

A Brief Study on the Positive Attentions to Muslim Women's Rights in Malaysia

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Abstract

This paper examines the debate on the Malaysian laws on Muslim women's rights with a view to identify whether the principle of gender equality governing the Muslim women's rights laws are consistent with the global standard of women's rights underpinned by the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention) or not. Generally, Muslim women in Malaysia have been guaranteed legal rights as human, yet their rights are different from men because of gender. These differences have been criticized by international organisation, non-governmental organisations and individual as 'intentional' and purposely designed to disempowering women. In this paper, I also examine the influence of feminism in Malaysia which brought about positive attentions to women's rights written debate in this country. By exploring the existing data of the works of leading scholars, their conceptual implications and reinterpretation, I have found that there has been a prevalent avoidance of the term 'feminism' in Malaysia, among others, due to the resistance of Western's message pertaining to women's rights issues in this local context. Even though there is a kind of 'feminist's phobia' culturally, however, I argue that it does not affect an effort towards empowering Muslim women by applying the principle of equality informed by the Women's Convention and the Islamic standard.

Key words: Muslim women's rights, feminism, gender equality, non-discrimination, formal and substantive equality

1.1 Introduction

Malaysia¹ acceded to the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention)² on 5 July 1995 with reservations³ to Article 2 (f), Article 5 (a), Article 7 (b), Article 9 and Article 16 owing to its non-conformity with *Shariah*⁴ practiced in Malaysia⁵ and the Federal Constitution (United Nations Treaty Collection). 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' (Declarations, Reservations and Objections to CEDAW, Division for the Advancement of Women).

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

² GA Res. 34/180, 34 UN GAOR Supp. (No. 710.46) at 193, UN Doc. A/34/46 (1979); entered into force on 3 September 1981. See Online: <http://www.un.org/womenwatch/daw/cedaw/>. Retrieved on 12/03/2009 (hereinafter Women's Convention)

³ Reservations are declarations made by State Parties to a treaty that they do not accept certain provisions as binding on them. 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. See Online:

<http://www.un.org/womenwatch/daw/cedaw/reservations.htm>. Retrieved on 12/03/2009

⁴*Shariah* means 'way' or 'path', which refers to the sacred law of Islam

⁵ In Malaysia, the laws are mainly based on the common laws, as a result of the colonisation by Britain. *Shariah* only plays a small role in the country and has jurisdiction in personal matters which applies to Muslims only

The Convention which was adopted on 18 December 1979 by the United Nations (UN)⁶ General Assembly⁷ is often described as an international bill of rights for women and sets up an agenda for national action to end such discrimination (Division of Advancement of Women). Consisting of a Preamble and 30 Articles, it defines what constitutes discrimination against women and provides the basis for realizing equality between women and men. It targets social and cultural patterns as influential forces shaping gender roles and family relations (Article 5).

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 as discriminating against Muslim women due to its refusal to accept certain provisions affecting Muslim women as binding on it. Along with this criticism, the primary objective of this paper is to analyse whether the legal protections of Muslim women in Malaysia underpinned by English common laws and Islamic textual sources (*Quran* and Prophetic traditions) or *ijtihad*⁸ of Muslim jurists could be harmonised with the Women's Convention even though the Government of Malaysia ratified the Women's Convention with reservations pertaining to personal laws of Muslims, which are rights to enter into marriage, maintenance, guardianship of children, polygamous marriage, dissolution of marriage and rights to choose a family name, a profession and an occupation. Personal laws refer to particular laws which govern people because they belong to a particular religion, race, caste, sect or tribe (Jaising, 1996).

1.2 Positive Attentions to Women's Rights Debate

In Malaysia, feminists' writings are relevant and applicable (Ahmad and Baljit, 1989 and Stivens, 2003: 128-130). However, even though the idiom '*feminism*'⁹ is not necessarily synonym with '*Western Feminism*'¹⁰, there has been a prevalent avoidance of the term '*feminism*'¹¹ in Malaysia (Mohamad and Koon, 1994). In the study of inter-related historical, legal and practical issues regarding gender and justice from the transmission of Egyptian reformist to Malaysia through the Azharites, no single word of '*feminism*' being used¹². The reason being, the influence of Western Women's Liberation which was synonym with '*Western Feminism*' has developed Malaysian women's movements which carried along similar message and theme of 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 varied from the avoidance of '*Western*' agenda to libertarianism.

