

## **GENDER EQUALITY UNDER ISLAMIC FAMILY LAW (FEDERAL TERRITORIES) ACT 1984**

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**Abstract:** *It is claimed that Islamic family law is discriminatory against women in which women do not have similar rights with men. It is due to the misinterpretation on the concept of gender equality within only formal equality rather than substantive equality. The interpretation of gender equality without acknowledging sexual and cultural differences of people will probably discriminate against them. This study discusses the meaning of formal and substantive equality in which understanding it is imperative in understanding the concept of gender equality under Islamic Family Law (Federal Territories) Act 1984 (IFLA) . This study highlights on the provisions of IFLA in which it applies substantive equality to maintain gender justice. The provisions of IFLA relating to the different rights of Muslim women and men in marriage and family relations are analysed whether it is discriminatory against women. This study is a qualitative research in which, the data collected through reading and analysis of the previous research relating to the issues of gender equality. It also refers to the relevant statutes of law, report, cases and current issues relating to women's rights. This study finds out that different entitlements of rights and duties between husband and wife under the provisions of IFLA are equal whenever both are equally responsible but not necessarily similar to fulfil the duties and responsibilities in a family institution. In addition to that, IFLA provides special measure considering women biological, physical and psychological nature and nurture. The measure is necessary to secure that women will get similar opportunity as men to enjoy their rights in private and public spheres. It is believed that IFLA through its universal attributes could be the best model governing the relationships between husband and wife which can be applicable not only for Muslim but also for non-Muslim in Malaysia with some amendment and modification through the methods of ijtiḥad which is not contrary with the substance principle of Shari'ah.*

**Keywords:** *Gender Equality, Justice and Non-Discrimination, Muslim Women's Rights, Islamic Family Law.*

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## **Introduction**

Malaysia practices a bicameral legislature and an independent judiciary comprising of Shari'ah and Common law. Both the Shari'ah and common law systems aim at upholding justice and maintaining peace and harmony in a multi-cultural law and religious society. However, Article 3 (1) of Malaysian Federal Constitution states that Islam is the religion of the federation. It is due to the majority of Muslims and the power of Rulers as Head of Faith acquired for the constitution. Islamic family law is an integral part of the Islamic law (Shari'ah). It is applied almost by Muslims in Islamic country as well as among Islamic communities of the secular states (Abdul Ghafur Hamid, 2009). In Malaysia, Islamic family law is applied in all 13 states through different legislations. However, the basic principles of Shari'ah contain under Islamic family law are based on primary sources of Shari'ah which are Al-Quran, Sunnah and opinions of Muslim Jurists particularly Shafi'e school of thought. Islamic Family Law (Federal Territories) Act 1984 (IFLA) is chosen as the model of Islamic family law applied in Malaysia since it has gone through several amendments for the betterment of law and society especially on the rights of women. Even though this act only applied for Muslims men and women in the Federal Territories of Kuala Lumpur, Putrajaya and Labuan, it is relevant to all Muslim Malay men and women in this country because it is based on similar sources of Shari'ah law. IFLA provides the rights and duties of women and men in marriage and family relationships. It is not only governing the rights and duties during marriage but also provides guidance for husband and wife before, during and after marriage and matters related to family members such as children and person who has given authority by law for the sake of marriage.

It is claimed that IFLA is discriminatory against women in which the rights and duties of women are not similar with men such as in the provisions of Section 7, 8, 13, 23 and 72. This research attempts to examine the meaning and concept of gender equality under IFLA. The analysis is made based on the principle of gender equality or gender justice in Islamic perspective. In spite of that, the provisions of IFLA on different entitlements of rights and duties between husband and wife are analysed whether it is discriminatory against women. The analysis made in the lights of the concept of difference since in fact women and men are differ in terms of sexual functions and social construction of the communities. It is intended to highlight that gender equality could only be achieved with justice which is to put the right things in its proper or suitable place, roles, and function.

### ***The Concept of Gender Equality: A Critical Analysis***

Malaysia has lack comprehensive equality legislations and equality enforcement bodies across all grounds (Nasharuddin Mat Isa, 2016). The different interpretations towards what constitute justice and equality in gender especially in family law contribute to the misunderstanding on the concept of gender equality, whether equality should means "similar" in all aspects without acknowledging any "differences" between them (Nurulbahiah Awang, 2016).

