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# Decriminalizing Section 138 of the Negotiable Instruments Act 1881- The Step Forward

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## ABSTRACT

*Cheque Dishonour is dealt under section 138 of the negotiable instruments act 1881. The provision penalizes dishonour due to insufficient funds. India has been using this provision since 1988. But lately, the government believes that the provision has fulfilled its original target which was to prevent people from dishonouring cheque and secure credibility of the cheques. Currently, 20% (approx. 4 million cases) of the total cases presented in the Indian courts are related to cheque dishonour. Hence, we look back at this decision; we can observe that criminalization has not proved to be as successful as it was estimated to be. Therefore, the government proposes to decriminalize it. This proposal has gathered support and opposition from every corner.*

*This paper discussed the development of the cheque dishonour law in India and how the government has always been inclined towards bringing this amendment. The paper tries to analyse the effect of this decision. The paper finally tries to answer whether this decision is the right course of action.*

**Keywords:** *Cheque, Dishonour, Decriminalization, Amendment, Negotiable Instrument*

## I. INTRODUCTION

The “cheque” is a bill of exchange which is defined under section 6 of The Negotiable Instruments act 1881 (NI act 1881)<sup>2</sup>. When the bank refuses to pay the amount mentioned on such cheques to the payee who presents it due to any particular reason(s) then is considered to be a dishonoured cheque. There can be various reasons for such dishonour. The most usual reason is insufficient funds in the account of the payer. Material alterations like overwriting, corrections, missing details etc may lead to dishonour as well. Sometimes the drawer's signature is different on the cheque than from the specimen signature with the bank leading to an irregular signature. Post- Dated Cheque are often used in India i.e. the date mentioned on the cheque has not yet come if presented to the bank before the mentioned date leads to dishonour. When a cheque is presented to the bank after three months from the date

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<sup>2</sup> The Negotiable Instrument Act, 1998 s 6

mentioned on it, it is a stale cheque which means it has expired, hence dishonoured. Sometimes the drawer asks the bank to 'stop payment' for a cheque already issued, it leads to cheque dishonour. The court or the government has the power to order the freezing of an account, this leads to the dishonour of all the cheques bearing that particular account number. Sometimes, the drawer may close the account after which all the cheques to this account are dishonoured<sup>3</sup>.

Section 138 of NI act 1881 only deals with the cheques dishonoured due to insufficiency of funds. The section was brought via amendment in 1988 to the NI act 1881. This section is infamous amongst bankers and legal professionals.

Nirmala Sitharaman, Finance minister in her budget speech in February 2020 announced the government's intention to decriminalise cheque dishonour along with various other offences that need to be recategorised as civil<sup>4</sup>. The government says that the decision is taken in order to improve the ease to conduct business in India and improve the economic growth of the country while safeguarding national security and public interest. This will ultimately reduce the needless burden on the Indian Courts as well<sup>5</sup>. Currently, 20% of the total cases i.e approx. 4 million cases presented in the Indian courts are related to cheque bouncing<sup>6</sup>. These cases will eventually be converted into civil cases if the proposal is accepted i.e the government succeeds at decriminalization.

## II. WHAT IS THE EXISTING LAW IN INDIA?

Dishonouring of cheque due to insufficiency of the funds was dealt under section 138 of the NI act 1881 and is penalized by the section. The punishment can be imprisonment up to 2 years or a fine up to twice the amount of cheque or both. The offence is non-cognizable and bailable.

For the section to apply, the following conditions need to be fulfilled:

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<sup>3</sup>Lawyered. 2019. *8 Reasons Why Your Cheque Is Dishonoured*. [online] Available at: <<https://www.lawyered.in/legal-disrupt/articles/8-reasons-why-your-chequedishonoured/#:~:text=So%20on%20presenting%20a%20cheque,cannot%20be%20further%20be%20used>> [Accessed 11 September 2020].

<sup>4</sup>The Economic Times. 2020. *Some Financial Offences Like Bouncing Of Cheques May Be Decriminalised*. [online] Available at: <<https://economictimes.indiatimes.com/news/economy/policy/some-financial-offences-may-be-decriminalised/articleshow/76289826.cms>> [Accessed 11 September 2020].

