JUSTICE CENTER FOR LEGAL AID (JCLA)

A DESPERATE BARGAIN: INSOLVENCY PROCEEDINGS IN JORDAN

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INTRODUCTION

This papers' concern is two-fold; the first addresses the causes and consequences of insolvent debt in Jordan while the second proposes solutions in a bid to urge the government in developing procedures and tools that will contribute to decreasing the imprisonment of debtors.

GENERAL CONTEXT

According to recent statistics, the number of poor and vulnerable individuals detained for issues of debt has been increasing. This is primarily due to the challenging economic circumstances experienced by poor communities in Jordan. Moreover, the lack of knowledge regarding legal consequences of signing checks and other debtors guarantees, significantly impacts this increase in debt related detainment.

Due to living in poverty, various community members resort to taking out loans and signing various guarantees that impose serious obligations. Often this is done without assessing their capacity to meet these obligations or being aware of the legal consequences that come with it. Under the current economic challenges in Jordan, many poor and vulnerable people often find themselves in deep financial crisis due to their poverty and lack of regulated work opportunities. They face economic challenges daily such as unpaid bills, unpaid rent, lack of medical support, or even food and essentials like water and electricity. Additionally, these individuals often live on a day to day basis with very little regular income and lack the necessary savings to deal with emergencies.

Poverty-stricken individuals then turn to micro-finance programs or buy gadgets through installments then sell them informally for cash, when emergencies hit. As a result of signing payment guarantees, sponsoring debtors, or signing unbalanced checks and being unable to pay them off, a vast majority of vulnerable individuals, most of them heads of households and breadwinners, are sentenced to executive or criminal detention.

It is the legislator's duty to protect traders and maintain stability of financial transactions through provisions that criminalize manipulation of financial documents. However, it is necessary to adequately address the rights of all parties under the law, in order to create balance in the legislative protection process, and not override the interest of one category over another. This will provide protection from the misuse of provisions by traders, and ensure that guarantee tools, specifically checks, are not being used as tools of credit.

An approach that protects the rights of all parties, will allow the state to avoid resorting to imprisonment and deprivation of liberty when sentencing unmet financial obligations. Moreover, this type of legal problems does not fall within the crimes covered by the General Amnesty Law. Jordan ratified the International Covenant on Civil and Political Rights (ICCPR) in 2006 (Art. 11: No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation).

Although the Constitutional Court issued a decision referring to, and based on, the ICCPR regarding insolvent debtors,[1] it was not reflected in other legislation and did not provide the necessary protection for poor people in debt, rather contributed to the aggravation of the problem. Article 11 of the ICCPR was used only once in a decision court in 2014 to reject a petition to detain a debtor. This is significant as it allows lawyers to use ratified treaties in court decision processes.

[1] Decision No. 6 of 2013 issued by the Constitutional Court.

LEGISLATIVE FRAMEWORK

The increased detention of debtors has put large economic strains on the government to manage detainees. Additionally, it has increased procedural strain on the justice system resulting in an agent that ensures profit for grantees, rather than protecting all parties' rights.

The Executive Law allows for debtors to be imprisoned for up to 90 days per year for a single debt. Every promissory note signed is considered a single debt. When vulnerable individuals take loans, they often are made to sign several promissory notes. This provision puts debtors at risk of being imprisoned every year for 90 days per debt depending on the number of promissory notes they sign.

Additionally, in Jordan, civil imprisonment does not have a limited duration. As a result, this puts them at risk of being imprisoned for longer periods, some up to life imprisonment. Unfortunately, the length of imprisonment for civil debt can often exceed the penalties of some more serious crimes. In other words, there are severe crimes that have limited imprisonment durations, while civil imprisonment does not.

Article 22 of the Executive Law leaves the judgement to the judge's discretion and does not impose mandatory detention. In fact, it gives power to the judge to invite all parties to verify the debtor's capability to pay the debt. Paragraph A of Article 22 states the responsibility of "issuing the appropriate decision" regarding the judges' authority. This explicitly mentions responsibility and authority of the judge to avoid resorting to imprisonment and reaching a just settlement for both parties. However, in practice, imprisonment is very often resorted to, without taking the necessary measures to verify the debtor's ability to pay the debt.

