

**Equality or Justice?
The Position of Labour Laws in Jordan, the UAE and England of Discrimination
against Women in the Light of the Requirements of CEDAW**

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Abstract

This article addresses the position of labour laws in Jordan, the United Arab Emirates (hereafter UAE) and England towards the issue of equality between woman and man in the workplace in light of the requirements of CEDAW¹ to which the three mentioned countries are parties. Generally speaking, CEDAW tends to be a convention aiming at achieving equality between man and woman in all aspects, inter alia, equality in work opportunities and rights. This vision is more suitable to English law, where it is argued that CEDAW and English law stemmed from the same environment, i.e. the Western environment. On the contrary, in many aspects, CEDAW contradicts the Eastern (Islamic) approach, respected by the laws of Jordan and the UAE, basing the relationship between man and woman on justice and integration rather than equality and competition. Therefore, the article examines to which extent labour laws in Jordan and the UAE have applied the requirements of CEDAW, and what are obstacles in front of applying the requirements not applied yet.

Keywords: labour law, woman, discrimination, Islamic law, CEDAW, Jordanian law, UAE law, English law

Introduction

The work field witnesses various types of discrimination on the basis of sex (male and female), marital status, pregnancy, religion, beliefs, race, and age, as well as persons with disabilities, including people with sexually transmitted diseases, most notably HIV.

Women are like men. They may be exposed to these various types of discrimination, as they may be discriminated against because of their beliefs, race or disability. However, there are cases in which women are discriminated against just because they are women. This is the discrimination on the basis of sex. In general, this discrimination may also include men, but it may be brought to women alone as in the cases of discrimination due to pregnancy and childbirth.

We address in this paper the legal protection of women against discrimination just for being women, specifically in the field of work. We ask several questions that revolve mainly around the position of the laws of Jordan and the UAE on the one hand, and England on the other hand, regarding the protection of women and whether the objective thereof was to achieve equality with men as required by CEDAW or justice as demanded by the opponents of this Convention.

The paper addresses the divisions of discrimination. There are the negative outlawed discrimination and the positive discrimination allowed by the legislation under consideration.

Also, discrimination can be divided, according to English law, into direct discrimination and indirect discrimination. The direct discrimination happens when an employer treats a worker unfairly compared with the others, just as when the employer deprives an appropriate person of the job because of sex, race, religion or color. Indirect discrimination takes place

¹ The Convention on the Elimination of All Forms of Discrimination against Women 1979, (hereafter CEDAW).

when the employer puts unjustified conditions impossible for some for reasons regarding their origin, gender, religion, disability or marital circumstances.

On the other hand, the paper discusses discrimination throughout the work relationship. Discrimination is not limited to a certain stage of the contract. It could happen before the contract when announcing for the job, during the execution of the contract in connection with the training of workers, promotion, pay, working hours, and at the end of the contract, as in the case of dismissal and retirement, and even after termination of the work relationship. Each of these phases will be under study to show the extent of coverage of the legal protection due under the laws in consideration.

The paper will also compare two of the Arab laws, namely, the laws of Jordan and the UAE, in addition to English law affected by the legislation issued at the level of the European Community, in the light of the requirements of CEDAW.

The study will be inclusive of the most relevant legislation in the countries mentioned in particular Jordanian Labour Law No. 8 of 1996 (hereafter referred to as the law of Jordan), the UAE Law on Regulating Labour Relations No. 8 of 1980 (hereafter referred to as the UAE Law) as well as English legislation, notably, the Equality Act 2010 (hereafter EqA) which superseded the Equal Pay Act 1970 (hereafter EPA) and the Sex Discrimination Act 1975 (hereafter SDA).

Because the study of these laws will be under the requirements of CEDAW, we will take at the beginning of this research a look at CEDAW, its introductions and the most prominent points in connection with the prevention of discrimination against women in the field of employment. Then, we will devote the first main section of research for the study of the position of English law on the issue of discrimination against women in the field work under CEDAW, and then the second section will examine the position of Jordanian and the UAE laws on this issue in light of CEDAW as well.

1. A Look at CEDAW

It was said that in the nineteenth century Britain, no questions were about what women did, but the questions were to whom this woman belonged, as if she was a thing or purse². It also happened in France in the same century when a lady refrained to pay taxes, arguing that since she had no rights, including the right to vote, she had no duties³. It might be said more than that about the perception of the Western community towards women and how negative it was⁴.

Despite the fact that Jordan and the UAE did not witness such a thing, given that Islam prevented this perception of inferiority of women⁵, but that look of Western society refers to

² B. Willey, *Employment Law in Context: an Introduction for HR Professionals*, 2nd ed (Harlow: Pearson Education Limited, 2003), 150.

³ N. Shafi, 'The Convention on the Elimination of all Forms of Discrimination against Women (**CEDAW**) and the reservations on Article 16 thereof', <http://www.lebarmy.gov.lb/ar/news/?28117#-U-pDHWxd7IU> (in Arabic).

⁴ Ibid.

⁵ Under the religion of Islam the woman has dignity like the man. Verse 1 of *Surat An Nisaa* (Women) expresses this very well as follows: 'يا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ' which can be interpreted as follows: 'O humankind [man and woman] fear your Lord [ALLAH] who created you from one soul'. And, in the *Hadeeth* (sayings of the Prophet Mohammad (PBUH)) collected by At-Termithy, it was narrated that the Prophet said that: 'النساء شقائق الرجال', which means: 'women are like men'. The woman, as such, and in the words of one of the most distinguished Islamic scholars at the current time, Yosef Al Qardawi, 'woman is like man, she belongs to him and vice versa', Y. Al Qardawi, 'Current Issues', cited in: 'the Woman Labour', <http://iicwc.org/lagna/iicwc/iicwc.php?id=127>, (in Arabic).

the size of the development that happened on the status of women and respect for their rights at the present time.

The issue of women's rights and equality has begun to evolve with the participation of women in the workforce after the First World War that created an economic activity which required manpower. This was accompanied by a change in the look of women's role in society and the labour market and the change in the labour market itself, which has become flexible in order to save costs. This also led to take legislative steps since the mid-seventies of the last century to address discrimination in the workplace⁶, where the role of anti-discrimination laws has grown since then⁷.

The attention to the rights and status of women was not limited to the national level only, but surpassed it to the international level, which in turn stimulated the national attention to this issue. There are at the international level several agreements focused on gender equality⁸ notably CEDAW joined by the UAE and Jordan. CEDAW was based on the United Nations Charter, which affirms the equal rights of men and women and to the Universal Declaration of Human Rights, which affirms the principle of the inadmissibility of discrimination and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without discrimination of any kind, including discrimination based on sex⁹.

CEDAW has pointed to the depth of isolation and restrictions on women because of their sex¹⁰. The discrimination against women constitutes according to CEDAW a violation to the principles of equal rights and the protection of human dignity as well as an obstacle in the face of the development of society and the family¹¹. Therefore, the Convention confirmed the necessity of granting women equal rights in all areas, including non-discrimination in employment and wages, and guarantees of job security in cases of marriage and motherhood.

To materialize the foregoing, Paragraph 1 of Article 11 of the Convention requires States Parties to take 'appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, *on a basis of equality* of men and women, the same rights'. These rights include in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

⁶ Willey, *supra* note 2, 151, 152 & 153.

⁷ R. Upex, R. Benny & S. Hardy, *Employment Law*, 3rd ed (Oxford: Oxford University Press, 2006), 161.

⁸ For example: Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

⁹ CEDAW, the Preamble.

¹⁰ *Ibid.*

¹¹ *Ibid.*

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

And, in order to prevent discrimination against women on the grounds of marriage or maternity, Paragraph 2 of that Article obliges States Parties to take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

Finally, Paragraph 3 of the same Article promotes State Parties to review protective legislation relating to matters covered in this Article periodically in the light of scientific and technological knowledge, and to revise, repeal or extend it as necessary.

Despite the many points of convergence, which will be reviewed later, the Convention has faced sharp criticism in the scope of the Arab world, not in terms of the rights set forth in which most of them received satisfaction in this range, but in terms of the source which they launch from. They stem from the need for equality between women and men. The most prominent thing said about them:

1- Discrimination is a legal term that has social implications and effects... Not every distinction is injustice; but that justice, all of justice, will be in distinction, and injustice, all of injustice, will be in equality. Equality is not justice if ruled that people are equal despite the difference in rights, duties, competencies and businesses. It is not of justice and equity, or of interest, that men and women are equal in all considerations, with variations in the properties that are entrusted with the rights and duties.

