

JUNE-2020

Don't fix what isn't broken: The proposed decriminalization of cheque bouncing



Analyzing the Government of India's proposed move to decriminalize the offence in respect of dishonored cheques.

The Government of India recently sought suggestions from stakeholders on its proposed decriminalization of 39 sections across 18 legislations [1]. Of these, the most controversial has been the proposed decriminalization of the offence of cheque 'bouncing' under The Negotiable Instruments Act, 1881 ("Act").

Section 138 of the Act treats the dishonour of a cheque as a crime. The Act penalizes anyone who signs a cheque which is eventually dishonored, with jail time of up to two years or a fine for twice the amount dishonored, or both. It treats a civil transaction as a criminal offence by fiction of law [2]. Section 143(1) of the Act provides for a summary trial if the sentence for imprisonment does not exceed one year. While in the middle of such a summary trial, the Magistrate may revert to the usual trial procedure prescribed under the criminal code if it realizes that the term of imprisonment it may impose might exceed one year. The Act [3] mandates that courts, in the interest of justice, carry out trials in Section 138 cases on a day to day basis and endeavour to conclude them within 6 months of filing the complaint.

The dishonoring of a cheque was criminalized by way of an amendment to the Act in 1988. The then finance minister attributed the criminalization to "persistent and widespread demands from various trade and industry associations to make bouncing of cheques a penal offence". [4]

The current government's stated purpose behind the proposed decriminalization can be segregated into (i) improving ease of doing business and (ii) unclogging the court system. This article argues that

while both these objectives are noble, decriminalizing the offence of dishonour of cheques will help achieve neither.

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Ease of doing business

It is no secret that the pandemic has left the economy in shambles and lenders, uncertain and circumspect. Every week heralds fresh news of layoffs and salary cuts, resulting in unpaid EMIs, rents and other debts. Through the proposed decriminalisation, the Government seems intent on removing any impediments in the way of its attempt to kick-start the country's economy, in the aftermath of the pandemic. While several archaic laws prescribing criminal penalties have served to clip the figurative wings of India's economy in the past, including Section 138 in that bracket would be doing disservice to an effective law.

Section 138 of the Act was incorporated with the specific objective of introducing strict liability with respect to cheques. The summary procedure and penalty provided for in Section 138 was aimed at, and has served to, encourage usage of the cheque and enhance the credibility of the instrument.

The Act ^[5] presumes that a cheque, of the nature referred to in Section 138, is received in whole or part by the holder, for the discharge of any debt or liability, unless it is proven otherwise. A large number of transactions in India require post-dated cheques to be deposited with the creditor/ lender as collateral. These range from simple day to day transactions such as securing future rent, to more complex mercantile transactions. Currently, the criminal charge and jail term prescribed by the Act adequately deters the debtor from issuing a post-dated cheque without maintaining the requisite account balance. However, in the event cheque bouncing is decriminalised, this deterrent would no longer hold water. This would greatly reduce the credibility of the post-dated cheque and the transactions that utilise it. To remove the cushioning provided to lenders by Section 138 would in turn alleviate the fear of any criminal liability or imprisonment upon the debtor. The vanishing

of the Sword of Damocles from above the head of the debtor, could in fact increase the suspicion and caution of lenders such as banks and other financial institutions, which lend capital based on post-dated cheques, thereby resulting in a further slowdown of the economy.

Unclogging Courts

A 2008 Law Commission Report [\[6\]](#) suggests that 20% of the pending litigation in India (over 38 lac cases) comprises of complaints under the Act pertaining to dishonour of cheques. There is no denying that complaints under Section 138 cast a heavy burden on courts. However, this is also indicative of the rampant nature of the offence and the need to deal with it effectively. Sections 138 and 143 establish a dedicated framework for resolution of a common manner of financial default in a time bound fashion.

Mindful of this burden, the 2018 amendments to the Act [\[7\]](#) sought to mitigate the problem. Section 143A of the Act empowers the Magistrate to award interim compensation of up to 20 per cent of the cheque amount to the drawee, in summary trials or summons cases in which the drawer has pleaded 'not guilty'. Through this amendment, which compliments the pre-existing timeline of six months for disposal of such cases, the Government has attempted to oil cogs that seemed somewhat jammed, and offer respite to complainants who were unable to secure speedy relief owing to the large volume of such cases.

While decriminalizing the offence will on one hand reduce the burden of the courts going forward, it will in the same breath add an equal volume of civil actions for recovery of monies. In effect, complainants who had a speedy remedy available under Section 138 will now be relegated to choose the more elaborate and painstaking remedy of an expensive civil suit.

Glaring judicial vacancies and the lack of quick and cost-efficient alternate dispute resolution mechanisms are some of the many reasons that courts remain clogged. To this end, the Law Commission had recommended that *Fast Track Courts of Magistrates* be set up to tackle the volume of Section 138 complaints [\[8\]](#). However, the quagmire that is the overburdened judiciary is a multifaceted issue of great complexity and must be reserved for an in-depth discussion another time. For now, instead of refining the process so as to minimize the burden on the judiciary, the Government is proposing to throw the baby out with the bath water.

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Conclusion

The armour that is Section 138 of the Act, is not without its fair share of chinks. The Government's proposed decriminalisation of this section along with Section 143(1), for the purposes elucidated in its *Statement of Reason* [9] seems to miss the mark of kick-starting the country's economy or unclogging the judicial system, by a great distance. The means are antithetical to the end. While other legislations referred to in the Government's press release may criminalize “*procedural lapses and minor non-compliances [which] increases burden on businesses*”, Section 138 of the Act is not one such legislation. Neither is the offence of dishonour of a cheque “*a minor non-compliance*” nor something that “*does not impact public interest at large*”.

As far as Section 138 and Section 143(1) of the Act are concerned, until a more comprehensive alternative is developed, it might be most prudent to adopt the strategy, “don't fix what isn't broken”.

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[1] *Decriminalisation of Minor Offences For Improving Business Sentiment And Unclogging Court Processes*, Department of Financial Services, Ministry of Finance, Government of India, 8 June 2020 [<https://financialservices.gov.in/sites/default/files/Decriminalization%20-%20Public%20Comments.pdf>]

[2] *Dalmia Cement (Bharat) Limited v. Galaxy Traders and Agencies Ltd. & Ors.* [(2001) 6 SCC 463] at Paragraph 4

[3] Section 143(2) & Section 143(3) of the Act

[4] *Cheque Bouncing : Join the League of 'Civil'ised Nations* , T. Prashant Reddy, Bloomberg Quint, 14 June 2020 [<https://www.bloomberquint.com/opinion/cheque-bouncing-join-the-league-of-civilised-nations>]

[5] Section 139 of the Act

[6] “*Fast Track Magisterial Courts for Dishonoured Cheque Cases*” , Law Commission of India, Report No. 213, November 2008 [<http://lawcommissionofindia.nic.in/reports/report213.pdf>]

[7] The Negotiable Instruments (Amendment) Act, 2018 [<http://egazette.nic.in/WriteReadData/2018/188048.pdf>]

[8] *supra* note 6

[9] *supra* note 1

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