The Jordanian Penal Code protects the handling of checks on the grounds that they are a complementary tool for cash in daily transactions. This ensures the stability of the commercial market and financial transactions. Any person who, in bad faith, issues a check that is not matched by a balance can be sentenced to one-year imprisonment and a fine of no less than 100 JD and no more than **200** JD. The penalty may not be reduced to less than 3 months and a fine of **50** JD. In addition, a fine equivalent to 5% of the overall debt to the treasury account of the court must be paid, and must be no less than **100** JD and no more than **5,000** JDs, even if a settlement was reached between the two parties.

These provisions criminalize debtors and presume bad faith on their behalf. According to the law, all persons are innocent until proven guilty. In check crimes, debtors have no opportunity to prove that their creditor knew they were signing a check with no balance.

> **Imprisonment has been proven to be both ineffective and unsustainable**

The law does not allow for debtors to prove creditors' potential bad faith, when in fact, creditors may use the law and force debtors to sign checks. For instance, debtors may be forced to sign a check by their creditors, who could use the check as a tool of credit rather than payment, to ensure payment.

It is therefore necessary to review modalities and basis to prove bad faith, as the application of the law must provide protection for vulnerable groups who could be abused by creditors. The negative consequences of punishing the un-fulfillment of contractual obligations through imprisonment are well known. Imprisonment has been proven to be both ineffective and unsustainable, yet is still used by legislators and considered an effective way to deal with debt sentences.

KEY ISSUES

1. Creates a Parallel Financial Market for Lending:

Sale in installments, mostly electronic gadgets, has increasingly become a form of loan that exists in-parallel to controlled financial markets. It is used by poor and vulnerable community members to obtain quick cash. The seller (creditor) sells gadgets in installments (such as a cell phone) at a price that exceeds its real price, sometimes even double the original price. In return the buyer must sign multiple promissory notes with the amount. The buyer will then proceed to sell the same item in another shop for less than the amount paid to purchase it, and less than the item's real price. This has developed into a business model where sellers take advantage of the debtors' urgent need for cash and rely on the justice system to collect installments and punish those late on payment.

The need for immediate cash exposes vulnerable individuals to exploitation and pushes them to accept the buyers' terms and guarantee that they will pay the debt. Most victims of these traps are low-income people who are unable to obtain bank loans due to their inability to provide the necessary guarantees, such as women and low-paid public sector employees.

Sale in installments has become a dangerous phenomenon that encourages the greed of certain traders to make quick profit by exploiting people's vulnerabilities. Such traders are indirectly granting unregulated loans beyond the scope of the Central Bank and the financial market. This has lasting negative effects on the country's economy. For instance, the Central Bank determines interest rates and prohibits signing promissory notes that exceed the value of the original debt. The Central Bank also prohibits using promissory notes as a guarantee to ensure debt payment, yet there are no controls on sale in installments for traders. Therefore, traders' practice in this context can be considered usury market, as its profits exceed the interest rate set for banks.

2. Exploitation of Penal Protection for Checks

Creating penal framework to avoid check crimes was intended to protect good faith traders, and to ensure the ease of financial trading in the market. On this basis, the law considers checks a type of commercial papers and a tool of payment just like cash. Therefore, the misuse of checks directly impacts trust and security within financial markets during commercial transactions.

Some traders misuse the protection ensured by the law when selling in installments. They use checks as a credit tool to ensure repayment of the debt, as the penal charge is punishable by imprisonment. Thus, traders use commercial papers for a purpose that is inherently different from its original one. Debtors or buyers in installments must be protected by the law as checks are being used as a prerequisite for buying in installments.

While signing checks has become a prerequisite for buying in installments, the creditor is aware that the debtor does not have balance and cannot cash the check. This means that buyers are coerced into signing checks. Debtors (sellers) should not be protected by the law when they seek to abuse it.

3. Women in Debt

Thousands of Jordanian families live in poverty for numerous reasons, the most significant including rising unemployment among youth, prevalence of low wages against the increases in tax burdens on people, as well as, high prices. In certain cases, female-headed households providing for their families on their own will turn to microfinance programs for assistance. Often these women will take out a loan with a view to pay off other loans, and secure their family's livelihood.

Lenders, however, do not take the necessary measures to ensure that borrowers or their sponsors (usually husbands who are not financially stable) are be able to settle their debt. As a result, impoverished women are thrown into cycles of debt to microfinance organizations who offer women's economic empowerment programs. As such, an increasing number of women in detention centers are detained for amount claims that should not exceed a one-month period of detention. These vulnerable individuals are then swallowed into a cycle of debt and detention on the basis of being unable to generate enough new income in order to pay creditors and interest.

