality as the complementary nature of the roles played by women and men[56] (Venkatraman, 1995: 2005), in that different roles and responsibilities between women and men are assigned purposely to ensure equal outcomes for dignity and justice. Baderin (2003: 60-61) has stressed that Islam recognises the equality of women and men, but it is not absolute. By referring the idea of non-absolute equality to the notion that women and men could have different roles and responsibilities, Baderin demonstrated the

[56] See detailed discussion in Venkatraman, Bharati Anandhi. 1995. 'Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination against Women: Are the *Shariah* and the Convention Compatible?' in the *American University Law Review* Vol. 44. Venkatraman explained about North American Muslim Women's Retreat and Dialogue in the Document: 'The International Convention on the Elimination of All Forms of Discrimination Against Women,' Looking at Human Rights, Document I, at 2 (draft 1994) (on file with *The American University Law Review)* [hereinafter Looking at Human Rights] (maintaining that the Women's Convention reflects Western and Christian principles of '*equality*' without regard for the Islamic counterpart of '*equitability*' and ultimately recommending the United States not to ratify the Convention) and declaring that the Women's Convention does not recognize rights and responsibilities of women that differ from those of men)

concept of *'equal but not equivalent'* in Islam. Baderin (2003: 60) noted that '*equality of women is recognised in Islam on the principle of equal but not equivalent',* especially in terms of their roles within the family. From this statement, to avoid inequalities, Islamic textual sources sometimes do not advocate equal treatment of women and men which is equated with sameness in family relations, because this will not result in equal dignity and justice.

Thus, in Islam, even though equality could be achieved if the laws treat likes alike, there is still a possibility that equality might not be achieved by treating likes alike. I note that, apart from similar treatment of laws, Islam also focuses on '*substantive equality'* to ensure gender justice and fairness and to promote the collective interest. I find that this type of equality is not intended to give similar treatment, but to give more advantages to the disadvantaged individual or group to safeguard equal outcomes. Again, this type of equality for women, for instance, is not meant to protect women because women are different from men but because women have been historically and systematically disadvantaged (Ahmad, 2005: 5; 2007: 61). The aim of substantive equality is to remedy past and present disadvantages (Rebouche, 2009: 712-713). As stressed by Husband (2004: 11), equality of treatment does not take into account the fact that *'the equal application of rules to unequal groups or individuals can have unequal results'.* According to Husband, equal treatment for unequal potential groups tends to reinforce inequalities and can lead to inequalities for groups that have been disadvantaged by a system that fails to take different needs into account. I argue that substantive equality goes further than the notion of equal treatment because it considers different needs between groups and individuals to achieve equal outcomes. Indeed, focusing only on results would not be the best practice because overemphasis on results might cause unfairness inherent in the process of achieving these

results. Therefore, the application of formal equality without setting aside substantive equality in Islam would help achieve the maximum justice for people, including disadvantaged groups. In my analysis of the application of principle of equality under the UDHR, UIDHR and CDHRI in the next Section and the Malaysian laws on Muslim women's rights in Chapters Four, Five and Six, I will show that formal equality is equally as important as substantive equality.

There is a varied body of literature on equality based on gender[57] from the feminist perspective. Issues of equality and possible ways to achieve it have always been at the heart of the feminist project (Frug, 1992: 4). I trace that, like the Islamic perspective on equal treatment, most writers have claimed that similar treatment is insufficient because it fails to address societal structures that perpetually disadvantage women. Charlesworth and Chinkin (2000: 10) professed that, even though women's rights to equality are guaranteed with similar treatment, inequality might still exist in the process and the principles of legal systems. As noted by Unterhalter (2005: 30), *'equality is no longer a matter of equal amounts, but a more substantive idea associated with solidarities and confronting injustice'.*

Even though equality has been described as a simple concept (Holtmaat, 2004: 2), its meanings and principles have not been properly understood. I note that similar treatment

[57] See, for example, Wolgast, Elizabeth. 1980. *Equality and the Rights of Women.* Ithaca: Cornell University Press; McKinnon, Catherine. 1987. *Feminism Unmodified.* Cambridge, Mass: Harvard University Press; Smart, C. 1989. *Feminism and the Power of Law.* Routledge; Kingdom, Elizabeth. 1991. *What's Wrong With Rights?* Edinburgh: Edinburgh University Press; Kiss, Elizabeth. 1997. 'Alchemy or Fool's Gold? Assessing Feminist Doubts about Rights' in Shanley, Mary Lyndon and Uma Narayan (eds.), *Reconstructing Political Theory: Feminist Perspective.* London: Polity Press; Fletcher, Ruth. 2002. 'Feminist Legal Theory' in Reza Banakar and Max Travers (eds.). *An Introduction to Law and Social Theory*. Oxford: Hart; Fredman, Sandra. 2003. 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights' in Borefijn, Coomans, Goldschmidt, Holtmaat & Weelenswinkel (eds.) *Temporary Special Measures – Accelerating de facto Equality of Women Under Article 4 (1) UN Convention on the Elimination of All Forms of Discrimination against Women*

might not have a value of neutrality because, once the right to equality is related to and enforced by laws, its objectivity and impartiality can be challenged. As discussed earlier, because of the *'aura'* of truth and justice, laws have always caused people to believe that truth and justice are incorporated into laws; in fact, however, as Fredman (1997: 2) alleged, laws are made by people in power, and their interests have always been predominantly male, which is why Fiss (1976) challenged the neutral value of similar treatment. I suggest that this might be due to the fact that the concept of similar treatment conceals the real nature of substantive needs and correlative principles of human rights and equality.

In thinking their way through such problems, feminists have developed certain critiques of the concept of equality which informs them. The critique asks that *'equality not be reduced to sameness'* (Fletcher, 2002: 149), similar to the Islamic perspective of equality offered by Bakar (2003), Yaacob (1986), Baderin (2003) and Unterhalter (2005) as explained earlier. In other words, if obstacles still exist to impede genuine exercise of choice, equal treatment is not sufficient (Fredman, 2003: 43). On the basis of my analysis of substantive equality applied in the Malaysian laws on Muslim women's rights in Chapters Four, Five and Six, I am in agreement with Smart (1989: 85 and 1995: 188) when she criticized the notion that women should be equal (treatment) to men, as if men are the standard by which women must be judged. As claimed by Fredman (1997: 15), *'the problem with relying in this way on the male norm is that the existing values in a male-dominated world are accepted without challenge and women are required to compete on their terms'.* McKinnon (1987: 34) also condemned the notion of the sameness standard which always measures females against male standards. Women, as such, I argue, must be given equal rights with men in order to gain access to all opportunities that might lead to equal outcomes of justice for

them, not similar treatment with men which results in injustice. And indeed, justice for women, to which I refer here, must be defined by women, not men.

Clearly, the idea that equality can be achieved by considering the differences between people is a departure from the notion that it can be achieved only by considering the sameness between them, as the latter requires that laws or policies be applied to treat people in the same way (Fredman, 2003). Therefore, I note that, like the Islamic method of achieving gender equality, modern feminism corresponds not only to equal treatment (similar treatment), which is commonly known as *'formal equality'* in the feminist discourses, but also to *'substantive equality*[58]*'* which can be achieved through laws (Smart, 1989: 140). For feminists, equality of gender may not be achieved if substantive equality is not to be considered, because the objective of substantive equality is to eliminate the substantive inequality of disadvantaged groups (Kapur and Cossman, 1996: 176). That is why feminists, both in the United States and United Kingdom, have been concerned with the inability of the concept of equal rights (which refers to formal equality only) to address the reality of gender inequality (Kingdom, 1991: 114). Wolgast (1980: 48), for instance, did not reject the concept of equality as commonly referring to equal status, but preferred the notion that rights are equally protected if they depend on gender differences. I argue that women, as such, should be treated in a manner which implies they need special protection solely on account of being a disadvantaged group. Fredman (2003: 43) thus stressed that the aims of equality require more than equal treatment: they require equal outcomes.

[58] Substantive equality is also referred to as *'positive discrimination'* in certain European contexts and *'affirmation action'* in the United States context

3.3 CONTRASTING PRINCIPLES OF GENDER EQUALITY IN THE UDHR, UIDHR AND CDHRI

In this Section, I examine gender equality based on the UDHR, UIDHR and CDHRI. I analyse whether the UDHR is harmonious with the UIDHR and CDHRI in terms of the application of gender equality. I argue that the UDHR is parallel with the UIDHR and CDHRI in terms of their usage of *'male-biased language'* in the provisions relating to rights conferred on women and men. I explain that the difference between the UDHR and the UIDHR and CDHRI is pertaining to different entitlements to certain rights in marriage and family relations for women and men. In my analysis of the contrasting principle and application of equality underpinning the UDHR, UIDHR and CDHRI in this Chapter, I consider whether different entitlements to rights for Muslim women (wives) and men (husbands) in marriage and family relations could protect women as a disadvantaged group. Some critics have alleged that the UIDHR and CDHRI disadvantaged Muslim women due to the *'inequality of gender'* expressed in the language and entitlements applied in both the Declarations' provisions. From this perspective, I examine both aspects of *'gender inequality'* applied in the UIDHR and CDHRI.

This is particularly important for my analysis in Chapter Six of whether different entitlements to rights for Muslim women and men in marriage and family relations according to Malaysian laws could protect women as a disadvantaged group. I will argue that women or wives, as persons who have been historically disadvantaged, must be accorded special measures which are not accorded to men or husbands, purposely to achieve equal outcomes between the sexes. Within the context of marriage, Ali (2000: 39) has agreed that the *Quranic* laws stipulate that a wife is her husband's responsibility. Ali

based her assertion on Verse 4: 34, which stated that '*men are the managers of the affairs of women for that God have preferred in bounty one of them over another, and for that they have expended of their property'.*

I trace that the UDHR confirms the right of every human being to freedom and equality (Article 1 and Article 2)[59]. Similarly to the UDHR, the UIDHR assures freedom (Preamble G (ii) and Article II (a))[60] and equality (Preamble G (i))[61]. The CDHRI also offers the same right to freedom and equality as stated in its Preamble,[62] Article 1 (a)[63] and Article 11 (a)[64]. However, there have been criticisms of the different entitlements to rights for women and men as set out in both the UIDHR and the CDHRI. The UIDHR and CDHRI were

[59] Article I of the UDHR stated that *'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'*. Article 2 stated that *'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty*

[60] Preamble G (ii) of the UIDHR stated that '….*Therefore, we, as Muslims who believe in our obligation to establish an Islamic order, wherein all human beings are born free, do hereby, as servants of Allah and as members of the universal brotherhood of Islam at the beginning of the fifteenth century of the Islamic era, affirm our commitment to uphold the following inviolable and inalienable human rights that we consider are enjoined by Islam'.* Article II (a) stated that '*Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the law'*

[61] Preamble G (i) of the UIDHR stated that '….*Therefore, we, as Muslims who believe in our obligation to establish an Islamic order, wherein all human beings shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of race, colour, sex, origin or language do hereby, as servants of Allah and as members of the universal brotherhood of Islam at the beginning of the fifteenth century of the Islamic era, affirm our commitment to uphold the following inviolable and inalienable human rights that we consider are enjoined by Islam'*

[62] Preamble of the CDHRI stated that *'The Member States of the Organization of the Islamic Conference wishing to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shariah'* and *'Believing that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God and were sent through the last of His Prophets to complete the preceding divine messages thereby making their observance an act of worship and their neglect or violation all abominable sin, and accordingly every person is individually responsible - and tile Ummah collectively responsible - for their safeguard'*

[63] Article 1 (a) of the CDHRI stated that '*All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or oilier considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection'*

[64] Article 11 (a) of the CDHRI stated that *'Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High'*

criticized by Mayer (1995: 102) on the grounds that the treatment of the status of Muslim women is deliberately obscure in both Declarations. Among the examples that Mayer cited were Article III, Article XIX and Article XX of the UIDHR, and she further claimed that Muslim women's rights in the UIDHR are denied by the application of Islamic principles, which are patriarchal in nature. Mayer also criticised Article 19 of the CDHRI because it does not endorse equality.

Article III of the UIDHR reads as follows:

'*Right to Equality and Prohibition against* ***Impermissible Discrimination***

a) All persons are equal before the Law and are entitled to equal opportunities and protection of the Law.

b) All persons shall be entitled to equal wage for equal work.

c) No person shall be denied the opportunity to work or be discriminated against in any manner or exposed to greater physical risk by reason of religious belief, colour, race, origin, sex or language'

Here, the phrase in Article III entitled *'right to equality and prohibition against* ***impermissible discrimination'*** gives the impression that there is a '*permissible discrimination'* in Islam. However, because the *Quran* is emphatic on the objectivity of justice and rejects any compromise in its basic conception (Sheriff, 2007: 6), it seems problematic to claim that Islam discriminates against women. Hence, permissible discrimination in Article III might refer to different entitlements to rights due to the differences or different treatment to protect disadvantaged groups, which might be called *'positive distinction'* and will not amount to *'less favourable'* treatment to women. Indeed, Mayer's argument was not wrong, as other people might also think that the term

'*permissible discrimination'* used in Article 3 of the UIDHR is the symbol of *Shariah's* promotion of gender inequalities.

Mayer's argument that Islamic principles are patriarchal in nature is also based on Article XIX (c) and Article XX. Article XIX (c)[65] of the UIDHR, similar in formulation to Article 6 (b)[66] of the CDHRI, establishes that the husband is the head of the household and obligated to provide for the family. Article XX[67] makes a detailed provision for the right of married women to be given rights to residential and other maintenances by their husbands during marriage and for the period of *iddah*[68] following dissolution of marriage, and also the right to seek dissolution of marriage and to secure inheritance.

Mayer (2007: 102) has observed that the CDHRI does not endorse equality and has argued that Article 19[69], which refers to equality before the laws, should be read as meaning that the laws apply equally to rulers and ruled only. My argument is that, as the provision

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[65] Article XIX (c) of the UIDHR stated that *'Every husband is obligated to maintain his wife and children according to his means'*

[66] Article 6 (b) of the CDHRI stated that *'The husband is responsible for the maintenance and welfare of the family'*

[67] Article XX of the UIDHR stated that *'Every married woman is entitled to:*

a) live in the house in which her husband lives

b) receive the means necessary for maintaining a standard of living which is not inferior to that of her spouse, and, in the event of divorce, receive during the statutory period of waiting (iddah) means of maintenance commensurate with her husband's resources, for herself as well as for the children she nurses or keeps, irrespective of her own financial status, earnings, or property that she may hold in her own rights

c) seek and obtain dissolution of marriage (khul'a) in accordance with the terms of the law. This right is in addition to her right to seek divorce through the courts

d) inherit from her husband, her parents, her children and other relatives according to the law

e) *strict confidentiality from her spouse, or ex-spouse if divorced, with regard to any information that he may have obtained about her, the disclosure of which could prove detrimental to her interests*

A similar responsibility rests upon her in respect of her spouse or ex-spouse'

[68] *Iddah* is a period of time following the dissolution of marriage by divorce or death in which the divorced wife or the widow is not permitted to enter into another marriage. The *iddah* of a divorced woman who has not reached menopause is three menstrual cycles, and for a divorced woman who has reached menopause or whose menstrual cycles are irregular it is three lunar months. Ter *iddah* period of a pregnant woman is until she delivers the child, and the *iddah* of a widow is four months and ten days. However, no *iddah* is prescribed to those woman whose marriages have not been consummated

[69] Article 19 (a) of the CDHRI stated that *'All individuals are equal before the law, without distinction between the ruler and the ruled'*

clearly mentions that *'All individuals are equal before the law',* it should be interpreted as applying just to a certain hierarchy of people, but to all persons in general. I argue that the line *'without distinction between the ruler and the ruled'* is only an example given in this provision, that the hierarchy distinguishing the ruler and the ruled is palpable; therefore, if the ruler and the ruled are equal, there will obviously be no distinction among ordinary people. Indeed, an important task of human rights documents is to guarantee that every individual is equal, not only in terms of protection by laws but also in terms of *'opportunities'* to be protected by laws, as expressly mentioned only in the UIDHR (Article III (a)). Article III (a) provides that *'All persons are equal before the law and are entitled to equal opportunities and protection of the law'*.

Like Mayer, Smith (2003: 195) has also criticised the CDHRI for falling short of universal human rights standards by distinguishing between the equality of Muslim women and men. Smith claimed that the Declaration asserts the superiority of men, as mentioned above by Mayer. Littman (1999) has condemned the CDHRI for introducing intolerable discrimination against Muslim women. However, I argue that all three Declarations guarantee that every person is equal before the law. The UDHR guarantees all persons equality before the law as stated in Article 7. Even though there is no mention in the UIDHR and CDHRI that everyone is recognised as a person before the law, the versions of provisions which guarantee equality before the laws (Article III (a)[70] of the UIDHR and Article 19 (a)[71] of the CDHRI), to enjoy legal capacity (Article 8 of the CDHRI)[72] and to

[70] Article III (a) of the UIDHR stated that *'All persons are equal before the law and are entitled to equal opportunities and protection of the law'*

[71] Article 19 (a) of the CDHRI stated that *'All individuals are equal before the law, without distinction between the ruler and the ruled'*

[72] Article 8 of the CDHRI stated that '*Every human being has the right to enjoy a legitimate eligibility with all its prerogatives and obligations; in case such eligibility is lost or impaired, the person shall have the right to be represented by his/her guardian'*

be treated in accordance with laws (Article IV (b) of the UIDHR)[73] automatically acknowledge all persons as having legal personalities equally. Both also list basic human rights for every human being irrespective of gender. Without recognition of their legal personality, *'sui juris'* or '*ahliyah'* under the *Shariah*, no individual will ever be able to bring any claims before the laws. Hence, as argued earlier, having legal personality is not sufficient if disadvantaged persons are not legally guaranteed affirmative actions to authenticate their detriment.

3.3.1 *'Man'* is Mankind

3.3.1.1 Freedom and Equality in Dignity and Rights

In this Section, I analyse whether the language of rights to equality under the UDHR, UIDHR and CDHRI is neutral and not gendered. As stressed by Smart (1992) earlier, if all legal subjects are treated equally, law can be an instrument to gender equality. The word *'men'* is often understood to be unmarked[74] and gender-neutral, similar to '*people'*, which refers to both women and men (Jong, 1993: 75); however, changing the word *'men'* to *'people'* indeed changes the perspective of a masculine-based idea into a fair and just statement: as *'verified by sociological and physiological studies, the use of the male pronoun does not bring women into readers' minds'* (Busby, 1990: 77). Indeed, the male-biased language definitely has negative impacts on women. For instance, gender-biased terms in human rights laws could form the basis for sexist argumentations when dealing with rights to life, even though the laws might not have intended this. Moreover, the word

[73] Article IV (b) of the UIDHR stated that '*Every person has not only the right but also the obligation to protest against injustice; to recourse to remedies provided by the law in respect of any unwarranted personal injury or loss; to self-defence against any charges that are preferred against him and to obtain fair adjudication before an independent judicial tribunal in any dispute with public authorities or any other person'*

[74] The word is considered as '*unmarked*' if it refers to a noun that includes women and men. See Busby, Karen. 1990. 'The Maleness of legal Language' in Dawson, T. Brettel (ed.), *Women, Law and Social Change*. Canadian Legal Studies Series. Captus Press. p. 76

'*men*' is not commonly understood by lay persons to include women. Charlesworth and Chinkin (2000: 232) wrote; *'Such word use is significant in reinforcing hierarchies based on sex and gender even if it is intended to be generic'*. This is particularly important for my analysis in Chapter Four of whether Malaysian laws on human rights are gendered and how Malaysian laws, prior to the amendments made to uphold gender equality language, were gender-biased.

In the UIDHR, I note that the '*male-biased language'* can be seen in Article II (a) pertaining to freedom and equality in dignity and rights. Article II (a), which warns that no inroads shall be made on man's rights to liberty, uses the word *'man'*, not '*mankind'* or *'everyone',* as has been used in the Preamble G (xiv) (a) and (b) about the same rights. Article II (a) states that '***Man** is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the law'*. The same rights mentioned in the Preamble G (xiv) (a) and (b), Article II (b) and Preamble G (i) and (ii) are flexible and gender-neutral; however, because Article II (a) uses the word *'man'*, this still indicates the privileging of the male subject. That is why Charlesworth and Chinkin (2000: 17) stressed the importance of replacing the word *'man'* with *'human'.* This *'male-language'* also supports feminist arguments that rights language is gendered (Poovey, 1992). Preamble G (xiv) (a) and (b) provides as follows:

'(a)….*Therefore, we, as Muslims who believe in our obligation to establish an Islamic order, wherein every effort shall be made to secure unto **mankind** deliverance from every type of exploitation, injustice and oppression, do hereby, as servants of Allah and as members of the universal brotherhood of Islam at the beginning of the fifteenth century of the Islamic era, affirm our commitment to uphold the following inviolable and inalienable human rights that we consider are enjoined by Islam'*;

(b)'….*Therefore, we, as Muslims who believe in our obligation to establish an Islamic order, wherein every effort shall be made to ensure to **everyone** security, dignity and liberty in terms set out and by methods approved and within the limits set by the law do hereby, as servants of Allah and as members of the universal brotherhood of Islam at the*

beginning of the fifteenth century of the Islamic era, affirm our commitment to uphold the following inviolable and inalienable human rights that we consider are enjoined by Islam'.

I trace that, even though Article II (b) applies the terms *'every individual'* and *'every people'*, this is inconsistent as the first limb (Article II (a)) explained above, uses the term *'man'.* Article II (b) states that '***Every individual*** *and* ***every people*** *has the inalienable right to freedom in all its forms - physical, cultural, economic and political - and shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle'.* This inconsistency might shows that the legal provisions are not fully gender-neutral. Smart (1989) argued that rights language would empower women as rights could be claimed by everyone irrespective of gender; however, Smart stressed that, should rights language not be properly employed, it will not bring any justice to women. Moreover, the Preamble G (i) and (ii) states that all human beings are born free irrespective of sex; however, it does not necessarily confirm equal protection of women and men because of the *'male-biased language'* employed in Article II (a). Preamble G (i) and (ii) confirms this: *'(i)…wherein* ***all human beings*** *shall be equal and none shall enjoy a privilege or suffer a disadvantage or discrimination by reason of race, colour, sex, origin or language'*; (b) *'….wherein* ***all human beings*** *are born free'.*

The CDHRI also offers similar protection to that provided in the UIDHR, for the freedom of all '*man'* (Preamble) and every human being (Article 11 (a)). In contrast to the UIDHR's Preamble, which uses the words *'mankind'* and *'everyone'*, the Preamble's language in CDHRI prefers to use the word '*man'* in affirming rights to a dignified life. The Preamble states: *'In contribution to the efforts of mankind to assert human rights, to protect* ***man*** *from exploitation and persecution, and to affirm his freedom and right to a*

dignified life in accordance with the Islamic Shariah'. Even though the same rights mentioned in Article 2 (a) and Article 18 (a) are conferred on *'every human being'* and *'everyone'*, again, these are inconsistencies, indicating laws as *'male subject'.* Article 2 (a) states that '*Life is a God-given gift and the right to life is guaranteed to* ***every human being****. It is the duty of individuals, societies and states to safeguard this right against any violation, and it is prohibited to take away life except for a Shariah prescribed reason',* and Article 18 (a) provides that ***'Everyone*** *shall have the right to live in security for himself, his religion, his dependents, his honour and his property'.*

Although I trace that the UDHR uses gender-neutral language in its provisions, in the drafting process this aspect was contentious. Morsink (1999: 118) has demonstrated that *'most of the early versions of Article 1 of the UDHR started out with the phrase* ***'all men'*** *and from the start various delegates expressed dissatisfaction with that phrase'.* Delegates from the USSR and Australia, Morsink explained, in the First Session of the Drafting Committee, argued against the idea of starting any Article with *'all men'* and objected to other delegates' understanding that *'all persons are included in this phrase'.* According to Koretsky, the delegate from the USSR, the phrase *'all men', 'implied an historical reflection on the mastery of men over women'* (Morsink, 1999: 118). This *'conflict'* continued until the Second Session of the Commission and some delegates proposed substituting the term *'men'* with *'human beings'*, to mean women and men without differentiation, even though Roosevelt repeatedly pointed out that the word *'men'* used in the draft was generally accepted as including all human beings. Interestingly, the delegate from the UK forwarded a suggestion, which might have reconciled the conflict, to include a note in the draft of the Declaration stating that the word *'men'* referred to *'all human*

beings'. However, according to Morsink, until the Third Session of the Commission, the *'debate'* was not enough to change the term *'all men'*.

In the Third Session of the Commission, the delegates received a draft of Article 1 from the Commission on the Status of Women (CSW)[75] which proposed that *'all people'* be substituted for all *'men'* and *'in the spirit of brotherhood'* for *'like brothers'* (Morsink, 1999: 119). As I argued earlier, even though the term *'men'* is unmarked and gender-neutral, it is unable to avoid *'misrepresentation'* of any rights. Amilia C. de Castillo Ledon, the Vice-Chairman of the CSW, has said that *'her Commission understood that the term 'all men' had a general sense but was still ambiguous'* (Morsink, 1999: 119). In the end, all subsequent drafts of the Declaration changed the term *'men'* to '*all people, men and women'* and *'like brothers'* to *'in the spirit of brotherhood'*, as proposed by the Vice-Chairman of the CSW. However, as explained by Morsink, the draft of the Secretariat report for that Third Session begins Article 1 with the phrase *'all human beings'*, instead of *'all people, men and women'* as a result of an error in the transmission of the text from the Third Session to the Third Committee. Article 1 of the UDHR states that *'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in the spirit of brotherhood'.*

Thus, I argue that, while the UDHR is more gender-neutral in its language, it originally intended to use male-biased language. This might indicate how covenant-makers fail to recognise the normative male model of traditional human rights formulation (Charlesworth, Chinkin and Wright (1991: 613). Without the interference of the CSW in

[75] The Commission on the Status of Women is one of the functional commissions of the ECOSOC. Its function is to prepare reports and recommendations for the ECOSOC to promote women's rights. See Rehman, Javaid. 2003. *International Human Rights Law: A Practical Approach*. Longman: Pearson Education

the Third Session of the Commission, the Article might have not changed. Hence, we cannot deny the *'gender-biased'* nature of the UDHR, similar with the UIDHR and CDHRI. The UIDHR and CDHRI sometimes prefer to use the word *'men'*, even though it refers to all persons, instead of '*all human beings'* or *'everyone'*. The UIDHR and CDHRI may have been influenced by the *Quranic* language which, according to Buang (2001: 18), always uses male pronouns to refer to both women and men. However, in the end, this does not exempt or release women from being the *'victims'* of male subject, which might counteract the endeavour of the *'rights'* and *'equality'* languages to empower women and protect them as a disadvantaged group.

3.3.2 *'Wife'* is Not an Ordinary Woman

3.3.2.1 Right to Marry and Found a Family

In this Section, I consider whether the UDHR, UIDHR and CDHRI take into consideration the disadvantages of women in marriage and family relations and confer different entitlements between sexes in order to ensure equal outcomes. I examine whether the UDHR is harmonious with the UIDHR and CDHRI in terms of the entitlements to rights for women and men in marriage and family relations. In the Islamic context, marriage is the legitimate means of founding a family, in which rights, privileges and obligations of every spouse must be stipulated by its laws (Al-Qardhawi, 1998). In this perspective, because of the marriage relationship, women and men are specifically assessed as wives and husbands, not merely women and men. This is because, when a woman is *'appointed'* as a wife, she is no longer an ordinary woman; the same is true for a man. For Muslims, an appointment as wife or husband comes with specific entitlements to rights and obligations to duties in the familial sphere and relationship, in which the entitlements and responsibilities are not the same as in the association of unmarried women and men.

Therefore, it is easy to understand that Islam confers upon wife and husband different entitlements and responsibilities due to their differences (Mustafa, 2004). In Chapter Six, I will analyse whether different entitlements to rights for Muslim women and men in marriage and family relations according to Malaysian laws disadvantage women. Here, I argue that different strengths are not a question of superiority or inferiority, but a question of natural capacity and proper functioning to achieve equal outcomes, which, according to Fredman (2003: 43), could come from choices to pursue a good life. These will not amount to inequality; rather, these different entitlements and responsibilities are purposely designed to suit their disparities and disadvantages to achieve an equal outcome, unless women are treated *'less favourably'* than men.

Safi (1998: 13) has rightly proposed that, to advance equitable rights for wife and husband, it is important to focus on ensuring that '*marriage constitutes a consensual relationship that contributes equally to advancing the interests of the various parties involved'*. I find that, by correctly understanding what equality is and how it works in the Muslim familial sphere, the debate on gender equality will be more helpful to Muslim women. Safi conditioned his proposal subject to providing Muslim women (wives to be) and men (husbands to be) with equal rights to enter into the relationship based on their own terms and to empower women (wives) to ensure that they can negotiate the marriage's strengths and weaknesses. This is indeed helpful in order to justify that equality depends on how it is defined.

In the UDHR, Article 16 (i) states that '*Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are*

entitled to equal rights as to marriage, during marriage and at its dissolution.' The UIDHR also stresses the sharing of obligations and responsibilities between wife and husband in the family and in terms of the paying of maintenance, an obligation imposed on the husband only (Article XIX (c)). Article XIX (c) expresses that *'Every husband is obligated to maintain his wife and children according to his means'*. I note that, in marriage and family relations of Muslim, the equality of wife and husband is equal in terms of their participation as wife and husband and parents to their children, no matter what their roles and functions are. Because of its difference from the UDHR, this dissimilar entitlement to right regarding maintenance payment is claimed as *'recognition'* of the gender inequality. Provided that one understands that equality is sometimes not about sameness, one might not regard this as a kind of gender inequality. This is because, like husbands, there is no law prohibiting Muslim wives from having jobs and receiving payment; moreover, wives are entitled to maintenance (whether they work or not). The general rule is that every husband must provide maintenance for his wife because not all wives can provide for themselves. Indeed, to ensure equal gender outcomes, in performing their biological tasks, for instance to become pregnant and give birth, wives are considered disadvantaged persons who must be afforded special measures (in the form of maintenance from husbands). The rule would not be different even if a woman decides not to have children in a marriage, because, as mentioned earlier, the general rule is that every husband must provide maintenance for his wife. Thus, even if wives could provide for themselves, they are still entitled for rights to be maintained.

The UIDHR not only assures wives of their right to receive maintenance but also guarantees motherhood a '*special respect, care and assistance'* in public and private spheres (Article XIX (g)). I trace that, whilst the detailed rights of married women to be

respected, cared for and assisted as disadvantaged persons are not cited in UDHR, they are precisely set out in the UIDHR. According to the UIDHR, every married woman is entitled to live in the marital home with her husband, receive maintenance during marriage and the *iddah* period irrespective of her own financial status (whether she can provide for herself or not), obtain rights to dissolve marriage, obtain inheritance rights from husband, parents, children and other relatives, and enjoy privacy and confidentiality in respect of anything harmful to her interests (Article XX). I note that, according to the CDHRI, women can also retain their name and lineage (Article 6 (a)) even after marriage, which shows that they are equal with men in terms of dignity rights. To ensure that every wife enjoys equal rights with her husband in family matters; both Islamic Declarations impose duties on every husband to be responsible for the support and welfare of the family (Article XIX (c) of the UIDHR and Article 6 (b) of the CDHRI). Therefore, it is dubious to allege that the Islamic Declarations affirm gender inequality.

Thus, I argue that the UIDHR and CDHRI conflict with the UDHR pertaining to the different entitlements to rights for Muslim women and men. The UDHR confers on women and men equal and similar entitlements to rights as to marriage, during marriage and at its dissolution. The UIDHR and CDHRI stress equal and different entitlements to rights to marriage, during marriage and at its dissolution based on the sharing of obligations and responsibilities between wife and husband in the family. The UIDHR and CDHRI take into consideration the disadvantages of women in marriage and family relations and confer different entitlements between sexes in order to ensure equal outcomes, which is parallel with equality informed by feminism, as explained earlier. Hence, in marriage and family relations of Muslims according to the UIDHR and CDHRI, the status of wife and husband

is equal in terms of their participation as wife and husband and as parents to their children, no matter what their roles and functions are.

3.4 PRINCIPLE OF EQUALITY UNDER THE WOMEN'S CONVENTION

In this Section, I examine the principle of equality under the Women's Convention and analyse whether it is congruent with the application of equality underpinning the UIDHR and CDHRI based on the idea of different entitlements to rights for women and men in marriage and family relations in order to address gender disadvantage. I will argue that the Women's Convention's principle of equality is harmonious with the application of equality underpinning the UIDHR and CDHRI should equality be defined as enabling different entitlements to rights to protect women as a disadvantaged group. Under the Women's Convention, rights for women are based on three fundamental principles: non-discrimination, equality and state obligation[76] (Byrnes, 2002; Facio and Morgan, 2009). I trace that the Women's Convention spells out the meaning of equality and how it can be achieved through its principal provisions which guarantee women's rights and needs. Even though there are various debates on whether the term *'equality of gender'* should be changed to '*equity',* the Women's Convention is comfortable in its use of the word '*equality*', which sets broad standards for Member States[77] (Facio and Morgan, 2009: 5-9). The Women's Convention recognizes in its Preamble that *'a change in the traditional role of men and women as well as the role of women in society and in the family is needed to*

[76] Following the obligation of the state under the terms of the Convention, State Parties must submit a national report within one year of acceding to the Convention and within every four-year period thereafter (Article 18 (1) of the Women's Convention). This process ensures that State Parties implement the Convention. These principles provide the framework for formulating strategies and give meaning to the Articles of the Convention (International Women's Rights Action Watch)

[77] The term *'equity'* appears only once in the Women's Convention. Preamble: *'Convinced that the establishment of the new international economic order based on* ***equity*** *and justice will contribute significantly towards the promotion of equality between men and women'*

achieve full equality between men and women'. The substance and framework of the Convention expressly convey feminist voices and messages on rights (Lacey, 2004: 53). According to Lacey, it locates the realization of rights and recognises important differences among women.

The Convention defines discrimination against women and sets up an agenda for national action to end such discrimination (Saksena, 2007: 483). In its Title, the Convention underscores states' obligation to prohibit discrimination against women. Under the Convention, equality is non-discrimination (Coomaraswamy, 1994: 47) and discrimination against women violates the principles of equality of rights and respect for human dignity. In the Preamble, the Convention explicitly acknowledges that '*extensive discrimination against women continues to exist'* and emphasizes that such gender discrimination '*violates the principles of equality of rights and respect for human dignity'*. Article 1 provides that,

'*For the purposes of the present Convention, the term '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'.*

Here, according to the definition of discrimination stated in Article 1, there is a close relationship between equality and non-discrimination.

In this analysis, I explore of the principles of the Women's Convention which are best demonstrated by Facio and Morgan (2009). Facio and Morgan established six important substances of Article 1. The first concerns the forms of discrimination which can arise from the distinction, exclusion or restriction of the person (Facio and Morgan, 2009: 10). As discussed earlier, it is important to bear in mind that discrimination may still occur even if different people are treated differently, unless the disadvantaged people are guaranteed special measures to achieve equal results similar to those of advantaged people. Bindman (1992: 52) and Fredman (2001: 160) explained that this direct discrimination could be proved by evidence that the victim of discrimination has been or would be treated less favourably than another person. Less favourably, stressed Bindman, means that *'different treatment must be proved between the complainant and others; it must be shown to be less favourable.'*

Secondly, the Convention defines discrimination as any act or omission that has the *'effect'* or *'purpose'* of denying women's exercise and enjoyment of all rights (Facio and Morgan, 2009: 10). From this perspective, acts or omissions constitute *'discrimination'* not only if they either expressly single out women for disparate treatment but also if they appear to be gender-neutral but, nevertheless, have a discriminatory impact on women. In other words, formal equality may discriminate against women if the outcome of affording equal treatment results in discrimination. This is what Bindman (1992) called indirect discrimination. Indirect discrimination seeks to address practices that have discriminatory effects (Lacey, 1992: 102; Fredman, 2001: 161).

