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Criminal Liability in Dishonoring of a Cheque in the Criminal Justice System of Oman

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When the beneficiary writes a cheque knowing that the funds are inadequate, the offence of issuing a bounced check then transpires and the analysis of the criminal justice system of Oman is emphasized in the light of statutory crimes and criminal law. According to the penal code, if the cheques (without sufficient funds) are issued in bad faith, this would be an indictable offence. Insisting upon the issuer, in order to settle with the beneficiary in the form of returning an unpaid check, will be the penalty for such an offence. The issuer should either settle with the beneficiary or face trial considering the nature of criminal penalties. The establishment of an assignment after the directive or final ruling or making of the payment, then leads to the completion of the case. Its execution will be held if this happens after the final decision.

Key words: *Basic law, Religious and customary Law, Criminal Law, Procedural Code, Public prosecution, Cheque, Penalty.*

Introduction

An area of 3,009,500 square kilometers, fringing with the United Arab Emirates, Saudi Arabia and Yemen, and the sea edging with Iran, encompasses the Sultanate of Oman. The contemporary Oman was founded on 23 July, 1970 by His Majesty Sultan Qaboos bin Said al Said who, in a short span of time, has transformed the country in an economically modern, safe, peaceful and clean realm. The economy banks on oil extraction, the services sector and manufacturing. However, the oil sector is coarsely based upon (67%) of the budget revenues, (40%) of GDP at current prices, and (65%) of export earnings. Historically, the economy has been made vulnerable to fluctuations in the price of oil because of its reliance upon it. So the Sultanate policies now guarantee the free market economy and encourage foreign investments.

The legal system of Oman on the bases of rule of law is treasured and guaranteed by the Basic Law of the State such as "*the rule of law is the basis of governance in the State. The honor of the judiciary, the impartiality and integrity of the judges are the safeguard of rights and* freedoms."(Article 59 of the Basic Law of the State) The term “Basic Law of the State” is equivalent to “constitution” in other jurisdictions. The Royal Laws and Decrees are dispensed by His Majesty, the Sultan, in accordance with the Basic Law of the State described in the legal system of the Sultanate. The guiding principles such as the political, economic, social, cultural, and security principles as well as the systems of the government in the state are protected by its Basic Law (RD No.101/96). It also specifies the constitutional rights, autonomies, and civic responsibilities. The constitution of the sultanate is its basic law which designates the doctrine for the segregation or separation of powers among the institutions of the sultanate (i.e. Legislative, Judiciary, and Executive) (UNODC, 2015).

This article gives an analysis of the religious and customary laws that were the basic sources of legal system of the Sultanate, preceding 1970 and the beginning of the modern era. The local Walis and tribal leaders (Sheiks) tried to play a key role in resolving the socio-economic disputes of the region, but when they couldn’t settle the disagreements, the Shari’ah Court determined the matters in the light of the principles of Islamic law. This study focuses on the available remedies in the justice system of Oman and the new amendments in the criminal law, constituting an offence in case of dishonor of a cheque. The perspectives of the historical and criminal law regarding the cheque as a negotiable and payment instrument are also discussed and analyzed.

Reforms in Criminal Justice System

Over the past 40 years, many decrees have been disseminated in Oman, regardless of the fact that it is one of the least known dominions in the Gulf region and the lawful expansion here has always been conducted in a discreet manner (For instance, the Penal Code 1974, the penal procedures code 1999, the Judiciary Code 1999, the Public Prosecution Code 1999, the Police Code 1990). The Omani criminal justice system has been making a number of significant reforms since 1970. The introduction of the Police Code was the first reform. It was endorsed in 1973 and authorized the police to carry out, not only the criminal proceeding, but moreover, they could take the decision to prosecute in order to restore peace (This law initiated the investigation of crimes in Oman). The police court was established the same year (The Police Court is earlier introduced later on replaced with criminal courts), but it only had complete jurisdiction until 1984.

