



TO DECRIMINALISE OR TO NOT DECRIMINALISE? THE CONUNDRUM OF SECTION 138 OF THE NEGOTIABLE INSTRUMENT ACT, 1881.

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Abstract

This paper seeks to analyse the proposal of the government to decriminalize section 138 of the Negotiable Instruments Act, 1881 in light of the ongoing circumstances. The proposal which though arises from the noblest of objectives that is firstly to boost India's ranking in the ease of doing of business index and secondly to unclog the court system, which is already plagued with many litigation cases as in fact, roughly litigation cases pursuant to section 138 account for one-fifth of total cases in the Indian courts today, we can see inherent challenges in decriminalizing of the same section.

This paper delves into the reasoning and analysis as to why the attempt to decriminalize section 138 is not a step in the right direction as the section has been particularly well received by the business community as it provides credibility to the negotiable instruments and fosters trust and any attempt to decriminalization it will lead to major challenges for the trade and business communities. This paper will critically analyze and present extensive arguments in support of the statements above-mentioned in this paper.

Keywords: - Cheque, Negotiable Instruments, Decriminalization, Section 138.

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Introduction

The government recently vide its notification titled “Statement of Reason”² announced the proposal to amend section 138 of the Negotiable Instruments Act³ (hereinafter NI Act). The said proposal was carried out in furtherance of the objective of easing the doing of business ranking which has been the hallmark of this governments policy⁴ coupled with other reasons like unclogging the court system and increasing the overall efficacy of the system as for a matter of fact more than 20% of litigation the court faces pertain to cheque bounce under section 138 of the NI Act.⁵

Section 138 of NI Act has been given a criminal overtone despite it being a civil wrong to deter possible defaulters from defaulting as credit is given on trust and good faith and a single act of dishonestly is bound to have ripple effects on the economy as a whole. The government’s proposal has caused widespread debate as to whether the section should be decriminalized or whether it should be left as it is.

This paper attempts to critically analyze and present a holistic picture surrounding the dishonour of cheque under Negotiable Instrument Act and if the same should attract criminal liability or whether it should be classified only as a civil wrong. The paper seeks to understand the same through the objectives and purpose of the Negotiable Instruments Act, 1881 and by critically analysing section 138 of the Act as the section is of utmost importance for it has direct effect on the whole economy because of the prevalent use of the instrument by the business community in their everyday transactions.

Further cheques stem its importance from the fact that it is also a credible and trustworthy form of negotiable instrument around the world and is a legal tender of the government and is duly sanctioned by law making the provision of utmost importance as far as trust quotient and credibility of the negotiable instrument is concerned.

² Ministry of Finance, Government of India, *Decriminalization of Minor Offences for Improving Business Sentiment and Unclogging Court Processes* (8th June 2020).

³ Negotiable Instruments Act, 1881.

⁴ NDA Government, 17th Lok Sabha elected in May 2019.

⁵ *See*, 213th Law Commission Report, 2018.



REVIEW OF LITERATURE

- I. **Yasika Saravria (2020)**⁶ in her research paper titled “Decriminalizing The Offense of Dishonour of Cheque: Why not Desirable?” emphasizes the need to not decriminalize the section given the nature of the objectives and purpose for which the Negotiable Instruments Amendment Act was brought in by the government in the year 1989 which was for tackling and preventing huge amounts of frauds and to ensure that the credibility of the instrument remains intact.

The author argues that the parliament brought criminal penalty to inculcate a sense of financial discipline with regards to matters pertaining to the businesses and trade. The author further argues that the objectives of the act should not be ignored, given the scenario in India where cheques are often issued to stall honest creditors and sometimes even defraud them. It is emphasized that the smooth functioning of the credit line would require belief and integrity in the system and the same shall not be possible without levying criminal penalty on the defaulter.

- II. **Devansi Desai (2020)**⁷ in her research paper titled “Decriminalising Section 138 of Negotiable Instruments Act, 1881: Whether a right manoeuvre to boost the economy?” argues that the Negotiable Instruments are the oils and wheels of the business world and their integrity should never be doubted.