Not only that, feminists' idea towards gender equality has been mistakenly understood as trying to develop a prejudice among women and men (Abd. Rashid, 1998: 10-11). Ahmad, a Malaysian feminist and a lawyer, has claimed that many Muslims regarded feminist approach as '*an attempt to discredit and misrepresent Islam or that it stands for enmity between women and men*' (Ahmad, 2007: 4).

⁶ 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. See Online: <http://www.un.org/en/aboutun/index.html>. Retrieved on 12/03/2009

⁷ 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

⁸ 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

⁹ '*Feminism*' refers to the struggles of 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

¹⁰ The concept of feminism was neither originated, imported nor imposed from the West into the Third World Countries, as the debates on women's rights were held as early as 18th century in China and later in India, Iran, Turkey, Egypt, Japan as well as Malaysia. See Jayawardena, Kumari. 1986. *Feminism and Nationalism in the Third World*. London: Zed Press

¹¹ In Malaysia, the term '*womanism*' is used interchangeably with the word '*feminism*'

¹² See Noor, Zanariah. 2007. 'Gender Justice and Islamic Family Law Reform in Malaysia' in *Kajian Malaysia*. Jil. XXV. No.

That is why women's movements in Malaysia comfortably used the word 'womanism' instead of feminism. Ng, Mohamad and Hui (2006) have thoroughly studied about women's movements in Malaysia and explained the reasons of inability of feminism to play a key role in reforming society in Malaysia. According to them, which I found out as one of the reasons of distancing from feminisms, feminists' movements in Malaysia were not until late 1980s engaged with Islam and Islamic intellectuals regarding women's rights. Also, feminists' organisations were not incorporate Islamic paradigm in their early generations. In fact, until early 1990s, feminists' projects remained unapproachable and untouched by Muslim professionals. This cannot be totally rejected as there are basis and reasons why public at large reject the notions of feminism.

Therefore, the strategy of pursuing women's right through a process of cultural dialogue is one of the best ways to work for local context (Ong, 1996). Margot Badran in 2002 writes that feminisms are produced in particular places and are articulated in local terms. According to her, feminisms scattered globally and the claim that feminism is Western is essentialist in nature. Martha Nussbaum (2000: 7) 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.' Othman (1998: 176) stressed further that even to define Malaysian Muslim women's rights and freedom, one needs to consider a cultural and political battlefield over modern Islamization and cultural relativism.

Malaysian women scholar activists have impulsively explored the relationships between feminist theory and practice. With only one publication on feminism and women's rights before 1970, it increased up to three from 1970 to 1980 and eight from 1981 to 1989 (Ngah, 2007: 388). Ngah found out that higher awareness on women's rights in post 1990s era resulted in huge writings on this subject up to 81 from 1990 to 2004, which was equivalent to 2.2 per cent of the total publication productivity during 1970 to 2004. Even though studies on equality and non-discrimination started only after 1990, women's rights and feminism has been the subject of research since 1970 (Ngah, 2008: 7).

Other than the leading study on history of the development of women's organisation in Malaysia by Mohamad and Koon (1994), Ng and Heng (1996), Ariffin (1999), Yuan (1999), Ng (1999) and Mohamad (2000) there is a significant literature addressing gender in Malaysia¹³.

