

Report on the Gender Lens to the UN Guiding Principles on Business and Human Rights

WOMEN'S DISCRIMINATIONS IN THE BUSINESS SECTOR IN MIDDLE-EASTERN COUNTRIES. SELECTED CASE-STUDIES

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United Nations
Educational, Scientific and
Cultural Organization



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Egypt

by Serena Tolino

1. Gender Equality and the Constitution

Egypt has been a state member of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) since 1981. CEDAW was ratified with a number of reservations. One reservation, concerning Article 9 (2), granting women equal rights with respect to the nationality of their children, without prejudice, depending on the nationality of the child's father, was withdrawn in 2008. There are, however, other reservations which are still active. One concerns Article 16 on the equality of men and women in all matters relating to marriage and family relations. In this case, Egypt declared that this would be implemented only when not against shari'a. Shari'a is also mentioned in the reservation concerning Article 2, which states that Egypt is committed to gender equality as long as this does not contradict shari'a. The last reservation regards Article 29 (2), concerning the possibility of undergoing arbitration in case of a dispute between two or more state parties on the interpretation or application of the CEDAW.

Since 2014, gender equality has also been explicitly mentioned in the Constitution. While former constitutions mentioned the right not to be discriminated according to sex, the 2014 Constitution speaks, more explicitly, of "equality between man and woman" (*al-musāwā bayna al-mar'a wa-l-rajul*). The 2014 Constitution is the result of a constitutional moment that started after the 2011 upheavals that saw the promulgation of a Constitution in 2012. The 2014 Constitution was the result of the work of two Constitutional Committees. The first Committee included ten members and was in charge of formulating proposals to revise the 2012 Constitution, approved during the Presidency of Muhammad Morsī (in charge between 30 June 2012 – 3 July 2013). This committee included six representatives of the judiciary and four constitutional law academics, none of them a woman. The draft elaborated by this Committee was then submitted to a second committee, which included 50 members and was led by the former Arab League leader and Foreign Minister, 'Amr Mūsā. Eighty percent of the committee consisted of members nominated by political parties, religious institutions, unions, syndicates, and revolutionary youth. The remaining 20% of the members were nominated by the government. Of the 50 members, five were women: Mīrvat al-Talāwī, the Chair of the National Council for Women, 'Azza al-Ashmāwī, from the National Council for Motherhood and Childhood, the feminist academic Hoda Elsadda (founder of the Women and Memory Forum), the attorney Mona Zulficar, and 'Abla Muḥī al-Dīn al-Laṭīf, a professor at the University of Banhā and consultant for the Ministry of the Industry. The Committee also examined the requests, criticisms, and suggestions that were submitted by the Working Committee on Women and Constitution, founded in February 2011, some of which were effectively taken into account.

Notwithstanding the low number of women involved in the process, in regard to gender equality, there are a number of articles that represent important steps forward. For example, Article 93 states that "[t]he State shall be bound by the international human rights agreements, covenants and conventions ratified by Egypt," stressing the importance of international law and human rights treaties, including the CEDAW. Article 180 also reserves at least one quarter of the seats in local councils to women, while Article 6 guarantees Egyptian citizenship to children born to an Egyptian father or an Egyptian mother. Beside the articles ensuring the equality of all citizens before the Law (notably, art. 9 and art. 53), Article 11 is the most revolutionary one because for the first time it explicitly mentions "equality between man and woman," stating that the state shall ensure it in all civil, political, economic, social, and cultural rights. Moreover, there is a clear commitment to take

adequate measures to ensure the representation of women at the political, judicial, and administrative levels and to ensure the “balance between family duties and work requirements.” The article directly confronts many of the problems facing Egyptian women: gender equality at the political level, representation, civil rights, and the balance between family and work, as well as criminalizing violence against women.

2. Reform of the Penal Code

Another important step toward the protection of women’s rights was the 2014 approval of an amendment to Article 306 of the Penal Code, which explicitly criminalizes sexual harassment. The punishment is imprisonment for at least six months or a fine of between 3,000 and 5,000 Egyptian pounds for “those who confront others in a public space or a private one or where one is present with permission by making forward actions, insinuations or hints that are sexual or pornographic whether by signals, words or action and by any means including wired and wireless communication methods” (art. 306, a). Furthermore, Article 306 (b) states that after defining sexual harassment, states that the penalty will be increased to a period of between 2 and 5 years and to a fine between 20,000 and 50,000 Egyptian pounds if the perpetrator “has occupational authority, familial, educational/mentoring or practiced any kind of pressure on the harassed.” In the same section, sexual harassment in the workplace is also explicitly mentioned.

Although the approval of a law against sexual harassment is certainly a step forward, in particular in consideration of the endemic problem that sexual harassment represents for women in Egypt, the law has been criticized by the feminist movement because it mentions “the intention to obtain benefits of a sexual nature,” (art. 306, b) while experience in Egypt has shown that often there is no intention of obtaining sexual benefits, especially in the cases of group-assaults led with political purposes.

3. Gender Equality in the Work field

While at the moment gender equality does not seem to be explicitly addressed in the Code of Ethics about any syndicate or company, a number of positive measures have been taken with the approval of Law 126/2008, which strongly revised Law 12/1996, or the Child Law. The law has as an aim to protect children’s rights and motherhood. In regard to labor rights, the fifth part of the law is particularly relevant, as it deals with working minors and with the protection of working mothers. As stated in Article 70, all working mothers have the right to a reduction in work time of at least one hour after the sixth month of pregnancy, and it is prohibited to employ a woman for any overtime work during pregnancy and until the end of the first six months following the child’s birth. Moreover, the same article guarantees to any woman working “for the State, the public sector, the business sector, and private sector” a paid maternity leave of three months at full salary. However, it is not possible to obtain this maternity leave more than three times, a measure that aims at birth control but that is discriminatory for those children whose mother may be forced to go back to work for economic reasons.

