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The Reality of Gender Equality in The Management of Joint-Stock Companies According to Algerian Legislation

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Abstract
In embodiment of the principle of gender equality between women and men in the practice of commerce and political rights, as outlined in Article 59 of the Constitution, which advocates for expanding women's representation in elected councils further confirmed by Organic Law No. 12-03 this article aims to explore the extent to which this equality is applied in areas not explicitly addressed by Algerian legislation. Specifically, it examines the management of commercial companies, where men are predominantly appointed and preferred over women. This imbalance has led some legislations to enforce a rule of equality in political rights concerning the appointment of board members in commercial companies. However, this provision is not explicitly stipulated by Algerian lawmakers, which means that the appointment of women in managerial positions remains contingent upon their desire to join and the approval of the General Assembly members. This situation complicates the position of women within these governing bodies.
Keywords: Gender equality; Management of joint-stock companies; Algerian legislation; Corporate governance.

I- Introduction :

The Algerian Constitution acknowledges the right of women to engage in commerce, as outlined in Article 61, which guarantees the freedom of trade, investment, and entrepreneurship within the framework of the law (Algeria, 2020). The text is general and does not distinguish between women and men. This constitutional principle is further reflected in Article 08 of the Algerian Commercial Code (Algeria, 1975), which affirms that women have full capacity to engage in commerce, just as men do (Algeria, 1975).

While women's entitlement to engage in individual business projects is legally ensured on an equal footing with men, a question arises when the woman is a partner in a company. In such cases, this right could be compromised due to the woman's position as a potentially weaker party in the partnership. This concern was, in fact, the reason behind the French legislator's prohibition of a company being established between a woman and her husband, to prevent the violation of one of the key conditions for establishing a company the intention to participate. This condition requires equality among partners in all rights, such as freedom to share profits and losses, the right to information, and the right to vote.

Although the Algerian legislator has protected the weaker party in a company, such as the partner contributing labor, there is, however, no provision that enhances the rights of women as a weaker party in the company, particularly regarding their right to membership in boards of directors or supervisory boards. It is rare for a woman to be allowed membership in a board of directors or a supervisory board unless she holds a stake in the company's capital that allows her to impose her membership decision in these boards. This issue has led some legislations, including Canadian and French laws, to introduce the principle of balanced representation of both genders in boards of directors and supervisory boards of commercial companies. The aim of this principle is to ensure the membership of women in these boards in order to achieve gender equality between both genders.

I.1. Study Importance

The significance of this research lies in the fact that the Algerian legislator has adopted a gender equality system regarding political rights, as stated in Article 31 bis of the Constitution, which aims to expand opportunities for women in elected councils. This has been further confirmed by Organic Law No. 12-03 (Algeria, 2012), which defines women's representation in elected councils. The system of mandatory quotas has led to an increase in the representation of women in elected bodies. However, while this system has been implemented in the political domain, the question arises whether it is possible to apply it to the representation in commercial companies.

I.2. Study Methodology

The analytical method was adopted as the most suitable approach since it will help analyze legal texts in order to reach a better understanding of the subject, particularly in light of the Algerian legislator's failure to address this issue. A comparative method was also used by comparing the position of the Algerian legislator with that of French legislation, given that the latter has adopted this principle.

I.3. Study Problem

What is the reality of gender equality in the management of commercial companies under Algerian legislation? This question is explored alongside an examination of the French legislator's experience, who has embraced the principle of gender equality in this field.

I.4. Study Plan

The study is divided into two main sections. The first section will examine the legal provisions regarding the appointment of directors in commercial companies under Algerian legislation, while the second section will discuss the principle of balanced representation of both genders in the boards of directors and supervisory boards of commercial companies.

II– Legal Provisions for Appointing Directors in Commercial Companies under Algerian Legislation

The author of the article in this section explains clearly how to select the sample, determine the variables and how to measure them, how to collect the data and describe how the data are summarized (average, percentage, …), Statistical and standard tools used in data analysis, hypothesis testing and statistical significance. Sometimes it may be necessary to mention the programs used in the calculation. When using a method previously used and published by another researcher, must be referred to as marginalization without being re-described, Though There are changes in the method, which must be explained and explained.

