

# Drawee's Omission to Honour a Valid Cheque: Legalisation vs. Criminalisation Under the Jordanian and United Arab Emirates Laws

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A cheque is a negotiable instrument that serves as cash money in everyday dealings, and thus the Jordanian and United Arab Emirates (UAE) legislation ensure its credibility by criminalising the drawer's failure to honour a valid cheque. To establish trust among all parties involved in cheque transactions, the UAE legislation, contrary to the Jordanian law expanded the circle of criminal protection for such trust by considering the drawee's failure to honour a valid cheque an offence punishable by law pursuant to Article 641/B of Commercial Transactions Law. The drawee bank is also criminally liable for such an offence, when committed by representatives acting in its name or favour (Article 65 of the UAE Penal Code). No similar rules exist in the Jordanian law leaving all parties involved in cheque transactions exposed to the drawee's mischief. This position needs reform and, arguably, could be informed by the UAE laws.

**Key words:** *cheque; honouring cheques; failure to honour cheques; cheque amount; legalisation; criminalisation; objection. Jordanian law, UAE law.*

## 1. Introduction

### 1.1. Subject of the Study

Arguably, a cheque serves as an instrument of cash payment in daily transactions. As a result, the Jordanian and United Arab Emirates (UAE) legislation serve to ensure that that a cheque is a



trusted instrument by criminalising the drawer's order to the bank not to cash a valid cheque. To establish trust among all parties involved in cheque transactions, including the drawees and their representatives, UAE legislation has expanded the circle of criminal protection for such trust by criminalising the drawee's failure to honour a valid cheque. This is provided for in Article 641/B of Commercial Transactions Law. This provision serves to urge financial institutions to fulfil their legal obligation to honour cheques drawn on them as per law, unless there are valid reasons to dishonour such cheques.

It is worth noting that as per Article 65 of the UAE Penal Code, if any worker in the drawee bank commits the offence of failing to honour a valid cheque, then the bank shall be criminally liable for such an offence, provided that the offence was perpetrated in its name or for its account.

Therefore, in this study, when we talk about the drawee bank failing to honour a valid cheque, it is initially assumed that such an offence was perpetrated by the drawee's employees and that it was committed in the name of the drawee bank or for its account.

## **1.2. Significance of the Study**

This study covers a new topic that only surfaced recently in Jordan and the UAE. This topic has not been fully investigated from the legal perspective. The purpose of this study is to explore the availability of criminal protection for the wrongful failure of a drawee to honour a valid cheque in both Jordanian and UAE legislations.

## **1.3. Problem of the Study**

The primary problem of this study is that Jordanian legislation lacks any provisions that incriminate the drawee's failure to honour a valid cheque. While in accordance with Article No. 421 of the Jordanian Penal Code, the drawer action ordering the drawee, without legal justification, to abstain from cashing a cheque is considered criminal. There is no doubt that such an action causes negligible prejudice than that of the drawee's behaviour. This due to the fact that by stopping the bank from honouring the cheque, the drawer's actions in this case cause damage to the beneficiary and the bearer of the cheque. In contrast, the drawee's failure to cash a valid cheque causes damage to the drawer, beneficiary, bearer and the drawee. In addition, the drawee's reputation is punctured. It can, therefore, be argued that as Jordanian criminal law incriminates the drawer's action of ordering the bank not to cash a valid cheque, it follows that it should equally incriminate the drawee's (bank) omission to honour a valid cheque.

#### **1.4. Research Questions**

The subject of this study raises many questions, which can be summarised as follows:

- What is the significance of criminalising the drawee's failure to honour a valid cheque?
- Is it an offence under Jordanian criminal law if the drawee omits to honour a valid cheque?
- From the UAE legislation perspective, are drawees, as private legal persons, criminally liable when any of their workers intentionally fail to honour a valid cheque?
- From the UAE legislation perspective, what is the nature of the criminal sanctions by which the drawee bank and its representatives can be judged when they fail to honour a valid cheque?

#### **1.5. Scientific Methodology of the Study**

To achieve its purpose, this study employs an analytical and comparative approach to examine the provisions of Jordanian and UAE legislations. It analyses the legal provisions related to the subject matter of this study, specifically Article 641/B of the UAE Transactions Law, which criminalises a drawee's failure to honour a valid cheque.

#### **1.6. Plan of the Study**

This study is divided into two parts. The first part defines what a cheque is and explores the criminalisation of a drawee's failure to honour a valid cheque from the Jordanian perspective. The second part delves into how the UAE legislation has dealt with the offence of a drawee's failure to honour a valid cheque.

### **2. Definition Of A Cheque And The Jordanian Perspective On A Drawee's Failure To Honour It**

Since a cheque is a negotiable instrument that serves as cash money in daily dealings, it is necessary to ensure that its credibility is preserved. To achieve that, Article 421 of the Penal Code of Jordan criminalises and penalises actions (perpetuated by either the drawer or the endorser) that may impair the public's trust in a cheque.