¹³ See for example Hong, Evelyn. 1983. *Malaysian Women: Problem and Issues*. Penang: CAP; Karim, Wazir Jahan. 1983. 'Malay Women's Movements, Leadership and Processes of Change' in *International Social Science Journal*, 35 (4); Hing, A. Y., Karim, Nik Safiah and Talib, Rokiah (eds.). 1984. *Women in Malaysia*. Petaling Jaya: Pelanduk Publications; Ariffin, Jamilah. 1991. *Women Studies in Malaysia-An Overview and Reference Bibliography*. Kuala Lumpur: National Population and Family Development Board; Ariffin, Jamilah. 1992. *Poverty amidst Plenty: Research Findings and the Gender Dimension in Malaysia*. Petaling Jaya: Selangor Darul Ehsan, Malaysia: Pelanduk Publications; Nagaraj, Shyamala and Yahya, Siti Rohani. 1992. 'National Machinery for the Integration of Women, Population and Development in Malaysia.' Bangkok: UNFPA Project No. RAS/88/PO2, ILO/LAPTAP; Khoo, Siew Mun. 1992. *Status and Role of Malaysian Women in Development: A Bibliographic Essay*. Kuala Lumpur: Faculty of Economics and Administration, University of Malaya, National Population and Family Development Board, Ministry of National Unity and Social Development; Lie, Merethe and Lund, Ragnhild. 1994. 'Renegotiating Local Values: Working Women and Foreign Industry in Malaysia' in *The Copenhagen Journal of Asian Studies*, Vol 9; Stivens, Maila, Ng, Cecilia, Sundaram, Jomo Kwame and Bee, Jahara. 1994. *Malay Peasant Women and the Land*. London: Zed Books Ltd; Heyzer, Noeleen. 1996. *Gender, Population, and Environment in the Context of Deforestation: A Malaysian Case Study*. Kuala Lumpur, Malaysia: Asian and Pacific Development Centre; Geneva, Switzerland: United Nations Research Institute for Social Development; Peletz, Michael G. 1996. *Reason and Passion: Representations of Gender in a Malay Society*. Berkeley: University of California Press; Manderson, Lenore J. 1997. 'Colonial Desires: Sexuality, Race and Gender in British Malaya' in *Journal of the History of Sexuality*, Vol. 7:3; Stivens, Maila. 1998. 'Sex, Gender and the Making of the Malay Middle Class' in K. Sen and M. Stivens (eds.), *Gender and Power in Affluent Asia*. London: Routledge; Healey, Lucy. 1999. 'Gender, Power and the Ambiguities of Resistance in a Malay Community of Peninsular Malaysia' in *Women's Studies International Forum*, Vol. 22:1; Noor, Noraini M. 1999. 'Roles and Women's Well-Being: Some Preliminary Findings from Malaysia' in *Sex Roles*, Vol. 41:3/4; Stivens, Maila. 2003. 'Family Values' and Islamic Revival: Gender, Rights and State Moral Projects in Malaysia' in *Women's Studies International Forum Volume 29*, Issue 4; Omar, Roziah and Hamzah, Azizah. 2003. *Women in Malaysia: Breaking Boundaries*. Kuala Lumpur: Utusan Publications & Distributors; Kausar, Zeenath and Kamaruddin, Zaleha. 2003. *Social Issues in Malaysia: Muslim Women's Perspectives*. Kuala Lumpur: Ilmiah Publishers; 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

Women and politics in Malaysia are also carefully explored¹⁴, instead of women and employments which have been researched as early as 1983¹⁵. In family matters, there are also a number of researches been done¹⁶. Other than that, studies on women and education been explored since 1978¹⁷. Economic status of women is significantly studied in early 1990s¹⁸. Women and media¹⁹ also attracted readers from various literatures whereas women's rights and conflicts with religion and culture been studied since 1987²⁰.

¹⁴See for example Martinez, Patricia. 2000. 'From Margin to Center: Theorizing Women's Political Participation from Activism on the Margins to Political Power at the Center'. Online:

http://www.philanthropy.org/GN/KEN/gntext/politicalrights_women_power_patricia.htm, 2000. Retrieved on

07/02/2009; Wan Ismail, Wan Azizah. 2002. 'Perempuan dalam Politik: Refleksi dari Malaysia' in the *International IDEA*.

Stockholm. pp. 191-202; Ng, Cecilia. 2010. *The Hazy New Dawn: Democracy, Women and Politics in Malaysia*. Asia Research Institute, National University of Singapore

¹⁵See for example Ng, Cecilia and Mohd Noor, Zanariah. 2001. *Sexual Harassment and the Code of Practice in Malaysia: A Study of Pioneer Companies Implementing the Code*. All Women's Action Society and Women's Development Collective; Abdul Aziz, Zarizana and Ng, Cecilia. 2001. 'Combating Sexual Harassment: The Way Forward'. Paper presented at the 11th Malaysian Law Conference. 8-10 November 2001. Malaysia; Ng, Cecilia, Mohd Nor, Zanariah and Abdullah, Maria Chin. 2003. *A Pioneering Step Sexual Harassment and the Code of Practice in Malaysia*. Women's Development Collective and Strategic Information Research Development. Malaysia; Kamaruddin, Zaleha. 2006. 'Towards Harmonisation of the International Human Rights of Women in Malaysia'. Draft paper presented at the Meeting of International Human Experts of Human Rights in Islam. Kuala Lumpur: Malaysia

