

## Amendment in Section 489-F of the Pakistan Penal Code

On 25 October 2002, the Criminal Law (Amendment) Ordinance 2002 was promulgated to insert a new section 489-F in the Pakistan Penal Code to make the dishonestly issuance of cheque a criminal offence. The object of this enactment was to check the trend of frauds through issuance of cheque to cause dishonest gain or loss. For ready reference, section 489-F is reproduced here in below-

**489-F. Dishonestly issuing a cheque.-** Whoever, dishonestly issues a cheque towards re-payment of a loan or fulfillment of an obligation which is dishonoured on presentation, shall be punishable with imprisonment which may extend to three years, or with fine, or with both, unless he can establish for, which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque.

Consequent upon insertion of subject section, the following new entries are added in the II<sup>nd</sup> Schedule of the Code of Criminal Procedure 1898:-

1	2	3	4	5	6	7	8
489-F	Dishonestly issuing a cheque for repayment of loan etc.	May arrest without warrant	Warrant	Not bailable	Comp-oundable	Imprisonment of either description for 3 years or with fine, or with both.	Magistrate of the First Class

Perusal of subject entries reveals that the offence under 489-F is a cognizable, non-bailable and compoundable offence which is triable by the Court of Magistrate of the first class.

The language of section 489-F indicates that the said section attracts where an individual issues a cheque dishonestly in favour of another individual and the same is, dishonored on presentation. It would suffice to add here that the word "Dishonestly" used in the section is defined in section 24 of the P.P .C, which reads as under:-

Dishonestly:- Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly.

From plain reading of subject provisions, it transpires that for prosecution under section 489-F one has to establish that the dishonored cheque was issued to cause fraud through dishonest loss or gain. Whereas, on the other hand exceptionally the onus of burden also lies on the drawer to prove that he had made arrangements with the bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the same.

It is a basic principle of criminal law that when a section creating an offence describes a particular state of mind on the part of offender as its ingredient than the prosecution is under obligation to establish the presence of that state of mind at the time of commission of offence. However, under the existing law, a case is registered soon after the cheque bounces. Legally speaking bouncing of check alone does not establish the intention of drawer unless it is proved through his conduct that the same was issued dishonestly to defraud the payee.

Generally, in business, one issues a cheque but later on asks the bank to stop the payment due to non-fulfillment of any obligation by the payee. Even there is possibility that a drawer might issue a cheque without knowing his account or he had enough money in his account at the time of issuance of cheque but the payee went to en-cash it so late that the money had been withdrawn. Therefore, in such circumstances registration of criminal case and arrest without affording any opportunity to discharge his obligation may leads to injustice and exploitation by the payee or the police.

It would not be out of place to mention here that the crime reporter of daily "Dawn" in a report published on 29.5.2008 disclosed that the police record of Federal Capital shows that 267 cases of "bad cheques" amounting to Rs. 586.3 million had been registered in the first 18 weeks of this year which is 29 more than registered, during the same period of last year. According to the report, the property dealers, car dealers and government officials are found involved in most of the cases.

The reporter contended that since under the law a criminal case is registered soon after a cheque is bounced, therefore, some lawyers consider it rough justice as in other countries the person issuing a bad cheque is put on a 15 days notice to make payment. However, presently criminal case under section 489-F is lodged irrespective of the circumstances that made a cheque bounce. It is further contended that as the banks do not take the matter seriously and the memo sent to the accounts holder with the cheque that bounced lists possible reasons but bank invariably tick the one marked "Insufficient funds". The reporter alleged that sometimes the banks do so on demand to oblige their clients; therefore, the people to settle their personal scores frequently misuse the law that meant to curb the practice.

In India, bouncing of cheque was made an offence under the Negotiable Instruments Act, 1881 through an amendment in the Year 2002. The newly added sections 138 to 147 deals with the Dishonoured Cheque the relevant section i.e. 138 is reproduced herein below for convenience:--

"138. Dishonour of cheque for insufficiency, etc., of funds in the account. Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another persons out of that account for the discharge in whole or in party of any debt or other liability, is returned by the bank unpaid either's because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank such person shall be deemed to have committed an offence and shall without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years. Substituted by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002(55 of 2002), S. 7, for term which may extend to one year" (w.e.f 6-2-2003) or with Fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the payee or the holder in due course of the cheque, as the case may be makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque (within thirty days) (Substituted by the

Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 (55 of 2002), S.7, for "within fifteen days" (w.e.f. 6-2-2003), of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(b) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the Cheque within fifteen days of the receipt of the said notice.