In determining the basis of discrimination against women, one of the most important aspects of 'rights talk' is the feminists' perception of rights (Nik Salida Suhaila, 2013:55). Generally, feminists concerns are for the dignity and the well-being of women, including women belonging to cultures (Oonagh Reitman, 1997) whereby feminists' psychologists had emphasized stereotypes, norms, identities, and roles that support gender differentiation in cognition and social behaviour. Understanding gender differences or gender analysis is beneficial because women are part of society in which their life after birth generally influenced by belief, culture and society around them (Salbiah Ahmad, 2005). If the law enacted exclude female value, thus it may be in some situation female might be disadvantage by that law.

Gender inequality between sexes has been criticized as the subject of stereotypes and generalization of women being second class citizen. Though equality between sexes may not necessarily be viewed in a numerical form, Muslim scholars agree that equality must be seen as an acceptance to the dignity of the sexes in equal measure, be that in social, economic as well as political rights and responsibilities (Najibah Mohd Zain, 2016; Ashgar Ali Engineer:42). In most of the situation, it is argued that formal equality is insufficient because it fails to address societal structures that perpetually disadvantage women because of their difference to men (Ineke Boerefijn et al. eds., 2003). In discussing formal equality and substantive equality from a gender's perspective, women's ability to exercise their rights is shaped not only by social constructions on sex differences, but also factors such as class, race, ethnicity (Salbiah Ahmad, 2005), religion, disability (Kimmell, 2000), need and the role of the state in constructing gender ideologies and relations power (Salbiah, 2005). Thus, in upholding justice, the meaning of equality does not necessarily mean 'same treatment'.

Gender equality is the systematic research on the differences of women and men in specific community (Jean Davidson, 2001). However, gender analysis in Islamic perspective is important to complete the social analysis of human and not to replace it (Anuar Ramli, 2012). It is relevant to apply gender analysis in evaluating gender relations in Islamic ruling including marriage. It is because Islamic family law acknowledges the differences between human beings as stated in various verses in the Quran. Not all differences among genders in the perspective of gender analysis imply gender injustice. The most important element is the value of justice and fairness. Therefore, the best rule to be applied for gender justice or gender equality could only be obtained by putting an element in its proper place and function that is by applying substantive equality in spite of formal equality (Nurulbahiah & Nik Salida Suhaila, 2016).

Matters pertaining to Islamic family law have been practiced fully and executed in the daily life of the Muslim community in Malaysia since the 12th century when Islam was introduced to Malaysia (Raihana Abdullah, 2007). She added that the awareness of Muslim on gender equality in Islamic perspective has been causes to the reviewable, reformation and amendment of law addressing several problems occurring the relationship between women and men in marriage and family relationships. However, the examination and investigation for the reformation of IFLA is focused to eliminate the negative elements positioned on women such as on the perception of low-intellectual capacity of women, the subordination status of women in the family institution and the allegation made that women are the cause of disasters happened in the society (Rahimin Afandi, Paizah & Norhayati, 2008:11).

### ***The Meaning and Concept of Justice, Equality and Non-Discrimination***

Justice or al-'adl, al-insaf, al-qist or al-haqq (the arabic term) is one of the basic principles embodied in the divine revelation of the Quran and the Sunnah. Generally, all these terms mean justice, fairness, equity, equality, fair minded, rightness and correctness (Meriam-webster Dictionary, 2017). In the implementation of justice in Islam, it relates with the rights of God and the rights of human beings.

Discrimination means unequal or unjust. Discrimination also defined as prejudice or prejudicial outlook, action or treatment (Ghazali Jaapar, 2006). It also means the treatment of a person or particular group of people differently, in a way that is worse than the way people are usually treated (Online Cambridge Dictionary, 2017). Since then, equality should means non-discriminatory or justice. Therefore, equality, justice and discrimination are inter-connected

which have to be understood in the right context. Since then, misunderstanding on the meaning of these terms drives the public to the misunderstanding on the object and purpose of certain law and provisions.

In another perspective, the meaning of justice and good according to the traditional concept as summarized in Justinian's Digests taken from the Roman jurist Ulpian is "Those are the commandments of law; to live uprightly, not to harm others, and to give to each person what belongs to him". It is stated that 'equality' literally means the state of being equal, especially in status, rights, and opportunities. It synonyms with fairness, equity, equal rights, equal opportunity. Equality is 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 Edinburge, 2017). Consequently, justice and equality relate with fairness and it is contended that whatever is unequal or unfair is by that very fact is unjust (N. Hanif, 1999).

