



BUSINESS ACTIVITIES AS A MECHANISM TO ACTIVATE THE LEGAL PRESENCE OF WOMEN – A STUDY IN ALGERIAN LAW

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ABSTRACT

Equality is the basic principle that all rights and freedoms are based on at present. It prevents every discrimination of any kind, which is sought by national and international trade laws alike, and this is to create opportunities to enable women to establish their legal presence in the labor market by Providing a work environment that preserves women's rights and is supportive and stimulating for them while being keen to demonstrate the difficulties faced by this on the one hand, and facilitating the exercise of their business and commercial activities on the other hand. This is what the Algerian constitution expressly calls for by devoting the principle of freedom of trade and competition, in addition to opening the way for the time being to commercial investments, which do not differentiate between a man and a woman.

INTRODUCTION

The principle of equality is the most important constitutional and humanitarian principle, which people are keen to uphold and support. Societies should not be based on human discrimination, whether in terms of origin, sex or religion, which is why various international conventions and treaties affirm this right.¹

On this basis, legal equality between men and women emerged, i.e., equality in treatment, which depends on fulfilling the conditions prescribed in constitutions and laws to ensure the effectiveness of their application to all holders of similar and similar legal positions.²

In line with the economic reforms undertaken by the Algerian legislator through the constitutional amendment of 2016, he adopted a policy of economic freedom more clearly with an expansion of the scope of transactions by recognizing freedom of trade, investment and competition, with guarantees by the state to provide a favorable climate for business³ through public and private commercial laws.

To establish their legal status as an active position in society, women must participate in all areas of life and extend their practical influence in parallel with men.

Therefore, at the beginning of the twentieth century, women became engaged in trade like other professions and even expanded their field of activity beyond the borders of the State through the conclusion of international commercial operations, thus competing with men in the activity that was believed to be exclusive to them.

However, for economic democracy to be achieved between both sexes, women must also be subject to all the dictates of the State, which are the basis for transparency and fairness in business practice. Most fields of economic activity have been the subject of attention by the legislators, so many legislative and regulatory texts related to the Algerian Business Code have been enacted, which

have witnessed great development at all levels. Therefore, this topic poses the following problem: What are the manifestations of women's legal rights in trade systems?

To answer this problem, we will divide this study into two parts, dealing in the first section with the dedication of constitutional principles to create a commercial presence for women, and in the second section, we will address the requirements of the work environment that preserves the rights of women traders.

1. THE DEDICATION OF CONSTITUTIONAL PRINCIPLES TO CREATE A LEGAL PRESENCE FOR WOMEN

After Algeria adopted a policy of economic openness, amendments were made to legalize the issue. The most important of these amendments was enshrined in the Algerian Constitution through its principles to establish a commercial legal base that seeks to create equal opportunities for all in the commercial field. This leads women to be able to delve into this field without hesitation.

The most important constitutional principles addressed in the constitution were the principle of freedom of trade and industry, freedom of investment (the second requirement), and freedom of competition, which we will elaborate on successively.

1.1. The Principle of Freedom of Trade and Industry

The legislator has not only devoted the legal presence of women in the commercial field through the issuance of a scattered set of legal texts but it has also been constitutionally enshrined by including the principle of freedom of trade and industry for the first time in Algeria with the text of the Constitution of November 16, 1996, where the content of article 37 of it states that: "Freedom of trade and industry is guaranteed and exercised within the framework of the law".

With this provision, the Constitution has given sufficient protection to women in the commercial

1 Al-Ferjani, S.A. (2015). The Principle of Equality before the Law and its Applications in Libyan Law, *Journal of Legal and Sharia Sciences*. (6). p. 227.

2 Hassan, A. (N.P.D). Human Rights. Publications Agency, Kuwait. p. 66.

3 Haddad, Z. (2016). Freedom in the Market Economy and Algerian Legislation. *Journal of Human Sciences*. 46 (A). p. 330.

field against all forms of infringement that may occur against them, whether issued by the State or privately. The legislator has excluded all barriers and obstacles that prevent them from participating in the development process after they were previously the preserve of the merchant man.

The principle of freedom of trade and industry is the most fundamental principle in the field of trade and is a clear reflection of the economic ideas adopted by the State.

Article 37 states that it is absolute without specification, as it does not discriminate between Algerian men and women or foreigners with regard to the benefit of this freedom.