<sup>5</sup>Anurag, S. and Bhatnagar, M., 2020. *Decriminalization Of Dishonor Of Cheque A/U Section 138, Negotiable Instruments Act 1881: A Remedy Viable Enough?* – HNLU Student Bar Journal. [online] Sbj.hnlu.ac.in. Available at: <<http://sbj.hnlu.ac.in/decriminalization-of-dishonor-of-cheque-a-u-section-138-negotiable-instruments-act-1881-a-remedy-viable-enough/>> [Accessed 11 September 2020].

<sup>6</sup>Ccs.in. 2015. *Criminalizing Cheque Bounce Cases – An Effective Remedy?*. [online] Available at: <<https://ccs.in/sites/default/files/research/research-criminalizing-cheque-bounce-cases.pdf>> [11 Sep 2020].

- The account on which the cheque is drawn should be a live account i.e an account which is in existence at the time when the cheque is issued.
- The debt for which the drawer has issued the cheque should be legally enforceable.
- The cheque should be presented to the bank within 3 months from the date mentioned on the cheque.
- The bank also needs to provide a statement which says that the drawer's bank account has insufficient funds or exceeds the credit limit that the bank can provide to the payer. The bank also needs to return the cheque along with this statement.
- The payee must within the time period of 30 days (after the return of unpaid cheque), should make a demand on the drawer for the amount of cheque in writing.
- The payee fails to provide the amount on above mentioned written demand within 15 days from receipt.
- The cheque holder needs to file a criminal complaint within a month in case of non-payment within the above-mentioned 15 days.<sup>7</sup>

This offence can also be compounded but only with the consent of both parties. Formal permission from the court is not required<sup>8</sup>. If the court is of the discretion that the drawer had paid the needful amount Even if there is no consent, the accused can be discharged<sup>9</sup>.

In such cases the bank is authorized to take the following actions:

- The offenders who repeat the offence can be banned from issuing a cheque.
- The drawer can be filed with a penalty.
- The bank account can be frozen until the account has sufficient money to pay for the cheque.<sup>10</sup>

#### **(A) WHY IS THE EXISTING LAW WHAT IT IS?**

Dishonour of the cheque was made an offence by an amendment in the existing NI act 1881 by inserting Chapter XVII, in the year 1988. The amendment was brought due to an endemic of cheque bounce cases. The amendment eased the situation of asynchronous payment and delivery transactions. Such disarrangement attracted only full cash payments which were further resulting in consequent problems. Therefore, Dr Rajamannar based on the

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<sup>7</sup> The Negotiable Instrument Act, 1998 s 138.

<sup>8</sup> Rameshbhai Somabhai Patel vs Dineshbhai Achalanand Rathi on 28 January, 2004, II (2005) BC 220, 2005 CriLJ 431

<sup>9</sup> M/S Meters And Instruments vs Kanchan Mehta on 5 October, 2017

<sup>10</sup>Supra note 5

committee report suggested penalizing the offence. Before decriminalization, cheque issues were a civil suit and used to be dragged for years and years. Also, it did not provide for the necessary discouragement to lessen the dishonour cases. The intention behind this amendment was to safeguard the faith of people in the banking operations and to encourage cheque as a mode of payment by increasing its credibility. This criminalization was done to discourage people from writing cheques that we're incapable of being honoured eventually. This also ensures the complainant about the compensation. These cases would be civil cases involving a breach of contract, in case sec 138 is decriminalized<sup>11</sup>.

### III. WHAT ARE THE LAWS IN OTHER COUNTRIES?

Countries like the UK, USA and France do not have any laws on the criminalization of cheque bounce. The UK prohibited imprisonment for failure to repay debts in 1869 while enacting the Debtor's Act<sup>12</sup>. In fact, a UK High Court judge in the Allen case<sup>13</sup> said that jail for cheque bouncing makes no sense<sup>14</sup>. The case involved dishonouring of cheque due to unfavourable circumstances i.e. illness and accident. The judge rightly pointed out that non-payment due to such reasons is not outside the daily course of life. In order to lead a case of dishonoured cheque towards criminal law, 'deception' and 'dishonesty' needs to be proved in countries like USA and UK.