II.1 The Joint Stock Company with a Board of Directors

This system is regulated by Articles 610 to 640 of the Commercial Law. Article 610 of the Commercial Law states: The management of the joint stock company is entrusted to a Board of Directors. Furthermore, Article 638 of the same law stipulates: The Chairman of the Board, under his responsibility, manages the overall operations of the company and represents the company in its relations with third parties...

From these two articles, it becomes clear that this system consists of two bodies: the first is the governing body and its Chairman, which we will elaborate on as follows:

II.1.1 The Board of Directors

Article 610 of the Commercial Law states: The management of the joint stock company is entrusted to a Board of Directors, consisting of at least three members and no more than twelve. In the case of a merger, the total number of directors may be increased to the number of existing directors who have been in practice for more than six months, without exceeding twenty-four (24) members.

A. Appointment of the Board of Directors

The appointment of the governing body requires both formal and substantive conditions.

a. Formal Conditions

The method of appointing the governing body varies according to the method of incorporation. It may be carried out by the founding general assembly if the company is established through public subscription, or after the company's establishment by the ordinary general assembly in accordance with Article 611 of the Commercial Law (Algeria, 1975).

In the case of immediate establishment, the appointment is made in the articles of association, as stipulated in Article 609 of the Commercial Code. This simplified procedure was adopted to facilitate the establishment process, considering the limited number of shareholders (Sabounji, 2002, p. 359).

However, the general rule regarding appointments is subject to an exception. In some cases, the power of appointment is granted to the governing body, which can appoint temporary members. The legislator has specified a set of conditions for this procedure in Article 617 of the Commercial Code (Algeria, 1975). From the text of the article, it is understood that if the number of members falls below the legal threshold, the General Assembly must be called immediately to make the appointments. In this case, the governing body does not have the authority to appoint. However, if the number of members falls below the threshold specified in the articles of association, but not below the legal threshold, the board members have freedom to make the appointments within three months from the date the deficiency occurred. These appointments must be submitted for approval at the first session of the General Assembly, in accordance with the provisions of Article 618, paragraph 1 of the Commercial Code.

If the appointment procedures are not carried out, according to the provisions of Article 618, paragraph 2, any concerned party may request the court to appoint a representative responsible for calling the General Assembly to take the necessary actions for the appointment or to approve them (Amari, 2007, p. 154).

B. Objective Conditions

- Limit on the Number of Directorships: According to Article 612 of the Commercial Code, a natural person who is a member of the governing body may not belong to the boards of directors of more than five joint-stock companies headquartered in Algeria. Based on this, if a woman is one of the shareholders, she cannot be appointed as a member of the governing body if she is already serving on the board of five companies established in Algeria.
- Shareholder Status Requirement: Board members must be shareholders; non-shareholders are not allowed to serve on the board. Additionally, the board must hold at least 20% of the company's capital, and these shares are referred to as guarantee shares and cannot be transferred, in accordance with Article 619 of the Commercial Code.
- Incompatibility of Roles: A board member must not simultaneously hold the position of both partner and employee. However, this is permitted if the employment contract predates the appointment by at least one year. An exception to this prohibition exists in cases of mergers, where the employment contract may have been with one of the merged companies, as per Article 615 of the Commercial Code. Furthermore, the person responsible for management cannot accept an employment contract from the company after their appointment, according to Article 616 of the Commercial Code. The same principle applies to the first condition: if the woman shareholder in the company is an employee and the employment contract does not exceed one year, she cannot be appointed as a board member.

II.1.2 Chairman of the Board of Directors

Given that the governing body of a joint-stock company is composed of multiple members, it is necessary to appoint a chairman. The chairman is responsible for calling the meetings of the board, presiding over them, determining the agenda for these meetings, and coordinating and overseeing the implementation of the decisions made by the board (Maala, 2001, p. 359).

Article 635 of the Commercial Code stipulates: The governing body elects a chairman from among its members, provided that the chairman is a natural person, otherwise the appointment will be void. The board also determines the chairman's remuneration.