¹⁶See for example Dagoy, F.J. 1989. 'Wives' Role among Padi-Farming Households in Two Villages in Malaysia' in *M.S. Thesis*, Universiti Pertanian Malaysia, Serdang, Selangor; Root, Robin. 2006. 'Family Values' and Islamic Revival: Gender Rights and Stare Moral Projects in Malaysia' in *Women's Studies International Forum*, Vol. 29:4; Hamzah, Masjaliza and Othman, Norani. 2010. 'A Normal Polygamous Family: A Malaysian Study'. Paper presented at the 7th Biennial Malaysian Studies Conference (MSC7)

¹⁷See for example Manderson, Lenore J. 1978. 'The Development and Direction of Female Education in Peninsular Malaysia' in *Journal of the Malaysian Branch of the Royal Asiatic Society [Singapore]*, Vol. 51:2; Strange, Heather. 1978. 'Education and Employment Patterns of Rural Malay Women 1965-1975' in *Journal of Asian and African Studies*, Vol. 13:1-2; Kaur, Manjit. 1990. 'Women and Education: The Development of Women in Education in Malaysia and Some Implications for Planning and Population Dynamics' in Ariffin, Jamilah and Yahya, Siti Rohani (eds.) *Proceeding of the Colloquium Women and Development in Malaysia-Implications for Planning and population Dynamics*. Kuala Lumpur: The Population Studies Unit, University of Malaysia; Buang, Amriah. 1992. 'Non-Formal Educational and Training Programme for Women: The Case of the Ministry of Agriculture, Malaysia.' *HAWA's Preparatory Project on NFET Programme*, Kuala Lumpur; Ahmad, Aminah. 1993b. 'Status of Education of Women in Malaysia' Report prepared for the *Education of Women in Asia Project*, Asian Development Bank; Agrodev Canada Inc., Hamid Don, Fatimah and Ahmad, Aminah. 1994. 'Education of Women in Asia Project. Country Program Report: Malaysia.' Report prepared for *Asian Development Bank and the Government of Malaysia*; Karim, Wazir Jahan. 1999. *Women in Higher Education*. Information Bank on Women: Penang

¹⁸See for example Mukherjee, V. N. 1991. *Women in the Economy: A Selected Annotated Bibliography of Asia and Pacific*. Kuala Lumpur: Asian and Pacific Development Center; Ahmad, Aminah. 1993a. 'Gender Role Analysis in Extension Program Planning: A Study of Small-scale Women Traders in Malaysia' in J. Coutts, J. Beek, P. V, Frank, B, Hamilton, G and Nolan, C (eds.) *Proceedings of the Australia-Pacific Extension Conference*, Vol. 1; Newstead: Dove Rural Media; Ariffin, Jamilah. 1994. *Reviewing Malaysian Women's Status: Country Report in Preparation for the Fourth UN World Conference on Women*. Population Studies Unit, Kuala Lumpur: University of Malaya; Chattopadhyay, Arpita. 1997. 'Family Migration and Economic Status of Women In Malaysia' in *International Migration Review*, Vol. 31: 2

¹⁹ See for example Kaur, Kiranjit. 1993. 'Malaysian Media and the Malaysian Woman' in *Media Asia* (Singapore), Vol. 20: 2; Azmawati, Azman Azwan. 2006. *Cultivating Gender Sensitive Culture in the Malaysian Media Industry: A Critique and an Alternative*. n.p

²⁰See for example Karim, Wazir Jahan. 1987. 'Status of Malay Women in Malaysia: From Culture to Islam and Industrialization' in *International Journal of Sociology of the Family*, Vol. 17:1; Karim, Wazir Jahan. 1992. *Women and Culture: Between Malay Adat and Islam*. Boulder: Westview Press; Ahmad, Aishah K. and Mahat, Khadijah. 1993. 'Wanita Islam Tiada Hak?' in *UMMI*, Februari, Tahun 5, Bil. 2; Hooker, Virginia Matherson. 1994. 'Transmission through Practical Example: Women and Islam in 1920s Malay Fiction' in *Journal of Malaysian Branch, Royal Asiatic Society (Singapore)*, Vol. 67, pt.2; Nagata, J. 1994. 'How to be Islamic Without Being an Islamic State' in Ahmed, Akbar and Donnan, Hastings (eds.). *Islam, Globalization and Post Modernity*. London and New York: Routledge; Nagata, Judith. 1996. 'The 'Rebirth' of a Modern Malay Muslim Woman' in *Southeast Asian Journal of Social Science*, Vol. 24: 1; Rahman, Isa, Ab.Shuib, Rashidah and Shukri Othman, M. 1999. 'The Practice of Female Circumcision among Muslim in Kelantan, Malaysia'