Despite the existence of this protection, we still need more criminal protection for a cheque in the Jordanian context so as to enhance public trust in it and protect the interests of all the parties involved in cheque transactions. This is especially important because Jordanian legislation does not criminalise the drawee's failure to honour a valid cheque. The following sections will,

therefore, define a cheque and explore the Jordanian perspective on a drawee's failure to honour it.

## 2.1. Definition of a Cheque

The definition of a cheque and its legal implications as a commercial paper needs detailed explanations. However, this study will only cover the depth needed to understand the nature of drawee offences, specifically the offence of failure to honour a valid cheque. Consequently, subsection one will provide a brief definition of a cheque and subsection two will tackle the importance and functions of a cheque as well as its encashment.

### 2.1.1. Definition of a Cheque

Article 123/C of the Commercial Law of Jordan No. 12 of 1966 defines a cheque as 'a document that is executed according to conditions laid out in the law, which includes an order issued by a person who is the drawer to another person, who is the bank, and it requires the drawee to pay a third person, the orderer or bearer of the cheque—the beneficiary—a certain amount of money as soon as the cheque is perused.' In commercial law jurisprudence, a cheque has been defined as (Taha, nd, p.247) '*A paper that includes an order from a person called the drawer to another person, who is called the drawee, which is a bank, that it should pay a certain sum of money on sight to a third person who is the beneficiary, orderer, or bearer.*'

According to the above definitions, a cheque includes three parties, which are the drawer, drawee and beneficiary (the bearer). It is presupposed that a cheque has two previous legal relationships: the first one is between the drawer and drawee, which is referred to as against fulfilment or payment (credit balance or supply) and the second one is between the drawer and beneficiary, which is referred to as the delivery of the value or amount (Taha, nd, p.247). It is obvious that a cheque only drawn on a bank<sup>1</sup> and through it, the customer withdraws the money deposited in the bank. Therefore, a cheque is strongly associated with bank operations, and it is always required that it must be used for sight payment on the part of the bank<sup>2</sup>. Furthermore, a cheque is only considered as an instrument of payment and for it to be valid, the account against which it is drawn must have sufficient funds that can be paid once it is banked<sup>3</sup>.

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<sup>1</sup> See the provision of Article 230 of the Commercial Law of Jordan and provision of Article 598 of the UAE Commercial Transactions Law.

<sup>2</sup> This is the provision of Article 245 of the Commercial Law of Jordan.

<sup>3</sup> In this sense, see Article 231 of the Commercial Law of Jordan and provision of Article 599 of the UAE Commercial Transactions Law.

### **2.1.2. Importance of a Cheque, its Functions and Encashment**

The advantage of a cheque as an instrument of payment is that it does not allow drawers to freeze the amounts to be paid into their treasury. It is also regarded as a means of establishing the fulfilment of a debt because the bank enters in its paper and electronic records that a certain cheque was paid to a specific person and on a certain date. Moreover, a cheque reduces the use of cash money, thereby considerably reducing the risks associated with handling cash such as theft and loss of money.

It goes without saying that it provides a good guarantee to the beneficiary or its bearer because it carries with it a criminal liability in case a drawee fails to honour it without a legal justification. Due to the importance of a cheque in facilitating transactions and the confidence the public has in it, Jordanian and UAE legislations have attempted to preserve its credibility by prescribing several criminal liabilities related to it, with the most important one being the offence of failure to honour a valid cheque<sup>4</sup>.

As for the payment of the cheque amount (Yamaleki, 2009, p.249), it should be remembered that if a creditor accepts a cheque in fulfilment of his debt, this is not considered to be a fulfilment of his debt, rather its fulfilment is attached to the condition of collection in the sense that fulfilment will only occur when the cheque amount is collected from the drawee. Moreover, when a creditor accepts a cheque in fulfilment of his debt, he is obliged to try to collect the cheque amount from the drawee. If he fails to collect it due to the drawee's failure to honour a valid cheque without a legal justification, then in accordance with the provisions of the Jordanian and UAE legislation, the bank will bear civil liability for its actions.

### **2.2. The Jordanian Legislation's Failure to Criminalise the Drawee's Abstention from Honouring a Cheque**

The provisions of the Jordanian legislation, as set out in the Penal Code and Commercial Law, do not criminalise a drawee's failure to honour a valid cheque. Further, the penal legislation of Jordan affirms the principle of legality of offences and penalties in Article 3 of the Penal Code. It is important to note that the absence of a legislation criminalising drawees' failure to honour a valid cheque does not negate drawees' civil liability if their actions occasion damage to a third party.

In our opinion, even if civil liability arises for the drawee, it is still important to have a punitive provision that criminalises a drawee's failure to honour a cheque so as to provide criminal

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<sup>4</sup> To find out the criminal forms, see Article 421 of the Penal code of Jordan, where Article 401 of the UAE Penal Code is the counterpart of such forms.

protection for important social interests that are worthy of such protection. The lack of a provision criminalising a drawee's failure to honour a valid cheque within the Jordanian legislation creates a legal vacuum. This is further explained in the subsequent subsections below.