2. Apparently, the above Article aims at the quality, but reflecting on its underlying philosophy and backgrounds, it reveals that it does not aim to just equality, but to perfect symmetry or congruence, even in the case of different features and capabilities, which is full injustice and not equality.¹²

This puts forward the question about the extent of adherence of the laws of the two Arab countries under study (Jordan and the UAE) to all the provisions of this Convention, currently and in the future. This is taken up in this paper after taking a look at the situation in the western state of England which is accused that the Convention is representing its culture and concepts¹³.

2. The Position of English Law of Discrimination against Women in the Workplace under CEDAW

This section comprises of two limbs. The first will treat the protection of women against discrimination in the workplace pursuant to English law, while the second will be devoted to discuss such a protection in light of CEDAW.

2.1 The Position of English Law of Discrimination against Women in the Workplace

¹² The Islamic International Committee of Child and Woman, 'the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW): a Critical Vision from an Islamic Point of view', <http://www.iicwc.org/lagna/iicwc/iicwc.php?id=960>

¹³ *Ibid.*

In this part of the study, we will discuss the position of English law of discrimination against women in its different forms (negative and positive, direct and indirect), the provisions dealing with this discrimination through the stages of relationship of employer and employee, the exclusions, the penalty and demonstration of discrimination.

2.1.1. Negative Discrimination

Originally, the discrimination against women is prohibited in English law, whatever is the cause be it the dress, marriage, pregnancy or childbirth and in the various contractual stages: When hiring, during the term of the contract with respect to: payment, training, promotion, transportation, facilities, when terminating the service and dismissal from work, and even in the early stages of the contract, in any phase of the announcement of the job, the selection for the job and the next phase of the expiration of the contract.

English law fought at the beginning the familiar form of discrimination, which is the direct discrimination. Then, the protection spread to another form of discrimination which is the indirect discrimination.

We will discuss these two forms, and then we will address discrimination through the stages of the relationship of worker and employer, the exceptions to the prohibition of discrimination and, finally, the responsibility for discrimination.

2.1.1.1. Direct Discrimination vs. Indirect Discrimination

English law distinguishes between direct discrimination and indirect discrimination. Britain was the forerunner when compared with other European countries¹⁴ in recognizing and addressing the impact of the presence of those two types of discrimination¹⁵, to the extent that some have described the prohibition of the latter as a milestone in the anti- discrimination English law¹⁶.

English law has treated the two forms of discrimination legislatively through SDA¹⁷ then EqA which replaced it. Section 13 (1) of the latter Law states that the direct discrimination occurs when someone treats another person unfairly compared to others because of certain character (sex, for example). As for the indirect discrimination, it was defined by Section 19 thereof as the provision, criterion or practice that applies to a person who meets a character that makes him and the people who share with him in this character lower than the others who do not meet this character without the discriminator being able of proving the existence of a lawful purpose for the discrimination¹⁸.

¹⁴ At the European level, indirect discrimination was recognized in the sixties of the past century through three cases brought before the European Court of Justice, which are: *Sabbatini*, *Ugliola* and *Sotgin*. However, indirect discrimination on the ground of sex was come to surface for the first time in *Airola* 1975 by one of the case parties, while it was used by the court itself in *De Angelis* 1985. Latter, this expression was adopted by the Second Equal Treatment Directive 2000 which prohibited such kind of discrimination, see, C. Tobler, *Indirect Discrimination* (Oxford: Hart Publishing, 2005), 109, 145.

¹⁵ Tobler, *ibid.*, 59.

¹⁶ Willey, *supra* note 2, 166.

¹⁷ S 1 (1) (b).

¹⁸ The Section provides that:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if: (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage

In the relationship between men and women, the indirect discrimination shows up where the employer imposes on women a provision, criterion or practice equal to that required of men but he puts women in an unfair position compared to men without having a legitimate justification¹⁹.

The indirect discrimination appeared as a result of the employer being keen not to fall in the direct discrimination because of the sanctions resulting from it. Therefore, they exercised a sort of hidden discrimination. In the case of *Jenkins*²⁰, the employer discriminated in pay between men and women working for him, but when Britain joined the European Union and committed itself to the European Convention, which prohibits such discrimination, the employer quit the discrimination between men and women in terms of pay, but discriminated between people working (full time) and (part time). As a matter of course, the party that was affected as a result was women, because they were the largest category of those who were working (part time). The percentage of women employed in this sector is 90%.²¹

Here, it is noted that the distinction between direct discrimination and indirect discrimination is in the clarity of direct discrimination compared to indirect discrimination, because the prohibition of direct discrimination is on a specific ground, such as race, ethnicity, and color. So, the direct discrimination was described as ‘visible discrimination’²² or as ‘clear and blatant’²³ discrimination. Therefore, when the law explicitly prohibits a type of indirect discrimination, this type turns to become direct discrimination. For example, what happened to the discrimination against those who were working (part time), the legislator decided the prohibition of discrimination between those who were working part time and full time under Part Time Work Directive 1997²⁴.

However, the distinction between the two types of discrimination does not stop at the degree of clarity. It was said that the direct discrimination cannot be justified as it can in the case of indirect discrimination²⁵. On the other hand, while it is not required in direct discrimination the deliberate intent, the requirement of intent regarding indirect discrimination is under debate. While some believe that indirect discrimination should be intentional and is not required in the direct discrimination²⁶. Some believe it is required in indirect discrimination to be intended to compensate²⁷. The European Court of justice upheld this trend where it required indirect discrimination to be intentional. This was adopted in the *Bilka* case where intentionality is required for indirect discrimination²⁸.

when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

¹⁹ E. MacIntyre, *Essentials of Business Law*, 2nd ed (Harlow: Pearson Longman, 2009), 365.

²⁰ The decisions made by English courts are of great importance when talking about discrimination since the EqA reflects the important of these decisions within its provisions, S. McKay, ‘A Right Not to be Discriminated Against: the Origins and Evolution of Discrimination Law’, in *Gower Handbook of Discrimination at Work*, H. Conley & T. Wright, editors, (Surrey: Gower Publishing Limited, 2011), 12.

²¹ C. Tobler, op cit, 58, 147. However, in 2011, part time workers were 8 million: 2 million of them were men and 6 million were women, see, H. Collins, K. Ewing & A. McColgan, *Labour Law*, 1st ed (Cambridge: Cambridge University Press, 2012), 398.

²² Tobler, op cit, 56.

²³ Willey, *supra* note 2, 166.

²⁴ C. Tobler, op cit, 58.

²⁵ S. McKay, op cit, 14.

²⁶ S. Judge, *Business Law*, 4th ed (Basingstoke: Palgrave Macmillan, 2009), 403.

²⁷ D. Kelly, A. Holmes & R. Hayward, *Business Law*, 3rd ed (London: Cavendish Publishing Limited, 2000), 439.

²⁸ C. Tobler, op cit, 147.

It seems that EqA requires in indirect discrimination to be intentional according to Section 124 (4), which states: 'Subsection (5) applies if the tribunal:

- a) Finds that a contravention is established by virtue of Section 19, but
- b) Is satisfied that the provision, criterion or practice was not applied *with the intention of discriminating against the complainant*'.

The conditions that must be met in the case in order to be considered indirect discrimination against women in the scope of work can be summarized as follows:²⁹

1. The presence of a condition or requirement or practice that requires all workers or job applicants to comply with it.
2. The percentage of women who are able to comply with this condition or requirement is less than men. Courts have interpreted the inability to comply on the basis of what happens in practice and not just theoretically³⁰, provided that the inability to comply with the requirement should be measured the moment the discrimination occurs not in the future³¹.

This ratio may be in the community as a whole or in a particular scope of work. Consequently, although the only worker Ms *Edwards*, from among the twenty-one worker, was not able to comply with the new work regulation because of her children, the Court held that even though the ratio of one to twenty one seemed unimportant, it could be argued that the total ratio for women raising children as single parents is the largest compared to men.³²

Therefore, we can say that the extent of the occurrence of indirect discrimination in a case is a question of fact examined in each case individually.