Not only urban women but rural women issues have also tackled various attentions from researchers²¹. Issues on public and private dichotomy of women's life in Malaysia has not yet thoroughly studied, except a debate on women's conflict and coping behaviour about the integration of home and non-home roles²² whereas representation of masculinity in a Malay society is only been studied in 1995²³. Masculinity in a Malay society, according to Ong (1995: 165) depended on almost entirely, man's economic power in his household.

1.3 Legal Protection of Women in Malaysia: New Law for Equality

These plenty of literatures on women's studies in Malaysia denote that women's situation in Malaysia could recall an active and positive attentions from scholars and women's movements, to study their rights and protection. However, there is lack of researches about legal protection of women in Malaysia except few studies on family, criminal and employment laws²⁴. Violence against women²⁵ as such, is gradually debated after 1990s even though efforts to deal with domestic violence began as early as 1980s (Ahmad, 2005: 16). The debates about violence against women carried along idea and inspiration to protect women from any wrongdoings in public or private life. As a result, the Domestic Violence Act was passed by Parliament in 1994 and implemented on June, 1996. The Women's Aid Organisation's (WAO) Status Report (2001) has shown that Malaysian women face much discrimination in family area, domestic violence and sexual harassment. Further, the Malaysia Human Rights Report (2004) stressed that violence against women in the home and workplace remains a problem due to inadequacy of support mechanisms for victims.

Besides, gender discrimination also exists in citizenship, immigration (Josiah, 2001) and employment (Bhatt, 2005 and Abd. Karim and Wan Talaat, 2008). Furthermore, in the Social Institutions and Gender Index, the UN Committee on the Elimination of Discrimination against Women (CEDAW) has reported that each ethnic group in Malaysia is influenced by values that determine the role of women in the private sphere contrary to men. The Human Rights Commission of Malaysia (SUHAKAM)²⁶ (2009) supported this assertion by claiming that discrimination against women exists in Malaysia in terms of promotion and recognition in the public and private sectors.

in *Reproductive Health Matters*, Vol. 7:13; Sharon A. 2006. *The Tension between Women's Rights and Religions: The Case of Malaysia*. n.p

²¹See for example Sim, Ng Choon. 1987. 'Agricultural Modernization and Gender Differences in a Rural Malay Community 1983-1987' in Ng, Cecilia (ed.), *Technology and Gender*. Serdang: Women's Studies Unit, Department of Extension and Continuing Education, Universiti Pertanian Malaysia and Malaysian Social Science Association. Abu Bakar and Rahamah, Noor. 1991. *Changing Role of Rural Women in Malaysia: A Case Study*. *Asian Profile*, Vol. 19: 1; Ahmad, Aminah and Ismail, Narimah. 1991. 'Women's Participation in Farm and House Work: Implications for Planning Rural Development Program.' Paper presented at the *National Integrated Research and Priority Areas Seminar*, Sintok, Kedah, Malaysia, 25-26 November, 1991; Ahmad, Aminah and Ismail, Narimah. 1992. 'Wives' Work Roles among Rubber Farming Households in Two Districts in Malaysia' in Funke, H. (ed.). *Abstracts of the Research Presentations of the XVIIth World Congress of the International Federation of Home Economics*. Paris: International Federation of Home Economics; Daud, Fatimah. 1992. *A Case Study of WID Programme*. KEMAS Community Development Division, Ministry of National and Rural Development Malaysia, Kuala Lumpur

²² See Greenhaus, J. H., & Beutell, N. J. 1985. 'Sources of Conflict between Work and Family Roles' in *Academy of Management Review*, 10

