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### **An examination of the adequacy of the Libyan Penal Code to deal with credit and debit card forgery**

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**An Examination of the Adequacy of the Libyan Penal Code to Deal with  
Credit and Debit Card Forgery**

**Yousef Alija, LLB, LLM (Libya)**

**Thesis submitted to Bangor University  
for the degree of Doctor of Philosophy**

**July 2014**

## ABSTRACT

### **An Examination of the Adequacy of Libyan Penal Code to Deal with Credit and Debit Card Forgery**

The development of credit and debit cards and the invisible information which they hold raises an argument that these cards may not be covered by the meaning of “document” in the context of forgery under the Libyan Penal Code. Under forgery law in Libya, the subject matter of forgery must be a “document” or a “paper”. Because the principle of legality is one of the legal systems’ fundamental principles, these two words (document and paper) may not be applicable to credit and debit cards. This raises a problem not only relating to whether existing criminal law covers the alteration of information on credit and debit cards, it has also features when one considers whether current Libyan law provides for an offence of *using* one of these false cards. The offence of *using* a forged document requires a *forged document* as a subject matter of the offence. Thus, existing forgery law under the Libyan Penal Code may not be applicable to credit and debit card forgery. Another problem which occurs is that *possession* under the Libyan forgery law is not a crime. Therefore, *the possession* of a false credit or debit card is not currently an offence in Libya. This raises another problem which confirms the insufficiency of the current forgery law in Libya.

Therefore, this thesis begins by examining the concept of credit and debit cards and the information they contain. Thereafter, the subject matter of forgery under the Libyan Penal Code, namely the words “document” and “paper” will be explored, followed by an examination of the offence of using a false credit and debit card, and the potential offence of possession. The main aim of the thesis is to suggest an effective proposal to the legislator in Libya for improving forgery law to deal with credit and debit card forgery.

*I dedicate this thesis to my parents,*

*and my wife*

## **ACKNOWLEDGEMENT**

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أَعُوذُ بِاللَّهِ مِنَ الشَّيْطَانِ الرَّجِيمِ

" وَالَّذِينَ لَا يَشْهَدُونَ الزُّورَ وَإِذَا مَرُّوا بِاللَّغْوِ مَرُّوا كِرَامًا "

الفرقان / 72

And those who do not testify to falsehood and if they pass near ill speech, they pass with dignity.

Holly Quran  
Alforqan/ 72.

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## CHAPTER ONE: INTRODUCTION

This thesis proposes that the forgery offences under the Libyan Penal Code<sup>1</sup> are not sufficient to deal with credit and debit card forgery and they need to be revised. The rationale of this research is explained below.

### 1.1. OVERVIEW

Credit cards and debit cards have traditionally, until relatively recently, attracted only peripheral interest from the law in Libya. Prior to The Law of the Banks 2005,<sup>2</sup> these cards had not been legally recognised. The Law of the Banks<sup>3</sup> has not given these cards any attention. It only mentions payment and credit cards in Article 65(2).<sup>4</sup> This was acceptable at that time, when credit and debit cards were still publicly unknown in Libya. However, by 2014, the need for organising credit cards and debit cards has become very significant, especially after these cards have come into more common use in Libya.<sup>5</sup> The use of these cards causes the author to question whether the current Libyan legislation covers credit and debit card forgery<sup>6</sup> under Libyan criminal law in general, and specifically under Libyan forgery provisions. In other words, the question which the thesis poses is whether forgery, which may happen to these cards, is covered by Libyan criminal law or does forgery need more attention from the legislator in Libya?<sup>7</sup> This is the main question, which the thesis attempts to answer.

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<sup>1</sup> Libyan Penal Code 1953.

<sup>2</sup> Law no 1 due 2005 relative Banks.

<sup>3</sup> *Ibid.*

<sup>4</sup> Article 65(2) states that

يعتبر من الاعمال والانشطة المصرفية التي يمارسها المصرف التجاري ما يلي:

إصدار وإدارة أدوات الدفع ، بما في ذلك ... بطاقات الدفع والائتمان ...

Which is translated as: "It is considered as bank activities exercised by a commerce bank the following: ... issuing and running payment equipment, including ... payment and credit cards ..." See Article 65(2) of the Law of the Banks 2005. *Ibid.* This law does not mention debit cards, although they are very important in the world of plastic payment. Helmut Stix, 'How Do Debit Cards Affect Cash Demand? Survey Data Evidence' (2004) 31(2-3) *Empirica* 93, 94.

<sup>5</sup> Credit and debit cards can now be used in Libya. Although they only issue debit cards, banks such as Aman Bank and the Bank of Commerce and Development accept both credit and debit cards. Therefore, cardholders of credit and debit cards issued by non-Libyan banks can use their cards in Libya.

<sup>6</sup> Credit and debit card forgery is considered as "white collar crime". For the meaning of "white collar crime", see Nicholas Ryder and Kerry Broomfield, 'Predatory Lending and White Collar Crime: A Critical Reflection' (2014) 9 *International Company and Commercial Law Review* 287.

<sup>7</sup> Although the crimes which are explored in this thesis are the offences of forgery of credit and debit cards, not only the Articles of forgery of the Libyan Penal Code will be examined. This thesis will

Examining the Libyan Penal Code, specifically its forgery provisions, whether they are sufficient or not to deal with credit and debit card forgery, helps to provide protection to the users of these cards. This protection leads to confidence in the use of these cards. Credit and debit cards are not merely a local issue. They may be used in any part in the world: for example, if a credit card is issued in the UK, it may be used in Libya. Thus, if this card is misused in Libya, the legitimate cardholder and the bank in the UK will be affected by this misuse.<sup>8</sup> Thus, protecting these cards in Libya means protecting credit and debit cards in the UK, and all over the world where these cards may be used.<sup>9</sup>

As the next two pages will demonstrate, the forgery offences set out in the Libyan Penal Code do not contain any provisions that explicitly deal with the forgery of credit or debit cards. Libyan law<sup>10</sup> criminalises the offences of breach of public trust<sup>11</sup> in Section Seven of the Second Book of the Libyan Penal Code.<sup>12</sup> These offences are divided into four Chapters<sup>13</sup>; Chapter Three of which deals with forgery offences. Therefore, the aim of imposing forgery offences is to protect the public trust in the contents of a document in general.<sup>14</sup> The majority of forgery offences<sup>15</sup> in Libya are regulated by Articles 341

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examine some other Articles such as 444(1) (the offence of theft) and 461 (the offence of deception) of the Libyan Penal Code, which may be considered as applicable provisions to credit and debit card forgery. This will be seen in Chapters Six and Seven.

<sup>8</sup> For example, if a bank incurs a loss of money due to credit or debit card fraud, cardholders may bear the consequences of this matter such as “higher fees, and reduced benefits.” Philip K Chan and others, ‘Distributed Data Mining in Credit Card Fraud Detection’ (1999) 14(6) *Intelligent Systems and their Applications* 67. Therefore, recently banks have realised that global and unified efforts should be taken for combating fraud resulting from using payment cards by sharing payment card information. See Salvatore J Stolfo and others, ‘Credit Card Fraud Detection Using Meta-Learning: Issues and Initial Results’ [1997] *Workshop on Fraud Detection and Risk Management*.

<<http://www.aaai.org/Papers/Workshops/1997/WS-97-07/WS97-07-015.pdf>> accessed 10 May 2014.

<sup>9</sup> In this respect, Masuda maintains that “credit card fraud is a flexible crime unobstructed by geography.” Barry Masuda, ‘Credit Card Fraud Prevention: A Successful Retail Strategy’ (1993) 1 *Crime Prevention Studies* 121, 124.

<sup>10</sup> The term Libyan law in this thesis means any law in Libya including criminal law and civil law.

<sup>11</sup> EG Adahabi, *Crimes Breaching Public Trust under the Libyan Penal Code* (Almaktaba Alwatania, Benghazi 1972) 115.

<sup>12</sup> The law followed, to a large extent, Italian legislation. This is because before the Libyan Penal Code was established, the Italian Penal Code was applied to forgery offences in Libya. *Ibid.*

<sup>13</sup> Libyan Penal Code 1953.

<sup>14</sup> EG Adahabi *supra* 115.

<sup>15</sup> There are some Articles which regulate particular situations of forgery such as Articles 356 and 357 which are concerned with false personal data. There is also Article 404 which governs the acts of kidnapping a child immediately after his birth with the intention to prepare false birth certificate. Libyan Penal Code 1953.

to 353 of the Libyan Penal Code, which were adopted from the Italian Penal Code.<sup>16</sup> All forgery offences can be paraphrased as the following:

***Forging Formal and Customary Documents:*** Forgery of formal and customary documents is proscribed by Articles 341, 342, 344, 346, 351, 352 and 353 of the Libyan Penal Code. The commission of these offences can occur by physical or nonphysical conduct.<sup>17</sup> In addition, the perpetrator may be a lay person or a public employee. If he is a lay person, the forged document will be a “customary document”. However, if he is a public employee, the forged document will be a “formal document”: the significance of this in the context of credit and debit card forgery will be explained later.<sup>18</sup>

***Using Forged Formal and Customary Documents:*** Using a forged document is criminalised by Article 347 of the Libyan Penal Code.<sup>19</sup> The difference between the uses of a forged formal document and a customary (informal) document can be seen in the difference in the punishment and the diversity of the intention required. The punishment for using a forged formal document is more severe than that which is applicable in the case of using a forged customary document.

***Forging Certificates of Necessary Public Services, (Article 343); forging books and communiqués, (Article 349); and forging passports, (Article 350):*** These offences were provided to treat particular cases, which the legislator thinks deserve less punishment or require a specific conduct’s criminalisation.

***Presenting False Information in a Formal Document (Article 345):*** This Article is an exception to the fact that forgery must be committed on a written document<sup>20</sup> or an

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<sup>16</sup> The reason why the Libyan Penal Code was influenced by the Italian Penal Code was because Libya had been occupied by Italy in 1911 until the first world war. Libya: Our Home, Libya: The Italian Occupation and the Libyan Resistance <<http://www.libya-watanona.com/libya/>> accessed 6 June 2013.

<sup>17</sup> Physical forgery is the act of changing the reality (information) physically so it leaves an impact on the writing of the document which can be seen and realised by the sensation. In this kind of forgery, the forger has no competency or is not entitled to create a genuine document. He only intervenes to change contents of a genuine document or issues a false document which he has no right to create. However, immaterial forgery happens on the meaning of the document in a way which is not realised by the sensation. In this kind of forgery, the forger (for example, an employee) has a competency to create a genuine document but he abuses this right and issues a false document. This will be explained later in Chapter Five.

<sup>18</sup> The difference between a formal and customary document will be explored in Chapter Three.

<sup>19</sup> Libyan Penal Code 1953.

<sup>20</sup> As will be seen in Chapter Three, under Libyan criminal law, forgery requires to be on a document or a paper.

instrument.<sup>21</sup> The forgery here is made by someone who does not forge any document. He only lies to a public employee. For example, if an employee creates a title for the ownership of a flat relying on false information presented by someone, the act will be forgery, but the person did not forge the document. He just lied. However, the legislator regards this conduct as forgery.<sup>22</sup>

***Destroying, Damaging or Concealing a Genuine Document, (Article 348):*** Although this offence is not an offence of forgery, it is prescribed among the provisions of forgery. The reason why the law provides this Article in the Chapter on forging documents is that destroying, damaging or concealing a genuine document may lead to hiding the reality which the document tells. Thus, the concept of this offence in this Article may meet the concept of forgery in terms of hiding the information.

It is clear, from this brief summary immediately above of the Libyan Penal Code's forgery offences, that the forgery provisions of the Libyan Penal Code do not contain any articles openly<sup>23</sup> governing credit cards or debit cards.<sup>24</sup> The reason behind that is that the Libyan Penal Code was established on the 23<sup>rd</sup> of September 1953. All the documents, which were dealt with by this Penal Code were papers. This can be understood from the words of the forgery provisions. The subject matter of forgery in the above-mentioned Articles is a "document" or a "paper".<sup>25</sup> At that time (the establishment of the Libyan Penal Code), there were no documents other than paper. That is to say, there were no plastic or electronic documents such as credit and debit cards. This indicates that documents only mean papers. These documents hold visible information which can be seen by the naked eye. These documents are different from credit and debit cards which hold invisible information.<sup>26</sup>

Therefore, although credit and debit cards are considered as the subject matter of

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<sup>21</sup> As the Forgery and Counterfeiting Act 1981 requires. Forgery and Counterfeiting Act 1981.

<sup>22</sup> See Article 345 of the Libyan Penal Code in Appendix 1.

<sup>23</sup> For this reason, this thesis examines this Penal Code to see whether it can deal with credit and debit card forgery or not.

<sup>24</sup> Thus, they may need to be revised, so that they can regulate the changes, which have happened in technology, in particular credit cards and debit cards. This will be explored in detail in this thesis.

<sup>25</sup> This will be discussed in detail in Chapter Three. In Chapter Three, the meaning of the subject matter of forgery under the Libyan Penal Code will be explored to understand whether this subject matter can meet credit and debit card requirements.

<sup>26</sup> The difference between visible and invisible information will be explored in depth in Chapter Two.



forgery in many countries, such as the UK's Forgery and the Counterfeiting Act 1981.<sup>27</sup> Under Section 8(1)(d), credit and debit cards are covered by the offence of forgery.<sup>28</sup> This Section provides that

Subject to subsection (2) below, in this Part of this Act "instrument" means—  
any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means.<sup>29</sup>

Another example is the Canadian Penal Code.<sup>30</sup> Under this Code "document" is defined to include credit cards. Article 321 states that:

"document" means any paper, parchment or other material on which is recorded or marked anything that is capable of being read or understood by a person, computer system or other device, and includes a credit card, but does not include trade-marks on articles of commerce or inscriptions on stone or metal or other like material<sup>31</sup>

Owing to the subject matter of forgery in Libyan law being a document or a paper, this subject matter may not be applied to credit cards and debit cards. Therefore, the question arises: Is the Libyan Penal Code sufficient to cover forgery offences of credit and debit cards? This thesis examines credit card and debit card forgery under the Libyan Penal Code.<sup>32</sup> These cards are made of plastic, so an immediate issue to consider is whether they fall outside the scope of existing Libyan legislation.<sup>33</sup> In addition, as will be seen in Chapter Two, these cards have new information (it is referred to in this thesis as "invisible" information)<sup>34</sup> which is considered as an odd concept in the context of forgery provisions in Libya. Hence, there are two major problems which may obstruct the application of Libya's forgery Articles to credit and debit card forgery: first, the subject matter of forgery in Libyan law could be paper; second, the electronic information might not be a "document" in terms of forgery in Libya.

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<sup>27</sup> Forgery and Counterfeiting Act 1981.

<sup>28</sup> See J Parry and others, *Arlidge and Parry on Fraud* (3<sup>rd</sup> edn., Sweet and Maxwell, London 2007) 283.

<sup>29</sup> Forgery and Counterfeiting Act 1981.

<sup>30</sup> See Article 321. Canadian Penal Code 1985.

<sup>31</sup> *Ibid.*

<sup>32</sup> The reason why only the Penal Code is considered in this thesis is that the Penal Code governs all criminal offences in general. Moreover, other special laws cannot be applied to credit and debit card forgery. Therefore, this thesis will only examine the Libyan Penal Code.

<sup>33</sup> This will be explained in depth in Chapter Two.

<sup>34</sup> It will be seen in Chapter Two that invisible information is different from visible information and it is not the same.

These two problems are examined because of the principle of legality, which is a mandatory principle in Libyan criminal law.<sup>35</sup> As will be seen later,<sup>36</sup> although this thesis focuses on credit card and debit card forgery, an examination of the principle of legality in Libya is necessary. The principle of legality means that an act cannot be criminalised unless there is specific legislation which prohibits the act in question. Owing to Article 1 of the Libyan Penal Code, the principle of legality is legally binding. The criminal judge in Libya has to rule on credit card or debit card forgery within the constraints imposed by this principle. Because one of the consequences of the principle of legality is that criminal matters must be interpreted narrowly, a question may be posed which is, can the judge interpret the words “document” and “paper” in the way that he would apply forgery provisions to these cards? Equally, imposing criminal liability by analogy is not allowed in the interpretation of Libyan criminal law. In addition, ambiguity of the law is interpreted in favour of the accused. What may be open to question here is that if the judge is bound by the principle of legality, to what extent are these consequences binding on the criminal judge in Libya in terms of credit and debit card forgery? Therefore, the principle of legality will be briefly examined in this Chapter.<sup>37</sup>

## 1.2. AIM, OBJECTIVES AND RATIONALES

Interviews conducted by the author in Libya<sup>38</sup> showed that judges, prosecutors and lawyers<sup>39</sup> in Libya had not faced any case of credit card or debit card forgery. As a result of this, it may be argued that there is no need to consider the forgery of these cards,<sup>40</sup> which are a new method of payment in Libya. However, the Libyan Penal Code,<sup>41</sup> including forgery provisions, needs to be examined because Libya, like some

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<sup>35</sup> This principle is an important principle in criminal law. Beth Van Schaack, 'The Principle of Legality in International Criminal Law' [2011] Santa Clara Law Digital Commons 101.

<sup>36</sup> As will be seen in this Chapter, this principle is mandatory according to the Libyan Constitutional Declaration and the Libyan Penal Code. See Constitutional Declaration, 2011; Libyan Penal Code 1953.

<sup>37</sup> Although this principle will be briefly illustrated in this Chapter, it will be explored in this thesis whenever it is necessary in all Chapters.

<sup>38</sup> The interviews were conducted in the period between February and March 2012, as will be explained later in this Chapter.

<sup>39</sup> Including the solicitors working in some banks such as Aman Bank and the Bank of Commerce and Development.

<sup>40</sup> Although some interviewees claimed that the provisions of forgery under the current Code in Libya could deal with credit and debit card forgery, the majority of them were of the view that credit and debit cards need a special law.

<sup>41</sup> *Ibid.*

other countries, will face the prospect of credit and debit card forgery, such as making new false credit or debit cards, or using false credit or debit cards. This type of forgery is a fact and many countries have recognised credit and debit cards in their laws such as the Omani Penal Code,<sup>42</sup> and the UK Forgery and Counterfeiting Act 1981.<sup>43</sup> Outdated laws such as the Libyan Penal Code may not be sufficient to deal with these card crimes. Thus, Saed states that Egyptian criminal law should be reviewed and forgery offences should be revised so that they clearly apply to the act of changing the information on debit cards. He argues that the current legislative provisions of forgery in Egypt are not sufficient to deal with debit card forgery.<sup>44</sup>

Therefore, the aim of this study is to identify and examine current weaknesses in Libyan criminal law, and to propose how to allow this law in general and specifically forgery provisions, to overcome their current deficiencies, so that the above-mentioned Libyan criminal law can deal effectively with credit and debit card forgery. Consequently, this thesis will examine all the offences of *credit and debit card forgery* such as *changing the information* on credit or debit cards,<sup>45</sup> *using false* credit or debit cards<sup>46</sup> and the *possession* of false credit or debit cards,<sup>47</sup>

The objective of this study is to analyse the forgery and other provisions of the Libyan Penal Code, which are potentially applied<sup>48</sup> to credit and debit card forgery. The researcher attempts to offer good guidelines to guide the legislator in Libya to improve forgery law in the context of credit and debit card forgery. Thus, the specific objectives of this research are the following:

1 - Examining whether the “alteration of the information” on credit and debit cards

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<sup>42</sup> Article 276(bis)(3) makes it an offence for anyone who changes any information on a debit or withdrawal card. Omani Penal Code 1974.

<sup>43</sup> Credit and debit cards are recognised by Forgery and Counterfeiting Act 1981. For example, Section 5 of this act mentions these cards openly when criminalising the possession of some instruments. See Section 5(5)(i) and (k) of the Forgery and Counterfeiting Act 1981. Forgery and Counterfeiting Act 1981.

<sup>44</sup> MN Saed, 'The Criminal Responsibility for the Illegitimate Use of Debit Cards: Comparative Study' (PhD thesis, Cairo University 2005) 462. Similarly, this stated by South in 1968. He stated that “Counsel should review his state’s criminal law and determine whether there are any specific statutes dealing with credit card crimes.” Jerry G South, ‘Credit Cards: A Primer’ (1968) *The Business Lawyer* 327, 334.

<sup>45</sup> This will be examined in Chapters Three, Four and Five.

<sup>46</sup> This will be explored in Chapter Six.

<sup>47</sup> This will be covered in Chapter Seven.

<sup>48</sup> It will be seen in Chapter Six that the offence of theft and the offence of deception under the Libyan Penal Code can be applied to the forgery acts, which may be committed by using false credit and debit cards.

constitutes a crime in Libyan law or not.<sup>49</sup> Credit cards and debit cards are made of plastic material which contains electronic information.<sup>50</sup> Therefore, as can be seen above, they may not be the subject matter of forgery.

2 - Examining whether the use of Libya's "forged document" offence can apply to the use of a false credit or debit card.<sup>51</sup> If not, is there any Article in Libyan criminal law which may be applied to this act?<sup>52</sup>

3 - Examining how Libyan criminal law should deal with the possession of false credit or debit cards. *The possession of false documents* is not dealt with in forgery law in Libya.<sup>53</sup> This research attempts to determine whether the possession of false credit cards and debit cards needs to be protected from this act, or whether society in Libya does not need criminal protection from such an act. At the same time, the research will examine whether there is any article in criminal law that can apply to this possession.

### 1.3. LITERATURE REVIEW

The subject of credit and debit card forgery is a major topic for debate in Arabic countries such as Egypt and Jordan. The main issue of this subject is the concept of document. It is controversial whether these cards are documents or not.

#### *a) The Meaning of Document in the Context of Forgery*

The concept of document is defined by many scholars. The Egyptian writer, Edwar Ghaali Adahabi, for example, in his famous book, *Crimes Breaching public Trust in the*

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<sup>49</sup> This will be covered in Chapters Three, Four and Five. The reason why this is covered by these Chapters is that this point is not possible to be covered in one Chapter. Some elements of the offence of forgery should be examined deeply. In addition, the problem (whether credit and debit cards constitute document or not), which is examined in these Chapters, is considered as a foundation for the discussion of the other Chapters, namely Six and Seven. It has an impact on these two Chapters. Therefore, they will need to be explored in these three Chapters.

<sup>50</sup> This will be explained in detail in Chapter Two.

<sup>51</sup> This will be covered in Chapter Six. In this Chapter, it will be seen that the problem of document has a reflection on this point.

<sup>52</sup> As will be seen in Chapter Six, it may be argued that the use of false cards may constitute the offence of theft under Article 444(1) and 446(2) or constitute the offence of deception under Article 461 of the Libyan Penal Code. This will be covered in Chapter Six.

<sup>53</sup> Although the possession of a false document is not a crime under the forgery provisions of the Libyan Penal Code, as will be seen in Chapter Seven, it may be argued that it could constitute another crime under Article 258 of the Libyan Penal Code.

*Libyan Penal Law*,<sup>54</sup> stated that “document” means writing. Faozia AbduAsattar, who is also an Egyptian writer, defined a “document” in her book, *Explanation of the Penal Law: the Special Part*,<sup>55</sup> as signs by which a particular meaning transfers from one person to another when they are seen. Equally, Omar Assayed Ramadan in the book, *Explanation of the Penal Law: the Special Part*,<sup>56</sup> took the view that in forgery, document means any readable writing expressing a certain meaning. David Ormerod in the book, *Smith and Hogan: Criminal Law*,<sup>57</sup> pointed out

A document will normally be written on paper but may be written on any material and the writing may consist in letters, figures or any other symbols used for conveying information.

Mohammed B Hemraj in the Article published in 2002 ‘The Crime of Forgery’<sup>58</sup> confirmed this argument. He maintained that in the 18<sup>th</sup> century, in the UK, “Forgery is mainly confined to documents.” He also stated “Forgery as a common law offence “was presumed to be capable of being committed only in respect of writing.” Glanville Williams in his paper ‘What is a Document’<sup>59</sup> also explored that “A document ... is at narrowest a verbal symbol (or series of verbal symbols.) written, typewritten, printed or otherwise produced on some material base.”

Conversely, not all materials which can be written on can claim to be a document. Mahmood Najeeb Hosni in the book, *Explanation of the Penal Law: the Special Part*,<sup>60</sup> expressed the view that the material must be lasting and must not be easily affected. In the light of this view, the Jordanian writer, Emad Ali Alkhaleel, also stated in his book, *The Penal Protection of Debit Cards: Analysed Comparative Study*,<sup>61</sup> that the concept of a “document” requires the words and the signs that are on the document must be relatively lasting so these words or symbols can be used as evidence. If the document is written, Moaoad AbduAtoab, in the *Intermediary in Explaining Crimes of Forgery, Counterfeiting and Imitating Seals*,<sup>62</sup> pointed out that it does not matter what language

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<sup>54</sup> EG Adahabi *supra* 121.

<sup>55</sup> (2<sup>nd</sup> edn., Dar Anahda Alarabia, Cairo 2000) 270.

<sup>56</sup> (Dar Anahda Alarabia, Cairo 1986) 145.

<sup>57</sup> (12<sup>th</sup> edn., Oxford University Press, Oxford 2008) 958.

<sup>58</sup> (2002) 9(4) *Journal of Financial Crime* 355.

<sup>59</sup> (1948) 11(2) *The Modern Law Review* 150, 151.

<sup>60</sup> (Dar Anahda Alarabia, Cairo 1988) 247.

<sup>61</sup> (Wael, Amman 2000) 51.

<sup>62</sup> (3<sup>rd</sup> edn., Dar Almajd, Tanta 2009) 90.

is used to write the document. Ahmmed Mohammed Moonis in the book, *The Comprehensive in Counterfeiting and Forgery Crimes*,<sup>63</sup> added that document can be written either by hand or by typewriter.

Consequently, Hamdi Rajab Atia in his book, *The Forgery, the Imitation and the Counterfeiting of the Currencies, the Seals and Documents*,<sup>64</sup> held that a record or a tape that holds a recording of the voice does not constitute a document. This was confirmed by David Ormerod.<sup>65</sup> He maintained that document cannot include all articles which are commonly called forgeries. Thus, Glanville Williams attempted to provide the solution. He stated that if “the thing is intended to have utility apart from the fact that it conveys information or records a promise” it may be a document.<sup>66</sup> In this respect, the Law Commission in its *Report on Forgery and Counterfeit Currency*<sup>67</sup> in 1973 in paragraph 22 pointed out documents must send two messages. It stated:

The essence of forgery, in our view, is the making of a false document intending that it be used to induce a person to accept and act upon the message contained in it, as if it were contained in a genuine document. In the straightforward case a document usually contains messages of two distinct kinds-first a message about the document itself (such as the message that the document is a cheque or a will) and secondly a message to be found in the words of the document that is to be accepted and acted upon (such as the message that a banker is to pay a specified sum or that property is to be distributed in a particular way). In our view it is only documents which convey not only the first type of message but also the second type that need to be protected by the law of forgery.<sup>68</sup>

In the context of the meaning of the document expressed in the above mentioned literatures, the subject matter of forgery under the Libyan penal law will be addressed in order to understand whether the word “document” provided by the forgery law in Libya has the same meaning or whether it has a wider meaning. This examination will help the author to address credit and debit cards, whether they can constitute the subject matter of forgery.

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<sup>63</sup> (Dar Alfekr Oa Alkanoon, Almansooraa 2010) 139.

<sup>64</sup> (Maktabat Jamiat Almenofya, Almenofya 2008) 43. Yet, Williams, argued that “perhaps a recording of the voice such as a dicta-phone record, is also a document, though here the verbal symbol is perceived through the ear and not through the eye.” Glanville Williams *supra* 151.

<sup>65</sup> D Ormerod *supra* 958.

<sup>66</sup> Glanville Williams *supra* 160.

<sup>67</sup> (Law Com No 55, 1973).

<sup>68</sup> *Ibid.*

## ***b) Analysing the Concept of Document in the Context of Credit and Debit Cards***

This explanation of the concept of document opens the door for a controversial issue regarding two kinds of information on credit and debit cards: visible information and invisible information. With respect to visible information, it is almost the majority of the scholars who do not deny that these cards are documents and could be the subject of forgery. Jameel AbduAlbaki Asagheer, for instance, stated in his book, *The Criminal and Civil Protection of Magnetic Credit Cards: a Practical Study in French and Egyptian Judicature*,<sup>69</sup> that a credit card is regarded as a set of concepts and meanings issued by banks and financial institutions. It is a document and any alteration happening on the visible information will constitute forgery. Mohammed Nooradeen Saed AbduAlmajeed in the book, *The Criminal Responsibility for Changing the Reality on Debit and Credit Cards*,<sup>70</sup> added that owing to the fact that the data or the signs on credit and debit cards can be understood by looking at them and the eye is the sense which discovers the concept or the idea which the card expresses, these cards are documents as to visible information. Furthermore, this view is also followed by Omar Salem in his book, *the Criminal Protection of Debit Cards: Comparative Study*,<sup>71</sup> in which he pointed out that there is no doubt that the information on the debit cards expresses a set of concepts and meanings, which proves that these cards can be documents in the context of forgery law in Egypt. Equally, Sameh AbduAlhakam stated that as the fixed information which is on credit cards expresses some concepts and meanings, these cards can form a document, which in turn can be a subject matter of forgery.<sup>72</sup> In line with this view, Fidaa Yahia Alhamood,<sup>73</sup> the Jordanian commentator stated that because it is regarded as a piece of plastic issued by a financial institution and it has the cardholder's data, special numbers and the expiration date of the card, a debit card can therefore be regarded as a document. Thus, any change that may take place to the visible information which the card contains will constitute forgery covered

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<sup>69</sup> (Dar Anahda Alarabia, Cairo 2003) 120.

<sup>70</sup> (Dar Anahda Alarabia, Cairo 2008) 91.

<sup>71</sup> (Dar Anahda Alarabia, Cairo 1995) 31.

<sup>72</sup> *The Criminal Protection of the Credit Cards: the Crime of Electronic Payment Cards* (Dar Anahda Alarabia, Cairo 2003) 47.

<sup>73</sup> *The Legal System of Credit Cards* (Dar Athakafa Alarabia, 1999)109.

by Article 260 of the Jordanian Penal Code.<sup>74</sup>

Although these writers agreed that visible information meets the requirements of the concept of the document and could be the subject of forgery, they disagree with respect to invisible information. Some considered all the information on credit and debit cards is the same, and could be the subject matter of forgery. For example, Omer Salem in his book mentioned above<sup>75</sup> explained that not defining the concept of forgery under Egyptian criminal law does not mean law cannot cover forgery occurring to the invisible information contained within debit cards. Huda Hammed Gashgoosh, in *Computer Crimes in Comparative Legislations*,<sup>76</sup> stated that electronic information is a document because the concept of document has been changed by the impact of technological developments. Similarly, Fidaa Yahia Alhmood stated there is no difference between visible information and invisible information because Article 260 of the Jordanian Penal Code does not require the information to be visible. Writing about the topic in the United Arab Emirates law, Fathia Mohammed Gorari stated in her paper ‘The Criminal Protection of Debit Cards’,<sup>77</sup> that it does not matter that this data is not readable, since there is no article in law, in the United Arab Emirates that states that the document must be readable by the naked human eye. Electronic information can be read by the cash machines, and card readers that banks supply to merchants and service providers.

However, other writers deny this to be applicable to invisible information. For example, the Egyptian writer, Jameel AbduAlbaki Asagheer, pointed out the sense of sight is the only sense that must discover the concept which the document conveys.<sup>78</sup> Alkhaleel, stated that the meaning of the “document” does not apply to invisible information, because the information is not seen by the human eye.<sup>79</sup> In this meaning, Naaela Adil Gora in the book, *The Economic Offences of the Computer: Theoretical and Practical*

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<sup>74</sup> The Arabic text of Article 260 states that

التزوير، هو تحريف مقتعل للحقيقة في الوقائع والبيانات التي يراد اثباتها بصك أو مخطوط يحتج بهما نجم أو يمكن أن ينجم عنه ضرر مادي أو معنوي أو اجتماعي.

Jordanian Penal Code 1960.

<sup>75</sup> O Salem *supra* 32.

<sup>76</sup> (Dar Anahda Alarabia, Cairo 1992) 121.

<sup>77</sup> (2004)1 Alhokok Journal for Legal and Economic Science 1, 39.

<sup>78</sup> JA Asagheer *supra* 121.

<sup>79</sup> EA Alkhaleel *supra* 68.



*Study*<sup>80</sup>, pointed out, it cannot be said that legislator did not define forgery, as say, changing the information on a magnetic strip, because this task was left for scholars to undertake.

Based on the above literature review related to the argument of whether these cards can be documents, and to what extent this meaning can be consistent with credit and debit cards in some countries, the author will address forgery offences under the Libyan Penal Code for the purpose of developing this law. This examination will be undertaken by analysing the provisions of forgery law in Libya and the results of the interviews conducted in Libya. It will be seen that the offence of forging credit and debit cards will require coverage by a new law.

### ***The Misuse of Credit and Debit Cards***

Owing to the fact that the debate over the meaning of document and some other issues in the Libyan Penal Code may negatively affect the law of forgery from applying the use of false credit and debit cards, this thesis will also address the possibility of applying other offences such as deception and theft by using a modified key. However, this may face some problems such as the notion that a machine may not be deceived. Another problem is that appropriation requires to be without the consent of the owner, and credit and debit cards are not “keys” per se in this physical sense.

### ***A Machine May not be Deceived***

There is a view that a machine cannot be deceived. For example, David Ormerod stated that “The prevailing opinion under the old law<sup>81</sup> was that it is not possible to deceive a machine.”<sup>82</sup> Similarly, Richard Card, in the book, *Cross Jones and Card: Introduction to Criminal Law*,<sup>83</sup> mentioned that “there can be no deception unless a person is induced to believe that a thing is true, which is in fact false.” Likewise, Anthony

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<sup>80</sup> (Alhalabi Alhokokia, Beirut 2005) 586.

<sup>81</sup> This law is the Theft Act 1968. Under this Act, Section 15(4) provides that  
For purposes of this section "deception" means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.

Theft Act 1968.

<sup>82</sup> D Ormerod *supra* 840.

<sup>83</sup> (6<sup>th</sup> edn., Buttrworths, London 1988) 337.

Arlidge, Jacques Parry and Ian Gatt confirmed in *Arlidge and Parry on Fraud*<sup>84</sup> that: “Whatever the precise nature of the state of mind which must be induced, it cannot exist unless there is a mind for it to exist in” This was the same as Alkhaleel.<sup>85</sup> He maintained that the machine does not distinguish between the true and the false, so it cannot be a subject of deception.

This was so held in some cases. For example, in *In Re London and Globe Finance Corpn Ltd*,<sup>86</sup> Buckley J observed that “To deceive is ... to induce a man to believe that a thing is true which is false...” In the same way, in *Director of Public Prosecutions v Ray*, the court held that “For a deception to take place there must be some person or persons who will have been deceived. ‘Deception’ is a word which is well understood.”<sup>87</sup>

Several reports of the Law Commission, prior to the Fraud Act 2006 was enacted, confirmed this. For example, in 1994 the Law Commission released their Consultation Paper *Criminal Law: Conspiracy to Defraud*, stating that: “it is generally accepted that for the purpose of offences of deception, a human mind must be involved.”<sup>88</sup> In another Consultation Paper *Legislating the Criminal Code: Fraud and Deception* introduced in 1999, the Law Commission observed that: “If a person uses a false coin to operate a washing machine in a launderette, there is no obtaining of services by deception because no human being is deceived.”<sup>89</sup> On another occasion, the Law Commission stated that

A machine has no mind, so it cannot believe a proposition to be true or false, and therefore cannot be deceived. A person who dishonestly obtains a benefit by giving false information to a computer or machine is not guilty of any deception offence.<sup>90</sup>

In this thesis, the Article of deception (461) under the Libyan Penal Code will be

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<sup>84</sup> (2<sup>nd</sup> edn., Sweet and Maxwell, London 1996) 143. See also J Parry and others, *Arlidge and Parry on Fraud* (3<sup>rd</sup> edn., Sweet and Maxwell, London 2007) 85.

<sup>85</sup> EA Alkhaleel *supra* 94.

<sup>86</sup> [1903] 1 CH 728.

<sup>87</sup> [1973] 3 WLR 359.

<sup>88</sup> Law Commission of England and Wales, *Criminal Law: Conspiracy to Defraud* (Law Com No 228, 1994) para 4.40.

<sup>89</sup> Law Commission of England and Wales, *Consultation Paper: Legislating the Criminal Code Fraud and Deception* (Law Com No 155, 1999) para 8.36.

<sup>90</sup> Law Commission of England and Wales, *Fraud: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Law Com No 276, 2002) para 3.34.

analysed in order to see whether the use of false credit and debit cards can be covered by this Article. The offences of using forged documents may not be applicable. Thus, the author will attempt to clarify the weakness of the offence of deception under the Libyan Penal Code and suggest that the offence of using a forged document should be revised.

### ***Appropriation***

Under theft offences in some Arabic countries the offence of theft requires that the appropriation must be executed without the consent of the victim of theft.<sup>91</sup> This raises an argument as to whether handing over the money or the goods from the machine to the illegitimate user constitutes appropriation or not. Asagheer,<sup>92</sup> for example, stated that the appropriation does not exist because the transfer of the money is done with the consent of the bank. AbduAllah Hosain Mahmood in his book, *Stealing the Information Stored in Computer*,<sup>93</sup> added that the bank programs the cash machine so as to provide the money once the card is inserted by the illegitimate user which is an indication that handing over the money by the bank is intended. However, Alkhaleel did not agree and pointed out the actus reus of the offence of theft no doubt exists provided that handing over the money is done in the manner which the bank wants.<sup>94</sup>

### ***Credit and Debit Cards are Considered as Keys***

Although some writers allege that using a false credit or debit card constitutes the offence of theft, this may be in doubt. The offence of theft was also criticised for another reason: these cards cannot be regarded as a “modified key”. Alkhaleel,<sup>95</sup> for example, stated that there is no difference between forged credit and debit cards, and a modified key used to open a door for theft purposes.<sup>96</sup> However, Asagheer<sup>97</sup> denied this

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<sup>91</sup> There are some Arabic countries which require this condition such as Egypt, Jordan and Libya.

<sup>92</sup> JA Asagheer *supra* 140.

<sup>93</sup> (3<sup>rd</sup> edn., Dar Anahda Alarabia, Cairo 2004) 240.

<sup>94</sup> Alkhaleel does not clarify this concept. However, the understanding of this condition is that the user of the false credit or debit cards must use the card according to the system of the machine. For example the user must not exceed the limit of the card and must follow the steps which the legitimate user follows. EA Alkhaleel *supra* 96, footnote 1.

<sup>95</sup> *Ibid* 97.

<sup>96</sup> He added, the Jordanian legislator did not define the key which in turn may be interpreted that these cards can be included. *Ibid* 98. See also EF Asaka, *the Criminal and Secure Protection of Credit Cards* (Dar Aljamia Aljadeeda, Alexandria 2007) 252.

view and pointed out that considering these cards as keys leads to an analogy in criminal law which is not allowed in criminal law because it interferes with the principle of legality. Mahmood<sup>98</sup> added that the modified key is the means used for entering the scene of the crime, but a credit card is not a means of entering this place. It is rather a means of committing the crime of using a false credit card.

Based on all different theories, the author will address whether the offence of theft can be applied to the use of false credit and debit cards, or not. The author will scrutinise the elements of the theft offence to see whether “appropriation” needs to be without the consent of the victim. In addition, this thesis will investigate the concept of the modified key and compare between these cards and the electronic cards which are used for opening doors, such as those used in modern hotel room doors. Furthermore, these two different views in the context of forgery law in Libya will be examined.

### ***The Possession of False Credit and Debit Cards***

As Libyan law does not recognise the possession of credit and debit cards as an offence, the researcher will address the possibility of calling the legislator in Libya to provide a new offence criminalising this act. This may face some problems such as determining the concept of the possession and what possession should be considered as a crime? The concept of possession is not easy to determine. It has posed a problem for a long time. In 1888, for example, Frederick Pollock pointed out that the word possession “is still very loose and unsettled in the books, and the reader cannot be too strongly warned that careful attention must in every case be paid to the context.”<sup>99</sup> Sealy and Hooley pointed out that “the warning given by Pollock and Wright ... remains as relevant today as it was in 1888.”<sup>100</sup>

In *United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England*,<sup>101</sup> EarJ Jowitt observed that “in truth, the English law has never worked out a completely logical and exhaustive definition of “possession”.” In addition, Andrew

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<sup>97</sup> JA Asagheer *supra* 140

<sup>98</sup> AHA Mahmood, *Stealing the Information Stored in the Computer* (3<sup>rd</sup> edn., Dar Anahda Alarabia, Cairo 2004) 240.

<sup>99</sup> F Pollock and RS Wright, *An Essay on Possession in Common Law* (Clarendon Press, Oxford 1888) 28.

<sup>100</sup> LS Sealy and RJA Hooley, *Commercial Law: Text, Cases, and Materials* (4<sup>th</sup> den., Oxford University Press, Oxford 2009) 73.

<sup>101</sup> [1952] AC 582.

Bell points out

The truth is that ‘possession’ has no single meaning: it is used in different senses in different contexts. This is perfectly reasonable, for the essence of possession is control, but the degree of control required for a particular rule will depend on the purpose of that rule. This flexibility has its price, however, the price of uncertainty.<sup>102</sup>

Similarly, Mohammed Ramadan Bara also mentioned this point by stating that although the concept of possession under criminal law is different from its concept under civil law, possession under civil law must be understood in order to determine the concept of possession in the context of criminal law.<sup>103</sup>

There are three kinds of possession, complete possession, incomplete possession and casual possession.<sup>104</sup> For example, under complete possession, the possessor has a bundle of rights and some obligations. According to AM Honore in his paper ‘Ownership’ these rights can be listed as the following:

the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary.<sup>105</sup>

Equally, M Bridge, in the book, *Personal Property Law*, pointed out possession

may be stated as consisting of two elements: first, the exercise of factual control over the chattel; and secondly, the concomitant intention to exclude others from the exercise of control.<sup>106</sup>

In this thesis, the author will suggest the guidelines of the element of the offence of the possession of false credit and debit cards, including the boundaries of the possession based on the general meaning of possession.

#### **1.4. SCOPE OF THE STUDY**

It is important to mention that this study will consider the provisions of forgery under

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<sup>102</sup> AP Bell, *Modern law of personal property in England and Ireland* (Butterworths, London 1989) 34.

<sup>103</sup> *Explanation of the Principles of the law of Drugs and Mental Influences and its amendments* (Asr Aljemaheer, Alkhoms 2003) 75.

<sup>104</sup> MR Bara, *Explanation of the Libyan Penal Law, the Special Section, Second Part, the Crimes of the Assault on Property* (The Green Company, Tripoli 2010) 41.

<sup>105</sup> In AG Guest, *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford 1961) 113.

<sup>106</sup> (3<sup>rd</sup> edn., Oxford University Press, Oxford 2002) 17.

the Libyan Penal Code. That is to say that the research will address the law in Libya. Therefore, the aim of the research is not to examine legislation and codes in other countries. However, legislation and codes in other countries such as the UK and the US which have the potential to contribute to this analysis and to help to evaluate and improve forgery law in Libya, will be addressed.

Furthermore, other private criminal laws are not considered in this study. The reason behind this is that the Libyan Penal Code is only the law which can be applied on the offences of forgery in general. The other private laws cannot be applied to credit and debit cards because these laws are introduced for a particular matter. For example, suppose that the law of identity cards<sup>107</sup> criminalises forgery happening on identity cards.<sup>108</sup> In this case this law cannot be applied to the forgery which may happen on credit and debit cards. Accordingly, these laws are outside the scope of this study. Because this thesis examines forgery law under the Libyan Penal Code, other crimes, therefore, which may be committed by using credit and debit cards such as the offence of deception or the offence of theft will not be considered, unless its examination is necessary to scrutinise forgery in the context of credit and debit cards. For instance, in Chapter Six, the offence of theft and the offence of deception are analysed. Yet, this analysis is only to show that the use of false credit or debit card does not constitute another crime under the Libyan Penal Code. In other words, the offences of theft and deception are not the aim of this study. They are only a means to explore the use of false credit and debit cards.

It is correct that this study will only focus on the forgery law in Libya not other countries, as stated. However, credit and debit cards which are the subject of forgery may be not made in Libya. They may be made in the US and used in Libya.<sup>109</sup> Or, they may be made in Libya, but in a form of a credit or a debit card originally issued in the UK.<sup>110</sup> Moreover, it may be forged by information obtained from another country.

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<sup>107</sup> Law no 18 due 1963 relative Identity Cards.

<sup>108</sup> However, forgery of identity cards is governed by general rules of forgery, namely the provisions of forgery of the Libyan Penal Code.

<sup>109</sup> Although some “plastic criminals” may prefer to use credit and debit cards “locally or regionally for convenience and predictability”. Michael Levi, ‘The Prevention of Plastic and Cheque Fraud: A Briefing Paper’ (2000) Home Office Research, Development and Statistics Directorate 1, 6

<<http://www.securitymanagement.com/archive/library/fraud1100.pdf> > accessed 3 May 2014.

<sup>110</sup> In other words, they may be similar to each other. For example, they may be made by a bank which has a branch in Libya.

Thus, this study will focus on any forgery that may happen on any credit or debit card.<sup>111</sup>

The cards considered in this study are common credit and debit cards which are made of plastic.<sup>112</sup> Thus, other kinds of devices which may be included by the definition of credit or debit card are not intended by this thesis. Furthermore, the cards considered in this study are only credit and debit cards. Therefore, cash withdrawal cards are not within the scope of this research. This is because withdrawal cards are local cards. However, if the legislator adopts the author's recommendations regarding credit and debit cards, withdrawal cards will also be covered. Withdrawal cards are not different from credit and debit cards in some aspects. For example, withdrawal cards hold visible and invisible information. They raise similar problems which credit and debit cards face in the context of forgery.

## **1.5. METHODOLOGY**

This thesis will use four methodologies to provide a clear and comprehensive analysis of credit and debit cards in order to reach a convincing conclusion which may be an effective solution to the problems which face the application of forgery law to the forgery of credit and debit cards in Libya. It will use legal analysis, black letter, case study and empirical study.

### **1.5.1. Legal Analysis**

This study will attempt to analyse legal theories relating to forgery offences of credit and debit cards. It will review literature in books and articles and reports in order to gather a cohesive picture about the problems surrounding the use of the credit and debit cards in Libya and how other legislation deals with this matter.

### **1.5.2. Black Letter**

Owing to forgery offences in Libya needing to be analysed,<sup>113</sup> the study will be based

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<sup>111</sup> Thus, Chapter Two will focus on the concept of credit and debit cards in general. It will examine many aspects of these cards including their history.

<sup>112</sup> It will be seen in Chapter Two that a credit card or a debit card may be only numbers.

<sup>113</sup> The reason for analysing forgery offences in Libya is to come to a conclusion whether law in Libya is sufficient to deal with credit and debit card forgery or not.

on analytical research. As this study examines the forgery of credit cards and debit cards, Libyan criminal law, particularly the Articles of forgery, will be analysed. For this purpose, the subject matter of forgery will be analysed in depth.<sup>114</sup> Although the thesis will analyse some other forgery laws, such as the UK Forgery and Counterfeiting Act 1981 and some provisions criminalising forgery in some States in the USA, in order to understand how the problem of credit and debit cards should be dealt with in Libya, this study is not a comparative study. These laws will be analysed or mentioned in the thesis as a means to strengthen the analysis of the offences of forgery and overcome the problems of the limited literature on the subject in Libya.<sup>115</sup>

### **1.5.3. Case Law Study**

The study of case law refers to cases and judgments relating to forgery offences. Because of a deficiency of literature dealing with forgery offences in Libya, the case study will occupy a main role in analysing forgery offences in Libya. These were addressed from different aspects, such as how judges interpret the subject matter of forgery. The study will also approach other cases which are related to the principle of legality in Libya and other countries.

### **1.5.4. Empirical Study**

This study will also use a qualitative research method, in which structured individual and focus group interviews were conducted. Because the key objective of this thesis is to explore how the subject matter of forgery in Libyan law is interpreted and whether it can be applied to the cards or not, qualitative research was thus chosen as an appropriate method. Qualitative research is significantly important because it can be an opportunity to interact with research subjects which allows them to express their fundamental values, which might be unclear to an outsider. It provides “access to the meanings people attribute to their experiences and social worlds”.<sup>116</sup>

The aim of these interviews is to build up an effective picture about forgery offences in

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<sup>114</sup> The reason behind this is that the main problem of credit and debit card forgery under the Libyan Penal Code is that the subject matter of forgery may not be able to be applied to credit and debit cards.

<sup>115</sup> HC Gutteridge, *Comparative Law: an Introduction to the Comparative Method of Legal Study and Research* (2<sup>nd</sup> edn., University Press, Cambridge 1949) 72.

<sup>116</sup>Jody Miller and Bary Glassner, "The "Inside" and "Outside": Finding realities in Interviews' in D Silverman (ed), *Qualitative Research* (3<sup>rd</sup> edn., SAGE Publications Limited, 2010) 133.



Libya, and to know the views of these experts about credit and debit cards in Libya, with regard to forgery offences. Many questions were asked.<sup>117</sup> The core of the discussion revolved around one main issue, which is whether credit cards and debit cards can be the subject matter of forgery or not.<sup>118</sup> What the researcher found most interesting was that the outcomes of the interviews were various and in particular, there were divergences of views between the interviewees on the subject matter of forgery under Libyan criminal law, and whether it can apply to cover forgery to a card made of plastic that holds electronic information.

The interviews were conducted in Libya. More than 40 interviews were conducted among, scholars, judges, prosecutors, lawyers, and solicitors. The interviews were conducted in different cities in Libya. They were conducted in Tripoli (the capital city of Libya), Alkhoms (where the researcher lives) and Mosrata (the third city in Libya). Some interviews were to have been conducted in Benghazi because it is the second city in Libya and there are many experts in this city whose views may inform this research. However, the situation in Libya made this desire difficult to be achieved for two reasons. First, the limit of the time of the field study (the interviews should have been finished within two months).<sup>119</sup> Second, the distance between Tripoli and Benghazi is too long (1000 km) and the transportation was not available and the way was not secure.<sup>120</sup>

Some interviews were recorded although some interviewees (particularly judges and prosecutors) refused to allow the researcher to record the interviews.<sup>121</sup> Recording the interviews was very useful and helped to avoid the possibility that some information might be lost. Therefore, the records could be transcribed in the comfort of the researcher's own home. However, with respect to those who did not like their

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<sup>117</sup> However, some interviews had to be stopped because the interviewees did not have sufficient time.

<sup>118</sup> This issue, as will be seen, is the main problem of this thesis.

<sup>119</sup> February and March 2012.

<sup>120</sup> This was because the fighting in Libya had not finished.

<sup>121</sup> For example, Jomaa Alfetoory, Sameha Abuzaid and Hatem Athelb refused for their interviews to be recorded for their personal reasons. Interview with Jomaa Alfetoory, Justice, Civil Chamber, Libyan Supreme Court (Tripoli, March 2012); Interview with Sameha Abuzaid, Prosecutor, North Tripoli Prosecution Office (Tripoli, February 2012); Interview with Hatem Athelb, Prosecutor, North Tripoli Prosecution Office (Tripoli, February 2012).

interviews to be recorded, notes were taken.<sup>122</sup> This negatively affected the researcher who could not always get to put all of the questions which were prepared.<sup>123</sup> In addition, some interviewees did not wish to be named in the thesis for personal reasons. However, the vast majority of them allowed the author to mention their names.

## 1.6. THE RESEARCH QUESTIONS

This study attempts to answer one main question and some sub-questions:

- Main question:

The main question, which this study attempts to answer, is that, to what extent can the Libyan Penal Code, particularly the provisions of forgery offences deal effectively with credit and debit card forgery?

- Sub-questions:

In order to answer the main question of this thesis, some sub-questions must be answered.

- 1) Could the forgery provisions of the offence of forgery deal with the alteration of information on credit cards and debit cards?<sup>124</sup>
- 2) Could the offence of using forged documents<sup>125</sup> deal with the use of false credit and debit cards?
- 3) Should the possession of the false cards deserve to be a crime under Libyan Criminal

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<sup>122</sup> For example, the Justice Jomaa Alfetoory preferred for his voice not to be recorded. Hence, the researcher made notes instead. Interview with Jomaa Alfetoory, Justice, Civil Chamber, Libyan Supreme Court (Tripoli, March 2012).

<sup>123</sup> Some interviewees refused to finish the interviews because they did not have sufficient time although they accepted to have interviews and did not state that they did not have time at the beginning of the interviews. For example, the judge (interviewee number 44) did not finish all questions because he had no time to do so. Therefore, the researcher had to respect that and finish the interview. Interview with Unnamed, No 44, Judge, Alkhoms Court of First Instance (Alkhoms, February 2012).

<sup>124</sup> This question will be explored in three Chapters, Three, Four and Five. This is an important question. The reason why this question is important is because it deals with a problem relating to all other questions, which is the subject matter of forgery under the Libyan penal Code.

<sup>125</sup> The offence of using a forged document falls under Article 347 of the Libyan Penal Code. This will be covered in Chapter Six.

law?<sup>126</sup>

4) Could criminal law in Libya generally deal with credit and debit card forgery?

### **1.7. The TIME LIMIT**

This thesis was supposed to be finished on 31 October 2012. However, because this study addresses forgery in Libya and the author who is writing this thesis is from Libya, his work has been affected by the conflict in Libya. The revolution in Libya had lasted for more than eight months (from 17 February to the end December 2011), which was not a short period. This period of time has affected the research by delaying interviews etc.<sup>127</sup>

### **1.8. SOME RELEVANT FEATURES OF THE LIBYAN LEGAL SYSTEM**

Two matters should be explained because they provide a clearer view about two themes which may be in the reader's mind throughout the reading of this thesis. These two matters are the principle of legality and the position of the legislator in Libya.

#### **1.8.1. The Principle of Legality**

As will be seen later, the main argument between scholars over forgery which happens to credit and debit cards, is whether these cards can be the subject matter of forgery or not.<sup>128</sup> This argument relies on the fact that the principle of legality stands against the application of the provisions of forgery to the alteration happening on credit and debit cards.<sup>129</sup> The explanation of this is that Libyan forgery provisions use two words for mentioning the subject matter of forgery, "paper" and "document". Owing to credit cards and debit cards being made of plastic, not paper, and because they hold two kinds

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<sup>126</sup> Although there is no Article under the Libyan Penal Code which deals with the possession of false credit or debit cards openly, it will be explored whether there is any Article that may be applied to some of the aspects of the possession of false credit and debit cards under the Libyan Penal Code.

<sup>127</sup> The study is about Libyan forgery law, so the researcher had to conduct some interviews. Although the interviews were conducted after the revolution ended (from February to the end of March 2012), the country was not completely secure which affected the time of the student.

<sup>128</sup> This will be covered in Chapter Four.

<sup>129</sup> JA Asagheer *supra* 120. As will be seen later, the vast majority of the interviewees were of the opinion that applying the provisions of forgery under the Libyan Penal Code to forgery happening on credit and debit cards breached the principle of legality.

of information, which in this study is referred to as visible and invisible,<sup>130</sup> it can be argued that these cards cannot be the subject matter of forgery.<sup>131</sup> The reason behind this is that the interpretation of these words “paper and document” cannot lead to the application of forgery provisions to these cards because of the principle of legality.<sup>132</sup> Thus, when the argument about the principle of legality is discussed,<sup>133</sup> it will be evident what the problem of the principle of legality is, in the terms of this study.

The law in Libya, which is a civil law country,<sup>134</sup> is made by the legislative power.<sup>135</sup> The judge in Libya is restricted in criminal matters by the principle of legality which is one of the significant principles of justice.<sup>136</sup> This principle which is expressed in Latin as *nullum crimen sine lege, nulla poena sine lege* generally means: no crime, no punishment without law<sup>137</sup>. In other words, it means that no person can be accused or punished without “a prior legislative enactment” that precisely defines the crime and the punishment in question.<sup>138</sup> Legality in Libyan criminal law had been guaranteed by the

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<sup>130</sup> Visible information is the information which is on the surface of the card and invisible information is the information stored on the magnetic strip or chip.

<sup>131</sup> Chapter Two will examine the information on credit and debit cards. Is it the same or is there a difference between these two kinds of information? It will also examine what the impact of this difference (if there is a difference) on the forgery which may happen on credit and debit cards.

<sup>132</sup> This will be explored in detail later.

<sup>133</sup> The principle of legality will be mentioned in many Chapters because it is a fundamental issue in this thesis.

<sup>134</sup> Civil law system means that the source of criminal law is codified law. In other words, the law must be written so the judge only applies the law and by interpreting it. This is different from common law in which judges rely on cases of a higher court. The French legal system is an example of the civil law system. For more details about the civil law legal system, see Joseph Dainow, ‘Civil Law and the Common Law: Some Points of Comparison’ (1966) 15 *The American Journal of Comparative Law* 419, 424.

<sup>135</sup> Therefore, the legislator in Libya should be determined, which will be covered in this Chapter later.

<sup>136</sup> This principle is confirmed in most of the human rights instruments, as one of the fundamental rights and as a self-evident principle of justice. See for example Declaration of the Rights of Man and of the Citizen, DRMC, 1789; The Universal Declaration of Human Rights, UDHR, 1948; The European Convention of Human Rights, ECHR, 1950; The International Covenant on Civil and Political Rights, ICCPR, 1966.

<sup>137</sup> Aly Mokhtar, ‘Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects’ [2005] *Statute Law Review* 41; Paul H Robinson, ‘Fair Notice and Fair Adjudication: Two Kinds of Legality’ (2005) 154(2) *University of Pennsylvania Law Review* 335, 336. Although the principle of legality is defined in this way, Arazgy suggests that legality does not only mean no crime and no penalty without law. He points out it means no crime, no punishment and no criminal procedure without law. Arazgy states that courts cannot operate their functions unless there are rules which determine the way that courts walk along with. Thus, the principle of legality should be stated so as to include criminal procedure. I Arazgy, *Lectures in Criminal Law: General Part* (Maktabat Tripoli Alilmia Alaalemia, Tripoli 2013) 31.

<sup>138</sup> Paul H Robinson *supra* 336. Herring clarifies this principle by stating that “This is the principle that criminal offences should be clearly enough defined to enable people who wish to be law abiding to live their lives confident that they will not be breaking the law” J Herring, *Criminal Law: Text, Cases, and Materials* (4<sup>th</sup> edn., Oxford University Press, New York 2010) 11. This is what was confirmed in

first constitution in Libya.<sup>139</sup> Although it was abolished after the Libyan regime was changed in 1969<sup>140</sup> the previous Libyan Constitution 1951<sup>141</sup> was the first written statement which guaranteed the principle of legality in Libya, after independence.<sup>142</sup> Article 17 of the abolished Libyan Constitution stated that

لا جريمة ولا عقوبة إلا بناء على قانون ولا عقاب إلا على الأفعال اللاحقة لصدور القانون الذي ينص عليها، كذلك لا توقع عقوبة أشد من العقوبة التي كانت نافذة وقت ارتكاب الجريمة.<sup>143</sup>

This Article is translated as: “No crime and no penalty except they were prescribed by law; and no penalty can be applied except to acts proscribed by law; in addition, no heavier penalty can be inflicted than the penalty which was applied at the time the crime was committed.”<sup>144</sup> This principle was confirmed by the Libyan Penal Code in 1953. The Libyan Penal Code assured this principle in its first Article. It provides that:

لا جريمة ولا عقوبة الا بنص.<sup>145</sup>

This is (literally translated): “No crime and no punishment can be without a text.” The meaning of this Article is that no act can be considered as a crime except the acts which are prohibited by a text in the law. Moreover, no punishment can be applied by a judge except the punishment which set out in a text in the law.<sup>146</sup> The word “text” means a legal provision. It is submitted that the legislator realised that this principle is, with respect to criminal law, a fundamental matter which is provided for in the first Article

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*Kafkaris*. In this case, the court held that: “...only the law can define a crime and prescribe a penalty.” *Kafkaris v Cyprus* (2009) 49 EHRR 35.

<sup>139</sup> Libyan Constitution 1951.

<sup>140</sup> The regime in Libya changed on first of September 1969 by some officers (the Free Unitary Officers) working in the Libyan Army. Libya: Our Home, ‘Libya: the 30th Anniversary of the Libyan Revolution’ <<http://www.libya-watanona.com/libya/sept.htm>> accessed 10 June 2013.

<sup>141</sup> Libyan Constitution 1951.

<sup>142</sup> Libya had its independence in 1951. William H Lewis and Robert Gordon, ‘Libya after Two Years of Independence’ (1954) 8(1) Middle East Journal 41, 42; Ann Dearden, ‘Independence for Libya: The Political Problems’ (1950) 4(4) Middle East Journal 395; Ghazi Gheblawi, ‘Libyan re-independence and reclaiming the revolution’ (2011) 2 Heinrich Böll Stiftung 188; Libya: Our Home, ‘Libya: The Italian Occupation and the Libyan Resistance’ <<http://www.libya-watanona.com/libya/resist.htm>> accessed 10 June 2013.

<sup>143</sup> The Libyan National Assembly drafted the Constitution and passed a resolution which was accepted in a meeting held in the city of Benghazi on Sunday, October 7<sup>th</sup> 1951(6<sup>th</sup> Muharram 1371). Libyan Constitution 1951.

<sup>144</sup> The Article was translated from the Arabic language by the author. Furthermore, Article 16 can also embody the principle of legality. It stated that: “It is not allowed that any human be arrested, detained or searched except in the cases prescribed by law, and it is never allowed that anyone be tortured or be subject to degrading punishment.” *Ibid*.

<sup>145</sup> Libyan Penal Code 1953.

<sup>146</sup> This Article was translated from the Arabic language by the author.

in the Code.<sup>147</sup>

The interesting thing in this Article is that the law must be in written form. This can be understood from the word text. The “text” in the context of Article 1 of the Libyan Penal Code<sup>148</sup> means a legal provision in written form. This means that the written law that provides a crime or imposes a punishment is the only law which can be compatible with the principle of legality. Thus, no rules such as the customary rules, or social rules, can be a source of law, unless it is put in a written form by the Legislature.<sup>149</sup>

Article 1 of the Libyan Penal Code is different from Article 17 of the amended Constitution. Whereas the Constitution required law in general (whether it is unwritten such as customary rules which may be adopted by the judge in civil matters, or it is written such as law provided in written form such as the Libyan Penal Code<sup>150</sup>), the Penal Code requires a text law (law must be written). The reason of this difference may be because Article 17 in the Constitution provided the principle of legality as a general rule for all laws, for example, civil law, criminal law and labour law. Legality in criminal law is not the same as it is in other laws. For example, in civil law, a judge can use analogy to impose civil liability<sup>151</sup> if there is no law governing a new fact and can use wide interpretation<sup>152</sup> if a provision is ambiguous. Consequently, the judge is not restricted by the strict principle of legality in civil law matters.<sup>153</sup> This is not the case in criminal law. The judge in criminal matters is restricted by the text. Hence, if there is a new act which may be socially unacceptable, before the judge, the judge cannot create a new law criminalising this new act.<sup>154</sup> Furthermore, the judge is not allowed to interpret

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<sup>147</sup> Thus, it is important to be considered in terms of addressing credit and debit cards.

<sup>148</sup> *Ibid.*

<sup>149</sup> Therefore, even though credit and debit card forgery is an unethical act, the judge cannot consider it as a crime if there is no text in law stating it is so.

<sup>150</sup> Libyan Penal Code 1953.

<sup>151</sup> On 28 November, the Supreme Court held that: “The judge can use the analogy to determine what is the meaning of the word “member” provided in the law of Audit Bureau if the legislator has no clear meaning of this word.” *Almahkama Alolia* ‘Libyan Supreme Court’, Administrative Appeal, No.1, Year 21, 28/11/1974, *Majalet Almahkama Alolia* (January 1975) Year 11, Vol.2, 41.

<sup>152</sup> This was confirmed by the Libyan Supreme Court on 22 June 1971. The court held that: “The court dealing with the case had the complete authority to interpret the terms of contracts as the court thinks the interpretation is more appropriate to the intention of the contract parties.” *Almahkama Alolia* ‘Libyan Supreme Court’, Civil Appeal, No.5, Year 18, 22/6/1971, *Majalet Almahkama Alolia* (October 1971) Year 8, Vol.1, 194.

<sup>153</sup> The civil judge in Libya can use customary rules if he does not find any provision in the law to apply.

<sup>154</sup> Therefore, it can be argued that altering the invisible information on credit and debit cards is a new act which may need a new law provided by the legislator. This will be discussed later in detail.

the vagueness widely or use the analogy, as will be seen later.<sup>155</sup>

However, this argument does not harmonise with the Constitutional Declaration which was established by the new legislature after the revolution in Libya on 3 of August 2011.<sup>156</sup> In Article 31 of this constitutional declaration, the new legislator stated that

لا جريمة ولا عقوبة الا بنص.<sup>157</sup>

This is the same as Article 1 of the Libyan Penal Code, which states: “No crime and no punishment can be without a text.” Therefore, the judge in Libya now must be consistent with this constitutional rule and must not create any new crime or punishment which is not made by the legislator in written form. The criminal judge must interpret criminal matters according to the principle of legality.<sup>158</sup>

### ***Rules of Interpretation***

Because the Libyan Penal Code has no exact interpretative rules which must be followed, the general civil law rules must be applied. This is because the general rules of civil law in Libya are considered as general guidelines which can be applied to all other branches of law, unless the law<sup>159</sup> provides otherwise.<sup>160</sup> Article 1(1) of the Libyan Civil Code provides that

1- تسري النصوص التشريعية على جميع المسائل التي تتناولها هذه النصوص في لفظها أو في فحواها.<sup>161</sup>

It is translated as: “The provisions of the enactments shall apply to all matters which

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<sup>155</sup> As will be seen, it can be argued that forging the information on credit and debit cards does not fall under forgery provisions of the Libyan Penal Code because there is vagueness whether the words “paper” and “document” can be interpreted so as to cover these cards. This point will be shed light on in Chapter Four.

<sup>156</sup> Libyan Constitutional Declaration 2011.

<sup>157</sup> *Ibid.*

<sup>158</sup> This fact was confirmed by the House of Lords in *Jones*.<sup>158</sup> It stated that

... the court no longer had power to create new criminal offences; ... it was for Parliament and not for the executive or judges to determine whether conduct not previously regarded as criminal should be treated as attracting criminal penalties, and, therefore, statute was the sole source of new offences.

See *Regina v Jones (Margaret) and others* (2006) 2 WLR 772.

<sup>159</sup> The law which needs to be interpreted.

<sup>160</sup> MR Bara, *Explanation of the General Rules of the Libyan Penal Code, First Part: the General Rules* (The Green Company, Tripoli 2010) 29.

<sup>161</sup> Libyan Civil Code 1954.

these provisions deal with in letter or spirit.”<sup>162</sup> This means that the interpretation of the provisions of the criminal law must first be literally interpreted. If this approach to interpretation is not effective (because the words are vague), the judge can resort to the logical manner in a way which respects the principle of legality.<sup>163</sup> Therefore, it can be stated that the judge in Libya has subsequently two ways of interpreting criminal laws: literal interpretation or logical interpretation (provided that this must be in the light of the principle of legality).

The *Literal* interpretation is also called the narrow approach.<sup>164</sup> This type of interpretation means that the judge has to give the words of the Act their ordinary and natural meaning irrespective of whether the result is reasonable or not.<sup>165</sup> Therefore, the judge cannot give it another meaning, other than the literal one, even if the interpretation leads to an illogical end. Following this approach means that the intention of the legislature can be achieved.

The advantage of this approach to statutory interpretation can be accepted as recognition of the primacy of the legislator and the prevention of the domination of the judge.<sup>166</sup> As a result, the judiciary cannot usurp the authority of making-law: the legislature will be the only institution which takes control of the legislation-making function. In other words, the principle of legality will be respected by following this approach so that the judge does not give any odd interpretation to the Articles of forgery. This interpretation will not be unacceptable in the context of the principle of legality.<sup>167</sup>

If the words are not sufficiently clear, the judge interprets them logically.<sup>168</sup> This means that the judge can ignore the literal interpretation and interpret the words of criminal law according to the rules of logic. However, the rule of logic is not, as will be seen

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<sup>162</sup> The Article was translated from the Arabic language by the author.

<sup>163</sup> MR Bara, *Explanation of the General Rules of the Libyan Penal Code, First Part: the General Rules supra* 29.

<sup>164</sup> I Arazgy *supra* 47.

<sup>165</sup> C Elliott and F Quinn, *English Legal System* (11<sup>th</sup> edn., Pearson Education Limited, London 2010) 54; M Zander, *The Law-Making Process* (6<sup>th</sup> edn., Cambridge University Press, Cambridge 2004) 130.

<sup>166</sup> I Arazgy *supra* 48.

<sup>167</sup> Following this approach results in the fact that forgery offences under Libyan law may not be able to be applied to forgery of credit and debit cards, as will be seen latter.

<sup>168</sup> However, as Asagheer argues, law does not always follow the rules of logic. JA Asagheer *supra* 120. This will be explored in depth in Chapter Four.



later in Chapter Four, sometimes compatible with the principle of legality.<sup>169</sup> Therefore, the judge must make sure that his logical interpretation does not interfere with the principle of legality. For this purpose, the judge cannot use analogy.<sup>170</sup> For instance, drinking alcohol in Libya is a crime under alcohol laws.<sup>171</sup> Suppose that taking drugs in Libya is not an offence.<sup>172</sup> In this case, the judge would not be allowed to use analogy and consider taking drugs as a crime and punish anyone who takes drugs by applying the alcohol law by analogy. Although both drinking alcohol and taking drugs leads to the same consequence (which is that the person will lose the ability to control himself) the principle of legality prevents the judge extending the reach of the alcohol law.

Additionally, the rule of logic requires the judge to avoid wide interpretation.<sup>173</sup> Broad interpretation may not be easy to define. However, according to Bara, the interpretation is wide when the judge gives the words of an Article a meaning which it appears that the words do not bear, because the legislator used words which do not reflect all the meaning which he intends.<sup>174</sup> That is to say the extensive interpretation is the meaning which the legislator wills, but he does not express it perfectly, so the judge does.<sup>175</sup> Bara does not see that criminal matters must be narrowly interpreted. However, as Abooda points out, criminal law in Libya has to be interpreted and read narrowly.<sup>176</sup> It should cover only the areas where it is obvious that the legislature intended it to cover.<sup>177</sup>

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<sup>169</sup> As Salem argues, it is not logical to consider the alteration which happens on visible information as forgery falling under the provisions of forgery of the Libyan Penal Code and not considering the alteration which happens on invisible information on the cards as forgery. He argues that the alteration whether it happens on visible or invisible information should be treated the same. However, if this is agreed, it would be against the principle of legality, as will be seen in Chapter Four. See O Salem *supra* 32.

<sup>170</sup> *Almahkama Alolia* 'Libyan Supreme Court', Civil Appeal, No.98, Year 23, 26/10/1976, *Majalet Almahkama Alolia* (April 1977) Year 13, Vol.3, 154; AA Abooda, *The Basics of the Libyan Positive Law: Entrance to the Science of Law* (4<sup>th</sup> edn., Almarkz Alkaomi Llbuhooth Oa Adirasat Alilmia, Tripoli 2003) 355.

<sup>171</sup> Law no 4 due 1423 relative Prohibition Drinking Alcohol

<sup>172</sup> Taking drugs is a crime under the law of drugs. See Law no 7 due 1990 relative Drugs and Mental Influences.

<sup>173</sup> *Almahkama Alolia* 'Libyan Supreme Court', Civil Appeal, No.98, Year 23, 26/10/1976, *Majalet Almahkama Alolia* (April 1977) Year 13, Vol.3, 154.

<sup>174</sup> MR Bara, MR Bara, *Explanation of the General Rules of the Libyan Penal Code, First Part: the General Rules* *supra* 31.

<sup>175</sup> *Ibid.*

<sup>176</sup> AA Abooda *supra* 355.

<sup>177</sup> In this meaning, see M Jefferson, *Criminal law* (11<sup>th</sup> edn., Pearson Education Limited, 2013) 20; A Ashworth, *Principles of Criminal Law* (6<sup>th</sup> edn., Oxford University Press, New York 2009) 68.

It is submitted that what Abooda states is more acceptable because it is in favour of the accused.<sup>178</sup> Interpreting criminal law widely may grant the judge power that he should not have. It may provide him the domination upon freedom and confer an authority which more properly belongs to the legislature power. Therefore, for the citizen, criminal matters should be interpreted narrowly, especially if there is doubt and the words of the law are capable of more than one interpretation.<sup>179</sup> This was confirmed by the Libyan Supreme Court. For example, on 26/10/1976,<sup>180</sup> the Libyan Supreme Court held that: “The principle of interpreting criminal text is that wide interpretation and analogy is not allowed.”<sup>181</sup> In another decision held on 4/1/1972,<sup>182</sup> the court stated that: “The acceptable principle of interpretation of criminal provisions (when there is an ambiguity in an Article) is that the judge must be aware that his interpretation must not be against the interests of the accused.”<sup>183</sup>

It is clear from these discussions that interpreting criminal matters should be consistent with the principle of legality which is a mandatory principle in Libyan criminal law. The judge must interpret criminal law narrowly and in favour of the accused. In addition, the interpretation must avoid criminalisation by analogy. Therefore, the judge must take this principle into account when the provisions of forgery are to be construed. The subject matter of forgery should be read in a way that it does not lead to a wide statutory construction. Furthermore, analogy should not be used by the judge when the words of the Libyan Penal Code are applied to the forgery of credit and debit cards. This includes the use and the possession of false credit or debit cards.<sup>184</sup>

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<sup>178</sup> Strict interpretation can be understood as “close questions as to the coverage of a criminal statute are to be resolved in the favor of the accused.” See Sam J Friedman, ‘Criminal Law – Strict Construction of Penal Statute’ (1960) 20(3) Louisiana Law Review 600, 601.

<sup>179</sup> Therefore, it can be argued that the subject matter of forgery under the Libyan Penal Code should not be interpreted widely so as to not cover credit and debit cards.

<sup>180</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Civil Appeal, No.98, Year 23, 26/10/1976, *Majalet Almahkama Alolia* (April 1977) Year 13, Vol.3, 154.

<sup>181</sup> This text was translated from the Arabic language by the author.

<sup>182</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.131, Year 18, 4/1/1972, *Majalet Almahkama Alolia* (April 1972) Year 8, Vol.3, 122. Similarly, in *Sweet v Parsley*, Lord Reid observed that: “It is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.” *Sweet v Parsley* [1970] AC 132.

<sup>183</sup> This text was translated from the Arabic language by the author.

<sup>184</sup> As will be discussed later in Chapters Four, Six and Seven.

### 1.8.2. Who is the Legislator in Libya

The intention of the legislator in Libya plays an important role in the discussion of the interpretation of the provisions of the forgery offences of the Libyan Penal Code. The argument lies in the supposition that the application of the Libyan criminal law to credit and debit card forgery depends on the intention of the legislator. If the legislator intended these cards to be covered, law can be applied to the forgery happening to the cards. Therefore, it is submitted that clarifying who the legislator is in Libya will provide more clearness so the thesis can be more evident. Hence, the legislator must be clarified.

The legislator in Libya has passed many changes since 1951 when Libya became an independent country.<sup>185</sup> The Legislator was different in 1951 from 2014.<sup>186</sup> However, during this period from 1969 to 2014, the power of the legislator had been changed more than once. When Libya acquired its independence, a new Constitution was established.<sup>187</sup> This Constitution divided the powers into the three known powers, legislative, judicial and executive powers. The Constitution put the legislative power in the hand of the King of Libya<sup>188</sup> and the Parliament.<sup>189</sup> The King was the one who provided laws, and they were confirmed by the Parliament afterwards. This can be found in the words of Article 41 of the Constitution.<sup>190</sup> This Article states in Arabic language that

السلطة التشريعية يتولاها الملك بالاشتراك مع مجلس الأمة. ويصدر الملك القوانين بعد أن يقرها مجلس الأمة على الوجه المبين في هذا الدستور.<sup>191</sup>

The literal translation of this Article is that: “The power of the legislation is held by the King with the participation of the Nation Committee.<sup>192</sup> In addition, the King provides

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<sup>185</sup> As has been mentioned, Libya was occupied by Italy. Before independence in 1951, Italian criminal law was applied to forgery offences in Libya. AG Adahabi *supra* 115.

<sup>186</sup> The similarity between 1951 and 2014 in the context of the power of the legislation authority is that the legislator in the two stages is the parliament. However, between these two stages the legislation power was vague.

<sup>187</sup> Libyan Constitution 1951.

<sup>188</sup> At that time, Libya was monarchist regime. This was confirmed by Article 2 of the constitution. It stated that: “Libya is a monarchist country and its regime is Parliamentary system. Its name is Kingdom of Libya”. *Ibid.*

<sup>189</sup> All the members of the Parliament were elected.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> The Nation Committee means the Parliament.

laws after they be agreed by the Nation Committee, as it is clarified in this Constitution.”<sup>193</sup> This state lasted until 1969.<sup>194</sup>

In 1969, after the revolution in Libya, the power of the legislature changed. The Revolutionary Command Council<sup>195</sup> (Al-Gaddafi and his companion officers) substituted for the parliament which was abolished afterwards. Consequently, the source of law became the Revolutionary Command Council. In other words, a new legislator appeared. On the second of March 1977, a declaration was made<sup>196</sup> whereby the power of the legislature became the hand of the people.<sup>197</sup> Therefore, when a new law was intended to be established, a draft of it was distributed to public conferences in all the cities in Libya. This draft was discussed in a conference known as The Basic Populist Conference (المؤتمر الشعبي الأساسي) and if it was agreed by the people, this draft would be transferred to the General Peoples Conference (مؤتمر الشعب العام), which was considered as the high department of the legislature’s power. This power could not introduce a new law without the consent of the local conferences in the cities. This state had continued until the regime ended in 2011 and a new system was established.

On 23 of October 2011 after the announcement that Libya has become free from Al-Gaddafi’s regime was made, the National Transitional Council (المجلس الإنتقالي) had become the representative of the legislative power in Libya. This Council established many laws such as the 37/2012 Act<sup>198</sup> which was overturned by the Libyan Supreme Court, on 14/7/2012, because it was not constitutional.<sup>199</sup> This Council finished its work and was replaced by an elected Council. On the 8th of August 2012, the power of the government was officially transferred to an elected Parliament, the General National

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<sup>193</sup> The Article was translated from the Arabic language by the author.

<sup>194</sup> For more details about the 1951 Libyan Constitution, see Ismail R Khalidi, 'Constitution of the United Kingdom of Libya: Background and Summary' (1952) 6(2) Middle East Journal 221.

<sup>195</sup> For more details about the Revolutionary Command Council, see Nathan Alexander, 'Libya: the Continuous Revolution' (1981) 17(2) Middle Eastern Studies 210.

<sup>196</sup> This declaration is known as the Declaration of the Establishment of the Authority of the Nation. It was made by the Colonel Moamar Al-Gaddafi by which the name of Libya became *Aljamahiria Alarabia Alebea Ashabia Aleshterakia*. Declaration of the Establishment of the Authority of the Nation 1972.

<sup>197</sup> This was another point declared by Colonel Moamar Al-Gaddafi in the Declaration of the Establishment of the Authority of the Nation. *Ibid*.

<sup>198</sup> Law no 37 due 2012 relative Glorification of Al-Gaddafi.

<sup>199</sup> Abuhamra states that this law is not consistent with the principle of legality because it is ambiguous. This law used loose words such as ‘insulting the government’. Alhady Abuhamra, ‘Comment on the Law 37 due 2012’ [2012] the Libyan Nation.

<[http://www.alwatan-libya.com/mobile\\_more.php?newsid=21753&catid=22](http://www.alwatan-libya.com/mobile_more.php?newsid=21753&catid=22)> accessed 1 January 2013.

Conference (المؤتمر الوطني العام), also known as the General National Congress.<sup>200</sup> This Parliament now has the power of the legislature. Hence, when the legislator is mentioned in the thesis, the meaning of the legislator is dependent on the period which is being discussed by the researcher.

## 1.9. THE STRUCTURE OF THE THESIS

After the background to this thesis, along with its aims and what it hopes to achieve, have been described in this first Chapter, a brief account will be given to the contents of each Chapter. The thesis is divided into 8 Chapters as follows:

### **Chapter Two: Credit and Debit Cards: *Meaning and Concept***

This Chapter provides an overview of credit and debit cards. Credit and debit cards will be explored. This Chapter will define these cards and explain their purpose. In addition, it will provide a brief review of their history, when they first emerged whether in Libya, or in other countries around the world. Furthermore, this Chapter will emphasise the information on the cards. This review is essential as it introduces the fundamental issue of credit cards and debit cards. This Chapter provides the basis for the discussion of the information which is contained in the cards in the following Chapters.

### **Chapter Three: The Subject Matter of Forgery under Libyan Penal Code**

In Chapter Three, the subject matter of forgery under the Libyan Penal Code will be explored, in particular the meaning of “document” and “paper”. The Chapter will also examine why did the legislator use the two words “document” and “paper” to indicate the subject matter of forgery. In addition, the justification of differentiation between formal document and customary document will be explored in this Chapter.<sup>201</sup>

### **Chapter Four: Credit and Debit Cards: Can they be the Subject of Forgery under the Libyan Penal Code?**

In Chapter Four the discussion centres on credit and debit cards to find out whether they can be the subject matter of forgery under Libyan criminal law. That is to say can

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<sup>200</sup> The General National Conference-Libya < <http://www.gnc.gov.ly/> accessed 1 January 2013.

<sup>201</sup> Therefore, credit cards and debit cards can be classified customary and formal. This will be seen in Chapter Four. Exploring the cards whether they are customary or formal is very fundamental because it provides the ability to the author to distinguish which article of forgery is potentially applicable. There is a difference between the provisions of forgery which are applied to the offences of forgery whether the subject matter of forgery is formal or informal (customary).

forgery law in Libya be applied to these cards or not? As will be seen, there is no consensus between the scholars that credit cards and debit cards are documents. Some, Egyptian and Jordanian scholars such as Asagheer<sup>202</sup> and Alkhaleel,<sup>203</sup> argue that these cards cannot be the subject matter of forgery. However, others, such as Salem who is also Egyptian,<sup>204</sup> argue they can. In this Chapter, the two conflicting views revolving around this matter will be explored.

### **Chapter Five: Changing the Information on Credit and Debit Cards and the Actus Reus of Forgery**

Chapter Five examines whether the actus reus of the forgery offences can apply to the alteration of the information on the cards. In this Chapter, the methods of altering the information on the cards will be explored. Changing the information on the cards is not the same as changing the information on the ordinary document which is made from paper. Hence, this Chapter will explain the difference and examine whether this difference causes a problem, in terms of the application of forgery law, or not. Furthermore, this Chapter will discuss the question of *use* of a forged document and whether it is a condition or an element of liability.

### **Chapter Six: Using False Credit and Debit Cards**

This Chapter will investigate the use of *false* credit and debit cards. In Chapter Six, it will be seen that false cards can be used for withdrawing money from cash machines or from banks. They also can be used for obtaining goods or money from the service providers. This Chapter addresses whether this use can be covered by forgery offences or not. It will also demonstrate other potential Articles which may be relatively applied to the misuse of these cards, for example Article 446(1) and Article 461 of the Libyan Penal Code.<sup>205</sup> In this Chapter, issues to be explored will include, for example, the issue of the *subject matter of* forgery. Another issue to be considered will be the interpretation of the word “forged” under Article 347 of the Libyan Penal Code.<sup>206</sup>

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<sup>202</sup> JA Asagheer *supra* 121.

<sup>203</sup> EA Alkhaleel *supra* 68.

<sup>204</sup> O Salem *supra* 32.

<sup>205</sup> Libyan Penal Code 1953.

<sup>206</sup> It will be seen that Article 347 of the Libyan Penal Code requires a forged document to be used so the Article can be applied. This word may pose a problem because credit and debit cards may not be forged. This will be addressed in detail in Chapter Six.

### **Chapter Seven: Possession of False Credit and Debit Cards.**

The *possession* of a false document is not a forgery offence in Libya. Hence, in Chapter Seven, the argument will revolve around whether criminalising this act is necessary (as it is in other countries such as the UK) or whether there is no need for it to be criminalised. In addition, this Chapter will approach the elements of the offence of possession of false credit and debit cards as a suggested offence. It will provide guidelines for the legislator to follow.<sup>207</sup>

### **Chapter Eight: Conclusion**

Finally, Chapter Eight summarises and concludes the study. It answers the study questions. It also provides recommendations for improving the provisions of forgery to deal effectively with credit and debit card forgery, so the new legislature in Libya may be stimulated to change the forgery Articles so that comprehensive legislative coverage is provided for. In this way, the new methods of payment which these payment cards bring<sup>208</sup> will be aligned to relevant offences.

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<sup>207</sup> Thus, if the forgery law is reviewed, these guidelines may help to shed light on this problem.

<sup>208</sup> Criminalising the offences of forgery of credit and debit cards may cover other bank cards such as cheque and withdrawal cards. The reason behind this is that these cards have the same characters. For instance, they are made from the same material, namely plastic.

## CHAPTER TWO

### CREDIT AND DEBIT CARDS: MEANING AND CONCEPT

#### 2.1. INTRODUCTION

This Chapter provides an overview of credit and debit cards. It explores the meaning of credit and debit cards and the information which they hold. Furthermore, it examines the history of these cards.

One reason for including this Chapter in this thesis is to provide a clear idea about credit and debit cards. Another reason is that writing about the information which the cards hold illustrates the problem of whether the cards can be the subject matter of forgery or not. As will be seen, there are arguments against the application of the subject matter of forgery to credit and debit cards<sup>1</sup> because the cards hold two kinds of information, visible and invisible.<sup>2</sup> It is contended that invisible information may not be the subject matter of forgery in Libya.<sup>3</sup> As a result, the categorisation of the information which is on the card should be clarified. To clarify this information, the explanation of this information will require the reader to understand the difference between the two kinds of information that is included on the card.

Information can be divided into two types, visible and invisible. The visible information is placed on the surface of the card. The other information is electronic information which is stored on the magnetic strip and the chips<sup>4</sup> which are placed on the card.<sup>5</sup> This way of placing the invisible information on the card raises difficulties for the application of forgery law in Libya to forgery which may happen using such cards.

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<sup>1</sup> For example, credit and debit cards are not document. JA Asagheer, *The Criminal and Civil Protection of Magnetic Credit Cards: a Practical Study in French and Egyptian Judicature* (Dar Anahda Alarabia, Cairo 2003) 121. These arguments will be explored in Chapter Four.

