

CONTROVERSY OVER DECRIMINALISATION OF DISHONoured CHEQUE: A COMPARATIVE ANALYSIS

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ABSTRACT

The study addresses the jurisprudential debate concerning criminalizing a dishonored cheque under Jordanian law. This discussion is based on two contradicting views. The first has justified the criminalization of the dishonored cheque, and the second has denied the criminalization of such a cheque. The authors analyzed the developed approach of Jordanian legislation and also pointed out recommendations of the Royal Committee for the Development of the Judiciary and Strengthening the Rule of Law (RCDJSRL) in 2107, also the Defence Order No.28 of (2021). The study concluded that decriminalizing the dishonored cheque is consistent with its main function as an instrument of payment; hence, the authors suggested that the provisions of the Jordanian law must decriminalize the dishonored cheque. Decriminalization should parallelly be performed with the imposition of some civil and administrative measures to protect the rights of other parties to this cheque.

Keywords: Criminalization, Decriminalization, Dishonored cheque, Jordan Law, English Law.

INTRODUCTION

Various expressions have been used to identify the dishonored cheque, such as the expression of cheque without funds,¹ cheque with non-sufficient funds (Nkobowo, 2021),² and bounced cheque. This instrument has also Colloquially been recognized as a dud cheque, bad cheque,³ cold cheque, rubber cheque, returned item, and hot cheque.⁴ Not only have these expressions been provided to recognize the dishonored cheque, but some jurisdictions have used the word 'check' instead of 'cheque'.⁵

Dishonored cheque is one of the main concerns of business owners as the such instrument can adversely influence the rights of protection and financial commitments of merchants. Issuing this kind of cheque may also influence the negotiability of cheques in general because the people will have no trust to accept payments through this instrument, which may expose them to lose their money.

From a legal perspective, the cheque is considered a binding promise to pay a certain amount of money, or it might be known as a bill of exchange drawn on a specific bank and must be payable on demand, provided that no expression provides otherwise.⁶ Therefore, one can argue that the drawer with an insufficient balance of account shall be considered to have breached the other party's legal rights.

A cheque performs a substantial role as an evidential payment instrument, substituting the payment in cash (Alnowiser, 2021). Thus, the penal laws of many states have rendered the drawers of the dishonored cheques subject to a penalty.⁷ Jordanian Penal Code No. 16

1960 (JPC) also criminalizes issuing a dishonored cheque. This has expressly been indicated in Article 421(1) of the same law, which states:

"Any person who maliciously commits one of the following acts shall be subject to imprisonment for one year and a fine, not less than one hundred Jordanian dinars and not exceed two hundred Jordanian dinars."

This article also indicated potential forms for the dishonoured cheques, which can be seen as follows:

1. Issuing a cheque without having a sufficient payable account.
2. Withdrawing the whole account balance or withdrawing a part of it and rendering it incapable of discharging the amount required in the cheque.
3. Ordering the drawee to withhold payment in instances other than those allowed by the law.
4. Endorsing or delivering a payable amount to the bearer of the cheque knowing that such cheque has no sufficient funds to discharge the full amount or that these cheque cannot be paid in cash.
5. Issuing or signing a cheque in a way preventing its discharging.

While the second paragraph has limited the powers of the court as follows:

"Concerning what is mentioned in paragraph 3 of this article, the court, when taking into consideration the mitigating factors in any of the instances stipulated in paragraph 1 of this article, should not reduce the imprisonment penalty to less than three months and the fine to less than fifty dinars, and replacement of imprisonment with a fine is not allowed in these cases."

However, the amendments of JPL in 2017 have limited the level of the fine provided for the act of dishonored cheque to five thousand dinars. The amendments above also added paragraphs 5, 6, and 7 to article 421 of JPL, which provide that:

"The scope of application of Paragraph (1) of this Article is limited to a check that fulfills the following two conditions: a. It must be drawn up using the form issued by the withdrawn bank. b. It must be presented to the drawee bank for payment on the date indicated therein or within six months following that date."

