

### **Essay : About the Effectiveness of the Penal Rule in Protecting the Elements of the Industrial & the Commercial Property**

Sakina Farrouj and Amal Aichaoui, “On the Effectiveness of the Criminal Rule in Protecting Elements of Industrial and Commercial Property,” *Academic Journal for Legal Research*, Vol. 13, No. 01, 2022, pp. 468–489.

Because of The adaptation of industrial property law to globalization and more particularly, to ADIPIC, one leads the Algerian legislator like his counterparts; to review the texts governing industrial property in order to strengthen the protection of the latter. However, it should be noted that this adaptation was carried out to the detriment of the rules of criminal law that have been known for a long time, in particular, those relating to the constituent elements of the offense. In fact, at the level of the penal provisions relating to the protection of industrial property rights, it is easy to see that in terms of infringement, a significant change in the characteristics of the legal element, and an ambiguity in the material element. Without doubt this would affect the Algerian policy of criminalization and penalization. Following the foregoing, it is legitimate to wonder about the effectiveness of the criminal rule relating to the protection of industrial and commercial property.

| العربية                    | English                              |
|----------------------------|--------------------------------------|
| الملكية الصناعية والتجارية | Industrial and Commercial Property   |
| الملكية الفكرية            | Intellectual Property                |
| التقليد                    | Counterfeiting                       |
| المنافسة غير المشروعة      | Unfair Competition                   |
| الجريمة الاقتصادية         | Economic Crime                       |
| السياسة الجزائية           | Criminal Policy                      |
| التجريم                    | Criminalization                      |
| العقاب                     | Punishment                           |
| العقوبات الجزائية          | Criminal Penalties                   |
| العقوبات الإدارية          | Administrative Sanctions             |
| الغرامة                    | Fine                                 |
| الحبس                      | Imprisonment                         |
| المصادرة                   | Confiscation                         |
| نشر الحكم                  | Publication of Judgment              |
| المنع من ممارسة النشاط     | Prohibition from Practicing Activity |
| الركن الشرعي               | Legal Element                        |
| الركن المادي               | Material Element                     |
| الركن المعنوي              | Moral Element (Mens Rea)             |
| الدعوى العمومية            | Public Prosecution                   |
| الإجراءات الجزائية         | Criminal Procedures                  |
| الإثبات                    | Evidence                             |
| محضر                       | Official Report                      |
| الحجز                      | Seizure                              |

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|--------------------------|-------------------------------|
| إدارة الجمارك            | Customs Administration        |
| أعوان الجمارك            | Customs Officers              |
| مديرية التجارة           | Directorate of Trade          |
| الشرطة القضائية          | Judicial Police               |
| القاضي الجنائي           | Criminal Judge                |
| قرينة البراءة            | Presumption of Innocence      |
| حق الدفاع                | Right of Defense              |
| الشخص المعنوي            | Legal Person                  |
| الشخص الطبيعي            | Natural Person                |
| براءة الاختراع           | Patent                        |
| العلامة التجارية         | Trademark                     |
| الرسوم والنماذج الصناعية | Industrial Designs and Models |
| تسمية المنشأ             | Appellation of Origin         |
| الدوائر المتكاملة        | Integrated Circuits           |
| النظام العام الاقتصادي   | Economic Public Order         |
| المسؤولية الجنائية       | Criminal Liability            |
| الردع العام              | General Deterrence            |
| الردع الخاص              | Specific Deterrence           |

## Introduction

The elements of commercial and industrial property constitute one of the fundamental pillars upon which business life is built. These elements are represented in new innovations such as inventions, industrial designs and models, as well as distinctive features like trade names and trademarks. They form part of the capital of various economic agents and provide a fertile ground for increased investment and major economic projects.

The Algerian legislator has enacted numerous laws to protect the elements of industrial and commercial property. However, these have not been sufficient to ensure protection in light of the emergence of new and recurring infringements that continually deplete them. Moreover, the phenomenon of infringement on these elements is not limited to national borders but extends beyond them. This has required updating legal frameworks in line with developments seen in comparative trademark and patent laws. In addition, some countries have adopted institutional systems such as the National Institute of Industrial Property and have strengthened the role of customs authorities, assigning them the critical task of combating smuggling within the framework of foreign trade regulation through the monitoring of goods. This is because the fields of customs, trade, and economy represent fertile areas for business investments, while simultaneously being central to various forms of infringement due to the diversity of industrial and commercial property elements.

This situation has necessitated the intervention of criminal law, through mechanisms of criminalization and punishment, to ensure the protection of these elements from various forms of infringement. However, asserting the effectiveness of criminal law intervention in the field of industrial and commercial property cannot be taken as absolute, as it remains dependent on the adaptability of its rules to economic phenomena and their fluctuations.

Based on the criminal law approach to industrial and commercial property elements, the question arises as to the effectiveness of the penal policy adopted by the Algerian legislator in protecting these elements.

To address this issue, an inductive method is required, involving the analysis of various approaches adopted to provide criminal protection for these elements, and identifying the aspects in which Algerian legislation has succeeded. It also involves assessing whether reliance on criminal law is the most appropriate approach, while highlighting areas where it has fallen short. This evaluation is conducted by examining the policy of criminalization and punishment adopted by the legislator to protect industrial and commercial property elements (Section One), as well as the procedural policy for establishing criminal liability for infringements on these elements (Section Two).

### **Section One: The Policy of Criminalization and Punishment for the Protection of Industrial and Commercial Property Elements**

Infringement on industrial and commercial property elements takes various forms, primarily acts of counterfeiting and unfair competition. These infringements constitute punishable offenses when they are unlawful. Most violations affecting these elements fall under the crime of counterfeiting, which is penalized under industrial property laws, in addition to offenses of unfair competition criminalized under the Commercial Practices Law<sup>1</sup>, as a parallel form of protection. Thus, on one hand, an individual may be prosecuted for acts of counterfeiting in general, while on the other, an economic agent may be specifically prosecuted under unfair competition offenses to prevent impunity.

On this basis, analyzing the effectiveness of criminalization and punishment in protecting industrial and commercial property elements requires evaluating both the policy of criminalization (first requirement) and the policy of punishment (second requirement) in this field.