France does not have a system that criminalizes cheque dishonour as well except in some situations. France provides for disqualification of the drawer from issuing cheques up to 5 years and the name can be added to a register called Fichier Central de Chèque<sup>15</sup>. This practice is also adopted by Italy and Spain. Following the examples from France, disqualification of a drawer whose cheque is dishonoured from time to time it will also help the banks to keep a track of people whose cheques are dishonoured. Such people can further be prevented from issuing cheques<sup>16</sup>. Along with prevention, a certain fine is charged by the

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<sup>11</sup>Singhania, K., 2020. Decriminalization Of The Offence Of Dishonour Of Cheques: Are We Moving In The Right Direction? | Lexology. [online] Lexology.com. Available at: <<https://www.lexology.com/library/detail.aspx?g=5736912b-4664-4cde-af5f-5b65617c574e>> [Accessed 12 September 2020].

<sup>12</sup> Reddy, T., 2020. Cheque Bouncing: Join The League Of 'Civil'ised Nations. [online] BloombergQuint. Available at: <<https://www.bloombergquint.com/opinion/cheque-bouncing-join-the-league-of-civilised-nations>> [Accessed 12 September 2020].

<sup>13</sup> The Government of the United Arab Emirates v Amanda Jane Allen [2012] EWHC 1712

<sup>14</sup> Shane, M., 2012. Jail For Bounced Cheques "Makes No Sense" - UK Judge. [online] ArabianBusiness.com. Available at: <<https://www.arabianbusiness.com/jail-for-bounced-cheques-makes-no-sense-uk-judge-467102.html#:~:text=Custodial%20sentences%20for%20bouncing%20cheques,absconding%20back%20to%20the%20UK>> [Accessed 17 September 2020].

<sup>15</sup> Supra note 4

<sup>16</sup> Desai, A., 2020. Decriminalising Dishonouring Of Cheques: The Saga And The Need. [online] BloombergQuint. Available at: <<https://www.bloombergquint.com/opinion/decriminalising-dishonouring-of-cheques-the-saga-and-the-need>> [Accessed 12 September 2020].

bank on such defaulter as well<sup>17</sup>. The USA had banned the debtors' prisons back in 1833<sup>18</sup> because of a simple reason that even if a debtor is sent to prison because even the sum of all his assets was not enough to repay the loan, he still cannot pay the debt from prison. It now has provisions which give the power to banks to hike the penalty for every consecutive dishonoured cheque. This also leads to the discouragement of frequent defaulters<sup>19</sup>.

Therefore, it can be observed that provisions related to cheque criminalization did not find their way into the legal systems of the developed countries as well.

#### **IV. DEVELOPMENT OF THE CHEQUE DISHONOUR LAWS OVER YEARS IN INDIA?**

The original NI act 1881 introduced by the British did not have any provisions for the criminalization of cheque dishonour. It was in 1988 that cheque dishonour due to insufficient funds was introduced in India via amendment in the original 1881 act.

From the 1970s to 1980s, India did not have a national clearing system; multiple clearance platforms were used. The process employed was manual which leads to dishonoured cheques slowing down the clearance systems.

Justice PV Rajamannar, in 1975, proposed criminalization of cheque dishonour due to insufficient funds. At that time the internet was still non-existent. It was after 13 years the provision to criminalise cheque dishonour was introduced in the Negotiable Instruments Act<sup>20</sup>.

The objective behind this amendment was observed in the case *Goa Plast (P) Ltd vs Chico Ursula D'Souza*<sup>21</sup>, which was to increase faith (of people) in efficiency while increasing the efficiency of the banking operations and to encourage the use of the negotiable instrument by increasing its credibility. By this time the manual work was being replaced by the Magnetic Ink Character Recognition clearance system to speed up the process.