The legislator also took this principle with several guarantees, including guaranteeing the legality of expropriation,⁴ guaranteeing the integrity of state institutions in dealing with investments,⁵ guaranteeing freedom of intellectual, artistic, and scientific innovation,⁶ and guaranteeing the right to private property.⁷

Thus, this principle of freedom of trade and industry is no longer confined to legal and legislative texts but has gone further by establishing a constitutional framework for it. However, freedom of trade and industry does not mean unconditionally exercised or even a repudiation of applicable legal obligations but is intended to be exercised in a regulated, clear and non-exclusive framework for a particular group or person. Economic activities must be subject to the text of the law to be binding on all and exclude only those expressly excluded by law.⁸

One of the principles contained in this principle is to prevent the public authority from embarking on the regulation of the economy, as it is synonymous with free competition, which is difficult to distinguish between them, as both define the stage of comprehensive economic liberalism.⁹

It is a set of freedoms that vary according to the role they play in confronting the public basket, but this freedom is limited by considerations of pub-

lic interest and the need to maintain public order, which allows the public authority to intervene to achieve the goal of this principle.¹⁰

1.2. The principle of freedom of investment

This principle was first enshrined in Law No. 90/10 of April 14, 1990, on currency and loans, where article 183 states: *“Non-residents are authorized to transfer capital to Algeria to finance any economic activities not expressly allocated to the State, its subsidiary institutions or any legal person...”* Article IV of Ordinance No. 01/03 of August 20, 2001, on Amended and Supplemented Investment, stipulates: *“Investments shall be made in complete freedom, subject to the legislation and regulations relating to regulated activities...”*

Article 43 of the Constitution explicitly stipulates this principle: *“Freedom of investment and trade is recognized and exercised within the framework of the law.*

The State shall endeavor to improve the business climate and encourage the prosperity of enterprises without discrimination in the service of national economic development.

The State shall guarantee market regulation, and consumers shall be protected by law.

The law prohibits monopoly and unfair competition”.

1.3. The principle of freedom of competition

It represents the mechanism by which it operates in the market, emphasizing the free dealing between all parties involved in the commercial field.

Through its legal texts, the legislator has adopted this principle by regulating the competitive course of economic activities, explicitly recognizing the freedom to compete and set prices, and limiting practices that may violate them.

The legislator subjected all persons engaged in economic activities to the controls of competition rules, regardless of their nature or sex, as

4 Article 22 of the Algerian Constitution (2020). <<https://www.joradp.dz/TRV/AConsti.pdf>> [20 June 2023].

5 Article 23 of the Algerian Constitution.

6 Article 44 of the Algerian Constitution.

7 Article 64 of the Algerian Constitution.

8 Ajabi, I. (2014). Consecration of the principle of freedom of trade and industry in Algeria. *Al-Researcher Journal for Academic Studies*, (4). p. 263.

9 Ahmed, M. (1980). *Algerian Commercial Law* 2(1). p. 13.

10 Ajabi, I. previous reference. p. 268.

confirmed by Article 2 of Law No. 10/05,¹¹ which emphasizes the equality of all market players in the face of the provisions regulating the competitive process, including equal opportunities, and making them available to all and at the same time protecting competition and competitors.¹²

To ensure the protection of competition, restrictive practices of competition have been prohibited under article VI of the aforementioned Competition Act, which is confirmed by the last paragraph of article 43 of the Constitution by recognizing the need for competition to be fair.

2. THE REQUIREMENTS OF THE WORK ENVIRONMENT TO PRESERVE THE RIGHTS OF WOMEN TRADERS

For women to do business and acquire the legal status of merchants, there must be a legal environment that preserves their rights vis-à-vis third parties. Therefore, reference must be made to the provisions of the first article of the Commercial Code, which states: “Any natural or legal person who carries out a commercial business and takes it as a habitual profession shall be considered a merchant unless the law provides otherwise.”¹³

Among the conditions required by the Algerian legislature are that women be professional in carrying out business, be independent in the exercise of such business, and have the legal capacity to enable them to carry out legal acts.

2.1. Business professionalism

A merchant is a person whose profession is to do business professionally; to achieve this, you

11 Algerian Competition Law (2010). n° 46. <<https://www.commerce.gov.dz/reglementation/loi-n-deg-10-05-du-15-08-2010>> [Last accessed: 21.06.2023].