3. There is no objective justification for this condition. English Judiciary cited various expressions to describe the justification. In *Steel v UPW* 1978, the justification must be built on the basis of what is 'necessary' for the employer to adopt and not on what is 'convenient' for him. In *Singh v Rowntree Mackintosh* 1979, it must be 'reasonably necessary'. In *Panesar v Nestle Co* 1980, the justification must be 'right and proper in the circumstances' and finally in *Ojutiku v MSC* 1982, it must be 'acceptable to right thinking people as sound and tolerable reasons for adopting the practice in question'. As for the European Court, in *Bilka Kaufhaus GmbH v Weber von Hartz* 1986, it pointed out that the employer must be in 'real need' and that the discriminatory action is necessary and appropriate to meet this need.³³

It is incumbent upon the employer to prove the existence of the legal justification as decided in *Steel v Union of Post Office Workers* 1978³⁴. However, the employer cannot rely on that customers or associations are wishing to do so as a justification for the condition or requirement³⁵. It cannot also justify discrimination in the existence of compensation³⁶.

4. The condition or requirement or practice is unfair to women complaining of discrimination compared to men. This unfairness must leave important financial or economic effects, as referred to by the Court of Appeal in *Barclays Bank plc v Kapur* 1995.

²⁹ S. Judge, op cit, 404.

³⁰ D. Lewis & M. Sargeant, *Essentials of Employment Law*, 9th ed (London: Clpd, 2007) 62. See, also, N. Selwyn, *Law of employment*, 4th ed (London: Butterworths, 1982), 73.

³¹ B. Willey, op cit, 168.

³² Ibid, 168.

³³ Ibid, 169.

³⁴ N. Selwyn, op cit, 72.

³⁵ D. Lewis & M. Sargeant, op cit, 63.

³⁶ S. Judge, op cit, 403, 404.

Among the conditions that English courts found that requiring them includes indirect discrimination against women, because the proportion of women who can comply with them is less than men, require a limit of age for employment, as it appeared in *Price v the Civil Service Commission* 1978. In this Case, it was found out that the condition which Price complained about requiring that the age of the applicant must be less than 28 years was discriminatory against women, as they in this lifetime period are free for child-rearing and family responsibilities³⁷.

For the same reason that has emerged in the case of *Price*, the following conditions are also discriminatory not in favor of women:³⁸

- The requirement of a minimum length of service (*R v Secretary of State for Employment ex parte Seymour-Smith and Perez* 1997);
- No assumption of social responsibilities such as the care of children, for example, (*London Underground Ltd v Edwards* 1998);
- The requirement of (full time), or selection from those working (part time), to dismiss because of overstaffing;
- The requirement for flexibility in movement (*Meade-Hill v British Council* 1995);³⁹
- The requirement of preventing couples from working with each other, (*Chief Constable of Bedfordshire Constabulary v Graham* 2002).⁴⁰

2.1.1.2. Discrimination through the Stages of the Relationship with the Employer

In this section, discrimination through the stages of the relationship between the employer and the worker will be addressed as follows:

A) When Advertising for the Job

Advertisements for job vacancies, which include discrimination, are not allowed in English law, only in exceptional cases where a particular sex is a genuine requirement for the job. Accordingly, it was largely observed the disappearance of the ads that include gender discrimination, such as: 'salesgirl', 'waiter', 'stewardess' so that newspapers included advertisements containing phrases such as: 'waiter/ waitress', 'male/ female' which means that both sexes are allowed to apply for the job⁴¹.

The matter does not stop at this point but that the ban extends to just directing questions that touch on the sexual orientation of the applicant, such as marital status and desire for marriage and children.⁴²

B) When Selecting for Work

English law does not authorize the employer to discriminate between men and women because of sex when selecting staff or even when making arrangements for that selection⁴³, as like

³⁷ See, also, *Bohon-Mitchell v Council of Legal Education* 1978, cited in: D. Keenan & S. Riches, *Business Law*, 8th ed (Harlow: Pearson Longman, 2007), 543.

³⁸ The first three examples are from: B. Willey, op cit, 167.

³⁹ E. Benson, et al, 'Discrimination and the Equality Act 2010', <http://www.brownejacobson.com-PDFEquality%20Act%202010%20notes.pdf>, p 7.

⁴⁰ R. Painter & A. Holmes, *Cases and Materials on Employment Law*, 9th ed, (Oxford: Oxford University Press, 2012), 241.

⁴¹ D. Keenan & S. Riches, op cit, 545.

⁴² Ibid, 553.

⁴³ EqA, 39 (1).

asking an employment agency to send men without women. This prohibition includes employment agencies as well.⁴⁴

One of the most common cases that occur in practice is when the employer refuses to appoint a woman worker because she is pregnant or because of the financial burden that may be borne by the employer due to pregnancy and maternity leave. Despite the seriousness of the lack of justice suffered by pregnant women in the workplace, where it was found that about half of pregnant women may have been subjected to unfair treatment,⁴⁵ the discrimination against pregnant women was not covered by the provisions of the law in the beginning, as there was no male that can be compared with because the pregnancy is for women not men⁴⁶. Then the courts in the later stages made a comparison with a sick man⁴⁷, but EqA, removed the need to a man to undertake a comparison. The law addressed these cases, viewing them as direct discrimination against women on the ground of sex⁴⁸. The European Court of Justice has adopted the same trend⁴⁹.

However, the case in which a particular sex is really required is excluded as we shall explain later when studying the exceptions to the prohibition of discrimination. Women can also benefit of this acceptable discrimination if employed in a job where the sex of the worker is a real requirement for the work.⁵⁰

C) While at Work

English law prevented all forms of discrimination at work because of sex, whether with respect to pay, promotions, training⁵¹, transferring to other jobs or places or facilities and benefits⁵². Prevention of discrimination is not limited to what happens during the work, but rather it

⁴⁴ See, D. Keenan & S. Riches, op cit, 539, 540.

⁴⁵ G. James, 'the Law Relating to Pregnancy and Maternity Leave', in *Gower Handbook of Discrimination at Work*, H. Conley & T. Wright, editors, (Surrey: Gower Publishing Limited, 2011), 47.

⁴⁶ Controversy over this issue, i.e. the effect of the lack of comparator man on the question of discrimination in the case of pregnancy was not limited to English law. Considering the discrimination against pregnant women as a discrimination on the basis of sex was controversial issue at both the judicial and juristic levels in Europe, the USA and Canada. There were courts decisions in these countries refused to consider discrimination against pregnant women as a discrimination on the basis of sex. However, this is no longer the case, since some of these decisions were repealed by virtue of either later decisions or new legislation, C. Tobler, op cit, 47.

⁴⁷ D. Kelly, A. Holmes & R. Hayward, op cit, 433.

⁴⁸ S 18 (2) of the EqA provides that: 'A person...discriminates against a woman if, in the protected period in relation to a pregnancy of hers, [he] treats her unfavourably: (a) because of the pregnancy, or (b) because of illness suffered by her as a result of it'. See, also, H. Collins, K. Ewing & A. McColgan, op cit, 374.

In addition, The Employment Right Act 1996 and Employment Relation Act 1999 provide protection to women at the stages of pregnancy and maternity, see, D. Kelly, A. Holmes & R. Hayward, op cit, 433.

⁴⁹ See, *Dekker v Stichting Vormingscentrum Voor Jonge Volwassenen (VJV-Centrum) Plus* 1991; *Mahlburg v Land Mecklenburg-vorpommern* 2000; *Handles-og Kontorfunktionaerernes Forbund i Danmrk v Dansk Arbejdsgiverforening* 1991; *Busch v Klinikum Neustadt GmbH & Co. Betriebs-KG* 2003, implementing the Council Directive 76/207/EEC, cited in: R. Painter & A. Holmes, op cit, 271-273.

⁵⁰ *Sisley v Britannia Security Systems* 1983, cited in: D. Keenan & S. Riches, op cit, 540.

⁵¹ In one case, a female, who won a place in a training program and was unable to attend that program because of pregnancy, was prohibited from attending it the following year without justification. This was deemed as direct discrimination against her on the ground of pregnancy, see, A. Davies, *Workplace Law Handbook 2011: Employment Law and Human Resources* (Cambridge: Workplace Law Group Ltd, 2011),141 .

⁵² EqA, 39 (2), see, also, D. Keenan & S. Riches, op cit, 551.

extends beyond that to what is in the context of the work as indicated by the courts in some case⁵³.