Since the chairman of the board must be one of the board members, they must meet the same requirements set for other members of the board, as previously mentioned.

II.2 Joint-Stock Companies with a Board of Directors and a Supervisory Board

The Algerian legislator introduced the concept of a Board of Directors through Legislative Decree No. 93-08, with Articles 642 to 653 of the Commercial Code regulating the governing body, and Articles 654 to 673 addressing the Supervisory Board. This new structure replaces the traditional board of directors and its chairman with the governing body and the Supervisory Board, creating a clear distinction between the roles of management and supervision (Belloula, 2008, p. 246).

The goal of this reform is to simplify the management of joint-stock companies and improve their effectiveness by eliminating the overlap seen in the traditional system, where the chairman simultaneously holds the roles of both management and oversight. Under the new system, the chairman becomes the actual manager and operator of the company, while the other members of the board transition to supervisory roles. To address this, the legislator established a clear separation of responsibilities between management and supervision, assigning each function to separate bodies (Maala, 2001, p. 363).

II.2.1 Board of Directors

According to Article 643 of the Commercial Code, the governing body consists of at least three members and at most five members. The members of the board are appointed by the supervisory board, and a president is also elected from among its members. It is required that all members of the board be natural persons (Algeria, 1975).

Under no circumstances can there be an agreement to appoint board members exceeding the legal limit. Furthermore, their number cannot be increased, even in the case of a merger, as the legislator did not provide a specific exception for such situations (Sabounji, 2002, p. 153).

Regarding the authority responsible for dismissal, Article 645, paragraph 1, of the Commercial Code states: The general assembly, based on a proposal from the supervisory board, may dismiss members of the governing body.

Members of the board have greater stability in their positions compared to members of the board in the traditional system, as their removal requires the approval of both the supervisory board and the general assembly. This results in greater job security for these members. Additionally, if a member is tied to the company through an employment contract and is stripped of their membership (Amari, 2007, p. 163), this does not lead to the termination of the employment contract. Instead, they are reinstated in their original position or a similar one (Algeria, 1975).

II.2.2 Supervisory Board

The Supervisory Board is a separate body from the governing body, tasked with monitoring the actions of the governing body in managing and running the company (Maala, 2001, p. 366).

According to Article 657 of the Commercial Code, the Supervisory Board consists of at least seven members and at most twelve members. In the case of a merger, the number of members can increase to a maximum of twenty-four, provided that the members have been appointed at least six months before the merger date, in accordance with Article 658 of the Commercial Code.

The members of the Supervisory Board are elected by either the founding general assembly or the ordinary general assembly (Algeria, 1975), and the board elects its president (Algeria, 1975). The general assembly has the authority to dismiss them at any time, as stated in Article 662, paragraph 4, of the Commercial Code. Their term is determined by the company's bylaws, but it cannot exceed six years if appointed by the general assembly, or three years if appointed according to the company's bylaws, as per Article 662 of the Commercial Code. Their roles also end in the case of resignation or death.

Should the membership count drop below the legal limit—seven members—the law mandates the governing body to promptly call for a general assembly under Article 665, Paragraph 1 of the Commercial Law to continue with appointments. The Supervisory Board may appoint new members if the count falls below that specified in the articles of association but above the legal limit; these appointments must be presented to the general assembly for approval under Articles 665, Paragraphs 3 and 4 of the Commercial Law. In case of negligence, any concerned party may request the court to appoint an agent tasked with calling the general assembly to make the appointments and approve them, as per Article 665, Paragraph 6 of the Commercial Law.

As for the conditions of membership, they are the same as those required for members of the governing body in the traditional management system of the joint stock company (Algeria, 1975). Members of the Supervisory Board must be shareholders of the guarantee shares. They may be either natural or legal persons, though for natural persons, they must not be members of more than five supervisory boards existing in Algeria (Algeria, 1975).

III- The Principle of Balanced Representation of Both genders in the Management of Joint Stock Companies

This issue has garnered significant attention from European countries, including France, which has attempted to establish legal provisions to ensure that women have freedom to be members of the boards of directors and supervisory boards of commercial companies, after the male gender dominated these boards. Given that the voting process for appointing those with freedom to manage the company always tended to favor men, the French legislator amended the Commercial Law and introduced provisions to ensure gender equality in the management of commercial companies.

