

THE CHEQUE CONCEPT BETWEEN COMMERCIAL LAW AND PENAL LAW IN JORDAN

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ABSTRACT

The aim of this article is to identify the cheque concept in Jordanian law among commercial law and penal law, and it addresses the amendments made by the Jordanian legislator to the penal law related to the crime of issuing a cheque without provision cover, it is manifested by the research that the Jordanian law tends to give significance to the cheque in the penal law differs from what is stated in the commercial law, accordingly, the penal protection of the cheque is no more as a commercial document in which stipulated at the commercial law, insofar it has become an autonomous and independent element in the penal law, whereof the article addressed the advantage of that, wherein the conclusion, he reached the necessity of unifying the terms of the two laws so that the penal law follows the commercial law in terms of the cheque so that the penal protection of the cheque shall add an additional and enhanced guarantee of protection in the other laws.

Keywords: Cheque, Penal Law, Jordanian Law, Jordanian Judiciary, Justice, Commercial Law.

INTRODUCTION

The cheque is an important commercial document, it was launched to replace money in dealing, therefore, the Jordanian legislator was keen to protect this document penalty to acquisition the confidence among its users, this step was taken after it became clear that the civil protection for this document is not sufficient to provide reassurance and confidence by its dealers (Haddad, 1988), since the first Jordanian penal law issued, Law No. (85) Of (1951), issuing a cheque without provision cover was been penalized by Article (414) thereof, later the current Penal law No. (16) (1960) was issued, which kept this crime in Article (421) thereof, but it is observed that Article (421) has been subject to multi amendments, as it was amended according to Amended Law No. (7) Of (1966), Amended Law No. (9) Of (1988), Amended Law No. (11) Of (1996), and Amended Provisional Law No. (12) Of (2010), this was rejected by the parliament upon presenting it, finally, the amended Law No. (27) Of (2017), this fundamentally changed the crime, as its text became according to Article (421) as follows

1. A penalty of imprisonment for a period of one year and a fine of not less than one hundred dinars and not more than two hundred dinars shall be inflicted on whoever commits one of the following acts in bad faith:
 1. If issues a cheque that does not have a provision cover and cashable.
 2. If drawn out, after issuing the cheque, all or part of the consideration for the payment, so that the remainder does not meet the cheque amount value.
 3. If issues an order to the drawer to refrain cashing the cheque in cases rather than those permitted by law.

4. If he endorses a cheque for others or gives them a payable cheque to its bearer and he knows that the cheque has no consideration to fulfill its full amount value or knows that the cheque is not cashable.
 5. If issues a cheque or signs it in a way that prevents it from being cashed.
2. Subject to the provisions of Paragraph (3) of this Article, the court is not permitted upon its consideration the mitigating reasons of the cases that stipulated in Paragraph (1) of this Article to reduce the imprisonment penalty to less than three months and a fine less than fifty dinars, and it is not permissible to replace imprisonment with a fine in these cases.
 3. A-Notwithstanding what is stated in Paragraph (2) of this Article, and the event that the value of the cheque is fulfilled or the complainant waived his personal right, a fine equivalent to (5%) of the value of the cheque shall be collected regardless of the number of the convicts, provided that the fine is not less than one hundred dinars and not more than five thousand dinars even after the verdict is issued or after it acquires the final degree. B- For the purposes of Clause (A) of this paragraph, the fine is calculated in the event of multiple cheques on the basis of cheques total value.
 4. The provisions of Paragraph (3) of this Article shall apply to judgments that acquired the final degree prior to the enforcement of the provisions of this law, and in this case, the decision to do so shall be issued by the court that issued the judgment.
 5. The application scope of paragraph (1) of this article is limited to the cheque that meets the following two scenarios:
 1. The cheque must be written by using the drawer bank form.
 2. The cheque being submitted to the drawer bank for payment on the date indicated therein or within six months after that due date.
 6. Checks that issued before the provisions of this law come into apply are exempt from the provisions of paragraph (5) of this Article.
 7. Subject to the provisions of Article (74) of this law, if the cheque is issued by the authorized signatory of the company, he will be consider as criminally liable in his capacity as a perpetrator of the crime stipulated in this Article when its elements available and regardless the company type).

The rule is that protecting the cheque by the Penal law is an ancillary role, in the sense that the criminal protection of the cheque shall be as a commercial document as defined by the Commercial Law, as the commercial law is the concerned to determine this, therefore, the Jordanian Cassation Court decided that the cheque is considered valid and the crime is carried out as long as it contains all the mandatory data that required in Articles (228) and (229) of the Trade Law in terms the document to be considered as a cheque, (Cassation Criminal 194/1989).

