

Criminal Protection of Banks and Financial Institutions' Monopoly on Banking Operations Through the Criminalization of Unauthorized Banking Practices

-Analysis in Light of Law No. 23-09 on Monetary and Banking Law-

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Abstract:

Avoiding the risks associated with banking operations can only be achieved by regulating and framing the supervising bodies, limiting them to a circle of institutions subject to state intervention through regulation and supervision. This is aimed at preventing the severe effects that could arise from such institutions facing crises that affect the entire state's financial and economic system, potentially causing irreparable losses. This led to what is known as the monopoly of banks and financial institutions on banking operations, where related legal texts have worked on imposing, controlling, and regulating it, as well as imposing legal protection at its highest degree, which is criminal protection, by criminalizing other entities from practicing such operations that are exclusively reserved for certain entities.

Keywords: *Banking operations, banks, financial institutions, monetary and banking law, payment methods.*

المخلص:

ان تفادي الخطورة التي تتسم بها العمليات المصرفية لا يتحقق الا بتنظيمها وتأطير الهيئات المشرفة عليها، وحصر هذه الأخيرة في دائرة مؤسسات تخضع لتدخل الدولة بالتنظيم والمراقبة، كل ذلك بهدف تفادي الآثار الوخيمة التي قد تنجر عن وقوع مثل هذه المؤسسات في أزمات تؤثر على النظام المالي والاقتصادي للدولة برمتها وتلحق به خسائر قد يصعب تداركها لاحقاً، من أجل ذلك نشأ ما يعرف باحتكار البنوك والمؤسسات المالية للعمليات المصرفية، حيث عملت النصوص القانونية ذات الصلة على فرضه وضبطه وتنظيمه، وكذا فرض الحماية القانونية عليه في أقصى درجاتها وهي الحماية الجزائية، وذلك من خلال تجريم ممارسة جهات أخرى لمثل هذه العمليات التي تختص بها جهات معينة دون غيرها على سبيل الحصر.

الكلمات المفتاحية: العمليات المصرفية، البنوك، المؤسسات المالية، القانون النقدي والمصرفي، وسائل الدفع.

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Introduction:

The principle of banks and financial institutions monopolizing banking operations is a globally recognized principle, resulting from numerous difficult experiences that various countries have gone through. This principle contains the same logic at all comparative legislations, meaning that the practice of banking operations is exclusively reserved for specific institutions. This exclusivity defines the scope within which these operations are conducted, allowing the state to regulate and monitor them.

The new Monetary and Banking Law No. 23-09, dated June 21, 2023, in its eighth chapter on criminal penalties, criminalizes a series of acts that the legislator deemed dangerous to Algeria's financial and monetary policy. Among them is Article 151, which penalizes any individual who acts, whether for their personal account or on behalf of a legal entity, in violation of the provisions of Article 83.

Referring to this article, it prohibits any natural or legal person from practicing operations that are conducted by banks and financial institutions as their regular profession, including operations legally defined in a series of articles referred to by the aforementioned article, such as Article 68, which addresses banking operations including receiving funds from the public, loan operations, and operations related to Islamic banking. Article 151 above penalizes the practice of such operations by entities other than financial institutions and banks, indicating the monopoly of banks and financial institutions on banking operations exclusively, imposing deterrent penalties including imprisonment, financial penalties, closure of the institution, publication and posting of the judgment, thus constituting criminal protection of the principle of monopoly by banks and financial institutions on banking operations. This leads us to the question: What are the manifestations of criminal protection of the monopoly of banks and financial institutions on banking operations through the Monetary and Banking Law No. 23/09?

This will be addressed by first defining banks and explaining their types, followed by elucidating the concept of financial institutions to distinguish them from banks due to the overlap and similarities between them, and concluding with examining the forms of criminal protection for the practice of banking operations by banks and financial institutions, both direct and indirect, according to Law No. 23/09, the new Monetary and Banking Law.

1. Definition of a Bank

Below are the linguistic and conventional definitions of a bank.

