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**CONSTRUCTIVE HARMONISATION OF ISLAMIC FAMILY
LAW AND THE WOMEN'S CONVENTION**

Nurulbahiah Awang (a)* & Nik Salida Suhaila Nik Saleh (b)

*Corresponding author

(a) Lecturer College of Computer Science & Information Technology Tenaga Nasional University, Jalan IKRAM-UNITEN, 43000 Kajang, Selangor, Malaysia, Nurulbahiah@uniten.edu.my

(b) Senior Lecturer Faculty of Shariah and Law Science Islamic University of Malaysia, 71800 Nilai, Negeri Sembilan, Malaysia, Salida@usim.edu.my

Abstract

Islamic family law on the rights of women has long been presumed as discriminatory against women because of different entitlements to rights and duties between women and men. However, it is argued by scholars that justice and equality do not reduced to sameness. It is contended that justice and equality could be achieved by considering and acknowledging the differences among human beings. Human beings are naturally different in kind of sexual and religious or cultural factors which become the crucial determinants for the basis of non-discrimination. This study highlights the attributes of rights applied by Islamic Family Law (Federal Territories) Act 1984 (IFLA) and it's concept of difference in achieving justice and equality between women and men in marriage and family relations. This study also examines the objective of Women's Convention (CEDAW) in eliminating discrimination against women. The purpose of this study is to find the divergences and convergences of IFLA and CEDAW in order to harmonise different jurisprudences of law within the principle of justice and equality. It is traced that both IFLA and CEDAW acknowledge the differences of human beings in their sexual and cultural factors. Even though the concept of difference applied by both jurisprudences is not in similar foundation and application of law, but both share the same objective to achieve justice and equality for women in marriage and family relations which not disadvantageous women.

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1. Introduction

Human rights to be universally accepted, the fundamental belief and practice of the community should be considered. Human rights as well as women's rights require justification in terms of standards principle in each culture and in terms of shared or common values of all cultures (Salbiah, 2005). It is contended that the main fundamental rights that are common to all cultures, despite the deviating ideologies that occur in the real worlds is the biological basis of morality. In this case, all people are similar in their nature of creation or biology but they may be differs in belief, culture, ability and priority. Yet, it is traced that Muslim women have different social position with women in the Western societies. But it does not necessarily meant that they are totally differs since their biological roles are same. Therefore, this study argues based on the biological basis and cultural diversities of human beings in searching for constructive harmonisation between IFLA and CEDAW with regards to marriage and family relations. As provided by the Malaysian Constitution, Muslim personal law is under the state authorities. Islamic Family Law (Federal Territories) Act 1984 or '(IFLA)' comprises of Islamic legal rulings with regard to the rights of women and men in marriage and family relations specifically provided for Federal Territories. Even though each state has its own Islamic family law, they actually follow similar foundation and precepts of Shari'ah with multiple customary practices. It shows the flexibility of Islamic jurisprudence whereby Shari'ah guides all Muslims with fundamental principles, while at the same time Shari'ah acknowledges the multiple cultural diversity among human beings within the scope of Shari'ah fundamental guidelines.

2. Literature Review

2.1. The Objective of the Women Convention

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) or (Women's Convention) is claimed as merely international human rights treaty that emphasizes on women's rights. Malaysia has ratified CEDAW on 5th July 1995 with few reservations. The remaining reservations with relates to the marriage and family relations are Article 16 (1) (a), (c), (f) and (g). Its primary objective is to eradicate discrimination against women in many aspects affecting women of their private and public spheres such as in law, politics, economic, education and health care. There are three fundamental principles highlighted by CEDAW with regard to the rights of women which are: i) principle of substantive equality; ii) principle of non-discrimination; and iii) principle of State obligation (Women's Aid Organisation, 2nd June 2017).