A criminal court was founded after the criminal judicial authority was restructured, which concurrently accorded, with the formation of the prosecution office in the Royal Oman Police

(Royal Decree No. 25/1984). Earlier, the officers of the Criminal Investigation Department were responsible for executing the prosecution functions and advocating the charges before the courts (Ibid). The Basic Law of the State, which was propagated and implemented with full force in 1996 (Royal Decree No. 101/1996), was the second main reform. Any ministry or institution in Oman, that needs certain laws then conscripts, proposes and executes them also, which are later revised by the ministry of legal affairs. The projected laws are first submitted to the 'Shura Council' (The Majlis al Shrua is an elected body having independence to perform administrative and financial functions) and later to the 'State Council' (The State Council (Majlis A'Dawla) plays a fundamental role in national development by acting as a link between the government and the people) for review, and finally presented before his Majesty, the Sultan, for his assent, approval, signature and issuance as Royal Decrees.

The Oman council, comprising both the Shura Council and the State Council (Article 58 of the Basic Law of the State explains the Council of Oman (Majlis Oman) that is constituted with member of the State Council (Majlis A'Dawla) and Consultation Council (Majlis A'Shura)), lacks the legislative authority and capacity to draft laws. As a matter of fact, the Sultan enjoys the exclusive power in this regard (The Basic Law of the State 1996, Article 58). Therefore, the change which has been attained by the Basic Law of the State cannot be seen because of the division of powers (the doctrine of separation of powers is also structured in the basic law of the sultanate).

Crimes and Criminal Proceedings in Oman

According to the Omani Penal Code 1974, the criminal offences are categorized into felonies, misdemeanors and minor offences (The Penal Code 1974, Article 29 explains the technical meanings). The discretionary criteria possess a complete formal nature, used in the Penal Code to distinguish among these three kinds of criminal acts and depend on the different types of penalties envisioned. The envisaged penalties include capital punishment, life sentences and prison sentences that can span from three to fifteen years in the cases of felonies (Ibid Article 39.1). Misdemeanor punishments consist of prison sentences, prolonged from ten days to three years, and fines ranging from ten to five hundred Omani Rials (Ibid Article 39.2). Finally, for minor offences, the punishment includes a prison sentence from twenty-four (24) hours to ten days and fines from one to ten Omani Rials (Ibid Article 39.3).

The purpose of the Penal Procedures in Oman is to resolve the impartial truth based on the framework of a procedural form, which is recommended by such law in order to guarantee objectivity. An opposite atmosphere is needed to be created on part of these rules and regulations of the criminal proceedings, which could serve the purpose of representing the truth and facts, avoiding any errors, and protecting the rights of the public prosecution, the

accused and his lawyer (Jescheck, 1970). These rules should protect the rights of the accused throughout the proceedings. They maintain a balance in the fight against the crime by empowering the investigation and prosecution authorities while still safeguarding the rights of the accused (Al-Suwaidi, 2009).

The code articles are not a clear and an accurate guide to the relevant authorities in terms of discriminating their powers. If the criminal system of Oman is compared with those of England and Wales, it would turn out that the situation is different in this regard as highlighted by the Police and Criminal Evidence Act 1984, which offers some comprehensive provisions regarding the supremacies and practices of the police relating to the matters of main criminal proceedings. For example, it provides detailed provisions relevant to the collection of evidence, identification, arrest, questioning and charges against the suspects (The Police and Criminal Evidence Act 1984, Codes of Practice A - H). In contrast, neither does the Omani Penal Procedures Code attain this level of detail, nor a clear explanation of most of the provisions of the Omani Penal Procedures Code could be found in the decisions of the Omani courts. The detailed guidelines would help the police and public prosecutors know their duties and powers, which would eventually ensure the security of the accused rights during the entire criminal proceedings (Al-Suwaidi, 2009). This could be provided by producing accurate guidelines, in the Penal Procedures Code, under the supervision of the professional legal community (Nasr et al., 2004).

Cheque as an Instrument of Payment in the Sultanate

A new facet has been given to the commercial and corporate world with the arrival of cheques in the market. People now a days abstain from carrying a large amount of money, so they use a cheque, which is worth the value of that money. Dealings in cheques are not only vital to the banking purposes, but also for the commerce industry and economy of the country. Cheques are used for almost all the transactions such as re-payment of loan, payment of salary, bills, and fees. Quite a large number of cheques are processed by the banks on daily basis. They are dispensed in order to fortify the evidence of the payment done. Yet, they are also a credible way of payment for many people. On the other hand, in order to avoid its misuse, a crossed "Account Payee Only" cheque should be issued. Crossed and account payee cheques are not used by any person other than the payee. The cheques have to be deposited into the payee's bank account. Legally, the author of the cheque is called the 'drawer', the person in whose favour the cheque is drawn is called the 'payee', and the bank who is directed to pay the amount is known as 'drawee'. However, cases of cheques bouncing are common. Cheques bearing large amounts, which either remain unpaid or dishonored, are returned by the bank and said occurrence or incident of return of cheque may be deemed a criminal act (Kumar, 2017).