1.1 Linguistic Definition:

The word bank has an Italian origin, known in French as "Banque" and in English as "Bank," meaning the "Banc" or bench on which the money changer sits to exchange currency. Later, the meaning evolved to denote the "Comptoir" or counter where money is counted. Eventually, it came to signify the place where this counter is located and where money exchange occurs. (Ali Jamal El-Din Awad, "Bank Liability from a Legal Perspective," Third Edition, Dar Al-Nahda Al-Arabiya, Cairo, 2000, p. 122.)

The word "مَصْرُفٌ" (Masrif) in Arabic is derived from "صَرَفَ" or "صَارَفَ," meaning to exchange one currency for another. The terms "صَرَافٌ" and "صَيْرَافِي" (plural "صَيْرَافَةٌ") refer to the person who exchanges currencies, while "صَرَافَةٌ" or "صَيْرَافَةٌ" denotes the profession or function, and "مَصْرُفٌ" signifies the place, equivalent to the term bank. (Elias Nasif, "Credit Contracts in Comparative Law," First Edition, Al-Halabi Legal Publications, Beirut, Lebanon, 2010, p. 105.)

1.2 Conventional Definition:

A bank is an institution that accepts money in the form of deposits and savings, creating liabilities, and offers funds to others, thus holding assets. It lends and borrows, performing financial intermediation. A bank is a financial institution that trades in money and primarily acts as an intermediary between capital seeking investment opportunities and investment avenues seeking capital. (Rahima Ledgham, Salima Ledgham, "The Criminal Liability of the Bank for

Banking Crimes in Algerian Legislation," Al-Bahith Journal for Academic Studies, Volume 05, Issue 03, Year 2018, p. 229.)

2. Types of Banks

Banks are divided based on a set of criteria into the following categories:

2.1 By Legal Form: Banks are branched into several types based on their legal form (Ali Jamal El-Din Awad, "The Previous Reference," p. 110.):

- **Public Banks:** These are banks owned by the state, which owns all their capital and oversees their operations and activities, such as central banks, national commercial banks, and banks specialized in a specific area (e.g., agricultural bank, industrial bank).
- **Private Banks:** These are banks owned by individuals, whether natural or legal persons, who manage the bank's affairs, bearing all its legal and financial responsibilities towards the state represented by the central bank.
- **Mixed Banks:** These are banks whose ownership and management are shared between the state and individuals or entities, with the government controlling these banks by owning a significant share of the capital that allows it to manage and direct the bank according to the state's financial and economic policy.

2.2 By Sources of Funds: Banks are divided based on their funding sources into (Ali Kaddour, "The Criminal Liability of the Bank for the Misdemeanor of Money Laundering," A thesis submitted for the Master's degree in Law, specializing in Professional Liability, Faculty of Law and Political Science, University of Tizi Ouzou, 2013, p. 191.):

- **Central Banks:** Responsible for supervising, directing, and monitoring the banking system, they also have the right to issue currency and hold the state's liquid assets such as gold reserves and foreign currencies. The capital of these banks is what the state allocates to them, in addition to the deposits from commercial banks.
- **Deposit Banks (Commercial Banks):** Their own funds consist of the capital owned by the partners as well as deposits from individuals and institutions for investment purposes or current accounts.
- **Investment Banks:** Primarily relying on their own funds in addition to deposits to conduct the activities they were established for, including providing long-term loans to projects or investing in them for investment purposes.

2.3 By the Nature of the Business Conducted: Banks are divided according to the nature of the business they conduct into (Ali Kaddour, "The Previous Reference," p. 190.):

- **Commercial Banks:** Banks that engage in banking activities, accepting deposits, providing loans, discounting or collecting commercial papers, opening documentary credits. These banks may also engage in non-banking activities such as participating in economic projects and buying and selling shares and bonds.
- **Industrial Banks:** Specialize in dealing with the industrial sector and contribute to industrial development by supporting industrial projects through loans and banking facilities.
- **Agricultural Banks:** Deal with agricultural institutions, specializing in providing all banking facilities and services to help these institutions perform their role in agricultural development, whether these institutions are owned by individuals or cooperative associations.
- **Real Estate Banks:** Provide all banking facilities and services to individuals, institutions, or housing cooperative associations to assist them in constructing real estates.