It is argued that women are entitled to enjoy the rights guaranteed on a basis of equality with men under the declaration of human rights (Andrew Byrnes, 1998). CEDAW has a goal for women to fight for equality especially in achieving similar opportunity with men. It requires the states to ensure that women and men are given the same access and opportunity in career development, education, and politics as well as in marriage and family matters. Article 3 of CEDAW stated that the States Parties are required to guarantee women '*the exercise and enjoyment of these rights*'. It means that women have rights to actually feeling the value of the right and or having satisfaction or have consent with that rights. It relates with the religious belief which influenced the individual conscience. In eliminating discrimination against people, it does not mean that they should apply the similar context and application of gender equality since different people live in different sexual function, belief, culture and legal background. If in the case of different

meaning and application of gender equality by different States, then the differences should be documented to be clearly applied by the authority. For instance, in the Malaysian context, the government should put in writing the new legislation on gender equality which defines the attributes of rights and the difference concept of gender equality in accordance with the Malaysian context.

This article highlights the concept of justice, equality and non-discrimination applied by IFLA. It is traced that the reservations to Article 16 (1) (a), (c), (f) and (g) of CEDAW is in line with the objective of CEDAW by applying substantive equality whereby Article 4 and 5 of CEDAW provides that the state parties are obliged to undertake a temporary special measure or an appropriate measure to achieve the objectives of equality of opportunity and treatment between women and men.

2.2. Substantive Equality and Non-Discrimination

Justice is one of the meanings of rights in Islamic jurisprudence (Mohammad Hashim, 1993) and one of the universal principles of ethics applied by all people regardless of their religion, sex or race. Justice and equality in Islamic jurisprudence is guided by the Creator, the Most Almighty, subject to the rights of God and rights of human. It is contended that understanding the meaning of rights which relates with duty and morality are crucial in the implementation of justice and equality. Grounded on the principle of justice and religious rights and duties, IFLA provides the concept of gender equality by considering the biological, physical, psychological and physiological and geographical aspects of people.

The commandment of God to do justice is universal in Islamic jurisprudence. Muslims are commanded to do justice while sexual discrimination and racism are also prohibited in Islam. The principle of non-discrimination and substantive equality under IFLA which is based on the context of 'difference' is prescribed by the Qur'anic verses such as in Surah al-Hujuraat 49:13 and Surah al-Isra' 17:70. These verses show that Islamic jurisprudence has dignified all of the children of Adam, all human beings and all races in the world. It also reminds all people that males and females as well as nations and tribes have been created so that humans may know one another with love and respect. It clarifies that in addition to sexual difference, geographical factors also affect different conception of human rights based on moral philosophies, which form different approaches towards human rights issues (Donnelly, 1984).

Equality means ensuring individuals or groups of individuals are treated fairly and equally and no less favourably, specific to their needs, including areas of race, gender, disability, religion or belief, sexual orientation and age (University of Edinburgh, 2013). From this definition of equality, it only can be achieved by the implementation of justice. It does not necessarily means similar in context to be equal but equality is fairness and justice as the primary outcome. Since equality is defined as fairness, to be treated 'like treated alike' is unfair for women and men and for people of different sex, faiths and cultures as they are in fact different in nature and nurture in most of the situations. Therefore, equality within the concept of sameness will discriminate against human beings because they are in fact differs in nature and nurture.

According to Steiner and Alston (2000:179), one of the vital characteristics of Article 1 of CEDAW is its reference to 'effect' as well as 'purpose'. The measurement of 'effect' means whether it disadvantageous women whereby the measurement of 'purpose' is whether it protects women. It is argued that whenever the act or omission, which in accordance to the belief and culture, does not put women in the state of less favourable or disadvantage state; therefore, this does not amount to discrimination under

CEDAW's provisions. Therefore, different entitlements to rights and duties for women and men as outlined by IFLA do not necessarily discriminate against women because it considers women's biological nature. It is traced that the attributes of rights uphold by IFLA through the authority of men as *wali* fit with the meaning of 'effect' and 'purpose' defined by CEDAW that is to protect women and not disadvantageous women. Besides, General Recommendation No. 25 stated that equality could be achieved by acknowledging differences in sex and culture because sameness would place women and men in the state of inequality. Therefore, the concept of equality applied by IFLA by acknowledging differences does not contradict the concept of equality under CEDAW.