By 1990 internet services entered India and there was a push to encourage the usage of the cheque as a method of non-cash payment. The Electronic Clearing Service scheme was introduced in the same year. It helped in handling bulk and repetitive payment requirements. In 2002, the NI act 1881 was amended in order to allow cheque image scanning and to use the electronic form of a cheque. In 2008, the transaction carried out between RBI entities and

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<sup>17</sup> Supra note 4

<sup>18</sup> Supra note 11

<sup>19</sup> Supra note 4

<sup>20</sup> Roy, S., 2020. The Saga Of Criminalising And Then Decriminalising Cheque Bouncing. [online] Blog.theleapjournal.org. Available at: <<https://blog.theleapjournal.org/2013/06/the-saga-of-criminalising-and-then.html>> [Accessed 12 September 2020].

<sup>21</sup> *Goa Plast (P) Ltd vs Chico Ursula D'Souza Appeal (crl.) 1968 of 1996*

markets was to be compulsorily done by an electronic form of payments. By 2018 the cheque payment declined from 14% of total payments to merely 3%<sup>22</sup>. This was the shift in the nature of commercial transactions gradually.

There was no estimation calculated when the amendment was done. This carelessness on the part of the government leads to an additional burden on the Indian criminal courts. Hence, is a lesson to Indian government that careful calculations are a must before such an amendment is enforced.<sup>23</sup>

#### (A) ANALYSIS OF IMPORTANT JUDGEMENTS

The case *Jayalakshmi Nataraj vs Jeena And Co.*<sup>24</sup> is a classic example of why the government proposes to decriminalize the section in question. The case deals with how the company's managing director automatically becoming vicariously liable under sec-138 for the cheque signed by anyone in the company on the behalf of the company. The director argued that she only dealt with the major work and was not involved in the everyday administration of the company. Therefore, she was unaware of any such cheque.

But the court held that even though the Managing Director is unaware of everyday affairs , he/she can still be held guilty.

In *Geekay Exim (India) Ltd. And Ors. vs State Of Gujarat And Anr*<sup>25</sup> the presumption of mens rea in case of sec-138 is questioned. The section does not specify the presumption of mens rea for dishonour. Therefore, Gujarat High Court held that presence of mens rea cannot be automatically presumed while adjudicating, its presence has to be assumed depending from case to case based on the facts and circumstances.

SC through *Dalmia Cement (Bharat) Ltd vs M/S.Galaxy Trades & Agencies Ltd*<sup>26</sup> clarifies the intention of legislature behind the enactment of this section. The Apex court states that the section was incorporated with a specific purpose to make a special provision integrate strict liability for cheque dishonour. The intention behind assigning such strict liability was to increase the credibility of the negotiable instrument which is convertible into money and easily passable from one person to another.

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<sup>22</sup>Supra note 15

<sup>23</sup> Supra note 19

<sup>24</sup> *Jayalakshmi Nataraj vs Jeena And Co.* 1996 86 CompCas 265 Mad

<sup>25</sup> *Geekay exim india limited vs. State of Gujarat* laws(GJH)-1997-7-26

<sup>26</sup> *Dalmia Cement (Bharat) Ltd vs M/S.Galaxy Trades & Agencies Ltd Appeal (crl.) 957 of 2000*

The court observes that cheques in India are the most used negotiable instrument which eases the course of commerce and trade. In the absence of this, bulk trading would become problematic.

This case dates back to 2001 when digital money transfer was not an easy option. But the technological development with time has provided citizens with more options which are much more safer than a cheque, let alone a post-dated cheque. By using digital money transfer options people can have better security of money as the exchange can happen effectively and efficiently.

Delhi High Court via *Dayawati vs Yogesh Kumar Gosain*<sup>27</sup> has drawn a clear line between traditional criminal cases and criminal case under sec-138 of NI act 1881. The court stated that a criminal case under sec-138 is legally compoundable and can be referred for mediation.

The court clearly lays down the process of mediation to be followed under such cases and also specifies the content that can be settled.