<sup>2</sup> This will be explained in detail in this Chapter.

<sup>3</sup> It will be seen in the conclusion of Chapter Four that the subject matter of forgery under the Libyan Penal Code does not cover the invisible information, namely the magnetic strip and chip because this invisible information does not form the document which the Articles of forgery means. In addition, there is a doubt whether the card itself can constitute the subject matter because this card is made of plastic.

<sup>4</sup> Data which may be stored on a chip is more than which can be stored on magnetic strip. Deborah Spidle, 'Comparing Chip Card and Magnetic Stripe Card Transaction Flows' (2010-2012) Paragon Application Systems 1.

<sup>5</sup> Some credit and debit cards do not hold chips. For example, debit cards that are issued by the North Africa Bank in Libya only hold on their backs magnetic strips and have no chips. Interview with Khalid Atabeb, solicitor, North Africa Bank, (Tripoli, March 2012).



Visible information is so-called in this thesis because of its appearance on the card. It is the information which is on the surface of the card. It can be on the face of the card and it can be on the reverse side. Some of the information is embossed<sup>6</sup> and some is printed. Not all the information on the surface is written by the issuer. The cardholder also participates in completing this information.<sup>7</sup> However, credit and debit cards hold another kind of information which does not appear on the card. This information is electronic information. It is stored on a magnetic strip and a chip. The invisible information, as will be seen, is not on the surface of the card. This is the reason behind calling it invisible. It is not seen by the naked eye. It can only be read by electronic machines. This invisibility in the context of forgery offences in Libya is a reason why the application of the Libyan forgery law may face difficulty as will be seen later.<sup>8</sup>

This Chapter will be divided into four sections. In section two, the definition of credit and debit cards will be explored. It will be seen that the main idea of credit and debit cards is the service which these cards provide. Therefore, these cards are considered as a means of obtaining money from cash machines and at the same time of obtaining services from the services providers.<sup>9</sup> However, the cards considered in this study are not the same thing. There is a difference between these cards, which will also be explored in this section. As for section three, it will provide a brief history of credit and debit cards, when they first emerged in the world and in Libya. This section shows how these cards have spread in the world and how they have succeeded in turning societies in some countries from a cash society to a card society, such as what happens in the US and UK.<sup>10</sup> In section four, the information appearing on the surface of the cards will be explored. The section will explain what the difference is between all the information. It will show that all the information on the card has a function or a purpose. For example, the 16 digits which are embossed on the card indicate a particular meaning, one of which is the institution which under whose supervision the card is issued.<sup>11</sup> Further, in

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<sup>6</sup> Embossing the information on the card is significant because it helps the issuer to protect the card. Altering the embossed information is not easy act. This will be seen in more details in this Chapter.

<sup>7</sup> As will be seen in this Chapter, the cardholder must sign credit and debit card before he can use it.

<sup>8</sup> This will be seen in Chapter Four.

<sup>9</sup> See MC Jasper, *Credit Cards and the Law* (3<sup>th</sup> edn., Oxford University Press, New York 2007) 1.

<sup>10</sup> This is not to say that cash has no value in the deals between people but is to say that cash has become less important in the deals than before.

<sup>11</sup> As will be explained, these digits are very important and always are required when the card is used by phone.

this section, the information which is stored in the strip or the chip will be examined. It will be seen that most of the information which is on the surface of the card is stored in these electronic devices, for example, the name of the cardholder and information about the account of the cardholder. Thus, this Chapter will be structured as follows:

- Definition of credit and debit cards.
- History of credit and debit cards.
- Contents: visible and invisible information.

## **2.2. DEFINITION OF CREDIT AND DEBIT CARDS**

Although credit and debit cards look almost the same, there are some differences between them. In this section, the concept of these cards will be explored and the difference will be emphasised.

### **2.2.1. Credit Card**

Jasper defines a credit card as: “a small card, usually made out of plastic, which contains an account number, ... and a means of identification, such as a signature or picture.”<sup>12</sup> She adds “the credit card authorizes the person named on it to charge goods or services to the account, for which the cardholder is billed periodically.”<sup>13</sup> This definition defines a credit card only from the apparent part. It does not mention the electronic information which is on the magnetic strip or on the chip. Thus, it may not be a comprehensive definition.<sup>14</sup>

Although it is mentioned by the Law of the Banks 2005,<sup>15</sup> a credit card has no definition under Libyan laws including the above mentioned law. This is because credit

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<sup>12</sup> MC Jasper *supra* 1.

<sup>13</sup> *Ibid.*

<sup>14</sup> Credit card is also defined as “one type of instrument used in a payment system to make a funds transfer.” Ling-Ling He and Razeen Sappideen, ‘The payment system in China’ [2008] *Journal of International Banking Law and Regulation* 168, 170. A credit card is also described as “a payment vehicle of convenience, which provides its holders with multifarious benefits.” Ahmad Nehaluddin, ‘Credit Card Fraud and the Law: A Critical Study of Malaysian Perspective’ (2009) 2 *Journal of Information, Law and Technology* 1, 2. See also Ahmad Nehaluddin, ‘E-Commerce and Legal Issues Surrounding Credit Cards: Emerging Issues and Implications’ (2009) 15(5) *Computer and Telecommunications Law Review* 114.

<sup>15</sup> Law no 1 due 2005 relative Banks.

cards were a new concept at the time of the establishment of that law.<sup>16</sup> In line with this, the Model Penal Code<sup>17</sup> of the United States does not provide any definition of credit cards, despite the fact that other State laws do. For example, the Penal Code of Texas defines credit cards by Section 32.31(a)(2) as

"Credit card" means an identification card, plate, coupon, book, number, or any other device authorizing a designated person or bearer to obtain property or services on credit. The term includes the number or description of the device if the device itself is not produced at the time of ordering or obtaining the property or service.<sup>18</sup>

This definition may be wide. It includes any device providing the cardholder with some benefits. This definition is not concerned with the form of the card. It does not matter if the card is made of plastic, paper or any material. It clarifies that a credit card may be in different forms. It does not matter whether the card is an identification card or a plate. In addition, a credit card may only be a number. It seems that for the card to be considered as a credit card, it is essential to enable the cardholder<sup>19</sup> to obtain money from cash machines or particular banks or financial institutions and enable him to obtain property or services.

In the same way, a credit card is defined by Section 205.630 of the Nevada Review Statute. It is defined as

"Credit card" means any instrument or device, whether known as a credit card, credit plate, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, property, goods, services or anything else of value on credit.<sup>20</sup>

The most important thing is that the instrument or the device must enable those holders to obtain money from cash machines or services from retailers or service providers.

Therefore, it can be understood that a credit card may be a piece of plastic holding some information and it enables the holder to obtain services and withdraw money from cash

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<sup>16</sup> Credit cards are still a new concept in Libya because banks in Libya have not produced these cards. The cards are produced in Libya are debit cards and withdrawal cards.

<sup>17</sup> The Model Penal Code 1962.

<sup>18</sup> Texas Penal Code 1973.

<sup>19</sup> Although the term "cardholder" seems obvious and not vague, the Penal Code of Texas defines this term under Section 32.31(a) (1). It defines it as "'Cardholder" means the person named on the face of a credit card to whom or for whose benefit the credit card is issued, and includes the named person's agents." *Ibid.*

<sup>20</sup> Nevada Review Statute.

machines without the need for prior credit. Equally, it may be only a piece of metal or glass<sup>21</sup> holding some information, which enables the holder to obtain money or services. Credit cards as Blunt points out “are ‘buy now, pay later’ products.”<sup>22</sup>

### 2.2.1. Debit Card

Like credit cards, debit cards are defined by some Acts. Section 32.31(a)(4) of the Texas Penal Code<sup>23</sup> defines debit card as:

"Debit card" means an identification card, plate, coupon, book, number, or any other device authorizing a designated person or bearer to communicate a request to an unmanned teller machine or a customer convenience terminal or obtain property or services by debit to an account at a financial institution. The term includes the number or description of the device if the device itself is not produced at the time of ordering or obtaining the benefit.<sup>24</sup>

The difference between a credit card and this definition of a debit card, is that debit card does not provide the cardholder with any credit. Similarly, Section 205.635 of the Nevada Review Statute<sup>25</sup> defines a debit card in the same way as it does as to the credit card. It is defined as:

... any instrument or device, whether known as a debit card or by any other name, that is issued with or without a fee by an issuer for the use of the cardholder in obtaining money, property, goods, services or anything else of value, subject to the issuer removing money from the checking account or savings account of the cardholder.<sup>26</sup>

Debit cards are also defined by some writers<sup>27</sup> such as Alkhaleel.<sup>28</sup> It is defined as a tool which allows the holder to conduct some procedures which are required for deducting amounts of money from his bank account for the interest of another person.<sup>29</sup>

From these definitions of credit and debit cards, it can be stated that these cards have

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<sup>21</sup> Plate means “a flat piece of metal with some information on it”. See AS Hornby, *Oxford advanced learner's dictionary* (7<sup>th</sup> edn., Oxford University Press, Oxford 2005) 1152.

<sup>22</sup> Gordon Blunt, ‘Mining Credit Card Data’ (PhD thesis, the Open University UK 2002). However, credit cards addressed in this study are the cards which are publically in use.

<sup>23</sup> Texas Penal Code 1973.

<sup>24</sup> *Ibid.*

<sup>25</sup> Nevada Review Statute.

<sup>26</sup> *Ibid.*

<sup>27</sup> See the definition of debit cards in FN Redoan, *Debit Cards* (Maktabat Aljala, Almansoor 1990) 8.

<sup>28</sup> EA Alkhaleel, *The Penal Protection of Debit Cards: Analysed Comparative Study* (Wael, Amman 2000) 7.

<sup>29</sup> *Ibid.* In this meaning see O Salem, *The Criminal Protection of Debit Cards: Comparative Study* (Dar Anahda Alarabia, Cairo 1995) 11.

some similar features. However, they are different in others.

### **2.2.2. Credit Cards and Debit Cards: Differences and Similarities**

Debit cards are typically made from the same material as credit cards, i.e., plastic.<sup>30</sup> In addition, the information may be embossed or printed. The logo of the issuing institution is placed on both cards.<sup>31</sup> Another similarity relates to their functions. Both credit and debit cards function in the same way in that they provide the cardholder with the same ability to obtain money from cash machines and goods from retailers.<sup>32</sup>

Conversely, even though credit and debit cards are almost the same regarding the material and the information that they hold, there are some differences between these two cards. First, they must hold different names. For example, if there were two cards, a credit card and a debit card, issued by the same bank, the difference would be in the name of the card. On the credit card, the word “credit” would be printed. On the other hand, on the debit card the word “debit” would be printed.

As for credit cards that are issued without account to the cardholder, they are different from debit cards in another way. These cards do not hold the account number since the cardholder has no account. Therefore, the card appears different in this respect.<sup>33</sup> Another difference lies in the advantages of the cards. Whereas a credit card grants the cardholder a credit, as the definition above provides, a debit card does not grant credit and the account of the cardholder must contain money sufficient to cover sums withdrawn or the value of goods obtained.<sup>34</sup>

Further, although it is obvious that credit and debit cards are almost the same in their form. Yet, they are not the same in respect of functions. Whereas a credit card grants its cardholder a credit or loan for a certain period, the debit card only enables the

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<sup>30</sup> Although credit and debit cards may be made from other materials such as paper or metal, the cards addressed in this study are credit and debit cards which are made of plastic.

<sup>31</sup> This is in case these cards are issued under the supervision of a particular institution such as Visa or MasterCard.

<sup>32</sup> Marcus Smith and Patricia Rebertson ‘Plastic Money’ in M Brindle and R Cox (eds), *Law of Bank Payments* (3<sup>th</sup> edn., Sweet and Maxwell, London 2004) 197.

<sup>33</sup> This will be explained more in detail in this Chapter below.

<sup>34</sup> MC Jasper *supra* 23.

cardholder to withdraw money and obtain goods and services from certain providers.<sup>35</sup>

Therefore, because these cards look almost the same and these cards are not distinguished by society in Arabic countries, such as Egypt and Libya, the concept of these two cards may be vague.<sup>36</sup> In this respect, Salem distinguishes between credit and debit cards and to determine their legal nature, the agreement between the cardholder and the bank (the issuer) must be made sure.<sup>37</sup> Thus, he states although the bank deducts the amount of the money (price of the goods or the services) from the account not exactly in the time of the transaction but after a particular period which may extend to six weeks, this matter does not reflect on the nature of the card. It is still a debit card not a credit card.

To sum up, it can be stated that credit and debit cards are almost the same. They may be made from any material such as plastic, paper or plate. And they may be in a form of the device.<sup>38</sup>

### **2.3. HISTORY OF CREDIT AND DEBIT CARDS**

Throughout history, a variety of methods of trading has been used for exchanging services and goods.<sup>39</sup> First, money replaced the bartering system, followed by cheques.<sup>40</sup> Later, as technology improved, credit and debit cards emerged.

Credit and debit cards first emerged in the US in 1914.<sup>41</sup> They were not in the same form as they are today. Prior to 1920, credit cards were issued in the form of metallic

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<sup>35</sup> In this meaning, see Ronald J Mann, 'Credit Cards and Debit Cards in the United States and Japan' (2000) 55 *Vanderbilt Law Review* 1055, 1056 footnote 2.

<sup>36</sup> It may be mentioned that these cards are different from digital money. The latter "is one type of a digital financial instrument that fulfils most or all of the functions of money." For more details about digital money, see Sally Ramage, 'Digital Money, Electronic Fraud, New Regulations and Old Money Laundering Regulations' [2011] *Criminal Lawyer* 1, 2; Carol L Clark, 'Shopping Without Cash: The Emergence of the E-Purse' (2005) 29(4) *Economic Perspectives* 34; Ian W Hutton, 'Electronic Cash—Welcome to the Future' (1995) 145 *New Law Journal* 1810.

<sup>37</sup> Salem *supra* 17.

<sup>38</sup> However, as has been emphasised in the previous Chapter, this thesis concentrates on the common credit and debit cards which are made of plastic.

<sup>39</sup> MC Jasper *supra* 1.

<sup>40</sup> Although a cheque is a very important method for paying and buying, it has not replaced money.

<sup>41</sup> William B Davenport, 'Bank Credit Cards and the Uniform Commercial Code' (1967) 1(2) *Valparaiso University Law Review* 218; MA Omar, *The Legitimate and Banking Accounting Aspects of Credit Cards* (Ietrack, Cairo 1997) 37; Mubarak Jazaa Harbi, 'The Doctrinal Interpretation of the Relation between the Issuer of Credit Card and its Cardholder' (2006) 2(30) *Alhokok Journal* 205, 206.

pieces resembling coins.<sup>42</sup> These credit coins held the name of the seller and a number indicating the account of the beneficiary of this credit coin.<sup>43</sup> In the 1920s new kinds of credit cards emerged.<sup>44</sup> Oil companies had introduced new cards to their customers.<sup>45</sup> These cards were only for buying the fuel from the stations of the companies' issuers.<sup>46</sup> This lasted until 1950, when the Diners Club introduced a new system for dealing with credit cards.<sup>47</sup> The first autonomous cards emerged.<sup>48</sup> In this system, there were separate agreements between the club and its members, and other separate agreements between the club and the merchants.<sup>49</sup> Among these agreements, the club plays the intermediary role.<sup>50</sup> Under this system, the cardholder paid a fee for obtaining a card and another fee was paid every twelve months to keep the cards.<sup>51</sup> Towards this, the members would pay the bills for services and goods obtained, on a monthly basis, not at the date of sale or the date of obtaining the services.<sup>52</sup>

Around 1976, Visa emerged.<sup>53</sup> Although Visa did not emerge under this name before this date, it had become known before this time but by another name, which was the BankAmericard.<sup>54</sup> In 1966 new credit cards appeared in the name of MasterCard.<sup>55</sup> This date was the date for Barclays bank which was the first bank in the UK, to issue credit cards.<sup>56</sup> With respect to debit cards, they were first introduced in the UK in 1987.<sup>57</sup> That is to say, credit cards were introduced earlier than debit cards in the UK.<sup>58</sup>

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<sup>42</sup> MC Jasper *supra* 2.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Ben Woolsey and Emily Starbuck Gerson, 'The History of Credit Cards'

<<http://www.creditcards.com/credit-card-news/credit-cards-history-1264.php>>

accessed 13 May 2014; Mary Bellis, 'Who Invented Credit Cards?'

<[http://inventors.about.com/od/cstartinventions/a/credit\\_cards.htm](http://inventors.about.com/od/cstartinventions/a/credit_cards.htm)> accessed 13 May 2014.

<sup>48</sup> MC Jasper *supra* 2.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid* 3.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> History of plastic cards in the UK, The UK Cards Association

<[http://www.theukcardsassociation.org.uk/Advice\\_and\\_links/](http://www.theukcardsassociation.org.uk/Advice_and_links/)> accessed on 16 January 2014.

<sup>57</sup> *Ibid.*

<sup>58</sup> This is not the case in Libya. In Libya, credit cards have not been issued until now. The reason may be religious. The interests which may result from the contract which governs credit cards are prohibited in Islamic Sharia. Thus, debit cards are preferred.

Although they have been in use in the US for a long time, credit and debit cards are a new concept in Libya and some Arabic countries. Despite the fact that credit cards issued in other countries can be used in Libya in some places for obtaining money, these cards have not been issued by Libyan banks. Libyan banks such as Aman Bank and North Africa Bank only issue debit cards. The first bank to issue debit cards was the Bank of Commerce and Development.<sup>59</sup> This was in 2004.<sup>60</sup> This card is a Visa Card. It has been issued under the supervision of the Visa institution. These cards are acceptable in many countries in the world. In 2006, Aman Bank began to issue debit cards.<sup>61</sup> These cards can also be used in different countries other than Libya. However, the cards issued by the North Africa Bank are not able to be used out of Libya because they are local cards.<sup>62</sup>

As for credit and debit cards in other Arabic countries, Egypt was the first Arabic country in which debit cards appeared.<sup>63</sup> In 1981, the African Arabic Bank issued debit cards named “Arabic Bank Visa Card”.<sup>64</sup> In 1982, Petra bank in Jordan issued “Petra Card” followed by Cairo Card, which was issued by Cairo Aman Bank.<sup>65</sup> Thus, it is obvious that credit and debit cards are new payment methods in Libya and in some other Arabic countries and these countries may have insufficient criminal protection to deal with the abuse of the cards.

#### **2.4. CONTENTS: VISIBLE AND INVISIBLE INFORMATION**

Credit and debit cards contain different information. Some of the information is visible. It can be seen by the naked eye. Conversely, other information is invisible. It needs tools to be seen. In this section these two kinds of information will be addressed.<sup>66</sup>

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<sup>59</sup> Yousef Alija, the Legal Problems which the Use of Credit Cards Poses under Libyan Criminal Law’ (LLM dissertation, Alfatih University 2007) 14.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> Interview with Khalid Atabeeb, solicitor, North Africa Bank, (Tripoli, March 2012).

<sup>63</sup> SM AbduAlhakam, *The Criminal Protection of the Credit Cards: the Crime of Electronic Payment Cards* (Dar Anahda Alarabia, Cairo 2003) 29.

<sup>64</sup> *Ibid.*

<sup>65</sup> EA Alkhaleel *supra* 16.

<sup>66</sup> Addressing this information is very significant for this study. By doing so, the problem of the application of the offences of forgery in Libya to the offences of forgery of credit and debit cards should be obvious. Thus, the reader can be clear regarding this matter.



### **2.4.1. Visible Information**

Visible information is all the information which appears on the card. It may be written or embossed. Further, it may be in the form of numbers, letters or signs. In other words, it is any tangible data placed on the card, on the face or on the back. This information can be seen by the naked eye and it does not need any tools to be seen. Thus, the parties (cardholder and the merchant) who deal with credit and debit cards can see and use (if it is required) this information while the transactions are performed. The information appears on the two sides of the card. Some of it is on its face and the rest of it is on the reverse side.

#### ***The Information on the Face***

With respect to the information which is on the card's face, there is much information. Some of this information appears in numbers e.g., the number of the card and the number of the account of the cardholder. In addition, credit and debit cards hold the name of the bank that issues the card with its logo and the name of the institution under whose supervision, that the card is used. Furthermore, the card has the name of the cardholder.

#### ***The Number of the Card***

As for the number of the card, all cards, whether credit or debit card, have a special number. This number is consistent with particular standards revealed by the International Organisation for Standardisation (ISO).<sup>67</sup> The set of digits of this number symbolizes many meanings. The first digit indicates the supervisory institution under whose control the card will be used,<sup>68</sup> e.g., Visa or MasterCard. All cards whether credit or debit cards must be used under the supervision of an institution which produces the card.<sup>69</sup> Every institution has a different number. For example, the digit 4 embodies Visa; the digit 3 points to American Express; and, digit 5 refers to MasterCard institutions. That is to say, all numbers of the cards which are made by the Visa

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<sup>67</sup> MC Jasper *supra* 4.

<sup>68</sup> *Ibid.*

<sup>69</sup> If the card is not issued under the supervision of one of the international institutions, it will not be able to be used in other countries. This may be applied to debit cards issued in Libya by the Africa North Bank.

institution must start with digit 4, those that are made by MasterCard institution must begin with digit 3, and those that are produced by American Express institution are required to start with digit 5.

This might help merchants to distinguish between which institution the card belongs to, by only looking at the first digit of the number of the card. Accordingly, if the first digit is not related to the name of the institution printed on the card, the card might be false. To be more precise, if the first digit is three and the card carries the name of the Visa, the card is without doubt false. The reason is that digit three belongs to American Express and this name (American Express) is the name which is supposed to be on the card, and not Visa.

Another thing which the number indicates is the issuer of the card. The issuer can be identified by the first six digits of the card's number, "the Issuer Identification Number".<sup>70</sup> These digits include the first one which embodies the supervisory institution. Therefore, if, for example, any card, which is issued by Lloyds bank (the issuer) to a particular cardholder, is compared with other cards issued by the same bank (Lloyds) to another cardholder, the first six digits of the number of the card should be the same. Thus, the six digits would be 492181. Another example is HSBC cards: the first six digits of the number of the cards that are issued by this bank are 465942. Banks do not produce cards. They only issue them. For example, Lloyds and HSBC issue cards under the supervision of Visa. Accordingly, the first digit of any card that may be issued by these banks would be four. However, the five following digits that are on the Lloyds card are different from those are on the HSBC card as has been stated.

In respect of the last digit of the number of the card, it is what can be called a "check digit".<sup>71</sup> It helps to correct any errors that may be discovered.<sup>72</sup> This function can be executed by using mathematical calculation.<sup>73</sup> Because the number of the card is important, some digits are repeatedly printed on the card. Whereas the first four digits are repeatedly printed below the beginning of the number of the card, the last four digits of the card number are printed on the panel signature on the back of the card, as will be

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<sup>70</sup> *Ibid*

<sup>71</sup> *Ibid*

<sup>72</sup> *Ibid*

<sup>73</sup> *Ibid*

shown.<sup>74</sup> It seems that all these measures are taken to detect false cards and prevent credit and debit card forgery.

### ***The Number of the Account***

Unlike some credit cards, debit cards must have the number of the account of the cardholder. This is because debit cards cannot be issued unless the cardholder has an account. Credit cards are different: when the credit card is used, the cardholder does not have to pay immediately. The payment may be made after a period of time, usually one month.<sup>75</sup> Therefore, the cardholder has time to discharge the bills without needing to have an account. However, some credit cards may be issued to customers who already have an account in the issuer's bank. In this case, the card might hold the number of the account on it. In addition to the account number, credit and debit cards hold the sort code number. This sort code is related to the account number. However, it is separate from it. It is also required for some transactions whenever the account number is requested. For example, when money is transferred from one account to another, this number is required.

### ***The Expiration Date***

The card also carries the expiration date. There are two dates on the card, the date of the beginning of the validity and the date of the expiration. Both dates consist of the month and the year. Therefore, the exact day of the beginning of the validity and the exact day of the expiration do not appear on the card. For example, suppose that the validity of the card is for three years from October 2011 to September 2014. The date of the expiration will be embossed as following: 10/11 space 09/14. Above or before the first date should be written "*valid from*" and above or before second date should be written "*expired end*".

### ***The Information on the Reverse Side***

As for the information on the reverse side of the cards, it is less than that on the face of the card. However, it is not less important. Credit and debit cards have a signature panel

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<sup>74</sup> See, for example, debit cards issued by Lloyds and HSBC.

<sup>75</sup> MC Jasper *supra* 2.

on their reverse sides.<sup>76</sup> It is embedded on the card. This signature panel is very sensitive and it can easily be damaged. On this panel, there are digits printed. The first four digits are the last digits of the card's number, and the last three digits are the card identification number. In addition, there is the signature of the cardholder.

### ***Repeated Digits***

Regarding the first four digits, they are repeatedly printed on the signature panel. Therefore, if the last digits of the card's number are 4921, the first four digits on the signature panel will be the same, 4921. The reason behind this repetition of these digits is to provide more security to the card. Hence, if the four digits that are on the panel signature are different from the last four digits of the card's number, the card may be forged.

### ***The Card Identification Number***

This number is considered as a security code number for the card when it is used for obtaining goods or services by internet or phone.<sup>77</sup> It is usually required with other numbers (such as the card's and the expiration date) by merchants or service providers (such as hotels, shops and agencies). This number consists of three to four digits, depending on which institution has made the card. As for cards issued with the logo of MasterCard, Visa and Discover cards, the number comprises of three digits. However, in respect of an American Express Card, the number consists of four digits. Unlike the first digit,<sup>78</sup> these numbers are not the same on all cards. It differs from one card to another, even if the cards are issued by the same bank under the supervision of the same institution. This is for a simple reason, which is that this number is considered as a security number and it is a personal number for the cardholder. Consequently, it must be different on each card.

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<sup>76</sup> M Levi and others, *The Prevention of Cheque and Credit Card Fraud* (Home office, London 1991) 8; Omar Asheikh Alasem, 'The Most Spread Credit Cards in Use in Arab Countries' [2002-1422] Naif Arab Academy Security Sciences 7, 17.

<sup>77</sup> Terry Corbitt, 'The Effect of Fraud on Credit Cards and E-Commerce' (2001) 165 Justice of the Peace 83. By using this number, the card itself does not need to be used since it is not required when the card is used at the points of sale or at cash machines. Alan Travis, 'As Credit Card Fraud Changes, numbers of Cases Soars' *The Guardian*, 10 January 2013.

<sup>78</sup> The first digit of the number of the card.

### *The Signature of the Cardholder*

There is on the signature panel, a space left by the issuer to be signed by the cardholder of the card. Banks usually require the cardholder to sign the card immediately after receiving the card.<sup>79</sup> This act must be done by the cardholder because it is considered as one of the preventive measures of forgery. Some cards<sup>80</sup> have a statement over or below the signature panel which is “*AUTHORISED SIGNATURE – NOT VALID UNLESS SIGNED*”.<sup>81</sup> This means the signature that is signed on the panel is considered as the legitimate signature of the cardholder. In addition, the card must be signed before first use. This may provide more security for the card.<sup>82</sup> This signature reduces the possibility of using the cards by others who may steal or find lost cards.<sup>83</sup> Therefore, when the card is used at points of sale, the sellers can make sure that the user is the legitimate card holder. This may be obtained by comparing the signature of the one who uses the card with the legitimate signature that is on the card, for example, when seller requests the user to sign the receipt after finishing the transaction, on some occasions.<sup>84</sup> Accordingly, the merchants and the service providers at the points of sale must check that the card was signed.<sup>85</sup>

### *The Logo*

The card also includes a hologram on its back.<sup>86</sup> It is considered as the logo of the card.

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<sup>79</sup> RF Basala, *Credit Card Crimes: an Epistemic Analytical Study of their Elements, Manners of their Counterfeiting and the Ways of Recognising them* (Dar Ashorook, Cairo 1995-1416) 62.

<sup>80</sup> See for example debit cards that are issued by HSBC.

<sup>81</sup> *Ibid.*

<sup>82</sup> Thus, as Levi observes, “the best cards to steal are those without signatures on them taken before the intended cardholder realises they are missing” Michael Levi, ‘Organising Plastic Fraud: Enterprise Criminals and the Side-Stepping of Fraud Prevention’ (1998) 37(4) *The Howard Journal of Criminal Justice* 423, 428.

<sup>83</sup> Roger Brownsword and John MacGowan, ‘Credit Card Fraud’ (1997) 147 *New Law Journal* 1806.

<sup>84</sup> For example, when the cardholder requests some cash back, the seller asks the cardholder to sign a receipt. However, the seller is not restricted to certain occasions to ask for the signature of the cardholder. The seller may request the signature whenever they feel there is a suspicion of an unauthorised use or misuse. In addition, some countries still issue cards with only a magnetic strip. Thus, cardholder may be asked to sign the receipt after the transaction. Bob Sullivan, ‘The Death of the Magnetic Stripe Credit Card’ *NBC News* 8 March 2011. <[http://redtape.nbcnews.com/\\_news/2011/03/08/6345317-the-death-of-the-magnetic-stripe-credit-card](http://redtape.nbcnews.com/_news/2011/03/08/6345317-the-death-of-the-magnetic-stripe-credit-card)> accessed 14 December 2011.

<sup>85</sup> However, the author notices that merchants do not check whether the card is signed or not. This is also the case when cards are used in banks. Cards may not be checked by the bankers which may lead to leaving some cases of fraud without detection.

<sup>86</sup> Katherine J Barker and others, ‘Credit Card Fraud: Awareness and Prevention’ [2008] *Journal of Financial Crime* 398, 400.

This logo is made by using a “lenticular refraction”.<sup>87</sup> Because this lenticular refraction needs a difficult process to make it,<sup>88</sup> it is the preferred choice to be used for making this hologram. This means that the hologram cannot be forged easily. An example of a hologram is a bird with the right leg in crooked position.<sup>89</sup> This logo usually appears on the back of the payment cards created under the supervision of Visa, e.g., credit and debit cards issued by HSBC. Another example of a hologram is the hologram of the MasterCard. It presents “two interlocking globes with the word MasterCard printed behind this image.”<sup>90</sup>

The difference between the false and the genuine hologram is that the fraudster cannot use the lenticular refraction in the case of making a false hologram because it requires a difficult process.<sup>91</sup> Fraudsters place foil instead, and stamp the required image on it.<sup>92</sup> Another difference between the false and the genuine hologram is that when the card is moved the real hologram appears in colour. However, the false hologram will not be changeable and no colour can be observed.<sup>93</sup>

### ***Embossed and Printed Information***

Although the information on the card appears on one card, the manner of its appearance is different. Some is *printed*<sup>94</sup> and some is *embossed*.<sup>95</sup> As for the *printed* information, it includes the name of the issuer of the card and the name of the institution. It also includes some digits, such as the first four digits of the number of the card as has been mentioned, and the seven digits that appear on the signature panel.<sup>96</sup> Regarding the *embossed* information, it includes some numbers and words. For example, on Visa cards such as those which are issued by HSBC, the name of the cardholder is embossed. Further, the account number of the cardholder, the number of the card and the date of

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<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> Sabic, Card Fraud Awareness: Learning Program. Facilitator’s Guide 2, 4.  
<<https://www.sabric.co.za/userfiles/file/FacilitatorGuide2.pdf>> accessed: 27 December 2011.

<sup>90</sup> *Ibid* 8.

<sup>91</sup> Katherine J Barker and others *supra* 400.

<sup>92</sup> *Ibid*

<sup>93</sup> *Ibid.*

<sup>94</sup> M Levi and others *supra* 8; Wg Schulze, ‘Smart Cards and E-Money: New Developments Bring New Problems’ (2004)16(4) SA Mercantile Law Journal: SA Tydskrif vir Handelsreg 703, 704.  
<<http://reference.sabinet.co.za/document/EJC54123>> accessed 14 March 2014.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

the expiration of the card are all embossed on the card. It seems that this information is more important than the printed information. The issuer attempts to make this information more difficult to change by forgers.

In addition to previous information, credit and debit cards hold magnetic strips and some also hold magnetic chips. Whereas the magnetic strip is often placed on the reverse of the card, the chip is usually placed on the face of the card.<sup>97</sup> However, this is not a principle. They could be removed to any place on the card or both be placed on the same surface of the card. The function of these magnetic materials is to electronically complete the transactions for which the card is issued. For operating this function, these materials (magnetic strip and magnetic chip) contain electronic information that is electronically encoded. This information, which can be called invisible information, will be explained in the next point.

#### **2.4.2. Invisible Information**

This information is electronically stored on a magnetic strip or a magnetic chip, which in turn is placed on the reverse side of the card.<sup>98</sup> Although this information is not seen by the naked eye, it can be electronically read by computerised tools (such as automatic teller machines and the card reader at the point-of-sale).<sup>99</sup> Some important information which appears on both sides of the card, whether it is printed or embossed, is also stored on the magnetic strip and the chip electronically. Therefore, the number of the card, and the date of expiration are stored on the magnetic strip<sup>100</sup> and magnetic chip (if there is a chip on the card).<sup>101</sup> In addition, the name of the card holder<sup>102</sup> and the cardholder's account are stored on the magnetic strip and chip<sup>103</sup> since they are considered as important information.

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<sup>97</sup> See, for example, debit cards issued by Lloyds and HSBC.

<sup>98</sup> As mentioned above, this is not a principle.

<sup>99</sup> Joynal Abdin, 'Credit Card Operations in Bangladesh' [2008] The Federation of Bangladesh Chambers of Commerce and Industry 2

<[http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=833631](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=833631)>accessed: 1 January 2012;

EA Alkhaleel *supra* 24; Asagheer *supra* 20.

<sup>100</sup> MC Jasper *supra* 5

<sup>101</sup> As has been mentioned above, not all credit and debit cards have a chip on their surface. For example, in the US many cards still operate with a magnetic strip. The reason behind this is that banks in the US use old system which is not adjustable with chip. Thus, all cards hold a magnetic strip, whereas not all cards hold a magnetic chip. Carol L Clark *supra* 36.

<sup>102</sup> Katherine J Barker and others *supra* 401.

<sup>103</sup> Joynal Abdin *supra* 2.

Even though the signature of the cardholder is important, it is not stored on the magnetic strip or the chip. This may be due to the complexity in encoding the signature on the strip, or because there is no need for it because there is a personal identity number (PIN) which is regarded as an electronic signature.<sup>104</sup> This PIN is a number which is required to be entered whenever the card is used, whether during withdrawing money from the cash machine, or during paying money at the point-of-sale.<sup>105</sup> Thus, this PIN is not visible on the card. In the same way, there is other information that is stored on the strip but it does not appear on the surface of the card. This information includes the “card verification code”<sup>106</sup> and the credit limit.<sup>107</sup> The encrypted verification code enables the card to be confirmed, i.e., that the card is legitimate or valid during the transaction being performed by the seller at the point of sale.<sup>108</sup>

The magnetic strip is regarded as one of the most important features of the card.<sup>109</sup> This is because the information that is stored on the strip is required for the use of the card. The card, without this electronic information, has no worth or value. For example, if someone makes a false debit card and places all the information required on the surface of the card without the magnetic strip (if the card has no chip), the card will not function. This is because when the card is inserted in the device (the card reader), there will be no information to read. The device does not read the visible information which appears on the surface of the card.

Although the magnetic strip is important, it was not a feature of either credit or debit

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<sup>104</sup> This “PIN is typically verified by the” chip placed on the card. Steven J Murdoch and others, 'Chip and PIN is Broken' [2010] Security and Privacy, IEEE Symposium on 433.

<<http://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=5504801>> accessed 10 May 2014.

<sup>105</sup> It is obvious that the PIN is personal and should not be known by others. Thus, it is very important for the cardholder to dispose of the letter containing this number which is sent by the issuer. Maes Sam and others, 'Credit Card Fraud Detection Using Bayesian and Neural Networks' [2002] Proceedings of the 1st International Naiso Congress on Neuro Fuzzy Technologies 1, 2; M Salama and M Ashinawi, *Internet Crimes, Credit Cards and Organised Crime* (Dar Alketab, Cairo 2007) 137; A AbduAlhafeed, *The Protection of Payment Electronic Cards* (Maktabat Ashorta, 2007) 14.

<sup>106</sup> Katherine J Barker and others *supra* 401.

<sup>107</sup> MC Jasper *supra* 5. Credit limit is the floor limit which the credit or debit cardholder cannot exceed in a certain transaction or a certain day. Authorisation from the issuer (the bank) of the credit and debit cards is required when the cost of the goods is more than a certain amount. In this case, the merchant has to obtain the consent of the bank or he will be on the risk of the transaction. Rreseanne Bonney, 'Preventing Credit Card Fraud' (1992)17 Crime and Justice Bulletin 1, 5.

<[http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/CJB17.pdf/\\$file/CJB17.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB17.pdf/$file/CJB17.pdf)> accessed 1 June 2013.

<sup>108</sup> Katherine J Barker and others *supra* 401; Steven J Murdoch and others, *supra* 433.

<sup>109</sup> M Levi and others *supra* 9.



cards when these cards first emerged in the 1914 in the US.<sup>110</sup> This strip was added to credit cards in the early 1970s.<sup>111</sup> However, some cards have a magnetic strip besides a magnetic chip. This chip, as it is stated by Clark, is more difficult to forge.<sup>112</sup> Although some cards contain chips on their surfaces, not all systems are able to deal with the chip. For example, because in the US, the majority of the systems of telecommunications were made to deal with magnetic strips, chip adoption is slower than it is in other countries in the world.<sup>113</sup> Hence, the magnetic strip is still more widespread than the chip.

### **2.4.3. The Difference between Visible and Invisible Information**

From this preceding description of credit and debit cards, it is obvious that visible information and invisible information is different. The differences between this information differ according to the side from which is seen. These differences can be observed in three main respects: the material on which the information is placed, the visibility of the information and the importance of the information.

#### ***Material of Credit and Debit Cards***

One difference between visible and invisible information can be seen in respect of the material on which the information is placed. Whereas visible information is placed on plastic material, the invisible information is placed electronically on a magnetic strip or on a chip. As will be seen, this difference poses a problem in respect of credit and debit card forgery. This problem is that forgery under Libyan law may not be applied to electronic material. In addition, plastic documents may pose a problem because the subject matter of forgery under the Libyan Penal Code may not be applicable to plastic documents.<sup>114</sup>

#### ***Importance***

Visible information is less important than invisible information. This is because the information which is on the surface of the card may not be used when the card is used at

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<sup>110</sup> MC Jasper *supra* 2. For more details about the history of credit and debit cards, see Chapter Two 2.3.

<sup>111</sup> Wg Schulze *supra* 705.

<sup>112</sup> Carol L Clark *supra* 48.

<sup>113</sup> *Ibid* 36.

<sup>114</sup> This will be addressed in detail in Chapter Four.

the cash machines. The forger only needs invisible information to withdraw the money. Invisible information is always important because the card cannot be used if it has no invisible information on its chip or magnetic strip. Therefore, the forger must change the information on the card. All the invisible information on the card is important.

However, this does not mean that visible information is not important and its alteration should not be an offence of forgery.<sup>115</sup> Visible information is significant when the card is used at the point of sale. When the card is used for obtaining goods or services from the service providers, it may be checked by the merchant or the seller. For example, the signature of the cardholder should be signed on the signature panel, especially if the card has no chip and used only by the magnetic strip. The reason behind this is that the cardholder or the user of the card must sign on a separate receipt and the signature must be the same as the signature which is on the card.<sup>116</sup> Therefore, visible information is important and it should appear as if it is genuine. If the information is forged, the card may not be used. Therefore, although the information on the card is not the same in the importance respect, the information complements each other and it operates as if it is the same information.

### ***Visibility***

Visible information is different from invisible information as to visibility. The way to view this information is different. Visible information can be seen by the naked eye. There is no need for any tools for seeing it. However, invisible information cannot be seen without computerised tools. As has been seen in this Chapter, invisible information is encoded in the strip and does not appear to the holders. It only appears to the machine which deals with it electronically. This, as will be seen,<sup>117</sup> may pose a problem which is that the information under forgery law in Libya may be required to be visible and readable by the naked eye.<sup>118</sup>

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<sup>115</sup> However, Levi and others argue that the forger does not need to change the visible information if he changes the invisible information. See M Levi and others *supra* 9.

<sup>116</sup> Until the beginning of 2001, card user had had to sign a receipt when using their credit or debit card for obtaining goods or services. Rupert Jones, 'Credit Card Fraud up by 60%' *The Guardian*, 4 January 2001.

<sup>117</sup> This will be addressed in Chapter Four.

<sup>118</sup> It will be seen that the interviews showed that the document which is required for forgery offences in Libya must be readable by the naked eye. This will be discussed in detail in Chapters Three and Four.

## 2.5. CONCLUSION

This Chapter has explored the physical features of credit and debit cards. In section two, the definition of these cards was examined. The difference between credit cards and debit cards has been clarified. The development of credit and debit cards has been discussed. It has been shown that credit and debit cards today, are not the same as cards in the past. The final section of the Chapter examined information which is on these cards.

From the definitions provided, it seems that the main purpose which these cards serve is that they provide their cardholders with services from points of sale and cash machines although there is a difference between credit cards and debit cards.<sup>119</sup> The holders of these cards can obtain money from cash machines, goods from shops and services from service providers. Another thing which can be understood from section two is that the subject matter of forgery of these cards is plastic and electronic material. These cards are usually made of plastic<sup>120</sup> and hold magnetic strips and chips. This difference in the material is significant when we come to consider the scope of forgery law in Libya (as will be seen in next Chapter, the material under the Libyan Penal Code may not be more than paper<sup>121</sup>).

These cards may be developed to be in a different material. Although the concept of credit cards has been the same since they emerged, the way of their making has undergone many developments. In other words, credit and debit cards may be in a new form in the future. As has been seen, credit cards were originally only in the form of metallic pieces. They were similar to the coins. The information held by these cards was less than the information held on these cards today. Therefore, the legislator in Libya should bear this fact in mind while reforming or considering the law of forgery in Libya. The battle against credit and debit card forgery should be in the context of this

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<sup>119</sup> There are differences between credit cards and debit cards. Whereas credit cards provide a credit to their cardholders, debit cards require a credit in the account of the cardholders. Thus, the holders of credit cards do not need any account despite the fact that it does not matter if they have.

<sup>120</sup> This is not to say that they must be made from a particular material, because as the Penal Code of Texas provides in Section 32.31(a) (2) these cards may only be “plate, coupon, book, number, or any other device”. See Texas Penal Code 1973. Yet, the common credit and debit cards in the world are those made of plastic and hold a magnetic strip and chip.

<sup>121</sup> Therefore, the subject matter of the offence of forgery of credit and debit cards may not meet the requirements of the offence of forgery in Libya. This will be addressed in Chapters Three and Four.

development and other potential developments.<sup>122</sup>

The variety of the material leads to the diversity in the information which is contained on credit and debit cards. It has been seen that there are two kinds of information, visible and invisible information. Whereas visible information is the information which is on the surface of the card, invisible information is information that is stored in the magnetic strip and magnetic chip. The differentiation between these two kinds of information is significant because there is an argument that the subject matter of forgery in Libya might not cover invisible information. As will be seen, it may be argued that credit and debit cards may be the subject matter of forgery only in respect of visible information.<sup>123</sup>

To sum up, examining this information helps the researcher to answer the main question of this thesis “can the Libyan Penal Code be applied to credit and debit card forgery?”<sup>124</sup> As has been mentioned in Chapter One, to answer this question the subject matter of forgery must be explored. This will be the subject of the next Chapter.

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<sup>122</sup> This can be obtained by providing a wide definition for credit and debit cards, as will be seen in the conclusion of this thesis.

<sup>123</sup> This will be addressed in Chapter Four.

<sup>124</sup> Chapter Two also reflects on all Chapters. It helps the reader to understand the concept of the research. Hence, it is included in this thesis.

## CHAPTER THREE

### THE SUBJECT MATTER OF FORGERY UNDER THE LIBYAN PENAL CODE

#### 3.1. INTRODUCTION

This Chapter examines the subject matter of forgery under the Libyan Penal Code.<sup>1</sup> It will explore the words that this law uses. The legislator under forgery law provides two words for specifying the subject matter of forgery. These words are “document” and “paper”.<sup>2</sup> As will be seen, the word “document” has different meanings. It has in the context of criminal law a meaning, which is different from its general meaning. This general meaning may harmonise with its meaning under the Libyan Civil Code.<sup>3</sup> Because Libyan law uses the word “watheeka” which means document as the subject matter of forgery, this word will be explored. However, the legislator does not only use this word. Forgery law also uses the word “paper”. This raises a question which is why does the legislator use two words? As will be seen, there are three eventualities. It could be stated that the legislator means one word. Yet, this potential may not be acceptable because it is supposed that the legislator is wise. Thus, it is possible that the legislator intends the two words together, as he does by providing two kinds of subject matter.

The nature of the subject matter is different depending on its issuer. There are two kinds of subject matter of forgery. If the subject matter (the paper or the document) is issued by a public employee, the subject will be formal as the forgery provisions state. Yet, if it is issued by another more than a public employee, it is a customary subject matter. Therefore, as will be seen, credit and debit cards may be formal and may be customary. Although the majority of the interviewees accepted the differentiation between formal and customary documents, this differentiation may be criticised. It will be seen that

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<sup>1</sup> Libyan Penal Code 1953.

<sup>2</sup> The reason why this matter is explored here is to understand whether credit and debit cards can be the subject matter of forgery in Libya or not. Therefore, this Chapter is considered as an integrative or a complementary Chapter with Chapter Four which explores whether credit and debit cards can be the subject matter of forgery or not. Despite the fact that Chapter Three (this Chapter) and Chapter Four (the next Chapter) are supposed to be examined under one Chapter, the researcher divided them into two Chapters. This is because this work cannot be done in one Chapter (it would become too long and confuse the reader).

<sup>3</sup> Libyan Civil Code 1954.

distinguishing between these two kinds of subject matter may minimise the strength of the trust and admissibility of documents in general. This of course may reflect on credit and debit cards.

Hence, this Chapter will explore the question of what exactly the subject matter of forgery under the Libyan Penal Code can be. Section two will show that the Libyan Penal Code provides two words to express the subject matter of forgery. It gives a brief idea about paper and its meaning in the forgery provisions of the Libyan Penal Code. It will show that “paper” is different from “document”. The meaning of “document” will also be explored. Document may pose a problem in the context of its meaning. Therefore, it requires to be examined in depth.<sup>4</sup> It will be seen that because its meaning is not clear, some countries<sup>5</sup> may define it in their criminal laws, so they leave no doubt about this matter.

The third section will demonstrate the reason behind providing two words for expressing the subject matter of forgery under the Libyan Penal Code. It will be seen that there are three assumptions. All the reasons behind these assumptions will be explored. The fourth section will examine whether a distinction between formal and customary document or paper is justified. It will show that this differentiation may not be acceptable. In this purpose, the conclusion of the interviews conducted in Libya will be analysed. Therefore, this Chapter will examine the following points:

- The words used under the Libyan Penal Code.
- Why the forgery law in Libya uses two words for its subject matter?
- The nature of the subject matter: customary or formal.

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<sup>4</sup> However, this is not the case with the word “paper” because the word ‘paper’ is obvious and does not pose any problem in terms of forgery.

<sup>5</sup> For example, in Canada, Article 321 of Criminal Code defines “document” as to include paper and other materials. Canadian Penal Code 1985.

### 3.2. THE WORDS USED IN FORGERY LAW IN LIBYA

Unlike other forgery laws in other countries,<sup>6</sup> forgery law in Libya uses two words to express the subject matter of forgery. These words are “document” (وثيقة)<sup>7</sup> and “paper” (ورقة).<sup>8</sup> Thus, all the offences of forgery in the Libyan Penal Code require a document or a paper to be falsely made or altered. Some Articles state that the subject matter of the forgery offences is a “document” and other Articles provide that the subject matter of the forgery offence is a “paper”. Articles 341, 342, 343 and 345 of the Libyan Penal Code<sup>9</sup> require a document. For example, Article 341 is translated as: “Any public employee, who during doing his duty, puts a forged *document*...”<sup>10</sup> However, Articles 346(1) and (3), 351(1) and (2), 352(1) and 353 of the same law<sup>11</sup> require a paper as a subject matter of the offences of forgery. For example, Article 346(1) states that: “Anyone, who draws up a false *customary paper*..., or distorts a valid *customary paper* or allows anyone to falsely draw it up or to distort it...”<sup>12</sup>

Equally, the Libyan Supreme Court used the words “paper” and “documents” to mention the same subject matter. On 29/6/1971 the court held that: “The *actus reus* of the offence of forgery existed by changing the reality (information) on a document which leads to harm.” Then in the same decision, it held that: “The harm on paper exists

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<sup>6</sup> For example, Canadian Penal Code uses only one word which is ‘document’. *Ibid.* Another example is forgery law in the UK. It uses the word “instrument”. See Section 8 of the Forgery and Counterfeiting Act 1981.

<sup>7</sup> The word ‘وثيقة’ in the Arabic language means document.

<sup>8</sup> ورقة is the Arabic word which means paper.

<sup>9</sup> Libyan Penal Code 1953.

<sup>10</sup> Article 341 of Libyan Penal Code states that:

يعاقب بالسجن مدة لا تقل عن ثلاث سنوات كل موظف عمومي يضع أثناء ممارسته لمهامه وثيقة مزورة في كليتها أو جزء منها أو يزور وثيقة صحيحة.

Libyan Penal Code 1953. This Article is translated as: “Any public employee, who during doing his duty puts a forged document entirely or in part or forges a valid document, shall be punishable by imprisonment for a term not less than 3 years.” This Article was translated from the Arabic language by the author.

<sup>11</sup> *Ibid.*

<sup>12</sup> Article 346(1) states that that:

كل من حرر ورقة عرفية مزورة كلياً أو جزئياً أو حرف ورقة عرفية صحيحة أو سمح بتحريرها مزورة أو بتحريفها وكان قصده تحقيق منفعة لنفسه أو للغير أو إلحاق ضرر بآخرين، يعاقب بالحبس مدة لا تقل عن ستة أشهر إذا استعملها هو أو سمح للغير باستعمالها.

*Ibid.* This Article is translated as: “Anyone, who draws up a forged customary paper entirely or in part, distorts a valid customary paper or allows anyone to falsely draw it up or to distort it with the intention that he obtains a benefit for himself or for others, or harms others, shall be subject to imprisonment for a term not less than 6 months if he uses or allows anyone to use it.” This Article was translated from the Arabic language by the author.

by changing the reality (information).”<sup>13</sup> Similarly, in its decision on 22/3/1977, it stated that: “The Libyan Penal Code did not determine the ways by which the forgery must be committed on formal documents.” And, in the same decision, it stated that: “Any alteration of the reality (information) in formal papers will constitute forgery, whatever the method of its commission.”<sup>14</sup> Hence, two words were used to express the subject matter of forgery, “document” and “paper”.<sup>15</sup>

This position of the law and the Supreme Court may be questionable. The question which is posed here is that, is there any significance in the difference between “document” and “paper” in the context of forgery law in Libya? There is no definition for these two words. Neither the forgery law nor the Libyan Supreme Court has defined the subject matter of forgery, while at the same time using two words (document and paper) to express the subject matter of forgery. This question is posed here because it is essential to know whether the legislator wanted to differentiate between these two words, or whether it meant the same thing. By doing so, credit and debit cards will be classified and considered whether they can be the subject matter of forgery and are included by the Libyan forgery law or not.<sup>16</sup> To answer this question, the words “paper” and “document” will be explored.

### **3.2.1. Meaning of Paper**

Although this word has no definition under the Libyan Penal Code, according to Arabic dictionaries,<sup>17</sup> paper means the leaves of trees and the paper of the books. In the Arabic language, it can be said papers of the trees means the leaves of the trees. This may be consistent with the fact that paper is made from wood. According to Hsui, paper is:

a felted sheet of fibres formed from a water suspension process using a sieve-like screen. When the water escapes and dries, the layer of intertwined fibres

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<sup>13</sup> It can be argued that this decision was not clear. In this decision, the court confirmed that changing the information must lead to harm. However, it stated the harm exists if the information is changed. This statement did not add anything. It only means that harm exists when the information is changed. Thus, the court should have been clear in its decision. *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.65, Year 18, 29/6/1971, *Majalet Almahkama Alolia* (January 1972) Year 8, Vol.2, 96.

<sup>14</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.26, Year 24, 22/3/1977, *Majalet Almahkama Alolia* (October 1977) Year 14, Vol.1, 230.

<sup>15</sup> However, the court did not define the subject matter of forgery.

<sup>16</sup> As will be seen in Chapter Four, it can be argued that if the legislator meant the word ‘paper’, this means plastic documents are not included. Thus, credit and debit cards are not included.

<sup>17</sup> MAA Arazy, *Mohktar Asahah* (Dar Almaaref, Cairo 1119)717.



become a thin matted sheet which is called paper.<sup>18</sup>

Thus, the word paper (ورقة), in its ordinary meaning, means a thin material, on which something can be written.<sup>19</sup> Although the size of the paper is not material,<sup>20</sup> the paper should be of a size to enable the reader of the paper to read and understand its writing. This is not to say that small papers cannot be the subject of forgery, it should be said that this matter should be left for the judge to decide. As a result, paper can be small such as a cheque. In addition, it does not matter which colour it is, although it is usually white. Thus, writing on coloured paper can be the subject matter of forgery in Libya. For example, in Libya, some electricity bills are issued on coloured papers. Therefore, if someone changes the information on these paper bills, this may be forgery.

It is submitted that in terms of forgery offences, paper should be strong, so the writing can last for a reasonable period. If it is not cohesive, it may not be considered as paper. To make this clearer, an example may be sufficient: tissue paper cannot be “paper” because it cannot be imagined that individuals use tissue for writing information. If two people write information on a tissue, they cannot frequently use this tissue, because it will be difficult to be used and it will easily be damaged or worn out. That is to say that, writing will not be kept on it. Thus, for purpose of forgery, it cannot be alleged that the word paper can apply to the tissue. Paper should to some extent be strong and lasting.<sup>21</sup>

To sum up, the meaning of the word “paper” can be stated to be clear and is a subject of agreement.<sup>22</sup> As a result, no one may doubt as to the meaning of paper intended by the legislator in the forgery provisions in Libya.<sup>23</sup> Yet, this may not be the same as to the meaning of the document. The meaning of the word “document” can be understood in different ways. Therefore, it will be discussed in more detail.

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<sup>18</sup> TT Hsuin, *Paper and printing* (Cambridge University Press, Cambridge 1985) Vol.5, 1.

<sup>19</sup> In this line, English dictionary defines the word “paper” as a “thin material that you write or draw on and that is also used for wrapping and packing things”. AS Hornby, *Oxford Advanced Learner’s Dictionary* (7<sup>th</sup> edn., Oxford University Press, Oxford 2005) 1097.

<sup>20</sup> For formal matters, paper used in Libya are usually in the size of A4 papers.

<sup>21</sup> This means that paper may be worn out as time passes. However, this time should be long.

<sup>22</sup> In this respect see MK Buckland, ‘What Is a “Document”?’ (1997) 4(8) *Journal of the American Society for Information Science* 804.

<sup>23</sup> Hence, as will be seen in the next Chapter, the meaning of paper is not a subject of argument in terms of credit and debit card forgery. In other words, it does not pose a problem in terms of its meaning.

### 3.2.2. Meaning of Document

Document can be defined in different ways and from many sides. The meaning of document today is different from its meaning in the past. In addition, “document” under criminal law is different from “document” under civil law, although there should be consistency. In the following section, the meaning of document will be explored.

#### *General Meaning*

According to the Oxford Dictionary,<sup>24</sup> the word “document” means any official paper or book containing information about a particular subject, or any official paper or book containing information that can be used as evidence or proof of something. The other definition which is given by this dictionary is that document means “a computer file that contains text that has a name that identifies it”.<sup>25</sup> The understanding from the first definition is that a document is only information on paper. This means the information must be written or typed on a paper. However, the other definition gives another wider view, which is that a document can be electronic information on an electronic document. This definition may be compatible with the ordinary meaning of the document. It is submitted that if someone was asked about some electronic files that contain some particular information, he may say these files are documents. This answer can be given because, the one who answers, thinks that the information that is stored on the electronic file, does not differ from the information that is on a paper. Hence, in the light of this argument, a document can include electronic information. That is to say that it may include credit and debit cards.<sup>26</sup>

#### *Meaning for the Purpose of Forgery*

However, this is only the general meaning of the document because from a legal perspective, the matter is controversial. Writers have different views of this issue. According to the Egyptian writer, Adahabi,<sup>27</sup> who wrote on Libyan criminal law,

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<sup>24</sup> AS Hornby *supra* 450.

<sup>25</sup> *Ibid.*

<sup>26</sup> This meaning may be consistent with the meaning of document under civil law as will be seen later in this Chapter.

<sup>27</sup> EG Adahabi, *Crimes Breaching Public Trust in the Libyan Penal Law* (Almaktaba Alwatania, Benghazi 1972) 120.

“document” means writing. As for AbduAsattar (who is also an Egyptian), she defines a “document” as signs by which a particular meaning transfers from one person to another when they are seen.<sup>28</sup> Hosni also confirms that the eye is the sense that discovers the notion which it expresses.<sup>29</sup> From these definitions, it can be understood that document must contain “writing” and this writing must be seen. In other words, the sense of the vision is the sense through which the meaning of the document must be realised.<sup>30</sup>

However, not all materials that may be written on can be a document. The material must be lasting and cannot easily be affected.<sup>31</sup> For instance, it can be paper, a piece of clothing or leather,<sup>32</sup> since such material will last for long time. On the other hand, it cannot be a piece of ice, since the writing will not be able to remain for a long period.<sup>33</sup> Similarly, writing on a beach cannot constitute a document, because it can be erased by the effect of the waves of the sea. Accordingly, it is submitted that writing can be on a piece of plastic, if this plastic can last, and is made in a way that implements its existence permanently. Thus, as will be seen in next Chapter, credit and debit cards may be a subject matter of forgery under the Libyan Penal Code as to visible information, because these cards are made of plastic.<sup>34</sup>

It is worth mentioning that a document can be written by hand or by typewriter.<sup>35</sup> Consequently, it may also be written by a computer. If a document is written by a computer and then it is subsequently printed and forged, the act can be forgery

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<sup>28</sup> F AbduAsattar, *Explanation of the Penal Law: the Special Part* (2<sup>nd</sup> edn., Dar Anahda Alarabia, Cairo 2000) 270.

<sup>29</sup> MN Hosni, *An Explanations of the Penal Law: the Special Part* (Dar Anahda Alarabia, Cairo 1988) 247. See also the decision of the Egyptian Supreme Court on 18/12/1985. It held that: “A document is any writing by which a particular meaning moves from one person to another, whatever its material, kind of language and the signs from which it is written.” Egyptian Supreme Court, Reversal Decisions, No.2464, Year 55, 18/12/1985, in MA Alalfi, *Counterfeiting, Imitation and Forgery Crimes under Penal Law Regarding Updated Supreme Court Decisions and of Prosecution Orders* (Dar Mahmood, Cairo 2007) 142.

<sup>30</sup> In this meaning, see also MS Ashawa, *The Revolution of the Information and its Reflections on Penal Law* (Dar Anahda Alarabia, Cairo 2003) 143.

<sup>31</sup> MN Hosni *supra* 247.

<sup>32</sup> OA Ramadan, *An Explanations of the Penal Law: the Special Part* (Dar Anahda Alarabia, Cairo 1986) 145; AM Khaleel, *The Crimes of Falsification of Documents* (Almaktaba Aljamia Alhadeetha, Aleksandra 2008) 92; R Ibaid and AE Alfaki, *Counterfeiting and Forgery Crimes* (Almaktab Alfani LLisdarat Alkanonea, Cairo 1999) 107.

<sup>33</sup> MN Hosni *supra* 248.

<sup>34</sup> However, visible information poses another problem. This will be addressed in Chapter Four.

<sup>35</sup> AM Moonis, *The Comprehensive in Counterfeiting and Forgery Crimes* (Dar Alfekr Oa Alkanoon, Almansoor 2010) 139.

occurring on a document. On the other hand, if the same information is changed on the computer but it is not printed out, this is a different matter, because this information would be electronic information which is the same as the invisible information on a credit or a debit card (and whether it can be the subject matter of forgery will be discussed later).<sup>36</sup> If it is written, it does not matter what language is used to write the document, as long as the law does not require a particular language.<sup>37</sup> Therefore, if a document is written or printed in English, Arabic, French or any other language, and the information is altered, it may constitute forgery.<sup>38</sup>

In line with this tendency, Alkhaleel, a Jordanian writer, states that the concept of a “document” requires: First, the denotation of the signs, that are on the document, that can be understood when the signs are looked at by a person (in other words, it must be realised by the sense of the vision). Second, the words and the signs that are on the document must be relatively lasting, so these words or symbols can be used as evidence<sup>39</sup> (thus, it is clear that the sense of the hearing is not considered as a way for understanding the “document”). As a result, a document cannot be a record or recording of a voice. This is also the view of some writers in the UK, such as Ormerod<sup>40</sup> and Williams.<sup>41</sup> Ormerod points out

A document will normally be written on paper but may be written on any material and the writing may consist in letters, figures or any other symbols used for conveying information<sup>42</sup>

Moreover, from the point of view of Williams, “A document ... is at narrowest a verbal symbol (or series of verbal symbols.) written, typewritten, printed or otherwise produced on some material base.”<sup>43</sup> Similarly, Turner maintains that

For the purpose of the law relating to forgery a “document” may be defined as: “Writing in any form, on any material, which communicates to some person or

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<sup>36</sup> This will be explored in Chapter Four.

<sup>37</sup> OA Ramadan *supra* 145.

<sup>38</sup> Thus, as will be explored, credit and debit cards may be documents even if they are issued in the English or French language.

<sup>39</sup> EA Alkhaleel, *The Penal Protection of Debit Cards: Analysed Comparative Study* (Wael, Amman 2000) 51.

<sup>40</sup> D Ormerod, *Smith and Hogan: Criminal Law* (12<sup>th</sup> edn., Oxford University Press, Oxford 2008) 958.

<sup>41</sup> Glanville L Williams, 'What is a Document?' (1948) 11(2) *The Modern Law Review* 150, 151.

<sup>42</sup> D Ormerod *supra* 958.

<sup>43</sup> Glanville L Williams *supra* 151.

persons a statement whether of fact or fiction.”<sup>44</sup>

From these views of the concept of the document, it can be understood that a “document” is nothing other than a piece of writing on a paper or, permanent or lasting, material. In addition, this writing must be realised by the eye. This is what Atia<sup>45</sup> confirms. He states that a record or a tape that holds a recording of the voice cannot be a document. The reason is that the recording is not writing and the document must hold writing.<sup>46</sup>

However, this view may be arguable. Although Williams<sup>47</sup> confirms that forgery must happen on a document and the document is in written form,<sup>48</sup> he does not deny that a recording of the voice may be a document. The reason why he takes this line is that he does not consider that the meaning of the document must be realised through the eye. In this regard, he states that: “perhaps a recording of the voice such as a dicta-phone record, is also a document, though here the verbal symbol is perceived through the ear and not through the eye.”<sup>49</sup> Therefore, according to this view, a document may be written, or it may be recorded. On the other hand, it is submitted that because it is regarded as a means for exchanging ideas and concepts between people, a document must be read and seen by the naked eye. Content or information stored on the tape needs a tool, which is the recorder, to be understood, which is not always available. Hence, a tape may not be a document.

If the meaning of the document is as has been emphasised above, a written or printed document, then the question which is posed here is, does the document have another meaning in the context of criminal law? The answer to this question will be discussed in the next point.

### ***The Modern Meaning of the Document***

Before the UK Forgery and Counterfeiting Act 1981<sup>50</sup> came into existence, the Law

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<sup>44</sup> Jw C Turner, “‘Documents’ in the Law of Forgery” (1946) 32(5) Virginia Law Review 939, 954.

<sup>45</sup> HR Atia, *The Forgery, the Imitation and the Counterfeiting of the currencies, the seals and documents* (Maktabat Jamiat Almenofya, Almenofya 2008).

<sup>46</sup> In this meaning, see also MN Hosni *supra* 247; OA Ramadan *supra* 147; F AbduAsattar *supra* 271.

<sup>47</sup> Glanville L Williams *supra* 150.

<sup>48</sup> *Ibid* 151.

<sup>49</sup> *Ibid*.

<sup>50</sup> Forgery and Counterfeiting Act 1981.

Commission of England and Wales confirmed that “document” means writing and the word did not include magnetic impulses on computer tape. It stated that:

We propose that the meaning of the word “instrument” should be extended beyond instrument in writing to include any disc, tape, sound-track or other device, on or in which instructions or data are recorded or stored by mechanical, chemical, electronic or other means<sup>51</sup>

From this statement, it can be stated that document (instrument as the commission stated) in modern meaning, namely electronic document, has not the same meaning as it had in the UK Forgery and Kindred Offences Act 1913.<sup>52</sup> “Document” was no other than a piece of writing under this Act. Therefore, the Commission drew attention to this point, which is that electronic documents should be covered.

This happened when Parliament established the Forgery and Counterfeiting Act 1981. Section 8(1)(d) of the Act states that instrument means: “any disc, tape, soundtrack or other device on or in which information is recorded or stored by mechanical, electronic or other means.”<sup>53</sup> This is not to say that electronic information is a document in the orthodox meaning. However, it can be argued that this is a new concept of document which has imposed itself. Electronic documents are used in different aspects of life. Thus, this fact should be considered. On the other hand, this may not be accepted in the terms of criminal law in Libya, in particular, forgery law, because considering electronic information as a new kind of document and therefore a subject matter of forgery, opens a door to the argument about the principle of legality.<sup>54</sup>

### **3.3. WHAT DOES THE LEGISLATOR MEAN BY USING TWO WORDS?**

To answer this question, there are three assumptions that need to be examined: (1) The subject is document and paper;<sup>55</sup> (2) The subject is document. (3) The subject is paper.

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<sup>51</sup> Law Commission of England and Wales, *Report on Forgery and Counterfeit Currency* (Law Com No 55, 1973) para 25.

<sup>52</sup> Forgery and Kindred Offences Act 1913.

<sup>53</sup> The Forgery and Counterfeiting Act 1981. Commenting on this paragraph, Cowley maintains that this paragraph brings “the law of forgery into step with modern technological advance since 1913.” David Cowley, ‘The Forgery and Counterfeiting Act 1981’ (1983) 74 *Journal of Criminal Law* 61, 62.

<sup>54</sup> This will be examined in depth in Chapter Four.

<sup>55</sup> As will be seen, the answer to this question will reflect the debate over credit and debit cards later in the next Chapter.

### 3.3.1. The Subject is a Document and a Paper.

In this assumption, it may be argued that the legislator deliberately used the two words, “document” and “paper” and intended them to have distinct meanings. Thus, whenever the legislator provides the word “document”, it should be understood so. However if the legislator provides the word “paper”, it should be strictly read. This argument may find its justification in the idea of the literal rule or as it is also called, the narrow approach.<sup>56</sup> This type of interpretation means that the judge has to give the words of the Act their ordinary and natural meaning irrespective of whether the result is reasonable or not.<sup>57</sup> Therefore, the judge cannot give it another meaning, other than the literal one, even if the interpretation leads to a silly end. The reason behind following this approach is that the intention of the legislator can easily be achieved. Considering Articles of forgery, it is obvious that the legislator knows that there is a difference between the concept of paper and the concept of document. Thus, stating that the legislator uses two words to mean different things is a logical conclusion.

In line with this approach Lord Esher stated that

If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question of whether the legislation has committed an absurdity.<sup>58</sup>

Similarly, Lord Bramwell pointed out in *Hill v East and West India Dock Co*:

I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems absurd to one man does not seem absurd to another....I think it is infinitely better, although an absurdity or an injustice or other objectionable result may be evolved as the consequence of your construction, to adhere to the words of an Act of Parliament and leave the legislature to sit it right than to alter those words according to one's notion of an absurdity.<sup>59</sup>

This argument may be reasonable. The reason behind this argument is the principle of

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<sup>56</sup> I Arazgy, *Lectures in Criminal Law: General Part* (Maktabat Tripoli Alilmia Alaalemia, Tripoli 2013) 47.

<sup>57</sup> C Elliott and F Quinn, *English Legal System* (11<sup>th</sup> edn., Pearson Education Limited, London 2010) 54; M Zander, *The Law-Making Process* (6<sup>th</sup> edn., Cambridge University Press, Cambridge 2004) 130.

<sup>58</sup> *Regina v the Judge of the City of London Court* (1892) 1 QB 273.

<sup>59</sup> *Arthur Hill v the East and West India Dock Company* (1884) LR 9 App CAS 448.

legality.<sup>60</sup> That is to say that if the legislator provides a word, and this word is clear, it must be followed, respecting the principle of legality. The language of criminal law must be interpreted literally to avoid the creation of a new crime without prior law.

### **3.3.2. The Subject is a Document**

On the other hand, one may argue that because the provisions of forgery provide two words for one subject (the subject of forgery), one should include the other. As a result, the word which has the broader meaning should include the word which has the narrower meaning. This may be logical reason to allege this. The legislator should always be wise. Therefore, from the point of wisdom, what is intended when the word “document” is used includes the word “paper”, because the word “paper” is logically included.<sup>61</sup> Paper has a narrower meaning than document. Thus, the word “paper” provided by Articles of forgery could also mean document.<sup>62</sup>

### **3.3.3. The Subject is a Paper**

Alternatively, it can be argued that the legislator means the word “paper”. The reasons behind this argument are various. First, almost all the documents that were in use in Libya at the time of the establishment of the Libyan Penal Code were papers. There were no electronic documents at the time of establishing the offences of forgery in 1953.

Another reason supporting this argument is that almost all cases of forgery in the Libyan courts have dealt with documents made from paper. For example, in the case ruled by the Libyan Supreme Court on 14/5/1966, the subject matter was a paper. It was a letter<sup>63</sup> alleged to be issued by a public employee confirming that the offender was Libyan.<sup>64</sup> Another example is the case decided on 4/4/1978.<sup>65</sup> In that case, the subject

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<sup>60</sup> As has been explained, the principle of legality is provided by the Article 1 of the Libyan Penal Code. This principle means no crime and no punishment without law. For more details see Chapter One 1.8.1.

<sup>61</sup> Conversely, as Asagheer states, law is not always logical and must be followed. JA Asagheer, *The Criminal and Civil Protection of Magnetic Credit Cards: a Practical Study in French and Egyptian Judicature* (Dar Anahda Alarabia, Cairo 2003) 122.

<sup>62</sup> Accepting this assumption, it can be argued that credit and debit cards are documents with respect to visible information. This matter will be discussed in depth in the next Chapter.

<sup>63</sup> This letter is called in Libya “knowledge and news” which means that a competent public employee has knowledge about a particular matter and issues a letter confirming this knowledge.

<sup>64</sup> *Almahkama Aolia* ‘Libyan Supreme Court’, Criminal Appeal, No.17, Year 13, 14/5/1966, *Majalet Almahkama Aolia* (October 1966) Year 3, Vol.1, 34.



matter of the forgery was a paper. It was a letter signed in blank<sup>66</sup> by the victim and handed to the offender who filled it, without the victim's knowledge or consent, with false information,<sup>67</sup> in participation with another unknown offender.<sup>68</sup>

Furthermore, under the Libyan Civil Code, the legislator does not provide the word "document" for mentioning formal and customary papers. It only uses the word paper. Article 377(1) of the Libyan Civil Code<sup>69</sup> which defines the formal paper, states that: "A formal paper is the paper in which a public employee or a person, who is entitled to provide a public service, proves what it is done by him..."<sup>70</sup> This Article clarifies the meaning of the formal paper. From this Article, it can be understood that the formal paper is the paper which is made from paper not anything else. It does not include the word "document". This fact can also be confirmed by Article 381 of the same Code.<sup>71</sup> This Article states that: "The customary paper is considered as the paper which is issued by the one who signed it, unless he frankly denies what it is imputed (writing, signature or print) to him."<sup>72</sup> Therefore, it can be understood that a document prescribed by

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<sup>65</sup> *Almahkama Alolia* 'Libyan Supreme Court', Criminal Appeal, No.239, Year 24, 4/4/1978, *Majalet Almahkama Alolia* (October 1978) Year 15, Vol.1, 159.

<sup>66</sup> This fact is governed by Article 351 of the Libyan Penal Code. This Article states that  
كل من اتهم على ورقة موقعة على بياض فأساء استعمالها بأن كتب عليها أو سمح بأن تكتب عليها وثيقة عرفية منشئة لأثار قانونية تختلف عما كان ملزماً بتعبئته أو مأذوناً له في كتابته، يعاقب بالحبس من ستة أشهر إلى ثلاث سنين إذا استعملها هو أو سمح للغير باستعمالها وكان غرضه من ذلك تحقيق منفعة لنفسه أو للغير أو إلحاق ضرر بأخرين.

Libyan Penal Code 1953. This Article is translated as: "Anyone, who is in a position of honesty of a paper signed in blank, abuses it, by writing on it or allowing to be written on it a customary document creating legal effects which are different from what he is allowed to fill in or he is entitled to write, shall be subject to imprisonment for a term of between 6 months to 3 years, if he uses it or allows others to use it with an intention that he obtains a benefit for himself or for others, or harms others." This Article was translated from the Arabic language by the author.

<sup>67</sup> The letter was filled in with the information that the victim received an amount of money and then the offender used this letter for obtaining benefit.

<sup>68</sup> See also *Almahkama Alolia* 'Libyan Supreme Court', Criminal Appeal, No.905, Year 50, 13/1/2005 (Unreported); *Mahkamat Alistinaf Mosrata* 'Mosrata Appeal Court', Criminal Circuit, No.446, Year 28, 10/4/2001, (Unreported); *Mahkamat Alistinaf Mosrata* 'Mosrata Appeal Court', Criminal Circuit, No.344, Year 32, 10/3/2005, (Unreported); *Mahkamat Alkhoms Alibtidaia* 'Alkhoms Court of First Instance', the Circuit of the Misdemeanours and the Contraventions, No.45 Year 1993, 24/11/1993 (Unreported); *Mahkamat Alkhoms Alibtidaia* 'Alkhoms Court of First Instance', the Circuit of the Misdemeanours and the Contraventions, No.462 Year 2003, 12/3/2003 (Unreported); *Mahkamat Alkhoms Alibtidaia* 'Alkhoms Court of First Instance', the Circuit of the Misdemeanours and the Contraventions, No.557 Year 2000, 13/4/2003 (Unreported). In each case of these cases, the subject matter is a paper.

<sup>69</sup> The Arabic text of paragraph (1) of this Article states that  
الورقة الرسمية هي التي يثبت فيها موظف عام أو شخص مكلف بخدمة عامة، ماتم على يديه أو ما تلقاه من ذوي الشأن...  
Libyan Civil Code 1954.

<sup>70</sup> This Article was translated from the Arabic language by the author.

<sup>71</sup> The Arabic text of this Article states that  
تعتبر الورقة العرفية صادرة ممن وقعها مالم ينكر صراحة ما هو منسوب إليه من خط أو إمضاء أو بصمة...

*Ibid.*

<sup>72</sup> This Article was translated from the Arabic language by the author.

forgery law, is a paper. In addition, from the experience of the researcher who has worked as a prosecutor and a lawyer in Libya, it may be confirmed that almost all the subject matter of the cases of forgery had been paper. There were no forgery offences whose subjects were plastic or electronic documents.<sup>73</sup>

However, following this supposition leads to the fact that the subject matter of forgery will be undermined. Forgery offences will not apply to any document unless this document is a paper. Thus, if a document is made from leather,<sup>74</sup> it will not be covered by forgery law.<sup>75</sup> Suppose, for example, that someone wants to borrow some money from another and they want to write a document to be used as evidence that there is a loan between them. They decide to use leather for writing their loan. They write their debt on the leather using a particular ink. If the lender changes the amount of the debt from £10 to £100, this act will not fall under the forgery offences. The reason for this result is that the leather is not paper. It is correct that the leather is a document in its general meaning, but not in the context of forgery offences. The document here means nothing more than paper, not anything else.<sup>76</sup> This assumption may lead to an unacceptable result. On the other hand, it seems that the word paper is the word which the legislator intends. The reasons provided for confirming this assumption may be more welcome.<sup>77</sup>

#### **3.4. THE NATURE OF THE SUBJECT MATTER OF FORGERY: FORMAL AND CUSTOMARY**

Unlike some other laws (such as English law), Libyan forgery law differentiates between two kinds of subject matter. It differentiates between customary documents and formal documents.<sup>78</sup> This differentiation can be understood from provisions of forgery which distinguish between formal documents or papers, and customary

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<sup>73</sup> The author worked as a prosecutor then a lawyer for more than nine years in Libya.

<sup>74</sup> This may suggest that credit and debit cards are not covered. This will be discussed in depth later in Chapter Four.

<sup>75</sup> This assumption will be also mentioned in Chapter Four.

<sup>76</sup> This applies to credit and debit cards which are made of plastic as will be discussed more deeply later in Chapter Four.

<sup>77</sup> It will be seen in the next Chapter that all provisions of forgery indicate this fact.

<sup>78</sup> Considering credit and debit cards as the subject of matter of forgery poses a question, which is what is the nature of credit and debit cards? This question must be answered because when the card is classified, the appropriate Article can be applied.

documents or papers. One Article which provides a clear example of this distinction between formal and customary is Article 353 of the Libyan Penal Code. It states that

تطبق بشأن تزوير الأوراق الموقعة على بياض في الحالات التي لم ينص عليها في المادتين السابقتين الأحكام الخاصة بالتزوير المادي في الأوراق الرسمية أو الأوراق العرفية.<sup>79</sup>

This can be translated as: “In other circumstances of forging blank signed papers which are not subject to Articles 351 and 352, the principles of the physical forgery of formal and customary papers are applied.”<sup>80</sup> In this Article the legislator openly differentiates between these two kinds of papers, formal and customary.

### 3.4.1. Formal Document

The meaning of the word formal is that the document is officially generated. That is to say that it is generated by a public employee or anyone who is officially entitled to generate a particular document. This can be understood from Article 341 of the Libyan Penal Code. This Article states that

يعاقب بالسجن مدة لا تقل عن ثلاث سنوات كل موظف عمومي يضع أثناء ممارسته لمهامه وثيقة مزورة في كليتها أو جزء منها أو يزور وثيقة صحيحة.<sup>81</sup>

This Article can be translated as: “Any public employee, who in the execution of his duty, puts a forged document entirely or in part or forges a valid document, shall be punishable by imprisonment for a term not less than 3 years.”<sup>82</sup> This Article penalises the act of changing information on a formal document.<sup>83</sup>

### Definition

This may be in line with Article 377(1) of the Libyan Civil Code.<sup>84</sup> Article 377 defines formal paper. It states that: “Formal paper is the paper in which a public employee or a person who is entitled to provide a public service, proves what it is done by him, or

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<sup>79</sup> *Ibid.*

<sup>80</sup> This Article was translated from the Arabic language by the author.

<sup>81</sup> *Ibid.*

<sup>82</sup> This Article was translated from the Arabic language by the author.

<sup>83</sup> The Article does not state the word “formal”. However, it can be understood from the words of the Article because formal document is the document which is generated by a public employee.

<sup>84</sup> The Arabic text of paragraph (1) of this Article states that.

الورقة الرسمية هي التي يثبت فيها موظف عام أو شخص مكلف بخدمة عامة، ماتم على يديه أو ما تلقاه من ذوي الشأن، وذلك طبقاً للأوضاع القانونية وفي حدود سلطته واختصاصه.

*Ibid.*

what he receives from the people who are concerned with the matter, according to the law and according to his authority and jurisdiction.”<sup>85</sup> This Article clarifies the meaning of formal paper. From this Article, it can be understood that the formal paper is that the paper which is made by a public employee, or the one who is entitled to provide a public service.

In this line, the Libyan Supreme Court defined “formal document” by stating that: “A formal document is the document which is written by a competent employee, according to what the laws provide.”<sup>86</sup> This decision confirmed that the formal document must be made by an employee. However, it did not state what kind of employee. That is to say that it did not emphasise whether the maker of this document is a public employee or a private employee. It is submitted that this decision meant a public employee. This can be understood from Article 341 of the Libyan Penal Code and Article 377(1) of the Libyan Civil Code, as has been emphasised above.<sup>87</sup>

With respect to the public employee, it is defined by Article 16 of Libyan Penal Code.<sup>88</sup> This Article states: “A public employee is anyone who has a public duty in relation to the employment by the government or other public institutions, permanent or temporary and with a salary or without it...”<sup>89</sup> Although they are not public employees, the Article specifies the notaries and witnesses to be included by the definition of Article 16. Therefore, this Article extends to include notaries and witnesses during performing their duty.<sup>90</sup> Thus, an example of forging a formal document can be a false draft of a ruling made by a judge, or can be a false contract falsely made by a notary. In addition, it can

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<sup>85</sup> This Article was translated from the Arabic language by the author.

<sup>86</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.81, Year 8, 26/6/1965, *Majalet Almahkama Alolia* (October 1965) Year 2, Vol.1, 51. This text was translated from the Arabic language by the author.

<sup>87</sup> See above.

<sup>88</sup> Article 16(4) of the Libyan Penal Code states in the Arabic language that

الموظف العمومي : هو كل من أنيطت به مهمة عامة في خدمة الحكومة أو الولايات أو الهيئات العامة الأخرى سواء كان موظفاً أو مستخدماً، دائماً أو مؤقتاً براتب أو بدونه، ويدخل في ذلك محررو العقود والأعضاء المساعدون في المحاكم والمحكمون والخبراء والترجمة والشهود أثناء قيامهم بواجباتهم.

Libyan Penal Code 1953.

<sup>89</sup> This Article was translated from the Arabic language by the author.

<sup>90</sup> If a witness makes a false testimony he will, as a general principle, be liable for perjury under Article 266 of the Libyan Penal Code. However, Adahabi alleges that it can be imagined some cases where the witness commits forgery, for example, when the witness receives the file of the case, in which he has made a testimony, to read his previous testimony but he takes the opportunity and alters his previous testimony. In this case, the witness is liable for forgery in a formal document which is the proceedings. EG Adahabi *supra* 230.

also be a false statement stated by a witness and submitted to the court.<sup>91</sup>

### 3.4.2. Customary Document

Although the customary document has no definition in criminal law, Alazhari defines a customary paper as a paper issued by lay people, usually those whom these papers belong to, and these papers are usually (not always) signed by them. Thus, no public employee or anyone assigned to public service intervenes in their issue.<sup>92</sup> Thus, it can be stated that customary document means the document which is made by the individuals themselves. It is not generated by a public employee in the execution of his duty.<sup>93</sup> This can be confirmed by Article 381 of the Libyan Civil Code.<sup>94</sup> This Article states that: “The customary paper is considered as the paper that is issued by the one who signed it, unless he frankly denies what it is imputed (writing, signature or print) to him.”<sup>95</sup> Despite the fact that this Article does not define the word “customary”, it implies that the issuer of the customary paper is not a public employee. That is, he is a lay person. Therefore, a customary document can be a bill made by any one. In addition, it can be a love letter which is made in the name of a wife for someone to make the husband thinking that it was made by her.<sup>96</sup>

### 3.4.3. Is the Differentiation Justified?

It is worthwhile mentioning that the differentiation between customary and formal documents is not justified, and credit and debit cards should not be classified as customary or formal. In this respect, a question was asked in the interviews which were conducted in Libya.<sup>97</sup> As can be seen from Chart 1 (below), the answers to the question “In the context of forgery offences, do you think the differentiation between formal and

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<sup>91</sup> Thus, if a lawyer receives a formal written testimony to adduce it to the court but he alters the information, this will be forgery in a formal document.

<sup>92</sup> MAA Alazhari, *The General Theory of the Obligation, Part Two, the Principles of the Obligation* (Dar Alkotob Alwatania, Benghazi 2013) 251.

<sup>93</sup> See also Alhashmy Zaed Alhashmy Abujareeda, ‘The Principles of Customary Paper under Civil Law and Islamic Sharia: Comparative Study’ (LLM dissertation, Almergheb University 2009) 12. He defines customary paper as writing issued by one of its parties or another entitled by them but he is not a public employee or assigned to public service. In this meaning see A Mourad, *Explanation of the Crimes of Forgery and Falsification* (Albahaa for Programming: Computer and Electronic Publication, Alexandria, 2004) 193.

<sup>94</sup> Libyan Civil Code 1954.

<sup>95</sup> This Article was translated from the Arabic language by the author.

<sup>96</sup> As will be seen in Chapter Four, credit and debit cards can be formal and can be customary.

<sup>97</sup> The interviews were conducted in the period between February and March 2012.

customary documents should be abolished?” were various. The vast majority of the interviewees were of the opinion that the differentiation between these two kinds of documents should remain. The main reason behind this view was that a formal document is more reliable than a customary document because it is issued by a public employee who is supposed to be trusted.<sup>98</sup>

Chart (1)<sup>99</sup>

Q. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?				
Scholars	Abooda		No	
	Alansary		No	
	Alaraby		No	
	Arazgy		No	
	Bara		No	
Judges	Unnamed 44		No	
	Alasbaly		No	
	Alfetoory			N/A
	Alhibaishy R			N/A
	Unnamed 45		No	
	Almarkoob		No	
	Bennoor		No	
	Unnamed 43		No	
	Unnamed 39		No	
	Mansoor		No	
Sohaim		No		
Prosecutors	Abuzaid		No	
	Alahoal		No	
	Alhesan		No	
	Alhibaishy S		No	
	Alkelany		No	
	Alkraioy	Yes		
	Unnamed 41		No	
	Unnamed 40	Yes		
	Athelb		No	
	Atoonsy	Yes		
	Unnamed 42	Yes		
	Bashaara		No	
	Ibraheem		No	
	Salem		No	
	Lawyers	Abuamood	Yes	
Abuarabeah			No	
Abujareeda			No	
Albisht			No	
Alhewaij		Yes		
Asagheer			No	

<sup>98</sup> See Chart 1, page 74.

<sup>99</sup> In the Chart above, the reader will see that some interviewees who are listed are unnamed and have numbers. The reason why they are not named is because they did not agree to be named in the thesis and the reason why they have numbers is because it is easy to classify their answers.