It is observed that the penal protection of the cheque considered as a fulfillment method and alternative for the cash, therefore, the Cassation Court decided that the enactment of the punishment for issuing a cheque by bad faith that is not matched by an existing amount allow it to be payable, is to protect the cheque as a fulfillment method within the public transactions and to protect the cheque acceptance in transactions as it's terms are similar to cash terms, this protection only takes place by keeping this payment instrument far from tamper withdrawal in its content and essence (Cassation Criminal 47/1988), the legislator considered that the cheque as a fulfillment instrument, same as the case of cash, and have the same role of cash, performing many functions in commercial and civil transactions that facilitate dealings between individuals and institutions, and increases the flexibility of the commercial and the economic transactions, in order the cheque to perform this function, to be used and traded to achieve the aims targeted by the legislator, and to be trustful by traders, the legislator bestowed the cheque a punitive penal protection by stipulating specific penalties for anyone who mishandles it or uses it in other than the purposes or methods specified and desired by the legislator (Cassation Criminal 825/2014).

The stated above applied before the Penal Law amendment in (2017), however, after the amendment, the legislator seems to have a different view of the cheque definition in terms of criminalization, different than the meaning in the Commercial Law, therefore, this research devoted to defining the differences and similarities between the cheque in the Commercial Law, and the cheque as a criminalization at the Penal Law.

Cheque Definition

Article (421) specifies the penalties for the issuance of a (cheque) crime, however, the Penal Law does not provide a certain definition for this term, therefore, it is needful to make a referral to the original provision that dealt with it, which is the Commercial Law, since the penal protection found particularly for the protection of this document contained in the provisions of the Commercial Law so that Article (123) of the Commercial Law defined the (cheque) in Paragraph (C) among defining the commercial documents by (The cheque is a written editor according to conditions mentioned in the law, includes an order issued by a person who is (the drawer) to another person who is a bank, which is the (drawee) to pay to a third person, to his order, or to the bearer of the cheque, who is the (payee), a certain amount, upon submitting the cheque).

Thus, the first fact that turns out is that the cheque is only written, as the law does not acknowledge the verbal cheque, as well, the legislator did not specify a certain form for the cheque, so that it can be issued on a specially designed form, or it can be written on a leaf of paper by hand, as all that is stipulated by the legislator is that the legal requirements be fulfilled, in this regard, the Cassation Court ruled in past that: (If the presented document includes the data mentioned in Article (228) of the Commercial Law, the fact that it does not implies as a cheque, in terms of the leaf similarity to the printed forms that are known by "*the bills of exchange*" will not influence its legal value as a cheque as long as the cheque requirements are available in the document, whereas the leaf shape, the printing, or leaf similarity with any other commercial document has no effect on it being a cheque as long as the cheque requirements are available) (Cassation Criminal 36/1975).

Also, according to the definition, the drawee in the cheque must be a bank, and the bank is a licensed institution by the Central Bank to conduct banking business.

However, after the amending of the Penal Law in (2017), the legislator deviated from this definition partially, as the legislator stipulated that the cheque to be editors by using the form issued by the drawee bank, which is not required by the Commercial Law that acknowledges the cheques issued on a plain leaf.

Cheque Conditions

The legislature has specified the data that must be available in the commercial document in order to be considered a cheque; this definition was indicated in Article (228) of the Commercial Law as follows:

“The cheque includes the below listed data:

1. *(The cheque) word must be written in the voucher text body, and in same the language in which it was written.*

2. *Non-conditional order to pay a certain amount of cash.*
3. *The name of the obligated party to pay (the drawee).*
4. *Performing place.*
5. *The cheque issuing date and place.*
6. *The cheque issuer signature (the drawee)".*

Below will address the details of the above-listed data:

The Cheque: Word Must Be written in the Voucher Text Body, and in Same the Language in Which it was Written

The document must include the word (the cheque) in the language in which the voucher was written, so if the voucher is written in Arabic, then (the cheque) word must be written in Arabic, the advantage of requiring (the cheque) word to be mentioned in the bond, is to distinguish it as soon as it is presented, especially since it may be get lost with (the bill of exchange (Al-Marsafawi, 1995)).