If equality does not mean same treatment, then different entitlements of rights and duties between women and men in a marriage and family relations based on sex, religion, culture and law does not constitute discrimination against women, as long as it does not disadvantage women. Therefore, it has been argued that similar treatment for those who are in different situation will result in discrimination and most importantly, different entitlements to rights and duties between them should be considered as a tool of justice.

Under the provisions of CEDAW, Article 1 and Article 4 define the meaning of discrimination against women.

Article 1 provides "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 4 means that adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

In understanding discrimination in gender, it is important to understand which groups are most likely to experience unfair or unjust treatment, discrimination and/or disadvantage situation, because every individual is the product of many different influences. Characteristics such as ethnicity, gender, religious affiliation, disability, sexuality and socio-economic background may or may not have a determining influence on any particular individual's values, life experience or behaviour. However, it is usual for such characteristics to have a compounding effect (Aegidus, 1972).

As McHugh J succinctly explained "discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons

whose circumstances are not materially different.” In general, the definition of direct discrimination coincides with the latter part of McHugh J’s observation that it is an act which treats persons whose circumstances are not materially different differently, whereas the definition of indirect discrimination generally coincides with the former part of his comment that is an act that equal treats those who are different. Thus, the differences in biological nature between women and men is the material consideration for discriminatory elements.

In the Malaysian context, Salbiah Ahmad (2005) explains the meaning of non-discrimination in gender within the provisions of Article 8 (2) read with Article 8 (1) of the Federal Constitution which provides the following:

- i) non-discrimination against females on the basis of cultural definitions of her role in society; -
- ii) non-discrimination against females on the basis of her biological sex difference;
- iii) non-discrimination against males on the basis of biological sex differences and interpretations of behaviour that is culturally associated with sex differences.

Hence, it can be concluded that to achieve equality in gender does not necessarily by means of sameness but the most important element to be put as the element of non-discrimination is the principle of justice and fairness, equal rights and duties which specific to their needs for their goodness which is in accordance with their conscience and belief.

### **The Philosophy of Gender Justice in Islamic Jurisprudence**

The philosophy of gender equality or gender justice in Islamic perspective based on the concept of marriage and family institution in Islam. The concept of marriage and family institution based on the principle in the Holy Quran and Tradition of the Prophet Muhammad s.a.w. A marriage institution is not only governed the relationship between a wife and a husband, but the relationship between all family members including father, mother, siblings and children. Besides, marriage in Islam is considered as one of ‘*ibadah*’ (Al-Qur’an, Ar-Rum, 21; Noor Aziah Mohd Awal, 2006) which composes the religious rights and duties among all family members. Therefore, Islamic marriage and family institution is not just a contract between two parties, but it has legal rules includes private and public rights of every family members. It also relates with the right of God and the right of humans which either competent or not competent.

Islamic jurisprudence considers the marriage institution as an important matter which valuable for Islamic civilization. The Prophet says that marriage is one method of completing the religious duties. Besides being a way of life, the Prophet P.B.U.H says, “Marriage is a tradition of ours”. In addition to that, Al- Ghazali, the famous Muslim jurist pronounced the concept of marriage as that:

*“...there is comfort for the soul, and it gives it strength to perform acts of worship. This is because the soul is likely to suffer from boredom and avert from right as it goes against its nature; so if it is compelled to do what is against its nature for a long time, it will feel bored, and may rebel; but if it is given pleasure and comfort from time to time, it will regain strength to resume activity in worship. In the good company of woman, man finds the comfort that removes his distress; virtuous people should seek comfort with permitted things. This is why the Qur’an describes this relationship as one of tranquillity”.*

The objective of marriage in Islam is not only for material enjoyment of life between two sexes but it includes the enjoyment of life in spiritual elements for collective goods. According to Al-Kanz, the term *nikah* (marriage) means ‘a purposeful contract for obtaining and possessing enjoyment’. The enjoyment of life here means both possess on the enjoyment of life through marriage physically, mentally and spiritually. Muhammad Abu Zahra has given the clearest explanation on the meaning of marriage that is ‘a contract leading to permissibility of having a common life between a man and a woman in a manner that fulfils the necessities of human nature, leading to life-time co-operation between them, and defines the rights and duties of each one of them’.

The relationship between wife and husband under Islamic law is a form of responsibility and a duty, and not a superiority or power. In the private spheres of life when a woman and a man enter into marital bond, they bring into existence an important social unit called a family. This requires a systematic management and Islamic jurisprudence has chosen men as the head of the family. As mentioned in the Holy Qur’an: 4:34, making man as the protector and the maintainer in no way indicates that man is superior to woman (Mek Wok Mahmud, Najibah Mohd Zin, Nora Abdul Hak, 2016: 39, Maulana, 1995:81). This choice based on a man’s capacity to manage which consistent with the physiological nature of men rather than on his superiority. It considers as positive patriarchal rule under Islamic marriage in order to empower women in their private and public spheres.