In this section, we will discuss the Algerian legislator's stance on women's rights to manage commercial companies, as well as the position of the French legislator. We will also explore the benefits of this equality and the challenges that may arise in its implementation.

III.1 The Algerian Legislator's Position on the Principle

The Algerian Commercial Code does not contain any provision that mandates or encourages business partners in commercial companies to adopt the principle of gender equality in the management and operation of these companies. As a result, the determination of the gender of the partners remains within the authority of the company's appointment procedures. If the power of appointment lies with women, it is possible that the gender balance in the company's board of directors or supervisory boards may tilt in favor of women. Similarly, if the power of appointment lies with men, the same may occur. Furthermore, partners may agree, either at the time of establishment or after the company's establishment, to implement gender equality in the boards of directors and supervisory boards.

However, even if the partners agree that women can hold administrative positions within the company, the practical application of this can be difficult in certain cases. For instance, if a woman is a limited partner in a limited partnership, the law prohibits her from undertaking external management duties. The same restriction applies to joint-stock companies, where a woman cannot hold membership in the governing body or supervisory board if she holds a position in five other boards of directors of companies in Algeria. Likewise, in the event of a limited partnership with shares, a woman cannot serve on the governing body unless she is one of the general partners; her right to board membership is restricted to the supervisory board.

In contrast to the Algerian legislator, the French legislator introduced amendments through Law No. 11-103 (France, 2011), dated January 27, 2011, which amended provisions of the Commercial Companies Code. This amendment specifically affected Article 225-17 (France, 2011) concerning the composition of the governing body of joint-stock companies, adding a second paragraph, as well as Article 225-68 concerning the composition of supervisory boards of joint-stock companies. The purpose of the amendment was to ensure gender equality in the representation of boards of directors and supervisory boards of joint-stock companies by granting the authority to appoint members with an equal gender balance. This principle of equality applies to French companies as well as European companies operating within French territory.

The quota system was introduced under Article 225-18, paragraph 1 (France, 2000), for companies listed on the stock exchange, and it was also applied to companies that have been in operation for three financial years and meet two criteria (Michel, 2018):

- The average number of permanent employees is 500.
- The net sales or total balance sheet amounts to 50 million euros.

The primary objective was for these targeted companies to reach a 40% representation of each gender on their appointed boards. However, since it is not feasible for a company's management to be entirely transformed overnight, a timeline for the gradual implementation of this amendment was established. Thus, these companies were required to have at least 20% female representation on their board by the end of the first general meeting after January 1, 2014, and to comply with the 40% gender quota starting January 1, 2017.

Non-listed companies have had significant time to adapt, as Article 5 of the law of January 27, 2011, indicates that the aforementioned thresholds will be considered for the three financial years starting on or after January 1, 2017.

The amendment has been criticized on the grounds that the principle of gender equality was introduced as a complementary rule rather than an imperative one. This means that the concerned companies might not fully comply with the law and could simply claim that they have made an effort to adhere to the principle of equality. To address this issue, Law No. 11-103 was amended by Law 14-378, issued on August 4, 2014 (France, 2014). Article 67 stipulated that the application of the equality rule is mandatory. Additionally, a new modification was introduced concerning the number of permanent employees, reducing the threshold from 500 employees to 250 employees as of January 1, 2020.

It is important to note that various sanctions are imposed in cases of non-compliance with the quotas, including the annulment of irregular appointments and the suspension of board members' fees for boards that are not constituted in accordance with the law.

The new law also amends Article 66 concerning the representation system outlined in the law dated July 26, 1983, regarding the democratization of the public sector. It strengthens gender equality in the appointment of directors and members of supervisory boards in public sector companies and state-controlled enterprises.

III.2 The Benefits and Challenges of Implementing Gender Equality

Like many legal texts, which can have both positive and negative effects, the legal provision that introduced the principle of gender equality between both genders has caused significant challenges in the management rules of joint-stock companies within French legislation. This will be illustrated below by examining both the positive and negative aspects of this principle.