### **2.2.1. The Importance of Criminalising a Drawee's Failure to Honour a Valid Cheque**

It is widely recognised that the interest or benefit, in general, plays a key role in criminalising an action because it has to acquire some status to catch the eyes of legislators who can enact laws to protect it. The aim of protecting individual interests or rights is to ensure stability and security of the society. The law that provides criminal protection for rights and interests is the Penal Code. It does this through prescribing proper rules for incrimination and penalties, which are characterised by reasonability. Therefore, it can be said that the criminal policy that charts the roadmap for criminal legislation is merely a reflection of various individual interests. To achieve the effectiveness of criminal protection of individual interests, it is necessary to surround such protection with actions that cannot hurt such interests or threaten to do so.

The importance of the incrimination and penalty rules lies in the fact that they form the highest levels of the legal protection of certain interests, where a transgression of the same is likely to prejudice the stability and security of the society. In other words, the rationale for incrimination and penalty is to protect a social interest that is worthy of a criminal protection due to the importance of its subject for the society and the seriousness of the prejudice caused to it.

Based on the foregoing, we can conclude that due to the overuse of cheques in our everyday lives and because they are important instruments of payment that serve as cash money in various transactions, criminal protection should be provided for them in instances where a drawee fails to honour a valid cheque. However, such protection cannot be provided without legal rules incriminating and punishing everyone who dishonours a cheque illegally. The reasons for calling for the criminalisation and penalisation of failure to honour cheques can be summarised as follows: First, it is necessary to preserve the credibility of cheques and protect public confidence in them. It is also important to protect the trust that customers have in drawees. Therefore, when drawees fail to honour a valid cheque, they breach the trust of the public, including individuals and traders, in the cheques and in the drawee. This is because the drawee's failure to honour a cheque in this case will undermine the role of the cheque as an instrument of payment that acts as cash money. Moreover, the drawee's customers are likely lose their confidence in the bank because it failed to honour a cheque without legal justification.

Second, it is necessary to protect an interest that is worthy of a criminal protection. Where an interest is worthy of criminal protection, it can be described as a common social interest because

it represents several common interests, which start with the interest of the drawer as well as that of the beneficiary and bearer and ends with the drawee's interest when the reputation of the latter is prejudiced due to failure by one of its employees to honour a valid cheque.

In other words, we can say that it is in the interest of the drawer, beneficiary, bearer and drawee not to sustain any financial or moral prejudice due to the drawee's failure to honour a valid cheque. It is certain that the drawee behaviour in this case will cause harm to the interests of all the parties involved in a cheque transaction. Therefore, there must be a criminal protection for such common social interests, and the Penal Code is the most appropriate piece of legislation to protect social rights and interests that are worthy of criminal protection.

### **2.2.2. The Legal Problem Arising from Jordanian Legislation's Failure to Criminalise the Abstention of the Drawee from Honouring a Cheque**

Both the Penal Code of Jordan and the Commercial Law of Jordan do not have any provisions criminalising a drawee's failure to honour a valid cheque as opposed to the legislations of Egypt, Saudi Arabia and UAE<sup>5</sup>.

It is worth noting that Article 421 of the Jordanian Penal Code criminalises the act of a drawer issuing an order to a drawee not to honour a valid cheque. There is no doubt that such action causes lesser damage than the behaviour of a drawee who fails to honour a valid cheque and the scope of the infringed upon interest due to such action is narrow than that of the interests infringed upon due to a drawee's actions.

By way of illustration, a drawer's actions in this case only cause prejudice to the beneficiary and bearer, while a drawee's failure to honour a valid cheque occasions prejudice to the drawer, beneficiary, bearer and even drawee bank itself because its reputation is also punctured. It can, therefore, be argued that if Jordanian legislations criminalise the acts of a drawer who issues an order to a drawee to refrain from honouring a valid cheque, then they should equally criminalise the acts of a drawee who fails to honour a valid cheque.

In our opinion, the failure to criminalise a drawee's abstention from honouring a valid cheque is a clear indication that there is a problem with the Jordanian legislative system. This is especially true because the legality of offences and penalty principle forms an obstacle that bars judicial

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<sup>5</sup> See the provision of Article 533/1/B of the Egyptian Commercial Law No. 17 of 1999, provision of Article 641/B of the UAE Commercial Transactions Law and the provision of Article 119 of the Saudi Commercial Papers Regulation of 1383 H. To find out the explanation of the articles related to the Egyptian and Saudi legislations, see Turkey (2014), p.104 and Al Bakri (nd), p.659 and after.

authorities from criminalising any actions without being backed up by provisions of law, regardless of whether the infringed upon social interests are worthy of criminal protection<sup>6</sup>.

However, it is important to reiterate the fact that the Jordanian legislation's lack of a provision that criminalises a drawee's failure to honour a valid cheque does not absolve the drawee bank from civil liability for its actions. Therefore, if any party sustains damage or prejudice due to the drawee's actions, he/she has a right to claim compensation, in accordance with Article 279 of Commercial Law.