In India to ascertain the intention or mala fides of the drawer, the payee in the event of dishonourment is required to give notice in writing to the drawer for payment of said amount and reply in response to the notice or no reply at all, helps to determine the presence or absence of the element of dishonesty.

It is pertinent to mention here that the Lahore High Court in case titled Jawad Inayat Khan V State reported in CLD 2006 at page 1314, after comparative study of section 489-F with section 20 (4) of Financial Institution (Recovery of Finances) Ordinance 2001 and Indian Law observed as under:-

"As compared to above, we do not find any deliberations, discussions of any Committee, etc., when Criminal Law [Amendment] Ordinance, 2002, was enacted to amend the Pakistan Penal Code and the Code of Criminal Procedure through the above Ordinance. In the said Ordinance, not only 489-F was inserted in the Pakistan Penal Code, sections 32, 260, 261 and 345 along with Schedule II were also amended. As a matter of fact, it appears as elaborated above language of section 489-F was lifted from subsection (4) of section 20 of Financial Institutions (Recovery of Finances), Ordinance, 2001 without any serious thought or discussion. Thus, it is suggested to the concerned Government that section 489-F, P.P.C, may be suitably amended; to ascertain whether the cheque was dishonestly issued by the drawer. This Court cannot make such recommendation to the Legislature, however, it is permissible under the Constitution and it is also in the interest of people to make such suggestion to the

Government to consider and initiate amendment in section 489-F, P.P.C.”

After deliberation, the Court maintained that before approaching investigation agency or launching a criminal case, it is necessary to establish that the cheque was issued dishonestly with the intention to defraud; therefore, to know the intention of a drawer, a payee could give a notice to the drawer after bouncing of cheque before approaching the police for initiation of action.

Before 1997, bouncing of cheque was a civil wrong in Pakistan and the only remedy available to the affectee was filing of civil suits for recovery of cheque amount. Taking notice of the increasing complaints and litigation, on the recommendations of Law and Justice Commission of Pakistan bouncing of cheque has been made a criminal offence. However, during the recent years an increase in the cases of dishonoured cheques has been noticed and in most of the cases dishonoured cheques are being used as a tool for blackmailing to get payments despite non fulfillment of obligations. Therefore, to ascertain the dishonest state of mind of the drawer prior to initiation of criminal action a provision regarding service of notice for payment of said amount may be added as recommended by the Lahore High Court. It is submitted that such addition will not only facilitate the parties to explain the stances to avoid exploitation but on the other hand would also provide opportunity for settlement of disputes. Accordingly, proposal is placed before Law and Justice Commission of Pakistan for deliberation.

EXISTING	PROPOSED
<p><b>489F. Dishonestly issuing a cheque.----</b> Whoever, dishonestly issues a cheque towards re-payment of a loan or fulfillment of an obligation' which IS dishonoured on presentation shall be punishable with imprisonment which may extend to three years, or with fine, or with both, unless he can establish for, which the burden of proof shall rest on him, that he had made arrangements with his bank to</p>	<p><b>No Change</b></p>

<p>ensure that the cheque would be honored and that the bank was at fault in not honoring the cheque.</p>	<p><b>Provided that nothing contained in this section shall apply unless.....</b></p> <ul style="list-style-type: none"><li>a) the payee or the holder of the cheque as the case may be, makes a demand; for the payment of said amount by giving a written notice to the drawer; and</li><li>b) the drawer of the cheque fails to make payment of such amount to the payee or to the holder as the case may be, within 10 days of receipt of said notice.</li></ul>
---	--

**Commission's Deliberations on 05 December, 2009**

The Commission considered the proposal of amendment in section 489-F of the PPC for avoiding abuse/misuse of section 489-F relating to punishment awarded to an accused person for bouncing of cheque. It, therefore, recommended the addition of a proviso to the said section so that before lodging an FIR on account of dishonoured cheque, a written notice is served on the drawer to pay the amount. If the drawer of the cheque failed to pay the amount within 10 days after receipt of notice, then an FIR can be lodged.