²³See Peletz, Michael G. 1995. 'Neither Reasonable nor Responsible: Contrasting Representations of Masculinity in a Malay Society' in Ong, Aihwa and Peletz, Michael J (eds.), *Bewitching Women, Pious Men: Gender and Body Politics in Southeast Asia*; Ong, Aihwa. 1995. 'State Versus Islam: Malay Families, Women's Bodies and the Body Politic in Malaysia' in Ong, Aihwa and Peletz, Michael J (eds.), *Bewitching Women, Pious Men: Gender and Body Politics in Southeast Asia*

²⁴ There are 76 publications on legal status of women in 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

²⁵See for example George, Susanna. 1994. 'Violence against Women: Immediate Action Needed' in *Aliran Monthly (Pulau Pinang)*, Vol. 25:1; Amirthalingam, Kumaralingam. 2003. *A Feminist Critique of Domestic Violence Laws in Singapore and Malaysia*. Asia Research Institute Working Paper Series. No. 6. National University of Singapore

²⁶The Human Rights Commission of Malaysia (hereinafter SUHAKAM) is 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, advice on legislation and policy, and investigate complaints. See Online: <http://www.suhakam.org.my/home>. Retrieved on 07/03/2009

As a result, the objective to have 30 per cent women's participation at the policy-making level has yet to be accomplished. Marina Mahathir²⁷ maintained that Malaysia has a set of laws guaranteeing non-Muslim women more rights, and giving Muslim women fewer (Hong, 2006). She has also claimed that injustice against women being justified in the name of Islam. She referred her allegation to polygamous marriage, divorce procedure and guardianship of children which related to the Government of Malaysia's reservation of Article 16 (1) (a) (c) (f) and (g) of the Women's Convention.

To overcome the problem of gender discrimination in both public and private spheres, Josiah (2001: 3) has rightly proposed that the comprehensive review of laws, policies, practices and implementation are important to ensure equal benefit of women in Malaysia. At the same time, according to Josiah, women's groups and the SUHAKAM have suggested that the amendment to the Federal Constitution must not limit itself to the word 'gender' alone, but to include a definition of discrimination as provided in the Women's Convention. While claiming that there are shortcomings in *Shariah* practiced in Malaysia and its implementation that contributes to the abuse and injustice faced by Muslim women in family area, Josiah did not detail out *Shariah*'s deficiency. Without understanding the meanings and principles of equality according to the Islamic perspective, someone must not easily make such assertion, as it is unfair to *Shariah* and the Muslims. Indeed, it is unjust to say that *Shariah* abuses Muslim women, at the same time failed to offer kinds or reasons of injustice. However, I am of the same opinion with Josiah that developing a culture of rights to respect and appreciate women's rights and encouraging men to participate in all actions towards equality would help elimination of discrimination against women.

Interest in the study of equality and the Women's Convention has increased a number of publications only after 2005²⁸. In the Conference on 'Human Rights in Malaysia: The Last 10 Years'²⁹ in 2009, prior to the withdrawal of Article 5 (a), 7 (b) and 16 (2) on 19 July 2010, recommendations were made to the Government of Malaysia to discuss about the reservations, improve enforcement of laws, enact laws for prevention of women's rights and amend relevant discriminatory laws. Even though the Government has withdrawn few Articles (Article 5 (a), Article 7 (b) and Article 16 (2)) nearly a year after the Conference, it did not consider Article 16 (1) (a), (c), (f) and (g) deserved withdrawal. After the first withdrawal in 1997 and the second in 2010, it seems that the Government still not be able to tolerate for the withdrawal of Article 16 (1) (a), (c), (f) and (g) concerning marriage and family matters of Muslims.

Kamal Malhotra, the United Nations Resident Coordinator, in his opening remarks of the 2010 UNDP Asia-Pacific Human Development Report on Gender has promised that the UN in Malaysia will continue advocating for 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 existed between the civil and *Shariah* legal system in Malaysia. This contradiction, according to him, 'hampers progress on substantive gender equality achievement in the country' (Malhotra, 2010: 4). However, I do not agree with Malhotra that *Shariah* practised in Malaysia, which is the reason of Malaysia's reservations to Article 16 (1) (a), (c), (f) and (g) of the Women's Convention causes gender discrimination. He might have different understanding of the principle of equality in the Women's Convention and *Shariah* themselves.