Among the most prominent forms of discrimination which occur during work is wage discrimination, including discrimination in pay resulting from limiting women's work in a particular sector of less pay.⁵⁴

English law was keen in EPA then in EqA⁵⁵, which replaced it, to give women the right to sue the employer if the latter discriminates between men and women in wage even though they operate in similar or equal work or of the same value performed by men⁵⁶. The employer cannot ward off the responsibility only if he proves the existence of a real difference between the woman and the man (comparator) with regard to qualifications, responsibility, or the work places.⁵⁷

Despite the foregoing, the inequality in pay between men and women are still going on in Britain, especially in the private sector⁵⁸, where statistics, until recently (2009), suggest that women in Britain still get paid less than men by about 20%.⁵⁹

Of the forms of discrimination, which also appears at work, is sexual harassment, even if unintentional⁶⁰. This discrimination was treated separately under the Employment Equality (Sex Discrimination) Regulations 2005, which made amendment to the SDA as a result of enacting the Equal Treatment Framework Directive 2002⁶¹, until enacting the EqA in which Section 26 thereof identified the cases in which harassment take place, saying:

‘(1) A person (A) harasses another (B) if: (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) The conduct has the purpose or effect of: (i) Violating B's dignity, or (ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if: (a) A engages in unwanted conduct of a sexual nature, and (b) The conduct has the purpose or effect referred to in Subsection (1) (b).

(3) A also harasses B if: (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex, (b) The conduct has the purpose or effect referred to in Subsection (1) (b), and (c) Because of B's rejection of or submission to the conduct, A treats B less favorably than A would treat B if B had not rejected or submitted to the conduct’.

The form of this discrimination includes, in addition to verbal and physical unwanted behavior, unwelcome sexual interest, the hint that sexual relations will develop the position of worker or limit it, sexual insults, display or distribution of materials with sexual overtones.⁶²

⁵³ D. Lewis & M. Sargeant, op cit, 61.

⁵⁴ D. Kelly, A. Holmes & R. Hayward, op cit, 417.

⁵⁵ Ss 65, 66.

⁵⁶ See, E. MacIntyre, op cit, 361.

⁵⁷ Ibid, 361, 363. See, also, G. Mansfield *et al*, editors, *Blackstone's Employment Law Practice 2011* (Oxford: Oxford University Press, 2011), 511.

⁵⁸ T. Dawson, ‘Pay Inequality in Manufacturing Industry: the Case of the Printing Industry’, in *Gower Handbook of Discrimination at Work*, H. Conley & T. Wright, editors, (Surrey: Gower Publishing Limited, 2011), 69.

⁵⁹ S. McKay, op cit, 12.

⁶⁰ J. Jones, ‘Dignity at Work: the Law's Engagement with Bullying and Harassment in the Workplace’, in *Gower Handbook of Discrimination at Work*, H. Conley & T. Wright, editors, (Surrey: Gower Publishing Limited, 2011), 39.

⁶¹ R. Upex, R. Benny & S. Hardy, op cit, 162.

⁶² S. Judge, op cit, 404.

As an application of the above, the Court found in *Strathclyde Regional Council v Porcelli* 1986 that what has happened to *Porcelli* of harassment, physical and verbal, constitutes discrimination against her because the working man would not be subjected to such harassment⁶³. Also, the Employment Appeal Tribunal in *Driskel v Peninsular Business Services Ltd* 2000 found that harassment was committed by the boss to *Driskel* when he joked with her by making comments against her dress during an interview for the promotion⁶⁴.

Finally, other job discrimination at work are non-allocation by the employer of locations for women workers to shower and change clothes fitting their beliefs⁶⁵, and the replacement of a women during maternity leave by a permanent male worker despite the employer's knowledge of her wish to return to work⁶⁶.

D) Upon and After the End of Contract

English law does not permit discrimination between workers on the basis of sex at the end of the contract. The most prominent cases of discrimination against women that lead to the end of the working relationship are pregnancy and childbirth (raising children).⁶⁷

This discrimination can be shown, for example, in the selection of redundant workers to terminate their services or when the demobilization of work⁶⁸, or in respect of pension rights. The EqA includes a text requiring de jure equality between the sexes with regard to pension rights⁶⁹.

Also, the discrimination, including harassment, is prohibited even after the expiry of the contract if it is linked to the previous relationship between the two parties⁷⁰, as in the case of claims or appeals, which track the expiration of the contract, and based on discriminatory bases⁷¹.

2.1.1.3. Discrimination Committed by a Third Party

The prohibition of discrimination in English law is not limited to discrimination committed by the employer, but also extends to discrimination committed by the other. Section 41 of the SDA provides that employers are responsible for discriminatory behaviors by their workers at work only if they prove that they have taken the necessary measures to prevent them. In *Burton v De Vere Hotels Ltd* 1997 and *Jones v Tower Boot co Ltd* 1997, there were racial discrimination against workers from a person other than the employer⁷², but the employer in both cases was able to prevent such discrimination, but he did not. So, the court decided for his responsibility for such discrimination⁷³.

In spite of the absence of a special provision then providing for the responsibility of the employer for harassment committed by a third person, the House of Lords in *Majrowski v Guys*

⁶³ S. McKay, op cit, 17.

⁶⁴ D. Keenan & S. Riches, op cit, 553.

⁶⁵ Ibid, 554.

⁶⁶ *Patefield v Belfast City Council* 2000, cited in: R. Painter & A. Holmes, op cit, 273.

⁶⁷ G. James, op cit, 47.

⁶⁸ See, EqA, s 39 (2). See, also, H. Collins, K. Ewing & A. McColgan, op cit, 374.

⁶⁹ S 66 (3). And, see, G. Mansfield *et al*, editors, *Blackstone's Employment Law Practice 2012* (Oxford: Oxford University Press, 2012), para 25.72.

⁷⁰ EqA, s 108.

⁷¹ E. Benson, *et al*, op cit, 18.

⁷² In *Burton*, the discriminatory action came from a customer who was at the workplace, while in *Jones* it came from Jones's colleagues, who insulted him when calling him (Baboon) due to his black skin.

⁷³ D. Keenan & S. Riches, op cit, 552.

and *St Thomas's NHS Trust* 2006 found the employer liable for harassment by one of his workers in the context of the work⁷⁴. Now, Section 40 of EqA provides for the harassment of a third person, so that the employer is responsible for this harassment, provided that he has known of the harassment and the harassment has been repeated albeit from different people without taking practical steps by the employer to prevent this harassment.

But, if the discrimination, either harassment or otherwise, has been committed from a worker against another worker, the employer may be liable for discrimination if this happened in the context of the work, whether aware of it or not⁷⁵. The employer can avoid the responsibility if he proves that he has taken the necessary steps to prevent his workers to commit the act of discrimination complained of⁷⁶, as if to prove that he drew their attention that the discrimination is regarded as a disciplinary violation or that he held training courses related thereto⁷⁷.

2.1.2. Exceptions to the Prohibition of Discrimination

In this section, we will explain the exceptions to the prohibition on the negative discrimination, and then positive discrimination will be addressed as one of the cases where discrimination is allowed.

2.1.2.1. Exceptions to the Prohibition on the Negative Discrimination

English law excludes from the provisions of the prohibition of discrimination cases where a specific race is required for the job (occupational requirement) with view to achieving a very legitimate aim⁷⁸. Examples of the job requirements are many as in some of the physical work that requires a man, or to save the respect and privacy, or the job may be in an institution confined to men (all-male Institution) or where the work is to provide services in the field of education or care and performed by men better, or where the vacancy is one out of the two designated for a couple⁷⁹, or where the law prohibits the employment of women, such as that required by law in a chair professorship in theology to be the incumbent priest (a man)⁸⁰.

Cases of work outside of Britain are also excluded in a country that its laws or customs prohibit women's work or allow discrimination against them in another way. The scope of British law in this case does not extend, but women may benefit from the provisions of international conventions that prohibit discrimination, such as the Rome Convention (Article 39), which prohibits discrimination between workers of the citizens of the European Union, the impact of which appeared in the case of *Bossa v Nordstress* 1998.⁸¹

3.1.2.2. Positive Discrimination

The idea of positive discrimination is not new to English law. The SDA allowed positive discrimination according to objective circumstances so warrant. For example, when a single father is granted an extra boost to meet the costs of caring for a child or may get special preferential terms.⁸²

Section 158 of the EqA provides an exemption from the provisions of the discrimination to enable individuals to overcome or reduce injustice (disadvantages) related to protected

⁷⁴ R. Painter & A. Holmes, op cit, 256.