When returning to the work place, a woman breastfeeding her child has the right, for two years after delivery, to supplementary pauses of at least a half an hour for breastfeeding. These pauses can also be combined and are to be considered part of her working hours. Any reduction of salary for this reason is excluded (art. 71). A woman working for the state or in the private sector – if the establishment employs more than fifty workers – also has the right, for a maximum of three times, to a facultative unpaid leave for the first two years after the child’s birth (art. 72). The employer is required, in that case, to pay for pension contributions or, as an alternative, to pay 25% of the salary to the woman. However, this is not explicitly mentioned in the article for what regards the private sector. Finally, an employer employing 100 female workers or more is required to open a nursery

or entrust to a nursery with the task of caring for the children of his/her female employees. Those establishments with less than 100 female workers should find ways to open a common nursery (art. 73).

Iran

by Zahra Azhar, Ali Akbar Siapoush

1. Relevant Constitutional and Basic Principles

After the establishment of the Islamic Republic of Iran in 1979 and the ratification of the Constitution in 1979 – and its amendment in 1990 – the bedrock of the Iranian legal regime was deeply influenced by Sharia. For the purposes of this study, several principles of the Constitution and the General Policy on the Occupation of Women have been taken into account in addition to the Civil Code. In its preamble, the Constitution introduces the family as a basic and fundamental social unit. Women stand at the heart of this concept of family; therefore, all of the constitutional principles and acts approved by the parliament should be seen in the light of the role of the woman. Nevertheless, the Constitution provides equal protections for women. In Principle 20, it stipulates that members of the nation, “whether man or woman,” are equally protected by the law. They enjoy all of the human, political, economic, social, and cultural rights that are in compliance with Islamic criteria, but it does not define the content or the origin of this Islamic “criteria.” The same is true for Principle 28. Here again, the word “people” guarantees equal protection for women and men, and they are free to choose whatever profession they wish. In this Principle, the right is subject to limits added to Sharia because their choice of work is recognized by law “as long as this profession is not against Islam, public interest, and the rights of others.” It is not clear what the difference is between Islam in the latter Principle and the Islamic criteria in the former. Moreover, the terms “public interest, and the rights of others” are deeply influenced by the term “Islamic Criteria” in Principle 20. The Iranian Constitution has dealt with women’s right in Principle 21. It establishes that the government must secure the rights of women in all respects. To achieve that aim, the government must do the following: 1). create an apt environment for the growth of a woman’s personality and restore her material and spiritual rights; 2). protect mothers, especially during the child-bearing and child-rearing periods and protect children without guardians; 3). create competent courts to protect the integrity and subsistence of the family; 4). establish special insurance policies for widows, elderly women, and women who are without guardians; 5). bestow the custody of children to qualified mothers if is in the interest of the children and in the absence of a legal guardian. All of these measures are regarded as valid only if they fit “according to the Islamic criteria.”

There are at least two definitions for Islamic criteria. One possible definition for this “criteria” that limits women’s freedom of choice can be found in the Civil Code (1928) and subsequent amendments) and in the Protection of Family Act of 1964. The Civil Code stipulates in Article 1117 that the husband can prevent his wife from having an occupation or technical work that is incompatible with “family interests” or with the dignity of the husband himself or of the wife. Article 18 of the Protection of Family Act has different criteria in its scope because, according to this article, the husband “by authorization of the competent court” can prohibit his wife from occupations contrary to the “expediency of family” or his/her dignity. Another possible definition is what has been suggested by the Supreme Council of the Cultural Revolution in its Resolution 1692 on the General Policy on the Occupation of Women, (RES. 1692, 1991). While Article 4 of this resolution provides that the work conditions and environment of women shall be provided as to lay the foundation for their spiritual, scientific, and professional improvement with no harm to their ritualism, personality, dignity, and their mental and physical wellbeing, Article 5 obligates the executive branch to undertake the related necessary steps. According to this article regarding women’s roles in social improvement and economic development as half of the population, the executive branch shall provide the necessary facilities and appropriate programming for women’s occupations; in addition, extra rules and opportunities shall be presented to fulfill the needs in occupations listed in (a) and (b) below, and as for (c), the condition must provide that women are able to obtain their preferred occupation without discrimination:

- (a) Occupations which are favored for women by Sharia such as obstetrics, certain disciplines of medical science, and teaching;
- (b) Occupations which are appropriate for the mental and physical condition of women such as professions in the following sectors: laboratory sciences, electronic engineering, pharmacology, aid work, and translation;
- (c) Occupations with no gender-based advantage in which the selection of the work force is based on knowledge and experience and not gender (for example, a worker in the technical or service sector);

Occupations that are prohibited by Sharia or occupations with harsh working conditions and/or based on ideological values (cultural and social) are inappropriate for women, such as serving as a judge or a firefighter.