The author states that decriminalizing the section would free the defaulter of any kind of criminal liability and also would increase chance of no recovery in the future and the same would be a threat to the business community who primarily deals with such instruments. The author further argues that the same will also defeat the purpose of the NI Act and increase circulation of false cheques in the economy and therefore such a move should not be resorted to by the government.

⁶ Yasika Saravria (2020) “Decriminalizing The Offense of Dishonour of Cheque: Why not Desirable” available at https://www.mondaq.com/india/financial-services/955680/decriminalising-the-offence-of-dishonour-of-cheque-why-not-desirable#_ftnref5 last visited on March 15, 2021.

⁷ Devansi Desai (2020) “Decriminalising Section 138 of Negotiable Instruments Act, 1881: Whether a right manoeuvre to boost the economy?” available at <http://www.tjprc.org/publishpapers/2-52-1600671345-6IJP SLIRDEC20206.pdf> (last visited 20th March 2021).



III. Palash Taking (2020)⁸ in his research paper titled “Decriminalization of Criminal Offence Under Section 138 Of Negotiable Instruments Act, 1881” states that section 138 of the Negotiable Instruments Act should not be decriminalized because it will remove the fear of any criminal penalty and no fear of any criminal punishment would reduce the integrity of the system which in turn would lead to increase in fraud cases of cheques issued and their subsequent dishonor.

The author further argues that in any case the provision of section 138 has a safeguard for an honest drawer of the cheque as criminal proceedings could be started only after giving a total of more than 45 days in notice to the drawer of such a cheque. Further the author provides that since most of the cases coming under this section gets compounded at an early stage, there is no need to decriminalize the section.

IV. Krrishna Singhania (2020)⁹ in his research paper titled “Section 138 Of Negotiable Instruments Act: Overview” states that cheques are used as a widely used method for payment and that post- dated cheques are also used as a means for security in terms of business deals, thereby ensuring of trust a mandatory requirement for such negotiable instruments.

The author further argues that cheques which are offered with the objectives of deferred payment and which are in fact accepted by the payee in good faith should not be made to suffer on account of non- payment and which in fact necessitates the requirement of criminal penalty to be imposed. The author further states that penal provisions ensures to a large extent that obligations are honored on both sides of the table and therefore the government should not think of decriminalizing the said section.

⁸ Palash Taking (2020) in his research paper titled “Decriminalization of Criminal Offence Under Section 138 Of Negotiable Instruments Act, 1881” available at <https://www.mondaq.com/india/crime/966664/decriminalization-of-criminal-offence-under-section-138-of-negotiable-instruments-act-1881> (last visited 30th February 2021).

⁹ Krrishna Singhania (2020) in his research paper titled “Section 138 Of Negotiable Instruments Act: Overview” available at <https://www.mondaq.com/india/financial-services/812822/section-138-of-negotiable-instruments-act-overview?type=popular> (last visited on 30th January 2021).



Understanding Negotiable Instruments

Negotiable Instruments were brought about by the society to attain a convenient method of transferring money. The Act on Negotiable Instruments provides for different types of negotiable instruments such as bill of exchange, promissory notes, cheques, etc.¹⁰ For the purpose of this paper, the author has limited its scope to covering only cheques and its decriminalization aspect under section 138 of the Negotiable Instruments.

With the advent of technology and the sheer development of the banking sector and the presence of bank branches in most locations, cheques became one of the most favorable Negotiable Instruments used by people, both in the business world and in everyday transactions¹¹. A cheque can be classified as an acknowledged bill of exchange which is drawn on a specific bank and is not expressed to be otherwise payable than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.¹²

Cheque as a mode of payment system became widely used therefore stemmed the reason for its control in the interest of the general public. Cheques are generally issued with the intention that it may be paid at an earlier date.¹³ A transaction by the mode of cheque generally involves three people: the drawer, the payee and the drawee. Drawer can be said to be the person who draws the said cheque so in question, the payee is the party that receives the money so mentioned in the cheque and the drawee is the bank to which the command to pay is given by the drawer of the cheque. Further a cheque can be classified as a bearer cheque, order cheque, post-dated cheque, open or crossed cheque depending upon the contents of the cheque.