Thirdly, Facio and Morgan stressed the degrees of discrimination, in that the Women's Convention prohibits not only total but also partial discrimination. For instance, if women

are allowed to be citizens of a country but the citizenship is not extended to their children. The fourth issue concerns the stage of occurrence of discrimination. Article 1 refers to the existence of rights as the '*moment of creation of laws that establish the right'* as recognition, '*necessities for satisfying right'* as enjoyment and '*active aspect of right'* as exercise (Facio and Morgan, 2009: 10). Thus, states' impairment of recognition, enjoyment or exercise of women's rights goes against the principle of equality under the Women's Convention. Fifthly, Article 1 specifies that the Women's Convention intended to eliminate all kinds of discrimination against women in all aspects of life, to be precise, in civil, political, economic, social and cultural life. Finally, the Women's Convention recognises women as legal subjects who have legal capacity and dignity equal to men.

Based on the substances of Article 1, discrimination can be defined as an act that violates the principle of equality. In Article 1, equality is presented more as substantive equality (*de facto* equality), which requires the delivery of equal outcome rather than equal treatment. I quote Paragraph 8 of the General Recommendation No. 25 of Article 4, Paragraph 1 of the Women's Convention:

'In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming under representation of women and a redistribution of resources and power between men and women.'

Indeed, the substance of the Women's Convention encapsulates the meaning of substantive equality by aiming to eliminate *de jure* and *de facto* discrimination (Byrnes, 2002: 124; General Assembly, Report of the Committee on the Elimination of Discrimination against

Women. U. N. Doc. A/59/38/Annex (2004)). In order to promote substantive equality, the Convention recognises that women do not share equal treatment with men, and women have to be treated differently from men (Facio and Morgan, 2009: 14-15).

Article 4 states that *de facto* equality between women and men shall not be considered discrimination. Women must not necessarily be treated in the same way as men, with an understanding that women's lack of empowerment arises precisely because they do things that cannot be compared to the things that men do. Hence, equality informed by Article 1 and Article 4 of the Women's Convention suggests that different entitlements to rights for women and men as outlined by the UIDHR and CDHRI in marriage and family relations do not necessarily discriminate against women because different entitlements to rights are purposely provided to uphold equality of outcomes by giving special measures to women as a disadvantaged group. This is why Steiner and Alston (2000: 179) stressed that one of the vital characteristics of Article 1 is its reference to '*effect*' as well as '*purpose',* thus directing attention to the intentions and consequences of governmental measures to eliminate discrimination. Therefore, I suggest that, as stated in Article 4, temporary special measures are important.

On the basis of equality, the Women's Convention requires State Parties to take all appropriate corrective measures in the political, social, economic and cultural fields to ensure full development of women (Lacey, 2004: 48). Here, I note that discrimination is not limited to '*state action'* but can also be performed by *'non-state actors'.* The modification of social and cultural patterns of women and men's conducts which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for women and men (Article 5 (a)) is part of the basis of gender equality. However, women

are still to be guaranteed equality with men before the law (Article 15). Article 15 states that,

'1. States Parties shall accord to women equality with men before the law

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile'.

Here, I submit that State Parties must not only take actions to achieve equality for both genders, but should also ensure that actions are taken to correct the inequalities.

3.5 CONCLUDING REMARKS

In summary, I have argued that Islamic and feminist jurisprudence are harmonious pertaining to the idea of equality which is based on the different entitlements to rights between the sexes in order to address gender disadvantages. I traced that an equality of rights that considers substantive equality rather than just formal equality could reconcile both traditions. Indeed, as asserted by feminists, focusing on equal rights can be awkward if equality is defined in ways that protect only one group of people and omit others or if it confers similar entitlements on women and men without taking into consideration the disadvantaged group (Fletcher, 2002; Facio and Morgan, 2009; Byrnes, 2002; Kingdom, 1991; Wolgast, 1980). This might occur even if equality were formulated in gender-neutral language. In laws as such, equality in general, which is legislated in statutes, can still

systematically disadvantage women. It is biased and unfair to groups that are non-autonomous and have less power and fewer opportunities. However, I argued that this problem might possibly be overcome were equality to be clearly understood and employed to include a comparison of like with like, unalike with unalike and to give affirmative measures to individuals or groups who are disadvantaged, such as women, or at least to encourage women (the disadvantaged) to see themselves as persons born with equal rights, even though equality is given and practised differently. This might also accommodate the tensions between diverse theoretical and applied understandings of equality from all traditions and practices.

I argued that the principle and application of equality in the Islamic human rights instruments underpinning the UIDHR and CDHRI are not entirely harmonious with the international human rights instrument underpinning the UDHR in terms of the different entitlements to rights for Muslim women and men in order to address gender disadvantages, although they are harmonious with the Women's Convention. I argued that the UDHR confers on women and men equal rights as to marriage, during marriage and at its dissolution, yet does not address special measures to be accorded to women as a disadvantage group whereas the UIDHR and CDHRI stress equal and different entitlements based on the sharing of obligations and responsibilities between wife and husband in the family. The UIDHR and CDHRI also differentiated entitlements to rights for women and men to compensate for women's disadvantages. I noted that, in marriage and family relations of Muslims based on the UIDHR and CDHRI, the status of wife and husband is equal in terms of their participation as wife and husband and as parents to their children, no matter what their roles and functions are.

I traced that dissimilar entitlements to rights for Muslim women and men in the UIDHR and CDHRI pertaining to marriage and family relations are consistent with the extended equality model which focuses on the subordinated group to ensure equal outcomes. The same battle has been fought in the feminist debates against *'unequal'* liberal equality, which was addressed by the Women's Convention. According to the Women's Convention, inequality can arise from the distinction, exclusion or restriction of women, any act or omission that has the *'effect'* or *'purpose'* of denying women's exercise and enjoyment of all rights or impairment of recognition, enjoyment or exercise of women's rights in all aspects of life, to be precise, in civil, political, economic, social and cultural life (Facio and Morgan, 2009).

CHAPTER FOUR

MUSLIM WOMEN'S RIGHTS AND EQUALITY UNDER THE MALAYSIAN LAWS AND POLICIES

4.1 INTRODUCTION

In order to analyse the extent to which Malaysian laws and policies are in line with the Women's Convention, I will consider in this Chapter whether the principles of equality interpreted by the Malaysian Federal Constitution and their application in various statutes and policies are harmonious with the principles of equality under the Women's Convention. This is particularly important for my analysis in Chapter Five, of how the notion of equality is interpreted according to the Women's Convention and Malaysian local context which produces a response to the CEDAW's concluding comments made against Malaysia in the Thirty-Fifth Session and how laws have been legislated and amended to uphold gender equality. I will analyse in Chapter Six how the notion of equality is interpreted according to the Women's Convention and the Malaysian legal context which brings about a reservation to Article 16 (1) (a), (c), (f) and (g) of the Women's Convention regarding marriage and family relations, because of the Article's inconsistencies with *Shariah* practised in Malaysia. Harmonisation of the principle of equality according to the Malaysian legal context with the Women's Convention is significant considering that the notion of equality under the Women's Convention is parallel with that of Islamic jurisprudence, as explored in Chapter Three.

First, I consider how Islamic textual sources became one of the sources of Malaysian laws, apart from the English common laws. This is important for this research as Malaysia reserved Article 16 (1) (a), (c), (f) and (g) of the Women's Convention regarding marriage and family relations because of the Article's inconsistencies with *Shariah* practised in Malaysia. I examine Part II of the Federal Constitution to acquire a legal picture of Malaysian laws on fundamental liberties and consider whether woman is a legal subject. I analyse how Malaysian laws on human rights inform *'rights'* and whether Malaysian human rights laws are parallel with the UDHR, UIDHR and CDHRI. Second, I consider Malaysia's progress towards empowerment of women, women's rights and gender equality laws. Here, my reference to *'women'* is not confined to Muslim women but also includes non-Muslim women, because the overall intention of the Government of Malaysia in its effort to develop women's rights is to empower all women in this country. I examine whether Malaysia enhances the status of women through Government policies and study its commitment to the global standard. Third, I explore how the term *'equality'* is interpreted under the Malaysian Federal Constitution and its application in various statutes. I analyse whether *'de facto'* equality is considered. I will argue that the principle of equality applied in the Malaysian Federal Constitution and statutes runs parallel with that of the Women's Convention, which was discussed in Chapter Three.

4.2 MALAYSIAN *SHARIAH* AND FUNDAMENTAL LIBERTIES: IS WOMAN A LEGAL SUBJECT?

In this Section, I trace how Islamic textual sources have formed part of the sources of Malaysian laws on human rights and Muslim women's rights, apart from English common laws. I note that the current Malaysian legal system is shaped by both legal backgrounds

which have been determined by a historical chronology of a period of some six hundred years. Before the arrival of the British, the laws of the Malay land were Islamic-based (Mohamad Ibrahim, 1987; Aun, 1999). In the case of *Shaikh Abdul Latif and Others v. Shaikh Elias Bux*[78], Edmonds J.C. in his judgement said:

'Before the first treaties the population of these states consisted almost solely of Mohammadan[79] Malays with a large industrial and mining Chinese community in their midst. The only law at that time applicable to Malays was Mohammadan modified by local customs.'

The influence of Islamic-based laws can be traced in most of the digests (Ngah, 1980; Awang, 1984) so as to recognize the Malay customary law, which was not contrary to Islam. It started with the founding of Malacca Sultanate[80] at the beginning of the 15th century, in which Islamic-based formal legal texts were compiled (Awang, 1984: 32); the most significant were *Hukum Kanun Melaka* or *Risalat Hukum Kanun, Undang-Undang Laut Melaka, Pahang Legal Digest, Kedah Law, Majallat Al-Ahkam* and *Al-Ahkam As-Syariyyah* (Selvaratnam and Mohd. Labib, 2003: 63). The rapid progress of Islamisation in South East Asia started in the 15th and 16th centuries, when the *Shafie* school of thought[81] began to establish itself (Mohamad Ibrahim, Ahmad, Awang Othman, Mahmud Saedon and Hassan, Kamal, 1990: 9). The study of the laws of Malacca (the texts of *Hukum Kanun Melaka* and *Kitab Undang-Undang Melaka*) of the 15th century by Mohamad Ibrahim,

[78] [1915] 1 FMSLR 204 at p. 214

[79] *Mohammadan* Malay laws refer to Islamic-based laws

[80] The adoption of Islam by the 15th century saw a rise in the number of Sultanates, the most prominent of which was the Malacca. Malacca was a major point of Islamic piety and learning prior to 1511, when the Portuguese captured Malacca. See Mohamad Ibrahim, Ahmad, Awang Othman, Mahmud Saedon and Hassan, Kamal. 1990. 'Islamisation of the Malay Archipelago and the Impact of *Al-Shafi'i's Madhhab* on Islamic Teachings and Legislation in Malaysia'. Paper presented at the *International Symposium on Imam Al-Shafi'i's* at Petaling Jaya Hilton, Kuala Lumpur, Malaysia. 13-15 August 1990. p. 9

[81] Before the establishment of the Sultanate of Malacca (Malacca is one of the Malaysian States), the centre of Islamic mission in this region was in Pasai. His Majesty Malik al-Zahir was a follower of *Shafie* school of thought. Later, *Shafie* school of thought was proclaimed by the Pasai Government to be the official school of thought; other states in this region then followed suit, including Malacca. See Mohamad Ibrahim, Ahmad, Awang Othman, Mahmud Saedon and Hassan, Kamal. 1990. 'Islamisation of the Malay Archipelago and the Impact of *Al-Shafi'i's Madhhab* on Islamic Teachings and Legislation in Malaysia'. Paper presented at the *International Symposium on Imam Al-Shafi'i's* at Petaling Jaya Hilton, Kuala Lumpur, Malaysia. 13-15 August 1990. pp. 8-9

Ahmad, Awang Othman, Mahmud Saedon and Hassan Kamal in 1990 discovered that, on the whole, the laws of Malacca were drafted based on Islamic laws according to the *Shafie* school of thought and Malay customary laws. These formal legal texts were widely accepted and practised until the British occupied the land and replaced them with English common laws throughout the Malaya[82] territories (Awang and Mohamad Yunus, 2003: 2).

The influence of Malay customary laws on the Islamic-based laws of Malacca may be the reason why, in Malaysia, as Mohamad (2008: 1) said, the word *'Islam'* was synonymous with Malay people and the Malay race. *'Islam'* has also been a symbol of religious-cultural identity for Malays (Noor, 2007: 124). Chandra Muzaffar, a Malaysian social activist, has observed that, as in a number of other post-colonial societies, Muslims in Malaysia have become very conscious of their Islamic identity (Frontline-Interview Chandra Muzaffar, n. d). Even when the Federal Constitution was being drafted, the Malays would not have accepted it had the definition of *'Malay'* not included '*Muslim'* and had Islam not been declared the religion of the Federation (Mohamad, 2008: 1).

Hence, the Malaysian Federal Constitution defines a *'Malay'*, among other things, as a person who professes the religion of Islam, habitually speaks the Malay language and conforms to Malay customs (Article 160 (2)). Malay people, who were dominated by Hindus and Buddhists from India (Ahmed, 1964: 1-3) and by Islamic culture, influenced each other (Chin and Hack, 1951: 380-381). Even though Islam in South East Asia was spread by Muslim Arabs (Fatimi, 1963; Al-Attas, 1969), Noor (2007: 57) has stressed that Malay Sultanates were also influenced by the religious interpretation of Hinduism and Buddhism. However, Al-Attas (1969) argued that Islam played a significant role

[82] Malaya was the predecessor of Malaysia

afterwards, replacing Hinduism. The *Shafie* school of thought spread throughout the history of the Malay world until the 1990s due to the influences of religious education in which the jurisprudence of the *Shafie* school of law was taught (El-Muhammady, 1992: 53); this continues to this day.

Muslims believe that *Shariah* is God's law and that it is used in conjunction with the substantive laws of Islam, based on either the textual sources or *ijtihad* of jurists of all schools of laws (Bari, 2003), but they disagree among themselves as to exactly what it entails (Sheriff, 2007). In fact, according to the Former Chief Justice of Malaysia, Dato' Abdul Hamid Mohamad, in his lecture on the '*Harmonisation of Common Law and Shariah in Malaysia: A Practical Approach'* at the Harvard Law School in 2008, *Shariah* is any *'law that is not un-Islamic'*. This means that any laws which are not in direct conflict with the textual foundations of Islam (*Quran* and the Prophetic tradition) might be called Islamic even though they may be of English or Malay origins. It is important to highlight here that *Shariah* does not form a homogenous entity as it depends on interpretations of the sources, cultural and ethnic influence, historical and colonial context, school of jurisprudence, and political and economic policies of state (Ali, 2000: 42). Therefore, I find that *Shariah* as practised in Malaysia constitutes the Islamic laws that have been interpreted based on the Islamic sources (*Quran* and the Prophetic tradition), which are influenced by Malaysian cultural, ethnic, historical, colonial, political, economic aspects and *Shafie* school of thought.

Even though *Shariah* in Malaysia is primarily interpreted based on *Shafie* school of thought, I argue that there were some modifications of Islamic Family Law Enactments in the 1980s which were based on the method of *takhayyur*, a selection of opinions from

schools of thought other than *Shafie* school of thought. Using this method, the rulings of *Shariah* were based not on *Shafie* school of thought but on *Hanafi* and *Maliki* schools of thought (Noor, 2007: 141). For example, according to *Shafie* school of thought, forced marriage is permissible but this is not accepted by *Hanafi* school of thought. Malaysia binds itself to the opinion of *Hanafi* in this situation to prohibit forced or unwanted marriage, which I will explain further in Chapter Five. Malaysia also follows *Hanafi* school of thought on the presumption of puberty pertaining to the minimum age for marriage; furthermore, on the law of divorce, Malaysia follows *Maliki* school of thought to make divorce more accessible to women[83]. I shall address these in detail in my analysis of Article 16 (1) (a), (c), (f) and (g) in Chapter Six. Hence, Muslim women's rights laws on marriage and divorce in Malaysia have been progressively reviewed by Malaysian legislators to ensure women's disadvantages are taken into consideration to ensure equality of dignity and justice.

I trace that the most significant impact on modern Malaysia, and the reason for this research, was British colonial rule which brought with it constitutional government and the common law system to the Malay States in the late 19th century. This colonial power gained control of the strategic ports of Malacca, Penang[84] and Singapore[85] and the whole Malay Peninsula (Tan, Min and Seng, 1991: 35). Malaysia inherited the English legal system as a colonial legacy and, therefore, Malaysian and Western-based human rights laws share common laws, stemming from the fact that much local legislation is based on English models (Aun, 1999: xvii). The Royal Charter of Justice of 1807, which established

[83] See detailed discussion in Noor, Zanariah. 2007. 'Gender Justice and Islamic Family Law Reform in Malaysia' in *Kajian Malaysia.* Jld. XXV. No. 2

[84] Penang was the first territory in Malaysia to fall into British hands. Francis Light, who declared British rule in Penang in 1786, named it Prince of Wales' Island. On 1 May 1791, Sultan Abdullah (the King of Kedah) signed an agreement acknowledging the British occupation of Penang. See Ooi, Keat Gin (ed.). 2004. *Southeast Asia: A Historical Encyclopaedia, From Angkor Watt to East Timor.* Vol. 3. ABC-CLIO. p. 786

[85] Singapore became an independent republic on 9 August 1965

the Court of Judicature of the Prince of Wales' Island (as Penang was then known) to exercise jurisdiction in all civil, criminal and ecclesiastical matters, marked the beginning of the formal statutory introduction of English common laws to Malaysia (Selvaratnam and Mohd. Labib, 2003: 65). Mohamad (2008: 2) claimed that the main preoccupation of the British administrators after the founding of Penang was the maintenance of some form of public order; however, local customs and laws were allowed to continue by leaving '*matters related to Islamic religion and Malay custom to the Malay Rulers'*. According to Abdullah (2007: 515), the Western colonization had failed to intervene in the family affairs of the Malay Muslim community. Thus, Muslim laws on marriage and family relations in Malaysia are not necessarily influenced by English common laws.

In the Malaysian Federal Constitution, although Islam would be referred to as '*the religion of the Federation'* (Article 3), nowhere was it stipulated that the country would be referred to as a '*Muslim State'*. The application of *Shariah* is also very limited, since it is not included expressly in the definition of law in the Federal Constitution[86]. Today, under the federal-state division of powers, matters related to the administration of Islam have been put under the states' jurisdiction for *Shariah* Courts to deal with (Article 121 (1A)) and the rulers (Sultans) of every state[87] stand as the highest authorities on Islamic matters (Article 3 (2) and Schedule 9, Section 1 of the Federal Constitution). These pertain to family matters, charitable and religious trusts, Malay customs, *zakat*[88], mosques, and the

[86] Article 160 (2) of the Federal Constitution defines law to include '*written law, the common law in so far as it is in operation in the Federation or any part thereof and any custom or usage having the force of law in the Federation of any part thereof*'

[87] As for the states which have no rulers (Malacca, Penang, Sabah and Sarawak), authority over religious matters is assumed by the *Yang di-Pertuan Agong* who is also the head of religion in his own home state (Article 3 (2) of the Federal Constitution)

[88] *Zakat* is '*a compulsory religious worship of the property referred to certain conditions as determined by Shariah. It is collected from some of the assets to be distributed to several groups who have been prescribed by the Shariah'*. See Ibrahim, Ab Rahim. 2010. 'The Distribution of *Zakat* Towards *al-Muallaf* in Malaysia: An Introduction to *Maqasid as-Shariah'*. Paper presented at the *2nd Langkawi International Conference Islamic Economics, Finance and Banking (LIFE2010)*. 13-15 December 2010

constitution, organisation and procedure of *Shariah* Courts. Other than these matters, all citizens of Malaysia are governed by uniform civil laws based on the common laws of England. This is because British administrators did not intervene in the custom and family affairs of the Muslim community because, as explained earlier, matters related to religion and customs of Muslims were under the authority of Malay Rulers. Even though Malaysia is not constitutionally a Muslim state, in this chapter I will refer to Malaysia as having the attributes of a Muslim state due to its majority Muslim population and its membership of the OIC[89]. Moreover, as mentioned earlier, *Shariah* was the '*law of the land'* applied in Malaya before colonialism.

For human rights laws in Malaysia, even though rights enshrined in the Malaysian Federal Constitution reflect a heavy Western influence as a result of the colonisation by Britain (Tan and Thio, 1997: 514), the idea of rights had already taken root in the pre-colonial Malay states and the inspiration is not of Western origin (Kheng, 2001: 73). The idea of rights can be seen in the *Hukum Kanun Melaka*, the Islamic-based formal legal texts compiled during the Malacca Sultanate period; these texts used the term *'merdeka'* (freedom) and its concept was embodied in the pre-colonial Malay Peninsula in relation to slaves (Reid, 1998: 141-160). Human rights laws were provided in the *Hukum Kanun Melaka* pertaining to rights of life and the punishment for wilful murder, stated in Clauses 5: 1, 5: 3, 8: 2, 8: 3, 18: 4 and 39. Rights to property and even animal rights were also protected (Fang, 1976).

Human rights laws in Malaysia today are rooted in the nine constitutional provisions contained in Part II of the Federal Constitution, from Article 5 to Article 13, and listed as

[89] Baderin listed Malaysia as one of the modern Muslim states due to its membership of OIC. See Baderin, Mashood. 2003. *International Human Rights and Islamic Law.* Oxford Monographs in International Law. p. 8

'fundamental liberties'; this Constitution was drafted during the independence negotiations between Britain and Malaya in 1956 by the Reid Commission[90] (Andaya and Andaya, 1984: 261). It was substantially adapted to form the original Federal Constitution, which was heavily influenced by the system of parliamentary democracy but still took into consideration the aspirations of all ethnic and religious groups, and became a document of shared destiny that all parties could identify with (Thomas, 2005). It was based on the notion of personal liberty, equality and human dignity (Omar, 1996: 16-23).

In my view, the choice of the term '*fundamental liberties'* was deliberate and has a crucial effect because, even though it is not absolute, it demonstrates that the founders felt these were not mere rights that cannot be alienated and that the restriction of such fundamental rights by Acts of Parliament should not have the practical effect of destroying or abolishing them. Rather, such restrictions should be minimal, limited and proportionate. Restrictive clauses refer to such consideration to maintain public order, public health, security of the Federation and morality (Omar, 1996: 19). This is in accordance with the principle of rights informed by feminists, and application of rights under the UDHR, UIDHR and CDHRI discussed earlier, that rights are not an absolute individual entitlement but take into consideration the collective interest to balance the rights of all individuals (Lacey, 2004).

Even though the Reid Commission did not explain the meaning of fundamental liberties (Bari and Shuaib, 2006: 17), Bari (2001: 183) has stressed that the underlying concepts and philosophy behind the provisions of fundamental liberties under the Federal Constitution were also influenced by the principles enunciated by the UDHR. I trace that the ambits of

[90] The Reid Commission refers to an independent commission responsible for drafting the Constitution of the Federation of Malaya prior to Malayan independence from Britain on 31 August 1957. One of the greatest judges in the United Kingdom that century was appointed as chairman, the other members being Sir Ivor Jennings, Sir William Mckell, Mr. B. Malik and Mr. Justice Abdul Hamid

these fundamental liberties are wide enough to cover basic human rights, with a heavy dose of legislative and administrative limitations built into them, and cover rights such as claim, power, immunity, liberty, choice and interest as explained earlier in Chapter Two. Section 2 of the Human Rights Commission of Malaysia Act 1999 (Act 597) says that *'human rights refer to fundamental liberties in Part II of the Federal Constitution'.* Meanwhile, Section 4 (4) of the Act added that *'For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution'.*

Article 5[91] of the Federal Constitution, which stated that '*No person shall be deprived of his life or personal liberty save in accordance with law*,' provides for life and personal liberties, including the right not to be deprived of life '*save in accordance with law'*; most importantly, Article 5 provides the right of an arrested person, among other things, to apply for habeas corpus. This guarantee applies to both women and men without gender distinction and, thus, does not discriminate against women. The word *'person',* employed pertaining to this right is not a piece of male-language. Thus, the law is not patriarchal in the way it frames issues, but recognises women as legal subjects. In this perspective, law can be put right because all legal subjects, women and men, are treated equally (Smart, 1992: 31). Similarly, the UDHR guarantees everyone's rights to *'life, liberty and security'*

[91] Article 5 of the Federal Constitution states that:
'1) No person shall be deprived of his life or personal liberty save in accordance with law
2) Where complaint is made to a High court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him
3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice
4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority
Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day
5) Clauses (3) and (4) do not apply to an enemy alien'

in Article 3. I note that the UIDHR assures the same rights, stating repeatedly in its Preamble G (xiv) (a), Preamble G (xic) (b), Article I (a) and (b) and Article II (a) that the sanctity of a person's body (life or death) shall be inviolable. The CDHRI shapes the same rights protection in its Preamble, Article 2 (a), (c) and (d), Article 3 (a) and Article 18 (a) which affirm human rights to a dignified life.

Article 6[92] of the Federal Constitution which affirmed that '*No person shall be held in slavery'* provides protection for individual and community against slavery, including forced labour. The UDHR, in its Article 4 provides similar protection that **'***No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms'.* Article 6 (1) uses the term *'person'* and not *'man'* to represent mankind. This language of right too, does not have masculine criteria which could disadvantage women (Dawson, 1993) because it applies to both women and men, thus automatically recognising women as legal subjects. I find that the UIDHR guarantees the same protection in its Preamble G (iii), that slavery and forced labour are abhorred. Meanwhile, the CDHRI in Article 11 (a) states that '*human beings are born free and no one has the right to enslave, humiliate, oppress or exploit them…'*

[92] Article 6 of the Federal Constitution states that:
'1) No person shall be held in slavery
2) All forms of forced labour are prohibited, but Parliament may by law provide for compulsory service for national purposes
3) Work incidental to the serving of a sentence of imprisonment imposed by a court of law shall not be taken to be forced labour within the meaning of this Article
4) Where by any written law the whole or any part of the functions of any public authority is to be carried on by another public authority, for the purpose of enabling those functions to be performed the employees of the first mentioned public authority shall be bound to serve the second mentioned public authority shall not be taken to be forced labour within the meaning of this Article, and no such employee shall be entitled to demand any right from either the first mentioned or the second mentioned public authority by reason of the transfer of his employment'

Article 7[93] of the Federal Constitution shelters both women and men from retrospective criminal law and repeated trials in order to protect people from being oppressed; which are also mentioned in Article 10 and Article 11 (1) and (2) of the UDHR. Article 7 (1) states that '*No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed'.* Article 10 of the UDHR entitles people to a fair trial and public hearing by an independent and impartial tribunal. I find that the UIDHR, apart from assuring similar rights in Preamble G (xi), Article IV (b) and (d) and Article V (a), (b) and (d), warrants that '*punishment shall be awarded in accordance with the law, in proportion to the seriousness of the offence and with due consideration of the circumstances under which it was committed'* (Article V (c)).

Article 8[94] of the Federal Constitution, which provides for equality before the law, is consistent with Article 6 and Article 7 of the UDHR. It guarantees individual rights to

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[93] Article 7 of the Federal Constitution states that:
'1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed
2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted'

[94] Article 8 of the Federal Constitution states that:
'1) All persons are equal before the law and entitled to the equal protection of the law
2) Except as expressly authorized 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 relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment
3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of the State
4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority
5) This Article does not invalidate or prohibit -
(a) any provision regulating personal law
(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion
(c) any provision for the protection, wellbeing or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service

equality and equal protection under the law. Article 6 of the UDHR recognises every person as a person before the law. Article III (a) and Article IV (b) of the UIDHR guarantee all persons equality before the laws, as well as equal treatment, opportunity and protection. I have discovered that the CDHRI pledges the same in Article 19 (a). Article 8 (1) of the Federal Constitution, which states that *'all person are equal before the law and entitled to the equal protection of the law',* clearly indicates that woman in Malaysia is a legal subject, similar to man. Article 9[95] of the Federal Constitution on banishment and freedom of movement appears to have been inspired by Article 13 (1) and (2) of the UDHR. Article 9 (1) states that '*No citizen shall be banished or excluded from the Federation'.* This right is secured for women and men equally as an individual right; however, to consider the collective interest, this right is subject to the security of the Federation, public order, public health, or the punishment of offenders (Article 9 (2)). The UIDHR provides rights to freedom of movement in Article XXIII (a) and (b).

Article 10[96] of the Federal Constitution, on freedom of speech and association, has some bearing on Article 19 and Article 20 (1) and (2) of the UDHR. I find that the rights to

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(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election

(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day

(f) any provision restricting enlistment in the Malay Regiment to Malays'

[95] Article 9 of the Federal Constitution states that:

'(1) No citizen shall be banished or excluded from the Federation

(2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof

(3) So long as under this Constitution any other State is in a special position as compared with the States of Malaya, Parliament may by law impose restrictions, as between that State and other States, on the rights conferred by Clause (2) in respect of movement and residence'

[96] Article 10 of the Federal Constitution states that:

'1) Subject to Clauses (2), (3) and (4) -

(a) every citizen has the right to freedom of speech and expression

(b) all citizens have the right to assemble peaceably and without arms

(c) all citizens have the right to form associations

2) Parliament may by law impose -

express thoughts and opinion are also protected by laws under Article XII of the UIDHR and Article 22 of the CDHRI. Article 10 (1) of the Federal Constitution mentions that '*(a) every citizen has the right to freedom of speech and expression (b) all citizens have the right to assemble peaceably and without arms (c) all citizens have the right to form associations.* These individual rights apply to women as well as men, all of whom are referred to as *'all citizens'* which indeed recognises women as legal persons. Nevertheless, to consider the collective interest too, Article 10 (2) imposes restrictions to these rights in the interests of the security of the Federation, friendly relations with other countries, public order or morality, to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence. Again, collective interest is equally important as individual interest (Lacey, 2004) to balance the rights of all individuals.

Article 18 of the UDHR is coherent with Article 11[97] of the Federal Constitution on freedom of religion. Article 11 states that '*Every person has the right to profess and*

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence

(b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, or public order

(c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality

3) Restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may also be imposed by any law relating to labour or education

4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2) (a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law'

[97] Article 11 of the Federal Constitution states that:

'1) Every person has the right to profess and practice his religion and, subject to Clause (4), to propagate it

2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own

3) Every religious group has the right -

(a) to manage its own religious affairs

(b) to establish and maintain institutions for religious or charitable purposes; and

practice his religion and, subject to Clause (4), to propagate it'. This right has no patriarchal identity due to the use of the words *'every person',* which automatically recognises women as legal subjects. The same is also mentioned in Article X (a) and (b), Article XII and Article XIII of the UIDHR and Article 10 of the CDHRI. Women and men are also guaranteed rights to education, and it is considered the duty of the State to provide it, as stated in Article 12[98] of the Federal Constitution. The same is mentioned in Article 26 of the UDHR which assures rights to free education to every person, at least in the fundamental stages. I trace that this right is protected under Article XXI of the UIDHR and Article 9 of the CDHRI. Finally, Article 13[99] of the Federal Constitution affords Malaysian citizens, women and men, the rights to property, as also seen in Article 17 of the UDHR. The UIDHR expresses its assurance on this right in Article XV and Article XVI, while the CDHRI does so in Article 14, Article 15 and Article 16. For both the right to education and the right to property, woman is a legal subject and entitle to equal entitlement as men.

(c) to acquire and own property and hold and administer it in accordance with law
4) State law and, in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law, may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam
5) This Article does not authorize any act contrary to any general law relating to public order, public health or morality'

[98] Article 12 of the Federal Constitution states that:
'1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth –
(a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or
(b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation)
2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose
3) No person shall be required to receive instruction in or take part in any ceremony or act of worship of a religion other than his own
4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian'

[99] Article 13 of the Federal Constitution states that:
'1) No person shall be deprived of property save in accordance with law
2) No law shall provide for the compulsory acquisition or use of property without adequate compensation'

To summarise, I have argued that Malaysia, as a member state of the UN since 17 September 1957[100] and of the OIC since 1969[101], has drafted its human rights provisions with regard to both Western-based and Islamic-based human rights. It is important that these domestic human rights laws are congruent with both sources, because the laws apply to all people, both Muslims and non-Muslims, in Malaysia. I traced that human rights according to the Federal Constitution, cover rights such as immunity and liberty, reflecting rights and duties, individual and collective and not absolute, consistent with the meanings of rights according to Islamic and international jurisprudences' definition of rights as explained in Chapter Two. I perceived that the language of human rights under the Malaysian Federal Constitution is non-gendered. I noted that woman according to the Malaysian Federal Constitution is a legal subject and has been given equal protection of the laws and equal rights to fundamental liberties as those conferred on man. Having established that Malaysian laws on human rights for women and men are based on English common laws which are not contradictory to Islamic textual sources, my further concern is to consider Malaysia's progress towards empowerment of women, women's rights and gender equality laws.

4.3 WOMEN'S RIGHTS: MALAYSIA'S ENHANCEMENT OR IMPAIRMENT?

As stated in the Preamble to the UN Charter, equality of rights for women is a basic principle of the UN (Smith, 2003: 42). The International Covenants on Civil and Political Rights (ICCPR) and International Covenants on Economic, Social and Cultural Rights (ICESCR) also proclaim the entitlement of everyone to equality before the laws and to the enjoyment of human rights. In this Section, I consider Malaysia's progress towards

[100] See Online: http://www.un.org/en/members/index.shtml. Retrieved on 09/02/2011
[101] See Online: http://www.oicun.org/3/28/. Retrieved on 06/10/2011

empowerment of women, women's rights and gender equality laws. I argue that the emergence of a new consciousness in the patterns of discrimination against women and a rise in the number of organizations committed to combating the effect of such discrimination in the 1960s prompted the Government of Malaysia to show its support by allocating funds, setting up organizations and advancing actions and measures for women as disadvantaged groups to achieve gender equality. In this Chapter, my reference to *'women'* is not confined to Muslim women but also includes non-Muslim women, because the overall intention of the Government of Malaysia in its efforts to develop women's rights is to empower all women in this country.

4.3.1 From the National Advisory Council on Integrating Women in Development (NACIWID) to the Tenth Malaysian Plan (2010-2015)

In response to the UN's General Assembly Resolution, 30th Session[102], to integrate all women into the development process, gender has been a development focus and was first mentioned in the Third Malaysian Plan (1976-1980) (Ministry of Women, Family and Community Development, 2007: 23). In the Plan, the Government allocated funds for the development of women, primarily in their roles and functions as housewives, mothers and supplementary income earners (Ahmad, 1998). To uphold equality of outcomes, the

[102] General Assembly Resolution 30th Session (U. N. Doc. A/RES/30/3519) on Women's Participation in the Strengthening of International Peace & Security of 15 December 1975:
'Calls upon all Governments, intergovernmental and non-governmental organizations, particularly women's organizations and women's groups, to intensify their efforts to strengthen peace, to expand and deepen the process of international detente and make it irreversible, to eliminate completely and definitely all forms of colonialism and to put an end to the policy and practice of apartheid, all forms of racism, racial discrimination, aggression, occupation and foreign domination'
General Assembly Resolution 3521 calling on States to ratify international conventions and other instruments concerning the protection of women's rights, A/RES/3521 (XXX), 15 December 1975:
'Aware that women, enjoying fully the rights provided for in the relevant international instruments, should play an equal role with men in all spheres of life, including the ensuring of peace and the strengthening of international security, and should fully participate in political life.
Confident that the relaxation of international tension contributes to the development and implementation of standards in all fields of concern to women
Calls upon all States to promote vigorously wider participation of women in the strengthening of international peace and in extending the relaxation of international tensions contributing to the creation of the most favourable conditions for the complete elimination of discrimination against women'

development and advancement of women is crucial, considering that women may not be able to stand at least as tall as men without positive measures being accorded to them. Thus, the Government's earlier indication in the Third Malaysian Plan that it would take appropriate measures to ensure the full development and advancement of women, might have suggested that it would give special rights to women as a disadvantaged group to ensure their enjoyment of human rights on the basis of equality with men. This is consistent with the principle of equality under the Women's Convention, that even though an act or omission appears to be gender-neutral, it still has a discriminatory impact on women if the giving of similar treatment results in discrimination (Facio and Morgan, 2009). As stressed by Fredman (2001: 154) earlier, similar treatment mirrors individuality. Thus, if women are guaranteed equal rights by law, but are not accorded special measures for development and enhancement, they will still suffer discriminatory impacts, considering that women are a disadvantaged group.

