

## Legal and economic analysis of preventive remedy in draft of revision check cod and its impact on social relationships

Abolhassan Mojtahed Soleimani <sup>1</sup>, Abdulmajid Jalaei <sup>2</sup>, Omid Mohammadi Nia <sup>3\*</sup>

1. Assistant Professor of Private Law, Kharazmi University, Faculty of Law and Political Science, Tehran, Iran.
2. Professor of Economics, Faculty of Management and Economics, Shahid Bahonar University of Kerman, Kerman, Iran.
3. Student of jurisprudence and private law, Kharazmi University, Tehran, Iran.

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### Abstract

**Purpose:** According to statistic research, more than ninety percent of payment of debt and transferring banking resources was done with check. So, providing its executive security is undeniable necessity. For this reason, legislators enacted draft that whose title is draft of revision check cod. **Methodology:** The present research is applied in terms of purpose and content analysis method. In the organization of research, the documentary and library methods have been used and the information analysis has been obtained qualitatively and based on the inference of the researcher on the sources and texts. **Findings:** Accordingly, writers with legal and economic approach and with research of its efficiency and improving its defects goal want to answer to two question. The first question is what point was ignored in past cods until legislators decide to amend it? And second question is, is draft come back efficiency to legal system by improving last defects? **Conclusion:** In answer should tell: the important of previous rules is neglecting of remedy's capacity. Why so, legislators help to promise after breach of contract in previous rules while in this draft they focus to preventive remedy and try to increase efficiency of check by revealing of information. this subject based on credit feature of obligating and prohibition deal with height risk and delete removing failure market.

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\* Corresponding Author e-mail: Mohammadinia.omid@yahoo.com

## 1. Introduction

The rise and fall of the economy depend on the fulfillment of monetary obligations in each country (Frederic S, 2009, Vol 1, p. 32). As a result, the reduced uncertainty and risk of non-fulfillment of such obligations can significantly affect reducing transaction costs, increasing the efficiency of contracts and enhancing social welfare (Dadger, 2011, p. 165, Chen, 2013, p. 930 and Veljanovski, 2007, p 111 and Markovits and Schawartz, 2012, p 658 Clarkson, 2012, p 462).

The questions addressed in this study are as follows: Which subject has been neglected in the existing laws and made the rules inefficient? Whether the adopted law can eliminate this defect and improve the behavior of economic agents? Whether the adopted law add to the volume of previous rules? The authors assume that the capacity of remedy has been neglected in existing laws. Therefore, the legislator in the amendment act has attempted to shift its measures from a restorative to preventive and corrective forms.

The present article has focused on the preventive remedies, so the corrective form will be examined in a separate article. In this paper, we begin with the definition and concept of a preventive remedy. Then, we will enumerate the weaknesses and shortcomings of the amendment act after describing this type of remedy and explaining the legal and economic principles governing this type of remedy.

## 2. literature Review

The fulfillment of these obligations is possible through payment instruments (Lawrence, 2015, p2). Economic analysis essentially deals with the evaluation of legal institutions with the help of economic theories and seeks to analyze the formation, function, and outcome of legal entities by applying economic theories (Dadgar, 2017, pp. 17 and 18, and Veljanovski, 2006, p24 and Posner, 2003, p15). From this perspective, the more stable contract brings more efficiency. In this view, human behavior is based on rationality and the cost-benefit criterion (Sarzaïam, 2018, p. 25 Timmons and Mele, 2007, p. 157). According to the game theory, contract is a game; and the role of the remedy is to change the contract from a non-cooperative mode to a cooperative mode (Dadger, 2004, p. 36 and 35, and Rahimi, 2012, p. 114).

## 3. Methodology

The present research is applied in terms of purpose and content analysis method. In the organization of research, the documentary and library methods have been used and the information analysis has been obtained qualitatively and based on the inference of the researcher on the sources and texts.

## 4. Finding

**Concept and Principles of Preventive Remedy:** Due to the novelty of the concept of preventive remedy, we first need to outline the concept and its principles. **The Basis of Preventive Remedy:** The question is how does remedy come to the fore when there is no obligation? Is remedy a part of the legal obligation? So how we can talk about remedy when there is no obligation?