#### **First Requirement: On the Policy of Criminalization in the Field of Industrial and Commercial Property**

Criminalization related to industrial and commercial property elements is characterized by the broad and flexible nature of its legal basis, which does not fully serve the principle of legality as applied in criminal law<sup>2</sup>. This opens the door to analogy in interpretation.

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<sup>1</sup> - Law No. 04-02 of June 23, 2004, which defines the rules applicable to commercial practices (Official Gazette No. 41, issued June 27, 2004), as amended and supplemented by Law No. 10-06 of August 15, 2010 (Official Gazette No. 46, issued August 18, 2010), provides for the criminalization of unfair competition.

<sup>2</sup> - Criminal law rules have increasingly come to serve economic policy, with laws being adapted within the framework of economic crime to keep pace with the rapid changes in economic phenomena, often without strict adherence to the rules and standards established in general criminal law.

Furthermore, the material element of the offense is left to the discretion of the criminal judge, as the legislator has not precisely defined the behaviors that constitute infringement on industrial and commercial property elements. Any violation of a new innovation or distinctive sign is considered an act of counterfeiting, which has led to the need to evaluate the policy of criminalization by examining the methods of criminalization adopted in this field (first branch), followed by a discussion of the constituent elements forming the structure of offenses affecting these elements (second branch).

Rules of criminalization fall within the scope of substantive criminal law. They are concerned with defining the material aspects of prohibited criminal conduct that the legislator requires individuals to refrain from, by specifying the elements necessary for the establishment of the offense and determining responsibility based on attribution.

### **First Branch: Evaluation of Methods of Criminalization**

There are many issues that require careful examination in the field of criminalization. Perhaps the most important points to address are the multiplicity of legal texts related to the criminal protection of industrial and commercial property elements (first), followed by the issue of duality of criminalization that characterizes the policy in this field (second).

#### **First: Multiplicity of Legal Texts**

These texts include:

- Ordinance No. 66-86, dated March 28, 1966, relating to industrial designs and models<sup>3</sup>;
- Ordinance No. 76-65, dated July 16, 1976, relating to appellations of origin <sup>4</sup>;
- Ordinance No. 03-06, dated July 19, 2003, relating to trademarks<sup>5</sup>;
- Ordinance No. 03-07, dated July 19, 2003, relating to patents<sup>6</sup>;
- Ordinance No. 03-08, dated July 19, 2003, relating to the protection of layout designs of integrated circuits<sup>7</sup>;

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<sup>3</sup> - Ordinance No. 66-86, dated March 28, 1966, relating to industrial designs and models, Official Gazette of the Algerian Republic, No. 25, issued on May 3, 1966.

<sup>4</sup> - Ordinance No. 76-65, dated July 16, 1976, relating to appellations of origin, Official Gazette of the Algerian Republic, No. 59, issued on July 23, 1976.

<sup>5</sup> - Ordinance No. 03-06, dated July 19, 2003, relating to trademarks, Official Gazette of the Algerian Republic, No. 44, issued on July 23, 2003.

<sup>6</sup> - Ordinance No. 03-07, dated July 19, 2003, relating to patents, Official Gazette of the Algerian Republic, No. 44, issued on July 23, 2003.

<sup>7</sup> - Ordinance No. 03-08, dated July 19, 2003, relating to the protection of layout designs, Official Gazette of the Algerian Republic, No. 44, issued on July 23, 2003.

- Law No. 04-02, dated June 23, 2004, defining the rules applicable to commercial practices<sup>8</sup>
- Law No. 79-07, dated July 21, 1979, containing the Customs Code<sup>9</sup>.

**In addition to this**, there are numerous decrees related to the implementation of these laws, as well as various regulations and organizational provisions governing the different elements of industrial and commercial property.

### **Second: The Duality of Criminalization in Cases of Infringement on Industrial Property Elements**

The duality of criminalization refers to the legislator's approach—through special laws relating to industrial and commercial property elements—of criminalizing infringements against these elements individually, classifying them as acts of counterfeiting. This is followed by Law No. 04-02 relating to the rules applicable to commercial practices, which criminalizes all such acts, including those previously classified as counterfeiting, under another legal characterization: unfair competition.

Although this approach has been necessitated by complex economic realities, it has created confusion and fragmentation in the fundamental rules and general principles of criminal law. It has also led to inconsistency in legal doctrine and judicial practice in defining the scope of economic crime, leaving its concept ambiguous. Both unfair competition and acts of counterfeiting have thus been classified as misdemeanors punishable by principal and supplementary penalties, for which both the principal offender and accomplice may be held liable. In addition, legal persons (corporate entities) may also be held liable when the elements of the offense are established in cases of infringement <sup>10</sup>.

The diversity in forms of criminalization relating to industrial and commercial property elements is an inevitable result of the intensity of legislative activity reflected in the extensive body of laws and regulations governing economic crime. However, this remains problematic, as it leads to legislative inflation, making it difficult to fully comprehend and control.

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<sup>8</sup> - Law No. 04-02, dated June 23, 2004, defining the rules applicable to commercial practices, previously cited reference.

<sup>9</sup> - Law No. 79-07, dated July 21, 1979, containing the Customs Code, Official Gazette of the Algerian Republic, No. 3, issued on July 24, 1979, as amended and supplemented by Law No. 98-10, dated August 22, 1998 (Official Gazette No. 61, issued August 23, 1998), and Law No. 17-04, dated February 16, 2017 (Official Gazette No. 11, issued February 19, 2017).

<sup>10</sup> - Naïma Alouach, *Trademarks in the Field of Competition*, New University Publishing House, Alexandria, 2013, p. 16.

## **Second Branch: Evaluation of Criminalization Policy in Terms of Its Constituent Elements**

A crime generally consists of three essential elements: the legal element, the material element, and the moral element. Through careful examination of the elements related to crimes affecting industrial and commercial property, several observations have been made, particularly concerning the legal and material elements.