The Government of Malaysia formed the National Advisory Council on Integrating Women in Development (NACIWID)[103] in June 1976, which served as an advisory and consultative body for the Government on matters relating to women in development, planning and implementation (Ministry of Women, Family and Community Development). I note that, amongst the functions of the Council, there are duties to provide guidance to women's organizations on their participation in national development and to give advice on the formulation of legislation and programmes affecting women, which could indeed help

[103] NACIWID was established as a multi-sectoral body comprising representatives from the government and non-government sectors and providing a platform for greater intensification of efforts towards the integration of women in development. Amongst the functions of the Council are to provide advisory services and guidance to women's organizations on their participation in national development and to advise on the formulation of legislation and programmes affecting women. It serves as a nucleus to which issues pertaining to women are referred and in addition, initiates research, studies and the dissemination of information. It liaises with appropriate authorities and related international organizations to promote friendly international relations and peace

to enhance and empower women in the public sphere. Moreover, it serves as a nucleus to which issues pertaining to women are referred, and also initiates research, studies and the dissemination of information. Furthermore, it liaises with appropriate authorities and related international organizations to promote friendly international relations and peace. However, to ensure maximum development of women, the role and composition of NACIWID should have been reviewed to establish a secretariat independent of the Government's Women's Ministry. According to the NGO Shadow Report on the Initial and Second Periodic Report of the Government of Malaysia in 2005, ensuring that NACIWID's members are all experts on gender might also strengthen its role as a coordinating, consultative and advisory body and help it operate effectively (NGO Shadow Report Group, 2005: Articles 1-4: Definition of Discrimination, Law, Policy and Measures to Implement the Convention, para 4.7).

In 1982-83, the Women's Affairs Secretariat (HAWA)[104] was set up in the Prime Minister's Office of Malaysia to take over the tasks of the NACIWID Secretariat and to administer matters relating to women (Ahmad, 1998: 49). The HAWA is intended to ensure that women's interests and concerns are taken into consideration. This might have empowered women by recognising their voice and giving them the choice to realise their own interests (Fredman, 2003: 43; Mahmood, 2005: 5-17). Krishnadas (2007) has argued that women's rights to determine their lives' patterns are dependent upon the process of recognition. HAWA was later placed under the then newly established Ministry of Women, Family and Community Development in 2001 and restructured as the Department for Women's Development (DWD). By 1 March 2002, the DWD had set up branch offices in every state in Malaysia (Portal MyWanita, Department for Women's Development).

[104] From 1997, HAWA functioned as a Department under the former Ministry of National Unity and Social Development

Again, in this perspective, the aim of HAWA to ensure that women's interests and concerns are taken into consideration in development, planning and implementation has indicated that women's rights to autonomy have been implemented.

The major initiative affecting gender equality in Malaysia was the National Policy on Women (NPW) prepared in 1989 (Ministry of Women, Family and Community Development and UNDP, 2007). The Status Report on Women's Equality in Malaysia by the Women Aid's Organisation (2001) testified that the NPW will ensure equitable sharing in the acquisition of resources and information, access to opportunities and benefits of development, and all sectors of national development in line with women's abilities and needs. This would have ensured women's recognition in the public spheres too. I note that, as a *'major initiative affecting gender equality and women's empowerment in Malaysia'*, the NPW was formulated as a basis of many subsequent policies and programmes, and its contents were incorporated in the Sixth Malaysia Plan (1991-1995) with the Chapter entitled '*Women in Development'* and the *'Second Outline Perspective Plan* (1990-2000)' (Economic Planning Unit, 2005) to empower women in development mainly in health, education and training, law, employment, sports, media, religion and culture (Ministry of Women, Family and Community Development and UNDP, 2007). The Policy recognised that poverty, lack of education and, sometimes, culture and tradition are major hindrances to women's progress. At the international level, the Policy recognises the international efforts to improve the status of women, in particular the Nairobi Forward Looking Strategies for the Advancement of Women 1985 and the Declaration of the Commonwealth Ministerial Meeting on Women 2000[105] in the Bahamas, which have resulted in administrative policies becoming more gender-aware (U. N. Doc.

[105] Since 1999, the Commonwealth Magistrates' and Judges' Association (CMJA) has run a number of Gender Section Conferences in conjunction with the Caribbean Regional Conferences in order to raise awareness of gender issues, including the one in the Bahamas

CEDAW/C/MYS/1-2, 2004: Part 1, Article 3, para 77). The enhancement of women in the Sixth Malaysia Plan has indicated that special measures have been secured for women for their participation in the public sphere to compensate for their historical disadvantages.

These affirmative actions to assist women in attaining self-confidence, achieving advancement under the opportunities afforded by the national development plans, and assuming increasingly larger roles outside the home and family are important considering that women are late starters in many fields and are confined in their lives to the private spheres. I note that an integral component of the planning process to provide special measures to achieve gender equality in the public spheres continued with the formulation of a National Action Plan (NAP) in 1992 to support the implementation of the NPW (Economic Planning Unit, 2005). Under the NAP, various strategies and programmes were drawn up to be implemented by Government agencies, the private sector and non-governmental organizations. Therefore, the Sixth Malaysia Plan emphasized the formulation of the NAP, which was intended to integrate women in the institutional process for planning, implementation and monitoring followed by an Action Plan for Women in Development in 1997.

In July 2003, the Ministry of Education, the Ministry of Higher Education, the Ministry of Health, the Ministry of Human Resources and the Ministry of Rural and Regional Development participated in the '*Gender Budgeting Pilot Project'* looking at incorporating gender-sensitive budgets into the national budgeting system (Economic Planning Unit, 2005: 102-103). As a result, outputs and incomes have become the essence of the gender budget statements for the operating and development budget, which could empower women. Officers of the above said that '*Pilot Ministries'* have acquired a good

understanding of the *'Gender Responsive Budget'* (GRB) approach and skills in gender budget analysis, and are able to conduct training for other ministries (Ministry of Women, Family and Community Development, 2005: 12).

In 2004, the Ministry of Women, Family and Community Development initiated a project on gender mainstreaming and developed Malaysia's Gender Gap Index (MGGI) to monitor trends in gender disparities in health, education, economic activity and political and economic empowerment, also aiming at integrating women into the development process in Malaysia (Ministry of Women, Family and Community Development, 2007: xii). The project of monitoring gender disparities will help empower women. According to the trends in the MGGI, during the period of 1980 to 2004 gender inequality declined sharply. Between 1980 and 1990, the gender gap (in health, education, economic activity and political and economic empowerment) fell by 1.9 per cent per annum; between 2000 and 2004 the gap fell by 1.7 per cent per annum, which was possibly a result of the previous Government's policies to empower women. However, as stated by Aliran (10 October 2010), in a report by the Women, Family and Community Development Ministry in 2009, the Malaysia Gender Gap Index showed that *'while Malaysia scored well in the sub-indexes of education and health, the gender gap in the political and economic empowerment sub-index remained high at 0.58 in 2007 (on a scale of 0 to 1, wherein 0 indicates no gender inequality, and 1 indicates maximum gender inequality)'.* This showed that, in the political and economic empowerment, women might have needed specific agenda for them to be integrated into the development process.

Malaysia's commitment was further demonstrated by the establishment of the Cabinet Committee on Gender Equality in December 2004 and the Gender Focal Point in all

Government Ministries and Departments to provide policy direction and to monitor the implementation of strategies and programmes for women and family development (Ministry of Women, Family and Community Development, 2007: xi). The Government also announced that 30 per cent of decision-making positions in the public sector are to be filled by women (Suhakam's Report on the Human Rights Approach to the Millennium Development Goals, 2006: 25). There has been a positive achievement in this regard as the percentage of women in top management positions in the public sector has increased from 18.8 per cent in 2004 to 24.8 per cent in June 2010 (Rastam, 2010: 3).

I have found that the Malaysian Millennium Development Goals (MDGs)[106], which emerged to guide efforts towards universal human wellbeing, addressed many of the most enduring failures of human development, placing human wellbeing and the eradication of extreme poverty at the centre of global development aims (Economic Planning Unit, 2005). The supreme objective among all the MDGs, which is, the eradication of poverty was already a primary national concern in 1970, when 49.3 per cent of all households in Malaysia were living in poverty (The Economic Planning Unit, Prime Ministers Department, 2008). And later, according to the Mid Term Review of the Ninth Malaysia Plan, just 5 per cent of households were poor.

Because women are often the group most affected by poverty (Yeok, 2004, 28), the third MDGs was developed to promote gender equality and the empowering of women. It was targeted to eliminate gender disparity in primary and secondary education by 2005 and in

[106] MDGs is a translation of the values and principles of the UN Millennium Declaration which resulted from the Millennium Summit in New York in an attempt to agree on ways to ensure a better future for every human being

all levels of education by 2015 (SUHAKAM[107]'s Report on the Human Rights Approach to the Millennium Development Goals, 2006: i). Ariffin (2006: 7) has alleged that *'none of these goals, targets or indicators is new'* because they are derivatives from the feminists goals already decided at numerous UN World Conferences of the 1990s as well as subsequent UN meetings in early 2000. In relation to this issue, Ariffin (2006: 12) has added, critics feel that economic empowerment by eliminating gender disparity in education without reproductive rights and the corresponding health care will leave women as less than full citizens. However, the review of the 2005 target in 2010 noted that Malaysia had achieved most of the goals ahead of the target date and had shown progress in achieving other goals, although they are yet to be fully achieved (Millenium Development Goals at 2010, 2011: vii-viii).

Additionally, a chapter on *'Women and Development'* in the Seventh Malaysia Plan (1996-2000), the Eighth Malaysia Plan (2001-2005), the Ninth Malaysia Plan (2006-2010) and *'references to women'* in the Third Outline Perspective Plan (2001-2010), which is the operational aspect of the second phase of the overall developmental plan called Vision 2020[108], have moved Malaysia closer to becoming a fully developed country. In the Seventh Malaysia Plan and Eighth Malaysia Plan, the Government of Malaysia identified women as an *'important resource that can be mobilised national development agenda'* (Eighth Malaysia Plan, 2000). Thus, the Government has taken numerous measures to improve women's participation in the labour market, such as by outlining the agenda for

[107] SUHAKAM is the Human Rights Commission of Malaysia (hereinafter SUHAKAM), a national human rights institution. It was established by the Malaysian Parliament using the Human Rights Commission of Malaysia Act 1999 (Act 597) with a mandate to promote human rights education and advice on legislation and policy, and investigate complaints. See Online: http://www.suhakam.org.my/home. Retrieved on 07/03/2009

[108] Vision 2020 is a Malaysian ideal introduced by the 4th Prime Minister of Malaysia, Mahathir Bin Mohamad, during the tabling of the Sixth Malaysia Plan in 1991. The vision calls for a self-sufficient industrial, Malaysian-centric developed nation, complete with an economy that, in 2020, will be eight times stronger than the economy of the early 1990s

meaningful participation of women in the workplace in the National Policy on Women and Development (Omar and Davidson, 2004: 269). Furthermore, the Eighth Malaysia Plan explicitly demands that the strategies and programmes implemented for women's advancement be consistent with Malaysian values, religious beliefs and cultural norms (Eighth Malaysia Plan, 2000).

In the Ninth Malaysia Plan, the Government promises to continue to facilitate women's greater participation in the nation's labour force and to continue to review existing laws and regulations that disadvantage women (Ninth Malaysia Plan, 2005: 30). In this Plan, more skills and training upgrading programmes such as information and communications technology and entrepreneurship are being implemented to facilitate more self-employment and greater participation by women in the economy (Ninth Malaysian Plan, 2005: 19-20), which should enhanced women's employment status in the public spheres in Malaysia. Moreover, single mothers' employability is also being improved by the formulation of a strategic plan covering economics and education. Furthermore, the Government is expanding childcare services and promoting flexible working hours and places. Programmes are also being implemented to create awareness of the importance of women's wellbeing (Ninth Malaysia Plan, 2005: 30). As a result, the Government has successfully conducted family development programmes for 60,000 participants and improved family wellbeing (Mid-Term Review of the Ninth Malaysian Plan 2006-2010, 2008: 86). In the Tenth Malaysia Plan (2011-2015), the Government encourages women to increase their participation in the labour sector as decision-makers. Women will be given wider opportunities to partake in the development of the State (Tenth Malaysia Plan, 2010).

4.3.2 Commitment to the Women's Convention: Sharing Global Standard?

As discussed in the earlier Section, all human rights laws in Malaysia underpinning Article 5 to Article 13 of the Federal Constitution apply to women as well as men, and automatically recognise women as legal subjects. I trace that the rights of all Malaysian women are further governed by other provisions in the Federal Constitution, legislations, religious and customary laws, and international conventions to which Malaysia is a State Party. In addition to the Women's Convention, Malaysia is a party to other international instruments that protect the rights of women, such as the Convention on the Nationality of Married Women and the International Labour Organisation (ILO) Convention No. 100 (U. N. Doc. CEDAW/C/MYS/1-2, 2004: Part 1, Article 2, para 75).

I have found that, by the mid-1990s, the Women's Convention had become a central part of campaigns for women's human rights in Malaysia. This can be seen from the movements of individuals and groups of women, some of whom are from non-governmental organisations, who have expressly demanded gender equality rights. The 1990 Women's Manifesto was launched by a combination of women's organisation in 1999 to secure commitments from all political parties to improve women's rights before the law, women's employment status and to protect women from violence (Stivens, 2003: 131-133). According to Stivens, there were also attempts by women's organisations to expand the issues of domestic workers rights, land, environment, sex workers and sexual harassment. As a result, Malaysia ratified the Women's Convention on 5 July 1995. Among the international human rights treaties, the Women's Convention takes an important place in bringing the female half of humanity into the focus of human rights concerns (Reichert, 2006: 221). As stated in the Introduction to the Women's Convention's

text, *'the spirit of the Convention is rooted in the goals of the UN, to reaffirm faith in fundamental human right, in the dignity and worth of the human person and the equal right of men and women'*. Therefore, Malaysia's ratification of the Women's Convention marked an explicit acceptance that Malaysia shares common standards and values on women's rights with the global community.

The Government of Malaysia has also committed itself to a number of initiatives to promote gender equality by agreeing to the commitments set out in the World Platform of Action[109] at the Beijing World Conference in 1995[110]. It promised to enhance the national machinery for women's advancement and increase women's participation in decision-making (Malaysian Women's Aid Organisation, 2001). At the Conference, the Government prepared its Report which outlined an enabling environment for the advancement of Malaysian women, a review of the situation of women in the early 1980s prior to the Nairobi Conference,[111] changes that have taken place since the Nairobi Conference, and future strategic goals and objectives (Ahmad, 1998: 50). The Report noted that all the recommendations envisaged in the Action Plan for the implementation of the National Policy on Women are in line with the macro policies of the National Development Plans, Vision 2020, and the World Platform for Action endorsed in the Beijing World Conference. According to Aminah Ahmad in the *'Country Briefing Paper on Women in Malaysia'*, the Report prepared by the Government of Malaysia at the Beijing World Conference acknowledged that women had made significant advances in all

[109] Prepared by delegates that aimed at achieving greater equality and opportunity for women

[110] Beijing Conference was the Fourth World Conference on Women held in Beijing in 1995 and was the largest international meeting ever convened under the UN. See Smith, Rhona K. M. 2003. *Textbook on International Human Rights*. Oxford University Press

[111] Nairobi Conference was held from 15-26 July 1985 in Nairobi, Kenya to review and appraise the achievements of the United Nations Decade for Women: Quality, Development and Peace

aspects of life, be they public or private (Ahmad, 1998: 51). This was reflected in the overall status of women in the country.

Malaysia, when acceding to the Women's Convention in 1995, ratified the Convention with reservations to Article 2 (f), Article 5 (a), Article 7 (b), Article 9 and Article 16. Article 2 (f) pertains to the State Parties' condemnation of discrimination against women in all forms, including legislation, policy, regulation, custom and practices, while Article 5 (a) is concerned with the State Parties' action to modify social and cultural patterns of conduct of women and men to eliminate practices which are based on the superiority or inferiority of the sexes or on the stereotyped roles of both sexes. Article 7 (b) relates to State Parties' action to eliminate discrimination against women in political and public life and to guarantee women's rights to participate in government policy-making. Article 9 requires State Parties to grant equal nationality rights to women, while Article 16 obliges State Parties to eliminate discrimination against Muslim women in matters relating to marriage and family relations; this was objected to due to its non-conformity with *Shariah* practised in Malaysia and the Federal Constitution (U. N. Doc. CEDAW/SP/2006/2, 2006: 18). The original reservations read as follows:

'The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Shariah law and the Federal Constitution of Malaysia. With regards thereto, further, the Government of Malaysia does not consider itself bound by the provisions of Articles 2 (f), 5 (a), 7 (b), 9 and 16 of the aforesaid Convention. 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'.

Even though the Government of Malaysia ratified the Women's Convention, it has been criticized by local non-governmental organisations, opposition political parties and international organizations for discriminating against Muslim women due to its refusal to

accept certain provisions of the Women's Convention affecting Muslim women as binding on it[112]. Because of these criticisms, the Government started to review such reservations progressively with a view to lifting them but is still taking into consideration the constitutional provisions and national interest. As a result, on 6 February 1998, the Government of Malaysia notified the Secretary-General of a partial withdrawal of reservations to Article 2 (f), Article 9 (1) and Article 16 (1) (b), (d), (e) and (h) (Declarations, Reservations and Objections to CEDAW, Division for the Advancement of Women).

Moreover, the Government of Malaysia has continued to make a commitment to review other reservations (Abdul Aziz, 2008: 86). I trace that this was proved by another withdrawal made to the reservations of Article 5 (a), Article 7 (b) and Article 16 (2) on 19 July 2010. Originally, the Government of Malaysia reserved these Articles without specific reasons, apart from the fact that they conflicted with the Federal Constitution or *Shariah* practised in Malaysia. However, on 6 February 1998, the Government of Malaysia notified the Secretary-General that it had decided to modify its reservation made upon accession with respect to Article 5 (a), Article 7 (b) and Article 16 (2) of the Convention (Declarations, Reservations and Objections to CEDAW, Division for the Advancement of Women, para 42). With regard to Article 5 (a), the Government of Malaysia declared that the provision was subject to the *Shariah* on the division of inherited property. The Government of Malaysia also proclaimed that the application of Article 7 (b) shall not affect the appointment of Muslim women to certain public offices such as the *Mufti*[113],

[112] See detailed discussion in Chapter One, Section 1.1

[113] *Mufti* refers to a person who presents the laws and *fiqh* of the scholars to people who ask for them. *Mufti* in Malaysia means the person appointed to be the *Mufti* for the Federal Territories under Section 32 (Appointment of *Mufti* and Deputy *Mufti*) of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) and includes the Deputy *Mufti*. Section 33 of the Act stated that *'The Mufti shall aid and advise the Yang di-Pertuan Agung in respect of all matters of Islamic law, and in all such matters shall be*

Shariah Court Judges[114] and the *Imam*[115], which was in accordance with the provisions of *Shariah*. And lastly, with respect to Article 16 (2), the Government of Malaysia affirmed that, under the Islamic-based laws in Malaysia, the minimum age for marriage for Muslim women was 16 and for Muslim men 18.

In withdrawing reservations to Article 5 (a), Article 7 (b) and Article 16 (2) of the Convention, the Government of Malaysia was not overruling *Shariah.* In fact, pluralistic views and *Ijtihad* among *Shariah* scholars in Malaysia pertaining to division of inheritance property, appointment of Muslim women as *Mufti*, *Shariah* Court Judges and *Imam*, and child marriage have been taken into consideration. This was to achieve the elimination of prejudices based on the idea of the inferiority or the superiority of either of the sexes according to the local Malaysian context. The judicial policy has been reformed by *takhayyur* or by selecting opinions from schools of thought other than *Shafie* and combinations of elements from various schools of thought, but it is still consistent with the spirit of divine injunctions to achieve equal dignity and justice (Noor, 2007: 136). As a result, the laws on the appointment of Muslim women as *Mufti*, *Shariah* Court Judges and *Imam* and on child marriage have been amended[116].

For instance, by virtue of the *Shariah* practised in Malaysia, Muslim women were previously being denied similar rights to Muslim men to hold public offices, such as

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the chief authority in the Federal Territories after the Yang di-Pertuan Agung, except where otherwise provided in this Act'. The *Mufti* also makes and publishes fatwa or rulings on any unsettled or controversial question of or relating to Islamic law (Section 34 (1))

[114] *Shariah* Court Judges in Malaysia means Judges of the *Shariah* High Court appointed under Section 43 (1) of the Administration of Islamic Law (Federal Territories) Act 1993 but does not include a Judge of the *Shariah* Subordinate Courts appointed under Subsection 44 (1) of the same Act

[115] *Imam* has multiple meanings, but normally refers to the person who leads congregational prayers and runs a mosque. *Imam* in Malaysia means *Imam* appointed under Subsection 76 (3) of the Administration of Islamic Law (Federal Territories) Act 1993. Subsection 76 (3) stated that *Imam* shall be appointed from amongst persons serving in the Religious Administrative Service

[116] Please refer further discussion on child marriage in Subsection 5.2.2

Shariah Court Judges. However, previous scholars have had conflicting views; some of them approved of and some disagreed with the appointment of Muslim women as judges in *Shariah* Courts. The minority view, held by Imam Abu Hanifah[117], expressed approval of Muslim women holding this position in all cases except *hudud*[118] and *qisas*[119]. The Malaysian National Fatwa Council, at its 73rd Conference held on 6 April 2006, later decided that Muslim women could be appointed as *Shariah* Court Judges provided that they had qualifications, were credible and had wide experience in *Shariah* matters (Portal Rasmi Fatwa Malaysia). Recently, two female Muslim judges were appointed as the first female *Shariah* Court Judges in Malaysia (Mohamad, 2010). With that, I argue, reservation to Article 7 (b) deserved to be withdrawn.

However, I note that, thus far, the Women's Convention has yet to be made enforceable in domestic courts because Malaysia has yet to pass any legislation to fully adopt the provisions of the Convention and has instead opted to apply it in a piecemeal fashion. The CEDAW was concerned that the Women's Convention is not yet part of Malaysian laws and that its provisions are not enforceable in domestic courts (U. N. Doc. CEDAW/C/MYS/CO/2, 2006: para 7). It is therefore necessary for a law be passed at the national level to give effect to the international commitments entered into. Because Malaysia follows a dualist approach in the application of international law, the rules of international law can operate in Malaysia only if they are deliberately transformed into it by means of a parliamentary enactment. Hamid (2006: n.p) has explained that *'an analysis*

[117] Imam Abu Hanifah's full name is Nuʿman ibn Thabit ibn Zuṭa ibn Marzuban (699-765 CE/80-148 AH), the founder of the *Sunn*i Hanafi school of *fiqh* (Islamic jurisprudence)

[118] *Hudud*, also transliterated *hadud, hudood;* singular *hadd*. Its literal meaning is '*limit'* or '*restriction*', the words often used in Islamic literature for the bounds of acceptable behaviour and the punishments for serious crimes. In *Islam*, *hudud* usually refers to the class of punishments which are fixed for certain crimes that are considered to be '*claims of God'*. They include theft, robbery, rebellion, fornication, consumption of alcohol and apostasy

[119] *Qisas* is an Islamic term which means retaliation, similar to the biblical principle of an eye for an eye. In the case of murder, it means the right of the heirs of a murder victim to demand execution of the murderer

of the Malaysian cases involving issues of international law in one way or another demonstrates convincingly that the Malaysian courts have applied international treaties to which Malaysia is a party provided that the treaty concerned has been transformed into the Malaysian law by means of a statute made by Parliament'. Although the Malaysian courts might not enforce treaty obligations, small windows have nonetheless been opened where Malaysian courts have referred to international human rights treaty obligations[120]. Malaysia submitted its initial and first periodical reports in 2006 prepared by the CEDAW Steering Committee[121]; these have thoroughly indicated Malaysia's commitment and progress towards eliminating gender discrimination since its ratification of the Women's Convention.

4.4 EQUALITY UNDER THE MALAYSIAN FEDERAL CONSTITUTION AND STATUTES: *'DE FACTO'* CONSIDERED?

In the concluding comment made against Malaysia in the CEDAW's Thirty-Fifth Session, the CEDAW expressed concern that the term *'discrimination'* is not defined in either the Malaysian Federal Constitution or in other statutes in Malaysia (U. N. Doc. CEDAW/ C/MYS/CO/2, 2006: para 7). I argue that Malaysia enacts human rights laws under the Federal Constitution in order to challenge bias and intolerance. Secondly, these laws aim to create opportunities for vulnerable groups to participate in development processes. In this way, discrimination is tackled. Parliament has classified these as human rights which are based on the notions of *'personal liberty, equality, free speech and human dignity'* (N.

[120] See *Abdul Malek Hussin v Borhan Hj Daud* [2007] 1 LNS 460 where the Judge held, *'I am mindful of the fact that I am presently dealing with the fundamental liberty of the citizens. The preservation of the personal liberty of the individual is a sacred universal value of all civilized nations and is enshrined in the Universal Declaration of Human Rights and Fundamental Freedoms of 1948'*. See also *Jakob Renner v Scott King, Chairman of Board of Directors of Kuala Lumpur International School* [2000] 3 CLJ 569

[121] CEDAW Steering Committee was established to monitor the implementation of the Women's Convention and to prepare the report

Mahmood, 2006: 3). It is a basic principle that all persons regardless of gender shall be afforded equal protection of the laws in Malaysia.

As discussed earlier, gender equality does not mean that women and men are to be treated the same even though they are different or that they are to be treated differently when they are similar. Therefore, the first step to empowering women and protecting their equal rights as human beings in Malaysia is to understand the meaning of equality according to the national legal context. I explore how the term *'equality'* is interpreted under the Malaysian Federal Constitution and its application in various statutes. I argue that gender equality laws could be regarded as being in the best interest of women rather than simply developing a *'culture'* of equal rights. I trace that the Malaysian Federal Constitution reflects its guarantee of formal equality of gender by conferring similar rights on women and men, as stated in Article 5 to Article 13 discussed earlier, and substantive equality by offering special and affirmative measures for equal outcomes and assigning different rights and roles to women and men[122] to avoid discrimination due to their differences.

I trace that the other national legislations guarantee equal gender rights in a number of different areas, including public and political life, employment, education, healthcare and family matters, which will be examined in the next Chapter. Moreover, the Government policies are extended to uphold the principles of equality and integrate all women into all sectors of development in accordance with their needs and capabilities (Suhakam's Report on the Human Rights Approach to the Millennium Development Goals 3: Promote Gender Equality and Empower Women, 2006: 1-2; Ahmad, 1998). As I explained in the earlier

[122] Men and women are given different roles and responsibilities in family matters. The Malaysian Federal Constitution gives jurisdiction to *Shariah* Court (State) to deal with personal rights of Muslims, as stated under Article 1, List II-State List of the Ninth Schedule, Federal Constitution. Article 74 (2) of the Constitution empowers the State legislatures to make laws on any matter in the State List

Section, the establishment of NACIWID, HAWA, National Policy on Women, National Action Plan and Action Plan for Women in Development was intended to empower women and to provide affirmative actions to assist women as a disadvantaged group in attaining self-confidence and achieving advancement under the opportunities afforded by the national development plans. Generally, Muslim women's rights in Malaysia are similar to those of men according to the laws, but there are a few situations where women's and men's entitlements to rights are different due to the application of substantive equality.

Malaysian women have been considered equal in their legal status with men, and this has been recognized and guaranteed by the Federal Constitution, which is stated under Article 8 (1) mentioned earlier. However, the Constitution was silent on the meaning of equality apart from a few details on discrimination. Practically, discrimination is often interpreted as '*treating women differently to men to the detriment of women'* (U. N. Doc. CEDAW/C/MYS/1-2, 2004: Part 1, Article 1, para 25). Article 8 (2) further provides that citizens will not be discriminated against by laws on the ground of gender. Article 8 (2) reads: *'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….'*

Ahmad (2005: 3) has explained that the inclusion of the word *'gender'* in Article 8 (2) read with Article 8 (1) provides the following:

'1. Non-discrimination against females on the basis of cultural definitions of her role in society

2. Non-discrimination against females on the basis of her biological sex difference

3. Non-discrimination against males on the basis of biological sex differences and interpretations of behaviour that is culturally associated with sex difference'.

Ahmad (2005), who analysed the compliance of Article 8 with the equality standard and the Women's Convention, has come to the conclusion that formal equality was dominant in Malaysia but has been displaced by the substantive equality standard. Substantive equality was defined in Malaysia in 1987 by Tun Salleh Abbas, in *Malaysian Bar & Anor v Government of Malaysia*[123] as follows '…*the requirement for equal protection of the law does not mean that that all laws passed by a legislature must apply equally to all persons and that the laws so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force…'*. Thus, in Malaysia, substantive equality is comprehensively defined and adopted not only in the policies and administrative programmes as discussed earlier, but also by the judiciary.

Ahmad (2005) has argued that Article 8 (1) and (2) are in *pari materia* to Article 14 and Article 15 (1) respectively of the Indian Constitution, which gradually adopted substantive equality. This argument is based on Kapur and Cossman's (1996: 175-176) studies on feminists' engagement with laws in India, which stressed that Indian constitutional laws have been informed by formal equality, yet fragments of the substantive approach have been progressively identifiable. Moreover, Article 15, as explained by Singh, Musharraf and Mollah (2006: 156), *'tries to ensure substantive equality by allowing special provisions in laws, including reservation for women and children to overcome the inequality in status'.* It is important to note here that the Malaysian Federal Constitution is adapted from Indian constitutional concepts, apart from British and United States constitutional frameworks (Hamzah and Bulan, 2003).

[123] (1987) 2 MLJ 165 at 166

The SUHAKAM, in its Report on the Human Rights Approach to MDGs 3: Promote Gender Equality and Empower Women, has stressed that, in promoting gender equality and women's empowerment, Malaysia is in line with the approach of substantive equality adopted by the Women's Convention. Malaysia, according to the Report, has three approaches to equality: formal equality approach, substantive equality approach and protectionist approach. Similarly to substantive equality approaches, the Report explained, the protectionist approach recognises the difference between women and men; however, the protectionist approach differs from the substantive equality approach insofar as it bars women from performing certain acts in order to protect them. According to Hevener (1983: 4), the legal protectionist approach engenders a situation where women should not or cannot engage in specified activities. Thus, the protectionist approach is part of how substantive equality works, which purposely strives to ensure equal outcomes.

Article 15 of the Women's Convention asserts the full equality of women in civil and business matters, demanding that all instruments directed at restricting women's legal capacity *'shall be deemed null and void'*. In Malaysia, as I traced earlier, Muslim women are *'sui juris'* and therefore have full equality in civil and business matters. Women may enter into any type of contractual relationship, whether in relation to commercial or non-commercial activities as allowed by the Contracts Act 1950 (Act 319) (CA) (Kamaruddin, 2006: 24). In this Act, for the contract to be valid, it should be entered into by a competent person who has given free consent, for a lawful consideration in relation to a lawful object (Section 10). Without disadvantaging anyone on the grounds of sex, *'a competent person'* is further defined by Section 11 as *'a person who has attained the age of majority and who is of sound mind and not disqualified by any law from contracting'.* For the purposes of making a contract, a person of sound mind is one who is able to comprehend the contract

and form a rational judgement as to its effect upon her/his interest (Section 12). These provisions show that the capability and validity of a contract is based on the willingness of parties to perform or not to perform certain acts, rather than on the gender of the parties. That is why the term used to refer to the competent person is *'a person'* which refers to both women and men. Hence, there is no room for sexual bias. In a specific commercial transaction, for instance, I trace that, in relation to the hire-purchase of goods, the terminology used in the law regulating such a transaction, in this case the Hire Purchase Act 1967 (Act 212) (HPA), is also neutral. The definitions of '*owner*[124]' and '*hirer*[125]' make no distinction on the basis of gender. The HPA also provides protection and redress to hirers on a general basis (Part III), regardless of the sex of the hirer or the owner. Based on this, a woman and man can enter into a hire-purchase agreement or any contract in so far as she fulfils the criteria laid down by the statutes.

I trace that the judicial system in Malaysia regards women and men as equal and both have equal access to the judicial system. According to the Evidence Act 1950 (Act 56) (EA), any person, regardless of gender, can be a witness in court and can testify as long as he or she possesses a sound mind and rational understanding of the questions put to him or her. Section 118 of the EA stated that *'All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind'*. The testimony of women and men is treated equally and the acceptability is based on the credibility of the witness

[124] Owner is defined in Section 2 of the Hire Purchase Act 1967 (Act 212) as '*a person who lets or has let goods to a hirer under a hire-purchase agreement and includes a person to whom the owner's rights or liabilities under the agreement have passed by assignment or by operation of law'*

[125] Hirer is defined in Section 2 of the Hire Purchase Act 1967 (Act 212) as '*the person who takes or has taken goods from an owner under a hire-purchase agreement and includes a person to whom the hirer's rights or liabilities under the agreement have passed by assignment or by operation of law'*

and relevance of the testimony, not on the gender of the witness. Thus, for the initiation of any legal proceeding, women and men can sue and be sued in their own names. A woman is also entitled to all remedies and redress available in laws in all respects.

I find that women's integrity and wellbeing are taken into consideration during criminal investigations and that they are treated differently from men in terms of sentencing. For example, the Criminal Procedure Code (Act 593) (CPC) provides that '*whenever it is necessary to cause a woman to be searched, the search shall be made by another woman with strict regard to decency'* (Section 19). Further, in terms of sentencing, there is a circumstance in which women are treated differently from men in consideration of their disadvantages. For instance, a sentence of death shall be commuted to life imprisonment if the woman convicted of an offence punishable with death is pregnant (Section 275 of the Penal Code). Women also shall not be punished with whipping (Section 289 (a)). This shows that this Malaysian law on sentencing takes into consideration the substance and principle of gender equality as examined earlier, that women, as a disadvantaged group in this perspective, should be treated differently to ensure equal outcomes for dignity and justice.

4.5 CONCLUDING REMARKS

In this Chapter, I have provided an overview of the ways in which Islamic textual sources have formed part of the sources of Malaysian laws on human rights and Muslim women's rights, because the laws of the Malay land were Islamic-based (Mohamad Ibrahim, 1987; Aun, 1999), which can be traced in most of the digests (Ngah, 1980; Awang, 1984). The idea of rights had already taken root in the pre-colonial Malay states prior to the the

introduction of English common laws in 1807 (Kheng, 2001: 73). However, I noted that Malaysia has drafted its human rights provisions in parallel with Western-based and Islamic-based Declarations. It is important that these domestic human rights laws are congruent with both sources, because the laws apply to all people, both Muslims and non-Muslims, in Malaysia. In my exploration of the fundamental liberties of Malaysian citizens, I argued that woman is a legal subject under Malaysian laws.