A bearer cheque¹⁴ is a cheque in which the holder of the negotiable instrument is the person to whom payment would be made and the instrument is transferable. In the case of order cheque¹⁵, payment is to be made to the person mentioned in the negotiable instrument and no one else and the bank will do it due diligence before moving ahead with it.

¹⁰ Section 64, *The Negotiable Instruments Act*, 1881

¹¹ RBI Annual Report titled "Discussion Paper on Disincentivizing Issuance and Usage of Cheques", 2013

¹² Section 6, *The Negotiable Instruments Act*, 1881

¹³ S.N. Gupta, *Dishonour of Cheque, Liability Civil and Criminal*, Universal Law Publication (2002) 12.

¹⁴ Section 13, *The Negotiable Instruments Act*, 1881

¹⁵ Section 85, *The Negotiable Instruments Act*, 1881



A post-dated cheque is a type of cheque in which the encashment date is of a later date, and which cannot be processed at the present time even though all the particulars may be right. An open cheque is a cheque which is not crossed, and which can be cashed from the bank and is also transferable. A crossed cheque¹⁶ is the most-safe method in which the cheque is crossed by drawing two parallel lines and by writing the name of the account holder between them as it ensures that the money is transferred to the person directly in his or her bank account and not to the person presenting it, and such cheques will only be able to be encashed at the drawee's bank.

Understanding Section 138 of the NI Act

Section 138 caters to that set of population who pursuant to a business transaction are issued a cheque, but later on, when the holder of the same goes ahead to collect the money so due by depositing the same in the bank, the bank dishonors it due to a variety of reasons like insufficiency of funds, account closed, etc. Section 138 of the NI Act attracts criminal liability for dishonor of cheques by providing to the holder of the instrument to prosecute criminally for the offense and the said section within itself contains a jail term of maximum two years.¹⁷ The criminal punishment for the offense of dishonor was brought in by the amendment made in ***Banking, Public Finance Institution and Negotiable Instruments Laws (Amendment Act), 1988***.¹⁸ The amendment was brought in as the act of dishonor of cheque leads to financial instability in business and immense loss and inconvenience to the payee as he/she obtained the instrument in trust and bona fide faith. Section 138 is also made de hors mens rea and is considered a deemed offense as the Parliament wanted to strengthen the use of cheques as a viable mechanism of payment in commercial trade deeming it necessary to be free from the mandatory requirement of proving mens rea as for one mens rea is an absolute sine qua non in cases which are criminal in nature, which the Parliament wanted to do away with in the case of cheque bounce cases under Negotiable Instruments.¹⁹

¹⁶ Section 123, *The Negotiable Instruments Act, 1881*

¹⁷ Section 138, *The Negotiable Instruments Act, 1881*

¹⁸ The present amendment to the Negotiable Instruments Act, 1881 was brought in with the objective to prevent dishonour of cheques and to ensure credibility and trust in the business community.

¹⁹ Lok Sabha Debates titled "Discussion on the Resolution of Negotiable instruments Act, 1881." Available at <https://indiankanoon.org/doc/71112813/> (last visited 12 Feb 2021).



The law further carves out *de hors mens rea* further in both the succeeding sections of the Negotiable Instrument as section 139²⁰ of the same Act creates a presumption in favor of the holder in due course, that he/ she may have received the same in discharge of a just liability and the succeeding section of the NI, that is section 140 states and clarifies that in no circumstances it would be available for the drawer to defend himself on the ground that he had no idea that the cheque so made would be dishonored. Further section 138 in itself clears that the offense is committed as soon as the drawee bank returns the duly presented cheque.