It is worth noting that the central bank does not fall under this classification as it supervises and monitors the activities of the banking system without engaging in any of the usual activities of the aforementioned banks.

2.4 By the Legitimacy of Operations: Banks are divided based on this criterion into (Ali Jamal El-Din Awad, "The Previous Reference," p. 110.):

- **Traditional (Usury) Banks:** Which rely on usury interest in their dealings with clients, varying in rates from one bank to another.
- **Islamic Banks:** Operate according to the rules and principles of Islamic Sharia, distinguished by not dealing with interest, either taking from borrowers or giving to depositors.

3. Definition of Financial Institutions

The vital role played by financial institutions in the national economy and the tasks entrusted to them in the banking sector have led many countries, including Algeria, to regulate the sector in which these institutions operate. This regulation is through the issuance of several legal texts, the latest being Law No. 23/09 on Monetary and Banking Law, pushing us to examine the concept of financial institutions to distinguish them from banks due to the overlap between them.

3.1 Jurisprudential Definition:

The jurisprudential definitions of financial institutions vary due to their diversity and multiple functions. Some define them as: "A financial intermediary through which funds are directed from lenders to borrowers and financial resources are mobilized from individuals and institutions in the economy to provide loans and investments (Bashir Alwan Hamad, "The Role of Financial Institutions in Stimulating Economic Activity in the Context of the Globalized Economy Crises," *Journal of Accounting and Financial Studies*, Volume Seven, Issue 19, 2012, p. 186.)," or as "Institutions that convert funds from units with a financial surplus to units with a financial deficit." (Sarmad Kokab Al-Jamil, "Introduction to Financial Institutions Management: Theories and Applications," Dar Al-Academics for Publishing and Distribution, Amman, Jordan, 2017, p. 9.)

They are also defined as: "Banking or financial units that collect financial resources from various sources to undertake multiple economic activities." (Raed Abdel Khalq Abdel Allah Al-Obaidi, Khalid Ahmad Farhan Al-Mashhadani, "Management of Financial and Banking Institutions," Dar Al-Ayyam, Amman, Jordan, 2013, p. 24.)

Furthermore, they are described as: "Business companies whose assets primarily consist of financial assets or claims on others, such as shares, bonds, or loans, rather than physical assets and raw materials. They grant loans to customers or buy and invest in securities." (Abdel Ghaffar Hanafi, Rasmia Quraïqos, "Stock Markets and Financial Institutions," The University Press, Alexandria, 2002, p. 12.)

From these definitions, financial institutions include all banks, insurance companies, and financial markets. Financial institutions act as a financial intermediary, forming a link between surplus units and deficit units. ("Surplus units refer to the economic units that possess surplus funds including individuals, groups, companies, and the government, whereas deficit units refer to those in need of financial resources to achieve their sufficiency and aspirations." See these definitions in: Salsabil bin Sama'il, "The Criminal Responsibility of Financial Institutions," A Doctoral Thesis in Public Law, Faculty of Law and Political Sciences, University of Ghardaïa, 2020/2021, p. 13, footnote No. 05.)

It is clear from the definitions presented that jurisprudence has not reached a unified and specific definition of financial institutions, due to the difference in their classification. Many jurists have linked the definition of a financial institution to the bank because it carries out the

same banking operations, even considering the bank as just a type of financial institution. Meanwhile, others have distinguished between banks and financial institutions, defining each separately by separating their tasks. (Salsabil bin Sama'il, "The Previous Reference," p. 14.)