12 Haddad, Z. previous reference. p. 334.

13 This article was amended by Ordinance. (1996). No. 96-27 after replacing the phrase “everybody” with “any natural or legal person”, and changed the word “craft” to “profession” and added the phrase “unless otherwise required by law”, which means that the fulfillment of the conditions mentioned in the article does not directly confer commercial character, as some laws may add their own conditions.

must do business. In carrying out commercial business, the legislator intends to carry out the substantive acts mentioned in article II of the Commercial Code and not to ancillary businesses since the latter requires the capacity of a merchant in the person who performs them.

Professionalism¹⁴ is the practice of business regularly and in some form of acquisition and subsistence, and therefore must:

2.1.1. Carrying out work in a consistent manner

That is, on a regular basis, and therefore not to practice business casually or sporadically.

2.1.2. Carrying out work on an ongoing basis

That is, the repetition of doing the business, and the problem is whether the caretaker of the business, according to the individual subject, acquires the status of a merchant. The answer to this question is no because repeating the business is required for its owner to acquire the status of a merchant.

2.1.3. Means of Livelihood

Business must be a person’s usual profession for his livelihood, and not a side job, i.e. an essential work under which a person acquires the status of a merchant.¹⁵

2.1.4. The rules of practicing commercial professions should be fulfilled

According to the principle of freedom of trade and industry, a person is free to practice any work of any kind, but this freedom is not absolute but is limited by public order on the one hand and a set

14 Professionalism differs from hobby in that there is no intention to make a profit or earn, because the amateur wants to spend time and have fun; Jajan, A.R., Burghul, A.Q., Fares, O. (2008), Introduction to Commercial Law – Business, Merchant, and Shop-. Directorate of Books and University Publications. p. 127.

15 Professionalism differs from habituality, the latter being the repetition of an action from time to time without reaching the point of continuity and regularity.

of general rules on the other hand, which is mainly represented in the rule of non-prevention of practising the activity as one of the prohibited commercial activities such as the sale of weapons and drugs. The rule of non-incompatibility, in which the profession of practising trade is incompatible with other professions, and therefore it is not permissible to acquire the status of a merchant, such as practising the profession of judiciary and accounting. In addition to the rule of non-lapse, which the legislator prohibited some persons who have been subjected to criminal penalties or who have been declared bankrupt from practising trade.¹⁶

Consequently, the business of women traders must be professional, so that it can be said that the first conditions for acquiring a commercial status have been met.

2.2. Independence in the exercise of trade

That is, a person carries out substantive business in his name and for his account and in the form of independence, such as starting a commercial enterprise and personally bearing the risks resulting from it.¹⁷

It should be noted that Ordinance 75/59 did not stipulate this requirement, but the Law on the Commercial Register provided that any natural person enjoying his civil rights could expressly express his desire to engage in business in his name and on his account.¹⁸ That is, there should be a direct relationship between the merchant and the business he is responsible for. A worker in a commercial shop is not considered a merchant because he does not carry out business for his account, but for others.

Therefore, women who want to engage in trade must do this work for their account and in their name to acquire commercial status.

2.3. Commercial Eligibility

By extrapolating the Commercial Code, we find that it did not include a special provision for commercial capacity, which must refer to the general rules. While we find him referring to the actions of the minor merchant and the married merchant woman.

2.3.1. General Eligibility Conditions

Article 40 BC states: “Every person who has attained the age of majority and enjoys his mental faculties and has not been interdicted shall have full capacity to exercise his civil rights. The age of majority is 19 full years”.

Under this article, which has no counterpart in commercial law, a person becomes eligible to engage in legal acts, including the practice of trade, unless there is a legal impediment. A legal impediment may be an impediment to capacity or an impediment to the exercise of trade. With regard to symptoms of eligibility, such as dementia, insanity, foolishness and inattention, each of their actions is either null and void, they cannot engage in business, and they do not have any penalty if they do so, and they can annul contracts concluded at that time.

2.3.2. Actions of the minor

Under Articles V and VI of the Commercial Code, the legislator has clarified the conditions a minor must meet to engage in trade and the resulting effects.

¹⁶ See Article 381 of the CCP.