	Azentany		No	
	Benrajab		No	
	Gadaad		No	
	Tebar	Yes		
Solicitors	Anahaas		No	
	Atabeeb	Yes		
	Jarbooh		No	
	Mohammed		No	
Notary	Asofrany		No	

### *Differences*

It is correct that there is a difference between documents that are issued by a public employee and those that are issued by individuals. A formal document represents the State and the government departments. It carries the name of the State. Therefore, the assault on it is considered as a disparagement to the State or its departments. On the other hand, a customary document represents individuals, so the assault on this document will not have the same value. In addition, documents that are issued by a public employee are more reliable than those issued by the individuals themselves. The reason behind this is that people usually think that a document which is issued by a public employee is not false, or at least it is impossible to be false. It expresses the authority of the government and the government never lies. However, it is submitted that in Libya, formal documents recently have become a target of forgers to the degree that there is no formal document that cannot be forged. There are some, who are specialists in forgery, in particular formal documents.<sup>100</sup>

In addition, documents that are produced by individuals have less strength as proof than the documents created by a public employee. For example, under Libyan Civil law, the formal document cannot be disregarded, except when there is an appeal against it by way of forgery. Article 378<sup>101</sup> states that: “The formal paper is evidence against all people but only as to the information which written by its issuer and in which he is

<sup>100</sup> The problem with forgery in Libya is that public employees deal with false documents and accept them as genuine even they know that they are false. A public employee informed the researcher that once a person came to an employee with a false document. The falsity on the document was obvious. The employee said to the person try to not let the falsity be obvious. This confirms that the formal document cannot always be reliable and the public employee is not always trusted.

<sup>101</sup> The Arabic text of this Article states that

الورقة الرسمية حجة على الناس كافة بما دون فيها من أمور قام بها محررها في حدود مهمته أو وقعت من ذوي الشأن في حضوره مالم يتبين تزويرها بالطرق المقررة قانوناً.

Libyan Civil Code 1954.

entitled or in which it was signed by its parts in the presence of the issuer of the paper, unless it is proved it is forged as the law states.”<sup>102</sup> However, the customary document can be disregarded by the judge if it is refused by the other party without needing to appeal against the forgery. Article 381<sup>103</sup> states that: “The customary paper is considered that it is issued by the person signed it unless he openly denies what it is imputed to him whether it is writing, signature or print.”<sup>104</sup>

However, it can be argued that all kinds of documents should be considered the same and the differentiation should be abolished. This is because the harm that may occur from forging a customary document is in some cases greater than the harm that may occur from forging a formal document. For example, forging a formal letter which states that someone has spent a night in a hospital by a public employee, (a doctor who is working in the hospital) so this person can prove to his manager that he was ill when he was absent, is less dangerous than forging a love letter which may break a family and cause a loss to the children of this family. This danger would clearly affect all of society.<sup>105</sup> However, the certificate may only affect the budget of the manger.

Furthermore, forging a credit card or a debit card may lead to a big loss to the bank or the cardholder or even to the service provider, according to the contract that organises the relationships between the parties of the card. If for example, a credit or debit card is forged and is used for obtaining goods from the merchant, service from service provider or money from cash machines, the harm may be greater than if a letter of reference from a formal employee is forged. However, whereas a credit card is a customary document, the letter of reference is a formal document. Consequently, under Libyan Law, the punishment for forging a letter of reference is more severe than the punishment for forging a credit card. Therefore, there is no reason to treat the two kinds of documents differently. In other words, what should be considered is the reality (information) which is on the document, not the creator or the maker of the

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<sup>102</sup> This Article was translated from the Arabic language by the author.

<sup>103</sup> The Arabic text of this Article states that

تعتبر الورقة العرفية صادرة ممن وقعها مالم ينكر صراحة ما هو منسوب إليه من خط أو إمضاء أو بصمة،...

*Ibid.*

<sup>104</sup> This Article was translated from the Arabic language by the author.

<sup>105</sup> It may affect society because families are considered as the ground or the basis of society. If the family in society is cohesive and connected, this cohesion and connection will reflect on society.



document.<sup>106</sup>

### *Suggestion*

Therefore, the author suggests that the differentiation in Libya between formal and customary documents should be abolished. Forgery law should treat documents similarly to some other western laws. For example, English forgery law (Forgery and Counterfeiting Act 1981) does not only differentiate between formal and customary documents but it also confirms this fact by mentioning that formal and informal documents have the same meaning, which is “instrument”. Section 8 which defines the subject matter of forgery states that

(1) Subject to subsection (2) below, in this Part of this Act “instrument” means—

(a) any document, whether of a formal or informal character;...<sup>107</sup>

Another example is the American laws such as the Model Penal Code.<sup>108</sup> This Code provides that any alteration of writing is considered as forgery. It does not matter whether the writing on a document is made by a public employee or by lay person. Section 224.1. of the Model Penal Code states:

(1) ... A person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:

(a) alters any writing of another without his authority...<sup>109</sup>

If the documents became the same and the differentiation is abolished, credit and debit cards would be affected. In that case, the punishment of forging credit and debit cards may be accepted. Credit and debit cards under Libyan law are customary documents, which currently “deserve” lighter punishment than the punishment of forging a formal document.

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<sup>106</sup> This opinion was also shared by one prosecutor, Interviewee No 40. He claimed that: “From a practical approach, the subject matter of the most forgery cases transferred to the Alkhoms prosecution office, are customary. In addition, the harm which is caused by forgery is the same in formal and customary documents, and it is sometimes greater in the customary document such as the customary title.” He concluded: “Thus, the differentiation should be abolished.” Interview with Unnamed, No 40, Prosecutor, Alkhoms Prosecution Office, (Alkhoms, February 2012).

<sup>107</sup> Forgery and Counterfeiting Act 1981.

<sup>108</sup> The Model Penal Code 1962.

<sup>109</sup> *Ibid.*

### 3.5. CONCLUSION

This Chapter has explored the subject matter of forgery under the Libyan Penal Code. It has examined the words, which the provisions of forgery used for expressing the subject matter of forgery. These words are “paper” and “document”. Although the words “document” and “paper” are not the same words and have different meanings, forgery law does not provide any definition for these words. As has been examined, the meaning of the word “paper” does not pose any significant problem, because it is obvious. Paper is, in its ordinary meaning, a thin material that can be written on.<sup>110</sup> However, this is not the case with “document”. Document has a different meaning from the past to the present. Whereas document is used in Libya to mean visible information on a particular material, its meaning is extended to include the invisible information on electronic material (such as has been done in the UK, Canada, etc.). However, this is only the wide meaning, because under criminal law in Libya, this may not be applied. Although the Libyan Penal Code does not define the term “document”, it can be understood from the position of the Libyan Supreme Court,<sup>111</sup> the interviews conducted in Libya and the views of some scholars that a document under criminal law cannot bear the current wide meaning. The reason behind that is that principle of legality.<sup>112</sup>

A further complication under the Libyan Penal Code is that there are two kinds of documents or papers used by the legislator in Libya, namely formal and customary. The reason behind this differentiation is that formal documents and papers are made by a trustworthy person who represents the authority of the State of Libya. These papers are more reliable and forgery of them is treated as being more serious than forgery of customary documents issued by individuals. This was the opinion of the vast majority of the interviewees.<sup>113</sup> However, this differentiation may not be a prudent treatment of the subject matter of forgery because what should be protected from forgery is the forgery of information regardless of the nature of the document. The information on a customary document may be more important than that which is on the formal one. This

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<sup>110</sup> See the definition of paper in the English dictionary. AS Hornby *supra* 1097.

<sup>111</sup> For example, see *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.81, Year 8, 26/6/1965, *Majalet Almahkama Alolia* (October 1965) Year 2, Vol.1, 51.

<sup>112</sup> For more details about the principle of legality, see Chapter One, 1.8.1. In addition, the principle of legality in terms of credit and debit forgery will be explored in Chapter Four.

<sup>113</sup> See Chart 1, page 74.

differentiation may weaken or diminish the trust in customary documents in Libya, and because credit and debit cards are presently considered as customary documents, trust in them as methods of payment will be weakened.

Therefore, the author suggests that this distinction should be abolished, despite the fact that the vast majority of the interviewees claimed the opposite. Formal and customary documents and paper should be the same in all aspects.<sup>114</sup> Thus, if information is changed on a formal document, the punishment should be the same as in the case of forging information on a customary document if the circumstances are the same. Another suggestion is that the word “paper” and the word “document” should have the same meaning. There is no reason for stating two words.<sup>115</sup> Thus, “document” should be sufficient to provide a clear expression of the subject matter of forgery. However, because there is no definition of the word “document”, it should have a clear meaning.

To sum up, it seems that the subject matter of the offence of forgery in Libya is vague. The two words currently used by the legislator (paper and document) pose a problem and this problem may be more obvious in the next Chapter, which will explore whether credit and debit cards can be the subject matter of forgery under the Libyan Penal Code.

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<sup>114</sup> For example, the punishment for forging these two kinds of the subject matter should be the same.

<sup>115</sup> They cause confusion over which word the legislator means.

## CHAPTER FOUR

### CREDIT AND DEBIT CARDS: CAN THEY BE THE SUBJECT MATTER OF FORGERY IN LIBYA?

#### 4.1. INTRODUCTION

This Chapter will explore whether credit and debit cards can be the subject matter of forgery under the Libyan Penal Code. As has been explored in Chapter Three, the Libyan Penal Code uses two words for mentioning the subject matter of forgery, “document” and “paper”. This Chapter will explore whether these two words can be applied to credit and debit cards.

This Chapter is considered as the key point in the thesis, because it affects all forgery offences. The element of the subject matter of forgery is fundamental because the problem of the subject matter of forgery affects the actus reus of the offence of credit and debit card forgery. Although the actus reus may exist in terms of the offence of forgery, the problem of the subject of forgery may prevent this actus reus from being considered so.<sup>1</sup> Equally, the same problem may have an impact on the offence of using a false credit and debit card.<sup>2</sup> In addition, in Chapter Seven, the meaning of the document may cause a problem for a potential offence of possession of false credit and debit cards.<sup>3</sup>

There is a doubt whether credit and debit cards are documents under Libyan law.<sup>4</sup> The reason behind this doubt is that, as has been seen, credit and debit cards are made of plastic.<sup>5</sup> The card has two kinds of information, visible information which is written on the surface of the card, and invisible information, which is encoded on the magnetic strip and the magnetic chip. Therefore, there are two subject matters of forgery. If the alteration happens to the visible information, the subject matter of forgery is to plastic.

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<sup>1</sup> This will be examined in next Chapter.

<sup>2</sup> It will be seen in Chapter Six that the results from this Chapter will play a main role in the existence of the offence of using the false credit and debit cards.

<sup>3</sup> Although the possession of a false credit or debit card is not criminalised, the problem of the subject matter partially affects the potential criminalisation of these false cards.

<sup>4</sup> See Chapter Three.

<sup>5</sup> For more details, see Chapter Two 2.4.3.

If the alteration happens to the invisible information, the subject matter of the forgery will be an electronic document. This matter leads to an argument between scholars in some Arabic countries such as Egypt and Jordan. Some<sup>6</sup> argue that credit and debit cards are documents falling under forgery law, and others<sup>7</sup> reject this argument because these cards cannot be covered by forgery law.

This matter is not only controversial between scholars, but also between the interviewees the author interviewed in Libya.<sup>8</sup> The results achieved by the interviews conducted in Libya illustrate how not only does invisible information pose a problem in terms of credit and debit card forgery, but so also does visible information. The results can be divided into two categories: the forgery of visible information and of invisible information. Some interviewees claimed that credit and debit cards can be the subject matter of forgery as to visible information, because these cards are considered as documents (as the legislator in Libya requires). However, other interviewees did not agree with this view, because credit and debit cards are not paper.<sup>9</sup> As for invisible information, some interviewees claimed that these cards could be the subject of forgery in Libya because the word document covered these cards.<sup>10</sup> Further, credit and debit cards should be dealt with the same as cheques. Conversely, some interviewees claimed that credit and debit cards cannot be covered by the Libyan Penal Code, namely the provisions for forgery: for example, the subject matter is a paper not a document; another reason was the principle of legality.<sup>11</sup>

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<sup>6</sup> O Salem, *The Criminal Protection of Debit Cards: Comparative Study* (Dar Anahda Alarabia, Cairo 1995) 31; HH Gashgoosh, *Computer Crimes in Comparative Legislations* (Dar Anahda Alarabia, Cairo 1992) 121; Fathia Mohammed Gorari, 'The Criminal Protection of Debit Cards' (2004)1 *Alhokok Journal for Legal and Economic Science* 1, 39.

<sup>7</sup> JA Asagheer, *The Criminal and Civil Protection of Magnetic Credit Cards: a Practical Study in French and Egyptian Judicature* (Dar Anahda Alarabia, Cairo 2003) 120; AT Shamsadeen, *The Criminal Protection of the Electronic Document: Comparative Study* (Dar Anahda Alarabia, Cairo 2006) 28; NA Gora, *The Economic Offences of the Computer: a Theoretical and Practical Study* (Alhalabi Alhokokia, Beirut 2005) 585; EA Alkhaleel, *The Penal Protection of Debit Cards: Analysed Comparative Study* (Wael, Amman 2000) 69.

<sup>8</sup> See Chart 2, page 86 and Chart 3, page 87.

<sup>9</sup> See further Chapter Three above on this issue.

<sup>10</sup> For instance, in an interview with Ali Abuamood, he claimed that "Forgery law in Libya did not determine the meaning of the paper or the document. Thus, in respect of the electronic writing, it is not more than signs that are electronically stored. It can be read by electronic machine. This writing in my view is a document and the alteration to it constitutes forgery under Article 346 of Libyan Penal Code." Interview with Ali Abuamood, Lawyer (Alkhoms, February 2012).

<sup>11</sup> For more details about the principle of legality, see Chapter One 1.8.1.

For this purpose, this Chapter will be divided into two sections. Section one will explore the views of the scholars regarding visible information. It will address whether credit and debit cards can be the subject matter of forgery as to visible information. It will examine the views of the scholars and the results of the interviews. As will be seen in this section, visible information may pose a problem because the credit and debit card are made of plastic rather than paper. Section two of the Chapter will approach the question of invisible information. It will explore the views of the scholars and the results of the interviews conducted in Libya. It will show that invisible information is not a subject of agreement between commentators in many countries. Thus, this Chapter will tackle the following issues:

- The debate over visible information.
- The debate over invisible information.

## **4.2. THE DEBATE OVER VISIBLE INFORMATION**

Although it is a subject of agreement in other Arabic countries, the interviews conducted in Libya showed that changing visible information on credit and debit cards is a controversial matter. The reason behind this lies in the ambiguity of the meaning of the subject matter of forgery under the Libyan Penal Code. Thus, there are two views revolving around visible information on credit and debit cards and whether they can be the subject matter of forgery. In this section, the views of some scholars will be addressed, then the matter in Libya will be examined.

### **4.2.1. Credit and Debit Cards are the Subject Matter of Forgery**

From the points of view of some scholars in Arabic countries<sup>12</sup> such as Egypt and Jordan, it is accepted that credit and debit cards do not pose any problem regarding visible information. They consider credit and debit cards as “documents” similar to other ordinary documents such as paper documents. They argue these cards hold visible information as other ordinary documents. This information may be read and changed. Thus, they maintain, this information can be the subject of forgery.

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<sup>12</sup> O Salem *supra* 31; JA Asagheer *supra* 120; MS Ashawa, *the Information Revolution and its Reflections on the Penal Law* (Dar Anahda Alarabia, Cairo 1998) 13; SM AbduAlhakam, *the Criminal Protection of the Credit Cards: the Crime of Electronic Payment Cards* (Dar Anahda Alarabia, Cairo 2003) 47; FEA Alhamood, *the Legal System of Credit Cards* (Dar Athakafa Alarabia, Amman 1999) 109.

### *Egyptian Approach*

This view is the trend argued by many writers in Egypt.<sup>13</sup> One of the Egyptian scholars, Asagheer, maintains that the credit card is regarded as a set of concepts and meanings issued by banks and financial institutions. It can be considered as a document. As a result, if any of the visible information that is fixed on the card (such as the information of the card holder, the account number or the expiration date) is changed, the alteration will constitute forgery. The forgery will be classified as a forgery happening on a customary document if the alteration happens on a card issued by a non-public or a foreign bank.<sup>14</sup> And it will be classified as a forgery happening on a formal document, if the forgery happens to a card issued by a public bank which belongs to the State.<sup>15</sup> Similarly, AbduAlmajeed believes that because the visible data or the signs on credit and debit cards can be understood by looking at them (the eye is the sense that discovers the concept or the idea), these cards are “documents” so far as concerns their visible information.<sup>16</sup> Equally, AbduAlhakam states that if the fixed information which is on credit cards expresses some concepts and meanings, the card can form a document that in turn can be the subject matter of forgery.<sup>17</sup> Furthermore, this view is also followed by Salem. He points out that there is no doubt that the visible information which is on the debit cards expresses a set of concepts and some meanings. He added that this means these cards can be documents in the context of forgery law in Egypt.<sup>18</sup>

Thus, it can be stated that generally speaking there is an agreement in Egypt that credit cards and debit cards do not pose any problem with respect to visible information because scholars consider these cards as documents. The general belief in Egypt is that they are documents and therefore can be the subject matter of forgery. For example, according to Hosni, the subject matter of forgery in Egypt is the document (محرر). He

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<sup>13</sup> O Salem *supra* 31; JA Asagheer *supra* 120; MS Ashawa *supra* 13; SM AbduAlhakam *supra* 47.

<sup>14</sup> Because the writer, Asagheer, addressed the matter of credit cards under Egyptian criminal law, the foreign banks which are meant here are the non-Egyptian banks. Therefore, all credit cards which may be issued in Libya or any other country such as the UK are considered as customary documents under Egyptian criminal law.

<sup>15</sup> JA Asagheer *supra* 120. Like the Libyan Penal Code which distinguishes between formal and customary documents, the Egyptian Penal Code also differentiates between formal documents and customary documents.

<sup>16</sup> MNS AbduAlmajeed, *The Criminal Responsibility for Changing the Reality on Debit and Credit Cards* (Dar Anahda Alarabia, Cairo 2008) 91.

<sup>17</sup> SM AbduAlhakam *supra* 47.

<sup>18</sup> O Salem *supra* 31.

does not distinguish between whether the document is made from paper or from other material as long as the document conveys the information and can be seen by the sense of vision.<sup>19</sup> Therefore, altering this kind of information on these cards may be forgery if the other requisite elements of the offence of forgery exist.

### *Jordanian Approach*

In line with this view, Alhamood,<sup>20</sup> the Jordanian commentator states that because it is regarded as a piece of plastic issued by a financial institution and it has the cardholder's data, special numbers and the expiration date of the card, a debit card<sup>21</sup> can be a document. Thus, any change that may take place to the visible information which the card displays will constitute forgery covered by Article 260 of the Jordanian Penal Code.<sup>22</sup> This Article states<sup>23</sup> that: "Forgery is a contrived distortion to the reality of the facts and information which is intended to be proved by a document or writing. These documents and writing must lead to potential or real harm. This harm may be physical, immaterial or social."<sup>24</sup> Considering this Article, it can be stated that it is not the same as Libyan forgery law, because this law defines forgery and makes it clear that the subject matter can be a document (صك) or writing (كتابة).<sup>25</sup> It states forgery is a contrived distortion of the reality of the facts and information which is intended to be proved by a document or writing. These two words can include credit and debit cards because the Article uses the word "or" as an indication that it does not matter whether the subject of forgery is a document or something in writing. In other words, it does not matter whether the subject of forgery is a document which may be made of plastic, or a paper on which there is writing.

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<sup>19</sup> MN Hosni, *An Explanations of the Penal Law: the Special Part* (Dar Anahda Alarabia, Cairo 1988) 246.

<sup>20</sup> FEA Alhamood *supra* 109.

<sup>21</sup> Alhamood only explores debit cards. However, his view can apply to credit cards because they both have the same information.

<sup>22</sup> *Ibid.*

<sup>23</sup> The Arabic text of this Article states that

التزوير، هو تحريف مقتعل للحقيقة في الوقائع والبيانات التي يراد اثباتها بصك أو مخطوط يحتج بهما نجم أو يمكن أن ينجم عنه ضرر مادي أو معنوي أو اجتماعي.

Jordanian Penal Code 1960.

<sup>24</sup> This Article was translated from the Arabic language by the author.

<sup>25</sup> However, as has been seen in Chapter Three the Libyan law uses two words but it does not distinguish between them. That is to say, it does not state document or paper. it only uses them as an indication that they are the same.



### *The Matter in Libya*

This opinion was the view of the majority of people interviewed in Libya.<sup>26</sup> According to these interviews, 30 of the interviewees claimed that visible information on credit and debit cards can be the subject matter of forgery. As Chart 2 shows, 22 of the interviewees answered “yes” to the question “does the Libyan criminal law protect credit and debit cards from forgery?”<sup>27</sup> These interviewees did not differentiate between visible information and invisible information.

However, although 21<sup>28</sup> of the interviewees answered “no” to the previous question,<sup>29</sup> 8 of them claimed that their answers did not include visible information. That is to say, they agreed credit and debit cards are covered by forgery law in Libya as to visible information.<sup>30</sup> These interviewees included judges, prosecutors and lawyers. One of the judges, Almarkoob claimed that: “If the alteration of the reality (information) happens on visible information on credit and debit cards, this alteration will be forgery and the forgery law can be applied in this case.”<sup>31</sup> Another prosecutor claimed that: “Credit and debit cards can be divided into two categories. As for the first category, visible information, these cards are considered as customary papers and the alteration on them constitutes forgery on a customary paper. However, for the second category, invisible information, alteration is not forgery.”<sup>32</sup>

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<sup>26</sup> These interviews were conducted in Libya in the period between February and March 2012.

<sup>27</sup> See Chart 2, page 86.

<sup>28</sup> It will be seen in the next Section that about 21 of the interviewees did not believe that credit and debit cards can be the subject matter of forgery.

<sup>29</sup> The question is “does Libyan Criminal law protect credit and debit cards from forgery offences?”

<sup>30</sup> It will be seen that the majority of the interviewees did not agree that invisible information on the magnetic strip or chip on credit and debit cards can be the subject of forgery under Libyan law.

<sup>31</sup> Interview with Ahmmmed Almarkoob, Judge, Eastern Tripoli Court of First Instance (Alkhoms, February 2012).

<sup>32</sup> Interview with AbduAsalam Alahual, Prosecutor, Alkhoms Prosecution Office (Alkhoms, February 2012). This will be addressed later in this Chapter.

Chart (2)<sup>33</sup>

Q. Does Libyan Criminal law protect credit and debit cards from forgery offences?				
Scholars	Abooda		No	
	Alansary		No	Yes as to visible info
	Alaraby		No	
	Arazgy		No	
	Bara	Yes		
Judges	Unnamed 44			No clear answer
	Alasbaly			No clear answer
	Alfetoory	Yes		
	Alhibaishy R	Yes		
	Unnamed 45	Yes		
	Almarkoob		No	Yes as to visible info
	Bennoor	Yes		
	Unnamed 43	Yes		
	Unnamed 39	Yes		
	Mansoor		No	
	Sohaim		No	Yes as to visible info
	Prosecutors	Abuzaid		No
Alahoal			No	Yes as to visible info
Alhesan			No	
Alhibaishy S		Yes		
Alkelany			No	
Alkraioy		Yes		
Unnamed 41			No	Yes as to visible info
Unnamed 40		Yes		
Athelb		Yes		
Atoonsy		Yes		
Unnamed 42		Yes		
Bashaara		Yes		
Ibraheem			No	Yes as to visible info
Salem			No	
Lawyers		Abuamood	Yes	
	Abuarabeah		No	
	Abujareeda		No	
	Albisht		No	Yes as to visible info
	Alhewaij		No	
	Asagheer	Yes		
	Azentany	Yes		
	Benrajab	Yes		
	Gadaad	Yes		
	Tebar		No	Yes as to visible info
Solicitors	Anahaas		No	
	Atabeeb	Yes		
	Jarbooh		No	
	Mohammed	Yes		
Notary	Asofrany	Yes		

<sup>33</sup> In the Chart above, the reader will see that some interviewees who are listed are unnamed and have numbers. The reason why they are not named is because they did not agree to be named in the thesis and the reason why they have numbers is because it is easy to classify their answers.

### *Credit and Debit Cards are Documents*

The reason that interviewees gave for supporting their view (credit and debit cards can be the subject matter of forgery) was that credit and debit cards are supposed to be documents. This reason was provided by the majority of the interviewees. This can be understood from Chart 3 below. As can be seen from this Chart, 33 of 45 interviewees<sup>34</sup> claimed that credit and debit cards are documents as regards visible information. They pointed out that credit and debit cards hold information and are used for obtaining the money from cash machines. Therefore, there is no reason for stating that these cards are not documents. Credit and debit cards are the same as any document. Thus, they did not doubt that the subject matter of forgery intended by the legislator in Libya is the word “document”.<sup>35</sup> In the light of this meaning, Alansary claimed that: “What must be clear is that when forgery offences were provided for, in 1953, the legislator was talking about documents that were made from paper and those that were tangible and touchable.”<sup>36</sup> In other words, paper is not only the word which was meant by the legislator.

Chart (3)<sup>37</sup>

Q. Are credit and debit cards documents?				
Credit and debit cards are documents as to:		Visible information	Invisible information	
Scholars	Abooda	No	No	Yes as in civil law – Not paper
	Alansary	Yes	No	
	Alaraby	No	No	Because it is not paper.
	Arazgy	Yes	Yes	Not paper
	Bara	Yes	Yes	
	Unnamed 44			No clear view
	Alasbaly			No clear view
	Alfetoory	Yes	Yes	
	Alhibaishy R	Yes	Yes	

<sup>34</sup> See Chart 3, page 87. Although some interviewees claimed that these cards are documents, they did not consider them as documents under criminal law, as will be seen later.

<sup>35</sup> As has been discussed in Chapter Three, there are three assumptions which interpret the reason why the legislator provides two words to express the subject matter of forgery. One of these assumptions is the legislator intended the word document. For more details, see Chapter Three 3.3.2.

<sup>36</sup> This interviewee meant only visible information not invisible information. Interview with Abubakr Alansary, President of Criminal Law Department, Faculty of Law, Tripoli University (Tripoli, March 2012).

<sup>37</sup> In the Chart above, the reader will see that some interviewees who are listed are unnamed and have numbers. The reason why they are not named is because they did not agree to be named in the thesis and the reason why they have numbers is because it is easy to classify their answers.

Judges	Unnamed 45	Yes	Yes	
	Almarkoob	Yes	No	
	Bennoor	Yes	Yes	
	Unnamed 43	Yes	Yes	
	Unnamed 39	Yes	Yes	
	Mansoor	No	No	
	Sohaim	Yes	No	
Prosecutors	Abuzaid	No	No	Yes in civil law
	Alahoal	Yes	No	
	Alhesan		No	
	Alhibaishy S	Yes	Yes	
	Alkelany		No	
	Alkraioy	Yes		
	Unnamed 41	Yes	No	
	Unnamed 40	Yes	Yes	
	Athelb	Yes	Yes	
	Atoonsy	Yes	Yes	
	Unnamed 42	Yes	Yes	
	Bashaara	Yes	Yes	
	Ibraheem	Yes	No	
	Salem	No	No	Yes in civil law
Lawyers	Abuamood	Yes	Yes	Customary document
	Abuarabeah	Yes	No	
	Abujareeda	No	No	Yes in civil law - customary document – not paper
	Albisht	Yes	No	
	Alhewaij	Yes	Yes	
	Asagheer	Yes	Yes	
	Azentany	Yes	Yes	Customary papers
	Benrajab	Yes	Yes	Customary paper
	Gadaad	Yes	Yes	
Solicitors	Tebar	Yes	No	
	Anahaas		No	
	Atabeeb	Yes	Yes	
	Jarbooh	No	No	
Notary	Mohammed	Yes	Yes	
	Asofrany	Yes	Yes	

### ***Meaning of Document: Visible Information***

Considering the meaning of document provided by the scholars,<sup>38</sup> it cannot be denied that credit and debit cards are documents as to visible information. They point out that document is considered as a set of signs by which a particular meaning transfers from

<sup>38</sup> MN Hosni *supra* 248; OA Ramadan, *Explanation of the Penal Law: the Special Part* (Dar Anahda Alarabia, Cairo 1986) 145; EG Adahabi, *Crimes Breaching Public Trust in the Libyan Penal Law* (Almaktaba Alwatania, Benghazi 1972) 121; F AbduAsattar, *Explanation of the Penal Law: the Special Part* (2<sup>nd</sup> edn., Dar Anahda Alarabia, Cairo 2000) 270. For more details, see Chapter Three 3.2.2.

one person to another when it is seen.<sup>39</sup> They also maintain “A document will normally be written on paper but may be written on any material ...”<sup>40</sup> Thus, there are some reasons which may support this view. First, credit and debit cards are made of plastic. Second, these cards hold information which is readable without using any tool.

### ***Plastic***

The piece of plastic (the card) can last for long period of time. Further, the information on it is not affected. Hence, it does not matter whether this information is printed (such as the name of the institution under whose supervision the card is issued); embossed (such as the number of the card); or written (such as the signature of the cardholder on this plastic). The important thing is that this plastic must be able to hold information for a non-transient period of time. This information must be visible and readable.

### ***Visible***

Visibility means the information does not need any tool to be seen. It must be readable by the naked eye. Tools mean any computerised equipment such as the cash machine and the card reader at the point-of-sale.<sup>41</sup> However, it can be argued that although this information is visible, it may need tools to be read. For example, if the reader has a lack of vision, he cannot see without using tools. These tools are glasses. However, this is correct that glasses are tools, but visibility which is meant here is the visibility from an objective aspect not from a subjective aspect. In other words, visibility should be considered by looking at the reasonable person who has normal and healthy vision. If the ordinary person whose vision has no problem can read this information, the information is visible, although others may need a tool to read it as per the example provided.

### ***Readable***

The information on the card must be readable. Even though the words may not be read

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<sup>39</sup> F AbduAsattar *supra* 270.

<sup>40</sup> D Ormerod, *Smith and Hogan: Criminal Law* (12<sup>th</sup> edn., Oxford University Press, Oxford 2008) 958.

<sup>41</sup> Joyanal Abdin, ‘Credit Card Operations in Bangladesh’ (2008) The Federation of Bangladesh Chambers of Commerce and Industry 2.

<[http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=833631](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=833631)>accessed: 1 January 2012;  
EA Alkhaleel *supra* 24; Asagheer *supra* 20.

by all people, it is still readable. For example, if a document is written in other language other than the Arabic language which is the first language in Libya, this document can be the subject matter of forgery even if it is not readable by some people, even the judge himself.<sup>42</sup> Equally, the information on a credit card issued in the UK may be not readable in Libya by all people who do not speak the English language. However, this does not mean that the card is not readable. The meaning of the capability of the readability is that the information can be read in its language. The language is not an issue as long as the law does not require a particular language.<sup>43</sup> This is a logical result because if documents written in different language more than Arabic are used in Libya, these documents must be respected and considered as documents. It does not matter if these documents are considered as customary documents although they are issued by a public employee in the issuer countries.<sup>44</sup> However, if the law stated credit and debit cards must be issued in Arabic or the information on credit cards dealt with in Libya should be only in Arabic, the cards issued in the language other than Arabic will not form a document.<sup>45</sup>

### ***Understandable***

For the information to be read it is sufficient to be capable of readability even it is not understandable by some people. Thus, although some information on a document is not understandable, this does not prevent it from being a document as long as it is understandable by some people. For example, a report which is made by a doctor explaining the situation of the patient is considered as a document despite the fact that this report may not be understandable by others including doctors who are not specialists or experts in the area for which the report was made. Thus, equally, the

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<sup>42</sup> Although the forgery law in Libya does not mention this fact, as has been seen in Chapter Three, according to some Arabic scholars, the language is not important unless the law states for a particular document to be written in a certain language. If the law requires a particular language, the forgery happening on the document will not constitute an offence of forgery. See for example M AbduAtoab, *The Intermediary in Explaining Crimes of Forgery, Counterfeiting and Imitating Seals* (3<sup>rd</sup> edn., Dar Almajd, Tanta 2009) 90.

<sup>43</sup> *Ibid.*

<sup>44</sup> As will be mentioned later in this Chapter, credit and debit cards are considered as customary documents under the Libyan Penal Code because they are issued by non-Libyan banks and institutions or by Libyan private banks.

<sup>45</sup> This assumption is not accepted because from the wisdom perspective, law should not provide such as Article. Credit and debit cards are fact and they are issued to be used not only in the country where they are issued. These cards are made to be used all over the world. Thus, the law in Libya should deal with this trend.

information on credit and debit cards does not need to be understandable as long as it is understood by the issuer. It does not need to be understandable even by the cardholder: for instance, the number of the card is not understandable to all people who use credit and debit cards. They may understand that it is a number of the card, but they do not know that it indicates the institution and the bank that issued the card.<sup>46</sup> This may be known only by the forger.

### *Nature of Credit and Debit Cards*

As has been seen in Chapter Three, the subject matter of forgery is divided into two categories, formal and customary. Thus, the subject matter of forgery can be a customary document,<sup>47</sup> or it can be a formal document.<sup>48</sup> Therefore, the question which arises here and has not been answered yet is that what is the nature of credit and debit cards? Are they formal or customary? It can be stated that credit and debit cards might be formal or customary. If the card is issued by a public employee in a public bank or institution in Libya, it will be a formal document. However, if the card is issued by a private bank or foreign (non-Libyan) bank, or institution, it will be a customary document. This can be understood from the decisions of the Libyan Supreme Court made on 1/6/1973.<sup>49</sup> In that decision, the Court held that: “All papers that are issued by Aljamahiria Bank<sup>50</sup> are considered as customary papers, and the alteration that happens to them was considered as a forgery happening to a customary paper.”<sup>51</sup> In addition, the Libyan Supreme Court stated on 8/4/1975<sup>52</sup> that: “All papers or documents that are issued by foreign persons or institutions are considered as customary papers, even if they are considered as formal documents in the issuer country.”<sup>53</sup> Therefore, because all

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<sup>46</sup> For more details about the number of the card, see Chapter Two 2.4.1.

<sup>47</sup> In this case, Article 346 of the Libyan Penal Code may be the applicable Article.

<sup>48</sup> Thus, Article 341 of the Libyan Penal Code may be the applicable Article.

<sup>49</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.102, Year 20, 1/6/1973, *Majalet Almahkama Alolia* (October 1973) Year 10, Vol.1, 102.

<sup>50</sup> The name of Aljamahiria Bank is now Aljomhoria Bank.

<sup>51</sup> This text was translated from the Arabic language by the author.

<sup>52</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.224, Year 21, 8/4/1975, *Majalet Almahkama Alolia* (October 1975) Year 12 Vol.1, 194

<sup>53</sup> This text was translated from the Arabic language by the author. See also *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.1283, Year 44, 28/4/1999 (Unreported). This decision may not apply to passports. The reason behind this is that passport forgery is governed by a special Article which is Article 350 of the Libyan Penal Code. This Article deals with passports issued in other countries in a different way. It deals with all passports the same, whether they are issued in Libya or in any other country.

credit and debit cards are issued by private banks in Libya (and as mentioned above non-Libyan banks and non-Libyan institutions), these cards are considered as customary documents. However, if for example, the Libyan central bank issued a credit or a debit card, this card would be a formal document<sup>54</sup> (this has not happened yet: all cards in Libya are issued by other banks. That is, all cards used in Libya are customary documents not formal documents).

To sum up, it can be stated that although neither the Libyan Penal Code nor the Libyan Supreme Court have defined the term “document”,<sup>55</sup> these cards can be the subject matter of forgery: the reason being that these cards are documents. They can be formal documents and can be customary documents. However, this result cannot be achieved unless the subject matter of forgery under the Libyan Penal Code is considered as a document, and not just confined to paper. Although these cards are considered as documents, as to visible information there is another view which doubts this result. The issue whether the subject matter of forgery is a paper or a document may be arguable, as will be addressed in the next section.<sup>56</sup>

#### **4.2.2. Credit and Debit Cards cannot be the Subject Matter of Forgery**

Although the majority of the interviewees were of opinion that credit and debit cards are documents in respect of visible information and therefore fall within the scope of Libyan forgery law, there is another view stating that these cards are not the subject matter of forgery. The rationales which these interviewees provided for supporting this view revolved around one point, which is that the subject matter of forgery is paper, and cannot be a document. Thus, because the cards are made of plastic, they cannot fall within the scope of forgery law in Libya.

##### ***Credit and Debit Cards are not Papers***

The explanation of this view is that the subject matter of forgery, as has been seen, can

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<sup>54</sup> This would be illogical, because, in this case, credit and debit cards would be dealt with in different way from credit and debit cards issued by other banks, although they are the same cards and have the same functions.

<sup>55</sup> For more explanation, see Chapter Three 3.2.

<sup>56</sup> It has been seen in Chapter Three, there are three assumptions in respect of this matter. For more details, see Chapter Three 3.3.



be formal or customary.<sup>57</sup> If the subject matter is customary, it should be paper, not any other material. The reason behind this is that Article 346 of Libyan Penal Code, which is an Article that may potentially be applied to credit and debit card forgery, requires that it is paper in order to be a subject matter of the offence of forgery. This Article states<sup>58</sup> that: “Anyone, who draws up a false *customary paper* entirely or in part or distorts a valid *customary paper*...”<sup>59</sup> From this Article, it can be understood that the subject matter cannot be plastic. The Article only uses the word “paper” as a subject of forgery. Therefore, because credit and debit cards are customary documents (issued by private banks or by non-Libyan banks or institutions),<sup>60</sup> they cannot be the subject matter of forgery under Article 346 of the Libyan Penal Code. They are not paper. They are made of plastic.<sup>61</sup>

This view was confirmed by many interviewees such as Alaraby. He claimed that: “If we consider the meaning of paper, the card is not paper, whether formal or customary paper. Thus, if we try to apply the forgery articles to the alteration of the reality on these cards, we are trying to protect an interest which the legislator should intervene to protect by a new law. Forgery law, as currently drafted, is not sufficient to be applied to credit and debit cards’ forgery. The reason is that the subject matter of forgery must be a paper and the cards are not papers.”<sup>62</sup>

Stating that the word paper may be the word which is intended by the legislator can be read in many Articles. Considering the Articles of forgery mentioning the words “paper” and “document” under Libyan forgery law, it may be convincing to say that the subject matter of forgery is not a document under many articles, not just under Article

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<sup>57</sup> For more details, see Chapter Three 3.4.

<sup>58</sup> The text of this Article in the Arabic language states that

كل من حرر ورقة عرفية مزورة كلياً أو جزئياً أو حرف ورقة عرفية ...

Libyan Penal Code 1953.

<sup>59</sup> The text was translated from the Arabic language by the author.

<sup>60</sup> For the nature of credit and debit cards, see above.

<sup>61</sup> On the other hand, some of the interviewees who confirmed this view claimed that if the cards are formal documents, they do not need to be papers. In other words, they think paper is only required under Article 346 of the Libyan Penal Code because the Article make it clear that the subject must be paper. This view confirms that the legislator intends two meanings, “document” and “paper”, as has been addressed in Chapter Three. See Chapter Three 3.3.1.

<sup>62</sup> Interview with Mostafa Alaraby, Lecturer, Faculty of Law, Alkhoms University (Alkhoms, March 2012). This opinion was also shared by Arazgy. He claimed that: “If we consider these cards as a paper, it will be an analogy. That is, we associate between paper and plastic. However, an analogy is not allowed in criminal law.” Interview with Imhemmad Arazgy, Lecturer, Faculty of Law, Tripoli University (Tripoli, March 2012). This will be mentioned later in this Section.

346 of the Libyan Penal Code.<sup>63</sup> This can be understood from Articles 351, 352 and 353 of the Libyan forgery law, all of above mention the word paper.<sup>64</sup>

### **Article 351**

Under Article 351, the legislator gives the Article a title as the following: “Forging *Customary Papers* Signed in Blank.”<sup>65</sup> From this title, it can be understood that the subject matter of forgery is a *paper*. However, this is not the case for the words of the Article. In the words of this Article, the legislator uses the word “document” and the word “paper” to mention the subject matter of forgery. Article 351(1) literally states<sup>66</sup> that: “Anyone, who is in a position of honesty of *paper* signed in blank, abuses it, by writing on it or allowing to be written on it a *customary document*...”<sup>67</sup> In this Article, the word paper appears first and then the word document comes. It may be argued in this Article that the legislator means “paper” can be a “document”. This is accepted because the meaning of the document includes the paper.<sup>68</sup> However, it cannot be said that a “paper”, meaning a “document” can be stretched so as to include items made of plastic.

### **Article 352**

Equally, the title of Article 352 uses the words “formal paper”. The title is as following: “Forging *Formal Papers* Signed in Blank.”<sup>69</sup> In this Article, the legislator also chooses to use the word ‘paper’ to indicate the formal subject matter of forgery. The Article states<sup>70</sup> that: “Any public employee, who has under his authority a *paper* signed in blank which he has to, or he can, fill in, and he abuses it by writing on it *formal*

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<sup>63</sup> Libyan Penal Code 1953.

<sup>64</sup> *Ibid.*

<sup>65</sup> The title in the Arabic language is “تزوير الأوراق العرفية الموقعة على بياض”.

<sup>66</sup> The Arabic text of this Article states that

كل من انتمن على ورقة موقعة على بياض فأساء استعمالها بأن كتب عليها أو سمح بأن تكتب عليها وثيقة عرفية...

See the complete text in appendix 1. *Ibid.*

<sup>67</sup> The text was translated from the Arabic language by the author.

<sup>68</sup> In other words, if someone says the word “document”, this word can be a paper or any material. However, if he says the word “paper”, paper will only mean paper. It would not mean document in its general meaning.

<sup>69</sup> The title in the Arabic language is “تزوير الأوراق الرسمية الموقعة على بياض”.

<sup>70</sup> The Arabic text of this Article states that

تنزل العقوبة المقررة في المادة 341 بالموظف العمومي الذي في حيازته بحكم وظيفته ورقة ممضاة على بياض، وكان مفروضاً عليه أو جائزاً له تعبئتها، فأساء استعمالها بأن كتب عليها ورقة رسمية تخالف ما كان مفروضاً عليه أو جائزاً له كتابته، أو سمح بذلك.

See the complete text in appendix 1. *Ibid.*

*paper...*<sup>71</sup> This means that the legislator uses the word “paper” with the word “formal”. Thus, the word formal does not include the word document. In other words, the subject matter is a paper, not a document.

### **Article 353**

Another example which may confirm that paper is the word meant by the legislator is Article 353.<sup>72</sup> The title of this Article is “Other Circumstances of Papers Signed in Blank”.<sup>73</sup> The legislator under this Article uses the word “paper” with the words “formal” and “customary”. This Article states<sup>74</sup> that: “In other circumstances of forging blank signed papers which are not subject to Articles 351 and 352, the principles of the physical<sup>75</sup> forgery of *formal* and *customary papers* are applied.”<sup>76</sup> From these Articles, it is obvious that the words “paper” and “document” are the same. Hence, it may be argued that the legislator did not mean the word document when it was establishing Libyan forgery law. This means that credit cards may not be a document<sup>77</sup> as to visible information, because they are not intended to be the subject matter of forgery by the legislator. However, the question still remains, if the legislator does not mean that, why then does it use different words in this way?

### **Article 347**

Although these Articles appear to confirm the argument that the subject matter of forgery must be a paper, not a document, this is still not the end of the debate, because Article 347 suggests that the subject matter may be a document! Under Article 347, the legislator uses the word document with the terms “formal” and “customary”. This Article, in paragraph 1, states<sup>78</sup> that: “Anyone, who uses a forged formal document...”<sup>79</sup>

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<sup>71</sup> The text was translated from the Arabic language by the author.

<sup>72</sup> *Ibid.*

<sup>73</sup> The title in the Arabic language is “حالات التزوير الأخرى في الأوراق الموقعة على بياض”.

<sup>74</sup> The Arabic text of this Article states that

تطبق بشأن تزوير الأوراق الموقعة على بياض في الحالات التي لم ينص عليها في المادتين السابقتين الأحكام الخاصة بالتزوير المادي في الأوراق الرسمية أو الأوراق العرفية.

*Ibid.*

<sup>75</sup> As will be seen in the next Chapter, forgery may be physical and may be immaterial.

<sup>76</sup> The text was translated from the Arabic language by the author.

<sup>77</sup> Document here means paper.

<sup>78</sup> The Arabic text of this Article states that

... كل من استعمل وثيقة رسمية مزورة ...

See the complete text in appendix 1. *Ibid.*

In paragraph 2 of the same Article, the legislator uses the word document with the term customary. This paragraph states<sup>80</sup> that: “Anyone, who uses a forged customary document...”<sup>81</sup> From this Article, it may be argued that the customary subject matter is not necessary to be a paper. It may be a document. Therefore, stating that Article 346 requires only paper as the subject matter of the offence may not be the end of the debate. Thus, it may be stated that this issue is doubtful and needs to be settled definitively by the legislator.

### ***The Principle of Legality***

Considering the subject matter of forgery as being confined to paper, it leads to another result which is that applying this Article to the forgery happening on the visible information on credit and debit cards may breach the principle of legality. This is because interpreting the word “paper” to cover credit and debit cards by analogy, is not allowed under criminal law. As has been mentioned in the first Chapter, the principle of legality is a compulsory rule under Libyan criminal law. This principle is provided by Article 1 of the Libyan Penal Code<sup>82</sup> which states that: “No crime and no punishment can be without law.” Thus, interpretation must not lead to a new crime. Because Analogy may result in a new crime,<sup>83</sup> it is not accepted under criminal law. Analogy means declaring

some acts actually outside the coverage of a statute to be criminal because they are like acts that are covered by the statute, in ways that are relevant to preventing the evil addressed by the statute.<sup>84</sup>

An example of analogy<sup>85</sup> can be as following. Drinking alcohol in Libya is a crime

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<sup>79</sup> The text was translated from the Arabic language by the author.

<sup>80</sup> The Arabic text of this Article states that

... كل من استعمل وثيقة عرفية مزورة ...

See the complete text in appendix 1. *Ibid.*

<sup>81</sup> The text was translated from the Arabic language by the author.

<sup>82</sup> This principle as has been mentioned in Chapter One was not only confirmed by the Libyan Penal Code, but also was confirmed by the first institution in Libya which was established in 1951 and recently by the Libyan Constitutional Declaration which was established on 3 of August 2011. For more details, see Chapter One 1.8.1.

<sup>83</sup> Analogy does not always lead to a new crime. It may lead to considering a harmful act as not a crime. According to Arazgy, an analogy is only allowed if it is in favour of the accused. I Arazgy, *Lectures in Criminal Law: General Part* (Maktabat Tripoli Alilmia Alaalemia, Tripoli 2013) 54.

<sup>84</sup> KS Gallant, *The Principle of Legality in International and Comparative Law* (Cambridge University Press, Cambridge 2009) 36.

<sup>85</sup> This example has been mentioned in Chapter One. See Chapter One 1.8.1.

under alcohol law.<sup>86</sup> Suppose that taking drugs is not an offence in Libya.<sup>87</sup> In this case, if a judge in a case before him considered the act of taking drugs as a crime, based on the fact that this act has the same consequences which results from drinking alcohol, this would be tantamount to imposing criminal liability by analogy. Drinking alcohol and taking drugs both leads to the same consequence which is losing the ability to control their behaviour. A person who takes drugs and a person who drinks alcohol may lose his ability to control himself. Similarly, considering the alteration on credit and debit cards as the same as an alteration on a paper because they both lead to the same result, which is changing the information, is analogous. However, on account of the principle of legality, neither analogy is not accepted in Libyan criminal law.<sup>88</sup> The reason behind this is that using an analogy in this case will lead to the creation of a new crime<sup>89</sup> which is the offence of forging a credit or a debit card. This argument was confirmed by many interviewees such as Arazgy. In the interview, Arazgy confirmed this argument by stating that: “If we consider these cards (credit and debit cards) as paper, it would be by analogy. That is, if we associated paper with plastic, imposing criminal liability by analogy is not allowed in Libyan criminal law.”<sup>90</sup>

However, it may be argued that ‘from the civil law perspective, credit and debit cards can be considered as paper. This is because analogy can be used as one of the manners of the interpretation. It is allowed under civil law, where the judge has more flexibility under civil law. In this light, Abooda claimed that: “Although, in general, Libyan Civil law does not deal with electronic law, the answer to the question “Do you consider credit and debit cards as documents under Libyan civil law?” is “yes”. The reason is that credit and debit cards contain information and this information is written in a particular way. However, the matter is not the same in criminal law because there is a principle that makes the answer different: the principle of legality.”<sup>91</sup> From the criminal law perspective, this is not possible. The justification for this is that to allow the imposition of criminal liability by analogy would lead to a new crime, which is contrary

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<sup>86</sup> Law no 4 due 1423 relative Prohibition Drinking Alcohol.

<sup>87</sup> Taking drugs is a crime under the law of drugs. Law no 7 due 1990 relative Drugs and Mental Influences

<sup>88</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Civil Appeal, No.98, Year 23, 26/10/1976, *Majalet Almahkama Alolia* (April 1977) Year 13, Vol.3, 154.

<sup>89</sup> I Arazgy *supra* 54.

<sup>90</sup> Interview with Imhemmed Arazgy, Lecturer, Faculty of Law, Tripoli University (Tripoli, March 2012).

<sup>91</sup> Interview with Alkoony Abooda, Lecturer, Faculty of Law, Tripoli University (Tripoli, March 2012).

to the principle of legality. If this is the case of visible information, what will be the case in respect of invisible information? This will be addressed in next section.

### **4.3. THE DEBATE OVER INVISIBLE INFORMATION**

Like visible information, the invisible information is not the subject of agreement. There is a debate between commentators whether credit and debit cards can be the subject matter of forgery with regard to invisible information. As has been mentioned previously, invisible information is the information which is stored on the magnetic strip and on the chip on credit and debit cards.<sup>92</sup> Some<sup>93</sup> argue that invisible information cannot fall under the offence of forgery. However, some<sup>94</sup> do not deny that this information can be so. These two views will be addressed in turn.

#### **4.3.1. Invisible Information is not the Subject of Forgery**

Considering the information on the magnetic strip on credit and debit cards whether it can be the subject of forgery poses some challenges. The main challenges are a magnetic strip or a chip may not be a document which is required for the offence of forgery. In addition, considering the invisible information as a document may not be consistent with the principle of legality.

##### ***Credit and Debit Cards are not Documents***

From the point of view of some commentators from Egypt<sup>95</sup> and Jordan<sup>96</sup> the application of the forgery offence to the manipulation of the invisible information on credit and debit cards is faced with a problem which is the absence of a “document”. The Egyptian writer, Asagheer, points out, forgery must occur on tangible signs or marks which can be seen by the eye. He adds the sense of sight is the only sense which must discover the concept that the document conveys.<sup>97</sup> Consequently, invisible information on the card is not a “document”. In line with this approach, the Jordanian

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<sup>92</sup> For more details, see Chapter Two 2.4.2.

<sup>93</sup> JA Asagheer *supra* 121; SM AbduAlhakam *supra* 47; AT Shamsadeen *supra* 28; NA Gora *supra* 585; EA Alkhaleel *supra* 69.

<sup>94</sup> O Salem *supra* 32; HH Gashgoosh *supra* 121; FEA Alhamood *supra* 110; Fathia Mohammed Gorari *supra* 39.

<sup>95</sup> JA Asagheer *supra* 121; SM AbduAlhakam *supra* 47; AT Shamsadeen *supra* 28; NA Gora *supra* 585.

<sup>96</sup> EA Alkhaleel *supra* 69.

<sup>97</sup> JA Asagheer *supra* 121.

commentator, Alkhaleel, states that changing the truth (information) on the magnetic strip or the chip does not constitute forgery under Article 260 of the Jordanian Penal Code.<sup>98</sup> The reason behind this is that, as has been mentioned, the meaning of “document” does not apply to the electronic information which is on a magnetic strip or a chip because the information is not seen by the eye.<sup>99</sup>

### ***Invisible Information under the Libyan Penal Code***

Similarly in Libya, the provisions of forgery may not be able to cover forgery happening to invisible information on credit and debit cards. As Chart 2 shows,<sup>100</sup> about the half of the interviewees answered “no” to the question “does the Libyan Penal Code protect credit and debit cards from the offence of forgery happening to invisible information?” The interviews conducted in Libya confirmed the view of Asagheer. They showed that some interviewees including judges, prosecutors and lawyers did not agree that invisible information can be the subject of forgery in Libya.

### ***Meaning of the Subject Matter of Forgery in Libya***

The other result achieved by conducting these interviews is that there was no agreement about exactly what meaning vis a vis the subject matter of forgery was intended by the legislator. Some argued that the legislator meant the word “document”,<sup>101</sup> and others claimed it was the word “paper”.<sup>102</sup> This result is very important because it leads to a different discussion about invisible information.<sup>103</sup> If the subject matter of forgery is considered as a document, the discussion will be about whether credit and debit cards in terms of invisible information are documents or not. In other words, the discussion will revolve around whether the concept which the document requires exists or not. However, if the cards are considered as papers, the discussion is confined to the possibility of whether the card can be interpreted as a document. In other words, is there any obstacle which may prevent the application of the paper to the invisible

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<sup>98</sup> Jordanian Penal Code 1960.

<sup>99</sup> EA Alkhaleel *supra* 68.

<sup>100</sup> See chart 2, page 86.

<sup>101</sup> See this Chapter 4.2.1.

<sup>102</sup> See this Chapter 4.2.2.

<sup>103</sup> This result has also its reflection on visible information, as has been discussed in this Chapter. See Chapter Four 4.2.

information?<sup>104</sup>

### ***Justification***

The interviews showed that there were three reasons which may lead to this tendency. One of these reasons was the same reason which Asagheer provides.<sup>105</sup> That is to say invisible information could not be a “document”. However, this is not the only reason which rendered this group of interviewees to prefer this approach. There are two other reasons: first credit and debit cards are not paper, and second the principle of legality. These three reasons will be discussed in turn.

### ***Invisible Information is not a Document:***

As Chart 3 shows,<sup>106</sup> some of the interviewees claimed that invisible information on credit and debit cards could not be a document. This was because the conditions which the concept of the document requires do not exist. To be more precise, the information must be seen and can be read without using any tools (a document must consist of visible information). The information must be touchable and seen by the naked eye. Because a magnetic strip and card chip do not comprise this kind of information, and because the information which is on them needs tools in order to be seen and cannot be read without these tools,<sup>107</sup> credit and debit cards are not regarded as documents. They confirmed the dominant and prevailing view of the scholars which has been addressed in the previous Chapter.<sup>108</sup> According to many scholars such as Adahabi<sup>109</sup> and Ormerod,<sup>110</sup> “document” means any piece of writing which contains letters or signs, by its reading the mind moves to a particular meaning.<sup>111</sup> Reading this information and signs must be by using no tools. They should be read immediately, as has been

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<sup>104</sup> In this case, visible and invisible information is the same in terms of analogy which is not allowed in criminal law matters.

<sup>105</sup> See JA Asagheer *supra* 121.

<sup>106</sup> See Chart 3, page 87.

<sup>107</sup> As has been emphasised in Chapter Two, the difference between visible information and invisible information is that visible information can be seen and read without any need for using computerised tools. However, invisible information is not seen when credit and debit cards themselves are seen by the naked eye. In other words, information should be able to be seen whenever the card is seen. This condition is required for the information to be considered as a document.

<sup>108</sup> For more details, see Chapter Three.

<sup>109</sup> EG Adahabi *supra* 121.

<sup>110</sup> D Ormerod *supra* 958.

<sup>111</sup> See also Glanville L Williams *supra* 151; OA Ramadan *supra* 145; MN Hosni *supra* 248; AM Moonis, *the Comprehensive in Counterfeiting and Forgery Crimes* (Dar Alfekr Oa Alkanoon, Almansoor 2010) 139; F AbduAsattar *supra* 270.



emphasised.<sup>112</sup> In addition, it has been emphasised that it is arguable whether the word meant by the legislator is a paper or a document. Although some interviewees considered that the subject matter of forgery is a document not just paper, they did not agree that invisible information contained on the magnetic strip and chip on the credit and debit cards is a document.<sup>113</sup>

### ***Credit and Debit Cards are not Papers***

Another reason which may be provided for confirming that the subject matter of forgery does not apply to invisible information is that these cards are made of plastic.<sup>114</sup> In other words, they are not paper. As has been emphasised in section one of this Chapter, some interviewees argue that the subject matter of forgery is a paper not a document. Therefore, they argued that Article 346<sup>115</sup> which requires a paper as the subject matter of forgery, could not be applied to invisible information which is basically on a card made of plastic. This view does not discuss whether invisible information could be the subject matter of forgery or not. It doubted whether the card itself can be the subject of forgery as one unit. It doubted that the subject matter of forgery is a paper but not plastic. As has been addressed in section one, the subject matter of forgery under the Libyan Penal code is a contentious matter. Some Articles may imply that the subject matter of forgery is a paper such as Article 346 of the Libyan Penal Code and others suggest it is a document such as Article 347 of the Libyan Penal Code.<sup>116</sup> In addition, considering invisible information as a document may breach the principle of legality whether the subject matter of forgery is considered as a document or as a paper.

### ***Wide Interpretation***

If the card is considered as a document, it may be argued that interpreting the word document to include invisible information is not compatible with the principle of

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<sup>112</sup> As the legislator in Libya uses two words for indicating the subject matter of forgery, namely “paper” and “document”, as has been mentioned, this reason basically finds its justification in the fact that the subject matter of forgery is regarded as a document, not only a paper. For more details, see Chapter Three.

<sup>113</sup> As a result of this view, they considered only visible information as the subject matter of forgery. This will be addressed later in this Chapter.

<sup>114</sup> Although, as has been emphasised in Chapter Two that credit and debit cards have been defined as numbers, the cards considered in this study are the cards which are made of plastic. See Chapter Two 2.2.

<sup>115</sup> Libyan Penal Code 1953.

<sup>116</sup> For more details, see Chapter Four 4.2.

legality. Interpreting the word document in this way may be a wide interpretation which is not accepted under criminal law in Libya. The reason behind this is that a wide interpretation can lead to injustice.<sup>117</sup> This is because invisible information (magnetic strips and chips on the cards) was not intended to be covered by the Libyan legislator in 1953 when the Libyan forgery law was established. The Libyan legislator did not recognise invisible information which is stored on the magnetic strip or chip. This kind of information first emerged in the 1970s on the cards.<sup>118</sup> Therefore, if invisible information on credit and debit cards is considered as the subject matter, this consideration will be a breach of the principle of legality because the forgery law will be expanded to cover what it may not have been originally intended to cover. As has been mentioned previously,<sup>119</sup> wide interpretation is not allowed under criminal law in Libya. As Alkoony<sup>120</sup> claimed: “Considering these cards (regarding the electronic information) as documents might be dangerous, because it leads to a widening of the criminalisation. It means, some people will be subject to criminalisation, although they do forge a customary document in the meaning which was not within the scope of the legislature’s intention in Libya in 1953.”

### ***Analogy***

Similarly, the principle of legality will be infringed if the subject matter of forgery is considered as a paper. The reason behind this is that considering credit and debit cards as papers is analogy. This way of interpretation is not allowed in criminal law as stated in the first Section.<sup>121</sup> In this line, Arazgy claimed that: “Considering forgery offences, Article 346<sup>122</sup> is the potential Article that may apply to the act of changing the information on credit and debit cards.<sup>123</sup> This Article states that: “Anyone, who draws up a forged customary *paper* entirely, or in part, or distorts, valid customary paper, or

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<sup>117</sup> In this respect, see AA Abooda, *The Basics of the Libyan Positive Law: Entrance to the Science of Law* (4<sup>th</sup> edn., Almarkz Alkaomi Llbuhooth Oa Adirasat Alilmia, Tripoli 2003) 355; M Jefferson, *Criminal Law* (11<sup>th</sup> edn., Pearson Education Limited, 2013) 20.

<sup>118</sup> Wg Schulze ‘Smart Cards and E-Money: New Developments Bring New Problems’ (2004) 16(4) SA Mercantile Law Journal: SA Tydskrif vir Handelsreg 703, 705.

<<http://reference.sabinet.co.za/document/EJC54123>> accessed 14 March 2014.

<sup>119</sup> See Chapter One.

<sup>120</sup> Interview with Alkoony Abooda, Lecturer, Faculty of Law, Tripoli University (Tripoli, March 2012).

<sup>121</sup> See this Chapter 4.2.2.

<sup>122</sup> Libyan Penal Code 1953.

<sup>123</sup> The reason behind this is that these cards are considered as customary documents and this Article governs forgery happening on customary documents.

allows anyone to falsely draw it up or to distort it...shall be subject to imprisonment.”<sup>124</sup> The problem with this is that this Article requires paper as the subject matter of forgery. However, these cards are not papers. They are made of plastic.”<sup>125</sup> He added, “If we consider these cards as papers, by analogy, that is, we associate paper and plastic, but analogy is not allowed in criminal law. However, if the mentioned Article chose to use the word “*document*” instead of the word “*paper*”, it would be possible to suggest that the Article applies to these cards. This is because document can be interpreted so as to include credit and debit cards. Therefore, the law must be changed to explicitly cover credit and debit card forgery.”<sup>126</sup>

To conclude, it is obvious that this view agrees that credit and debit cards cannot be the subject matter of forgery, although there is no consensus agreement about the meaning of the subject matter under the Libyan Penal Code.<sup>127</sup> Some argued it was a document and others argued it was paper. Conversely, the result is the same. Both groups agree these cards cannot be the subject matter of forgery. However, there is another view stating that invisible information can be the subject matter of forgery. This will now be discussed.

#### **4.3.2. Credit and Debit Cards are the Subject Matter of Forgery**

Some intellectuals in Egypt,<sup>128</sup> Jordan<sup>129</sup> and the United Arab Emirates<sup>130</sup> claim that changing invisible information on credit and debit cards can constitute an offence of forgery. The reasoning behind this is that a magnetic strip is a document. Gashgoosh, states electronic information is a document because the concept of the document has been changed by the impact of the technological developments.<sup>131</sup> Similarly as Chart 2 shows,<sup>132</sup> 22 of the interviewees, who took the view that credit and debit cards are protected against forgery under the Libyan Penal Code regarding visible information, claimed the same regarding invisible information. Some of these interviewees did not

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<sup>124</sup> See the complete text of this Article in appendix 1.

<sup>125</sup> Interview with Imhemmad Arazgy, Lecturer, Faculty of Law, Tripoli University (Tripoli, March 2012).

<sup>126</sup> *Ibid.*

<sup>127</sup> Libyan Penal Code 1953.

<sup>128</sup> O Salem *supra* 32; HH Gashgoosh, *supra* 121.

<sup>129</sup> FEA Alhamood *supra* 110.

<sup>130</sup> Fathia Mohammed Gorari *supra* 39.

<sup>131</sup> HH Gashgoosh *supra* 121.

<sup>132</sup> See Chart 2, page 86.

distinguish between these two kinds of information. The justification for this view lies in some reasoning that forgery has no definition under forgery law. In addition, invisible information exists on credit and debit cards. These reasons will be addressed in turn in addition to other reasons.

### *1) Forgery is not Defined*

Despite the fact that the magnetic strip indeed does not convey information to the naked eye, Salem<sup>133</sup> argues that it can be a “document” and the alteration of it can be forgery under Egyptian Penal law.<sup>134</sup> This approach relies on the fact that criminal law in Egypt does not define forgery and does not determine its concept. In other words, as long as the legislator does not determine the elements of forgery, it is possible to say that the subject of forgery (document) can include invisible information. Therefore, the Articles of forgery offences in Egypt can apply to the forgery which happens on the magnetic strip. Thus, it cannot be argued that Articles regarding to forgery are an obstacle to applying forgery law to modern technology developments.<sup>135</sup>

This argument may be applied to the case of Libya: forgery law in Libya does not define forgery. This can be seen in the Libyan Penal Code’s Articles on forgery. For example Article 341 states that

يعاقب بالسجن مدة لا تقل عن ثلاث سنوات كل موظف عمومي يضع أثناء ممارسته لمهامه وثيقة مزورة في كليتها أو جزء منها أو يزور وثيقة صحيحة.<sup>136</sup>

This Article is translated as: “Any public employee, who during doing his duty, puts a forged document entirely or in part or forges a valid document, shall be punishable by imprisonment for a term not less than 3 years.”<sup>137</sup> Another Article is Article 343(1) which provides that

يعاقب بالحبس مدة لا تزيد على سنة أو بغرامة لا تجاوز مائة جنيه كل من حرر شهادة وصرح فيها كذباً بوقائع تعتمد الوثيقة عليها في صحتها أثناء ممارسته لمهنة طبية أو قانونية أو لإحدى الخدمات العمومية الضرورية.<sup>138</sup>

The translation of this Article is that: “Anyone, who writes a certificate by which he

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<sup>133</sup> O Salem *supra* 32.

<sup>134</sup> Egyptian Penal Code 1937.

<sup>135</sup> O Salem *supra* 32.

<sup>136</sup> Libyan Penal Code 1953.

<sup>137</sup> The Article was translated from the Arabic language by the author.

<sup>138</sup> *Ibid.*

falsely declares facts which the document relies on for its authenticity during practicing a medical or a legal profession or any public necessary services, shall be subject to imprisonment for a term not exceeding one year or a fine not exceeding 100 dinars.”<sup>139</sup>

Another example is Article 350(1). This Article prescribes that:

يعاقب بالسجن مدة لا تتجاوز خمس سنوات كل من زور جواز سفر أو تذكرة مرور أو إذن بالمرور وما إليها أو استعمل شيئاً من ذلك دون أن يشترك في تزويره مع علمه بذلك. وإذا كان المزور موظفاً عمومياً طبقت في شأنه الأحكام الخاصة بالموظفين العموميين.<sup>140</sup>

which is translated as: “Anyone, who forges a passport, a traffic permit, traffic permission or any such conduct, or uses it after being forged or altered, shall be subject to imprisonment or a fine not exceeding 50 dinars.”<sup>141</sup> From these Articles and other provisions of forgery law in Libya,<sup>142</sup> it is obvious that forgery itself is not defined. There is no Article which gives a clear or a vague definition of the forgery. However, although there is no definition of forgery in Libya, it can be understood from these Articles that forgery must happen on a document or a paper. Considering the above-mentioned Articles, forgery means changing information on a document or a paper.

This was confirmed by the Libyan Supreme Court. It held on 25/6/1974<sup>143</sup> that: “Forgery is a written lie.”<sup>144</sup> In other words, forgery is changing information on a document by means of writing. This definition is consistent with the definitions provided by many writers such as Adahabi. Adahabi<sup>145</sup> states that although the Libyan forgery law does not define forgery, it can be defined as changing the reality (information) on a document protected by the law, with an intention to deceive.<sup>146</sup> From these definitions, it may be obvious that the elements of forgery are determinate.<sup>147</sup> One

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<sup>139</sup> The Article was translated from the Arabic language by the author.

<sup>140</sup> *Ibid.*

<sup>141</sup> The Article was translated from the Arabic language by the author.

<sup>142</sup> See other Articles of forgery in appendix I.

<sup>143</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.229, Year 20, 25/6/1974, *Majalet Almahkama Alolia* (January 1975) Year 11, Vol.2, 208.

<sup>144</sup> The text was translated from the Arabic language by the author.

<sup>145</sup> EG Adahabi *supra* 119.

<sup>146</sup> *Ibid.*

<sup>147</sup> According to Adahabi, the elements of the offence of forgery under the Libyan Penal Code are three elements. These elements are *actus reus*, *mens rea* and the subject matter of forgery. In this respect see *Ibid* 120; *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.65, Year 18, 29/6/1971, *Majalet Almahkama Alolia* (January 1972) Year 8, Vol.2, 96; *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.51, Year 13, 10/12/1966, *Majalet Almahkama Alolia* (October 1967) Year 4, Vol.1, 33; *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.123, Year 21, 28/1/1975, *Majalet Almahkama Alolia* (April 1975) Year 11, Vol.3, 197. It is important to mention that the Libyan Supreme Court held that: “Harm is also one element of the elements of the offence of forgery.” However,

of the elements is the document.<sup>148</sup> Therefore, it is submitted that not defining the forgery by the law forgery may not be a good reason to be considered in this matter. It may not be accepted to allege that invisible information is the subject matter of forgery in this course. The problem which should be considered here is the concept of the subject matter of forgery (document), not the concept of forgery itself. Forgery law clarifies that forgery must happen on a document. Therefore, the question which may be posed here is whether the subject matter of forgery under the Libyan Penal Code can be interpreted to include forgery of invisible information? Before answering this question, it should be confirmed that the subject matter in this discussion is supposed to be a document not a paper. This is because invisible information cannot constitute paper: invisible information cannot be interpreted as a paper because of the principle of legality.<sup>149</sup>

### ***Document is not Defined***

According to the interviews conducted in Libya, it can be understood that some of the interviewees agreed that invisible information may be considered as a document because the concept of the document is not defined under the Libyan Penal Code. Because no definition has been provided by either Libyan forgery law or by the Libyan Supreme Court to the word “document” in Libyan forgery law, the document can be any material and the information on this material can be in any form.<sup>150</sup> Therefore, document can be paper, plastic or any electronic material such as a magnetic strip or chip. In addition, the information on this material can be written information or electronic information.

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it also held that: “Harm does not need to be proved in terms of the offence of forging a formal document because it is obvious whenever a formal document is forged. As for the harm in terms of forging a customary document, it should be proved.” On 18/10/1977 the court held that: “The element of harm of the offence of forging a formal paper exists merely by changing the reality because this leads to an assault on its value in terms of the information which it contains.” See *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.5, Year 24, 18/10/1977, *Majalet Almahkama Alolia* (January 1978) Year 14, Vol.2, 262. Although this is an element of the offence of forgery, according to the Libyan Supreme Court, it is submitted that it is not important to address this element because it does not pose any problem in respect to credit and debit card forgery. Harm is obvious whenever the information on these cards is changed, if the other elements of forgery required exist.

<sup>148</sup> Document here includes paper.

<sup>149</sup> For more details, see Chapter Four 4.3.1.

<sup>150</sup> This view is consistent with the modern meaning of the document. See Chapter Three 3.2.2.

### *The Role of Legal Commentators in Interpreting Law*

However, this view may not be accepted. As Asagheer<sup>151</sup> and Gora<sup>152</sup> point out, it cannot be said that the legislator did not define forgery to say changing the information on a magnetic strip is forgery. The legislator did not define many crimes, and when the legislator leaves any crime without definition, it means the legislator leaves this task to be to scholars and the judiciary. As has been emphasised, many commentators<sup>153</sup> define “document” as any readable writing expressing a certain meaning. It does not matter whether writing consists in letters, figures, signs or any other symbols. The important thing for being a document is that writing must convey the information, so if someone looks at or touches it, he will immediately understand the meaning. The sense of touch and the sense of vision are the only sense which can discover the concept the document expresses.<sup>154</sup> Thus, because the information, which is stored on the magnetic strip (invisible information), is not seen by the naked eye and needs particular tools to be so, it cannot be a document in terms of the offence of forgery.

This can be seen not only in respect of the matter of forgery, but it can also be observed in respect of many other crimes. There are many concepts not defined by law but commentators play a main role in interpreting the meaning of the elements which define the crimes. For example, Article 461 of the Libyan Penal Code, which criminalises the deception offence, does not define deception and does not determine the concept of “the deceptive manners” which are one of the ways of committing this crime (deception).<sup>155</sup> However, writers<sup>156</sup> have interpreted this concept. Bara<sup>157</sup> states that Libyan law does not determine the concept of the deceptive manners. However, it can be defined as the

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<sup>151</sup> JA Asagheer *supra* 121.

<sup>152</sup> NA Gora *supra* 586.

<sup>153</sup> F AbduAsattar *supra* 270; MN Hosni *supra* 246; OA Ramadan *supra* 145; D Ormerod *supra* 958; EG Adahabi *supra* 121.

<sup>154</sup> JA Asagheer *supra* 121.

<sup>155</sup> Article 461 of the Libyan Penal Code provides that: “Everyone who obtains an illegitimate benefit for himself or for others by harming others and by using deceptive manners, by acting in a real or a personal property which is not his own and has no right to act in it or by using a false name or character shall be subject to imprisonment and a fine...” The Article was translated from the Arabic language by the author. This Article will be explored in depth later in Chapter Six.

<sup>156</sup> MR Bara, *Explanation of the Libyan Penal Law, the Special Section, Second Part, the Crimes of the Assault on Property* (The Green Company, Tripoli 2010) 180; F AbduAsattar *supra* 819; OA Ramadan *supra* 562.

<sup>157</sup> MR Bara *supra* 180.

external facts (physical conduct) which support the act of telling a lie by the offender.<sup>158</sup>

### ***Is Doctrinal Interpretation Binding?***

On the other hand, it can be argued that doctrinal interpretation of the statute is not binding. Thus, the definition of “document” (by the commentators) which provides that the magnetic strip is not a document for the purpose of forgery, may not be a good reason to further say that Articles of forgery do not apply to the falsification which may happen on the magnetic strip. However, although doctrinal interpretation is not binding, it cannot be denied. Anabraoy<sup>159</sup> states that interpretation of statutes by scholars is not binding.<sup>160</sup> However, it cannot be denied if it is convincing. He adds, doctrinal interpretation has an indirect impact on the judicial and legislative interpretation. It helps the legislator and judge to deal with complicated cases, whether by providing a new law or by interpreting the words of a statute in a particular case.<sup>161</sup>

### ***Intention of the Legislator***

It is also submitted that the interpretation must seek the correct intention of the legislator. Hence, considering forgery offences, it is clear that legislator did not contemplate the magnetic strip<sup>162</sup> when it originally created the offences of forgery. This is because the magnetic strip had not emerged,<sup>163</sup> in Libya, when the forgery offences were legislated for in 1953.<sup>164</sup> As a result, although the law does not define forgery, and does not determine the concept of the document, electronic information on a debit card could not be a document, and making a false magnetic strip or altering the information on it, could not be forgery.

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<sup>158</sup> Another example is the concept of the modified key, as will be explained in Chapter Six.

<sup>159</sup> MS Anabraoi, *Explanation of General Principles of the Libyan Penal Law* (Benghazi University, Benghazi) 44.

<sup>160</sup> In Libya, the doctrinal and judicial interpretations are not binding. However, the only judicial decisions that are binding on the other courts are the decisions which are made by the Libyan Supreme Court if they are made by all its circuits.

<sup>161</sup> In light of this argument, it may be worthwhile to mention the criminal law report on forgery and counterfeit currency. In this report, the commission for explaining the meaning of document referred to many writers who addressed the concept of document. This shows how the writers have their impact on the legislature. See Law Commission of England and Wales, *Report on Forgery and Counterfeit Currency* (Law Com No 55, 1973) para 19.

<sup>162</sup> This can apply to all electronic documents.

<sup>163</sup> As stated before, the magnetic strip has been added to credit cards since the early 1970s. Wg Schulze *supra* 705.

<sup>164</sup> Electronic debit cards first emerged in Libya in 2003 by the Bank of Commerce and Development. See Chapter Two 2.3.



## ***The Principle of Legality***

In addition, it is submitted that while it is correct that criminal law does not determine the meaning of document, on the other hand it is not to say that “document” can be a magnetic strip because of the principle of legality. Respecting the criminal principle of legality,<sup>165</sup> interpreting criminal matters must be narrow<sup>166</sup> and not to create a new crime. Hence, if a commentator interprets an Article, he must take into account that his interpretation is not too wide and ensure no new crime has been inadvertently recognised. The reason behind this is that crimes must only be created by the legislator, and any interpretation which may create a new offence must be rejected. Thus, claiming that a document can be a magnetic strip can breach the principle of legality, because a new offence will have been created. Thus, one of the judges interviewed, Almarkoob claimed that: “With respect to electronic information, I think this law<sup>167</sup> is insufficient to deal with the forgery on these cards. The judge may mention in his decision that the law should be amended so as to become more appropriate with these cards.”<sup>168</sup> That is to say, the judge would acquit the accused rather than breach the principle of legality.<sup>169</sup>

## ***2) Invisible Information is Readable***

The second ground to support this view is that, the magnetic strip is readable, the same as the visible information. Salem<sup>170</sup> argues that if it is not possible to read the stored signs or the stored information on the magnetic strip with the naked eye, they can be read by using a particular electronic system. These signs can be read by using a special device or tool. When the cards are used at cash machines, the machines read the invisible signs stored on the magnetic strip or the chip. In the same way, despite the fact that when the cards are used at the points of sale, the human service provider does not

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<sup>165</sup> This principle is verified by Article 1 of the Libyan Penal Code. It states that: “No crime and no penalty can be without a text.” This means that any conduct cannot be punishable unless the law provides that it is a crime and provides its penalty. For more details, see Chapter One 1.8.1. The principle is also confirmed by many laws such as Egyptian criminal law and Iraqi criminal law. Libyan Penal Code 1953; Egyptian Penal Code 1937; Iraqi Penal Code 1969.

<sup>166</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Civil Appeal, No.98, Year 23, 26/10/1976, *Majalet Almahkama Alolia* (April 1977) Year 13, Vol.3, 154.

<sup>167</sup> The provisions of forgery under the Libyan Penal Code.

<sup>168</sup> Interview with Ahmmmed Almarkoob, Judge, Eastern Tripoli Court of First Instance (Alkhoms, February 2012).

<sup>169</sup> *Ibid.*

<sup>170</sup> O Salem *supra* 32.

read the information stored on the strip or chip: a device used for operating the transaction reads these signs. The difference between the information on the card and the information stored on the strip or the chip in terms of the ability of being read, is the means which is used. Whereas the readability can be achieved directly in terms of visible information, the readability can be achieved indirectly, namely by the means of device or a machine. Consequently, according to Salem<sup>171</sup> arguing these signs are not of capability to be read is not accepted.

In line with this view, Gorari claims that credit cards include data. These cards are issued by a particular institution for a particular person. These cards include a particular content, which can be subject to criminal protection under forgery principles. It does not matter that this data is not readable, since there is no Article in law, in the United Arab Emirates, which states that the document must be readable by the naked eye. Electronic information can be read by cash machines, and card readers supplied to merchants and service providers. Therefore, any forgery that may happen on this card constitutes a forgery offence.<sup>172</sup> Similarly in Libya, some interviewees claimed that invisible information on credit and debit cards could be the subject matter of forgery, because this information is read and “visible”. It does not matter that reading needs a computer or cannot be done by the naked eye. What is important is that the information can be read regardless of the means of reading.<sup>173</sup> One of the prosecutors, No 40,<sup>174</sup> claimed that: “With respect to the invisible information as a reason for stating the card is not a document, I do not think this is correct. The reason for this is that the invisible information is in fact visible. It can be read by computerised tools. Therefore, it is visible to the person who reads it”.<sup>175</sup>

However, this can be arguable. The argument is that reading the visible information on the card can be done at the time of dealing with the card (the operation of the transaction) but the information stored on the strip or the chip cannot be read at the time of dealing with the card. The service provider does not deal with visible information

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<sup>171</sup> *Ibid.*

<sup>172</sup> Fathia Mohammed Gorari *supra* 39.

<sup>173</sup> Interview with Ali Abuamood, Lawyer (Alkhoms, February 2012); Interview with Shahban Alhibaishy, Prosecutor, Tripoli Attorney’s General Office (Tripoli, February 2012).

<sup>174</sup> As has been emphasised in the first Chapter, some of the interviewees did not agree to be named in the thesis, so they are mentioned by numbers.

<sup>175</sup> Interview with Unnamed, No 40, Prosecutor, Alkhoms Prosecution Office, (Alkhoms, February 2012).

himself. The machine is the one which reads the information, but does not provide any information to the service provider. All that appears on the screen, which is before the service provider, is a confirmation that the card is accepted and the transaction can be completed. Thus, the service provider does not know whether there is in fact information stored on the strip or the chip or not.<sup>176</sup> He only follows the instructions provided by the machine. This may be, to some extent, the same as what happens when the card is used at the cash machine. The information on the strip and the chip is not read by the cardholder during the transaction. The invisible information is not available. The only information which the cardholder may read on the screen during the transaction of withdrawing money is the level of the balance of the account.<sup>177</sup> However, the cardholder cannot see the expired date of the card or the account number of the cardholder on the screen of the cash machine. Therefore, in terms of forgery, the information on the card and the invisible information may be different without causing any problem to the user of the false card. However, as stated before,<sup>178</sup> the information should be the same because the service provider may doubt the card and ascertain the falsity by comparing between the visible information and the four digits which are printed in the end of the transaction on the receipt.<sup>179</sup>

### ***3) Invisible Information Exists***

There is another argument which is considered as a consequence of the previous discussion. The argument lies in the fact that if the information, stored in the strip or the chip, is readable, this means that it exists.<sup>180</sup> While it is true that there is a limitation in the meaning of the concept of the “document” in terms of invisible information, yet, the limited meaning of the concept of the “document” cannot be a cause for denying its existence.<sup>181</sup> As a result, stating that there is no document (as to this strip information)

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<sup>176</sup> In other words, the service provider does not read any information. For example, apart from visible information, if a service provider is asked “what is the expired date of the card in question”, he would answer “I do not know.” The reason behind this is that the information stored on the card is not available to him. The author in many stores such as Asda and Lidl asked the service providers about the information appearing on the screen during the transactions when credit and debit cards are used. They confirmed that they do not see any information which is stored in the card.

<sup>177</sup> This may be when the cardholder has an account, for example, when the card is used is a debit card.

<sup>178</sup> See Chapter Two.

<sup>179</sup> As stated in Chapter Two, the last four digits of the number of the card appear on the receipt printed after the transaction is completed. See Chapter Two 2.4.1.

<sup>180</sup> see O Salem *supra* 32.

<sup>181</sup> *Ibid* 33.

is because the writers overlap between the necessity to know the information on the magnetic strip (by the sense of vision) and the visibility of the information. The invisibility of the information, and the need to use a special system to make it visible, does not deny its existence.<sup>182</sup>

### ***Existence is not Sufficient***

However, this reasoning is also rejected by Asagheer.<sup>183</sup> He states that in order to say something is a document, the information on this object must be reachable directly without a need to use any tool. Thus, the existence alone does not suffice. The reason behind this is that the document, as it is, is a means for communication between people, so therefore must be readable as soon as it is seen without the need to use any tool. In addition, tools are not always available when the document is used. Therefore, because the magnetic strip is not readable when it is seen, it cannot be a document, despite the fact that it exists.

### **4) *Illogical Consequence***

The fourth point which this approach provides for supporting this trend is the logical reason: Salem argues that if the alteration on visible information is considered as forgery, that stating there is no forgery in respect of altering the information on the magnetic strip leads to an illogical result.<sup>184</sup> It is difficult to say that there is no forgery in respect of altering the information on the magnetic strip, that yet there is a forgery regarding the alteration of the information on the surface of the card.<sup>185</sup> The reason behind this is that all the information on the card is on the same card. The difference is only that the information which is on the surface of the card is visible, and the information which is on the magnetic strip is invisible. Thus, how can it be forgery and (at the same time) no forgery, whereas all the information is on the card in one form or another?<sup>186</sup> In other words, the card must be treated in the same condition.

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<sup>182</sup> *Ibid.*

<sup>183</sup> JA Asagheer *supra* 121.

<sup>184</sup> O Salem *supra* 33.

<sup>185</sup> *Ibid.*

<sup>186</sup> See NA Gora *supra* 586.

### *Law and Logic: a Diversion of Meaning*

With respect to this fourth point, it is evident that from one angle, it is true that all the information is on one card and the two kinds of information are necessary for making credit and debit cards work because the visible information cannot alone form the card. The magnetic strip has a main role in order for the card to operate its functions. For example, a debit card cannot be used, for withdrawing money from cash machines or for buying goods at the points of sale, without this information being stored on it. Consequently, it is not logical to say that the alteration which happens on credit and debit cards, whether on the internal or external information, cannot constitute forgery because all the information is one unit. However, there is another fact which Asagheer maintains. This fact is that it is not necessary for the law to be always coincident with the rules of logic. There is sometimes a difference between the will of the legislator and the rules of logic and if this occurs, the will of the legislator must be respected.<sup>187</sup>

Indeed law is not always logical. For making this clear two examples would be sufficient. The first example is related to criminal liability or so called “supposed liability”.<sup>188</sup> Article 62(1) of Libyan Penal Code provides<sup>189</sup> that: “Any act or refusal, which is a crime, is not punishable, unless it is committed with volition and consciousness.”<sup>190</sup> This is one of the general principles of criminal law which is consistent with the rules of logic.<sup>191</sup> One is, in criminal law, not responsible for any conduct if it is done without consciousness. The justification for this view is that if it is possible to blame individuals, who cannot distinguish between what is right and what is wrong, it would be possible to blame animals which have no volition and consciousness. This Article is consistent with the rule of logic, no volition no punishment.

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<sup>187</sup> JA Asagheer *supra* 122.

<sup>188</sup> This kind of responsibility is known as strict liability in English law. It means that the accused will be liable even if one of the elements (*mens rea*) is absent. In other words, *actus reus* is sufficient to constitute the crime. For more information about strict liability, see D Ormerod, *Smith and Hogan: Criminal Law, Cases and Materials* (10<sup>th</sup> edn., Oxford University Press, Oxford 2009) 232; C Elliott and F Quinn, *Criminal Law* (8<sup>th</sup> edn., Pearson Education Limited 2010) 35.

<sup>189</sup> The Arabic text of this paragraph states that

لا يعاقب على فعل أو امتناع يعده القانون جريمة إلا إذا ارتكب عن شعور وإرادة.

Libyan Penal Code 1953.

<sup>190</sup> The Article was translated from the Arabic language by the author.

<sup>191</sup> In this respect, see, for instance, C Elliott and F Quinn *supra* 10.

However, Article 90 of Libyan Penal Code states<sup>192</sup> that: “Voluntary drinking of alcohol neither precludes the liability of the perpetrator, nor diminishes it.”<sup>193</sup> This means that anyone who drinks alcohol and loses his ability to distinguish between things may commit a crime and may be responsible for his act. By stating this Article, the legislator wants to encourage individuals not to drink alcohol because drinking alcohol is a crime in Libyan law.<sup>194</sup> However, under Article, 62, no one is responsible for committing any crime unless he has ability to choose and know the good and the evil. This is logical, but it is inconsistent with Article 90 of Libyan Penal Code because under Article 90 it is possible for an unconscious person to be liable for committing a crime. Thus, Article 90 of Libyan Penal Code is not logical because it leads to a fact that the ability to distinguish (the volition and consciousness) is not necessary for criminal liability. However, as has been said, law is not always logical.

Another example is related to strict liability and secondary parties. One of the principles of English criminal law is that strict liability is imposed only on the principal offender and it is not applied to a secondary party.<sup>195</sup> This can lead to illogical consequences. For instance, in *Callow v Tillstone*<sup>196</sup> the offence was exposing bad meat for sale. The principal offender who was a butcher who exposed a carcass of a heifer which had eaten yew leaves. The carcass was passed as fit for sale by a vet who produced a certificate after examining it. This means the butcher relied on the certificate of the vet for exposing and selling the meat in the shop. The court convicted the principle offender as the offence was strict liability. With respect to the vet, he was found guilty at first instance because he was negligent in issuing the certificate, but the Court of Appeal acquitted him because he did not know, nor was reckless that the meat was rotten.