⁷⁵ EqA, s 109 (1) (2) (3).

⁷⁶ EqA, s 109 (4).

⁷⁷ E. Benson, *et al*, op cit, 16.

⁷⁸ EqA, Schedule 9, part 1.

⁷⁹ S. Judge, op cit, 405.

⁸⁰ D. Keenan & S. Riches, op cit, 542.

⁸¹ Cited in: D. Keenan & S. Riches, op cit, 541.

⁸² D. Keenan & S. Riches, op cit, 542.

characteristic (such as the fact that the worker is a woman), if those who have this protected characteristic at a disadvantage or have special needs or their participating in a particular activity is disproportionately low compared with others.

As for Section 159 of the same law, if the conditions mentioned above are available, and unless the employer has a general policy of discrimination in the interest of those with a characteristic protected, allows the latter to recruit and promote people who have a characteristic protected for a qualified person equal to him but he does not have this protected characteristic.⁸³

Another form of the positive discrimination is represented by the fact that women are treated with preference to men, standing out in particular in cases of pregnancy and childbirth. This discrimination in this case is permitted without a doubt⁸⁴, not to mention that some do not consider it discrimination⁸⁵.

2.1.3. The Responsibility for Discrimination: Discrimination Suit, Reward and Demonstration

Whether the contract with the employer is lawful or unlawful⁸⁶, the worker can bring a claim of discrimination before the Labour Court (Employment Tribunal). The worker must file his claim within a period of three months from the date of the occurrence of the act complained of in general, and six months in the case of wage discrimination⁸⁷. However, the court may, as an exception, hear the case despite the lapse of time if it considers that justice so require⁸⁸.

Once the suit is filed, the Labour Court has powers, including the power to decide for compensation without limit, including financial compensation, compensation for injury to feelings, aggravated damages and compensation for personal injury⁸⁹.

Besides, the court may issue the necessary recommendations that address discrimination, which vary from case to another in proportion to the presented situation. These recommendations may not benefit the complainant alone, but may also benefit others whose rights were prejudiced like him, as well as those potentially being subjected to discrimination in the future⁹⁰. If the defendant did not comply with the recommendation given by the court during the specified period without reasonable excuse, the court may order him to pay compensation. And, if it has already ordered for compensation, it may increase the amount of compensation⁹¹.

As for the discrimination that takes the form of sexual harassment, the court may issue the decision to compensate the complainant for injury to feelings; compensation varies from one case to another⁹². In addition, if the harassment was intentional, it is criminally punishable by imprisonment up to six months and a fine of up to 5000 pounds as a crime under the Criminal Justice and Public Order Act 1994. There is a broader law, namely, the Protection From Harassment Act 1997 under which the harassment is addressed civilly by compensation and the

⁸³ See, also, E. Benson, *et al*, op cit, 19.

⁸⁴ D. Kelly, A. Holmes & R. Hayward, op cit, 438.

⁸⁵ E. MacIntyre, op cit, 363.

⁸⁶ S. Judge, op cit, 406.

⁸⁷ EqA, s 123. See, also, S. McKay, op cit, 21.

⁸⁸ SDA, s 76 (5). See, *Roberbon v Bexley Community Centre* 2003; *Hawkins v (1) Ball and (2) Barclays Bank plc* 1996; *Mills and Crown Prosecution Service v Marshall* 1998, cited in: E. Benson, *et al*, op cit, 20.

⁸⁹ *HM Prison Service v Salmon* 2001, cited in: E. Benson, *et al*, op cit, 22.

⁹⁰ EqA, s 124 (2) (3).

⁹¹ EqA, s 124 (7).

⁹² *St Andrews Catholic Primary School Governors v Blundell* (EAT) 2010, cited in: op cit, 23.

issuance of injunctions, as happened in *Majrowski v Guys and St Thomas's NHS Trust* 2005⁹³, provided that the act of harassment is repeated, as evidenced in *Banks v Ablex Ltd* 2005⁹⁴.

In addition to the powers of the courts, the Equality and Human Rights Commission can ask the Court for judicial review leading to the result of the elimination of discrimination, as happened in⁹⁵ *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* 1994⁹⁶.

Moreover, the Commission may carry out an investigation within the institutions in which discrimination is claimed to exist. It can issue a warning, asking for a commitment from the employer to the relevant legislation. If the employer wanted to object to this warning, he must do so with the competent court within 6 weeks. If the court confirmed this warning, the employer must then comply with it. If he did not, the Commission may ask the county court to issue a judicial warning urging him to comply with the law under pain of criminal punishment if he decided to ignore the court order.⁹⁷

The punishment may extend to publishing enterprises such as newspapers in the event of advertising for a vacancy including discrimination, provided that they are aware of the illegality of discrimination which should not be among the cases in which the law provides for the inadmissibility of discrimination. The publisher may ward off the responsibility by proving reliance on a permit from the party that asked him for the vacancy announcement that the discrimination contained in the announcement is legal and that he had reasonable grounds to accept that permit.⁹⁸

As for proving discrimination, with the recognition of the difficulty of proving discrimination for several reasons, including the composition of the labour courts, which often have men more than women, white men in particular⁹⁹, the law is satisfied from those who claim the existence of discrimination by proving it. If he did, the court may infer from his proving that the discrimination was done on the basis of protection of the law such as the discrimination due to sex, then the burden of proof shifts to the employer to prove the reason for the act, which took place by him and it was not because of discrimination against the worker. The claim that discrimination was not intended will not be acceptable to avoid the responsibility as long as it has already occurred¹⁰⁰.

2.2. The Protection of Women against Discrimination in the Workplace in English Law in Light of CEDAW

Through what passed previously, although there were some who questioned its effectiveness¹⁰¹, we can say that there are established and integrated rules in English law prohibiting all forms of discrimination against women through the different stages of contract, even before the conclusion of the contract and after it ends. The prohibition includes discrimination by the employer and others. And, there are sanctions on the exercise of this discrimination.

⁹³ D. Keenan & S. Riches, op cit, 553.

⁹⁴ R. Painter & A. Holmes, op cit, 255.

⁹⁵ It is worth mentioning that the judicial review in this case was requested by the Equal Opportunities Commission which is now part of the Equality and Human Rights Commission.

⁹⁶ D. Keenan & S. Riches, op cit, 544; S. Judge, op cit, 403.

⁹⁷ Equality Act 2006, ss 20-22. See, also, D. Keenan & S. Riches, op cit, 542.

⁹⁸ Equality Act 2006, s 54. See, also, D. Keenan & S. Riches, op cit, 546.

⁹⁹ Statistics of 2007-2008 show that only 01% of the cases brought before the courts because of sex discrimination was successful, Sonia McKay, op cit, 20.

¹⁰⁰ S. McKay, op cit, 20.

¹⁰¹ D. Kelly, A. Holmes & R. Hayward, op cit, 424.

This fact is undoubtedly consistent with the requirements of CEDAW. English laws preceded CEDAW itself in addressing discrimination against women, so that it cannot be claimed that these laws purely to meet the requirements of CEDAW. It is true to say that the provisions contained in English laws are in line with CEDAW. This as a result supports the view of some who claim that CEDAW has stemmed from the same environment that produced English law, viz, from the Western social, economic and legal Environment.

To determine the size of the harmony between English law and the Convention, we recall the text of Article 11 of CEDAW, mentioned earlier, which committed the States parties to take measures to eliminate discrimination against women in the field of employment in order to ensure her, 'on the basis of equality between men and women', the same rights. Then that Article stated the most prominent of those rights. Here, we see the extent of harmony between what is stated in that Article and what we have studied previously with regard English law, as if English law was pursuant to this Article or as if this Article was a reflection of the provisions of English law, especially the Article is talking about the right of women to:

- Enjoy the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- Free choice of profession and employment;
- Promotion, job security and all benefits and conditions of service, the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- Equal remuneration, including benefits;
- the right to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work ;
- Social security, particularly in cases of retirement, unemployment, sickness, disability and old age and other incapacity to work ;
- Paid leave;
- Maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.
- No dismissal from the service because of pregnancy or maternity leave;
- No discrimination in dismissals from the service on the basis of marital status.

We have seen that the most prominent of these principles contained in the Convention are largely consistent with English law with regard to the fight against discrimination against women in the field of workplace, so that we cannot easily refer to a provision goes against that convention and beyond its limits.