The objective of section 138 is two-fold. Firstly, to promote efficiency in the banking system which is already infused with a variety of payment systems and their consequent frauds and secondly, to ensure credibility which again is a major cause of concern as a result of a wide variety of payments systems.²¹ In the case of *Modi Cements v. Kuchil Kumar Nand*²² the court had emphasized on the need for enacting a legislation so as to incorporate the concept of strict liability with regard to the financial instrument used as a means of credit in the business of trade and commerce by providing due sanctity to the instrument so used in the day-to-day business transactions and therefore as a result of the same the Parliament had come up with the amendment to criminalize the said section and brought sections 138- 142 to catering the same.

Further in the case of *Dalmia Cement v. M/S Galaxy Trades and Agencies Ltd.*²³ and *Others* the court held that section 138 of NI Act was never enacted with the purpose of protecting unscrupulous drawers who never intended to honor the cheques issued by them but for the purpose of punishing them for their unscrupulous actions and in fact to protect honest men who so dealt with them in a commercial capacity. It can be further said that this section only targets those unscrupulous drawers and not honest persons and therefore there doesn't exist a need to decriminalize it. The fact that the credibility of cheques were degraded grossly in the past couple of decades was one of the foremost reasons behind the legislative trying to re-establish the credibility and reliability to cheques as a principal form of payment made as an alternative to cash transactions²⁴ by enacting section 138 which creates a criminal liability on the drawer of the said cheque.

²⁰ Negotiable Instruments Act, 1881.

²¹ RBI Paper titled "Payments System in India" available at <https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/PSSBOOKLET93D3AEFDEAF14044BC1BB36662C41A8C.PDF> (last visited 12th August 2021).

²² *Modi Cement Ltd. v. Kuchil Kumar Nandi*, (1998) 3 SCC 249.

²³ *M/s Dalmia Cement (Bharat) Ltd. v. M/s Galaxy Traders and Agencies Ltd.*, AIR 2001 SC 676.

²⁴ Sen Gupta, *Negotiable Instruments Act 1881*, Kamal Law House (1998) 450.



In fact, the whole objective of bringing section 138 of the NI Act was to bring efficiency and making sure of liability in transactions operating via cheques in cases of default or wrongdoings on the part of the drawer.²⁵ The section is against the very idea of protecting any unscrupulous drawer who do not honor their side of the bargain and impose strict liability.²⁶ Courts have often times opined that the main object of incorporation of this section is to recover money and criminal liability is to be only exercised when faced with a case involving willful default.²⁷

The Argument Against the Proposal to Decriminalize

The act of decriminalization of the act of dishonoring of cheque under section 138 of NI Act is not desirable due to a variety of reasons founded well not only on the grounds of rationale and logic but also on factors like, time and money, among other considerations. The paper aims to analyze the same in this section.

Firstly, section 138 of the NI Act gives ample time for an honest drawer of the cheque to pay the amount due.²⁸ The provision lays down various mechanisms that allow the drawer to make right what has been wronged by him. Secondly, the law further makes the person liable only in circumstances wherein there existed and exists a legally enforceable debt and not when the cheque is furnished as a form of security. The paper delves into the grounds so stated in greater detail as follows:

1- Existence of Essential Ingredients to Constitute an Offense under Section 138 of the NI Act.

In the landmark case of *Kusum Ingots and Alloys Ltd. v Pennar Peterson Securities Ltd.*²⁹ the Court held that the necessary pre-conditions should be met to constitute an offense under section 138 of NI Act. Section 138 of Negotiable Instruments Act 1881 states and explains Dishonour of cheque for insufficiency, etc., of funds in the account. It defines as follows:

²⁵ Modi Cement Ltd. v. Kuchil Kumar Nandi, (1998) 3 SCC 249.

²⁶ M/s Dalmia Cement (Bharat) Ltd. v. M/s Galaxy Traders and Agencies Ltd., AIR 2001 SC 676.