The illogical result in this case is that the principal offender (the butcher) was liable,

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<sup>192</sup> The Arabic text of this paragraph states that

لا يحول السكر الاختياري دون مسئولية الفاعل ولا ينقصها.

Libyan Penal Code 1953.

<sup>193</sup> The Article was translated from the Arabic language by the author.

<sup>194</sup> Drinking Alcohol is prohibited in Libya under the Law of Prohibition Drinking Alcohol. See Law no 4 due 1423 relative Prohibition of Drinking Alcohol. This law embodies the principles of Islamic law because Alcohol is prohibited by Islamic Sharia.

<sup>195</sup> A Reed and B Fitzpatrick, *Criminal Law* (4<sup>th</sup> edn., Sweet and Maxwell, London 2009) 116.

<sup>196</sup> (1900) 64 JP 823.

although he was blameless (he did not know about the putrefaction of the meat), whereas the vet (the secondary party) was not liable, although he was at fault because he was negligent in issuing the certificate. The reason behind this consequence is that strict liability is imposed only on the principal offender not on the accessory. However, as Reed and Fitzpatrick<sup>197</sup> state

this is illogical since if there are good policy reasons for imposing strict liability on the principal there are equally good reasons for imposing it on the secondary offenders-but the law is not always logical.<sup>198</sup>

From the preceding discussion, it is submitted that it is clear that the view, which argues that it is not logical to say that there is no forgery in respect of altering the information on the magnetic strip and there is a forgery regarding the information on the surface of the card, is not acceptable. The reason for this is indeed the rules of law sometimes interfere with the rules of logic. Although it is so, law must always be respected.

#### ***5) Invisible Information is one of the Contents of Credit and Debit Cards.***

Some of interviewees<sup>199</sup> claimed that if credit and debit cards are accepted to be documents as to visible information, any information must be treated the same. It does not matter if this information is visible or invisible. The subject matter of forgery is the plastic and any information on this material is the same and is treated as a part of the card.<sup>200</sup> This point reminds us of Salem's view in which he states that it is not logical to consider the card as a document with respect to visible information, and not to consider it as a document as to invisible information, because all the information is on one card and the card cannot operate if the invisible information is not on the card.<sup>201</sup> This may be arguable. The argument is correct in that all the information on the card is one unit. However, invisible information is a new concept and has separate material which is a

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<sup>197</sup> A Reed and B Fitzpatrick *supra* 116.

<sup>198</sup> *Ibid.*

<sup>199</sup> Interview with Mohammed Asagheer, Lawyer (Alkhoms, February 2012); Interview with Imhemmad Arazgy, Lecturer, Faculty of Law, Tripoli University (Tripoli, March 2012).

<sup>200</sup> In an interview with Mohammed Asagheer, the issue of forgery of credit and debit cards was discussed, specifically the question of does Libyan Criminal law protect credit and debit cards from forgery offences? Mr Mohammed was of the opinion that the card is protected. He stated that: "The card is one unit. All the information completes each other. The card cannot be divided. The electronic information is the essence of the use of the card. Without this information the card cannot be used. Thus, the card is a subject matter of forgery regardless of whether the forgery happens on invisible information or on visible information." Interview with Mohammed Asagheer, Lawyer (Alkhoms, February 2012).

<sup>201</sup> O Salem *supra* 33.

magnetic strip or a chip. In addition, this strip or chip can be removed and used without needing the visible information on the card.<sup>202</sup> In other words, credit and debit cards consist of two kinds of documents: plastic documents and electronic documents.<sup>203</sup> These two documents are different.

### ***6) The Card is Equal to the Cheque***

One may argue that credit and debit cards are similar to the cheque. They both operate in the same way. Whereas the cheque is used for obtaining money from banks, the card is also used to obtain money from banks and cash machines. Thus, cards should be considered documents and should be treated as the subject matter of forgery under Libyan criminal law.<sup>204</sup> Because the cheque is a customary document, the card is regarded the same. It should be a customary document. However, this cannot be accepted because although they (cards and cheques) function the same way, it may be argued that a cheque is different from a card. The first difference is that the cheque is made from paper and the information on the cheque is visible and printed. On the other hand, the card holds two kinds of information and one of them is invisible.<sup>205</sup> Another difference is that cards are not made to be used by other than the cardholder. They are made for personal use. Yet, a cheque is made to be reciprocal between people. If the card is used by other than the cardholder, the bank may withdraw the card from the cardholder.<sup>206</sup> Thus, how can it be stated they are the same?<sup>207</sup>

### ***7) Respecting the Rule of Justice***

Another reason that was provided by the interviewees to support the opinion that invisible information is the subject matter of forgery is the rules of justice. Some of the

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<sup>202</sup> This may be seen on some occasions such as when the card is used at cash machines.

<sup>203</sup> For more details, see Chapter Two 2.4.3.

<sup>204</sup> This opinion was also shared with some lawyers such as Mohammed Asagheer; Moosa Azentany and Waleed Benrajab. Interview with Mohammed Asagheer, Lawyer (Alkhoms, February 2012); Interview with Moosa Azentany, Lawyer (Tripoli, February 2012); Interview with Waleed Benrajab, Lawyer (Tripoli, March 2012).

<sup>205</sup> Hence, considering them as the same in the context of forgery may breach the principle of legality. This can be an analogy. For more details about the principle of legality and analogy, see the introductory Chapter 1.8.1.

<sup>206</sup> This may not happen if the user is authorised by the cardholder or the use takes place in its presence.

<sup>207</sup> In addition, a cheque and, credit and debit cards, cannot be regarded the same because of the principle of legality. This may be considered as an analogy. The cards are made of plastic and the cheque is made of paper.



interviewees<sup>208</sup> claimed that despite the fact that invisible information is a new concept, this information must be treated the same as the visible information because of an important reason which is criminal justice. In other words, it is not justice to treat the alteration of the reality (information) that happens to visible information in a different way from the alteration that happens to the invisible information. The forger, who changes the information on the surface of the card, is the same as the one who changes the invisible information. They both change the information. The difference is only the kind of the information changed. They both have the same intention to alter the information. Therefore, why is the forger of the visible information punished when the forger of the invisible information is left without punishment? They must both be punished. Visible information is in fact a new concept under Libyan forgery law, but the judge must act. The judge must not wait until the legislator intervenes by providing a new law. If the judge does not find any Article to apply, he can apply any Article that may be close to the case before him, especially if the act that was done is not ethical such as credit and debit card forgery. If this is done, it means justice would be done to the forgers in both documents.<sup>209</sup>

At first glance, it may appear that differentially dealing with visible and invisible information is unfair. However, if the matter is deeply thought of, it will be obvious that this argument may not be correct. This evidence may be against the known criminal principle which is law must threaten before punishing.<sup>210</sup> The justice rules require that people must know what is forbidden and what is allowed by the law.<sup>211</sup> Thus, this law can be applied and they can be subject to it.<sup>212</sup> In addition, stating that the judge should act and convict the person who changes the invisible information (although this

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<sup>208</sup> Interview with Jomaa Alfetoory, Justice, Civil Chamber, Libyan Supreme Court (Tripoli, March 2012); Interview with Unnamed, No 39, Judge, Alkhoms Court of First Instance (Alkhoms, February 2012); Interview with Mohammed Bashaara, Prosecutor, Alkhoms Prosecution Office (Alkhoms, February 2012).

<sup>209</sup> See Interview with Jomaa Alfetoory, Justice, Civil Chamber, Libyan Supreme Court (Tripoli, March 2012); Interview with Unnamed, No 39, Judge, Alkhoms Court of First Instance (Alkhoms, February 2012).

<sup>210</sup> I Arazgy *supra* 38; Ks Gallant *supra* 20.

<sup>211</sup> One of the rights which people have is that if someone wants to dispute criminal responsibility, he must be able to contest the charges against him. This can be achieved by providing a notice clarifying the acts which leads to this liability. This right can be acquired by the principle of legality. Legality means that the legislature must provide notice before people may be judged. In addition to clarifying the prohibited acts, legality requires that the notice must set out the deserved punishment for any act which is prohibited. *Ibid.*

<sup>212</sup> This principle is one of the principles that spring from the principle of legality.

information is not covered by forgery law) gives the judge the power of the legislature. This means judges would make a new law, trespassing on the competency of the legislator, contrary to the principle of separation of powers.<sup>213</sup>

### ***Solution***

As a result of this problem, some countries realised that credit and debit cards must be protected and they must adjust their laws in order to cover this new sort of document. Consequently, new laws were established for this purpose. For instance, in Canada, the legislator provided a new Article<sup>214</sup> which states that:

“document” means any paper, parchment or other material on which is recorded or marked anything that is capable of being read or understood by a person, computer system or other device, and includes a credit card, but does not include trade-marks on articles of commerce or inscriptions on stone or metal or other like material

It is obvious from this Article that the meaning of document includes, in addition to credit cards which are expressly provided, any material on which the information can be stored or kept. Thus, the meaning of the document according to this Article also includes debit cards. Another example is the UK law, the Forgery and Counterfeiting Act 1981.<sup>215</sup> This law considered electronic information as an instrument. It states that the instrument which is the subject matter of forgery can be “any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means.”<sup>216</sup> The Parliament in this Article replaced the term instrument with the term document.<sup>217</sup> As a result, the card’s magnetic strip became included by this Act and changing the information on a credit or a debit card became a

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<sup>213</sup> The principle of legality requires that all the powers of the State should be separated. That is, the power of legislature; the power of judiciary and the power of executive are not held in one hand of the government. In addition, every authority has different jurisdiction and does not intervene in another authority. Thus, the legislative power’s jurisdiction is to make legislation. This legislation must be clear. Furthermore, legislation also should be in general rules that can be applied to all people not to a special person. AA Jeera, *The Judicial System in Libya* (3<sup>rd</sup> edn., Benghazi University, Benghazi 1987) 37; C Elliott, and F Quinn, *English Legal System* (11<sup>th</sup> edn., Pearson Education Limited, London 2010) 4; I Arazgy *supra* 40.

<sup>214</sup> Canadian Penal Code 1985, Article 321.

<sup>215</sup> The Forgery and Counterfeiting Act 1981.

<sup>216</sup> Article 8(1)(d). *Ibid.*

<sup>217</sup> The term document was used by the UK Forgery and Kindred Offences Act 1913. Section 1(1) states that: “for the purpose of this Act, forgery is the making of a false document...” Forgery and Kindred Offences Act 1913.

forgery under Section 8(1)(d) of that Act.<sup>218</sup>

#### 4.4. CONCLUSION

This Chapter has examined whether credit and debit cards can be the subject matter of forgery under the Libyan Penal Code. In Libya, the subject matter of forgery may be a paper or may be a document.<sup>219</sup> Therefore, this Chapter has examined whether the words “paper” and “document” provided by the Libyan Penal Code can be applied to credit and debit cards. The matter whether credit and debit cards are the subject of forgery under Libyan law is doubtful. The reason behind this is that, as has been seen, credit and debit cards are made of plastic.<sup>220</sup> In addition, these cards have two kinds of information, visible information which is on the surface of the card, and invisible information, which is encoded on the magnetic strip and chip. Therefore, there are two kinds of the subject matter of forgery, plastic documents on which alteration happens to visible information, and electronic documents on which alteration happens to invisible information.

The Chapter has been divided into two sections. Section one has explored whether visible information can be the subject matter of forgery and section two has examined the matter regarding invisible information. Different Arabic approaches, related to this issue were explored. There is an agreement between scholars in Arabic countries<sup>221</sup> such as Egypt and Jordan that credit and debit cards can be the subject matter of forgery as to visible information because they are documents. They suggest that because the card is made of plastic and the information on it is seen by the naked eye, it can be a document falling under the forgery offence. However, the matter regarding invisible information is not the same. Some such as Salem<sup>222</sup> argues that invisible information on credit and debit cards can be the subject matter of forgery because there is no difference between visible information and invisible information. They exist and it is logical that these two kinds of information should be considered the same. However, others such as

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<sup>218</sup> J Parry and others, *Arlidge and Parry on Fraud* (3<sup>rd</sup> edn., Sweet and Maxwell, London 2007) 283. See also D Ormerod *supra* 960; R Rowell, *Counterfeiting and Forgery: A Practical Guide to the Law* (Butterworths, London 1986) 73.

<sup>219</sup> This has been addressed in Chapter Three 3.3.

<sup>220</sup> For more details, see Chapter Two 2.4.3.

<sup>221</sup> O Salem *supra* 31; JA Asagheer *supra* 120; FEA Alhamood *supra* 109.

<sup>222</sup> O Salem *supra* 31.

Asagheer<sup>223</sup> argue that forgery must occur on tangible signs or marks which can be seen by the eye. Invisible information cannot be regarded as a document falling under forgery offences because of the principle of legality. Forgery of invisible information is a new crime which should be covered by a new law.

In Libya, the interviews showed that the interviewees had different opinions whether visible information is the subject matter of forgery or not. As Chart 2 shows,<sup>224</sup> 30 of the interviewees claimed that visible information on credit and debit cards could be the subject matter of forgery. The reasons behind this view revolved around a main argument, which is that credit and debit cards are documents. This view basically relies on the fact that the subject matter of forgery required under forgery law in Libya is a document not paper. As Chart 3 showed,<sup>225</sup> 33 of 45 interviewees claimed that credit and debit cards are documents as regards visible information. On the other hand, although some interviewees did not deny that these cards are documents as to visible information, they did not accept that these cards can be the subject of forgery because of the principle of legality which is mandatory principle under Article 1 of the Libyan Penal Code. These cards are made of plastic and Libyan forgery law requires paper for the subject matter of forgery.<sup>226</sup> That is to say, the subject matter of the offence of forgery is paper not a document. Arguing that the subject matter of forgery is paper can be understood from many Articles under the Libyan Penal Code such as Articles 3551, 352 and 353.<sup>227</sup>

Equally, the matter as to invisible information in Libya is controversial. As chart 2 shows,<sup>228</sup> about the half of the interviewees answered “no” to the question “does the Libyan Penal Code protect credit and debit cards from the offence of forgery happening to invisible information?” The interviews showed that this kind of information is not covered by Libyan forgery law because some (19) of the interviewees, as Chart 3

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<sup>223</sup> JA Asagheer *supra* 121.

<sup>224</sup> See Chart 2, page 86

<sup>225</sup> See Chart 3, page 87.

<sup>226</sup> Interview with Imhemmad Arazgy, Lecturer, Faculty of Law, Tripoli University (Tripoli, March 2012).

<sup>227</sup> For example Article 351(1) states that: “Anyone, who is in a position of honesty of *paper* signed in blank, abuses it, by writing on it or allowing to be written on it a *customary document...*” See other Articles in this Chapter 4.2.2.

<sup>228</sup> See Chart 2, page 86.

shows,<sup>229</sup> claimed that invisible information on credit and debit cards could not be documents. This was because a document, which is required by Article 346 of the Libyan Penal Code, must be seen by the naked eye. Another reason is that credit cards are made of plastic and the document required is a paper document not a plastic document. Yet, other interviewees claimed that credit cards are documents (as to visible information) and can be the subject matter of forgery required by Article 346 of the Libyan Penal Code. They claimed that the subject matter of forgery required is a document regardless of its material and its ingredients as long as the information can be seen and is readable. Because invisible information on credit and debit cards is readable and is a fact, these cards are regarded as the subject matter of forgery.

Obviously, under the provisions of forgery in Libya, the matter depends on the subject matter of forgery.<sup>230</sup> If the subject matter of forgery is regarded as paper, then the principle of legality means that cards may not be the subject of forgery because of the principle of legality. This can be applied whether in respect of visible information or invisible information. Considering credit and debit cards as paper by analogy is not allowed under Libyan criminal law. If the subject matter of forgery is regarded as a document, the matter on visible information would be different from it in respect of invisible information. In this case, the visible information would fall under the forgery law in Libya. All the conditions required for the document exist. On the other hand, the invisible information may not be regarded as the subject matter of forgery because of the principle of legality: therefore, interpreting the word “document” to cover credit and debit cards may be regarded a wide interpretation which is not accepted under criminal law.

Hence, there are two ways to solve this problem. The first suggestion is to provide a new Article frankly stating that credit and debit cards are the subject matter of forgery. By providing such an Article, the doubt around whether credit and debit cards are documents would disappear. The meaning of document would not be a problem preventing the application of the offence of forgery to the forgery of credit and debit cards. However, this solution may only be effective for credit and debit cards, but not

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<sup>229</sup> See Chart 3, page 87.

<sup>230</sup> The subject matter of forgery has been explored in Chapter Three.

for other cards.<sup>231</sup> Therefore, the second solution may be more useful. This solution suggests that a new Article is provided stating that credit and debit cards are documents. In this case, there is another problem which may occur. There may be overlap between the words “document” and “paper”. As has been seen, there is no agreement whether the subject matter of forgery is a paper or a document. In addition, there is vagueness surrounding the concept of document whether the invisible information is a document or not.<sup>232</sup> Therefore, if the second solution is selected by the legislator, another Article should be suggested. It may be effective if a new Article is provided stating that the word document and the word paper have the same meaning and that they mean a document. In addition, the term of the document should be defined to expressly include electronic information.

This is the problem of the subject matter of forgery under the Libyan Penal Code. The question which arises now is that is this the only problem which may prevent the application of the offences of forgery to the alteration of the information to the forgery happening on credit and debit cards? In other words, is there any problem which prevents the actus reus of the offence of forgery from the application to the forgery of credit and debit cards? This question will be approached in next Chapter.

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<sup>231</sup> This solution may not be effective for withdrawal cards because they would not be included by such an Article. Applying such Article to withdrawal cards would be analogy, which is not allowed under Libyan criminal law.

<sup>232</sup> For more details, see Chapter Three.

**CHAPTER FIVE**  
**CHANGING THE INFORMATION ON CREDIT**  
**AND DEBIT CARDS AND THE ACTUS REUS OF FORGERY**

**5.1. INTRODUCTION**

This Chapter explores whether two issues prevent the actus reus element under Libyan forgery law from the application to the alteration of the information on credit and debit cards. These issues are the way of changing the information on credit and debit cards and using the forged document. In other words, this Chapter will examine whether the actus reus of the forgery offences in Libya meets the actus reus of the offence of forging a credit or a debit card. This Chapter is important for the thesis because it completes the picture of the offence of forgery of credit and debit cards whether it is covered by the forgery law in Libya or not.

As will be seen in this Chapter, changing the information needs a special technique because, as has been noticed in the previous Chapters credit and debit cards are not the same as common documents in Libya (which are paper). This difference may be observed when the alteration of the information happens on the surface of the cards or when it is done on a magnetic strip or a chip. Thus, it may be argued that changing the information on credit and debit cards does not constitute the actus reus under the offence of forgery in Libya.<sup>1</sup> To address this argument, the ways of changing the information on credit and debit cards, should be clear.<sup>2</sup>

In addition, the difference in the information on credit and debit cards, and the way which it requires to be changed, reflects on the actus reus of the offence of forgery in Libyan law. Thus a question arises: to what extent can the methods of forging a document under Libyan law apply to the methods of changing information on credit and debit cards? The legislator in Libya does not require any special method to commit the act of changing the information on the subject matter of forgery (documents or papers). In addition, unlike the subject matter of forgery, the legislator does not distinguish

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<sup>1</sup> In other words, the actus reus of the offence of forgery is absent.

<sup>2</sup> By doing so, the difference between alteration on credit and debit cards and alteration on papers should be obvious.

between changing information on a formal document or on a customary document. Yet, there is a distinction between a physical alteration and an immaterial alteration (although it is not significant). Although the legislator in Libya does not require a special method for the commission of forgery, the reflection of the problem of the subject matter of forgery addressed in the previous Chapter has its impact on this matter.<sup>3</sup>

The other issue which may be considered in the context of the actus reus under forgery law in Libya is what Article 346 and Article 351 require for the actus reus to be committed. In these two Articles, the legislator requires that the forged document must be used in order to apply the punishment for the forgery. This may pose the question is this requirement a part of the actus reus or is it only a condition for the application of the penalty of the offence of the forgery? Therefore, a problem arises here because it may be argued that this condition is a part of the actus reus of the offence of forgery as mentioned by Adahabi.<sup>4</sup> This is important because the answer will affect the existence of the actus reus of the offence of forging credit and debit cards.<sup>5</sup> If this is the course, the offence of forging credit and debit cards will be affected and may not be constituted except to narrow extent.

Thus, this Chapter will address three issues in the context of credit and debit card forgery. The second section will address the issue of changing the information on the cards. The ways of changing the information on the credit and debit cards will be investigated. It will be seen that changing information on credit and debit cards is different from changing the information on the common documents in Libya. In the third section, the actus reus of the offence of forging a document will be explored. It will be explained that there is no particular method by which forgery must be committed, although it may be committed in two ways: physical forgery (means the forgery has a visible alteration on the document or the card) or an immaterial forgery:

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<sup>3</sup> Although the actus reus of the offence of forgery can be committed by any way, it requires a document to happen on, as will be seen later in this chapter.

<sup>4</sup> Adahabi mentioned that the actus reus of forging a customary document under Articles 346 and 351 requires that the forged document must be used. Therefore, if the document is not used the offence of forgery has not been constituted. EG Adahabi, *Crimes Breaching Public Trust in the Libyan Penal Law* (Almaktaba Alwatania, Benghazi 1972) 246.

<sup>5</sup> In fact, this problem does not only affect the existence of the actus reus of the offence of forging a credit or a debit card, it also affects the offence of forging a document in general.



no visible alteration on the document (committed by the issuer himself), with no physical signs that the document has been forged.

The fourth section will address the issue of the requirement that the false document must be used in order to punish the forger. For this purpose, a question will be addressed: is the use of the forged document which is required by Articles 346 and 352,<sup>6</sup> a part of the actus reus of the offence of forgery or it is only a condition for applying the penalty of the offence. Thus, this Chapter will address these points:

- Alteration of the information on credit and debit cards
- Changing the information on credit and debit cards and forgery law in Libya
- The use of false cards: requirement or condition?

## **5.2. ALTERATION ON CREDIT AND DEBIT CARDS**

Changing the information on credit and debit cards is different from the alteration which happens on common documents<sup>7</sup> which are papers. This is because the material which holds the information and the information itself are different. As has been emphasised,<sup>8</sup> credit card and debit cards have two kinds of information. Some information is on the surface of the card, “visible” information; the other information is electronic information, which is invisible and it is stored on the magnetic strip or the chip. Therefore, changing the information on a credit or a debit card may occur to either visible information or invisible information.

### **5.2.1. Changing the Information on the Surface of the Card**

Changing the information on the surface of the card may be complete or partial. It can be complete if, for example, a new credit card is made as another genuine card. This can be called a “complete forgery” of the card.<sup>9</sup> However, it is partial if the alteration is

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<sup>6</sup> Libyan Penal Code 1953.

<sup>7</sup> Common document means the documents which are in use by people in Libya, namely documents made of paper.

<sup>8</sup> For more details, see Chapter Two 2.4.

<sup>9</sup> MNS AbduAlmajeed, *The Criminal Responsibility for Changing the Reality on Debit and Credit Cards* (Dar Anahda Alarabia, Cairo 2008) 127; Mohammed Abduarasul Khiat, ‘the Credit Card Forgery Operations’[2002-1422] Naif Arab Academy Security Sciences 33, 37; RF Basala, *Credit Card Crimes: an Epistemic Analytical Study of their Elements, Manners of their Counterfeiting and the Ways of Recognising them* (Dar Ashorok, Cairo 1995-1416) 107.

made by changing some information on the card (such as changing the name of the card holder or the expiration date). This is so called “partial forgery” of the card.<sup>10</sup>

### ***Complete Alteration: Making, Imitating and Difference***

The complete alteration on a credit or a debit card might be executed by imitating or making a new card. In this regard, all the drawings, the inscriptions and the writing which is on the original card must be put on the forged card.<sup>11</sup> For example, the numbers (such as the number of the card, the account number and the expiration date) must be embossed.<sup>12</sup> In addition, the name of the institution and the name of the bank (if the card is issued by a bank) must be printed. After that, a magnetic strip (and sometimes a chip)<sup>13</sup> is fixed on the card.<sup>14</sup> In other words, the card must hold all the information that is usually on the genuine card and look like it is real card.

Although imitating or making a false card is a complete forgery, there is a difference between these two words. Whereas, according to Hosni<sup>15</sup> and Ashawarby,<sup>16</sup> the meaning of the “imitation” is writing a document by a script resembling another’s script with the intention that this document is issued by that person, “making” a document as the Egyptian Supreme Court<sup>17</sup> stated, means writing a document without caring about, or paying attention to, the script of the writer of the genuine document. That is to say, the difference between the “imitation” and “make” is that the forger of the latter variety does not care about the similarity between his script and the script of the original document in terms of making a false document.<sup>18</sup> Therefore, the false card might not be exactly the same as the genuine one. For instance, the false card may not hold the name of the bank (the issuer), whereas the genuine one does. However, the imitator attempts

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<sup>10</sup> MNS AbduAlmajeed *supra* 133; Mohammed Abduarasul Khiat *supra* 40.

<sup>11</sup> Riad FathAllah Basala, ‘Fraud Crimes by Credit Cards and the Manners of their Combats’ [2002-1422] Naif Arab Academy Security Sciences 63, 95.

<sup>12</sup> The reason behind this is that this information is usually embossed on the card. For more information, see Chapter Two 2.4.1.

<sup>13</sup> As has been mentioned, it is not necessary for the card to have a chip because cards can operate with only magnetic strips. See Chapter Two 2.4.1.

<sup>14</sup> RF Basala *supra* 107.

<sup>15</sup> Hosni, *Explanation of the Penal Law: the Special Part* (Dar Anahda Alarabia, Cairo 1988) 238.

<sup>16</sup> A Ashawarbi, *The Forgery and the Counterfeiting: Criminally and Civilly in the Light of the Doctrine and Judicature* (Monshaht Almaaref, Alexandria 1996) 46.

<sup>17</sup> Egyptian Supreme Court, Reversal Decisions, No.105 Year 19, 6/5/1968, 536 in HS Almersfaoui, *Almersfaoui in Special Penal Law: Legislation and Judiciary* (Monshaht Almaaref, Alexandria 1990) 677; Egyptian Supreme Court, No.200, Year 22, 27/12/1971, 833 in HS Almersfaoui *supra* 677.

<sup>18</sup> MN Hosni *supra* 239.

to make his script the same as the script in the original document in terms of the “imitation”.<sup>19</sup> This means the forged card will appear as if it is genuine.

Accordingly, making a card means making a new card and claiming that it is issued by a particular bank. This new card has not existed before. However, imitating a card means making a new card to mimic another existing card.<sup>20</sup> The new card and the old card should be the same. In other words, the forger in the case of the imitation card is concerned to ensure that the new card exactly resembles the old card. On the other hand, the forger in the case of making a new card is not concerned with the similarity between the forged card and the genuine card. He only attempts to make a credit or a debit card appear as other cards in general. Therefore, for example, it is submitted that in the context of making a false card, it does not matter if the writing is bigger than the writing on the genuine cards, as long as this writing does not affect the card in performing its employment. The reason behind this is that the forger does not pay attention to the similarity between the false and the genuine cards.

Although there is a difference between making and imitating a credit or a debit card, Saed<sup>21</sup> alleges that there is no difference between these acts in terms of credit and debit card forgery. He traces this view to the fact that credit and debit cards are not documents that are written by hand. All the cards, e.g., Visa card and MasterCard, are the same regarding the shape of the script and the signs that are on the cards. Consequently, the forger (the maker or the imitator) will not try to imitate another’s script. All cards are the same so there is no need for differentiation between imitating and making a false credit or debit card.

However, it is submitted that even though it is correct that all cards are the same and the cards are printed and made by a particular device, this differentiation is nevertheless justified.<sup>22</sup> This is because when a new false card is made, it should be under the standard and the conditions required for making the cards in general. If it is not, the

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<sup>19</sup> *Ibid.*

<sup>20</sup> Kelany AbduArady Mahmood, ‘The Legal System of Debit and Guarantee Cards’ (PhD thesis, University of Aeen Shams 1996) 846 footnote 1.

<sup>21</sup> Mohammed Nooradeen Saed, ‘The Criminal Responsibility for the Illegitimate Use of Debit Cards: Comparative Study’ (PhD thesis, Cairo University 2005) 332.

<sup>22</sup> Yousef Alija, ‘The Legal problems which the Use of Credit Cards Poses under Libyan Criminal Law’ (LLM dissertation, Alfatih University 2007) 169.

forgery on the card will be easy to detect. On the other hand, the script on the card may be bigger or thinner than usual and no one can be aware of it. For example, the name of the cardholder may be embossed in a bigger script. In this occasion, the forgery will be committed by the way of making a false card. The reason behind this is that in the case of imitating a card, the false card must be the same as the genuine one in all the elements of the card. In addition, the size of the script should also be the same as the genuine card. Accordingly, theoretically, the difference between making and imitating the false card must be obvious.

### ***Difficulty***

It is noticeable to mention that making or imitating a false card is not an easy matter. It is correct that all the requirements for doing so are available in the market.<sup>23</sup> For example, the forger can easily obtain plastic, which is the main material for making credit and debit cards.<sup>24</sup> In addition, although it was added to cards to provide more strength against forgery,<sup>25</sup> the hologram has become easier to forge.<sup>26</sup> It is correct that a fraudster cannot use the lenticular refraction from which the real card is made, in the case of making a false hologram because it requires a difficult process.<sup>27</sup> However, as has been emphasised,<sup>28</sup> the hologram can be made by placing foil on the card and stamping the required image,<sup>29</sup> but this makes the hologram forgery not difficult to detect. The reason is that when the card is moved, the real hologram is seen in colour, whereas the false hologram will remain as it is.<sup>30</sup> Furthermore, although the requirement for making a new false credit or a debit card can be easily obtained, this act is not easy. This is because it requires special skills and knowledge. Thus, there are some

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<sup>23</sup> RF Basala *supra* 59; Peter Burns and Anne Stanley, 'Fraud Management in the Credit Card Industry' [2002] Federal Reserve Bank of Philadelphia Payment Cards Center Discussion Paper 1, 4.

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=927784](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927784)> accessed 15 May 2014.

<sup>24</sup> Katherine J Barker and others, 'Credit Card Fraud: Awareness and Prevention' [2008] *Journal of Financial Crime* 398, 401; Mohammed Abduarasul Khiaat *supra* 42.

<sup>25</sup> M Levi and J Handley, *Criminal Justice and Future of Payment Card Fraud* (Institute for Public Policy Research, London 2002) 18.

<sup>26</sup> Katherine J Barker and others *supra* 402.

<sup>27</sup> *Ibid* 400; David Arthur Williams, 'Credit Card Fraud in Trinidad and Tobago' [2007] *Journal of Financial Crime* 340, 343.

<sup>28</sup> For more information about the hologram see Chapter Two 2.4.1.

<sup>29</sup> *Ibid*

<sup>30</sup> *Ibid*.

companies that specialise in producing false credit and debit cards.<sup>31</sup> They create false cards and distribute them throughout different countries in the world (such as the US, Canada and the UK).<sup>32</sup>

### ***Partial Alteration***

Unlike the complete forgery that requires the forger to make a new card with all the information required, partial forgery requires only alteration of one or more elements of the data on the card.<sup>33</sup> The card may be forged (for example) by only changing the name of the cardholder, or by altering the expiration date of the card so as to appear valid. Furthermore, it might be forged by altering the number of the card or putting a false signature on the card. In short, it may happen by any alteration or placing any embossed, printed or written data on the surface of the card.

### ***Embossed and Printed Information***

Because genuine cards are made of plastic, changing data on the cards needs particular equipment. For example, altering the number of the card on the face of the card requires a particular instrument which enables the forger to emboss the number on the card, after making the old card smooth and erasing or removing the old number. Embossed numbers can be removed by exposing the card (stolen or lost card which may be expired) to heat,<sup>34</sup> for example, putting the card in water and heating the water until boiling point is reached.<sup>35</sup> Then digits are pushed until they disappear and the card

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<sup>31</sup> It is notable that this kind of forgery may make great profits. Thus, some companies in Asia, where there is no strong security, issue these false cards as business. *Ibid*.

<sup>32</sup> *Ibid*; Jamie Wilson, 'Triads' Credit Card Fraud Accounts for £13m UK Loss' *The Guardian*, 17 February 1990. Therefore, some banks try to improve their systems to watch the transactions which take place by using cash machines and that take place at the points of sale. Furthermore, banks seek to develop credit and debit cards. They added some attributes to the cards to prevent forgers from making false cards. Examples of attributes are holograms, ultraviolet ink and fine line printing. *Ibid* 402. However useful, all of these security measures may not ultimately prevent credit and debit cards forgery.

<sup>33</sup> This forgery is based on stolen and lost cards. Forgers collect these cards by different ways, e.g., buying them from thieves. See Smith G Russell and Peter Grabosky, 'Plastic Card fraud' [1998] Australian Institute of Criminology 1, 3; Ma Yu-Feng, 'Tendency and Responses to Credit Card Fraud in Taiwan' (2005) 12(4) Journal of Financial Crime 344, 345.

<sup>34</sup> Mohammed Abduarasul Khiat *supra* 42; Lăcrămioara Balan and Mihai Popescu, 'Credit Card Fraud' (2011) 11(1) The USV Annals of Economics and Public Administration 81, 82. Furthermore, the embossed numbers can be changed with the flattening key of a portable embossing machine. David Arthur Williams, 'Credit Card Fraud in Trinidad and Tobago' [2007] Journal of Financial Crime 340, 342.

<sup>35</sup> RF Basala *supra* 97.

becomes smooth.<sup>36</sup> After that, new numbers are embossed. Equally, the date of expiration may be changed. Because the date is also embossed on the face of the card, the forger will follow the same technique that is followed for forging the number of the card. It is obvious that removing the embossed numbers is not difficult.<sup>37</sup> Another difficulty which may be obvious is changing the digits that are printed on the signature panel. As has been mentioned, the panel of the signature is made from sensitive material.<sup>38</sup> Consequently, when this panel is scratched, the word 'INVALID'<sup>39</sup> or 'VOID'<sup>40</sup> will appear. Therefore, the forger must change the panel or find a new way to change this information. This difficulty may occur when the forger tries to forge the cardholder's signature. On the other hand, the signature can be forged in another way as will be seen.

### ***Putting a False Signature***

As has been clarified,<sup>41</sup> credit and debit cards have a signature panel on their reverse<sup>42</sup> which should be signed by the legitimate cardholder. This signature, as other information on the card,<sup>43</sup> might be changed or falsely signed if the signature panel is empty.<sup>44</sup> Thus, forging a signature can be achieved in different ways. The easiest means to forge the signature is when the place of the signature on the signature panel is left empty. In this case, forgery will not be difficult since all that the forger needs to do is to fill in the blank with a false signature. Consequently, cards should be signed after they are received by the legitimate cardholders and the issuer should make sure that this obligation has been made by the cardholder. The other way to forge the signature is by changing the old signature. This may happen by removing the old signature which is on the card, and signing a new false signature. Although this act is difficult to be done

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<sup>36</sup> *Ibid* 107; Riad FathAllah Basala *supra* 92.

<sup>37</sup> It is obvious that removing the embossed numbers might not be difficult. However, the difficulty may appear in embossing the numbers. See above.

<sup>38</sup> The signature panel and the information printed on it have been mentioned in Chapter Two. For more information, see Chapter Two 2.4.1.

<sup>39</sup> M Levi and others, *The prevention of cheque and credit card fraud* (Home office, London 1991) 9.

<sup>40</sup> *Ibid* 8; EA Alkhaleel *The Penal Protection of Debit Cards: Analysed Comparative Study* (Wael, Amman 2000) 24.

<sup>41</sup> For more information, see Chapter Two 2.4.1.

<sup>42</sup> M Levi and others *supra* 8.

<sup>43</sup> Such as the number of the card and the account number.

<sup>44</sup> As a result, credit and debit cards should without delay be signed by the cardholder after its arrival from the issuer. RF Basala *supra* 99.

without detection, it may happen. The difficulty is traced to the accuracy which is followed in producing the signature panel.<sup>45</sup> When an attempt to remove the old signature is made, the word 'VOID',<sup>46</sup> or 'INVALID',<sup>47</sup> appears on the signature panel.<sup>48</sup> This means the card will not typically be used at points of sale because the seller will easily discover the falsity of the card while the transaction is being performed.<sup>49</sup>

### *Alternative Way*

Because removing the signature itself is easy to detect, the forger might seek an alternative way to achieve this aim. The forger may change the signature by removing the old signature panel<sup>50</sup> on a stolen or a lost card and placing a new false one in its place. This might lead to inconsistency between the signature panel and the surface of the card, since the signature panel will not be flush (in the same level) with the face of the card.<sup>51</sup> As a result, forgery may be discovered by the merchants or service providers when they check the cards. However, this may be safer for the forger than changing the signature.

### **5.2.2. Changing the Invisible Information**

Like the alteration of visible information, changing invisible information might be complete or partial. The complete alteration occurs when the forger changes all the information on the magnetic strip or makes a new magnetic strip.<sup>52</sup> The alteration is partial when the forger changes some information on the strip or the chip (such as the expiration date).

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<sup>45</sup> M Levi and others *supra* 9.

<sup>46</sup> *Ibid* 8; EA Alkhaleel *supra* 24

<sup>47</sup> M Levi and others *supra* 9.

<sup>48</sup> This may also happen when the last four digits written on the signature panel are attempted to be forged.

<sup>49</sup> However, the card may be used at the cash machines since at these machines there will be no human checking whether the signature is false or the signature panel is scratched.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> Some credit and debit cards still have no chip on their surface and some countries still rely on magnetic strip terminals such as countries in America and Asia (as Everett states). See R Anderson and others, 'Chip and Spin' (2006) 22(2) Computer Security Journal 1,3; David Everett, 'Chip and PIN' [2006] <<http://www.smartcard.co.uk/Chip%20and%20PIN%20Security.pdf>> accessed 8 January 2012.

### *Complete Alteration*

The complete alteration may be achieved by making a new magnetic strip<sup>53</sup> or by changing all of the information on the magnetic strip. In respect of making a new magnetic strip, the forger makes a new strip and includes all the information required on the strip electronically.<sup>54</sup> The strip would be blank. However, as for changing information on a magnetic strip, the forger needs to decode the old information from a genuine strip, and re-code new information onto it.<sup>55</sup> This type of forgery might not be difficult.<sup>56</sup> On the other hand, because this alteration of the reality (information) takes place on an electronic subject, it needs a special technique to be effective. It is submitted that it can be argued that, unlike the complete alteration of visible information which can be achieved by the way “imitating” or “making”, the complete alteration on invisible information cannot be divided into such divisions. The reason is that the electronic information is not words or signs that are seen by the naked eye. It is all the same. As a result, there is no need for distinguishing between these two kinds of forgery in respect of this information as has been done as to visible information.

The information on the magnetic strip is collected by those who work in some places that offer services to individuals (such as petrol stations,<sup>57</sup> stores and restaurants<sup>58</sup>). Typically, waiters and waitresses are recruited to steal the information from the credit and debit cards during transactions.<sup>59</sup> They use skimming devices to save the information during the transactions at the point of sale.<sup>60</sup> The transactions at the point of sale are usually performed by inserting the card in an electronic device which the issuer provides to the merchants or service providers. The cardholder then enters the Personal

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<sup>53</sup> RF Basala *supra* 59.

<sup>54</sup> *Ibid.* Equally, in this respect, if the card has a chip, the forger also needs to make a new chip and re-code all the information required on it.

<sup>55</sup> Katherine J Barker and others *supra* 401. See also *R v Ameen Din and others* [2004] EWCA Crim 3364. In this case, the appellants used false credit cards. The court held that the data on these false cards “must have been skimmed or copied from a genuine card’s magnetic strip in the course of a genuine transaction and transferred onto another card.”

<sup>56</sup> E Wilding, *Information Risk and Security: Preventing and Investigating Workplace Computer Crime* (Gower Publishing limited, Burlington 2006) 30. AAM Othman, *The Principle of Credit Cards in the Law and Islamic Views* (Dar Alfeqr Alaraby, Alexandria 2006) 200.

<sup>57</sup> Terry Corbitt, ‘Credit Card Fraud’ (2006) 170 *Justice of the Peace* 732.

<sup>58</sup> E Wilding *supra* 30.

<sup>59</sup> Katherine J Barker and others *supra* 400; Rupert Jones, ‘Credit Card Fraud up by 60%’ *The Guardian*, 4 January 2001.

<sup>60</sup> *Ibid.*



Identity Number (PIN)<sup>61</sup> and the transaction ends. However, this transaction does not sometimes work. The server then needs, to complete the transaction, to take the card and swipe it through another electronic machine (card reader) to end the transaction.<sup>62</sup> The information which is stored on the magnetic strip will then be cloned in the skimmer.<sup>63</sup> Consequently, the forger obtains this information from the service provider or the merchant and uses it to forge a magnetic strip.<sup>64</sup>

### ***Partial Alteration***

This kind of alteration is done by changing one or more elements of the information that is stored on the card strip which was stolen or lost.<sup>65</sup> The forger electronically erases the information which he wants to alter and recodes new information instead.<sup>66</sup> For example, the forger may electronically change the credit limit that the card can withdraw, change the expiration date of the card, or change the number of the card.<sup>67</sup> Unlike the complete alteration of invisible information, partial alteration of the invisible information may be performed on information on a legitimate magnetic strip without changing the visible information. For example, when the credit limit is the only data on the magnetic strip which is changed, the forger does not need to change any information

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<sup>61</sup> PIN is a number which is required to be entered whenever the card is used. For more details, see Chapter Two 2.4.2.

<sup>62</sup> “If a card is presented at an ATM or POS terminal whose chip has been damaged, or which never had a chip, then the device falls back to magnetic strip operation.” R Anderson and others *supra* 1,3.

<sup>63</sup> Edward Wilding *supra* 30.

<sup>64</sup> This is not the only way to collect the information of credit and debit cards. The information may be collected in different ways. For example, in *Viorel Militaru and Marcel Bujor*, the defendants were in conspiracy to clone information of credit and debit cards at cash machines. “False facias would be attached to the machines in order to read the information on the cards and a camera would be secreted in order to read the PIN numbers as they were entered by the customer.” See *R v Viorel Militaru and Marcel Bujor* [2007] EWCA Crim 2531. This also happened in *Nicolae Sas* in which “the conspiracy to defraud involved the reading and recording of credit and debit cards at ATM machines”. See *Regina v Nicolae Sas, Anatol Cotorobai, Anzelika Kravcenko, Diana Stefanco, Ghenadii Rusu, Vadim Ciornea* [2009] EWCA Crim 1522. In addition, some information such as numbers of these cards may be collected from the internet when they are used for transaction on the internet. Mark Griffiths, ‘Fraud on the Internet: Growing Problem’ (2000) 164 *Justice of the Peace* 526. Therefore, cardholders worry “about privacy and disclosure of data” when using their cards on the internet. Lilian Edwards, ‘Consumer Privacy, On-Line Business and the internet: Looking for Privacy in All the Wrong Places’ (2003) 11(3) *International Journal of Law and IT* 226, 230; Justice Arden, ‘Electronic Commerce: Information Technology’ (1999) 149 *New Law Journal* 1685.

<sup>65</sup> As has been emphasised, credit and debit cards which may be used for forgery may be lost or stolen cards. Cards may be stolen in different ways including during their journey in the mail to the cardholder. See Miles Brignall, ‘Jobs and Money: Why We Need a Plastic Revolution: Problems Encountered by Nationwide Customers Left Without a Debit Card Highlight a Serious Flaw in the Banking System’ *The Guardian*, 4 September 2004.

<sup>66</sup> *Ibid.*

<sup>67</sup> RF Basala *supra* 111; MN Saed *supra* 343; EA Alkhaleel *supra* 49.

on the surface of the card because this information (the credit limit) does not appear on the card. As a result, the card can be used with no fear of detection at all. However, if the information which is changed on the magnetic strip also appears on the card, the visible information should be the same as the forged information. This is, as has been emphasised, because when the invisible information is different from the visible information, forgery may easily be detected by the merchant or service providers. On the other hand, this does not always happen because the card may be used for withdrawing money from cash machines where the cash machine only reads the information which is stored on the magnetic strip without reading the visible information. In addition, at cash machines, there is no service provider to check the card.<sup>68</sup>

Considering the alteration of the information on credit and debit cards, it may be stated that there are some differences between this alteration and changing the information on ordinary documents. These differences can be seen in some aspects. One difference is that alteration on paper is usually committed by writing. For example, changing a date on a certificate needs to be done by writing. Although most letters today are created by computer, these letters need to be signed by hand. It may be argued that the signature may be also done by a computer. However, changing the signature needs to be written as a primary stage for putting it in the computer then printing it out. This is not the case in terms of changing the information on credit and debit cards. As has been seen,<sup>69</sup> it does not need writing except when the signature on the signature panel is signed.<sup>70</sup> As for other information such as the name of the cardholder and the number of the account on the surface of the card or on the magnetic strip, it needs to be altered other ways more than writing.<sup>71</sup>

### ***Professional***

Because changing the information on credit and debit cards is a complex operation and

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<sup>68</sup> Thus, forgers may prefer to not use these kinds of false cards at points of sale.

<sup>69</sup> See Section two of this Chapter.

<sup>70</sup> The signature is the only information which needs to be written on the credit and debit card.

<sup>71</sup> As has been emphasised, changing the embossed information needs to be heated and pushed. As for invisible information, it needs to be altered electronically. Therefore, it does not need writing by hand.

needs a special technique,<sup>72</sup> this operation needs experts who have knowledge<sup>73</sup> in the field of making credit cards and coding electronic information. Therefore, lay people who are not specialist in this area of technology may not be able to change the information such as the hologram on the card or embossed information such as the sort code placed on the surface of the card. In contrast, changing information on paper, does need this experience, it is sufficient for the forger to know how to use the computer or even on some occasion, he does not need to use the computer if he changes a number on a paper. Changing the information on papers is a small operation that needs no more than a pen and sometimes a photocopier. It does not need complex or special tools. Although it may need a computer for typing a false letter, this is not the same as changing the information on the credit and debit cards. Changing the information on credit and debit cards needs a special device, especially in respect of changing the information on the magnetic strip.

Hence, it can be confirmed that changing information on a document or making a new document in Libya is different from changing information on credit and debit cards or making a new credit or debit card. Therefore, a question arises and may be self-evident which is “Is the alteration under the Libyan Penal Code consistent with the alteration on credit and debit cards? In other words, can this difference be a reason for preventing the actus reus under the offence of forgery to cover the alteration on credit and debit cards? To answer this question, the act of changing information under the offence of forgery in Libya should be clear.<sup>74</sup>

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<sup>72</sup> In this meaning, in *Taj (Kamarn)*, the judge held that “forging of credit or debit cards had been both professional and sophisticated.” *R v Taj (Kamran) and others* [2003] EWCA Crim 2633.

<sup>73</sup> Therefore, Papadopoulos and Brooks confirm that for combating credit card fraud, there is need for specialised knowledge. Andreas Papadopoulos and Graham Brooks, “The Investigation of Credit Card Fraud in Cyprus: Reviewing Police “Effectiveness” (2011) 18(3) *Journal of Financial Crime* 222, 232; Hendi Yogi Prabwo, ‘Nationwide Credit Card Fraud Prevention’ [2011] <[http://www.popcenter.org/problems/credit\\_card\\_fraud/PDFs/Prabowo%20card%20fraud.pdf](http://www.popcenter.org/problems/credit_card_fraud/PDFs/Prabowo%20card%20fraud.pdf)> accessed 3 May 2014.

<sup>74</sup> By addressing the act of changing the information under Libyan forgery law, the difference will be obvious, and a view can be achieved.

### 5.3. CHANGING THE INFORMATION ON CREDIT AND DEBIT CARDS AND FORGERY LAW IN LIBYA

The act of alteration<sup>75</sup> of forgery is provided by many Articles of forgery. Some Articles provide for special acts, and some for forgery in general. As for the Articles providing for special acts, for example, Article 343 provides for the act of forging certificates of necessary public services, Article 349 provides for the act of forging books and communiqués and Article 350 provides for the act of forging passports. These offences were provided to deal with particular cases which the legislator thinks need less punishment or which required the criminalisation of specific conduct. With respect to the general articles, they are: Articles 341,<sup>76</sup> 342,<sup>77</sup> 344,<sup>78</sup> 346,<sup>79</sup> 351,<sup>80</sup> 352<sup>81</sup>

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<sup>75</sup> The act of the alteration may be different from the *actus reus*. The difference lies in the fact that the *actus reus* is wider than the act of the alteration. It includes the act of the alteration. *Actus reus* under Libyan law, as Adahabi states, consists of the act of changing the information, the result and using the forged document. In this Section, the act of changing the information will be examined. As for the result, it will not be addressed in this thesis because the author believes that it is not necessary. It does not pose any problem in respect of the application of the *actus reus* of forgery. The result of changing the information on a credit or a debit card occurs whenever the information is changed completely. If the forger did not manage to change the information but he starts to do so, this would be attempted forgery, governed by the rules of the attempt under Article 59 of the Libyan Penal Code. This Article states that: "Attempt is the beginning of performing an act with an intention to commit felony or misdemeanour if the act is stopped or its impact fails without the intervention of the person who is doing the act." The Article was translated from the Arabic language by the author. For more details about this matter, see Adahabi *supra* 201.

<sup>76</sup> This Article is translated as: "Any public employee, who during doing his duty, puts a forged document entirely or in part or forges a valid document, shall be punishable by imprisonment for a term not less than 3 years." This Article was translated from the Arabic language by the author.

<sup>77</sup> This Article is translated as: "Any public employee, who falsely decides that a document is valid which its submission, writing or supervision is under his authority, writes data which he is not provided, omits or alters data which he was provided, or falsely decides, in any way, facts which the document relies on its authenticity, shall be punishable by the same penalty which is in the previous Article." This Article was translated from the Arabic language by the author.

<sup>78</sup> This Article is translated as: "If the act prescribed in Article 341 is committed by, a lay person or a public employee out of performing his duty, the penalty shall be punishable by imprisonment for a term not exceeding 5 years." This Article was translated from the Arabic language by the author.

<sup>79</sup> This Article is translated as: "Anyone, who draws up a forged customary paper entirely or in part, distorts valid customary paper or allows anyone to falsely draw it up or to distort it with the intention that he, obtains benefit for himself or for others, or harms others, shall be subject to imprisonment for a term not less than 6 months if he uses, or allows anyone to use, it.

It is also regarded as a distortion the false additions on valid customary paper after finishing of its final drawing up." This Article was translated from the Arabic language by the author.

<sup>80</sup> This Article is translated as: " Anyone, who is in a position of honesty of paper signed in blank, abuses it, by writing on it or allowing to be written on it customary document creating legal effects which are different from what he is allowed to fill in or he is entitled to write, shall be subject to imprisonment for a term not less than 6 months if he uses it or allows others to use it with an intention that he, obtains benefit for himself or for others, or harms others.

And it is considered signed in blank every paper on which the owner of the signature leaves a gap to be filled in." This Article was translated from the Arabic language by the author.

<sup>81</sup> This Article is translated as: "Any public employee, who has under his authority a paper signed in

and 353.<sup>82</sup>

Because special Articles are imposed for particular acts as emphasised above, these Articles cannot be considered whether they can be applied to credit and debit cards. They provide for special acts. Hence, the general Articles are the Articles which may be applied to credit and debit card forgery. Considering these general Articles under the Libyan Penal Code and related law cases, it can be stated that there are two kinds of forgery. In other words, the ways of making a false document can be divided into two categories, physical and immaterial forgery.<sup>83</sup>

### 5.3.1. Physical Forgery

According to Adahabi,<sup>84</sup> forgery under Articles 341<sup>85</sup> and 346<sup>86</sup> can happen by making or an alteration. And the making may be divided into two divisions, making and imitating a new document. Libyan law expresses this kind of forgery by using different terms. It uses the word “يضع” in Article 341 which means “to put” and the word “حرر” which means “to draw up” in Article 346. As for the alteration, it happens by changing any information to a document. It is expressed by the word “يزور” which means “to forge” in Article 341 and the word “حرف” which is translated as “to distort” in Article

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blank which he has to, or he can, fill in, and he abuses it by writing on it formal paper which interferes with what he, has to, or can, write or he allows that, shall be punishable by the penalty which is decided in the Article 341.” This Article was translated from the Arabic language by the author.

<sup>82</sup> This Article is translated as: “In other circumstances of forging blank signed papers which are not subject to Articles 351 and 352, the principles of the material forgery of formal and informal papers are applied.” This Article was translated from the Arabic language by the author.

<sup>83</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.357, Year 26, 9/2/1982, *Majalet Almahkama Alolia* (October 1982) Year 19, Vol.1, 208.

<sup>84</sup> EG Adahabi *supra* 156.

<sup>85</sup> The Arabic text of Article 341 of Libyan Penal Code states that

يعاقب بالسجن مدة لا تقل عن ثلاث سنوات كل موظف عمومي يضع أثناء ممارسته لمهامه وثيقة مزورة في كليتها أو جزء منها أو يزور وثيقة صحيحة.

Libyan Penal Code 1953. This Article is translated as: “Any public employee, who during doing his duty puts a forged document entirely or in part or forges a valid document, shall be punishable by imprisonment for a term not less than 3 years.” This Article was translated from the Arabic language by the author.

<sup>86</sup> The Arabic text of Article 346 states that

كل من حرر ورقة عرفية مزورة كلياً أو جزئياً أو حرف ورقة عرفية صحيحة أو سمح بتحريرها مزورة أو بتحريفها وكان قصده تحقيق منفعة لنفسه أو للغير أو إلحاق ضرر بآخرين، يعاقب بالحبس مدة لا تقل عن ستة أشهر إذا استعملها هو أو سمح للغير باستعمالها.

*Ibid.* This Article is translated as: “Anyone, who draws up a forged customary paper entirely or in part, distorts a valid customary paper or allows anyone to falsely draw it up or to distort it with the intention that he, obtains benefit for himself or for others, or harms others, shall be subject to imprisonment for a term not less than 6 months if he uses, or allows anyone to use it.” This Article was translated from the Arabic language by the author.

346. Thus, it can be stated that physical forgery is the act of changing the reality (information) physically, so that it leaves an impact on the writing of the document which can be seen and realised by sensation. It may happen by any act which is not covered by immaterial forgery.<sup>87</sup>

### ***Making and Imitating***

Making a false document may occur by making a new false document which did not exist before, whether completely or in part. For example, it can be completely constituted if someone makes a new false certificate and alleges that it was made by a certain University. In addition, it can, in part, occur if someone makes a new certificate which professes to be made by a certain University with only some, but not all, of the information being false. The difference between making a complete document and making a partially complete document, is that in the first kind of forgery all the information is false (for example, the person whose name in the certificate has not attended the University and has no degree from it); however, in the case of a partially complete forgery, the person has graduated but the marks in the new false certificate are higher than the genuine grades awarded. Moreover, making a false document can be committed by making a new false document as another genuine document, which can be called imitation. However, it is not necessary for the false document to be exactly the same as the genuine one. The important thing is that the appearance of the false document gives a view that it is another real document. This can happen, for instance, if someone makes a false airline ticket or transport ticket.<sup>88</sup>

This forgery may happen on credit and debit cards.<sup>89</sup> As has been emphasised in the previous section, changing the information on credit and debit cards can take place on these cards, whether in relation to either visible or invisible information.<sup>90</sup> If a new credit or a debit card is made, this may be a complete forgery as the forgery law in

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<sup>87</sup> This kind of forgery is different from the immaterial forgery as will be seen latter.

<sup>88</sup> EG Adahabi *supra* 157.

<sup>89</sup> It should be taken into account that this supposition requires that credit and debit cards be considered as the subject matter of forgery.

<sup>90</sup> See section two of this Chapter.

Libya requires.<sup>91</sup> This can be done by making a new card which either has not existed before, or, by imitating another card. However, if the forger only confines the forgery to the making of a new magnetic strip or chip, this may not be complete forgery under forgery law because the strip or the chip may be considered as an element of the card.<sup>92</sup> In addition, invisible information is not visible, so the alteration would not be physical. As a result, this may not constitute forgery in this course.

### ***Incomplete Forgery***

Altering information on a document can be constituted by any act leading to adding or omitting any information on, or from, a document. For example, if someone antedates a certificate of death or alters his mother's name into another name on his birth certificate to impersonate another person who has the same name, he will commit forgery by altering information.<sup>93</sup> In this case, the forgery is only committed in respect of some information. This means that if the forgery happens on a credit or a debit card, the card is supposed to be genuine and the forgery happens only on some information. Thus, if someone changes the expiration date, the name of the cardholder, the account number or any other information on a genuine credit or debit card, this may be an incomplete forgery under the Libyan Penal Code.

It is also covered by this meaning if someone falsely signs a document to make it appear to be made by someone else. It does not matter if the person, to whom the signature belongs, is in fact real or imaginary. Thus, it will constitute forgery if someone obtains his daughter's signature that she has the same name of his ex-wife, to use the false signature as it is his ex-wife's signature.<sup>94</sup> Furthermore, it is not necessary that the signature must be the same as the original one.<sup>95</sup> It suffices if someone writes a full name without trying to make it similar to the signature, even if the owner of the signature is used to signing it in a particular way. In line with this, the Supreme Court in

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<sup>91</sup> Making a false new document can happen on a formal or a customary document. In addition, it is not important that the false document is signed, stamped or printed as long as it mentions its producer. See Article 389 of the Libyan Civil Code 1954; EG Adahabi *supra* 157.

<sup>92</sup> As has been seen in Chapter Four, some argue that all the information, including invisible information, is the same and the card is one unit. For more details, see the previous Chapter 4.3.2.

<sup>93</sup> However, impersonating another person is a separate crime under Article 355 of Libyan Penal Code. Thus, the conduct of the offender may constitute two offences.

<sup>94</sup> EG Adahabi *supra* 159.

<sup>95</sup> *Ibid.*

Egypt held that: “The law does not require for forging signatures the imitation of the original signature, but it is sufficient to be signed in the name of the person whose signature is forged even if the drawing of the forged signature is different from the original drawing.”<sup>96</sup> In line with this, signing a credit or a debit card with a false signature may constitute forgery under the Libyan Penal Code (if the card is considered as a subject matter of forgery as will be emphasised<sup>97</sup>).

It is important to mention that forgery cannot be constituted if the person, to whom the signature belongs, authorises another person to sign in his name a document in respect of a particular matter.<sup>98</sup> However, in this case, the law does not require that the signature must be done by the person, to whom the signature belongs, himself.<sup>99</sup> For example, if a son signs a document in his father’s name to perform a commercial transaction, it will not be forgery if he is authorised by his father to sign in this way. However, the signature will constitute forgery if the son signs his father’s name on a passport, even if he is authorised by his father,<sup>100</sup> because the law, in this case, requires the original signature of the person to whom the signature belongs.<sup>101</sup> Therefore, if someone authorises his wife to sign his own credit or debit card, this would not be forgery, despite the fact that there is an obligation<sup>102</sup> that the cardholder must sign his card himself. The reason behind this is that there is no law imposing this obligation in Libya.

### **5.3.2. Immaterial Forgery**

Unlike physical forgery (which can be committed by any act), immaterial forgery only can be constituted by two ways: stating a false fact in the form of a real fact, and dishonesty in documents signed in blank.

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<sup>96</sup> Egyptian Supreme court, the Legal principle Set No.178, Year 6, 3/5/1943, 244 in HS Almersfaoui, *Almersfaoui in Special Penal Law: Legislation and Judiciary* (Monshaht Almaaref, Alexandria 2001) 678.

<sup>97</sup> See this Chapter 5.3.2, in which the impact of the problem of the subject matter of forgery will be addressed.

<sup>98</sup> MN Hosni *supra* 232.

<sup>99</sup> *Ibid.*

<sup>100</sup> In this case, the son will be the principal accused and the father will be an accessory by the incitement. See Article 100 (1) of the Libyan Penal Code. Libyan Penal Code 1953.

<sup>101</sup> The entitlement of the signature is usually allowed in case of a customary document whereas it is not in the case of a formal document.

<sup>102</sup> The obligation here means an agreement between the issuer and the cardholder.



### ***Stating a False Fact in a Form of a Real Fact.***

This way is imposed by Article 342 of the Libyan Penal Code.<sup>103</sup> This Article states<sup>104</sup> that “Any public employee, who falsely decides that a document is valid which its submission, writing or supervision is under his authority, writes data which he is not provided, omits or alters data which he was provided, or falsely decides, in any way, facts which the document relies on for its authenticity, shall be punishable by the same penalty which is in the previous Article.”<sup>105</sup> It concerns creating false facts in a formal document. A public employee has authority to create a document including what he has seen or watched or understood. Instead of including what he has seen, he includes false information. This can be constituted by falsely stating that a certificate is real. For instance, a public employee falsely confirms that, he has seen a marriage certificate and found it legitimate, or he has seen a passport and found the visa on it.<sup>106</sup> It may also cover the case where the writer of the document changes the information of which he has been informed by persons. For instance, it can deal with a case where the clerk changes the statement which he has heard from the accused or the witness and writes a false statement in the proceedings.<sup>107</sup> Finally, it can apply by confirming a false fact.<sup>108</sup> An example would be where a police officer confirms in his investigation that the accused has confessed to the murder, when in fact he has not.

This way of forgery may not be applicable to credit and debit cards for one reason. This reason is that this way requires a formal document. Owing to the fact that, as has been seen,<sup>109</sup> credit and debit cards are supposed to be customary documents, this case which is governed by Article 342<sup>110</sup> may not be covered. If for example, credit or debit cards become issued by public sectors, this way of the immaterial forgery may be applied.

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<sup>103</sup> *Ibid.*

<sup>104</sup> The Arabic text of this Article states that

يعاقب بالعقوبة المنصوص عليها في المادة السابقة كل موظف عمومي يقرر كذباً صحة وثيقة مما يدخل تسليمه أو تحريره أو مراقبته ضمن اختصاصه، أو يثبت بيانات لم يدل إليه بها أو أغفل ذكر بيانات أدلى بها إليه أو يحرفها أو يقرر كذباً بأي وجه من الوجوه وقائع تعتمد الوثيقة على صحتها.

*Ibid.*

<sup>105</sup> The punishment, as the previous Article (341) states, “shall be imprisonment for a period not less than 3 years” (from 3 to 15 years). This Article was translated from the Arabic language by the author.

<sup>106</sup> EG Adahabi *supra* 168.

<sup>107</sup> *Ibid* 169.

<sup>108</sup> *Ibid* 170.

<sup>109</sup> See Chapter Four 4.2.1.

<sup>110</sup> EG Adahabi *supra* 170.

(However, until the date of finishing this thesis, credit and debit cards are only issued by private banks in Libya).

### ***Dishonesty in Documents Signed in Blank***

In this kind of forgery the document is supposed to be signed in blank by someone (C). After that, the document is given to another (D) to fill it in with particular information. Instead of filling it in with that information, the other (D) dishonestly fills it in with different information. Apart from the signature, it is not important that the document is free of the information, or it includes some information and there are other gaps left to be filled in.<sup>111</sup> Thus, the forgery may occur if someone (A) signs a bill and leaves it to (F) to fill in the amount which is £50 but (F) dishonestly writes £100 instead.

Little needs to be said about the immaterial forgery. To be said that it is immaterial forgery, the alteration in the blank document must be done after the document is signed and given to the forger. However, if, the alteration is committed before the signature has been done, the forgery will be physical. In addition, unlike the first way of immaterial forgery which can only happen on a formal document, the forgery of dishonesty in documents signed in blank could happen on both documents, formal or customary. This is because Articles 351<sup>112</sup> and 352<sup>113</sup> state that signing a paper in blank can be committed by anyone (a public employee or a lay person) who is in a position of

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<sup>111</sup> This is what can be understood by reading Article 351 of the Libyan Penal Code. Libyan Penal Code 1953.

<sup>112</sup> The Arabic text of this Article states that

كل من ائتمن على ورقة موقعة على بياض فأساء استعمالها بأن كتب عليها أو سمح بأن تكتب عليها وثيقة عرفية منشئة لآثار قانونية تختلف عما كان ملزماً بتعبئته أو مأدونها له في كتابته، يعاقب بالحبس من ستة أشهر إلى ثلاث سنين إذا استعملها هو أو سمح للغير باستعمالها وكان غرضه من ذلك تحقيق منفعة لنفسه أو للغير أو إلحاق ضرر بأخرين. وتعد موقعة على بياض كل ورقة يترك فيها صاحب التوقيع فراغاً يراد ملؤه.

*Ibid.* This Article is translated as: “Anyone, who is in a position of honesty of paper signed in blank, abuses it, by writing on it or allowing to be written on it customary document creating legal effects which are different from what he is allowed to fill in or he is entitled to write, shall be subject to imprisonment for a term not less than 6 months if he uses it or allows others to use it with an intention that he obtains a benefit for himself or for others, or harms others. And it is considered signed in blank every paper on which the owner of the signature leaves a gap to be filled in.” This Article was translated from the Arabic language by the author.

<sup>113</sup> The Arabic text of this Article states that

تنزل العقوبة المقررة في المادة 341 بالموظف العمومي الذي في حيازته بحكم وظيفته ورقة ممضاة على بياض، وكان مفروضاً عليه أو جائزاً له تعبئتها، فأساء استعمالها بأن كتب عليها ورقة رسمية تخالف ما كان مفروضاً عليه أو جائزاً له كتابته، أو سمح بذلك.

*Ibid.* This Article is translated as: “Any public employee, who has under his authority a paper signed in blank which he has to, or he can, fill in, and he abuses it by writing on it a formal paper which interferes with what he, has to, or can, write or he allows that, shall be punishable by the penalty which is decided in Article 341.” This Article was translated from the Arabic language by the author.

honesty of a signed paper in blank. However, Article 342, which talks about a first way of immaterial forgery (stating a false fact in the form of a real fact), states in the beginning of the Article that: “Any public employee, who falsely decides that a document is valid which its submission, writing or supervision is under his authority...”<sup>114</sup> This means that the act can only be committed by a public employee during the execution of his duty. In other words, a lay person cannot commit this prohibited act. Consequently, this may apply to forgery happening on a credit or a debit card signed in blank. This means credit and debit cards can be forged by the second category of the immaterial forgery. For example, one of the interviewees<sup>115</sup> stated that: “Debit cards which are issued by the Aman Bank in Libya are signed in blank. They are received by the bank from the supervisor institution Visa with some information filled in.” Thus, if an employee in the Aman Bank in Libya fills in these debit cards with false information, this may constitute forgery under Article 351.

### ***Forgery Can Happen by any Act***

Although alteration is divided into two divisions, physical and immaterial, this division does not prevent the alteration on credit and debit cards to fall under the act of forgery in Libya. This is because these two divisions can include any kind of alteration. This may be understood from Article 353 which states that

تطبق بشأن تزوير الأوراق الموقعة على بياض في الحالات التي لم ينص عليها في المادتين السابقتين الأحكام الخاصة بالتزوير المادي في الأوراق الرسمية أو الأوراق العرفية.<sup>116</sup>

This can be translated as: “In other circumstances of forging blank signed papers which are not subject to Articles 351 and 352, the principles of the physical forgery of formal and customary papers are applied.”<sup>117</sup> This means if the alteration is not covered by this kind of forgery (dishonesty in documents signed in blank), the physical alteration can be applied instead. Thus, it can be stated, the legislator wants to remind that there is no alteration which may not be covered by the provisions of forgery. All alterations can be covered by forgery law.

This may be confirmed by the position of the Libyan Supreme Court in many cases. For

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<sup>114</sup> See above.

<sup>115</sup> Interview with Unnamed, No 46, Employee, Aman Bank, (Tripoli, March 2012)

<sup>116</sup> Libyan Penal Code 1953.

<sup>117</sup> This Article was translated from the Arabic language by the author.

example, on 29/6/1971, the court held<sup>118</sup> that: “The actus reus of the offence of forgery can be obtained by changing the reality on a document.”<sup>119</sup> In this case, the court does not determine the way of changing the information. It only clarified that the truth must be on a document and must be changed. If for example, the court held that “forgery can be obtained by changing the reality on a document by a particular way”, the matter may be otherwise. In that case, it would be stated that the alteration would not be considered so unless it is done in the required way. Thus, there is no doubt that alteration can be committed by any act. The key point here is that the act leads to changing the information on a document.

This was confirmed by another decision held by the Libyan Supreme Court in 22/3/1977.<sup>120</sup> This decision states<sup>121</sup> that: “The Libyan Penal Code did not determine the methods by which the forgery on formal documents can be executed. Any manipulation of these documents constitutes forgery. As a consequence, any alteration on a formal paper constitutes the offence of forgery whatever the method of the alteration is.”<sup>122</sup> This decision was made in respect of a formal document. Yet, it may be applied to a customary document. The reason behind this is that on the question of alteration under forgery law in Libya, there is no difference between formal and customary documents. The law does not provide that forgery on a formal document is different from altering a customary document.

Consequently, it is submitted that changing the information on credit and debit cards is also not different. It can be considered as forgery falling under the Libyan Penal Code,

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<sup>118</sup> The Arabic text of this decision states that

... إن الركن المادي في جريمة التزوير يتحقق بتغيير الحقيقة في المحرر...

*Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.65, Year 18, 29/6/1971, *Majalet Almahkama Alolia* (January 1972) Year 8, Vol.2, 96.

<sup>119</sup> The text of this decision was translated from the Arabic language by the author. Another case which confirmed this trend was decided on 24/6/1980. The Libyan Supreme Court held the same words which were used in the above -mentioned decision. *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.14, Year 27, 24/6/1980, *Majalet Almahkama Alolia* (April 1981) Year 17, Vol.3, 154. See also *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.105, Year 28, 1/3/1983, *Majalet Almahkama Alolia* (June 1984) Year 20, Vol.4, 145.

<sup>120</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.26, Year 24, 22/3/1977, *Majalet Almahkama Alolia* (October 1977) Year 14, Vol.1, 230.

<sup>121</sup> The Arabic text of this decision states that

إن قانون العقوبات الليبي لم يحدد الطرق التي يتم بها التزوير في المحررات الرسمية بل أطلق في جميع مواده معتبرا بذلك كل عيب في تلك المحررات يكون جريمة تزوير... ولذلك فإن أي تغيير للحقيقة في أوراق رسمية يكون جريمة التزوير مهما كانت طبيعته...

*Ibid.*

<sup>122</sup> The text of this decision was translated from the Arabic language by the author

if these cards are considered as documents under the Libyan Penal Code. The methods or the manners of altering the information are not a matter as long as the information on credit and debit cards is changed whether the information is visible or invisible. If it is so, the alteration on credit and debit cards is considered as an alteration falling under the Libyan Penal Code.

### ***The Issue of the Document: its Reflection on the Actus Reus***

Although the Libyan Penal Code does not require a specific method for changing the information on documents, the forgery under Article 346 of the Libyan Penal Code and other provisions of forgery in Libya requires that the alteration must happen on a document or a paper, as has been emphasised previously.<sup>123</sup> Therefore, the problem addressed in the previous Chapter finds its impact on this matter.<sup>124</sup> Thus, according to the approach stating that credit and debit cards can be the subject matter of forgery as to visible information,<sup>125</sup> it can be stated that the act of changing the information on credit and debit cards constitutes the actus reus of the offence of forgery under the Libyan Penal Code only if the act happens on the visible information. However, if the act of the alteration happens on the invisible information, it is not considered as an actus reus. The reason behind this is not because the actus reus cannot be committed in this way but because the subject matter on which the act must happen does not exist.

Unlike the first supposition,<sup>126</sup> if credit and debit cards are considered as the subject matter of forgery as to both kinds of information, as some scholars point out,<sup>127</sup> the act of alteration constitutes the actus reus of forgery. This can be applied to visible and invisible information. There is no reason to prevent this identification between the act of altering the information on credit and debit cards and the actus reus under the

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<sup>123</sup> See Chapter Three 3.2.

<sup>124</sup> The problem of document has another impact in the next Chapter. As will be seen, the offence of the use of a forged document requires that the subject matter must be a forged document. This will be discussed in detail in Chapter Six.

<sup>125</sup> See for example JA Asagheer, *The Criminal and Civil Protection of Magnetic Credit Cards: a Practical Study in French and Egyptian Judicature* (Dar Anahda Alarabia, Cairo 2003) 120; O Salem, *The Criminal Protection of Debit Cards: Comparative Study* (Dar Anahda Alarabia, Cairo 1995) 31; FEA Alhamood, *The Legal System of Credit Cards* (Dar Athakafa Alarabia, Amman 1999) 109. For more details, see Chapter Four 4.2.1.

<sup>126</sup> See above.

<sup>127</sup> See for example O Salem *supra* 31; HH Gashgoosh, *Computer Crimes in Comparative Legislations* (Dar Anahda Alarabia, Cairo 1992) 121. For more details see Chapter Four 4.3.1. This can be seen in the results of the interviews conducted in Libya. See also Chart 2 page 86 and Chart 3, page 87.

offences of forgery. However, if the subject matter of forgery required by the Libyan Penal Code is considered as paper, the alteration will not constitute the actus reus of the offences of forgery, whether the forgery happens on visible information or on invisible information. As has been suggested, the subject matter of forgery meant by the legislator in 1953 contemplated paper, not anything else. Therefore, the act of changing the information on credit and debit cards may not constitute the actus reus under the provisions of forgery. This is because the subject which the law needs (paper) does not exist.

Therefore, it is obvious how important the problem of the “document” is. The matter of credit and debit cards and whether they can be considered as the subject matter of forgery or not, has its reflection not only on the subject matter of forgery but also on the element of actus reus.<sup>128</sup> Thus, this problem should be considered by the legislator as has been suggested in chapter Four. However, the subject matter is not all the problem of actus reus. There is another problem which may render the application of actus reus to the alteration of the information on credit and debit cards difficult. This problem is the use of forged documents, which will be addressed in the next section.

#### **5.4. THE ISSUE OF THE USE OF FALSE CARDS: REQUIRMENT OR CONDITION?**

As has been seen above, Articles 346 and 351 require that the forger must use the forged document to be punished. Article 346(1) states<sup>129</sup> that: “Anyone, who draws up a forged customary paper entirely or in part, distorts a valid customary paper or allows anyone to falsely draw it up or to distort it with the intention that he, obtains benefit for himself or for others, or harms others, shall be subject to imprisonment for a term not less than 6 months if he uses, or allows anyone to use it.”<sup>130</sup> Equally, Article 351(1) provides<sup>131</sup> that: “Anyone, who is in a position of honesty of paper signed in blank,

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<sup>128</sup> In other words, it can be stated that the acts reus relies for its existence on the subject matter of forgery.

<sup>129</sup> The Arabic text of this paragraph of this Article states that

كل من حرر ورقة عرفية مزورة كلياً أو جزئياً أو حرف ورقة عرفية صحيحة أو سمح بتحريرها مزورة أو بتحريفها وكان قصده تحقيق منفعة لنفسه أو للغير أو إلحاق ضرر بآخرين، يعاقب بالحبس مدة لا تقل عن ستة أشهر إذا استعملها هو أو سمح للغير باستعمالها.

Libyan Penal Code 1953.

<sup>130</sup> This Article was translated from the Arabic language by the author.

<sup>131</sup> The Arabic text of this paragraph of this Article states that

abuses it, by writing on it or allowing to be written on it informal document creating legal effects which are different from what he is allowed to fill in or he is entitled to write, shall be subject to imprisonment for a term of between 6 months and 3 years, if he uses it or allows others to use it with an intention that he, obtain benefit for himself or for others, or harms others.”<sup>132</sup>

From these two Articles, it can be understood that if someone forges a customary document, he will not be punishable unless he uses this card. These two Articles state that: “...shall be subject to imprisonment for a term not less than 6 months if he uses, or allows anyone to use it.” This raises a question, which is that does this condition (use) affect the actus reus of the offence of forgery of a customary document? In other words, is this condition a part of the actus reus of the offence of forgery of a customary document or only a condition for the application of the punishment? The question is fundamental because the answer will affect the offence of forgery of credit and debit cards.<sup>133</sup> The effect will reflect on the commission of the actus reus. There are two assumptions in this respect.

#### 5.4.1. The Use is a Part of the Actus Reus

It may be argued that the forgery and the use both participate in the constitution of the actus reus of the offence of forgery of the customary document. As Adahabi mentions in his book about forgery in Libya,<sup>134</sup> if the forger does not use the customary document or allows another to do so, he will not liable for the offence of forgery. The reason is that the offence of forgery is not completed. The actus reus is not committed. Yet, it can be argued that if this interpretation of the words of Articles 346(1) and 351(1) “...shall be subject to imprisonment for a term not less than 6 months if he uses it or allows others to use it.” is accepted, it may lead to an unwelcome result. This result is that the offence of forgery would be useless. That is to say that there is no reason for providing

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كل من ائتمن على ورقة موقعة على بياض فأساء استعمالها بأن كتب عليها أو سمح بأن تكتب عليها وثيقة عرفية منشئة لأثار قانونية تختلف عما كان ملزماً بتعبئته أو مأذوناً له في كتابته، يعاقب بالحبس من ستة أشهر إلى ثلاث سنين إذا استعملها هو أو سمح للغير باستعمالها وكان غرضه من ذلك تحقيق منفعة لنفسه أو للغير أو إلحاق ضرر بآخرين.

*Ibid.*

<sup>132</sup> This Article was translated from the Arabic language by the author.

<sup>133</sup> This does not only affect the offence of forgery of credit and debit cards, it also affects the offence of forgery of documents in general. What will be stated as to credit and debit cards will be also applied to customary documents in general.

<sup>134</sup> EG Adahabi *supra* 246.

the offence of forging a customary document. The basis of this argument is that it is sufficient for the user to be liable for the offence of using a forged document whether he is the forger or is someone other than the forger. If the user is not the forger, the forger will be liable as a second party if he assists the user by allowing him using this forged document.

Hence, accepting this interpretation may reflect on the offence of using a false document as a separate offence, as will be seen in the next Chapter.<sup>135</sup> It may pose a problem. This problem is that the requirement that the subject matter of the offence of using a forged document must be forged, as the Libyan Supreme Court held,<sup>136</sup> may not be applicable if the act of the use of a forged document is a part of the actus reus of the offence of the customary document forgery. It is not possible to apply the offence of using a false card if the forger does not use the card or allows others to do so. For example, suppose that someone uses a false card<sup>137</sup> or a document without participating in its forgery. Suppose also that the maker of the document does not allow the user to use this document. Therefore, the maker will be liable neither for the forgery nor for the use as an accessory. Equally, the user should not be liable for the use of false document<sup>138</sup> because the document is not forged. It is only false. A forged document is a legal term which means that a particular document is false and at the same time is a subject matter of forgery in the context of forgery offences. In other words, all the elements of the offence of forgery exist.<sup>139</sup>

In addition, the maker or the forger is not liable because he does not use the document or the card and he does not allow the user to use it. Thus, it may be argued that if the act of using a forged document is considered as a part of the actus reus of the offence of forging a customary document, the legislator should not have provided the offence of forgery of a customary document. It should have left it a lawful act. This is because the

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<sup>135</sup> As will be seen in Chapter Six, the offence of false credit and debit cards under Article 347(2) of the Libyan Penal Code requires that the card must be forged. This may be a problem which prevent the mentioned Article from the application to the use of false credit and debit cards. The offence of using false credit and debit cards will be explored in detail in Chapter Six.

<sup>136</sup> *Almahkama Alolia* 'Libyan Supreme Court', Criminal Appeal, No.18, Year 18, 29/6/1971, *Majalet Almahkama Alolia* (January 1972) Year 8, Vol.2, 76. This case will be addressed in more details in the next Chapter.

<sup>137</sup> The card here is considered a document for the sake of argument.

<sup>138</sup> Falsity means the information that is on the document or on the card is not true compared with the real fact.

<sup>139</sup> The difference between forgery and falsity will be explored later in detail in Chapter Six.



forger would be punished if he uses the forged document. Hence, what is the benefit of providing this offence?

#### **5.4.2. The Use is a Condition for Attracting the Penalty**

Another argument may be that what the legislator provides in the above mentioned Articles (346 and 351) is only a condition for the application of the punishment in the context of the offence of forging a customary document. In other words, the use of the document is not an element of the ingredients of the offence of forging a customary document. This view may be more incontestable because it does not interfere with the general ideal of the forgery. In general, forgery only means changing information on a document.<sup>140</sup> This can be understood from the words of the articles 346(1) and 351(1) themselves. In these two Articles, the legislator provides this condition after providing the actus reus of the offence of forgery.

As has been mentioned,<sup>141</sup> Article 346(1)<sup>142</sup> states in the beginning of the Article that: “Anyone, who draws up a forged customary paper entirely or in part, distorts a valid customary paper or allows anyone to falsely draw it up or to distort it, with the intention that he obtains benefit for himself or for others, or harms others...” This is the actus reus and the mens rea of the offence. After providing the actus reus and the mens rea, the legislator describes how the penalty must be. The rest of the Article is that it “shall be subject to imprisonment for a term not less than 6 months...”: this is the penalty for the act of forging a customary document. Thus, the provision of the offence is completed. If the legislator stopped at this stage, all the elements of the offence would exist, namely the actus reus, the mens rea and the subject matter of the offence. In addition, the penalty is prescribed. However, the legislator did not want to punish the forger unless he uses what he has forged. Therefore, it made the imposition of the penalty subject to the condition that it must not be applied unless the forger uses this document or allows

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<sup>140</sup> In this meaning Hemraj points out that “forgery is the *crimen falsi* or the false making or alteration of an instrument which purports on the face of it to be good and valid for the purpose for which it was created, with a design to defraud.” Thus, “it means, properly speaking, no more than to make or form.” Mohammed B Hemraj, ‘the crime of forgery’(2002) 9(4) *Journal of Financial Crime* 355. See also *Regina v Epps* (1864) 4 *Foster and Finlason* 81. In this case, Willes, J stated that

Forgery consists in drawing an instrument in such a manner as to represent fraudulently that it is a true and genuine document, as it appears on the face of it, when in fact there is no such genuine document really in existence, as it appears on the face of it to be.

<sup>141</sup> See above.

<sup>142</sup> Libyan Penal Code 1953.

others to do so: “...shall be subject to imprisonment...if he uses it or allows others to use it.”<sup>143</sup>

This is consistent with the other Articles of forgery under the Libyan Penal Code.<sup>144</sup> They do not require any use for the actus reus to exist. For example, Article 341 only requires for the offence of forging a formal document that the forger makes a new document or changes some information on a document. This Article states that: “Any public employee, who during doing his duty, puts a forged document entirely or in part or forges a valid document, shall be punishable by imprisonment for a term not less than 3 years.”<sup>145</sup> This Article illustrates the real meaning of the forgery. Another example is Article 344 of the Libyan Penal Code. This Article criminalises the act of forging a formal document by a lay person. It states<sup>146</sup> that: “If the act prescribed in Article 341 is committed by, a lay person or a public employee out of performing his duty, the penalty shall be imprisonment for a term not exceeding 5 years.”<sup>147</sup> This Article makes it clear that the act of forgery is not the act of using a forged document.<sup>148</sup>

Although the forgery law in Libya does not define forgery, the Libyan Supreme Court did in its decision on 25/6/1974.<sup>149</sup> It held that: “Forgery is a written lie, by which others are intended to be misled and wandered.”<sup>150</sup> It does not require any use of the forged document. Therefore, it seems that the legislator in Articles 346 and 351 does not require the use of forged document as an actus reus. It is submitted that this is only a condition for the application of the punishment. Yet, this is not a wise decision. Providing this condition has its negative reflection on the existence of forgery offences. First, if the act of using a forged document is considered as an actus reus, the offence of using a forged document may be affected, because it could not be applied unless the

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<sup>143</sup> See Articles 346 and 351 above.

<sup>144</sup> Libyan Penal Code 1953.

<sup>145</sup> This Article was translated from the Arabic language by the author.

<sup>146</sup> This Article prescribes that:

إذا ارتكب الفعل المنصوص عليه في المادة 341 أحد الأفراد العاديين أو الموظف العمومي خارج مهامه الرسمية، يعاقب بالسجن مدة لا تزيد على خمس سنوات.

*Ibid* .

<sup>147</sup> This Article was translated from the Arabic language by the author.

<sup>148</sup> See also other Article of forgery such as 342, 343 and 345 in appendix 1.

<sup>149</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.229, Year 20, 25/6/1974, *Majalet Almahkama Alolia* (January 1975) Year 11, Vol.2, 208.

<sup>150</sup> This text of the decision was translated from the Arabic language by the author.

forger uses the forged card. This offence requires a forged document.<sup>151</sup> Second, if the act of using the forged document is considered as a condition for the punishment as stated above, the forger may not be punished if he does not use the forged credit and debit cards and does not allow others to use it. Therefore, this Article should be amended and this condition should be abolished.

## 5.5. CONCLUSION

This Chapter has examined whether the *actus reus* of the offence of forging documents under forgery law in Libya can be applied to the forgery happening on credit and debit cards. There is a difference between changing information on a document in its orthodox meaning under Libyan forgery law and changing information on credit and debit cards from two stand points. First, there is a difference from the experience required. Second, the way of changing the information. In terms of the alteration on a document, the forger does not usually need to be “professional” in that he alters the information: for example, imitating a signature on a document may be done by anyone who can use a pen. Thus, alteration can be achieved without much difficulty. However, changing the information on credit and debit cards is not easy for everyone to do. It needs someone who has a good knowledge and skill on how to change this information. Further, the invisible information needs a special technique. The invisible information is changed electronically which cannot be achieved by lay people. The second difference is the way of changing the information. In Libya, the document in use is usually in paper form. Thus, changing the information on them can be done by writing. Although letters may be made by a computer, they usually need to be signed by hand. Despite the fact that a printed signature is expected as a document, it is not a document (in the context of forgery) in Libya, because it is considered as a copy of a document. In addition, it is not common in Libya. Therefore, changing information often needs writing. Yet, changing the information on credit and debit cards does not constantly need writing. For example, changing the embossed information on cards needs particular tools. The card needs to be heated<sup>152</sup> in water and the embossed information

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<sup>151</sup> This will be discussed in detail in the next Chapter.

<sup>152</sup> Mohammed Abduarasul Khiat *supra* 42. Lăcrămioara Balan and Mihai Popescu *supra* 82.

needs to be pushed or pressed.<sup>153</sup>

Although there is a difference between the alterations in these two cases, this difference may not pose any problem in respect of the application of the act of alteration under the Libyan Penal Code. The alteration under forgery law does not require a certain mode of alteration. Alteration, as Articles 346 and 341 state, can be done by any act as long as this act affects the reality on the document. Therefore, altering the embossed and electronic information can be covered by the forgery offences under the Libyan Penal Code, in terms of the act of the alteration. However, this alteration must happen on a document. Thus, the impact of the problem of the document reflects on the act of changing the information on credit and debit cards. The previous discussion in Chapter Four finds its repercussion in the fact that the *actus reus* cannot be applied to the alteration happening on the credit and debit cards, not because the alteration is not covered, but because the subject matter of forgery may not exist.