The case *M/s Meters and Instruments Private Limited & Anr. v. Kanchan Mehtaon*<sup>28</sup> had a crucial role to play in the development of sec-138. SC via this case issues guidelines for the speedy disposal of cases under the section. In this case the court held that cases of cheque bouncing were primarily of civil nature. Court lays emphasis on the modern technological advancement that is extremely helpful for such speedy disposal. The court observes that the efficient use of such technologies can lead India to a paperless court along with reducing the overburden of cases. The court considers the need to categorize cases into categories that can be resolved online and offline. A significant number of cases under sec-138 of NI act 1881 can be solved online. Complainant or accused can avoid the need to have a physical appearance before court if the affidavit and other documents are filed online. The process can be issued online and the accused can pay the specified amount online as well. The proceeding can take place through a video conferencing if required by either parties.

In *Smt.Asha Baldwa vs Ram Gopal & Anr*<sup>29</sup> the petitioner had given a dishonoured cheque to the respondent while she (respondent) was aware of the fact that it was a dishonoured cheque and she had consented to accepting the same i.e. she is responsible for the consequences of accepting such a cheque. The petitioner contended that under sec-141(2) of the NI act 1881, the company or its members are only liable when the negligence was on their part, not when the payee was well aware about the fact that it was a dishonoured cheque. The court held that

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<sup>27</sup> Dayawati vs Yogesh Kumar Gosain CC No. 2429/15 & 2430/15 (two connected matters)

<sup>28</sup> M/s Meters and Instruments Private Limited & Anr. v. Kanchan Mehtaon Appeal (Crl.), 1731 of 2017

<sup>29</sup> Smt.Asha Baldwa vs Ram Gopal & Anr Criminal Misc(Pet.) No. 2726 / 2014

when a person promises to pay via cheque he/she abides by such promise. Consent to such cheque does not matter because under sec-139 on NI act it is presumed that payee has received the cheque of the nature referred to under section 138 of the act, to discharge any debt or other liability.

This case, once again, made it clear that all the members of the company (MD, BOD etc) are liable for any cheque signed on behalf of the company, if person signing the cheque gets the consent from any such member.

In the case *Electronics Trade & Technology Development Corporation Ltd., Secunderabad v. Indian Technologists & Engineers (Electronics) (P) Ltd. and Anr.*<sup>30</sup> SC again clarified the objective of the legislature i.e. to ensure the credibility of the instrument

In *Goa Plast (P) Ltd vs Chico Ursula D'Souza*<sup>31</sup> SC observed that the cheques were used as a instrument of fraud and has been creatinf irreplaceable injuries. Cheques were hindering the business transaction more than helping it. It affected the course of business both inside and outside the country.

In the case *Makwana Mangaldas Tulsidas v. The State of Gujarat & Anr.*, Supreme Court recommended High Courts to set up special courts to deal with cases under Section 138 of the Act. This case shows that decriminalization is need of the hour.

## **V. THE GRADUAL BUILT-UP BY GOVERNMENT TOWARDS DECRIMINALIZATION**

Decriminalization of cheque dishonoured was not a sudden decision, in fact, the ground for it was being laid from years ago.

It was in 2011 when the amendment for decriminalization was first proposed as part of a delay deduction drive (from Indian courts). Later in 2012, a group of ministers was set up to delve into various policy and legislative changes that were required to decrease the number of cheque dishonour changes. Again decriminalization was proposed along with other suggested amendments.

The ADR mechanism and creation of a summary process were a few suggestions by the group to resolve the dishonour cases faster. It was also suggested that the courts should charge according to the ad valorem i.e is based on the value of the cheque. This would

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<sup>30</sup> *Electronics Trade & Technology Development Corporation Ltd., Secunderabad v. Indian Technologists & Engineers (Electronics) (P) Ltd. and Anr.* Appeal (crl.) 124 of 1996

<sup>31</sup> *Goa Plast (P) Ltd vs Chico Ursula D'Souza* Appeal (crl.) 1968 of 1996

discourage unnecessary and taxing proceedings<sup>32</sup>. But unfortunately, these suggestions were not implemented. Although in 2018 some amendments including interim compensation, paying a part of fine amount etc were done with the intention to speed up the process<sup>33</sup>.