3.2 Legal Definition:

Most comparative legislations do not include a clear and specific definition of financial institutions but have attempted to define them based on their legally granted tasks and powers. Among these legislations, we mention the following:

A. French legislator:

This legislator has used several terms to indicate financial institutions, referring to them in the monetary and financial law as "credit institutions" ("Les établissements de crédit"), defined as: "Legal entities that, by virtue of their profession and on their own account, receive repayable funds from the public and grant loans." It also used the term "financing companies" ("Les sociétés de financement") and defined them as: "Legal entities, other than credit institutions, that by virtue of their profession and on their own account, engage in credit operations under legally specified conditions." (Art.L511-1 of the French Monetary and Financial Code: "Credit institutions are companies whose activity consists, for their own account and as a habitual profession, of receiving repayable funds from the public mentioned in Article L.312-2 and of granting credits mentioned in Article L.313-1. -Financing companies are legal entities, other than credit institutions, which carry out credit operations as a habitual profession and for their own account within the conditions and limits defined by their approvals. They are financial establishments within the meaning of paragraph 4 of Article L.511-21.")

B. Egyptian legislator:

This legislator did not define financial institutions but identified them in paragraph (c) of Article 1 of the Anti-Money Laundering Law as: "Banks operating in Egypt and their branches abroad, branches of foreign banks operating in Egypt, exchange companies, other entities licensed to deal in foreign currency, entities engaging in money transfer activities, entities operating in the securities field and in receiving funds, as well as the Postal Savings Fund, entities engaged in real estate financing, real estate securitization entities, entities engaged in financial leasing and factoring activities, in addition to entities engaged in any type of insurance activities, private insurance funds, and brokerage activities in the field of insurance."

From the text of the aforementioned article, it is clear that the Egyptian legislator did not differentiate between the concept of financial institutions and banks and similar entities, considering every entity that carries out financial, banking, real estate, and insurance operations according to the same article as a financial institution. (This definition is included in Article 01, paragraph g, of Law No. 80 of 2002 regarding the issuance of the Money Laundering Control Act amended by Law No. 78 of 2003 and further amended by Law No. 181 of 2008, published in issue No. 25 of the Official Gazette of the Arab Republic of Egypt dated June 22, 2008.)

C. Algerian legislator:

Institutions are somewhat a new concept in Algerian law, emerging with banking system reforms under Law No. 90-10 on currency and credit (Law No. 90-10 dated April 14, 1990, on currency and credit, published in issue No. 16 of the Official Journal dated April 18, 1990.), which was repealed, adding financial institutions as legal entities practicing banking activity alongside banks. They were defined under Article 115 of the same law as: "Legal entities whose regular and primary task is to engage in banking operations, except for receiving funds from the public." However, this was revised in Order No. 03-11 on currency and credit, amended and supplemented, merely listing their tasks and the activities they are prohibited from engaging in directly.

According to Article 72 of Order No. 03-11, financial institutions can engage in the following activities: (Corresponding to Article 79 of Law No. 23-09 dated 3 Dhu al-Hijjah 1444 AH corresponding to June 21, 2023, containing the monetary and banking law, published in issue No. 43 of the Official Journal dated 9 Dhu al-Hijjah 1444 AH corresponding to June 27, 2023.)

- Foreign exchange operations
- Operations on gold, precious metals, and precious metal coins
- Investment in securities and any financial product, subscribing, purchasing, managing, conserving, and selling them
- Consulting and assistance in asset management
- Financial consulting and engineering and generally all services aimed at facilitating the establishment and development of institutions and facilities, respecting legal provisions in this field.

In contrast, Article 71 of the same order stipulates that financial institutions cannot receive funds from the public ("Funds received from the public" are funds received from others, especially in the form of deposits with the right to use them on behalf of the recipient on the condition of repayment, according to Article 67 of Order 03-11, corresponding to Article 69 of Law No. 23-09 containing the monetary and banking law.), manage payment means, or make them available to their customers, meaning that financial institutions can lend but not use third-party funds, as the primary source of funds used is the institution's capital, shareholder loans, and long-term savings.