Despite the fact that forgery only means changing information on a document, as the Libyan Supreme Court suggested,<sup>154</sup> Articles 346 and 351 of the Libyan Penal Code<sup>155</sup> require that penalty must not be applied unless the forger uses or allows others to use the false credit or debit card. This poses an argument whether this is a condition for the punishment or it is an element of the *actus reus* of the offence of forgery under Articles 346 and 351 of the Libyan code.<sup>156</sup> Whatever the answer, this matter poses a problem which should be resolved by the legislator in Libya.

Therefore, it is suggested that the legislator in Libya should be clear in respect of the act of changing the information required, by stating that forgery can happen on credit and debit cards or to electronic information in general. Further, the requirement that the document must be used as a prior condition for applying the punishment of the forgery to the forger should be abolished, so the offence of forgery can be effective. Finally, as has been suggested in the previous Chapter, it should be confirmed that the problem of the document should be addressed by the legislator and its meaning should become

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<sup>153</sup> For more details about altering the information on credit and debit cards, see section Two of this Chapter. RF Basala *supra* 97.

<sup>154</sup> *Almahkama Alolia* 'Libyan Supreme Court', Criminal Appeal, No.229, Year 20, 25/6/1974, *Majalet Almahkama Alolia* (January 1975) Year 11, Vol.2, 208.

<sup>155</sup> Libyan Penal Code 1953.

<sup>156</sup> *Ibid.*

wider to include credit and debit cards.<sup>157</sup> The problem of the document has its impact not only on the offence of forging a credit or a debit card, but also on the offence of using a false document which will be addressed in the next Chapter.

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<sup>157</sup> The problem of the meaning of the document is very important because it affects all the offences of forgery. Thus, it is stressed in this conclusion.

## CHAPTER SIX

### USING FALSE CREDIT AND DEBIT CARDS UNDER LIBYAN PENAL CODE

#### 6.1. INTRODUCTION

This Chapter explores whether these potential crimes can be applied to the misuse of false credit and debit cards. These crimes are the offence of using false documents,<sup>1</sup> the offence of deception<sup>2</sup> and the offence of theft.<sup>3</sup> The reason why these crimes are considered whether they apply to this misuse is because there is currently no dedicated Article in the Libyan Penal Code which can be applied to this act.<sup>4</sup>

False credit cards and debit cards can be used in many ways. They may be used for withdrawing money from the cash machines or for obtaining services and goods from the points of sale.<sup>5</sup> When a false card is used at a cash machine the deal will be with a machine which is not operated by any one. The user will insert the card and press the personal identity number (PIN).<sup>6</sup> After that, the machine will show some service choices, one of which is withdrawing money. Finally, the user will press the button for the preferred amount of money. However, when the card is used at the points of sale the transaction will be with a human. The merchant or the service provider will ask the user to insert the card in the device. The user will insert the card. The merchant asks the user to insert their personal identity number and take the card after the transaction is completed. Therefore, it is clear that the victim of the offence of using a false card in the two occasions is not the same. In the first use, the “victim” is a machine and the other, it is a human.<sup>7</sup> These various usages result in different discussions about the crimes which may occur and the law which may be applicable under Libyan criminal

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<sup>1</sup> This offence is provided by Article 347 of the Libyan Penal Code. Libyan Penal Code 153.

<sup>2</sup> This offence is prescribed by Article 461 of the Libyan Penal Code. *Ibid.*

<sup>3</sup> Theft is governed by Articles from 444 to 450 of the Libyan Penal Code. *Ibid.*

<sup>4</sup> This will be explored in detail in this Chapter.

<sup>5</sup> Therefore, they are not only used instead of cash, but they can help the holders to obtain cash.

<sup>6</sup> PIN is a number which is required to be entered whenever the card is used, whether during withdrawing money from the cash machine, or during paying money at the point-of-sale. For more details, see Chapter Two 2.4.2.

<sup>7</sup> This difference is very significant in terms of applying the offence of deception, as will be seen in section four of this Chapter.

law. This Chapter examines whether Libyan forgery law can deal with the use of false credit and debit cards.

Using a false card is the same as altering the information on the cards in respect of forgery provisions under the Libyan Penal Code.<sup>8</sup> The common denominator between these two acts is the subject matter of the offence. Whereas the subject matter of the credit and debit card forgery offence is a card, the subject matter of the offence of using a false credit or debit card is a forged card. Subsequently, the discussion provided about the subject matter of the forgery offence under Libyan criminal law<sup>9</sup> reflects on the discussion of the use of a false card under the provisions of forgery of the Libyan Penal Code.

The first Article which is of possible application and may deal with this use is Article 347 of the Libyan Penal Code.<sup>10</sup> This Article deals with the use of forged documents in general. It requires three elements. One of these elements is a forged document. Like the alteration of the information on the cards, which poses a problem in connection with the subject matter of the forgery, as has been discussed in the previous Chapters,<sup>11</sup> the use of the false card poses a problem<sup>12</sup> with respect to the forged document required, as will be seen later.

Because there is no certainty whether the offence of using a *forged document* applies to the use of a *false card*, discussing other possible applicable law might be effective. As a result, it is possible to argue that *using a false card* may constitute the offence of *aggravated theft*, under Articles 444(1)<sup>13</sup> and 446(2),<sup>14</sup> by using a modified key. When the user of the false card inserts the card in the cash machine and presses the personal identity number (PIN), the act is the same as inserting a modified key in a lock and

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<sup>8</sup> Libyan Penal Code 153.

<sup>9</sup> For example, can credit and debit cards be the subject matter of forgery or not? This reflection will be explored in this Chapter in depth.

<sup>10</sup> *Ibid.*

<sup>11</sup> The problem of the subject matter of forgery has been discussed in Chapters Three and Four.

<sup>12</sup> This problem is that the offence of using a forged document requires a document or a paper as the subject matter of the offence. Because there is a debate whether credit and debit cards can be the subject matter of forgery, this will affect this offence.

<sup>13</sup> *Ibid.*

<sup>14</sup> Article 444(1) governs the general principle of the offence of theft under the Libyan Penal Code. The other articles govern the other related matters such as the aggravating circumstances which are governed by Article 446, as will be seen later in this Chapter. *Ibid.*

opening a door. Conversely, this may pose a problem, which is that the card may not be a “key”. In addition, in terms of using the card at cash machines, “appropriation” does not take place. This is because, under Libyan criminal law, when the machine (the victim) hands over the money to an illegitimate user of the false card, the money is deliberately provided, as will be seen later in this Chapter.

Thus, it could be argued that using the false cards may constitute another crime, namely, the *offence of deception*. Using a false document (even if it is not legally forged under forgery provisions) is considered as a fraudulent act under Article 461<sup>15</sup> which governs deception offences in Libya. However, the problem, which may be faced by the application of this Article to the use of false credit and debit cards at cash machines, is that “deceiving a machine” may not occur under Libyan criminal law. The reason why this argument may be stated is that the machine has no mind which may understand and distinguish or doubt that a particular card is false, or that the user of the card may be not the legitimate holder.

Therefore, this Chapter will explore whether these three potential crimes can be applied to the misuse of false credit and debit cards. First, reflection on the problem of the *subject matter of forgery* and *use* will be examined. The use of false documents under Libyan forgery provisions will be explained, and the difference between the *forgery offence* and the *use of a false document* will be emphasised. It will be seen that the subject matter of forgery under Libyan criminal law is the same as the subject matter of the offence of using a false document (which though may not be applicable to the cards). Furthermore, as will be seen, there is a difference between the false document, (as per Article 6 of the Forgery and the Counterfeiting Act 1981<sup>16</sup>), and the forged document (as per Article 347 of the Libyan Penal Code provides<sup>17</sup>).

Second, the author will consider whether the theft offence can be applied to this misuse. The problem with trying to invoke this crime lies in two areas: firstly, the card is not a

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<sup>15</sup> *Ibid.*

<sup>16</sup> Forgery and the Counterfeiting Act 1981.

<sup>17</sup> As will be seen in section two of this Chapter, there is a difference between the word “forged” which is used by the Libyan Penal Code and the word “false” which is used by the Forgery and the Counterfeiting Act 1981 in the UK.



“key”,<sup>18</sup> and secondly, there is no appropriation in the use of the false card.<sup>19</sup> This will be discussed in detail in section three of this Chapter. Third, an examination will be undertaken to aver whether the crime of deception under Article 461 of the Libyan Penal Code can be an alternative choice to be applied to the undesirable use of false credit and debit cards. For this purpose, the possibility of deceiving a machine will be subject to some detailed focus. It will be seen that the majority of the interviewees interviewed in Libya were of the opinion that the machine cannot be “deceived” under the Libyan Penal Code (the main reason being that a machine is not human<sup>20</sup>). Therefore, this Chapter will examine the following issues:

- The issue of the subject matter of forgery
- Using a false credit or debit card under the offence of theft
- Deception and machine: *the card as a means for deceiving a machine*

## **6.2. THE ISSUE OF THE SUBJECT MATTER OF FORGERY**

This section will explore whether the offence of using a forged document under Article 347 of the Libyan Penal Code can be applied to the use of a false card. As will be seen, one of the problems that Article 347 faces is that there is a doubt whether the card can be the subject matter of forgery. The second problem is that applying Article 347 requires a forged document in order to be applicable to the use of these cards. Therefore, this section will explain the elements of the offence of using a forged document first,<sup>21</sup> thereafter these two problems will be explored in turn.

### **6.2.1. The Offence of Using a Forged Document: Article 347**

Article 347 of Libyan Penal Code<sup>22</sup> is a general provision which governs the use of

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<sup>18</sup> In this Chapter, it will be seen that there is an argument that credit and debit cards may be considered as electronic key cards which are used in hotels. This is because credit and debit cards and the electronic key cards have some similarities.

<sup>19</sup> As will be seen, the matter of the appropriation in the Libyan Penal Code is different from as it is under English law.

<sup>20</sup> This is consistent with the general view in the UK. See, for example, *Re London and Globe Finance Corp'n Ltd* [1903] 1 CH 728. In this meaning also see *Director Public Prosecution v Ray* [1973] 3 WLR 359.

<sup>21</sup> The explanation of this offence is not merely tautology, but it is clarification for the problems which will be examined in this section. In other words, it is the door which if it is opened the entrance to the followed discussion would be obvious.

<sup>22</sup> Libyan Penal Code 1953.

forged documents under Libyan criminal law. It states that:

يعاقب بالسجن مدة لا تجاوز خمس سنوات كل من استعمل وثيقة رسمية مزورة دون أن يشترك في تزويرها مع علمه بذلك.  
وتطبق عقوبة الحبس على كل من استعمل وثيقة عرفية مزورة مع علمه بذلك دون أن يشترك في تزويرها إذا كان القصد من استعمالها تحقيق منفعة لنفسه أو للغير أو إلحاق ضرر بآخرين.<sup>23</sup>

This Article comprises two paragraphs<sup>24</sup> which can be translated as: “(1) Anyone, who uses a forged formal document, without participating in its forgery, and with knowledge of its forgery, shall be punished by imprisonment for a term not exceeding 5 years. (2) Anyone, who uses a forged customary document, without participating in its forgery and with knowledge of its forgery, if the intention of its use is to obtain a benefit for himself or for others or to harm others, shall be subject to imprisonment.”<sup>25</sup>

This offence is different from the offence of forgery. It is important to mention, before discussing the elements of this offence, that the offence of using a forged document is a separate offence from the forgery offence. The use of the forged document is not an element of the forgery offence. The two crimes have a different nature. The forgery offence is a momentary<sup>26</sup> crime: changing the information and the occurrence of the result, which is that the fact on the document becomes false (the elements of *actus reus*),<sup>27</sup> occur at the same time and do not need a long time to take place. On the other hand, the offence of using a forged document is usually a continuous crime.<sup>28</sup> The time, which the elements of this crime need to be completed, is usually lengthy. For example, the use of the false document offence lasts as long as the user continues using the document. The case of the continuation does not finish unless the target, which the user

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<sup>23</sup> *Ibid.*

<sup>24</sup> As it is seen, in the original text of the Article 347 of the Libyan Penal Code there are no numbers on each paragraph. However, it is obvious that each paragraph is different. Thus, they are divided in this way.

<sup>25</sup> This Article was translated from the Arabic language by the author.

<sup>26</sup> The meaning of momentary or temporary crime is that the conduct and the result of the offence occur at the same time. This is different from the conduct crime which has no result. As Williams states, in the conduct crime, “you do not have to wait to see if anything happens as a result of what the defendant does.” Glanville Williams, ‘The Problem of Reckless Attempts’ [1983] *criminal Law Review* 365, 368.

<sup>27</sup> As well-known, *actus reus* consists of three elements, the act, the result and the causation. However, not always these elements must exist. There are conduct crimes which need only an act such as dangerous driving as Section 2 of the Road Traffic Act 1988. See M Jefferson, *Criminal law* (11<sup>th</sup> edn., Pearson Education Limited, 2013) 48.

<sup>28</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.224, Year 21, 8/4/1975, *Majalet Almahkama Alolia* (October 1975) Year 12, vol.1, 194. The court held that the offence of using a forged document is a continuous crime. It starts when the document is first used and continues as long as the user of the forged document is still alleging its facts.

wants to achieve is obtained, either when the user gives up using the document or the document becomes useless because the forgery is discovered.<sup>29</sup>

With respect to credit and debit cards however, this may not be entirely applicable. Forging such cards may be a momentary crime, for instance, if the forgery only takes place on the signature on the signature panel, and equally it may be a continuous crime such as when a new card or a new magnetic strip are forged (because forging a new card takes a long time which may last months<sup>30</sup>). Using a false card is usually a momentary crime, especially when the card is used for obtaining money from the cash machines, or obtaining goods or services from the shops and service providers.

### ***Intention***

Little needs to be stated about the importance of the differentiation between these two offences. The intention of the user is not required to occur at the same time when the use of the false document starts. The *mens rea* can occur even if the user does not know that the document is forged, but he continues using it, after he has known that it is forged.<sup>31</sup> Subsequently, it is possible for the maker of the forged document to be the same person who uses the same forged document. That is, the maker is the user. In this case the user will not be responsible for the offence of using a forged document. He will only be liable for the forgery of the document.<sup>32</sup> However, the actor might be different. If, for example, someone forges a document, thereafter this document is found and used by another who does not participate in its forgery, this person will commit the offence of using a forged document. In short, therefore, forgery and the use of a forged document are not the same crimes even if the actor in both offences is one person or an individual.<sup>33</sup>

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<sup>29</sup> See F AbduAsattar, *Explanation of the Penal Law: the Special Part* (2<sup>nd</sup> edn., Dar Anahda Alarabia, Cairo 2000) 348.

<sup>30</sup> JA Asagheer, *The Criminal and Civil Protection of Magnetic Credit Cards: a Practical Study in French and Egyptian Judicature* (Dar Anahda Alarabia, Cairo 2003) 135.

<sup>31</sup> ME Alghareep, *Explanation of the Penal Law: the Special Part* (4<sup>th</sup> edn., 2002) 569.

<sup>32</sup> This is what Article 347 affirms by stating that: "Anyone, who uses a forged document *without participating in its forgery*..." The same fact was also confirmed by the Libyan Supreme Court on 25/2/1975. See *Almahkama Alolia* 'Libyan Supreme Court', Criminal Appeal, No 200, Year 21, 25/2/1975, *Majalet Almahkama Alolia* (October 1975) Year 12, Vol.1, 105.

<sup>33</sup> Although they are not the same crime, they are connected to each other, as will be seen later.

Form this Article 347,<sup>34</sup> it can be understood that this offence requires three elements.<sup>35</sup> The first element is the subject matter, which is a forged document. The second element is the *actus reus*, the use of the forged document. The last element is the *mens rea*, the intention which is that the user of the forged document must know that he uses a forged document and intends to obtain a benefit for himself or for others or to harm others.

Article 347 of the Libyan Penal Code requires a document which is considered to be the subject matter of the forgery. This document or “watheeka” as is the preferred expression used by the legislator in Libya, must be a forged document. This subject of this offence, therefore, requires two conditions: a document and this document must be forged. Therefore, for credit and debit cards to be the *subject matter of forgery*, they must be forged documents. As has been discussed in Chapter Three, the document (*watheeka*) can be formal or can be customary.<sup>36</sup> All credit and debit cards are customary documents as explained in Chapter Four.<sup>37</sup>

Using a forged document is defined by Ramadan<sup>38</sup> as presenting a forged document with the assumption that it is real. Hence, it can be a use of a forged card if someone, who is buying some goods, provides a forged debit card alleged to have been made by a certain issuer to obtain these goods. This act of the use of a forged document must be voluntary.<sup>39</sup> Hence, if it is not, the offence may not occur.<sup>40</sup>

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<sup>34</sup> Libyan Penal Code 1953.

<sup>35</sup> This was confirmed by the Libyan Supreme Court. See *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.188, Year 26, 19/6/1979, *Majalet Almahkama Alolia* (April 1980) Year 16, Vol.3, 156; *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.18, Year 18, 29/6/1971, *Majalet Almahkama Alolia* (January 1972) Year 8, Vol.2, 76.

<sup>36</sup> If it is issued by a formal employee as defined in Article 16 of the Libyan Penal Code during the carrying out of his duty, it is a formal document, but if it is issued by a lay person, an employee who is not doing his job or by a foreign issuer, it is not considered as a formal document. It is considered as a customary document. Article 16 states that: “A public employee is anyone who has a public duty in relation to the employment by the government or other public institutions, permanent or temporary and with a salary or without it...” See Chapter Three 3.4.1.

<sup>37</sup> See Chapter Four 4.2.1.

<sup>38</sup> OA Ramadan, *An Explanation of the Penal Law: the Special Part* (Dar Anahda Alarabia, Cairo 1986) 202.

<sup>39</sup> *Ibid* 203.

<sup>40</sup> For example, a police officer stops someone on suspicion of committing the offence of drinking alcohol (Drinking alcohol is an offence in Libya under Law no 4 due 1423 relative Prohibition Drinking Alcohol) and seizes a forged credit card in his custody. The police officer asks him about it. The suspect alleges that the card is genuine. This person will not be guilty of using a forged document because he is obliged to allege its reality. He would not have alleged that if the police officer had not searched him. In addition, the suspect does not also commit attempted use of a forged document because the possession of the forged card is merely preparatory conduct of the offence of using a forged document, as will be

Furthermore, according to Algareep,<sup>41</sup> the concept of use requires that the user must allege that the forged document is genuine. As a result, if he presents it as a forged document it will not be an offence of using a forged document. For example, if someone presents a false card to a service provider without using it as a payment method, he or she will not be guilty of its use. However, if someone presents a forged credit card, which he does not know is forged, but his wife, for instance, knows that it is forged so she alleges its reality, the husband will not be guilty of the offence but his wife will.<sup>42</sup> In addition to alleging that the forged document is genuine, the user must present the forged document.<sup>43</sup> Therefore, if he just refers to it without presenting it, the offence of using a forged document cannot be constituted. This case might occur where someone in the court alleges that he has a document which might prove his allegation but he does not adduce it to the court. As a result, if someone refers that he has a credit card which is forged, this person is not guilty under Article 347 because no forged document is presented. The reason behind this is that the concept of use also supposes presenting the forged document and using the information which the document contains to affect someone to act upon it.

The offence of using a forged document requires a general intention, which is that the user must know that he or she is using a forged document and this knowledge must be definite.<sup>44</sup> This is called general intention. Therefore, presenting a forged card is not sufficient to say that the user knows of its forgery.<sup>45</sup> Moreover, it cannot be said that the user knows of the forgery even if he does not seek the reality of the card as long as he does not really know of its forgery. On the other hand, Hosni and Alghareep maintain

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discussed in detail in Chapter Seven. With respect to conspiracy in terms of the use of a forged document in Libya, it is not a separate crime. Therefore, if someone 'F' conspires with another 'S' to use a forged credit or debit card and 'S' is seized before a stage of using that document, nor S neither F is responsible for the offence of using a forged document. The reason behind this is that the conduct of conspiracy of the offence of using a forged document is not criminalised until the offence is committed in full or in an attempt. Thus, if it is committed, the person 'F' who conspires and does not commit the crime will be a secondary party of the offence of using a forged document whereas the other 'S' will be a principal offender. In this respect, see M Bara, *Explanation of the General Rules of the Libyan Penal Law, First Part: the General Rules* (The Green Company, Tripoli 2010) 348.

<sup>41</sup> ME Alghareep, *Explanation of the Penal Law: the Special Part* (4th edn., 2002) 565.

<sup>42</sup> See EG Adahabi, *Crimes Breaching Public Trust in the Libyan Penal Law* (Almaktaba Alwatania, Benghazi 1972) 240.

<sup>43</sup> MN Hosni, *Explanation of the Penal Law: the Special Part* (Dar Anahda Alarabia, Cairo 1988) 511.

<sup>44</sup> *Almahkama Alolia* 'Libyan Supreme Court', Criminal Appeal No.188, Year 26, 19/6/1979, *Majalet Almahkama Alolia* (April 1980) Year 16, Vol.3, 156.

<sup>45</sup> See F AbduAsattar *supra* 347.

that if a user after presenting a card realises that the card is forged, he must retreat and stop using it.<sup>46</sup> This statement is applicable to the use of a forged document whether it is formal or customary. That is, the user of the forged card must know that the card is forged. Despite the fact that there is no difference between using a forged formal document and a customary document in respect of the general intention required, there is a difference in relation to the special intention required. This difference lies in the fact that using a forged customary card requires that the forger intends to obtain an advantage for himself or for others or to harm someone as Article 347(2) provides.<sup>47</sup> Although this element (the intention) and the actus reus do not pose any problem in terms of the application of Article 347 to the use of false credit or debit cards, the element of the subject matter may be arguable. The argument underlies a difficulty, which is that the subject matter of this offence may not exist. This will be explored in the next two sections.

### **6.2.2. Problem of the Subject of Forgery and its Reflection**

As has been discussed in Chapters Three and Four, it is a contentious issue whether credit and debit cards could be the subject matter of forgery or not. The problem discussed in the previous Chapters lies in the fact that credit and debit cards hold visible and invisible information. This visible information is a new concept in criminal law.

#### ***The Credit and Debit Cards are not the Subject of Forgery***

Thus, Asagheer<sup>48</sup> and other scholars<sup>49</sup>, as discussed in Chapter Four,<sup>50</sup> suggest that credit and debit cards are not documents and cannot be the subject matter of forgery concerning invisible information. They allege that this invisible information could not be consistent with the principle of legality. Asagheer points out that interpreting the term “document” as to be applicable to credit and debit cards may be done, but it leads

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<sup>46</sup> See MN Hosni *supra* 309; ME Alghareep *supra* 569.

<sup>47</sup> See Article 347 of Libyan Penal Code. Libyan Penal Code 1953.

<sup>48</sup> JA Asagheer *supra* 121.

<sup>49</sup> SM AbduAlhakam, *The Criminal Protection of the Credit Cards: the Crime of Electronic Payment Cards* (Dar Anahda Alarabia, Cairo 2003) 47; AT Shamsadeen, *the Criminal Protection of the Electronic Document: Comparative Study* (Dar Anahda Alarabia, Cairo 2006) 28; NA Gora, *the Economic Offences of the Computer: a Theoretical and Practical Study* (Alhalabi Alhokikea, Beirut 2005) 585; EA Alkhaleel, *The Penal Protection of Debit Cards: Analysed Comparative Study* (Wael, Amman 2000) 69.

<sup>50</sup> There are also some interviewees whose opinions are the same. See Chapter Four 4.2.2.

to the extension of criminalisation by analogy, which is not allowed in Libyan criminal law.<sup>51</sup> This was affirmed by the interviewees, as discussed in Chapters Three and Four above: they stated that interpreting the words “document” and “paper” in the Libyan Penal Code as being applicable to these cards could lead to an overwide interpretation of existing forgery law. However, this is against the principle of legality.<sup>52</sup> Equally, some interviewees claimed that visible information cannot be the subject matter of forgery because the card is made of plastic and the subject required under Article 346 is paper.<sup>53</sup>

### ***The Credit and Debit Cards are the Subject of Forgery***

In contrast, however, there is an opposite tendency, which stands against this argument. Salem<sup>54</sup>, for example, and others<sup>55</sup> argue that these cards are documents and they can be the subject matter of forgery because these cards hold information and are made from durable material. Salem does not differentiate between visible information and invisible information. He considers the “invisible” information as “visible” information, and there is no reason as such why the principle of legality which could interfere with this approach.<sup>56</sup>

### ***Can Credit and Debit Cards be the Subject under Article 347 (Use of a Forged Document)***

This divergence of these views forms the basis of another divergence concerning the subject matter of the offence of using a forged document. Therefore, the answer to the question “Can credit and debit cards be the subject under Article 347?” depends on whether credit and debit cards are considered the subject matter of forgery or not. If they are considered so, it may be argued that these cards are covered by the offence of using the forged document under Article 347. If it is not the case, this allegation may

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<sup>51</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Civil Appeal, No.98, Year 23, 26/10/1976, *Majalet Almahkama Alolia* (April 1977) Year 13, Vol.3, 154.

<sup>52</sup> *Ibid.*

<sup>53</sup> For more details, see Chapter Four 4.3.1.

<sup>54</sup> O Salem *supra* 32.

<sup>55</sup> HH Gashgoosh, *Computer Crimes in Comparative Legislations* (Dar Anahda Alarabia, Cairo 1992) 121; Fathia Mohammed Gorari, ‘The Criminal Protection of Debit Cards’ (2004)1 *Alhokok Journal for Legal and Economic Science* 1, 39. For more details, see Chapter Four 4.3.1.

<sup>56</sup> This was the opinion of some interviewees. See Chart 2, page 86.

not be acceptable.

***Credit and Debit Cards are not the Subject under Article 347***

This reflection of the problem of the subject matter of forgery lies in the fact that if these cards are not considered as the subject matter of forgery, it can be stated that the use of these false cards may not constitute the offence of using a forged document under Article 347 of the Libyan Penal Code,<sup>57</sup> whether the false card is used at the cash machine or at the point of sale. Many interviewees agreed with this argument. As Chart 4 shows,<sup>58</sup> half of the interviewees answered “no” to the question: “Do you think that the use of a false credit or debit card constitutes the offence of using a forged document in Libya?” They were of the opinion that not considering the use of a false credit or debit card as an offence under the above-mentioned Article, it was a logical result of not considering these cards as documents under Libyan Criminal law. This view reflects the answer to the question discussed in Chapter Four, whether the card can be the subject matter of forgery or not. Therefore, the attitude on this matter (whether the card is the subject matter or not) influences the interviewees to have the same approach to *the use* of a false card.<sup>59</sup>

Chart (4)<sup>60</sup>

Q. Do you think that the use of a false credit or debit card constitutes the offence of using a forged document in Libya?				
Scholars	Abooda		No	
	Alansary		No	
	Alaraby		No	
	Arazgy		No	
	Bara		No	
Judges	Unnamed 44		No	
	Alasbaly			n/a
	Alfetoory			n/a
	Alhibaishy R	Yes		
	Unnamed 45			n/a
	Almarkoob		No	

<sup>57</sup> The Libyan Penal Code 1953.

<sup>58</sup> See Chart 4, page 164.

<sup>59</sup> This statement is not completely correct because although some interviewees were of the opinion that the cards are the subject matter of forgery under Libyan criminal law they did not think that the use of false cards fell under the Article 347 of Libyan Penal Code. See for example in appendix 3, Interview with Mohammed Bara, Lecturer, Faculty of Law, Tripoli University (Tripoli, February 2012); Interview with Yousef Bennoor, Judge, Alkhoms Court of First Instance (Alkhoms, February 2012); Interview with Moosa Azentany, Lawyer (Tripoli, February 2012).

<sup>60</sup> In the Chart above, the reader will see that some interviewees who are listed are unnamed and have numbers. The reason why they are not named is because they did not agree to be named in the thesis and the reason why they have numbers is because it is easy to classify their answers.



	Bennoor		No	
	Unnamed 43	Yes		
	Unnamed 39	Yes		
	Mansoor		No	
	Sohaim		No	
Prosecutors	Abuzaid		No	
	Alahoal		No	Yes as to visible info
	Alhesan		No	
	Alhibaishy S	Yes		
	Alkelany		No	
	Alkraioy	Yes		
	Unnamed 41	Yes		
	Unnamed 40	Yes		
	Athelb	Yes		
	Atoonsy	Yes		
	Unnamed 42	Yes		
	Bashaara	Yes		
	Ibraheem			n/a
	Salem		No	
Lawyers	Abuamood	Yes		
	Abuarabeah		No	
	Abujareeda	Yes		
	Albisht		No	
	Alhewaij	Yes		
	Asagheer	Yes		
	Azentany		No	
	Benrajab	Yes		
	Gadaad	Yes		
	Tebar		No	
Solicitors	Anahaas			n/a
	Atabeeb	Yes		
	Jarbooh		No	
	Mohammed			n/a
Notary	Asofrany	Yes		

### ***Credit and Debit Cards are the Subject under Article 347***

On the other hand, if it is considered that credit and debit cards are the subject matter of forgery under the Libyan Penal Code,<sup>61</sup> these cards may be the subject matter of the offence of using a forged document. As Chart 4 also shows, some interviewees thought that the usage of a false credit or debit card constituted an offence under Article 347(2). This view found its justification in the fact that credit cards and debit cards are included by the meaning which the Libyan legislator intended. This is also a result of accepting that credit and debit cards are documents in the context of forgery as discussed in

<sup>61</sup> Libyan Penal Code 1953.

Chapter Four.<sup>62</sup> The vast majority of the interviewees who shared these views did not distinguish between whether the forgery happens on the visible information or on the invisible information.<sup>63</sup> It seems that the reason behind this is that they considered that all the information is the same and the cards are one unit regarding the use of a false card.<sup>64</sup>

### ***The Importance of the Visible and Invisible Information***

However, as one of the interviewees suggested, which can be seen in Chart 4,<sup>65</sup> one could argue that visible and invisible information may be differentiated. If the false information used is visible, the use of the card may be subject to Article 347(2).<sup>66</sup> On the other hand, if the false information used is invisible, the use of the card will not fall under the Article, irrespective of the visible information whether it is forged or not: the use of the card is not considered as an offence under this above-mentioned Article unless the forged information used is visible information. In other words, it does not matter which information is forged, *as long as it is not used*. In short, invisible information has no importance.<sup>67</sup> This argument is based on a supposition that credit and debit cards are the subject matter of forgery only as to visible information. (This takes the attention back to Chapter Four in which there is an approach<sup>68</sup> considering that the card is merely a document, if the forgery happens on visible information<sup>69</sup>).

However, this argument may not be consistent with Article 347, which requires only a forged document. That is, if all the information which is on the card is forged but the user uses only the invisible information, could this be considered as the use of a forged document because the card in question is in fact forged? In other words, is the card “forged” in this case or not? In fact, the card is “forged” because the visible information

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<sup>62</sup> For more details, see Chapter Four.

<sup>63</sup> See Chart 2, page 86.

<sup>64</sup> This was discussed in Chapter Four 4.3.2.

<sup>65</sup> Interview with AbduAsalam Alahual, Prosecutor, Alkhoms Prosecution Office (Alkhoms, February 2012). See Chart 4 page 164.

<sup>66</sup> Article 347(2) is translated as: “Anyone, who uses a forged customary document, without participating in its forgery and with knowledge of its forgery, if the intention of its use is to obtain a benefit for himself or for others or to harm others, shall be subject to imprisonment.” Libyan Penal Code 1953. This Article was translated from the Arabic language by the author.

<sup>67</sup> This means invisible information does not constitute the offence unless it is used with visible information side by side, even if the visible information on the card is false.

<sup>68</sup> JA Asagheer *supra* 121.

<sup>69</sup> For more details, see Chapter Four 4.3.1.

is forged,<sup>70</sup> and Article 347 does not require that the forged information must be used. Section 2 of the Article<sup>71</sup> only states: “Anyone who uses a forged customary document”.<sup>72</sup> It does not state anyone who uses forged information.<sup>73</sup> It may be argued that stating the use of invisible information on credit and debit cards does not constitute an offence under Article 347(2)<sup>74</sup> may be welcome if the forged information on the cards is only the invisible information, but not if the all information (visible and invisible) is forged.

In addition, it may be argued that the user sometimes does not use the visible information, but he may need this information in case the seller or the service provider doubts that the card is forged because of any reason. For example, if the user uses a false card to obtain some goods from a particular store. The user will normally use the card himself. He needs to insert the card into the device at the point of sale and the seller will ask him to enter the personal identity number. When the transaction ends, the service provider or the seller asks the user to pull the card from the reader device. In this example, the illegitimate card-user does not need the visible information because the seller did not need it. The service provider does not hold the card. Conversely, suppose that the seller doubted the card because the illegitimate card-user was confused during the transaction. The seller would certainly make sure that the information on the card is genuine and would check the information on the card such as the signature on the card. The seller may ask the card-user to sign so as to compare between the two signatures (the false signature on the card and the user’s).<sup>75</sup> In this case the card-user uses the visible information. This example in short illustrates how the card is one unit<sup>76</sup> and the information on the credit and debit cards is complementary. In this term therefore, it becomes justifiable to suggest that this argument (using invisible

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<sup>70</sup> This is only an assumption that the card is the subject matter of forgery whether the forgery happens on the visible information or on invisible information, as some argue. See Chapter Four 4.3.2.

<sup>71</sup> Article 347 of the Libyan Penal Code. Libyan Penal Code 1953.

<sup>72</sup> That is to say that the card is forged if the visible information is forged.

<sup>73</sup> In other words, the information is not considered by the legislator.

<sup>74</sup> *Ibid.*

<sup>75</sup> The seller or the service provider is responsible for making sure that credit and debit cards are legitimate cards. For example, if the card has an expired date, the seller has to refuse to complete the transaction. FEA Alhamood, *The Legal System of Credit Cards* (Dar Athakafa Alarabia, Amman 1999) 40.

<sup>76</sup> This connects to the view stating that all the information is one unit to confirm the fact that there is no difference between visible and invisible information. See this view in Chapter Four 4.3.2. However, although visible and invisible information is used side by side so the card can operate its function, this does not deny that these two kinds of information are different, see Chapter Two 2.4.3.

information on a credit or debit card does not fall under Article 347 even the visible information on the card is false) is not acceptable. It seems that using a false credit or debit card should be treated as one unit, either all the information on the card is false or all the information on the card is not so. On the other hand, accepting that the card is a document may lead to another problem,<sup>77</sup> which the application of Article 347(2) may face. This will be discussed in the next section.

### **6.2.3. Forged or False Card:**

Supposing that credit and debit cards are documents under the Libyan Penal Code, this is not the end of the problem of the application of Article 347(2)<sup>78</sup> to the use of false credit and debit cards. This is because another problem could arise: the meaning of the terms “forged document” in Article 347.<sup>79</sup> As has been emphasised, Article 347 requires, for the subject matter of the offence of using a forged document to exist, that a document must be forged. The question which raises itself here is “Does the word “forged” provided in Article 347<sup>80</sup> mean literally a forged document or only mean “false” document?” If the legislator literally means the term “forged” all the elements of the forgery offence must exist. However, if it merely means false, it does not matter whether the elements exist, as long as the information on the card is not genuine.

#### ***Meaning of Falsity and Forgery***

The difference between falsity and forgery, in the context of credit and debit card forgery, is that falsity means the information that is on the document or on the card is not true compared with the real fact. On the other hand, forgery is a legal term which means that a particular document is false and at the same time is a subject matter of forgery in the context of forgery offences. In other words, all the elements of the offence of forgery apply to the document. Thus, *actus reus*, *mens rea* and the *subject matter* of forgery must exist at the same time. Consequently, for the document to be forged, someone must change the information (the *actus reus*) and this information can

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<sup>77</sup> Accepting that credit and debit cards are the subject matter of forgery under the Libyan Penal Code is not the view of the researcher. It is only assumed for the sake of the argument to explore all the possible problems of the use of false credit or debit cards which may be posed through this study.

<sup>78</sup> Libyan Penal Code 153.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

be seen by the naked eye and must be on a document which consists of a durable material. This alteration must be deliberately done, that is, the forger knows that he changes information which is not genuine with an intention to obtain an advantage for himself or for others or he intends to harm someone (*mens rea*).<sup>81</sup> As a result, if for example someone changes information on a document only for the sake of a joke, this will not be forgery because the document is not forged owing to the absence of *mens rea*.

It is clear and unambiguous to argue that the document required under Article 347<sup>82</sup> is a forged document, not a false document. This can be understood from the fact that if the legislator in Libya means a false document, it would make this obvious as other law does. For example, Section 6 of the Forgery and Counterfeiting Act 1981 in the UK states that “it is an offence for a person to use an instrument which is, and which he knows or believes to be, false...”<sup>83</sup> It is evident from this Section that the instrument required must be false, not forged. If Section 6 stated that it is an offence for a person to use an instrument, which is, and which he knows or believes to be, forged, all the elements of the forgery offence would have had to be present and established in order to apply the Section. However, the Section states “false” not “forged”. In addition, the UK Forgery and Counterfeiting Act 1981 defines the word false in Section 9,<sup>84</sup> so the judge does not find any problem when applying this Act, or when interpreting the word “false”. Section 9 provides a detailed definition of “falsity”.<sup>85</sup> The

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<sup>81</sup> As has been mentioned in the previous Chapters, this intention is required in terms of the offence of forging a customary document. Article 346(1) of the Libyan Penal Code states that: “Anyone, who draws up a forged customary paper ... with the intention that he, obtains benefit for himself or for others, or harms others, ...” However, if the subject matter of forgery is a formal document the intention required is that the user must intend to use the forged document. This intention which is required for the offence of forging formal documents, was the decision of the Libyan Supreme Court. Despite the fact that the Articles of forgery under the Libyan Penal Code do not refer to any intention, the Libyan Supreme Court confirmed that this offence required that the forger must intend to use the document which he forges. See *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.98, Year 25, 20/6/1978, *Majalet Almahkama Alolia* (April 1979) Year 15, Vol.3, 249; *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.463, Year 32, 6/6/1989, *Majalet Almahkama Alolia* (February-July 1990) Year 26, Vol.3-4, 181. This decision is certainly correct because the use of the false document is the main reason why the forgery is a crime. The forger will not obtain any advantage if the forged document is not used. However, this is not to state that the use is only the problem which should be considered in the context of the offences of forgery because, as will be explored in Chapter Seven, the possession of a false card may also be harmful. See Chapter Seven.

<sup>82</sup> Libyan Penal Code 1953.

<sup>83</sup> The Forgery and Counterfeiting Act 1981

<sup>84</sup> *Ibid.*

<sup>85</sup> Section 9 states that:

main concept of falsity is that the instrument must tell a lie about itself.<sup>86</sup> It is the instrument which must be false, and not only the information inside it.<sup>87</sup>

### *The Position of the Judiciary*

This clarity of Article 347 may be understood from the decision of the Libyan Supreme Court on 29/6/1971.<sup>88</sup> It stated that: “The offence of using a forged document could not be constituted unless the forgery of the document used is proved.”<sup>89</sup> This means that in order to talk about the use of a forged document, the court must make sure that the document in question is forged according to forgery offence provisions. The court did not only mean that the offence occurs in some elements, but it meant that all elements of the forgery offence must have occurred. This may be understood from the fact that the subject matter in this case (the false driving licence) was false and the court was

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- (1) An instrument is false for the purposes of this Part of this Act—
    - (a) if it purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or
    - (b) if it purports to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or
    - (c) if it purports to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or
    - (d) if it purports to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or
    - (e) if it purports to have been altered in any respect by a person who did not in fact alter it in that respect; or
    - (f) if it purports to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or
    - (g) if it purports to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or
    - (h) if it purports to have been made or altered by an existing person but he did not in fact exist.
  - (2) A person is to be treated for the purposes of this Part of this Act as making a false instrument if he alters an instrument so as to make it false in any respect (whether or not it is false in some other respect apart from that alteration).

*Ibid.*

<sup>86</sup> See DJ Bentley, ‘Documents in the Law of Forgery’ (1959) 22(3) *The Modern Law Review* 292, 296; D Ormerod, *Smith and Hogan: Criminal Law* (12<sup>th</sup> edn., Oxford University Press, Oxford 2008) 961.

<sup>87</sup> *Ibid.*

<sup>88</sup> The Arabic text of this decision states that

إن جريمة استعمال المحرر المزور لا تقوم إلا بثبوت تزوير المحرر.

*Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.18, Year 18, 29/6/1971, *Majalet Almahkama Alolia* (January 1972) Year 8, Vol.2, 76. The fact of this case is that the third accused asked his friend (the second accused) to help him to obtain a driving licence. The first accused forged a driving licence after accepting an amount of money (45 Libyan Dinars) as a bribe from the first via the second accused. The Appeal Court convicted the first accused for forging a driving licence and accepting 45 Libyan dinars as a bribe, acquitted the second accused from participating in the bribe and forgery, and convicted the third accused for using a forged document and acquitted him from bribing the first accused to obtain the false licence.

<sup>89</sup> The text of this decision was translated from the Arabic language by the author.

sure the licence was so, because there was a report from a forgery expert stating that the signature which was on the licence was false. In other words, the information, which was on the driving licence, was not genuine. In this case, it is obvious that the subject matter of the offence is in fact false but it is not forged in the eye of the court. For this reason, the court did not agree with the decision of the lower court (*Mahkamat Alistinaf: Appeal Court*)<sup>90</sup> which convicted the user of the false driving licence. To sum up, according to the Libyan Supreme Court, for the subject matter of the offence of using a forged document to exist, the document must be forged.

As a result, considering this decision in terms of credit and debit cards, it should be obvious that if these cards are considered as documents, they would not be considered as a forged credit or debit card unless the court convicted the accused person of forgery. The court cannot convict the user of the false card if, for example, the *mens rea* is absent. Therefore, all elements must exist. In other words, the debit or credit card must be forged, not false.

Accepting this argument may lead to an undesirable result, which is that whenever the forger is unknown, the offence of using a forged document has no sense. The reason behind this is because the court cannot make sure whether all the elements of the offence of forgery do exist or not. The court does not always know whether the forger intended to forge the document or not. Therefore, if the judge finds that the forger is unknown, he should acquit the user of the false document, even if the judge is in no doubt that the document is false and the information on the card is not true.

Therefore, Adahabi<sup>91</sup> states that it is sufficient for the document to be the subject matter of the offence of using a forged document if the information is not true. He argues that there is no need for *mens rea*, if the *actus reus* takes place on a document.<sup>92</sup> This means that it is not necessary for the card to be forged as the court held. It is sufficient for it to

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<sup>90</sup> *Mahkamat Alistinaf*: the Appeal Court is the Court which specialises in felony crimes, for example, murder, bribery and kidnap. This court is regarded as a first instance court regarding felony crimes. It has no appellate jurisdiction and its decisions are appealed to the Supreme Court. The decisions of this Court are not binding on any other court. For more details about the structures of the courts in Libya, see AA Jeera, *The Judicial System in Libya* (3<sup>rd</sup> edn., Benghazi University, Benghazi 1987) 54.

<sup>91</sup> EG Adahabi *supra* 239. In this line, see also Alghareep ME *supra* 562; AbduAsattar F *supra* 346.

<sup>92</sup> According to this approach, therefore, if someone uses a false document but this document was made by someone who did not want to obtain benefit by doing so or harm any other person, this use constitutes the offence of the use of the false document if the other required elements exist.

be false. For this reason, this understanding (document must be forged) is not accepted by some courts. For example, on 11/11/2010, the judge in Alkhoms Appeal Court decided not to follow this approach and convicted the user of the false document although the offender of the forgery was unknown.<sup>93</sup>

It is submitted that although the decision of Alkhoms Appeal Court appears logical, it is submitted that it is not a legally correct decision. It was logical because it is not necessary that the document must be forged, as long as the document is false. The court ensured that the information which was on the document was not true, so why is using this document not prohibited? However, this judgement interfered with the principle of legality because the above-mentioned Article (Article 347) makes it obvious that the document which is required for the offence must be forged, not merely false. As a result, in order to consider credit and debit cards as the subject matter of the offence of using a forged document, without facing any potential problem such as the absence of the *mens rea* of the forgery offence, the card must be forged and not only false. This means that in addition to the fact that the card must be the subject matter of forgery, the other elements of the offence of forgery have to exist so the card can be considered as a forged card.

### ***Suggestion***

For that reason, it is submitted that the word “forged” in Article 347 should be amended so as to become “false” because this Article cannot be applied whenever the accused (the forger of the used document) is *unknown* or the *mens rea* (of the offence of forgery) is *absent*. Amending the word forged would provide flexibility for Article 347 to be applied even if the *mens rea* of the offence of forgery does not exist. Alternatively, the term “forged” may be defined as other criminal laws did, such as the New York Penal Code.<sup>94</sup> This code requires under Section 170.27<sup>95</sup> for the possession of false credit and debit cards to be an offence in the second degree that the card must

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<sup>93</sup> *Mahkamat Alistinaf Alkhoms* ‘Alkhoms Appeal Court’, Criminal Circuit, No.434, Year 2010, 11/11/2010, (Unreported). Although the defence of the accused alleged the absence of the offence of forgery and indicated to the decision of the Libyan Supreme Court No.18, Year 18 which mentioned above and which held that ‘in order to talk about the use of a forged document, the court must make sure that the document in question is forged according to forgery offence provisions.’, the perpetrator was convicted. The court stated that the offence of using the forged formal document (a certificate issued by the Mosrata high college) existd.

<sup>94</sup> New York Penal Code 1967. This Section will be mentioned later in the next Chapter.

<sup>95</sup> *Ibid.*



be forged. Unlike the Libyan Penal Code, the New York Penal Code does not leave this term surrounded by vagueness. It defines the meaning of term forged in Section 170.00(1) by providing that: the ““forged instrument” means a written instrument which has been falsely made, completed or altered.”<sup>96</sup> Hence, there is no doubt that the term “forged” does not require for the instrument, which includes credit and debit cards, to be forged, as it seems to be under the Libyan Penal Code. The card under this Code only needs to be false.<sup>97</sup> If it is false, then it does not matter whether is falsely completed or altered in part.

To sum up, it can be stated that Article 347 may not be applicable because (1) there is a doubt whether the cards can be documents or not, and (2) Article 347 provides that the card must be forged. Therefore, it may be suggested that looking for another article to be applied to such a matter seems to be necessary. This will be discussed in the next two sections.

### **6.3. THE THEFT OFFENCE: USING FALSE CREDIT AND DEBIT CARDS**

Alleging that the use of false cards falls under Article 444(1)<sup>98</sup> and 446(2)<sup>99</sup> finds its basis in the fact that credit and debit cards are similar to electronic key cards. Therefore, when the illegitimate credit or debit card user uses the card by inserting the false card into the machine, this act is the same as the act when someone uses an electronic key card and opens a safe which is opened by such an electronic card. This argument is the point of view of Alkhaleel.<sup>100</sup> According to Alkhaleel, the offence of theft under Article 399 of Jordanian Penal Code<sup>101</sup> may be applied to the use of false cards.<sup>102</sup> Considering Alkhaleel’s argument, it is questionable, whether or not this allegation is applicable to the offence of theft in Libya. As one of the interviewees<sup>103</sup> suggested, it may be argued that the use of false credit or debit cards at cash machines constitutes theft under Article

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<sup>96</sup> *Ibid.*

<sup>97</sup> It is obvious that the word ‘forged’ means false.

<sup>98</sup> Libyan Penal Code 1953.

<sup>99</sup> *Ibid.*

<sup>100</sup> EA Alkhaleel *supra* 97.

<sup>101</sup> The Arabic text of Article 399(1) states that

1- السرقة هي أخذ مال الغير المنقول دون رضاه.

Which is translated as: “Theft is taking other’s property without his consent.” Jordanian Penal Code 1960. This Article was translated from the Arabic language by the author.

<sup>102</sup> EA Alkhaleel *supra* 97.

<sup>103</sup> Interview with Omran Jarbooh, solicitor, North Africa Bank, (Tripoli, March 2012).

444(1) and Article 446(2) of the Libyan Penal Code. He considered that the card is only a key, which is used for opening a safe which is behind the cash machine. Therefore, a question arises here, which is, can this point of view be applied to the use of false credit or debit cards or are there some problems which may prevent this application?

Article 444(1) states that

كل من اختلس منقولاً مملوكاً لغيره يعاقب بالحبس.<sup>104</sup>

Which is translated as: “Anyone, who appropriates a movable owned by another shall be subject to imprisonment.”<sup>105</sup> This Article draws on the general outlines of the offence of theft under the Libyan Penal Code.<sup>106</sup> Article 446 provides the cases in which the theft will be aggravated theft. It states the aggravated circumstances. Under Article 446(2) the offence of theft becomes an aggravated offence of theft by using a modified key. It provides that

تكون العقوبة الحبس مع الشغل مدة لا تقل عن ستة أشهر و غرامة لا تقل عن عشرة جنيهات ولا تزيد على خمسين جنيهاً:  
إذا حصلت السرقة... باستعمال مفاتيح مصطنعة.<sup>107</sup>

Which is translated as: “The punishment shall be imprisonment for a term not less than 6 months, and a fine not less than 10 dinars and not exceeding 50 dinars if the theft is committed by using modified keys.”<sup>108</sup> From Article 444(1), it is clear that offence of theft requires three elements, the subject matter of theft (a movable owned by another),<sup>109</sup> *actus reus* (appropriation)<sup>110</sup> and *mens rea* (the intention to own the stolen chattel).<sup>111</sup>

Considering these elements in the context of using a false credit or debit card, the

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<sup>104</sup> Libyan Penal Code 1953.

<sup>105</sup> This Article was translated from the Arabic language by the author.

<sup>106</sup> This is not the only law which governs theft. There is another law which is the law of theft according to Sharia law. However in this study, the author only considers crimes which are governed by the Libyan Penal Code.

<sup>107</sup> *Ibid.*

<sup>108</sup> This Article was translated from the Arabic language by the author.

<sup>109</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.105, Year 21, 8/4/1976, *Majalet Almahkama Alolia* (October 1976) Year 13, Vol.1, 179.

<sup>110</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.211, Year 31, 15/1/1985, *Majalet Almahkama Alolia* (January 1986) Year 22, Vol.2, 245.

<sup>111</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.55, Year 22, 2/12/1975, *Majalet Almahkama Alolia* (April 1976) Year 12, Vol.3, 215; *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.58, Year 16, 2/2/1975, *Majalet Almahkama Alolia* (April 1971) Year 7, Vol.3, 205.

application of this offence may be in doubt. This is because, according to the Libyan Supreme Court, for the *actus reus* of the offence of theft to take place, the appropriation in theft must be appropriated without the consent of the owner.<sup>112</sup> Therefore, the absence of the *actus rea* (the appropriation), may be arguable. In addition, credit and debit cards may not be a “modified key” under Libyan criminal law.

### 6.3.1. The Issue of the Appropriation

The word “appropriates” (اقتلس) was not defined by the Libyan Penal Code.<sup>113</sup> Therefore, the judiciary found no way to apply Article 444(1) unless they could define the word “appropriate”. The Libyan Supreme Court<sup>114</sup> defined this word as: “Taking an article from the possession of the victim, (the owner) or from the previous hand of its personal possession (possessor) without consent.”<sup>115</sup> In the same way, the word is defined by Hosni as directing a possession of an object of a victim without his consent and entering it in to the possession of another.<sup>116</sup>

#### *The Consent of the Owner of the Property*

Considering these definitions, it may be understood that the appropriation requires two conditions. First, a change in possession, and second, this change has to be involuntary. In other words, handing over the subject matter of the theft must not be with the consent of the possessor (if it is in its possession) or with the consent of the owner.<sup>117</sup> Consequently, the act is not appropriation unless the actor takes the stolen object without the consent of the victim. If the victim hands it over freely, the element of

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<sup>112</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.100, Year 19, 13/3/1973, *Majalet Almahkama Alolia* (July 1973) Year 9, Vol.4, 130.

<sup>113</sup> This is not the case under the Theft Act. Under Section 3(1) of this Act, appropriation is defined as:  
Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as an owner.

Theft Act 1968.

<sup>114</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.100, Year 19, 13/3/1973, *Majalet Almahkama Alolia* (July 1973) Year 9, Vol.4, 130. See also *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.485, Year 36, 12/3/1995 (1425), *Majalet Almahkama Alolia* Year 33-34, 271.

<sup>115</sup> This text was translated from the Arabic language by the author.

<sup>116</sup> MN Hosni *supra* 839.

<sup>117</sup> As for the theft Act 1968, it does not mention whether the appropriation must be without the consent of the possessor or not. In this respect, see J Herring, *Criminal Law* (8<sup>th</sup> edn., Palgrave Macmillan, 2013) 190.

appropriation disappears.<sup>118</sup> In the case of the use of a false credit or debit card at cash machines, for the appropriation to take place, handing over the money from the cash machine to the illegitimate user must be done without the consent of the bank, because the bank is the owner of the money. Therefore, the question that arises here is, does the bank actually want to hand over the money to the illegitimate user?

### ***The Debate over the Consent***

According to Asagheer, handing over the money from the cash machine to the illegitimate user is voluntary. Therefore, he argues that the appropriation does not exist because the act of handing over the money is with the consent of the bank, which has a negative effect on the offence of theft.<sup>119</sup> This is not the view of Alkhaleel<sup>120</sup> who argues that the *actus reus* no doubt exists provided that handing over the money is done in the way which the bank wants.<sup>121</sup> Therefore, he alleges if the other element of the offence of theft (*mens rea*) exists, the offence of theft takes place.<sup>122</sup> It is clear that the above-mentioned interviewee<sup>123</sup> also agreed with Alkhaleel in respect of the fact that handing over the money from the cash machines to the users is not voluntary. This can be understood from his attitude to the use of the illegitimate electronic cards at the cash machines.<sup>124</sup>

This may be different from the use of legitimate credit and debit cards because when the cardholder exceeds his credit or allowance amount, he breaches the agreement with the bank which issues the card. The bank does not want to allow the cardholder to take more than the money which was agreed to be taken. On the other hand, in the case of using a false credit or debit card, there is no agreement between the bank and the

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<sup>118</sup> It is notable to mention that consent can be prior to the appropriation, contemporary with or following it. The consent which eliminates the appropriation is only the prior consent to and the contemporary consent with the change of the possession of the property. However, the following consent does not affect the change of the possession. In this respect, see FU Albasha, *The Special Libyan Criminal Law: Second Part, Offences Against Property* (Dar Anahda Alarabia, Cairo 2003-2004) 48.

<sup>119</sup> JA Asagheer *supra* 140.

<sup>120</sup> EA Alkhaleel *supra* 96.

<sup>121</sup> Alkhaleel does not clarify this concept. However, the understanding of this condition is that the user of a false credit or debit card must use the card according to the system of the machine. For example, the user must not exceed the limit of the card and must follow the steps which a legitimate user follows.

<sup>122</sup> *Ibid.*

<sup>123</sup> Interview with Omran Jarbooh, solicitor, North Africa Bank, (Tripoli, March 2012).

<sup>124</sup> He claimed that: "The use of illegitimate electronic cards, which includes illegitimate credit and debit cards for withdrawing money from the cash machines is considered a theft under Article 444(1) and 446(2) of the Libyan Penal Code." *Ibid.*

illegitimate user. Thus, alleging that the use of legitimate credit and debit cards for withdrawing money from cash machines when the user exceeds the allowed limit, is considered a theft under Article 444(1) of the Libyan Penal Code may not be applicable in this case.

It seems that the view of Asagheer<sup>125</sup> may be the better view. The reason behind this is that when the bank uses cash machines for handing over the money to the users of the credit and debit cards, it wants to hand over the money to the legitimate user. However, this is half of the fact. The rest is that the bank also does not mind handing over the money to the user of the false credit or debit card. In fact, the bank does not care whether the money is handed over to an illegitimate user or to a legitimate user. It only wants to hand over the money to the one who inserts a credit or a debit card into the cash machine. This may be proved by stating that the bank knows that the money might be withdrawn by a false card whether a credit or a debit card, but it does not do anything which may stop such users. If the bank cares about the legitimacy of the card, it should improve its system, so the machine can distinguish between the illegitimate and legitimate users, and hand over the money only to the legitimate holders when a genuine card is used, but it does not do anything which may stop such illegitimate users.<sup>126</sup>

This is, for instance, the same as a manager who leaves the salary of the workers on a table to be taken by the workers, although he knows they may take more than they deserve. If a manager really does not want anyone to take more than their money, the manager could hand over a certain amount to everyone in person.<sup>127</sup>

Thus, it can be argued that if the bank does not want the cash machine to hand over the money, it can appoint someone (employee) to watch the transactions which take place and make sure if the card is legitimate or not, and stop the use of false cards and allow only the legitimate transactions.<sup>128</sup> Hence, this act is not theft because the consent

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<sup>125</sup> This approach is that in the case of using false credit and debit cards at cash machines there is no theft because the appropriation is absent and the money is delivered with the consent of the bank. See JA Asagheer *supra* 140.

<sup>126</sup> This argument may not be logical because it may be difficult to distinguish between legitimate and illegitimate users. However, law is not always compatible with the rules of logic.

<sup>127</sup> In this meaning, see MN Saed *supra* 69.

<sup>128</sup> In this case, it may be stated that the consent does not exist because the bank does its best to prevent delivering the money to the illegitimate user. However, this is only a supposition.

exists.<sup>129</sup> This consent leads to the fact that the appropriation does not exist.

### 6.3.2. Are Credit Cards and Debit Cards a Modified Key?

Like the subject matter of forgery, the modified key has no definition in Libyan criminal law.<sup>130</sup> Article 446(2)<sup>131</sup> only mentions it as an aggravating circumstance. However, unlike the word document, which is the subject matter of forgery offences and which has been defined, neither under the Libyan Penal Code nor by the Libyan Supreme Court, the words “modified key” were defined by the Libyan Supreme Court. It was defined as: “Any tool, which the offender may use to open locks.”<sup>132</sup> From this definition, it is inferred that there is no condition required for the tool to be a modified key. The only thing required is that the key can be used to open a lock. Therefore, Bara<sup>133</sup> states that the tool can be anything, which may be used to open a lock. He adds, it can, therefore, be a spare key, knife, nail or any tool by which the lock can be opened without causing any damage to the lock.<sup>134</sup> This definition might open the door for the researcher to consider credit and debit cards as a modified key.

If the modified key is defined as above mentioned, the question which arises is, can the false credit or debit card be considered as a modified key? Moreover, is there any lock in the cash machine as the Libyan Supreme Court required in the previous decision? According to Alkhaleel,<sup>135</sup> and Almanasa,<sup>136</sup> using a false card can be classified as

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<sup>129</sup> As will be seen later, this act may be deception because the user uses fraudulent or deceptive means which is the false card, as will be seen later when discussing the offence of deception as a potential offence.

<sup>130</sup> As has been explored in Chapter Three, the Libyan Penal Code does not define the word “watheeka” (document) which is used for the subject matter of forgery. For this discussion, see Chapter Three 3.2.

<sup>131</sup> This Article is translated as: “The punishment shall be imprisonment for a term not less than 6 months, and a fine not less than 10 dinars and not exceeding 50: ... 2- if the theft is committed by using modified keys.” Libyan Penal Code 1953.

<sup>132</sup> The Arabic text of this decision states that

كل أداة يستعين بها الجاني لفتح الأقفال دون أن يترتب عليها تلفها.

The text of this decision was translated from the Arabic language by the author. *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.3, Year 27, 16/3/1982, *Majalet Almahkama Alolia* (January 1983) Year 19, Vol.2, 164.

<sup>133</sup> MR Bara, *Explanation of the Libyan Penal Law, the Special Section, Second Part, the Crimes of the Assault on Property* (The Green Company, Tripoli 2010) 108.

<sup>134</sup> *Ibid.*

<sup>135</sup> EA Alkhaleel *supra* 97.

<sup>136</sup> AA Almanasa and others, *Computer and Internet Crimes* (Wael, Amman 2001) 174.

aggravated theft by using a modified key under Jordanian criminal law.<sup>137</sup> From this view, it may be understood that they considers that there is no difference between credit cards and debit cards, and the electronic cards which are used as keys for opening the doors in many places such as hotels, (hereafter simply referred to as key cards). This was also the opinion of interviewees who were asked the question “Do you think that the use of a false credit or debit card constitutes the offence of using a forged document in Libya?” They answered no; using the card at cash machines constituted theft by using a modified key. This means that the key is the credit and the debit card.<sup>138</sup>

### ***Similarity and Difference between Credit and Debit Cards and Key Cards***

In fact, considering credit cards and debit cards, it may be argued that they are similar to the key cards that are used for opening doors. They are made from the same material which is plastic. Furthermore, credit and debit cards and key cards hold visible and invisible (electronic) information. Whereas, as previously mentioned in Chapter Two, credit and debit cards hold the name of the cardholder, the name of the issuer and the institution, the number of the card and other information<sup>139</sup>, the key cards usually hold the name of the place, in which they are used, on the surface of the card. In addition, they hold a magnetic strip on which some electronic information is stored. This electronic information is used for opening the doors when they are scanned on the monitor, which is placed on the door of the room of the hotel to which the card key belongs.<sup>140</sup>

However, others<sup>141</sup> allege that credit and debit cards are not keys and they should not be considered so. Mahmood maintains that the modified key is the means used for entering

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<sup>137</sup> This was also the point of view of one of the Barclays bank staff. A Barclays spokeswoman maintained that “Debit cards, like credit cards, should be treated as if they were a key to a person’s home and not left with anyone.” Antony Barnett, ‘Barclays Fails to Connect on Fraud Banks Have Cracked Credit Card Crime, but Still Have Trouble with the Debit Variety’ *The Guardian*, 4 September 1994.

<sup>138</sup> Interview with Omran Jarbooh, solicitor, North Africa Bank, (Tripoli, March 2012); Interview with Moosa Azentany, Lawyer (Tripoli, February 2012).

<sup>139</sup> For more details about the information on credit and debit cards, see Chapter Two 2.4.

<sup>140</sup> See, for example, key cards which are used by Premier Inn hotel. They hold on one side the name of the hotel “Premier Inn” and the logo of the hotel. In addition, on the other side of the key card, the structures how to use the card are printed. As for the magnetic strip, it is also on the other side of where the structures are printed. This strip holds information which enables it to open the door.

<sup>141</sup> AHA Mahmood, *Stealing the Information Stored in the Computer* (3<sup>rd</sup> edn., Dar Anahda Alarabia, Cairo 2004) 240; JA Asagheer *supra* 140; AB Hijazi, *Combating Computer and Internet Crimes under the Model Arabic Law: Deep Legal Study in Informatics Law* (Dar Alfekr Aljamey, Alexandria, 2006) 590.

the scene of the crime, but the credit card is not the means of entering this place. It is rather a means of committing the crime of using a false credit card.<sup>142</sup> Similarly Asagheer points out that considering these cards as keys leads to an analogy in criminal law.<sup>143</sup> As has been emphasised on many occasions in this thesis, imposition of criminalisation by analogy is not allowed in criminal law because it interferes with the principle of legality.<sup>144</sup>

The researcher completely agrees with the point of view of Asagheer. In fact, even though there is similarity between credit and debit cards, and key cards, there may be some differences. First, the functions of the cards are different. For example, the function of the credit and debit cards is to obtain money from cash machines, or to obtain goods or services from shops or the service providers. On the other hand, the only function, which the key card operates, is to open a door. In addition, the importance of the cards is uneven. Although both credit and debit cards, on one side, and key cards, on the other side, hold visible and invisible information, this information is not exactly the same. Whereas credit and debit cards hold the name of the issuer and the name of the cardholder and other important information,<sup>145</sup> key cards do not hold such information. Key cards only hold the name of the hotel and a code, which operates for opening the door of the room.<sup>146</sup> This means that the importance of the cards is not the same.

Furthermore, the issuers of the two cards are different. The issuer of credit and debit cards is usually a bank or a financial institution such as Visa or MasterCard. On the other hand, key cards may be issued by the hotel itself. It can also be considered as a difference that the use of the two cards is different. Whereas credit and debit cards are

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<sup>142</sup> AHA Mahmood *supra* 240.

<sup>143</sup> JA Asagheer *supra* 140.

<sup>144</sup> For more details about the principle of legality, see Chapter One 1.8.1.

<sup>145</sup> In addition, credit and debit cards hold much information such as the number of the account and the sort code. For more details, see Chapter Two 2.4.

<sup>146</sup> The reason why key cards do not hold such information such as the name of the visitor may be that the key card is not personal and even though it is used by the customer, it still belongs to the hotel. However, this is not to say that the ownership of credit and debit cards is transferred to the cardholder, but it means that banks do not usually request these cards after the expiry date. This may affect the deal of these cards negatively because these cards may be used by criminals who use them in forgery. Thus, as will be suggested in the next Chapter, these expired cards should be returned to the issuer, so they can be shredded.



used by only the cardholder, which it means that they are personal,<sup>147</sup> the key cards can be used by many people. They are only keys which should be returned to their owners.<sup>148</sup> Therefore, it is better not to consider them as keys and look for another solution to tackle the problem of the use of false credit and debit cards.

As for the question whether there is a lock on the cash machine or not, it can be argued that yes there is a lock on the cash machine, but it is not the place where the card is inserted. The lock is usually in the back of the machine. This lock is used by the bank or by the operator of the cash machine. From that lock, the machine can be opened and be full of money. Therefore, it can be argued that the place, where the credit or debit card is inserted, is merely a system operating the cash machine to grant the users some features such as withdrawing money from the cash machine.<sup>149</sup> This is because the lock should be opened by a key and then everything in the cash machine should be available to the one who uses the card. In fact, this does not happen. The user cannot only reach all what is in the cash machine, but also cannot know how much money is inside it.<sup>150</sup> Conversely, when the illegitimate holder uses the false card and enters the card into the cash machine, he will not be able to take all the money which is in the cash machine. He could only take the amount that the card allows him to take, even if the cash machine has more than the allowance amount of the card. This is because the credit or debit card only provides the user some benefits from using the cards. They are not keys for opening the cash machines. For this reason, it is obvious that there is a great difference between locks and the system of the cash machines. This means credit and debit cards are not key cards.

#### **6.4. DECEPTION AND THE MACHINE**

As an alternative solution for the problem of the use of false cards under the provisions of forgery under the Libyan Penal Code, it can be argued that this act may fall under

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<sup>147</sup> Credit and debit cards are usually shredded after they become expired if they are returned to the issuer. However, key cards are encoded again to be used by another customer.

<sup>148</sup> However, they may be kept by the customer. For example, once the researcher requested the key card after leaving the hotel so he could keep it and the hotel did not mind.

<sup>149</sup> A cardholder can also change his personal identity number and check his account by using this system.

<sup>150</sup> In other words, when, for instance, someone uses a key card to open a room or a safe, the user will be able to enter the room or see what is in the safe and take everything which is inside the room or all the money which is in the safe.

Article 461<sup>151</sup> which governs the offence of deception. Considering Article 461, it is debatable to state whether this Article can cover the use of these false cards or not. The problem, which may face the application of this Article under the Libyan Penal Code, is that the means, which Article 461 requires, may not occur in terms of dealing with machines. However, this problem may not exist in the case of using these cards at the point of sale, whenever the deal is with a human,<sup>152</sup> as will be seen in this section.

#### 6.4.1. Using a False Card Constitutes Deception

Article 461(1) of the Libyan Penal Code provides that

كل من حصل على نفع غير مشروع لنفسه أو للغير اضراراً بأخرين باستعمال طـرق احتيالية أو بالتصرف في مال ثابت أو منقول ليس ملكاً له ولا له حق التصرف فيه أو باتخاذ اسم كاذب أو صفة غير صحيحة، يعاقب بالحبس وبغرامة لا تتجاوز خمسين جنيتهاً.<sup>153</sup>

Which is translated as: “Anyone who obtains an illegitimate benefit for himself or for others by harming others and by using deceptive methods, by disposing of a real or a movable property which he neither own nor has the right of disposing thereof or by assuming a false name or a false character shall be subject to imprisonment and a fine not exceeding 50 dinar.”<sup>154</sup> From this Article, the actus reus of this offence can be satisfied by using fraudulent methods, disposing of a real or a movable property, assuming a false name or a false character. Consequently, for this Article to be applicable, the user of the false card must practice one of these special means. Some of these methods could be practiced during the use of a false credit or debit card at the point of sale. Thus, the offence of deception may occur by using fraudulent methods or assuming a false name or a false character.

#### *Fraudulent Methods*

As for fraudulent methods, they are not defined by this Article, although the scholars do. According to Hosni,<sup>155</sup> fraudulent methods can be defined as telling a lie supported

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<sup>151</sup> Libyan Penal Code 1953.

<sup>152</sup> Human means the person who operates the device when dealing with credit and debit cards, namely the seller or the service provider.

<sup>153</sup> *Ibid.*

<sup>154</sup> The Article was translated from the Arabic language by the author.

<sup>155</sup> MN Hosni *supra* 999.

by external aspects.<sup>156</sup> The external aspect can be any material act, which may support the lie of the offender.<sup>157</sup> Therefore, telling a lie in itself is not sufficient to constitute the offence of deception. For example, if someone lies to another that he owns a company and the effect of this lie causes the victim to hand over an amount of money to the offender, this act was not brought about by a fraudulent method because the offender is only lying to the victim. However, if the offender supports his pretences by bringing two people to approve this lie, or by receiving the victim in an office and alleging it is the company's building, to deceive the victim that there is a company, the act will be achieved by a fraudulent method which may constitute the offence of deception. In short, for the fraudulent method to take place, there must be an external aspect used by the offender to support the lie.<sup>158</sup>

Therefore, using the card at the point of sale can be a fraudulent method which constitutes the offence of deception under Article 461. In this case, the fraudulent method is the lie of the user that he has a legitimate credit or debit card and he wants to use it to obtain goods: and the false card is the aspect which supports this lie. This may be consistent with the decision of the Libyan Supreme Court (18/2/1967.<sup>159</sup>) The court held that: "The offence of deception under Article 461 cannot be constituted merely by telling a lie even if the actor exaggerates that it is true, so the victim is affected by it. Telling a lie must be accompanied by external aspects supporting the pretences and affecting the victim to believe the lie. However, using letters or documents, suggesting they are issued by others, is considered an external aspect regardless of whether those others in fact existed or not."<sup>160</sup> From this case, it is inferred that the external aspect can be any false document such as a false credit or debit card. The card does not need to be forged as the Libyan Supreme Court held in another case on 8/3/1980, in which the court considered the forged document as an external aspect in the offence of deception

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<sup>156</sup> In other words, fraudulent methods are pretences and external aspects.

<sup>157</sup> In this respect see MR Bara *supra* 180. See also FU Albasha, *supra* 137; A Ashawarbi, *The Offence of Deception in the Light of the Judicature and Doctrine* (Moasasat Shebab Aljamia, Alexandria 1990) 15.

<sup>158</sup> It was held that: "It was a deception where the offender came to the victim by a car driven by another to mislead the victim that the offender has a house for rent. When the victim believed the pretences of the offender and handed an amount of money as a rent, the offender took the money and left the victim. In this case, the appearance of the offender in a car with another is considered as external aspects which constitute deception." *Almahkama Alolia* 'Libyan Supreme Court', Criminal Appeal, No.205, Year 26, 6/11/1979, *Majalet Almahkama Alolia* (July 1980) Year 16, Vol.4, 118.

<sup>159</sup> *Almahkama Alolia* 'Libyan Supreme Court', Criminal Appeal, No.89, Year 13, 18/2/1967, *Majalet Almahkama Alolia* (July 1967) Year 3, Vol.4, 19.

<sup>160</sup> The text of the decision was translated from the Arabic language by the author.

under Article 461 of the Libyan Penal Code.<sup>161</sup> As can be understood from this decision, it is not necessary that the document is forged, although the court used the formulate “forged”. The main important point is that the document is false and supports the lie of the offender.<sup>162</sup>

### *Assuming a False Name or a False Character*

In addition, the offence of deception may also take place by using a false name or a false quality. In this case, there is no need for an external aspect. Alleging a false name or a false quality itself suffices. With respect to assuming a false name, when the illegitimate user presents a false card, he uses a false name.<sup>163</sup> He pretends that his name is the name which is on the card. Equally, by using the false card the user of the false credit or debit card pretends that he is the legitimate cardholder, which is not the truth. On this case, the name which is on the card may not be the name of the illegitimate user. Thus, the two methods would occur. However, the false name is not always different from the name of the illegitimate user. The name which is on the card may be the name of the illegitimate user. If this is the case, using a false name may not be applicable. However, the character which is the illegitimate user alleges, it is not true. It is false.<sup>164</sup> This false character is that the user alleges that he is the legitimate cardholder.

In line with this, for example, Asagheer<sup>165</sup> points out using a false card constitutes an offence of deception by using fraudulent methods under Article 336<sup>166</sup> of the Egyptian

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<sup>161</sup> In that case, the court held that: “Using forged documents is considered as a fraudulent method, provided that the handing over of the subject matter of the offence of deception is under the effect of misleading the forged document.” This decision considered the forged document as an external aspect. *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.211, Year 26, 8/4/1980, *Majalet Almahkama Alolia* (January 1981) Year 17, Vol.2, 153.

<sup>162</sup> This is because the letter might not be forged in this case. It might only be false. The court did not make sure whether the letter was forged according to the offence of forgery under the Libyan Penal Code. In addition, if the letter was forged, it would be an offence of using a forged document under Article 347 of the Libyan Penal Code.

<sup>163</sup> In this case, the name on the card must not be the name of the illegitimate cardholder.

<sup>164</sup> Thus, it may be mentioned that although these two methods (assuming a false name and assuming a false character) are similar, providing both of them may have its importance.

<sup>165</sup> Asagheer *supra* 141.

<sup>166</sup> The Arabic text of Article 336 of the Egyptian Penal Code states that

يعاقب بالحبس كل من توصل إلى الاستيلاء على نقود أو عروض أو سندات دين أو سندات مخالصة أو أي متاع منقول وكان ذلك بالاحتيال لسلب كل ثروة الغير أو بعضها إما باستعمال طرق احتيالية من شأنها إيهام الناس بوجود مشروع كاذب أو واقعة مزورة أو إحداث الأمل بحصول ربح وهمي أو تسديد المبلغ الذي أخذ بطريق الاحتيال أو إيهامهم بوجود سند دين غير صحيح أو سند مخالصة مزور وإما بالتصرف في مال ثابت أو منقول ليس ملكاً له ولا له حق التصرف فيه وإما باتخاذ اسم كاذب أو

criminal law because the illegitimate user is attempting to convince the seller that there is a loan from the issuer of the card which is used by the illegitimate user.<sup>167</sup> In other words, the card is supporting the lie of the user of the false card. Saed<sup>168</sup> also confirms that presenting the false card to the merchant and signing the receipt, which may be provided by the seller, could both be fraudulent methods. These two methods confirm the lie (the falsehood) of the user, which is that the card is legitimate. To sum up, one of these three means of deception is sufficient for the offence of deception to take place in the case that the deal is with a merchant or a service provider. However, although these three means are present when the illegitimate cardholder uses the card at the cash machines or at the self service machines for obtaining goods or services without any intervention from the servant, the offence of deception may not take place. This will be explored in the next point.

#### **6.4.2. Deceiving a Machine under Article 461**

If the card is used for withdrawing money at the cash machines or for obtaining goods at the points of sale but without dealing with merchants,<sup>169</sup> the presence of the deception offence is in doubt. The reason behind this is that it can be argued that the means which the deception offence requires may not exist because the idea of deceiving a machine is not acceptable under Libyan criminal law for many reasons. This argument was confirmed by the divergence of views between the interviewees on this matter.

As Chart 5 shows<sup>170</sup> when the interviewees were asked “Can the machine be deceived under Article 461 of the Libyan Penal Code?” the majority of the interviewees

صفة غير صحيحة...

See Egyptian Penal Code 1937. This Article is translated as:

A penalty of imprisonment shall be inflicted on whoever lays hold on moneys, offers, debentures, acquittal documents, or movable effects and luggage, by contrivance to strip a third party of all or part of his/her wealth either by resorting to fraudulence or deceptive methods that are apt to mislead others toward believing in the existence of a bogus project or false fact, creating hope of obtaining an illusory profit, settling an amount taken by deceptive methods, or deceiving others with the existence of [a] false debt, or forged acquittal document, or by disposing of a fixed or movable property which he does not own nor has the right of disposing thereof, or by assuming a false name or incorrect quality. Emphasise added.

A Mourad, *the English Translation for the Penal Law, its Formulas and its Arabic Texts* (Albaha Company, Alexandria) 261.

<sup>167</sup> The deceptive methods were not defined by the Libyan Penal Code or by the Egyptian Penal Code.

<sup>168</sup> MN Saed, ‘The Criminal Responsibility for the Illegitimate Use of Debit Cards: Comparative Study’ (PhD thesis, Cairo University 2005) 431.

<sup>169</sup> This is called a self service machine.

<sup>170</sup> See Chart 5, page 186.

answered no. Whereas 21 of the interviewees answered no, merely 18 answered yes.<sup>171</sup> This result is consistent among the prosecutors. As can be seen in Chart 5, 9 to 4 of the 13 prosecutors were of the opinion that the machine cannot be deceived. However, the result was not the same regarding the judges. It is notable that the majority of the judges answered yes and they agreed that the machine could be deceived under Libyan criminal law. As for the lawyers, the result was the same. 5 of the lawyers answered yes and 3 answered no. This may indicate to the fact that this matter is not clear because such cases have not happened in Libya. What confirms the fact that this matter may not be clear is that one of the interviewees, who was a scholar and expert in criminal law,<sup>172</sup> had no answer to this question. He stated that he was not sure whether Article 461 of the Libyan Penal Code was applicable to the use of the false credit or debit card at cash machines because the matter was in doubt and needed research. This means Article 461 may be vague.

Chart (5)<sup>173</sup>

Q. Can the machine be deceived under Article 461 of the Libyan Penal Code?				
Scholars	Abooda	Yes		
	Alansary	Yes		
	Alaraby		No	
	Arazgy		No	
	Bara			Not sure
Judges	Unnamed 44		No	
	Alasbaly	Yes		
	Alfetoory	Yes		
	Alhibaishy R		No	
	Unnamed 45	Yes		
	Almarkoob	Yes		
	Bennoor	Yes		
	Unnamed 43		No	
	Unnamed 39	Yes		
	Mansoor		No	
	Sohaim		No	
	Abuzaid		No	

<sup>171</sup> Some interviewees were not asked this question because there was no chance to do so. This was because the discussion of other questions took a long time.

<sup>172</sup> Mohammed Bara is a lawyer and a lecture at many law schools in Libya and a specialist in criminal law. He has published many books in criminal law such as *Explanation of the General Rules of the Libyan Penal Law, First Part: the General Rules* (The Green Company, Tripoli 2010); *Explanation of the Libyan Penal Law, the Special Section, Second Part, the Crimes of the Assault on Property* (The Green Company, Tripoli 2010) and *Explanation of the Principles of the law of Drugs and Mental Influences and its amendments* (Asr Aljemaheer, Alkhoms 2003).

<sup>173</sup> In the Chart above, the reader will see that some interviewees who are listed are unnamed and have numbers. The reason why they are not named is because they did not agree to be named in the thesis and the reason why they have numbers is because it is easy to classify their answers.

Prosecutors	Alahoal		No	
	Alhesan		No	
	Alhibaishy S		No	
	Alkelany		No	
	Alkraioy	Yes		
	Unnamed 41		No	
	Unnamed 40		No	
	Athelb	Yes		
	Atoonsy	Yes		
	Unnamed 42		No	
	Bashaara	Yes		
	Ibraheem			n/a
	Salem		No	
	Lawyers	Abuamood	Yes	
Abuarabeah			No	
Abujareeda				n/a
Albisht				n/a
Alhewaij		Yes		
Asagheer		Yes		
Azentany			No	
Benrajab		Yes		
Gadaad			No	
Tebar		Yes		
Solicitors		Anahaas		No
	Atabeeb			n/a
	Jarbooh		No	
	Mohammed			n/a
Notary	Asofrany	Yes		

The main reason for the answer “no” to the above-mentioned question,<sup>174</sup> in addition to other reasons, was that deception can only be practised on a human not on a machine.<sup>175</sup> Because the concept of deception requires that the victim, who is under the effect of the deception, must distinguish between the false and the correct facts, the machine may not be deceived because it does not have this ability. The machine cannot distinguish whether the card used is false or not. It has no will. The machine is only inanimate. Therefore, one interviewee questioned how the inanimate (the cash machine) can be a victim in this offence.<sup>176</sup> Conversely, although there is no doubt that the machine is inanimate, it may be argued that this is not to allege that the machine has no will because it has and its will is the will of the bank to which it belongs. The machine

<sup>174</sup> The question was that “Can the machine be deceived under Article 461 of the Libyan Penal Code?”

<sup>175</sup> This opinion was shared by many different categories of interviewees such as scholars, judges, prosecutors and lawyers. See this answer in appendix 3.

<sup>176</sup> Interview with Yousef Asofrany, Notary Public (Tripoli, February 2012).

represents the bank.<sup>177</sup>

### ***The Principle of Legality***

Another reason why the deception offence may not be applied in this case is the principle of legality. Like in the case of forging invisible information,<sup>178</sup> stating that Article 461 is applicable may not be compatible with the principle of legality. The reason why this consideration may be not compatible with this very well-known principle is that when the Article of deception was introduced, it did not mean the machine as a victim. The idea of deceiving a machine was not imaginable when the Libyan legislator provided the provision of deception.<sup>179</sup> The law merely meant deceiving a human.<sup>180</sup> However, it may be argued that Article 461 can be applied. The rationale is that Article 461 does not state that the victim of this offence must be a human. The Article only requires a particular means for obtaining the property. It does not determine the victim. Therefore, there is no prevention which may stand against the application of the offence of deception, and interpreting the Article so as to include deception practiced on machines does not breach the principle of legality.<sup>181</sup> In other words, the fraudulent methods can be practiced against a machine and they are not restricted to humans. In addition, it can be argued that deceiving a machine is imaginable. For example, if someone makes a hole in a coin and puts a silk in it and puts this coin in a public phone, which requires an amount of money to work, the machine will work. Imagine that when the time, which equals the amount of the coin ends, the phone will indicate that the call will end. However, if the user pulls the silk and the coin is also pulled and returns the coin again into the machine for another deceptive operation, would this not be a deception of the machine? If the answer is

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<sup>177</sup> This view was shared by some interviewees. See Interview with Mohammed Asagheer, Lawyer (Alkhoms, February 2012); Interview with Unnamed, No 39, Judge, Alkhoms Court of First Instance (Alkhoms, February 2012); Interview with Waleed Benrajab, Lawyer (Tripoli, March 2012); Interview with Mohammed Tebar, Lawyer (Tripoli, March 2012).

<sup>178</sup> This argument reminds us of another argument which is considering invisible information as a document breaches the principle of legality. See Chapter Four 4.3.1.

<sup>179</sup> In other words, there were no machines (such as cash machines) in Libya which dealt with human as today.

<sup>180</sup> Interview with Mostafa Alaraby, Lecturer, Faculty of Law, Alkhoms University (Alkhoms, March 2012).

<sup>181</sup> This view was shared by some interviewees such as Alkrioy and Bashara. Interview with Mohammed Alkrioy, Prosecutor, Alkhoms Prosecution Office, (Alkhoms, February 2012); Interview with Mohammed Bashara, Prosecutor, Alkhoms Prosecution Office (Alkhoms, February 2012). See their views in appendix 3.



“yes”, why is not the deceiving machine included in the offence of deception under Article 461 of the Libyan Penal Code?<sup>182</sup>

### *Libyan Supreme Court*

However, stating that the legislator meant humans not machines as a victim may be understood from many decisions of the Libyan Supreme Court. There are several cases which have dealt with deception and clarified that the victim of this offence is a human and this human victim must be affected by the means of the deception. For instance, in the above-mentioned decision of the Libyan Supreme Court which was held in 8/4/1980,<sup>183</sup> the court observed that: “If there was no effect of these forged documents on the victim to hand over the property (the subject matter of the offence), the offence will not take place. The victim must fall under a false impression rendering him to voluntarily hand over the property to the fraud.”<sup>184</sup> From this case, it is obvious that the court is conditioned for the deception to be present regarding the fraudulent method, which is the forged document in this case, and must be practiced on a human, not on a machine. Similarly, the Court confirmed this position in its decision on 14/2/1985.<sup>185</sup> It held that: “The fraudulent methods can be done by practicing external acts by the fraud against the victim and this act must defraud the victim and render him to believe the pretences of the fraudulent person.”<sup>186</sup> Evidently, the court in this case implied a fact that the deception could not take place unless there was a victim against whom the fraud was practiced. This victim must be human.<sup>187</sup>

### *English View*

This was observed by many western writers. For example, Arlidge and others confirm

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<sup>182</sup> This view was shared by some interviewees. Interview with Saleh Alhewajj, Lawyer, Ministry of Justice – Legal Practice People’s - Alkhoms (Alkhoms, February 2012); Interview with Jomaa Alfetoory, Justice, Civil Chamber, Libyan Supreme Court (Tripoli, March 2012). See appendix 3.

<sup>183</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.211, Year 26, 8/4/1980, *Majalet Almahkama Alolia* (January 1981) Year 17, Vol.2, 153.

<sup>184</sup> The text of the decision was translated from the Arabic language by the author.

<sup>185</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.406, Year 29, 14/2/1985, *Majalet Almahkama Alolia* (April-July 1986) Year 22, Vol.3-4, 138.

<sup>186</sup> The text of the decision was translated from the Arabic language by the author.