The Algerian legislator has introduced several new additions that have altered the traditional foundational principles historically considered as the general legal framework of criminal law, clearly departing from the general theory of crime in both substance and form. Accordingly, under this section, the focus will be on the legal element (first), followed by the material element (second).

### **First: The Decline of the Principle of Legality in the Field of Protection**

There is a noticeable decline in the role of the legislator in the field of criminalization. The executive authority and ministerial bodies increasingly intervene in defining the elements of crimes related to the business sector in general, and to industrial and commercial property elements in particular, to the extent that some scholars argue for the existence of a secondary authority in defining crimes. Consequently, this has led to a shift in the fundamental features and criteria of the principle of criminal legality. As a result, both the requirements of precision and clarity have been undermined, as criminalization in the field of business has come to involve vague expressions that are open to multiple interpretations.

#### **A. Lack of Precision in the Drafting of Criminalization Provisions**

The legislator has tended to enact criminal provisions with undefined and broad meanings, without providing clear definitions or precise delimitations. These provisions include vague and absolute concepts that are open to multiple interpretations. Legal doctrine has considered this a deviation from the rule requiring clear and precise drafting of criminal provisions, particularly in the context of offenses affecting industrial and commercial property elements.

The legislator frequently uses ambiguous expressions with broad meanings, which are often more economic than legal in nature. This weakens the boundary between what is permissible and what falls within the scope of criminalization. As a result, criminalization may extend to serious and harmful situations without necessarily fulfilling the conditions for the completion of the offense or deriving benefit from it. An example of this can be found in Article 47, which uses the expression “in particular,” indicating that the listed cases of criminalization are not exhaustive. This constitutes a serious violation of a fundamental principle of criminal law, namely the principle of legality.

However, acknowledging the dual nature of unfair competition may partially mitigate this issue, as it may be considered criminal in nature in explicitly provided cases, in compliance with the principle of legality, and civil in nature in other cases <sup>11</sup>

## **B. Inconsistency Between the Arabic and French Texts**

Among these inconsistencies is what is found in Article 27 of the law relating to the rules applicable to commercial practices. The Arabic version limits itself to referring to acts of unfair competition related to trademarks, whereas the French version uses the term “distinctive signs” or “symbols,” which is significantly broader in scope. The difference between the two terms is substantial.

## **C. The Policy of Blank Criminal Legislation**

Within the framework of economic crime, the legislator has not adhered to the fundamental standards governing substantive criminal law. While the law provides for punishment, it delegates the task of defining and determining the elements required to classify the criminal act to administrative authorities. This has effectively created a separation between the two components of criminalization and punishment. Legal doctrine has referred to this modern technique as “blank criminal provisions” or “blank criminalization,” whereby the text may contain the element of criminalization, yet it remains incomplete and lacks the full components required for its effective existence<sup>12</sup>

Within the framework of protecting industrial property elements, the legislator has not adhered to the fundamental standards governing substantive criminal law. This has led to the emergence of so-called “blank provisions,” which do not acquire binding legal force unless the competent authority intervenes to define the constituent elements of the offense. Accordingly, “such a rule cannot be applied unless the complementary element is fulfilled and acquires its legal character.” This situation is evident in most laws related to the protection of industrial and commercial property elements, which establish registration and publication as conditions for protection, while leaving the determination of the procedures

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<sup>11</sup> - Zoubir Hammadi, “Protection of Distinctive Signs from Unfair Commercial Practices in Light of Legislative Provisions and Judicial Practice,” *Academic Journal for Legal Research*, Faculty of Law and Political Science, University of Abderrahmane Mira Bejaia, Issue 02, 2012, p. 14, Vol. 13, 2022.

<sup>12</sup> - Ihab Al-Rousan, “Characteristics of Economic Crime: A Study of the Concept and Its Elements,” *Notebooks of Politics and Law Journal*, Kasdi Merbah University Ouargla, Issue 07, 2012, p. 21.

governing registration and publication—key factors in the occurrence of infringement—to the regulatory authority.

#### **D. Reliance on Referral and Delegation in Criminalization**

Although the general principle is that provisions of criminalization and punishment should be enacted by the legislative authority, exceptional circumstances may arise that require rapid legislative action to address gaps in the law. In such cases, the executive authority may request a specific legal delegation from the legislature, limited in time and scope, in order to respond promptly to urgent situations.

If the legislature grants such authorization by issuing a delegation law, the executive authority is then entitled, within the specified timeframe and subject matter, to issue regulations or orders having the force of law<sup>13</sup>

As previously noted, laws relating to industrial and commercial property consistently refer to regulatory frameworks for defining the elements upon which protection is based. Moreover, most of these texts that provide protection for such elements have been issued in the form of ordinances rather than formal statutes, whether concerning trademarks, patents, the protection of integrated circuits, or appellations of origin.

#### **Second: The Material Element**

The material element represents the external act that embodies either criminal intent or negligence. It consists of three components: the act, the result, and the causal relationship. The same applies to offenses affecting industrial property elements; however, these offenses are marked by several shortcomings resulting from the adopted criminalization policy.

Consequently, the judge is faced with legal provisions that are vague, permeating the material element and causing an overlap of terms to the extent that it becomes difficult to determine what constitutes a criminal act and what is permissible. This is what will be detailed below.

##### **A. The Ambiguity of the Material Element**

The material element represents the external structure of the crime and is essentially embodied in the criminal conduct for which the legislator prescribes a penalty. Through it, the crime takes the form of an external act that reflects either criminal intent or negligence.

Determining the material element of a crime has several implications, including identifying the manner in which the act is committed—whether it requires a specific physical action or may also result from an omission (failure to act). It also involves defining the time frame

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<sup>13</sup> - Mireille Delmas-Marty, Business Criminal Law, ed. Thémis, 1990, Introduction, p. 17.

during which the offense occurs, leading to the classification of crimes into instantaneous, continuous, and successive offenses <sup>14</sup>.

In the context of protecting industrial property elements, it is observed that the legislator has not adhered to the fundamental standards that should govern the material element under general criminal law. Consequently, the ambiguity of the material element in crimes of counterfeiting and unfair competition constitutes one of the prominent features of criminal provisions in the economic field.