Also, the offence of dishonour has never been treated as a pure criminal and economic offences. In the case *Rangappa vs Sri Mohan*<sup>34</sup> the court has defined it as a regulatory offence. In another case of *Kaushalya Devi Massand vs Roopkishore Khore*, the court has described it to be more of civil wrong which has been given a criminal status even though it is limited to private parties and is of commercial nature<sup>35</sup>. Again in the 2017 case of *M/S Meters And Instruments vs Kanchan Mehta*,<sup>36</sup> The supreme court stated that cheque dishonour was primarily a civil wrong only right from the beginning and not a crime against the society.

The courts also realised that sec 138 has also been used by the complainants as a weapon of harassment<sup>37</sup>.

Even before the offence of dishonour was statutorily made compoundable, the courts had permitted the compounding of this offence, which was seen in the case of *O. P Dholakia vs State of Haryana*<sup>38</sup>. After the statutory compounding came into action the courts began to charge a certain cost as per the amount of dishonour. This eventually leads to cases being mostly settled by such compounding. One intriguing observation made here is that even though the suggestions by the group of ministers to charge ad valorem was not previously put directly into the statutes, the courts re-crafted something new with a similar effect.

Legal services act was introduced in 1987. The justice system through this act wanted to encourage Lok Adalats to resolve cheque dishonour cases via compromise. Such a system would provide the speed required for such cases. The supreme court in 2012 realised that the awards passed by the Lok Adalats on such compromise could be treated as a decree which can be executed by the civil courts even if a given case was criminal in nature.

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<sup>32</sup>Patil, G., 2014. Government May Amend Law To Clear Cheque-Bounce Cases Soon. [online] The Economic Times. Available at: <[https://economictimes.indiatimes.com/industry/banking/finance/banking/government-may-amend-law-to-clear-cheque-bounce-cases-soon/articleshow/42494907.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/industry/banking/finance/banking/government-may-amend-law-to-clear-cheque-bounce-cases-soon/articleshow/42494907.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)> [Accessed 11 September 2020].

<sup>33</sup> Supra note 15

<sup>34</sup> *Rangappa vs Sri Mohan* (2010) 11 Scc 441, A on 28 September, 2018

<sup>35</sup> *Kaushalya Devi Massand vs Roopkishore Khore* on 15 March, 2011

<sup>36</sup> *M/S Meters And Instruments vs Kanchan Mehta* on 5 October, 2017

<sup>37</sup> Supra note 15

<sup>38</sup> *O.P. Dholakia v. State of Haryana & Another S.L.P. (Crl.) No. 2964 of 1999 | 15-11-1999*

The observations made from limited data available from NALSA on cases settled by Lok Adalat shows that the majority of cases were settled pre-conviction and post-conviction, ultimately resulting in acquittal.

Again in 2014, the SC directed the trial courts to indicate the summons in case the accused makes an application for compounding such offence in the very first hearing and after such application is made the court should pass the appropriate orders as early as possible. Further, in the case of *M/S Meters And Instruments vs Kanchan Mehta*<sup>39</sup> in 2018 the courts said that if the defaulter has duly compensated the complainant, the court can discharge the defaulter without the permission from both the parties to compound the offence (though compounding generally needs consent from both parties). The intention behind this to provide fast and fair justice<sup>40</sup>.

Most recently in March 2020, the SC emphasized on a more practical and sensible approach to solving these civil cases without the need for a criminal system. The court suggests a scheme to solve such cases firstly via settlement rather than a private complaint. The action to lodge a private complaint should come into the picture when a settlement does not take place<sup>41</sup>.

## **VI. ROLE OF COVID-19 IN DECRIMINALIZATION**

SC has ordered an extension for the limitation period for all the negotiable instruments.<sup>42</sup>

The major problem this pandemic has brought into everybody's plate is hindrances in everyday life that have lead to some very difficult situations. Due to the nationwide lockdown numerous individuals have been unable to present their cheques on time. Even after the unlock it was impossible due to difficulty in logistics. Also, the commercial transactions were affected because the drawers were suppose to maintain sufficient balance throughout the lockdown, which again, was not possible due to less inflow of money in many cases.

Therefore, Covid has played a major part in this push by the government to decriminalize this section because the section has started to bring unnecessary criminal liability on the citizens and overburden on the courts.