The principle of gender equality between a wife and husband in Islam based on love, compassion and respect for each other to promote the functions of human civilization. Islamic jurisprudence teaches that a morsel of food that a husband may put in his wife’s mouth in happy moment or when she is too busy to care about eating, is a good deed that is urged and rewarded by God. A husband and wife are the closest of companions. Each derives strength from the other and each act as a shield for the other. Due to biological difference, men do not experience with pregnancy, giving birth and nursing children. These experiences given by God only for women which make them the most suitable person for childcare whereby uterus in the body of women has become the first home for every human (Yusof Abbas & Nor’Izam Alias, 2010). This biological nature experienced by all women around the world which universally accepted in determining the concept of gender equality.

In spite of the full equality of women and men as individuals and as spouses, it is fair that a man is a person who is primarily responsible for sustaining his wife during the pregnancy and subsequent natal care. Islamic law provides for more sensible and balanced relationship between the rights of an adult and his or her guardian. In this regard, a husband has more responsibilities that he should fulfil with kindness and generosity with the values mentioned by the Holy Qur’an and the Hadith of the Prophet:-

*“Men shall take care of women with what God has bestowed on the former and with what they have to spend of their possessions”*

*“And the rights of the wives (with regard to their husbands) are equal to the obligations that they have (toward their husbands), but men have a precedence (in responsibilities)”*

The Holy Qur’an expresses the relationship between husband and wife to each other akin to a body and its garments (Al-Qur’an, 2:187). Without garments, a body is meaningless and without a body, the garments are meaningless. This symbolise the closeness of the two sexes in the material and spiritual senses. They are lifelong partners and the relationship as partners

in life determines the rights and duties of husband and wife in marriage. These basic value principles in Islamic marriage are universal values in human relationships. In spite of the differences in completing their preferences, husband and wife are spiritually equal in their rights and duties towards Gods.

All of these rules and regulations are the guidance by Allah for all human beings. This teaching guides us to act correctly according to the biological human nature which also influencing their physical and emotional tenderness. A wrong mind-set that Islam has chosen men because of his superiority of power over women leads to the misunderstanding on the true teachings of Islam. In another context, this misunderstanding leads to the discriminatory treatment on women in Muslim marriage whenever men misunderstood their rights and duties to a wife. Therefore, the rights and duties of husband and wife as acquired by the Holy Quran and tradition of the Prophet should be understood in the righteous way so as the marriage life will be continued together without bitterness so as achieve its objectives.

The material aim of Islamic law is to uphold public or societal regulation and thus it contradicts the individualistic nature of Western philosophy of human rights (Mohammad Hashim Kamali, 1993). It is added that some Western commentators commented that Shari'ah does not recognise rights but only obligations. Sachet (1970), Gibb (1955) and Siegman (1964) claimed that Islam does not recognise the idea of an individual having inherent rights, fundamental or otherwise. This has been argued by Hashim Kamali (1993) that Islamic jurisprudence is concerned with the relations between the Lawgiver and the recipient of law which is inspired by the ideals of unity and integration rather than duality of their respective interest. He commented that modern constitutional law and constitutionalism as such, champions the rights of the citizen when dealing with the ever-expanding power of the state. For example, Malaysia practices constitutional monarchy and parliamentary democracy which uphold both individual liberty and state power.

Thus, the principle of gender justice in Islam is the best principle to establish justice due to the diversities among human beings. This may be explained by the fact that society is actually made up of a collection of individuals. Thus, by giving priority to the collective rights in enacting the laws, there are social veils which when lifted, reveal nothing but individuals (Baderin, 2001:66-67).

### **The Principle of Substantive Equality under IFLA**

The principle of substantive equality under IFLA can be seen through the provisions on different entitlements of rights and duties between women and men. The entitlements of rights and duties between women and men are given considering their biological (nature) and geographical or cultural (nurture) aspects of life. The verse thirteen, surah al-Hujuraat in the Holy Quran clearly states the concept of difference in Islam in which the differences between people should be acknowledged and respected in a just and equitable manner. However, the most righteous among people is who believe and follow Allah's rules and guidance.