4. Cost of imprisoning Insolvent Debtors

The financial cost of detention is **750 JD** per individual, according to official statements. Therefore, the frequency and recurrent use of detention decisions consequently puts pressure on the national economy. Rather than detention, the State must find more feasible and less costly means for people to obtain their rights. It is necessary to reconsider the basis of criminalizing unbalanced checks, in order to alleviate the number of inmates in detention and reduce its cost. This is especially relevant for insolvent debtors and debt holders of low incomes.

In addition to the direct costs burdening the government, imprisonment of debtors generates indirect costs as well. Families lose their primary breadwinners who lose their jobs due to being detained. After serving their detention period they will have difficulty finding work, as employers are unlikely to hire those with criminal records, regardless of the crime. The 2016 National Aid Fund statistics indicate that the Fund spends 354,498 JD each month as part of a temporary financial aid program for families of persons in debt. The Fund also provides emergency aid in case the main breadwinner is arrested, which amounts to 8,054,420 JD per year.

The implications of detaining an insolvent debtor is treating them as a criminal whose freedom is a danger to society, and it must be taken. Given these facts, detaining debtors brings no use or value, as it hinders debtors from paying their debts, and further impoverishes their families due to lack of income.

5. General Amnesty and Insolvent Debtors

It is not legally possible to solve the problem of insolvent debtors through the general amnesty law. A general amnesty is issued under a Royal Decree under Article 38 of the Constitution. According to Article 50 of the Penal Code, amnesty includes criminal cases and eliminates "criminal status". Detention of debtors is the result of financial claims that fall within the framework of civil - not criminal - cases in accordance with the Penal Code.

RECOMMENDATIONS

Silence and neglect in the face of the exploitation of poor and vulnerable people facing economic difficulties will have disastrous results in the Jordanian community. Debtors will continue to fall into poverty, and their social fabric will be destroyed if major actors refuse to deal with the consequences of detaining debtors. Furthermore, unregulated markets will continue to expand as chaos and lawlessness prevail. It is therefore imperative that the government addresses this problem by developing legislation and effective administrative mechanisms.

Consequently, JCLA proposes the following recommendations to contribute to the reduction of this problem in the hope that stakeholders put an end to negative practices, exploitation, and abuse of legal protection.

1. Conduct a comprehensive review of the laws governing commercial transactions. The laws must be updated in accordance with the current reality and developments in financial transactions. This is to ensure legal protection of good faith trader, and challenge trader/creditor who exploit legal protection to achieve inflated profits at the expense of the government.

2. Review the provisions related to the criminalization of checks, adding a section that places an obligation on the creditor to verify the existence of balance against the check. This is to ensure that checks are not used as a means of credit, while granting debtors the right to prove bad faith creditors and their awareness of the absence of corresponding balance. This is to ensure that checks are only used to fulfill their purpose under the law.

3. Amend the trade law in line with the above given development in the market. This is to distinguish clearly between traders and non-traders, and to ensure that commercial papers such as checks are not consistently considered commercial in nature, rather, based according to the party involved.

4. Amend the Executive Law as follows:

a. Set a high minimum amount for financial claims to file a detention request (for example JD 1000 and above).

b. Clarify article 22 in a way that allows the judge to have the power to hold a procedural hearing for the settlement purposes of the parties based on the debtor's situation, rather than opting for a judicial decision. This will allow both parties to present their evidence regarding the debtor's ability to pay.

5. Establish administrative pathways and procedures through which the history of individuals' financial practices can be known. This will allow for the right inquiries to be made about the extent of commitment to repay debts and comply with the dates and conditions of loans. It will also offer controls on the loans regarding granting or rejecting them and determine the type of guarantees imposed in each case. Administrative mechanisms can also be established to ensure there are no ways of borrowing outside registered, licensed, and authorized financial institutions.

6. Avoid resorting to national repayment campaigns on behalf of insolvent debtors as the primary solution, as it encourages bad faith creditors to continue to circumvent the law and exploit the need of poor people for liquidity.

7. Expand the implementation of awareness campaigns targeting community members on the effects of borrowing and the signing of guarantees, promissory notes, and checks that do not have a balance as a preventative mechanism. This will mitigate the size of the problem of insolvent debtors and its negative consequences on society and the national economy.

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