

**Amendment to section 489F of the
Pakistan Penal Code, 1860**

Report No.129

AMENDMENT TO SECTION 489F OF THE PAKISTAN PENAL CODE, 1860

Section 489-F was inserted in Pakistan Penal Code, 1860 vide Criminal Law (Amendment) Ordinance LXXXV of 2002 dated 25-10-2002 with the purpose of criminalizing the dishonest issuance of cheques towards the payment of a loan or fulfillment of an obligation and which stands dishonored upon presentation. For ready reference the said section is reproduced;

489-F Dishonestly issuing a cheque:- Whoever dishonestly issues a cheque towards re-payment of a loan or fulfillment of an obligation which is dishonored 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 honored and that the bank was at fault in not honoring the cheque.

The above section carries punishment of three years and does not fall within the prohibitory clause of 497 Cr.P.C and is thus bailable and is triable by a Magistrate 1st class while appealable before court of Sessions and is cognizable and compoundable.

Two very important terms in the above referred section *i.e* “loan” and “obligation” have not been defined either in the said section or in the definition part of the PPC. As per Blacks Law Dictionary, the definition of the term loan includes “A lending. Delivery by one party to and receipt by another party of sum of money upon agreement, expressed or implied, to repay it with or without interest.” Similarly definition of the term “obligation” includes “Law or duty binding parties to perform their agreement. An undertaking to perform.”

The Preamble of Pakistan Penal Code States as follows;

“WHEREAS, it is expedient to provide a general Penal Code for Pakistan, it is enacted as follows-----“

Kindly note that the word “general” is used which is literally opposed to the term “special” and connotes a code in relation to or with respect to general offences and not special offences under special laws.

The special law of the land pertaining to loans is the Financial Institutions (Recovery of Finances) Ordinance, 2001. It has exhaustive definitions of the terms “finance” and “obligations” as contained in its section 2 (d) and (e) respectively, moreover the term “finance” includes the term “loan” as provided in section (2) (d) (iv). For ready reference section 2 (d) (iv) and 2 (e) are reproduced;

(d) “finance” includes—

(i) -----(iii) -----

(iv) a loan, advance, cash credit, overdraft, packing credit, a bill discounted and purchased or any other financial accommodation provided by a financial institution to a customer;

(v) -----(vi) -----

(e) “obligation” includes

(i) any agreement for the repayment or extension of time in repayment of a finance or for its restructuring or renewal or for payment or extension of time in payment of any other amounts relating to a finance or liquidated damages; and

(ii) any and all representations, warranties and covenants made by or on behalf of the customer to a financial institution at any stage, including representations, warranties and covenants with regard to the ownership, mortgage, pledge, hypothecation or assignment of, or other charge on assets or properties or repayment of a finance or payment of any other amounts relating to a finance or performance of an undertaking or fulfilment of a promise; and

(iii) all duties imposed on the customer under this Ordinance.

Section 7 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 provides for powers of Banking Courts, for ready reference the same is reproduced;

7. Powers of Banking Courts.

(1) Subject to the provisions of this Ordinance, a Banking Court shall—

- (a) in the exercise of its civil jurisdiction have all the powers vested in a Civil Court under the Code of Civil Procedure, 1908 (Act V of 1908);
- (b) in the exercise of its criminal jurisdiction, try offences punishable under this Ordinance and shall, for this purpose have the same powers as are vested in a Court of Sessions under the Code of Criminal Procedure, 1898 (Act V of 1898).

Provided that a Banking Court shall not take cognizance of any offence punishable under this Ordinance except upon a complaint in writing made by a person authorised in this behalf by the financial institution in respect of which the offence was committed.

(2) A Banking Court shall in all matters with respect to which the procedure has not been provided for in this Ordinance, follow the procedure laid down in the Code of Civil Procedure, 1908 (Act V of 1908), and the Code of Criminal Procedure, 1898 (Act V of 1898).

(3) All proceedings before a Banking Court shall be deemed to be judicial proceedings within the meaning or sections 193 and 228 of the Pakistan Penal Code (Act XLV of 1860), and a Banking Court shall be deemed to be a Court for purposes of the Code of Criminal Procedure, 1898 (Act V of 1898).