<sup>187</sup> The facts of this case are that on 4/9/1981, the offender went to the original owner of the car (the subject matter of the deception) which the offender stole from the victim (second owner) and lied that he bought the car from the second owner and he wanted the original owner to change the ownership in his name, because the car was still in the name of the original owner.

this by pointing out “Whatever the precise nature of the state of mind which must be induced, it cannot exist unless there is a mind for it to exist in”<sup>188</sup> Allen also stated that “Using a false coin to obtain items from a vending machine did not constitute obtaining property by deception as no person was deceived.”<sup>189</sup> Similarly, this point was observed in some cases. For instance, in *In Re London and Globe Finance Corporation, Limited*, Buckley J stated that “To deceive is ...to induce a man to believe that a thing is true which is false...”<sup>190</sup> Equally, in *Davies v Flackett* the court observed that if someone inserts a false coin into a machine, this person cannot be convicted under the offence of deception.<sup>191</sup>

In line with this tendency, the commission of law, before the Fraud Act 2006<sup>192</sup> was established, confirmed that a machine cannot be deceived. It stated that “If a person uses a false coin to operate a washing machine in a launderette, there is no obtaining of services by deception because no human being is deceived.”<sup>193</sup> The law commission reiterated this tendency on another occasion. It stated that

A machine has no mind, so it cannot believe a proposition to be true or false, and therefore cannot be deceived. A person who dishonestly obtains a benefit by giving false information to a computer or machine is not guilty of any deception offence.<sup>194</sup>

Therefore, the Fraud Act 2006<sup>195</sup> was introduced and made it clear that the deception,

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<sup>188</sup> A Arlidge and others, *Arlidge and Parry on Fraud* (2<sup>nd</sup> edn., Sweet and Maxwell, London 1996) 143. See also J Parry and others, *Arlidge and Parry on Fraud* (3<sup>rd</sup> edn., Sweet and Maxwell, London 2007) 85; R Card, *Cross Jones and Card: Introduction to Criminal Law* (6<sup>th</sup> edn., Butterworths, London 1988) 337; JC Smith, *The Law of Theft* (8<sup>th</sup> edn., Butterworths, London 1997) 97; Maureen Johnson and Kevin M Rogers, ‘The Fraud Act 2006: The E-Crime Prosecutor’s Champion or the Creator of a New Inchoate Offence?’ (2007) 21(3) *International Review of Law Computers and Technology* 295, 296; David Ormerod, ‘The Fraud Act 2006 - Criminalising Lying?’ [2007] *Criminal Law Review* 193, 199.

<sup>189</sup> M Allen, *Textbook on Criminal Law* (11<sup>th</sup> edn., Oxford University Press, Oxford 2011) 491.

<sup>190</sup> *In Re London and Globe Finance Corporation, Limited* [1903] 1 CH 728. In this meaning also see *Director Public Prosecution v Ray* [1973] 3 WLR 359. In this case, Lord Morris stated that “For a deception to take place there must be some person or persons who will have been deceived.”

<sup>191</sup> *Davies v Flackett* [1973] RTR 8 See also *Director Public Prosecution Appellant v Ray* [1973] 3 WLR 359; *Re Holmes* [2004] EWHC 2020; [2005] Crim LR 229.

<sup>192</sup> Fraud Act 2006.

<sup>193</sup> Law Commission of England and Wales, *Consultation Paper: Legislating the Criminal Code Fraud and Deception* (Law Com No 155, 1999) para 8.36

<sup>194</sup> Law Commission of England and Wales, *Fraud: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Law Com No 276, 2002) para 3.34. In this meaning, see also Law Commission of England and Wales, *Criminal Law: Conspiracy to Defraud* (Working Paper No 56, 1974) 10; Law Commission of England and Wales, *Criminal Law: Conspiracy to Defraud* (Working Paper No 104, 1987) 34.

<sup>195</sup> Fraud Act 2006.

which may be practiced on humans, has the same consequences when it is practised on a machine. Section 2(5) states

For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications (with or without human intervention).<sup>196</sup>

As a result of this section, a machine now can be deceived and but not under the old Act. This defiantly includes the use of a false credit or a debit card at cash machines or at points of sale where machines operate and respond without any need for human intervention. From this discussion, it can be confirmed that Article 461 is not sufficient to deal with the use of a false credit or debit card at the cash machine or at the point of sale if there is no human to deal with it.

## 6.5. CONCLUSION

This Chapter has examined whether forgery law<sup>197</sup> in Libya and some other Articles under the Libyan Penal Code<sup>198</sup> could cover the use of false credit and debit cards. The use of a false credit or debit card may be for withdrawing money from cash machines or may be for obtaining goods or services from the merchants or service providers. During the transactions, the user may deal with humans and may deal with machines. Because this use of false cards is considered a new activity which is not specified under Libyan criminal law; and because, as has been seen in previous Chapters that, credit and debit cards are a controversial issue with regards to, whether they are the subject matter of forgery or not,<sup>199</sup> this Chapter has explored three potential applicable articles under the Libyan Penal Code. These Articles are Article 347(2) which governs the offence of using a forged document, Articles 444(1) and 446(2) which govern the offence of theft, and Article 461 which governs the offence of deception. All these offences have a problem in relation to the application of this use.

The problem which Article 347(2) faces is first the reflection of the problem of the subject matter of forgery, whether the cards are documents or not in the context of

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<sup>196</sup> *Ibid.*

<sup>197</sup> The provisions of forgery under the Libyan Penal Code. See the full Arabic and English text of these Articles in appendix 1.

<sup>198</sup> These Articles are 444(1), 446(2) and 461 of the Libyan Penal Code. Libyan Penal Code 1953.

<sup>199</sup> For more details, see Chapters Three and Four.

forgery offences. It has been seen that there was no agreement between the interviewees on whether the use of these false cards is covered by the Article. This is because the Article requires three elements, one of which is a forged document. Because the cards are in doubt as to whether they are documents or not, the absence of the subject matter of the offence under this Article is an issue. The second problem is that the card must be forged, as required by forgery law in Libya. In addition, Article 444(1) and Article 446(2) also raise a problem relating to the use of these false cards. The problem of these two Articles is that the presence of appropriation which is required for the theft offence to be completed under these Articles is debatable. The reason behind this problem, as has been seen, is that appropriation requires that handing over the property must be without the consent of the owner of the property. However, handing over the money from the cash machine to the user and handing the goods from the merchants to the user are voluntary. The only Article which may be applicable on some occasions on the use of these false cards is Article 461 (which covers the deception offence). The Article can be applied in terms of using the false cards at the points of sale, provided that there is a human operating the transaction. If the transaction is not dealt with by a human but only by the machine itself, Article 461 may also not be applied. The reason behind this is that there is an argument as to whether the deception or fraud can be practised on the machine. The scholars and the interviewees do not all agree that a machine can be deceived, which seems a reasonable view.<sup>200</sup>

Thus, it can be stated that the use of false documents is not covered by the Libyan Penal Code. It is obvious that all the potential Articles which were explored in this Chapter are inadequate to deal with all the uses of false credit or debit cards. It is submitted that there should be an intervention from the legislator in Libya to solve the problem of credit and debit card forgery by making it clear that the card is a document.<sup>201</sup> In addition, the legislator should amend Article 347(2). The word “forged” should be amended to be “false”. Then, Article 347(2) can be applied. Further, the use of false credit or debit cards at electronic devices should be considered the same as using them at the point of sale. The researcher also suggested that the legislator should intervene to add a new section to Article 461. This section can be as following, “any deception

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<sup>200</sup> For more details, see Section Four of this Chapter.

<sup>201</sup> This recommendation is considered as a confirmation of what has been suggested in Chapter Four. See the conclusion of Chapter Four.

practiced on a machine is considered as a deception practised on a human”, or it may be as follows “for the purpose of this article deception may be practiced on human or on a machine.” However, this suggestion may be not necessary if the recommendations with respect to the use of false credit and debit cards are considered by the legislator because, using these false cards will constitute a crime under forgery law.<sup>202</sup> If the legislator intervened by amending and adding articles 347(2) and 461 as suggested, the theft offence would not be required to be applied, and the card would not need to be considered as a modified key. Therefore, there would be no need for Articles 444(1) and Article 446(2) to be considered.

However, there is another problem which these false cards may face. These false cards may not be *used*.<sup>203</sup> The question which arises here is whether the possession of the false credit and debit cards deserves to be criminalised under Libyan criminal law. This question will be the subject of the next Chapter.

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<sup>202</sup> The purpose of this thesis is to consider forgery law whether it is sufficient or not to deal with credit and debit card forgery. Hence, exploring the offence of deception in this Chapter is only to explain how complex the problem of the use of false credit and debit cards is.

<sup>203</sup> That is to say that they may only be possessed.

## CHAPTER SEVEN

### THE POSSESSION OF FALSE CREDIT AND DEBIT CARDS UNDER THE LIBYAN PENAL CODE

#### 7.1. INTRODUCTION

This Chapter explores whether the possession of false credit and debit cards in Libya deserves criminalisation under the Libyan Penal Code<sup>1</sup> and how the offence of possession should be defined. In other words, is there any demand for a new offence relating to the possession of false credit and debit cards in Libya? Thus, the aim of this Chapter is not to examine whether the Articles of forgery apply to the possession of false credit and debit cards. This is because there are no provisions criminalising the possession of false credit and debit cards.

This Chapter is different from the previous Chapters because, what has been explored above is whether the provisions of the offence of forgery<sup>2</sup> and the offence of the use of forged documents<sup>3</sup> under the Libyan Penal Code can be applied to the forgery of credit and debit cards and the use of these forged cards. There are provisions under the law of forgery, criminalising the act of forging documents and using forged documents. The aim of those Chapters was to explore whether the existing forgery Articles can be applied to the *forgery* of credit and debit cards and the *use* of these false cards. However, the difference in this Chapter is that there is no dedicated Article,<sup>4</sup> under the forgery provisions, criminalising the act of the possession of a forged document or paper.<sup>5</sup>

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<sup>1</sup> Libyan Penal Code 1953.

<sup>2</sup> This was explored in Chapters Three, Four and Five.

<sup>3</sup> This matter was examined in Chapter Six.

<sup>4</sup> Although as will be seen later, Article 258 of the Libyan Penal Code may be applied to a particular case of the possession of false documents or papers in general, there is no special Article under this code criminalising the possession of false documents, or false credit and debit cards.

<sup>5</sup> Another difference between the previous offences (the offence of credit and debit card forgery and the offence of using false credit and debit cards) and the offence of the possession in question is the subject matter of this offence. Whereas the subject matter of forgery and the offence of using false credit and debit cards is a credit or a debit card, the subject of the possession is not only credit and debit cards but also includes other equipment which may be used for making new false credit and debit cards or changing their information. This is because the philosophy of the criminalisation of the possession of false cards is not only to prevent the use of false credit and debit cards, but also to prevent the forgery on credit and debit cards. Therefore, this Chapter will attempt to suggest a foundation of the offence of the

The absence of a dedicated and comprehensive Article, under the Penal Code's forgery provisions, criminalising the possession of false credit and debit cards, requires the author to consider other Articles of the Libyan Penal Code.<sup>6</sup> As will be seen later, this examination results in the fact that Article 258 of the Libyan Penal Code may be able to cover the possession of false credit and debit cards.<sup>7</sup> Despite the fact that this Article may be applicable to some acts of possession in terms of forgery, it cannot cover all the acts of possession. Equally, the absence of a special Article under forgery law in Libya requires an investigation of whether the possession of false cards should be criminalised in Libya or not. For this purpose, the question was asked<sup>8</sup> in the interviews conducted in Libya,<sup>9</sup> the answers to which indicate that there is a demand for the possession of false credit and debit cards to be made a crime. Possessing these false cards may lead to harm which endangers the public and individual interests in Libya. Thus, criminal protection should be provided.

This Chapter will be divided into two sections. In the first section the question of whether the possession of false credit and debit cards should be criminalised will be explored. The reasons in favour of criminalisation and the reasons against criminalisation of the offence of the possession of false credit and debit cards will be considered in turn. It will be seen that there is more than one reason which calls for criminalising the possession of false credit and debit cards. One reason is the harm affecting society and individuals. This reason was provided by some interviewees in Libya. Another reason is that this harmful possession is already criminalised in laws in different countries, such as the UK<sup>10</sup> and the US.<sup>11</sup> In addition to these reasons, it will be seen that criminalisation of false credit and debit cards may be a logical result. This is because, currently, Libyan law only criminalises the hiding of genuine documents.<sup>12</sup>

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possession so as to become guidelines for a new potential offence of possession, which the legislator in Libya can follow.

<sup>6</sup> This will be discussed later in section two of this Chapter.

<sup>7</sup> Some interviewees suggested that the possession of false documents including credit and debit cards may constitute another crime. However, they did not specify a particular Article, thus the researcher has to examine whether this view was correct or not.

<sup>8</sup> The question was that "Do you think that the possession of false credit and debit cards should be criminalised?" See Chart 6, page 197.

<sup>9</sup> The interviews were conducted in the period between February and March 2012.

<sup>10</sup> See Section 5 of the Forgery and Counterfeiting Act 1981. Forgery and Counterfeiting Act 1981.

<sup>11</sup> See for example the Model Penal Code 1962.

<sup>12</sup> It will be seen that Libyan criminal law criminalises the act of hiding, destroying or damaging a genuine document under Article 348 of the Libyan Penal Code.

As for the reasons behind the opposite view, it will be seen in section one that there are three reasons to oppose criminalisation: first, possession may already constitute a crime under the Libyan Penal Code;<sup>13</sup> second, possession is only a preparatory act to the use of false credit and debit cards and does not require criminalisation; third, possession is not a crime in Libya similar to other Arabic countries.

Although there is no agreement between the interviewees on criminalisation, section two provides the framework of the criminalisation of the possession of credit and debit cards.<sup>14</sup> In this section, three elements of the suggested offence will be clarified, the actus reus, the mens rea and the subject matter of possession. It will be seen that the main problem in the act of possession is the concept of possession. The problem arises because the boundaries of possession have not been obvious for a long time.<sup>15</sup> In addition, possession is not determined under Libyan criminal law and it is different in criminal law from how it is in civil law.<sup>16</sup> Another problem which may arise relating to the actus reus of possession is when possession is the result of another crime, namely forgery and possession.<sup>17</sup> Should this be left to the general principle of the Libyan Penal Code or should it be treated in a different way? Regarding the mens rea, the main important thing is that the possessor should know that he possesses a false credit or debit card. This is stressed because as will be seen in *Warner*,<sup>18</sup> the possessor may be considered as a possessor of credit and debit cards without any knowledge of their falsity or even with no knowledge of their possession. Therefore, this Chapter will examine the following issues:

- Possession: criminalisation in balance
- Offence and framework

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<sup>13</sup> Although Article 258 is the only Article under the Libyan Penal Code which may be applicable to this possession, it will be seen that this Article is not sufficient for all acts of the possession in question.

<sup>14</sup> This is important if the legislator would prefer to follow the technological development and not isolate Libya from the international community in terms of the field of the use of credit and debit cards.

<sup>15</sup> LS Sealy and RJA Hooley, *Commercial Law: Text, Cases, and Materials* (4<sup>th</sup> edn., Oxford University Press, Oxford 2009) 73.

<sup>16</sup> As will be seen in Section two of this Chapter, the concept of possession under civil law is wider.

<sup>17</sup> The possession of false credit or debit cards may be the result of forgery if the forger keeps the false card under his possession after completing its forgery. This will be examined more deeply later.

<sup>18</sup> *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256.



## 7.2. THE POSSESSION: CRIMINALISATION IN BALANCE

Considering the offence of possession of false credit and debit cards, the value of this criminalisation should be examined. In fact, it is debatable whether this possession deserves to be a crime or not in Libya.<sup>19</sup> The interviews conducted in Libya indicate that there is no consensus on the criminalisation of the possession of false credit and debit cards, although the majority of the interviewees confirmed this possession should be criminalised.<sup>20</sup> As can be seen from Chart 6 below,<sup>21</sup> the majority of the interviewees answered “yes” to the question: “Do you think that the possession of false credit and debit cards should be criminalised?” More than the half of the interviewees (26 to 19)<sup>22</sup> were of the opinion that the possession of false credit and debit cards is an unwelcome act. The rationale behind these two different positions was varied. Whereas the main reason, which the proponents of criminalisation called for, was the harm or the potential harm which may be generated from this undesirable possession, the reasons, which the adversaries provided, was that this act may constitute another crime. They questioned why it needs to be criminalised. Another reason is that possession of false credit and debit cards may be an act preparatory to the offence of using false credit and debit cards. In this section the reasons behind both these views will be examined.

Chart (6)<sup>23</sup>

Q. Do you think that the possession of false credit and debit cards should be criminalised?				
Scholars	Abooda	Yes		
	Alansary	Yes		
	Alaraby	Yes		
	Arazgy		No	
	Bara	Yes		
Judges	Unnamed 44		No	
	Alasbaly		No	
	Alfetoory		No	
	Alhibaishy R		No	
	Unnamed 45	Yes		
	Almarkoob		No	

<sup>19</sup> Although this possession constitutes an offence in other countries, such as the UK. This will be seen later.

<sup>20</sup> The interviews were conducted in Libya in the period between February and March 2012.

<sup>21</sup> See Chart 6, page 197.

<sup>22</sup> As can be seen from chart 6, although some interviewees agreed for the possession of false credit and debit cards to be an offence, they denied this in the general document. This is because of the importance of these cards.

<sup>23</sup> In the Chart above, the reader will see that some interviewees who are listed are unnamed and have numbers. The reason why they are not named is because they did not agree to be named in the thesis and the reason why they have numbers is because it is easy to classify their answers.

	Bennoor		No	
	Unnamed 43	Yes		
	Unnamed 39	Yes		
	Mansoor		No	
	Sohaim	Yes		
Prosecutors	Abuzaid		No	
	Alahoal	Yes		
	Alhesan	Yes		
	Alhibaishy S		No	
	Alkelany		No	
	Alkraioy	Yes		
	Unnamed 41	Yes		No for documents in general
	Unnamed 40		No	
	Athelb	Yes		
	Atoonsy	Yes		
	Unnamed 42	Yes		
	Bashaara		No	
	Ibraheem	Yes		
	Salem	Yes		
Lawyers	Abuamood	Yes		No for documents in general
	Abuarabeah	Yes		
	Abujareeda	Yes		
	Albisht	Yes		No for documents in general
	Alhewaij	Yes		
	Asagheer	Yes		
	Azentany		No	
	Benrajab		No	
	Gadaad		No	
Tebar		No		
Solicitors	Anahaas		No	
	Atabeeb	Yes		
	Jarbooh	Yes		
	Mohammad		No	
Notary	Asofrany	Yes		

### 7.2.1. The Possession Should be Criminalised

Criminalising the act of possession of false credit and debit cards was the opinion of many interviewees. The main reason<sup>24</sup> for the criminalisation which these interviewees called for revolved around the concept of harm which may arise from this unacceptable act.

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<sup>24</sup> There are other reasons, such as criminalising the possession of false credit and debit card is a logical result and possession may lead to their use. This will be explored in the next point.

### ***The Possession of False Cards is Harmful.***

Although the main reason, which brought the interviewees to this opinion (the criminalisation of the possession of false cards), was that the possession of the false mentioned cards could be harmful, these interviewees did not justify their argument. They did not provide any interpretation for this opinion.<sup>25</sup> They only stated that possession could harm others and should be criminalised. Therefore, this argument may not be convincing if it is not explored. For this reason, the author attempts to examine this reason. Hence, it is submitted that this allegation is acceptable.<sup>26</sup> This reason may be justified and harm may be interpreted in the context of credit and debit card forgery. One interpretation is that this possession may threaten society. This threat may be a general threat which does not threaten a particular person. Or, harm may be understood as a danger threatening a particular individual.

### ***General Harm***

With respect to general harm, this may materialise in the fact that the possession of false cards leads to destabilisation of confidence in the credit and debit cards themselves, which in turn may affect the future of and the use of these cards in Libya. When the possession of false cards is left without criminalisation, people in Libya might feel that these cards do not have sufficient protection. They may feel that some cards, which existed in the market, are false. This danger may threaten society and prevent people from dealing with these cards which in turn may lead to the preference of using cash instead. Consequently, all of society may be affected by not taking

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<sup>25</sup> In other words, there was no explanation provided for the concept of harm.

<sup>26</sup> Generally speaking, Harm can be a good reason for criminalisation. This is confirmed by many writers. For example, Mill states that

the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

JS Mill, *On Liberty* (Penguin Books, London 2010) 17. Equally, Herring points out that the principle of harm “is seen as a line between that conduct which is suitable for criminalization and that conduct which is not.” J Herring, *Great Debates: Criminal law* (2<sup>nd</sup> edn., Palgrave Macmillan, London 2012) 1. In this respect, see also A Ashworth, *Principles of Criminal Law* (6<sup>th</sup> edn., Oxford University Press, New York 2009) 38. Ashworth states that

One kind of justification offered for criminalization is that certain conduct may create an opportunity for serious harm to be caused subsequently. The preventive function of the criminal law may be interpreted as licensing the stare to criminalize conduct that creates the risk of a certain harm: the conduct may not be wrongful or harmful in itself, but it is criminalized because of the consequences that may flow from it.

advantage of these cards.<sup>27</sup>

In addition, the economy in Libya also may be affected. Leaving the possession of these cards without criminalisation may prevent people from other countries dealing with the banks in Libya because of a lack of security (criminal protection). They may avoid using these cards because they might think credit and debit cards are false. Western countries are card-using societies rather than cash-using societies. This also may increase the danger which Libya may face because Libya may become isolated from the world. The reason behind this is that banks in other countries may not deal with banks in Libya in this context because they may feel that there is no sufficient protection against forgery of credit and debit cards.

### ***Special Harm***

The possession of false credit and debit cards may also harm individuals such as the victim and the issuer of the cards. The victim may suffer from the possession of these cards even though these cards are not used. The victim may be harmed physically or emotionally.

### ***Physical Harm***

Physical harm lies in the fact that the position of the victim (the one in whose name the card is falsified) may be affected. An example may illustrate this allegation.<sup>28</sup>

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<sup>27</sup> The advantages which credit and debit cards offer are various. They offer the cardholder the ability to obtain cash at any time without carrying money. The cardholder will be secured. He will avoid the risk which carrying money may cause, such as theft. In addition, a cardholder can obtain goods and services in easy ways. He may use these cards to obtain the services or goods online or by telephone.

<sup>28</sup> Suppose that someone, who was an employee in a bank, knew that some false credit or debit cards are possessed by a particular person (possessor). Suppose also that the victim in whose name these false cards were falsified did not know anything about the forgery or the possession of these cards. The employee informs the bank to be aware of the customer (victim) as a precautionary measure (this is what banks usually do if they feel any danger, which may affect their properties). As one of the precautionary measures, the bank refused to provide the one in whose name these false cards were issued (the victim) with a loan which he had already applied for. The reason behind this precautionary measure is that the bank doubts that the victim may know of the false cards or he may be the one who falsified them. Because of this fear and the anxiety, which generated from this possession, the bank could not provide the victim with any loan. In this case, it cannot be denied that the victim was harmed. However, it may be argued that this physical harm can be treated by compensation. This is correct. However, this is not the only harm, which may be generated from the possession of false credit and debit cards. There is emotional harm and potential harm in addition to other reasons supporting the criminalisation.

### ***Emotional Harm***

In addition to this potential physical harm, the victim would probably suffer emotional harm. In the last example, the victim may feel frustrated and disappointed because he would think about the reason for which these false cards in his name are possessed. He may think that he has done something wrong to others and they are trying to take their revenge back which in turn may lead to another dangerous result. When he feels there is no fair reward for the possessor, the victim may attempt to harm him,<sup>29</sup> or he may attempt to steal this false card.<sup>30</sup> As a result, the victim may change from a good person to a dangerous person. In short, he may become a criminal.

### ***Potential Harm***

In addition, the banks which issue the cards and the financial institutions under whose supervision the cards are issued, may be affected by this possession. It may be susceptible to a potential harm. In *Taj (Kamran) and others*<sup>31</sup> it was held that:

Considering the number of cards found and that could have been reproduced from the material that had been ordered, the potential loss to the credit card companies and banks could have been about £34 million.<sup>32</sup>

The judge also mentioned that “offences of such a nature undermined the efficacy of the credit and debit card system.”<sup>33</sup> However, it may be argued that this potential loss only exists in the imagination of the judge. Cards may be used and this amount mentioned by the judge would not take place. Conversely, mentioning this large amount of money does not necessarily mean that this amount would be lost by the company or banks. Mentioning this amount is only to show how the problem of the possession of false credit and debit cards is important, and how the danger of this possession is serious. Further, it underscores the fact that such possession deserves to be punishable.

Another argument may be that the possession of false cards does not harm the victim

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<sup>29</sup> This may take place if the possessor is known to the victim.

<sup>30</sup> This may happen if the victim knows the place in which the false cards are kept.

<sup>31</sup> *R v Taj (Kamran) and others* [2003] EWCA Crim 2633.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* Similarly, the prosecution in *Ameen* “alleged that the total amount lost to banks and other companies was in excess of £241,000, and attempts were made to cause further losses in the amount of £244,000.” *R v Ameen Din and others* [2004] EWCA Crim 3364. In addition, it is believed that the forged credit cards seized could have led to British banks losing £5m. See also Rob Griffin, ‘Credit Card Forgers Await Sentencing’ *The Guardian*, 13 January 2001.

because he is merely harmed by the forgery of these cards, not by their possession. This is correct, but only if the forger is known, or he is the same one who possesses the false cards. On the other hand, the case here is that the forger is unknown and the possessor is not the same person who forges the cards and he does not participate in the forgery.<sup>34</sup> However, what if the forger is not known and the false cards are not used<sup>35</sup> but they are possessed by someone other than the forger? In this case, it may be argued that the victim would be harmed without protection and the possessor has no appropriate retribution, deterrence or reward. Therefore, criminalising possession should be a good solution for combating forgery.<sup>36</sup>

### ***Criminalisation is a Logical Result***

It may be argued that criminalising the act of possession of false credit and debit cards is a logical result. Considering the provisions of forgery,<sup>37</sup> it is evident that the possession of genuine documents without the consent of the one to whom the document belongs is a crime under Article 348.<sup>38</sup> The literal translation of this Article is that: “Anyone, who destroys,<sup>39</sup> damages<sup>40</sup> or conceals a formal valid document, shall be punishable by imprisonment for a term not exceeding 5 years. And it shall be subject to imprisonment if the act happens on customary documents with an intention mentioned

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<sup>34</sup> If the forger is the same one who forges the cards, he will be responsible for the forgery which has been discussed in previous Chapters. However, as has been emphasised, forgery is not punishable if the card is not used. See particularly Chapter Five 5.4. Thus, the criminalisation of false credit and debit cards should not be denied.

<sup>35</sup> The reason behind this is that if they are used, the possessor will be responsible for the use of false cards which has been discussed in Chapter Six.

<sup>36</sup> This is so whether in respect of credit and debit cards in particular or forgery of false documents in general.

<sup>37</sup> As has been mentioned, forgery offences are governed by Articles from 341 to 355 under the Libyan Penal Code. See these provisions in appendix 1. Libyan Penal Code 1953.

<sup>38</sup> The Arabic text of this Article provides that

كل من أعدم أو أثلّف أو أخفى وثيقة صحيحة رسمية يعاقب بالسجن الذي لا تزيد مدته على خمس سنوات. وتكون العقوبة الحبس إذا تعلق الفعل بأوراق عرفية وتوفر الغرض المبين في المادة السابقة.

*Ibid.*

<sup>39</sup> Regarding the way of destroying the document, it can be committed by any conduct such as tearing a document into many pieces so it cannot be read or burning it until it disappears. EG Adahabi, *Crimes Breaching Public Trust in the Libyan Penal Law* (Almaktaba Alwatania, Benghazi 1972) 265.

<sup>40</sup> With regards to the damage, it might be any act which makes the document has no sense although it physically still exists. Damage can be complete or partial. In case of being complete, damage may constitute one of the offences of forgery. The reason behind that is that it may leads to altering some information on a document which means forgery. *Ibid* 266.

in the previous Article.<sup>41</sup> It can be understood from this Article that if someone hides or keeps another's document (formal or customary) without permission of the owner of the document, this act will fall under this Article. This offence takes place by hiding the document and keeping it in a place where nobody can reach it. The document hidden should remain in its original state.<sup>42</sup> Despite the fact that the Libyan Penal Code does not provide how long the document must have disappeared,<sup>43</sup> Adahabi points out that it is logical to state that the hiding must last for a period during which the document cannot be used when the owner needs it.<sup>44</sup>

Therefore, considering credit and debit cards as documents under the Libyan Penal Code, as Salem argues<sup>45</sup> if a credit or a debit card was hidden, the party concealing the card would be responsible for this act under Article 348 because he had hidden a document. He would be liable for the possession of a genuine document (a credit or a debit card). Suppose that another one possesses a false credit card. A question may arise "how the possession of a genuine document is a crime and the possession of a false document is not so?" Which Act in this example is more dangerous? Is it the possession of the genuine credit card or the possession of the false credit card?

It is submitted that the possession of a false credit card is more dangerous than the possession of a genuine credit card because in the case of hiding a real credit card, the cardholder would realise that his card is in the possession of the concealing party or at least (if the cardholder does not know that his card is hidden by someone) he would realise that he had lost his card. Therefore, he would take some measures such as reporting the matter to the bank so the hider may not be able to use this card.<sup>46</sup> In

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<sup>41</sup> The intention required by Article 347 which is the previous Article, as has been mentioned in Chapter Six, is that the actor intends to obtain a benefit for himself or for others or harming others. See Chapter Six 6.2.1. Article 348 was translated from the Arabic language by author.

<sup>42</sup> If the document is changed or destroyed by the hider, the act of hiding a document would not be applied although the same Article may be applicable. This is because the actor may intend to destroy or damage the document. In this case, the Article would be applied not because the actor hides the document but because he destroys or damages it.

<sup>43</sup> Equally, the Libyan Supreme Court has not clarified this point.

<sup>44</sup> *Ibid* 267.

<sup>45</sup> O Salem, *The Criminal Protection of Debit Cards: Comparative Study* (Dar Anahda Alarabia, Cairo 1995) 32. It should be mentioned here that accepting credit and debit cards as documents is only for the sake of argument. The researcher does not consider credit and debit cards as the subject matter of forgery under the Libyan Penal Code. The reason behind this is that, as mentioned in Chapter Four, credit and debit cards are a new concept which was not meant by the legislator when it provided the provisions on forgery. For more details, see Chapter Four.

<sup>46</sup> When a credit or a debit card is lost, the cardholder has to report this loss to the bank (the issuer of the

contrast, however, in the case of the possession of a false credit or debit card, the one in whose name the card is possessed does not usually know there is a false card possessed in his name. This card may be used anytime and he cannot prevent this use.<sup>47</sup> Thus, the danger in the latter case is greater than the one in the former case because it is hard to be prevented. Hence, it is logical to make this possession an offence the same as the possession of the genuine credit and debit cards.

### ***The Possession may Lead to Use***

It may be argued that one of the reasons, which may support the criminalisation of the possession of false credit and debit cards, is that the possession in terms of forgery may bring about the use of the false credit and debit cards. The use of false credit and debit cards is usually preceded by possession because for the user to use the false card, this card must be held. It does not matter whether the possession is long<sup>48</sup> or is short.<sup>49</sup> Thus, if the possession is criminalised, it may prevent or at least diminish the opportunity for the commission of the offence of the use of false credit and debit cards. This is true, even the possessor holds the false card with no intention to use it. He may, after possessing the false card change his mind and attempt to use it. On the other hand, it may be argued that even the possession leads to the use, the possessor will be punished by applying the provision of the offence of the use of false document. Therefore, there is no need for the offence of the possession. The answer to this argument can be that the purpose of the criminalisation in this course is not only to prevent the use of false credit and debit cards. The reason behind that is also because the possession itself is harmful. Thus, why is the act of possessing a false card not

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lost card) immediately, “in order to limit their liability for unauthorized use.” See Jasper MC, *Credit cards and the law* (3<sup>rd</sup> edn., Oxford University Press, New York 2007) 26. Lăcrămioara Balan and Mihai Popescu, ‘Credit Card Fraud’ (2011) 11(1) *The USV Annals of Economics and Public Administration* 81. Reporting the loss is not only the obligation which the cardholder has to undertake. Cardholder has also to report any fraud which he may face to the issuer. Although this may not be easy to prove, it is important. See N Ryder, *Financial Crime in the 21st Century: Law and Policy* (Edward Elgar Publishing, Cheltenham 2011) 135.

<sup>47</sup> It can be argued that if the possessed false credit card is used, this would be another issue. The issue would be whether the offence of using false credit and debit cards can be covered by the provisions of forgery or not and this issue has been explored in the previous Chapter. On the other hand, the researcher only here attempts to show the difference between criminalising the possession of genuine credit and debit cards and the false credit and debit cards, not to discuss the matter of using a false card.

<sup>48</sup> The possession may be long if the possessor keeps the used card in his possession for long time (for example three months) before using it.

<sup>49</sup> This may be if the possessor uses the card immediately (for example after an hour) after receiving it from another.



criminalised by lighter punishment? By doing so, the use of the false credit and debit cards may be prevented and the harm of the possession may be avoided.

### ***This Act may be Used as a Pretext***

When the possession of false credit and debit cards remains lawful, it may be used as a pretext to hide another crime such as the offence of forgery. For example, suppose that someone makes a number of false credit cards. This person is arrested with this large number of cards. He may allege that he only possesses these cards without any intention but he does not forge them. In addition, this act may be used for hiding the offence of the use. Logically these false cards are held to be used<sup>50</sup> whether by the possessor or by another regardless of the intention of the possessor.<sup>51</sup> This is the obvious reason for possessing a large number of false credit or debit cards. In this case, the possessor may use this possession as a pretext to allege that he would not use the card but only he is a possessor. However, if someone holds some false cards and is asked why he holds them, the answer would be unacceptable if he states that these cards are only kept as a curio,<sup>52</sup> although he is not legally liable for this action.

### ***The Possession of False Cards is Criminalised in other Laws***

Another reason, which may be added in the interest of criminalisation, is that the possession of false credit and debit cards is criminalised in many countries.<sup>53</sup> It may be argued that if the possession is criminalised in many countries, why is it not a crime in Libya? For example, under the Forgery and Counterfeiting Act 1981,<sup>54</sup> the possession

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<sup>50</sup> In *Gbolahan Anthony Owolabi*, the appellant has in his possession, additional to three credit cards which were used, a further seven credit cards hidden in a magazine. Further, at his address, more than 130 false credit cards were found, additionally a credit card reader and other machines suspected of being used to produce credit cards. *Regina v Gbolahan Anthony Owolabi* [2010] EWCA Crim 3184. Another example is *Joseph* in which

There were a large number of blank plastic credit and/or debit cards, along with a machine that could be used to emboss the cards with details of account holders, account numbers, sort codes and the like.

*Regina v Joseph King* [2009] EWCA Crim 1631.

<sup>51</sup> Possession may not be with intention to use the card. However, the card may be used at any time.

<sup>52</sup> One of the interviewees claimed that the possession of credit and debit cards should not fall under criminalisation because these cards may be possessed as curio. Interview with Waleed Benrajab, Lawyer (Tripoli, March 2012).

<sup>53</sup> For example, the possession of false credit and debit cards is a crime in the UK and US.

<sup>54</sup> Forgery and Counterfeiting Act 1981.

of false cards is a crime. Section 5 of the mentioned Act, makes it an offence for anyone to possess a false credit or debit card.<sup>55</sup> It states that

(1) It is an offence for a person to have in his custody or under his control an instrument to which this section applies which is, and which he knows or believes to be, false, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

(2) It is an offence for a person to have in his custody or under his control, without lawful authority or excuse, an instrument to which this section applies which is, and which he knows or believes to be, false.

The instrument, which these two paragraphs mean, includes credit and debit cards as paragraph 5 states.<sup>56</sup> In addition, this Act criminalises the possession of any machine or device or any material which is specially adapted or designed for producing false cards.<sup>57</sup>

Another example is United States law. Under the Model Penal Code<sup>58</sup> the possession of credit and debit cards and anything which may be used for making a false credit or debit card is considered as an offence. Section 5.06(1) of the Model Penal Code states that: "...A person commits a misdemeanor if he possesses any instrument of crime with the purpose to employ it criminally." "Instrument" is defined to include false credit and debit cards. This Section in the same paragraph defines the instrument of crime as

(a) anything specially made or specially adapted for criminal use; or

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<sup>55</sup> In addition to other instruments which are provided in Section 5(5) of the Forgery and Counterfeiting Act 1981. *Ibid.*

<sup>56</sup> Paragraph 5 of Section 5 of the Forgery and Counterfeiting Act 1981 states that  
The instruments to which this Section applies are—

...  
(ja) debit cards;  
(k) credit cards;  
.....

*Ibid.*

<sup>57</sup> Section 5(3) stated that

It is an offence for a person to make or to have in his custody or under his control a machine or implement, or paper or any other material, which to his knowledge is or has been specially designed or adapted for the making of an instrument to which this section applies, with the intention that he or another shall make an instrument to which this section applies which is false and that he or another shall use the instrument to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

*Ibid.*

<sup>58</sup> Model Penal Code 1962.

(b) anything commonly used for criminal purposes and possessed by the actor under circumstances which do not negative unlawful purpose .<sup>59</sup>

Thus, there is no reason why the legislator in Libya cannot to be inspired by other laws, specially the problem of credit and debit cards, because it is more than just a local problem. The possession of false cards is a common danger and a global problem. The card may be forged in the UK, possessed in Libya, and used in the US.<sup>60</sup> Thus, the efforts of the countries, against credit and debit card crimes, must unite and laws should be similar in this aspect, so the forger or the possessor cannot think he may avoid the retribution of his act in any part in the world.

Conversely, it may be argued that the culture in Libya is different from that in other countries criminalising the possession of false credit and debit cards. In other words what is considered morally wrong in one place may be not so in another place. For example, in the UK, having sex with the consent of the couple is not a crime if they are both over 18.<sup>61</sup> Yet, this is not the case in Libya. In some Muslim countries, including Libya, a sexual relationship is not permissible at any age because of the religion.<sup>62</sup> Marriage is the only relation, which ties men and women. Thus, the culture in these countries may not accept a law, which suggests that this act may be lawful.<sup>63</sup>

Possession, in contrast, is not the same. There is no cultural prevention, which may render the legislator to hesitate to criminalise the act of possession of false credit and

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<sup>59</sup> *Ibid.*

<sup>60</sup> As has been mentioned previously, there are some companies, specialising in producing false credit and debit cards that create false cards and distribute them throughout different countries in the world. Katherine J Barker and others, 'Credit Card Fraud: Awareness and Prevention' [2008] *Journal of Financial Crime* 398, 400.

<sup>61</sup> See Section 1 and the following Sections of the Sexual Offences Act 2003.

<sup>62</sup> Having sex without marriage is also prohibited in Islam. This prohibition was confirmed in many Verses in the Holy Quran. For example, in Verse 32 of Surah Al-Israa, the Quran states:

وَلَا تَقْرَبُوا الزَّوْجَ إِذَا كَانَ فَاَجْشَةً وَسَاءَ سَبِيلًا

The translation of this verse is that "And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way." See Holy Quran, Verse 32 of Surah Al-Israa. International S, *The Quran: English Meanings and Notes by Saheeh International* (Al-muntada Al-Islami Trust, London 2012) 391. For the meaning of this Verse, see also MM Khan and MT Al-Hilali, *Interpretation of the Meanings of the Noble Qur'an in the English Language: A Summarized Version of At-Tabari, Al-Qurtubi and Ibn Kathir with Comments from Sahih Al-Bukhari* (Darussalam, London 2011) 509.

<sup>63</sup> Therefore, under Article 407(4) of the Libyan Penal Code, sexual intercourse is an offence if it is committed without marriage. The Arabic text of this paragraph of this Article states:

وكل من واقع إنساناً برضاه يعاقب هو وشريكه بالسجن مدة لا تزيد على خمس سنوات

Libyan Penal Code 1953. This paragraph is translated as: "Anyone who has sex with another with his consent shall be punishable by imprisonment for a term not exceeding 5 years." This text is translated from the Arabic language by the author.

debit cards. Owing to the fact that forgery itself is a crime, the possession should be a part of the offence of forgery. Forgery is prohibited by the culture because it is also prohibited by the religion.<sup>64</sup> Hence, no one may feel harshly treated if the possession of false credit and debit cards is made a crime. However, some interviews showed that the possession of false credit and debit cards is not in need of criminalisation. This will be examined in the next point.

### 7.2.2. The Possession Should not be Criminalised

As Chart 6 shows above,<sup>65</sup> a minority of the interviewees were of the opinion that the possession of false credit and debit cards did not need criminalisation. They provided different reasons for justifying this point of view. One of these reasons was that the possession of credit and debit cards may constitute an *existing crime*.<sup>66</sup> Another reason was that the act of the possession of credit and debit cards is considered as a preparatory act to *the use* of false credit and debit cards.<sup>67</sup> These reasons will now be examined in turn.

#### *Is the Possession of False Credit and Debit Cards a Crime in Libya?*

As some interviewees suggested,<sup>68</sup> the possession of false documents including false credit and debit cards, may already be covered by one of the Articles of the Libyan

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<sup>64</sup> Forgery is prohibited in Sharia law. There are many Verses in the Holy Quran which confirm this fact. For example, in Verse 30 of Surah Al-Hajj, the Quran states:

ذَلِكَ وَمَنْ يُعِظْ حُرْمَاتِ اللَّهِ فَهُوَ خَيْرٌ لَهُ عِنْدَ رَبِّهِ وَأَجَلْتُ لَكُمْ الْأَنْعَامَ إِلَّا مَا يُنْتَلَى عَلَيْكُمْ فَاجْتَنِبُوا الرِّجْسَ مِنَ الْأَوْثَانِ وَاجْتَنِبُوا قَوْلَ الزُّورِ.

The translation of this verse is that: “That [has been commanded], and whoever Honors the sacred ordinances of Allah – it is best for him in the sight of his Lord. And permitted to you are the grazing livestock, except what is recited to you. So avoid the uncleanness of idols and avoid false statement.” See Holy Quran, Verse 30 of Surah Al-Hajj. International S, *The Quran: English Meanings and Notes by Saheeh International* (Al-muntada Al-Islami Trust, London 2012) 471. For the meaning of this Verse, see also MM Khan and MT Al-Hilali, *Interpretation of the Meanings of the Noble Qur’an in the English Language: A Summarized Version of At-Tabari, Al-Qurtubi and Ibn Kathir with Comments from Sahih Al-Bukhari* (Darussalam, London 2011) 603.

<sup>65</sup> See Chart 6, page 197.

<sup>66</sup> Interview with Shahban Alhibaishy, Prosecutor, Tripoli Attorney’s General Office (Tripoli, February 2012); Interview with Mohammed Tebar, Lawyer (Tripoli, March 2012); Interview with Mohammed Asagheer, Lawyer (Alkhoms, February 2012).

<sup>67</sup> Interview with Shahban Alhibaishy, Prosecutor, Tripoli Attorney’s General Office (Tripoli, February 2012); Interview with Sameha Abuzaid, Prosecutor, North Tripoli Prosecution Office (Tripoli, February 2012).

<sup>68</sup> Interview with Shahban Alhibaishy, Prosecutor, Tripoli Attorney’s General Office (Tripoli, February 2012); Interview with Mohammed Tebar, Lawyer (Tripoli, March 2012); Interview with Mohammed Asagheer, Lawyer (Alkhoms, February 2012).

Penal Code. Therefore, the possession of false credit or debit cards does not require a new offence in Libya. They did not state what offence might be applicable. However, this may be correct to some extent: under Article 258<sup>69</sup> of the Libyan Penal Code, the act of possessing a false credit or a debit card may be covered. On the other hand, not all the kinds of possession of false credit and debit cards can be covered. The above-mentioned Article means it is an offence for any public employee to become aware of, in the execution of his duty or because of it, a commission of a crime, which does not require a complaint from the victim, if he does not report this crime or is too late to do so. The average punishment for this crime is imprisonment between 24 hours to 1 year, or a fine between 10 to 50 dinars.

This offence requires that a public employee knows of the commission of a crime. This knowledge must be in the execution of the duty of the employee or because of it. As has been mentioned, the public employee is defined by Article 16 of the Libyan Penal Code.<sup>70</sup> It has been also emphasised that this definition makes it clear that the meaning of the public employee in the context of the Libyan criminal law is different from the meaning of public employee under Libyan civil law. Therefore, apart from the employees who work in the Libyan Central Bank, all the employees who work for other banks in Libya are not included under Article 16. They are treated as private employees.<sup>71</sup> Another element of this offence is the subject matter of the crime, which is the commission of a crime. Considering the word “commission”, it means that the

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<sup>69</sup> The Arabic text of this article states that

إذا علم موظف عمومي أثناء ممارسة مهامه أو بسببها بوقوع جريمة مما يجب اتخاذ الإجراءات بشأنها دون التوقف على شكوى الطرف المتضرر وأهمل أو تأخر في التبليغ إلى السلطات المختصة يعاقب بالحبس مدة لا تزيد على سنة أو بغرامة تتراوح بين عشرة جنيهات وخمسين جنيهاً.

See Libyan Penal Code 1953. This Article is translated as: “If a public employee in the execution of his duty or because of it, becomes aware of a commission of a crime which does not require a complaint from the victim and to which he has to enact some measures, but he does not care to report it to the competent authority or be late to do so, he shall be subject to imprisonment for a term not exceeding one year, or a fine between 10 to 50 dinars.” The Article was translated from the Arabic language by the author.

<sup>70</sup> As has been mentioned in the previous Chapters, Article 16 of the Libyan Penal Code states that: “A public employee is anyone who has a public duty in relation to the employment by the government or other public institutions, permanent or temporary and with a salary or without it...” *Ibid*. This Article was translated from the Arabic language by the author. See Chapter Three 3.4.1.

<sup>71</sup> This exclusion was decided by the Libyan Supreme Court. As has been emphasised in Chapter Three the court states that: “Aljamahiria Bank (now Aljomhoria) is a private legal person because it has a separate financial capacity from the government and aims to obtain commercial objectives. Therefore, all papers that are issued by this bank are considered as customary papers and the alteration that happens on them is considered as forgery happening on a customary paper.” See *Almahkama Alolia* ‘Libyan Supreme Court’, Criminal Appeal, No.102, Year 20, 1/6/1973, *Majalet Almahkama Alolia* (October 1973) Year 10, Vol.1, 102.

crime must be completed and all its elements must take place. This commission must be known by a public employee. Therefore, if the public employee does not know that there is a commission of a crime, even if he knows that there is a wrongdoing but he believes it does not constitute a crime, the offence of not reporting a crime does not take place.

Consequently, applying this Article to the possession of false credit and debit cards requires three conditions. First, there must be a public employee. Second, there must be a forged credit or debit card. Finally, the employee knows that these cards are forged documents and he does not report this offence to the competent authority. Thus, if, for example, a public employee working in the Libyan Central Bank visited<sup>72</sup> any other bank in Libya and was informed that there were some forged<sup>73</sup> credit or debit cards in the bank, this means an offence of forgery had taken place: therefore, he must report this offence to the department in which he works (Libyan Central Bank) or to the prosecuting authority. Suppose that he takes these false cards and keeps them in his possession. In this case, he will be liable for this offence, if he does not report them, or does so only after a significant lapse of time.<sup>74</sup> He may face a charge of this offence. Thus, the act of possession may be covered.<sup>75</sup>

### ***Reflection***

However, it seems that this Article may not be sufficient to deal with other instances relating to the possession of false credit and debit cards. The reason behind that is the absence of the subject matter. The explanation for this argument is that one of the elements required under the article in question is a commission of an offence. This offence is an offence of forging a credit or a debit card. As has been discussed in the previous Chapters,<sup>76</sup> there is no agreement whether the alteration on the cards constitutes the offence of forgery. Therefore, in the previous example, alleging that the employee who holds the false cards and not reporting them or neglecting to report them

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<sup>72</sup> This visit must be in the execution of the employee's duty or because of it.

<sup>73</sup> As has been stated, the card must be forged not only false. See Chapter Six 6.2.3.

<sup>74</sup> There is no exact time required because the Article does not determine certain time. The Article only states if the public employee is late to report the offence.

<sup>75</sup> This is because the employee would be liable not for the possession itself, but he would only be liable for the offence of not reporting a crime which is the offence of forgery.

<sup>76</sup> It has been argued that credit and debit cards may not be the subject matter of forgery under the Libyan Penal Code because they contain electronic information and they are made of plastic. See Chapter Four.

to the competent authority falls under Article 258 of the Libyan Penal Code may be contested. The argument is that if credit and debit cards may not be “documents”, then the commission of the offence of forgery may not take place. Consequently, one of the elements of the offence (not reporting an offence) is not committed.

In addition, this Article cannot cover all the aspects of the offence of the possession of false credit and debit cards. It may be argued that even if these cards are supposed to be the subject matter of forgery and they could fall under the offences of forgery, the above-mentioned Article (Article 258) may not be able to cover all acts that may constitute this possession. They may only cover the possession that is done by a public employee. The reason behind this is that one of the elements of the offence under this article is that the actor must be “a public employee”.<sup>77</sup> Thus, if the actor is not so, the offence could not take place. For example, if an employee in a bank other than the Central Bank, found forged cards, he will not be liable for the possession of these cards *because he is not a public employee*. In addition, this article cannot cover the possession of false credit and debit cards possessed by lay people. As a result, the view that possession is a crime under the Libyan Penal Code may not be accepted. This Article may not be sufficient to deal with all the acts that may constitute the possession of false credit and debit cards.

### ***Possession is a Preparatory Act***

It can be argued that possession is merely a preparatory act of the use of the false document.<sup>78</sup> This preparatory act is not a crime.<sup>79</sup> Thus, a question arises, why a lawful act should be criminalised. In addition, if the possession of these cards is criminalised the offence of the use of false credit or debit cards may be emptied of its content. As a result, what should be considered here is not the act of possession, but rather the act of *the use* of false credit and debit cards. If the use of these cards falls under

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<sup>77</sup> The Article does not determine the actor. Therefore, it can be any public employee who is included under Article 16.

<sup>78</sup> Interview with Shahban Alhibaisy, Prosecutor, Tripoli Attorney’s General Office (Tripoli, February 2012); Interview with Sameha Abuzaid, Prosecutor, North Tripoli Prosecution Office (Tripoli, February 2012).

<sup>79</sup> This is confirmed by Article 59(1) of the Libyan Penal Code. This Article states that:

ولا يعتبر شروعاً في جنابة أو جنحة مجرد العزم على ارتكابها ولا الأفعال التحضيرية لذلك.  
Libyan Penal Code 1953. This paragraph of this Article is translated as: “And it is not considered an attempt of a felony or misdemeanour merely the intention to commit it or the preparatory acts of it.” The Article was translated from the Arabic language by the author.

criminalisation, possession will be included. Therefore, there is no need to criminalise it because it is included under the offence of *the use* of a false card.

In fact, it is correct that the preparatory act is not a crime. On the other hand, the preparatory act is not a crime only if it is a preparatory act of another crime. If a preparatory act of another crime constitutes another separate crime, it cannot be denied that this is not a crime. For example, carrying a gun with an intention to kill someone is a preparatory act of murder under Libyan Criminal law.<sup>80</sup> If the possessor does not act more than possessing the gun, the attempt of killing the victim is not committed. The actor must act more than merely possessing a gun. He, for instance, should try to undertake one of the actions of the criminal activity (the murder) such as pointing the gun towards the victim. In short, holding a gun is not considered as an attempt. Therefore, possession should not be a crime. However, the legislator in Libya criminalises the possession of weapons without permission under Articles 478<sup>81</sup> and 480<sup>82</sup> of the Libyan Penal Code. As a result, in the previous example, if the possessor of the gun who intends to kill someone has no permission to possess the gun, this possession will be a crime under the appropriate Article. From this example, it may be concluded that the preparatory act does not constitute a crime in itself unless the law provides otherwise. Therefore, if the legislator provides that a particular act is a crime, it should be so, even if it is considered as a preparatory act for another crime. As a result, arguing that the possession of the false credit and debit cards is a preparatory act may not be a sufficient argument to reject its criminalisation.

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<sup>80</sup> In this line, Arazgy points out the act of buying weapons is an ambiguous act. It may indicate to the intention of murder or it may indicate to the intention of hunting of animals. I Arazgy, *Lectures in Criminal Law: General Part* (Maktabat Tripoli Alilmia Alaalemia, Tripoli 2013) 232.

<sup>81</sup> The Arabic text of Article 478 of the Libyan Penal Code provides that

كل من كانت في حيازته أسلحة أو ذخيرة ولم يبلغ السلطات عنها يعاقب بالحبس مدة لا تجاوز سنة والغرامة التي لا تزيد على عشرين جنياً.

Libyan Penal Code 1953. This Article is translated as: “Whoever has in his possession weapons or munitions but he has not report them to the authorities, shall be liable to imprisonment for a period not exceeding 1 year or a fine not exceeding 20 dinars.” The Article was translated from the Arabic language by the author.

<sup>82</sup> The Arabic text of Article 480(1) of the Libyan Penal Code provides that

كل من حمل سلاحاً خارج مسكنه أو ملحقاته دون ترخيص من السلطات يعاقب بالحبس مدة لا تجاوز السنتين وغرامة لا تجاوز خمسين جنياً.

*Ibid.* This paragraph is translated as: “Whoever holds a weapon out of his house or its appurtenances without permission from the authorities shall be liable for imprisonment for a period not exceeding 2 years and a fine not exceeding 50 dinars.” The Article was translated from the Arabic language by the author.



Furthermore, it may be argued that stating that possession is preparatory act is reason for calling for the criminalisation not for leaving it as it is. The explanation of this argument is that what if someone has in his possession some false cards which he does not use, but instead they are held by another, without the knowledge of the former possessor, then the latter uses them? Can this act be harmful and deserve to be criminalised? The answer would be yes. The reason behind this is that if the possessor does not possess the cards, the user cannot use them. The possessor is the cause of using these cards. Therefore, this act should be prohibited. In addition, alleging that the possession of a false card is a preparatory act so it is not necessary to be criminalised, may be considered, or even welcome, if the possessor in fact uses the card. On the other hand, the possessor may not use the false card, but rather keep it in his custody for a long time. If this is the case, this argument may not be accepted, because the possession of the false document in itself is harmful and needs to be criminalised.

### ***Possession is not Criminalised in Arabic Countries***

It can also be argued that the possession of false credit and debit cards is not criminalised in some Arabic countries, such as Egypt<sup>83</sup> and Iraq.<sup>84</sup> Libya is an Arabic country and the culture in Libya is similar to these countries. Hence, why should this possession be criminalised in Libya? The legal position of these countries may confirm and indicate that this act does not deserve criminal intervention. However, this argument may not be convincing. Comparing the law in Libya with the laws in other Arabic countries such as Egypt and Iraq is controversial. This is because the criminal codes in Egypt<sup>85</sup> and Iraq<sup>86</sup> are relatively out of date regarding the issue of credit and

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<sup>83</sup> The offences of forgery are covered by Articles from 211 to 227 of the Egyptian Penal Code. Egyptian Penal Code 1937. See MN Hosni *supra* 216.

<sup>84</sup> Although the offences of forgery are covered by articles from 289 to 295 of the Iraqi Penal Code, the possession of false documents is not one of these offences. Iraqi Penal Code 1969.

<sup>85</sup> As has been seen in the previous Chapters, criminal law in Egypt may not be sufficient to deal with credit and debit cards. See JA Asagheer, *The Criminal and Civil Protection of Magnetic Credit Cards: a Practical Study in French and Egyptian Judicature* (Dar Anahda Alarabia, Cairo 2003) 121; Chapter Four 4.3.1.

<sup>86</sup> See Iraqi Penal Code 1969. About the matter of payment cards in Iraq, see Ali A Alfeel, 'The Criminal Liability against the Abuse of Electronic Credit Cards' Justice Academy for Legal and Economic Studies < <http://2013.aladalacenter.com/index.php/2012-10-31-17-26-38/105-visacard>> accessed 28 May 2014. See also Hasan H Hameed and Jasem K KHalaf, 'Misuse of Electronic Revoked Credit Cards' (2010) 18(2) Majalet Jamiat Babal.

debit card forgery.<sup>87</sup> Moreover, it can be argued that credit and debit cards are new payment methods in Arabic countries. For instance, in Egypt, credit and debit cards have not been dealt with until recently, namely 1981. In that year, the Arabic African Bank in Egypt issued the Arabic Bank Visa Card.<sup>88</sup> This was the first bank card issued in Egypt. As for the case in Iraq, the cards were first introduced in late 2005.<sup>89</sup> Therefore, Arabic countries cannot be used as a comparator to assert that there is no need for criminalising the act of possession of false credit and debit cards. The comparison must be with other countries, which have dealt with credit and debit cards for a long time such as the UK and the US.<sup>90</sup>

To sum up, it is obvious from these two different views that the act of possessing false credit and debit cards should be criminalised. Possessing a false credit or debit card is a harmful act. This harm may need to be combated by a criminal penalty which is more effective than the compensation, because this criminalisation employs acts as a means of prevention of other crimes, namely the use of false credit and debit cards and credit and debit card fraud.<sup>91</sup> This may not be achieved by compensation. Owing to the fact that this offence would be a new crime in Libya, hence, in the following section, the elements of this new suggested offence will be illustrated.

### 7.3. FRAMEWORK AND A NEW CRIME

As with any intended crime<sup>92</sup> in Libya, the offence of possession requires *actus reus*

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<sup>87</sup> In addition, not criminalising the possession of the documents at the time of establishing the codes might be because the legislator did not consider that this act should have deserved criminal intervention at that time in which the documents were not commonly used as recently.

<sup>88</sup> SM AbduAlhakam, *The Criminal Protection of the Credit Cards: the Crime of Electronic Payment Cards* (Dar Anahda Alarabia 2003) 29; SNS Alkhaleeli, *Crimes Used by Illegitimate Ways of Internet Network* (Dar Anahda Alarabia, Cairo 2009) 16. It is obvious that there is a long period between the establishment of the Penal Code (1937) and the establishment of credit and debit cards in Egypt. This renders some scholars to call for amending the law in Egypt to deal with the offences of these cards. See MN Saed, 'The Criminal Responsibility for the Illegitimate Use of Debit Cards: Comparative Study' (PhD thesis, Cairo University 2005) 465.

<sup>89</sup> United States Agency for International Development, *Report on Iraq Private Sector Growth and Employment Generation: Iraq Competitiveness Analysis* (USAID, 2006) 45.

<sup>90</sup> Whereas credit and debit cards emerged in 1966 in the UK, they were first established in the US in 1914. See History of plastic cards in the UK, The UK Cards Association <[http://www.theukcardsassociation.org.uk/Advice\\_and\\_links/](http://www.theukcardsassociation.org.uk/Advice_and_links/)> accessed on 16 January 2014; MA Omar, *The Legitimate and Banking Accounting Aspects of Credit Cards* (Ietrack, Cairo 1997) 37; Mubarak Jazaa Harbi, 'The Doctrinal Interpretation of the Relation between the Issuer of Credit Card and its Cardholder' (2006) 2(30) Alhokok Journal 205, 206; MC Jasper *supra* 2.

<sup>91</sup> Fraud means the offence of deception.

<sup>92</sup> Therefore, the faulty or mistaken crimes are excluded.

and *mens rea*. Whereas the first element describes how the act of possession should be, the second element clarifies the state of mind of the accused. In addition, this offence requires that the subject matter should be determined. Thus, all these elements will be examined in this section.

### 7.3.1. Actus Reus

To determine the *actus reus* of the possession of false credit and debit cards, two points should be considered. The first issue is the concept of possession in terms of credit and debit cards. The second issue is the cards' possession and forgery.

#### *The Concept of Possession*

The criminal activity of the offence of the possession of false credit and debit cards may not be easy to clarify. The reason behind this is that the Libyan Penal Code<sup>93</sup> does not provide any definition of the act of the possession. In other words, there are no general rules which determine the concept of possession under Libya's criminal law. All Libyan criminal law does, is that it criminalises the possession in some Articles of the Libyan Penal Code<sup>94</sup> and under other special criminal laws.<sup>95</sup> For example, Article 172(2)<sup>96</sup> provides that: "He shall be punished with imprisonment, whoever is found in that places or areas or thereabouts<sup>97</sup> in possession of equipment which can be used for spying, without a legal excuse."<sup>98</sup> In addition, Article 450(2)<sup>99</sup> is translated as: "And the same punishment shall be applied if the threat is used after the theft immediately has been completed for securing the possession of the stolen property or for the escape."<sup>100</sup> From these Articles, it is obvious that the concept of possession is not defined and does need

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<sup>93</sup> Libyan Penal Code 1953.

<sup>94</sup> For example, possession has been provided for in many Articles such as 172, 329, 450, 456, 478, 503, 479 and 506 of the Libyan Penal Code. All these Articles mentioned possession whether indirectly or directly. However, they do not give it any definition.

<sup>95</sup> For example, see the law of Drugs and Mental Influences and the Law of Prohibition Drinking Alcohol. Law no 7 due 1990 relative Drugs and Mental Influences; Law no 4 due 1423 relative Prohibition of Drinking Alcohol.

<sup>96</sup> The Arabic text of this Article states that

كل من عثر عليه في تلك الأماكن أو المناطق أو بجوارها وفي حيازته دون مبرر قانوني وسائل صالحة للتجسس.

Libyan Penal Code 1953.

<sup>97</sup> These places or areas are clarified in the same Article in paragraph 1. These places are military areas.

<sup>98</sup> The Article was translated from the Arabic language by the author.

<sup>99</sup> The Arabic text of this Article states that

وتطبق العقوبة ذاتها إذا استعمل الإكراه بعد تمام السرقة مباشرة لضمان حيازة الشيء المسروق أو للهرب.

*Ibid.*

<sup>100</sup> The Article was translated from the Arabic language by the author.

to be explored.

With respect to Libya's special criminal laws, mention can be made of the law of Drugs and Mental Influences.<sup>101</sup> Under this law, Article 2<sup>102</sup> makes it an offence to own or possess drugs or mental influences. This Article does not define the word "possess". It provides that: "It is forbidden for anyone to own, hold ... any drugs or mental influences... except in the cases which are provided by this law and according to the conditions required."<sup>103</sup> Unlike the Law of Drugs and Mental Influences, the law of Prohibition Drinking Alcohol<sup>104</sup> uses two words for criminalising the possession of alcohol.<sup>105</sup> It provides<sup>106</sup> that: "It is considered as a prohibitive act: drinking ... possessing and holding alcohol...and the perpetrator shall be subject to punishments provided by this Act."<sup>107</sup>

Although criminal law does not define possession, some features of the meaning of the possession can be found in the decisions of the Libyan Supreme Court. On 22/6/1971<sup>108</sup> it held that: "The offence of holding or surrendering the drugs is constituted merely by physically appropriating the drugs for any purpose, with knowledge that it is so, but without permission."<sup>109</sup> This definition is related to the word "ihraz" but it does not cover the concept of possession in general. Thus, the word "possession" (*heaza*) in the context of drugs is defined by Bara.<sup>110</sup> He points out possession means taking control of drugs as an owner without the need to physically hold it.<sup>111</sup> He added, one is considered

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<sup>101</sup> Law no 7 due 1990 relative Drugs and Mental Influences.

<sup>102</sup> The Arabic text of Article 2 of the Drugs and Mental Influences Act provides that

يحظر على أي شخص أن ... يملك أو يحرز ... مواد مخدرة أو مؤثرات عقلية ... إلا في الأحوال المنصوص عليها في هذا القانون وبالشروط المبينة به.

*Ibid.*

<sup>103</sup> The Article was translated from the Arabic language by the author.

<sup>104</sup> Law no 4 due 1423 relative Prohibition of Drinking Alcohol.

<sup>105</sup> These two words have a similar meaning, namely "heaza" and "ihraz". The literal translation for the word "heaza" is the word "possession". This is the accurate translation of it. However, the word "ihraz" means taking something or holding it. It does not matter whether the period of the holding is short or long.

<sup>106</sup> The Arabic text of Article 1 of the law of Prohibition of Drinking Alcohol provides that

يعتبر فعلاً محرماً شرب الخمر، ...، وحيازتها، وإحرازها، ... ويعاقب مرتكبها بالعقوبات المقررة بهذا القانون.

*Ibid.*

<sup>107</sup> The Article was translated from the Arabic language by the author.

<sup>108</sup> *Almahkama Alolia* 'Libyan Supreme Court', Civil Appeal, No.5, Year 18, 22/6/1971, *Majalet Almahkama Alolia* (October 1971) Year 8, Vol.1, 194.

<sup>109</sup> The text of the decision was translated from the Arabic language by the author.

<sup>110</sup> MR Bara, *Explanation of the Principles of the Law of Drugs and Mental Influences and its Amendments* (Asr Aljemaheer, Alkhoms 2003) 75.

<sup>111</sup> *Ibid* 76.

as a possessor, even another holds the drugs on behalf of him.<sup>112</sup> It seems that the difference between these two words is that the word “*heaza*” is the general word for possession. It has loose meaning, which can mean all kinds of possession, even it means the word “*ihraz*” (hold). In other words, the subject which is possessed must be physically under the possession of the possessor.

From this discussion, it is submitted that these Articles and laws do not provide a real meaning of possession. The reason behind that is that the concept of possession is not clear. This has been confirmed by writers.<sup>113</sup> For example, in 1888, Pollock and Wright pointed out the word possession “is still very loose and unsettled in the books, and the reader cannot be too strongly warned that careful attention must in every case be paid to the context.”<sup>114</sup> Despite the fact that writers realised that it is a problem since that time, the concept of the possession is still vague as it was. Sealy points out that “the warning given by Pollock and Wright ... remains as relevant today as it was in 1888.”<sup>115</sup> Therefore, it may be useful to clarify its meaning under civil law.<sup>116</sup> Thus, the concept of possession may be more evident.

### ***Possession under Civil Law***

Generally speaking, the concept of possession is divided into three divisions, the complete possession, the temporary possession or the incomplete possession and physical or casual possession.<sup>117</sup> The complete possession requires two elements, the physical element and the immaterial element.<sup>118</sup> The physical element means the real control on the possessed object which provides the possessor the benefits of the object.

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<sup>112</sup> *Ibid.*

<sup>113</sup> F Pollock and RS Wright, *An Essay on Possession in Common Law* (Clarendon Press, Oxford 1888) 28.

<sup>114</sup> *Ibid.*

<sup>115</sup> LS Sealy and RJA Hooley *supra* 73.

<sup>116</sup> The reason for examining the possession under civil law is because civil law is considered as the principle law which provides the general principle rules of criminal law in case there is a deficit in criminal law. In this respect, Bara states that in order to determine the concept of the possession in terms of the law of Drugs and Mental Influences, the concept of the possession under civil law must be determined. MR Bara *supra* 75.

<sup>117</sup> MR Bara, *Explanation of the Libyan Penal Law, the Special Section, Second Part, the Crimes of the Assault on Property* (The Green Company, Tripoli 2010) 41. See also FU Albasha, *The Special Libyan Criminal Law: Second Part, Offences Against Property* (Dar Anahda Alarabia, Cairo 2003-2004) 42; MN Hosni, *Explanation of the Penal Law: the Special Part* (Dar Anahda Alarabia, Cairo 1988) 836.

<sup>118</sup> *Almahkama Aolia* ‘Libyan Supreme Court’, Civil Appeal, No.36, Year 8, 28/3/1964, *Majalet Almahkama Aolia* (January 1969) Year 5, Vol.2, 25.

As for the second element, it lies in the knowledge of the possessor that he possesses the object as an owner.<sup>119</sup> Equally, Bridge<sup>120</sup> points out possession

may be stated as consisting of two elements: first, the exercise of factual control over the chattel; and secondly, the concomitant intention to exclude others from the exercise of control.<sup>121</sup>

The possessor must intend to practise all the rights that the possession may provide. The real example of the complete possession is the possession which results from ownership.<sup>122</sup> Under this complete possession, the possessor has a bundle of rights and some obligations. These rights and obligations are described as the “standard incidents of ownership”.<sup>123</sup> According to Honore, these rights can be listed as following:

the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary<sup>124</sup>

It is obvious that the right to possess is one of the other rights which the ownership provides. In other words, the ownership includes possession, but not only possession.

Unlike complete possession,<sup>125</sup> which provides the possessor with the right to act as the owner, incomplete possession does not provide these rights which are listed by Honore.<sup>126</sup> The possessor under this kind of possession, although he has some rights, cannot for example sell the possessed object or permanently abandon it for others. An example of this possession is the relationship between the owner and the tenant under a contract of tenancy. Under this relation, the tenant has some rights. For example, if someone rents a house, he can definitely use this house. He can live in it and receive guests and may leave these guests for a while to stay alone in it. These rights are possible for the tenant to practice. However, this tenant cannot sign a contract with the

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<sup>119</sup> *Ibid.*

<sup>120</sup> M Bridge, *Personal Property Law* (3<sup>rd</sup> edn., Oxford University Press, Oxford 2002) 17.

<sup>121</sup> *Ibid.*

<sup>122</sup> FU Albasha *supra* 42. Honore defines ownership “as the greatest possible interest in a thing which a mature system of law recognizes” See AM Honore, ‘Ownership’ in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford 1961) 112.

<sup>123</sup> *Ibid* 112.

<sup>124</sup> *Ibid* 113.

<sup>125</sup> This kind of possession is also known as temporary possession. FU Albasha *supra* 42.

<sup>126</sup> AM Honore *supra* 112.

guests for a short stay in this house.<sup>127</sup> The difference between the complete and incomplete possession is that, the latter does not include the immaterial element of possession under civil law. These two kinds of possession are also different from casual possession, the third kind of possession.<sup>128</sup> This kind of possession takes place when the possession does not take a long time. It only lasts so as not to provide the holder time to practice the complete or incomplete possession. It provides him with a time to hold and see the subject matter under the supervision of the owner or the possessor who has an incomplete possession.<sup>129</sup>

### ***Possession and Control***

From this explanation, it is obvious that possession and control are different conceptions.<sup>130</sup> The concept of possession requires a condition which is that the possession of a credit card or a debit card, for example, must be under the hand of the possessor. In other words, it must be under a physical possession. It does not matter (if the thing is not under the hand) whether the possessed thing is under the control of the possessor or not. For example, if a company hires a car to another, in this case, although the company has a control on the car, it is not the possessor. The possessor, who is the lessee, is the only one having the possession of the car. Although the company still has the control of the car, the company in fact is not the possessor. Similarly, the owner may not be the possessor. For example, if someone lends his car to another for a week. The owner has no possession of the car during the period of the week, although he still has control of it. Despite the fact that he can reacquire his car, he has no possession.<sup>131</sup> Therefore, control itself is not adequate to cover the concept of possession under civil law.

For this reason, the Law of Drugs and Mental Influences 1990<sup>132</sup> uses two words (“own” and “hold”). It seems that the legislator in Libya comprehends that the word “possession” alone does not suffice. It realised that the word “possession” does not

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<sup>127</sup> However, if the owner and the tenant agreed for the house to be sublet for the tenant, this would not affect the possession as an incomplete possession.

<sup>128</sup> It is also called physical possession. *Ibid* 43.

<sup>129</sup> An example of this possession may be where someone gives a book to another to read the title and return the book immediately under his supervision.

<sup>130</sup> Hence, one may control a false credit or debit card but he does not possess it.

<sup>131</sup> See the example given by Sealy and Hooley. LS Sealy and RJA Hooley *supra* 68.

<sup>132</sup> Law no 7 due 1990 relative Drugs and Mental Influences.

cover possession which criminal law attempts to prohibit. Consequently, this might require the legislator to amend the previous law of drugs<sup>133</sup> by changing the word “possess” with the word “own”. Thus, the new law can cover all unwelcome acts of possession of drugs.

Similarly, the UK Forgery and Counterfeiting Act 1981<sup>134</sup> uses two words (“custody” and “control”) for criminalising the possession of false credit and debit cards. It does not use the word possession because it might prefer to avoid this complex word. It seems that these two words can cover all kinds of possession of false credit and debit cards. It can cover the complete possession where the possessor is the owner of the false card.<sup>135</sup> Moreover, it can cover the incomplete possession because the false credit and debit cards will be under the hand of the possessor. However, this word may be understood to cover the third kind of possession, namely the casual possession. This kind of possession should not be criminalised. The reason behind this is that there is no benefit from criminalising such an act. The possessor only sees the false cards and has no intention to possess or use them. Therefore, this issue should be clear when the Libyan legislator enacts a new law in terms of the possession of false credit and debit cards.

With respect to the word “control”, it seems that it can cover all kinds of acts that the word possession cannot include. It can cover the act of owning false cards when they are not in the possession of the owner. For example, if someone buys false credit or debit cards,<sup>136</sup> but instead of him receiving them, he asks the seller to deliver them to another. In this case, the owner does not possess these cards because they are not physically in his possession.<sup>137</sup>

To sum up, it is submitted that the concept of possession is not evident and the legislator in Libya should avoid using such a term. In addition, the word “ownership”

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<sup>133</sup> Law no 23 due 1971 relative Drugs. In this law, the legislator used different words for the possession from the words used in the new law of drugs namely, the law no 7 due 1990.

<sup>134</sup> Forgery and Counterfeiting Act 1981.

<sup>135</sup> Ownership in this context means that false cards belong to the possessor. It does not matter how the possessor owns them. He may buy them or receive them as a gift.

<sup>136</sup> As will be seen later, not only false credit and debit cards can be the subject matter of the offence of the possession concerning credit and debit cards. The subject matter of the possession will be discussed later in this section.

<sup>137</sup> Therefore, the word control can cover such cases.



may not alone be sufficient to include all harmful acts related to possession. As a result, it seems that the words “custody” and “control” or the words “own” and “hold” are more appropriate to achieve the desired outcome. The possession, which deserves criminalisation, is the possession in which the possessor is physically connected to the false credit or debit cards, or he has control over them.

### ***Forgery and Possession***

Another issue which may need to be considered in the context of the possession of false credit and debit cards is when the act of the possession of these false cards results from another crime. This may be illustrated where the possession is a consequence of the forgery. For example, suppose that someone makes a false credit or a debit card. This person does not use it or attempt to dispose of it.<sup>138</sup> In this case, the forger makes a new card, which is a forgery. In addition, he possesses this false card, which means he commits an offence of possession.<sup>139</sup> The act of possession in this example is an extent of the act of forgery. In such a case, the forger would possess the false card because this is a result of the forgery. Accordingly, a question may arise. How should this issue be treated? Should it be left to the general principles of the Libyan criminal law or should it be considered here, and a line drawn between the *actus reus* of the forgery and the *actus reus* of possession?

It is submitted that this issue should be considered because the general principles may not provide a good solution. According to the general principle of the Libyan criminal law, the possessor here will not be liable for the possession if he is punishable by the penalty of the offence of forgery.<sup>140</sup> Article 76(1) of the Libyan Penal Code states<sup>141</sup> that: “If one act results in two crimes, the penalty of the more severe of the two offences should be applied.”<sup>142</sup> However, it may be argued that this principle may not be applied. The offence of forgery is different from the offence of possession. As has been

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<sup>138</sup> He only keeps it in his custody.

<sup>139</sup> In other words, two crimes take place.

<sup>140</sup> This assumption is that when committing forgery itself is punishable. However, as has been examined in Chapter Five, forgery is not punishable. See Chapter Five 5.4.

<sup>141</sup> The Arabic text of this paragraph of Article states that

إذا كون الفعل الواحد جرائم متعددة وجب اعتبار الجريمة التي عقوبتها أشد والحكم بعقوبتها دون غيرها.

Libyan Penal Code 1953.

<sup>142</sup> The text of this Article was translated from the Arabic language by the author.

examined in the previous Chapters,<sup>143</sup> the offence of forgery, under Article 346 of the Libyan Penal Code,<sup>144</sup> consists of three elements. First, the *actus reus*, which is the alteration of the information.<sup>145</sup> Second, the subject matter of forgery, which is the document or the paper. The last element is the *mens rea*, which is the intention of the forger that he must intend to obtain a benefit for himself or for others, or to harm others. It is obvious that the offence of forging a customary document<sup>146</sup> does not require the forger to possess the forged document after finishing the commission of the offence of forgery. It only requires that the forger changes information on a document with a particular intention.<sup>147</sup> Therefore, if a forger disposes of a forged document immediately after finishing the alteration on it, no one may deny that the forgery happened and has been completed.<sup>148</sup> In addition, in this case, it is clear that the recipient who receives the false card is a possessor of this false card. The card is in his custody. As a result, the forger commits two offences, namely forgery and possession of the false card, which he forged. Therefore, it may be argued that the act of the possession is a result of the act of forgery, but not a part of it. In other words, these two acts are not one act.<sup>149</sup>

Another reason for considering this matter as stated is that it may be argued that the forger in this case is not punishable by the penalty of the forgery because as Article 346 requires, the forger must use the forged document so the punishment can be applied.<sup>150</sup> In this case, the forger will be punished neither by the penalty of the offence of forgery nor by the penalty of the possession, because the punishment would be lighter than the punishment of the offence of forgery. Thus, it is submitted that this solution (applying Article 76(1)) is not acceptable because the offence of possession would be meaningless.

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<sup>143</sup> For more details, see Chapters Three, Four and Five.

<sup>144</sup> *Ibid.*

<sup>145</sup> Adahabi alleges that the ingredients of the *actus reus* of the offence of forgery under Article 346 and 351 include the use of the forged document, as has been discussed in Chapter Five. See Adahabi *supra* 246. For more details, see Chapter Five 5.4.1.

<sup>146</sup> What is considered here is the customary document because credit and debit cards are considered as customary documents. For more details, see Chapter Four 4.2.1.

<sup>147</sup> The intention required is to obtain a benefit for the forger or for others, or to harm others.

<sup>148</sup> In this case, it is supposed that the use of the forged document is not one of the elements of the *actus reus*, not as Adahabi maintains. Adahabi *supra* 246.

<sup>149</sup> More precisely, these two crimes are not a result from one act. The act of forgery is different from the act of the possession. The forger usually makes the false card. When he finishes this act, he possesses it.

<sup>150</sup> Adahabi alleges that this condition is an element of the forgery offence under Article 346 of the Libyan Penal Code. His point of view is that if the forger does not use this false paper, the forgery is not constituted. For more details, see Chapter Five 5.4.1.

### *Suggestion*

Consequently, the question which should be answered is what is the solution in this case? Should the forger deserve the two penalties of the offence of forgery and the offence of possession? The answer to this question would be yes. It suggested that if someone forges a credit card or a debit card and then keeps it in his possession, he should be liable for two offences, namely the offence of forgery and the offence of possession. However, although forgery and possession are different, it may be argued that it is not just to punish the forger for the possession. The logic may require that it is not just to consider the possession of the false document as a crime<sup>151</sup> because practically, the forger may not be able to dispose of the forged document immediately.<sup>152</sup> Thus, it is suggested that the forger should have time to decide whether he would dispose of the false document or proceed with another conduct.<sup>153</sup> If he chooses to commit another crime, then he should be liable for it. He deserves the consequences of his choice. In other words, there should be a clear boundary between the end of the act of forgery, and the beginning of the act of possession.

If this is accepted, the question which arises here is how long should the period be and who decides it. This period should not be long and should not be very short. It should only be so long as to provide for the forger to choose whether to dispose of the false card or commit another crime, namely the offence of possession of the false credit or debit card. It may be no more than one week. It seems that one week is sufficient for the forger to decide whether to continue possessing the false card or dispose of it. It is suggested that the legislator states that possession of false credit and debit cards<sup>154</sup> is a crime if the forger does not dispose of the false credit or debit cards or prohibited material within a reasonable time. This period should be decided by the judge under the supervision of the Supreme Court. The judge is the only one who should decide the case after considering each case alone. Therefore, he may decide one day is sufficient in one case, whereas one week may be reasonable in another.

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<sup>151</sup> Although law is not always logical.

<sup>152</sup> In other words, he might need a period of time to do so.

<sup>153</sup> That is to say he should choose whether he wanted to commit only forgery or he intended to commit the possession of the forged credit or debit card.

<sup>154</sup> As will be seen, not only credit and debit cards are suggested to be the subject matter of the offence of the possession in terms of credit and debit cards.

### 7.3.2. Mens Rea

In general, Libyan criminal law requires that the intended crimes<sup>155</sup> must be committed with intention. This intention comprises two elements, namely knowledge and will. Whereas knowledge means the actor must know and realise that he acts against the law and commits the crime, will means he wants to commit this act. He knows then he acts. Article 63 of the Libyan Penal Code<sup>156</sup> provides that: “A crime (felony or misdemeanour) is committed with deliberate intention if the committer by his act or omission expects and wants the happening of the harm or the happening of the danger which took place and on which the presence of the crime relies.”<sup>157</sup>

Accordingly, the possessor of the false credit or debit card should know that the card which he holds is false, not genuine. If he does not know this fact, the possession would not take place. This was confirmed by the majority of the interviewees who agreed that the possession of credit and debit cards should be criminalised.<sup>158</sup> They claimed that the possessor *must know* that he possesses a false credit or debit card. They also stressed that if this mere knowledge develops and becomes an intention to use a false credit or debit card, the matter should be different. There must be a distinction between the one who *holds* a false credit or debit card with *an intention to use* and the one who *merely possesses it without this intention*. They considered *that possession with intention to use* is more dangerous than *possession with the knowledge that the card is false*. One of the interviewees claimed that: “One who possessed a false credit or debit card with a plan to use it had more of an insistence to commit the crime<sup>159</sup> than the one who merely held the card without any plan.”<sup>160</sup> This is correct. It is submitted that the latter prepares himself for another crime, with the use of the card which he has already possessed. This

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<sup>155</sup> Under the Libyan Penal Code, crimes can be divided into two kinds, the intended crimes and mistaken crimes. MR Bara, *Explanation of the General Rules of the Libyan Penal Law, First Part: the General Rules supra* 279.

<sup>156</sup> The Arabic text of Article 63 states that

ترتكب الجناية أو الجنحة عن قصد عمدي إذا كان مقترفاً يتوقع ويريد أن يترتب على فعله أو امتناعه حدوث الضرر أو وقوع الخطر الذي حدث والذي يعلق عليه القانون وجود الجريمة.

Libyan Penal Code 1953.

<sup>157</sup> This Article was translated from the Arabic language by the author. For more details about the intention under Libyan criminal law, see MR Bara *Explanation of the General Rules of the Libyan Penal Law, First Part: the General Rules supra* 279; I Arazgy *supra* 277.

<sup>158</sup> See Chart 6, page 197.

<sup>159</sup> This crime might be the use of false credit and debit cards.

<sup>160</sup> Interview with Yousef Asofrany, Notary Public (Tripoli, February 2012).

means he may be more dangerous than the former. Hence, the *possession with intention to use* deserves an aggravated penalty.

This is exactly what the UK Forgery and Counterfeiting Act 1981<sup>161</sup> provides. Section 5 differentiates between the acts of possessing a false credit or debit card.<sup>162</sup> Under paragraph 1 of Section 5, the possession of a false credit or debit card is criminalised, if the possessor has an intention to use the card.<sup>163</sup> There are two parts to the mens rea for this offence. A possessor must (1) have known or believed that a credit or debit card is false and (2) have intended to use the card in question.<sup>164</sup> Unlike paragraph 1 of the Forgery and Counterfeiting Act 1981, paragraph 2 of the same Act only requires for the mens rea of the offence of possession of a false credit or debit card to exist, that the possessor has in his custody or under his control, a false credit or debit card with knowledge or belief it is false. This paragraph does not require a certain intention as to intended use. It requires that the possession must be without lawful authority or excuse.<sup>165</sup> There is only one part to the mens rea for this offence. A possessor must have known or believed that a credit or debit card is false.

On the other hand, this was not the view of all the proponents of the criminalisation in the interviews. Some interviewees<sup>166</sup> claimed that there should not have been a variation between the two different intentions of the possession.<sup>167</sup> One reason they provided was that there was a difficulty to prove the intention of the possessor, whether

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<sup>161</sup> Forgery and Counterfeiting Act 1981.

<sup>162</sup> As will be explored later, this Act does not only criminalise the possession of false credit and debit cards, but it also criminalises the possession of some other false instruments which parliament in the UK considered that they need to be protected against possession.

<sup>163</sup> This Section provides that

It is an offence for a person to have in his custody or under his control an instrument ... which is, and which he knows or believes to be, false, with the intention that he or another shall use it ...

*Ibid.*

<sup>164</sup> The act of using a false credit or debit card has been explored in Chapter Six. For more details, see Chapter Six.

<sup>165</sup> The Section states that

It is an offence for a person to have in his custody or under his control, without lawful authority or excuse, an instrument ... which is, and which he knows or believes to be, false.

*Ibid.*

<sup>166</sup> Interview with Mohammed Asagheer, Lawyer (Alkhoms, February 2012); Interview with Fathy Atoonsy, Prosecutor, Alkhoms Prosecution Office (Alkhoms, February 2012); Interview with Unnamed, No 39, Judge, Alkhoms Court of First Instance (Alkhoms, February 2012).

<sup>167</sup> Although some stated the possession of false credit and debit cards should be an offence such as Mohammed Bara, he did not think that the possession of a false credit or debit card with mere knowledge should be so. Interview with Mohammed Bara, Lecturer, Faculty of Law, Tripoli University (Tripoli, February 2012).

the possessor intended to use a false credit or debit card or only had mere intention.<sup>168</sup> However, this reason may be arguable. The argument is that to prove the presence of knowledge or the intention is not the matter, which is considered here. This is the matter of the prosecution. The prosecution is the one who seeks the evidence, whether the accused (possessor) has mere knowledge or he intends to use the prohibited thing. The prosecution considers all the facts and circumstances of the case. Therefore, this is not a problem or an obstacle which may prevent the differentiation between the two intentions, mere knowledge and the intention to use.

It is obvious that if a credit or a debit card is genuine but the cardholder thinks that the card is false, this should not constitute the suggested offence of possession. For example, if someone obtains a credit card, of which he has no doubt of its falsity, but later he realises that it is genuine, this possession does not form the offence of the possession of false credit and debit cards. The reason behind this is that the *actus reus* does not exist. It is correct that the one who possesses the card thinks or believes that the card is false. Yet, the fact is that the card is not so. The presence of this crime is only in the mind of the possessor, but not in the actuality (real life).<sup>169</sup> Therefore, the state of mind here is not considered. Section 5 of the UK Forgery and Counterfeiting Act 1981 confirms this fact by stating these two words “which is” in this Section.<sup>170</sup> Whereas the word “which” means the instrument, which is clarified in Section 5(5),<sup>171</sup> the word “is” means the instrument is in fact false. Hence, it is not sufficient for the card to be believed that it is false whereas it is in fact genuine. In this line, the House of Lords held in *Montial*<sup>172</sup> that

A person cannot know that something is A when in fact it is B. The proposition that a person knows that something is A is based on the premise that it is true that it is A. The fact that the property is A provides the starting point. Then there

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<sup>168</sup> Interview with Unnamed, No 39, Judge, Alkhoms Court of First Instance (Alkhoms, February 2012).

<sup>169</sup> In other words, generally speaking, if one element of the elements of a crime does not exist, the crime cannot take place. See M Jefferson, *Criminal law* (11<sup>th</sup> edn., Pearson Education Limited, 2013) 43; MR Bara *Explanation of the General Rules of the Libyan Penal Law, First Part: the General Rules supra* 103.

<sup>170</sup> Article 5(5) provides that

It is an offence for a person to have in his custody or under his control, without lawful authority or excuse, an instrument ... which is, and which he knows or believes to be, false.

Forgery and Counterfeiting Act 1981.

<sup>171</sup> It includes credit and debit cards.