Cheques written before the entry into force of the provisions of this law are excluded from the provisions of Paragraph (5) of this Article. Subject to the provisions of Article (74) of this law, if the authorized signatory draws up the check on behalf of the company, he shall be criminally liable in his capacity as the perpetrator of the crime stipulated in this Article whenever its elements are available, regardless of the type of company.

Like other crimes, issuing a dishonored cheque under Jordanian law consists of two main elements; Guilty Act and Guilty Mind. The Guilty Act element is satisfied when the issuer issues a dishonored cheque without having a balance. However, the Guilty Mind -as a criminal intention- can apparently be noted when the issuer's bad intention accompanies issuing a dishonored cheque. Namely, the Guilty Mind element shall be considered when the issuer knows no balance is available after issuing the dishonored cheque. In other words, the mere act of issuing a cheque shall not be considered for criminalizing the dishonored cheque, and rather, this act also has to be accompanied by the bad intention of the issuer of this cheque.

It is worth mentioning that criminalizing the dishonored cheque is a controversial issue, whether between scholars, courts, or legislation. Some views have justified the approach of criminalizing the dishonored cheque under the argument of protecting the main legal principles of the cheques and fostering the public's trust in cheques; hence, they argued that the debtor could issue other kinds of commercial papers for credit – such as promissory notes- to be used as instruments of securities, instead of issuing a dishonored cheque.⁸

However, the opposite opinion believes that the issuance of a dishonored cheque is deemed to be a civil matter that shall be sorted out within civil courts (Babaoglu & A Wulf).⁹ It can be noted that the second view has been based on the legal principle that a cheque is deemed to be an instrument of payment, not an instrument of credit (Wikipedia, 2022), and on this presumption, criminal protection has been provided in the context of the dishonored cheque. For further discussion, the next topic will shed light on both sides' arguments regarding the criminality of the act of issuing the dishonored cheque.

DISHONoured CHEQUE BETWEEN CRIMINALISATION AND DECRIMINALISATION

The controversy in terms of the essence of liability of the issuer of the dishonored cheque has given rise to different views that can be classified into two main approaches, first, which has argued that such liability should be based on criminal liability, whereas the second has determined such liability on the principles of civil liability.

The Criminalisation of Dishonoured Cheques

The opinion that supports the idea of criminalizing the act of issuing a dishonored cheque believes that the liability arising in this context shall be determined based on Criminal liability. This view is justified under the argument that applying the principles of criminal liability on the dishonored cheque will provide a twofold privilege. First, the criminal protection for the right of property, and second (Tripathi, 2020), the civil protection embodied in the holder's right to recover the due amount of the dishonored cheque.¹⁰

Although issuing a dishonored cheque does not satisfy the same legal elements of fraud, the effect of this act can amount to that which arises from the deceitful act under the crime of fraud. This is because the drawer of the dishonored cheque deceives the payee, who becomes confident that the drawer has a sufficient balance covering the amount of this cheque, and that is why the act of issuing dishonored cheques has been attached to the crime of fraud.¹¹ This assumption can further be derived from the approach of JPC, as article 421 of this law -which has criminalized the act of issuing dishonored cheques- has directly been placed after the relevant articles of the crime of fraud. Criminalizing the dishonored cheque is essential to restrain the propensity of drawers aimed at defrauding the payees (Agrawal & Singh, 2020).¹² Therefore, it can be inferred that the one-year imprisonment for the drawer of the dishonored cheque under article 421 of JPC is another piece of evidence that can prove the approach of Jordanian law to criminalizing such an act, which will result in boosting the stability of negotiating the cheque in commercial markets.

It could also be assumed that decriminalizing the dishonored cheque will adversely affect the number of pending cases, as it will increase the number of cases brought before courts due to the nonpayment of dishonored cheques. This is because the absence of criminal liability -in this regard- will encourage many of the bad faith drawers to repeat their act of issuing such kinds of cheques, as they have no concern about the penalty.¹³

