

The Liability of Company Board Members: A Comparative Study on Civil, Criminal, and Disciplinary Aspects

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Abstract

This study emphasizes the importance of corporate governance practices in providing strategic guidance for the direction and management of a company. It highlights the need for effective oversight of executive management by the board of directors and underscores the significance of holding the board of directors accountable to both the company and its shareholders. According to general principles, board members can be held responsible if they violate the law or the company's bylaws, whether their actions result in harm to the company and its shareholders or third parties. Board members may face various forms of responsibility, including civil, criminal, and disciplinary liability, depending on the circumstances. Any clause that attempts to exempt board members from liability for their actions is considered invalid, and they can only be absolved from responsibility in cases of force majeure, the fault of the aggrieved party, or actions by third parties. Therefore, this study discusses the multifaceted responsibilities of board members, encompassing civil, criminal, and disciplinary aspects.

Keywords: Types of Liability, Board of Directors, Criminal Liability, Civil Liability, Disciplinary Liability.

Introduction

It is widely accepted that the board of directors of a company is held responsible in case of violations of the legal rules governing its operations or if it deviates from the company's bylaws. Legislators have defined how a non-compliant member can be held accountable. This obligation has been somewhat described, as have the consequences. And based on the regulations governing tort liability as per the governing norms and contractual liability as derived from the foundational contract of the organization.

An individual member may be questioned personally for an error if it is personal and stems from their actions without consulting the board of directors. The entire

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board may be questioned if the error originates from the board and is voted upon by its members. This responsibility can be disciplinary, criminal, or civil, represented by damages compensation. The default assumption for the responsibility of board members is that it is joint and several. It becomes individual if one of the board members, acting alone, commits an act that causes harm to the company or others, except when the individual who committed the error is the managing member. In this case, the board members are questioned jointly, and the responsibility is collective (Zerban & Madani, 2018).

Regarding the chairman and members of the board, the responsibility is collective if they collectively commit an error by making a unanimous decision that is contrary to the law, the company's bylaws, or the decisions of the general assembly. However, if the board's non-compliant decision is made by a majority vote, the members who opposed this decision cannot be held accountable if they record their objections in the meeting minutes. The disciplinary responsibility of board members lies in the general assembly's authority to remove them all or the members who committed the error against the company, shareholders, or others.

The Egyptian legislator has granted the general assembly the right to remove members of the board of directors in a public joint-stock company, whether the removal is comprehensive for all members or only for some. This authority is inherent to the general assembly since it is responsible for their appointment. The removal can occur at any time, even if it is not included in the general assembly's agenda (Hajjaji, 2017).

Importance of the Study

The significance of this research lies in elucidating the role of the board of directors in managing a company's affairs. It also aims to clarify the responsibility that may be incurred by any board member in the event of a violation and to outline the consequences of such violations considering Jordanian corporate law and other laws governing the functions of corporate boards. To maintain the company's operations, this entails looking at the penal code's definition of crimes. Moreover, it needs to determine how the board can be involved in disciplining a noncompliant member when criminal guilt cannot be proven. The study also seeks to emphasize the board's function in overseeing the business's operations.

Research Question

To underscore the importance of research, it is essential to address a set of questions that constitute the research problem or issues, forming the core of the

responsibility that falls upon board members of companies. These questions include:

- What is the legal basis for the concept of responsibility concerning a non-compliant board member?
- What are the types of responsibility that a non-compliant board member may face and the legal or penal consequences thereof?
- How have comparative laws dealt with the responsibility of a board member in case of violations of laws and internal regulations of the company?
- Does disciplining a non-compliant member become necessary if they evade criminal penalties or if a decision of non-liability for the alleged crime is issued?

Research Objectives

- Define the responsibilities associated with corporate boards and categorize them.
- Determine the concept of responsibility, its types, the resulting penalties, and their legal implications.
- Identify actions that may lead to the responsibility of board members in companies and specify the type of responsibility and associated penalties.
- Explore jurisprudential and judicial approaches to the responsibility of board members in companies through a comparative study between Jordanian legislation and other legislations, while addressing the challenges surrounding this responsibility.