Therefore, to seal this legislative loophole, Jordanian legislators should amend either the Penal Code or Commercial Law to include provisions that criminalise a drawee's failure to honour a valid cheque. On the one hand, the objective of this is to protect the credibility of a cheque, enhance public trust in it and cultivate the confidence of customers in the drawee. On the other hand, this will protect a common social interest, starting with the drawer's interest as well as that of the beneficiary and bearer and ending with the drawee's interest—when its reputation is hurt due to intentional negligence on the part of its employees.

### **3. Criminalisation of a Drawee's Failure to Honour a Valid Cheque by UAE Legislation**

The UAE Penal Code No. 3 of 1987 does not have any provisions that criminalise a drawee's failure to honour a valid cheque. However, the UAE Federal Commercial Transactions Law bridges this gap. It provides criminal protection for the interests of all parties involved in cheque transactions when a drawee fails to honour a valid cheque, in accordance with Article 641/B. This Article, therefore, criminalises the actions of a drawee. To further explore the provisions of this Article, this section will be divided into three parts. The first part will examine the elements of the offence of the drawee's failure to honour a valid cheque, the second one will elaborate the sanctions prescribed for this offence and the final one will explore the subject of objection as a defence to the drawee's failure to honour a valid cheque from the UAE legislation perspective.

#### **3.1. Elements of the Offence of a Drawee's Failure to Honour a Valid Cheque from the UAE Legislation Perspective**

Just like the Egyptian legislation<sup>7</sup>, the UAE legislation has also criminalised a drawee's failure to honour a valid cheque. Article 641/B of the UAE Commercial Transactions Law provides that 'Every person who has committed any of the following acts shall be punished by imprisonment or

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<sup>6</sup> This principle has been prescribed in Article 3 of the Penal code of Jordan No. 16 of 1960.

<sup>7</sup> See the provision of Article No. 533 of the Egyptian Commercial Law No. 17 of 1999.

fine payment: B-Refuse in bad faith to cash a cheque drawn on a bank that has enough funds in the account for a bearer against whom no valid objection is raised.’

From the above provision, it is clear that the UAE legislation’s intention is to criminalise a drawee’s failure to honour a valid cheque and urge those working in banks to abide by their work ethics, which also require banks to avoid dishonouring cheques without any legal justification. The purpose of doing this is to enhance the credibility of cheques and the confidence that parties to transactions have in cheques and the drawees. Moreover, a drawee’s failure to honour a cheque can undermine the role of a cheque as an instrument of payment that serves as an alternative to cash and all the parties concerned will be prejudiced. In order for the offence of a drawee’s failure to honour a valid cheque to be established, two preconditions must be met and two material and moral pillars must be satisfied. These are explained in the subsequent sections.

### **3.1.1. The Two Conditions that Must be Met to Establish a Drawee’s Offence of Failure to Honour a Valid Cheque**

For this offence to occur, there are two assumed preconditions that must be satisfied before the physical element that constitutes it occurs. The two conditions are: One, there should be a cheque that has already been issued and the cheque meets the required conditions for being a valid cheque (Al Jumaili, 2015, p.189) and two, the drawee must be holding a credit balance for the drawer and that balance must be sufficient to fulfil the full amount of the cheque and be withdrawable.

### **3.1.2. The Physical Elements in the Offence of a Drawee’s Failure to Honour a Valid Cheque**

In this case<sup>8</sup>, the physical elements for the offence of a drawee’s failure to honour a cheque include: the cheque must be properly drawn, it must be drawn against an account that has enough balance and must not have any objections raised against it. In sum, the following conditions must be fulfilled in order for the physical element for such an offence to be established:

1-There must be some refrain from performing a positive action on the part of a drawee bank employee

Abstention is not an abstract negative position; it only becomes a negative position when compared to a certain positive action (Al Ani, 2010, p.176; Fattah, 2014, p.121). This means that the legislation considers some circumstances as the preconditions that lead to a certain positive action

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<sup>8</sup> According to jurisprudence, the abstention is defined as (It happens when the person refrains from doing a certain positive action that is awaited from him by the legislator under certain circumstances, on the condition that there is a legal obligation that obliges him to perform such action and the abstainer can do it). Abstention offenses are called (Passive Offenses), See Hosni (1986), p.5.

that is mandatory for the protection of a right, and if a person fails to perform that action, then he/she is considered an abstainer in the eyes of law (Masoud, 2013/2014, p.48). In implementing this, the offence of the drawee's abstention in this case assumes that a bank's employee refrained from honouring a properly drawn cheque against an account that had enough funds and against which (the cheque) no valid objection was made.

2-There should be a legal obligation requiring a drawee's employee to perform a positive action. Abstention does not exist in the eyes of the law unless a positive action is legally imposed on the abstainer. There is no doubt that there is a legal duty on the part of the drawee and its representatives to pay the cheque amount to the beneficiary or bearer of a cheque that is properly drawn against an account that has enough funds and against which (the cheque) no valid opposition is made. The source of this obligation is the provision of Article 620/3 of the UAE Commercial Transactions Law, which requires a drawee bank to cash a cheque despite the drawer's objection, except under two circumstances: where there is loss of a cheque and where its bearer is adjudged bankrupt, as prescribed in paragraph two of the same Article.