A number of studies contended that IFLA provides women with equal opportunity as men in accordance with their biological nature to achieve equal results similar to men within the principle of justice and human dignity in Islam. Nik Salida Suhaila (2013:88) noted that advocates of Islamic standards defined equality as the complementary nature of roles played by women and men. It is not to be specifically defines their roles in all aspects and not to restrict their roles to a particular aspects but considering their different needs and priority to enjoy this life are the crucial determinants of gender equality. Since the different entitlement of rights and duties under IFLA is equal, it harmonise with the acknowledgement made by the Secretary-General of Human Rights that "*families assume diverse forms and functions among and within countries*" (General Comment No. 28). If it is so, different entitlements of rights and duties between women and men under IFLA are within the context of difference acknowledged by CEDAW.

Islam recognises equality of women and men but not in absolute terms (Baderin, 2010:60-61). Those differences are assigned purposely to establish a balance in their roles by considering their needs and priority and equal outcomes of their dignity because women and men are similar but not identical (Mahmud Saedon, 1999:189). Since the preservation of human dignity between women and men in Islam is based on their biological nature, thus it affects their rights and duties in private and public spheres. It might not be the same for married women and a single woman because a married woman is not an ordinary woman after solemnisation of marriage in Islam (Nik Salida Suhaila, 2013:103). In order to avoid inequalities of human being in their dignity and justice, IFLA does not provide an equal treatment for women and men which parallel to sameness. Instead, IFLA focuses on substantive equality to ensure gender justice and fairness and to promote a collective rights or happiness in a family institution.

The meaning of discrimination under CEDAW covers direct and indirect discrimination. Indirect discrimination refers to partial discrimination which puts women in disadvantaged situation compared to their male counterpart. On the other hand, IFLA acknowledges lawful or positive discrimination, namely by recognising different treatments given for those in different situations i.e. different roles and functions of women and men in accordance to their biological, physical and psychological appearances. Thus, it demonstrates that both IFLA and CEDAW harmonise in the objective to preserve the rights of women through substantive equality. Thus, gender roles as stipulated under the provisions of IFLA which acknowledge differences are in accordance with the basic principle of non-discrimination under Islamic law and do not contradict with CEDAW. This concept of difference is equal and just and it is not disadvantageous women. It is in line with CEDAW which requires the State parties to provide for not only formal equality but also substantive equality (General Recommendation on Article 16 of CEDAW, 2013, para. 8).

The application of substantive equality under IFLA is illustrated by Section 8 where it is stated that the minimum age to enter into marriage for women is sixteen whereas men is eighteen. It is contended that the difference in the age is not imperative as long as it is just and equal, in accordance with their nature and nurture. If substantive equality is applied under IFLA, the reservation made to Article 16 (1) (a) which states that women should have the same rights with men to enter into marriage is not discriminatory against women. The reservation is aimed to protect women from discrimination if the sameness of rights is acquired by law in the meaning of that provision.

Substantive equality is also applied in Section 59 of IFLA which declares the power of court to order on matters pertaining to the maintenance of wife. This provision does not deny the rights of women to maintain the family. It highlights that men are primarily responsible to maintain the family not women and the court has power to order the husband to give maintenance to the wife. It shows that Islamic law considers the difficulties facing by women in situations where they bear the duty to provide care for children, difficulties during pregnancy and labour as well as difficulties during the nursing of the children and also during menstruation period. Correspondingly, the responsibility of men to be a primary maintainer in a marriage is in accordance with biological, physical and psychological capabilities of men in nature. This argument is the basis of the reservation made to Article 16 (1) (a), (c) and (f) of CEDAW whereby women and men do have different rights and responsibilities during marriage and its dissolution based on their abilities in nature and nurture. Thus, the application of substantive equality rather than only formal equality is required in those circumstances due to the fact that their biological nature have an essential reactive effect on their roles in society (Adeeb, 2006), justifying the different treatments given to them.