Section 8 of IFLA provides the different minimum age of marriage for men is eighteen and for women is sixteen. Does this provision is discriminatory against women? And whether this provision against the Shari'ah principle in marriage and family matters?

There is no specific age of marriage discussed in the Holy Quran. However, there are several verses touch on the capacity to manage the property. The interpretation of the 'full manhood'

in Islam is not valued from the number of age but the capacity to manage the property or family wisely and the sexual capacity. Muslim jurists permit marriage upon reaching sexual and mental or emotional maturity (baligh). In the preservation of collective rights, the State has the authority to control this practice by stating the minimum age to marry such as provided in section 8 even more or less suitable with the situation and objective of law.

Thus, it is not right to claim that different numerical number of minimum marriage age between women and men as discriminatory against women. It is because the minimum age provided by IFLA takes into consideration the Islamic jurisprudence, nature of human being, culture and practices of the Muslim Malay community in Malaysia. Since there is no specific minimum age of marriage in Islamic law, it is not wrong to state any number of age to enter into marriage. However, there are many problems arise due to child marriage. It would affect the opportunity to study, the social problems due to divorce. It would also affect the generation whenever children cannot manage the marriage wisely with mental, physical and spiritual strengths. Thus, to overcome this issue, the State has to decide for the collective rights of people and consider the well-being of all family members affected by the institution of marriage especially women and children.

For example, in Malaysian education system, women and men would complete secondary school at the age of eighteen which at this time they will be qualified to further for higher education. Thus, in order to provide women for higher education opportunity, then the minimum age of marriage would be at the age of 18 or above. Mufti Wilayah Persekutuan, Datuk Seri Dr Zulkifli Mohamad Al-Bakri has reflected to this issue by stating that the issue of underage marriage is not the matter of *usul (tsawabit)* which cannot be changed. It is the matter of *furu' (al-mutaghayyirat)* which can be changed due to situation and place. It is called *taqyid al-mubah* which is permissible in Shari'ah to uphold justice and not to forbid the permissible thing under Shari'ah legal ruling. He further stated that this method has been implemented by Islamic countries such as Jordan, Syria. This kind of method also has been recommended by Islamic jurists such as Syeikh Mustafa Siba'ie and Syeikh Dr Muhammad al-Zuhaily (Berita Harian Online, 22 September 2018). Referring to Moudawana Law of Morocco, the minimum age of marriage of women has been amended from sixteen to be eighteen similar with men. However, it allows for marriage under the minimum age if certified by a court (Paul Scott, 2015). This is similar to what has been practiced in Malaysia whereby Section 8 of IFLA clearly stated that syariah judge could grant permission in writing for underage marriage under certain circumstances. If the marrying persons are under the age of sixteen or eighteen, a syariah judge must give consent in writing for the relevancy of marriage. It means there will be a court procedure where they must go to the court and apply for consent to marry (Orzala Ashraf Nemat & Jawed Nader, 2006).

The other provision which provides different entitlements to rights and duties between women and men in marriage is Section 13, whereby the walī (a man) or syariah judge on behalf of woman has jurisdiction to give consent to the marriage in accordance with Hukum Shara'. Section 7 of IFLA states that walī is a man who can solemnise the marriage. On the other hand, Section 13 (a) provides that consent from walī of the woman is required in a marriage contract. It is based on As-Shafīyy school of thought. However, walī's consent in marriage does not mean that a walī can force a marriage without the consent of both parties to the marriage. Imam As-Shafie maintains that the father or wali can only marry the daughter off if the groom fulfils the criteria of having financial ability to provide maintenance. A father or paternal grandfather and above or walī raja have the greatest responsibility to make sure that the marriage of woman



is entered without any fraud, and is conducted in an honourable manner with full dignity. A walī is chosen from among the eldest person in a family who has blood relationship and most experienced in life, and would be the one who could best advise and guide the woman in her married life.

As-Shafīyy jurist opines in his book *Al-Umm*, a woman cannot solemnize her own marriage, and if solemnisation is made without the permission of walī, the marriage is not valid (Mohammad Azam Hussain & Alias Azhar, 2015). However, it does not mean that a woman does not have her own choice or right in a marriage. Women, as well as men have similar rights in a marriage, but special measures are provided by Shari'ah to protect women before and after the marriage, through the authority of the walī. On the other hand, Hanafi jurists argue that the requirement of walī in a marriage is only in a case of the marriage of child or insane person. Therefore, the duty of a walī for women in marriage is important because the responsibility of walī upon women will transfer to the husband in terms of material as well as spiritual maintenance.