Methodology

The researcher employed an analytical approach to texts of Jordanian civil law and compared them with texts from other legal systems. The study also involved a comparative analysis between Jordanian civil law and foreign laws, such as Egyptian, Iraqi, and French laws, to understand how the research problem is addressed in various legal systems. The study relied on judicial decisions, if available, to determine the practical application of the research topic. Additionally, the study made use of jurisprudential explanations to examine opinions that discussed the concept of the general system in the field of private international law and its impact on excluding the application of foreign laws.

Study Discussion and Analysis

All legislations concur on the responsibility of board members in case they violate legal rules or provisions in the company's bylaws. Accordingly, this responsibility has been regulated with some degree of detail. A person may be questioned individually if a violation is attributed solely to them, or collectively if others are involved. The responsibility may be disciplinary for the member(s) being investigated or it may be criminal if the act is considered a crime under the law. In our study of this topic, we will address the types of responsibility as follows:

1. Personal Civil Responsibility.
2. Joint and Several Responsibilities.
3. Disciplinary Responsibility.
4. Criminal Responsibility.

1. Personal Responsibility

The fundamental principle regarding the responsibility of board members is joint and several. However, responsibility can become individual if one of the board members, acting alone and without the participation of others, commits an act that causes harm to the company or others. Except when the individual committing the individual error is the managing member, in which case, the board members are jointly responsible until they prove that they have fulfilled their duty of supervision and could not prevent the error from occurring (Mohammadi et al, 2022).

Personal responsibility is only attributed to the member who committed the error individually. They alone bear the consequences of their mistake, and other members cannot be questioned about it. Therefore, the members are questioned if they exceed the powers delegated to them by the board of directors. In this case, the member is questioned individually about the excess and bears the obligations resulting from it if it causes harm to the company (Al-Azemi, 2010).

It is worth noting that the Egyptian legislator did not explicitly mention personal responsibility in the texts of the Companies Law, but Egyptian jurisprudence perceives the existence of this responsibility through Article 102 of the Companies Law, which states: "Any decision issued by the general assembly shall not result in the dismissal of a liability claim against members of the board of directors for any damages they cause in the execution of their tasks." On the other hand, the Jordanian legislator regulated this responsibility and referred to it in Articles 157-159 of the Jordanian Companies Law. Therefore, the chairman and members of the board of directors of public shareholding companies are responsible towards the company, shareholders, and third parties for any violations committed

by any of them or all of them against the laws, regulations, the company's bylaws, and for any mistakes in managing the company (Sami, 2006).

Hence, responsibility is limited to the chairman of the board of directors or one of the members when an individual error is committed that cause harm to the company, shareholders, or third parties. The Lebanese Trade Law explicitly mentions personal responsibility in Article 170, stating: "Responsibility is either individual, specific to one member of the board of directors, or joint among all of them..."

2. Joint and Several Liability

Liability is joint and several for the chairman and members of the board of directors if they collectively commit an erroneous act by unanimous decision that contradicts the law, company regulations, or resolutions of the general assembly. However, if the dissenting decision was made by a majority vote, the members who opposed it cannot be held accountable, if they record their objections in the official record of the board meeting (Sami, 2006)

Collective action may result in a decision endorsed by all members, making it an error that renders the members jointly liable for any resulting damage. Joint liability is applicable when decisions arise from discussions and opinions exchange. If each member has specific responsibilities, or if the nature of the work does not involve collective action, joint liability does not apply.

The Egyptian legislator explicitly outlined joint liability in Article 161 of the Egyptian Companies Law, stating, "Any act, transaction, or decision contrary to the rules established in this law or issued by the board of directors of joint-stock companies or their general assemblies shall be null and void, without prejudice to the right to claim compensation when necessary. If multiple individuals are responsible for the annulment, they shall be jointly liable for compensation among themselves." (Algaragolle, 2022).

It is important to note that the liability of board members is inherently joint and is derived from the principle of the unity of authority governing the actions of board members. Only members who objected to the erroneous decision during the official record of the board meeting are exempt from this liability.