3-The drawee bank employee should have a voluntary character

The voluntary character of abstention requires the will to be its source; i.e. there should be a relationship of material attribution between the will and abstention (Hussein, 2015/2016, p.103). For a bank employee's behaviour to amount to abstention, he/she must have refrained from performing a positive action imposed on him (which is the payment of the cheque) out of his own free will. In other words, if it is established that the bank employee refrained from performing the positive action without his/her own free will—for instance, if the employee was subjected to material coercion—then such inaction will not be deemed as an abstention in the legal sense required for the offence of abstention to occur.

4-No proper objection was raised against a valid cheque that was dishonoured; i.e. there was no legitimate objection, which entails the loss of the cheque or bankruptcy of its bearer, in accordance with the provisions of Article 620/2 of the UAE Commercial Transactions Law.

One would then ask: What is the possibility of a drawee committing such an offence? Is the offence punishable under the UAE law?

In our opinion, this is an abstention offence that can be classified as 'a passive offenses that can be attempted' because its physical element assumes that there is abstention that is followed by a criminal consequence. This is because the drawee's abstention from honouring a valid cheque without a legal justification is followed by a harmful consequence, which is the prejudice caused to the drawer, beneficiary and bearer. Therefore, this offence can be attempted. The following example attempts to further clarify this:

Employee A, working in in a drawee bank, might intentionally abstain from cashing a cheque without any legal justification, while employee B, who also works in the same bank, honours the same cheque. In this case scenario, employee A's abstention will be considered as an attempt to commit the offence of abstention from cashing a cheque without a legal justification<sup>9</sup>

However, despite the fact that this is an attempted offence, it might be punishable because Article 641/B of the UAE Federal Commercial Transactions Law penalises everyone who abstains from honouring a cheque without any legal justification by either imprisonment or payment of a fine. Both offences are misdemeanours. According to the general rules, there is no penalty for attempting a misdemeanour, unless it is stipulated by law<sup>10</sup>, and there is no provision in the Commercial Transactions Law that stipulates the penalty of attempting such a misdemeanour.

### **3.1.3. The Mental Element in the Offence of the Drawee's Abstention from Honouring a Valid Cheque**

The offence of the drawee's abstention from honouring or cashing a valid cheque is a deliberate offence; it is not an offence of fault or negligence. As a result, its moral element takes the form of a criminal intent that comprises two elements: knowledge and will. The UAE legislation lays down the required intentional intent for such an offence to take place. It specifically uses the phrase 'bad faith', as set out in Article 641/B of the Commercial Transactions Law.

The phrase 'bad faith' is used to refer to the general criminal intent as settled by jurisprudence (Al Saeed, 2008, p.306; Nammour, 2018, p.341; Al Bahar, 2008, p.270) and the judiciary<sup>11</sup>, which have explained the meaning of this phrase in the context of 'the offense of giving a cheque without

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<sup>9</sup> An example for passive offenses with a consequence in the UAE legislation is the offense specified in Article 395 of the Federal Penal Code, which is the offense of the unjustifiable abstention from paying any due amount of money in exchange for taking food in a store or a place prepared for this purpose. Such abstention is followed by a harmful consequence, which is the financial loss sustained by the store owner that is prepared to serve food in exchange for a financial consideration.

<sup>10</sup> See the provision of Article 36 of the UAE Penal Code.

<sup>11</sup> See Appeals before Court of Cassation – Abu Dhabi in its penal capacity with Nos. 754 of 2010, Judicial Year 5 A, No.28 of 2008 Judicial year of 3 A and No. 54 of 2008 Judicial Year 3 A, published on the website (<https://www.adjd.gov.ae/Ar/judgments>). See also appeal No.25 of Judicial Year 5, 1984 and appeal No. 80 of Judicial Year 8 of 1986 before the UAE Federal Supreme Court in its criminal capacity. Additionally, see Court Cassation of Jordan in its criminal capacity No. 67 of 1970 – Legal Database and Judgments delivered by Courts of Jordan (Qararak) issued by the Jordan Bar Association. <sup>12</sup> See appeal No. 54 of 2008 Judicial Year 3 A before Abu Dhabi Court of Cassation in its criminal capacity, posted at the website link: <https://www.adjd.gov.ae/Ar/judgments>. <sup>13</sup> With this drafting, a judgment No.112 of 1981 by the Court Cassation of Jordan with its criminal capacity is cited —See the legal database and judgments delivered by the Courts of Jordan (Qararak) issued by Jordan Bar Association—where there is little aspect of jurisprudence that supports such interpretation, which is referred to by Al Daghathar (nd), p.25.

enough balance—this amounts to acting in bad faith’. Both the judiciary and jurisprudence have emphasised that the criminal intent that is required for such an offence to occur is the general criminal intent only. Therefore, a special criminal intent, such as the intention of occasioning harm to the beneficiary or bearer, is not required for such an offence to occur (Hosni, 2018, p.1395; Al Juboor, 2010, p.337). Based on the foregoing, the next section will discuss the general criminal intent that is required for the offence of a drawee’s abstention from honouring a valid cheque by clarifying the two elements (knowledge and will) that are necessary to establish the said criminal intent.