<sup>172</sup> *Regina v Montila and others* [2004] 1 WLR 3141.

is the question whether the person knows that the property is A.<sup>173</sup>

In addition, although the possessor knows that the credit or debit card is false, he may not be liable for the offence of the possession of false credit or debit cards in some cases. The Forgery and Counterfeiting Act<sup>174</sup> mentions these cases in Section 5 namely, “lawful authority and excuse”. In Section 5(5), for example, the Section states that “It is an offence for a person to have in his custody or under his control, without lawful authority or excuse, an instrument ...” Therefore, if a police officer, during the execution of his duty, seizes a false credit card or debit card, the possession of this false card is authorised. Equally, if someone finds a false credit card and takes it to the police or to the bank whose name is on this card, this would be lawful authority.<sup>175</sup> As Ormerod<sup>176</sup> confirms, “Lawful authority must extend not only to those authorised by law but also to those who plan to act in accordance with the law.” With respect to the lawful excuse, it should include general defences such as insanity, infancy or duress, but not be limited to them.<sup>177</sup> As Ormerod states, deciding what the excuse includes “must be a matter of law for the judge” in line with the rules of logic and reasonability.<sup>178</sup>

### ***Knowledge: Absolute or Supposed***

It seems that the intention to use the card may not pose any problem because if a person possesses a false card to use, this means he already knows that the card is false. If he does not know it is false, how could he use it? The card is supposed to be used by only the cardholder.<sup>179</sup> Conversely, what may pose a problem is the mere knowledge or belief. The requirement that the possessor must know or believe that the card possessed is false, may pose a question which is that what degree of the “knowledge or belief”

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<sup>173</sup> *Ibid.*

<sup>174</sup> Forgery and Counterfeiting Act 1981.

<sup>175</sup> See *Regina v Wuyts* [1969] 2 QB 474.

<sup>176</sup> D Ormerod, *Smith and Hogan: Criminal Law* (12<sup>th</sup> edn., Oxford University Press, Oxford 2008) 980.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> However, in some cases, the card may be used by another than the cardholder such as the husband or the wife provided that there is consent from the cardholder. The cardholder must allow the use. Although this use may not pose any criminal liability, the cardholder could breach the conditions of his contract with the bank or the company issuing the card. See Susan Singleton, ‘Children, Contracts and the Internet’ (2000) 2(9) *Electronic Business Law* 8.

should the possessor have?<sup>180</sup> Should the knowledge be absolute or it is sufficient to be supposed?

This question arises because there are some cases in which the actus reus takes place but the knowledge is in doubt. For example, someone receives a bag from a friend containing some false credit cards. He does not ask his friend about the contents of the bag. However, he knows that the bag contains something. Second example, suppose that the person received the bag has seen the cards but he does not suspect that they are false. Third example, the possessor of the bag, in the first example, sees the cards and suspects that they are false. Conversely, he does not care about this suspicion. The last example is where the possessor sees the cards and the friend informed him that they are false. Therefore, he knows they are false. The question which arises here is which one of these examples should constitute mens rea?

In Libya, according to Article 63 of the Libyan Penal Code,<sup>181</sup> the only example which would constitute mens rea (knowledge) is the last example. This example illustrates the real knowledge which is required under Libyan criminal law. Under the above-mentioned Article, the actor (the possessor of the false credit or debit card) must have absolute knowledge that the card is false. This can only take place in the last example. With respect to the second and third examples, the mens rea does not take place because the possessor does not know of the falsity of the cards. Suspicion<sup>182</sup> or mere doubt is not considered as absolute knowledge. Despite the fact that the possessor does not care about the suspicion that the cards are false, it cannot be stated that he has mens rea. He does not know or believe the cards are so. Therefore, in the third example, the possessor of the card should not be liable for possession. He merely suspects that the card is false. Similarly in the second example, the possessor sees the false cards but he does not

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<sup>180</sup> It should be noted that this question arises if the false card possessed is not in the name of the possessor. Because if it is in his name, he cannot allege that he does not know that the card is false. In Libya, when the card is issued in the name of the cardholder, it is handed personally to the cardholder. This may be different from what happens in the UK. In the UK, credit and debit cards are usually sent to the cardholder's address. Because the address is usually inaccurately determinate in Libya, the cards are usually handed over to the cardholders in the bank which issued the card.

<sup>181</sup> Libyan Penal Code 1953. See the discussion about mens rea in this Chapter.

<sup>182</sup> Suspicion as it was defined in *Hussien* is:

A state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.

See *Shaaban bin Hussien and others v Chong Fook Kam and Another* [1970] AC 942.



doubt that they are false.

### ***Can Knowledge of the Possession be Supposed?***

Yet, under the UK Forgery and Counterfeiting Act 1981, the possessor in the first example may be liable for the possession, despite his unawareness that there are false credit or debit cards in the bag. In that example, the possessor does not know about the cards. He only knows that there is something in the bag but not the particular thing. This can be suggested from the position of the Court of Appeal in *Warner*.<sup>183</sup> In that case,<sup>184</sup> the court considered such an act as a prohibited possession and convicted the possessor under Section 1(1) of the Drugs Act (Prevention of Misuse) 1964.<sup>185</sup> The House of Lords agreed with the Court despite the fact that the defendant alleged that he did not know that one of the two boxes which he carried contained drugs. He stated that he thought they had both contained scent.

Conversely, the court held that because he knew that he was in possession of the two boxes and these boxes contained something, the defendant was supposed to be in possession of the content of this thing which was the scent and the drugs. It does not matter whether the possessor knew the content or not, as long as he knew that there was something in the boxes.<sup>186</sup> Lord Pearce stated that

I think that the term "possession" is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse. This would comply with the general understanding of the word "possess." Though I reasonably believe the tablets which I possess to be aspirin, yet if they turn out to be heroin I am in possession of heroin tablets. This would be so I think even if I believed them to be sweets.<sup>187</sup>

It may be argued that this decision is not accepted, because the defendant has no

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<sup>183</sup> *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256.

<sup>184</sup> *Ibid.*

<sup>185</sup> The Drugs (Prevention of Misuse) Act 1964.

<sup>186</sup> In line with this argument, Wilson maintains that

Consistent with the general pattern of situational liability, the possession of...firearms or controlled drugs does not impose any requirement upon the prosecution to establish any act of (voluntarily) taking possession. It is enough simply that the accused is in possession of the proscribed thing.

W Wilson, *Criminal Law* (4<sup>th</sup> edn., Pearson Education Limited, 2011) 76. See also other cases which followed this tendency such as *R v James McNamara* (1988) 87 Cr App R 246; *R v Gareth Edmund Lewis* (1988) 87 Cr App R 270.

<sup>187</sup> *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256.

knowledge that there were drugs in the box. This may be understood from Simester who points out

Although a *ratio decidendi* is difficult to distil from the judgments, it appears a majority of their Lordships were prepared to accept that the mens rea of possession requires only that D should know he is in possession of something, provided the something he thinks he is not completely different from the thing he actually has. D need not know the precise nature of the material he possesses. Thus if D had thought the box was empty, he would not have been in possession of its contents –yet since, on the facts, he thought it contained scent, he had sufficient mens rea to be in possession of the drugs (because scent, apparently, is not sufficiently different from drugs).<sup>188</sup>

However this is not accepted because in fact, knowledge is defined as true belief. The possessor should know that A is A, not B. This meaning may be found in the decision of the Canadian Supreme Court. In *Dynar*<sup>189</sup> the Canadian Supreme Court held that

In the Western legal tradition, knowledge is defined as true belief: ‘The word “know” refers exclusively to true knowledge; we are not said to “know” something that is not so’<sup>190</sup>

Equally, in *Saik*,<sup>191</sup> it can be understood that “knowledge” does not mean more than “true belief”.<sup>192</sup> Therefore, how it can be stated in the context of criminal law, that the possessor possesses something if he does not know that this thing is in his possession. The possessor must have true belief<sup>193</sup> or at least have a belief<sup>194</sup> that he has drugs in his possession. If he does so, then it does not matter what kind of drugs he has. For example, he thinks that he possesses heroin but he is found in possession of cocaine. Likewise, if the possessor in the first example thinks that he is carrying a false document or false credit card but he is found carrying a false debit card, he should be liable for the offence of possession of a false credit card. He cannot allege innocence because of the absence of mens rea. In other words, he cannot allege that he knows that he holds a false debit card, not a false credit card. Mistake in the subject matter of an

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<sup>188</sup> AP Simester and others, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (4<sup>th</sup> edn., Hart Publishing, Oxford 2010) 161.

<sup>189</sup> *United States of America and Another v Dynar* [1997] 3 LRC 265.

<sup>190</sup> *Ibid.*

<sup>191</sup> See *Regina v Saik* [2006] UKHL 18.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*

<sup>194</sup> As Section 5 of the Forgery and Counterfeiting Act 1998 states. Forgery and Counterfeiting Act 1998

offence is not an excuse.<sup>195</sup> Hence, it can be stated that the House of Lords required assumed knowledge, not absolute knowledge. In other words, there is no mens rea in the offence. In other words, the offence is an offence of conduct.

However, it seems that this position<sup>196</sup> would not be accepted. The suggested mens rea for the possession of false credit and debit cards should be absolute knowledge in terms of the possession of false credit and debit cards.<sup>197</sup> If there is no proof that the possessor absolutely knows that he is carrying false cards or the prohibited material, he should not be liable for the possession.

### **7.3.3. The Subject Matter: Cards and Other Materials**

To complete the picture of the suggested offence of the possession of false credit and debit cards, the subject matter of the offence should be determined. At first glance, the subject of this offence is obvious and is not surrounded by any vagueness. The reason behind this is that because this thesis is exploring credit and debit card forgery, it is a logical result that the subject of the possession in terms of forgery is false credit cards and false debit cards. However, this is not entirely correct. It is not denied that the false cards are the core of the problem of the possession in terms of credit and debit card forgery, but not all of the problem. Considering the purposes of criminalising the possession of false credit and debit cards, there is no doubt that the clear aim of this criminalisation is to prevent the possessor from using the false cards. It is correct that this is not the only purpose, but it can be stated that it is not less important than the other purposes, such as the harm, which the victim may suffer.<sup>198</sup>

Consequently, the criminalisation under this offence should include any possession that may lead to forgery, or the possession or the use of false credit and debit cards. It is suggested that three categories of possession should be criminalised. The first category is false credit and debit cards. The second category is the machines or materials, which

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<sup>195</sup> If a possessor intends to possess a false credit or debit card, it does not matter whether the possessor wants to possess a credit card instead of a debit card. Mens rea will exist in the two cases, whether the possessor possesses a credit card or a debit card.

<sup>196</sup> See the position of the House of Lords in Warner. *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256.

<sup>197</sup> The decision is also not accepted in terms of the possession of drugs because the reason which makes this decision is not accepted in the context of forgery and is more obvious in terms of the possession of drugs. The possession of drugs is more dangerous than the possession of false credit or debit cards.

<sup>198</sup> For more details, see section two of this Chapter.

may be used for making a false credit or debit card. Finally, the third category is the expired credit or debit cards.

### *False Credit and Debit Cards*

False credit and debit cards should mean any credit or debit card holding false information on the card whether on the back or the face. It does not matter if the card is issued by Libyan banks or non-Libyan banks.<sup>199</sup> Thus, it can be a credit or a debit card issued by Aman Bank,<sup>200</sup> the Bank of Commerce and Development, or North Africa Bank or any bank, which may issue credit and debit cards.<sup>201</sup> Furthermore, it can be a credit or a debit card issued by HSBC<sup>202</sup> bank or by Lloyds bank. With respect to the false information on the possessed card, it does not matter whether the information is printed, embossed or written. The information should be included in the offence whether it is printed, such as the name of the bank (the issuer), or the name of the company under whose supervision the card is issued (such as Visa card or MasterCard). In addition, it may be embossed information, such as the number of the card or the number of the account. Additionally, it may be written such as the signature of the cardholder.<sup>203</sup>

It is significant to mention that the offence of possession should take place whether the information falsified is intrinsic or otherwise. Thus, the false information may be fundamental, such as the expiration date of the card, or it may be unessential such as the word “debit” which is printed on some debit cards, such as the cards issued by the North Africa Bank<sup>204</sup> or the word “VISA” which is printed on the debit cards issued by the HSBC bank. The reason behind the submission of this suggestion is that there is no reason requiring the possessor to hold such cards. It is correct this unessential information is not fundamental and does not bring about any problem if it is the only information that is falsified. In other words, it does not provide any benefit to the

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<sup>199</sup> It should be mentioned that non-Libyan banks here means any bank which is not owned by a Libyan citizen whether it is located in Libya or in any other place in the world.

<sup>200</sup> The central site of this bank is located in Tripoli, the capital city in Libya. See its website at <<http://www.amanbank.ly/>> accessed 6 February 2014.

<sup>201</sup> As has been mentioned before, the only Libyan banks which issue debit cards are these banks. As for credit cards, they have not been issued in Libya.

<sup>202</sup> This bank has many branches in the world such as the UK and Egypt.

<sup>203</sup> For more details about the information on credit and debit cards, see Chapter Two 2.4.

<sup>204</sup> The central site of this bank is located in Libya, in the second city Benghazi. See its website at <<http://nbc.com.ly/>> accessed 11 September 2013.

possessor. He cannot use it. However, under the offence of possession all the falsifications should be covered. The prohibition of possession does not aim only to prevent the real use of false cards, but rather to prevent the possession itself, as this prohibition may contribute to the increase of confidence in the use of these cards.

### ***Equipment***

It is not sufficient and it may not be effective for the offence of possession (in terms of credit and debit card forgery) if the possession of false credit and debit cards is only criminalised. The subject of the suggested offence here should cover any tools which can be used for making credit and debit cards if the possession is to use these tools for making false credit or debit cards, whether new false cards, or only changing the information on old cards. It seems that this is logical, because the purpose of the suggested offence in addition to other purposes<sup>205</sup> is to prevent the forgery and the use of false credit and debit cards. The inclusion of the equipment that can be used for producing credit and debit cards is a good practical step to help prevent forgery.

However, this suggestion may need some clarification because it is not possible to criminalise all tools that may be used for this purpose. The equipment can be varied. In addition, there are many tools which may be used for different purposes, including the making or forging of credit and debit cards. For example, there are some machines which are made for making student cards. These machines may be used for producing new credit or debit cards. For making a new student card, all that is required is a blank piece of plastic in addition to a thin strip (Dye Film) made of plastic which wraps around the card. This machine may be used for making a new credit or debit card if it is adapted.<sup>206</sup> Another example is a household cleanser. This material can be used for removing the signature of the cardholder which is on the signature panel on credit and debit cards.<sup>207</sup> In these two examples, the machine and the household cleanser used for forging credit or debit cards, can be used for other legitimate operations. The machine is

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<sup>205</sup> As has been stated, the possession offence in terms of forgery is not only an attempt to prevent the forgery and the use of false cards, but also to prevent the possession itself as it is a harmful act. See the discussion in this Chapter 7.2.

<sup>206</sup> For example, Bangor University uses a machine called “Magicard Rio” for issuing student cards. This machine may be adapted for making false credit or debit cards. For more information about this machine, see Ultra Electronics, Magicard <<http://www.ultramagicard.com/>> accessed 6 June 2014.

<sup>207</sup> D Ormerod *supra* 979.

made to be used for only issuing student cards. Therefore, it may be not be acceptable to include these things in the suggested offence. The reason behind this is that it may be argued that this machine and the household cleanser are not specially made for making or forging credit and debit cards. This argument may not be denied, because it is in fact difficult to criminalise such possession even if the intention of the possessor is to make or change information on a debit or credit card.

Therefore, Section 5(3) of the UK Forgery and Counterfeiting Act 1981 makes it an offence of possession if the possessed tools are specially adapted or designed for making a false credit or debit card to which Section 5 applies.<sup>208</sup> Section 5(3) states that:

It is an offence for a person to ... have in his custody or under his control a machine or implement, ... or any other material, which to his knowledge is or has been specially designed or adapted for the making of an instrument to which this section applies...<sup>209</sup>

The Section requires that in order for the tools possessed to be criminalised, they must be specially designed or adapted to make a false credit or debit card, or one of the instruments mentioned by Section 5(5).<sup>210</sup> Thus, unadapted tools made for other purposes are not included. In line with this Section, the machine and the household cleanser in the previous examples are not included, since they are not specially designed or adapted for making a credit or debit card.<sup>211</sup> The machine (in the example above) is specially designed to produce student cards and the household cleanser is especially designed for cleaning houses.

In this line, Ormerod<sup>212</sup> stated that

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<sup>208</sup> The instruments that Section 5 applies are stated by paragraph 5 of this Section.

<sup>209</sup> *Ibid.* The full text of the Section is that

It is an offence for a person to make or to have in his custody or under his control a machine or implement, or paper or any other material, which to his knowledge is or has been specially designed or adapted for the making of an instrument to which this section applies, with the intention that he or another shall make an instrument to which this section applies which is false and that he or another shall use the instrument to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

<sup>210</sup> *Ibid.*

<sup>211</sup> This is confirmed by Ormerod. He observes that "Certain household cleansers can be used to remove the holder's signature from credit cards thus enabling D to sign the holder's signature" is not an offence under the Forgery and Counterfeiting Act 1981. D Ormerod *supra* 979, footnote 119.

<sup>212</sup> *Ibid* 979.

it is, of course, not possible to provide an exhaustive list of the machines, implements, paper or other materials which are specially designed or adapted for making instruments to which the section applies.<sup>213</sup>

This is correct because it is difficult to make a comprehensive definition including all specially adapted or designed tools which may be used for producing credit or debit cards or changing the information on them. However, examples may be given. One example<sup>214</sup> is where someone holds cheque books (which are stolen). He may commit the offence of possession under Section 5(3) of the forgery and Counterfeiting Act 1981. The reason why is that cheque book are specially made for making a cheque.<sup>215</sup> Similarly, if someone with required intention possessed some non-completed<sup>216</sup> credit or debit cards, this possession should be included in the suggested offence. The reason behind this is that non-completed cards are made to be completed by the issuer to be a credit or debit card. To sum up, it is submitted that tools should include any machine, device, plastic, card or any material, which is specially designed or adapted to make credit or debit cards or change any information on them.

### ***Expired Credit and Debit Cards***

Although expired credit debit cards are not false, they should be covered by the offence of possession if these cards are possessed by someone other than the cardholder.<sup>217</sup> There is no reason for someone other than the cardholder to possess an expired card. Holding an expired card may be acceptable to the cardholder (although he should dispose of the card by destroying it or returning it to the issuer<sup>218</sup>). In addition to the

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<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid.*

<sup>216</sup> According to the interviewee number 46, the Aman bank receives debit cards from the Visa company before they are ready. When these cards are received, they hold only general information such as the first four digits of the number of the card. Interview with Unnamed, No 46, Employee, Aman Bank, (Tripoli, March 2012). This fact was also observed by the researcher during the interview with the interviewee unnamed 46. The researcher saw these blank cards.

<sup>217</sup> Because expired credit and debit cards may be used by cardholders, some, such as AbduAlmajeed, argue that using expired credit and debit cards should be criminalised. MNS AbduAlmajeed, *The Criminal Responsibility for the Illegitimate Use of Debit and Credit Cards* (Dar Anahda Alarabia, Cairo 2008) 217. However, the author does not see that possession of these cards by cardholders should be a crime. This is because cardholders are usually careful of not leaving these cards to be in the possession of others.

<sup>218</sup> It is notable that despite the fact that credit and debit cardholders cannot use expired cards, they may keep them in their possession. This may lead to a problem which that these cards may be possessed by others who may be able to use them in a forgery act. Thus, they should either dispose of them or return

cardholder, an exception should also be made for the employees in the banks who deal with these expired cards. As has been mentioned above, the cardholder should dispose of his expired card. He can return this expired card to the bank. In this case, one of the employees in the bank would receive the expired card. Hence, the employee in the bank should be excepted as long as these cards are not found with the employee out of the execution of his duty.

As for the reason why the cards should be included in the prohibited possession, it can be argued that they may be used for forgery. If they are possessed by a wrong person, (someone other than the cardholder) these expired cards may be used for making new false cards. As has been mentioned,<sup>219</sup> these cards are considered as a target for forgery because the information on these cards is ready to be changed, specially the invisible information. It can be altered and hold false information. This may be easier than making new cards since all a forger needs to do is change the invisible information.<sup>220</sup> He does not need to change the visible information. Therefore, these expired cards offer this service in an easy way. Consequently, it may be effective for combating credit and debit card forgery and the use of false credit and debit cards to include expired credit and debit cards with the scope of the suggested possession offence.

#### 7.4. CONCLUSION

This Chapter has examined whether the possession of false credit and debit cards and other materials which may be used for forging credit and debit cards deserve criminalisation under the Libyan Penal Code.<sup>221</sup> It has been mentioned in this Chapter that provisions of forgery under the Libyan Penal Code do not contain any Article criminalising this possession, which distinguishes this Chapter from the previous one. This matter has been explored in two sections. Section one examined whether the possession of false credit and debit cards and other materials needs to be criminalised, and section two has explored the framework of the suggested offence of possession. It has attempted to show what problems this criminalisation may face.

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them to the issuer. In this meaning, see MAA Ashawabka, *Computer and Internet Crimes: the Informatics Crime* (Dar Athakafa, Amman 2004) 198.

<sup>219</sup> See Chapter Three 5.2.1.

<sup>220</sup> This may be in the case of using the card at cash machines.

<sup>221</sup> Libyan Penal Code 1953.



There was no agreement between the interviewees about the criminalisation. Some reasons in this respect (pros and cons) have been explored. As Chart 6<sup>222</sup> showed, the majority of the interviewees confirmed the need for criminalisation. The main reason behind this view was that possession of false credit and debit cards is a harmful act. Harm may be a general threat endangering society and may be a danger threatening a particular individual. General harm may materialise in the fact that the possession of false cards leads to destabilisation of confidence in the credit and debit cards themselves, which in turn may affect the future of and the use of these cards in Libya. Another reason, which is in favour of criminalisation, was that criminalising the possession of false credit and debit cards is a logical result. It may be not logical to criminalise the act of hiding a genuine credit or debit card (if the card is considered as a document)<sup>223</sup> whereas possession of a false credit or debit card is left a lawful act. In addition to these reasons, the possession of false credit and debit cards is an unlawful act in some countries such as the UK<sup>224</sup>. It may be argued that if the possession is criminalised in many countries, why is it not a crime in Libya?

Although the minority of the interviewees were of the opinion that criminalising possession was not a good idea,<sup>225</sup> there are some reasons deserving consideration. One reason was that the possession of false credit and debit cards might be included in Article 258 of the Libyan Penal Code. However, this might not be sufficient because credit and debit cards may not be the subject matter of this offence. In addition, this Article cannot cover all the aspects of the offence of possession of false credit and debit cards. Another reason is that possession is not a crime in some Arabic countries, so it is not necessary to be a crime in Libya. Yet, this was argued, because documents have become more important, so possession of false documents including credit and debit cards should be considered.

Therefore, in section two the elements of the offence of possession was explored and

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<sup>222</sup> See Chart 6, page 197.

<sup>223</sup> Hiding a genuine document is a crime under Article 348 of the Libyan Penal Code. This Article states that: "Anyone, who destroys, damages or conceals a formal valid document, shall be punishable by imprisonment for a term not exceeding 5 years. And it shall be subject to imprisonment if the act happens on customary documents with an intention mentioned in the previous Article." This Article was translated from the Arabic language by the author

<sup>224</sup> This act is a crime under Section 5 of the UK Forgery and Counterfeiting Act 1981.

<sup>225</sup> See Chart 6, page 197.

the problems in the context of this crime were discussed. As for the act of possession, it was emphasised that its concept is not clear, not only in Libyan criminal law,<sup>226</sup> and has been a subject of debate. Thus, it was emphasised that the concept of possession is different from the concept of ownership and it is not defined by the Libyan criminal law. Another problem explored was the overlap between the offence of the forgery and the offence of possession, and whether the possession should be a crime if it results from the offence of forgery. Equally, the mens rea of the offence of possession was discussed. It was explored what intention should be required in the context of the possession of credit and debit cards and whether the knowledge of the possession should be absolute. In addition, the subject matter of possession was considered. All equipment and materials, which their possession may lead to forgery or use of false credit or debit cards, were considered including whether they deserve to be subject of this offence.

It seems that the possession of false documents including credit and debit cards<sup>227</sup> was not in the contemplation of the legislator in Libya when the provisions of forgery under the Libyan Penal Code were drafted. As was emphasised in Chapter Five, Article 346(1)<sup>228</sup> requires that in order for the forger to be punished, he must *use* the forged customary document. This condition should be abolished. Hence, *forgery* and *possession* should be criminalised. Proposing criminalisation for the *possession* of false credit and debit cards is the better way to proceed. This possession negatively affects the public interest, in addition to protecting individuals' interests.

If the legislator in Libya is inspired by this suggestion, they should be aware of some problems. First, the concept of possession should be clear, so the word can be translated in a way that does not bring about legal confusion. Second, the legislator should make it clear that *forgery* is a separate offence from *possession*, and if the possessor and the forger is the same, he should bear both punishments.<sup>229</sup> Third, it should not be vague in

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<sup>226</sup> See for example LS Sealy and RJA Hooley *supra* 73; F Pollock and RS Wright *supra* 28.

<sup>227</sup> This can be applied to documents in general.

<sup>228</sup> Article 346(1) states that: "Anyone, who draws up a forged customary paper entirely or in part, distorts a valid customary paper or allows anyone to falsely draw it up or to distort it with the intention that he obtains a benefit for himself or for others, or harms others, shall be subject to imprisonment for a term not less than 6 months if he uses or allows anyone to use it." Libyan Penal Code 1953.

<sup>229</sup> This should be if a reasonable period passed after the act of forgery, as will be suggested in the recommendations in Chapter Eight.

the text of the Article that would create the suggested offence that the possessor should *know* that he possesses false cards; and *carrying false cards* does not mean *possession* if the possessor does not know he does so. Therefore, the one who carries a bag containing a false credit or debit card should not be liable for this offence, if he has no knowledge of its falsity. Finally, the legislator should include with the scope of the offence all the materials that may be used for forging a credit or a debit card. Therefore, the subject matter of the offence of possession should include the machines or devices that are specially made or designed or adapted for making or forging a credit or debit card. In addition, it should include expired credit and debit cards if they are possessed by someone other than the cardholder.

## CHAPTER EIGHT

### CONCLUSION AND RECOMENDATIONS

#### 8.1. INTRODUCTION

The aim of this study is to suggest some improvement and developments with regard to offences of forgery in terms of credit and debit card forgery in Libya in order to overcome its weaknesses. This thesis examined the provisions of the offences of forgery under the Libyan Penal Code<sup>1</sup> and whether they are sufficient to cover forgery of credit and debit cards. This is to say, the thesis explores whether changing the information on a credit or a debit card and the use of a false credit or debit card are crimes in Libya, and whether the possession of false credit and debit cards deserves to be an offence under the Libyan Penal Code? The research sought to answer three questions: 1. Could the Libyan offence of forgery provisions<sup>2</sup> deal effectively with the alteration of information on credit cards and debit cards? 2. Could the offence of using forged documents<sup>3</sup> deal effectively with the use of false credit and debit cards? 3. Does the possession of false credit and debit cards deserve to be made a crime under Libyan Criminal law?

This Chapter will be in three sections. First, a summary and findings of the thesis. Second, a review of the research questions. Third, some recommendations and suggestions for further research will be provided.

#### 8.2. SUMMARY AND FINDING

This thesis has been divided into eight Chapters.

**8.2.1. Introduction:** Chapter One approached the background of the thesis and the importance of the study. It has provided an overview of current forgery law provisions in Libya and the problems arising with the forgery of credit and debit cards. It discussed the relevant literature and explained the rationale for the study.

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<sup>1</sup> Libyan Penal Code 1953.

<sup>2</sup> The provisions of forgery which may be applicable to credit and debit card forgery are Articles 346 and 351 of the Libyan Penal Code. *Ibid.*

<sup>3</sup> This offence is governed by Article 347 of the Libyan Penal Code. *Ibid.*

**8.2.2. Visible and Invisible Information:** Chapter Two ‘Credit and Debit Cards: Meaning and Concept’ examined the concept of credit and debit cards, their history and their contents. It has examined the difference between credit cards and debit cards and the difference between the information which they contain. The main findings in this Chapter were as the following.

**(I) Credit Cards and Debit Cards are almost the same:** Chapter Two has shown that there is no huge difference between credit and debit cards. They can be issued by the same issuer and from the same material. Further, credit and debit cards can be made from any material. They can be made of plastic or paper. In addition, they can be only a number or a plate. The fundamental condition which these cards require is that these cards must provide certain services. They must allow the holder to obtain money from cash machines and services from service providers.

**(II) Credit and Debit Cards are a New Payment Method in Libya:** This Chapter emphasised that these cards are a new concept in Libya. Credit cards are not known in the Libyan banks. All cards providing the holder with money or services issued in Libya are debit cards. Even though banks in Libya issue debit cards which provide money and services, the shops which deal with these cards are almost nonexistent at present. For example, in some stores and shops, such as Almeahary store,<sup>4</sup> despite the fact that there are some card readers which deal with credit and debit cards, these card readers are not used and the credit or debit cardholder cannot benefit from these services.

**(III) Visible and Invisible Information:** This Chapter has also shown that the common credit and debit cards in use hold two kinds of information, visible information and invisible information. The first information appears on the cards, on the both sides of the card. In contrast, invisible or electronic information is stored on the magnetic strip or on a chip, which is placed on the cards. The difference between these two kinds of information has negatively reflected on the application of current forgery offences in Libya so that the alteration happening on these cards is not adequately covered by

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<sup>4</sup> Almeahary store is located in Tripoli, the capital of Libya. In this store, there is a cash machine which provides cash to credit and debit cardholders.

existing Libyan forgery laws. The reason behind this is that invisible information may not be the subject matter of forgery under the current law.

**8.2.3. The Subject Matter of Forgery:** Chapter Three ‘The Subject Matter of Forgery under the Libyan Penal Code’ has addressed the subject matter of forgery under the Libyan Penal Code. It has examined what exactly does the subject matter of forgery contemplate, the terms used, their meanings and their nature. This Chapter has resulted in the following findings.

**(I) Terms of the Subject Matter of Forgery:** The Libyan Penal Code uses two words to express the subject matter of forgery, “paper” and “document”. Owing to the fact that these two words have a different meaning, the law did not succeed in this respect. It did not make it clear whether the subject of forgery is a document or a paper, or both. A “document” has a wider meaning than the word “paper”. A document means any piece of writing containing letters or signs, by its reading the mind moves to a particular meaning.<sup>5</sup> Yet, paper has narrower meaning. According to Hsuin, paper is

a felted sheet of fibres formed from a water suspension process using a sieve-like screen. When the water escapes and dries, the layer of intertwined fibres become a thin matted sheet which is called paper.<sup>6</sup>

Therefore, paper is merely one category of the different sorts of document. Under forgery law in Libya, the use of these different words leads to an overlap, which is confusion and a lack of clarity as to what word the legislator meant by referring to the words “paper” and “document”?

**(II) Meaning of Document:** A document has different meanings. It may mean electronic information, i.e, invisible information which cannot be seen by the naked eye and visible information which can be seen by the eye. However, under current Libyan criminal law, “document” only means visible information.

**(III) Formal and Customary Subject Matter:** Forgery law in Libya differentiates between the formal subject matter and the customary (informal) subject matter. There is an obvious contrast between the nature of the formal and customary subject matter. The

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<sup>5</sup> See, for example, D Ormerod, *Smith and Hogan: Criminal Law* (12<sup>th</sup> edn., Oxford University Press, Oxford 2008).

<sup>6</sup> TT Hsuin, *Paper and printing* (Cambridge University Press, Cambridge 1985) Vol.5, 1.

formal subject matter is a document or a paper generated by a public employee during the execution of his duty or because of it. In contrast, a customary document is a document made by an ordinary person, i.e, a private employee or even by a public employee but not in relation to his duty. This differentiation has its reflection on the value of the subject matter: the formal subject matter has assumed more importance, attracting heavier penalties under Libyan law, and as a consequence, the public confidence in the customary subject matter has decreased. This impacts on credit and debit cards because these cards are customary documents. This negative impact requires corrections, by an appropriate legislative response.

**8.2.4. Credit and Debit Cards, and the Subject of Forgery:** Chapter Four ‘Credit and Debit cards: Can they be the Subject Matter of Forgery in Libya?’ explored whether these cards can be the subject matter of forgery. For this purpose, the results of the interviews conducted in Libya regarding to this matter were considered.<sup>7</sup> It was found that the answer to this question is debatable.

*(I) Credit and Debit Cards are Documents:* Credit and debit cards are considered documents in the general meaning of the term “document” as to visible information.

*(II) Visible Information:* Assuming that the subject matter of forgery is paper, credit and debit cards may not be the subject matter of forgery. The rationale is that imposing a criminal liability by analogy is not allowed under the Libyan Penal Code.<sup>8</sup> It infringes the principle of legality.

*(III) Invisible Information:* There is an ambiguity surrounding the meaning of document in terms of invisible information, and whether it can be covered by the Libyan Penal Code or not. Considering the subject matter of forgery as a document, the meaning intended by the legislator in 1953<sup>9</sup> may not be applicable to credit and debit cards. The forgery law in Libya conveys the term “document” in the sense of documents which hold visible information. Only visible information can be a means of helping people to communicate with each other. This does not occur in terms of invisible information.

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<sup>7</sup> The interviews were conducted in Libya in the period between February and March 2012.

<sup>8</sup> *Almahkama Alolia* ‘Libyan Supreme Court’, Civil Appeal, No.98, Year 23, 26/10/1976, *Majalet Almahkama Alolia* (April 1977) Year 13, Vol.3, 154.

<sup>9</sup> In this year, the Libyan Penal Code was established. Libyan Penal Code 1953.

**8.2.5. Alteration of Information on Credit and Debit Cards:** Chapter Five ‘Changing the Information on Credit and Debit Cards and the Actus Reus of Forgery’ has addressed whether the alteration of information on credit and debit cards can be covered by the actus reus of the offence of forgery in Libya or not. It addressed the manner of alteration of the information on these cards. In addition, it analysed the problems which may occur when applying the forgery offence to the alteration of the information on these cards. Addressing this matter produces the following findings:

**(I) Differences:** changing the information on credit and debit cards is not the same as the alteration taking place on ordinary documents.<sup>10</sup> Dealing with invisible information is dealing with an imaginary world. Furthermore, the means used for changing the information on the card is different from the means employed for changing the information on documents and papers. For example, changing the embossed information requires a long process and needs different equipment. In addition, it needs a particular level of specialised experience.

**(II) The Use of Forged Documents:** alteration of the information is not the only thing which is required for the actus reus of forgery in Libya. Libyan forgery law requires *the use* of the forged subject matter. This may prevent the application of the actus reus to the alteration happening on credit and debit cards. Thus, it has been found that the forgery of cards is not a separate crime in Libya, even when the agreed elements of the forgery exist.<sup>11</sup>

**8.2.6. Credit and Debit Card Use:** Chapter Six ‘Using Credit and Debit Cards under the Libyan Penal Code’ has demonstrated whether *the use* of false cards in Libya falls under the offence of using a forged document. It has explored the subject matter of the offence of using a forged document and the word “forged” used by Article 347(2) of the Libyan Penal Code.<sup>12</sup> It also considered whether this act falls under other offences covered by the Libyan Penal Code, namely the *offence of theft*<sup>13</sup> and the *offence of deception*.<sup>14</sup> With respect to the offence of theft, the Chapter has assessed whether the

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<sup>10</sup> Ordinary documents mean common documents in Libya, which are paper documents.

<sup>11</sup> This means forgery is in connection with the offence of using a forged document.

<sup>12</sup> Libyan Penal Code 1953.

<sup>13</sup> This offence is covered by Article 444(1) of the Libyan Penal Code. *Ibid.*

<sup>14</sup> The offence of deception is covered by Article 461. *Ibid.*



card can be a modified key, which constitutes the offence of aggravated theft.<sup>15</sup> In addition, consideration was given to the question of whether the appropriation can take place during the withdrawal of money from cash machines. The offence of deception under Article 461 of the Libyan Penal Code<sup>16</sup> was also examined. This discussion was based on the argument of whether the machine can be deceived or not by using a false card. In this Chapter the results of the interviews conducted in Libya were explored. The following findings were produced:

**(I) Using Credit and Debit Cards under Article 347:** The offence of using a forged document under Article 347 of the Libyan Penal Code<sup>17</sup> may not be applicable to the use of false credit and debit cards. The reason behind this is first: these cards may not be the subject of forgery. This problem<sup>18</sup> reflects on the application of the offence of *using* a forged document. Article 347(2) of the Libyan Penal Code requires a forged document as a subject matter. Therefore, it seems that this subject matter may not “exist” for the purpose of establishing the offence. The second problem is that for the offence of using a forged card to be covered by Article 347(2), the card must be forged, not only false. It has been found that the word “forged” used by Article 347(2) is different from the word “false” and poses a problem which is that the card must be forged as Article 346 of the Libyan Penal Code so requires.

**(II) A Machine May not be “Deceived”:** The term “machine” under Article 461 of the Libyan Penal Code may not be deceived. This finding was affirmed by the interviews conducted in Libya. The majority of the interviewees<sup>19</sup> were of the opinion that deceiving a machine was not covered by criminal law in Libya. It has been found that this was the case in the UK before the introduction of the Fraud Act 2006.<sup>20</sup>

**(III) Theft is not Applicable:** The offence of theft under Articles 444(1) and 446(2) of the Libyan Penal Code has been discussed and the result is the fact that it may not cover the use of false cards at cash machines or at points of sale. The reason behind this is that

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<sup>15</sup> This Aggravated circumstance is stated by Article 446(2) of the Libyan Penal Code. *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> This problem is the problem of the subject matter of forgery which is that whether credit and debit cards can be the subject matter of forgery.

<sup>19</sup> See Chart 5, page 186.

<sup>20</sup> In this respect, see for example, *In Re London and Globe Finance Corpn Ltd* [1903] 1 CH 728.

the appropriation under the offence of theft under the Libyan Penal Code must be without the owner's consent. Yet, the transfer of the money from the cash machine and the transfer of the goods from the merchants may be voluntary. The bank and the service provider hand over the money and the goods or service with consent.<sup>21</sup> Another finding is that credit and debit cards and the key cards are not the same, which suggests that the offence of using a modified key may not be applicable.

**8.2.7. Problem of the Possession of False Credit and Debit Cards in Libya:** Chapter Seven 'The Possession of False Credit and Debit Cards under the Libyan Penal Code' considered whether the possession of false credit and debit cards in Libya deserves criminalisation under Libyan criminal law.<sup>22</sup> For this purpose, interviews were conducted in Libya.<sup>23</sup> Further, the reasons, which may support the suggestion of criminalising the possession of false credit and debit cards and those which rendered some interviewees to reject the criminalisation, were examined, and whether it deserves criminal intervention or whether mere civil penalties are sufficient. In this Chapter, suggestions were made as to the parameters that should be devised as to how the offence of possession should be, if the legislator wishes to criminalise the possession of false credit and debit cards. All the elements of the proposed offence were considered and the concept of possession addressed as to whether it is sufficiently defined under current Libyan criminal law or not. In addition, the subject matter of the offence was examined. The main findings of this Chapter are:

*(I) Possession is not a Crime in Libya:* It has surprisingly been found that not only is the *possession of false* credit and debit cards not an offence in Libya, but also the *possession of a false or forged document* does not in general constitute any crime. The reason may be the policy which the legislator in Libya follows for dealing with forgery: the legislator heretofore has also been concerned with *the use* of forged documents not *the possession* or even the forgery if the document is not used.<sup>24</sup>

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<sup>21</sup> See, for example, JA Asagheer, *The Criminal and Civil Protection of Magnetic Credit Cards: a Practical Study in French and Egyptian Judicature* (Dar Anahda Alarabia, Cairo 2003) 140.

<sup>22</sup> Libyan Penal Code 1953.

<sup>23</sup> The interviews were conducted in Libya in the period between February and March 2012.

<sup>24</sup> This obviously can be seen when the legislator requires the use of the forged paper under Article 346 of the Libyan Penal Code.

**(II) The Possession of False Credit and Debit Cards is Harmful:** Possession may be harmful both to society and to individuals. The possession of false cards may cause a lack of confidence in acceptance and use of credit and debit cards. This may affect the future use of these cards as well as the economy in Libya. Further, the position of the victim of the offence of possession may be affected. The harm resulting from the possession of false cards may be *physical* (such as losing a loan which the victim had already applied for and had approval to be obtained). Furthermore, it may be *emotional*, such as feeling frustrated and disappointed because the victim may think about the reason for which these cards in his name were forged and possessed. This harm may be *potential* which may be illustrated by the loss which the banks or institutions face.<sup>25</sup>

**(III) The Possession is a “Long Time” Offence:** Although in some Arabic countries possession of false credit or debit cards is not an offence, this act has been criminalised in some other countries for a long time. For example, under Section 5 of the UK Forgery and Counterfeiting Act 1981,<sup>26</sup> the possession of false credit and debit cards<sup>27</sup> is a crime in addition to the possession of any machine or device or any material which is specially adapted or designed for producing false cards.<sup>28</sup> Another example is the American Model Penal Code.<sup>29</sup> This may encourage the legislator in Libya to criminalise possession.

After stressing these findings, the research questions now can be answered.

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<sup>25</sup> See *R v Taj (Kamran) and others* [2003] EWCA Crim 2633. In this case, it was held that  
Considering the number of cards found and that could have been reproduced from the material that had been ordered, the potential loss to the credit card companies and banks could have been about £34 million.

<sup>26</sup> Forgery and Counterfeiting Act 1981.

<sup>27</sup> In addition to other instruments which are provided in Section 5(5) of the Forgery and Counterfeiting Act 1981.

<sup>28</sup> Section 5(3) stated that

It is an offence for a person to make or to have in his custody or under his control a machine or implement, or paper or any other material, which to his knowledge is or has been specially designed or adapted for the making of an instrument to which this section applies, with the intention that he or another shall make an instrument to which this section applies which is false and that he or another shall use the instrument to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

*Ibid.*

<sup>29</sup> Section 5.06(1) of the Model Penal Code states that “... A person commits a misdemeanor if he possesses any instrument of crime with purpose to employ it criminally.” Instrument is defined to include false credit and debit cards. Model Penal Code 1962.

## 8.3. REVIEWING THE QUESTIONS

### 8.3.1. Question One

With respect to the first question “could the forgery provisions of the offence of forgery in Libya deal with the alteration of information on credit cards and debit cards?”, the answer is no.<sup>30</sup> The reason behind this is that there is a vagueness surrounding the meaning of the subject matter of forgery under the Libyan Penal Code,<sup>31</sup> whether it is a document or a paper. This negatively affects the possibility of the application of current forgery offences’ provisions to the forgery of credit and debit cards. Applying these two words (“document” and “paper”) to credit and debit cards may be doubtful in many instances. In addition, the condition which Article 346 requires<sup>32</sup> may undermine the application of the Article, unless false cards are used.

### 8.3.2. Question Two

As for the second question “could the offence of using a false document deal with the use of false credit and debit cards?”, the answer is no. This is because the offence of using a forged document in terms of credit and debit cards requires a forged document as the subject matter of forgery. It requires that the card must be a forged document. In other words, the forged document required here must be forged according to Article 346 or Article 351 of the Libyan Penal Code<sup>33</sup> which are applied in case of forging a customary document. Therefore, the same problem—lack of legislative scope of current legal provisions - which occurs in terms of question one occurs here also.

### 8.3.3. Question Three

Finally, the question “should the possession of false cards deserve to be made a crime under Libyan Criminal law?” has been answered. The answer to this question is yes. Possession of a forged or false document is not criminalised. This is because the criminal policy which the Libyan legislator follows in the context of the offence of

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<sup>30</sup> This question has been examined in three Chapters, Three, Four and Five.

<sup>31</sup> Libyan Penal Code 1953.

<sup>32</sup> This condition is that the punishment of the offence of forging a customary document cannot be applied unless the forged card is used. See Chapter Five 5.4.

<sup>33</sup> *Ibid.*

forging a customary document is that as long as the forged customary document is not used, the punishment is not required.<sup>34</sup> In other words, forgery is less important than the use of false documents in terms of customary documents. On the other hand, possession of credit and debit cards is harmful and criminalised in all countries dealing with these cards. Therefore, the author finds it is necessary to provide some recommendations for improving the law of forgery in Libya to deal effectively with these serious crimes, including the possession of false credit and debit cards.

## **8.4. RECOMMENDATIONS**

This thesis makes some suggestions for improving forgery law in Libya. Thus, it may overcome its problems in terms of credit and debit card forgery in Libya. This section provides four categories of suggestions. These divisions are general suggestions, suggestions related to the offence of forgery, suggestions related to the use of false credit and debit cards and finally, suggestions related to the possession of false credit and debit cards. All these suggestions will be approached in turn.

### **8.4.1. General Recommendations**

The ambiguity which surrounds the words “paper” and “document” provided by some forgery Articles such as Article 347 of the Libyan Penal Code<sup>35</sup> should be clarified. These two words have a different meaning. Thus, they should have the same meaning or it should be clarified that the subject matter of forgery is a document in addition to paper. Thus, there should be a new Article providing that the word paper is included within the meaning of the term “document”. However, clarity in this way on its own may not be sufficient. The word document also needs to be defined. The word document should be determined and defined so as to include electronic information, and credit and debit cards. Thus, a new Article should be introduced defining the word document. For instance, an Article similar to Article 321 of the Canadian Penal Code which states that:

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<sup>34</sup> As has been mentioned in Chapter Five, Article 346 and 351 require that the forged document must be used, so the punishment can be applied. These Articles state that: “... shall be subject to imprisonment for a term not less than 6 months if he uses it or allows others to use it...” See the full text of the Articles in appendix 1.

<sup>35</sup> Libyan Penal Code 1953.

“document” means any paper, parchment or other material on which is recorded or marked anything that is capable of being read or understood by a person, computer system or other device, and includes a credit card, but does not include trade-marks on articles of commerce or inscriptions on stone or metal or other like material<sup>36</sup>

Therefore, two new Articles should be added to Section Seven of the Second Book of the Libyan Penal Code as following:

#### Article 353 (bis a) Document and Paper

For the purpose of this Chapter, “document” and “paper” provided in the Libyan Penal Code shall be interpreted as a document.

#### Article 353(bis b) Meaning of Document

Document means any writing on paper, parchment, plastic, or any other material on which is recorded or marked anything which is capable of being read or understood by a person, computer system or other device and includes credit cards and debit cards.

### **8.4.2. Recommendations for the Offence of Forgery**

As for the offence of changing the information on credit and debit cards, the author suggests that a new special Article should be provided. This Article should criminalise the forgery of credit and debit cards. For an effective Article, some points which may pose problems, should be made aware to the legislator. These points can be summarised as follows.

1) For the offence to be effective to combat and decrease the occurrence of forgery, the condition (that the punishment of forgery must only be applied if the forger uses the card or allows others to use it) provided by Article 346 and Article 351 of the Libyan Penal Code<sup>37</sup> should not be replicated in the new Article. The act of the offence should not be restricted by such a condition. Thus, if anyone makes a new false card or changes any information on a genuine credit or debit card, he or she should be guilty of forgery without the need for the use of the card. The *use* of forged credit and debit cards should be another separate crime, in addition to the offence of changing the card's

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<sup>36</sup> Canadian Penal Code 1985.

<sup>37</sup> *Ibid.*

information.<sup>38</sup>

2) The punishment for the offence of forging credit and debit cards should reflect the seriousness of this act. The punishment provided by the current Article 346 or Article 351 is too light.<sup>39</sup> It is suggested to be not less than 5 years imprisonment. In other words, an appropriate punishment should be a term of between 5 to 15 years imprisonment.

3) The differentiation between the two kinds of the subject matter of forgery (formal and customary) should be abolished. All documents should be dealt with in the same way. Thus, as for credit and debit cards, they should not be treated differently. There should not be a difference between a “formal” credit or debit card and a “customary” credit or debit card. All cards should be classified on the same level, whether they are made by a private bank or issued by a public bank. In the same way, there should not be a difference between a credit or a debit card made in Libya and another made in another country. In short, all credit and debit cards should be regarded as the same subject matter. Thus, the author suggests that a new Article should be added to the Articles of forgery under Section Seven of the Second Book of the Libyan Penal Code<sup>40</sup> as follows:

#### Article 350(bis) Forging Credit and Debit Cards

Anyone who makes a new credit or a new debit card, or changes any information on them, whether this information is visible or invisible, in any manner, with intention to use this card, shall be subject to imprisonment for a period of between 5 to 15 years.

#### 8.4.3. Recommendations for Article 347

To ensure that the offence of *using a forged document* under Article 347 of the Libyan Penal Code<sup>41</sup> can be applied to the use of false credit and debit cards without causing any problematic issues, some changes to this Article should be made as follows:

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<sup>38</sup> That is to say, forger should be liable for forgery without needing to use this card.

<sup>39</sup> The punishment which is provided by these Articles (346 and 351) is imprisonment for a period of between 6 months to 3 years.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

1) It is suggested that the word “forged”, provided by Article 347 of the Libyan Penal Code, should be defined.<sup>42</sup> Forgery is a legal term, which means that a particular document is false, and at the same time is a subject matter of forgery in the context of forgery offences. Thus, *actus reus*, *mens rea* and the subject matter of forgery must exist at the same time. Using this word is not useful because only the forged document will be the subject of the offence of using a false credit or debit card. The limitation of the word “forged” in this way may affect the utility of the Article and may limit its application. Therefore, this word should be defined in a way which enables the offence<sup>43</sup> to include *any use* of a false credit or debit card. For example, it may be stipulated as follows:

#### Article 347(bis) Definition of a Forged Document

Forged document means any document which has been falsely made or altered.<sup>44</sup>

2) In addition, the distinction between a formal and customary document and paper should be abolished in this Article. Thus, the use of false credit and debit cards would be the same whether the card is formal or customary. This would be consistent with the suggestion that the distinction between a formal and customary document and papers in the context of forgery should be abolished.

3) Another suggestion is that, the condition that the forger must not participate in the forgery of the document<sup>45</sup> should be abolished. The offence of forgery and the offence of using a false credit or debit card are different. Therefore, the forger should be liable for two crimes if he or she chooses to forge a credit or a debit card and use it. It is not justice to punish the one who uses the false card only if he is not the forger. The forger should bear responsibility for his act. This suggestion is to confirm the suggestion

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<sup>42</sup> Article 347 is translated as: “Anyone, who uses a forged formal document, without participating in its forgery, and with knowledge of its forgery, shall be punished by imprisonment for a term not exceeding 5 years. And anyone, who uses a forged customary document, without participating in its forgery and with knowledge of its forgery, if the intention of its use is to obtain a benefit for himself or for others or to harm others, shall be subject to imprisonment. This Article was translated from the Arabic language by the author. *Ibid.*”

<sup>43</sup> The offence of using a false document.

<sup>44</sup> This is the same as Section 170.00(1) of the New York Penal Code. It states that ““forged instrument” means a written instrument which has been falsely made, completed or altered.” New York Penal Code 1967.

<sup>45</sup> Under Article 347 of the Libyan Penal Code, for the user of the offence of using a forged document to be liable for this offence, he must not be the forger of the used document or a participant in the offence of forgery of the used document.



provided in relation to the offence of forgery.<sup>46</sup>

4) Paragraph 2 of Article 347 should be abolished.<sup>47</sup> It may not be necessary. However, in this case, some terms should be added to the paragraph (1). First, the term “or customary document” should be inserted into Article 347, so that formal and customary documents would be dealt with in the same way. Second, the terms “credit and debit cards” should be added. This may make it clear that using any false credit or debit card is covered by Article 347. Therefore, the amended Article and the new Article should be as follows:

#### Article (347) Using Forged Documents

Anyone, who uses a forged document whether formal or customary, or uses a forged credit or debit card with knowledge of its falsity, shall be punishable by imprisonment for a period of between 5 to 15 years.

#### Article 347(bis a) Forging and Using the Same Card

If anyone is liable for the offence of forging a credit or debit card, this shall not prevent him from being guilty of the offence of using a forged credit or debit card if he uses the same forged card.

#### **8.4.4. Recommendation for a New Offence**

For a good criminal protection against the offences of forgery, it is suggested that the possession of forged credit and debit cards should be criminalised. This criminalisation may be effective if the legislator in Libya bears in mind some points. These points are as follows:

1) The concept of possession should be clear, so the word can be translated in a way that does not bring about any confusion. It should include two kinds of possession,

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<sup>46</sup> See the previous section (Recommendations for the Offence of Forgery) which suggests that the condition to use the false document provided by Articles 346 and 352 should be abolished.

<sup>47</sup> Article 347(2) states that: “And anyone, who uses a forged customary document without participating in its forgery with knowledge of its forgery if his intention of its use is obtaining a benefit for himself or for others or harming others, shall be subject to imprisonment.” The text of this paragraph was translated from the Arabic language by the author.

complete possession<sup>48</sup> and incomplete possession. Thus, the act of owning a forged credit or debit card or any prescribed subject should be included. It should be clear that owning a false credit or a debit card is sufficient.<sup>49</sup> In addition, the act of possession by which the possessor has the rights of the owner (though he is not the owner) should be criminalised. However, casual possession should not be included where the possessor only possesses the false card for a very short period without owning or controlling it.<sup>50</sup>

2) Like the suggestion provided for the offence of using a forged document and the offence of forgery, the legislator should make it clear that forgery is a separate offence from possession. Therefore, if the possessor is the same person who forged the card, he should be subject to two penalties, the penalty of the offence of forgery and the penalty of the offence of possession. In other words, Article 76(1) should not be applied.<sup>51</sup> However, the forger in this case, should have time to decide whether he is willing to dispose of the forged card or not. This reasonableness of the duration of this time should be decided by the judge provided that it should not be long.

3) Another point which should be kept in mind is that the knowledge of the falsity of the card should not be vague in the text of the Article of the proposed offence. That is to say, it should be clear that the possessor should have absolute knowledge that he possesses a credit or a debit card *and* that this card is false. Therefore, the one who carries a bag containing a false credit or debit card should not be liable for this offence, if he has no knowledge of its falsity. Furthermore, a distinction between mere intention and intention to use should be considered.<sup>52</sup>

4) The subject matter of possession should not be limited to false credit and debit cards. The legislator should take further steps. The subject matter of the offence of possession should include any machine or device that is specially made or designed or adapted for

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<sup>48</sup> Complete possession requires two elements, the physical element and the immaterial element. It is different from incomplete possession. For more details about complete possession and incomplete possession, see Chapter Seven 7.3.1.

<sup>49</sup> In other words, it is not necessary for the false credit or debit card to be in the hand of the possessor as long as he controls it.

<sup>50</sup> As has been clarified in Chapter Seven.

<sup>51</sup> Article 76(1) provides that: "If one act constitutes multiple crimes, the penalty of the more severe crime shall be applied." Libyan Penal Code.

<sup>52</sup> Thus, the one who possesses the false credit or debit card with intention to use the card should deserve a more severe punishment than the one who only possesses the card without this intention.

making a false credit or debit card. Thus, any machine which is not specially made for forging a credit or debit card such as a student card machine<sup>53</sup> or the machines used for issuing credit and debit cards by companies such as Visa and MasterCard should not be so. In addition, it should include any materials which may be used for making a forged card if this material is specially made or designed for making false credit or debit cards. Although the expired credit and debit cards can be possessed by the cardholder, they should not be so, if they are possessed by others. Hence, a new Article should be provided as follows:

#### Article 348(bis b) Possession of Forged Credit and Debit Cards

- (1) Anyone who has in his possession, without lawful authority or excuse, a credit or a debit card which is, and he knows, to be forged, shall be subject to imprisonment for a period of between 3 to 5 years.
- (2) Anyone who has in his possession, without lawful authority or excuse, a credit or a debit card which is, and he knows, to be forged with intention to use this card, shall be subject to imprisonment for a period of between 5 to 15 years.
- (3) If anyone is liable for the offence of forging a credit or debit card, this shall not prevent him from being found guilty of the offence of possession of a forged credit or debit card if he possesses the same forged card.
- (4) Anyone who makes or has in his possession, without lawful authority or excuse, a machine or implement, paper or any other material, which to his knowledge is, and has been, specially designed or adapted for making a false credit or a debit card, shall be subject to imprisonment for a period of between 3 to 5 years.
- (5) Anyone who makes or has in his possession, without lawful authority or excuse, a machine or implement, paper or any other material, which to his knowledge is and has been specially designed or adapted for making a false credit or a debit card, with the intention of making or changing information on a credit or debit card, shall be subject to imprisonment for a period of between 5 to 15 years.

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<sup>53</sup> Such as “Magicard Rio” which is used by Bangor University. See Ultra Electronics, Magicard <<http://www.ultramagicard.com/>> accessed 6 June 2014.

- (6) Anyone more than the cardholder who has in his possession, without lawful authority or excuse, an expired credit or debit card which is and he knows to be so, shall be subject to imprisonment for a period of between 3 to 5 years.
- (7) Anyone more than the cardholder has in his possession, without lawful authority or excuse, an expired credit or debit card which is and he knows to be so, with the intention of making or changing information on a credit or debit card, shall be subject to imprisonment for a period of between 5 to 15 years.

### **8.5. SUGGESTIONS FOR FURTHER RESEARCH**

At the end of this thesis, it is important to mention that credit and debit card forgery is not the only subject under criminal law which needs intensive study. Although credit and debit cards have been discussed in the context of the offences of forgery, these cards require more research. Following the application of the offences of forgery to the forgery happening on credit and debit cards, there should be further studies on how the Libyan Penal Code should deal with the misuse of credit and debit cards. For example, as has been seen in this thesis, the machine may not be deceived under Article 461 of the Libyan Penal Code. Thus, if someone deceives the cash machine by using a false credit or debit card or even by using a genuine card (for example, a stolen card), the act may be committed without attracting any criminal responsibility.<sup>54</sup> Thus, this problem should be addressed. Another example is the stealing of the information on credit and debit cards. This matter should be also addressed. It should be explored whether Libyan criminal law is able to protect the users (such as cardholders, merchants and companies) from such acts, and if not, a solution should be provided.

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<sup>54</sup> Neither the offence of deception nor the offence of theft can be applied.

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Interview with Tebar M, Lawyer (Tripoli, March 2012).

Interview with Unnamed, No 39, Judge, Alkhoms Court of First Instance (Alkhoms, February 2012).

Interview with Unnamed, No 40, Prosecutor, Alkhoms Prosecution Office, (Alkhoms, February 2012).

Interview with Unnamed, No 41, Prosecutor, Alkhoms Prosecution Office (Alkhoms, February 2012).

Interview with Unnamed, No 42, Prosecutor, Alkhoms Prosecution Office (Alkhoms, February 2012).

Interview with Unnamed, No 43, Judge, Sirt Court of First Instance (Alkhoms, February 2012).

Interview with Unnamed, No 44, Judge, Alkhoms Court of First Instance (Alkhoms, February 2012).

Interview with Unnamed, No 45, Judge, Tripoli Court of First Instance (Tripoli, March 2012).

Interview with Unnamed, No 46, Employee, Aman Bank, (Tripoli, March 2012).

## **APPENDIX 1**

Articles of forgery law under the Libyan Penal Code 1953 in the Arabic and English  
languages

## Chapter Three Forging Documents

### الفصل الثالث تزوير الوثائق

#### Article 341 - Forging Formal Papers by a Public Employee

Any public employee, who during doing his duty, puts a forged document entirely or in part, or forges a valid document, shall be punishable by imprisonment for a term not less than 3 years.

#### مادة ( 341 ) تزوير الموظف العمومي للأوراق العامة

يعاقب بالسجن مدة لا تقل عن ثلاث سنوات كل موظف عمومي يضع أثناء ممارسته لمهامه وثيقة مزورة في كليتها أو جزء منها أو يزور وثيقة صحيحة.

#### Article 342 - Forging the Content of Formal Documents by a Public Employee

Any public employee, who falsely decides that a document is valid which its submission, writing or supervision is under his authority, writes data which he has not been provided, omits or alters data which he was provided, or falsely decides, in any way, facts which the document relies on for its authenticity, shall be punishable by the same penalty which is in the previous Article.

#### مادة ( 342 ) تزوير الموظف العمومي لفحوى

#### الوثائق العمومية

يعاقب بالعقوبة المنصوص عليها في المادة السابقة كل موظف عمومي يقرر كذباً صحة وثيقة مما يدخل تسليمه أو تحريره أو مراقبته ضمن اختصاصه، أو يثبت بيانات لم يدل إليه بها أو أغفل ذكر بيانات أدلى بها إليه أو يحرفها أو يقرر كذباً بأي وجه من الوجوه وقائع تعتمد الوثيقة على صحتها.

#### Article 343 - Forging the Certificates of who Practise Public Necessary Services

Anyone, who writes a certificate by which he falsely declares facts which the document relies on for its authenticity during practicing a medical or a legal profession or any public necessary services, shall be subject to imprisonment for a term not exceeding one year or a fine not exceeding 100 dinars.



And if the act is committed with the intention for obtaining an illegal gain, the penalty shall be both imprisonment and a fine.

And anyone, who incites one of those referred to in this Article to commit the forgery, or uses the forged certificate with the knowledge of its falsity, shall be subject to the same penalty.

#### مادة ( 343 ) تزوير شهادات القائمين بالخدمات العامّة الضرورية

يعاقب بالحبس مدة لا تزيد على سنة أو بغرامة لا تتجاوز مائة جنيه كل من حرر شهادة وصرح فيها كذباً بوقائع تعتمد الوثيقة عليها في صحتها أثناء ممارسته لمهنة طبية أو قانونية أو لإحدى الخدمات العمومية الضرورية.

وإذا ارتكب الفعل بقصد الكسب غير المشروع كانت العقوبة الحبس والغرامة معاً.

وتطبق العقوبة ذاتها على كل من حمل أحد الأشخاص المذكورين على التزوير أو استعمل الشهادة المزورة مع علمه بأنها كاذبة.

#### Article 344 - Forging Formal Certificates by a Lay Person

If the act prescribed in Article 341 is committed by, a lay person or a public employee out of performing his duty, the penalty shall be imprisonment for a term not exceeding 5 years.

#### مادة ( 344 ) تزوير الشخص العادي للشهادة العمومية

إذا ارتكب الفعل المنصوص عليه في المادة 341 أحد الأفراد العاديين أو الموظف العمومي خارج مهامه الرسمية، يعاقب بالسجن مدة لا تزيد على خمس سنوات.

#### Article 345 - Presenting False Information in a Formal Document

Anyone, who presents false information to a public employee in respect of an official proceeding which relies on the authenticity of that information, shall be subject to imprisonment for a term not exceeding 2 years.

And the penalty shall not be less than 3 months if the falsity is about personal identity.

### مادة ( 345 ) الإدلاء ببيانات كاذبة في الوثائق العمومية

يعاقب بالحبس مدة لا تجاوز سنتين كل من أدلى لموظف عمومي ببيانات كاذبة بخصوص إجراء عمومي يعتمد على صحة تلك البيانات.

ولا تقل العقوبة على ثلاثة أشهر إذا تعلق الكذب بالبيانات الشخصية.

### Article 346 - Forging Customary Papers

Anyone, who draws up a forged customary paper entirely or in part, distorts a valid customary paper or allows anyone to falsely draw it up or to distort it with the intention that he obtains a benefit for himself or for others, or harms others, shall be subject to imprisonment for a term not less than 6 months if he uses, or allows anyone to use, it.

It is also regarded as distortion if there are false additions on valid customary paper after the finishing of its final drawing up.

### مادة ( 346 ) تزوير الأوراق العرفية

كل من حرر ورقة عرفية مزورة كلياً أو جزئياً أو حرف ورقة عرفية صحيحة أو سمح بتحريرها مزورة أو للغير أو إلحاق ضرر بآخرين، يعاقب بالحبس مدة لا تقل عن ستة بتحريرها وكان قصده تحقيق منفعة لنفسه أو أشهر إذا استعملها هو أو سمح للغير باستعمالها.

وتعد في حكم التحريف أيضاً الإضافات المزورة على ورقة عرفية صحيحة بعد تحريرها نهائياً.

### Article 347 - Using False Documents

Anyone, who uses a forged formal document without participating in its forgery with knowledge of its forgery, shall be punishable by imprisonment for a term not exceeding 5 years.

And anyone, who uses a forged customary document without participating in its forgery with knowledge of its forgery if his intention of its use is obtaining benefit for himself or for others or harming others, shall be subject to imprisonment.

### مادة ( 347 ) استعمال الوثائق المزورة

يعاقب بالسجن مدة لا تتجاوز خمس سنوات كل من استعمل وثيقة رسمية مزورة دون أن يشترك في تزويرها مع علمه بذلك.

وتطبق عقوبة الحبس على كل من استعمل وثيقة عرفية مزورة مع علمه بذلك دون أن يشترك في تزويرها إذا كان القصد من استعمالها تحقيق منفعة لنفسه أو للغير أو إلحاق ضرر بآخرين.

### Article 348 - Destroying, Damaging or Concealing Valid Documents

Anyone, who destroys, damages or conceals a forma valid document, shall be punishable by imprisonment for a term not exceeding 5 years.

And it shall be subject to imprisonment if the act happens on a formal document with the intention which is mentioned in the previous Article.

### مادة ( 348 ) إهلاك الوثائق الصحيحة أو إتلافها أو إخفاؤها

كل من أعدم أو أتلف أو أخفى وثيقة صحيحة رسمية يعاقب بالسجن الذي لا تزيد مدته على خمس سنوات. وتكون العقوبة الحبس إذا تعلق الفعل بأوراق عرفية وتوفر الغرض المبين في المادة السابقة.

### Article 349 – Forging Records and Communiqués

Anyone, who is legally obligated to hold records which are subject to the inspection of general security, or is legally obligated to present information about his economic, commercial or professional activity, confirms in the records, or in the statement, false information, or allows anyone to do so, shall be subject to imprisonment for a term not exceeding 6 months, or a fine not exceeding 100 dinars.

### مادة ( 349 ) تزوير السجلات والتبليغات

كل من كان ملزماً قانوناً بمسك سجلات خاضعة لتفتيش سلطات الأمن العام أو كان ملزماً بتقديم بيانات لتلك السلطات عن نشاطه الصناعي أو التجاري أو المهني وأثبت في السجلات أو البيانات أقوالاً كاذبة أو سمح بإثبات تلك الأقوال الكاذبة يعاقب بالحبس مدة لا تزيد على ستة أشهر أو بغرامة لا تتجاوز مائة جنيه.

## Article 350 - Forging Passports

Anyone, who forges a passport, a traffic permit, traffic permission or any such conduct, or uses it after being forged or altered, shall be subject to imprisonment or a fine not exceeding 50 dinars.

And if the forger is a public employee, the principle of the public employees must be applied.

### مادة ( 350 ) تزوير جوازات السفر

يعاقب بالسجن مدة لا تتجاوز خمس سنوات كل من زور جواز سفر أو تذكرة مرور أو إذن بالمرور وما إليها أو استعمل شيئاً من ذلك دون أن يشترك في تزويره مع علمه بذلك. وإذا كان المزور موظفاً عمومياً طبقت في شأنه الأحكام الخاصة بالموظفين العموميين.

## Article 351 – Forging Customary Documents Signed in Blank

Anyone, who is in a position of honesty of paper signed in blank, abuses it, by writing on it or allowing to be written on it a customary document creating legal effects which are different from what he is allowed to fill in or he is entitled to write, shall be subject to imprisonment for a term of between 6 months and 3 years, if he uses it or allows others to use it with an intention that he, obtains a benefit for himself or for others, or harms others.

And it is considered signed in blank every paper on which the owner of the signature leaves a gap to be filled in.

### مادة ( 351 ) تزوير الأوراق العرفية الموقعة على بياض

كل من انتمن على ورقة موقعة على بياض فأساء استعمالها بأن كتب عليها أو سمح بأن تكتب عليها وثيقة عرفية منشئة لأثار قانونية تختلف عما كان ملزماً بتعبئته أو مأذوناً له في كتابته، يعاقب بالحبس من ستة أشهر إلى ثلاث سنين إذا استعملها هو أو سمح للغير باستعمالها وكان غرضه من ذلك تحقيق منفعة لنفسه أو للغير أو إلحاق ضرر بآخرين.  
وتعد موقعة على بياض كل ورقة يترك فيها صاحب التوقيع فراغاً يراد ملؤه.

## **Article 352 - Forging Formal Documents Signed in Blank**

Any public employee, who has under his authority a paper signed in blank which he has to, or he can, fill in, and he abuses it by writing on it formal paper which interferes with what he, has to, or can, write or he allows that, shall be punishable by the penalty which is decided in the Article 341

### **مادة ( 352 ) تزوير الأوراق الرسمية الموقعة على بياض**

تنزل العقوبة المقررة في المادة 341 بالموظف العمومي الذي في حيازته بحكم وظيفته ورقة ممضاة على بياض، وكان مفروضاً عليه أو جائزاً له تعبئتها، فأساء استعمالها بأن كتب عليها ورقة رسمية تخالف ما كان مفروضاً عليه أو جائزاً له كتابته، أو سمح بذلك.

## **Article 353 Other Circumstances of Documents Signed in Blank**

In other circumstances of forging blank signed papers which are not subject to Articles 351 and 352, the principles of the material forgery of formal and customary papers are applied.

### **مادة ( 353 ) حالات التزوير الأخرى في الأوراق الموقعة على بياض**

تطبق بشأن تزوير الأوراق الموقعة على بياض في الحالات التي لم ينص عليها في المادتين السابقتين الأحكام الخاصة بالتزوير المادي في الأوراق الرسمية أو الأوراق العرفية.

## **APPENDIX 2**

### **Interview Letters**

**Declaration to be attached to the Topic Form  
For research degrees (Phd, MPhil and MA by research)**

**A copy of this declaration accompanied by a copy of the research proposal  
should be sent to Anwen Evans, Secretary, CBSSL Ethics Committee  
(CBSSEthics@bangor.ac.uk)**

Prior to undertaking any research project, students and supervisors should familiarise themselves with the University's Research Ethics Policy. The policy document can be found at the website below

<http://www.bangor.ac.uk/ar/ro/recordsmanagement/REF.php>

Researchers should note that the following research activities would normally be considered as involving more than minimal risk and, consequently, require ethical review by the College Ethics Committee:

- i) Research involving vulnerable groups – for example, children and young people, those with a learning disability or cognitive impairment, or individuals in a dependent or unequal relationship.
- ii) Research involving sensitive topics – for example participants' sexual behaviour, their illegal or political behaviour, their experience of violence, their abuse or exploitation, their mental health, or their gender or ethnic status.
- iii) Research involving groups where permission of a gatekeeper is normally required for initial access to members.
- iv) Research necessarily involving deception or which is conducted without participants' full and informed consent at the time the study is carried out.
- v) Research involving access to records of personal or confidential information, including genetic and other biological information, concerning identifiable individuals.
- vi) Research that would induce psychological stress, anxiety or humiliation or cause more than minimal pain
- vii) Research involving intrusive interventions – for example, the administration of drugs or other substances, vigorous physical exercise, or techniques such as hypnotherapy.

**Data Protection**

If it is anticipated that human participants will be engaged, duly signed Consent forms and information sheets should be drawn up and a copy lodged with the secretary of the College Ethics Committee. Special attention must be given to compliance with the legal requirement of checks by the Criminal Records Bureau

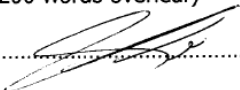
when dealing with children and vulnerable adults. The College Manager should be able to guide applicants through this process. The student must discuss with supervisors and agree procedures to ensure confidentiality of respondents.

**Declaration by student:**

The student should sign either of the following declarations, as appropriate, followed by a declaration by the supervisor.

**EITHER**

I certify that I have read the Research Ethics Policy of the university and my supervisor agrees with me that none of the issues raised there is relevant for this research project because (Maximum of 200 words overleaf)

(Sd)..........Date..16/11/2011

Name of researcher.....

**OR**

I certify that I have read the Research Ethics Policy of the university and believe that my research proposal requires ethical review. The relevant ethical issues are addressed as follows.(Maximum of 200 words overleaf)

(Sd).....Date.....

Name of student.....

**Declaration by supervisor:**

I have read the University's Research Ethics Policy and the College Ethics Policy and, in my professional judgement and on the basis of information given to me by the student (**delete as appropriate**)

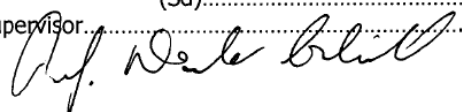
**EITHER**

All the relevant ethical issues have been addressed satisfactorily and I recommend that approval is given subject to these steps being taken (**enumerate**)

**OR**

All the relevant ethical issues will have been addressed satisfactorily subject to following steps being taken by the student, and I recommend that approval be given by CBSL Ethics Committee

— *Interview Consent to be signed by Subjects.*  
(Sd).....Date..16/11/11

Name of Supervisor.....  




26<sup>th</sup> January 2012

**TO: AMAN BANK**

**Student: Alija, Yousef**  
**ID: 500235963**  
**Degree: PhD Law**

This letter is to certify that Mr Alija is a registered full-time PhD student here in Bangor University.

Mr Alija is currently studying for a PhD in Criminal Law, researching the credit and debit forgery in Libya. He will be travelling to Libya to conduct research and collect data for his thesis titled: 'An Examination of the adequacy of Libyan Forgery Law'.



**Rebecca Jane Owen**  
**Postgraduate Curriculum Administrator**

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[www.bangor.ac.uk](http://www.bangor.ac.uk)

26<sup>th</sup> January 2012

**TO: ATEJARA & ATANMEA BANK**

**Student: Alija, Yousef**  
**ID: 500235963**  
**Degree: PhD Law**

This letter is to certify that Mr Alija is a registered full-time PhD student here in Bangor University.

Mr Alija is currently studying for a PhD in Criminal Law, researching the credit and debit forgery in Libya. He will be travelling to Libya to conduct research and collect data for his thesis titled: 'An Examination of the adequacy of Libyan Forgery Law'.



**Rebecca Jane Owen**  
**Postgraduate Curriculum Administrator**

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## **Declaration no Ethical issues raised in the research project**

### **“An Examination of the Adequacy of Libyan Forgery Law to deal with Credit and Debit Card Forgery”**

Yousef Alija (Ph.D. Thesis) under the Supervision of Professor. Dermot Cahill

**At the School of Law in the College of Business, Social Sciences and Law**

**Bangor University**

#### **Statement of Ethical Practice**

1. This statement intends to provide assurance that the above named Ph.D. research program will be conducted in such a manner that it satisfies the requirements of the University’s Research Ethical framework. In particular, the research will address the following ethical responsibilities:

- a. Ensure that valid, informed consent is obtained before individuals participate in the research;
- b. Avoid personal and social harm;
- c. Protect the confidentiality of information about the research participants and their identities;
- d. Ensure dignity, respect and privacy are accorded to research participants;

Review the assessment and management of risk to the researchers and the research participants during the research.

2. The proposed research requires ethical review and approval from the College Ethics Committee because the research will be conducted in Libya which is outside the United Kingdom (as enshrined in section 5.3 of the Bangor University Research Ethics Framework).

#### **3. Purpose of the research.**

The research seeks to examine the law of forgery in Libya and is it able to protect credit and debit cards by assessing forgery offences in the Libyan Penal Code. Furthermore, the research aims to improve the understanding of the forgery offences and whether the law of forgery needs to develop.

#### **4. The research scope**

The study would be conducted in Libya in two cities, Tripoli and Alkhoms. Participants in the research will include:

- a. In Tripoli city:  
Judges in the Supreme Court and other courts  
Prosecutors

Lawyers:

Lawyers in some branches and central banks (such the Libyan Central Bank, as Aman bank, Aljamhorea Bank and Atejara Oa Atanmea Bank)

Experts in criminal law.

Police officers.

Law students in the school of law in Alfateh University

b. In Alkhoms city:

Judges

Prosecutors

Lawyers

Experts in criminal law

Police officers

## **5. Research Time Frame**

The research will be conducted in one phase. It will be carried out between February and April 2011.

## **6. Research Methods**

1. Semi structured interviews with the research participants at every stage.
2. Questionnaire to be administered to random people to know people's views and knowledge about credit and debit cards.

## **7. Data recording and Handling.**

Interviews will be recorded using either audio or video equipment, subject to the participants' consent. Field notes taken during and directly after the interviews will serve as a back-up to recordings. All recordings and notes will be transcribed and data will be kept physically and electronically secured at all times.

## **8. Informed Consent.**

All participants in group or individually, will be given a sufficient explanation of the purpose and use of the research.

This information will be clear and sufficient to ensure that they are capable of making an informed decision.

Before participation in the research, a prepared Consent form will be given to participants to comprehend and complete.

Research participants will be assured that all information given will not be disclosed or shared and will be handled confidentially. This includes their personal identities.

At every stage of the research, research participants' anonymity will be protected and their confidentiality will be guaranteed.

Anonymity and privacy of the participants in the research will be respected. Personal information concerning the research participants will be kept confidential.

No identity of the research participants will be disclosed at any stage of the research or thereafter unless the participant does not mind whose name is to be given.

It will be made clear to the participants that their participation in the research is voluntary and they have the right to refuse to answer individual question (s) and or withdraw from the research at any point.

All Methods to be used in this research are overt and will be declared as such throughout.

### **9. Confidentiality and anonymity**

The confidentiality of all materials and information obtained will be respected throughout the research process; including details of government documents, data collection, handling, analysis and reporting.

### **10. Ethical Compliance**

The research will seek to comply with the ethical research requirements of Bangor University and ESRC Research Ethics Framework (2005).

In addition to this Statement, I pledge to comply with any other condition(s) the University may so wish to add that will make the proposed research valid and reliable. Enclosed are a copy of the signed Declaration for the College Ethics Committee's consideration and approval.

Mr. Yousef Alija  
Ph.D. Program (Ref: 500235963)  
School of Law

## **APPENDIX 3**

### **The Transcription of the Interview in the English Language**

## Interview No 1

The name: Doctor Alkoony Abooda

Occupation: Lecturer / Expert in civil law

Place of work: Tripoli University/ school of law

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Do you consider credit and debit cards as documents under Libyan law?

Although, in general, Libyan Civil law does not deal with electronic law, the answer is yes. The reason is that these credit and debit cards contain information and this information is written in a particular way. This is answer is as to civil law.

However, the matter is not the same in criminal law because there is a principle that makes the answer different. This principle is the principle of legality. No crime and no punishment without law. If we consider these cards as documents, they will fall under forgery offences. However, the Article of forgery requires a material made from paper. The electronic material cannot be the alternative. Considering these cards as documents might be dangerous because it leads to a widening in the criminalisation. It means, some people will be subject to criminalisation, although they do not forge a customary document in the meaning that was meant by the legislature in Libya in 1953. The reason is that the legislator intended the information that is on a paper proper and this paper

material must be signed by a signature or fingerprint.

Q2. Do you mean that the information which is on the plastic material is not covered by the forgery offences?

From the civil law perspective, it can be covered if we use an analogy as a type of interpretation, but from the criminal law perspective is not because of the principle of legality.

Q3. Do you mean the visible and invisible information or only the invisible one?

If we consider this card as a document, it must be considered as an integral document, whether as to the invisible information or visible information.

The interpretation of the word 'paper', which is provided for in the Article of customary document forgery (346), can be any information on a physical material. However, it can be said no; the word covers the electronic information too. This is as has been emphasised, from the civil law side, but from criminal law angle, there is the principle of legality.

Q4. What is your view about the word 'customary' in Article 346 of the Libyan Penal Code? Do you think that it means what people are used to at that time when the legislation was made?

I presume that the concept of customary paper came not from the idea of the custom. It came from a fact that customary paper is not a formal document. In other words, it is not created by a public employee. It means it is created by an ordinary person. Thus, customary paper means a non-formal document.

Q5. Do you mean that when a judge in Libya makes a decision considering a credit or a debit card as a document and applies Article 346 of Libyan Penal Code (forging a customary document) he is breaching the principle of legality?

From my point of view, yes, it is. As long as the Article is still in its current formulation, the interpretation must be in a way that does not harm the accused, respecting the principle of legality. Thus, because when considering these cards as documents, the Article's meaning is widened.

Q.6 Do you think not considering these cards as documents means using false credit



and debit cards is not criminalised under the Libyan Penal Code?

It is sure and this requires the legislator to act by stating a new law in this regard. If the legislator amends civil law and considers these cards as documents so as to become the word 'customary document' means either writing on a paper material or on an electronic material, interpreting these cards as documents will be appropriate in criminal law. The judge in this case can apply Article 346 without breaching the principle of legality because the definition of customary paper is existent in civil law. However, in the current case this interpretation interferes with the intention of the legislator in 1953, because the legislator did not think of electronic documents at that time.

Q7. Do you think the Libyan Supreme Court is considering and following the principle of legality?

To answer this question, one must follow the decisions of this court. However, my answer is yes. The court is watching other courts and making sure that they apply law in the correct way.

Q8. If the Libyan Supreme Court interpreted this Article (346) as to cover electronic documents, do you think that it would be a breach the principle of legality?

This interpretation would be inconsistent with the principle of legality because of the aforementioned discussion.

Q9. Is the deception imagined against machines in Libyan criminal law?

Deception is not required in criminal law to be conducted against a person. It could be committed in the face of a person or a machine. What is required for the deception offence to be committed is that the fraudulent person gains a physical interest regardless of who was under the effect of fraudulent ways. Thus, I think a deception crime is imaginable to be committed, but forgery is not.

Q10. Do you think that the possession of a false document should be criminalised, and what about credit and debit cards?

Criminalising the possession of false documents is effective from a criminal policy aspect. It restricts forgery and deception offences. With respect to the penal, it should

be different in the possession of false document with only the knowledge that it is from the possession of a false document with the intention of using it.

Q11. Do you think that the differentiation between formal and customary documents should be abolished?

The differentiation between these two documents has its justifications. Because the formal document represents the state and the government departments, the assault on it is considered as a disparagement to the state or its departments. On the other hand, a customary document represents individuals, so the assault on this document will not have the same value. The formal document carries the name of the state and presents the state. Therefore, whereas forging formal documents deserves a more severe punishment, forging customary documents deserves a less severe penalty.

Q12. Do not you think that the harm, which is generated from a false customary document, is sometimes bigger than that which results from forging a formal document?

This is true. If we consider the consequences that may result from forging electronic documents such as credit and debit cards (as they are customary documents in Libyan law), or from some other value customary documents such as the title that proves the ownership of a property, we will observe that forging customary documents might be more dangerous. Thus, from the practical consequences, the answer would be yes. However, the concept of formal documents is restricted in the fact that this document represents the state and its prestige. Thus, the one who disparages the state's prestige deserves a different consequence from the one who only disparages individuals' prestige. The matter here is the respect of the public interest not the individual's interest.

Q13. Do you think that the punishment that is provided by Article 346 of the Libyan Penal Code<sup>1</sup> is appropriate to credit card forgery?

No, it is not sufficient. I suggest that the punishment should be not less than three years imprisonment and not more than five years imprisonment.

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<sup>1</sup> The punishment for forging a customary paper in the Libyan Penal Code is imprisonment for a term of not less than 6 months and not more than three years. See Article 346 of the Libyan Penal Code.

Q14. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the chapter on forgery offences?

I agree with you that the act does not constitute forgery.

Q15. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the chapter on forgery offences?

The legislator meant the real documents not false documents. Thus, I assume that it is not in its supposed place.

When I was in the commission for suggesting a bill of civil law, the commission suggested a particular Article governing electronic signatures from a civil law aspect. I suggest that a new law should be established with respect to forgery offences including the electronic material.

As for the interpretation, there is difficulty in applying forgery offences to credit and debit cards, if we follow the purposive interpretation. The reason is that when we do so, we act as if we give the Article a meaning other than what the legislator gave when the Article was provided. We give a meaning that was not intended by the legislator.

Q16. It can be argued that the intention of the legislator when the forgery law was imposed is to combat forgery in any form. Thus, because changing electronic information is considered as forgery, the forgery law can apply to this kind of forgery. Do you agree with this argument?

My Point of view is that as long as the words of the provisions are clear and indicate that the legislator, in Libya, at that time dealt with documents that was written on tangible physical material, and we now deal with information on a mineral disc or card, this interpretation is not accepted. This is because it seems that there is a problem which is the principle of legality. I am with those who state that customary papers must not be widely interpreted. However, they can be interpreted widely in civil law but not in criminal law.

Q17. Suppose that civil law defines customary paper so as to include electronic documents. Would this reflect on criminal law?

Legislations complete each other. Thus, when civil law defines the customary paper, the

criminal judge can interpret these words (customary paper) either in the accused's interest or against his interest. This will not breach the principle of legality.

## Interview No 2

The name: Ali Abuamood

Occupation: A lawyer

Location of the interview: Alkhoms City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Criminal law did not determine the meaning of the paper or the document. However, when we consider the meaning of it in civil law, the document means authenticating information in a paper. It means writing. Therefore, the authentication is writing whether the writing is on a paper or anything that is similar to the paper. In addition, writing can be signs, numbers or letters.

In respect of the electronic writing, it is not more than signs that are electronically stored. It can be only read by electronic machine. This writing in my view is a document. Thus, credit and debit cards are customary documents.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

The alteration of the reality that may happen to these cards constitutes forgery which falls under the Article 346 of Libyan Penal Code. It constitutes forging a customary paper offence. This Article can be applied whether the alteration happens on visible

information or on invisible information.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

If the judge is faced with an alteration of a reality on a credit or debit card he can apply the forgery offence to this case.

Q4. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

No it is not.

Q5. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

Yes it is. It constitutes the use of a false customary document.

Q6. Can the machine be deceived?

The machine is systemised by its owner. When the machine responds to the user of the card, it operates, as if it has will or volition. Thus, the machine can be deceived.

Q7. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

There is no reason for the possession of the false cards to be criminalised because forging a card and using a false card is punishable. The possessor does not benefit from the possession unless the false card is used and if he uses it, he will be punished by the penalty of the use of a false document offence.

However, if the possession of a false card is criminalised as provisions or a prevention policy, it will be acceptable.

Q8. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

I do not see any reason for removing this Article.

Q9. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

This Article should be removed to another Chapter in the code.

Q10. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

I am with the view which calls for the differentiation between these two kinds of documents to be abolished. The reason behind this is that some customary documents have a value that is greater than the formal document has, e.g. a customary document proving the ownership of a piece of land or proving a large amount of money. These customary documents will be more important than the formal documents that do not prove any important right. I mean that the determination of the document whether it is important or not should rely on the value of the right that this document protects.

Q11. Have you ever been faced with such a case?

No.