One can further believe that criminalizing the dishonored cheque's issuance will enhance the credibility of cheques, which will flourish the commercial environment, as commercial transactions can safely, rapidly, and efficiently be practiced and concluded. As opposed to this approach, decriminalizing such cheques might break the trust between the people negotiating cheques, as this will provide room for deception. This, in turn, will force the deceived payee to have recourse to civil court to retrieve the amount proved in the dishonored cheque. Thus, the deceived will adversely be affected, as they will bear more

expenses and consume more time to be retrieved through the litigation brought before the civil court, especially since the majority of payees might not be able to afford the expenses incurred under civil litigation. Therefore, it is argued that attaching the act of issuing a dishonored cheque to the criminal prosecution can ensure the trust in cheques and also deprives the bad faith drawer of issuing such cheques.¹⁴

Decriminalizing dishonored cheques in Turkey has led to a significant increase in bounced cheques, as Turkish law has replaced imprisonment with administrative sanctions. Hence, it is inferred from the Turkish experience that imprisonment -as a criminal sanction- is more effective than administrative measures that might be imposed to protect the people from dishonored cheques.¹⁵

It can fairly be concluded that the approach of criminalizing the dishonored cheque is widely adopted under various jurisdictions like Jordan, India, and some legislations in the USA (Centre for Civil Society). The adoption of this approach might be justified under the arguments mentioned earlier, which have been invoked by the proponents of decriminalizing the dishonored cheque.

The Decriminalization of Dishonoured Cheques

Cheques have widely been used as means of credit rather than a payment. This can be noted through issuing post-dated cheques.¹⁶ Issuance of cheques as an instrument of credit contradicts the principles of negotiability of cheques as an instrument of payment that amounts to the payment in cash. Nonetheless, such cheques in Jordan enjoy criminal protection provided through article 421 of JPC, even though cheque holders knew that these cheques had been issued as an instrument of credit. This has been justified under the argument that the idea of depriving the dishonored cheque of criminal protection will not be in favor of the negotiability of a bill of lading, as the people would not be interested in dealing with such an instrument that does not enjoy such kind of protection (Jain, 2020), similar to other kinds of negotiable commercial papers.¹⁷

Although article 421 of the Jordanian penal code criminalizes dishonored cheques, the credibility of cheques is at risk. This is from the percentage of the dishonored cheque that has registered around 6.7 % of the total number of cheques issued in 2020 (Central Bank of Jordan, 2021).

However, it can be argued that decriminalizing dishonored cheques is the right step that should be taken by legislation. This is because decriminalizing this kind of cheque will mitigate the burden of cases on the criminal Judge. However, it is presumed that dishonored cheques will obstruct the enforcement of contracts, in particular in terms of the obligation of payment.¹⁸

Many countries apply alternative civil measures for the purpose of substituting the criminal penalty in the context of the dishonored cheque. Malaysia law, for example, has provided that the drawer's account shall be locked if the drawer issued a dishonored cheque, and also, they shall be listed in the List of Dishonoured Cheques, according to which the issuer will be banned from opening and operating its current accounts for a specific period of time.¹⁹ Turkey, however, established the Risk Centre of the Bank Association, which significantly impacts the number of dishonored cheques. This center is dedicated to identifying unmerited credits, which has resulted in a reduction in the number of dishonored cheques, which has boosted the people's trust to accept the cheque as an instrument of payment, and this proves that no need for dishonored cheques to be attached with a criminal punishment.²⁰ However, the UK, Australia, and Singapore do not prescribe a penalty for the

dishonored cheque; rather, they have adopted civil remedies as a means of protection, ensuring proper and trusted negotiability for cheques (Centre for Civil Society).

France also prescribes a civil liability on the issuer of the dishonored cheque, and this liability shall also be accompanied by a procedure of registering offenders to the main database, under which offenders shall be prohibited from issuing cheques for a period of five years. This practice is also adopted in Italy and Spain.²¹ In other words, if the drawer cannot settle the dispute arising in the context of the dishonored cheques, they will be subject to another procedure, through which they will be added to a central register known as Central Check File, according to which the drawer will be banned from issuing cheques for five years, in addition to the bank charges and particular fines that might be imposed on the drawer.²²

It is interesting to say that the approach of criminalizing the dishonored cheque is considered to be a harsh solution to halt the issuance of such cheques, and thus, an administrative and civil alternative solution might be more appropriate to struggle the issuance of these cheques. This solution will encourage the banks to develop their own screening systems, reducing the number of dishonored cheques. Another approach has replaced imprisonment with a fine to protect cheques from deceitful acts, which has contributed to reducing the amount of bounced cheques.²³