## **B. The Multiplicity of Forms of the Material Element in Crimes Affecting Industrial and Commercial Property Elements**

The forms of criminal conduct constituting both counterfeiting and unfair competition are numerous. To clarify this issue, we will examine the forms related to counterfeiting (1), followed by those related to unfair competition (2).

### **1. Infringements Falling within the Scope of Counterfeiting**

These infringements are no longer exhaustively listed in modern laws, as was the case in earlier legislation. Instead, the legislator has limited itself to defining a general framework for such acts. Some legal scholars justify this approach by the diversity of offenses affecting these elements and the increasing number of unlawful acts accompanying the development of commercial and economic activity.

For the sake of clarity, a distinction can be made between acts of counterfeiting affecting new innovations and those relating to distinctive signs.

#### **– Acts of Infringement Related to New Innovations of Commercial Enterprises**

- Acts constituting infringement of rights protected by a patent include:  
infringement of a product subject to a patent;  
use or manufacture of a product covered by a protected patent;  
sale, offering for sale, or importation of a patented product;  
infringement of a manufacturing process protected by a patent;  
use of a manufacturing process subject to patent protection;  
sale or importation of a product directly resulting from a protected manufacturing process.

#### **– Infringement of Industrial Designs (Formal Innovations)**

Infringements relating to industrial designs and models include the production of a design or model owned by another party or previously registered; the use of a design or model by an unauthorized party in advertising; the sale, offering for import, or distribution of a product or

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<sup>14</sup> - Mounir Al-Hamsh, previously cited reference, p. 53.

design; as well as the copying or incitement to copy an industrial design or model and its commercialization.

- **Infringements relating to layout designs of integrated circuits** include the use or exploitation of the layout design of integrated circuits; the copying of such designs; or the sale, importation, or distribution of layout designs of integrated circuits for commercial purposes.
- **Acts of counterfeiting affecting distinctive signs** include infringements related to appellations of origin, such as the use of an appellation of origin by any means, or its fraudulent use. They also include acts relating to trademarks.
- **Direct infringements affecting the identity of trademarks** include counterfeiting a trademark and falsifying a trademark.
- **Indirect infringements affecting the identity of trademarks** include selling or offering for sale goods bearing a counterfeit or falsified trademark, selling goods bearing an imitated trademark, offering goods bearing a counterfeit or falsified trademark for sale, and possessing such products with the intent to sell.

Infringements affecting the proprietary rights of trademarks include the unlawful use of a trademark owned by another party, and the possession or sale of products bearing trademarks owned by others.

## **2. Forms of the Material Element of the Offense of Unfair Competition**

The criminal conduct constituting the offense of unfair competition consists of all infringements affecting the intangible assets of commercial enterprises, committed by one economic agent against another. These include acts likely to create confusion between enterprises or products.

Such acts encompass all behaviors capable of misleading an average consumer, diverting their choice away from the product they originally intended to purchase and had in mind, thereby making it difficult to identify the genuine product <sup>15</sup>

False claims not consistent with the truth; this form is realized when an economic agent resorts to publishing false allegations in various media such as newspapers, magazines, radio, television, and even social media<sup>16</sup> or through advertising based on comparison and

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<sup>15</sup> - Djilali Adjja, Disputes in Industrial and Commercial Intellectual Property: Civil Action, Criminal Action, and Alternative Methods – A Comparative Study, Part Six, Zine Legal Publications, Beirut, 2015, p. 56.

<sup>16</sup> - Nassim Khaled Al-Shawawreh, Trademark and Its Protection from Acts of Unfair Competition, A Comparative Study, Dar Al-Thaqafa for Publishing and Distribution, Amman, 2017, p. 201.

preference by placing a television advertisement suggesting the modification of a specific trademark, designation, or product<sup>17</sup> This leads to the distortion of the reputation of the commercial company and its products and services, causing it to lose its marketing opportunities<sup>18</sup> and creates disturbances in a competing enterprise in the market. These acts generally consist of economic agents adopting a policy of intimidation and inducement by implanting in the minds of consumers ideas and information that would lead them to turn away from the products of a commercial company, while at the same time encouraging them toward their own goods and products by setting preferential prices or offering sales with bonuses, solely for the purpose of excluding a particular company from the market and undermining its marketing project<sup>19</sup>.

Acts of counterfeiting include those acts previously detailed in the first section relating to the offense of counterfeiting, provided that they are committed by an economic agent competing with the affected company, with the aim of excluding it from the market and opening the way for its own products<sup>20</sup>.

The lack of precision of the Algerian legislator in defining the term “counterfeiting” is evident, as it resorts to using several terms conveying the same meaning. The term “counterfeiting” is used in the ordinance relating to trademarks, the ordinance relating to patents, and the law on designs, while the ordinance relating to appellations uses the term “unlawful use,” and the Customs Code employs the term “falsification”<sup>21</sup>.

There is also a lack of consistency among the legal texts providing criminal protection. By referring to the provisions criminalizing acts of counterfeiting, it is observed that they use the term “criminalization of counterfeiting” or other terms employed by the legislator to describe the offense of counterfeiting; however, when referring to the law governing the rules applicable to commercial practices, it is found that it reiterates the criminalization of acts of counterfeiting. Among the most notable instances is its reference to trademark counterfeiting

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<sup>17</sup> - Farha Zarawi Saleh, *The Complete Guide to Algerian Commercial Law: Intellectual Property Rights*, Ibn Khaldoun Publishing and Distribution, Oran, 2003, p. 362.

<sup>18</sup> - KOKTVEDGAARD Mogens, “The Legal Rules of Unfair Competition in the Nordic Countries,” *RIDC*, Vol. 26, No. 3, July–September 1974, p. 506.

<sup>19</sup> - Mazhoud Ammar, *Action for Unfair Competition as a Mechanism for the Protection of the Economic Agent*, Master’s Thesis, University of 8 May 1945, Guelma, Algeria, 2016, p. 92.

<sup>20</sup> - Zoubir Hammadi, *Protection of Industrial Property in Algeria*, Doctoral Thesis, Mouloud Mammeri University, Tizi Ouzou, 2018, p. 260.