According to joint liability, those affected by the erroneous decision have the right to hold any board member accountable for full compensation. After paying the due compensation, the member can then seek reimbursement from the other members based on their respective shares of the compensation.

Regarding absent members during the meeting, some argue that absence, even with a valid excuse, does not absolve them of liability, while others consider absence with a valid excuse as a reason for exemption from liability. None of the parties involved consider mere absence as negating the liability of the absent member, as it may be interpreted as an attempt to avoid participating in the decision-making process or expressing objections (Al-Azemi, 2010).

The researcher tends to agree with the view that all board members are jointly liable for damages resulting from erroneous decisions, except for the member who objected to the decision and recorded their objection in the official record of the board meeting, as well as the member with a valid excuse for their absence. An absent member without a valid excuse should be held liable as if they were present at the meeting.

3. Disciplinary Responsibility

Disciplinary responsibility is the legal responsibility arising from an employee's breach of their duties. This type of responsibility has received significant attention from various employment legislations worldwide due to its importance in defining and reflecting its impact on the goal of discipline, which is to ensure the proper and continuous functioning of public institutions (Afifi, 1976).

Disciplinary violations constitute the focal point of studies related to discipline, as they have a unique nature with specific elements distinguishing them from other violations. They do not fall under the principle of "no crime and no punishment without a text," which is applied to criminal offenses. Due to the difficulty of legislatively defining disciplinary violations, legislators often refrain from providing a specific definition but rather mention the duties assigned to employees and what is prohibited. Jurists and the judiciary have made efforts in this regard. In a previous ruling of the Jordanian Supreme Court, disciplinary violation was defined as "independent charges separate from criminal charges, involving a person's breach of their duties, profession, and its requirements and dignity" (Engelcke, 2018).

Disciplinary violation can be defined as a deviation by an individual who belongs to an entity from the duties assigned to them (Hassani, 1998). Given the broad and unspecified nature of disciplinary violations, judicial oversight of disciplinary authorities serves as a significant safeguard for public employees, especially considering that disciplinary violations involve both material and ethical considerations.

In Egyptian public joint-stock companies, the General Assembly has the power to remove board members individually or collectively for any mistakes made

against the company, shareholders, or other parties. This authority is a part of the General Assembly's appointment authority and can be used whenever it isn't officially scheduled on the agenda. The board is unable to limit or waive this privilege since it is deemed to be a matter of public policy. The Egyptian Companies Law's Article 238/2 further details the dismissal process, which includes informing the company and designating a successor to serve out the remaining term. In contrast, the Jordanian Companies Law, as stated in Article 157, deprives the General Assembly of the right to correct errors or discharge the Board of Directors, citing reasons related to public policy. (Algaragolle, 2022).

Members who have been dismissed do not have the right to claim compensation for damages resulting from their dismissal unless the dismissal was without legal justification, and the dismissal decision can only be annulled if it was tainted with a defect (Barboury, 2006). Moreover, The Jordanian legislator allows the dismissal of the chairman of the board of directors or any member of the board as per Article 165 of the Jordanian Companies Law, provided it follows a specific procedure and includes exceptions (Al-Akra et al., 2009).

The request for dismissal must be submitted by shareholders owning 30% of the company's shares to the board of directors and a copy must be sent to the company's monitor. A specific timeframe is set for holding an extraordinary meeting (ten days) from the date of submitting the request. Afterward, the General Assembly will discuss the dismissal request and a secret ballot will be held to vote on the request (Jordan Court of Cassation, 2011).

A question arises regarding the disciplinary accountability of board members and whether the General Assembly has the right to hold them accountable disciplinarily. It is noteworthy that the Egyptian legislator has granted the General Assembly the right to hold the board of directors accountable disciplinarily and to dismiss appointed or elected members without discrimination. However, the Jordanian legislator excluded government share representatives or any public legal entity from this exception. Article 47 of the amended internal regulations of the Irbid Electricity Company grants the General Assembly the right, during an extraordinary meeting, to dismiss the chairman of the board of directors or any of its members. This provision excludes members representing government shares or any public legal entity. Article 45 of the same regulations also exempts the representative of private sector shares from being subjected to a dismissal proposal during the General Assembly's meeting, whether ordinary or extraordinary. However, Article 82 of the same regulations, which prohibits a legal entity from electing or dismissing board members representing private sector shareholders, contradicts the provisions of Articles 135, 165, and 175 of the Jordanian Companies