It can be concluded that the investors under the decriminalization of bounced cheques will be more confident to issue cheques as instruments of payment, but imprisonment might adversely affect business and commercial transactions. Therefore, one can argue that the idea of disregarding the imprisonment in the context of the bounced cheques can decrease the number of cases brought before courts, and also this will flourish the realm of businesses, as the creditors will furnish credits to the companies based on trust and confidence (Verma, 2020).²⁴

THE RECENT ATTITUDE OF JORDANIAN LEGISLATION CONCENING THE CRIMINALISATION OF DISHONOURED CHEQUES

Cheque is widely used within commercial transactions, and this instrument is regulated in articles 228-260 of Jordanian Commercial Law (JCL) 1966, which have addressed negotiability, issuance, and payment of the such instrument. However, these articles have only been confined on offered addressing the civil protection provided for cheques, while the criminal side of protection has been addressed in article 421 of JPC.

It can be understood from the provision of JCL that the cheque is recognized as an instrument of payment, which facilitates the enforcement of commercial transactions as an alternative way of payment. However, practices in Jordanian business proved that cheques perform another role in addition to that performed in the context of the payment. According to these practices, cheques are also being used as an instrument of credit or guarantee for a third party. The additional function of the cheques in the Jordanian Commercial environment is observed through the issuance of post-dated cheques, which provides a credit similar to that noted under bonds.

Intending to recognize the developed attitude of Jordanian law in terms of the criminalization of dishonored cheques, it is necessary to shed light on the JPL before and post-2017. Before 2017, the drawer of dishonored cheques used to be imprisoned for one year up to two years, even though the cheque's form had not been issued from the respective bank.

However, it was pointed out in the report of the Royal Committee for the Development of the Judiciary and Strengthening the Rule of Law (2107) that the problem of the accumulated court cases has to be solved. Therefore, article 421 of JPC was amended in

order to mitigate the number of cases filed in courts. The amendments in this article can be seen in the reduction of the maximum imprisonment for the act of issuing a dishonored cheque, which was reduced from two years to become only one year. Also, this article decided that the maximum fine for the act of issuing such a cheque must not exceed five thousand Jordanian dinars, provided that two conditions have been satisfied. First, the complainant has waived their personal rights, and second, the perpetrator has paid the cheque amount. This article also declared that the calculation of the fine should be determined based on the total value had the drawer issued multiple cheques.

Another aspect of the amendment, which was aimed at decreasing the number of accumulated cases of the dishonored cheque, can be seen in the conditions prescribed to recognize the dishonored cheque. Namely, in order for the dishonored cheque to be subject to criminal penalty, two requirements have to be met:

1. The dishonored cheque has to be written on a form issued by the relevant bank.
2. The dishonored cheque must be presented at the drawee bank to get it paid, and this must be on the same date indicated therein or within six months following that date.

Another aspect of the development of the Jordanian approach -in terms of the dishonored cheque- was noted in the Defence Order No.28 of the Jordanian Prime Minister, which was issued on 23 Mar 2021. This order was issued on the basis of Article 3 of the Defence Law 1992 and aimed at reducing overcrowded prisons as a means of struggling with the spread of COVID-19, which has also been justified under the argument that this order is taking into account the financial and economic conditions of the drawers (potential prisoners) that have adversely been influenced by COVID-19 (BSchäfer, 2013). Therefore, the order postponed the imprisonment sentence for issuing dishonored cheques if the total amount does not exceed 100000 JD, provided that the issuers of such cheques must be prohibited from traveling. However, this interim order expires on the last day of the year 2021, with the possibility of being extended per the circumstances of COVID-19.