<sup>21</sup> - Zoubir Hammadi, “Judicial Controls in Assessing the Crime of Counterfeiting or Imitation of Distinctive Signs,” *The Lawyer Journal*, Bar Association of Sétif, Issue 11, 2010, p. 117.

as a misdemeanor in the law relating to trademarks, as well as to the counterfeiting of trademarks in the law relating to commercial practices.

### **Second Requirement: The Penal Policy Adopted for the Protection of Industrial and Commercial Property Elements**

Penal policy in the economic field primarily seeks to achieve at least two fundamental objectives: deterring individuals and protecting public economic order. Deterrence aims to prevent the offender from reoffending and to discourage others from imitating such behavior. As for the protection of public economic order, it aims to rectify financial transactions and restore balance to a financial situation disrupted by crime, by enabling the financial administration to assess and determine the amounts of fines, given that it possesses financial autonomy and seeks to reinforce its resources through the collection of revenues.

Accordingly, the legislator is required to adopt a deterrent policy based on the diversification of penalties in order to achieve the objectives of criminal policy.

Punishment is considered the most effective and efficient means in all crimes of competition in general, and particularly those related to industrial and commercial property elements, as it inflicts harm on the offender and eliminates the causes of the crime within the environment in which it arose, and may prevent its recurrence in the future<sup>22</sup>

On this basis, the evaluation of the method of punishment adopted by the Algerian legislator to deter infringements affecting industrial and commercial property elements will be addressed (first branch), followed by an examination of the penalties prescribed for these elements (second branch).

#### **First Branch: Evaluation of the Method of Punishment**

The method of punishment refers to the approaches adopted by the legislator to limit crime. It may rely on preventive measures or on penalties, which may be principal or supplementary, and may involve deprivation of liberty, financial sanctions, or deprivation of rights.

It has been observed that the method of punishment is characterized by duality and multiplicity of sanctions, with a predominance of financial penalties, alongside a focus on sanctions involving deprivation of rights. This will be detailed as follows:

#### **First: The Duality of Penalties Prescribed for Infringement of Industrial and Commercial Property**

The multiplicity and duality of penalties are a natural consequence of the multiplicity of criminalization texts and the dual nature that characterizes the field of industrial and

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<sup>22</sup> - Saïda Barra, *Protection of Industrial Property of the Foreign Investor in Algeria: The Trademark as a Model*, Doctoral Thesis, University of Abderrahmane Mira, Bejaia, 2018, p. 185.

commercial property, which has become today one of the pillars of business development. In this context, numerous prescribed penalties can be observed for the protection of industrial and commercial property elements, grouped within the various legal texts regulating these elements on the one hand, as the first pole of duality. On the other hand, when referring to the law relating to the rules applicable to commercial practices, we also find other penalties that may sometimes apply to the same act already punishable under the special laws, thus constituting the second pole of the duality of punishment.

### **Second: Multiplicity of Penalties**

By examining the overall provisions relating to industrial and commercial property elements, it appears that penalties are multiple in nature. Some are administrative, while others are criminal. Within the latter category, there are various types of sanctions, including principal and accessory penalties, as well as financial penalties and those involving deprivation of rights.

### **Third: Predominance of Financial Penalties**

A close analysis of the applicable penalties reveals the predominance of the financial aspect, as they most often take the form of fines rather than custodial sanctions. Financial penalties provide additional resources to the state budget, contributing to its support, especially during periods of economic difficulty. However, their effectiveness remains dependent on the efficiency of penal enforcement, which currently faces several challenges and constitutes a key area of reform in criminal policy across many comparative legal systems.

Nevertheless, this consideration has not prevented the legislator from establishing custodial penalties whenever the offense is of a serious nature requiring stricter repression and deterrence.

### **Second Branch: Forms of Penalties Prescribed for the Protection of Industrial and Commercial Property Elements**

What distinguishes punishment in the economic field is the diversity of sanctions (economic, administrative, practical, and criminal), as previously indicated. The penalties provided for in industrial property laws will first be examined (first), followed by those stipulated in the law relating to the rules applicable to commercial practices (second).

#### **First: Criminal Penalties**

Criminal penalties consist of custodial sanctions alongside financial fines, in addition to a set of supplementary penalties, as follows:

##### **A. Imprisonment**

Imprisonment is one of the principal penalties prescribed for misdemeanors, based on the deprivation of the convicted person's liberty for a period ranging from more than two months up to a maximum of five years, in accordance with the general rule. However, with regard to the offense of counterfeiting industrial and commercial property elements, the Algerian

legislator has established penalties that vary depending on the element subject to infringement. The duration of imprisonment also differs between the laws relating to the protection of these elements and those provided for under the law governing the rules applicable to commercial practices.

## **B. Fine**

This refers to the financial penalty imposed by the criminal judge in favor of the public treasury or the financial administration, as specified in the judgment. The amount of fines varies depending on the object of infringement<sup>23</sup> and differs from one element of industrial and commercial property to another, as well as according to the law under which criminal liability is established.

This is in addition to a set of supplementary penalties, including confiscation, closure of the establishment, publication of the conviction judgment, and destruction.

## **Second: General Administrative Sanctions**

The administrative penalties prescribed for the protection of industrial and commercial property elements can be summarized as follows:

### **A. Financial Fine**

The Commercial Practices Law provides for fines as a principal penalty for all violations related to commercial practices, either by setting a minimum and maximum range or by specifying a fixed amount<sup>24</sup> With regard to acts of unfair competition affecting the intangible assets of commercial companies, the prescribed fine is set out in Article 38 of the Commercial Practices Law, ranging from fifty thousand (50,000 DZD) to five million Algerian dinars (5,000,000 DZD).

### **B. Confiscation**

Confiscation is defined as “the final transfer of ownership of specific property, or a set of properties, to the State, or their equivalent value where appropriate”<sup>25</sup> It is also defined as

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<sup>23</sup> - Wahiba Laouarem Ben Ahmed, *The Crime of Trademark Counterfeiting under Algerian Legislation*, Al-Wafaa Legal Library for Publishing, Alexandria, 2015, p. 154.