Another form of substantive equality under IFLA is the provision on polygamy. Section 23 of IFLA provides that the court will determine whether the man applied is qualified to enter into a polygamous marriage. As the primary condition required by the Holy Quran in the permissibility of polygamy is 'justice', IFLA provides that the court has to consider whether it is just and necessary for the polygamy to be practiced in that situation. However, a total abolishment of polygamy will lead to the violation of public right and violates the right of Allah the Almighty and hence is considered as a sin. This indicates that Islamic legal rulings with regard to the rights and duties of women and men in marriage and family relations are in accordance with human nature and nurture and principle of justice. It is based on what is needed by human beings in accordance with their priority and circumstances. Substantive equality here means a person with a different background is not entitled to a similar treatment given to others as the collective interest should be considered above the individual interest to avoid discrimination.

2.3. The Nature And Nurture Attributes of Islamic Human Rights

The attributes of Islamic human rights and its concept of equality under the provision of IFLA are in accordance with the Divine revelation, namely Al-Qur'an and Al-Sunnah and juristic opinions. It consists of the rights of God and the rights of human beings and non-human beings. The rights of God which are considered as public rights will prevail over individual rights but the individual rights is permissible as long as it is not infringe the public rights. Islamic human rights which are based on human nature acknowledge the sexual and religious or cultural differences in human beings. Instead of similarities, the different of sex, religion and culture or gender is the crucial factors to be considered in achieving equality. Islamic concept

of equality is based on the nature of human creation which relates with biological roles and function, religious and spiritual obligations as well as reward and punishment. Islamic jurisprudence clearly shows that God creates women and men from a similar origin but with different functions in biology, psychology, physiology and their spiritual belief which influence the individual conscience and value of life.

Islamic moral values and principles influence the rights and duties of Muslims (Mohammad Hashim, 2006). The division of rights and duties in Islamic jurisprudence are based on the decree of ruling revealed by the Creator. But it is not against human nature. For example, only the adult competent women are obliged to fully cover their body. It is not obliged for children. It shows that the command of God for women after puberty is to protect their body or their dignity because the physical body of women will be changed after puberty. Besides, it is due to the fact that women reproductive functions are active after menstruation period which if it is not protected would disadvantage women. Without the command of God to cover the body and to protect their dignity, women are more open for disadvantageous situation.

Islamic jurisprudence is based on the same sources of Divine will that is Al-Quran and As-Sunnah. The differences in the opinions of the jurists and scholars of Islamic jurisprudence represent 'different manifestations of the same divine will' and are considered as 'a diversity within unity'. As Breiner (1992) noted, the appreciation of differences is an important principle of Islamic law which is quite different from the assumptions of Roman law that is inherited by most of the European nations. On the other hand, in Islamic jurisprudence, it is inherited from the Divine revelation which consists of the rights that cannot be changed (absolute right that is the right of God) and there are the rights that can be modified (non-absolute right that is the right of men) in accordance to the situation but still in alignment with Shari'ah principles, or otherwise recognised as Shari'ah compliance.

In Islamic jurisprudence, the nurture element must not go beyond the limit of nature, namely the religious principles and biological factors. In determining the minimum age of marriage for instance, IFLA considers biological nature and customary practice of Malay Muslims. Shari'ah law does not precisely state the age of marriage for women and men. Women and men have equal rights in a marriage under IFLA by addressing the importance and priority of their roles and duties in marriage and family relations. IFLA determines that the age of marriage for men is higher as they bear more responsibilities after marriage in taking care of the family. It is argued that if the state considers that it is more adequate, just and beneficial for both genders to have a similar age for marriage, then it is permissible and not against the precepts of Shari'ah.

It is believed that Islamic jurisprudence, as the law of nature in its Divine revelation and scientific view offers the best solution to solve the problems of discrimination against women. Under Islamic jurisprudence, the scope of non-discrimination is perceived within the meaning of equality by considering the differences in human beings. In spite of having the attributes of nature and nurture, another attributes of Islamic rights are collective rights which prevail over individual rights, rights must come with duties, the meaning of universal must acknowledge the differences and the coverage of rights is both for private and public spheres (Nurulbahiah & Nik Salida Suhaila, 2016).

2.4. Biological Nature of Women Acquires Both Protection in Private and Public Spheres

Islamic law does not restrict women to act in the private sphere without being involved in the public sphere. In Islamic jurisprudence, men are considered as the protector for women's private and public spheres due to the historical background of women of being disadvantaged. In addition to that, women are facing some difficulties and disabilities during pregnancy, child birth and breastfeeding period. At this time, most of the women need help, special care and attention to stable their health and perform their duty to others.