(4) Subject to sub-section (5), no Court other than a Banking Court shall have or exercise any jurisdiction with

respect to any matter to which the jurisdiction of a Banking Court extends under this Ordinance, including a decision as to the existence or otherwise of a finance and the execution of a decree passed by a Banking Court.

(5)------(7)-----

Section 20 of the Financial Institution- (Recovery of Finances) Ordinance, 2001 provides for offences including dishonestly issuing a cheque towards repayment, relevant subsection (4) of section 20 is reproduced; For ready reference section 20 is reproduced;

20. Provisions relating to certain offences.

(1) Whoever—

(a) -----(d) -----

(2) -----(3) -----

(4) Whoever dishonestly issues a cheque towards repayment of a finance or fulfilment of an obligation which, is dishonoured on presentation, shall be punishable with imprisonment which may extend to one year, 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.

(5) -----

(6) All offences under this Ordinance shall be bailable, non-cognizable and compoundable.

It can be gathered from sections 7 and 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 that;

(a) No other court than the Banking Court shall have jurisdiction in respect of matters which fall within its purview.

- (b) A Banking Court shall take cognizance only upon a complaint in writing of the Financial Institution.
- (c) The dishonest issuance of cheque towards repayment of finance (that includes loans) which is dishonored on presentation is triable by the Banking Court.
- (d) The offence of dishonest issuance of cheques carries imprisonment of upto one year or with fine or both and is non-cognizable, bailable and compoundable.
- (e) The Banking Court while trying a case under section 20, performs as a Court of Sessions. (under section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, final order appealable before a Division Bench of the High Court).

Dissimilarities of jurisdiction, procedure etc in respect of offence pertaining to dishonest issuance of cheques under section 489-F P.P.C and section 20 (4) of the Financial Institutions (Recovery of Finances) Ordinance, 2001.

The said dissimilarities are submitted in the form of following table, below;

Section/ Statute	Applicable to	Triable by and Appealable to	Punishment	Whether Cognizable, Bailable and Compoundable
Section 489F P.P.C	Ordinary persons who have availed loans not being customers of financial institutions	Magistrate 1 st class. Court of sessions	Upto three years in prison or with fine or both	Cognizable, bailable and compoundable
Section 20 (4) of the Financial Institutions (Recovery of Finances) Ordinance, 2001	Customers of Financial Institutions	Banking Court High Court	Upto one year in prison or with fine or both	Non-cognizable, bailable and compoundable

The Financial Institutions (Recovery of Finances) Ordinance, 2001 is a special law designed for the expeditious recovery of public money and overrides provisions of other laws as provided in its section 4, which is reproduced;

4. Ordinance to override other laws.- The Provisions of this Ordinance shall have effect notwithstanding anything contained inconsistent therewith contained in any other law for the time being in force.

Provisions of section 489F P.P.C are clearly inconsistent with provisions of section 20 (4) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and hence cannot be resorted to in case there is banker-customer relationship between parties. A person who obtains finance (that includes loan) from a financial institution and then issues cheques for repayment which are dishonoured can and ought to be tried before the Banking Court as the finance/loan which has been availed falls within judicial purview of the Banking Court and as provided by law and as will be in the fitness of things that one court may deal with all aspects of finance/loan, both civil and criminal in order to provide a single forum to the financial institutions for the recovery of dues and this appear to be the core objective of establishment of Banking Courts. On the other hand section 489F P.P.C will be attracted when an individual would issue a cheque dishonestly in favour of another individual and the same is dishonoured on presentation. Thus the purpose of both the enactments is different and the cognizance by police of matters falling under the banking law amounts to defeating the very purpose of banking law. In this context reliance is placed on 2011 CLD 1539, relevant citation reproduced;