CONCLUSION

It cannot be expected that *mens rea* or bad mind is always presumed in the context of a non-performance of commercial commitments.²⁵ However, the offense of issuing a dishonored cheque -like any other offense- requires that a perpetrator should have a bad mind (*mens rea*) and should have taken action. That is why article 421(1) has stipulated malicious acts in order to emphasize the requirement of a bad mind. In other words, the claimant, in terms of the dishonored cheque, must prove the perpetrator's intention and act. This means that if the plaintiff failed to prove a bad action or bad mind, the trial would prove futile, and this is because

"an act does not make a person guilty unless its mind is also guilty".²⁶

Therefore, one can infer that the issuing of a postponed cheque for credit shall not be considered a form of a dishonoured cheque, as drawer and payee both have been aware of insufficient of balance at the time of issuing such paper. However, a view believes that the approach of decriminalising this kind of postponed cheques will diminish the rate of misusing the cheques issued as a credit instrument.²⁷

It is worth mentioning that the total amount of bounced cheques in Jordan decreased during the first half of 2021, which registered 642.7 million Jordanian dinars, i.e., bounced cheques dropped by 35% compared to that was recorded in the same period the last year (Declaration of Jordanian Central Bank, 2021). In June 2021, bounced cheques registered several 19,000 cheques, and 62% of this number was returned for financial reasons, compared with the total number of bounced cheques, which amounted to 128,000 cheques in

the first six months of the year 2021, which was about 303,000 cheques in the same period of the year 2020, rating approximate 58% (Declaration of Jordanian Central Bank, 2021). It is also important to note that three months of this period were under the influence of the defense order, under which the government decided to postpone the penalty of imprisonment imposed on the drawer of the bounced cheques.

It can fairly be concluded that the decision to suspend a penalty of imprisonment -in this regard- resulted in a reduction in the number of bounced cheques, as the payees have realized that the absence of such a penalty has deprived them of the pressure, they can put on the drawers to get the cheques paid (Will, 2021).

Authors can argue that the approach to criminalizing dishonored cheques -used as instruments of credit- results in misusing the criminal protection intended for the favor of public interest, as the payee bilaterally uses it against the drawer as a pressure tool irrelevant to the public interest. Further, the number of bounced cheques -noted in Jordan during the last three months- demonstrates the potential impact of suspending imprisonment imposed to protect the negotiability of cheques. This number proves that cheques became unacceptable as a means of credit during this period of time. Hence, one can assume that the decision to postpone imprisonment, which has been decided under the defense order of the Jordanian Prime Minister, has contributed to protecting the legal nature of the cheque as a means of payment rather than credit.

It is worth mentioning that some jurisprudence believes that governments of underdeveloped economies basically rely on incarceration, contrary to governments of developed economies, which argue that administrative and civil sanctions are more effective means of deterring rich people from committing crimes, not like poor people who can be deterred by incarceration.²⁸ Hence, it can be inferred that Jordanian strategies of criminalizing dishonored cheques will result in targeting poor people, and this will adversely influence the equality balance in society, as the approach of criminalizing dishonored cheques is deemed to be unjustified interference from the state's authority for the favor of payee who contracted with the drawer under a civil or commercial relationship, both of which are governed by the principle of Parties Autonomy.

Decriminalizing dishonored cheques will restore the legal role of cheques because a cheque is merely used as an instrument of payment, not as a means of credit, and this will make there is no room for post-paid cheques. Namely, criminalizing the bounced cheque will give rise to delusive exchange cash in the market resulting from negotiable cheques, parties of which are aware of the insufficiency of the drawers' balance. Decriminalizing the dishonored cheque will also lead to the fact that the post-dated cheques would not be restored and will contribute to expressing the real value of the payment arising in the context of the commercial transactions, as post-dated cheques will give rise to inflation in the context of the commercial transactions. For the reasons mentioned above, the authors argue that decriminalization of dishonored cheques is the proper approach, and hence they suggest that Jordan should take a step to eliminate article 421 of JPL, and then, a further step must be undertaken in order to impose civil remedies instead. Also, it is suggested that a registry base has to be settled to list frequent offenders that should be banned from issuing a cheque for at least two years.

END NOTES

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Received: 08-Apr-2024, Manuscript No. JLERI-24-14724; **Editor assigned:** 09-Apr-2024, Pre QC No. JLERI-24-14724(PQ); **Reviewed:** 23-Apr-2024, QC No. JLERI-24-14724; **Revised:** 29-Apr-2024, Manuscript No. JLERI-24-14724(R); **Published:** 06-May-2024