It is not clear why a woman's occupation should be a "cultural" issue. The Supreme Council of the Cultural Revolution was established to be a "cultural control room" and a center for "cultural engineering" for all institutions. It seems that the issue being dealt with by the Council is more about "Islamic criteria" than women's occupations. Therefore, the categorization presented by Article 5 follows a specific logic. For example, it is not clear on what basis class (a) is defined as "favored [...] by Sharia," or what defines the "mental and physical condition of women" specified in class (b). Furthermore, regarding occupations that are "inappropriate for women," they are defined based on their "harsh" conditions. However, some of the jobs defined by the Hard and Harsh Works Acts ((Interpretation of Art. 76 of Social Security Act) (2013), are favored by women. Therefore, there is a systemic inconsistency in defining the scope of the basic law governing women's rights in terms of occupation. It must be mentioned that according to the Conditions of Selection of Judges Act of 1982, women cannot sit as judges in the Iranian judicial system. According to this law, judges will be selected among competent men. Despite this, an amendment to Note 5 to the Conditions of Selection of Judges Act, states that the head of the judiciary can employ competent women "with juridical rank" for the position of Advisor to the Administrative Justice Court, Special Civil Court, Inquiry Magistrate, Office of Legal Studies and Codification, Office of Custody of Orphans, Advisor to the Legal Office, and other departments with juridical positions. A similar limitation is set in the field of military positions. According to Article 32 of the Islamic Republic of Iran Army Act, 1987, the army can employ women "only for" medical and health services; Article 20 of the Employment Regulation for Islamic Revolutionary Guards Corps (IRGC), 1992, permits the IRGC to employ women for "services that require the use of a female work force"; and, finally, Article 20 of the Islamic Republic of Iran Police Employment Act, 2003, with regards to Islamic rules and for "services that require use of female work force," the police can employ women "as administrative employees."

2. Rules Governing the Working Condition of Women

The Resolution mentioned above sets the core value on the working condition of women in Article 9. It requires that in determining the value of work in equal conditions, at least equal wage and advantages shall be taken into account, but the foundation of the working condition regulation is set by the Labor Code of 20 November 1990 (Rouznameh Rasmi, 17 February 1991, No. 13387, pp. 114.). Section 38 of the code states that equal wages shall be paid to men and women performing work of equal value in a workplace under the same conditions. Any discrimination in wage determination on the basis of age, gender, race, ethnic origin, and political and religious conviction shall be prohibited. The Code also stipulates on the working conditions of women (Division IV. Sec. 75.) that women shall not be employed to perform dangerous, arduous, or harmful work or to carry, manually, or without mechanical means, loads heavier than the authorized maximum. Instructions regarding the kinds of such prohibited work and degrees of prohibition shall be approved by the Minister of Labor and Social Affairs on recommendation by the Supreme Labor Council. Further, according to Sec. 76 of the Code, women workers shall be entitled to 90

days maternity leave, of which 45 days shall, if possible, be taken after delivery. The said maternity leave entitlement shall be extended by 14 days for women giving birth to twins. On termination of maternity leave, a woman worker shall return to her former work, and the duration of this leave is considered part of her effective service, subject to confirmation by the Social Security Organization. During maternity leave, wages shall be paid in accordance with the provisions of the Social Security Organizations Act. Moreover, Sec. 77 adds that where, on the advice of a physician of the Social Security Organization, a type of work is deemed dangerous or arduous for a pregnant worker, the employer shall, without reducing her remuneration, provide her with more suitable and easier work until the end of her pregnancy. Finally, according to Sec. 78, in workplaces employing female workers, nursing mothers shall be granted a half-hour break every three hours to enable them to nurse their children until they reach two years of age; such breaks shall be regarded as part of normal working hours. Furthermore, the employer shall set up children's care centers (such as day nurseries and kindergartens), according to the total number of children and with consideration of their age.

It seems that working condition standards in Iran are compatible with international standards set by the ILO. Although this is a minimum amount of protection, there are other regulations in progress that will be passed by parliament that will improve the working condition of women. It is worth noting that most of these proposals are guided by the social role that is defined for women in the family.

Participation of women in the corporate world is regulated by the general rules of the Trade Code and Civil Code. It is based on the fundamental principle of “consent” of the parties to the contract. Although it seems that the general rule may favor women, in practice it has little, if any, contribution to the improvement of women’s participation in the corporate realm. Women’s participation in business is mostly affected by social and traditional factors, which are difficult to define in legal terms. Furthermore, the structure of Iran’s economy is mainly based on the government sector. Therefore, there is a major difference between the liberal economic structures known in western countries and Iran’s economy. As a result, the principle of freedom may lead to different outcomes.

3. Conclusion

It seems that there is a significant division between what is related to the freedom of choice and the regulation of working conditions for women. Most of the restrictions imposed on women’s rights related to occupation can be seen in the former. Such restrictions are also extended to political positions because of the ambiguity when defining or interpreting Islamic criteria. For example, there is an intense debate on the term “men” in Principle 115 of the Constitution as a requirement for running for the presidency. This term, in its ordinary meaning, may also mean ‘women’ in politics. Even so, the rules that regulate working conditions for women provide minimum protection based on international standards.

It is worth noting that the minimum level of protection has more effective results in the government sector. However, in the private sector, this is due to a lack of an appropriate monitoring mechanism. Therefore, even if the law stipulates an equal wage for equal work, this equality is guaranteed only for the minimum wage in the private sector. The fact that the Iranian economic system heavily relies on governmental control does not mitigate the risk on women’s rights in occupational fields. One significant point is the secondary or indirect restrictions imposed on women’s occupations. One example can be found in the Passport Act of 1973, which came into being six years before the revolution. Article 18(3) of this act requires the consent of the husband for a woman who wants to travel abroad, while Article 19 of the same act recognizes the right to cancel a previously granted consent by the husband. As a result, in occupations that require traveling abroad, the right of a woman to select her work type is highly dependent on the consent of the husband in each case.