A cheque is an instrument written in a language containing the date and place of the drawing, the name of the person obligated to make payment (the drawee) along with the name of the person to whom the payment is to be made. Though a cheque needs the signature of a person drawing it (the drawer), it should also be an absolute directive to make payment of a particular amount at a certain place (Article 523 of Royal Decree 55/90). The cheques issued in the Sultanate of Oman and due for payment, are only supposed to be drawn in a bank, or else, would not be considered as valid (Article 525 of Royal Decree 55/90). A cheque could not be issued until it is with the drawee's money, and which the drawer could dispose of according to an implied agreement at the time of drawing. The drawer alone should be able to verify that the person upon whom the cheque is being drawn, had the provision for the payment at the time of drawing if he is unable to establish that he should then guarantee the payment, even if a protest for non-payment has been made within the given time limit (Article 526 of Royal Decree 55/90).

However, a cheque may be stipulated as payable to a named person with or without an express wording, 'to-order' or "not to order" stipulation conveying such meaning to the holder of a cheque. A cheque with the words 'or to holder' or something similar, drawn in favour of a named person should be given to the holder. A cheque should be considered to be that of the holder if the receiver's name is not indicated. However, a cheque with the stipulation "not negotiable" shall be paid only to a holder who has received the same with such stipulation incorporated (Article 528 of Royal Decree 55/90). A cheque might be stipulated payable at a bank where the drawee is residing or in any other place (Article 531 of Royal Decree 55/90). If the money is transacted by a cheque that has been forged in terms of signature or text, then the drawee alone should be held liable for the damage elicited by it. If he does not pay attention or is not careful, once he has received the cheque book, the drawer then is responsible for that (Article 535 of Royal Decree 55/90).

The owner thereof may launch a complaint to the drawee against the payment of the amount, if a cheque is lost or destroyed. The objection includes the number of the cheque/s, the amount, the name of the drawer, all other information assisting identification, and the circumstances surrounding the loss or destruction of the cheque. If the objector has no domicile in the Sultanate, he shall retain one himself. When the drawee receives the complaint, he should refrain from paying a person, the amount of the cheque and allocate the provision for payment until a decision is made (Article 551 of Royal Decree 55/90).

Cross Cheque

Crossing of a cheque by a drawer or a holder comes into effect by depicting two similar lines on the face of the cheque. If the word "bank" or any other word of significance is written between the two lines or nothing is detailed between the two lines, the crossing is a general

one. If, however, the name of a specific bank is written between the two lines, the crossing is a special one (Article 554 of Royal Decree 55/90). A general crossing could be converted into a special crossing. A special crossing however, shall not be altered into a general crossing. A cheque with a general crossing should be paid either to one of its customers or to a bank by a drawee. The cheque bearing a special crossing should only be paid to the bank, whose name is written between the two lines or to a customer of such bank. The amount of the check might be delivered to another bank by the one whose name is written between the two lines. A bank can only acquire a crossed cheque or receive the amount from either one of its customers or another bank or the account holder respectively (Article 555 of Royal Decree 55/90).

If a cheque bears a number of special crossings, the drawee cannot pay unless the cheque with special crossings has these two of them crossings. One of those two crossings is for the collection of the amount through a clearing house. The drawee would be held liable if he does not submit to the prior provisions and would have to recompense for any detriment. The words "account payee" could be mentioned on the cheque if the drawer or holder does not want to get paid in cash. The amount then might be settled via book entry in that case by the drawee (Article 556 of Royal Decree 55/90).

There has been an increased number of bounced cheques in Oman since last year, as the sultanate continues to endure tough economic conditions (Gulf Business, 2017). *Times of Oman* quoted the figures of the central bank, confirming that there were 373,082 bounced cheques in the country last year, a 32 per cent increase from 282,209 as observed in 2015. Inadequate funds were the reason for nearly seventy (75%) per cent of the bounced cheques according to the central bank with closed or legally blocked accounts making up to 9.79 per cent and scrambling miscalculations up to 4.05 per cent. An 8.4 % increase from 6.9 % in 2015 has also been observed which means that almost one out of ten cheques bounced last year (Gulf Business, 2017).