The role of wali in Islam considers as special measure for women and children who always open for disadvantageous situation. In the case where a husband fails to maintain his wife and children due to going missing or is irresponsible which caused the wife and children suffer in terms of economic, health, safety and education, then it is a walī authorised by law who will be responsible to maintain or protect the wife and children. It shows that the role of a walī in an Islamic marriage is not based on individual rights but on collective rights. Islamic law does protect the society as a whole through a systematic hierarchy in a family institution through the functions of a walī in order to protect the disadvantaged group from any harm or violence.

The role of men as wali and the head of the family is to protect and provide maintenance because Islamic law stresses the meaning of 'manhood' as the responsibility of men rather than power of men over women. The responsibility of men as maintenance provider is mentioned in Section 59, 72 and 73 of IFLA. These provisions show that Islam emphasizes on the protection of religion, dignity, property, intellect and life of all members in a family institution. The role of the head of family in Islamic marriage should not be looked into restrictive perspective but has to be look at protective perspective on biological and historical contexts of being women. The head of family has huge responsibility to protect the dignity and rights of the wife and children to ensure that she enjoy this life with a suitable life partner without any fraud, violence and is conducted with full honourable manner. This valuable rule could be applied with justice to avoid persistent perception and critiques on the harshness of Shari'ah law with regard to the rights of women and children in marriage.

Section 13 (b) of IFLA states that the Syar'iah Judge having jurisdiction may granted his consent thereto as wali Raja in accordance with Hukum Syara'. Such consent may be given wherever there is no wali by nasab in accordance with Hukum Syara' available to act or if the wali cannot be found or where the wali refuses his consent without sufficient reason. The power given by IFLA on walī raja is intended to ensure that women entered into marriage without any fraud, force marriage and with honourable manner with the implementation of justice without prejudice. If wali mujbir manipulates his rights, then the girl has the right to enter into marriage through wali raja. Therefore, the provision of IFLA with regard to wali should not be seen as discriminatory since there are adequate measures provided in order to avoid disadvantageous situation against women and children.

Substantive equality under IFLA can also be seen under Section 23 on polygamous marriage. Polygamous marriage is claimed to be discriminatory against women, whereby it is permissible only for men. This is a popular discussion with regard to the rights of women in marriage at national and international dialogues. Islamic law permits polygamous marriage for men and not for women due to scientific and religious reasons. For example, if similar entitlement to rights given to woman to marry more than one husband at one time, then there would be an unbalanced and unjust family institution as it will cause prolonged argument about the legal status of the children born, inheritance matter of children and who should be a father to the child. It is because most of the rules in Islamic law are the outcome of the will to protect women and their dignity (Equitas, 2009:52). Polygamy is not practical for women but will disadvantageous women if it is permissible. However, if men were forbidden to practice polygamy, family institutions will not grow in a harmonious and natural situation. The permissibility of polygamous in Islamic law is with the implementation of justice. It is clearly stated in the Holy Quran which means:

*“And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice]” (Al-Quran An-Nisa’ 4:3).*

Islam sees marriage as an institution and protection against social risk (Equitas, 2009:51). Thus, Islam permits men to enter into marriage with more than one up to four to give justice to certain parties under certain circumstances. It has been argued by jurists that justice in the context of polygamy has to be looked in the form of material or immaterial or both (Haris Hidayatollah, 2015). However, Muslim scholars and jurists have advanced reasons such as demographic needs, economic factors, barrenness of the wife, chronic illness of the wife, higher sexual needs of men, e. t. c., in their attempt to justify the conditional permissibility of polygamous marriage (Ibn Qayyim, 1900:85-87; al-Qaradawi, 1984:pp.92-93; Baderin M.A., 2010:177). He further stated that Islamic law also recognises defects of the husband such as impotence, lack of semen or ejaculation during intercourse, lack of testicles and amputated sexual organ, all of which constitute grounds on which the wife may seek for the dissolution of the marriage. For example, al-Zaylā’i, the twelfth century Hanafī jurist stated that since these defects defeat the very purpose of marriage i. e. satisfaction of sexual urge and procreation of children, the wife has a right to demand for a dissolution.

Scientifically, polygamous marriage under Islamic law does not discriminate against women. It is in accordance with the principle of substantive equality in which women and men are differ biologically in which they needs for different treatment which is suitable with their nature and nurture. Polygamous marriage is not permissible for women to be practiced because it is against the nature of women and will disadvantageous her life. For Muslims, it is against haqq Allah. It is noted that treating woman as individual persons to practice polygamy just like man is discriminatory, as women would face the problems if they have relationships with more than one man. Thus, in the case of polygamous marriage, different behaviours, aspirations and needs of women and men are considered, valued and favoured equally.