As a result of not indicating the word (the cheque) in the body text of the bond, the legislature has set up a control for that, since the principle is to lose its status as a cheque, however, according to Article (229) of the Commercial Law, if the document is complete with data and does not contain the word (the cheque) in its body text and its customary appearance indicates that it is a cheque, then it is considered as a cheque, some of the jurisprudence astonished from this text, as it has adopted the common appearance (Awad, 2009), and as evidence for formatting the bond must be made so, in order to be considered it as a cheque, the Cassation Court ruled the following:

(Since the judge does not rule with his knowledge so that the complainant must prove this characterization, and since the complainant failed to present any evidence in the lawsuit other than this document, accordingly, the court cannot rule and without evidence that what is recognized indicates that this leaf is a cheque (Cassation Criminal 258/1988)).

Non-Conditional Order to Pay a Certain Amount of Cash

This data contains two conditions; The payment order shall not conditional, as suspending the payment on fulfilling the condition is incompatible with the nature of the cheque as a fulfillment method, therefore, if any mentioned phrase in the bond stating that it is linked to performing a condition, the leaf loses its capacity as a cheque and turns into just a normal bond. The Cassation Court has ruled the following: (Among the data that Article (228) of the Commercial Law requires that it be available in the bond to be considered as a cheque (Non-conditional order to pay a certain amount of cash), so If the payment order for a specified amount in the cheque is linked to a specific condition, then it is not considered as a cheque in the legal sense) (Cassation Criminal 197/44), also, the court ruled: (The cheque is not considered as a cheque in the legal sense if it contains a condition to pay its value when a land plot being sold, because of the payment order dependent on a condition which is contrary to what was stipulated in Paragraph (b) of Article (228) of the Commercial Law) (Cassation Criminal 153/1987). Part of the common matters that nullify the cheque is writing on its text voucher the phrase (insurance), the presence of such phrase takes the bond out of the check frame, as the cheque must include the payment order upon sight, it is a fulfillment method and any attempt to make it insurance

instrument shall take it away from its specified function by the legislator, therefore is not considered as a cheque. As for, if the document is completed with the cheque data, then it is counted as a cheque, and it will not be accepted from the drawee to say that he issued the cheque for insurance purpose, therefore, the Cassation Court stated: (As for what claimed by the drawee that he issued the aforementioned cheque as an insurance method, it is an allegation that does not affect the offense perpetration that he committed once the cheque was issued and handed to the beneficiary as long the (insurance) phrase was not written in the body text of the cheque prominently and clearly visible) (Cassation Criminal 621/1997).

The payment order of a certain amount of cash: If the mentioned payment order in the cheque was for an unspecified amount, then the cheque will not be considered valid, such as writing (Pay all my account balance) or (Pay the interest accrued to my account balance)... etc., whereas the ignorance of the due fulfillment amount that needs to be paid is not of the nature of dealing with cash itself (Karim, 1997), and the same rule will be considered if the payment order was for other than cash, it is not permissible for a payment order to be on a commodity or on gold... etc., as the legislator stipulated that the cheque payment order is on cash only. The amount must be specified correctly, and it is customary to write the amount in two ways on the cheque; by writing and numbers. But what if there is a difference between the written amount and the amount in numbers? According to this scenario, the cheque will lose its value within the criminal sense, similar to this scenario the Cassation Court ruled the following: (The determination of the drawer's liability for the offense of issuing a cheque with no provision balance shall depend on proving that the cheque includes all the data that if none of it is mentioned, the cheque will not be valid, as per the provisions of Article (229) of the Commercial Law, therefore, writing the cheque with two currency types: as the written amount in letters is (sixty thousand dollars), while the amount in numbers (60,000 Jordanian dinars), will forfeit the cheque from payment order validity for a specific cash amount, precisely known, and free of any ambiguity, convicting the drawer with the offense of issuing this cheque and punishing him on this basis is against the law (Cassation Criminal 46/1994). This decision of the Cassation Court contravenes what was stipulated in Article (129) of the Commercial Law in force its effect that ruling on the cheque is not inconsistent with the description of the cheque, as Article (129) stipulated the following:

1. If the amount of the withdrawal voucher is written in letters and numbers together, the written amount by letters shall be considered as a reference upon differences.
2. If the amount is written several times in letters or numbers, the reference will be the lowest amount mentioned.

The Name of the Obligated Party to Pay (The Drawee)

The drawee must be a bank, as it is not permitted to draw the cheques except at banks, the debentures that issued in the Kingdom of Jordan which are payable and drawn on other than banks in the form of cheques shall not be considered valid cheques.