In response, it should be said that the oddity of such a concept in the legal system of Iran is based on the traditional basis of contractual rights, which still encompasses the contractual system. In fact, in the context of the market system and market orientation (Ajamoglu and Robinson, 2013, p. 263 and 227), and the traditional theory of contract law, which is based on the rule of will and humanism and the non-intervention of government (Bordeaux, 1999, p. 95), the resort to the force majeure does not make sense until the breach of contract. After that, the government does not intervene in the affairs of the parties unless the plaintiff proposes a lawsuit. During the conclusion of a contract and its violation, the only way

that will lead the obligor to the fulfillment of obligation is moral decrees intended to encourage the obligor to fulfil the obligation by illustrating that the breach of contract is unethical (Mostafavi, 1426, p. 190 and Hosseini Haeri, vol., p. 403, vol. 1, pp. 185-186, Naraqi, 1417, p. 20, Mohaqiq Ardebili, 1403 A, 3, p. 151, and Mohaqiq Karki, 1414, vol. 8, p. 326, and bix, 2014, p. 18).

For this reason, the remedy takes on a minimal concept of measures adopted by the obligee after the breach of contract. In this approach, the starting point of the remedy is interconnected with the breach of contract. Hence, the condition for its existence is the establishment of an obligation and then its violation so that the remedy substitutes the principle of obligation (oren bar and omriben, 2009, p148 and aliyah and Smith, 2005, p371).

But when the market fails due to the lack of information asymmetry or an imbalance in trading power, the government's intervention would be justified in a way that if the government does not intervene, then it will not only lose its own financial instruments (Tatjana, 2010, p2010), but the elimination of market security would reduce investment and cause the decline of society, and ultimately social capital and economic security will disappear.

In this situation, legal pragmatism is required (Posner, 2003, p. 59). The traditional private law defects in which individual interest is prioritized are abandoned, and the government has taken control of the market by intervention in the relationships of individuals through regulations and supervision (Ogus, 2004, p 246-247). Thereby, the public confidence will be maintained while the welfare is back to the community (Baldwin, 2010, p3-16 and Hollander, 2012, p. 5-49).

In other words, the contract is not merely a private contract, but a social phenomenon to which the survival of the society depends on and causes social co-operation (Durkheim, 2015, p. 69 and Aron, 2003, p. 361). The legislator's emphasis on consolidating the confidence space for economic activists in Article 45 of the final document of the 20-year vision of the Islamic Republic of Iran and the approval of article 116 of the sixth development plan law on the establishment of a system for financial convictions along with the criminal records shows that contract breach can disrupt social security as the crime does so. Therefore, as prevention of crime is better than punishment, preventing the breach of contract will also be more effective than compensation.

Preventive Remedy in the Amendment Act, Its Principles, Advantages, and Disadvantages: Now that we have understood the concept and basis of preventive remedy, it is time to describe its advantages and disadvantages after bringing the examples of this type of remedy in the amendment act.

Examples: In the amendment act, two preventive measures are taken into account by the legislator. The first step is to pay attention to the credit status of the people applying for the checkbook. In accordance with Articles 5 and 8 of the amendment act, which will amend Article 6 of the current law and will add a new article as a matter of Article 21, not only granting checkbook to a bankrupt or insolvent person is prohibited, but everybody will receive checkbook based on its credit score. The only exception to is paragraph 2 of article 6 of the amendment act that is not subject to credit score. The precision of the validation process is so important to the legislator that it has determined a criminal remedy for any fraud in this regard. The only similar provision is Article 795 of the Commercial Law Bill, with a difference that the person's insolvency does not prevent the receipt of the checkbook and the only obstacle from getting checkbook is the definitive conviction for the issuance of a dud cheque. Contrary to the amendment act, the credit limit of the checkbook owner is inscribed on every sheet, and there is no distinction regarding the cheque.

The second step is to give a credit report to the person going to receive a cheque. According to Article 21, these individuals can use SAYAD system to request the latest status of the issuer through, including the allowable credit limit, the record of the unpaid cheque in the last three years, and the number of unpaid obligations. Now, the question arises that what is the basis for the preventive remedy in this law?

Principles governing the legislator's arrangements: In this section, we review the principles of the legislator from the legal, juridical and economic point of view:

**Legal-Juridical Principles:** The most important legal basis for creating a preventive remedy in the amendment act can be the materiality of obligation while the avoidance of an uncertain contract is the juridical basis.