I argued that it is possible to admit that the notion of equality which informs the Women's Convention is harmonious with the principle of right to equality as adopted by Article 8 of the Malaysian Federal Constitution, statutes and policies. I traced that Malaysia enacts laws on human rights (fundamental liberties) under the Federal Constitution purposely to prevent any forms of bias and intolerance among citizens with regard to the laws and policies of the government and to create positive opportunities for vulnerable groups to participate in development processes, which define how gender inequalities are to be eliminated. Apart from the laws, the Government applies equality through appropriate means, such as policies, administrative decisions and programmes. These indeed show that the Government has made a continuous and consistent effort to ensure that all women are given special measures to facilitate their full development and advancement, and their acclimatization into the mainstream of social and economic activities. These means also increase the understanding of the human rights concept, as they give formal recognition to the cultural and traditional influences that are restricting women's enjoyment of their fundamental rights. Even though men are not treated the same, this does not mean that the Government is biased against women; however, considering that women have been historically and systematically disadvantaged, they must be treated differently to compensate for their loss, and this will ensure equal outcomes of dignity and justice.

It is important to ensure that Malaysian laws are in line with the Women's Convention in interpreting equality because the Convention spells out the meaning of equality from women's perspective and how it can be achieved. This harmonisation is significant considering that the notion of equality under the Women's Convention is parallel with that of Islamic jurisprudence as explored in Chapter Three. With the idea that gender equality according to the Malaysian legal context runs parallel with that of the Women's Convention, I will analyse in the next Chapter how Malaysia has responded to the CEDAW's concluding comments made against Malaysia in the CEDAW's Thirty-Fifth Session and will examine legislation and amendments of laws to uphold gender equality.

CHAPTER FIVE

CONFLICTING OR COMPLEMENTARY NORMS? MUSLIM WOMEN'S RIGHTS UNDER THE WOMEN'S CONVENTION AND MALAYSIAN LAWS, POLICIES, ADMINISTRATIVE DECISIONS AND PROGRAMMES

5.1 INTRODUCTION

In this Chapter, I examine whether Malaysia, as a State Party to the Convention, is taking all appropriate measures, including laws, policies, administrative decisions and programmes, to eliminate Muslim women's disadvantages based on the principal areas of concern and recommendations of the CEDAW in the concluding comments made against Malaysia following the Thirty-Fifth Session in New York from 15 May to 2 June, 2006, and based on the application of equality informed by the Women's Convention. In the CEDAW's concluding comments, I note that there are several principal areas of concern to the CEDAW which require progressive efforts by the Government of Malaysia to resolve. They are in regard to the definition and application of equality, elimination of gender stereotypes, public and political life, employment, adequate sanctions for acts of violence against women, trafficking, rural women and, most importantly, CEDAW's concern about the reservation of Article 16 (1) (a), (c), (f) and (g) of the Women's Convention. In this Chapter, I analyse Malaysia's response to the CEDAW's concerns regarding all the above-mentioned issues, except the definition and application of equality, which has already been examined in Chapter Four, and reservation of Article 16 (1) (a), (c), (f) and (g) of the Women's Convention, which will be analysed in Chapter Six.

First, I consider whether the Government of Malaysia has amended or abolished existing laws, regulations and practices that constitute the disadvantaging of women and modified social and cultural patterns of conduct of women and men which are based on the idea of superiority and inferiority of either of the sexes in economic and social mainstream activities and marriage and family relations. Second, I consider whether Malaysia has committed itself to undertaking a series of measures to end gender discrimination laws in all forms and to incorporate the principle of equality of women and men in its legal system. In this analysis, I argue that the Women's Convention has provided a wide and general definition of the nature of rights, which might allow ratifying State Parties to interpret every single provision in the light of their national circumstances and cultural and religious beliefs, provided that the domestic laws guarantee gender equality and do not conflict with the object, purpose and principle of the Convention. Having said this, I argue that Malaysia has incorporated the substance of the Convention, which is the principle of equality, in its national legislation, policies, administrative decisions and programmes. I argue that the latest enactments and amendments of laws to prevent women from being treated unequally evidence the sensitivity of the Government to gender equality. The practical realization of gender equality in Malaysia can be seen from the response of the Malaysian Government to calls for a review of laws to adopt appropriate legislative measures, including sanctions prohibiting discrimination against women in various sectors. In Malaysia, Muslim and non-Muslim women share similar rights protection stated in the Women's Convention, but not those pertaining to marriage and family relations.

Earlier literature on women's movements and the legal system in Malaysia as discussed in Chapter Four indicates that Muslims in Malaysia were dominated by Hindus and Buddhists from India (Ahmed, 1964: 1-3). Malay Sultanates, as the heads of religion of Islam in

every state, were also influenced by the religious interpretation of Hinduism and Buddhism (Noor, 2007: 57). According to liberal feminist literature, classical Malay Muslim scholars' thought was gender-biased, misogynist, narrow-minded and backward, as demonstrated in the classical jurisprudence documents and writings[126] (Ramli, 2010). Literal understanding of the religious teaching in the classical *fiqh* books, according to Noor (2007: 125), seemed to strengthen the superiority of men. The context of superiority of the male over the female in Malay Muslim society is generally understood based on the role of men as family providers and the role of women in managing household affairs and raising children (Raja Mamat, 1991: 14-15).

However, Islam played a significant role afterwards, replacing Hinduism (Al-Attas, 1969). The *Shafie* school of thought spread throughout the history of the Malay world until the 1990s due to the influences of religious education in which the jurisprudence of the *Shafie* school of law was taught (El-Muhammady, 1992: 53), which continues to this day. I trace that gender equality laws have been applied in Malaysia and the progressive development of women has been evidenced since the 1980s, following the establishment of the NACIWID, as explained in Chapter Four. I argue that the Government has worked towards reducing this disparity and has shown a commitment to promoting gender equality laws and implementing comprehensive measures to change stereotypical roles of women and men to eliminate stereotypes associated with traditional gender roles. I might say that, even though Malaysia has been slow in responding to international developments in the field of

[126] Almost all classical Muslim jurists were male. A study stated that nowhere in the history of Alam Melayu (Malay World) was there any mention of female Muslim jurists or their contribution. See Azra, Azyumardi. 2002. *Historiografi Islam Kontemporer: Wacana Aktualitas dan Aktor Sejarah*. Jakarta: PT Gramedia Pustaka Utama. However, there was a Malay Muslim scholar named Fatimah who had written a book entitled '*Perukunan Jamaluddin'* which explained about Islamic pillars and the pillars of faith, yet the book was published under Fatimah's uncle's name, 'Al-Alim Al-Allamah Mufti Jamal Al-Din Ibn Al-Marhum Al-Alim Al-Fadil Al-Syeikh Muhammad Arshad Al-Banjari'. See Ramli, Mohd. Anuar. 2010. 'Pemikiran 'Mesra Gender' Dalam Karya Fiqh Ulama Melayu Klasik' in *Jurnal Syariah.* Vol. 18. No. 2

human rights[127], it has progressed well in the struggle for the protection of women's legal rights[128].

Ramli (2010: 278) has proved that some views of classical jurists were *'gender-friendly'*[129] and the liberal feminist view that classical Malay Muslim scholars' thought was gender-biased is prejudicial to the Muslim scholars. Abdullah (2007: 517) has observed that the British administrators during the Malay colonial period wanted to investigate the Malay community practices and Malay customs pertaining to family relations further because, according to the British colonial administrators, Malay family relations were matrilineal. The matrilineal nature of family relationships among Malays was not uncommon (Kassim, 1992) because the Malays had applied Islamic rules and customs to regulate their marriage and family relations, which had given more privileges to women as a disadvantaged group and imposed more duties on men. This might have been observed from the Muslim wife's entitlement to dowry, maintenance during marriage and after dissolution of marriage, jointly acquired property, *mut'ah* or consolatory gift after divorce, and inheritance from father, husband, brother and son.

The situation of Muslim women in Malaysia today has gradually improved due to their increasing access to the public sphere, such as in education and economic activities, as women's higher educational attainment increases their income-generating capacity (Ministry of Women, Family and Community Development and UNDP, 2007). I will argue

[127] For example, in the 2010 worldwide press freedom ranking index by Reporters without Borders, Malaysia ranked 141 out of 178, in 2009 ranked 131 out of 175, in 2008 it was placed 132 out of 173, ranked 124 in 2007 out of 169 and in 2006, Malaysia ranked 92 out of 168. Also, Malaysia's score in the Corruptions Perceptions Index has dropped, with its ranking 47 out of 180 countries in 2008, 56 out of 180 in 2009, 56 out of 178 in 2010 and 60 out of 182 in 2011. See Online: http:// www.transparency.org.my/. Retrieved on 15/12/2011

[128] See detailed discussion in Chapter Four

[129] Ramli may be using the term *'gender-friendly'* to mean gender-neutral

that the improvement is also evidenced by several policies, administrative decisions, programmes and amendments to laws that have attempted to remove gender inequalities; these will be discussed in this Chapter. Major policy initiatives to empower women were included widely in the government and non-government sectors. Dato' Seri Najib[130], who was reading a speech on behalf of the Prime Minister Abdullah Ahmad Badawi[131] (as he then was), alleged that more measures should be taken to eliminate gender bias in the workplace[132].

Supporting the Prime Minister's statement, Dato' Seri Shahrizat Abdul Jalil, the former Minister of Women, Family and Community Development, said in her address at the same event that the Government of Malaysia, as a State Party to the Women's Convention, would review laws and policies that were gender-biased. It is indeed the Government that plays an important role, as Rebecca Cook writes:

'*If a state facilitates conditions, accommodates, tolerates, justifies or excuses private denials of women's rights, the state will bear responsibility. The state will be responsible not directly for the private acts, but for its own lack of diligence to prevent, control, correct or discipline such private acts through its own executive, legislative or judicial organs* (Cook, 1994: 229)'.

5.2 ELIMINATING GENDER STEREOTYPES: SUPERIOR/INFERIOR MODIFIED?

In the concluding comments made against Malaysia by the CEDAW in the Thirty-Fifth Session in New York, the CEDAW calls upon Malaysia to implement comprehensive measures to change stereotypical roles of women and men and to eliminate stereotypes

[130] The former Deputy Prime Minister, who is currently the Prime Minister of Malaysia
[131] The 5th Prime Minister of Malaysia
[132] The speech was delivered during the National Women's Day celebration in 2006. See Online: http://www.undp.org.my/25-08-2006-dato-seri-najib-launches-gender-budget-publications-in-conjunct ion - with-womens-day. Retrieved on 12/03/2010

associated with traditional gender roles in accordance with Article 2 (f) and Article 5 (a) of the Women's Convention (U. N. Doc. CEDAW/C/MYS/CO/2, 2006: para 16). Article 2 (f) states that State Parties undertake *'to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women'*. Article 5 (a) states an obligation of State Parties *'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'.* In Malaysia, as explained by Raja Mamat (1991: 14-15), the superiority of the male over the female in Malay Muslim society is generally understood based on the role of men as family providers and the role of women in managing household affairs and raising children. Part of the obligation to eliminate women's disadvantages is achieved by formally guaranteed equality by the Federal Constitution and also by statutes, as discussed in Chapter Four. In this Section, I consider whether existing laws, regulations and practices that constitute disadvantaging women in economic and social mainstream activities and in marriage and family relations has been amended by the Government of Malaysia.

5.2.1 Economic and Social Mainstream Activities

The CEDAW has encouraged Malaysia to take *'sustained measures'* to accelerate the increase in the representation of women in public life (U. N. Doc. CEDAW/C/MYS/CO/2, 2006: para 18). As I mentioned in Chapter Two, a broad range of activities outside the domestic sphere or public life is dominated by men, who historically have exercised the power to confine and subordinate women within the private sphere (General Recommendations No. 23, 16th Session, 1997: Comment para 8). In this Section, I will show that efforts such as providing temporary special measures have been made by the

Malaysian Government to facilitate the assimilation of women into the mainstream of social and economic activities to eliminate gender stereotype norms that constrain women in their private lives only. Private life, in this analysis, refers to the sphere associated with managing household activities, acting as a wife, reproduction, and the raising of children. This, I trace, could modify the social and cultural patterns of conduct of women and men which are based on the idea of the superiority or inferiority of either of the sexes. I note that the Government has progressively empowered women and eliminated gender stereotypes by ensuring women's financial independence and providing special measures in economic activities, education and healthcare and in marriage and family relations.

5.2.1.1 Financial Independence and Economic Activities

As special measures are important for empowering women and for ensuring substantive equality (Kapur and Cossman, 1996), I have found that women are entitled to more financial rights to compensate for their previous economic disadvantages in Malaysia. This is parallel with Article 1 and Article 4 of the Women's Convention regarding the principle of equality that, to ensure equality, those who are disadvantaged (women) should be protected by the provision of special measures to empower them (Facio and Morgan, 2009) and to remedy past and present disadvantages (Rebouche, 2009: 712-713). This aims to ensure that, in the end, women will be socially and economically equal with men.

In 1975, the Government of Malaysia amended the Income Tax Act 1967 (Revised 1971) (Act 53) (ITA) to allow wives to elect for separate assessment of their income for tax purposes. This is to ensure that the wives' rights are equal to those of the husbands, which are guaranteed by law. Previously, Section 45 (2) of the ITA stated that a wife had to be taxed jointly with her husband. I trace that, prior to this amendment, the law was gendered

and did not represent woman as a legal subject. Women were treated less favourably as they were not allowed to be assessed individually for in-come tax purposes, which amounted to discrimination against women. This might be an example of direct discrimination as explained by Bindman (1992: 52) and Fredman (2001: 160) earlier, and could be proved by forwarded evidence that the victim of discrimination has been or would be treated less favourably than another person and against the principle of equality as enunciated under Article 1 and Article 4 of the Women's Convention as explained in Chapter Three. It was not until the year 2000 that Section 45 (2) was again amended to enable either spouse to elect for aggregation of his/her income with that of the other spouse. Section 45 (2) now reads;

'Subject to this section, where an individual and his wife were living together in the basis year for a year of assessment and did not in that basis year cease to live together or to be husband and wife of each other-

> *(a) the wife may elect in writing (wife who elects) that her total income shall be aggregated with the total income of her husband and assessed in his name for that year of assessment; or*
>
> *(b) the husband may elect in writing (husband who elects) that his total income shall be aggregated with the total income of his wife and assessed in her name for that year of assessment:*
> *Provided that where the wife who elects or the husband who elects is not resident for the basis year for a year of assessment, such wife or husband, as the case may be, may elect under this subsection only if she or he is a citizen'.*

Later, Section 45A of the ITA was added to provide for deduction for the husband. Section 45A stated that *'Where (a) the husband has no source of income; (b) the husband has no total income which can be aggregated with that of his wife; or (c) an election has been made by the husband under paragraph 45(2) (b), there shall be allowed to the wife, for a year of assessment, in addition to the allowances or deduction (if any) to that wife under Sections 46, Section 48 and Section 49, a deduction of three thousand ringgit for the*

husband and a further three thousand five hundred ringgit if he is a disabled person: Provided that this section shall only apply to one wife'.

Moreover, according to the ITA, a wife and husband are legally entitled to choose who should claim their children's tax relief, which is an indication of women's financial independence. This clearly shows that woman is recognised as *'sui juris'* and has the right to choose. Section 48 (4) stated that '*Where two or more individuals are each entitled to claim a deduction for a year of assessment under this section for a payment made in respect of the same child, there shall be allowed to each of those individuals, in place of the whole deduction which would otherwise be allowed under this section, a reduced deduction which, in the case of any one of those individuals, shall bear the same proportion to that whole deduction as the payment made by that individual bears to the total of the payments made by all those individuals'*. Similarly, under the same Act, either the wife or the husband may claim medical expenses for parents that were incurred in the year of assessment. In addition, either the wife or the husband can claim tax relief for medical expenses of a spouse or child suffering from a serious disease and for the purchase of medical support equipment for the individual's own use, or for other family members, including parents, who are disabled. This recognises the financial independence of Malaysian women, who constitute an increasingly important proportion of the Malaysian work force, in both public and private sectors. These amended legal provisions denote that the laws are neutral and not a gendered product.

Under the Pension Act 1980 (Act 227), workers are paid pensions based upon a predetermined formula irrespective of gender (Section 1). In the case of a male pensioner who dies, his widow and children will continue to receive his pension; the same principle

applies upon the death of a female prisoner (Section 15). The Government has also rightly recognised the problems faced by widows who remarry. Previously, under the Pensions Act 1980, widows lost their pensions if they remarried. In the Budget Speech of October 2001, the Prime Minister announced that widows would continue to receive pensions even after they remarried (Budget Speech 2002: 48-49). The pension is paid directly to the widow and to the children until they attain the age of maturity (Section 16). This is a way of eliminating laws that have the effect or purpose of denying women's exercise and enjoyment of their rights to remarry, which is against the principle of equality as enunciated under Article 1 of the Women's Convention, as explained by Facio and Morgan (2009).

Moreover, in 2004, Section 20A (1) (a) of the Employees' Social Security Act 1969 (Act 4) regarding survivors' pensions was amended by Act A1232, and Section 20B was deleted. Under Section 20A (1), before the amendment, if an insured person who was in receipt of an invalidity pension died, a survivor's pension was payable to widows only, and not widowers. This, I note was a gender-biased law and distinction that discriminates against women. As expressed by Bayefsky (1990: 34), distinction is discriminatory if it has no objective or reasonable justification; thus, I trace that excluding widowers from receiving their wives' pensions is a kind of unjustified distinction which amounts to discrimination, not only against the wives, but also against the husbands. Now, Section 20A (1) (a) reads as follows;

'If an insured person who is in receipt of invalidity pension, or if an insured person who has not attained 55 years of age but has completed a full or reduced qualifying period as specified under section 17A, dies, survivors' pension at the rates specified in the Eighth Schedule shall be payable-

(a) to the widow or the widower during life, and if there are two or more widows, the widow's share of survivors' pension specified in the Eighth Schedule shall be divided equally between the widows:

Provided that if a widow or widower is entitled to more than one survivors' pension, she or he shall be paid only one pension, being the pension with the higher rate'.

Likewise, the dependent's benefit payable under Section 26[133] was extended to widowers. Section 20B, which was deleted, stated that a widower was entitled to the survivor's pension only if he was without adequate means of support and if he was wholly or mainly dependent on the earnings of such insured person at the time of her death. This provision was seen as disadvantaging women in that they could not transmit to their husbands a benefit equal to that which male workers could leave to their wives. This *'discriminatory provision'* had to be eliminated to ensure that female workers were given rights equal to those of male workers, so that their dependents are guaranteed similar rights to be financially protected after the death of their *'breadwinner'.*

Moreover, Bank Negara (Central Bank) Malaysia formally provides, on a gender-blind basis, various loan schemes to promote the development of certain sectors or activities including the Low Cost Housing Program, the New Entrepreneur Fund Scheme, the Fund for Tourism and the Entrepreneur Rehabilitation Scheme (Bank Negara Malaysia). Gender is not a consideration in assessing an applicant's suitability for a housing or conveyance

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[133] Section 26 (1) and (2) of the Employees' Social Security Act 1969 (Act 4) stated that; *'If an insured person dies as a result of an employment injury sustained as an employee under this Act (whether or not he was in receipt of any periodical payment for temporary disablement in respect of the injury) dependants' benefit at the rates specified in the Fourth Schedule shall be payable to his dependants as follows: (a) to the widow or widower during life, and, if there are two or more widows, the widow's share of dependants' benefit specified in the Fourth Schedule shall be divided equally between the widows:*
Provided that if a widow or a widower is entitled to more than one dependants' benefits, she or he shall be paid only one benefit, being the benefit with the higher rate (b) to each child until marriage or until he attains the age of twenty-one years, whichever occurs earlier:
Provided that in the case of a child referred to in paragraph (b) of the definition of 'child' in section 2, dependants' benefit shall continue to be paid so long as he is incapable of supporting himself:
And provided further that the Organization may continue such benefit to any child who is in receipt of education in any institution of higher learning but not beyond the first degree until he completes or ceases to receive such education or until he marries, whichever occurs earlier (c) (Deleted by Act A675)
(2) If an insured person who dies as a result of an employment injury does not leave a widow or child, dependants' benefit shall be payable to the widowed mother and other dependants as specified in paragraph (b) of the definition of 'dependant' in Section 2 at the rates and for the duration specified in the Fourth Schedule'

loan at the Bank Negara Malaysia; instead, factors such as the applicant's years of service, seniority and ability to repay the loan are taken into account (Housing Loan Division and Treasury Malaysia). In the public sector, both female and male officers have equal access to government housing loans and conveyance loans under Section 5 of the Housing Loan Fund Act 1971 (Act 42).

As Islamic and feminist jurisprudences have provided, to ensure gender equality; similar treatment will not necessarily guarantee equal outcomes if women are in an unequal position with regard to men to begin with (Bakar, 2003; Yaacob, 1986; Fletcher, 2002; Kingdom, 1991; Wolgast, 1980). As explained earlier, sameness will not necessarily produce equality, and treating women and men with similarity may simply perpetuate the difference between them (Fletcher (2002: 149). Women's equality requires both the acknowledgement and accommodation of women's actual differences and elimination of discriminatory treatment (Cook and Howard, 2006-2007: 1044). Thus, special measures are important to compensate women's disadvantage in financial and economic activities. Special funds for women's advancement are allocated by the Treasury and the Ministries[134] to reduce poverty among women by providing incentives for home-based industries and introducing marketing schemes for their products (U. N. Doc. CEDAW/C/MYS/1-2, 2004: Part 1, Article 3, para 83 (ii)). This was realised by allocating specific loans for women in business through microfinance and entrepreneurial development.

Microfinance[135] is among the best mechanisms for enabling poor and unskilled women to enter the economic arena, while entrepreneurship is developed by teaching entrepreneurial

[134] The Ministries are the Ministry of Entrepreneurial Development, the Ministry of International Trade and Industry, the Ministry of National Unity and Social Development and the Ministry of Rural Development and Youth and Sports

[135] It is sometimes used interchangeably with micro enterprise

skills and business practices such as how to deal with clients, how to use profits, where to sell, the use of special discounts, credit sales, and what goods and services to produce (Malaysia Nurturing Women Entrepreneurs, 2008). It was reported in the Malaysia Nurturing Women Entrepreneurs in 2008 that microfinance in Malaysia had its roots in the *Ikhtiar* Project[136], which was conducted with an allocation of only RM2,000; its success led to the establishment of the *Amanah Ikhtiar* Malaysia (AIM) as an independent trust body in 1987 to promote microcredit throughout the country in order to help eradicate hard-core poverty, which particularly affected women. By its 20th anniversary in 2007, the AIM had established 69 branches and was serving a total of 173,000 members, referred to as *Sahabat* (friends). The AIM is funded through interest-free loans from the Malaysian Government, starting with the Fifth Malaysia Plan (1986-1990). Under the Sixth Malaysia Plan (1991-1995), a loan of RM20 million was allocated to the AIM, with another RM300 million added during the Seventh Malaysia Plan (1996-2000). To date, the Government has successfully trained 2,680 women entrepreneurs nationwide while an additional 2,000 are still in training (Economic Management and Prospects, 2011).

Moreover, the Women Entrepreneurs Fund (WEF) was also established in 1998 to increase women's participation in business, with an initial allocation of RM10 million and another RM10 million under the Eighth Malaysia Plan (2001-2005) (Eighth Malaysia Plan, 2001). This would strengthen women's position in the public sphere. Furthermore, in 1999, the Government allocated RM50 million from the National Budget to the Women's Affairs Secretariat and, in 2002, the National Budget allocated RM59 million to finance programmes for women, increasing to RM105.4 million in 2004 (Economic Planning Unit, 2005: 101). This adoption of special measures for women was intended to achieve *'de*

[136] The Ikhtiar Project pioneered by Universiti Sains Malaysia (USM) in 1985

facto' or substantive equality between women and men and should not be considered a kind of discrimination defined by Article 1 of the Women's Convention, as explained in Chapter Three. These special measures are temporary in nature, as they are allocated from the annual Malaysian National Budget and will change accordingly, depending upon whether the objectives of equality of treatment have been achieved.

Additionally, the amount approved for the Special Assistance Scheme For Women Entrepreneurs under the Small and Medium Industry Development Corporation (SMIDEC) also increased from RM11.5 million to RM18 million between 1999 and 2002 (U. N. Doc. CEDAW/C/MYS/1-2, 2004: Part 1, Article 4, para 86 (ii)). In 2005, loans and grants amounting to RM8.5 million in total were approved to women entrepreneurs under this Scheme (Malaysia International Trade and Industry Report 2005: 147). Thus, even though it might not be the best way forward, the transformation of women from the margins to the centre in social and economic activities could accelerate the empowerment of women in all spheres of public life and could modify the social and cultural patterns of conduct of women and men which are based on the idea of the superiority or inferiority of either of the sexes.

5.2.1.2 Female Domination of Higher Education

In terms of education, Article 10 of the Women's Convention which affirms women's equal rights in education is consistent with Article 12 of the Malaysian Federal Constitution explained earlier in Chapter Four. In Malaysia, I trace that women are guaranteed similar conditions to men in the administration of any educational institution, admission, fees, curricula, examinations and opportunities to participate actively in sports and gain access to specific learning information. Scholarships are also being provided for those who have the

capacity to pursue tertiary education. In polytechnics as such, females received scholarships to take Diplomas and First Degrees in Education (Ministry of Higher Education).

Article 12 mandates the revision of textbooks, school programmes and teaching methods with a view to eliminating stereotyped concepts in the field of education. As textbooks could be a hidden obstacle to achieving gender equality (Blumberg, 2007), efforts have been made by the Government to address gender-stereotyped images in school textbooks. The Government's report to the CEDAW stated that the Ministry for Women and Family Development has requested the Ministry of Education to eliminate stereotypical images and representations of women in textbooks (U. N. Doc. CEDAW/C/MYS/1-2, 2004: Part 1, Article 5, para 95). The deadline in the National Plan of Action (NPA) for revision of textbooks and curriculum to remove gender biases and promote positive images of girls and women was set for 2000 for secondary education (National Plan for Action, 1998: Strategic Objective B.4, Action 2) and 2003 for primary education (National Plan for Action, 1998: Strategic Objective L.3, Action 2). The Malaysian Government's provision of gender-related guidelines to textbook producers has contributed to good practice in combating stereotypes and improving the quality of education (UNESCO Global Gender and Education Digest, 2010).

Under the Malaysian education system, female and male students in schools are taught using the same common curriculum and sit the same national examinations conducted by a central body, the Examinations Syndicate of the Ministry of Education (Ministry of Education). Within the National Curriculum System, students in secondary schools are allowed to choose certain technical or commercial subjects and courses based on their interests and potential, not their sex; this indeed, ensures there is no distinction or exclusion

of women, which is against the principle of equality adopted by Article 1 of the Women's Convention pertaining to this right. There are currently 20 public universities under the Ministry of Higher Education. Selection of students is based solely upon academic results and I note that there is no discrimination against females pertaining to enrolment in universities.

Earlier, the CEDAW commended Malaysia for its achievements in women's education (U. N. Doc. CEDAW/C/MYS/CO/2, 2006: para 5). I note that in Malaysia, women have recently made considerable progress in education, which has brought about changes in the widely accepted stereotypical roles of women and men in education. This can be seen from the enrolment of students in 2009; 48.5 per cent of students enrolled in primary schools were females, in secondary schools 49.9 per cent, in post-secondary schools 65.1 per cent, in colleges 49.7 per cent, and in public universities 60.1 per cent (Ministry of Higher Education). In 2010, females predominated in public universities, accounting for 58.6 per cent, whereas male students accounted for only 41.4 per cent. Female literacy also increased by 36 per cent between 1980 and 2004, and in 2008 the literacy rate for women aged between 15 and 24 was 98.5 per cent; this was higher than the literacy rate for men of the same age group, which was 98.3 per cent (Central Intelligence Agency (CIA) World Factbook, 2011).

This success is, among other things, an effect of the Millennium Development Goals (MDGs) which aimed to eliminate gender disparity in primary and secondary education by 2005 and all levels of education by 2015. Its key indicators for monitoring the progress of women are the ratio of boys to girls in primary, secondary and tertiary education, the ratio of literate women to men in the 15-to-24 age group, the share of women in paid

employment in the non-agricultural sector and, lastly, the proportion of seats held by women in the national parliament (Ministry of Women, Family and Community Development, 2005). These special measures provided for women are intended to ensure that women are given equal and fair access to the public spheres.

5.2.1.3 Main Beneficiaries in Healthcare

According to Article 12 of the Women's Convention, it is an obligation of the State Parties to take all appropriate measures to eliminate discrimination against women in the field of health-care and to ensure that women have appropriate services in connection with pregnancy. In Malaysia, the development of the health sector was a key area of concern in national development initiatives during the two decades following independence (1957-1977) (U. N. Doc. CEDAW/C/MYS/1-2, 2004: Part 1, Article 12, para 231). I note that access to healthcare is given equally to women and men in Malaysia, although women are given more attention and services because of their needs associated with maternity. This is what has been affirmed by Leng and Lin (2007: 137), that *'women have specific health care needs even when they are not ill'.* These specific needs include fertility control, pregnancy and childbirth.

In Malaysia, Leng and Lin (2007: 137) have explained that women are accorded access to healthcare and appropriate services in connection with pregnancy, confinement and the post-natal period. This different treatment might be intended to ensure equal outcomes and to eliminate substantive inequality of the disadvantaged. Facilities are well distributed throughout the various geographical localities of the country (Leng and Lin, 2007: 143-144). From the same study, it was found that from the urban-centred and curative-based services of the pre-Independence era, the health system has evolved into a network of rural

and urban free services and has developed to provide preventive and curative health services. According to Pathmanathan and Dhairiam (n. d: 152), by 1978 there was a relatively well-developed public sector health service in Malaysia.

I have found that, in the Second National Health and Morbidity Survey (NHMS2) conducted by the Ministry of Health in 1996, there was evidence that overall access to health services was good and that there was no gender inequality. The combined life expectancy for female and male Malaysians in 2007 was among the highest in the medium human development countries (Ministry of Women, Family and Community Development, 2007: 9). In 2011, the female life expectancy was 76.73 years, whereas for males it was 71.05 years (Central Intelligence Agency World Factbook, 2011). The focus was also on rectifying imbalances in the distribution of services and to identify and reach out to disadvantaged groups. Today, Malaysia provides a relatively well-developed public health service, consisting of a rural network of midwifery clinics and health clinics (Shepard, Savedoff and Hong, 2002: 4), including '*1Malaysia Clinics*,' which could be considered as one of the success stories in the history of women's rights in Malaysia. '*1Malaysia Clinics'* are community clinics, which are part of the Government's effort to apply the highest medical care methods and standards for all Malaysians. In the 2010 Budget, the Malaysian Prime Minister announced the RM10 million establishment of new *'1Malaysia Clinics'* across the nation; they are strategically located and open daily for 12 hours. Qualified nurses and medical assistants with at least five years' experience provide quality treatment for just RM1 (Official Portal of 1Malaysia).

Furthermore, to provide special measures to women generally, the healthcare system in Malaysia is also concerned about conditions which threaten women's health, a concern

which runs parallel with the principle of equality under the Women's Convention. These include conditions that affect women exclusively, such as '*female*' cancers or diseases, or conditions which, although not exclusive to women, have biological or socio-economic implications which are specific or particularly relevant to women, such as Human **Immunodeficiency Virus (HIV) or Acquired Immune Deficiency Syndrome** (AIDS) (Ministry of Health). According to Dahlui, Ramli and Bulgiba (2011: 1633), a subsidy for mammogram screening was introduced in 2007 to promote early detection of breast cancer by the Ministry Of Women, Family and Community Development. The Ministry provides a RM50 subsidy for every mammogram done in private clinics and hospitals registered with the National Population and Family Development Board Malaysia (NPFDB). The HIV or AIDS diseases have been seen as increasingly affecting women. This is evidenced by the increasing numbers of women infected with HIV or AIDS in Malaysia, from 1.2 per cent of new cases in 1990 to 16.4 per cent in 2007. The number of AIDS deaths among women also increased from zero in 1986 to 114 cases in 2008. The Ministry of Women, Family and Community Development actively advocates the importance of incorporating gender perspectives in HIV or AIDS policy formulation and programme implementation (PT Foundation). Therefore, special focus has been placed on reducing HIV vulnerability among women, such as the establishment of a special task force of the National Advisory Council on Women to address the feminization of HIV[137]. Moreover, under the National Strategic Plan on HIV or AIDS (2006-2010), women found to be HIV-positive are provided with post-test counselling and free anti-retroviral treatment (Malaysia National Strategic Plan on HIV/AIDS 2006-2010, 2006: 12-13). Thus, the healthcare system in Malaysia recognises the importance of addressing the needs of

[137] The 65th Session General Assembly on Agenda Item 28 (b) reaffirmed the Declaration of Commitment on HIV/AIDS, and the Political Declaration on HIV/AIDS adopted at the High-level Meeting on HIV/AIDS, held on 2 June 2006, acknowledged the feminization of the pandemic. See A/RES/65/192, 65th Session General Assembly Resolution, Agenda Item 28 (b), 3 March 2011

women as patients more than those of men due to their needs associated with maternity and conditions that affect women exclusively.

5.2.2 Marriage and Family Relations

In marriage and family relations, the CEDAW expressed concern that there are still countries where women are prevented from enjoying equality of status in the family (General Recommendation No. 21, 13th Session, 1994: Comment para 12). The CEDAW identified forced marriage as constitutive of this unequal enjoyment; thus, according to CEDAW, women's rights to choose must be protected and enforced by law (General Recommendation No. 21, 13th Session, 1994: Comment para 16). According to Article 16 (1) (b), the Women's Convention secures women and men '*the same right freely to choose a spouse and to enter into marriage only with their free and full consent'.*

In this Section, I argue that Malaysia has moved towards eliminating gender inequality by prohibiting forced marriage and securing women's rights to choose a spouse. Betrothal and marriage of a child have no legal effect in Malaysia, as Section 8 of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) (IFLA) states that marriage may not be solemnised where the man is under the age of 18 and woman under the age of 16. According to Noor (2007: 137), the practice of forced marriages had been prevalent in Malay society, and the existing customs, prior to the legislation of Section 13 of the IFLA that both parties must consent to their marriage, considered marriage of a daughter as *'generated income family businesses*[138]*'* which enhanced the practice of forced marriage. Therefore, the prohibition of forced betrothal and marriage is indeed important to protect

[138] One of the marriage conditions in Islam is for the groom to pay a dowry to the bride and the dowry payment should be the property of the bride. However, the previous practice among Malay families was to take the dowry and treat it as the father's or family's property. Therefore, to generate the family's income, a father would ask the groom to pay a large dowry, which contradicts the principles of marriage in Islam

girls, and the provision of specification of a minimum age for marriage as regulated under Section 8 of the IFLA might have been intended to reconcile the principle of women's rights protection under Article 16 (2) of the Women's Convention.

In Islam, women, like men, have rights to choose a husband and enter into a marriage contract (Yusuf, 2005: 6). Muslim women in Malaysia are guaranteed by law the freedom to choose a spouse and enter into marriage with full consent; however, this right comes with a unique requirement. Under Section 13 of the IFLA, marriage shall not be solemnised[139] unless either *wali*[140] by *nasab* or (in the absence of *wali* by *nasab*) *wali raja* has consented. *Wali* or guardian is someone who possesses or has been granted the authority to perform a marriage contract (Awang Teh, n.d). A question might arise as to whether the presence of *wali* in the marriage contract is intended to restrict the *'bride's'* consent to her own marriage or to protect the bride from being discriminated against.