Morocco

by Andrea Borroni, Sabrina Darbali, Gian Maria Piccinelli

1. Relevant Constitutional Provisions

When the royal speech given on 9 March 2011 announced a constitutional revision, recognizing the supremacy of ratified international conventions over national laws and the need of harmonizing them accordingly, the recognition of gender equality was firmly entrenched in the legal system. Indeed, the first lines of the Preamble introduced a commitment to “banish and fight any discrimination against anyone, because of sex.” It is peculiar that sex discrimination is mentioned first in the cited paragraph, even before of race, beliefs, culture, social or regional origin, language, and disability. Article 19 of the Constitution, included in Title II, Freedoms and Fundamental Rights, also affirms that “*l’homme et la femme jouissent, à égalité, des droits et libertés à caractère civil, politique, économique, social, culturel et environnemental, énoncés dans le présent titre et dans les autres dispositions de la Constitution ainsi que dans les conventions et pactes internationaux dument ratifiés par le Royaume, et ce, dans le respect des dispositions de la constitution, des constantes et des lois du Royaume. L’Etat marocain œuvre à la réalisation de la parité entre les hommes et les femmes. Il est créé à cet effet, une Autorité pour la parité et la lutte contre toute forme de discrimination*”. From a women’s empowerment perspective, the first paragraph of Article 19 of the new Constitution, enumerating the rights that men and women enjoy equality, introduced those that have an economic significance. This represents a clear break with tradition and is one of the most significant indications on the evolution of women’s status in Morocco. Furthermore, Article 34 states that “*les pouvoirs publics élaborent et mettent en œuvre des politiques destinées aux personnes et aux catégories à besoins spécifiques. A cet effet, ils veillent notamment à: traiter et prévenir la vulnérabilité de certaines catégories de femmes et de mères.*”

These principles are the concrete expression of the tenet of equality in civil and political rights between men and women provided by Article 8 of the Constitution, which proclaims that “*l’homme et la femme jouissent de droits politiques égaux* » et que « *sont électeurs tous les citoyens majeurs des deux sexes jouissant de leurs droits civils et politiques.*”

Moreover, as a citizen, the Moroccan woman is given the constitutional guarantees provided for freedom of movement, opinion, association, access to public functions, and jobs and education.

2. Rules concerning the Labor Law

Although a form of professional representation within industrial plants, commercial premises, and the liberal professions – if these regularly employ at least ten workers – has been provided since the Dahir n°1,161,116 of 29 October 1962 relating to workers’ representation in companies, an equality between women and men in elected professional representation has not been protected. Nevertheless, a bill is currently under discussion at the parliamentary level.

Since trade-union freedom was granted since the Dahir of 16 July 1957 (art. 2), it is worth mentioning that it also ensures that “*the married women practicing an occupation or a trade can adhere to the trade unions and take part in their administration and their direction*” (art. 5).

Similarly, Morocco has shown specific attention to working mothers since its establishment, thus producing a stratified regulation nowadays codified in the new 2003 Labor Code. Notably, (a.) the employment contract of a pregnant woman employee is suspended for twelve consecutive weeks in the period preceding and following a child’s delivery; (b.) it is forbidden to employ women who have given birth in the six weeks following delivery; (c.) women who are visibly pregnant can leave work without notice and without having to pay a termination indemnity; (d.) the employer cannot dismiss a pregnant woman during the period of suspension; (e.) a woman who has given birth has a half an hour in the morning and a half an hour in the afternoon to nurse her newborn, and the woman can breastfeed her child in a special room inside or outside the school; (f.) a woman is allowed to two-thirds of the average daily wage; (g.) Article 152 of the new Labor Code provides that a pregnant woman is entitled to 14 weeks of maternity leave unless there are more favorable provisions in a collective agreement or internal regulations; (h.) the female employee has the right

to suspend the contract of employment 7 weeks before delivery and 7 weeks after delivery; (i.) in case of a sickness established by medical certificate, the period of maternity leave may be extended, provided that this extension does not exceed 8 weeks before the expected date of confinement and 14 weeks after the date of delivery; (l.) a salaried woman can benefit, at her request, from unpaid leave, not exceeding 90 days, for which she must inform her employer, and she can also benefit from a one-year unpaid leave to raise her child, with the employer's consent. (m.) a pregnant woman or a woman who has benefited from maternity leave may terminate the contract of employment without notice or compensation if she finds out that she is pregnant or at the end of the year of unpaid leave from which she would have benefitted. (n.) a female employee cannot be dismissed during a pregnancy established by a medical certificate and for 14 weeks after childbirth; (o.) a woman must be able to preserve, at the end of the maternity leave, the same or an equivalent position, enjoying the rights acquired before the interruption of her employment contract.

The Code provides for dissuasive fines of 10,000 to 20,000 Dirhams (MAD) in case of termination of an employment contract of a pregnant woman or of a woman who has given birth during a period of 14 weeks following the birth and for the employment of a salaried woman during the 7 weeks following delivery. A sanction of 2,000 to 5,000 Dirhams is then fixed in violation of the provisions relating to breast-feeding. However, operationally, this does not have a practical application, given the economic irrelevance of the fine.

The Labor Code also prohibits night work for women in public or private institutions (art. 12). Temporary derogations were provided for places where confections, canned fruit and vegetables, and canned fish are made and for establishments where milk and cheese are processed. In these kinds of establishments, exemptions can be made for working periods at night of between 60 and 90 days. Permanent exemptions were granted to certain restaurants and entertainment establishments. In addition, Article 12 prohibits the employment of women in quarries and at underground work sites at the bottom of mines. Work that poses a high risk of danger, entails excessive labor, extends their capabilities or is likely to offend their morals (art. 179 and 181) is also prohibited. It finally stipulates that in establishments where goods and articles are handled or offered to the public by female staff, each of the rooms where the work is performed must have a number of seats equal to the women employed there. These seats must be separate from those made available to customers. A lack of seats or a number less than the number of seats prescribed by Article 182 is punishable by a fine of 2,000 to 5,000 Dirhams.