Law. Article 83 of the Irbid Electricity Company's internal regulations stipulate that "the regulations apply only to the extent that they do not conflict with the provisions of the Companies Law, which apply to any matter not explicitly addressed in these regulations." Therefore, in cases of conflict, the Companies Law prevails. Consequently, the extraordinary meeting of the General Assembly of the Irbid Electricity Company was held under the provisions of the law, and all decisions made during that meeting complied with the law and principles. Thus, the dismissal of the claimant from the board of directors was legal and procedural, under the provisions of the Companies Law (Jordan Court of Cassation, 2011).

In conclusion, it is evident that the General Assembly does not possess the right to dismiss an appointed member, but the entity responsible for their appointment holds the right to dismiss them. However, if reasons exist that warrant the dismissal of a member and the entity that appointed them refuses to dismiss them, the General Assembly or any of the shareholders can request the judiciary to rule on the member's dismissal (Afifi, 1976). Therefore, the disciplinary responsibility of members exists if they commit errors against the company, shareholders, or others, allowing the General Assembly the right to dismiss them disciplinarily due to the errors they have committed, ensuring that members who exceed their powers in their positions are held accountable. The General Assembly's right to dismiss members disciplinarily is not limited to their commission of errors but extends to their monitoring and ensuring that the necessary conditions for their membership are met.

4. Criminal Responsibility

Any breach of legal obligation by members of the board of directors' results in criminal liability. Therefore, laws have intervened in regulating this responsibility to protect the interests. The board of directors may be questioned if it violates its duties and causes harm to the company, shareholders, or others. This responsibility is governed by the legal principle known as 'no crime and no punishment without a text.'

Criminal responsibility is the commitment of a natural person with full capacity to bear the consequences arising from their violation of 'criminal law.' Thus, the chairman of the board of directors or one of its members may commit an act that constitutes a crime punishable by law. The responsibility falls on the perpetrator who committed it willfully and knowingly, meaning they have legal capacity. They may be subject to either criminal law or the penalties prescribed by the company law. The penal code specifies punishable crimes, and the company law regulates some crimes and penalties. Jordanian legislation, in articles 282, 278, 279,

and 168, among others, mentions some violations that warrant punishment (Al-Akra et al., 2009).

Therefore, members of the board of directors may face criminal accountability if they commit any act punishable by criminal or company laws or any other related laws. Examples of criminal responsibility in the Egyptian Companies Law include the prohibition of distributing profits or benefits against the provisions of the Companies Law or the Company Regulations. Board members may also be questioned if they knowingly provide false information in stock or bond offering prospectuses, contrary to the provisions of this law or its executive regulations, and anyone who falsifies the company's records or knowingly records false information in them or prepares or presents reports to the general assembly containing false or inaccurate data that could affect its decisions (Algaragolle, 2022).

The Companies Law has specified the forms of criminal violations and the penalties imposed for them, detailing them to some extent. The penal code has not limited criminal liability to crimes that occur within the country where the company's main office is located but extends it to anyone who commits an act considered a crime by the law, even outside the state's territory where the company's main management is located.

It is worth noting that the Egyptian and Jordanian legislations have not addressed the criminal liability of the company as a legal entity since the texts of the Companies Law address natural persons. This is because the Constitution establishes the principle of personal liability, which, in turn, excludes holding legal entities accountable for the crimes committed by those in charge. Therefore, it is necessary to address the criminal liability of the legal entity with some elaboration and clarification. In this regard, an important question arises: How possible is it to hold the legal entity criminally responsible?

The criminal legislator did not define the legal entity, but by referring to civil law as general law, it is necessary to refer to it to fill any gaps and clarify any ambiguities that arise in criminal law. The legal entity can be defined as a group of persons or funds enjoying legal personality, such as companies, associations, and entities recognized by the law as having a separate legal existence from their owners.