Remedies for Refusal of Payment of Cheque

If a payment is refused or the cheque is dishonored, the cheque holder may exercise remedies by initiating a civil or criminal proceeding against the drawer or endorser. Despite all of the legislative obligations for duly execution of the cheque presented within the statutory time, the payment might be refused or bounced due to which the holder could them protest for the nonpayment (Article 557 of Royal Decree 55/90). However, in order to prove that the payment was refused, a statement is required by the drawee, stating that the cheque was presented and also a statement is needed by the financial organization, declaring that the cheque was presented within the statutory time. If a holder requests a statement, even if it carries a stipulation for recourse, it may not be refused. Even if the holder does not present

his cheque before the drawee or exercises his right of recourse against the non-payment resort against the drawer (Article 558 of Royal Decree 55/90).

A case can be filed against the drawee, the drawer, the endorser and other obligors on behalf of the cheque holder. However, the case shall be closed after a year from the day the obligor had either paid or was instructed to pay during the judicial proceedings (Article 561 of Royal Decree 55/90). The defendants may pledge during the court proceeding, that they have been cleared of the debt or their beneficiaries may vow under oath that they were unaware of any information whatsoever indicating that their predecessors were under debt. If the judgement is given about the debt, or the debtor acknowledges the same by a separate instrument in such a manner, as to bring about novation of the debt, then the extinctive prescription would be unaffected (Article 562 of Royal Decree 55/90).

The period of extinctive prescription is only effective from the date of the last proceeding. A holder shall not be prevented by the extinctive prescription from appealing, against a drawer who has not furnished provisions to him as regards the payment. He has either provided him with the payment, and then taken it back, or in addition, has augmented himself without rightful cause (Article 564 of Royal Decree 55/90). On the contrary, if a person draws a cheque in bad faith without a provision of payment, or if the balance is inadequate to satisfy the amount mentioned in the cheque, or if he asks the drawee not to make the payment, then, he shall be held liable for commission of crime and would be penalized through the proceeding as per the Penal Code (Article 565 of Royal Decree 55/90). A cheque holder could claim in the criminal court the outstanding amount on the cheque to be paid to him along with the required supplementary reimbursement, even though the criminal action is carried out against a drawer (Article 566 of Royal Decree 55/90). Therefore, such judgements by way of conviction shall be published in the Official Gazette.

Earlier, a drawee would be reprimanded by paying a fine not more than two hundred Rial Omani if he didn't pay the cheque despite of the provisions of payment available. This amount would be owed to the drawer with respect to the damage sustained by him to his credit because of the non-payment (Article 567 of Royal Decree 55/90). Any drawee knowingly declaring that the provision for payment is less than what he actually holds, would also have to pay a fine up to one hundred Rials Omani (Article 568 of Royal Decree 55/90). A person would also be fined up to one hundred Rials Omani if he tries to draw a cheque in a place other than a bank, without a date or with a receipt of a cheque by way of set-off (Article 569 of Royal Decree 55/90).

The criminal law regarding the punishment for dishonoring of a cheque has been amended. The new law defines that a person could go into imprisonment from a period of one month to two years and fined from RO 100 up to RO 500, if he provides with a cheque, that could not

be offset by an existing one, if the balance is less than the value of the check, or if the account is closed, if the remaining amount, after the withdrawal, does not meet its value, if the drawee is ordered not to pay the check, if the check is released or signed in a manner that prevents its disbursement, or if the drawer knows that he is lacking the recompense to meet his full value, and even then delivers a check payable to the holder. The court would need the guilty to pay as per the value of the cheque and bear the expenses endured by the beneficiary (Article 356 ibid). If the drawer declares in bad faith, that there is either no existing or less balance to be withdrawn, then he could be imprisoned for a period of one month up to one year, and also fined (500) five hundred Omani Riyals up to (1000) thousand RO (Article 357 ibid). However, the prosecution of the offence shall be based on the victim's complaint (Article 358 ibid). The case could be settled by payment before being submitted to the court or the execution of the judgment could be concluded by a waiver (Article 359 ibid).