While the Monetary and Credit Law allows financial institutions (Corresponding to Article 80 of Law No. 23/09 containing the monetary and banking law.), as an exception to legal provisions related to subscription as defined in commercial law, to receive funds from the public intended for investment in the form of contributions to an institution, according to all legal modalities, such as in shares, investment bonds, company shares, and partners in limited partnership companies or others, subject to many conditions, the most important of which are:

- These funds are not considered deposits in the sense of Article 67 of Order 03-11 on currency and credit (Corresponding to Article 69 of Law No. 23-09 containing the monetary and banking law.) but remain owned by their contributors.
- They do not generate interest.
- They must be deposited with the Bank of Algeria in a special account for each intended investment until it is invested.
- A contract must be signed between the depositor and the depositary specifying:
 - The name of the institution receiving the funds, its purpose, capital, and headquarters.
 - The project or program for which these funds were prepared
 - Conditions for sharing profits and losses
 - Conditions for selling the shares
 - Conditions for the redemption of shares by the institution itself
 - The conditions that the bank or financial institution must comply with to return the funds to their owners if the contribution does not materialize
 - The contribution must be made within a maximum period of six months from the date of the first payment made by the contributors and may be preceded by a period of six months in case of collecting subscriptions without payment.
 - If the contribution does not materialize, the financial institution that received the funds must make them available to their owners within the week following this observation.

The Monetary and Banking Law No. 23-09 specifies the operations carried out by financial institutions within Articles 75 to 77, including banking operations involving receiving funds from the public, loan operations ("A loan operation in this law's context is any act for compensation whereby a person places or promises to place funds at the disposal of another person, or undertakes on behalf of the other person a commitment to sign as a standby guarantee, surety, or warranty."), operations related to Islamic banking, as well as making all payment means available to customers and managing these means.

Moreover, Law No. 23-09 on the new Monetary and Banking Law prohibits financial institutions from regularly engaging in activities other than those legally permitted unless authorized under regulations determined by the newly established Monetary and Banking Council under Articles 61 and following. It also prohibits them from receiving funds from the public, managing payment means, or making them available to their customers, allowing them to engage in all other operations.

With the issuance of Law No. 05-01 on the prevention of money laundering and terrorism financing, amended and supplemented (The last amendment was by virtue of Law No. 23-01 dated Rajab 16, 1444 AH corresponding to February 7, 2023.), the Algerian legislator explicitly defined financial institutions under Article 04 as: "Any natural or legal person engaging for commercial purposes in one or more of the following activities or operations in the name of or on behalf of a client:

- Receiving funds and other repayable deposits
- Loans or advances
- Leasing, except for financial leasing related to consumer products
- Money or value transfer
- Issuing all payment means and managing them
- Providing guarantees and undertaking commitments
- Trading and dealing in:
 - Money market instruments
 - Foreign exchange market
 - Currency and interest rate instruments and indices
 - Securities
 - Commodity futures delivery trading
 - Participation in issuing securities and providing related financial services
 - Individual and collective asset management
 - Custody of cash or liquid securities and their management on behalf of others
 - Other investment operations and money or fund management and administration on behalf of others
 - Subscription and investment in life insurance and other investment-related insurance products
 - Currency exchange and foreign currencies exchange

This definition has been criticized by some for conflicting with the Monetary and Banking Law, which defines a financial institution as a "natural person," while the Monetary and Banking Law stipulates the establishment of financial institutions in the form of joint-stock companies with legal personality, according to Article 91 of Law 23/09, which states: "Banks

and financial institutions must be established in the form of joint-stock companies, and the council assesses the feasibility of a bank or a financial institution taking the form of a cooperative." The same law entrusts financial institutions with the same tasks assigned to banks, despite Law 23/09 explicitly prohibiting financial institutions from receiving funds from the public, according to Article 78 of the law.

It should be noted that the Monetary and Banking Law (By virtue of Article 102 thereof.) requires the governor to keep updated lists of financial institutions, which are published annually in the Official Gazette of the People's Democratic Republic of Algeria, and any amendments thereto are published in the same manner.

4. The Direct Criminal Protection of the Monopoly of Banks and Financial Institutions over Banking Activities

The direct criminal protection of banks and financial institutions is realized when violating the prohibition stated in Article 83 of the new Monetary and Banking Law No. 23/09 (Law No. 23-09 dated 3 Dhu al-Hijjah 1444 AH corresponding to June 21, 2023, contains the monetary and banking law, published in issue No. 43 of the Official Journal dated 9 Dhu al-Hijjah 1444 AH corresponding to June 27, 2023.). In such cases, we are dealing with the criminalization of the unauthorized practice by others of banking institutions, which necessitates understanding the meaning of "others" mentioned in this article, as a prelude to identifying what may be considered a condition, namely the "habituality" mentioned in the text of the article.