In Malaysia, *wali* by *nasab* refers to *wali akrab* and *wali ab'ad. Wali akrab* is the father or paternal grandfather and above on the father's side whereas *wali ab'ad* are the siblings (brothers) of the bride, the bride's father's siblings (brothers), the bride's brother's son, the bride's uncle and the bride's cousin on the father's side (Mohd Awal, 2006: 32). I note that *Wali raja* is a *Shariah* Court Judge who has jurisdiction in the place where the bride resides or can be any person generally or specially authorized on that behalf by the *Shariah* Court Judge (Section 13 (b) of the IFLA). Awang Teh (n.d) has explained that *wali akrab* must be given priority over *wali ab'ad,* and in cases where a woman who wants to enter into a contract of marriage appoints *wali ab'ad* as her *wali* even though her *wali akrab* is

[139] Marriage shall be solemnised only in the presence of the Registrar or with the permission of the Registrar (Section 7 of the IFLA)

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

still alive and able to perform his duty as *wali*, the marriage contract is void[141]. The consent of *wali raja* may be given wherever there is no *wali* by *nasab,* in accordance with *Shariah,* available to act (Section 7 (2)) or if the *wali* by *nasab* cannot be found or where the *wali* by *nasab* withholds his consent without sufficient reason (Section 13 (b)).

I trace that, even though women might choose a spouse and enter into marriage by themselves, women's rights are strengthened by the fact that their *wali* is allowed to interfere in the marriage contract only when there is a possibility of women being treated unjustly by the contract. This is because, as I argued earlier, Muslim women have been historically disadvantaged (Yaacob, 1986: 89-91) and they need special measures to guarantee their equal outcomes with men in terms of choosing a spouse. As Islam has commanded that a woman must marry someone who is her equal in terms of status or *kufu'*[142], the function of *wali* is important in ensuring that the prospective husband of his daughter is of equal status to his daughter (Noor, 2007: 142). In general, Soleh (n.d), in his article on *'Perkahwinan dan Perceraian di Bawah Tangan di Tinjau Dari Hukum Islam'* (marriage and divorce in Islam), has explained that, according to the *Hanafi* school of thought, marriage could be solemnised without *wali.* The consent of *wali* is required only, as I argued earlier, when there is a possibility that women might be treated unjustly by the marriage contract. In the *Hanafi* school of thought, according to Soleh, *wali* is required for child marriage when females who are entering into marriage have not yet reached *baligh*[143] or are of unsound mind, or if the marriage is between a woman and a man who are not *kufu'* or equal in status. Therefore I trace that, according to the *Hanafi* school of law,

[141] See *Ismail bin Abdul Majid v Aris Fadilah and Insun binti Abdul Majid* (1990) Jil. V, II. JH

[142] *Kufu*' means having the same social standing. The rationale for *kufu'* is to ensure compatibility and suitability between the parties and consequently to avoid problems in the intended marriage. It involves matters such as morality, education, religion, race and standing in society

[143] According to Section 2 of the IFLA, *baligh* means the age of puberty according to *Shariah*

women who have reached puberty and are of sound mind can marry without the presence of *wali.*

On the other hand, Soleh (n.d: 8) clarified, the majority of schools of law have agreed that the presence and consent of *wali* is one of the marriage requirements that must be taken into account in order for the solemnization of the marriage and for it to be valid. Considering that Malaysia applies the *Shafie* school of thought, which is one of those that consider *wali* to be a requirement, I submit that, according to the IFLA, marriage cannot be solemnised without *wali* (Article 7). The view that women may solemnize their marriage without *wali* is not accepted, according to local tradition of Malaysian society (Zainul Abidin, 2007).

However, the existing Malaysian laws do not give absolute power to a *wali* in solemnizing a marriage and, as researched by Zainul Abidin (2007) and Abd. Rahim, Ismail and Mohd Dahlal (2008), even a forced marriage or an arranged marriage is not part of the practice of Muslim society in Malaysia today. Using force or threat to compel a woman to marry against her will or to prevent her from contracting a valid marriage once she has attained the age of 16 is an offence punishable with a fine of up to RM1, 000 or imprisonment for up to six months or both (Section 37). This means that, if a woman does not give consent to her marriage, her *wali* has no right to solemnise the marriage as marriage can only be solemnised by *wali* if both parties consent to the marriage contract. Hence, because a marriage contract could still proceed without the consent of *wali* by *nasab* (father or grandfather and above on the father's side), if the *wali* refuses to give consent without sufficient reason, it is clear that, according to Malaysian laws, women have rights to enter into marriage with their full consent. I trace that *wali's* role in Malaysian Muslim marriage

contract according to the IFLA is not to restrict the bride's autonomous rights to choose a spouse or enter into marriage, but to protect a bride from possible discrimination in the marriage contract. This does not defeat the woman's rights to marry freely because, if *wali* by *nasab* refuses to give consent without sufficient reason, the woman may still proceed with the marriage using *wali raja*.

Indeed, the concept of *wali,* which has always been understood as a means of precluding women from entering into marriage, seems to be very paternalistic as a man could marry anyone without consent of *wali*; the implication is that women have no capacity to contract themselves into marriage. However, as argued earlier, it is important to understand that the notion of *wali* in Islam is as a protective instrument to ensure women's equal rights to enjoyment of marriage and family life (Etty Murtiningdyah, 2005: 55-56), not to to restrict the *'bride's'* consent to her own marriage. Certainly, I argue that the requirement for a *wali,* whether in the category of *wali* by *nasab* or *wali raja,* is very important if a woman is not to be unfairly treated in her choice of a husband. This protective instrument is to ensure justice for women as a historically and currently disadvantaged group, which is consistent with the principle of equality in Islam and which is addressed by the Women's Convention. Thus, this shows that, under the Malaysian laws, Muslim women not only have the right to choose but have also secured special measures in exercising their rights, and this may change the stereotyped pattern of marriage and family relations of Muslims. This special measure, which is the interference of wali when there is a possibility that woman might be treated unjustly by the marriage contract, clearly indicates that the law is not biased in favour of men to the disadvantage of women but protects women as a disadvantaged group.

In terms of rights and responsibilities as parents, the CEDAW expressed concern that some countries do not observe the principle of granting the parents equal status (General Recommendation No. 21, 13th Session, 1994: Comment para 19). Article 16 (1) (d) provides that wives and husbands are entitled to '*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'.* Here, I argue that Muslim wives and husbands in Malaysia have equal rights and responsibilities as parents, which could eliminate the gender stereotype that only husbands can provide maintenance or only wives can bear and raise children; however, as stated in Article 16 (1) (d) that the interests of the children shall be the paramount consideration, their rights as parents are divided accordingly to accommodate their different strengths.

Section 72 of the IFLA imposes a duty on a father to maintain children whether they are in his custody or not, and Section 81 of the IFLA states that the mother shall be, of all persons, the most entitled to the custody of her infant children during the connubial relationship as well as after its dissolution. The maintenance by the father includes provision of accommodation, clothing, food, medical attention and education (Section 72 (1)). In theory, Islam confirms that a husband is responsible for providing for the family (Raja Mamat, 1992: 60), and this responsibility is not only for the material needs as mentioned above, but also for the good teaching and guidance of wife and children (Abd. Majid and Azahari, 1989). However, in practice, Islam and Malaysian laws do not prohibit women from maintaining the family, or men from raising the children, and it is up to the parents to decide who will have duties to maintain or raise children, provided that, as stated in Section 81 (2), it does not affect the welfare of the children. Therefore, a mother could be the provider for the family and a father could raise the children, as long as priority is

given to the welfare of the children. I trace that this practice is not prohibited either by Islam or in the Malaysian context, by IFLA. The equal rights of women under the Income Tax Act 1967 (Revised 1971) (Act 53) (ITA) to elect for separate assessment of their income for tax purposes (Section 45 (2)) and the provision under the Employees' Social Security Act 1969 (Act 4) that widowers are entitled to a pension if an insured person who was in receipt of an invalidity pension has died (Section 20A (1) (a)) as discussed earlier, might indicate that women's role as breadwinners is recognised by laws in Malaysia.

The CEDAW has stressed in the General Recommendation No. 21 that the domestic responsibilities that women have to bear affect their rights to public life such as education and employment; thus, women are to be entitled to decide on the number and spacing of their children (General Recommendation No. 21, 13th Session, 1994: Comment para 21). Article 16 (1) (e) provides that wives and husbands have *'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'.* Both wife and husband in Malaysia have the same rights to decide on the number and spacing of their children as there are no laws in Malaysia restricting the wife's rights to this. Thus, women's and men's equal freedom and right to decide on the number and spacing of their children indicates that there is no superiority of men in marriage and family relations in this aspect, which might eliminate the gender stereotype that women, as wives, have no right to choose.

Article 16 (1) (h) further provides that wives and husbands have *'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'.*

Similar rights are further guaranteed in Islam for both spouses in respect of the rights to property (Yusuf, 2005: 7). For Muslims, Abdullah, Martinez and Mohd Radzi (2010: 162) wrote, '*what the wife earns is never the right of the husband, it is hers to dispose of as she herself deems appropriate'*. Buang (2001: 27) has stressed that restrictions on the wife's rights to personal control over her property were the practice of ancient Western society,[144] and not the Islamic tradition. According to Malaysian laws, both Muslim wife and husband have rights to ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration, as discussed in Chapter Four on Malaysian fundamental liberties. According to Article 13 of the Malaysian Federal Constitution;

''1) No person shall be deprived of property save in accordance with law

2) No law shall provide for the compulsory acquisition or use of property without adequate compensation'.

Thus, the gender strereotype that a wife does not have the right to own and control her property is not a practice in Malaysia according to the Federal Constitution, which might indicate that the social and cultural pattern of conduct of women and men based on the idea of the superiority and inferiority of either of the sexes in this aspect has been eliminated by the legal provision.

5.3 30.5 PER CENT OF TOP PUBLIC SECTOR MANAGEMENT POSITIONS

[144] Buang demonstrated that Napoleonic law in France stated that a wife did not have rights to property because she was under the *'marriage power'*, and her property transaction was void, except with the husband's consent. This restriction was only abolished in 1882 in England by the introduction of the Married Women's Property Act 1882, and in France a wife was conferred full rights over her property in 1938. See Buang, Ahmad Hidayat. 2001. 'Keupayaan Wanita untuk Berkontrak di Dalam Undang-Undang Islam' in Raihanah Abdullah (ed.) *Wanita dan Perundangan Islam*. Ilmiah Publishers Sdn. Bhd.

The CEDAW expressed concern in its concluding comment made against Malaysia about the low level of representation of women in public and political life and in decision-making positions, including in the foreign office (CEDAW/C/MYS/CO/2, 2006: para 17 and 18). Globally, the legal status of women is receiving the broadest attention, as concern over the basic rights of political participation has not diminished since the adoption of the Convention on the Political Rights of Women in 1952. Its provisions, therefore, are restated in Article 7 of the Women's Convention, whereby women are guaranteed the rights to vote and be eligible for election to all publicly elected bodies, to participate in the formulation of government policy and hold public office, to exercise public functions and to participate in non-governmental organizations. I trace that, in Malaysia, there are no laws that discriminate against a person on the basis of gender with respect to participating in the electoral process and holding elected offices. Active women voters, who accounted for about 54 per cent of registered voters and 59 per cent of voter turnout in the 1998 general elections (Mansor and Ghazali, 1998), have demonstrated women's active participation in the electoral process. Therefore, women in Malaysia are not prohibited from participating in elections at any level of office and are free to participate in political movements.

The Malaysian Parliament is modelled on the Westminster[145] system with a Lower House of elected representatives (*Dewan Rakyat*) and an Upper House of appointed senators (*Dewan Negara*). I have found that, since Independence in 1957 and the first election to the then Federal Legislative Assembly in 1959, the number of female candidates elected to

[145] Westminster model can be said to mean a constitutional system in which the effective head of government is a Prime Minister presiding over a Cabinet composed of Ministers, in which the effective executive branch of government is parliamentary inasmuch as Ministers must be members of the legislature and in which Ministers are collectively and individually responsible to a freely elected and representative legislature. See De Smith, SA. 1961-1963. 'Westminster's Export Models: The Legal Framework of Responsible Government' in *1 Journal of Commonwealth and Political Studies.* pp. 2-16

Parliament has increased at a moderate rate. For example, in the 1959 election, only 2.9 per cent (three out of 104) of the candidates elected to office in the Lower House were female. This increased to 4.1 per cent in 1986, 7.3 per cent in 1995, and 9.6 per cent in 2008 when 17 out of the 68 senate seats went to females (Malaysia Human Rights Report, 2008). The Report disclosed that the number of women elected to the various State Assemblies during this period also increased gradually, rising from only 2.7 per cent in 1986 to 4.8 per cent and 5.5 per cent in 1995 and 2000 respectively. This might be due to the active participation of women in the public spheres which influence their awareness to become involved in political life.

I note that the 12th General Elections in 2008 resulted in an increased number of women as elected representatives, both within the Federal Parliament as well as in the respective State Legislative Assemblies. In positions of decision-making, the number of female Members of Parliament increased from 5.3 per cent to 10.4 per cent between 1990 and 2009 (Ministry of Finance, Malaysia, 2011: 4). According to the Report on Economic Management and Prospect 2011 issued by the Ministry of Finance, Malaysia, women accounted for 30.5 per cent of top public sector management positions in 2010, an increase from 6.9 per cent in 1995. Opportunities for qualified women to hold top positions in the civil service continued to be made available by the Government, and today 31.5 per cent of the key positions in the public sector are held by women (Economic Management and Prospect, 2011: 4). Even though women are given similar rights and equal opportunities to men to stand as candidates for election, their number is still disappointing. Thus, I note that giving similar rights for women and men to be involved in political life is not adequate as women need special measures to stand as candidates for election. The *'dual burden'*, juggling domestic responsibilities with careers, has been one of the obstacles that hinder

women's active involvement in politics (Wan Ismail, 2002: 3-4). However, Wan Ismail has stressed that *'a more relaxed attitude is discernible among the younger generation and men now appear to be more willing to see women as partners in both the domestic and professional spheres',* which might balance the numbers in the future.

In non-governmental organizations and associations concerned with public and political life, I argue that women are also participating actively (Zakaria, 2008: 379-382). However, until recently, there have been no comprehensive data analysing the position of women in non-governmental organisations concerned with the public and political life of the country. Yet, according to the Women's Centre for Change (WCC) in 2008, there were no less than 45 active women's NGOs engaged in a range of activities from giving free counselling and legal advice to advocating the realisation of human rights of women through the lens of the Women's Convention (Women's Centre for Change (WCC)). This is indeed helpful in order for society at large to understand the notion of women's rights as underpinned by the Women's Convention.

I have also found that recruitment of personnel to represent the Government at the international level and to participate in the work of international organizations is primarily based on the qualifications of the applicants, not their gender. With suitable credentials, women and men can be assigned as Foreign Service Officers after taking a mandatory pre-service course (Ministry of Foreign Affairs). I trace that the number of women officers in the Malaysian Foreign Service has increased significantly over the years. In 2002, 20.7 per cent of officers were female (69 out of 333) as compared to 18.8 per cent (64 out of 340) in 2001. Five per cent of the 69 female officers in 2002 were in top postings i.e. Ambassador/ High Commissioner/Head of Mission. Women now comprise a third of the officers in the

Ministry of Foreign Affairs and occupy 15 per cent of the top posts in over 100 Malaysian missions and consulates worldwide[146].

The above data show that women in Malaysia are equal with men in accessing the opportunity to represent Government at the international level and to participate in the work of international organizations. However, I suggest that women must be accorded more appropriate measures to ensure that their numbers as elected representatives and in the Ministry of Foreign Affairs increase and reach a balance with male officers. To be assigned as Foreign Service Officers, they may need flexible training hours and more women-friendly coaching methods during service.

5.4 *'MALAYSIAN WORKING WOMEN ARE MORE CONFIDENT AND SELF-ASSURED'*

In the concluding comments made against Malaysia, CEDAW expressed concern that, despite the high level of education attained by girls and women, there is still a lack of employment opportunities for women in Malaysia (CEDAW/C/MYS/CO/2, 2006: para 19). Article 11 of the Women's Convention affirms women's rights in the field of employment in order to ensure the same rights to work, the same employment opportunities, right to free choice of profession, promotion, job security and all benefits, and the right to receive vocational training. Unlike in other Muslim countries where women do not have the right to choose a profession, I trace that the rights of Muslim women in Malaysia are secured and they are entitled to the right to equal remuneration, social security, and protection of health and safety in working conditions. In Malaysia,

[146] See detail in 'Malaysian Women Taking On More Prominent Roles In Foreign Service' in *Sarawak News*, Bernama, October, 12, 2009. Online: http://www.mysarawak.org/2009/10/12/malaysian-women-taking-on-more-prominent-roles-in-foreign-service.html. Retrieved on 23/07/2010

women's equal rights in employment are guaranteed under Article 8 (2) of the Federal Constitution, as discussed earlier in Chapter Four. Article 8 (2) provides that '*Except as expressly authorized 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 relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.* In order to prevent discrimination against career women on the grounds of marriage or maternity, dismissal on the grounds of marital status, pregnancy or maternity leave is prohibited.

However, I have found that, even though there are equal rights and opportunities for employment assured by laws and Malaysian women have contributed to the development of the country, the labour force participation rate among women has remained rather low. Female employers are still scarce and the majority of working women are employees. This may be because, as I mentioned earlier regarding the involvement of women in political and public life, domestic responsibilities have been one of the obstacles to women actively participating in public spheres. In 2004 only 36.97 per cent of employees were women while more than 69 per cent of unpaid family workers were women (Malaysian Department of Statistic). This trend continued through 2006, 2007, 2008 and 2009, when labour force participation of males was higher than females in every age group. In 2006, only 45.8 per cent of females were employed compared to 79.9 per cent of males. In 2007, the figure increased slightly, with 46. 4 per cent of females in work compared to 79.5 per cent of males (Analysis of Labour Force in Malaysia, 2006-2007). In 2008, only 44.6 per cent of females participated in the labour force compared to males at 79.9 per cent, while in 2009 only 46.4 per cent of females participated in the labour force compared to males at

78.9 per cent. As of 2010, the total number of women in employment was only 46.1 per cent compared to 78.7 per cent of men (Malaysian Department of Statistics).

Despite the low numbers, however, I note that the data show that labour market participation among women is gradually increasing year by year. To ensure women's empowerment in this public sphere, the Malaysian Government has taken various measures to improve women's participation in the labour market, which includes the provision of special measures to women in economic and social mainstream activities, as discussed earlier, to ensure equal outcomes with men pertaining to women's rights in labour force participation. This includes parental access to childcare facilities (Chiam, 2008: 34), a subsidy for childcare costs (Chiam, 2008: 36-37), and the promotion of part-time or flexible working (Subramaniam, 2011: 82-83). As stated by Ariff and Abu Bakar (n.d: 8), employers were also encouraged to provide facilities such as proper housing schemes or benefits, transportation and healthcare benefits for all workers, especially rural migrants, the majority of whom are women. As stated in the Malaysian Country Profile at the Johannesburg Summit 2002, improvements were also recorded in the occupational structure, with more women moving into higher-paying occupations during the Seventh Malaysia Plan (1996-2000) (United Nations: Malaysian Country Profile of World Summit on Sustainable Development-Johannesburg Summit, 2002: 37).

In fact, in Malaysia, I trace that women play significant roles in the socio-economic arena. Georgette Tan, Vice President of Communications, Asia/Pacific, Middle East & Africa, Master Card Worldwide[147], stated:

'Malaysia continues to be a key market in encouraging the evolution of women as consumers and as influencers changing the socio-economic dynamics across Asia/Pacific

[147] Which released Fourth Annual MasterCard Worldwide Index of Women's Advancement 2008

and seems to be closing the gap with men in the socio-economic arena. These are subjective indicators which gauge how positive the respondents feel about their place in the workforce. The scores indicate that Malaysian working women are more confident and self-assured and as they become more educated and qualified, evolving in tandem, the workplace has become more inclusive with greater opportunities for women to attain roles in management and leadership[148]*.'*

The Employment Act 1955 provides a comprehensive legal framework governing matters such as payment of wages (Section 18-23), rest days (Section 59-60), hours of work (Section 60A), holidays (Section 60D), termination (Section 60J) and all other matters pertaining to employment which apply equally to women and men. Additionally, some of the provisions in the Act apply exclusively to women, according them special treatment to guarantee equal outcomes to those of men. These relate to the employment of women at night (Section 34), underground work (Section 35) and the provision of maternity leave and other maternity benefits (Part IX). Protection of women employees under the Act means that they are not allowed to work in any industrial or agricultural undertaking between the hours of ten in the evening and five in the morning or to commence work for the day without having had a period of eleven consecutive hours free from such work (Section 34 (1) of the Employment Act 1955). Section 35 of the same Act also prohibits women from carrying out underground work. This is indeed substantively equal to men's conditions, because female workers are given other opportunities to work between the same hours, although not in industrial or agricultural settings.

I have found that the Ministry of Human Resources ensures that provisions for the health and safety of pregnant women and women employees generally are complied with. Recommendations were also made to amend the Employment Act 1955 to increase maternity leave from 60 days to 90 days in the public and private sectors and to ratify ILO

[148] See Online: http://www.adoimagazine.com/newhome/index.php?view=article&catid=1%3Abreaki ng-news&id=2915%3Amalaysian-women-third-advanced-inasiapacific&option=com_content&Itemid =2.Retrieved on 08/08/2010

Convention No. 183. Recently, the Prime Minister of Malaysia has declared, in the 2011 Budget Speech, that female civil servants will be entitled to fully-paid maternity leave not exceeding 90 days, an increase from the previous 60 days, subject to a maximum of 300 days of maternity leave throughout the tenure of service (Budget Speech, 2011). The leave can be taken at any time during the 30 days immediately preceding her confinement or no later than the day immediately following her confinement. The employers must be informed of the expected confinement date and of the expected date of commencement of leave within 60 days preceding the expected confinement date, either orally or in writing (Official Portal of the Public Service Department of Malaysia). Also, the Government was recommended to amend the Employment Act 1955 to include the provision of paternity leave to be extended to 15 days for male workers in both the public and private sectors so that they can care for their wives and new-born babies.

In terms of childcare facilities, a proposal was made to the Government to provide community-based childcare facilities or set up childcare centres at the workplace (Roketkini.com, 27 November 2012). Moreover, considering that career women might face the difficult situation of having to perform and cope with multiple roles as a mother and worker if their husbands are also working, the Malaysian Prime Minister has proposed that local employers employ part-time female workers who could work during lunch breaks or after office hours (*Utusan Malaysia*, 26 August 2010). To assist career mothers, the Government provides a subsidy of RM180 per child to civil servants whose monthly household income is less than RM3000.

I note that the most contentious issue between the Government and the women's movements in terms of women's labour rights is sexual harassment. Incidences of sexual

harassment at the workplace are covered by both the civil and criminal laws. The Government, through the Ministry of Human Resources, has introduced a *Code of Practice on the Prevention and Handling of Sexual Harassment in the Workplace* (Kamaruddin, 2006: 22). The Code provides working definitions of sexual harassment and guidelines for employers on how to deal with it. For instance, employers are encouraged to set up grievance procedures in line with the principles set out in the Code. However, as this Code of Practice is not a legally binding instrument, employers are not obliged to adopt it. This may be a reason why many employers have failed to adopt it[149]. As no legislation exists to deal with sexual harassment, victims of sexual harassment have to resort to the Penal Code[150], sue in tort for assault and battery or claim for unfair dismissal should their employment be terminated[151].

In a study carried out by the All Women's Action Society and the Women's Development Collective on the impact of the Code, it was found that, while the Code sets out exemplary procedures and encourages the establishment of comprehensive in-house mechanisms to prevent and eradicate sexual harassment, these mechanisms do not exist everywhere (Ng, Mohd Noor and Abdullah, 2003). Even where there are mechanisms in place, if different procedures and features still exist, this reflects a lack of uniformity in the implementation of the Code. Another important factor forwarded by Ng, Mohd Noor and Abdullah (2003) is the lack of counselling facilities available to both the complainant and the perpetrator; furthermore, the measures to protect the complainant against retaliation are also found to

[149] As of March 2001, only about 1 per cent of employers nationwide have implemented the Code. See News Straits Times, 21st March 2001

[150] Section 509 of the Penal Code reads: '*Whoever, intending to insult the modesty of any women, utters any words, makes any sound or gesture or exhibits any object, intending that such word or sound shall be heard, or such gesture or object shall be seen by such woman, shall be punished with imprisonment for a term which may extend to five years or with a fine, or with both'*

[151] It is a most unsatisfactory manner of dealing with the problem as it is difficult to prove beyond a reasonable doubt. Sexual harassment is also often repetitive, which could make the charges lengthy as each act of harassment constitutes a separate charge. There is also no room to provide preventive measures and employers cannot be held liable

be inadequate. Sanctions against the harasser are not set out, and the employer cannot be held responsible for failing to provide a working environment safe from sexual harassment because the adoption and implementation of the Code is entirely voluntary. As proposed by Abdul Aziz and Ng (2001: 12), a comprehensive action plan is just as important as legislation in eradicating sexual harassment in the work place, in which education, training and outreach programmes are essential. Hence, the Ministry of Women and Family Development, in consultation with the Ministry of Human Resources, NGOs, the Malaysian Employers Federation (MEF) and the Federal Malaysian Manufacturers (FMM), is currently studying a proposal to formulate specific sexual harassment legislation (Berita Harian, 23 Februari 2012).

5.5 ADEQUATE SANCTIONS FOR ACTS OF VIOLENCE AGAINST WOMEN

I trace that, in response to the CEDAW's recommendation to include adequate sanctions for acts of discrimination against women (U. N. Doc. CEDAW/C/MYS/CO/2, 2006: para 8), the Malaysian Penal Code was amended to increase the penalties for rape. Under the Malaysian Penal Code, rape is defined as a man having sexual intercourse with a woman against her will or with her consent obtained under duress, misconception or under circumstances where she gives consent without understanding the consequences of it or is under 16 years of age (Section 375). The punishment for those who commit rape is imprisonment for a term of not less than five years and not more than 20 years; they shall also be liable to whipping (Section 376).

Moreover, as young women have been continuously suffering from the crime of incest, there was an urgent need for an amendment of the laws governing incest. It has been

reported that there were 334 cases of incest in Malaysia in the year 2008; this figure increased in 2009 with 385 cases being reported. The majority of the victims were under 16 years of age and were mostly raped by their fathers (Perangkaan Wanita, Keluarga dan Kebajikan Masyarakat). According to the Penal Code, rape and incest are different, as rape is sexual intercourse with a woman against her will or without her consent (Section 375 (a) and (b)), while incest is sexual intercourse with a person without her consent whose relationship to the perpetrator is such that she is not permitted to marry that other person under the law, religion or custom (Section 376A). It has been reported that there were 334 cases of incest in Malaysia in the year 2008; this figure increased in 2009 with 385 cases being reported. The majority of the victims were under 16 years of age and were mostly raped by their fathers (Perangkaan Wanita, Keluarga dan Kebajikan Masyarakat). Section 376B (1) provides, for the punishment of incest, imprisonment for a term not less than six years and not more than 20 years; the perpetrator shall also be liable to whipping.

I trace that the Government's commitment to eliminate discrimination against women in Malaysia has been achieved not only by amending *'gender-biased laws'* but also by legislating new laws to protect women. In 1994, the Domestic Violence Act (Act 521) (DVA) was legislated to provide protection for battered wives and other victims of domestic violence (Official Portals of the Attorney General's Chambers of Malaysia). According to Section 2 of the DVA, domestic violence refers to the commission of any of the following acts: *'(a) wilfully or knowingly placing or attempting to place, the victim in fear of physical injury (b) causing physical injury to the victim by such act which is known or ought to have been known would result in injury (c) compelling the victim by force or threat to engage in any conduct or act, sexual or otherwise, from which the victim has a right to abstain (d) confining or detaining the victim against her will or (e) causing*

mischief or destruction or damage to property with intent to cause or knowing that it is likely to cause distress or annoyance to the victim'.

Even though the DVA does not exist solely for the protection of women, they have gained more attention as they are more likely to be victims in the domestic sphere in Malaysia. In 2006, there were 463 cases of domestic violence involving women as victims, but only 22 cases in which men were the victims. The margins increased in 2007 with 517 female victims and only 12 cases with male victims, while in 2008 there were 513 female victims and only 12 male victims (Social Welfare Department of Malaysia). This DVA is a kind of *'substantive equality statute'* that has been introduced and enforced by the Government to provide additional protection for women as a disadvantaged group. The extension of the definition of domestic violence under Section 2 of the DVA to include psychological abuse was realised on 21 December 2011 (*Utusan Malaysia,* 22 December 2011). The amendment bill was tabled for the first reading in the *Dewan Rakyat* (House of Representatives) on 30 June 2011.

5.6 ANTI-TRAFFICKING IN PERSONS ACT 2007

The CEDAW expressed concern that Malaysia has not enacted legislation on trafficking (CEDAW/C/MYS/CO/2, 2006, para 23) in its concluding comments made against Malaysia in 2006. According to Article 6 of the Women's Convention, a State Party has to '*take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women'.* I note that, in 2006, an official from the United States Department of State alleged that Malaysia had not done enough to combat human trafficking and needed to set up legislation and procedures to address this

problem[152]; this allegation may have been made because Malaysia did not have its own legislation on anti-human trafficking. Malaysia has also been downgraded to Tier 3 from Tier 2 in the Trafficking in Persons (TIP) Report 2009 released by the United States Department of State for allegedly not doing enough to combat human trafficking[153].

Women and their status might not be empowered if laws are patriarchal or biased in favour of men, including if there is no law to protect women from all forms of trafficking. According to Busby (1993) and Chen (1997), law is patriarchal in the way it frames issues and defines problems. Thus, laws or legal systems which cannot adequately express women's experience and needs might be biased too (Kiss, 1997). In this Section, I trace that Malaysia, as a State Party, is committing itself to taking appropriate measures against all forms of trafficking in women and the exploitation of women. The Government has been using a variety of laws to prosecute traffickers, such as the Child Act 2001 (Act 611) on trafficking of children, as immediate action is needed to protect women from violence (George, 1994). Indeed, because violence against women has been legitimised by social practices historically (Amirthalingam, 2003: 4), the Government has to work hard to provide laws that can protect women from violence and exploitation.

Article 6 (1) of the Federal Constitution provides that no person shall be held in slavery while Article 6 (2) prohibits all forms of forced labour except compulsory service for national purposes prescribed by federal laws. I note that, as a protection, Section 55A of the Immigration Act 1959/1963 (Act 155) makes it an offence for any person to be involved, directly or indirectly, in conveying to Malaysia in or on any vehicle, vessel or

[152] See detail in 'Malaysia Not Doing Enough to Combat Human Trafficking, Says Ambassador.' *The Sun Daily*. 23 November 2006. Online: http://www.humantrafficking.org/updates/570. Retrieved on 22/07/2010
[153] See detail in 'Enforcement Agencies Serious in Combating Human Trafficking–Musa'. *Bernama.com*. 20 June 2009. Online: http://www.humantrafficking.org/updates/860. Retrieved on July 22/07/2010

aircraft any person in contravention of the Act. Moreover, Section 55B makes it an offence to employ one or more persons, other than a citizen or holder of an *'Entry Permit'*, who is not in possession of a valid Pass, whereas Section 56 (1) (d) makes it an offence to harbour any person whom one knows or has reasonable grounds to believe has acted in contravention of the Act. The Royal Malaysian Police have successfully invoked the Restricted Residence Act 1933 (Act 377) to prosecute traffickers in order to control activities that are a threat to public order (CEDAW/C/MYS/1-2, 2004: 30), such as smuggling or immoral activities. The rationale is to take the person out of the area where undesirable activities are being conducted or prohibit him from entering such an area so that he will not be able to carry out such activities.

The Malaysian Government presented its first Anti-Human Trafficking Bill in 2007 to provide the legislative means to fight the trafficking in human beings, particularly women and children. Once the Bill was passed, the Government could ratify the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplements the UN Convention against Transnational Organized Crime[154]. Today, '*trafficking in persons'* is specifically criminalized in Malaysia under the Anti-Trafficking in Persons Act 2007 (Act 670). Offences under these laws include the recruitment, transportation, transfer, harbouring and receipt of persons by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability or the giving or receiving of payments or benefits to gain consent (of the victim) for the purpose of exploitation by way of prostitution and other sexual activities, forced labour, servitude and slavery. The scope of the Act was extended on 3 August 2010 when it was amended by Parliament to introduce a new section entitled *'Smuggling of*

[154] See detail in 'Malaysian Government Presents First Bill against Human Trafficking'. *People's Daily Online.* 25 April 2007. Online: http://www.humantrafficking.org/updates/621. Retrieved on 22/07/2010

Migrants'. As well as the laws, the capacity of enforcement agencies is also being developed through training programmes and the Government is also working towards strengthening cooperation with other Governments (Laporan Pemerdagangan Manusia, 2011: 1-7).

Previously, there were no special provisions relating to violence against a sex worker; therefore, the offence would be covered by the Penal Code, which legislates against acts such as assault, using criminal force, wrongful restraint or confinement and causing hurt or grievous hurt. Section 370 of the Penal Code makes it an offence to import, export, remove, buy, sell or dispose of any person as a slave or to accept, receive or detain any person against his/her will as a slave. Also, Section 371 makes it illegal to habitually import, export, remove, buy, sell, traffic or deal in slaves. I note that the DVA, which provides legal protection for victims of violence in the home, supplements the offences under the Penal Code in terms of protection for the victims.

Here, I have discovered that the Royal Malaysian Police Force is the main law enforcement agency, while the Social Welfare Department (SWD) is responsible for the protection and rehabilitation of women below the age of 21 who have been victimized, coerced or forced into prostitution. The SWD is responsible for providing protection, rehabilitation and counselling to girls and women under the age of 18 who have been involved in prostitution (Social Welfare Department). Together with the other local agencies, the Royal Malaysian Police Force has taken all possible measures to enforce the laws, continuously monitor the situation, undertake preventive actions and instigate criminal proceedings against those who traffic or exploit women for the purpose of prostitution (Royal Malaysian Police Force). Thus, with the legislation of the Anti-

Trafficking in Persons Act 2007 (Act 670), Malaysia is moving towards progressive achievement in terms of combating human trafficking, which could protect women from being disadvantaged simply for being women. Women and their status could be empowered when the laws governing them reflect their need and experience, as expressed by Busby, Chen and Kingdom, and in this perpective, when women's need for the law against anti human-trafficking is realised.

5.7 DECLINATION OF LOW LITERACY TO EMPOWER THE ECONOMY OF RURAL WOMEN

The CEDAW expressed concerns that Malaysia did not present a current picture of the situation of rural women and information on the *'de facto'* position of rural women in its Combined Initial and Second Periodic Reports of Malaysia in 2006 (U. N. Doc. CEDAW/C/MYS/CO/2, 2006: para 29 and 30). Rural women of Malaysia comprise a significant proportion of the county's population even as the country undergoes a rapid rate of industrialization, aimed at achieving a developed status by the year 2020. The Malaysian Department of Statistics (MDS) revealed that 10,340,900 out of a total population of 28,250,500 people were residing in rural areas in 2010 and that there were 4,997,800 women among the rural populace. I note that there are demands for special attention to be paid to the situation of rural women, whose particular struggles and vital economic contributions, as noted in Article 14 of the Women's Convention, warrant more attention in policy planning. This will ensure their participation in the elaboration and implementation of development planning at all levels. The MDS defines rural areas as '*all other gazetted local authority areas with a population of less than 10,000 persons and non-gazetted areas'* (Malaysian Department of Statistics).

The incidence of poverty is a matter of concern in the rural areas (Siwar, 1996). However, as explained in *'Rural Development Model in Malaysia'* by Mohd. Arshad and Shamsuddin (1997), the agricultural and rural infrastructure programmes carried out since Independence have significantly improved living conditions in the rural areas. The Deputy Prime Minister has declared in his keynote address at the Women's Summit 2010 that, in the long term, education will be the Government's way of creating the necessary impetus to uplift rural Malaysia (*Borneo Post Online,* 9 December 2010). According to him, one of the six National Key Result Areas (NKRAs) in the Government Transformation Programme is to improve the level of education across the board. This is an important strategy, considering that women can be empowered by allowing their equal access to education (Gender and Development Group, World Bank, 2003: 11-13).