In order to deal with the increase in the number of dishonoring of the cheques, the government has promulgated a new penal code (RD 7/2018), that regulates the offences regarding the dishonoring of the cheques in the Sultanate. Although it is now being argued that keeping the economic destitution into consideration, the laws relevant to dishonoring of the cheques should be reviewed, as the economic hardship is an extraordinary situation. It is also suggested that such transactions should be perceived as commercial transactions that entail a relaxed and credible environment for investors and business community in order to safeguard their financial interest through state legislation. However, the commercial transactions are subject to the rules of civil prosecution considering the fact that the courts contemplate a cheque as a commercial paper and look at the nature and elements of a cheque on this basis, but the new law also takes the dishonoring of a cheque with mens-rea.

From the perspective of a criminal court, the word ‘security’ on a cheque does not modify its nature as long as it gratifies the official rations set out in the law. The obligatory statistics must be specified on a cheque i.e. an unconditional order to pay a precise sum of money. A security cheque, on the other hand, fulfills the condition when making the payment. With regard to the cheques, there is a vast difference between the criminal and civil court. According to the fact recognized by the courts in the Sultanate of Oman, a cheque is a commercial paper, comprising of an order, which the drawer gives to his bank, in order to pay the beneficiary, an explicit sum of money at a precise date. A cheque is much like a payment instrument, and functions as cash. It would be an offence on the part of the drawer if he issues a cheque to the beneficiary, with deficient funds, on the due date.

An Analysis of a Cheque as an Instrument of Payment with regard to Historical Evolution and Criminal Liability in Case of Dishonoring of Cheque

One of the foremost concerns confronted by the parties while transferring money through negotiable instruments, is dishonoring of a cheque. It has become prevalent and recurrent in courts of law and is taking up pace. Even if he was oblivious to the inadequacy of the fund in his account within a suggested limit of time, it would make the drawer liable, but they are given ample time by the law in order to reimburse the amount to the payee. The failure to pay, past the deadline would be an illicit action as it implicates an illegal intent of not paying the money back to the deserving party. As per the law, the parties while dealing with the cheque, should have the complete knowledge of the amount of money in their relevant bank accounts. Legally, the drawer becomes a principal debtor to the holder as soon as a cheque is dishonored and the holder could file a suit against him in order to recuperate the amount from him. Dishonor of a cheque, by the drawer, is a criminal liability and the articles 356 to 359 of Penal Code (RD7/2018) and commercial law (RD 55/90), regulating the negotiable instrument, such as exchange and cheque is dealt in it.

Cheques have their ancestry in an ancient banking system. In the primordial banking system, the bankers would pay money to the identified payees at the request of their customers. This was referred to as a bill of exchange. Its use expedited the trade by eradicating the merchant's requirement to carry large amounts of currency (e.g. gold) for the purpose of obtaining merchandises and amenities. In the countries with civil law, cheques are administered by statutes, demonstrated in Geneva uniform law of cheques-1931. In countries with the civil law, the codification of negotiable has a longer history than in the countries with common law. At present, in the wake of unification efforts of The Hague conventions of 1910 and 1912 and Geneva conventions, most of the countries under civil law have presented the laws either by accepting or displaying the impact of the uniform law of bill of exchange and cheque. Although many different countries across the world, have drafted and implemented the laws of their own, they are basically influenced by the Uniform law of bill exchange and cheque.

An old and established payment instrument widely used across the world, cheques are a type of bill of exchanged supervised by the provisions of law of negotiable instruments applicable to both the cheques and bills. The Geneva Uniform Law for Cheques (ULC) is the foundation of cheque legislation in countries under civil laws. The Geneva Uniform Law divulges that a ‘cheque’, being an instrument, must abide by six formal requirements. First, it must be comprising of the term ‘cheque’ in the body of the instrument and expressed in the language employed in drawing up the instrument”. Second, it must contain “an unconditional order to pay a determinate sum of money”. Third, it must name the drawee, that is, the person who is supposed to pay. Fourth, a statement of the place where the payment is to be made ought to

be included. Fifth, the date and place of withdrawal must be mentioned on the cheque. Sixth, the drawer's signature must be there on the cheque. The cheque not only is a mandate or authorization by the drawer to the drawee in order to pay, but also a decree by him to the payee, for collecting the payment from the drawee. Finally, the payee's rights are convened on the cheque fulfilled by the drawee-banker and/or the drawer.