In the next section, we will discuss the most important provisions relating to the fight against discrimination against women in the laws of Jordan and the UAE, and then show the extent of compliance with the requirements of CEDAW.

3. The Position of Jordanian and the UAE Laws of Discrimination against Women in the Workplace under CEDAW.

In this part of the research, the position of Jordanian and the UAE laws on the issue of discrimination against women in the field of employment will be addressed. At the beginning, their position of negative discrimination against women will be reviewed. Then, the features of positive discrimination in favor of women in the two laws will be examined. Finally the position

of the two laws will be evaluated in light of the requirements of CEDAW with some comparison to English law.

3.1. Negative Discrimination

Jordanian and the UAE laws initiated their sections in a way to indicate their desire to equality of men and women when defined the worker in Section 2 that: 'Every person, male or female...', then Jordanian law returned to embody it in some of its provisions, where, for example, it decided in Section 68 that 'each of the spouses of workers shall get vacation once without pay for a period not exceeding two years, to accompany his/her spouse if moved to another job located outside the province in which he/she operates'. So did the UAE law when Section 20 provided for the inadmissibility of employing juveniles 'of both sexes' who have not completed the age of fifteen.

However, with the exception of these signals, there is no legal principle that provides for equality, not even an explicit mention for equality, contrary to what was indicated by some Arab laws such as the Egyptian Labour Law No. 12 of 2003 in which Section 88 stipulates that: 'Without prejudice to the provisions of the following sections, all the provisions governing the employment of workers without discrimination shall apply on women, when their employment situation is similar'. It appears from the above as if the laws of Jordan and the UAE are insisting on the roots which is inequality between workers considering that the relationship with each and every one of them is based on individual contracts of employment which may be different with regard to the rights and obligations they entail from worker to another, according to 'the autonomy of will' principle, which grants the employer the freedom in the selection of the people to work for him and agree with him on the rights he receives from the contract .

Despite the intervention of the legislature in putting a lot of mandatory legal rules in the field of work contract in general, the original is still the freedom of the employer, so that he does not originally have to use a worker he does not wish to use. This is due to the fact that the employer is responsible for the functioning of the facility, and this requires to give him a wide range of freedom in the selection of his associates in the work so as to achieve the purpose of the facility¹⁰².

This situation is not in line with the requirements of CEDAW, which confirms in Article 11, Paragraph (b), the text which has already been mentioned, the obligation of equal treatment between men and women to enjoy the same employment opportunities, including the application of the unified criteria for selection in matters of employment .

Many of the detailed provisions in the laws of Jordan and the UAE are in line with the original, which we have referred to, i.e. not requiring equality as a principle, where there is nothing to prevent an employer from gender discrimination, or even between workers belonging to one sex, when selecting for the work, with regard to promotions, training and other rights such as leave, which the employer is not required but to adhere to the minimum of vacations¹⁰³.

However, the UAE law, without Jordanian, has departed from the original with regard to equal pay, because we find the first has met the requirements of Paragraph (d) of Article 11 of CEDAW, which provides for women's right to equal pay. Section 32 of the UAE law provides for equal pay between men and women in the case of similar work.

¹⁰² T. Faraj, *the New Labour Law*, 3rd ed (Cairo: Ibrahim An-Nahil Institution, 2007), 188, (in Arabic).

¹⁰³ Pursuant to Section 61 of Jordanian law, this leave is 14 days per year, becomes 21 days if the worker has spent 5 years at work.

Jordanian law has ignored what CEDAW imposed in this regard. The employer is required to observe Jordanian non-discrimination in pay between workers based on the sex of the worker, but the utmost thing required from him is not to go down the minimum wage set by law .

The difference between the laws of Jordan and the UAE in dealing with the issue of equal pay between the sexes has a great impact on other labour rights accrued at retirement and dismissal from work, because these rights are built on the basis of the monthly wage of the worker. If there is wage discrimination between male and female in spite of similar work, this will lead to discrimination between them with regard to the pension, the end of service reward, the arbitrary dismissal allowance or the notice allowance¹⁰⁴.

In the overall attitude of Jordanian law, it seems understandable what the practical reality of Jordan is witnessing of the large inequalities between men and women with regard to access to employment, promotion, pay and pension rights. The employer can refuse to use female workers or reduce their wages because of their inability to make enough effort or complete similar work as men or due to the large periods of holidays from work due to pregnancy and child-rearing. There is not the slightest infraction of the law as long as the law does not prohibit such discrimination. Rather, it goes beyond that to the possibility of discrimination among women themselves because of marriage, pregnancy or because of the veil. For example, some institutions reject the use of married women to evade the maternity leave, while other institutions, such as non-Islamic banks, refuse to use veiled women, perhaps because of the belief that non-veiled women are more attractive to customers¹⁰⁵.

3.2. Positive Discrimination

Compatible with the provisions of *Sharia* (Islamic law, hereafter *Sharia*), which adopts a general concept of discrimination that differs from that known in the West, the constituent of which is the positive discrimination in favor of women, which requires mercy and compassion for them¹⁰⁶, the laws of Jordan and the UAE are keen on the organization of what falls under the heading of positive discrimination, namely the discrimination that gives women an advantage over men, notably in Section 27 of Jordanian law, which does not allow the employer to terminate the service of pregnant working women or send them the notice of termination of employment, starting from the sixth month of her pregnancy or during maternity leave.

We also find it in the laws of Jordan and the UAE regarding vacations in various forms. Section 67 of Jordanian law gives women who work in an organization that uses ten or more workers the right to a leave without pay for a period not exceeding one year to raise her children, and the right to return to work after the expiration of such leave .

In addition, Section 70 of Jordanian law gives to working women the right to have access to maternity leave with full pay before and after childbirth totaling ten weeks, provided that the duration from such leave after the delivery is not less six weeks. The Law also prohibits women to work before the expiration of that duration. It is the same right enshrined in Section 30 of the UAE law, where the days of leave are made 45 with full pay provided that the woman has spent one year in the work, and half pay if she has not.

Such preferential treatment is found as well in Section 71 of Jordanian law that gives working women after the end of maternity leave stipulated in Section 70, mentioned above, the right to take within one year from date of birth period or periods of paid intent to breastfeed

¹⁰⁴ See, ss 14, 25, 32, 91 of Jordanian law.

¹⁰⁵ H. Kalimat, 'Obstacles Detering the Participation of the Woman in the Labour Market', <http://www.alrai.com/article/512729.html> (in Arabic).

¹⁰⁶ M. Al Yosef, 'the Concept of Discrimination against Woman: an Islamic View', 24, (in Arabic), can be found at: http://www.musanadah.com/index.php?action=show_d&id=10.

birth of the new total does not exceed time per day. Section 31 of the UAE has made it two in a paid day by half an hour each period during the 18 months from the date of birth .

Above all, Section 72 of Jordanian law requires the employer who employs at least twenty working women to create a suitable place to be in the custody of the nanny eligible for child care for children under the age of four years, with no fewer than ten children. It is an advantage for working women making them work safely .

Last but not least, Jordanian law provides for preferential treatment for women with regard to the age of retirement. Section 62 of the Social Security Act No. 1 of 2014, the retirement age for women is 55 years, while it is 60 years for men. In the UAE, the same preferential treatment is provided for in Section 27 of Law No. 2 of 2000 concerning pensions and civil retirement benefits for the Emirate of Abu Dhabi .

3.3. To What Extent the Laws of Jordan and the UAE Have Applied the Requirements of CEDAW?

After reviewing the provisions contained in the laws of Jordan and the UAE regarding discrimination against women, we figure out the following points:

First: The laws of Jordan and the UAE did not comply with some requirements of the CEDAW regarding discrimination in the employment field. The most prominent manifestation of this offense is represented in two issues, namely, the absence of a general principle requiring equality between women and men as under Article 11 (b) of CEDAW, and the absence of the decision for equality in the work opportunities as necessitated by the same paragraph.