Pertaining to the low literacy level among women, I note that it has declined with improved educational services which also empower women in the economy. I trace that the role of Malaysian rural women in the economy has been carved up into two perspectives: formal (labour force participation[155]) and non-formal (micro enterprise activities[156]). Government programmes to incorporate functional literacy curricula into socio-economic programmes for rural populations addressed some of the educational needs of rural women[157]. Indeed, rural women's involvement in decision-making at all levels of policy and programme planning was also vital to ensure that their needs were addressed and that

[155] Labour force participation includes administrative and managerial, sales, professional and technical, service, clerical and production

[156] Micro enterprise or home-based enterprise activities include sales and production of batik, basketry, pottery, silverware, woodcarvings, bread and cakes, fish crackers, clothing, furniture, brick and cement blocks. See Fact Sheet Malaysia: Rural Women in the Malaysian Economy. Online: ftp://ftp.fao.org/docrep /fao/008/ae549e/ae549e00.pdf. Retrieved on 30/06/2011; Mohd. Arshad, Fatimah and Shamsuddin, Mad Nasir. 1997. 'Rural Development Model in Malaysia'. *Paper presented to the Hon. President of Peru, Mr. Alberto Fujimori.* Lima, Peru. 13 October 1997

[157] See detail in Fact Sheet Malaysia 'Rural Women in the Malaysian Economy'. Online: ftp://ftp.fao.org/docrep /fao/008/ae549e/ae549e00.pdf. Retrieved on 30/06/2011

they were given opportunities to be partners in development. However, in terms of the ways in which women are involved, I find that rural women's participation was limited to their *'private world'*; which is a monopoly on leadership only in women's organizations, which are mainly social and welfare-based in nature. As such, the scope is limited for women leaders to make decisions pertaining to economic participation, control of resources and planning for mainstream activities, especially in the context of village development (Khaled, 1997). In the political arena, rural women have always been the major supporters of political parties. Conversely, as Kamaruddin (2006: 23) argued, the involvement of rural women in the decision-making bodies of the various political parties is minimal compared to their numbers because a vast majority of rural women tend to be followers and not leaders.

To increase participation of rural women at decision-making level, courses and training have been conducted by various agencies such as the Department of Women's Development, the Ministry of Rural Development and the Department of Agriculture to build the skills or capacity of rural women, improve their access to knowledge, particularly information and communication technology (ICT) literacy, and enhance their motivation and leadership ability (Ali, 2010: 2). According to Ali, gender sensitisation courses for policymakers, programme implementers and community leaders have also been conducted by the Department of Women's Development and the Institute of Public Administration. Additionally, skill and capability-building services for women are also provided by various agencies in the rural areas (Ali, 2010: 2) Basically, training programmes focus on enhancing women's role in homemaking and family life by teaching them skills such as cooking, sewing and caring for children (U. N. Doc. CEDAW/C/MYS/1-2, 2004: 96). Some women, however, are able to develop and commercialise their skills by venturing

into micro enterprise projects and other such economic activities, which I discussed earlier, pertaining to special measures accorded to women in economic and social mainstream activities. The courses and training programmes for rural women have been diversified to include entrepreneurship, motivation and leadership training to empower rural women in the public sphere (Ministry of Women and Family Development, 2003: 65). According to the Report on the Progress of Malaysian Women since Independence (1957-2000), religious classes, literacy and family development programmes are mainly targeted at women too. Furthermore, rural women also play an active role in community activities, especially welfare and socially-oriented activities (U. N. Doc. CEDAW/C/MYS/1-2, 2004: 99).

Indeed, the development of the rural areas and the concerted efforts by all agencies serving rural communities, among others, are intended to achieve the objective of empowering rural women and eliminating discrimination against them. Gender sensitisation programmes at all levels, as discussed above, have been intensified to remove stereotypical assumptions about the role of women by policymakers, programme implementers and community leaders as well as the women themselves to ensure that rural women have equal outcomes with rural men and with urban women and men.

5.8 CONCLUDING REMARKS

Through this Chapter, I have argued that the Government of Malaysia is committed to eliminating women's disadvantages by legislating and amending gender-biased laws and has taken appropriate measures, including laws, policies, administrative decisions and programmes, to eliminate discrimination against Muslim women based on the principal

areas of concern and recommendations of the CEDAW in the concluding comments made against Malaysia following the Thirty-Fifth Session in New York. They are in regard to the elimination of gender stereotypes, public and political life, employment, adequate sanctions for acts of violence against women, trafficking, and empowerment of rural women. I argued that Malaysia has incorporated the substance of the Convention, which is the principle of equality, to provide special measures for women to ensure gender equality in its national legislation, policies, administrative decisions and programmes. As women have been historically disadvantaged (Ahmad, 2007), substantive equality is a tool to eliminate substantive inequality of disadvantaged groups (Kapur and Cossman, 1996: 17).

I argued that efforts such as providing temporary special measures have been made by the Malaysian Government to facilitate the assimilation of women into the mainstream of social and economic activities to eliminate gender stereotype norms that constrain women in their private life only, which could modify the social and cultural patterns of conduct of women and men. I traced that the Government has progressively empowered women and eliminated gender stereotypes by ensuring women's financial independence and providing special measures in economic activities, education, healthcare and marriage and family relations.

As special measures are important for women, I have found that women are entitled to more financial rights to compensate for their previous economic disadvantages in Malaysia. I noted that women are guaranteed similar conditions to men in the administration of any educational institution, admission, fees, curricula, examinations, scholarship and opportunities to participate actively in sports and access to specific learning information. I discovered that access to healthcare is given equally to women and

men, although women are given more attention and services because of their needs associated with maternity. I discovered that many gender stereotypes in terms of marriage and family relations of Muslims in Malaysia have been eliminated and women now have the following rights: the right to choose a spouse, equal rights and responsibilities as parents, equal rights to decide on the number and spacing of their children, and equal rights to property.

I have found that, in Malaysia, women are guaranteed the rights to vote and be eligible for election to all publicly elected bodies, to participate in the formulation of government policy and hold public office, to exercise public functions, and to participate in non-governmental organizations. The right of Muslim women in Malaysia to choose a profession is secured and they are entitled to the right to equal remuneration, social security, and protection of health and safety in working conditions. I traced that, in response to the CEDAW's recommendation to include adequate sanctions for acts of discrimination against women, laws were amended to increase the penalties for rape and incest. The Government's commitment to eliminating discrimination against women in Malaysia has been achieved not only by amending *'gender-biased laws'* but also by legislating new laws to protect women. Pertaining to the low literacy of rural women, I noted that it has declined with improved educational services which also empower women in the economy.

However, there are a few areas that need specific improvement for the betterment of the laws, policies and administrative decisions and programmes in protecting women's rights which I have proposed throughout the discussion. Indeed, having gender equality laws could be regarded as being in the best interest of women even though social construction to

eliminate gender stereotyping is equally important. Moreover, to ascertain whether there is a possibility of harmonising the Women's Convention with the Malaysian Muslim women's rights laws, an analysis of the reservation of Article 16 (1) (a), (c), (f) and (g) is extremely important and will be discussed in the next Chapter. If the reservation does not conflict with the object and purpose of the Women's Convention and is consistent with the principle of equality informed by the Women's Convention, I will argue that the two doctrines of laws are capable of harmonisation.

CHAPTER SIX

ALTERNATIVE CONCEPT OF EQUALITY: AN ANALYSIS OF MALAYSIA'S RESERVATION OF ARTICLE 16 (1) (A), (C), (F) AND (G)

6.1 INTRODUCTION

In order to develop the previous Chapter's argument that Malaysia has taken appropriate measures, including laws, policies, administrative decisions and programmes, to eliminate discrimination against Muslim women based on the principal areas of concern and recommendations of the CEDAW in the concluding comments made against Malaysia following the Thirty-Fifth Session in New York, my concern in this Chapter is to analyse whether the reservation to Article 16 (1) (a), (c), (f) and (g) entered by the Government of Malaysia goes against the object and purpose of the Women's Convention. This is significant as the question of whether the Malaysian laws on Muslim women's rights might possibly be harmonised with the Women's Convention could be best constructed if the Article reserved by the Government of Malaysia does not conflict with the object and purpose of the Convention. As I mentioned earlier in this thesis, the Government of Malaysia reserved Article 16 (1) (a), (c), (f) and (g) and Article 9 (2) of the Women's Convention, but I shall not include Article 9 (2) in my analysis here, as the basis of reservation to this Article is not because of its non-conformity with *Shariah* practised in Malaysia, but with the Malaysian Federal Constitution.

I trace that the substance of Article 16 is to ensure equality of women and men in marriage and family relations by securing *'similar'* rights and *'similar'* legal entitlements to rights.

For instance, if men are given the legal right to marry, women are also accorded the same right. And if men have the legal right to marry at 18 years of age, women are also given the right to marry at the age of 18. In this Chapter, I argue that both Muslim women and men in Malaysia are given similar rights by laws in matters relating to marriage and family relations, but their entitlements to rights differ. Taking a similar example which will be discussed in detail in this Chapter, *Shariah* applied in Malaysia gives Muslim women and men the right to marry, but the ages at which they can marry differ. Women have the right to marry at 16 years of age, but the age for men is 18. This divergence, I argue, does not show that women are not accorded equal rights (right to marry) by law to those accorded to men, but that the law has conferred different entitlements (dissimilar ages) on women and men to enter into marriage. This divergence is intended to ensure that the law secures equal outcomes for both women and men.

As I explained in Chapter Three, similar treatment or formal equality might result in gender equality; however, yet in certain circumstances, similarity may bring about inequalities. In this Chapter, I analyse whether different entitlements to the right to enter into marriage, rights and responsibilities during marriage and at its dissolution, right to guardianship and personal rights for Muslim women and men disadvantage women. Based on the conception of equality under the Women's Convention informed by Facio and Morgan (2009), as explained earlier in Chapter Three that disadvantaged people are guaranteed special measures to achieve equal results similar to those of advantaged people, an act or omission does not have the *'effect'* or *'purpose'* of denying women's exercise and enjoyment of all rights and prohibit total discrimination in all aspects of life. I answer the question of whether the reservation of Article 16 (1) (a), (c), (f) and (g) entered by the Government of Malaysia makes Muslim women's rights laws in Malaysia incompatible

with the Women's Convention. I analyse whether the reservation disadvantages Muslim women and argue in this analysis that, if a woman is in an unequal position with regard to a man to begin with, then treating them with total equality will simply perpetuate the difference between them.

I argue that, in Muslim marriage and family relations according to Malaysian laws, wives and husbands are guaranteed equal legal rights, yet their entitlements to rights differ. This is to ensure that, in marriage and the family sphere, wives are given special measures by laws to accommodate their disadvantages. I find that Article 16 (1) (a), (c), (f) and (g) of the Women's Convention marks a *'unique approach'* to rights for Muslims. I argue that Malaysian laws on Muslim women's rights are capable of harmonisation with the Women's Convention and that the reservation to Article 16 (1) (a), (c), (f) and (g) is not against the object and purpose of the Women's Convention if it ensures Muslim women's equal outcomes in terms of justice.

There is a view that all provisions enunciated under the Women's Convention must be adopted to ensure maximum implementation of the law, although there is no general consensus on this[158]. This stance may have merit because equality, as a principle in the Women's Convention, is a major concern in international, Islamic and Malaysian human rights laws too; therefore, as Yaacob (2006) has stressed, equal rights for women in all fields existing in the human rights instruments must be implemented. In contrast, in a working group set up during the Meeting of International Experts on Human Rights in Islam (MIEHRI) held in Malaysia in 2006, which I attended as an observer, only a small group agreed to the incorporation of the Women's Convention into Islamic countries while

[158] Read earlier discussion on this issue in Chapter One

the larger group resisted it. In this regard, the majority opined that rights should apply to cultural activities and show respect for cultural diversity. A majority of the experts agreed that women's equality rights are a major concern in Islam and need to be implemented in the national laws, but this should be done according to Islamic principles (The Rt. Hon. Justice Tan Sri Dato' Siti Norma Binti Yaakob, Chief Judge of High Court of Malaysia, 2006: 28-29).

My argument is, however, that maximum implementation of the laws might not necessarily be achieved by incorporating all provisions stated in the Women's Convention into national laws, because the rights protection might be achieved not only by applying the same legal terms, wordings, provisions, rights or formal equality, but also by applying the same understanding of the principle of equality and its results, which I shall employ in my analysis in this Chapter. Thus, even though I have stated earlier that it is necessary for a law be passed at the national level to give effect to the international commitments entered into, however, the interpretation of the legal provisions has to take into consideration the principle or substance of the law, rather than only the form. As stated by the Former Chief Justice of Malaysia, Dato' Abdul Hamid Mohamad, to harmonise laws attention must be paid to the substance of the laws, rather than just the form (Mohamad, 2003). This means that, to be harmonised, laws do not necessarily have to be uniform, a point addressed by Sir Anthony Mason, the Former Chief Justice of the High Court of Australia, '*harmonisation of rules does not necessarily mean uniformity of rules'* (Mason, 1997). Thus, it might be sufficient for two different rules to co-exist conveniently. Practical realization of women's human rights might be achieved upon application of formal and substantive equality based on protective and corrective measures outlined in the Women's Convention.

Drawing on an earlier critique that two things that are unalike could be treated differently to ensure equal outcomes, I argue that the CEDAW is not consistent in enhancing this principle of substantive equality by *'asking'* State Parties to ensure Muslim women and men have the *'**same right** to enter into marriage* (Article 16 (1) (a)', *'**same rights** and responsibilities during marriage and at its dissolution* (Article 16 (1) (c)', *'**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* (Article 16 (1) (f)', and *'**same personal rights** as husband and wife, including the right to choose a family name, a profession and an occupation* (Article 16 (1) (g)'. For substantive equality standard, application and achievement, I propose that, even though the term used in these provisions is *'same rights'* or *'same personal rights',* women and men can have different entitlements to rights to ensure equal outcomes. Were the term to be changed accordingly, all Muslim or non-Muslim State Parties which reserved Article 16 (1) (a), (c), (f) and (g) might withdraw their reservations.

6.2 IS THE RESERVED ARTICLE AGAINST THE OBJECT AND PURPOSE OF THE WOMEN'S CONVENTION?

The CEDAW, in its concluding comments to Malaysia's Combined Initial and Second Periodic Report submitted in 2004, urged Malaysia to review and withdraw reservation to Article 16 (1) (a), (c), (f) and (g) due to its contradiction of the object and purpose of the Convention (U. N. Doc. CEDAW/C/MYS/CO/2, 2006: para 10). According to Hamid (2006: 9), Western countries also believe that the reservations entered by Muslim countries

are not in accord with the object and purpose of the Women's Convention. I trace that, while the concept of equality in the Women's Convention is coherent with Islamic doctrine, the application of rights to equality by the Women's Convention, which is Western-based, and by Malaysian Muslim women's rights laws, which are Islamic-based, are not necessarily similar. The question might arise as to whether Islam or other traditions which confer similar rights on women and men but different entitlements to rights due to their different strengths disadvantage women and are against the principle of equality informed by the Women's Convention.

Hamid (2006), while analysing the reservations made by the Islamic countries, the objections to these reservations by other State Parties, and pressure applied by the CEDAW to withdraw these reservations, has drawn this conclusion:

'It is an extremely difficult and sensitive issue and the solution will largely depend on to what extent CEDAW can accommodate Muslim countries to be able to comply with the most fundamental precepts of Shariah and to what extent Muslim countries are prepared to accept the liberal interpretation of the Islamic family law without affecting the most fundamental precepts of Shariah.'

Indeed, when State Parties become parties to the Women's Convention, they are required to ensure that their domestic laws are in line with the Convention, even though they may have entered reservations to the Women's Convention. I note that, even though reservations are allowed,[159] the CEDAW and Western countries always claim that the reservations entered by Islamic countries are not in accord with the '*object and purpose'* of the Convention. For instance, the Netherlands objected to Malaysia's reservations to the Women's Convention,

[159] Currently, out of the 187 State Parties to the Women's Convention, 56 States have entered reservations to the Convention and the majority of them are non-Islamic countries. Only 25 of them are Islamic countries. Nauru is the most recent State Party, which ratified CEDAW on 23 June 2011. See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en. Retrieved on 01/07/2011

'The Government of the Kingdom of the Netherlands considers……that such reservations, which seek to limit the responsibilities of the reserving state under the Convention by invoking the general principles of national law and the Constitution, may raise doubts as to the commitment of this state to the object and purpose of the Convention……The Government of Netherlands further considers that the reservations made by Malaysia regarding Article 2 (f)[160], Article 5 (a)[161], Article 9 and Article 16[162] of the Convention are incompatible with the object and purpose of the Convention. The Government of Netherlands therefore objects to the above reservations. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Malaysia[163]. '

I note that, even after the Government of Malaysia had withdrawn reservation to Article 2 (f), Article 9 (1), Article 16 (b), (d), (e) and Article 16 (h) on 6 February 1998, there were still objections from the Governments of France and the Netherlands[164] relating to the said partial withdrawal.

I argue that the problem in examining whether Malaysia's reservations are incompatible with the object and purpose of the Convention is that there is no single objective criterion to determine whether any reservations are compatible with the object and purpose or not. Even though the decision of the International Court of Justice (ICJ) in the Advisory Opinion Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention Case) has devised the '*object and purpose test',* which requires each state to individually determine whether it perceives a proposed reservation as being against the object and purpose of the treaty (International Court of Justice, 1951, ICJ

[160] On 6 February 1998, the Government of Malaysia notified the Secretary-General of a partial withdrawal of Article 2 (f)

[161] On 19 July 2010, the Government of Malaysia notified the Secretary-General of a partial withdrawal of Article 5 (a)

[162] On 19 July 2010, the Government of Malaysia notified the Secretary-General of a partial withdrawal of Article 16 (2)

[163] See Multilateral Treaties Deposited with the Secretary-General, Part I, Chapter IV, Objections Made by Netherlands. Online: http://treaties.un.org/doc/source/ publications/MTDSG/2009/ English-I.pdf. Retrieved on 01/01/2010

[164] France on 20th July and Netherlands on 21st July, 1998. See Declarations and Reservations. Para 36, Chapter IV, Human Rights. Convention on the Elimination of All Forms of Discrimination against Women. Online: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en #36. Retrieved on 01/10/2010

Rep 15, 21, General List No. 12), according to Hamid (2006: 13) this test remains quite subjective.

Hence, I employ the definition of '*object and purpose'* as stated in the General Recommendation No. 25 on Article 4, Paragraph 1 of the Women's Convention on temporary special measures and the one which is offered by the International Law Commission's Draft Guidelines on '*Reservations to Treaties'* (U. N. Doc. A/CN.4/L.685, 2006: Comments on Draft Guidelines: para (i)). In the General Recommendation No. 25, the overall object and purpose of the Women's Convention is *'to eliminate all forms of discrimination against women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms'* (Paragraph 3). The Draft Guidelines define the *'object and purpose'* as *'the essential provisions of the treaty, which constitutes its raison d'etre*[165]*'.* According to the Draft Guidelines, *'when evaluating the impact of a reservation considered to be contrary to the object and purpose of a treaty, consideration should be given to whether the impact of the reservation would be limited to the provision itself or whether it would have a broader effect on the substantive content of a treaty'*. Thus, to ensure that the reserved Article does not go against the Women's Convention, it is important to consider in this analysis whether the reservation prevents women from having equal rights with men and whether the reservation has a broader impact on the substantive concept of the Women's Convention.

The CEDAW considered Article 2 and Article 16 to be core provisions and that *'neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention. The Committee also remains convinced that*

[165] *Raison d'etre* means *'the most important reason for the existence of something'*

reservations to Article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn (Reservations to CEDAW, Division for the Advancement of Women: Impermissible Reservations). Therefore, as Malaysia reserved Article 16 (1) (a), (c), (f) and (g) subject to the *Shariah* applied in this country, from the above analysis it might be seen as incompatible with the object and purpose of the Convention.

However, I argue that, by correctly understanding the essence of equality (formal and substantive), one might see the compatibility of the Women's Convention with Malaysian laws on Muslim women's rights, even though Malaysia reserved Article 16 (1) (a), (c), (f) and (g). This is a valid option for the State Party's Government rather than strictly complying with the Convention's provisions and ignoring *Shariah* or maintaining the *status quo* of *Shariah* and ignoring the Convention. I will argue that, if gender equality could be achieved by reserving this Article and if the reservation does not have a broader impact on the substantive concept of the Women's Convention, then the reservation would not be against the object and purpose of the Women's Convention.

6.3 SIMILAR RIGHTS, DIFFERENT ENTITLEMENTS: EQUAL OUTCOMES

In this Section, I argue that the Government of Malaysia's initial refusal to accept all the provisions of Article 16 of the Women's Convention as binding upon it does not necessarily restrict Muslim women's equal rights with men or indicate its apparent reluctance to extend full equality to Muslim women in this sphere. As discussed in Chapter Four, Malaysia operates a dual legal system based on both English common laws and

Islamic textual sources. Article 121 (1A) of the Malaysian Federal Constitution, introduced in 1988 by constitutional amendment, stated that the civil courts have no jurisdiction in matters that fall within the *Shariah* Court's jurisdiction. Civil courts have jurisdiction over the majority of laws, including contracts, torts, property, criminal, constitutional and administrative matters. Family matters are governed by a combination of civil, *Shariah* and customary laws. In most cultural practices of the ethnic groups in Malaysia, the concept of family also includes the extended families of the wife and husband (Abd. Rahim, Ismail and Mohd. Dahlal, 2008: 188).

The Government of Malaysia reserves Article 16 (1) (a), (c), (f) and (g) due to its inconsistencies with *Shariah* as practised in Malaysia. The non-recognition of similar entitlements to rights for Muslim women and men on issues of rights to enter into marriage (Article 16 (1) (a)), rights and responsibilities during marriage and at its dissolution (Article 16 (1) (c)), rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children (Article 16 (1) (f)) and personal rights as wife and husband (Article 16 (1) (g)) has led to the Government being criticized for not protecting Muslim women's rights and therefore discriminating against them on the basis of gender. Throughout my analysis in this Chapter, however, I argue that Muslim women might be guaranteed similar rights to those of men, although their entitlements to the rights differ. I trace that there is no specific reason for reserving this Article because Malaysia entered a general reservation, which uses justification of supremacy of religion and the country's constitution as explained earlier, except to Article 16 (1) (a), which is more specific.

Even though Muslim wives' and husband's entitlements to rights differ in the above matters, my argument, as informed by equality scholarship is that their rights may be

equal. Treating women and men differently in family relations, as alleged by Kapur and Cossman (1996: 174), is not discriminatory but protects individual roles in the family. Before I proceed with the analysis, I note that, in Islam, when women and men enter into marriage agreements, the laws and their rights, roles and responsibilities will treat them as wife and husband, not merely as an ordinary woman and man. I submit that they have to adhere to the concept of joint rights and joint duties, even though both have their exclusive rights and duties according to their own strengths. That is why Elmalmad (2002: 244) has averred that, when dealing with women in Islam, the most important thing is to distinguish between married and non-married women.

I note that, in Islam, only a man can be a husband and only a woman can be a wife. Because of their different strengths, generally the husband will perform the task of providing for the family whereas the wife's task is to give birth and breastfeed (Abd. Ghani, 2003: 2-3). On the other hand, the situation could be otherwise; in the matters that are demonstrated by Abd. Ghani as *'murunah'* (flexibility), in the sense of caring for and loving each other, a wife could provide for the family and the husband could be responsible for raising the children although, of course, a husband could not give birth and breastfeed. Therefore, drawing on a range of feminist scholarship, it seems *'unfair'* for the wife to be given similar tasks to her husband, working and supporting the family and, at the same time, performing her biological tasks of giving birth and breastfeeding, although women are not prohibited from working if they wish to. Riffat Hassan, according to Ali (2000: 65), has argued that, in the Muslim world, wives should not have additional obligations of providing for the family when bearing and raising children at the same time. However, a wife might provide for her family if her husband is unable to do so, is imprisoned, unknown, or refuses to support the family; she may simply prefer to be the

breadwinner, which, as Yusuf (2005: 7) asserted, would be considered an act of charity. One can be a wife without being a mother and be a husband without being a father in such cases, both wife and husband could work because the general rule in Islam is that a wife is permitted to work (Buang, 2001: 33-37).

6.3.1 Right to Enter into Marriage

6.3.1.1 Female 16 and Male 18: Are They Going To School?

With respect to Article 16 (1) (a) on the issue of rights to enter into marriage, the Government of Malaysia declared that, under the *Shariah* practised in Malaysia, the age limit for marriage for Muslim women is 16 and for men it is 18. The principal right in this Article is the similar right to enter into marriage, which is conferred on both Muslim women and men, but the *'age'* of entitlement differs. Thus, the law does not have an effect or purpose of denying women's exercise and enjoyment of their rights to enter into marriage; neither does it prevents women from having equal rights with men. The different entitlement could be a special measure accorded to women to compensate for their disadvantages, which could result in equal outcomes with men. Because equality should not be reduced to sameness (Fletcher, 2002; Bakar; 2003; Yaacob; 1986), this different entitlement could be one way of achieving the aim of equality, as Fredman (2003: 43) explained; equality could be achieved by providing an alternative choice to pursue a good life.

In Malaysia, different age limits for Muslim women and men to enter into marriage are provided under Islamic Family Law Enactments of every State. I note that women are

permitted to marry at a younger age than men, under both the civil laws[166] and Islamic family laws. Section 8 of the IFLA states that '*no marriage may be solemnized or registered under this Act where either the man is under the age of 18 or the woman is under the age of 16 except where the Shariah Judge has granted his permission in writing in certain circumstances.'* Therefore, the Government of Malaysia reserves Article 16 (1) (a) that Muslim women and men must have the same *'age limit'* to enter into marriage in order that Section 8 mentioned above might prevail.

I note that, under Article 1 of the Convention on the Rights of the Child (CRC), every human being below the age of 18 is considered a child. This is why the CEDAW has stipulated a minimum age of 18 years for people to contract into marriage (General Recommendation No. 21, 13th Session, 1994: Comment para 36). In Islam there is no fixed age for marriage; due to these circumstances, Noor (2007: 138) has explained that the Rector of Al-Azhar, the Grand *Qadhi,* the Grand *Mufti* and a group of religious scholars who were invited by the Government of Egypt to take part in a discussion in response to the demands of the Feminists' Union,[167] set the minimum age for marriage at 16 for Muslim girls and 18 for Muslim boys[168], a decision that later inspired Malaysian legislators. This minimum age of marriage seemed to follow the *Hanafi* school of thought on the presumption of puberty (Noor, 2007: 143). In Islamic theory, Elmalmad (2002: 243) affirmed that a girl attains the age of majority generally at around ten to 12 years of age.

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[166] Under the Law Reform (Marriage and Divorce) Act 1991 (Act 1976) (LRA), while the minimum age for marriage is 18 for boys, a female who has completed her 16th year can marry with the authorization of the Chief Minister (Section 10). The LRA states that the Registrar of Marriage must be satisfied that both parties freely consent to the marriage before solemnizing the marriage (Section 22 (6)). It is an offence for a person to use force or threats to compel a person to marry against his or her will or to prevent a person who has attained the age of 21 from contracting a valid marriage. Invalidity of consent is also a ground for voidable marriage.

[167] Its name in Arabic is '*Al-Ittihad Al-Nisai Al-Misri'* which was formed in 16 March 1923 led by Huda Sha'rawi

[168] See Izadparast, Ali Akbar. 1974. *Position of Women in Muslim Arab Societies.* PhD Thesis. University of Utah. Quoted from Noor, Zanariah. 2007. 'Gender Justice and Islamic Family Law Reform in Malaysia' in *Kajian Malaysia*. Jil. XXV. No. 2

By the age of 18, a man is no longer considered a child (General Recommendation No. 21, 13th Session, 1994: Comment para 36) and is deemed competent to fulfil his duty as a husband and the family maintainer. In contrast, a wife may not be the breadwinner in the family, so she may not necessarily be physically competent to work to support the family. Yet, she might need to reach a biological maturity to fulfil her reproductive duty; therefore, to enter into a contract of marriage having reached the age of at least 16 might be sensible for a woman in Malaysia, as Abu Bakar, Majumdar and Ann (1983) have claimed that women in Malaysia are biologically mature at 15.6 years of age. Saudi Arabia, in its responses to the list of issues and questions prepared by the CEDAW, recommended that the CEDAW acknowledge that each country has environmental and physiological particularities and that the age of majority in cold Western countries is higher than in hot Eastern countries (U. N. Doc. CEDAW/C/SAU/Q/2/Add. 1, 2007: Phase 10, para 31). Because a woman and a man could fulfil their duties as wife and husband according to their different strengths, I submit that this difference is equal. Preventing women from entering into marriage when they are biologically competent to marry might amount to a discrimination against them.

Moreover, for Muslims, sexual intercourse outside marital relationships is totally prohibited (Al-Qardhawi, 2001: 146). Muslim women and men are allowed to have sex only when they are religiously recognised as wife and husband. Because boys of 18 years of age and girls as young as 16 might be biologically mature enough to have a sexual relationship as mentioned earlier, and if the sexual relationship cannot be prevented, as Muslims they are encouraged to legalise their relationship by marriage. Thus, allowing boys of 18 and girls of 16 to enter into a marriage contract might reduce illegal sexual

intercourse and illegal pregnancy which might contribute to the rejection of unwanted babies. There have been many cases in Malaysia of new-born babies being thrown out and almost all of them were found dead (Pak, 2010). Statistics from the Royal Malaysian Police Force have shown that 67 babies born out of wedlock were reportedly cast aside in 2005; there were 83 cases in 2006, 65 cases in 2007, 102 cases in 2008, 79 cases in 2009 and 91 cases in 2010, almost all of which involved Muslim babies. I note that the situation worsened in 2011 when 34 cases were reported in January alone.

From data gathered by the Malaysian Department of Social Welfare, I note that, between 2004 and 2009, 20.4 per cent or 99 babies were thrown into housing areas, 15.8 per cent or 77 babies were thrown into dustbins and the rest were thrown into coppices, rivers, drains, mosques, hospitals and latrines. Most of the cases were due to unwanted pregnancies, which resulted from early-age illegal sexual intercourse, and most of the *'illegitimate parents'* involved in these cases were teenagers, some of them under 18 years old (girls) and 20 years old (boys) (Royal Malaysian Police Force). Therefore, an age limit of 16 for girls and 18 for boys is ideal in the Malaysian local context to protect Muslim girls from committing criminal offences due to illegal sexual intercourse. Although babies are still being cast aside even though the Government of Malaysia reserved Article 16 (1) (a) to allow girls to marry at 16, this age limit might at least reduce the number of cases. Hence, allowing women as young as 16 to marry could eliminate women's disadvantages.

Age limit for marriage is important because early marriage has profound *'physical, intellectual, psychological and emotional impacts, cutting off educational opportunity and chances of personal growth'* (UN Children's Fund (UNICEF), 2001: 2). Those who marry at a younger age frequently forfeit their opportunities for further education (Oyorti and

Pobi, 2003: 6) at secondary school and are not ready to fulfil their duty as wife, husband or parents. Menon-Sen (2005: 3) has stressed that both female and male students who drop out of school have lower employment opportunities and lower bargaining powers in marriage, making them more vulnerable to economic dependency and further inequalities within the marriage. In fact, education is an important strategy to empower women and advance towards gender equality (Gender and Development Group, World Bank, 2003: 11-13). I submit that those who argue that marriage does not prevent women from receiving an education are possibly unaware that the world is still far from achieving gender equality in study completion rates. The UNESCO reported in 2004 that an estimated 54 to 57 per cent of all children who drop out of school are girls (UN Millennium Project 2005). This is due to what Menon-Sen (2005: 3) has described as *'patriarchal attitudes that define girls' destiny in terms of marriage and family'*. I note that early marriage and pregnancy forces girls to drop out of education before its completion, which is not the case with boys. Moreover, young couples who marry and become saddled with heavy responsibilities are more likely to have marital problems, which may lead to divorce. Early childbearing, according to research conducted by UNICEF in 2001, is likely to lead to a lifetime of domestic and sexual subservience over which women have no control.

Even though I have argued that those who marry at an age below the limit provided by the laws frequently forfeit their opportunities for further education, the situation in Malaysia is different. Here, I submit that there may be no risk of married girls forfeiting their opportunities for further education, because they will be permitted to continue their studies as usual. The problem is that they themselves may abandon their education due to the greater burden of being a wife and mother at the same time. However, the Government of Malaysia provides *'special schools'* for pregnant girls as a special measure to compensate

for their weaknesses. The Government of Malaysia has recently provided *'Sekolah Harapan'* and *'Rumah Harapan'* in Jasin, Malacca, in September 2010 for pregnant girls to prevent them from being indirectly discriminated against due to their condition (Shamsuddin, 2011). I note that this provision is also intended to discourage pregnant (married or unmarried) girls from forfeiting their studies, to inhibit unmarried pregnant girls from casting aside their babies, and to gradually educate society into accepting them as members of society. Up to December 2011, 80 unmarried pregnant girls between the ages of 14 and 18 were enrolled in the schools and 59 babies were safely delivered by their young mothers; 45 of them were extradited to the girls' mothers (*Kosmo*, 8 December, 2011).

It is important to note that the ideal age for marriage should be determined not only by biological criteria but also by all aspects of human significance, such as emotional, mental and financial aspects. While acknowledging the importance of setting girls' and boys' age limits at 16 and 18 years respectively, early marriage, or a marriage involving parties below the age of 24, could be problematic. Abdullah (2001: 96) has explained that, according to the studies conducted by Swift (1963), the number of dissolved marriages was increasing during the 1950s and 1960s due to early marriages. It was the culture in society at that time for daughters to marry at 16 or 17 years of age. From the 1970s to the 1990s, as explained by Abdullah, the usual age range for marriage extended to encompass those aged in their early 20s, which reduced the divorce rate in Malaysia. However, most divorced wives were still aged between 20 and 24[169] (Abdullah, 2001: 105). Hence, a person aged around 24 or 25 might be considered financially and biologically ready for marriage.

[169] Abdullah has evidenced that 18.33 per cent of respondents in her research in 1999 in Perlis *Shariah* Court divorced at the ages of 20 to 24 years old. See Abdullah, Raihanah. 2001. 'Wanita, Perceraian dan Mahkamah Syariah' in Raihanah Abdullah (ed.) *Wanita dan Perundangan Islam*. Ilmiah Publishers Sdn. Bhd.

However, if, for any reason, a person needs to marry at an early age, they should at least do so after they have attained biological maturity. At this age, a woman is able to fulfil her responsibilities and reproductive duties as a wife.

Therefore, dissimilar age limits for Muslim women and men to enter into marriage are important in Malaysia due to their different biological natures, different rates of development and the need to protect against unwanted pregnancies resulting from illegal sexual intercourse by young girls. Even though Section 8 of the IFLA treats women and men differently, the difference does not necessarily amount to discrimination because the different entitlement, which is an earlier age for marriage conferred on women as compared to men, could be considered a special measure to protect women from having illegal sexual intercourse and unwanted pregnancies. Furthermore, women's right to pursue education is secured even after their marriage and special measures are provided for them to guarantee equal outcome in the educational right.