An order to pay could create an obscurity if the drawer, the payee and the drawee are present. The drawee in this case takes necessary action in order to address either the drawer's or payee's claim. The focus upon the payee's rights and the matter of a cheque is given in the study of civil liability. The payee's rights against the drawee and his recourse against the drawer are nonetheless of a certain interest and are both interconnected. Unless he has compelling remedy against the drawee, the payee would not renounce his rights against the drawer. A payee may exercise his rights against the drawer the same way he exercises his rights against the drawee. The payee's rights against the drawer and drawee may be relevant to the drawer's original obligation towards him, which may turn into an assurance. The accessibility of this remedy, preceding the dishonoring of the cheque because of the drawee's failure is questioned, even though the payee is authorized to recover from the drawer. The legal underpinning of the cheque operation does not require the drawee to be liable to the payee. At the same time, such liability does not need to be precluded or prohibited (Gupta, 2010).

The obligations of a drawer, who issues a cheque to the payee whether as a security or surety of some payments or as an obligation to pay through encashment of a cheque, in favour of a payee by a particular drawee or bank during a definite time, are categorised by the penal code (i.e. RD.7/2018). Preserving adequate funds for the purpose of honoring the cheque acquiesced to the drawee or bank by the payee, is also the responsibility of a drawer. The new penal code defines that any cheque issued by the drawer to the payee for the purpose of financial security or guarantee, does not institute mens-rea or criminal resolve for the commission of an offence in the form of dishonoring of a cheque, whenever presented for encashment to the drawee or the bank who declines any sort of payment due to some reasons. So the dishonoring of a cheque which has been issued for safety, security or guarantee and not for payment could not be called as criminal offences, since the criminal intention or mens-rea is lacking (Criminalizing Cheque Bounce Cases, 2015). The offended party could invoke the civil remedies as they have been provided with the right in the penal code, the commercial law as an instrument of bill of exchange and the criminal procedure code of the Sultanate.

Instead, if a drawer executes or issues a cheque and the drawee purposely dishonors the cheque for any reason whatsoever, it would be established as an offence under the penal code and would be prosecuted by the prosecution department of the Sultanate accordingly. It is for

the prosecution department to decide whether it should prosecute or drop the case against the accused in the light of the available evidence. The case would be prosecuted before the criminal court for administration of justice if the prosecution decides that dishonoring of the cheque is an offence and also gathers sufficient evidence in this regard. It is again for the court to decide to either punish or acquit the convict. In case of punishment, the case may neither be dropped nor the convict acquitted, only their punishment may be suspended if both the parties reach a settlement with the permission of the court (De Lanerolle, 2015). However, the complainant party may request to the prosecution to drop the case at the stage of investigation rather than during the trial (Ali, 2016). Providing a formal guarantee to the business community and investors in all the commercial and financial transactions through banking channels is the basic aim of the penal code.

The historical analysis reveals that a payee-creditor has been considered as an assignee of the debt owed by the drawee to the drawer-debtor. Moreover, the drawee either may be held liable to the payee with relevance to the drawer's obligation or debt, or he may not have been held liable to the payee at all. Traditionally, the legal system at different times has had different possibilities. Those people became the "creators of the bank of deposit", who used to lend the deposited funds and provide non-cash payment services to money changers in Ancient Greece (trapezitai), during the 5th century BCE (Tesfaye, 2008). This gave rise to a nascent payment system in which written payment orders were nevertheless rare. The earliest written payment orders were found in Greco-Roman Egypt as part of a standard banking practice.

A wide-ranging bank payment activity was substantiated chiefly during the Ptolemaic period (323 BCE to 30 BCE). The first known cheque system materialized in Ptolemaic Egypt during the first half of the 1st century BCE. There was no inkling of the law that used to oversee these available instruments. At the same time, they delimited the 'double mandate' to pay and collect the 'cheques' both as a payment method. During the Roman period, the cheques were notably obscured. The historic importance of the Greco-Roman non-transferable cheque in Egypt had been exaggerated in terms of the broad economic picture and discontinued documented record. However, a cheque was singled out as the major input for the Greco-Roman Egyptian banking as regards the payments through banks by payment orders (Tesfaye, 2008).