### Interview No 3

The name: Faozy Abuarabeah

Occupation: A lawyer

Place of work: Ministry of Justice – Legal Practice People’s - Tripoli

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Credit and debit cards are documents because they prove the rights in banks.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Forgery law does not protect these cards from forgery for a number of reasons. First, credit and debit cards are not customary papers. The Libyan legislator, in 1953, criminalised forgery that happens on customary papers not customary documents. He meant paper in its ordinary meaning. Hence, cards cannot be considered as customary papers, not because they are made of plastic, but because the information on them is not visible as the information on the paper. Second, credit and debit cards were not recognised when the law was introduced. Forgery law was established in 1953. Thus, how can it be stated that these cards are covered by this law? Finally, credit cards are documents not paper because they made of plastic. Hence, plastic is not paper; therefore, as the credit and debit cards are plastic, they are not covered by Article 346.



If the card is issued by a public employee or a department, the card will be covered by forgery offences. However, it will not be covered by Article 346. It will be covered by the other Articles which criminalise forging formal documents. The reason is that the card in this case will be a formal document not a customary document.

With respect to the forgery happening on the visible information on the card, it cannot be forgery. The reason behind this is that there will not be an advantage from this forgery. The forger will not benefit from this forgery unless he changes the invisible information (electronic information). Thus, the elements of the forgery offence will not occur.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

If the judge is faced with such a case and applies the forgery offences, he will breach the principle of legality.

Q4. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies the forgery articles?

Although the decision of the Supreme Court is binding upon the other courts, it will be inconsistent with the principle of legality.

Q5. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

It does not constitute an offence. The reason is that cards are documents not papers and the Article requires a paper.

Q6. Can the machine be deceived?

The Article of the deception cannot be applied to the use of the false card at cash machines. The law is insufficient and it should be reformed.

Q7. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession of a false document is not a crime and is only a preparatory act of the use of the false document offence. On the other hand, it should be criminalised if the

possessor knows that it is false or he intends to use it. With respect to the punishment, I suggest that it should be various.

Q8. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

This false statement is not forgery.

Q9. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

I cannot answer.

Q10. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

The differentiation is justified. A formal document is different from the customary paper. The harm in the customary paper is less than it is in the formal document.

Q11. Have you ever been faced with such a case?

No.

## Interview No 4

The name: Alhashmy Abujareeda

Occupation: A lawyer

Place of work: Ministry of Justice – Legal Practice People’s - Alkhoms

Location of the interview: Alkhoms City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

From a civil law perspective, I consider these cards as documents in their new meaning. Document used to have another meaning which was different from the meaning the document has today. Before the electronic document emerged, the only document that was known was the traditional customary paper. The best example of these documents is the contracts that were issued between individuals. Because these cards are usually issued by banks, they are customary documents.

There is a problem with these cards. They cannot be used as evidence. The reason is that for the customary paper to be used as evidence, it must be signed or stamped by the issuer. The electronic document is not stamped or signed. Thus, the electronic document has no capability of being evidence.

Q2. Does Libyan criminal law protect credit and debit cards from forgery offences?

There is a gap in the law. It is not sufficient to deal with this kind of document. However, the criminal judge should interpret the word document in its new meaning and apply forgery offence to such crimes.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

If the judge applies forgery the offence to the credit or debit card forgery, he will breach the principle of legality because these cards are not documents according to Libyan penal law. However, the criminal judge should interpret the word document in its new meaning. If he does not do so, the confidence in the use of these new cards will be affected. Thus, the judge should apply forgery offence to credit and debit cards.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

Yes it constitutes the use of a false document offence.

Q5. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession of false documents should be criminalised. The reason for this view is that the false document may be possessed by someone who uses this false document. However, it should be differentiated between the mere possession with the knowledge that the document is false and the possession with an intention to use the false document. The possession with the intention of use is more harmful. From my point of view, the possession of a false document is similar to the possession of drugs.

Q6. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

The differentiation between these two kinds of documents finds justification in the fact that the formal document presents the state but the customary document presents the relationships between individuals. The formal document should be distinguished from the non-formal document and the punishment should be different. However, this does not mean the punishment of the credit and debit card forgery should be the same as the punishment of the customary document forgery. The punishment should be higher but not the same as the punishment of the formal document.

Q7. Have you ever been faced with such a case?

No. In addition, I suggest that the legislator should make special new law criminalising the credit and debit crimes.

## Interview No 5

The name: Sameha Abuzaid

Occupation: A prosecutor

Place of work: North Tripoli Prosecution Office

Location of the interview: Tripoli city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Credit and debit cards are considered as documents, whether as to electronic information or visible information. These cards are considered as the passports and other formal document which must be protected by a new law.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Forgery offences cannot be applied to these cards. The law is insufficient to deal with these cards. Thus, the legislator should intervene and change the law so as to the alteration of the reality on these cards becomes a crime. They must be protected because the use of these false cards cause harm to the cardholder in respect of his personal information that is on the card.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

If the judge does so, he will breach the principle of legality. The court must rule that the accused is not guilty because no crime is committed.

Q4. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

Yes it would be a breach of the principle of legality. The Libyan Supreme Court may breach the principle of legality. For example, in its decision in 1997, the court did breach the principle of legality. It interpreted the word (يجلب: *eaglib*) as carrying something from one city to another inside Libya. The legal known meaning of the word (يجلب) is to bring the drug from outside Libya. However, the court interpreted the word to give another meaning. The evidence is that the word means the meaning that I mentioned is that later the law of drugs added a new provision which openly states that this word means carrying drugs from one city to another inside the country. If the word means carrying something from one city to another inside Libya, the law would not need to confirm that meaning.

Q5. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

Because the legislator does not criminalise credit and debit card forgery, the use of these false cards is not a crime which should be so.

Q6. Can the machine be deceived?

According to the Libyan criminal law, the deception must be committed against a natural person. Thus, the deception against a machine is not imagined.

Q7. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

It is not necessary that this possession be criminalised. The reason is that this act is considered as a preparatory act of the use of the false document and the preparatory act is not a crime in Libyan criminal law.

Q8. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

It should not be in the Chapter on forgery offences.

Q9. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

This Article should be in another place in the code, for example, in the Chapter of the money offences, but not in the Chapter on forgery offences.

Q10. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

A formal document should be punished by more severe punishment than the customary document should. The reason is that the formal document is more important.

Q11. Have you ever been faced with such a case?

No.



## Interview No 6

The name: AbduAsalam Alahoal

Occupation: A prosecutor

Place of work: Alkhoms Prosecution Office

Location of the interview: Alkhoms city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. What is your view about the magnetic strip on credit and debit cards? Are they documents?

Credit or debit cards can be divided into two divisions. As for visible information, these cards are considered as customary paper and the alteration of it constitutes customary paper forgery. However, the second division which is invisible information is not a document and the alteration on it is not forgery.

Q2. If the judge makes a decision considering these cards as documents and applies the forgery offences, what is your view about that?

If the information forged is visible information, this decision is correct but if it is in respect to invisible information, it is against the principle of legality.

Q3. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

The authority of the Court is to narrowly interpret the law but not to make a new law or widely interpret it. In this case, the Court breaches the principle of legality if the decision is as to invisible information because the law is interpreted widely.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya? Can you explain?

The use of a false card is the same as the alteration of the reality on the card. If the use is as to visible information, it constitutes the use of a false customary paper, but if it is not, this offence is not constituted.

Q5. Can the machine be deceived?

The Article of the deception crime requires that a person must be deceived and believes the fraudulent manners. The machine has no will. Thus, the machine cannot be deceived.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

Because there is harm from the possession of a false document, it should be criminalised. This can be applied to the possession of false cards.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

Stating false information is not forgery. However, it is not necessary to remove this Article from this Chapter because it meets the meaning of forgery by hiding the reality.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

I think it is in the correct place and there is no reason for changing its position.

Q9. Do you think that the differentiation between formal and customary documents should be abolished?

Yes. There is a difference between these two documents in respect of the position of the public employee.

Q10. Have you ever been faced with such a crime?

No.

## Interview No 7

The name: Abubakr Alansary

Occupation: Lecturer / Expert in criminal law

Place of work: Tripoli University/ school of law

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Do you think credit and debit cards fall under forgery offences?

No, they do not. The reason is that although the intention of the legislator in 1953 when the law was provided, was the protection of the public trust, it did not intend to apply forgery offences to electronic documents which have emerged recently.

This also can be suggested as to civil law that has not given these electronic documents any strength to be used as evidence.

Q2. If for example civil law gives electronic documents strength as a proof, do you think this will reflect on criminal law and forgery offences? In other words, will forgery offences apply to credit and debit cards?

It could be but by using a wide interpretation and this interferes with the principle of legality.

What must be clear is that when forgery offences were provided for, in 1953, the

legislator was talking about documents that were made from paper and those that were tangible and touchable. The legislator did not imagine that this law would be applied to these new electronic untouchable documents, despite the fact that the intention of the legislator was to protect public trust irrespective of whether these documents were formal, customary, physical or electronic. The question that is posed here is, why does not the legislator in Libya frankly state a new law criminalising electronic document forgery? This will settle the argument and solve the problem of credit and debit card forgery.

Q3. Suppose that there is a case of a credit or a debit card forgery before the judge and the decision that is made considers this act as a forgery offence, do you think that it will be a breach of the principle of legality?

Of course it will. The judge must acquit the accused of this charge.

Q4. Has the Libyan Supreme Court ever breached the principle of legality?

I do not think so. However, not all the decisions of the Supreme Court are correct. The evidence is that this court sometimes makes wrong decisions, is that, it sometimes revises its previous decisions and abolishes them.

Q5. Are you with the criminalisation of the possession of false documents, and what about false credit and debit cards?

Criminalising the possession of false documents might be useful, whether for the purpose of the use or only for the purpose of mere possession. As for credit and debit cards, the matter is the same. They may need to be criminalised.

Q6. Do you think that the differentiation between formal and customary documents should be abolished?

The trust that is created from these different documents is not the same. The trust that appears from the formal document is stronger than that which is sent from the customary paper. Although it might be argued that the harm caused by forging a customary paper might sometimes be bigger, this is not a reason for aggravating the punishment of the customary paper forgery offence. There is a civil court to which the victim can go. However, I do not disagree with the equalisation between these two different documents. There is no obstacle in the path of this view.

With respect to credit cards, the legislator should give special provision to credit and debit cards, and should end the disagreement between the commentators and judges. I suggest that the legislator provides a special provision for credit and debit cards as it did for the passport forgery. It could provide a provision that makes credit and debit cards formal documents so the punishment will be the same as the formal documents.

Q7. If the Libyan Supreme Court makes a decision considering credit or debit cards as a document, do you think this is a breach of the principle of legality?

Yes it would be so, especially with respect to electronic information. However, as to the visible information, the card can be considered as a document and this does not breach the principle of legality.

Q8. Is the use of a false credit or debit cards a crime in Libya? Can you explain?

As a consequence of considering credit and debit credit cards not documents as to electronic information, the answer would be no. The use of these false cards does not constitute the use of a false customary paper.

Q9. Can the machine be deceived under Libyan law?

In fact the one who is harmed by using the false card at cash machines is the bank not the machine. In addition, the law does not require that the fraudulent manners must only be practised against a person. Thus, why do we ask about who was deceived. Therefore, the deception crime may be constituted. An example of the deception of machines is the machines that sell drinks. If someone puts counterfeit coins or any subject that makes the machine work and that one benefits from that machine, the act will be considered as a fraudulent manner. Thus, I do not see any problem in applying Article 461 which is criminalising the deception.

Q10. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the chapter on forgery offences?

No answer

Q11. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the chapter on forgery offences?

Hiding a real document is not forgery. However, it does not matter if the legislator put

this article in this chapter; especially if the act of concealing it is connected with forgery. The concealing act contains the meaning of forgery. In addition, concealing a document is considered as an assault on public trust. Forgery and concealing both have a relation so as to encourage the legislator to put them in the same Chapter. Furthermore, it is better when there are some connected crimes to be together in the same chapter. This is the manner of the Libyan legislator. For example, in many chapters you find some Articles that are different from the title of the chapter, e.g. the Article that criminalises receiving the stolen property is put in the chapter on deception crimes. Therefore, the title of chapter 7 (forging documents) does not mean that the word paper means document.

## Interview No 8

The name: Mostafa Alaraby

Occupation: Lecturer / Expert in criminal law

Place of work: Almergheb University

Location of the interview: Alkhoms City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. What is your view about the magnetic strip on credit and debit cards? Are they documents?

Because it must be visible (as the scholars state) the credit and debit cards are not documents as to the electronic information on the cards. Because I do not know what kind of information is on the magnetic strip, it is not a document.

If we consider the meaning of paper, the card is not paper, whether formal or customary paper. Thus, if we try to apply the forgery articles to the alteration of the reality on these cards, we are trying to protect an interest that the legislator should intervene to protect by a new law. I presume forgery law is not sufficient to be applied to credit and debit card forgery. The reason is that the subject matter of forgery must be paper and the cards are not papers. In addition, whereas the information must be visible, the information on the cards is not visible. That is, the legislator must intervene.

Q2. Does the Libyan Supreme Court consider the principle of legality?



The Libyan Supreme Court does sometimes breach the principle of legality. For example, Articles 163 and 164 of the Libyan Penal Code require, for applying the confiscation, that the owner of the property (the subject of the confiscation) must not be an assistant or a principle accused. On the other hand, the Article states this principle is not applied if the owner of the equipment of the crime is a person who has not committed the crime. For example, if a car is used for delivering drugs or a mobile phone is used for taking scandalous pictures, they will not be confiscated if they do not belong to the offender, whether the participant or the principle offender.

The legislator in other special laws (such as the law of alcohol and the law of customs) does not provide this condition that was provided by Articles 163 and 164 of the Libyan Penal Code. When the Libyan Supreme Court is faced with such a case, which is subject to customs law, it stated that because the law did not provide the rights of the others who are in good faith, the confiscation must be applied in any case. It does not matter if the equipment belongs to the offender or belongs to the other who is in good faith. This is a breach of the principle of the legality. This breach is presented in the interpretation of the law in a way that interferes with Articles 163 and 164 of the Libyan Penal Code. The explanation of this is that Articles 163 and 164 are considered as general principles and they must applied whenever there is no Article in the special laws. Thus, because customs law did not provide anything in this regard, the general principles must be applied. However the court did not do so.

Q3. Is the use of a false credit or debit cards criminalised in Libya? Can you explain?

Logically we will achieve the same result that we achieve when we talk about card forgery. Thus, the use of false credit and debit cards cannot be subject to the use of a false customary document.

Q4.Can the machine be deceived?

To apply Article 461 of the Libyan Penal Code, the one who is subject to the fraudulent manners practiced by the fraud must be a human. If the victim is a machine, the offence cannot be applicable. The application of the deception offence to such a case interferes with the principle of legality because the legislator did not expect there to be a deception against the machines.

Q5.Do you think that the possession of a false document should be criminalised and

what about credit and debit cards?

I agree with you. However, the punishment should be different. One who possesses a false document because he merely intends to possess it without any other intention should be penalised by a lighter punishment than the other who possesses a false document intending to use it in the future.

Q6. Do you think that the differentiation between formal and customary documents should be abolished?

I am with the differentiation between these two kinds of document. The reason is that forging a formal document will lead to a great harm. For example, forging a certificate of a family will lead to a great danger.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the chapter on forgery offences?

I think it may be transferred to another place in the code.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the chapter on forgery offences?

Yes it is. I agree with you.

## Interview No 9

The name: Sahd Alasbaly

Occupation: Justice /Criminal Chamber

Place of work: the Libyan Supreme Court

Location of the interview: Tripoli City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Libyan Penal law does not recognise credit or debit cards, because they are not frequently used in Libya. Law does not require a specific form in the document. Thus, the document can be in any form. The kind of the document depends on the issuer of the document. If it is issued by a private constitution, it is a customary document or if not it is a formal document.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

If I want to know whether credit and debit cards are protected by forgery law or not, I have to study this matter.

Q3. To what extent does the principle of legality bend to the Supreme Court in Libya?

The principle of legality is against a wide interpretation. However, the judge during the

interpretation may make a new law. In other words, the judge can interpret the law in a new vision which is different from a previous interpretation that was known. However, if the judge goes out of the provision, this will be a breach of the principle of legality.

The judge may, when he interprets and applies Libyan law, bear in the account the other laws. Libyan criminal law was affected by Italian law. Libyan law was developed although the society was not developed. In addition, Libyan maritime law was adopted from English law. Thus, Libyan law is developed although some provisions cannot be applied at this time. Equally, civil law came from French law. Thus, forgery law can be applied

Q4.Can the machine be deceived?

Yes. It is possible. The Article of deception applies to the use of a false card in withdrawing money from the cash machines.

Q5.Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The mere possession of a document is not imaginable. It is always presumed. The reason for this view is that the possessor of a false document is always or usually a participant in the forgery. He may be an encourager (encouraging the forger to commit forgery) or he may be a conspirator (agrees with the forger to take the paper after it is forged) or an assistant, (provides the papers and the equipment to the forger).

However, if it is supposed that someone possesses a false document or card, there is no necessity for this act to be criminalised whether the possession is mere possession or with intention to use the false document or card.

Q6. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

It is in the wrong place but I think the legislator did so because the false statement (oral lie) is written in a paper.

Q7. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

I agree with you. This Article is supposed to be in another place in the code. I think the

legislator wanted to put this Article in a place that may meet with some features.

Q8. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

A customary document has always less trust in civil law. However, the formal document has more trust. It is issued by a public employee in particular standards. In addition, formal documents are more dangerous than customary documents. Moreover, the judge does not accept the customary paper as evidence. Finally, because the legislator realised that the customary paper is not important as much as the formal document, it states that this document is not punishable unless it is used. However, forging a formal document is punishable after it is forged without needing to be used. Thus, there must be a distinction between these kinds.

Q9. Have you ever been faced with such a case?

No.

## Interview No 10

The name: Khalid Albisht

Occupation: A lawyer

Location of the interview: Tripoli City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

As for the visible information on the surface of the card, the card is a document because the card is here the same as the ordinary paper, but with respect to the invisible information the card is not a document.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

From my point of view, forgery law is insufficient to protect these cards as to invisible information because the legal system in Libya does not recognise electronic proof. However, regarding the visible information, it is protected. Thus, if the visible information on the card is altered, the act is considered as forgery, but if the alteration happens on the invisible information, the act does not constitute forgery.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

I think there is a legislative gap in forgery law. The judge should rule such a case in the favour of the accused. The innocence must be the decision. He cannot apply forgery law to such a case.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

It does not constitute any offence because the card is not a document.

Q5. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

Because there is no harm from the possession of false documents, this act does not need to be a crime. The possessor may not use the false document, so why is he punished? However, as for credit and debit cards, their possession should be an offence.

Q6. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

It is not acceptable.

Q7. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

It is supposed not to be in this Chapter because it has nothing to do with forgery.

Q8. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

The differentiation is acceptable because formal documents are usually issued by an authorised employee and this employee is supposed to be confidential. In addition, forging customary papers are predictable but a forging formal document is not because the employee is usually watched by the managers. Thus, forging a formal document should remain severer than forging a customary paper.

Q9. Have you ever been faced with such a case?

No.

## Interview No 11

The name: Jomaa Alfetoory

Occupation: justice / Civil Chamber

Place of work: Libyan Supreme Court

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Although the present legislation is insufficient to deal with these cards, I consider them as documents.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Yes. Forgery law can protect these cards from forgery. However, this does not mean the law is sufficient. The law needs to be reformed.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

The judge must apply the current law because saying no will result in unacceptable and illogical consequences. For example, whereas if someone who forges an identity card will be punished, the one who forges the credit card and gains millions will be left without penalty. This is not logical.



Q4. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

No, there is no breach of the principle of legality. The present law can be applied and at the same time law should be developed.

Q5.Can the machine be deceived?

The machine can be deceived and this act can be punishable.

Q6.Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

There is no requirement for the possession of false documents or cards to be criminalised because there is no harm from this possession.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

Because this Article was provided in the Chapter on forgery, I consider this act as forgery. However, it should be removed from this Chapter.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the chapter on forgery offences?

I think it should be removed.

Q9. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

I do not have any comment on this differentiation. All I can say is that the legislator differentiates between these two kinds because of the degree of harm. The harm is not great in terms of forging a customary document.

Q10. Have you ever been faced with such a case?

NO.

## Interview No 12

The name: Khalid Alhesan

Occupation: A prosecutor

Place of work: Alkhoms Inclusive Prosecution Office

Location of the interview: Alkhoms city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

These cards are not considered as documents as to electronic information and visible information. The legislator must intervene.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

The current forgery law is not sufficient to be applied to forgery which occurs on these cards. The legislator should act and amend this law.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such case?

If the judge applies forgery law to the credit and debit card forgery, he will breach the principle of legality.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false

document in Libya?

The use of a false card does not constitute the use of a false paper offence.

Q5. Can the machine be deceived?

The deception cannot be committed in this case because the machine cannot make sure if the information provided is correct or not. The machine only operates associating with the information that was already stored in its memory.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

It should be criminalised irrespective of the intention of the possessor.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

The legislator here protects the document not the person. Thus, the Article is in the correct place.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

Compared with the title of Chapter Three which is “Forging Documents”, the Article is in the wrong place.

Q9. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

I agree with this differentiation.

Q10. Have you ever been faced with such a case?

No.

## Interview No 13

The name: Saleh Alhewaij

Place of work: Ministry of Justice – Legal Practice People’s - Alkhoms

Occupation: A lawyer

Location of the interview: Alkhoms City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

These cards are considered as documents whether as to visible information or invisible information.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Forgery is not required to happen on visible information. The information (the subject matter of forgery) does not need to be seen by the naked eye. It is sufficient for the information to exist. Thus, because the information does exist, forgery can be committed and Libyan forgery law can be applied although this law is not completely sufficient.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

I think the decision will interfere with the principle of legality. However, the judge has

nothing to do but decide if this act is forgery, so the law can be consistent with scientific development.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

Although law does not consider this a crime, I think it constitutes the use of a false document offence.

Q5. Can the machine be deceived?

Yes. The machine may be deceived.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession of a false document should be a crime regardless of the intention. That is, the punishment should be the same whether the possessor only knows that the document is false or he knows so and wanted to use it.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

The purpose of this act is to create a new legal position. Therefore, the Article should remain where it is.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

The purpose of forging and hiding a document is the same. For example, if someone hides a title of a property, the land is still under the control of the person who hides the document. In the same way, when the forger forges a title of land, the ownership of this land will be under the control of the forger. Thus the purpose of the two acts is similar.

Q9. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

The punishment of forgery offences should be the same whether the forgery happens on a formal or customary paper.

Q10. Have you ever been faced with such a case?

No. However, I think the judge should have some authority to deal with the new facts.

## Interview No 14

The name: Redoan Alhibaihy

Occupation: A judge

Place of work: Tripoli Court of First Instance

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Yes, they are documents.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

As long as the reality on the card is changed, forgery offences will occur. It does not matter whether the information is invisible or it cannot be seen by the naked eye. It is correct that these cards were not recognised by the legislator when forgery law was introduced. However, this law can be applied to credit and debit card forgery.

At the same time, I cannot deny that forgery law needs to be reformed so it can be improved and properly deal with credit and debit card forgery.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

Applying forgery offences is not a breach of the principle of legality. Documents can be interpreted to cover credit and debit cards and this is not a wide interpretation.

Q4. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

The Libyan Supreme Court does sometimes breach the principle of legality. When it does, it sometimes changes its decisions in the next case if it realises that the principle of legality was breached. This is normal. Judges always disagree with each other. For example, I and my colleagues on some occasions disagree with each other about a particular subject. However, applying forgery offence in this case is not against the principle of legality.

Q5. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

Yes. It does.

Q6. Can the machine be deceived?

The machine cannot be the subject matter of deception. With respect to the use of a false card in withdrawing money from the machine, it constitutes the use of a false document offence.

Q7. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

Although there is harm from the possession of a false document or a false card, I suggest that its possession should not be a crime, as long as it is not used,

Q8. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

Stating a false statement is not forgery. Therefore, this Article should not be here. It may be moved to Chapter Four of Section Seven of the Second Book of the Libyan Penal Code. It may be added where the crime of stating false identity information to a public employee is.

Q9. Do you think it was wise when the legislator put Article 348 of the Libyan Penal



Code in the Chapter on forgery offences?

No. It is not in the correct position.

Q10. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

This differentiation should be abolished.

Q11. Have you ever been faced with such a case?

No.

## Interview No 15

The name: Shahban Alhibaisy

Occupation: A prosecutor

Place of work: Attorney's General Office/ Tripoli

Location of the interview: Tripoli city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. What is your view about the magnetic strip on credit and debit cards? Are they documents?

Credit and debit cards are considered as a customary paper, whether as to visible information or invisible information and changing this information is forgery falling under Article 346 of the Libyan penal Code. All the elements required for the forgery offences are existing when information is changed on the card, *actus reus* and *mens rea*. In addition, even though the information on the magnetic strip is not visible, the subject matter of the forgery offence exists. Another reason confirming this view is that the information on the strip is, in fact, existing. It can be read by computerised tools. Thus, they are documents.

Q2. If the judge makes a decision considering these cards as documents and applies the forgery offences, what is your view about that?

This decision is correct. There is no breach of the principle of legality.

Q3. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

The principle of legality is strict. The judge cannot make new law. He can only narrowly interpret the law. Thus, he cannot widely interpret the law or use the rules of the analogy. According to this explanation, if the Court does so, the ruling does not breach the principle of legality although the legislator did not think of these electronic cards when the forgery law was introduced. The reason is that these cards are considered as customary papers. The forgery is a fact. It happens.

Q4. Do you think that the use of a false credit or debit card to withdraw money from the cash machine constitutes the use of a false document in Libya? Can you explain?

No. The use of a false card constitutes a theft offence.

Q5. Can the machine be deceived?

The machine is not responsible and it is only made for easing the transaction that may be conducted.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession of a false document does not need to be criminalised because, first it is considered as preparatory act of the forgery offence. As is well known the preparatory act of this offence is not a crime in Libyan criminal law. Second, the possession of a false document may be covered by another Article of the Libyan Penal Code.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

Telling a lie in this Article is forgery. Thus, the Article should remain where it is.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

Because hiding, damaging or destroying a real document breaches public trust and Article 348 is in Section Seven of the Libyan Penal Code whose title is the offences of breach of public trust, it is acceptable for the Article to be in this Chapter.

Q9. Do you think that the differentiation between formal and customary documents should be abolished?

I support this differentiation. Formal documents are concerned with State trust. Therefore, the State must provide greater protection to their documents than other documents.

Q10. Have you ever been faced with such a case?

No. these cards are new in Libya and it is better if the legislator provide a new law concerning this matter.

## Interview No 16

The name: Faozy Alkelany

Occupation: A prosecutor

Place of work: Alkhoms Prosecution Office

Location of the interview: Alkhoms city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1.What is your view about the magnetic strip on credit and debit cards? Are they documents?

Credit and debit cards are not considered as documents whether as to visible information or invisible information. The card is one part and the information cannot be divided. Therefore, the Articles of forgery do not apply to credit and debit cards. The reason is that the law does not recognise them as documents.

Q2.If the judge makes a decision considering these cards as documents and applies the forgery offences, what is your view about that?

In this case the judge breaches the principle of legality and breaches the principle of the separation between the powers because when the forgery law was provided in 1953, these cards were not in the imagination of the legislator. Penal law cannot be improved by prosecutors or judges but by the legislator. The latter is only the one who makes law.

Q3. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery Articles?

This decision would be a breach of the principle of legality. However, it would be binding because all the decisions of the Supreme Court are binding on all the other courts.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

The use of a false card does not constitute the use of a false customary document and it is not a crime in Libyan criminal law.

Q5. Can the machine be deceived?

The Article of the deception crime requires that a person must be deceived. The Libyan Penal Code concerns persons not machines.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

Because there is no harm that will occur when a false document is possessed, there is no need for criminalising the possession of false document.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the chapter on forgery offences?

The Chapter of forgery offences was not well organised.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

The place of the Article is not in the correct position. The legislator is not accurate. I suggest that this Article should be in Chapter Four with Article 356, 'information about the identity'.

Q9. Do you think that the differentiation between formal and customary documents should be abolished?

A formal document is generated by a public employee such as a judge or a solicitor

whereas the creator of the customary document is an ordinary person. Therefore, there must be differentiation between the formal and customary documents.

Q10. Have you ever been faced with such a crime?

No.

## Interview No 17

The name: Mohammed Alkraioy

Occupation: A prosecutor

Place of work: Alkhoms Prosecution Office

Location of the interview: Alkhoms city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. What is your view about the magnetic strip on credit and debit cards? Are they documents?

Credit and debit card are considered as customary papers, whether as to visible information or invisible information. As for electronic information, it cannot be denied. The card includes this electronic information. In addition, the alteration of information on these cards is committed for deceiving another person and to gain money that does not belong to the gainer. Therefore, this alteration is without any doubt forgery under Article 346 (forging customary paper) of the Libyan Penal Code.

Q2. If the judge makes a decision considering these cards as documents and applies the forgery offences, what is your view about that?

This decision is correct. There is no breach of the principle of legality. If we accept that the card is a document as to visible information, electronic information should be the



same. The reason is that electronic information exists and it is a fact. It can be read and seen. Therefore, the alteration of this information is forgery and the decision of the court is consistent with the principle of legality.

Q3. Do you think that the use of a false credit or debit card to withdraw money from the cash machine constitutes the use of a false document in Libya? Can you explain?

Yes.

Q4. Can the machine be deceived?

Because Article 461 of the Libyan Penal Code did not require that the victim must be a person or human, this Article can be applied to the deception that may happen on the machine. Thus, the machine can be deceived.

Q5. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession of a false document should be criminalised. However, there is no reason for the differentiation between the mere possession and the possession with intention to use the false document. I think the possession of the weapons is the same as the possession of the false documents, because both are harmful.

Q6. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

No answer.

Q7. Do you think that the differentiation between formal and customary documents should be abolished?

This differentiation should be abolished. The reason is that there are some customary documents which are more harmful than the formal document. I suppose that it would be better if the punishment is the same in the forgery happening on both documents.

Q8. Have you ever been faced with such a case?

No.

## Interview No 18

The name: Ahmmmed Almarkoob

Occupation: A judge

Place of work: Eastern Tripoli Court of First Instance

Location of the interview: Alkhoms City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

These cards are not documents as to invisible information but they are as to visible information.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Forgery law does not protect these cards because considering these cards as documents leads to inconsistency with the principle of legality. In addition, it is inconsistent with the rule which the interpretation must not be wide. All commentators state that a magnetic strip is not a document.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

With respect to electronic information, I think this law is insufficient to deal with the forgery on these cards. The judge may mention in his decision that the law should be

amended so as to become more appropriate with these cards. However, if the alteration of the reality happens on the visible information, this alteration will be forgery and forgery law can be applied in this case.

Q4. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

Although the Supreme Court may make mistakes, its decision must be binding upon the other courts.

Q5. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

No, it does not constitute this crime because the physical element (actus reus) of the crime is not available. This element is the use of the forged document.

Q6. Can the machine be deceived?

Despite the fact that Article 461 of the Libyan Penal Code does not mention a machine, it does not also mention the victim. The Article does not require the act of deception to be committed against a person. It can be committed against a machine.

Q7. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

From my point of view there is no need for criminalising the act of the possession of false documents. The possession of a false document is not a use of it. Because the false document is not used, there will be no negative effect from it. Thus, it should not be criminalised. The possession of a false document will never lead to harm. In addition, the possessor will not benefit from it. Thus, I do not think it deserves to be a crime. It might be argued that the possessor may use the false document. However, I can state that we should not punish merely because of the intention. The possessor may change his mind and not commit the crime (the use of the false possessed document)

Q8. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the chapter on forgery offences?

Telling a lie is not a forgery. Thus, this Article should not be in this chapter.

Q9. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the chapter on forgery offences?

This Article is in the wrong place. If I am in a committee for reforming the forgery law, I will suggest that this Article should be removed.

Q10. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

Protecting a formal document is a protection of the state. The assault on the formal document is considered as an assault on the prestige of the State. Thus, I am with the differentiation between these two kinds of documents.

Q11. Have you ever been faced with such a case?

No.

## Interview No 19

The name: Khaleifa Anahaas

Occupation: Solicitor

Place of work: Bank of Commerce and Development /Tripoli

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

They are not documents. They are called magnetic cards that let its cardholders withdraw money from cash machines, whether locally or internationally and pay bills all over the world.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

I have never been faced with any case in the bank related to credit or debit card forgery. Thus, there is lack of experience in this regard. However, I can state that these cards are not papers and they are not subject to forgery law. Forgery may happen on the receipts that are provided by the service providers during the transactions when the illegitimate cardholder falsely signs the receipt. Forgery may also occur when someone applies for a new credit or debit card. He may provide false documents such as a false identity.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he

will be able to apply existing forgery offences to such a case?

If the card is used, it should be a crime. It is correct that the card is not a document and its use is not subject to the use of a false document offence and considering it so, leads to a breach of the principle of legality. However, the judge cannot keep watching and do nothing. If the judge does not act, the actor or the perpetrator will escape and be left without requital or retribution. Thus, the judiciary should try to find a punishment for such an act.

Q4. Can the machine be deceived?

No, it cannot. The machine responds to any instructions that it may receive. The user of the card uses the card as if he is the legitimate cardholder but in fact he is not the legitimate cardholder. However, the machine does not distinguish between genuine and false cards.

Q5. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession is usually done for the purpose of the use. That is, the possessor will use the false document. In this case, it must bear in mind that the possession will not be a crime if the card has expired because there is no benefit from the possession.

Q6. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

The differentiation is not because of the document itself. It is because the document belongs to the state. Whereas forging a formal document assaults the prestige of the state, forging customary paper does not do so. Thus, I think the differentiation is accepted.

Q7. If someone manages to obtain a card by providing the bank false documents, do you consider this card as a forged card?

In this case the card will be forged because the card is issued by false documents.

Q8. How many kinds of cards does the bank issue?

The bank issues many kinds of cards. Some of them are internationally used and some

are locally used. For example, the bank issues Visa cards, net cards and local withdrawal cards.

Q9. Have you ever been faced with such a case?

No. I would like to also say that Libyan law should be improved in this respect.

## Interview No 20

The name: Imhemmad Arazgy

Occupation: Lecturer / Expert in criminal law

Place of work: Tripoli University/ school of law

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. What is your view about the magnetic strip on credit and debit cards? Are they documents?

Credit and debit cards are not a paper under the Libyan Penal Code. Considering forgery offences, the nearest Article that may apply to changing the information on credit and debit cards is Article 346. Article 346 states that: “Anyone, who draws up a false customary paper entirely or in part or distorts a valid customary paper or allows anyone to falsely draw it up or to distort it...shall be subject to imprisonment.”<sup>2</sup> From this Article it can be understood that the alteration of the reality on electronic cards (credit and debit cards) does not constitute forgery because they are not papers. He added, if we consider these cards as a paper, it will be an analogy. That is, we associated between paper and plastic, and analogy is not allowed in criminal law.

However, if the mentioned Article chose to use word ‘document’ instead of the word

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<sup>2</sup>Libyan Penal Code, 1953.



'paper', it would be possible to say the Article applies to these cards. This is because the document can be interpreted so as to include credit and debit cards. Therefore, the law must be changed and must cover credit and debit card forgery.

Q2. Is principle of legality strictly applied in Libyan criminal law? In other words, does the judge make law?

The principle of legality is not an obstacle in the way of social development. The interpretation of the Libyan Penal Code in 1953 cannot be the same as in 2011. Therefore, the old provisions can be consistent with society's development.

The Libyan Supreme Court does not breach the principle of legality. It may wrongly interpret law but it has never breached this principle. With respect to the wrong interpretation, it occurs as follows: For example, the right of self-defence is considered as a permissive act. Article 70 of the Libyan Penal Code confirms this right. When the Supreme Court states that self-defence is a crime but it is permissive, this will be a wrong interpretation of the meaning of reasons for permissiveness. The crime is not permissive and the permissive act can never be a crime. These two words cannot be associated.

The court has a right to interpret law, for example, lengthen the time of the night or determines the beginning of the life of the foetus. However, if the court states that the night time is from sun set until the afternoon, it will breach of principle of legality.

The literal interpretation is ignored and no longer of use. The purposive interpretation is the kind of interpretation that is used. This must be applied so the old or stationary provisions can be applicable and not be an obstacle in the path of development.

However, in respect of forgery offences, they cannot be interpreted in a way to cover credit and debit card forgery. If the judge does this it breaches the principle of legality. The reason is not because the judge cannot interpret law widely. The reason is that because considering these cards as documents means that the judge is using an analogy in criminal law which is prohibited. In other words, a wide interpretation is allowed but not an analogy.

Q3. Is the use of a false credit or debit card criminalised in Libya? Can you explain?

No. using a false card does not constitute using a false customary paper.

Q4.Can the machine be deceived?

Article 461 considers the deceptive action. This Article does not apply to anyone who uses false credit and debit cards.

Q5.Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

I believe that not every reprehensible act in society must be criminalised. Criminalising should be narrow and not wide. The possession of false documents does not generate any harm. The harm only occurs when the possessor attempts to use this false document or really uses it. Therefore, this can be consistent with credit and debit cards. What if someone possesses a duplicate key? Does this act need to be criminalised? This duplicate key may be used and may not. In other words, it may open a door and it may not. It is the same as the cards. They may be used and may not. Thus, why do we need to criminalise this possession?

When a particular society increases the level of criminalisation, it means an indication of an aspect of the backward aspects.

Q6. Do you think that the differentiation between formal and customary documents should be abolished?

The formal document is more dangerous than the customary document, because the forger of the formal one is a public employee and represents the state, or he is a normal person but assaults the state and the government. Thus, there must be a difference between these two documents. In addition, regardless of the harm caused by the forgery whether (emotional or physical), the formal document has more strength than the customary one has. The formal document is also more acceptable than the other document; it has more impact on people. Therefore, this formal document must have its privacy.

Q7. Do you think that the punishment for the customary forged document is sufficient for credit and debit card forgery?

Yes, it is. It is a deterrent fearful penalty. He added criminal law is not singly responsible for protecting social interests. Responsibility must be shared between other boundaries such as school.

Q8. Can the law be illogical?

Law sometimes interferes with the rules of logic. If this occurs, the law must be followed. This reason makes me discuss the objective responsibility (strict liability). For example, the legislator in Libya, in Article 79 of the Libyan Penal Code, requires that for a person to be criminally responsible, there needs to be strength of volition and consciousness. However, the legislator did not follow the aforementioned logical rule, when he imposed the principle that is 'law cannot be ignorant. The reason is that how can people be responsible for their acts if they do not know what the law forbids and what it allows? Therefore, the law is not always logical.

Q9. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the chapter on forgery offences?

This Article was put in the incorrect place. Forgery means changing the reality on a document. Telling a lie is not forgery. Hence, if we can reform forgery law, the place of this article should be inserted in another place in the Code, but not with forgery offences.

## Interview No 21

The name: Mohammed Asagheer

Occupation: A lawyer

Location of the interview: Alkhoms City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Yes. They are documents whether as to visible information or invisible information. The reason for this view is first the card is one part. All the information completes each other. The card cannot be divided. Second, the electronic information is the essence of the use of the card. Without this information the card cannot be used. Third, the card is equal to the cheque in the regard that both the card and the cheque operate for helping customers to gain money from banks. Thus, credit and debit cards are documents.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Forgery law can be applied to the alteration that may happen on the card whether the alteration happens on visible information or invisible information.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

Yes. The judge in this case should decide that this alteration is forgery and should apply

forgery law to such an act. The judge should interact with new crimes that occur in line with the technology development. If he does not act, the alteration on these cards will be left without protection. The judge should do his best to not let the criminal escape without penalty.

Q4. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

The function of the courts is to interpret the law not to make it. Therefore, if the court decides that this alteration on the cards is a crime, the court will breach the principle of legality. The Libyan Supreme Court has judicial authority not legislative authority.

However, the Libyan Supreme Court does sometimes breach the principle of legality. I remember a case in which the court breached the principle. The case was about a cheque. The court decided that one signature is sufficient for the subscriber on the cheque to be guilty of signing a cheque without credit in the bank, whereas Article 13 of Act 2 according the Determination of the Cheque 1979, requires that the cheque needs two subscribers to sign to be ready for the withdrawal, The cheque cannot be dealt with if the two subscribers do not sign the cheque. The court here breached the principle of legality because it considered a new act as a crime.

Q5. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

It constitutes the use of a false document offence. In addition, it may constitute a deception offence.

Q6.Can the machine be deceived?

Yes it can. The machine has a will or volition which is the will of the person who systemises the machine. The deception can be done against a person or a machine.

Q7.Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

This is not the wisdom of the Libyan legislator. The possession of a false document should be criminalised. Leaving the possession of a false document without criminalisation is not in the favour of the criminal policy because it may lead to the use

of false documents. Thus, it should be a crime. With respect to the penalty, it does not matter if it is various or not. It could be one punishment to either, the possession with intention to use it or the mere possession with the knowledge that the document is false.

Q8. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

Telling a lie is not forgery except if it is written on a document. The one in the Article who states the information to the public employee does not forge because he does not write anything and the employee is not forger because he is in good faith. Thus, this is not forgery and the Article is not in correct place.

Q9. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

The act of hiding a genuine document is not forgery. Therefore, the Article should not be with other forgery offences.

Q10. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

The differentiation is justified. Formal documents present the prestige of the government and any assault on it indicates the assault on the state. However, the customary document is dealt with by the individuals and it does not assault the state. Hence, there must be a differentiation between these two kinds of documents.

Q11. Have you ever been faced with such a case?

No.

## Interview No 22

The name: Yousef Asofrany

Occupation: Notary Public

Location of the interview: Tripoli City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Yes, they are. They carry information. They hold the name of the cardholder and the number of the account of the cardholder. Thus, if they are forged, it will harm their cardholders. As a result, they are documents. With respect to the invisible information, although it is not seen by the naked eye, it can be used for withdrawing money from cash machines. Thus, the electronic information on the card is a document.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Yes, it does.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

The judge should apply forgery law and this will not breach the principle of legality.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false

document in Libya?

If we acknowledge that the card is a document, the Article will apply and from my point of view, it is so.

Q5.Can the machine be deceived?

It is not possible to deceive a machine under Libyan Penal Code because the machine is inanimate being. Deception is not imaginable except against the person, human being.

Q6.Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

It should be criminalised. On the other hand, there should be a distinction between the mere possession and the possession with an intention to use the false card. This is logical because the possessor with the intention to use has insistence to commit the crime.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

This act is not forgery. It is merely telling a lie. Thus, I agree that it is in wrong place.

Q8. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

There is wisdom of this distinction. Forging formal document assaults the prestige of the state and its system. Consequently, it is more dangerous than forging customary document. In addition the formal document is more acceptable and reliable. Hence, the differentiation has its justification.

Q9. Have you ever been faced with such case?

No



## Interview No 23

The name: Khalid Atabeeb

Occupation: Solicitor

Place of work: North Africa Bank /Tripoli

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1 do you think that credit and debit cards are documents according to the Libyan Penal Code?

Yes they are documents. The justification for this view is that these cards are issued by the bank according to contracts between the customers and the bank. In addition, there are forms to be filled in by the customer. The card is a contract. It expires and it can be renewed. Thus, if any alteration happens on it, it is considered as forgery.

With respect to electronic information, it is visible to the person who changes the reality on it. It is not required to be seen by all people.

Q2. Do you think that considering the card as a document breaches the principle of legality?

The bank has never such a problem. However, the legislator should intervene by imposing a new clear law. This is because the matter before the court will make a

division or disagreement among the judges.

Q3. Do you think that the use of a false credit or debit card to withdraw money from the cash machine constitutes the use of a false document in Libya? Can you explain?

Yes. It constitutes the use of a false document offence.

Q4. Do you think that the possession of false documents should be criminalised?

Yes. Any possession of these documents and cards should be criminalised whether the possession is with an intention to use these documents or merely with knowledge that these documents are forged. As to the punishment, it should be varied.

Q5. Do you agree that the differentiation between formal documents and customary documents should be abolished?

I suggest that formal and customary documents should be the same. Forging any of these two kinds of documents should deserve one punishment.

## Interview No 24

The name: Hatem Athelb

Occupation: A prosecutor

Place of work: North Tripoli Prosecution Office

Location of the interview: Tripoli city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Credit and debit cards are documents

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Yes. Forgery law can be applied to credit and debit cards forgery.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

The judge can apply forgery law because the principle of legality does not restrict the judge. The judge can develop his decisions to be consistent with the developments that happen in the life.

Q4. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

There is no breach of the principle of legality in this case.

Q5. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

Yes it is.

Q6. Can the machine be deceived?

Because the machine is systemised by a human, the Article of the deception can be applied to the use of the false card in the cash machines.

Q7. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession of a false document including the possession of a false card should be criminalised, because the possession exceeds the preparatory act of the forgery offence.

Q8. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

This act is not considered forgery and the article should be removed.

Q9. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

Hiding a document should be out of the forgery Chapter in the code. However, as long as the Article is in this chapter, the act of hiding a document is forgery.

Q10. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

Because the formal document presents the prestige of the state, it should carry a severe punishment.

Q11. Have you ever been faced with such a case?

No.

## Interview No 25

The name: Fathy Atoonsy

Place of work: Alkhoms Prosecution Office

Location of the interview: Alkhoms city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. What is your view about the magnetic strip on credit and debit cards? Are they documents?

A credit or debit card is considered as a customary paper, whether as to visible information or invisible information. As for the electronic information, it cannot be denied. The card includes this electronic information. In addition, the alteration of the reality on these cards is committed for deceiving another person and to gain money that does not belong to the gainer. Therefore, this alteration is without any doubt forgery under Article 346 (forging customary paper) of the Libyan Penal Code.

Q2. If the judge makes a decision considering these cards as documents and applies the forgery offences, what is your view about that?

If the judge makes such ruling, there will be no breach of the principle of legality. If we accept that the card is a document as to visible information, the electronic information should be the same. The reason is that electronic information exists and it is a fact. It

can be read and seen. Therefore, the alteration on this information is forgery and the decision of the court is consistent with the principle of legality.

Q3. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

No.

Q4. Do you think that the use of a false credit or debit card to withdraw money from the cash machine constitutes the use of a false document in Libya? Can you explain?

Yes. It constitutes the use of a false customary document offence.

Q5. Can the machine be deceived?

Yes. This constitutes a deception crime.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession of a false document or a false card should be criminalised without any differentiation between the mere possession and the possession with intention to use the false document.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

I think that the document that is created by the public employee relying on the information that is provided by someone (as the Article mentions), is a forged document. The reason is that the content of the document is not genuine.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

It should be in elsewhere in the code, but not in this Chapter.

Q9. Do you think that the differentiation between formal and customary documents should be abolished?

This differentiation should be abolished. The reason behind this is that there are some customary documents which are more important than the formal document. I suppose

that it would be better if the punishment is the same in both documents.

Q10. Have you ever been faced with such a case?

No.

## Interview No 26

The name: Moosa Azentany

Occupation: A lawyer

Location of the interview: Tripoli City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. What is your view about the magnetic strip on credit and debit cards? Are they documents?

Credit and debit cards are considered as customary papers, whether as to the visible information or the invisible information and the alteration of the reality on them is forgery falling under Article 346 of the Libyan penal Code. These cards are considered as cheques because they can be used for withdrawing money from banks. With respect to the visibility of the information, it is not necessary for the information on the document to be visible as long as the information is existing and changed.

Q2. If the judge makes a decision considering these cards as documents and applies the forgery offences, what is your view about that?

This decision is correct. There is no breach of the principle of legality.

Q3. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?



The word document carries a wide meaning which can include many kinds of documents. The electronic document is one of them. Consequently, the judge can apply forgery law to the alteration of the reality on these cards. It is correct that these cards are new to the judge and the law did not recognise them when it was introduced. However, the judge cannot keep watching without acting. The judge must try to adapt this law and apply it to these cards.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya? Can you explain?

The use of a false card constitutes a theft offence. It is the same when the duplicate key is used to open a treasury.

Q5. Can the machine be deceived?

The use of a false card constitutes a theft offence by using a duplicate key.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession of a false document whether a general document or credit or debit cards does not need to be criminalised because there is no harm from this possession. If we criminalise the possession of a false document, it means we put this act and the possession of the drugs in the same position which is not correct. In addition, the danger from forgery is not the same as the danger from the possession of a false document.

Q7. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

It is acceptable for the Article to be in this Chapter.

Q8. Do you think that the differentiation between formal and customary documents should be abolished?

It is better to differentiate between these two kinds because the harm that occurs from forging a formal document is not the same as that which occurs from the customary one. For example, if the certificate is issued by a private university, it will not be trusted as the certificate that is produced by a public university. The reason behind this is that the latter cannot be easily forged.

Q9. Have you ever been faced with such a case?

No. these cards are new in Libya and it is better if the legislator provides a new law concerning this matter.

## Interview No 27

The name: Mohammed Bara

Occupation: Lecturer and lawyer / Expert in criminal law

Place of work: Tripoli University/ school of law

Location of the interview: Tripoli City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. What is your view about credit and debit cards? Are they documents according to Libyan criminal law?

Yes, they are documents, whether as to electronic information or visible information.

Q2. Does the alteration that may happen on these documents fall under the provisions of forgery?

Forgery law protects formal and customary documents and any alteration on a document (if it is not exposed) can be subject to forgery offences in Libyan criminal law as long as this alteration is not visible.

Because, during the alteration, the forger sees the electronic information and changes it, forgery occurs. In addition, law does not determine the kind of document, electronic or not electronic document. Therefore, forgery provisions might apply to electronic documents, namely credit and debit cards. The legislator in Libya did not determine

many words. For example, it did not define the appropriation in the theft offences. Hence, any appropriation may constitute theft.

Q3. Do not you think that the appropriation was known to the legislator, but the electronic information was not known in 1953?

Electronic document is a document according to criminal law and magnetic strip is considered as a part of the whole paper. Article 346 of Libyan Penal Code can apply to the alteration on credit and debit cards. However, the existing criminal protection is not sufficient to protect these cards as customary documents.

It can be argued that there are recently some passports and some identity certificates that carry a magnetic strip. Are these passports and certificates documents according to criminal law and does the alteration on these passports and certificates constitute forgery under Libyan criminal law? The answer is yes. They are documents whether with these electronic data or not. Thus, the alteration is subject to forgery offences. Thus, the alteration of the reality on credit and debit cards is forgery and requires for the judge to apply the provisions of forgery. There is no breach of the principle of legality. The legislator did not provide that the transcription must be in a red or a blue colour. Thus, it cannot be argued about the breach of the principle of legality.

However, it can be sated that the existing punishment of the alteration of the reality on credit and debit cards is subject to an argument. The punishment that is provided regarding the alteration of the reality on customary paper which is applied in this case is not sufficient. Thus, I suggest that there should be special provisions for the alteration of the reality on credit and debit cards as the other countries did.

Q4. To what extent does the Libyan Supreme Court follow the principle of legality?

So far the Court works according to the rules of the principle of legality.

Q5. Do you think that it would be a breach of the principle of legality if the court adopts a wide interpretation and leaves a narrow one?

When it is faced with a case, needing an interpretation because the words of the Article require an interpretation, the court must rule the case. Its interpretation must follow the rule of logic and the wisdom. The interpretation must not be ineffective.

The legislator cannot provide detailed law and cannot include everything in the law. Thus many words in the Articles are subject to interpretation because they are not precisely clear. For example, the word men can be interpreted. When can men be said? When does life start? And when does it finish? What is the meaning of the word dead? And so on so.

The application of the principle of legality requires that if there is no provision criminalising an act, then the act is permissible. As a principle, any act is allowed to be done except when the law prevents it. For this purpose, the interpretation must be narrow. The judge must not interpret criminal provisions widely.

Interpretation consists of three kinds: 1. The literal interpretation. This kind may sometimes not be consistent with the logic. 2. The purposive interpretation. It means achieving the intention of the legislator. This kind of interpretation may lead to a wide interpretation. 3. The third is the kind of interpretation that aims to seek what the Articles state. In this kind of interpretation, the judge can look for the wisdom from providing the Article. The last one is the kind that the courts follow. Thus, if the judge interprets the alteration that happens on the information in the computer as forgery, his interpretation will interfere with the principle of legality. The writing in the computer is not a document.

Q6. Is the use of a false credit or debit card criminalised in Libya?

The use of a false credit or debit card may not be covered by the use of a false customary document offence.

Q7. Can the machine be deceived?

It is not easy to answer this question because the matter needs research. However, some argue it could be. They give an example to confirm that. When the meter reader of the electricity is stopped from recording by someone for the purpose of not paying the cost, this may be a deception. The meter reader will imagine that there is no electricity being used. Thus, it falls under the misunderstanding and it can be said it is deceived.

Q8. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

I encourage the legislator to criminalise the possession of false documents. The reason

for this view is to combat all the ways of using false documents. Why should one possess a false document?! However, if the possession was not for the purpose of the use, it is not necessary to be an offence. For example, the possession could be for the purpose of the press.

Q9. Do you think that the differentiation between formal and customary documents should be abolished?

This differentiation came from the Italian Penal code. In fact, there is a difference between these two kinds of documents. For example, it is not the same when someone forges an identification card and forges an agreement paper with another one. The harm that occurs from the former is greater than that which occurs from the latter. Forging identification cards may lead to a fact that the trust in such documents will be lost and then the trust in the state will be affected. In addition, the formal document has more effect on people because it is issued by the government. However, the customary document (the agreement in the previous example) has no value except between its parties. Formal documents have their prestige and they protect public trust. Thus, they should be different from customary documents.

Q10. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the chapter on forgery offences?

This Article will apply when, for example, a public employee (such as prosecutor or police officer) asks someone questions about his identity. If this person lies to the police officer, it will be forgery or will have a meaning of forgery because the result is the same.

With respect to stating information to the bank staff, it is different. For example, if someone goes to a bank and provides them with false information, Article 345 will not apply, because the one who works in the bank is not a public employee. Law determines public employees. As a result, neither the one who provides the information, nor the person who works in the bank, is forger. Therefore, this act may need criminal protection and needs the legislator to act.

Q11. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the chapter on forgery offences?

Because the purpose of forgery is to hide the reality and concealing the reality requires its alteration, the Article of hiding a real document is put in this chapter. As a result, from my point of view, the act of concealing the reality is a kind of alteration.

Q12. Can the one who hides a document be a forger?

No, but the interest in question in this Chapter is the protection of the reality. However, it could be that this Article is not precise but I do not see any problem with leaving it in this chapter.

## Interview No 28

The name: Mohammed Bashaara

Occupation: A prosecutor

Place of work: Alkhoms Prosecution Office

Location of the interview: Alkhoms city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. What is your view about the magnetic strip on credit and debit cards? Are they documents?

Credit and debit cards are considered as documents and the alteration of them is forgery. It does not matter whether the information that is on the card is visible or invisible as long as it is changed. With respect to the visible information, it does not pose any problem. As for electronic information that is stored on the card, it may be said it does not form a document because it is not visible. However, my point of view is that this information is a document. The reason for considering it as a document is that it is not necessary that the information on the document must be seen by the eye. In addition, from another angle, it may be stated that it is not justice to punish the one who alters the visible information on the card and not to punish the one who alters the visible information whereas the two kinds of the information are on the same card. Using two scales is not accepted whether logically or mentally. Law means logic and anything



which is not logical is not legal because it is supposed that logic must be consistent with law.

The legislator in Libya did not define the document. Thus, the word may include the tangible document and electronic document.

The views of the writers are not binding on judges although they can be sometimes persuaded if they are logical. The only thing that is binding is the decision of the Libyan Supreme Court. However, this court has not defined the document. It merely stated that if the alteration happens on the contents of the document. Thus anything that may assault the document and harms the victim is forgery.

Q2. If the judge makes a decision considering these cards as documents and applies the forgery offences, what is your view about that?

It would legally be correct judgment.

Q3. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

No. The judge must decide the case in this way. If he does not do so, he will deny the rules of justice and he may commit a crime. There is no breach of the principle of legality. This does not mean that the Libyan Supreme Court does not breach the principle of legality. It sometimes does and the evidence is that this court sometimes retreats from its previous decisions.

Q4. Do you think that the use of a false credit or debit card to withdraw money from the cash machine constitutes the use of a false document in Libya?

This act constitutes the use of a false customary document.

Q5. Can the machine be deceived?

If the human can be deceived, the machine which is made by this human should be deceived. As for Libyan criminal law, Article 461 does not require that the victim must be human. It does not mention the victim. Thus, it can be human or a machine.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

There is no wisdom from criminalising the possession of false document, because there is no benefit from this act. In addition, there is no harm from this possession to any person.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

Stating false information to a public employee constitutes forgery. Whereas the public employee is considered as good faith, the one who states false information is considered as the encourager of the forgery. Thus, the document which is created by the public employee is a false document and the Article is in a correct position.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

I suggest that this Article should be in another place, for example, with damaging properties offences.

Q9. Do you think that the differentiation between formal and customary documents should be abolished?

There should be a differentiation between formal and customary documents. The formal document represents the state and whose creator is a public employee. In addition, the assault on this document is considered as an assault on the sovereignty of the state. However, the customary paper does not have this impact.

Q10. Have you ever been faced with such a case?

No.

## Interview No 29

The name: Yousef Bennoor

Occupation: A judge

Place of work: Alkhoms Court of First Instance

Location of the interview: Alkhoms City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Because they hold personal information, they are documents. The document may be a normal paper or any other material as long as it holds particular information.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

The Libyan legislator has not dealt with credit or debit cards, but the current forgery law can be applied to card forgery.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

Yes, this law is applicable and the judge can apply it. However, there will always be a doubt which brings us to say a new law as to credit and debit cards forgery should be introduced and the legislator in Libya should act. Hence, the matter in question can be settled and the argument about these cards goes to the end.

Q4. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

Yes. The reason for this answer is that the role of the Libyan Supreme Court is to interpret the law and watch the application of the law by the other courts in the state. It cannot make a new law. Thus, if it decides that the card is a document and applies forgery law to the alteration of the reality on credit or debit cards, this will be a breach of the principle of legality. However, I prefer breaching the principle of legality rather than an offender escapes without penalty.

Q5. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

This question is related to the matter of the alteration of the reality on the cards. As a result of the previous discussion, the use of a false document is not applicable to the use of a false credit or debit card. The solution to this problem is the intervention of the legislator. New legislation will be a good settlement to this matter.

Q6. Can the machine be deceived?

The Article of deception was provided in general. It did not require that the victim must be a natural person. From this point, it can be said that this article can be applied to the deception that may be committed against the machine.

Q7. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

Although the possession of a false document may be a threat against the person who the forged document in his name, I do not think this act should be an offence. There is no real harm from this possession that should be criminalised. In addition, there is no benefit to the possessor from this possession if the false document is not used.

Q8. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

Although this act is not written forgery, I believe it is in a correct position. In addition, this act may constitute an oral forgery which is similar to the testimony.

Q9. Do you think it was wise when the legislator put Article 348 of the Libyan Penal

Code in the Chapter on forgery offences?

I do not see any problem with this Article being in this Chapter.

Q10. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

No. I think the difference between these two kinds of documents must remain.

Q11. Have you ever been faced with such a case?

No.

## Interview No 30

The name: Waleed Benrajab

Occupation: A lawyer

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

They are documents. There is no difference between these cards and a cheque. Cheque are issued by banks, these cards are issued by banks. Thus, because cheque is a customary paper, cards are also considered as customary papers.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Yes. These cards are protected by forgery law as to invisible information or visible information. The card cannot be used without this invisible information because only forging visible information will not benefit the forger. The forger cannot use the card without this invisible information. Thus, all the information is considered as the same. However, all laws in Libya need to be improved and forgery law is one amongst these laws.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

Yes. He can apply forgery law without any breach of the principle of legality.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

Yes. It constitutes the use of a false customary paper forgery offence. It may also constitute theft by using a modified key. The card here is considered as a modified key.

Q5. Can the machine be deceived?

The machine belongs to a particular person. It is not subject to criminal law because it is an inanimate being, not a living being. The only thing that is subject to criminal law is persons. When the transaction is done, it means an implied transaction between the cardholder and the bank or the owner of the machine. Thus, the one who is deceived is the bank by virtue of the bank being a legal person.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession of false documents (including the cards) is not a crime and there is no reason for it to be criminalised. As for the cards, they may be forged and used as decoration, namely as a medal.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

This crime is concerned with real papers not false papers. Thus, I think it should not be in this Chapter.

Q9. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

I do not care about the place of the Article as long as there is an Article existing and dealing with a particular unethical act.

Q10. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

This differentiation is not justified. Whereas forging a formal document may lead to a minor harm, forging a customary document may be a big danger, for example a loss of

a large amount of money. Credit and debit cards must be protected by increasing the punishment of the forgery offence. The punishment for forging a customary paper is not sufficient to the forging of credit and debit cards.

Q11. Have you ever been faced with such a case?

No, I have not. The reason behind this is that dealing with these cards is not common in Libya.



## Interview No 31

The name: Ahmmed Gadaad

Occupation: A lawyer

Location of the interview: Tripoli City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

These cards are documents. The Libyan Penal Code does not require a strict form for the document to be so. Thus, the word document applies to the cards whether as to the visible information or invisible information. The kind of the card depends on the issuer. If the card is issued by a public employee, it is a formal document but if it is issued by another department such as banks institutions, it is a customary document.

With respect to the visibility of the information, it is not required for the offence to take place. If we make sure that the forgery happens, the crime is committed, whether the information is visible or invisible. However, the visibility may be required for proving the forgery to be committed.

Q2. Does Libyan criminal law protect credit and debit cards from forgery offences?

Yes. The alteration of the reality on these cards is considered as the alteration on a document and it is subject to forgery law. Thus, if any information on the card is

changed or expunged, the forgery law will be applied.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

I think the correct decision is to rule that this act is forgery and apply the current forgery law. It will not be a breach of the principle of legality.

Q4. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

The court can interpret the law and the interpretation does not need to be in favour of the accused. It can be against his interest. The main aim of the judge is to achieve the real meaning of the Article or the legislator's will. I presume if the Libyan Supreme Court considers the cards documents, its decision will be consistent with the will of the legislator. There will not be a breach of the principle of legality.

Q5. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

The use of a false card constitutes the use of a false document offence.

Q6. Can the machine be deceived?

In fact, the use of a false card is not a deception against the machine. It is a deception against the person or the department the machine belongs to.

Q7. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

As I am against extending the criminalisation, my point of view of the possession of a false document is to leave it as it is. The possession of false cards does not also need to be criminalised, although this act may be emotionally harmful.

Q8. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

We cannot say that the person who states false information is a forger, but the position of the Article is acceptable.

Q9. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

Although the document, that the Article mentions, is not false, it is not important to remove this Article from this chapter.

Q10. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

Forging a formal document breaches the public interest. In addition, the formal document is usually more acceptable by individuals than the customary one. The latter is always doubtful and people do not trust these kinds of documents. Thus, a formal document must be distinguished and altering its reality deserves a severe punishment.

With respect to the alteration on credit and debit cards, it deserves more severe punishment than the alteration of customary documents deserve, but not the punishment of the formal card.

Q11. Have you ever been faced with such a case?

No.

## Interview No 32

The name: AbduAlfataah Ibraheem

Occupation: A prosecutor

Place of work: Attorney's General Office/ Tripoli

Location of the interview: Tripoli city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. What is your view about the magnetic strip on credit and debit cards? Are they documents?

My point of view on this matter is to differentiate between visible information and invisible information. As for the former, it is considered as a customary paper and falls under forgery law in Libya. On the other hand, invisible information is not a document and forgery law does not apply to it.

Q2. If the judge makes a decision considering these cards as documents and applies the forgery offences, what is your view about that?

This decision breaches the principle of legality.

Q3. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

The principle of legality is strict. The judge cannot make new law. He can only narrowly interpret the law. If the Court does narrowly interpret the law, the ruling will breach the principle of legality.

The Libyan Penal Code is relatively old and it needs to be reformed. In addition, these cards need to be included by a new law, because the current law does not sufficiently deal with them.

Q4. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

It is better if the possession of false documents is criminalised. In addition, I suggest a particular law for the possession of false cards should be imposed. Hence, the trust in this new method will increase. With respect to the punishment, it should be various, so the possession with intention to use is severer than the mere possession.

Q5. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

The Article should remain where it is because the protection in Chapter Three is a general protection for all documents.

Q6. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

The same answer may be provided. The Article should remain where it is because the protection in Chapter Three is a general protection for all documents.

Q7. Do you think that the differentiation between formal and customary documents should be abolished?

I accept this differentiation because although the harm from forging customary paper is sometimes great, the emotional harm from forging the formal document is always greater.

Q8. Have you ever been faced with such a crime?

No.

## Interview No 33

The name: Omran Jarbooh

Occupation: Solicitor

Place of work: North Africa Bank /Tripoli

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Do you think that credit and debit cards are documents according to the Libyan Penal Code?

The card here is not a document because it can be used as a key to open a treasure which is the cash machine. Thus, if this key has been misused by others the act is considered to be making a copy of a key and using it to steal the money from a cash machine.

Q2. Do think that considering the card as a document breaches the principle of legality?

If the judge decides that the card is a document, the rule is regarded as a breach of the principle of legality.

Q3. Do you think that the use of a false credit or debit card to withdraw money from the cash machine constitutes the use of a false document in Libya?

No. It constitutes a theft crime by using a modified key. The card here is the key.

Q4. Can the machine be deceived?

The use of a false card is not a common crime.

Q5. Do you think that the possession of a false document should be criminalised?

Yes. I agree that the possession of documents and these cards should be criminalised whether the possession with the mere possession or with the intention that the possessor intends to use it.

Q6. Do you agree that the differentiation between formal documents and customary documents should be abolished?

No.

Q7. Do you think it was wise of the legislator to put Article 345 of Libyan Penal Code in Chapter Three which is concerned with forgery offences?

This position is the appropriate place for this Article.

Q8. Do you think it was wise of the legislator to put Article 348 of Libyan Penal Code in Chapter Three which is concerned with forgery offences?

Yes. It is the same as the last question.

## Interview No 34

The name: Mokhtar Mansoor

Occupation: A judge

Place of work: Alkhoms Court of First Instance

Location of the interview: Mosrata City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Credit and debit cards are not documents. These cards emerged as a result of the improvement in the deals. They were not known when the forgery law was introduced.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

I do not think that forgery law can deal with these cards whether the forgery happens on visible or invisible information. The card is one unit. The legislator did not consider these cards when the forgery law was established in 1953. Interpreting forgery law so as to cover these cards will not be factual or accurate.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

Interpretation in criminal law should not be wide. The criminal provisions should be strictly interpreted. I think the forgery law cannot bear to be construed so as to include



credit and debit card forgery.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

I think this act must be considered by the legislator. If such a case is faced by me I will decide it is not a crime although judges sometimes think that if the act is unethical it should be punishable.

Q5. Can the machine be deceived?

Deceiving a machine is imaginable. However, the deception offence is not applicable. The legislator is not consistent with this development.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The false document in this case is considered as nothing. Thus, it does not need to be criminalised. In addition, the possession of a false document may constitute a crime which is not informing the authority about a crime. The possessor knows that there is a crime that happens and he does not inform the police about it. In addition, cards do not need to be criminalised whether the possession is with only knowledge that the card is false or with an intention of use.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

This act is forgery and the person who states the false statement is a forger. One may forge himself or by using another one. This forger is similar to a blind person who states a false statement to another one to write it down.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

I agree with you. It was not wise.

Q9. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

The differentiation is correct. Whereas formal documents have a relation to the state

and its stability, customary documents have a relation to individuals. Formal documents present the prestige of the state and the public trust.

Q10. Have you ever been faced with such a case?

No.

## Interview No 35

The name: Asmaa Mohammed

Occupation: Solicitor

Place of work: Aman Bank – Tripoli

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Yes, they are documents because we deal with them.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Although the law in this respect needs to be reformed, forgery law is applicable whether the alteration of the reality happens on the visible information or electronic information.

Q3. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

I do not agree that the possession of a false document should be criminalised. Yet, if it is used, the illegitimate user should be punishable.

Q4. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

I think the differentiation is justified. The formal document is not the same as the customary one. The formal document holds the stamp of the state and the issuer of it has a special character. Thus, this formal document deserves a more severe punishment.

Q5. Have you ever been faced with such a case?

No. I would like to say if I am faced with false credit or debit cards, I will consider it a forged card and transfer the case to the prosecution department. It is a crime.

## Interview No 36

The name: Najat Salem

Occupation: A prosecutor

Place of work: North Tripoli Prosecution Office

Location of the interview: Tripoli city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

Credit and debit cards are considered as documents whether as to electronic information or visible information.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Forgery offences cannot be applied to these cards. The law is insufficient to deal with these cards.

Q3. If the judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such case?

If the judge does so, he will breach the principle of legality.

Q4. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

Yes, it would be a breach of the principle of legality. The Libyan Supreme Court does sometimes breach this principle.

Q5. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

Because the legislator does not criminalise credit and debit card forgery, the use of these false cards is not a crime which I agree with.

Q6. Can the machine be deceived?

Deception must be committed against a natural person, not against a machine.

Q7. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

Yes, I agree. The possession of a false document should be criminalised.

Q8. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

It should not be in the Chapter of forgery offences.

Q9. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

This Article should be in another place in the code, not in the chapter on forgery offences.

Q10. In the context of forgery offences, do you think the differentiation between formal and customary documents<sup>3</sup> should be abolished?

There must be differentiation between these two kinds of documents.

Q11. Have you ever been faced with such a case?

No.

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## Interview No 37

The name: Hafid Sohaim

Occupation: A judge

Place of work: Alkhoms Court of First Instance

Location of the interview: Alkhoms City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

With respect to the visible information, the card is a document. However, as for invisible information, it is not.

Q2. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

If the card is used by using visible information, its use constitutes the use of a false document offence. Whoever, if it is used by using invisible information, it does not constitute this offence.

Q3. Can the machine be deceived?

The deception in this case is not imaginable. The machine does not have volition. In addition, the deception offence does not cover the act of deceiving a machine. However,

this act may constitute a theft offence.

Q4. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

If the possession of a false document is left as it is now, without being criminalised, it may lead to an undesirable consequence. That is, the perpetrator of the forgery or the user of a false document may give the false document to someone and ask him to profess that he possesses it. Thus, the perpetrator and the possessor both will avoid the punishment. Thus, I suggest that it should be a crime. With respect to the penalty, it should be the same, whether the possessor only knows of the forgery of the document or he intends to use it.

Q5. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

Destroying a document is not a forgery.

Q6. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

The forger in terms of forging a formal document is a public employee. He betrays his employment.

Q7. Have you ever been faced with such a case?

No.



## Interview No 38

The name: Mohammed Tebar

Occupation: A lawyer

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

There is a difference between whether the information is visible or invisible. With respect to visible information, the card is considered as a customary paper. On the other hand, as for the invisible information which is stored on the magnetic strip or the chip, the card is not a document.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

There is a difference between whether the alteration happens on visible or invisible information. If the alteration happens on the visible information, the card is protected by forgery law. The alteration constitutes forging a customary paper. However, if the alteration happens on the invisible information, the card will not be a forgery and the card is not protected.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

The judge cannot apply forgery law and if he applies this law to these cards, his decision will breach the principle of legality.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

No. It does not constitute this crime.

Q5. Can the machine be deceived?

The deception does not happen on the machine. The machine is not an entity, creature or living being. It has no volition or consciousness.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

I think it is not a good idea to criminalise the possession of a false document. The reason behind this is that this act is in fact a crime. The possession of a false document constitutes the crime which is 'not notifying about a crime.' Thus, it is not necessary to criminalise the possession of false credit or debit cards.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

The act of creating a document by a public employee in good faith relying on false information stated by someone in bad faith is forgery although the teller does not write any information. Forgery means a written lie. Stating false information here is forgery because it is written by the employee. Thus, I do not think this Article is in the wrong place.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

This Article is in the wrong place.

Q9. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

Although a formal document presents the prestige of the state, I believe that this differentiation is not acceptable. The reason behind this is that customary paper has

become equal to the formal document or it may be more important. Thus, because credit and debit cards are, to some extent (as to visible information), customary documents, they should be the same as the formal document.

Q10. Have you ever been faced with such a case?

No. However, I suggest that the law must be improved as to these cards. These cards are really important because they deal with a large amount of money. Thus, if these cards are left as customary documents, they will not be desirable and no one will use them. The legislator should be associated with the development of technology.

I dealt with a case which was about someone from Jordan who had a website. This website was deliberately closed by someone. The case was transferred to the prosecution. The prosecutor who investigated the case was confused because he did not know how to deal with it and which law can be applicable. He said “how can I deal with such cases. It is better to deal with a human.”

## Interview No 39

The name: Unnamed

Occupation: A judge

Place of work: Alkhoms Court of First Instance

Location of the interview: Alkhoms City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

They are documents. A magnetic strip is a document.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Yes, the alteration on the cards is forgery.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

If I am faced with such an offence I would decide that this act is forgery and apply forgery law. The judge should develop himself and this does not breach the principle of legality. The judge can widely interpret law and applies forgery law to the alteration of the reality on electronic information. In addition, if the judge does not find any Article to apply, he can apply any Article that may be close to the case before him, especially if

the act that was done is not ethical. He questions, can we leave credit and debit card forgery without penalty if the legislator does not intervene?

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

Yes. It is the use of a false document offence.

Q5. Can the machine be deceived?

It can be stated that the machine in this case becomes as the person who systemises it. Thus, the deception crime can be applied to this act.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession may develop to be used. In other words, there is a potential harm from the possession of false documents. As for the punishment, it should not be various. Thus, the penalty may be the same as the possession with intention to use the false document and mere possession. The reason is that it will be difficult to prove intention.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

Yes it is.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

This Article should not be in this Chapter. Hiding a genuine document or a genuine card is not forgery, so why it is in this Chapter?

Q9. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

I believe that the differentiation is justified because the harm that occurs from forging a formal document is greater. However, after I heard the example that you provided about the emotional draft, my view has changed and I agree that the differentiation must be abolished without decreasing the punishment of the formal document. This means the penalty of forging a customary paper should be increased to be the same as the formal

document.

Q10. Have you ever been faced with such a case?

No.

## Interview No 40

The name: Unnamed

Occupation: A prosecutor

Place of work: Alkhoms Prosecution Office

Location of the interview: Alkhoms city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. What is your view about the magnetic strip on credit and debit cards? Are they documents?

Credit and debit cards are considered as documents whether as to visible information or invisible information. The reason behind this is that because these cards operate as a cheque, they must be treated as one. Another reason is that law cannot introduce all customary papers. With respect to invisible information as a reason for stating the card is not a document, I do not think it is, because the invisible information is visible. It can be read by computerised tools. Therefore, it is visible to the person who reads it.

Q2. If the judge makes a decision considering these cards as documents and applies the forgery offences, what is your view about that?

This decision is correct because it is not possible to accept that someone in 2012 forges a credit or a debit card and he is left without penalty.

Q3. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

The Court in this case will not breach the principle of legality. It only interpreted the divisions of forgery and applies them to the cards' forgery.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya? Can you explain?

The use of a false card is the same as the use of a false cheque. Thus, it does constitute the use of a false customary document.

Q5. Can the machine be deceived?

The Article of the deception crime requires that a natural person must be deceived. Thus, the machine cannot be deceived.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

It is not important to criminalise the possession of false documents, because there is no harm from the possession. As for credit and debit cards, they can be treated as bank documents are treated.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

I think it is in the correct place.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

I think it is in the correct place, because the act of hiding, damaging or destroying a document meets the meaning of forgery. They are similar in a way that the reality is changed. However, in theory, it can be stated that forgery offences were not well organised.

Q9. Do you think that the differentiation between formal and customary documents should be abolished?



I suggest that there is no difference between formal and customary documents. From practical approach, in 99% of forgery cases the subject matter is customary documents. In addition, the harm which is caused by the forgery is the same in formal and customary documents, but it is sometimes greater in the customary document such as 'the title'. Thus, the differentiation should be abolished.

Q10. Have you ever been faced with such a crime?

No.

## Interview No 41

The name: Unnamed

Occupation: A prosecutor

Place of work: Alkhoms Prosecution Office

Location of the interview: Alkhoms city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. What is your view about the magnetic strip on credit and debit cards? Are they documents?

Credit and debit cards can be divided into two categories, visible information and invisible information. As for visible information, these cards are considered as documents but as to invisible information, they are not. The Libyan Penal Law criminalised the act of stealing the electrical energy in Article 444 and it did provide a special Article (330) about a particular kind of card. Thus, I suggest it should do the same for credit and debit cards because they are new methods which were not known before. However, at this time and until the legislator will do, the visible information can be considered as a document.

Q2. If the judge makes a decision considering these cards as documents and applies the forgery offences, what is your view about that?

It is a breach of the principle of legality only as to electronic information. It can be acceptable as to visible information.

Q3. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

The Court in this case will breach the principle of legality as to invisible information.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya? Can you explain?

The use of a false card is a crime under Libyan criminal law because the act of changing the information is not forgery.

Q5. Can the machine be deceived?

The Article of the deception crime requires that a person must be deceived. Thus, the machine cannot be deceived.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

It is not necessary for the possession of false document to be a crime, because there is no harm that may occur from this possession. However, credit and debit cards are not the same. They are dangerous. Thus, their possession should be criminalised.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

Although stating false information is not forgery, this Article is in the correct place.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

I think it is in the correct place.

Q9. Do you think that the differentiation between formal and customary documents should be abolished?

No. I think the differentiation should not be abolished.

Q10. Have you ever been faced with such a crime?

No.

## Interview No 42

The name: Unnamed

Occupation: A prosecutor

Place of work: Alkhoms Inclusive Prosecution Office

Location of the interview: Alkhoms city

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

These cards are considered as commercial customary documents whether as to visible or invisible information.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Yes, it is, although there is no special law for governing these cards.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

As long as the cardholder knows that there is information on the card existing on the magnetic strip, the forgery can be committed. The information does not need to be visible to all people. It is sufficient that the information in fact exists. The Articles of forgery offences in general can be interpreted in this way and cover the forgery

happening on these cards. With respect to the visibility of the electronic information, it is considered as a matter of proof.

Q4. Do you think it is considered as a breach of the principle of legality if the Libyan Supreme Court decides that these cards are documents and applies forgery articles?

No. There is no breach of the principle of legality.

Q5. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

This use constitutes the use of a false customary paper offence. The legislator uses two formulations, paper and document. I suggest that the word document is the word that was meant since it is wider than the word paper.

Q6. Can the machine be deceived?

The deception against the machine is not reasonable.

Q7. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession of the false document should be criminalised so the use of false papers can be prevented. However, the mere possession should deserve less punishment.

Q8. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

The employee who writes the statement is considered as a machine under the control of the one who states the false statement. Thus, this act is forgery and the article is in the correct position.

Q9. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

It should not be in this Chapter.

Q10. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

I agree with you that customary paper and formal documents should be the same as to

the penalty. The reason is that customary documents are more common in use. They have a particular respect.

Q11. Have you ever been faced with such a case?

No. However Libyan law is similar to Italian law and this should be in the account.

## Interview No 43

The name: Unnamed

Occupation: A judge

Place of work: Sirt Court of First Instance

Location of the interview: Alkhoms City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

These cards are considered as customary documents.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

The current forgery law is sufficient to be applied to forgery which occurs on these cards. This means the law does not need to be amended.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such a case?

If the judge applies forgery law to the credit and debit card forgery, he will not breach the principle of legality.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?



Yes, it does.

Q5. Can the machine be deceived?

The deception cannot be constituted.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

The possession of a false document, including credit and debit cards, should be criminalised. The reason behind this is that this possession may lead to danger or harm. However the punishment should be various. If the possessor only knows that the possessed document is false and he does not intend to use it, the penalty should be less than if the possessor intends to use this false document or card.

Q7. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the Chapter on forgery offences?

The answer can be yes and can be no.

Q8. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the Chapter on forgery offences?

This Article is not in the correct place.

Q9. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

I agree with this differentiation.

Q10. Have you ever been faced with such a case?

No.

## Interview No 44

The name: Unnamed

Occupation: A judge

Place of work: Alkhoms Court of First Instance

Location of the interview: Alkhoms City

Date of the interview: February 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

These cards are a new payment method in Libya. People still refuse to use these cards and prefer to use money and cheques instead. Thus, the legislator does not need to intervene. It does not consider that they must be protected because people do not use them often.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

At this time, there are no provisions in the Libyan criminal law that can clearly be applied.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such case?

The principle of legality is a strict principle. The judge must not exceed it because

criminal law provides in Article 1 of the Libyan Penal Code that no crime or punishment can be established without a provision in the law. Thus, the court must be bound by this principle. However, the judge exceeds this principle when he interprets the law but he never makes new law. On the other hand, the only judges who can interpret the law are the Supreme Court judges. Thus judges in other courts cannot interpret the law.

Q4. Do you think that the use of a false credit or debit card constitutes the use of a false document in Libya?

The use of the card is not a crime because the card is not forged.

Q5. Can the machine be deceived?

The deception against the machine is imaginable if the judge uses the analogy. However, the analogy is not permitted in criminal law. Thus, the deception crime is not applicable to the use of the false card at machines, except if the legislator intervenes and changes the law.

Q6. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

Any possession of any false document does not constitute a crime in Libyan criminal law as long as it is not used. My point of view is in line with this approach. The possession of false documents does not need to be criminalised because there is no any harm or danger from this possession. Thus, the possession of false credit and debit cards should be treated in the same way.

Q7. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the chapter on forgery offences?

This Article should be abolished. The reason behind this is that this Article criminalises the act of hiding or damaging a common document although it is sometimes vacated by the parties and it does not benefit the one who hides or damages the document. Thus, the Article is not necessary to be a crime.

Q8. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

Because of the character of the forger in formal and customary documents, I suggest that the treatment of these two kinds should be different as the Libyan legislator does when it differentiated between formal and customary documents. The punishment should not be the same. The forger in a formal document is a public employee representing the State. Thus the penalty should be more severe.

Q9. Have you ever been faced with such a case?

No.

## Interview No 45

The name: Unnamed

Occupation: A judge

Place of work: Tripoli Court of First Instance

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q1. Are credit and debit cards documents?

These cards are documents whether as to visible information or invisible information. They are the same as a cheque.

Q2. Does Libyan Criminal law protect credit and debit cards from forgery offences?

Although the legislator did not mean these cards when the forgery law was introduced in 1953, this law can be applied to the forgery that happens on these cards whether the forgery takes place on the visible information or on invisible information. The legislator usually puts general provisions so they can be applied to perspective facts.

I admit that forgery law is not sufficient to deal with credit and debit card forgery. On the other hand, this does not mean the judge cannot apply this law if he is faced with

such a case.

Q3. If a judge is faced with a credit or debit card forgery offence case, do you think he will be able to apply existing forgery offences to such case?

The judge can apply forgery offences and this is not a breach of the principle of legality. I believe these cards are documents as long as there is no Article stating that these cards are not so.

Q4. Can the machine be deceived?

Yes. It could be deceived. For example, the machines that are placed in public places which offer people services such as drinks and sweets, can be deceived. If someone puts mineral piece which is similar to the coin instead of the coin itself and the machine responds and provides the service which is an illegal benefit. The machine in this case is deceived.

Q5. Do you think that the possession of a false document should be criminalised and what about credit and debit cards?

It should be so. The reason for this is that this possession may generate harm to society. For example, if someone possesses a false contract and then this person dies, the contract may be used by the heir of the dead person. Another example is the title of a property. The possession of a false title is harmful and should be criminalised. However, the punishment should be various. The mere possession without intention to use should be less punishable than the possession with intention to use the false document.

Q6. Do you think it was wise when the legislator put Article 345 of the Libyan Penal Code in the chapter on forgery offences?

The legislator may put this Article in this chapter because this chapter is concerned with documents. The legislator might find this place the appropriate place which I agree with.

Q7. Do you think it was wise when the legislator put Article 348 of the Libyan Penal Code in the chapter on forgery offences?

It is really in wrong position.

Q8. In the context of forgery offences, do you think the differentiation between formal and customary documents should be abolished?

This differentiation is acceptable. The one who forges a formal document which presents the state is different from the one who forges a customary document that presents individuals. However, as for credit and debit cards, they deserve more severe punishment than that the customary documents deserve. The reason is that these cards may include a great amount of money which affected the deal between people.

Q9. Have you ever been faced with such a case?

No.

## Interview No 46

The name: Unnamed

Occupation: Employee

Place of work: Aman Bank – Tripoli

Location of the interview: Tripoli City

Date of the interview: March 2012

First of all, I would like to express my thanks for granting me this opportunity to conduct this interview. This interview will enrich my thesis by providing an invaluable insight into your work experience in the field of forgery law. To introduce myself, I am a PhD candidate in the third year in the University of Bangor (United Kingdom). My PhD thesis deals with the issue of credit and debit card forgery under the Libyan Penal Code. The purpose of conducting these interviews is to discuss the problems which may prevent the provisions of offences of forgery under the Libyan Penal Code to deal effectively with the offences of forgery of credit and debit cards in order to know whether forgery law in Libya needs to be amended or improved. Before I begin the interview, I would like to ask for your consent to allow me to record the interview in order to fully benefit from the experience, and I can assure you that all personal data will remain confidential.

Q.1. How many kinds of cards does the bank issue?

All cards issued by this bank are one sort. They are debit cards. The bank does not issue credit cars. The reason behind this is that there is a difficulty to obtain the accurate address of the customers. In addition, the information about the customers is not updated. For example, customers change their phone numbers without informing the bank.

Q.2. Are there any problems that occur from the use of these cards?

Yes, there are. For example, cash machines sometimes make mistakes and exceed the limit. If this happens, the customer may leave his account (if the account becomes zero) because he does not want to pay back the money that he takes mistakenly. Unfortunately, the bank cannot follow the customer. Thus, credit cards are not issued. Another example of problems is that the machine may take an amount from the



customer without paying him. It also causes a problem for the bank when someone gives his card to another to withdraw a certain amount of money but the latter takes more than the entitled amount, so the customer thinks that the bank has made a mistake.

Q.3. Which constitution does the bank deal with for issuing debit cards?

The bank deals with MasterCard and Visa card institutions. Issuing MasterCards began in November 2005. About after two years, the bank started to issue cards under the supervision of the Visa constitution.

Q.4. Do the employees, in the bank, request customers to immediately sign on the signature panel after receiving the card?

No. The reason is that the cards issued by this bank hold the picture of the cardholder. Thus, the card cannot be used by others and the signature is not important.

Q.5. Has the bank ever been faced with card forgery?

No. In addition, the bank has never transferred any case to the court.

Q.6. Would you like to add any information?

I suggest that a new law must be established to protect these cards. These cards are not protected. The proof of this allegation is that some service providers and merchants refuse to use these cards in Libya.