Not mentioning the drawer's name nullifies the status of the cheque on the debenture, the Cassation Court has ruled the following:

For the purpose of imposing a penalty on the issuer of the cheque, the law stipulates that the debenture issued by the drawer is a cheque, if it contains the necessary requirements for its validity as a cheque, therefore, the failure of the Appeal Court to deal with a fundamental

requirement which is that the cheque does not contain the drawee name, shall defect the judgment and revocation the judgment shall be applied (Cassation Criminal 230/1993).

Performing Place

Article (228) of the Commercial Law stipulates that the place of payment be mentioned in the cheque, but not mentioning this data does not nullify the cheque functionality from the bond, as Article (229) of the Commercial Law states the following:

1. If the payment place is not mentioned, then the place that is mentioned next to the name of the drawee shall be considered as a place for payment.
2. If the cheque is devoid of this data or any other data, it is obligatory to be paid in the place where the head-quarter of the drawee is located.

The Cheque Issuing Date and Place

This data is for the necessity of mentioning the date and place of cheque issue, however, not mentioning the issuing place does not lose the cheque its character, as Article (229/C) of the Commercial Law stipulates that, if the cheque is devoid from mentioning the issuing place, so the issue place will be consider as shown next to the drawer name, and if the place not mentioned, then then issuing place shall be considered is the place of handing the cheque to the beneficiary.

As for the cheque date, it is the date of its issuance or editing it, and starting from this date the cheque shall be payable upon submitting, Article (245) of the Commercial Law states:

1. The cheque shall be payable upon submitting it, and any data contrary to that, it shall be deemed null and void.
2. The submitted cheque for fulfillment before the indicated day on it bodies, as the issuance date, its fulfillment is obligatory on the date of its submitting.

As an implementation for the above, the Cassation Court has judged the following (before amending the Penal Law) that (the nature of the cheque as a fulfillment method requires that the cheque draw date be the same as the fulfillment date, and the cheque issuance date same according to the date that mentioned in it to be payable upon submitting, similar to the cash which individuals pay it for what they owe, and free from any indication that may inspire the viewer that the cheque is insurance instrument in reality, accordingly, the date that indicated in the cheque is the same as the date of the issuing/handing date, as the drawer will be punished in case if there is no provision cover, and will not accept from the drawer any proof of the non-functionality of the date because the fact is in the apparent case alone) (Cassation Criminal 185/1988).

After the amending of the Penal Law at (2017), The criminal protection for the cheque has become as (that it be submitted to the drawee bank for payment on the date indicated in it, or within six months after that date), actually, this is a stark exit from the cheque nature, the nature that was originally intended to act as cash, and it expressly contradicts with what stated in the above mentioned Article (245) of the Commercial law, also this amendment would convert the cheque to instrument of insurance, not fulfillment.

If the date not mentioned in the cheque at all, then the cheque loses its character as a check, as the date is one of the mandatory data that must be available on the cheque, and this shall not be considered an authorization for the drawer to fill in the date, the Cassation Court judged by the following:

“As for claiming that the crime of issuing a cheque without a provision cover corresponding to it, shall be realized even if the cheque without issuing date, on the pretext that the cheque remains valid as a cheque, this exegesis cannot be taken into account in this court, as this opinion tilted to the law which did not acknowledge the cheque invalid if the date was available or not, unlike the Jordanian Commercial Law, which explicitly stipulates that a cheque without mentioning the issuing date is not considered a valid cheque, and claiming that the free of date cheque does not defect it, but rather this will authorize the beneficiary to set the date is a statement without law basis, as the mere issuance of the cheque without a date will lose the bond the cheque character, and this appearance does not gain the beneficiary the authorization to set the date, and if there was an authorization upon issuing time, it must be proven that authorization in the legal means (Cassation Criminal 93/1970).”

It seems that the Cassation Court is adhering in not proposition the authorization, so it judged:

Claiming that signing and handing over this instrument that devoid from its basic data is an (authorization) for the beneficiary to fill in these data is against the law.

1. The authorization is a form of a power of attorney, and the power of attorney is not assuming, it must be proven, and the proven shall not be by inference, it must be written, especially when the commitment is financial.
2. The date on the cheque is one of the mandatory data, as is clear from Article (228) of the Jordanian Commercial Law, if the bond is handed without a date presence, then it is not considered a cheque.
3. Assuming that the drawer has authorized the beneficiary to fill the data in the cheque, including the date, this act has a serious consequences, as the date that may the beneficiary set on the cheque may have no provision balance for the drawer in it, so that the drawer will be punished due to others actions, which is not permissible.
4. The authorization theory is quoted from Egyptian jurisprudence, buying in account the difference between Egyptian law and Jordanian law.