²⁷ Marina Mahathir is the daughter and eldest child of the 4th Prime Minister of Malaysia. She is well-known as a leader in many non-governmental organisations and has called for an end to discrimination based on sexual orientation

²⁸ 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

²⁹ This Conference was organised in conjunction with the Malaysian Human Rights Day on September 9, 2009

I argue that this principle's meaning and purpose in the Women's Convention and Malaysian *Shariah* is harmonious, therefore, the allegation that *Shariah* contradicts with the civil legal system in Malaysia making women unequal and discriminated is questionable. The Retired Chief Judge of Malaya, the Honourable Tan Sri Siti Norma Yaakob, in her opening address underlined the relationship between Islam, justice and equality said;

'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-regents 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 laws³⁰.'

Musawah's³¹ Statement to the CEDAW (2009) has submitted that the *Quran*, Islamic-based laws' objectives, human rights standard and gender relations are governed by equality principles. Therefore, according to Musawah, all laws must be changed to ensure equality, which I found that similar with Josiah and Malhotra, Musawah also understand the value of rights, concept and principle of equality according to Islam and the Women's Convention differently. Musawah has claimed that '*religious-based law*', referred to *Shariah* for Islamic family laws in Muslim countries cannot justify inequality (Musawah, 2009: 7), again shown Musawah's lack of understanding that *Shariah* differs from states to states and judging that *Shariah* practised in all Muslim states discriminates against women is problematic. By correlating equality equated with differences and substantive equality in family and marriage matters of Muslim with inequality, Musawah has also limited its interpretation of equality. Based on my understanding on the natural practices of different rights and duties conferred to women and men in Islam, 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 community and individual and equal in securing and achieving the greatest happiness in life to community and individual which end up with equal dignity and justice to all as the outcome*', not '*putting things at a same place*' or '*giving something of a same amount to different people*'. Islam, at the first place, recognises that equality does not mean that women and men are the same.

The CEDAW also, after considering Malaysia's combined initial and second periodic report, was of the opinion that Malaysia needs laws directed specifically at eliminating sex and gender discrimination because current laws did not sufficiently protect women's rights (U. N. Doc. CEDAW/C/MYS/CO/2: 2). The Committee proposed that all provisions in the Women's Convention should be incorporated into Malaysian laws and ensure that the laws are to be fully enforced. This is among the reasons why the Sisters in Islam (SIS)³², the independent non-governmental organisation which believes that Islam uphold the principles of equality, justice, freedom and dignity insists for a new Muslim family laws based on male-female equality, which is accused as trying to interpret Islam according to Western norms. Might be Othman's (1997) idea of '*cultural mediation*³³' in Malaysia by revisiting and reinterpreting Islamic teachings and texts that are authentic and locally persuasive could address SIS's suggestion.

Abdul Aziz (2008), who has taken a close look at the interpretation, application and adjudication of gender equality in Malaysia, seemed to support the CEDAW's proposal that Malaysia needs gender equality legislation to realise and implement the ideal of gender equality. She documented the Malaysian Court's interpretation of equality and the effect of constitutional guarantees on equality based on *Beatrice Fernandez v Sistem Penerbangan Malaysia*'s³⁴ case and the Women's Convention. Unlike others' argument on equality as discussed earlier,

³⁰Opening speech at the International Conference on '*Legislations and Mechanisms to Promote Gender Equality*', Kuala Lumpur, 28 August 2006

³¹ 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 brought together over 250 participants from 47 countries including 32 countries that are members of the OIC. See Online: <http://www.musawah.org>. Retrieved on 07/02/2011

³²See Online: http://www.sistersinislam.org.my/index.php?option=com_frontpage&Itemid=1. Retrieved on 16/07/2009

³³This term is 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

³⁴ [2004] 4 CLJ 403 (Court of Appeal) and [2005] 2 CLJ 173 at 719 (Federal Court)

Abdul Aziz offered a very distinctive view on equality, yet compatible with Islamic idea and Women's Convention's principle on equality, that, substantive equality is as important as formal equality (Abdul Aziz, 2005: 2 and 2008: 80-81). She detailed out 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 point of view, I centre my argument in this paper that according to Islam and the Women's Convention, gender equality laws might come first as equal treatment of women and men, however, if equal treatment bring anunequal results, then the laws should play its role to ensure equal outcomes and remove barriers to advancement of either women or men. Until recently, the Women, Family and Community Development Ministry is still studying the necessity to enact a Gender Equality Act as legal reform proposals (MySinchew, 26 May 2010).