This issue has been the subject of significant debate in criminal jurisprudence, with one side arguing that it is not possible to hold the legal entity criminally responsible, while the other side supports it (Imam, 1991). Some criminal scholars have expressed significant reservations about the criminal liability of legal entities,

seeing it as not possible (Aliah, 2001). They have based this on several arguments, as follows:

1. The legal entity is nothing more than a legal fiction devoid of personal will or independence; it is a mere legal assumption necessitated by necessity, lacking will, discernment, and freedom of choice. It cannot commit a crime, nor can an error be attributed to it, as there is no fault without a sinful will (El Shazly, 2006).
2. Criminal liability for legal entities contradicts the principle of specialization. If the law recognizes legal personality for the legal entity, this personality is defined by the purposes for which it was established, and which are clarified in its founding document. The legal entity is only connected to legal life for a specific purpose for which it was created. It is not reasonable for the scope of these purposes to extend to committing crimes; committing crimes is beyond its scope (Malanchuk, 2020).
3. Asserting the criminal responsibility of the legal entity contradicts the principle of personal punishment. It is first and foremost inconceivable to hold the legal entity criminally accountable for a crime it cannot commit due to the absence of the elements and components of the crime. Secondly, accepting the establishment of collective liability implies indirectly accepting the punishment of innocent parties. Consequently, the legal entity's liability may affect all its contributors, despite their distance from the crime (El Shazly, 2006).

Supporters of this approach argue that criminal responsibility for legal entities is not possible, and the law should focus on holding individuals, including representatives or employees of the legal entity, personally accountable if the elements of the crime are established for them.

On the other hand, another faction of legal scholars supports the idea of criminal responsibility for legal entities and relies on some arguments, the most important of which are:

1. The legal entity is not a mere illusion but a real entity with a legitimate existence, separate from its owners. This is due to the interests it seeks to achieve, which can give it a legal personality independent of its owners.
2. There is no room for the argument that the crime goes beyond the purpose for which the legal entity was established. Designating the legal entity to perform a specific purpose does not define the legal boundaries of its existence, and therefore, it does not exclude the possibility of attributing the crime to it. Just as an ordinary person was not created to commit crimes,

neither was the legal entity. However, both can commit them (Alsouri & Saleh,2019).

3. The argument that penalties provided by the law apply to natural persons and cannot be applied to legal entities does not hold. Penalties can be applied to legal entities but in a manner consistent with their nature.
4. As for the argument that imposing penalties affects all contributors, this is true to some extent. However, it is also true for natural people. Isn't punishing a father affecting all family members?
5. Based on these arguments, some legal scholars have recognized criminal responsibility for legal entities while developing trial procedures and criminal penalties in line with their nature.

Findings

1. All legislations unanimously uphold the accountability of board members in cases of non-compliance with legal regulations or provisions outlined in the company's establishment framework. Consequently, this accountability has been meticulously defined. An individual may be held accountable if they commit an infraction independently, without the involvement of others.
2. The default assumption regarding the responsibility of board members is joint and several. Nevertheless, individual responsibility may be invoked when a board member acts autonomously and causes harm to the company or other parties without the involvement of their colleagues.
3. Collaborative decision-making can lead to the adoption of a resolution endorsed by all board members, rendering their responsibility collective in cases of harm resulting from this decision. Collective responsibility is joint when it arises from discussions and the exchange of opinions. However, if each member has specific responsibilities, or if the nature of their work does not necessitate joint action, there is no basis for collective responsibility.
4. Disciplinary responsibility for board members is determined by the provisions governing the authority of the general assembly to remove them collectively or to remove the member responsible for an offense against the company, shareholders, or other stakeholders.
5. Any breach of the legal obligations of board members gives rise to criminal liability. Consequently, legislation has intervened to regulate this liability, aiming to safeguard the interests of stakeholders. In cases where the board of directors violates its duties and causes harm to the company,

shareholders, or others, it may be subjected to legal action. This liability is governed by the legal maxim "no crime and no punishment without a text."