¹⁷ Salah, F.Z. (2003). *Al-Kamil fi commercial law – Business – Merchant – Artisan – Organized Commercial Activities – Commercial Register-*. published and distributed by Ibn Khaldun. p. 167.

¹⁸ This is stated in the first paragraph of Article II Algerian Commercial Register Law. (1990). No. 90/22. <<https://www.commerce.gov.dz/reglementation/loi-n-90-22>> [Last accessed: 21.06.2023].

2.3.2.1. Conditions for qualifying a minor to practice trade

Under Article V of the Commercial Code¹⁹ a minor must meet three conditions to be eligible to conduct business:

1. The minor has completed the age of 18 years.
2. The minor obtains permission to engage in trade from her father or mother or a decision of the family council approved by the court whether her father is deceased or absent, or his parental authority has been revoked or impossible for him to exercise it, or in the absence of a father or mother.
3. The permission to engage in trade must be in writing and may also be a general or specific permission for certain operations.
4. Registration of the permission in the commercial register to inform third parties dealing with the minor guide.

2.3.2.2. Effects of qualifying a minor to engage in trade

If the conditions above are met, a minor, male or female, can practice business. He may carry out all actions, including arranging a mortgage or any obligation on his real estate, provided that the disposition of the latter can only be done by following the procedures related to the sale of the property of minors or incapacitated, and this is in accordance with article VI of the Commercial Code, which states: “Minor traders licensed in accordance with the provisions of article 5 may arrange an obligation or mortgage on their real estate.

However, the disposal of such funds, whether voluntary or forced, can only be effected by following the forms of procedure relating to the sale of the property of minors or incapacitated persons”.

¹⁹ It states: “A minor guide, male or female, who is eighteen years of full age and who wishes to engage in trade may not commence commercial operations, nor shall he be considered an adult in respect of undertakings entered into in connection with a business: if he has not previously obtained the permission of his father or mother or a decision of the family council certified by the court, whether his father is deceased or absent, or his parental authority has been forfeited or impossible for him to exercise it, or in the absence of the father and mother. This written permission must be provided in support of the application for registration in the Commercial Register”.

2.3.3. Married women who are merchants

Article 7 of the Commercial Code states: “A merchant’s husband shall not be considered a merchant if he carries on a commercial activity subordinate to that of his spouse.

He shall not be considered a merchant unless he carries on a separate business”.

The legislator has stipulated that a separate commercial activity be exercised for both the wife and husband and that no subordinate activity should be practised.

It is also inferred from the term “wife” that it accrues to the husband or wife. If a man is a merchant, his wife cannot engage in business activity unless her activity is separated from that of her husband and vice versa.

However, the legislator did not clarify what the phrase “separate business” meant in the text. Does this mean legal or practical separation? The Algerian legislature should have intervened to clarify the ambiguity.

Thus, it can be said that women are subject to the same conditions as men without restriction or conditions, as confirmed by the text of Article VIII of the Commercial Code.²⁰

In addition, and through all legal texts, and to acquire this status vis-à-vis everyone and invoke it, it must be registered in the commercial register.

Thus, the Algerian legislature has provided women with a legal environment that enables them to obtain their commercial rights in addition to the constitutional principles and, in return, imposed on them a set of obligations. However, he did not differentiate between male and female or assign additional conditions to her.

CONCLUSION

Through economic reforms, the Algerian legislature has tried to enshrine certain commercial principles constitutionally to guarantee women’s rights to trade in parallel with men. This depends on the outcome of the following stages of openness and the entry into the era of globalisation.

²⁰ For more details, see: Salah, F.Z. previous reference. p. 355.

This issue raises many questions, most of which revolve around the fate of women's economic activities in the country, the maximum limits for practising these activities, and the restrictions that must be applied in light of the fierce competition, especially if we look at the two opposing phrases contained in Article 37 of the Constitution, which states: "*Freedom of trade and industry is guaranteed and exercised within the framework of the law*".

Therefore, we have concluded from this subject two conclusions:

- The first concerns considering equality as one of the fundamental constitutional principles on which all commercial rights and freedoms are based;
- The second is that equality in trade practice must be actual and real, not just a textual paper.

Therefore, we recommend emphasising women's role in activating constitutional principles on the ground through their economic activities, in which they sometimes surpassed the male trader through the sweep of "businesswomen" into the world of commerce.

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