**Materiality of Obligation:** The legislator's emphasis on the existence of credit for the issuer and giving the credit information to the bearer derives from the material nature of the obligation. In other words, contrary to the prevailing thought in the history of the law of obligations based on which the obligator became the captive of the creditor and the violation of the contract was at the expense of the obligator's captivity or death (Philipp Levi and Custadello, 2007, p. 56 and 57, and Yazdanian, 2012, P. 165 and Mohaqiq Damad, 2009, p. 82-86); today, obligation is the relation between two assets (Amiri Ghaem Maghami, p. 1, p. 70, Sanhoori, 2003, p. 1, p. 25 and 26, Stone, 2002, p74, 75); Hence, the creditor can only collect his debts by referring to the debtor's properties. Therefore, in long-term monetary obligations, it is important not only to have enough assets that can guarantee the debt but also to maintain this asset until the due date of obligation.

This risk increases for some reason in the legal system of Iran. The first reason for the increased risk is that the creditor confronts with the losing party's insolvency, which is rooted in the religious and juridical doctrines of the legal system. It not only deprives the winning party of taking his/her right but the money paid to the winning party will not actually compensate the losses due to the suspension of late payment damages (Aghaei, 2017, pp. 239-258 and Mohseni, 2010, pp. 95-116).

The second reason is the legal deficiency in debtor's asset management so that the legal system of Iran has obtained the score 3 out of 6 in the area of debtor's asset management (Dadgar and Haddadi, 2016, p. 128). Therefore, after the issuance of a cheque, the issuer will have enough time to reduce his/her assets to escape from the payment of the obligation and declare insolvency or bankruptcy when the winning party intends to collect his/her debt. Although the legislator intends to prevent such a situation by drafting Article 21 of the Law on the Enforcement of Financial Convictions and Article 218 of the Civil Code, the object of judgment in Article 21 of the Law and the necessity of extreme interpretation of the Criminal Code give the debtor the opportunity to reduce its assets before being condemned. Thus, Article 218 remains virtually abandoned in judicial proceedings.

In such a situation, the only appropriate mechanism is the use of preventive remedy in such a way that a person with no assets cannot issue a cheque and the payee is confident that the current issuer owns the necessary assets to fulfill the obligation based on the legislator's measures for granting checkbook. **Prohibition of Uncertain Contracts:** The second juridical basis is the need for sufficient knowledge of the issuer's financial status and his/her assets at the moment of issuing the cheque. In the view of researchers, in the event of information asymmetry, the issuance of the cheque has been uncertain, and the legislator is required to compensate for this information defect to reduce the transactional uncertainty.

It should be explained that jurists and lawyers highlight the necessity of information symmetry in alternative contracts to draw the status of considerations and believe that ignorance to the considerations in reciprocal contracts causes the annulment of contract (Mirza Qomi, 1427 AH, 2, 934, and Katouzian 2012, vol. 1, p. 110). However, the analysis of jurisprudential books shows that the term "Uncertainty" does not merely refer to a loss, but includes a loss that comes from ignorance; and an uncertain contract is a transaction that harms the obligee due to the contracting parties' ignorance to the contract subject. Consequently, great jurists have considered uncertainty as the risk of gaining access to the considerations, which results from information asymmetry (Naraqi, 1417 AH, p. 93 and Ansari, 1415 AH, 4, 180, and Isfahani, 1409 AH, p. 252 and Araki, 1415 AH, vol. 2, p. 242)

On this basis, it seems that the existence of knowledge in monetary obligations must be interpreted beyond the determination of obligation, in such a way that knowledge of the amount of obligation that

arises in the debtor's assets is also a condition of contract validity. For this reason, the legislator's measure to provide the issuer's information is a step that can prevent the issuance of an uncertain cheque.

Disadvantages of the Amendment Act: After an introduction to the concept and principles of preventive remedy in the amendment act, the assessment of its advantages and disadvantages can increase the efficiency of the future law. Disadvantages of the Amendment Act: The present article believes that the amendment act has some disadvantages whose elimination will increase with the efficiency of the law.

Generalization of cheque and conflict with the Bill of Commercial Code: Contrary to the bill of the commercial code in which paragraph 7 of Article 1 considered cheque along with draft and demand note as commercial operations, the legislator considers cheque as a payment instrument to which the public have access. The existence of this type of legislative conflicts not only lead to government failure but also deprive the legislator of an important tool such as soft remedy.

This type of remedy, which is rooted in public international law (Shelton, 2006, p143), stands against the official remedies of the government and implies any norm that leads the obligor toward self-execution (Hall and Guzman, 2007, p142 and Meyer, 2009, p. 888). In other words, contrary to the viewpoint of classical and neoclassical, humans are not atomic so that the circumstances affect their behavior (Lawson, 2013, p61-86) and change their behavior. Therefore, if there are significant norms in the market, there is no need to use legal remedies because the norms can lead to the implementation of the contract.