IFLA protects the private and public spheres of women in marriage with a special measure, which is the application for permission to marry in Section 16 (1). It is provided that the permission to marry should be made to the Registrar of the *kariah masjid* in which the woman is a resident. This is intended to protect women from being disadvantaged by irresponsible persons. Besides, Section 7 of IFLA states that *wali* is a man who can solemnise the marriage. On the other hand, Section 13 (a) provides that consent from *wali* of the woman is required in a marriage contract. It is based on As-Shaficīyy school of thought. However, *wali*'s consent in marriage does not mean that a *wali* can force a marriage without the consent of both parties to the marriage. A *wali* is chosen from among the eldest person in a paternal blood relationship, normally those who have more experience in life, and would be the one who could best advises and guides the woman in her married life. *Wali* has an important role even before solemnisation of marriage, namely to ensure that the groom is reliable and trustworthy person to be married to the bride and that he can carry out his obligations as a husband. This kind of measure is to ensure that women are being protected in the private and public spheres of life during and after marriage.

In addition, Section 13 (b) of IFLA provides another appropriate measure to protect women in marriage, namely through the role of the state whereby the Shari'ah judge has the jurisdiction in accordance with *Hukum Shar'ca* in cases where a woman has no *wali* by *nasab* to act on her behalf or the *wali* cannot be found or the *wali* refuses to give his consent without sufficient reasons. This provision is important in cases where a *wali* misuses his power as the guardian to force marriage or refuses to give his permission to a woman to marry with an unreasonable cause. IFLA also provides a specific provision under Section 37 which provides that any persons who uses any force or threat or commit an offence shall be punished with a fine not exceeding one thousand ringgit or an imprisonment not exceeding six months or both. This provision is applicable for all persons including the *wali*. Thus, this provision, even if it seems patriarchy, clarifies the roles of *wali* in marriage and family relation to ensure that they are carried out justly. This is necessary to make sure that women are continuously protected and attains happiness before, during and after marriage, not only in private but also in their public life.

IFLA does not only protect women from an irresponsible *wali* but also from an irresponsible husband. The rights in dissolution of marriage are not given to only men but also to women in various circumstances as provided by IFLA under Part V. For example, the dissolution of marriage should be validated by the Court. The duty of the Court is to control any kind of discrimination against women while the court construes the case before declaring the validity of a divorce. The Court has to balance the preservation of the marriage contract and the protection of women against the abuse of men in accordance with *Hukum Shar'ca*. As argued before, Islamic law considers that violence against women as one type of discrimination and this is why divorce is permissible in Islamic law, even within a minimal permissibility.

The arguments justify the reservation made to Article 16 (1) (c) of CEDAW as women need different types of dissolution of marriage compared to men in order to achieve an equal result.

In another provision, Section 10 of IFLA allocates that women are not permitted to marry men of other religions. If women are allowed to do so, it will put them in difficult situations in both private and public spheres. Naturally, family institution is developed through a mutual expectation on rights and duties of the family members based on certain religious rights and duties. In Islamic jurisprudence, men are considered as the head of the family and carry a huge responsibility in religious, moral and ethical domains. Women who enter into marriage with men of different religion may face difficult situations in practicing their religion due to the different belief and faith that shape their individual conscience. Hammudah (1984) in his book, argued that Christians prohibit Jews to enter into exogamous marriage. He further noted that in 1807, the only way to legalise marriage between Christians and Jews is if the contract is made based on the Civil Code. It was also noted that in the Jewish ritual, this type of marriage cannot be sanctioned in the religion. Therefore, it has been argued that the marriage with a person of a different religion is not only prohibited by Islam but also in other religions.