However, to protect women from unwanted pregnancies and at the same time, to accept the fact that the ideal age for marriage should be determined not only by biological criteria but also by emotional, mental and financial aspects, it might be better if the age limit for women is made 18 rather than 16. It is not against the *Shariah* too, as Maliki school of law determined that the age of puberty for both male and female is 18 (U. N. Doc. CRC/C/MYS/1, 2006: 37). Other Muslim states, such as Jordan and Morocco have recently raised the minimum age limit of marriage for both female and male to 18. The Jordanian Parliament increased the legal age of marriage for both girls and boys, from 15 and 16 to 18, to avoid early marriages and subsequent school drop out for married girls (World Bank, 2005: 47). Labadi (2004: 81) has stressed that Article 279 of the Jordanian

Penal Code criminalizes anyone involved in the marriage of girl under 18. In Morocco too, the national government has raised the age of marriage for girls from 15 to 18. As stated in the Moroccan Family Code (Moudawana) 2004, *'men and women acquire the capacity to marry when they are of sound mind and have completed eighteen full Gregorian years of age'* (Article 19).

Hence, throughout the above analysis, it seems that the law is inadequate for social change and might disadvantage girls when they are treated differently as a wife, which amounts to *'less favourably'* than men. It is important to note that discrimination could still occur even if different people are treated differently, unless the disadvantaged people are guaranteed special measures to achieve equal results similar to those of advantaged people. If different entitlement does not bring about equal outcomes, it might amount to discrimination (Bindman, 1992). Thus, I propose in this perspective that a range of special measures provided by laws in education and health are important as effective strategies for protecting married girls as a disadvantaged group in Malaysia. As Facio and Morgan (2009) explained, Article 1 of the Women's Convention defines equality and non-discrimination as a prohibition of total, not partial, discrimination in all aspects of life. Without special measures in education and health, women might not have equal rights with men in relation to their different entitlements of the right to enter into marriage.

6.3.2 Rights and Responsibilities During Marriage and at Its Dissolution

In this Section, I explain that, pertaining to Article 16 (1) (c) on the issue of rights and responsibilities during marriage and at its dissolution, even though the Government does not set out in detail the reasons for this reservation, it is understood that the reservation is subject to *Shariah* on the issue of maintenance, polygamous marriage and dissolution of

marriage. In the Malaysia's combined initial and second periodic report submitted to the CEDAW, the report has explained that there are dissimilarities in rights between women and men pertaining to polygamous marriage (U. N. Doc. CEDAW/C/MYS/1-2, 2004: 108-109), maintenance (U. N. Doc. CEDAW/C/MYS/1-2, 2004: 109), dissolution of marriage (U. N. Doc. CEDAW/C/MYS/1-2, 2004: 111-113), guardianship of children (U. N. Doc. CEDAW/C/MYS/1-2, 2004: 114-115) and the wife's rights to retain her name (U.N. Doc. CEDAW/C/MYS/1-2, 2004: 109). The NGO Shadow Report on the initial and second periodic report of the Government of Malaysia also elucidated on the same issues about different entitlements of women and men in Malaysia by reason of *Shariah* (NGO Shadow Report Group, 2005: Articles 16: Equality in Marriage and Family: 116-130).

Here, I argue that the principal rights of this Article concern similar rights and responsibilities during marriage and at its dissolution; which are in fact, conferred on Muslim women and men in Malaysia according to the laws, yet only the entitlements to rights during marriage and at its dissolution, differ. I argue that this does not show that Muslim women are not given equal rights to men. As mentioned earlier, according to the International Law Commission's Draft Guidelines on '*Reservations to Treaties'*, the reservation could be against the object and purpose when it prevents women from having equal rights with men (U. N. Doc. A/CN.4/L.685, 2006: Comments on Draft Guidelines: para (i)). According to the IFLA, Muslim women and men do not have the same entitlements to rights and responsibilities during marriage in providing maintenance for the households, the practice of polygamous marriage and dissolution of marriage. This sounds unfair at first glance; however, similar to the application of rights in the UIDHR and CDHRI, I will argue that these different entitlements to rights during marriage do not necessarily make Muslim women and men unequal. The difference is intended to enable

wife and husband to complement each other (Abd. Ghani, 2003: 3) which results in equality of outcomes.

6.3.2.1 Wives' Entitlement to 'Wife Duties'

Malaysia, following the Islamic-based rule, pointed out the responsibility of a husband to provide for the family whereas a wife is under no such obligation (U. N. Doc. CEDAW/C/MYS/1-2, 2004: Part 1, Article 16, para 410). The basis of a Muslim wife's right to maintenance is provided in the *Quran* and is translated as '*men are the managers of the affairs of women for that God have preferred in bounty one of them over another, and for that they have expended of their property*.[170]' The UIDHR, as explained in Chapter Three, also stresses the sharing of obligations and responsibilities between wife and husband in the family and, in terms of the paying of maintenance, an obligation imposed on the husband only (Article XIX (c)). Article XIX (c) expresses that *'Every husband is obligated to maintain his wife and children according to his means'*.

However, a Muslim wife's rights to support and maintain her family are not restricted by any laws in Malaysia; therefore, I submit that their right is equal to that of men. I trace that entitlements to rights differ due to special measures accorded to women to compensate for their disadvantages, which could result in equal outcomes with men in terms of marital responsibilities. Even though *'giving birth'* is a biological strength of women, women are in a disadvantaged position at the time of giving birth and cannot continue to provide for themselves or the family. Even though fully-paid maternity leave may be available to support the women and family, not all women work and earn salaries. Hence, the *'obligatory'* entitlement of right to maintain a family, which is given to the husband alone,

[170] *Quran*: 4, verse: 34

does not discriminate against Muslim women but could be a special measure to compensate for women's disadvantage. Also, this will not restrict women's rights and choice to work or maintain a family because women are not prohibited by laws from doing so.

I note that maintenance in Islam refers to material provisions and conjugal rights of wives from husbands; here, material provisions include basic necessities such as food, clothing, accommodation, protection and security (Yusuf, 2005: 7). Meanwhile, conjugal rights, according to Yusuf (2005: 13), include meeting the needs of sexual desire to ensure the continuity of lineage and psychological aspects that result in a happy family according to the Islamic perspective. For Muslims, the *Quran* and the Prophetic tradition made it clear that there is such a duty which imposes an obligation upon a husband to maintain his wife,[171] coupled, according to Stowasser (1987: 293), with an authority over the family members. Therefore, Muslim women and men do not have similar entitlements to rights and responsibilities pertaining to the issue of maintenance even though they share a similar principal right, which is similar rights and responsibilities during marriage. Even though women are not prohibited from providing for their family, there is no obligatory duty to do so.

Ali (2000: 61 and 2006: 33) has agreed that a Muslim wife's right to maintenance is a kind of protective right, which is afforded to women to ensure justice for them. I submit that all Muslim wives are entitled to this right regardless of how wealthy they are or even if they can support themselves, because the right to maintenance is the right conferred due to their

[171] For example in the *Quran* S.4 v: 34, S.2 v: 233, S.17 v: 23, 24, 26, S.65 v: 6, 7; In *Sunnah* for example a *Hadith* delivered by the Prophet at the Farewell Pilgrimage (*Haj al-Wida):* '*Beware about your treatment of woman. You have accepted them with the word of Allah, and have made lawful sexual relationship with them with the word of Allah… as you have made a duty to provide them with reasonable maintenance and clothing'*

status as *'wife'*, not because they are *'poor'.* In the words of Singh, Musharraf and Mollah (2006: 178), '*it is well known that Quranic stipulations command a Muslim husband to maintain his wife if she has means to maintain herself and even if the husband is without any means'.* Singh, Musharraf and Mollah have stressed that maintenance of a wife is a husband's debt and prevails over other persons' rights to receive maintenance. Mahmuda Islam (2006: 130) has demonstrated in his research on *'CEDAW and Bangladesh: A Study to Explore the Possibilities of Full Implementation of CEDAW in Bangladesh'* that some respondents even objected to giving women the right to maintenance because, according to them, it discriminates against men. Thus, this different entitlement does not disadvantage women or prevent women from having equal rights with men.

A Muslim wife's right to maintenance commences upon the conclusion of her valid marriage to her husband and expires on the death of the person against whom (husband) or in whose favour (wife) the order was made, whichever is the earlier (Section 64 of the IFLA) or on the wife being *nusyuz* (Section 59 (2)) or on the expiry of the period of *iddah* (Section 65 (1)). *Nusyuz*, according to Section 59 (2), is when the wife;-

'……*unreasonably refuses to obey the lawful wishes or commands of her husband, that is to say, inter alia-*
(a) when she withholds her association with her husband;
(b) when she leaves her husband's home against his will; or
(c) when she refuses to move with him to another home or place, without any valid reason according to Hukum Syarak'.

Shafie school of thought provides that the husband's obligation to maintain his wife may continue even after the marriage has been ended by divorce during the period of *iddah.* Therefore, Jaising's (1996: 7) allegation according to his research on the laws of India, that the position of Muslim women under the laws is very unequal compared to men because divorced wives are not entitled to maintenance, is problematic. The period of *iddah* is a

period of time following the dissolution of marriage by divorce or death during which the divorced wife or widow is not permitted to enter into another marriage (At-Tuwaijiry, 2000: 34). According to At-Tuwaijiry, the *iddah* for a divorced woman who has not reached menopause is three menstrual cycles; for a divorced woman who has reached menopause or whose menstrual cycles are irregular, it is three lunar months. On the other hand, the *iddah* for wives whose husbands die is four months and ten days. For a woman who is pregnant, the *iddah* period lasts until she delivers the child. However, no *iddah* is prescribed for those women whose marriage has not been consummated. The wisdom of *iddah* is to show respect to and honour for the sanctity of the marriage bond, to determine the paternity of the offspring and to provide a period of time for reconciliation (At-Tuwaijiry, 2000: 34).

Even though the obligation of maintenance is provided in the *Quran*, the amount and nature of it has not been clearly provided. Thus, this is naturally left to Islamic scholars to define. According to Section 61 of the IFLA, the *Shariah* Court will base the assessment for maintenance on the means and needs of the parties, '*regardless of the proportion the maintenance bears to the income of the person against whom the order is made'*. The means and needs could be defined as all those things which are necessary to support a wife; these include the three basics of food, clothing and lodging as well as any other essential services and articles pertaining to the wife's contentment. According to the provision from the *Quran* which says that *'A woman must be retained in honour or released in kindness*[172]', a Muslim woman is even entitled to petition for divorce if the husband does not fulfil this duty (Section 52 (1) (c)).

[172] *Quran:* 2, verse: 22

Acknowledging the above fact that maintenance is the Muslim wife's right during marriage and not the husband's, and accepting that, at the same time, she could possess means of her own without an obligation to pay towards the upkeep of the household, there is clearly a dissimilar entitlement to rights between Muslim wife and husband in a family. A Muslim wife is confined by her duty to obey the husband as long as the husband fulfils his duty (Roberts, 2003: 64; Musawah, 2011: 13-14) and by her duty to perform biological functions which balance the husband's duty and otherwise. Indeed, a husband could be superior to a wife due to his responsibilities to maintain the family; as Stowasser mentioned earlier, he could be more authoritative. This is a common notion, as a leader of a state is also superior to the people of the state, considering that the leader has to bear more responsibilities for the nation. However, that this does not necessarily suggest that a wife is inferior or could not be superior by any means.

From the above analysis, it is understandable that the concept of *qiwamah* or superiority of the husband derived from *Surah Al-Baqarah*, Verse 228, and *Surah An-Nisaa,* Verse 34 in Islam is only applicable in a familial context, which is limited to the husband's responsibilities to provide for the family. Surah Al-Baqarah, Verse 228, stated that: *'And women shall have rights similar to the rights against them, according to what is equitable, but men have a degree over them'.* Additionally, Surah An-Nisaa', Verse 34, stated that: *'Men are the protectors and maintainers of women because Allah has given the one more (strength) than the other and because they support them from their mean'.* However, as I argued earlier, according to the Islamic faith, a husband's superiority comes from his responsibilities to maintain the family; thus, the *qiwamah* concept does not necessarily

disadvantage the wife. As stressed by Sayyid Sheikh Al-Hadi,[173] the concept of *qiwamah*, which is confined to the family sphere, does not render Muslim women unequal to men[174] (Noor, 2007). *Qiwamah* is synonymous with the superiority of the husband only because it connotes *'support'* and *'protection',* and has come to signify authority (Safi, 1998). If the husband fails to provide for the family, he no longer retains superiority in the family. Again, by referring to the concept of rights and duties which balance entitlements and performance as discussed in Chapter Two, it can be seen that superiority comes with duties to perform and inferiority comes with rights to claim. Therefore, both Muslim wives and husbands could be superior and inferior at the same time, thus balancing their status.

6.3.2.2 Women's Rights to be Protected: How do the Islamic Family Laws on Polygamous Marriage Work?

With regard to polygamous marriage, Malaysia permits the practice, yet it is limited by restrictions and preconditions set out in laws. The CEDAW regularly expresses its concern over the persistence of polygamous marriage by recalling its General Recommendation Number 21, which stated that polygamous marriage contravenes Muslim women's equal rights with men and must be abolished (General Recommendation No. 21, 13th Session, 1994: Comment para 14). This assertion was based on the view that polygamous marriage causes problems in the distribution of property and custody of children. Interestingly, the CEDAW has recommended the State Parties that reserved Article 16 to adopt measures that will bring religion and marriage in line with the Women's Convention. While appreciating the notion of adopting measures that will make religion and marriage comply

[173] Sayyid Syeikh Al-Hadi (1867-1934) was a Malay reformist who advocated the need for elevating the status of Malay women within the Malay societies. Al-Hadi's writings about Muslim women in Malaysia evidenced the influence of Muhammad Abduh and Qasim Amin on Al-Hadi's idea

[174] The changing perceptions of gender justice in the socio-legal context of Malay society were brought by Azharites. Among them was Sayyid Sheikh al-Hadi, who had developed a new gender consciousness and movement among Muslims

with the Women's Convention, the CEDAW needs to be more flexible in accepting the views and practices of *'others'* and *'others' traditions'*, and how they define equality. I argue that measures to be adopted to ensure that religious and marriage practices in Malaysia are in line with the Convention should allow the practice of polygamous marriage with restrictions, rather than abolishing it.

Thus, even though polygamous marriage is allowed in certain circumstances, it should not be practised unless all the wives have access to justice with regard to the distribution of property and custody of children; otherwise, polygamous marriage might amount to discrimination against women. Even though it is not easy to equally divide tangible matters and love, the meaning and concept of equality as discussed earlier could be applied in this situation. Equality is not about dividing something into similar quantities to give to all parties (Fletcher, 2002; Bakar, 2003, Kingdom, 1991); it is about distributing something according to people's needs (Yaacob, 1986), which might not involve similar quantities, but will produce equal satisfaction and outcomes. As Unterhalter (2005) stressed, equality is no longer a matter of equal amount.

Muhammad Abduh has advocated that the practice of polygamous marriage should be permitted within a limited context only, not as a general rule (Noor: 2007, 144). If polygamous marriage practised by any particular person is likely to bring injustice to wives, it must be prevented[175]. This is significant considering that, in the Islamic debate, even though polygamous marriage is permitted, this practice is neither encouraged nor prohibited (Noor, 2007: 143). Based on the interpretation of verse 129 of *Surah an-Nisa'* that justice rendered between the wives was something conceded as almost impossible to

[175] This view was highlighted in *Al-Hikmah*. 26 March 1936. p. 476. In this journal, Malay reformists called for restricted practices of polygamy in Malaysia. Quoted from Noor, Zanariah. 2007. *'Gender Justice and Islamic Family Law Reform in Malaysia'* in Kajian Malaysia. Jilid XXV. No. 2

achieve, Noor demonstrated Abduh's argument that the original intention of the *Quran* was monogamy, not polygamy. I note that Abduh's idea obviously did not prohibit polygamous marriage but was intended to provoke awareness of the theme of responsibility and introduce strict regulations for those who intended to engage in polygamy. Prohibition of polygamous marriage will deny females' rights to protection because some women have been protected by polygamous marriage (if a woman marries a married man). Polygamous marriage might protect unmarried women who are unable to support and provide for themselves except by husbands and could protect widows with children whose their breadwinners had passed away. There should at least be protection of their right to have legal and *'religiously approved'* relationships with men. The President of Islamic Friendship Association of Australia, Keysar Trad has alleged that *'recognising polygamous unions would help protect the rights of women in the relationship'* (Brisbanetimes.com.au., 24 June 2008).

The IFLA allows Muslim men in Malaysia to practise polygamy (Section 23). Although polygamous marriage is permitted for Muslims (Yusuf, 2005: 7), the Government has introduced laws and procedures in order to control the practice (Abd. Rahim, Ismail and Mohd Dahlal, 2008: 201). The main reason for the introduction of these laws and procedures is to ensure equality for all wives in a polygamous marriage, because, as stressed by Yaacob (1986: 93), if a man is not able to provide justice for all his wives, he is enjoined to marry only one. In fact, I submit that subjecting polygamous marriage to strict conditions shows that the Government is promoting monogamy as the preferred form of marriage. Therefore, the right to practise polygamous marriage may only be exercised with the Court's permission (Section 23 (1)). Traditionally, polygamous marriage was

considered the husband's right and could be freely practised in Malaysia among Muslims (Noor, 2007: 143), which was not desirable according to Islam.

Today, I consider that justice and equality are incorporated in the Islamic family laws in Malaysia in terms of polygamous marriage. Muslim men who want to contract a polygamous marriage have to complete an application to marry and specify their income, financial obligations, number of proposed dependants and the views of the existing wife (or wives) on the marriage (Section 23 (3) of the IFLA). Thereafter, a judge will evaluate the application and grant permission for the marriage if satisfied that the proposed marriage is just and necessary, having regard to such circumstances as sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights or insanity on the part of the existing wife or wives (Section 23 (4) (a)). According to Section 23 (4), the court must also be satisfied that the applicant will be able to support all his wives and dependants and be able to treat them equally, and that such intended marriage will not cause harm to the present wife/wives. This provision indicates that the application for polygamous marriage will not be approved by the court should the applicant be unable to support all his wives and dependants equally.

The standard practice in the Malaysian courts nowadays is to record the existing property belonging to the husband and the existing wife when the husband's application to contract polygamous marriage is granted. This is to ensure that the wife has a just and adequate share of the property acquired prior to the husband's marriage to another women. It is still left to the discretion of the judges to grant the proportionate amount depending on the contribution of the parties to the property. Indeed, polygamous marriage is not allowed if its practice will discriminate against women, be they the first, second, third or fourth wives

(Yaacob, 1986: 90). Thus, the CEDAW's concern in the General Recommendation No. 21 that polygamous marriage causes problems in the distribution of property might be resolved.

Furthermore, in Malaysia polygamous marriage might offer protection to Muslim women by legalising their relationships with men; this is preferable to them forming illegal relationships or being illegal wives, which could result in them being disadvantaged. Polygamous marriage might represent a female's choice of protection, as there are some women who have not been *'approached'* by any men, apart from the husbands of other women. The situation becomes difficult when the women need protection from a husband, who could maintain, provide and support them as breadwinner. Keysar Trad, the President of Islamic Friendship Association of Australia, believed that polygamous marriages should be recognised to protect the rights of women (*The Daily Telegraph*, 25 June, 2008). Moreover, some women enter into polygamous marriages of their own choice; they enjoy living in larger families, as in Burkina Faso (U. N. Doc. CEDAW/C/SR. 696, 2005: para 34).

On the other hand, polygamous marriage could be an alternative for a Muslim man who needs more than one wife due to his higher sexual drive (U. N. Doc. CEDAW/C/SR.816, 2008: para 75) because, as mentioned earlier, illegal sexual intercourse is totally prohibited in Islam. In a study conducted by Sisters in Islam between 2007 and 2010, it was found that *'to avoid adultery'* was among the top reasons for practising polygamous marriage in Malaysia (Ann, 2010). 46.3 per cent of polygamous marriage practices in this country, according to the research, were due to this reason. Polygamous marriage could also be

practised if the wife is afflicted with a chronic disease that prevents her from fulfilling her marital obligation,[176] or if the wife is infertile [177].

Thus, polygamous marriage has the potential to bring about justice for women, but not for all women. Musawah has demonstrated in its 2011 Report that polygamous marriage as practised today is largely harmful to women and children (Musawah, 2011: 35). Musawah based its assertion on the ground-breaking research conducted by the Malaysian non-governmental organisation, Sisters in Islam, and by academics from three Malaysian universities on the impact of polygamous marriage in Malaysia. This project included surveys and interviews with husbands, first and second wives and the children of the first and second wives. The research reported that 80 per cent of husbands thought that they could be fair to all their wives and children and, of these, only 30 per cent of first wives agreed that this was possible. The research also discovered that, compared to the 30 per cent of husbands who were very satisfied with their polygamous marriages, only seven per cent of the first wives and 13 per cent of the second wives reported that they were *'very satisfied'* with polygamous marriage. In Musawah's report, it was also stated that 44 per cent of the first wives had to take additional jobs to support the family after their husbands married the second wives. This may indicate that the first wives have to be responsible for the financial burden in the family as the breadwinner (husband) needs to maintain two families, which might contribute to the women's disadvantages.

[176] This is the view of Qasim Amin discussed in Noor, Zanariah. 2007. *'Gender Justice and Islamic Family Law Reform in Malaysia'* in Kajian Malaysia. Jilid XXV. No. 2. Although Qasim Amin has agreed that this reason could be used to justify the practice of polygamy, he will not personally practise polygamy for this reason because, according to him, women are not at fault for suffering chronic disease

[177] See Al-Manar. 1927. Vol. 28. pp. 29-35. Quoted from Noor, Zanariah. 2007. *'Gender Justice and Islamic Family Law Reform in Malaysia'* in Kajian Malaysia. Jilid XXV. No. 2

One might suggest that total prohibition of polygamous marriage could protect Muslim women from being disadvantaged and discriminated against; however, I argue that such prohibition may be insufficiently effective or appropriate to prevent women's disadvantages. For example, even though the laws in Turkey and Tunisia[178] (Roberts, 2003: 63; Donini, 2009), Kyrgyz Republic, Tajikistan and Uzbekistan (Musawah, 2011: 36) prohibit polygamous marriages, polygamous marriages occur secretly. In Turkey, for instance, polygamous marriage remains widespread in the deeply religious and rural Kurdish region of South-Eastern Anatolia, home to one third of Turkey's 71 million people (Bilefsky, 2006). A report prepared by academics at the University of Hacettepe in Ankara has revealed that nearly 187, 000 women in Turkey are in polygamous marriages despite the practice being illegal in this country (EurActiv Networkd, 2011). Bilefsky further explained that, since polygamous marriage is illegal, the *Imam* who conducts the marriage will be punished and the second wife (or third or fourth) will have no legal status, *'making them vulnerable when marriages turn violent'.* In Tunisia, polygamous marriage is forbidden under the 1956 laws based on the understanding that it is impossible for a man to be able to deal justly with more than one wife (Musawah, 2011: 34). In fact, it is a criminal offence punishable by a year's imprisonment or a fine of 240, 000 Tunisian Dinars or both for the wife and husband. In this perspective, even though polygamous marriage is totally prohibited by law, this will not necessarily bring justice to all women. Rather, women who contracted into *'illegal' marriage* as second, third or fourth wives might be disadvantaged by their illegal status as wives.

In situations where polygamous marriage occurs secretly, a wife is not treated justly and is not protected by laws as the husband has married another woman without her knowledge

[178] Turkey and Tunisia are countries with majority Muslim populations that do not apply *Shariah*

or authority. In Malaysia, for instance, even though the practice of polygamous marriage is allowed with strict legal conditions to ensure equality of all wives, it was reported that an average of four Malaysian Muslim couples solemnised their marriage without the first wife's knowledge in Southern Thailand every day during the first quarter of 2010[179] (*The Star*, 13 May 2010). This situation not only threatens the rights of legal wives but also jeopardizes the legal status of children born of such unions. I submit that the prohibition of polygamous marriage by law is not only ineffective in restraining polygamous marriage but also gives rise to other marital problems which, to a certain extent, are disadvantageous to women. Here, the most important thing is to have laws and special measures that substantively protect the first[180] wife and children rather than prohibit polygamous marriage.

Hence, I submit that polygamous marriage does not necessarily disadvantage Muslim women but could protect both women and men. Even though I agree that polygamous marriage might disadvantage women, I suggest that it is a *'choice'* for women that cannot be denied by laws. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa has recognised in its Article 6 that *'monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected'* (Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003). Polygamous marriage is unfair to women when it is wrongly practised and understood as a right of men only. Therefore I argue that, even though Muslim women are not allowed to marry more than one husband, considering that a wife is not a maintenance

[179] The Islamic Council of Narathiwat Province's (MAIN) Registrar, Ishak Mohamad, has admitted that among the reasons why many couples liked to solemnise their marriage in Southern Thailand are the *'cheaper package'* (which is RM320 per couple) and objections from families. See *The Star*, 13 May 2010

[180] In cases where a husband has married up to three or four wives, the laws must substantively protect the first and second or the first, second and third wives

provider this dissimilar entitlement to rights does not disadvantage women. The most important idea is that justice, dignity and the greatest happiness in life can be equally attained by both parties. Thus, by applying the principle of equality as informed by the Women's Convention and *Shariah* practised in Malaysia, and considering that the IFLA takes into account equal and just distribution of property between parties of the existing marriage and custody of children before granting permission for polygamous marriage, I argue that, if properly practised, and if special measures are accorded to wives by laws, polygamous marriage will not disadvantage Muslim women in Malaysia.

6.3.2.3 Talaq vs. Fasakh, Khulu' and Ta'liq

Divorce is permitted in Islam to avoid greater evil which might result from the continuation of the marriage (Ahmad, 1978: 4). In Malaysia, I note that Muslim women and men are given equal rights to dissolve their marriage but the methods of dissolution are not similar. The reason why the Government of Malaysia reserves Article 16 (1) (c) of the Women's Convention is because the Article confers similar entitlements to rights for wife and husband to dissolve the marriage; I will argue that similar entitlements may not protect the wife as a disadvantage person. According to the IFLA, Muslim women have the right to dissolve their marriage on the grounds of *fasakh, khulu'* and *ta'liq* whereas men may dissolve it on the ground of *talaq*.

In Malaysia, I trace that, due to their increased awareness of their own rights and their right to demand that their husbands fulfil their responsibilities, Muslim women have become more open to the idea of not confining family crises within the private (familial) sphere. Unlike poor Muslim women in other Muslim countries such as Egypt, who consider reconciliation a better option than divorce in cases of marital conflict (Watson, 1994), in

Malaysia Muslim women are not reluctant to petition for divorce should the marriage promise to bring them unhappiness. In Egypt, two interrelated reasons which enforce marital reunion are *'the economic costs imposed by legal dissolution of marriage and the high value attached to the security and stability of family life and conflict resolution'* (Watson, 1994: 37). In Pakistan, according to Ihsan and Zaidi (2006: 208), women who petition for divorce in court have been killed or injured.

On the other hand, in Malaysia women are the *'main clients'* in the *Shariah* Courts dealing with petitions for divorce (Azahari, 2008: 266). Abdullah (2001: 101-102) has stated that, according to her research on Muslim women and divorce in Malaysia, 56.6 per cent of the plaintiffs in divorce cases are women[181]. Earlier, Mohamad (1999: 241) found that 60 to 62 per cent of applications for divorce in *Shariah* Courts were made by women[182]. This shows that, according to Malaysian laws, women have equal entitlement to men to marry and to end marriage, as explained earlier. Thus, I note that Malaysia's situation is the reverse of that in other Muslim countries, which might explain why Muslim women can easily decide to marry by their own choice or to dissolve their marriages in case of marital conflict. Among other reasons, Muslim women in Malaysia are able to provide for the financial costs of petitioning for divorce and, because of the wide involvement of women in the public sphere (social and financial) which I discussed earlier, the value of security or stability of family life might no longer prevail over the *'single'* life.

[181] Abdullah has conducted research on 60 divorce files in Perlis *Shariah* Court in 1999. See Abdullah, Raihanah. 2001. 'Wanita, Perceraian dan Mahkamah Syariah' in Raihanah Abdullah (ed.) *Wanita dan Perundangan Islam.* Ilmiah Publishers Sdn. Bhd.

[182] Mohamed has conducted research in three states of Malaysia, which were Federal Territories of Kuala Lumpur, Pulau Pinang and Johor. See Mohamed, Maznah. 1999. 'Di Mana Berlaku Diskriminasi dalam Undang-Undang Keluarga Islam' in *Undang-Undang Keluarga Islam dan Wanita di Negara-Negara ASEAN*. Kuala Lumpur: IKIM

Generally, a Muslim husband can divorce his wife unilaterally, *'without assigning any cause and without the interference of the court'* (Ali, 2006: 31) or, as stressed by Islam (2006: 116), without reason or divorce proceedings. However, in Malaysia, a husband's right to dissolve marriage cannot proceed without the court's intervention and restrictions. Under the Islamic Family Law Enactments of all states, the *Shariah* Court can make an order relating to divorce by allowing a husband to pronounce a *talaq* (repudiation of marriage) in court after hearing the application (Section 47 of the IFLA). I note that, in such cases, the court may only issue a decree of divorce if satisfied that proper provision has been made for the wife and the children. However, judges usually do not intervene in mutual consent divorces (Section 47 (3)). If *talaq* is pronounced outside court, the parties may still refer the matter to court for verification of the termination of the marriage, and the law provides that men will have to pay up to RM1, 000 or be imprisoned for up to six months (Section 124), as pronouncement of divorce outside court is an offence.

On the other hand, I note that Muslim women in Malaysia may petition the court for *fasakh, khulu'* and *ta'liq*, which has the effect of dissolving the marriage. *Fasakh* means *'to cancel a contract'* (I. Doi, 1984: 171) and, according to the IFLA, *fasakh* is the annulment of a marriage by reason of any circumstance permitted by *Shariah* (Section 2). A wife is entitled to obtain an order for *fasakh* on any one or more of the following grounds (Section 52 (1) of the IFLA):

(a) that the whereabouts of the husband have not been known for a period of more than one year

(b) that the husband has neglected or failed to provide for her maintenance for a period of three months

(c) that the husband has been sentenced to imprisonment for a period of three years or more

(d) that the husband has failed to perform, without reasonable cause, his marital obligations (nafkah batin) for a period of one year

(e) that the husband was impotent at the time of marriage and remains so and she was not aware at the time of the marriage that he was impotent

f) that the husband has been insane for a period of two years or is suffering from leprosy or vitilago or is suffering from a venereal disease in a communicable form

(g) that she, having been given in marriage by her wali mujbir before she attained the age of baligh, repudiated the marriage before attaining the age of eighteen years, the marriage not having been consummated

(h) that the husband treats her with cruelty, that is to say, inter alia-

(i) habitually assaults her or makes her life miserable by cruelty of conduct; or

(ii) associates with women of evil repute or leads what, according to Hukum Syarak, is an infamous life; or

(iii) attempts to force her to lead an immoral life; or

(iv) disposes of her property or prevents her from exercising her legal rights over it; or

(v) obstructs her in the observance of her religious obligations or practice; or

(vi) if he has more wives than one, does not treat her equitably in accordance with the requirements of Hukum Syarak

(i) that even after the lapse of four months the marriage has still not been consummated owing to the wilful refusal of the husband to consummate it

(j) that she did not consent to the marriage or her consent was not valid, whether in consequence of duress, mistake, unsoundness of mind, or any other circumstance recognized by Hukum Syarak

(k) that at the time of the marriage she, though capable of giving a valid consent, was, whether continuously or intermittently, a mentally disordered person within the meaning of the Mental Disorders Ordinance 1952 [Ord. 31 of 1952] in the case of the Federal Territory of Kuala Lumpur, or the Lunatics Ordinance of Sabah [Sabah Cap. 74] in the case of the Federal Territory of Labuan, and her mental disorder was of such a kind or to such extent as to render her unfit for marriage

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

I argue that the wide and reasonable grounds of *fasakh* stated above would be very helpful to any wives wishing to apply for dissolution of marriage. Therefore, Nawaz's (1996: 15) assertion that a Muslim woman cannot divorce her husband easily can be challenged as such a situation does not prevail, according to Malaysian family laws for Muslims.

A wife can also divorce her husband on the ground of *khulu'* or redemption according to Islamic family laws in Malaysia. *Khulu'* is a right accorded to women to dissolve their marriage by *'agreeing to give up her dowry'* (Islam, 2006: 116). According to Maliki school of thought, *khulu'* means *'to return something'* (I. Doi, 1984: 192-197). Section 49 (1) of the IFLA stated: '*Where the husband does not agree to voluntarily pronounce a talaq, but the parties agree to a divorce by redemption or cerai tebus talaq, the Court shall, after the amount of the payment of tebus talaq is agreed upon by the parties, cause the husband to pronounce a divorce by redemption, and such divorce is bain sughra or irrevocable'*. I note that Muslim wives are allowed marital separation under very simple laws such as the requirement for wives to pay redemptions to husbands.

Other than *fasakh* and *khulu*', a wife can dissolve the marriage based on the prescribed *ta'liq* or stipulation on the ground of the husband's failure to keep the promise (Abd. Rahim, Ismail and Mohd Dahlal, 2008: 200) he made during the solemnisation of marriage according to Malaysian family laws. Section 2 of the IFLA states that *ta'liq* means '*a promise expressed by the husband after solemnisation of marriage in accordance with Hukum Syarak'.* The promise or prescribed particulars shall be entered by the Registrar in the Marriage Register immediately after the solemnisation of marriage (Section 22 (1) of the IFLA). The declaration or promise by the husband states that;

'I [name] solemnly declare that I have made ta'liq as follows:

Every time I leave my wife [name] for a period of four months continuously;

(1) or that I do not give her the compulsory maintenance for a period of four months or more;

(2) or that I cause hurt to the person;

or that I neglect her for four months, my wife can complain to any Kadi or Shariah Judge which if found to be true by the Kadi or Shariah Judge I shall be deemed to have divorced her by one talaq; and every time I ruju' her without her consent then I shall be deemed to have divorced her by another talaq'.

The court, after hearing the application made by the wife, may order the husband to pronounce *talaq* (Section 50). Under the IFLA, if the husband wishes to *ruju',*[183] the recohabitation must take place by mutual consent and without force (Section 51).

Hence, I argue that, even though Muslim wives and husbands are accorded different grounds and methods to dissolve the marriage, they have equal rights in doing so. This different entitlement does not have the effect or purpose of denying women's exercise and enjoyment of rights. Facio and Morgan (2009) stressed that according to Article 1 of the Women's Convention, any act or omissions which have the effect of denial of right amount to discrimination. The most important idea is that both have equal rights to determine whether they can end their marriage using particular reasons allowed by the laws if the marriage seems unlikely to bring happiness to their lives. As a husband has a right of *talaq*, a wife has rights of *fasakh, khuluk* and *ta'liq,* the objectives of which are equal, to dissolve the marriage. I note that similar entitlements to rights to dissolve the marriage as stated in Article 16 (1) (c) might not necessarily bring justice to women because a woman's right to divorce is permissible simply due to the failure of the husband to maintain her; this privilege is not given to the husband. Thus, different entitlements to rights in this perspective are important to uphold equal dignity and justice for women, because similar entitlements are likely to bring them unequal outcomes.

6.3.3 Right to Guardianship

[183] Section 2 of the IFLA: *'a return to the original married state'*

The Government of Malaysia reserves the provision pertaining to similar entitlements to rights in terms of guardianship of children (Article 16 (1) (f) of the Women's Convention). In this Section, I explain that the principal element in Article 16 (1) (f) on the issue of guardianship of children is the provision of similar rights and responsibilities with regard to guardianship, which are conferred on both mother and father according to Malaysian laws, but the entitlements to rights and responsibilities to ensure that the interests of the children are paramount differ. I argue that this is a different entitlement which will bring about justice to both mother and father, and also to children.