3. Encouraging Female Leadership

In 2005, the National Program of Support the Creation of Enterprises "Moukawalati" was launched during the Assises of employment in Skhirat (Morocco), aiming at progressively reducing the rate of unemployment and at safeguarding existing companies. The Moukawalati projects benefited from pre- and post-creation support provided by the National Agency for the National Employment Authority for the Government and Public Affairs (ANAPEC); herein, women represent 29% of the promoters of projects that have actually started a VSE (Very Small Enterprise).

The National Agency for the Promotion of Small and Medium Enterprises (ANPME), created in 2002 with the mission to contribute to the promotion and development of SMEs, has also launched the "Support to Women Entrepreneurs" program, in partnership with the Taahil Almokawalat program of the German Technical Cooperation, to promote women's entrepreneurship. In addition, "EntreElles" is an ANPME-derived program that has benefited 80 entrepreneurs. Its objectives are to strengthen the capacity of women entrepreneurs, to develop business plans, and to promote the formation of Femmes Chefs d'Entreprises networks.

The *Association des Femmes Chefs d'Entreprise du Maroc* (AFEM) and other regional associations of women entrepreneurs also encourage women's initiatives for business creation. They provide a meeting place, information, training, and solidarity for the promotion of women's

entrepreneurship. The incubator CasaPionnières is one of AFEM's achievements that it duplicated in the city of Eljadida and Fes. To date, 65 companies have been created and supported in this context.

Economically speaking, the most relevant entities are the CRIs (regional investment centers), created in 2002, and aimed at promoting investment and business ideas. Their mission is to inform, provide support, and facilitate business creation. Although there is not a specific focus protecting women's businesses, women have greatly benefitted from the funds CRIs has provided in order to start their business projects.

Although at the moment a clear national program of positive actions is lacking, the Economic, Social and Environmental Council has finally integrated several targets and indicators relating to the economic equality between men and women in a socio-legal framework characterized by the establishment of new institutional mechanisms for respecting and promoting human rights in general and women's rights. These include the Authority for Parity and the Fight Against All Forms of Discrimination (art. 19 and 164 of the Constitution) and the Advisory Council of the Family and Childhood (art. 169 of the Constitution). Also, the emergence of civil society groups such as the "Spring Coalition of Dignity," the "Women's Spring Collective for Democracy and Equality," "Civil Coalition For The Application Of Article 19," and "All Women's Networks And Associations, Human And Democratic Rights," are becoming more relevant, and these groups have called on the Moroccan government to speed up the enactment of the remaining rules for gender equality and women's rights protection.

Turkey

by Ozgun Celebi, Valentina Rita Scotti, Zeynep Derya Tarman ¹

1. Relevant Constitutional Provisions

After the establishment of the Turkish Republic on 29 October 1923, Turkish women enjoyed the modernizing environment of the first republican period and obtained the right to vote in 1930 for municipal elections and in 1935 for general elections. They have also benefitted from several provisions entrenched in the renewed Civil Code which allowed women to enter the public sphere, although a woman is still subject to the husband, who is considered the head of the family.

Although the country has gone through two coups d'états (in 1960 and in 1980), which led to the approval of new Constitutions in 1961 and in 1982, the constitutional framework concerning women did not evolve so much, and relevant innovations were only introduced since the reform period starting at the beginning of the 21st century. Indeed, in 2018, Turkish women can benefit from several constitutional protections, already adumbrated in the gender equal tone of the Preamble, which makes the country one of the most advanced in the area.

Therefore, the 174 gender neutral provisions of the 1982 Constitution are grounded on the prohibition of discrimination based on sex (art. 10) and on the recognition (after the amendments introduced in 2004 and 2010) that “Men and women have equal rights” and that it is a duty of the state to ensure the implementation of this equality. It is noteworthy that only in 2010 it was clarified that affirmative actions for ensuring the equality of children, the elderly, disabled people, widows, and orphans of martyrs, as well as for invalids and veterans, were allowed and did not represent a violation of the principle of equality.

Equality is also recognized in the family, conceived as the foundation of Turkish society (art. 41), although some measures privileging the husband – i.e. with regard to the surname – are still put into effect. As for the working field, the Constitution now protects women’s right to work (art. 48) and includes them – together with minors and physically and mentally disabled persons – in the category of those who can enjoy special protections, given the general assumption that “No one shall be required to perform work unsuited to his/her age, sex, and capacity” (art. 50). Against these protections, none of the constitutional provisions deals with the gender pay gap or explicitly encourages the promotion of women in higher positions.

2. Women and Employment

Although general principles of contract law and commercial law apply equally to all of the actors in economic life, in the field of employment contracts there are specific legal provisions for the protection of women in the work environment. Indeed, under the employment law, (i) the employment of women for underground work, such as work conducted in mines, laying cables, tunnel construction, and work under the water is forbidden; (ii) employment of women during night shifts is subject to special conditions. Employers who do not observe these rules will be subject to an administrative fine. These rules, which aim to protect women from physically challenging work, have been criticized by scholars for their eventual discriminative consequences on female employment. Likewise, in case a woman terminates her employment contract within the year following her marriage, she is entitled to a higher amount of compensation a man that is in the same situation, and this is interpreted as an incentive for women to stay home after getting married. In the same field, there are also regulations disciplining motherhood. Thus, temporary leave periods or the possibility to decrease working hours (i) during pregnancy, (ii) after the birth,

¹ The authors respectively wrote the parts on Labor Law and Contract Law, Constitutional Law, and Corporate Social Responsibility. Conclusions are in common.