Second: The position of the UAE law which provides for equality of women and men with respect to remuneration does not agree only with the CEDAW, but also stems from the harmony of the Convention in this point, in addition to other issues made to agree with the *Sharia*, which the Arab lawmaker is generally keen on consistent with its rules. This Convention was praised for its eagerness to work for the equal rights of women and men with regard to equal pay for equal work, as well as the social security, health, and safety of work conditions. It was said that the provision of this Article is consistent with the provisions of *Sharia*.¹⁰⁷

Third: The UAE and Jordanian lawmakers were keen to incorporate many of the provisions which constitute discrimination in favor of women within the articles of the law. If these provisions may be seen from one angle as an attempt to prevent discrimination against women, it may be seen from another angle as a kind of positive discrimination ‘taking into account the conditions of women’¹⁰⁸. However, a look on the matter from a third angle may result in a different perception that these provisions did not include in the law, the protection of women, whether it is was done in positive discrimination or to prevent discrimination against women, but included the protection of the family in which the women is a member. The protection is therefore not due to women alone but also for their families and children, in particular, as well as their husbands eventually. Thus, the existence of the protection cannot be attached to CEDAW, and the evidence is that much of it was prior to the existence of the Convention .

This perception is more consistent with the Islamic view of the role of women in the family and their relationship with men. They are members of their families and their relationship with men is complementary not competitive, and then all the family is entitled to protection. This is illustrated through the protection of pregnant and child raising women in particular, just like saying that the family is the nucleus of society and not the individual, whether male or female.

¹⁰⁷ The Islamic International Committee of Child and Woman, op cit.

¹⁰⁸ G. Ad-Dawoody, *Explanation of Labour Law*, 3rd ed (Amman: Dar Wael Publications, 2004) 130, (in Arabic).

Thus, we can say that what the Arab laws are looking for is justice, integration, harmony and not equality .

The question that arises here is the extent to which CEDAW takes the role given to women in the family and the nature of the relationship between men and women that we have mentioned above?

Then, this requires us to answer other questions flowing in one direction: Is discrimination between men and women is justified? Is the treatment of women equally with men is wrong? Is the man as to the woman is a similar situation?

We will answer these questions through making a comparison between the laws of Jordan and the UAE on the one hand and English law on the other hand for compatibility with CEDAW, which will be dealt with in the next section .

3.4. Three Laws in Light of CEDAW

Comparing the situation in the light of the three laws under study, we can record the following observations:

First: there is under English law a general principle prohibiting discrimination in general and against women in particular. English law is marked by its developed provisions relating to discrimination over time and the evolution of events. These provisions did not come at once, making them integrated covering all cases of discrimination in all its forms, manifestations and nature, from direct and indirect, allowed and not allowed, and along the job relationship from the announcement of the job then when employment and during the labour relationship in terms of pay, training, promotion and then at the end of the relationship of labour and even after completion .

As for the laws of Jordan and the UAE, they do not provide for such a principle, but there are a few scattered provisions expressly refer occasionally to prevent discrimination in some areas such as remuneration in the case of UAE law, and in most cases, they refer that the worker may be male or female.

Second: what was mentioned above makes the latter two laws similar against English law. This difference between the laws of Jordan and the UAE on the one hand and England on the other hand is healthy and does not raise concerns of any kind. The law in general and the labour law in particular, are a result of extensive economic and social developments, and a result of conflict and struggle between ideas of different social groups and competing doctrines¹⁰⁹. It is natural that the ideas and beliefs of the East and the West are various and the circumstances and the economic and social developments witnessed by the three countries are different, especially about the concept of women's rights, which is different from one country to another¹¹⁰, and the issue of equality, which is different from culture to culture also. This is, discrimination in a particular environment may no longer be the case in another environment¹¹¹.

This is reflected in the definition of discrimination in legislation that addressed it. For example, discrimination in the scope of the UN generally means: 'unjustified disadvantageous treatment',¹¹² in the EC law it means: 'unjustified different treatment', in terms of

¹⁰⁹ G Davidov & B. Langille, *the Idea of Labour Law*, 1st ed (Oxford: Oxford University Press, 2011). 3.

¹¹⁰ M. Al Qasimi, 'Convention on the Elimination of All Forms of Discrimination against Women between the Theory and the Application', *Sharia & Law Journal- Al Azhar University*, 32 (2007): 587-679, 651, (in Arabic).

¹¹¹ M. Al Qasimi, op cit, 601.

¹¹² For example, pursuant to Article 1 (1) (a) of Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the term discrimination includes 'any distinction, exclusion or preference made on the basis of race,

jurisprudence, discrimination from the point of view of some is ‘wrongly equal, or wrongly unequal treatment’, by others is the ‘unlawful unequal treatment’, and according to a third opinion, it is ‘systematic disadvantage of social groups based on their domination by other groups’.¹¹³

Therefore, it cannot be said that the different provisions in Jordanian and the UAE laws compared with English law are caused by a deficiency in them, but it may be due to the look of the laws on women and their role in society, the family and their relationship with men. The woman is not an independent being equal to the man in the characteristics and nature, but a distinct member in her family, with close relationship of integration with the man, making the attempt to equalize her with the man hard¹¹⁴. Here, we understand why the legislator granted women preferential treatment enjoyed by them and by which they benefited their husbands and children as well as the society in the end. Also, why did the legislator ban women to work in some times and jobs¹¹⁵. As though the purpose is to achieve the interest of the family as a whole on the one hand, and recognize the difference between men and women on the other hand. Perhaps Section 6 of Jordanian Constitution of 1952 is the best witness to this view, saying:

‘1-Jordanians are equal before the law without discrimination in rights and duties on grounds of race, language or religion.¹¹⁶... 3- The State shall ensure work and education within the limits of its potentials and ensure tranquility and equal opportunities to all Jordanians. 4- The family is the basis of society founded on religion, morality and patriotism, and the law preserves its legal structure and strengthens its ties and values. 5- The law protects motherhood, childhood and old age and takes care of young people and those with disabilities and protects them from abuse and exploitation’.

This Section has availed us in the matter of equality in three things at least. First: equality on the basis of sex was not in the mind of the legislator, Second: The State shall guarantee equal opportunities, but, as interpreted by the High Court of Justice (Supreme Administrative Court in Jordan), this is just among those of similar conditions¹¹⁷, and women and men are not like

colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’.

However, Para 2 of the same Article provides that: ‘any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination’.

¹¹³ On these definitions, see, C. Tobler, op cit, 41- 43 & 49.

¹¹⁴ In supporting this idea, see, M. Al Qasimi, op cit, 611.

¹¹⁵ Ss 69 of Jordanian law and 27- 29 of the UAE law. For further reading on this, see, A. Abu Shanab, *Explanation of Labour Law*, 5th ed (Amman: Dar-Uthaqafah, 2009)130 *et seq.* (in Arabic).

¹¹⁶ This goes against the opinion of some writers who argued that this Paragraph supports the idea of equality between man and woman, see, M. Baydoon, ‘Reservations on the “Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)” Based on Islam and its Practical Application in Jordan: Legal Perspectives’, *Arab Law Quarterly* 25 (2011): 51-69, p 63.

¹¹⁷ In Decision No. 107/1964, the Court pointed out that ‘it is the duty of the administrative authority to settle between people in treatment when their circumstances are similar... In this regard, it will not be able to give some people a particular right and then deprive others from it despite the similarity in the circumstances’.

Later, the court stressed this in decision No. 286/2002, explaining that the principle of equality enshrined in Section 6 of the Constitution does not mean that citizens must be treated equally despite of variation in their legal positions. Viz, many forms of discrimination which are based on objective grounds do not breach Section 6. This is to say that this principle does not oppose all forms of discrimination. Discrimination which is forbidden, under this Section, is the one which is arbitrary. This is because a legislative provision is not intended in itself, rather it aims at achieving specific goals stemming their legitimacy from the public interest the legislature keen to achieve. Therefore, if the discriminatory provision opposes these goals it can be deemed arbitrary and has no objective grounds, and then contradicts Section 6 of the Constitution.

this, Third: The family is the basis of society and not the individual, and the law is bound to strengthen its ties .

Thus, it seems that the approach taken by Jordanian and the UAE laws toward the issue of equality was built on the idea that the focus should be on a fair result and not on formal equality, because similar treatment could lead to discrimination in practice¹¹⁸.

This view does not fit to a large extent with the vision of the CEDAW, but it supports the point of view of its opponents. Article 1 of CEDAW which defines discrimination shows that it is based on equality not justice, saying:

‘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’.