4.1 The Scope of the Principle in Terms of Subject Matter: Banking Operations

According to the texts of the Monetary and Banking Law, banking operations include the following:

A. The reception of funds from the public: These are funds received from third parties, especially in the form of deposits, with the right to use them on behalf of the receiver, provided they are returned.

However, funds received or remaining in the account belonging to shareholders owning at least 5% of the capital, members of the board of directors, and managers, as well as funds resulting from contribution loans, are not considered received from the public.

B. Lending operations: Any act against compensation by which a person places or promises to place funds at the disposal of another, or by which a person undertakes on behalf of another person a commitment to sign as a collateral guarantee or surety, are considered lending operations. Lease operations with an option to buy are also considered lending operations, especially leasing loans.

C. The provision and management of payment means for customers: Payment means are all instruments that enable anyone to transfer funds, regardless of the document or technical method used. After addressing the reception of funds from the public and lending as banking operations, the legislator conferred the same nature on the provision and management of payment means, enabling both the bank and customers to execute and realize these operations by moving funds among them.

4.2 The Scope of the Principle in Terms of Persons: Banks and Financial Institutions

These are institutions active in the banking field according to Algerian law, where banks alone are authorized to carry out all operations provided by law under the Monetary and Banking Law. (Ghassan Rabah, "A Concise Guide to Banking Offenses," Zein Legal and Literary Library, Beirut, 2005, p. 15.)

Therefore, banks and financial institutions are lending institutions that the legislator has authorized to carry out banking operations as a regular profession, specifically for each of them.

Banks are authorized to carry out all operations, especially the reception of funds from the public. Financial institutions, however, are only allowed to carry out lending operations. (Mona Ben Latrach, "Liability in the Field of Bank Lending," A Doctoral Dissertation in Business Law, Faculty of Law, University of Mentouri, Constantine, 2013, p. 15.)

In any case, banks and financial institutions do not acquire this status without adhering to a legal framework that imposes respect for their conditions of establishment, which can be summarized as follows: (These conditions are stated in Chapter Four of the Monetary and Banking Law No. 23-09 within Articles from 89 to 104.)

A. Licensing: The Money and Credit Council is legally authorized to grant a license to establish a bank or financial institution, based on the license application regulated by the Monetary and Banking Law and the regulations issued by the Money and Credit Council.

It is noteworthy that the license is granted only after verifying the fulfillment of the following conditions:

- Proven that the founders, directors, and board members of the institution have not committed felonies or misdemeanors that generally lead to a loss of confidence in them and their ability to undertake the required tasks.
- The project of the institution or bank meets all the legal requirements for a joint-stock company.
- At least two individuals determine the actual directions of the banks' and financial institutions' activities and bear the burdens of their management.

B. Accreditation: After obtaining the license, the bank or financial institution project can request its accreditation as a bank or financial institution, as the case may be. Accreditation is then granted if the company fulfills all the legal requirements and is published in the Official Gazette of the People's Democratic Republic of Algeria.

C. The meaning of "others": The "others" referred to in the aforementioned article are all legal entities that are not banks or financial institutions and engage in banking activities. If it concerns a natural person, they will be personally prosecuted for this crime following the principle of personal criminal responsibility. If it concerns a legal person, the natural person acting on its behalf will be prosecuted, meaning the matter concerns individuals who are not related to banking and have no connection to it. (Nazihah Ghazali, "The Criminal Responsibility of the Banker in Algerian Law," A thesis submitted for the Master's degree in Business Law, Faculty of Law, University of Mentouri, Constantine, 2010, p. 67.)

Additionally, the "others" addressed by the provisions of the aforementioned article can be entities closely related to those legally qualified to conduct banking operations. For example, a bank or financial institution that has not yet obtained its accreditation may still engage in banking activities. This also includes a bank or financial institution whose accreditation has been revoked by a disciplinary decision issued by the Banking Commission or by an individual decision from the Money and Credit Council, yet it continues to carry out banking operations. (Ghassan Rabah, "The Previous Reference," p. 57.)