III.2.1 Positive Aspects of Equality

The primary positive effect of implementing the principle of equality between both genders is that it represents a true realization of Article 36 of the Algerian Constitution, which states the principle of gender parity and the promotion of women's rights in positions of responsibility in public institutions and on institutional levels.

The principle of equality creates a competitive environment and efficient economic performance for the company's Board of Directors, thus becoming a source of growth. In general, professional equality between both genders is a cornerstone of quality work life and social cohesion in the workplace, which has a direct impact on employee well-being and performance.

The feminization of boards of directors and supervisory boards presents a societal challenge, as diversity accelerates the development of attitudes and perceptions regarding the role of women in our society. Many barriers still hinder women's access to the boardroom, including their insufficient participation in the commercial sector.

III.2.2 Obstacles and Challenges in Implementing Gender Equality

Despite the positive aspects of the principle of gender equality in the management of commercial companies, and its alignment with constitutional rules that mandate the enhancement of women's economic rights, this principle can be seen as a constraint on a company's ability to choose its managers. By imposing this principle, managers might be appointed not based on their competence, but solely based on gender. However, the basic criteria for appointing a company manager should primarily be their competencies, regardless of gender. Another issue could arise in certain cases, where a shareholder may be prohibited from managing the company if they are a member of five boards of directors of joint-stock companies in Algeria, for instance.

This principle restricts contractual freedom, as the law, while regulating company management to protect the rights of shareholders and those dealing with the company, should not impose who is entitled to manage the company. Rather, such decisions should be made by the partners, who should choose the person they deem most suitable for managing the company.

The application of the principle of equality to joint-stock companies makes it easier to circumvent the principle by converting the company. Particularly under French law, converting the company to a simplified joint-stock company is sufficient. The Algerian legislator introduced this type of company under Law No. 22-09 (Algeria, 2022), which amended Article 544 of the Commercial Code, introducing a new form known as the simplified joint-stock company. The law stipulates that it can only be established by companies with the start-up designation.

A simplified joint-stock company, whether under Algerian or French legislation, is managed by the company's president, with the possibility of appointing shareholders in addition to the president, such as a general manager or a delegated general manager, as per Article 715 bis 136 of the Commercial Code. The president can also be a legal entity, provided they appoint a natural person to represent them, under penalty of invalidation of the appointment, as stipulated in Article 635 of the Commercial Code.

The powers and duties of the Chairman of the simple joint stock company, or the manager, or the delegated manager, are freely determined in the company's articles of association. These powers include all the authorities exercised by the governing body and its Chairman, as stipulated in Article 622 of the Commercial Law. In the case of a single-member joint stock company, the sole shareholder assumes the role of the Chairman and makes decisions that would otherwise be within the authority of the shareholders' general assembly.

The Chairman of the Board is considered the executive body of the company, responsible for implementing the decisions and recommendations of the shareholders' general assembly. He sets the company's objectives and makes decisive decisions in the areas of economics, finance, and technology, essentially undertaking all actions that align with the company's purpose (Amari, 2007, p. 157). Therefore, the company is bound by the actions of the Chairman of the Board that exceed the company's scope, unless it is proven that the third party dealing with the company was aware of this deviation or that the deviation could not be avoided due to specific circumstances.

IV- Conclusion:

The Algerian legislator has granted full discretion to the partners to determine who has the right to manage the company, in order to avoid restricting the partners and forcing them to appoint managers who lack the necessary competence to run the company. Such a situation could lead to issues that might result in the dissolution or insolvency of the company, with negative consequences for the national economy. The issue of applying the principle of gender equality in the management of commercial companies reveals a reluctance among women to participate in business partnerships. This raises the question of who will represent the female gender in the share of seats allocated to them if such quotas are imposed, potentially causing delays in the appointment of managers and disrupting the interests of the company and its stakeholders. A clear example of this is the French experience, where the companies subject to the principle of equality in the boards of directors and supervisory boards faced resistance. This led them to alter their structure in order to avoid compliance with the legal requirements.

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