People claim that polygamy is unfair for women because it throws families into emotional and economic turmoil. It seems unfair if the husband neglects his responsibilities toward his family, but it is not because the polygamous marriage on its substance of Islamic law. The main factor of injustice in the case of polygamy is caused by the behavoiur of the husband which is not

responsible toward his wife and family either in material and spiritual supports. This is the main contributor for the emotional and economic turmoil of the family members in the practice of polygamy. Abdul Monir Yaacob said that "...that most men entered polygamous marriage not out of emulating the Prophet's Sunnah (example) but for personal interest" (Raihanah Abdullah & Nurhayati Surbaini, 2011). Thus, it is the behaviour of people which should be changed not the law.

Islamic law teaches men to be the protector of women and not to control women and abuse their rights socially, economically and politically. In fact, the head of the family should be primarily responsible for the material and spiritual needs of family members, and must perform the duties and responsibilities as required by Shari'ah law. Shari'ah law under all circumstances does not approve the act of cheating, beating and any cruel acts. The basic principles of relationship between women and men in marriage are to love and respect each other and to protect the dignity of each other. It is a similar principle even in monogamous marriage. Therefore, it is contended that polygamous marriage does not discriminate against women but give women benefits such as in the case of infertility, illnesses, health problems, weak financial status and so on. In all these circumstances then, polygamy is needed, whereby the marriage is necessary and just and the persons affected in that situations will get their rights, including the first and new wife and the children in that marriage. Thus, Shari'ah law gives rights for both woman and man in this matter in accordance with their strength biologically, physically and materially while preservation of collective rights is the primary objective, in spite of individual rights.

Polygamous marriage is a type of marriage permissible under Islamic jurisprudence with few conditions stipulated by legal ruling just as on other Islamic marriages. Polygamous marriage might be mandatory, forbidden, recommended, undesirable and permissible according to Islamic legal ruling. That is why under certain Islamic country such as Tunisia has banned the polygamous marriage. It is because, the practice of the community on polygamous marriage is not in accordance with the principle of polygamous marriage in Islam. In order to avoid unjust polygamous marriage, it is not by abolishing the practice of polygamy but to provide for laws which can prevent unfair polygamous practices. Therefore, it is imperative for the Court to make sure the element of justice is uphold in giving permission of polygamous marriage. It is suggested that the content of *ta'liq* agreed by the first wife under the first marriage is reformed or modified in order to protect the welfare of the wives and children in the presence of the husband and all his wives. This kind of modification does not change the substance of Islamic marriage. It is only to ensure that no dependants deprive of their rights in violation of the husband's duties and responsibilities.

Section 23 (3) of IFLA provides that whenever a husband files to the Court on the practice of polygamy, the Court has to order a first wife or future wife to attend the Court. It is with doubt that, this provision of law is necessary enough to show that women are given rights to inform the Court if the polygamous marriage would be unjust for their family. Therefore, the permission for a polygamous marriage is neither the right of a husband nor the right of wife but the right of the State which has been transferred to the syarie judge to decide with justice. The Court will decide whether such polygamous marriage is permissible or not permissible with the valid reason as provided by Shari'ah law. Nik Noraini (1998) noted that it should be for the State and not an individual to decide whether such social conditions exist which could necessitate taking more than one wife at a time. However, to avoid the misuse of power of

court, there should be the provision to penalize the court staff who do not follow the court procedure which will disadvantageous women or the parties.

In sub section (4) of Section 23 of IFLA, the Court may grant the permission to practice polygamy if it is satisfied on four grounds;

- (a) that the proposed marriage is just and necessary, having regard to such circumstances as, among others, the following, that is to say, sterility, physical infirmity, physical unfitness for conjugal relations, willful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives;
- (b) that the applicant has such means as to enable him to support as required by hukum Shara' all his wives and dependants, including persons who would be his dependants as a result of the proposed marriage;
- (c) that the applicant would be able to accord equal treatment to all his wives as required by Hukum Shara'; and
- (d) that the proposed marriage would not cause darar sharīyy to the existing wife or wives. Therefore, it is suggested that the syarie judge as the authorised person in the Court institution has to decide marriage and family cases based on the principle of justice and collective rights in all circumstances including polygamy. Besides, the role of the Court is important to distinguish between causing harm or (darar sharīyy) and disobedient (nushuz) and read together Section 59 (2) of IFLA in order to distinguish between them to avoid unjust decision.