3. Problem Statement

Malaysia has ratified CEDAW since 1995 in achieving gender equality. Malaysia as a signatory party to CEDAW, is obliged to prohibit discriminations against women and ensure equality between both sexes is implemented as per its objective (Nasharuddin, 2016). In achieving gender equality in Malaysia, there have been arguments put forward by women's group and lobbyists that certain provisions of IFLA are discriminatory against women. CEDAW's Committee also claimed that the reservations made by Malaysia on Article 16 (1) (a), (c), (f) and (g) on the rights of women in marriage and family relations are not in compatible with the object and purpose of CEDAW (Abdul Ghafur Hamid, 2009). Therefore, this article highlights that the conflict between IFLA and CEDAW is due to the misunderstanding on the concept of equality applied by IFLA and CEDAW.

4. Research Questions

- Whether the attributes of IFLA are in line with the objective of CEDAW?
- Whether there are any divergences and convergences between IFLA and CEDAW?

5. Purpose of the Study

- To discover the divergences and convergences of the attributes of IFLA and CEDAW in order to harmonise the different jurisprudences of law within the principle of justice and equality.

6. Research Methods

This research is a doctrinal legal research which reviews materials that may offer information to solve the conflict on the concept of gender equality under IFLA to stream line with the objective of CEDAW without sacrificing the fundamental principle of Shari'ah law.

7. Findings

It is found that IFLA and CEDAW acknowledge the sexual and geographical differences between human beings but not in similar application of social construct. It is because the concept of difference under IFLA is based on Islamic religious rights and duties but it has similar objective with CEDAW that is to achieve justice and equality for women in marriage and family relations. Different entitlements to rights and duties between women and men under IFLA is not necessarily discriminates against women as long as it does not disadvantage women. It is due to the fact that equality or non-discrimination can be achieved not only through sameness but also differences. Thus, it is traced that IFLA is in line with CEDAW in applying substantive equality and they could be harmonised by conceptualising the differences in accordance with their right context.

8. Conclusion

It can be concluded that the provisions of IFLA are just and equal in nature and nurture of Muslim women with the universal attributes of rights. IFLA provides the universal principle of justice and morality based on biological nature and belief of people. It is traced that the provisions of IFLA are reasonable to protect Muslim married women from disadvantage situation since the attributes of IFLA is based on the principle of justice, equality and morality which acknowledge differences of human beings. From this study, it can be said that IFLA and the reservations made by Malaysian government to Article 16 (1) (a), (c), (f) and (g) of CEDAW with regard to the rights and duties of women in marriage and family relations are harmonious with the object and purpose of CEDAW in eliminating discrimination. This does not contradict with the concept of equality applied by CEDAW that is substantive equality in achieving gender equality.

Through this study, it is discovered that a major difference between IFLA and CEDAW is in the coverage of law, namely IFLA regulates the rights and duties of Muslim women and men in marriage and family relations based on Islamic religious principles whereas CEDAW is aimed to protect the private as well as public spheres of only women from any kind of discrimination. Another difference of IFLA with CEDAW is on the basis of the foundation of law, whereby IFLA is founded under the Shari'ah framework of which the sources and methodologies are based on Divine revelations, namely the Al-Qur'an and Sunnah of the Prophet P.B.U.H and Muslim jurists. In Shari'ah law, it consists of the rights of God and the rights of human beings (the servant of God as well as the companion on earth). On the other hand, CEDAW is based on human ideology originated from Western enlightenment consist of only human rights which is mainly derived from Christian ethics and moral values.

Despite the divergences between IFLA and CEDAW, some convergences are also observed in the context of nature of human or women creation as well as the women's need and ability to enjoy the life. Since the biological nature of women is similar whether they are in the West or the East, and considering that both IFLA and CEDAW are aimed to protect women from infringements of laws, both laws acknowledge biological differences between women and men by taking into account the *de jure* and *de facto* equality between women and men in establishing justice. It is observed that IFLA specifically provides the ideal entitlements to rights and duties between women and men in marriage and family relation by considering biological nature and their biological roles in different context while CEDAW provides the

scope of discrimination which cover both direct and indirect discriminations to make sure that there is no discrimination against women within their public and private spheres of life. However, it is suggested that Article 16 (1) (a), (c), (f), and (g) of CEDAW on the word 'same' to be replaced with the most suitable word which constitutes the meaning of 'substantive and formal equality' in order to be universally applied by multiculturalists country.

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