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)—

—Ss. 7, 9, 10 & 20---Penal Code (XLV of 1860), S. 406—
Constitution of Pakistan, Art.199—Constitutional petition—
Criminal breach of trust—Registration of F.I.R. pending
suit for recovery of loan—Petition for quashing of F.I.R.—
Relationship between the petitioners and Bank was of
banker and customer and Financial Institutions (Recovery
of Finances) Ordinance, 2001 which was a special law,

had been enacted for resolution of dispute arising out of finance, both civil and criminal—Basic purpose for enacting said special law was to provide machinery for ousting the jurisdiction of local Police with reference to commercial dispute between the banker and customer—Financial Institutions (Recovery of Finances) Ordinance, 2001, had provided the complete procedure for redressal of bank's grievance of criminal nature in addition to civil nature; and under S.7(b) of Ordinance Banking Court enjoyed all powers, vested in a Court of Session—Said powers were subject to proviso of S.20 of the said Ordinance, where under Banking Court would take cognizance only on a complaint in writing made by a person authorized in that behalf—Courts established under Criminal Procedure Code, 1898, would have no jurisdiction to take cognizance of the matter arising out of a finance advanced by the bank—Main object for enacting Financial Institutions (Recovery of Finances) Ordinance, 2001, which was special law, was that customer or the bank should not be dealt under ordinary court or criminal law—Special law would prevail over the general law—Local Police, in circumstances, had no jurisdiction to take cognizance in the matter covered under the Ordinance—Jurisdiction under the general law having been specially ousted, entertainment of complaint was patently against law—Very registration of F.I.R. was void as complainant was not authorized person to lodge the complaint and the exclusive jurisdiction to decide the issue was with the Banking Court—F.I.R. was quashed in circumstances.

[2010 YLR 760, relevant citation reproduced];

Criminal Procedure Code (V of 1898)—

—S. 498---Penal Code (XLV of 1860), Ss.489-F & 420—Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001), S.20—Dishonestly issuing a cheque and cheating—Ad interim pre-arrest bail, confirmation of—Relationship of Financial Institution and customer existed between the complainant Bank and

accused /customer and for repayment of the finance, four cheques were issued by customer—Offence, if any with which customer could be charged would be S.20 of Financial Institutions (Recovery of Finances) Ordinance, 2001; and cognizance could only be taken on the direct complaint by concerned Banking Court and S.20, Financial Institutions (Recovery of Finances) Ordinance, 2001 under which accused could be tried was bailable, non-cognizable and compoundable—Matter with regard to the cognizance taken by the Police was triable by the ordinary or Banking Court and applicability of S.20 of Financial Institutions (Recovery of Finances) Ordinance, 2001 in the matter required further inquiry—Interim bail already granted to accused, was confirmed, in circumstances.

[2009 CLD 1422, relevant citation reproduced];

Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)—

—Ss. 20, 7 & 2(c)—Penal Code (XLV of 1860), S.489-F—Constitution of Pakistan (1973), Art.199—Constitutional petition—Object and reasons for enacting Financial Institutions (Recovery of Finances) Ordinance, 2001 and Penal Code, 1860 were ° different—Cheques issued by customer to Leasing Company in connection with lease of vehicle were dishonoured—Leasing Company got registered F.I.R. against the customer—Validity—Lessee of the vehicle was a “customer” within the meaning of S.2(c) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and case of the lessee clearly fell within the ambit of provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001—Section 7, Financial Institutions (Recovery of Finances) Ordinance, 2001 had conferred criminal jurisdiction to the Banking Court, to try offences punishable under the Ordinance—Whenever an offence was committed under S.20(4) of the Ordinance, Banking Court would take cognizance upon a complaint filed by the authorised person and complaint would be tried by

concerned Banking Court, appeal against which was provided before High Court—F.I.R. against the customer under S.489-F, P.P.C. or allowing the same to exist was only wastage of time and abuse of process of law—High Court allowed the constitutional petition of the customer and directed the police not to take law in its own hands in cases covered within the ambit of Financial Institutions (Recovery of Finances) Ordinance, 2001—Principles.

[2006 CLD 1314, relevant citation reproduced];