An Evolution and analysis of Cheque in Islam Era as an Instrument of Payment

On the other hand, the citation of Islamic payment instruments is pretty opulent especially, during the period of Fatimid Caliphate, between the 10th and 12th centuries (Tesfaye, 2008). Since that period, or precisely between the 11th and 13th centuries, plenty of documents had been initiated from the Jewish Geniza of Cairo. The Islamic payment had not always been

diverse. Thus, the withdrawal out of an account with a sarraf (private moneychanger) in the execution of a non-cash payment made by a small retailer, may be treated as a hawale. Ruq'a is more of a specified term, with a few meanings. Firstly, it means an order for the delivery of goods. Secondly, it is a payment order, issued to the payee, instructing the drawee to make a payment to the person entitled. Thirdly, it denotes the drawee's own obligation towards paying and acknowledging a debt. The modern word 'cheque' may have been derived from sakk which overlaps with ruq'a (Tesfaye, 2008). Usually, a ruq'a or sakk was billed to the bearer and did not designate a named payee.

The ruq'a or sakk relates to the modern cheque as an order to pay and is addressed to a person acting as a banker (Tesfaye, 2008). Hawale literally means a 'removal' or a 'turn'. It marks the conversion of an obligation from one person to another, founded upon "an agreement according to which a debtor could be relieved of a debt by another while he becomes responsible for it". The other person has an obligation to pay as a debt, whatever amount he has received from the debtor. The hawale, therefore, is distinct from the cession which is the transfer from the creditor to another. It can be termed as casing the transferal of an obligation rather than that of a debt. In hawale, while assisting a payment mechanism, it is the drawee ('transferee'), who replaces the debtor ('transferor'), and takes over the debt owed by the latter to the creditor.

In a practical setting, a drawee transferee, who owes money to the original debtor-transferor, not only expects that his payment to the creditor will confer upon a discharge on the original debtor-transferor towards the creditor; rather, he also expects that in the process, he (the drawee-transferee) will obtain his own discharge towards the original debtor-transferor. A drawee-transferee, who does not owe money to the original debtor-transferor, intends, either to extend the credit to him or to give him a discharge from the creditor by way of a gift. Legal theory underlying the hawale is contested among the four principals of Islamic legal traditions, which are the Hanafi, Maliki, Shafi'i, and Hanbali schools of law (Tesfaye, 2008). Among them, the Hanafi School has been prominent in the east, particularly in Iraq and Syria, while the Maliki School has been protruding in the west, particularly in Egypt and North Africa. This controversy is ample with practical implications.

The hawale may have been originated from the payer-debtor's instruction to the payee-creditor, in order to collect from the drawee. In case of sanctioning the payee-creditor, for presenting the instructions to the drawee, the latter's assent is mandatory under Hanafi rules. However, hawale can be abstracted from the creditor's powers to demand payment from the transferee-drawee, so that the hawale can be treated as a precursor for a legal doctrine underlying the cheque. The general rule in Islamic law is, that a suretyship does not liberate the liability of the principal debtor to the guaranteed debt (Tesfaye, 2008). Being

conceptualized by Hanafi law as the drawee-transferee's guarantee, the hawale ought to have quartered an incessant original debtor transferor's liability to the creditor.

Ultimately, the notion prevailing in Hanafi law is that, on the basis of the hawale's effect to 'remove' or transfer the debt from the original debtor-transferor to the drawee-transferee, the original debtor-transferor must be discharged altogether, when the collection from the drawee-transferee becomes impossible. Thus, the original debtor-transferor is considered to be as liable, in a quite limited way, in circumstances involving "the destruction of the debt" owed by the drawee -transferee to the creditor. In Ianafi law, once a hawale has been prepared, the original debtor-transferor becomes liable to the creditor upon the drawee -transferee's death in poverty, as well as, when the drawee-transferee repudiates the hawale, which nevertheless, cannot be proven by the creditor. This reliant liability is streamlined as an equivalent to the inferred warranty of a seller of goods (Tesfaye, 2008).

The hawale is a legal rather than divergent notion, under which such instruments, even the oral agreements, function as payment mechanisms. It also signifies any document or arrangement, which activates its solicitation. It is a bilateral contract between the creditor and either the drawee-transferee or the debtor-transferor under Hanafi law. Either way, it exemplifies both the order to pay and the directive to collect, also suits, to deliver a legal basis to transact a cheque (Tesfaye, 2008). Therefore, stripped to its bare bones and broadly defined, the cheque is issued to the creditor (payee) in order to authorize him to collect the payment for his own use by the debtor-payer (drawer). It is addressed to a bank or another type of depositary of funds (drawee) and is an unconditional order to pay a specific sum of money on demand that confers upon the rights of the payee towards the drawee-banker and/or the drawer. The payee's remedies are provided both in the civil and criminal laws upon the dishonor of the cheque. A cheque, nevertheless, appears to have been hidden in Greco-Roman Egypt even before the Middle Ages, emerging in the Ptolemaic Egypt, during the 1st half of the 1st century BCE.