²⁷ Damodar S. Prabhu v. Sayed Babalal H., AIR 2010 SC 1907.

²⁸ Palash Taing, (2020), Decriminalization Of Criminal Offence Under Section 138 Of Negotiable Instruments Act, 1881 <https://www.mondaq.com/india/crime/966664/decriminalization-of-criminal-offence-under-section-138-of-negotiable-instruments-act-1881> (last visited 20th Feb, 2021).

²⁹ Kusum Ingots and Alloys Ltd. v. Pennar Peterson Securities Ltd., (2002) 2 SCC 745.



“Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended to two years’], or with fine which may extend to twice the amount of the cheque, or with both.”

Provided that nothing contained in this section shall apply unless—

- 1. The cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
- 2. The payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
- 3. The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*

It can be argued that the above- mentioned ingredients are essential and sine qua non to proceed with a lawsuit whether in the nature of civil or criminal in a court of law and only after these conditions are met the suit can be instituted.³⁰

2- Cheque as a Negotiable Instrument is used as a Means of Credit.

Generally, the common trade practice has been to use cheque as a means of credit³¹ rather than as a means of making payment. Often times the issuer of the cheque issues it in lieu of goods and often it the case so that it is issued post- dated and as a means of security. It can be inferred that the decriminalization of the section would pave way for the dishonest and unscrupulous drawers to escape penal accountability for their actions altogether, firstly, in the capacity as to the issuer of the cheque and secondly, on its subsequent dishonor.

³⁰ Kusum Ingots and Alloys Ltd. v. Pennar Peterson Securities Ltd., (2002) 2 SCC 745.

³¹ S. Krishnamurthi Aiyar, Law Relating to the Negotiable Instruments Act, Universal Law Publishing (2012) 19.



3- Due Recourse for an Honest Drawer of a Cheque

If anything, the law provides with respect to the drawer of a cheque under Negotiable Instruments is the timely recourse to prevent honest drawers from implicating in cheque bounce cases. The law states clearly that only after notice has been given titled “Notice as to Demand” to the Drawer of such a cheque whose cheque has so been so defaulted upon and his further refusal to pay the money within 15 days the offence will be deemed to have been committed and section 138 will be attracted. The drawer has been given sufficient time, that is the period of 15 days to make the payment so due to the payee and not face any criminal action.

Further, the NI Act under section 147 makes the offense compoundable and further helps the drawer to escape prosecution by settling the case at any stage of the trial. The court also has the inherent power to settle the case if in its opinion there exists elements of settlement despite the prosecution demanding criminal action or jail time to be involved. It can be said that an honest drawer of a cheque can never be falsely implicated as there are enough safeguards to protect him under various acts covering the regulation and working of Negotiable Instruments.³²

4- The Removal of Fear³³

It undoubtedly can be said that the fear of criminal litigation and imprisonment is the precipitating factor behind making timely payments of cheques. It is also the reason why most cases get settled in the initial stages of criminal proceedings and some even before the case is duly instituted before the court as the fear of imprisonment looms over the defaulter/ drawer of such cheques.³⁴ The proposed law for decriminalization of the section will remove the fear and as a consequence, there is bound to be a steep rise in the number of cases involving such defaults and the original objective of the government, that is unclogging of the court system and ease of doing business ranking will be obviously defeated. Further, cheque as a negotiable instrument will lose its well-founded value and faith in the market. Gradually the trust that was so accorded to cheques will erode and we could see a gradual decrease in the number of transactions that would be carried through the means of cheque as a negotiable instrument.

³² Krishnan Singhania (2019), Section 138 of the Negotiable Instrument: An Overview accessible at <https://www.mondaq.com/india/financial-services/812822/section-138-of-negotiable-instruments-act-overview> (last visited 10th Feb, 2021).

³³ 213th Law Commission Report (2018).