<sup>24</sup> - Kawsar Othmania, “The Specificity of Penalties in Competition Offenses under Algerian Legislation,” Proceedings of the National Conference on Competition Law: Liberalization of Initiative and Market Regulation, University of Guelma, March 16–17, 2015.

<sup>25</sup> - Zoubir Hammadi, *Protection of Industrial Property in Algeria*, previously cited reference, p. 272.

“the compulsory deprivation of ownership of a specific asset from its owner without compensation, and its transfer to State ownership”<sup>26</sup>

It therefore constitutes a legal seizure of the convicted person’s property, resulting in the transfer of ownership to the State without any compensation. It is imposed by judicial authority, and the property concerned may include securities, equipment, machinery, or goods subject to confiscation, as a consequence and sanction for the violation.

### **C. Publication of the Judgment**

The publication of the judgment is generally authorized under Article 48 of the Commercial Practices Law, whether ordered by the governor (wali) or by the criminal judge. This means that the court is also empowered to order the publication of the criminal judgment as a supplementary criminal penalty <sup>27</sup>

### **D. Prohibition from Practicing the Activity**

The prohibition from practicing the activity, as provided for in Article 47, may be imposed on a temporary basis not exceeding ten years. It is a discretionary penalty subject to the assessment of the criminal judge<sup>28</sup>

This penalty is considered one of the most severe administrative sanctions in competition-related offenses in general, and particularly those concerning industrial and commercial property elements. It affects the offender significantly and eliminates the causes of the offense within the environment in which it arose, and may prevent its recurrence in the future.

It should be noted that Article 47, prior to its amendment by Article 11 of Law No. 10-06, did not specify a maximum duration for closure. However, after the amendment, the maximum period was set at ten years<sup>29</sup>. Furthermore, prior to the amendment, in cases of recidivism, a supplementary penalty consisting of a prohibition from practicing an activity could be imposed without specifying which activity. In contrast, after the amendment, the prohibited activities were limited to those listed in Article 2 of Law No. 04-02. Additionally, before the amendment, the law provided for the penalty of removal from the commercial register, a sanction that is no longer included in Article 47 after its amendment.

In general, the penalties provided for under the Commercial Practices Law are deterrent against all enterprises that seek to enhance their position at the expense of others without lawful justification, unlike what is provided for in Law No. 03-03, which abolished

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<sup>26</sup> - Saïda Barra, previously cited reference, p. 183.

<sup>27</sup> - Zoubir Hammadi, *Protection of Industrial Property in Algeria*, previously cited reference, p. 272.

<sup>28</sup> - Farha Zarawi Saleh, *The Complete Guide to Algerian Commercial Law* (Commercial Business and Intellectual Property, Part Two), Ibn Khaldoun, Algeria, 2001, p. 377.

<sup>29</sup> - Zoubir Hammadi, *Protection of Industrial Property in Algeria*, previously cited reference, p. 240.

...criminalization in its entirety, which suggests a shift toward administrative sanctions within the framework of what is known in business law as decriminalization<sup>30</sup>.

It can be concluded that the idea of aligning economic phenomena with legal rules, even if it reaches a level of constraint and obligation, is nevertheless a necessity for the proper functioning of modern life. This is due to the transformation of the role of the State and the expansion of its scope, accompanied by developments in the notion of the unlawfulness of criminal acts and the subject matter of penal deterrence.

### **Second Section: The Effectiveness of the Procedural Aspect in Confronting Infringements of Industrial and Commercial Property**

From the foregoing, the specificity of crimes affecting industrial and commercial property elements becomes evident in terms of both criminalization and punishment. The prosecution of infringements relating to these elements requires techniques different from those applied to ordinary crimes, as certain procedural functions have been entrusted to administrative authorities. From the initiation of proceedings to the pronouncement of the sentence, the adopted system is highly exceptional<sup>31</sup>.

Procedural rules relating to the prosecution of crimes constitute an integral part of general criminal policy, as they represent the fundamental step upon which the activation of rules of criminalization and punishment depends. Accordingly, the stronger and more coherent the procedural system—clear in its structure and providing all legal guarantees to the parties in criminal proceedings—the closer it comes to achieving justice and proportionate accountability.

Within the framework of evaluating the procedural provisions related to the protection of industrial and commercial property elements, and in line with an objective approach, several observations can be made. Some of these reinforce and ensure effective protection of these elements, while others undermine them.

One of the most notable features of the procedural rules governing criminal liability for infringements of industrial property elements is the multiplicity of judicial authorities

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<sup>30</sup> - Decriminalization was introduced by Ordinance No. 03-03 of July 19, 2003, relating to competition (Official Gazette of the Algerian Republic No. 43, issued July 20, 2003), as amended and supplemented by Law No. 08-12 of June 25, 2008 (Official Gazette No. 36, issued July 2, 2008). This came after the previous competition law had criminalized acts of unfair competition under Ordinance No. 95-06 of August 22, 1995 (Official Gazette No. 09, issued February 22, 1995).

<sup>31</sup> - Abdel Fattah Mostafa El-Saifi, *The Criminal Rule – An Analytical Study in Light of Contemporary Criminal Jurisprudence*, Dar Al-Nahda Al-Arabiya, Cairo, 1976, p. 174.

competent to prosecute such offenses (first requirement), as well as the reliance on reports establishing the infringement in the absence of a specialized judge (second requirement).

### **First Requirement: Multiplicity of Authorities Empowered to Initiate Criminal Proceedings**

One of the most notable features of economic criminal law is the broad powers granted to administrative agents to detect certain infringements affecting industrial and commercial property elements. The law assigns to each economic administration a structure composed of specialized agents responsible for carrying out such inspections.

Through examining the legal provisions governing industrial and commercial property elements, it becomes clear that there is a multiplicity of inspection agents endowed with extensive powers (first branch), in addition to the issue of jurisdictional conflict between administrative authorities and criminal courts regarding public prosecution and adjudication (second branch).