(iii) after the adoption of a child who is younger than three years old are provided, depending on the situation. Two possibilities, which were put into effect in 2016 in order to take better consideration of the period of raising the child, deserve special attention: (i) the mother, in case of birth, and any of the parents, in case of adoption, can request unpaid leave corresponding to half of their weekly working time for a limited period of time (i.e. for a period of 60 days for the first birth), beginning from the termination of the normal maternity leave period; (ii) once the period of leave is terminated, each of the parents can request to change to a part time contract until the month the child reaches the age of mandatory school education if the other parent is also working. If the employee relies on these rights, (i) the employer cannot rely on such grounds to terminate the contract; (ii) if the employer makes the employee work, that employer is subject to an administrative fine. In addition, non-working days before and after the birth must be left out of consideration for the calculation of the annual leave. It must be added that rights relating to motherhood are regulated in a special manner for women who work in public institutions and qualify as civil servants.

The Labor Code also prohibits discrimination in employment contracts on the grounds of language, race, gender, disability, political conviction, philosophical belief, religion, membership in a religious sect, and similar reasons (art. 5) and also clarifies that: (i) different treatment on the grounds of gender or pregnancy is forbidden while concluding the employment contract, determining its clauses, and terminating it; (ii) payment of a lower wage on the grounds of gender is forbidden for the same work or for work of equal value and, in addition, application of special protective provisions due to the gender of the employee does not justify payment of a lower wage. Non-respect of these provisions by the employer entitles the employee to request the rights he/she was deprived of as well as compensation for up to the amount of four months of salary, something which scholars call “compensation for discrimination.” The burden of proof relies upon the employee; however, if the employee can establish an evidence that strongly points to the possibility of such discrimination, the burden of proof shifts to the employer.

As for contracts which do not fall within the scope of the Labor Code, the problem of discrimination has for a long time been left to the liberal approach of contract law and to the principle of freedom of contract, which could be restricted only by specific provisions in certain areas and of the prohibition of the abuse of rights. Nevertheless, Law n. 6701 of 6 April 2016 of the Turkey Human Rights and Equality Institution seems to modify the legal principles in these areas and enlarges the scope of the prohibition of discrimination in a way that could also become a guiding principle in contracts other than employment contracts. In fact, it forbids discrimination on the grounds of gender, race, skin color, language, religion, belief, membership in a religious sect, philosophical and political conviction, ethnic origin, wealth, birth, civil status, health condition, disability, and age (art. 3). It also stresses that public institutions and professional organizations that fall into the category of public institutions or real and legal persons who provide services relating to education, justice, security, health, transport, communication, social security, social services, social aid, sports, accommodation, culture, tourism, and similar services cannot discriminate against persons who benefit from these services, who have applied to benefit from these services, or who wish to have information about these services (art. 5). In addition, in case these persons and those who are delegated by them make a public offer relating to the sales or rent of movable or immovable goods, they cannot discriminate against persons who wish to acquire or rent these goods or who wish to have information on these transactions at any stage of the sale or rental process. Likewise, discrimination is forbidden against persons who would like to become members of or who have any function in associations, foundations, syndications, political parties, and professional organizations, except for the stated exceptions in specific legal provisions and the statutes of the relevant institution.

A person who claims to have incurred damage due to the violation of these provisions is entitled to apply to the Turkey Human Rights and Equality Institution (art. 17). If the discrimination is established, an administrative fine is imposed (art. 25). In addition, the relevant public institutions and professional institutions are required to take the appropriate measures in order to have the discrimination ceased, to remove its consequences, to prevent its repetition, and to ensure judicial and administrative processes take place (art. 3/3)

It should be noted that the law also provides a list of cases for which a claim for discrimination cannot be made (art. 7). Two cases are particularly relevant in terms of the gender: different treatment with the aim of removing inequalities, if they are necessary, adapted to purpose and proportion; and cases where employment of a specific gender is mandatory.

Two provisions of the Turkish Penal Code can be mentioned as being relevant tools for women in their struggle against obstacles in their professional activities. According to the crime of “hate and discrimination,” any person who prevents another from acquiring a movable or immovable good offered to the public, from benefiting from a service offered to the public, from being employed, from conducting a usual economic activity because of hatred arising from a difference of language, race, nationality, skin color, disability, political conviction, philosophical belief, religion or membership in a religious sect will be subject to imprisonment for one to three years (art. 122). Protection against sexual harassment has also been provided in a gender-neutral way (art. 105) in an evolutive framework introduced with the reform of the Turkish Penal Code of 26 September 2004, which also recognizes rape, and domestic violence as crimes against the individual, and not any longer against the general morality and family order.

3. Gender Discrimination and the Corporate Law

In the vein of the new century’s reforms, some measures have been adopted to improve gender equality in the country. Indeed, the Prime Minister’s circular n. 2004/7 of January 2004 focused on gender equality in state employment, and the 2009 “Law on Commission on Equal Opportunities for Women and Men” provided for the establishment of a “Commission on Equal Opportunities for Women and Men” within the Turkish Grand National Assembly (TGNA), which is in charge of providing opinions for the TGNA on the protection and the promotion of women’s rights with regard to the latest developments on gender equality in the country and in a comparative perspective.