Polygamy is permitted on the condition of justice (Mawdudi). If a man is unable to do justice, he has no right to avail himself of this conditional permission. Justice here means the husband would be able to maintain his family in matters of living expenses, social contact and other aspects of marital relationship (Zeenath Kausar, 2008) including spiritual elements to guide into the right path as examined by syarie judge as just and necessary which does not cause harm to the existing wife as stipulated by IFLA. For example, in the case of Mohd Izudin bin Mohd Ilias v Rozeta bt Hasan, 2013, the court allowed the plaintiff's application to practice polygamy but with the condition that the husband must be just to his wives in matters such as food, shelter, clothing and overnight rotation with wives. If the husband fail to support his wives and fail to treat them equally and just, the wives can go to court and make an application for maintenance or divorce and their acts in disobeying their husband are not considered as disobedient (Noraini Hashim, 2015).

Understanding polygamous marriage in its history and within the principle of justice and collective rights, eliminate the discriminatory allegations of Shari'ah polygamy. Islamic marriage and family institutions are concerned with the welfare of collective interests including children and women, not with satisfying the lust of an individual. With regard to the Islamic legal ruling of polygamy, it is an option and neither discouraged nor made obligatory. It is left to the husband's personal choice to decide and the wife's personal choice to accept under different situations. When the decision is taken, men who intend to practice polygamy must make sure that he will not hurt the feeling of his wives because he is responsible to all his wives. He has to make sure that he will treat them equally and fairly.

## **Conclusion**

From the above explanations, it shows that IFLA applied substantive equality to maintain justice or to eliminate discrimination. The concept of gender justice in Islam is not

discriminatory against women in the sense that it is suitable with the nature and nurture of women. Even though women do not entitle with similar rights and duties with men under certain circumstances (Nik Salida Suhaila Nik Saleh, 2013), it is just and equal for women for having those entitlement of rights. The entitlements of rights and duties under IFLA are just, ideal, balance and universal which comes out in a unique spiritual, physical, psychological and legal relation which gives comfort to the soul, physical and psychological needs of human beings collectively. As women and men are the God's creation and the God knows the best for the creations, therefore acknowledging differences between them is equal to justice. Islamic law promotes women and men in marriage and family relationships with the rights and duties suitable with their nature and nurture due to the fact that they are different in sexual functions and religious affiliations.

In another perspective, since equality is defined as substantive as well as formal equality under CEDAW, any provisions of law or culture of people which disadvantageous women are considered as indirect discrimination. Therefore, the provision of law which is fall under the category of *furu* matters can be considered to be amended or reformed. For example, Section 8 on the minimum age of marriage for women. To be just and equal for women, it is suggested that the role of wali within the provision of IFLA is not only relating to the solemnization of marriage but also with regard to the duty to provide the inner and outer maintenance of his descent in the absence of his son. In the issue of polygamous marriage, it is not the substance principle of polygamy is wrong, but the behavior and practice of people who affect the harmonious objective of polygamy. The procedural matters on the application of polygamous marriage should be revised so that all persons contributed in the process of application is following the law. The adequate measures should be provided to eliminate discrimination against women in the case of polygamy such as in the provision of ta'liq.

In Islamic law, gender equality is important to empower the nation. It is not for individual rights of women perse. Since equality means formal and substantive equality, the rights of women should not necessarily be the same with men to develop the nation. Their rights and duties are complementary each other with priority roles provided by Shari'ah considering their nature and nurture as guideline. This understanding would eradicate a lot of misunderstanding on the concept of gender justice or gender equality under IFLA. IFLA upholds the principle of justice and equality through acknowledging differences between women and men. IFLA has the attributes of collective rights and duties to empower private and public spheres of life of Muslim women and men. Therefore, in order to avoid the conflict of understanding on the principle of gender justice in Islamic family law, it is recommended that the rights and duties of married women and men in Islamic Family law being codified in one standardized Enactment. It is because all of the States refer to the same sources of Islamic Family Law that is Al-Quran and Sunnah of the Prophet while all applying the Shafi'e School of thought whereby the opinion of other jurists are also applicable in certain circumstances in maintaining justice. Last but not least, it is believed that IFLA through its universal attributes could be the best model governing the relationships between husband and wife which can be applicable not only for Muslim but also for non-Muslim in Malaysia with some amendment and modification through the methods of *ijtihad* which is not contrary with the substance principle of Shari'ah.

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