(d) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)—

—Ss. 2(d)(iv), 7, 20 & 22—Penal Code (XLV of 1860), S.489-F [as added vide S.2 of Criminal Law (Amendment) Ordinance (LXXXV Of 2002)]--Recovery of loan—Procedure—Object and reason for enacting Financial Institutions (Recovery of Finances) Ordinance, 2001 and S.489-F, P.P.C., was to provide single forum to the Banks for the recovery of their loans from their customers and like-wise to the customers to approach the same Court if they had any grievance against the Banks—Word "loan" was substituted in P.P.C. with word "finance", similarly, punishment of one year was substituted with three years in P.P.C.—Objective to legislate S.20(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001, was different than objective to legislate S.489-F, P.P.C., but S.489-F, P.P.C. had not been legislated/drafted differently—Purpose of enacting said laws was to provide speedy measures for the recovers/of outstanding loans and finances—Under S.7 of Financial Institutions (Recovery of Finances) Ordinance, 2001, a Banking Court was conferred criminal jurisdiction to try offences punishable under said Ordinance and for the purpose, same powers were vested as were vested in the Court of Session in Code of Criminal Procedure, 1898—Banking Court could take cognizance of any offence under Financial Institutions (Recovery of Finances) Ordinance, 2001 upon a complaint in writing made by a person authorized in that

behalf by concerned Financial Institutions in respect of which offence was committed—Whenever an offence was committed under S.20(4) of Financial Institutions (Recovery of Finances) Ordinance, 2001, Banking Court would take cognizance on a complaint filed by authorized person and the complaint would be tried by concerned Banking Court— Appeal was provided before two Judges of the High Court under S.22 of Financial Institutions (Recovery of Finances) Ordinance, 2001— Under S.489-F, P.P.C., an F.I.R. was lodged with a concerned police station and after submission of final report, jurisdiction of trial was conferred upon Magistrate of the First Class and appeal could be filed before concerned Sessions Judge—Section 489-F, P.P.C. would be attracted where an individual would issue a cheque dishonestly in favour of another individual and the same was dishonoured on presentation—Purpose of both enactments was different and the procedure for prosecution was also different—Banking Laws relating to recovery, expressly or impliedly, envisaged effect of issuance of cheque "dishonestly" or "inadvertently".

It is hereby proposed that in order to curtail the misuse of section 489F P.P.C the same may be amended so as to exclude customers of financial institutions that have availed finance/loans.

The proposal was placed before the Sub-committee, as follows,

“489F Dishonestly issuing a cheque:---Whoever dishonestly issues a cheque towards re-payment of a loan or fulfillment of an obligation, not being a loan or obligation under the Financial Institutions (Recovery of Finances) Ordinance 2001 (Ordinance XLVI of 2001), which is dishonored 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 honored and that the bank was at fault in not honoring the cheque.”

The Sub-committee approved the same. Accordingly, the recommendation of the Sub-committee were placed before the Commission along with below comparative table.

COMPARATIVE TABLE

Existing sections 489F of the Pakistan Penal Code	Proposal of the Secretariat	Approved by the Sub-committee
<p>489-F Dishonestly issuing a cheque:--- Whoever dishonestly issues a cheque towards re-payment of a loan or fulfillment of an obligation which is dishonored 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 honored and that the bank was at fault in not honoring the cheque.</p>	<p>489-F Dishonestly issuing a cheque:--- Whoever dishonestly issues a cheque towards re-payment of a loan or fulfillment of an obligation, not being a loan or obligation under the Financial Institutions (Recovery of Finances) Ordinance 2001 (Ordinance XLVI of 2001), which is dishonored 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 honored and that the bank was at fault in not honoring the cheque.</p>	<p>Approved</p>

Commissions deliberations on 8th September, 2013

The proposal was discussed by the Commission and deliberated that as registration of criminal case against the customer under section 489F of the Pakistan Penal Code on the ground of dishonouring of cheque (given by a customer to financial institution) is exploitation and not warranted under the law, therefore, the proposed amendment was approved, accordingly.

Draft Bill for amendment of the law is hereby enclosed.

A

Bill

further to amend the Pakistan Penal Code, 1860

WHEREAS it is expedient further to amend the Pakistan Penal Code, 1860 (Act No. XLV of 1860) for the purposes hereinafter appearing;

It is hereby enacted as follows:-

1. Short title and commencement.—(1) This Act may be called the Pakistan Penal Code, 1860 (Act No. XLV of 1860) (Amendment) Act, 2013.

(2) It shall come into force at once.

2. Amendment to Section 489F.—In the Pakistan Penal Code, 1860 (Act No. XLV of 1860) in section 489F, after the word “obligation” the words, figures, brackets and commas “, not being a loan or obligation under the Financial Institutions (Recovery of Finances) Ordinance, 2001 (Ordinance No. XLVI of 2001)” shall be inserted.