Besides these measures, however, the empowerment of women has been left to the voluntary activity of the actors in the field. For instance, the Capital Markets Board of Turkey (CMB) issued on 3 January 2014 a Communiqué on Corporate Governance, which covers only the realm of publicly held companies. Accordingly, “[c]orporation shall determine a target rate provided that it is not less than 25% and a target time for membership of women in the board of directors and form a policy for this target. The Board of directors shall annually evaluate the progress in respect to achieving this target.” (Art. 4.3.9.) However, this provision is not binding, as it is not included in the list of principles set forth under the Communiqué that corporations are liable to implement provided in Article 5. Nonetheless, the boards of publicly held companies are still expected to evaluate and report the progress made in reaching this target on an annual basis as this clause is based on the “Comply or Explain” approach. Those companies that do not set a target must explain why they have not set one under their “corporate governance compliance reports,” which is a requirement (art. 8). These reports are published as annexes to annual activity reports.

It has also been observed that publicly held companies consider their corporate social responsibilities part of their marketing strategy and aim to promote their positions in the Borsa Istanbul Sustainability Index (BIST), which aims to provide a benchmark for Borsa Istanbul companies with strong performance in corporate sustainability and increase the awareness,

knowledge, and practice of sustainability in Turkey. Moreover, the index is a platform for institutional investors to demonstrate their commitment to companies with strong performances in managing environmental, social, and governance (ESG) issues. To be included in the index, companies should perform at or over certain thresholds for each criteria group.

Some companies have also launched programs devoted to increasing women's visibility and participation in boards. Sabanci University's Corporate Governance Forum (CGFT), in strategic partnership with Egon Zehnder International (EZI) Turkey, for instance, initiated the "Independent Woman Directors (IWD)" Project in 2012, which has helped several companies and investors, including IFC, find suitable female candidates to nominate to various boards. The IWD Project also includes the piloting of a shareholder initiative that makes use of mandatory electronic general assemblies in Turkey to ask questions to the boards about their gender diversity targets. Within the scope of the IWD project, researchers collect data on boards, analyze trends, conduct research, and report them. They also calculate the Women Empowered Boards Index, developed by a team of scholars at Sabanci University. On 22 March 2017, an IWD spin-off, called the 30% Club's Turkey Chapter, was launched at the BIST as a business-led campaign aimed at improving corporate boards' gender diversity through the involvement as founding members of some of Turkey's most powerful business groups that collectively dominate the stock market. The Forum, which maintains a database of female talent and tracks improvements in BIST boards' gender diversity initiatives, facilitates and coordinates the 30% Club Turkey campaign.

4. Conclusions

The case of Turkey represents a relevant and interesting experience in the Middle-Eastern landscape – but also in the European one – as it was among the first countries after WWI to encourage the presence of women in the public sphere, not only through the recognition of the right to vote. Nevertheless, when the Republic was established, the vision about women rights was still based on an emancipation led by the state and controlled through the institute of the family. Although a lot of progress has been achieved in recent years, together with raising awareness as to the negative effects of cultural stereotypes on the participation of women in working life, the classic approach is still evident in some of the provisions in force at present, notably in the employment field. Besides the recognition of formal equality, and sometimes under a protective appearance, women are still discriminated against by provisions forbidding certain physical activities, encouraging their layoff after a wedding, or after the birth of a child, due to the fact that advantages relating to a decrease of working hours or termination of the contract are mostly given to women and not to men. As a result, one may get the impression that protective and well-intended measures may lead to a redistribution of classical gender roles, which obliges women to remain home, whereas men have the duty to earn money for the family. In addition, pure formal equal treatment for women in the area of commercial entrepreneurship also leads women to be victims of cultural prejudices because of their capacities. Consequently, women are not adequately supported by the legislative framework with regard to their careers. Insufficient empirical studies on the application of legal provisions by administrative and judicial authorities also make it difficult to evaluate whether the law can actually be accurately applied and in which direction legal solutions should evolve. An unbreakable glass ceiling still exists in the country, as demonstrated by the fact that powerful women often belong to powerful families, so it is difficult to find women reaching apical positions by themselves. The lack of such a legal framework is even more questionable when considering the important number of Turkish women involved in politics, the presence of the aforementioned Commission on Equal Opportunities at the TGNA, and the existence of a vibrant civil society.

Tunisia

by Salwa Hamrouni

1. Les principes et règles constitutionnels relatifs aux droits des femmes

Après la révolution qu'a terminée la dictature de Ben Ali, le processus constitutionnel en Tunisie a été lent et compliqué mais a donné naissance à une constitution consensuelle en 2014.

La question de la place des droits humains en général et des droits de la femme en particulier a largement été débattue au sein de l'assemblée nationale constituante et les femmes tunisiennes ont dû descendre dans la rue pour exiger non seulement la protection des acquis mais aussi leur développement vers une égalité complète. Ceci a donné des résultats plutôt positifs.

En effet, le pouvoir constituant exprime dans le Préambule sa fidélité au sang des « martyrs et aux sacrifices des tunisiens et des tunisiennes au fil des générations ». Nous pouvons aussi lire dans le préambule que le « but des constituants » est d'instituer « un régime républicain dans lequel...l'Etat garanti...l'égalité en droits et devoirs entre tous les citoyens et toutes les citoyennes... ».

Dans le dispositif de la Constitution, l'art. 21 stipule : « Les citoyens et les citoyennes, sont égaux en droits et devoirs. Ils sont égaux devant la loi sans discrimination aucune ». Il est donc question non seulement de l'égalité devant la loi mais de l'égalité dans la loi. Précisons que cette affirmation a été difficilement acquise après qu'il était question de complémentarité et non d'égalité dans le premier projet de la Constitution.