Conclusions

This research highlights key aspects of corporate governance and board member accountability within the legal contexts of Jordan and Egypt. The findings underscore a shared consensus on the responsibilities of board members, encompassing individual and collective accountability, disciplinary measures, and potential legal penalties for violations of laws and company bylaws. The study emphasizes the need for refinement in Jordan's legal framework, particularly in terms of board member criteria, financial guarantees, and compensation availability for claimants. Strengthening disciplinary measures and specifying consequences for board members found not guilty despite legal violations is also recommended. Furthermore, it is advisable to consolidate corporate criminal sanctions into a dedicated law in Jordan, clarifying the relationship between corporate governance, board member roles, and criminal liability. Enhanced regulatory oversight by authorities such as the Jordanian Companies Control Department and the Egyptian Financial Regulatory Authority is crucial to proactively address financial and legal issues within corporate entities. These insights and recommendations aim to bolster corporate governance and protect stakeholders' interests in Jordan and Egypt, fostering more effective governance practices for the future.

Recommendations

- Establish a comprehensive framework for individual member responsibility, emphasizing stringent criteria for board membership in public joint-stock companies.
- Expand the scope of disciplinary penalties, providing detailed regulations. For instance, in cases where a member is found not guilty or not liable despite evident legal violations, this should not absolve them of disciplinary consequences.
- Explores the possibility of extending liability for damages to the personal assets of the offending member, following the precedent set by the French legislature.

References

- Afifi, M. M. (1976). *The General Theory of Disciplinary Punishment in the Public Service* (Doctoral dissertation). Ain Shams University, Cairo.
- Al-Akra, M., Ali, M. J., & Marashdeh, O. (2009). Development of accounting regulation in Jordan. *The International Journal of Accounting*, 44(2), 163-186
- Al-Azemi, F. (2010). *Responsibility of Board Members of Public Joint-Stock Companies for Board Decisions* (Doctoral Dissertation). University of Cairo. (p. 218).
- Algaragolle, W. M. H. (2022). Revival Of the Stumbled Companies In Iraqi And Egyptian Law (A Comparative Study). *Journal of Positive School Psychology*, 6(2s), 24-38.
- Aliah, S. (2001). *Commentary on Criminal Law - General Section: A Comparative Study*. University Establishment for Studies, Publishing, and Distribution.
- Alsouri, K., & Saleh, I. (2019). Chastisement between Islamic Sharia and the Jordanian Penal Code. *JL Pol'y & Globalization*, 89, 158
- Barboury, M. M. A. (2006). *Commercial Transactions* (2nd ed.). Arab Renaissance House.
- El Shazly, F. (2006). *Criminal Liability - Book Two*. University Press, United States.
- Engelcke, D. (2018). Law-making in Jordan: Family law reform and the Supreme Justice Department. *Islamic Law and Society*, 25(3), 274-309.
- Hajjaji, S. A. D. A. (2017). *Clash of the Titans: A Comparative Approach to Reform of Judicial Accountability in Egypt*. *Seattle UL Rev.*, 41, 61
- Hassani, M. N. (1998). *General Section of the Penal Code*. University Press House, Cairo. (Original work published in Arabic)
- Hassani, M. N. (1998). *General Section of the Penal Code*. University Press House, Cairo. (Original work published in Arabic)
- Imam, M. (1991). *Criminal Liability: Its Foundation and Development - A Comparative Study*. Dar Al-Jamia Al-Jadeeda for Publishing.
- Jordan Court of Cassation. (2011). *Decision No. 756/2011* (Quinquejudges), dated 19/6/2011. Justice Center Publications.

- Mohammadi, T., Lotfi, A., & Noshadi, I. (2022). Basics of evaluation and assignment of civil liability of managers in Iran and US joint stock companies. *Political Sociology of Iran*, 5(10), 1786-1805
- Sami, F. (2006). *Commercial Companies: General and Special Provisions (1st ed.)*. Dar Al-Thaqafa for Publishing and Distribution. (p. 459).
- Zerban, A. M., & Madani, A. M. A. (2018). Corporate governance and board of director's responsibility in appointing senior managers: a case in Saudi Arabia. *International Journal of business and Management*, 13(1), 183-189