Islam considers that the mother is the best person to have custody of a son up to seven years of age (Syed Mohammad, 2001) and, according to *Hanafi* school of thought, a daughter until she attains puberty (Ali, 2000: 63). *Shafie* school of thought, however, allows custodianship of a daughter until she is married (Ihsan and Zaidi, 2006: 230). I find that, under Section 81 of the IFLA, a mother is considered the best person to have custody and guardianship of her infant children. In a study conducted by Abdullah in 1999 in Perlis[184] *Shariah* Court, only 5 per cent of guardianship rights were given to fathers (Abdullah, 2001: 113). The custody of illegitimate children[185] remains exclusively with the mother and her relations (Section 85). However, the father may also apply to the *Shariah* Court for custody of the legitimate children and the Court will generally consider the welfare of the child as the paramount consideration before deciding on the issue of custody (Section 86). The father, on the other hand, is required to pay maintenance during marriage and after the dissolution of the marriage for his children irrespective of whether the child is in his custody or in the custody of another person, including the mother and her relations,

[184] Perlis is one of 14 states in Malaysia

[185] Section 2 of the IFLA refers illegitimate child to a child born out of wedlock but not as a result of '*syubhah intercourse'*. *Syubhah intercourse* means intercourse performed on erroneous impression that the marriage was valid or intercourse by mistake and includes any intercourse not punishable by *Shariah*

or under the guardianship of another person (Section 72). A mother will only be required to pay for or contribute towards the maintenance of her child if the court finds that it is reasonable given her means (Section 72). To ensure that women are accorded the right of equal guardianship, a *'Cabinet Directive'* was issued in September 2000 which also allows mothers to sign all documents relating to their children (Malaysian Women's Aid Organisation, 2001).

Because the welfare of the child is the paramount consideration before a decision is made on the issue of guardianship, the question of whether mother and father are given equal rights to custodianship does not arise. Islam considers that the mother is the best person to have custody of children of up to seven years of age due to the biological nature of the mother, who can breastfeed; later, the father can apply to the court for custody of the children. At first glance, this seems unfair to the father; however, as the father is the one who is obligated to pay maintenance for his child irrespective of whether the child is in his custody, it is fair for the father not to bear the responsibility of raising the child. Moreover, the relationship between the father and child will continue as the father pays maintenance and has the right to spend time with his child, as specifically ordered by court. The situation might not be the same were the child under seven years of age to be in the custody of the father, because the mother is not the one who pays maintenance and the father cannot breastfeed. Therefore, this positive distinction would be equal for mother and father. Reservation entered by the Government of Malaysia in regard to this issue to serve justice and equality of outcome is parallel with the principle of equality under the Women's Convention's and Islamic principles. As noted by Unterhalter (2005: 30), *'equality is no longer a matter of equal amounts, but a more substantive idea associated with solidarities and confronting injustice'.*

6.3.4 Personal Rights

The Government of Malaysia reserves Article 16 (1) (g) of the Women's Convention which confers similar personal rights on Muslim women and men as wives and husbands, including the right to choose a family name, a profession and an occupation. Article 16 (1) (g) states that women and men must be ensured '*the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation'.* Muslim women retain their own names after marriage, as do men (Yusuf, 2005: 6-7). As practised in Malaysia too, married Muslim women and men retain their own names after marriage. The principal provision of this Article, which confers similar personal rights on wives and husbands, is guaranteed for both Muslim women and men in Malaysia, although their entitlements to rights differ. I note that the difference involves their personal entitlements to the right to work.

Unlike a husband, in Islam a wife can choose not to work if she does not wish to do so. However, it is an obligation for a husband to work or earn money, because, as discussed earlier, a husband must maintain and provide for the family. For a husband there is no choice, unlike for a wife, who can choose. As argued earlier, a wife is entitled to maintenance and is responsible for performing biological '*mother tasks'*, to become pregnant, to give birth and to breastfeed. However, Islam does not prohibit a wife from working as long as she does not neglect her duties as mother and wife (Al-Qardhawi, 1998). In fact, in Malaysia and according to Malaysian laws, as I discussed in Chapter Five, there is a fair equality of opportunity for the woman (wife) and man (husband) to work. The commitment to employment opportunities for both wives and husbands is common practice in Malaysia as fair equality of opportunity. As of 2010, the total

percentage of women in employment had increased to 46.1 per cent (Malaysian Department of Statistics). I note that most working wives/mothers will have a helper or maid at home to assist them in managing the household duties; this helper will also be paid for their work. Moreover, women may wish to work not necessarily to maintain their families but for their own satisfaction or because their expertise is needed. Indeed, as explained earlier, a working wife is not responsible for providing for the family; however, if the wife is willing to do so, she is not prohibited from performing this function. Therefore, in Malaysia, Muslim wives and husbands have equal rights to choose a family name, a profession and an occupation. Even though the entitlements to rights are different, because a wife could choose not to work, this does not cause any gender inequalities.

6.4 CONCLUDING REMARKS

As Malaysia ratified the Women's Convention and entered reservation to Article 16 (1) (a), (c), (f) and (g) in order to seek gender equality as understood from the Convention and in the Malaysian local context, I argued that the Malaysian legislation pertaining to the Islamic conception of equality for women is compatible with the objectives and principles contained in the Convention. *Shariah's* and the Women's Convention's notion of equality is equal dignity, equal access to justice and equal outcome; this might not locate women and men at the same *'starting'* place. Ali (2006) and Abdul Aziz (2005) have mentioned that the struggle for equality must come from within those societies. Different global visions of justice and specific visions in local contexts cannot be reconciled unless the CEDAW recognises the alternative conception of social justice and accepts ways in which local arrangements can promote human rights, particularly those relating to gender equality rights (Sally Engle Merry, 2006: 132).

I argued that different age limits for entering into marriage contracts according to Malaysian laws might not render Muslim women unequal because the laws could protect them from being disadvantaged. As, in Malaysia, girls mature earlier than boys, it is indeed reasonable to allow girls to enter into marriage contracts at 16 years of age. Girls can also continue their secondary education instead of committing themselves to marriage in their earlier teens. However, I argued that, to ensure that women will not be disadvantaged, the ideal age for marriage should be determined not only by biological criteria but also by all aspects of human significance, such as emotional, mental and financial aspects. While acknowledging the importance of setting girls' and boys' age limits at 16 and 18 years respectively, however, I argued that early marriage might be problematic. As explained by Abdullah (2001: 96), according to the studies conducted by Swift (1963), the number of dissolved marriages was increasing during the 1950s and 1960s in Malaysia due to early marriages. It was the culture in society at that time for daughters to marry at 16 or 17 years of age.

Thus, the age limit of 16 provided by law might be inadequate to protect women from being disadvantaged. Throughout the above analysis, it seems that the law is insufficient for social change and might disadvantage girls when they are treated differently, which amounts to *'less favourably'* than men. Different treatment might amount to discrimination when it does not bring about equal outcomes. In terms of education, for instance, girls tend to forfeit higher education to give priority to their domestic and marital life, which might not necessarily happen to boys. Thus, I propose in this perspective that a range of special measures in education and health are important as effective strategies in protecting married girls as a disadvantaged group in Malaysia.

Pertaining to maintenance, I argued that a Muslim wife is not responsible for supporting her family because she might become pregnant, give birth and be required to breastfeed. That is why according to Malaysian laws, the duty to provide for a household's needs is only imposed on the husband. However, Islam does not prohibit a wife from maintaining her family if she is willing to do so, or to work, even though she is not responsible for providing for her family. The '*husband's only duty'* (here, I prefer to say that to maintain a family is a duty, not a right) is to not disadvantage the wife by making her carry the extra burden of working and at the same time performing her biological tasks.

I argued that polygamous marriage rights, which are only given to Muslim men, do not necessarily disadvantage Muslim women, because a wife is not a maintenance provider. Thus, a wife must not be burdened with the task of providing for a family because she has to perform her biological functions. Therefore, I argued that to allow a wife to marry more than one husband would defeat the purpose or wisdom of polygamous marriage. The circumstance in which polygamous marriage is unfair to women is when it is wrongly practised. That is why the Government of Malaysia has introduced laws and procedures in order to control the practice (Abd. Rahim, Ismail and Mohd Dahlal, 2008: 201). The Malaysian laws on polygamous marriage require Muslim men who want to contract a polygamous marriage to complete an application to marry and specify their income, financial obligations, number of proposed dependants and the views of the existing wife (or wives) on the marriage (Section 23 (3) of the IFLA). The most important idea of equality here is that justice, dignity and the greatest happiness in life can be equally attained by both parties. However, a wife might not be treated justly and is not protected by laws if polygamous marriage occurs secretly. Thus, by applying the principle of equality as

informed by the Women's Convention and *Shariah* practised in Malaysia, and considering that the IFLA takes into account equal and just distribution of property between parties of the existing marriage and custody of children before granting permission for polygamous marriage, I argue that, if properly practised, and if special measures are accorded to wives by laws, polygamous marriage will not disadvantage Muslim women in Malaysia.

In terms of dissolution of marriage, I argued that a Muslim wife has the right to divorce her husband on the grounds of *fasakh*, *khulu'* and *ta'liq*, whereas a husband can do so by a pronouncement of *talaq*; each has the same objective, which is to dissolve the marriage. According to Malaysian laws, a wife has the right to dissolve the marriage simply because of the husband's failure to maintain her (Section 52 (1) of IFLA). Regarding guardianship, I traced that the Malaysian laws see the welfare of the child as the paramount consideration before the issue of custody is decided upon (Section 86). Islam considers that the mother is the best person to take custody of children of up to seven years of age due to her biological ability to breastfeed (Syed Mohammad, 2001); later, the father can apply to the court for custody of the children. At first glance, this seems unfair to the father; however, as the father is the one who pays maintenance for his child irrespective of whether the child is in his custody, I would say that it is a positive distinction and fair for the father not to have to bear the responsibility of raising the child.

On the other hand, a husband may be relieved not to have to raise the children, although he will be aware that paying maintenance is not an easy task. Moreover, the relationship between the father and child will continue as the father pays maintenance and has the right to spend time with his child as specifically ordered by court. The same might not occur were a child under seven years of age to be in the custody of the father, because the mother

is not the one who pays maintenance and the father cannot breastfeed. With regard to personal rights as wife and husband, I argued that both have equal rights even though a wife might choose not to work. This does not necesarily discriminate against women, as Islam obligates only the husband to provide for the family, even though the wife could work if she wanted to, provided that she did not neglect her duties as mother and wife (Al-Qardhawi, 1998).

I argued that, with the earlier understanding that the term *'equality'* as used in the Women's Convention is compatible with the Malaysian laws on Muslim women's rights, the reservation of Article 16 (1) (a), (c), (f) and (g) entered by the Government of Malaysia will not conflict with the object and purpose of the Women's Convention should the few areas that treat women less favourably which I discussed throughout this analysis be improved. I submitted that the terms used in the provision of Article 16 (1) (a), (c), (f) and (g) of the Women's Convention are against the object and purpose of the Convention itself. This is because the Convention's principle of equality is intended to ensure equal outcomes (Facio and Morgan, 2009). Muslim women and men might be treated differently or given different entitlements to rights, but the outcomes must be equal; however, conferring '*similar rights'* on both Muslim women and men in all matters relating to marriage and family relations as stated in Article 16 (1) (a), (c), (f) and (g) might defeat the principle of equality. I argued that the provision must be read as *'equal rights'*, not *'same rights'*, because similar is not necessarily equal. The most important task in the analysis of equality in this research is to attain equality of outcomes, even with dissimilar entitlements to rights. Therefore, conferring similar rights on women and men might cause discrimination against the disadvantaged group in this situation, women. As the Convention's principles are intended to ensure equal outcomes, granting women and men similar rights and

responsibilities without considering local context and people's choice in performing their tasks as wives and husbands is against the Convention's idea of equality. This may be why Egypt has stated that withdrawal of reservation to Article 16 of the Women's Convention would *'diminish the rights of women under Islamic law'* (U. N. Doc. CEDAW/C/EGY/7, 2008: Part IV, para 16.1).

CHAPTER SEVEN

CONCLUSION AND PROPOSED SOLUTIONS

7.1 CONCLUSION

In this concluding Chapter, I summarise the main arguments. I have argued that the human rights laws affecting Muslim women in Malaysia are not entirely irreconcilable with the Women's Convention. Insofar as this is the case, I have argued that understanding the notion of *'equality'* and how its value affects the laws and policies is important to construct the possibilities of harmonisation between the Malaysian laws on Muslim women's rights and the Women's Convention. Throughout the thesis, I have argued that formal equality is equally as important as substantive equality if women are to be guaranteed equality with men.

In Chapter One, I set out the structure of this thesis and outlined the problem that the thesis would address. This Chapter concisely specified the principal aim of the research which was to explore the possibility of harmonisation of the Women's Convention with Malaysian laws on Muslim women's rights. I provided the general themes and background to the discussion, as well as the issues and the conceptual framework of the study. I explored the method of research regarding the harmonisation of laws and indicated the importance of synchronising the substance of the laws. According to the Former Chief Justice of Malaysia, Dato' Abdul Hamid Mohamad, to harmonise laws, attention must be paid to the substance of the laws, as well as to the form (Mohamad, 2003). This Chapter briefly introduced the concept of rights and equality in the international and Islamic legal

jurisdictions and declarations and the positive attention to women's rights in Malaysia. I concisely initiated a discussion on legal protection of women in Malaysia to sketch the main arguments and discussions for all the chapters. In Chapter One, I also highlighted the literature review, objective, the research's significance and scope, the methodology and the structure of the thesis.

Chapter Two examined the jurisdictional background of rights in international and Islamic human rights jurisprudences and deliberated on its conceptual analysis in the international and Islamic human rights instruments underpinned by the UDHR, UIDHR and CDHRI. I considered whether *'rights'* exist in Islam. I applied the introductory concept of *'rights'* by Mohammad (2003) to argue that the notion of *'rights'* is not a concept foreign to the Islamic tradition. In the analysis of whether rights in Islam are harmonious with rights in Western terms, I drew upon Lacey's (2004) and Mohammad's (2003) ideas of rights to argue that international and Islamic human rights jurisprudences share similar meanings and principles of rights. The Islamic-based human rights jurisprudence has embodied a meaning of rights similar to that of international human rights to protect and promote values and ideals that reaffirm equal dignity and justice for human beings. The subject (individual and collective) and object (choice and interest) of rights in the international and Islamic human rights doctrines also share similar principles justifying human rights. The international and Islamic human rights doctrines focus on the correlative relationship between rights and duties and the non-absolute autonomy of individual choice to enable the interests of the community to be considered; this balances the rights of all individuals as human beings.

I discussed a range of feminist viewpoints of rights in an attempt to explore a wider understanding of rights from women's perspective and to show how their critiques have informed the Women's Convention. This was intended to critically review existing formulations of rights in these diverse traditions and to show that they share similar meanings and principles of rights as they have important implications when applied to Muslim women's rights. Insofar as this is the case, I supported arguments that there are still differences, but the dissimilarities do not indicate that they contradict each other, as they are similar in concepts and principles. I analysed whether *'rights'*, as a legal subject, is gendered. I examined how the principle of rights might be reconstructed for the purpose of upholding gender equality should *'rights determine the identity of the rights-bearer'* (Krishnadas, 2007: 161). From the theory that *'rights'* are an individual entitlement, I considered the critique that individual entitlements are not absolute (Lacey, 2004). Through my analysis of the image of rights' subject, I argued that the framework of non-absolute individual entitlements constructs a value of interest and a wider coverage of rights, which limits the gendered nature of rights. This theoretical review developed a framework to analyse whether rights could inform equality.

I critically examined how the conception of rights informs the international and Islamic human rights underpinned by the UDHR, the UIDHR and the CDHRI in an attempt to grasp an idea that reconciles international and Islamic human rights instruments on the notion of rights. I argued that both jurisprudences and all three Declarations present rights as an instrument for equality among human beings. The tenets of justice and dignity, rights and duties and non-absolutism of rights are the principles that accommodate similar values of the human rights concept underpinned by the UDHR, UIDHR and CDHRI. I argued that

the concept of rights in Islam underpinning the UIDHR and CDHRI is capable of harmonisation with the UDHR.

Next, in Chapter Three, I analysed the jurisdictional background of equality in international and Islamic human rights debates and feminist arguments and deliberated on the conceptual analysis of gender equality in the international and Islamic human rights instruments underpinned by the UDHR, UIDHR, CDHRI and the Women's Convention. This was intended to review existing formulations of the term *'equality'* in these diverse traditions and to trace how the notion of equality is shared in the international, Islamic human rights and feminist points of view. I presented an analysis of the principle of equality in the Women's Convention to consider whether the application of substantive equality (different entitlements to rights for women and men in marriage and family relations in order to address gender disadvantage) in the UIDHR and CDHRI is harmonious with the Women's Convention.

I drew upon Fletcher's (2002) and Bakar's (2003) ideas of equality to argue that Islamic human rights jurisprudence and feminist standpoints share similar meanings and principles of equality. I argued that similarity of legal treatment does not necessarily denote equality, because if a woman occupies a different position from a man to begin with, then treating them with total similarity will simply perpetuate the differences between them. I traced how an extended equality model which focuses on the subordinated group is rather significant in the analysis of gender equality. The central inquest of this model is into the *'disadvantage'*, and whether the law contributes to the subordination of women (disadvantaged group).

I considered whether both formal and substantive notions of equality inform the UDHR, UIDHR and CDHRI. I argued that the UDHR is harmonious with the UIDHR and CDHRI in terms of the *'language of equality'*, but conflicting in terms of different entitlements to rights for women and men in marriage and family relations. I presented an analysis of the principle of equality in the Women's Convention, drawing upon Facio and Morgan (2009), to consider whether the application of substantive equality (different entitlements to rights for women and men in marriage and family relations in order to address gender disadvantage) in the UIDHR and CDHRI, although irreconcilable with the UDHR, is harmonious with the Women's Convention. I argued that dissimilar entitlements to rights for Muslim women and men in the UIDHR and CDHRI pertaining to marriage and family relations are consistent with the extended equality model which focuses on the disadvantaged group to ensure equal outcomes. The same battle has been fought in the feminist debates against *'unequal'* liberal equality, which addressed the Women's Convention. According to the Women's Convention, inequality can arise from the distinction, exclusion or restriction of women, any act or omission that has the *'effect'* or *'purpose'* of denying women's exercise and enjoyment of all rights, or impairment of recognition, enjoyment or exercise of women's rights in all aspects of life, to be precise, in civil, political, economic, social and cultural life (Facio and Morgan, 2009). Hence, throughout my analysis, I argued that, on the application of substantive equality (that equality should not be reduced to sameness), the UIDHR and CDHRI are not entirely harmonious with the UDHR, but are reconcilable with the Women's Convention.

Chapter Four illustrated the broad historical background of the Malaysian legal system and offered an overview of the sources of human rights laws in Malaysia and an analysis of the contemporary legal protection with regard to the Federal Constitution and other

legislations. I provided an overview that Islamic textual sources have formed part of the sources of Malaysian laws on human rights and Muslim women's rights, because the laws of the Malay land were Islamic-based, as can be traced in most of the digests. Kheng (2001) has argued that the idea of rights and freedom was already in place even before the colonial period and was not of Western origin. However, I traced that Malaysia has drafted its human rights provisions which are parallel with Western-based and Islamic-based Declarations. I examined Part II of the Federal Constitution to acquire a legal picture of Malaysian laws on fundamental liberties and to consider whether woman is a legal subject. In my exploration of the fundamental liberties of Malaysian citizens, I argued that woman is a legal subject under Malaysian laws.

I considered Malaysia's progress towards empowerment of women, women's rights and gender equality laws in an attempt to trace whether Malaysia has been committed to gender equality as informed by global standards underpinning the Women's Convention. I examined how the term *'equality'* is interpreted under the Malaysian Federal Constitution and statutes, policies, administrative actions and programmes to determine a clear method of analysis in exploring whether Malaysian laws on Muslim women's rights could be harmonised with the Women's Convention. I argued that it is possible to admit that the notion of equality which informs the Women's Convention is harmonious with the principle of right to equality as adopted by Article 8 of the Malaysian Federal Constitution, statutes and policies. I argued that Malaysia enacts laws on human rights (fundamental liberties) under the Federal Constitution purposely to prevent any forms of bias and intolerance among citizens with regard to the laws and policies of the government and to create positive opportunities for vulnerable groups to participate in development processes, which define how gender inequalities are to be eliminated. Apart from the laws, the

Government applies equality through appropriate means, such as policies, administrative decisions and programmes.

I analysed whether *'de facto'* equality is considered. I argued that the interpretation of *'equality'* is the key to constructing the possibilities of harmonisation between the Malaysian laws on Muslim women's rights and the Women's Convention. I argued that Malaysia has included sex as a prohibited ground of discrimination in its national laws and addressed the structural nature of violation of Muslim women's rights through the Women's Convention. I configured that Malaysian laws provide and secure equal dignity and justice for Muslim women's rights and that equality is not only formal but also substantive. I examined how Muslim women's disadvantages are taken into consideration while securing their equal dignity and justice.

I considered the extent to which Malaysian laws on Muslim women's rights are in line with the Women's Convention based on the principles of equality in Chapter Five. I examined whether Malaysia has taken all appropriate measures, including laws, policies, administrative decisions and programmes, to eliminate women's disadvantages based on the concluding comments of the CEDAW made against Malaysia in its Thirty-Fifth Session in New York in 2006 and application of equality informed by the Women's Convention. These are in regard to the elimination of gender stereotypes, public and political life, employment, adequate sanctions for acts of violence against women, trafficking and rural women. I analysed whether the Government of Malaysia has amended or abolished existing laws, regulations and practices that constitute the disadvantaging of women and modified social and cultural patterns of conduct of women and men which are

based on the idea of superiority and inferiority of either of the sexes in economic and social mainstream activities and marriage and family relations.

I considered whether Malaysia is committed to undertaking a series of measures to end gender discrimination laws in all forms and to incorporate the principle of equality of women and men in its legal system. I argued that the Women's Convention has provided a wide and general definition of the nature of rights, which might allow ratified State Parties to interpret every single provision in the light of their national circumstances and cultural and religious beliefs, provided that the domestic laws guarantee gender equality and do not conflict with the object, purpose and principle of the Convention. I argued that Malaysia has incorporated the substance of the Convention, which is the principle of equality, in its national legislation, policies, administrative decisions and programmes. I concluded that Malaysia has taken appropriate measures, including laws, policies, administrative decisions and programmes, to eliminate discrimination against Muslim women based on the principal areas of concern and recommendations of CEDAW in the concluding comments made against Malaysia following the Thirty-Fifth Session in New York. I argued that the latest enactments and amendments of laws to prevent women from being treated unequally evidence the sensitivity of the Government to gender equality. I argued that the Government of Malaysia has taken positive steps to empower Muslim women. However, to achieve congruity with the tenets of the Women's Convention, there are a few areas that need specific improvements for the betterment of the laws in securing Muslim women's equality rights. Like others, I agree that having gender equality laws could be regarded as being in the best interest of Muslim women even though social construction to eliminate gender stereotyping is equally important.

In Chapter Six, I analysed the application of Muslim personal laws and their implications for Muslim women's rights in Malaysia. I analysed whether, in the Malaysian *Shariah* local context, the reservation of Article 16 (1) (a), (c), (f) and (g) is against the object and purpose of the Women's Convention. I did not include Article 9 (2) in my analysis, as the basis of reservation of this Article is not its non-conformity with *Shariah* but with Article 14, Article 15, Article 24 (4), Article 26 (2) and Second Schedule Section 1 (d) of the Federal Constitution. I answered the question of whether the particular reservation entered by the Government of Malaysia has made Muslim women's rights laws in Malaysia incompatible with the Women's Convention. This is significant as the question of whether the Malaysian laws on Muslim women's rights might possibly be harmonised with the Women's Convention might be best constructed if the Article reserved by the Government of Malaysia does not conflict with the object and purpose of the Convention. I argued that Article 16 (1) (a), (c), (f) and (g), which refers to the '*same rights'* conferred on both Muslim women and men in all matters relating to marriage and family relations, is against the object and purpose of the Convention itself. I argued that the Convention's principles is to ensure equality of outcome, but granting Muslim women and men similar rights and responsibilities without considering their differences is against the Convention's idea of equality.

I argued that the Malaysian legislation pertaining to the Islamic conception of equality for women is compatible with the objectives and principles contained in the Convention. *Shariah's* and the Women's Convention's notion of equality is equal dignity, equal access to justice and equal outcome; this might not locate women and men at the same *'starting'* place. The conflicting situation between these two doctrines concerns the application of laws only, which does not render them irreconcilable. However, again, there are a few

areas that need specific improvements because there are situations where women are treated differently and, thus, *'less favourably'* than men. The general rule is that women and men can only have different entitlements to rights if different entitlements will achieve equal results. However, as stressed by Facio and Morgan (2009), women might be disadvantaged by a distinction that treats them less favourably than men. Thus, to ensure that the reservation of Article 16 (1) (a), (c), (f) and (g) does not prevent Muslim women's rights laws in Malaysia from being in harmony with the Women's Convention, a few areas in which women are treated less favourably need to be improved.

7.2 PROPOSED SOLUTIONS

Firstly, I offer the view that the wording of Article 16 (1) (a), (c), (f) and (g) of the Women's Convention must be amended from '*same rights'* to *'equal rights'* to synchronise it with the principle of the Convention itself. Having acknowledged that the principle of equality in the Women's Convention is harmonious with the principle of equality in Islam, one might ask why the majority of Islamic nations reserve this Article. The answer is that the wordings used in this Article are not consistent with the Convention's principle of equality. '*Same rights'* is not similar in wording and meaning to '*equal rights'*. As I have argued throughout this thesis, similar is not necessary equal; therefore, women might be disadvantaged in the marriage and family domain were they to be given similar entitlements to rights as men.

Secondly, I propose the idea that the meaning, concept and principle of equality according to the Women's Convention and *Shariah* be widely understood and conveyed to people through education and public discourse by Islamic women legal scholars as an academic

contribution. So far, the term equality has commonly been understood as treating people similarly, without taking into consideration the possibility that similar application of rules to unequal groups or individuals might achieve unequal results. The problem in Malaysia nowadays is that women's movements themselves do not have a pluralistic understanding of equality according to various cultures and religions; therefore they have tried to universalise the idea of equality based on their own definition. The women's movements claim that placing women as the subject would settle the multicultural or multi-religious issues concerning women, but the movements ignore how people's religions address their believers. I propose that '*understanding equality'* be embedded in all teaching subjects in secondary schools and universities. Then men would respect women as human beings, as people similar to them, and they would realise that they have duties to perform for women.

My third proposal is to explain that rights should be understood as being correlated with duties and that people should realise that rights can only be claimed if duties are performed for others. This means that individual rights are not absolute, because it is a matter of whether the community rights should be considered as well. Fourthly, I recommend that Malaysian society be aware of any kind of disadvantages due to gender that have been occurring or might occur. The most important point is that Muslim women themselves must able to differentiate between objective and patriarchal or impartial and male-biased laws, regulations or even social structures.

Fifthly, I propose that developing a culture to respect and appreciate women's rights and encouraging men to participate in all actions towards equality would help eliminate discrimination against women in general (not necessarily just Muslim women). It is well understood that, anywhere in this world, women are always the likely victims of criminals.

This might occur due to a lack of respect for women's right to protection, their social rights, and their right to be treated as human (or man) or possibly because men see women as second-class human beings who deserve second-class treatment and who can be victimised. Therefore, encouraging men to participate in all actions towards equality would be a new dimension in the efforts to empower women in Malaysia. This would not only empower women and their lives but would also create awareness among men to appreciate their masculinity by protecting and providing for women, especially in the family unit, rather than considering themselves superior to them.

Lastly, I suggest that it is crucial to explain the objectives, functions and methods of feminism in terms of how they might apply to Malaysian society. Perceived resistance to feminism or *womanism* has so far been due to public misunderstanding that the interests of feminism are only suitable for Western people in Western countries, not for Muslims in Malaysia. This has resulted in ignorance of the women's movement in Malaysia and the denial of its voice raised on behalf of Muslim women for their protection. However, the historical development of women's rights in this country has proved that the situation of Malaysian Muslim women and their rights has been empowered due to the feminists' struggles since the 1930s.

The Malaysian scenario, in which society rejects the women's movement, feminism and the ideas brought by them, has resulted in legal constraints that are hindering the development of women's legal protection. To win over Malaysian society, I advise women activists in Malaysia to base their approach on reflecting local women's voices and to engage in local cultural dialogue, rather than copying the ideas and thoughts of so-called *'universal'* standards that may not, in fact, be universal. According to Krishnadas (2007:

161), it was *'only in the women's groups that women could share their experiences and conceptions of rights to reflect each other's identities'.* Even defining Malaysian Muslim women's rights and freedom is, according to Othman (1998: 176), a task that must proceed on a complex cultural and political battleground in the midst of acute polemical contests over Islamization, modernisation and cultural relativism, furthermore speaking on their behalf.

The theory of feminisms is as important in Malaysia as it has been in other countries. It has been proved everywhere in the world, including in Malaysia, that legal reforms and women's empowerment have been underpinned by feminists' struggles towards equality. Therefore, to reject feminism is to deny women's rights because not all women can address the processes that discriminate against them, especially when the social and legal atmospheres are impartial and objective. Feminism, on the other hand, can detect the gendered and patriarchal nature of laws, policies or societies and their institutions. Having said that, Muslim women's rights and equality in Malaysia could be improved swiftly were feminists to enter into all spheres irrespective of gender and religious sectors, provided that the movements understand the substance of equality and non-discrimination in all cultural and religious local contexts.

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APPENDIX

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

(WOMEN'S CONVENTION)

INTRODUCTION

On 18 December 1979, the Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly. It entered into force as an international treaty on 3 September 1981 after the twentieth country had ratified it. By the tenth anniversary of the Convention in 1989, almost one hundred nations have agreed to be bound by its provisions.

The Convention was the culmination of more than thirty years of work by the United Nations Commission on the Status of Women, a body established in 1946 to monitor the situation of women and to promote women's rights. The Commission's work has been instrumental in bringing to light all the areas in which women are denied equality with men. These efforts for the advancement of women have resulted in several declarations and conventions, of which the Convention on the Elimination of All Forms of Discrimination against Women is the central and most comprehensive document.

Among the international human rights treaties, the Convention takes an important place in bringing the female half of humanity into the focus of human rights concerns. The spirit of the Convention is rooted in the goals of the United Nations: to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women. The present document spells out the meaning of equality and how it can be achieved. In so doing, the Convention establishes not only an international bill of rights for women, but also an agenda for action by countries to guarantee the enjoyment of those rights.

In its preamble, the Convention explicitly acknowledges that "extensive discrimination against women continues to exist", and emphasizes that such discrimination "violates the principles of equality of rights and respect for human dignity". As defined in article 1, discrimination is understood as "any distinction, exclusion or restriction made on the basis of sex...in the political, economic, social, cultural, civil or any other field". The Convention gives positive affirmation to the principle of equality by requiring States parties to take "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"(article 3).

The agenda for equality is specified in fourteen subsequent articles. In its approach, the Convention covers three dimensions of the situation of women. Civil rights and the legal status of women are dealt with in great detail. In addition, and unlike other human rights treaties, the Convention is also concerned with the dimension of human reproduction as well as with the impact of cultural factors on gender relations.

The legal status of women receives the broadest attention. Concern over the basic rights of political participation has not diminished since the adoption of the Convention on the

Political Rights of Women in 1952. Its provisions, therefore, are restated in article 7 of the present document, whereby women are guaranteed the rights to vote, to hold public office and to exercise public functions. This includes equal rights for women to represent their countries at the international level (article 8). The Convention on the Nationality of Married Women - adopted in 1957 - is integrated under article 9 providing for the statehood of women, irrespective of their marital status. The Convention, thereby, draws attention to the fact that often women's legal status has been linked to marriage, making them dependent on their husband's nationality rather than individuals in their own right. Articles 10, 11 and 13, respectively, affirm women's rights to non-discrimination in education, employment and economic and social activities. These demands are given special emphasis with regard to the situation of rural women, whose particular struggles and vital economic contributions, as noted in article 14, warrant more attention in policy planning. Article 15 asserts the full equality of women in civil and business matters, demanding that all instruments directed at restricting women's legal capacity "shall be deemed null and void". Finally, in article 16, the Convention returns to the issue of marriage and family relations, asserting the equal rights and obligations of women and men with regard to choice of spouse, parenthood, personal rights and command over property.

Aside from civil rights issues, the Convention also devotes major attention to a most vital concern of women, namely their reproductive rights. The preamble sets the tone by stating that "the role of women in procreation should not be a basis for discrimination". The link between discrimination and women's reproductive role is a matter of recurrent concern in the Convention. For example, it advocates, in article 5, "a proper understanding of maternity as a social function", demanding fully shared responsibility for child-rearing by both sexes. Accordingly, provisions for maternity protection and child-care are proclaimed as essential rights and are incorporated into all areas of the Convention, whether dealing with employment, family law, health care or education. Society's obligation extends to offering social services, especially child-care facilities that allow individuals to combine family responsibilities with work and participation in public life. Special measures for maternity protection are recommended and "shall not be considered discriminatory". (article 4). "The Convention also affirms women's right to reproductive choice. Notably, it is the only human rights treaty to mention family planning. States parties are obliged to include advice on family planning in the education process and to develop family codes that guarantee women's 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".

The third general thrust of the Convention aims at enlarging our understanding of the concept of human rights, as it gives formal recognition to the influence of culture and tradition on restricting women's enjoyment of their fundamental rights. These forces take shape in stereotypes, customs and norms which give rise to the multitude of legal, political and economic constraints on the advancement of women. Noting this interrelationship, the preamble of the Convention stresses "that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality of men and women". States parties are therefore obliged to work towards the modification of social and cultural patterns of individual conduct in order to eliminate "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" (article 5). And Article 10 (e) mandates the revision of textbooks, school programmes and teaching methods with a view to eliminating stereotyped concepts in the field of education. Finally,

cultural patterns which define the public realm as a man's world and the domestic sphere as women's domain are strongly targeted in all of the Convention's provisions that affirm the equal responsibilities of both sexes in family life and their equal rights with regard to education and employment. Altogether, the Convention provides a comprehensive framework for challenging the various forces that have created and sustained discrimination based upon sex.

The implementation of the Convention is monitored by the Committee on the Elimination of Discrimination against Women (CEDAW). The Committee's mandate and the administration of the treaty are defined in the Articles 17 to 30 of the Convention. The Committee is composed of 23 experts nominated by their Governments and elected by the States parties as individuals "of high moral standing and competence in the field covered by the Convention".

At least every four years, the States parties are expected to submit a national report to the Committee, indicating the measures they have adopted to give effect to the provisions of the Convention. During its annual session, the Committee members discuss these reports with the Government representatives and explore with them areas for further action by the specific country. The Committee also makes general recommendations to the States parties on matters concerning the elimination of discrimination against women.

The full text of the Convention is set out herein

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women has the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

PART I

Article I

For the purposes of the present Convention, the term "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.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(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 refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to en sure 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.

Article 4

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.

Article 5

States Parties shall take all appropriate measures:

(a) 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;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

PART III

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;

(g) The same Opportunities to participate actively in sports and physical education;

(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to work as an inalienable right of all human beings;

(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

(b) The right to bank loans, mortgages and other forms of financial credit;

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

Article 14

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(a) To participate in the elaboration and implementation of development planning at all levels;

(b) To have access to adequate health care facilities, including information, counselling and services in family planning;

(c) To benefit directly from social security programmes;

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;

(e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;

(f) To participate in all community activities;

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

PART IV

Article 15

1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16

1. 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.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

PART V

Article 17

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

Article 18

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(a) Within one year after the entry into force for the State concerned;

(b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 19

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

Article 20

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.

2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. (amendment, status of ratification)

Article 21

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

2. The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

Article 22

The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

PART VI

Article 23

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:
(a) In the legislation of a State Party; or

(b) In any other international convention, treaty or agreement in force for that State.

Article 24

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

Article 25

1. The present Convention shall be open for signature by all States.

2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.

3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 26

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 27

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 29

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 30

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, duly authorized, have signed the present Convention.