Subsequently, a nascent cheque system started operating during the early Middle Ages at the Islamic lands and resurfaced in the Continental Europe only as late as in the late Middle Ages. The cheque spread its roots and grew to generate a 'cheque system' in England later in the 17th century, from where it expanded worldwide (Tesfaye, 2008).

Conclusion

The changes in the recent Criminel Justice System of Oman are an important aspect of the criminal justice system where offences are divided into felonies, misdemeanors and minor offences. The suspicion and evidence collection stage, where the police play a significant role; the preliminary investigation stage in which public prosecution has a fundamental role;

and the trial stage, where the contending parties put their evidence before the court, are the three stages of the criminal proceedings. These stages are administered by the Code of Penal Procedures. This Code is a modern inquisitorial law, which focuses on the inquisitorial model, emphasizing the pre-trial stages, and ruling out the involvement of the defense lawyer in these stages.

As for the application and execution of the law, the courts may take into consideration, several key points, as the circumstances surrounding the bounced cheque, would determine if there was any criminal intent or mens-rea, examined and investigated on the part of the drawer of the cheque, while determining the cases related to the bounced cheques. Secondly, a check being the guarantee and security of a bank, would become payable if the circumstances during which a cheque was issued is being realized, for example, a cheque issued for the guarantee of a 'performance bond'. If payment is not outstanding on their part, some owners cannot exploit this right in order to avoid the balance owed as a security cheque for payment. In order to further urge the drawer, they will not be allowed to invoke criminal action due to insufficient funds. Instead of convicting the drawer simply because of the bounced cheque, the merits determining the reason in order to write the cheque should be examined by the criminal court, which, for the purpose of further investigation, could refer the case to the civil court. The case could however be returned to the criminal court in order to decide for the penalty if bad faith is established on the part of the drawer. If a relationship arises from a contract or agreement, then the motive behind writing the cheque should be investigated by the criminal judge. The court would, however, sentence the drawer if it is found that the issuer had acted with mens-rea, or had a criminal intention and defrauded the victim.

In the event of the breach of a loan contract and failure to repay the loan according to the agreed repayment schedule, the banks often require the borrowers to sign blank cheques as a security or else the dishonored cheques are considered a loan. The creditor bank would present the cheque (parts of which would be completed by the creditor bank) to the relevant authorities for the borrower to be prosecuted upon default nonpayment by the client (borrower) of the loan. If the bank was aware of the fact at the material time and the drawer did not have sufficient funds to cover, the dishonoring of the cheques by the drawee maybe investigated, as such cases could amount to security. It should therefore be considered by the prosecution and courts at an initial stage that the criminal offenses, under the penal code, are not constituted by the security or guarantee cheques in order to answer the question as to how to establish a fraud in such cases if a cheque is issued by a customer, who is aware of the insufficient funds in his account. The ancient Romans used an earlier form of cheque known as prescriptions in the first century BC. The banks in Persia and other territories in the Persian Empire under the Sassanid Empire issued letters of credit known as Sakks during the 3rd century.

It is said that cheque system for the pilgrims, travelling to the holy land or across Europe was introduced by the Knights Templar between 1118 and 1307. The pilgrims would deposit reserves at one-chapter house, and then withdraw them from another chapter at their destination by showing a draft of their claim. These drafts would be written in a very complicated code, which only the Templars could decipher. The knights adopted from the Muslims, who were known to have used the cheque or Sakk system, since the times of Harun alrashid. A Muslim businessman used to make a transaction earlier in the form of the cheque, in China drawn on sources in Baghdad, during the 9th century, and this tradition was considerably fortified during the 13th and 14th centuries, at the time of Mongol Empire. The fragments, originating from the Cairo Geniza, indicate that during the 12th century, cheques that were oddly analogous to those used in current times, were in use. The only difference was that these ancient cheques were smaller to save the cost of the paper. They enclosed a sum to be paid and then the order "may so and so pay the bearer such and such amount". The date and name of the issuer were apparently used as mode of payment through a cheque.

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