Having said that, Archer (2007: 57), who studied comparative family laws reform and the feminist debate in Morocco and Malaysia, offered Morocco's transformation of Islamic family laws to be a highly effective agent of change, based upon Islamic principles of many Islamic countries. She claimed that Malaysia currently using Morocco's framework as a model of legal reform and stressed that by bridging the gap between Islamic tradition and the demands of modern life, pragmatic framework for the reform could be realised. Indeed, the practical context of Islamic modern family laws become an urgent need for transformation of gender equality and non-discrimination in Malaysia, yet the demand to understand the concept of equality which could reconcile *Shariah* in Malaysia and the Women's Convention must be prioritised, or otherwise the legal transformation could not satisfy Muslim women.

From a different perspective, 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, abolish all discriminatory practices against women by guaranteeing equal access and equal opportunities in the political, social, economic, civil and cultural fronts and recognise physical, biological and physiological differences of women to overcome this problem. Here, Anirudhan and Siva also stressed on both formal and substantive equality, considering that equality could also be achieved by treating women and men according to their differences, not only sameness. This is similar to what Zaitoon Othman, the President of the Malaysian Muslim Lawyers' Association has pointed out earlier, that women and men have different roles and responsibilities, and their entitlements in law reflect that. Because Islam treats women and men differently but equal, Zaitoon admitted that, '*in some ways, Islamic law is even more advantageous than civil law*' (Hong, 2006).

It seems that the lack of understanding of the equality principle from the Islamic perspective and the Women's Convention's standpoint among women's movements in Malaysia is the reason of charging that reservations to Article 16 (1) (a) (c) (f) and (g) of the Women's Convention as the main reason of discrimination. While formal equality or *de jure* equality can be created by the laws and constitutional reforms, the issue of *de facto* equality or substantive rights still lags behind (Bhatt, 2005) among women's movements and according to Ahmad (2005), remained unexplored in Malaysia. Moreover, specific content of '*equality*' is also not properly defined in Malaysian Federal Constitution (Ahmad, 2005: 4) except 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*'. Ahmad has demonstrated how substantive equality was constructed to be understood as equal opportunity and outcomes. Example of situation of pregnant woman employee has revealed a concrete view on how different treatment may be required to maintain effective equality on the ground of substantive equality. This equality approach would require an employer to provide a temporary change of the nature of work, location or duties to ensure justice for pregnant women, if they could not perform their task as they supposed to due to their condition.

From the feminist perspective, legal response to gender discrimination has to promote substantive equality (Amirthalingam, 2003: 7). Not only has the language of international human rights, feminist discourse, Amirthalingam imparted, had also forces States to engage with substantive equality (Amirthalingam, 2003: 13). Though formal equality is important, the effect of its implementation must also be guaranteed to avoid discrimination, instead of corrective measures. This is the principle of equality in the Women's Convention that State Parties must uphold in all legislations concerning rights.

1.4 Conclusion

To summarize, it is indeed significant to say that the Islamic and international human rights of women underpinned by the Women's Convention affirm gender equality. Women's rights are equally imperative with human rights and they are very noble notion that have to be preserved and protected in the course of human life. This harmonisation could form an international acceptance of legal implementation. As stressed by Brems (2001: 258), 'Islam can be pro human rights, but only to the extent that human rights are pro Islam.' Nonetheless, there are still differences. Exploring the common and contrasting principles of equality under the international convention and Islamic standard are vital to prove that the nature of gender equality is being shared by both traditions.

Indeed, as criticised by feminists, focusing on equal rights can be awkward if equality is defined in ways that only protecting a group of people and leave some out. It might happen even if equality is formulated in gender neutral language. In laws as such, equality in general, which is legislated in statutes can still systematically disadvantage and discriminate women. It is absolutely bias and unfair to the groups that non-autonomous and having less power and opportunity. However, this problem may possibly be overcome if equality is clearly understood and employed to include a comparison of alike with alike, unlike with unlike and to give affirmative measures to individual or groups whose are disadvantaged such as women, or at least to convince women (the disadvantage) to see themselves as persons born with equal rights, even though equality are given and practiced differently. This might also accommodate the tensions between diverse theoretical and applied understandings of equality from all traditions and practices.

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