D'autres articles traitent directement des droits des femmes à la représentation. L'Art. 34 traite ainsi des droits politiques : « Les droits d'élection, de vote et de se porter candidat sont garantis, conformément aux dispositions de la loi. L'Etat veille à garantir la représentativité des femmes dans les assemblées élues ». L'art. 46 est plus général et peut s'appliquer dans tous les domaines de discriminations y compris celui de l'emploi ou des affaires. Selon cet article « L'Etat s'engage à protéger les droits acquis de la femme, les soutient et œuvre à les améliorer. L'État garantit l'égalité des chances entre la femme et l'homme pour assumer les différentes responsabilités et dans tous les domaines. L'Etat œuvre à réaliser la parité entre la femme et l'homme dans les conseils élus.

L'État prend les mesures nécessaires afin d'éradiquer la violence contre la femme ».

2. Le principe de l'égalité des genres dans le domaine du travail

La loi tunisienne ne fait pas de discrimination quant aux droits des femmes et des hommes dans le domaine du travail. La pratique reste cependant totalement discriminatoire puisque les femmes les plus vulnérables sont payées moins que les hommes pour une même travail ou même un travail plus important. Ceci est vérifiable notamment dans le secteur agricole où les femmes restent très exploitées et sans réelles garanties ou sécurité.

Actuellement, loi organique n° 2017-58 du 11 août 2017, relative à l'élimination de la violence à l'égard des femmes peut être une source de protection des femmes dans le domaine du travail.

Dans ses dispositions générales, la loi prévoit que celle-ci vise « à mettre en place les mesures susceptibles d'éliminer toutes formes de violence à l'égard des femmes fondée sur la discrimination entre les sexes afin d'assurer l'égalité et le respect de la dignité humaine, et ce, en adoptant une approche globale basée sur la lutte contre les différentes formes de violence à l'égard des femmes, à travers la prévention, la poursuite et la répression des auteurs de ces violences, et la protection et la prise en charge des victimes » (art. 1). De plus, « la présente loi concerne toutes les formes de discrimination et de violence subies par les femmes fondées sur la discrimination entre les sexes, quel qu'en soient les auteurs ou le domaine » (art. 2).

La loi intégrale sur la violence a aussi pris le soin de définir les concepts les plus importants. En effet, l'art. 3 définit la violence à l'égard des femmes comme « toute atteinte physique, morale,

sexuelle ou économique à l'égard des femmes, basée sur une discrimination fondée sur le sexe et qui entraîne pour elles, un préjudice, une souffrance ou un dommage corporel, psychologique, sexuel ou économique et comprend également la menace de porter une telle atteinte, la pression ou la privation de droits et libertés, que ce soit dans la vie publique ou privée ».

Quant à la violence économique, elle a été définie par le même article comme « tout acte ou abstention de nature à exploiter les femmes ou les priver des ressources économiques, quel qu'en soit l'origine, tels que la privation des fonds, du salaire ou des revenus, le contrôle des salaires ou revenus et l'interdiction de travailler ou la contrainte à travailler ».

Plusieurs mécanismes doivent être aujourd'hui mis en œuvre pour faire respecter cette loi. Nous pouvons citer une première tentative qui peut aider à l'application d'une approche globale du genre. Il s'agit en l'occurrence du Conseil des pairs créé par décret gouvernemental n° 2016-626 du 25 mai 2016, portant création du conseil des pairs pour l'égalité et l'équivalence des chances entre la femme et l'homme.

Parmi ses rôles : l'élaboration du plan national de l'intégration de l'approche genre, - l'approbation des plans exécutifs annuels sectoriels pour la réalisation du plan national d'intégration de l'approche genre, le suivi de son exécution et de son évaluation.

Le conseil a adopté le plan national et il est maintenant question de le décliner en politiques sectorielles.

3. Le principe de l'égalité des genres dans les codes éthiques

En Tunisie il existe des codes ou des règles organisant certaines professions ou certains corps de métier. La plupart des textes sont anciens et n'ont pas encore été revus à la lumière des nouvelles dispositions constitutionnelles.

Les ordres professionnels restent encore loin du principe de l'égalité femme/homme ou de l'adoption d'une quelconque procédure permettant à la femme d'être dans les structures dirigeantes de ces ordres. Nous pouvons citer la loi n°74-76 du 22 mai 1974 portant organisation de l'ordre des architectes qui traite des conditions de l'inscription sur l'ordre, de la formation ainsi que de l'élection de ce dernier sans spécifier le principe de l'égalité. Aujourd'hui le conseil comprend 9 membres avec seulement une femme.

D'autres ordres avaient des cadres juridiques récemment révisés mais sans que l'on prenne le soin de féminiser le langage ou encore citer le principe de l'égalité femme/homme ou même l'égalité des chances. Il en est ainsi du décret-loi n°79 du 20 août 2011 qui organise la profession d'avocats. Aujourd'hui, le conseil de l'ordre comprend 30 avocats avec seulement 3 avocates. L'ordre des médecins sur 15 membres il y a deux femmes actuellement.

Le projet de la charte universitaire préparé par l'association pour la défense des valeurs universitaires prévoit « la prise en compte du principe de parité dans la composition des organes représentatifs de la communauté universitaire. » dans le cadre de la bonne gouvernance de l'Université.

Tous ces ordres professionnels ainsi que les syndicats et notamment l'union générale tunisienne des travailleurs restent en deçà des exigences constitutionnelles sur la parité dans les conseils élus et surtout sur l'égalité des chances dans tous les domaines et pour toutes les responsabilités. Un effort considérable doit donc être fait dans ce sens surtout que la femme tunisienne est de plus en plus diplômée et de plus en plus présente dans tous les secteurs.

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