³⁴ Yashika Saravria (2021), Decriminalising The Offence Of Dishonour Of Cheque: Why Not Desirable? <https://www.mondaq.com/india/financial-services/955680/decriminalising-the-offence-of-dishonour-of-cheque-why-not-desirable> (last visited 12 Feb 2021).



5- Failure of the objective of the Negotiable Instruments Act.³⁵

The reason and objective for bringing about the said proposal does not go hand in hand as it nowhere seems to decrease the burden on businesses and in fact takes away the confidence of the businesses and traders which was so instilled when the act of dishonor of cheque was made a criminal offense. Further when courts hear matter with respect to imposition of criminal liability the mens rea or malafide intention is given due importance and only if their existed malafide or criminal intent for the purpose of non-compliance of cheque dishonor, only then the accused will be made criminally liable or guilty.

The courts do not go ahead with a criminal charge if the non-compliance is due to negligence or inadvertent omission on the part of the accused. Further one is made guilty on criminal grounds only when the offense has been committed in a habitual manner.

Regard being given to the manner in which one is convicted criminally under section 138 of NI Act, the proposed decriminalization proposal of section 138 of NI Act is unjustified. Further it is advised that government should refrain from making any changes to the NI Act which has the capacity to blow the sanctity of cheques, banking sector, businesses, and common citizens of the country who treat cheques as a guaranteed and secure system of payment.³⁶ The proposed decriminalization has the capacity to throw the whole system of an ideal secure payment system down the gutter, defeating the very purpose for which this section was enacted by the Indian Parliament.³⁷

The proposed decriminalization would only render the system toothless and without a proper forum where the victim can approach for violation of his rights and unjust treatment. The move will lead to disgruntled citizens who would be unjustly bothered for no fault of theirs. One can only imagine that when in a situation where the offense is criminal in nature, so many defaults happen, presently covering 20%³⁸ of all litigation matters in various courts of the country then how would the situation be in a world where the offense is decriminalized and only a civil penalty is levied.

³⁵ The object of the Negotiable Instruments Act, 1881 especially in Chapter XVII is to promote the efficacy of the banking operations and to ensure credibility in transacting business through cheques.

³⁶ S. Krishnamurthi Aiyar, *Law Relating to the Negotiable Instruments Act*, Universal Law Publishing (2012) 15.

³⁷ *Modi Cements Ltd. v. Kuchil Kumar Nandi*, (1993) 3 SCC.

³⁸ See, 213th Law Commission Report, November 2008.



6- Costly Affair

Apparently, the cost of proceeding is far lesser when instituted by the payee under section 138 of the NI as compared to when instituted in civil courts. Upon decriminalization of the offense of cheque bounce the holders of such cheques would have to turn to civil courts for any relief, this in turn would add to the workload of civil courts as it will see an exponential rise in cheque bounce cases before it.³⁹

Further in criminal proceedings, usually the holder of the cheque may demand an interim compensation of 20% of the total amount of the cheque under section 143A, decriminalization would take away this right of the holders to recover such sums, which it could have been easily obtained under the above- mentioned section in a trial court. The brunt of decriminalization will be mostly faced by poor litigants, employee belonging to the marginalized sections and they would find it extremely difficult to afford costly and time- consuming civil remedies to recover the amount that has been so due to them from the drawer of the negotiable instrument.⁴⁰

7- Time Duration

Normally a large number of criminal complaints instituted under section 138 is settled and compounded well before the first date of hearing or in the initial stages of the court proceedings due to fear of imprisonment. Therefore, it can be said that the object and purpose of the offense being criminalized is achieved for most part of cases instituted for criminal prosecution. With the decriminalization of the offense, litigants have to resort to civil courts and its remedies, often instituting a suit for recovery which are time consuming.