Some writers have noted that the international conventions on the status of women within their families and communities did not take the privacy of the status of women in different societies. In general, what is demanded by CEDAW is mere superficial equality, expressed best by irrational concern shown by the Committee on the Elimination of Discrimination against Women, entrusted with monitoring the implementation of the Convention, that discrimination is permitted in cases where equality is impossible between the sexes because of biological differences.¹¹⁹

The Convention focuses on the similarity between the sexes and assumes its existence though some may see the impossibility of it for physical, psychological and congenital reasons reflected on women's role and function¹²⁰ in the family and community¹²¹. The evidence of asymmetry is the presence of positive discrimination in favor of women, which we had previously shown some of its cases, or, in the words of some, is the special legal status of women in the labour law ‘due to her physical composition and own nature’,¹²² or ‘due to the natural and social conditions surrounding her’¹²³.

On the contrary, we find that English law is largely in line with CEDAW because it emanates from the melting pot of Western culture and ideas, from which the Convention came out¹²⁴, without meaning that it came in response to it specifically because many of its provisions were prior to the Convention.

However, it should not necessarily be understood from that the support for the rejection of Jordan and the UAE laws of all that was provided by CEDAW, because the violation of some provisions of the Convention of *Sharia* does not apply in total to the discrimination against women in the field of work, especially since the text of Article 11 of the Convention in particular¹²⁵ was not an object of reservation by Jordan and the UAE, where we have seen that

¹¹⁸ S. Fredman, *Discrimination Law*, 2nd ed (Oxford: Oxford University Press, 2011), 14.

¹¹⁹ M. Al Qasimi, op cit, 617, 644.

¹²⁰ ‘The woman's first duty and main work, from an Islamic point of view, is her duty towards her husband and children, so she must not work outside the home on the account of this duty’, See, Y. Al Qardawi, op cit.

¹²¹ M. Baydoon, op cit, 57.

¹²² I. Saleem, *Labour Law*, 2nd ed (Alexandria: Monshaat El-Maarif, 2002) 604, (in Arabic).

¹²³ M. Mansoor, *Labour Law*, 1st ed (Beirut: Al Halaby Legal Publications, 2010), 343.

¹²⁴ M. Al Qasimi, op cit, 645.

¹²⁵ Most Islamic states which expressed reservations on the Convention reported a general reservation that they will not be bound by any rule violating the provisions of *Sharia*. Examples of countries that expressed reservations on this way: Mauritania, Libya, Oman, Bahrain, Saudi Arabia, Brunei and the Maldives, M. Baydoon, op cit, 52, 59.

most of what came in this Article is consistent with *Sharia*. Lots of the provisions of the Convention are taken in the laws. Rather, some of these provisions, those consistent with the Convention, were prior to the existence of the Convention itself, and this applies specifically to many of the manifestations of positive discrimination in the two laws .

Consequently, we should distinguish between the absence of a general principle in the two laws prohibiting discrimination, something that could be understandable given what many think of violating *Sharia*¹²⁶, and the absence of forcing the employer to achieve equal opportunities when hiring and equality in other rights, especially with regard to remuneration which reflects the disparity in the rights arising from the end of the service. This may be attributed to the power of will in contracts, especially in its most important manifestations, namely, the selection of the contractor of the other party. Some may fear that the breach of this right could be seen as an intervention in the essence of the contract and imposing a worker on the employer whom he may not want, especially where labour contracts are generally built on a personal consideration in the relationship between the employer and the worker.

On the other hand, many states see the slowness in the implementation of the international convention that they have signed, or the reservation on some of its clauses, not because of conflicting with their beliefs and culture, but to avoid many legislative amendments that should take place within them¹²⁷, especially if linked to social or economic difficulties that might confront those amendments. Such difficulties are perceived in the legislation related to work and labour relations more than others, because of the contact of such legislation with the broader slice in society, namely, the slice of workers, and the largest sector of the economy, namely, the sector of private work.

In light of all this, because of the fact that the provisions of CEDAW would not find their way to the application locally, only if introduced into national legislation, the future is open to various possibilities, including Jordan¹²⁸ and the UAE hurrying to modify labour legislation leading to the application of the provisions of the Convention, or refraining from it altogether, or doing so gradually within determinants, notably, the extent of prejudice of the text to be applied to the peremptory provisions of *Sharia* and the ability to pave the economic and social ground to allow the application of the terms of the Convention without hurting the business and investment sector on the one hand or prejudice the structure of the family and the function of each individual in it.

Conclusion

The issue of the protection of women, like all other matters relating to the family and human rights, is difficult to delve, because interference for the purpose of organizing it is so risky.

However, we have addressed in this paper the issue of discrimination between men and women in the field of employment, and dealt with three laws, namely, Jordanian, the UAE and English laws. As CEDAW is the most prominent in addressing the issue of discrimination against women in general, we compared these three laws with this Convention, revealing the extent of their compliance with the provisions of the Convention .

¹²⁶ Some *Sharia* writers pointed out that ‘there is no single letter in the Holly Quran asks equality between creatures, rather it always focuses on the fairness’. Therefore, ‘it is not right to say that Islam is the religion of equality, but it is correct to say that it is the religion of fairness’, see, M. Al Yosef, op cit, 16, 17.

Different parties in Jordan, especially the Islamic Action Front Party, argue that CEDAW contradicts the *Sharia* and Jordanian traditions and human nature. Some of these parties did not only refuse raising the government's reservations on CEDAW, but also called it to withdraw from the Convention, M. Baydoon, op cit, 64, 69.

¹²⁷ M. Baydoon, op cit, 68.

¹²⁸ H. Kalimat, op cit.

Unsurprisingly, we found that English law consorts with CEDAW. It demanded the removal of all forms of discrimination against women in the field of work and to be treated on an equal footing with men, in various stages of the labour relationship, starting from the announcement of the job vacancy, and even after the termination of the labour relationship. English law went to the extent that fought the discrimination perpetrated by the employer in an attempt to evade the provisions of the law that fights discrimination, as in the case of indirect discrimination, and fought as well the discrimination that comes from non-employer such as discrimination issued by a coworker or customer dealing with the employer, and making the employer responsible for it in some cases .

As for the laws of Jordan and the UAE, it is noticed that the two laws did not come forward on the explicit mention of the prohibition of discrimination in principle. But many of the provisions of CEDAW are actually taken out in the two laws, whether as a result of the ratification of the Convention, or were taken before that, or perhaps as a result of the ratification of the other conventions prior to the CEDAW. The most prominent point that is consistent with CEDAW in the two laws is the positive discrimination in favor of women, including the paid maternity leave and the prohibition of dismissal during such leave. This purpose of such discrimination was not aiming at the protection of women only but their families as well. As for the prohibition of negative discrimination with regard to access to employment opportunities and rights emanating from the contract of wage, hours of work, promotion, training and at the end of the service, it is noticed that the UAE law alone has touched on the need for equality between men and women regarding pay if the work is uniform. Otherwise, we do not find what compels the employer of equality between men and women in the laws of Jordan and the UAE. This is of course different from the case of English law on the one hand, and does not meet the requirements of CEDAW on the other hand .

The reason for the failure to meet the requirements of CEDAW regarding the negative discrimination is uncertain. Even if it could be argued that the existence of a general principle imposes equality between the sexes may be seen as contradictory to the *Sharia* which builds the relationship between the sexes mostly on the basis of justice and kindness and not equality. Then, the absence of such principle within the provisions of the law in the two countries is understood. This does not apply necessarily to the absence of detailed provisions imposing gender equality with regard to jobs opportunity, pay, working hours, promotion, training and rights arising as a result of dismissal from service if qualifications and conditions are equal.

Hence, the reason for the lack of provisions that require equality in these matters, except what is stated in the UAE law for equality in pay between the two sexes in similar circumstances, cannot be attributed to the violation of *Sharia*, in particular, we have seen the agreement between what is required by the *Sharia* in this regard and the bulk of what is raised by the Convention, but may be due to social or economic difficulties different from one country to another. It may be a desire not to prejudice the essence of the contract of employment as like another contract based on the autonomy of the will of contractors, even if the legislature has intervened in some of its provisions for the public interest and in the interest of the worker more than it did in the other contracts .

As a result, lawmakers in Jordan and the UAE are invited to take the initiative to apply the provisions of the Convention, which explicitly are not compatible with the provisions of the *Sharia* and its lofty goals which aim at women's welfare and safeguard their dignity and maintain the unity of the families to which they belong. If the initiative is opposed by the social or economic obstacles (unrelated to the constants of Islamic law), the executive bodies of the two countries, which for so long consented to join the Convention, are invited as well to overcome these obstacles, albeit gradually as per the available potentialities.

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