### **The Element of Knowledge**

For this element to be realised, a bank employee must know that he/she is going to abstain from honouring a properly drawn cheque upon presentation of the same, despite being aware that the cheque has fulfilled all the conditions of its validity. The employee must also be aware that the cheque has enough funds, is cashable and no proper objection has been raised against it.

### **The Element of Will**

It is not enough to be merely aware for the criminal intent to be established, there should also be the will to abstain from honouring a cheque that is properly drawn, has no valid objection raised against it, and which ought to be legally recognised (i.e. be mindful, sensible and wilful). For example, the will is absent if the abstaining employee is under duress. As previously mentioned, the causes and motives that influenced the bank employee to abstain from honouring a cheque are immaterial, and they have no impact on the actualisation of the criminal intent. This is because requiring the availability a private intent and a general one would narrow down the scope of incrimination. As a result, this will reduce the criminal protection offered to preserve the credibility of a cheque and minimise protection for the beneficiary and the bearer. This was affirmed by Abu Dhabi Court of Cassation, which ruled that<sup>12</sup> ‘the reasons that prompted the issuance of a cheque are irrelevant because they are just the motives that have no impact upon creating a criminal liability as long as the legislator has not required a special intent for such an offense to take place’. To clear confusion in the interpretation of this specific aspect, we hope that UAE legislators will replace the phrase ‘bad faith’, which is mentioned in Article 641/B of the Commercial Transactions Law, with the word ‘deliberately or intentionally’. The purpose of doing this is to seal the loophole

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<sup>12</sup> See appeal No. 54 of 2008 Judicial Year 3 A before Abu Dhabi Court of Cassation in its criminal capacity, posted at the website link: <https://www.adjd.gov.ae/Ar/judgments>.<sup>13</sup> With this drafting, a judgment No.112 of 1981 by the Court Cassation of Jordan with its criminal capacity is cited —See the legal database and judgments delivered by the Courts of Jordan (Qararak) issued by Jordan Bar Association—where there is little aspect of jurisprudence that supports such interpretation, which is referred to by Al Daghaithar (nd), p.25.

of discretion or jurisprudence that might disagree over the interpretation of the phrase ‘bad faith’, with some<sup>13</sup> interpreting it as ‘the special intention’ that must be established to prove the offence of abstention from honouring a valid cheque. On the other hand, majority of jurisprudence and judiciary rulings<sup>14</sup> have interpreted it as the general criminal intent. Therefore, it is not necessary to have a private criminal intent (the intention of prejudicing the drawer, the beneficiary, or the bearer), in addition to the general intent of the offence of a drawee’s abstention from honouring a valid cheque.

### **3.2. The Penalties Contemplated for the Offence of a Drawee’s Abstention from Honouring a Valid Cheque Under the UAE Legislation**

Article 641/B of the UAE Commercial Transactions Law establishes the penalty of imprisonment or a fine for each person who refuses in bad faith to honour a valid cheque drawn on a bank, against an account that has enough funds and against which no proper objection has been raised. It is also important to note that this Article cannot be read in isolation from the general rules set out in the UAE Penal Code pertaining to this offence. The rules make it clear that precautionary measures may be imposed on a bank employee who has committed this offence or the bank itself (as a private legal person), in addition to the penalty of imprisonment, a fine, or both. The subsections below explore these measures and penalties.

#### **3.2.1. Penalties Prescribed for the Offence of a Drawee’s Abstention from Honouring a Cheque**

As already mentioned, Article 641/B of the UAE Commercial Transactions Law establishes the penalty of imprisonment, a fine, or both for the offence of abstaining from honouring a valid cheque. The fine penalty was envisaged as an option for imprisonment. Both penalties are considered as misdemeanour penalties, in accordance with the provisions of Article 29 of the UAE Penal Code. Therefore, all misdemeanour-related provisions, both substantive and procedural provisions, apply to this offence (Khutwa, 1989, p.133).

Article 641/B does not specify the term of imprisonment or the amount of the fine; therefore, to ascertain this, it is necessary to refer back to the general rules of the Penal Code. Article 69 of the Penal Code stipulates that the minimum term of imprisonment for a person who has committed a

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<sup>13</sup> With this drafting, a judgment No.112 of 1981 by the Court Cassation of Jordan with its criminal capacity is cited—See the legal database and judgments delivered by the Courts of Jordan (Qararak) issued by Jordan Bar Association—where there is little aspect of jurisprudence that supports such interpretation, which is referred to by Al Daghaithar (nd), p.25.