The Egyptian law does not acknowledge the punishment to those who issue a cheque without a date, and since Article (275) of the Jordanian Commercial Law penalizes the issuance of a cheque without a date, where this provision prevents the adoption of the authorization theory within the Jordanian law, because the authorization must be legitimate, so if it is null because it constitutes an offense, it is not permissible to authorize.

Article (6/275) of the Commercial Law stipulate for the punishment of those who issue a cheque without a date, this means that it cannot dealt with a cheque without date, as it constitutes a crime, and this action does not convert into a correct act unless the beneficiary set up the date, because the authorization is not assumed, and if the authorization assumed, then this assuming shall not convert the act that constitutes an offense to legal act) (Cassation Criminal 721/1997).

With regards to the rule of the check that contains two dates, the Jordanian Cassation Court has decided that the cheque with two dates does not negate the character of the cheque, since Article (245) of the Commercial Law states that for this cheque case shall be payable upon submitting, and any data contrary to that is considered as if the cheque is void, meaning that there is no point unless the cheque issuing date (Law, 2017; Law, 2020).

The Cheque Issuer Signature (The Drawer)

The drawer's signature on the cheque is one of the most important data that must be available, as the signature indicates to whom issued the cheque and there is no value for the bond that does not include the drawer's signature even if other all data are fulfilled.

The validity of the cheque does not require that the signature be completely identical to the form that the drawer used to use in cheques, and for this purpose the bank conducts matching before cashing the cheque, as this conducting is a kind of internal precaution in the bank point of view, and not linked to the legal formality of the cheque.

CONCLUSION

The article flagged that the Jordanian legislator tended to gain the cheque in penal terms a meaning different from what is stated in the Commercial Law, although the penal protection came initially as a reinforcement and additional guarantee for the commercial document, which requires keeping the definition of the cheque nature and terms within the Commercial Law.

In the amendment of the Penal Law, the legislator performs fundamental changes to the cheque understanding, the most important is deprivation of the post-dated cheques from the penal protection, in fact, constitutes a stark exit from the identity and nature of the cheque, this means that the legislator accepts and allows the dealing of post-dated cheques despite the fact that the Commercial Law expressly states that the cheque must be paid at the time of submitting, regardless of the date on which it is written, and this is the basis for the existence of the cheque to act similar to the cash.

One of the fundamental amendments is that the penal protection is included for printed cheques which are issued by banks only, this is also counted as a stark exit from what is stipulated in the Commercial Law, that for the bond to be considered a cheque, the legal conditions must be met regardless of whether it is written on an authenticated form or not.

In fact, the role of the Penal Law in protecting the cheque must be subordinate, meaning that the Penal Law protects the cheque as a commercial document in which the Commercial Law regulated its provisions, and it is not permissible to come with different provisions that do not aim primarily to increase protection, but on contrary, it reduces the protection, and this is unacceptable.

It seems that the legislator's approach by this amendment is not from nowhere, as we notice that reducing the penal protection is a step to the abolition of this protection, this is what has raised by the Royal Commission for the Development of the Judiciary and the Promotion of the Rule of Law in, as it stated in its report that the criminalization policy should be developed and updated through (Re-evaluating the criminalization of some acts, and the need extent to impart criminal protection to these acts, and the possibility to provide alternatives protection which outside the criminalization frame, since the reality revealed the magnitude of inflation in the penal criminalization rules, among this, omit the penal protection that dedicated for the cheques in the future).

REFERENCES

- Al-Marsafawi, S. (1995). *Cheque crimes*. Ma'arif Foundation: Alexandria.
- Awad, A. (2009). *The cheque in commercial law and Arab countries legislations*. Dar Al-Nahda Al-Arabiya: Cairo.
- Haddad, E. (1988). The crime of withdrawing a cheque without provision cover. *The Arab Journal for Security Studies*, 4(7), 1-9.
- Karim, Z. (1997). *The cheque legal system*. Dar Al Thaqafa: Amman.
- Law. (2017). *Report of the royal commission for the development of the judiciary and the promotion of the rule of law*. Amman, February.
- Law. (2020). *The Jordanian cassation court decisions*. Retrieved from <https://qistas.com/en>