Such a crime can also be committed at the very heart of the banking sector by the bankers themselves. This occurs when a financial institution engages in receiving funds from the public or managing payment means for the public. Since these operations fall within the exclusive competence of banks, their execution by a financial institution constitutes a crime, subsequently leading to the prosecution and accountability of the individuals acting on behalf of the financial institution. (Mona Ben Latrash, "The Monopoly of Banks and Financial Institutions in Banking Operations," The Academic Journal for Legal Research, Volume 14, Issue 01, Year 2023, p. 131.)

D. The requirement of habituality for the crime of unauthorized banking operations:

The principle of protecting the monopoly of banks and financial institutions requires that the unauthorized practice of banking operations be criminalized when carried out habitually. Occasional practice of such operations by "others" does not pose a threat to the banking system and therefore does not warrant punishment, as is the case in comparative laws such as French law (Peltier Frédéric, "Structure, Regulation, and Public Control of Banking Professions," *Juris-Classeur Bank and Credit*, Paris, fascicle 50, 1998, p. 6.) and Algerian law, which in Article 83 of the Monetary and Banking Law emphasizes the prohibition of habitual operations carried out by banks and financial institutions.

Referring to the aforementioned Article 83, it is clear, and some support this view (Mona Latrash, "The Previous Reference," p. 131.), that the text does not require habituality for the crime of unlawful banking operations to occur. The phrase "habitually" used in the text indicates the operations that others are prohibited from carrying out, which are the operations habitually carried out by banks and financial institutions—namely banking operations.

Thus, the legislator, by using the term "habitually," does not require that banking operations be carried out habitually for the crime of unlawful banking operations to occur. Instead, its use refers to the operations that others are prohibited from performing. Therefore, according to the way the article is drafted by the legislator, the practice of a banking operation even once is sufficient for criminalization and for the concerned individual to be prosecuted. (Mona Latrash, "The Previous Reference," p. 132.)

Overall, the crime of unlawful practice of banking operations may require specialists to follow up and verify its occurrence, which led the legislator to enable the court to use the assistance of the Banking Commission and to request from it all opinions and information that may aid the investigation process.

5. Indirect Criminal Protection of the Banking Monopoly of Banks and Financial Institutions

The principle of the banking monopoly of banks and financial institutions is of significant importance in the banking system. Hence, the legislator has incorporated this principle within related legal texts, dedicating its protection against any breaches through various forms of protection, the most notable and severe being criminal protection.

5.1 Forms of Indirect Criminal Protection

Article 88 of the Monetary and Banking Law states: "It is prohibited for any entity other than a bank, financial institution, independent intermediary, exchange office, or payment service provider to use a name, trade name, advertising, or generally any terms that could lead to the belief that it is accredited as a bank, financial institution, independent intermediary, exchange office, or payment service provider.

It is also prohibited for any financial institution, independent intermediary, exchange office, or payment service provider to give the impression that it belongs to a category other than the one it is accredited to operate within or to cause confusion in this regard."

This article criminalizes acts that undermine public trust by misleading them into believing that a certain entity is a bank through naming or advertising, constituting one form of indirect criminal protection for the banking monopoly principle. The act of an entity engaging in one of the misleading methods mentioned constitutes, in the view of some, a preliminary step to breaching the monopoly principle and unlawfully conducting banking operations. (Ghassan Rabah, "The Previous Reference," p. 58.)

The legislator also criminalizes, within the same article, the act of a financial institution misleading the public into believing it is a bank, aiming for the financial institution to conduct operations monopolized by banks and prohibited from practice, especially the receipt of funds from the public.

Therefore, criminalizing the act of misleading the public by a financial institution or otherwise into believing it is a bank is extremely dangerous. This deception facilitates people depositing their money with these entities, without the protective mechanisms of the banking system for bank deposits, potentially creating a crisis of confidence in the banking system fundamentally based on trust, a crucial and existential matter for any banking system worldwide.