<sup>14</sup> See what is established by the jurisprudence and judiciary as we indicated in the subject of the moral element that is required for the offense of the drawee’s abstention from cashing the cheque.

misdemeanour should be a minimum of one month and a maximum of three years. In addition, Article 71 of the Penal Code sets out the amount of a misdemeanour-induced penalty. It provides that the minimum amount should be one thousand UAE Dirhams and the maximum amount three hundred thousand UAE Dirhams.

It is worth noting that a drawee bank, as a private legal person, must be penalised by imposing the fine penalty set out in Article 641/B of the UAE Commercial Transactions Law on it, regardless of whether an employee who abstained from honouring a valid cheque has already been penalised by imprisonment or a fine. However, to penalise a bank as a legal person, the employee who committed the offence must be a representative, manager, or an agent for the drawee bank and that employee must have committed the offence in the name of the drawee bank or its account. That is because in accordance with Article 65 of the UAE Penal Code (Mustafa, 2012, p.287; Al Fadel, 1977–1978, p.448), a bank takes criminal liability for the offences committed by its representatives, managers, or agents when anyone of them commits an offence in the name of the bank or its account. Article 74 of the Penal Code of Jordan has also provided the aforesaid provision, whereby a private legal person is vicariously liable for the criminal acts perpetrated by its representatives in its name or its account.

A bank employee who has committed the offence of abstention from honouring a cheque may be penalised by being required to pay the fine set out in Article 641/B of the Commercial Transactions Law and the drawee bank may also be penalised for the same fine (the two fines can be decided in one single judgement). In other words, in instances where there is no joint action between both the bank and the employee to pay any of the two fines, it is possible to deliver a judgement on both fines at the same time. This is because the fine here is of a specific crime and person (it is not relative). Had the UAE legislation envisaged a joint payment of the penalty by the employee and the bank, then it would have expressly stated that—as is the case with Egyptian legislation in Article 533 of the Commercial Law No. 17 of 1999<sup>15</sup>.

### **3.2.2. Measures Prescribed for the Offence of a Drawee's Abstention from Honouring a Valid Cheque**

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<sup>15</sup> This Article penalized for the fine each bank employee deliberately abstaining from cashing a cheque that has funds in whole or in part and against which no valid objection was raised, and this Article made the bank jointly liable with its convicted employees for paying the financial sanctions as adjudicated.

As previously mentioned, a drawee bank is criminally liable for the offences committed by its representatives, managers, or agents when any of those offences are committed in the name of the drawee bank or in favour of its account. Therefore, when the offence of abstention from honouring a valid cheque is established, a drawee is penalised by being required to pay the fine penalty prescribed in Article 641/B of the Commercial Transactions Law. In addition, as per the provisions of Article 65 of the UAE Penal Code, judgement may be entered for drawee bank to be shut down. As per the provisions of Article 126 of the UAE Penal Code, a drawee bank employee who commits the offence of abstention from honouring a valid cheque breaches the duties of his job and he can be convicted for a minimum six month custodial penalty. This will make it possible for the court, upon delivering the judgement, to prevent him from doing his work for a maximum period of two years. Moreover, the court may find it appropriate to prohibit such an employ from doing his job instead of adjudicating for the original penalty prescribed for the offence.

This is provided for in Article 128 of the UAE Penal Code, which provides that the court may, upon ruling, prevent a person from doing his job, and in accordance with Article 126 of the same law, where the offence of abstention from honouring a valid cheque unlawfully took place, it may order the drawee bank to close down for a minimum period of one month and a maximum of one year.

To sum up, in accordance with the provisions of Article 641/B of the UAE Commercial Transactions Law, the court has the discretionary power to penalise an employee who has committed the abstention offence by either imprisonment or fine. Moreover, in accordance with the provisions of Article 126 of the UAE Penal Code, the court may also choose to prohibit him from doing his job for a specific period of time.

It is also incumbent on the court to adjudicate by rendering a fine penalty against a drawee bank when it is established that the bank's employee committed the offence of abstention from honouring a valid cheque, in accordance with the UAE Commercial Transactions Law. The court also has the discretionary power to render a judgement that directs the drawee bank to close down for a definite period, in accordance with the provisions of Article 128 of the UAE Penal Code.

Notably, the UAE legislation approach (Article 128 of the UAE Penal Code) makes it optional for the judge to close down a drawee bank; it is not mandatory. This is due to the important role that such legal persons (e.g. the drawee bank) play in a state. However, in instances where closure is the most appropriate penalty for a drawee bank, it's necessary for courts to ensure that the closure is within the narrowest limits possible because of the importance of banks in the national economy and the role they play in facilitating the business and financial transactions for all.

Article 128 of the UAE Penal Code is similar to the provisions of Article 35 of the Penal Code of Jordan. Both of these Articles grant the court the discretionary power to enter a judgement to close down a drawee bank when it is established that any of its employees has committed criminal acts in its name or in favour of its account.