Losing business reputation is one of the most important soft remedies in commercial transactions (OGUS, 2011, p230 and lesson, 2003, p30). In fact, since traders do not want to lose their credit because of the breach, they are more committed to fulfilling their obligations rather than non-traders. Therefore, the commercialization of cheque could provide the legislator with this important tool in order to lead traders toward self-execution through information tools and an implicit threat of the loss of credit in the event of a breach of contract. It is while it is less important for ordinary people because they do not continually trade. In other words, since traders do not tend to be abandoned in the market screening process, they have greater self-obligation to fulfill the contract in comparison to those who are less affiliated with the market and earn their income elsewhere. This soft remedy drives the trader to fulfill the obligation by internalizing the cost of implementing the contract.

Reducing the Importance of Commercial Documents Formalism: One of the advantages of a commercial document is formalism, so that the recipients of commercial documents can get them with confidence in the form of a document (Safari, 2008, p. 16 and 17, Sotoudeh Tehrani, 1995, pp. 16 and 22, and Erfani, 2012, p. 26). The significance of this formalism is so much that the non-observance of the form reduces the value of the commercial document to the normal document (Ghasemi, 2009, p. 265). However, the legislator has made validation and information subject to referring to a particular system. Notwithstanding the fact that the proper structure of this matter is not yet available, the commercial document validity is separated from its form and dependent on another thing; an issue that both slows down the validation process and conflicts with the underlying principles of commercial document formalism. So, it was better for the government to go to the meta-regulation and make the intermediary financial institutions risk-taker instead of interventionism. In this way, the applicant's creditor would be inserted on every check sheet and the banks would be required to pay. This issue is foreseen under Article 795 of the new bill on the commercial code. In this case, the intermediary institutions were in charge of supervision, and they would take the credit risk. Thus, the banks and financial institutions' obligation to pay the cheques would prevent them from granting checkbook to everyone, and gradually the checkbook would be available to well-off people. Meanwhile, the government would not condemn to intervention in the market, and the transaction space would be organized at a much lower cost.

Lack of attention to the existence of substitute goods: One of the microeconomic issues is the problem of substitution, in the sense that if there is a substitution for a good, as the price goes up, the consumer will go to the substitute good (Salvatore, 2017, 102, and Henderson and Quant, 2014, p. 50). The legislator

has exacerbated the remedy of unpaid cheques with the aim of securing executive control. In the microeconomic language, the price of the cheque is increased so that individuals move towards the substitute good, with the same function but is cheaper in price if there is any. In Iran's legal system, draft and demand note can have the function of the cheque. Given the increased use of draft and demand note over time, the legislator will also be faced with problems such as cheque in the current situation. In this case, the legislator is compelled to either sacrifice the security of the market for a change in terms of these two commercial documents or fail to come along the globalization process by making changes like the amendment act. These issues are not a good alternative. On this basis, it was better for the legislator to delegate the use of cheque to the traders and provide the public with credit cards as a long-term payment instrument, instead of generalizing the use of cheques and determining strict remedies (Farhang, 1992, p. 441). In addition, the "case cheque" in paragraph 2 of article 6 of the amendment act somehow a substitute good which is considered misconduct of the law by intensifying the remedy for the unpaid cheques.

## 5. Discussion

As a result, it can be said that the legislator's measure for creating a preventive remedy in the law on an amendment to cheque regulations suggests its thoughtfulness in the pathology of the current laws. In this context, the legislator has understood that the gap in the current law lies in the discredit and information asymmetry. The traditional theory of contract law, which is based on market orientation and non-intervention in the private relations of individuals, has been abandoned. Thus, the contract is regarded as a social phenomenon and a means of allocating wealth by disqualifying invalid persons and drawing the credit status of the cheque issuer in order to take measures to regulate market before issuing a cheque. These measures originate the concept of preventive remedy.

However, what is noteworthy as a weakness in the lawmaker's performance is the lack of consideration of more effective means of achieving its goal. It seems that the legislator could restrict the issuance of a cheque to business relationships by replacing a debit card instead of a cheque. Thereby, the unification process of the rules of commercial documents with the aim of self-executing a contract will not be abandoned while benefiting from the concept of soft remedy. Also, the government can oblige banks to pay the number of cheques up to the credit determined by the issuer in order to transfer the market safety costs to intermediary institutions, such as banks and credit institutions, and also provide intermediary institutions with higher incentives to secure cheque issuance process by shifting from intervention policy to supervision.

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