Even in cases where courts have adjudicated the matter and judgment has been given, the process of obtaining the court decree as well its successful execution will be cumbersome and a long-drawn battle. The alternative remedy involving institution of civil proceedings for cheque bounce cases is not only costly as court fee payable for filing of criminal complaint is lesser⁴¹ as compared to when a case is filed in civil courts but also time consuming.⁴²

³⁹ Satya Prashanth (2020), Critical Analysis of Section 138 of the Negotiable Instruments Act <http://www.legalserviceindia.com/legal/article-1558-critical-analysis-of-section-138-of-negotiable-instruments-act.html> (last visited 30th Feb, 2021).

⁴⁰ Law Commission of India Report titled “Fast Track Magisterial Court for Dishonoured Cheque cases” available at <https://lawcommissionofindia.nic.in/reports/report213.pdf> (last visited 15th April 2021).

⁴¹ Court Fees Act, 1870.

⁴² 1998 (3) SCC 249.



Critical Analysis

The above proposal to decriminalize defeats the very purpose for which the sections 138- 142 of the NI Act were brought in by the government in the year 1988⁴³ and the act was so amended to the extent, to include the same, as the government wanted to stablish financial discipline in the day-to-day business dealings and to in fact encourage efficiency of banking and business operations. Decriminalization of section 138 would basically mean that the issuer of the cheque who has defaulted his liability from making any payment towards the other party is freed from any kind of criminal liability despite performing an act of cheque dishonor maliciously or with mala fide intention.

It is speculated and rightly so that removal of criminal liability on the commission of the said offense would exponentially increase chances of no recovery and for that matter payment of dues, in the process creating a threat to public security and justice system in the country. It was observed by the Supreme Court in the case *Rajesh Laxmichand Udeshi v. Pravin Hiralal Shah*⁴⁴ that the whole objective of section 138 r/w 139 was to prevent abuse of banking system to commit fraud. The above act of decriminalization will take us back several decades back rather and the progress made till now in the banking system will go in vain.

It also has to be understood that the dishonor of cheque by a bank leads to incomputable loss both for the payee and the business environment in the nation and abroad and many businesses and its operations is affected and disturbed as a result of it, causing both irreparable loss and setback⁴⁵ as the whole reliability of the business deal is affected both within and outside the nation.

It is very important for the government and concerned ministries to keep the trust in the banking operations of the country and the same can only be achieved when the government shows seriousness and is able to provide due mechanisms for the addressal of such disputes in a time bound manner and providing adequate punishment for the crime which has been committed maliciously and with mala- fide intention by the person concerned.

⁴³ Banking, Public Finance Institution and Negotiable Instrument laws (Amendment) Act, 1988.

⁴⁴ *Rajesh Laxmichand Udeshi v. Pravin Hiralal Shah*, Appeal (L) No.202 of 2012.

⁴⁵ *Goa Plast (P) Ltd. v. Chico Ursula D'Souza*, (2004) 2 SCC 235.



As with every crime, punishment serves as a deterrent factor behind non-commission of a crime, and in the present case, the criminal provision for jail time coupled with other factors like fine and litigation charges are the main reasons for timely payment of cheque, thus it is advisable that the government do not take away the very provisions which help the country to have a secure, credible and safe environment to make timely payments.

Suggestions & Recommendation

The author of the paper sincerely believes that the proposal to decriminalize will not solve the problem of cheque bounce and cheques issued with mala fide intention. The provision of section 138 was itself brought in the year 1988 by way of amendment to ensure credibility and public trust in the system of banking operations.⁴⁶ It should be kept in mind that most of the matters which are criminally prosecuted pertaining to cheque bounce are settled in the initial stages of proceedings and some are even settled before the proceeding starts and also some are compounded when matter is listed before the court.

The object of the act is to not criminally prosecute but to prevent unscrupulous persons from taking undue advantage of an honest person. The fear of criminal proceeding in the form of jail time prevents to a large extent the commission of the said offence and therefore the researcher of the paper thinks that this provision should be retained and further should not be decriminalized.