Noticeably, it is worth mentioning that it is a rule that when the drawer issues an order to the drawee not to cash the valid cheque, this constitutes an offence, in accordance with Article 401 of the UAE Penal Code. However, there is an exception to this rule—the UAE legislation has allowed a drawer to make an objection against the drawee to abstain from honouring a valid cheque in two cases: in the event of loss of a cheque and when its bearer is adjudged bankrupt. This exception is provided for in Article 620/2 of Commercial Transactions Law, which states that ‘the objection in cashing the cheque shall be accepted only in case of its loss or bankruptcy of its bearer’.

## **4. Conclusion**

### **4.1. Findings**

1-Unlike the UAE legislation, the Jordanian legislation lacks a provision that criminalises a drawer’s abstention from honouring a valid cheque. Therefore, from the Jordanian legislation’s perspective, this act is permissible because the rule is that things that are not prohibited are legal or permissible, and arguing the opposite would undermine the offences and penalties of the principle of legality.

2-The fact the Jordanian legislation lacks a provision that criminalises a drawee’s abstention from honouring a valid cheque does not mean that the drawee’s civil liability is negated in the event of confrontation from everyone who suffers prejudice due to such abstention. This is because Article 279 of the Commercial Law allows everyone who suffers prejudice due to such abstention a right to claim compensation.

3-Despite the fact that the drawee’s civil liability is established due to his abstention from honouring a cheque, the Jordanian legislation still needs a penal provision that criminalises a drawee’s abstention in such a case. The purpose of this is to provide criminal protection to ‘a common social interest’ that is worthy of such protection, where this interest comprises numerous interests, starting with the drawer’s interest and that of the beneficiary and bearer and ending with the drawee’s interest. The drawee’s interest is important because its reputation is also hurt when any of its employees intentionally abstains from cashing a valid cheque. This legislative vacuum clearly shows that there is a problem with the Jordanian legislation, which must be addressed.

4-The UAE legislation has adopted an approach that is different from that of Jordan, where it has provided criminal protection to the interests of all parties involved in cheque transactions—by considering a drawee’s abstention from honouring a valid cheque as an offence that is punishable under Article 641/B of the Commercial Transactions Law.

5-The UAE legislation expressly provides for the criminal intent required in order for the offence of a drawee’s abstention from honouring a valid cheque to be established by using the phrase ‘refusal in bad faith’ in Article 641/B of the Commercial Transactions Law. According the judiciary and jurisprudence in this area, the phrase ‘bad faith’ refers to the general criminal intent.

6-The drawee bank is also held criminally liable for the offence of abstaining from honouring a valid cheque when such an offence is committed by any of its employees, provided that it is committed in its name or account. This is provided for in Article 65 of the UAE Penal Code. Therefore, the drawee bank is penalised for such an offence by paying a fine, as stipulated in Article 641/B of the UAE Commercial Transactions Law.

7- Article 128 of the UAE Penal Code makes the court’s authority to order for the closure of a drawee bank optional because of the important role that financial institutions play in a state.

8-It is a rule that when a drawer issues an order to the drawee not to honour a valid cheque, this constitutes an offence, in accordance with Article 401 of the UAE Penal Code. However, as an exception of this rule, the UAE legislation has allowed a drawer to instruct the drawee to abstain from cashing a valid cheque in two cases: where there is loss of a cheque and where the bearer of a cheque is adjudged bankrupt.

## **4.2. Recommendations**

1-Jordanian legislation, either the Penal Code or Commercial Law, should consider criminalising a drawee’s abstention from honouring a valid cheque. On the one hand, the objective of this is to protect the credibility of a cheque, the confidence and trust that the public has in it, and the trust that customers have in the drawee, and on the other hand, it is to protect ‘a common social interest’, starting with the drawer’s interest and that of the beneficiary and bearer and ending with the drawee’s interest. The drawee’s interest is protected because its reputation is punctured when one of its employees intentionally abstains from honouring a valid cheque.

2-The UAE legislation should replace the phrase ‘bad faith’, mentioned in Article 641/B of the Commercial Transactions Law, with the word ‘deliberately’. Doing this would seal the loopholes of discretion that tend to result in disagreement over the interpretation of this phrase, with some parties interpreting it as ‘a special intention’ that must be established for the offence of a bank



employee's abstention from honouring a valid cheque to be proved. On the other hand, majority of jurisprudence and judicial decisions have interpreted it as a general criminal intent.

3-When the offence of abstention from honouring a valid cheque is established, the UAE judiciary should adjudicate by closure of the drawee bank within the narrowest limits. This is due to the important role that banks play in the national economy and in facilitating business and financial transactions for all.

4-To seal the loopholes of discretion in the expansion of cases allowing objection to cheque encashment, the UAE legislation should explicitly provide for all cases where a cheque is collected due to a financial crime as reasons legalising objection to honouring a valid cheque. The legislation should also expressly provide for the involvement of prohibited persons, who can legalise objection to the encashment of a cheque by analogy to the cheque bearer's bankruptcy due to the fact that the two cases have the same identical reason. The Egyptian legislation has provided for this in Article 507/1 of the Commercial Law, which stipulates that it is legal to raise an objection to the encashment of a cheque in three cases: where a cheque is lost, where its bearer is adjudged bankrupt, or where prohibited persons are involved.

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