5.2 Exceptions to the Principle of Prohibition on Non-Banks and Non-Financial Institutions from Conducting Banking Operations

The principle of the banking monopoly includes several exceptions legislated for economic reasons, aiming to encourage and facilitate the activity of concerned financial institutions, and for social motives intended to improve social life. These exceptions are found within the Monetary and Banking Law and some other laws outside its scope.

Within the Monetary and Banking Law, the exceptions to this prohibition are mentioned in Article 84, exempting the following entities: (These bodies are mentioned in Article 84 of Law No. 23-09 containing the monetary and banking law.)

- A. The Public Treasury: This entity is not subject to the prohibition specified in Article 83 of the aforementioned Monetary and Banking Law, meaning it can engage in banking operations, such as opening accounts for the public, providing them with checkbooks, and receiving funds from individuals and institutions within its framework. Moreover, any institution, in the course of its activities, can offer its contractors payment terms or advances, or issue cards or vouchers that allow the purchase of goods or services.
- B. Non-profit organizations that, within the scope of their mission and for social reasons, provide loans under specific conditions from their own resources to some of their members.
- C. Institutions that offer wage advances or exceptional loans to their employees for social reasons.

Outside the scope of the Monetary and Banking Law, these exceptions are found, for example, within Law No. 18-04, which sets the general rules related to postal and electronic communications, allowing natural and legal persons to open current postal accounts and receive funds within them and deal with payment methods under Article 46 and subsequent articles.

Conclusion

A quick review of the history of banking transactions reveals that their unregulated practice without oversight or control led to global financial crises. Initially, banking operations were carried out by any natural person in an unregulated manner and as a subsidiary to other professions. Subsequently, this chaotic practice was regulated, and banking operations began to be conducted more cautiously within a framework of rules and standards gradually established by banking systems, learning from past experiences.

Algeria, like other countries, has moved towards regulating this sector through a series of legal texts, the latest being Law No. 23-09, which contains the Monetary and Banking Law. This law restricted the practice of banking operations to specific institutions, thus creating what is known as the monopoly of banks and financial institutions on banking operations, which the Monetary and Banking Law sought to enforce.

This principle limits the practice of banking business to a specific group of entities, accompanied by stringent regulations by the legislator to protect this principle so that the practice of banking operations remains confined within it, achieving the purpose of its imposition. The legislator has imposed criminal responsibility for violating this restriction, meaning that the monopoly of banking operations is granted the highest form of protection: criminal protection.

This study has concluded several key findings, including:

- ✓ The Algerian legislator failed to define many concepts related to the banking sector accurately, especially financial institutions, which should be precisely defined to avoid any potential issues.
- ✓ There are inconsistencies in the definition of financial institutions between the Monetary and Banking Law and the law related to the prevention of money laundering and terrorism financing. The latter assigns the same tasks and powers to financial institutions as banks, while the Monetary and Banking Law excludes certain activities, such as receiving funds from the public and managing payment methods, which are monopolized by banks.

The Algerian legislator has established direct criminal protection for banks and financial institutions and indirect protection in their monopoly over banking operations.

Based on these findings, we suggest the following:

- ✓ Resolve the ongoing debate on the concept of financial institutions by providing a clear and precise definition, eliminating the existing contradictions between the Monetary and Banking Law and the law related to the prevention of money laundering and terrorism financing.
- ✓ Amend Article 04 of the law related to the prevention of money laundering and terrorism financing, which was an opportunity missed by the legislator in the recent 2023 amendment.
- ✓ Consolidate the scattered legal texts related to banking, financial, and economic crimes in general, and attempt to create a unified legislation governing them.

Referrals and references:

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- Law No. 90-10 dated April 14, 1990, relating to currency and credit issued in issue No. 16 of the Official Gazette dated April 18, 1990.

- Law No. 80 for the year 2002 concerning the issuance of the Anti-Money Laundering Law amended by Law No. 78 for the year 2003 amended by Law No. 181 for the year 2008, issued in issue No. 25 of the Official Gazette of the Arab Republic of Egypt dated June 22, 2008.

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