The author of the present paper recommends pursuant to the study undertaken on the topic the following suggestions:

1. The government should refrain from decriminalization of section 138 of the Negotiable Instrument in light of reasons stated above.
2. The government, should by legislation, incorporate process for speedy disposal of cases related to cheque bounce and create a fixed time limit for the court to hear and decide the matter.
3. The government should also appoint ad-hoc judges to clear the increasing pile of cases pertaining to negotiable instruments as 1/5th of all cases in the judiciary pertain to cheque bounce.

⁴⁶ 213th Law Commission Report, November 2008.



4. The government should create additional courts to deal with matters pertaining to cheque bounce so as to free up the lower judiciary of such matters as most of the cases, presently 38 Lakhs in number are lodged there.⁴⁷
5. Additional guidelines for making payment can be issued by the government, such as making payment through the online mode like NEFT, etc. which will leave no issues like bounced cheque and in turn would make the banking system more efficient, fast, reliable and safe.⁴⁸

Further it is also recommended that the government should explore other measures to ease the doing of business ranking in the world rather than fostering a system where the creditors lose their confidence and credibility in the system and the very reason for which section 138 was incorporated is done away with and the objectives of NI Act not given due regard in terms of ensuring credibility and fostering trust in the banking operations in the country.

It has to be understood that good rankings can be achieved via other whole wide range of measures, but the trust and confidence once lost can never be brought back and therefore we should think rationally and act with a great sense of caution before we act on matters involving banking operations and the same should be done even more so when it has direct nexus with the economic growth and development of the country as a whole.

⁴⁷ See, 213th Law Commission Report, November 2008.

⁴⁸ S. Krishnamurthi Aiyar, *Law Relating to the Negotiable Instruments Act*, Universal Law Publishing (2012) 15.



Conclusion and Way Forward

It can be said that criminalization of the offense of dishonor of cheques has been proven to be partly successful in deterring future dishonor of cheques. One cannot imagine what would a scenario entail where the offense is decriminalized, bringing day-to-day operations of businesses at a halt, who predominantly use it as a means for payments. It should be remembered that even the fear of jail has not deterred a significant portion of population from dishonoring just claims of parties⁴⁹ they have entered into transactions with, and the situation is only further going to degrade if the government goes ahead and decriminalizes the said section, and the economy is bound to face the brunt of the said move if the said proposal to decriminalize is given effect of law.

More so, in light of the recent socio- economic conditions involving covid 19 pandemic where businesses have taken a hit throughout the world, we can only see a rise in cases pertaining to cheque bounce, the same if decriminalized is only going to further increase the number of such casualty and not serve the very objective by which it is brought. The proposal to decriminalize has the potential of defeating the entire purpose for which the provision was brought along with the objective and purpose of the Negotiable Instruments Act.

Furthermore, the said section, if decriminalized, has the potential to withdraw the existing fear of payment, which has been so instilled due to the criminal liability imposed on the drawer of the cheque and also the provision has the capacity to encourage further non- payment of dues.⁵⁰ For the reasons elucidated above, the author thinks it is not fit to decriminalize the section as one has to think logically and rationally the actual impact of the amendment to the section on normal day to day operations in the businesses and trade and their further impact on the economy as a whole, which in turn will affect the common man.⁵¹ It for these reasons, it is recommended to keep the section as it is and not decriminalize it, as often times one must not judge a action from the object it seeks to achieve but the actual impact it has on the very subject matter it seeks to achieve, for therein lies its true picture.

⁴⁹ As per the 213th *Law Commission Report*, more than 38 Lakh cases on cheque bounce under section 138 of the NI Act has been lodged in the lower Judiciary.

⁵⁰ Devanshi Desai (2021), *Decriminalizing Section 138 of Negotiable Instruments Act, 1881: A Right Manoeuvre to Boost the Economy?* <http://www.tjprc.org/publishpapers/2-52-1600671345-6IJPSLIRDEC20206.pdf> (last visited 30th Feb, 2021).

⁵¹ S. Krishnamurthi Aiyar, *Law Relating to the Negotiable Instruments Act*, Universal Law Publishing (2012) 12.