### **First Branch: Multiplicity of Authorities Responsible for Investigation, Detection, and Inquiry**

Given the complexity of business activities, the difficulty of proof, and the technical nature of crimes related to new innovations—which require specialized agents to detect and establish them—it has become necessary to establish specialized bodies for handling economic crimes in order to ensure the effectiveness of criminal law. This has led to the multiplicity of agents entrusted with enforcement, including judicial police officers, customs officers, and agents of the Directorate of Trade.

#### **First: Judicial Police**

The status of judicial police is not limited to the police force alone, nor only to those holding the rank of officer; rather, it also extends to agents who possess such authority. According to Article 14 of the Code of Criminal Procedure, this category includes presidents of municipal people's assemblies, officers of the National Gendarmerie, officials belonging to specialized inspection corps, as well as commissioners and officers of the National Security Police. It also includes gendarmerie personnel who have served at least three years in the National Gendarmerie and have been appointed by a joint decision of the Minister of Justice and the Minister of National Defense, following approval by a special committee. In addition, it includes personnel from specialized corps, guards and agents of the National Security Police, and non-commissioned officers affiliated with military security services<sup>32</sup>.

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<sup>32</sup> - Article 14 of Ordinance No. 66-155 of June 8, 1966, containing the Code of Criminal Procedure (Official Gazette of the Algerian Republic No. 40, issued July 8, 1966), as amended and supplemented, in particular by Ordinance No. 17-06 of March 27, 2017 (Official Gazette No. 20, issued March 19, 2017).

## **Second: Customs Administration Officers**

Customs officers, without distinction in rank or function, are vested with the authority to investigate and detect offenses affecting industrial and commercial property elements. This constitutes one of the most important powers granted to the customs administration...

...the customs administration within the scope of its procedural powers, in addition to various customs offenses that may coincide with it in legal characterization.

The customs legislator requires customs officers, during the performance of their duties in investigating and detecting customs offenses, in accordance with customs laws and regulations, to carry authorization cards indicating that they have taken the oath, in order to be qualified to perform their duties. This is stipulated in Article 37 of the Customs Code<sup>33</sup>.

## **Third: Agents of the Directorate of Trade**

Agents of the Trade Administration responsible for economic investigations, competition, pricing, quality control, and fraud repression are also entrusted, under Law No. 04-02, with the task of pursuing and investigating infringements affecting industrial and commercial property elements, as this law criminalizes violations of these elements and classifies such infringements within the scope of unfair competition.

## **Second Branch: Overlapping Jurisdiction Between Criminal Courts and Administrative Authorities**

The entry of criminal law into the economic field has been accompanied by several transformations, particularly through the significant role assigned to administrative authorities. This is due to the specific nature of economic crimes, as they pose risks affecting both individuals and the national economy, resulting in overlapping competencies in combating economic crimes in general, and infringements on industrial property elements in particular.

This overlap extends to both the initiation of proceedings and the adjudication of cases relating to industrial and commercial property elements. This will be detailed as follows:

### **First: Overlap in Initiating Public Prosecution**

It is well established that the Public Prosecutor plays a fundamental role in initiating public prosecution, and the law expressly grants it this competence. However, this role is limited in

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<sup>33</sup> - Article 37 of the Customs Code provides: “Customs officers must, while performing their duties, carry their authorization cards indicating that they have taken the oath. They are required to present them upon first request.”

customs matters, where it overlaps with that of the customs administration. While the Public Prosecutor has the authority to initiate proceedings, this power may sometimes be constrained by the customs administration. Accordingly, the customs administration holds the right to initiate customs proceedings and also to carry them out.

### **Second: Overlap Between the Criminal Judge and Various Administrative Authorities in Imposing Sanctions**

Certain bodies have been granted the authority to impose administrative sanctions on those who violate applicable legislation and regulations. In this context, the administration is limited to imposing financial penalties, in addition to supplementary sanctions. Algerian law has adopted this system, as is evident in several economic laws. This reflects the legislator's alignment with most comparative legal systems in granting administrative authorities the power to adjudicate economic violations. For instance, administrative fines may be imposed by the Directorate of Trade without recourse to the judiciary. Similarly, legislation governing brokerage activities in stock exchange operations grants an administrative body—the Disciplinary and Arbitration Chamber under the Commission for the Organization and Supervision of Stock Exchange Operations—the authority to impose administrative sanctions on accredited intermediaries in cases of legal violations.

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### **Second Requirement: Reliance on Reports in the Absence of a Specialized Judge**

A review of the laws governing the protection of industrial and commercial property elements shows that they primarily rely, in matters of proof, on reports drawn up by judicial police officers, customs agents, or agents of the Directorate of Trade. In many cases, these reports may constitute the sole means of proving infringement, particularly in light of the absence of a specialized judge. The nature of these elements requires that the person adjudicating such matters possess expertise and specialized knowledge, given that these elements combine artistic creativity, originality, and technical sciences.

This reliance on reports in proving infringements, coupled with the absence of a specialized judge, may undermine the principles of a fair trial, such as the right of defense and the presumption of innocence, as a person may be considered guilty merely upon the drafting of a report. This calls for an examination of the issue of reliance on reports as evidence (first branch) and the absence of a specialized judge (second branch).

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### **First Branch: Reliance on Reports as Evidence**

An analysis of the legal provisions relating to industrial and commercial property elements reveals that the primary means of proving most infringements affecting these elements is through official reports. The use of such reports as evidence has been regulated in nearly all laws relating to industrial property elements, in addition to the regulation of seizure procedures in the Customs Code and in the law governing the rules applicable to commercial practices.

### **First: Seizure Reports under the Commercial Practices Law**

Acts of unfair competition may be proven by all means of evidence, in accordance with the general principle of freedom of proof, in addition to a specific method represented by the report of seizure<sup>34</sup>. The Algerian legislator has authorized, through specific provisions, the owner of the intangible asset or the license holder to resort to seizure procedures in order to establish the occurrence of the offense of counterfeiting. This is done by submitting a request to the president of the court regarding the seizure, accompanied by a document evidencing the registration of the intangible asset subject to infringement by counterfeiting<sup>35</sup>.

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### **Second: Seizure under the Customs Code**

The Customs Code provides another legal basis for seizure, which is carried out by customs officers according to specific procedures within their competence<sup>36</sup>. The legal basis for this type of seizure can be inferred from Articles 22 and 22 bis.

Pursuant to these provisions, customs officers legally authorized to detect customs offenses are empowered to seize goods subject to confiscation, particularly goods involved in fraud.

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### **Second Branch: Absence of a Specialized Judge**

The legislator has assigned jurisdiction over disputes relating to intellectual property, including industrial and commercial property, to specialized judicial divisions that have not yet been established. This situation hinders judicial work and weakens the effectiveness of the protection of industrial and commercial property elements.

Under these circumstances, the assessment of whether an act constitutes a criminal infringement falls to the criminal judge, who is not specialized in this field. This raises the issue of determining the criteria of counterfeiting depending on the circumstances, often leading the judge to request expert opinions or detailed examinations of the new innovation

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<sup>34</sup> - Seizure is studied here as a means of proof, although it also constitutes a precautionary measure. However, Law No. 04-02, which defines the rules applicable to commercial practices, classifies seizure as a penalty by providing for it in Article 29 under Chapter Two entitled "Other Penalties," within Title Four concerning violations and penalties.

<sup>35</sup> - Souhila Bouzebra, "Crimes of Commercial Practices under Law No. 04-02," *Journal of Legal and Political Research*, University of Mohamed Seddik Ben Yahia Jijel, Issue 05, December 2017, p. 65.

<sup>36</sup> - Fathi Wardia, "The Customs Administration as a Primary Channel for Preventing Infringement of Industrial Property," Proceedings of the National Conference on Intellectual Property between the Requirements of Globalization and Development Challenges, published in the *Academic Journal for Legal Research*, Faculty of Law and Political Science, University of Abderrahmane Mira Bejaia, Special Issue, April 28–29, 2013, p. 126.

or distinctive signs<sup>37</sup>. It should also be noted that in Algeria, with regard to new innovations, even the National Institute lacks the necessary means to conduct substantive examinations of patents, designs, and models, and instead limits itself to formal examination. Therefore, how can the judge first ascertain the existence of the original right in order to rule on the case before him, especially given the complexity of these procedures and the time they require, which is incompatible with the speed required in commercial law?

Consequently, the material element is left to the discretion of the criminal judge, since the legislator has not specified the behaviors that constitute a criminal infringement of intangible assets, merely stating that any infringement of a new innovation or distinctive signs constitutes an act of counterfeiting.

## **Conclusion**

As a result of the search for the effectiveness of legal and regulatory rules governing economic activity characterized by technicality and complexity, the legislator has been compelled to adapt the fundamental principles traditionally upheld in general criminal law to new economic functions and fields. It is therefore not surprising that these principles are sometimes set aside or sacrificed in order to ensure the effectiveness of criminalization rules in business generally, and in the field of industrial and commercial property in particular.

Criminal law has thus come to serve economic policy, leading to the adaptation of legal rules concerning crimes affecting elements of industrial and commercial property, in order to keep pace with the rapid changes of economic phenomena, without strict adherence to the rules and standards established in general criminal law. This is evident both in the legal elements required for the offense, where there is a clear transformation in the features of the legal element, and in the ambiguity surrounding the material element of crimes such as counterfeiting and unfair competition.

Since acts of counterfeiting and unfair competition constitute the most significant infringements affecting the ownership rights of commercial companies over these intangible assets, the Algerian legislator has enacted multiple provisions aimed at criminalizing and punishing such acts, thereby reinforcing the criminal protection of these elements.

## **Findings:**

- The attempt of the Algerian legislator to extend criminal protection to elements of industrial property is consistent with the requirements of international agreements.
- The absence of clearly defined procedures that must be followed by officials responsible for carrying out seizures—whether customs officers or agents of the Directorate of Trade—who suffer from insufficient training and a lack of material and

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<sup>37</sup> - Zoubir Hammadi, “On the Authority of the Algerian Judge in Disputes Arising from the Practice of Economic Activity: Competition Disputes as a Model,” *The Lawyer Journal*, Bar Association of Sétif, Issue 24, 2015, p. 120.

legal resources necessary to perform their duties and exercise their functions, with the aim of reducing the phenomenon of counterfeiting.

- Despite the multiplicity of legal texts relating to the protection of industrial and commercial property elements, the rate of infringements against them remains high. This may be due to weak enforcement of these texts by the competent authorities, which raises questions about their effectiveness.
- The lack of clarity regarding the procedures that judicial authorities must follow to protect industrial property elements, in the absence of a specific procedural framework defining the system of prosecution.
- The fragmentation of legal texts related to the protection of industrial and commercial property elements, including regulatory laws, implementing decrees, and international agreements on the one hand, and, on the other hand, the existence of dual criminal protection, which makes it difficult for researchers to fully grasp the content of all these laws.

It has become evident that modern criminal policy requires a diversification of methods to address criminal phenomena, which no longer stem from the same motives nor aim to achieve the same objectives. Consequently, most scientific studies emphasize that dealing with crime in the economic field must take different forms.

### **Recommendations**

Based on the above, it is necessary for the Algerian legislator to keep pace with the developments affecting the penal system in Algeria and to adopt measures that ensure effective protection of industrial and commercial property elements. This can be achieved by incorporating specific provisions into criminal laws relating to these elements, assigning criminal liability to legal persons in cases of violation of the rules and regulations governing industrial and commercial property, or any offense subject to criminal sanctions. This is particularly important given that the most serious crimes are often committed by legal persons, such as classified establishments, companies, and various types of economic enterprises engaged in industrial, commercial, and artisanal activities, which may use these structures to conceal or legitimize their unlawful acts.

From this perspective, it is necessary to intensify efforts in this field by:

1. Engaging specialists to identify the real causes behind the increase in infringements affecting industrial and commercial property elements, whether economic, political, or social, in order to determine the most effective means to reduce and limit their spread.
2. Clearly defining, from a legal standpoint, the concepts of counterfeiting and unfair competition by establishing a precise legislative model for these offenses.
3. Reconsidering the legal sanctions prescribed to address infringements of industrial and commercial property elements in order to ensure both general and specific deterrence.