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<sup>39</sup> *M/S Meters And Instruments vs Kanchan Mehta* on 5 October, 2017

<sup>40</sup> *Supra* note 15

<sup>41</sup> *Supra* note 15

<sup>42</sup> *Vakilsearch*. 2020. *The Limitation Period For Cheque Bounce Case During COVID-19* - *Vakilsearch*. [online] Available at: <<https://vakilsearch.com/advice/the-limitation-period-for-cheque-bounce-case-during-covid-19>> [Accessed 11 September 2020].

## **VII. IS DECRIMINALIZING CHEQUE DISHONOUR THE RIGHT COURSE OF ACTION?**

Decriminalization of cheque dishonour has received a fifty-fifty response from the citizens. While some favour it some do not. We must analyse both sides to draw a conclusion.

The proposal has attracted strong resistance. People who advocate of criminalization say that in India cheque is a very common payment mode. The law of criminalization of dishonour ensures accountability. If there is no adequate punishment such credibility will not be ensured. It is important that the punishment be serious enough to create the necessary seriousness in the mind of the person signing the cheque. It is necessary that the drawer understands that it is important for his cheque to honour otherwise he will have to face serious consequences.

India since the beginning had the concept of 'post-dated cheques'. These cheques act as security for payment. If the criminalization is removed offenders will not fear the law related to cheque dishonour. This will in turn have a serious effect on the economy. This will lead to the loss of confidence in the use of cheque as a negotiable instrument as people will be reluctant to use it.

The AIBEA is in opposition to this proposal and suggests that limits be fixed on cheque dishonour to call for criminal prosecution<sup>43</sup>.

If you view the situation from this angle, decriminalization might end up being a failed attempt and it might lead to cheque not being as powerful as they use to be.

Although decriminalizing the offence of dishonour of cheque has its advantages, however, the cons certainly outweigh the pros. E.g. Housing loans arranged by the real estate developer. In this case, the lender often relies upon the post-dated cheques from the buyer. Although the lender temporarily owns the flat and can use it as collateral, the issuer can still go to jail if the cheque ends up being dishonoured.

Despite all the criticism received by the proposal, it has various supporters.

The current legal procedure to deal with a dishonoured cheque is quite hectic and difficult. Each cheque requires a separate complaint. Mere FIR is not enough for the arrest of the defaulter. This has led to the overburdening of Indian courts with innumerable cheque

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<sup>43</sup> Supra note 10

bounce cases. Currently, India has more than 3.5 million cases of cheque dishonour alone. The prosecution process needs simplification<sup>44</sup>.

When criminalization was introduced, the primary intention was to improve the efficiency of the banking system, which has been fulfilled over years. The law seems to have outlived its target. This proposal will lead to the required legal and commercial development. It will decrease the burden on criminal courts and lead to a better criminal justice delivery system. This makes re-categorization of cheque dishonour as a civil offence a must.

The Indian government has been working towards making the country operate its transactions cashless and paperless which is what Digital India is all about. Decriminalization will serve this purpose successfully<sup>45</sup>.

It is unjust for a minor non-compliance to lead to jail and fine. This leads to a needless burden and negatively affects the business transaction by obstructing investment (domestic and foreign). Solving cases in India is a process of ages. Cheque dishonour is not the type of offence that should take such a long time. In fact, the civil process would be easier because it is easier to impose civil liability. This will eventually fasten the process.

Various commercial courts have designed and applied procedures to fasten the process. Mala-fide intention is not always a mandate when it comes to such offences. It does not endanger public security or national interest. The imposition of penalty in such cases would be enough to discourage drawers from intentionally committing such an offence.

FEMA has set an example by amending the laws on the breach to more strict yet non-harsh laws.

Therefore, the pros of decriminalizing section 138 of the NI act 1881 outweigh the cons of it. It can be concluded that there are three major reasons that this section should be decriminalized.

Firstly it is in violation of the basic norms of the civilised societies and international laws. Section 138 represents inequalities in law by discriminating the mode of payments<sup>46</sup>.

Secondly, the section makes it difficult for bigger companies to carry out their business in India because of the exaggerated form of punishment for a minor non-compliance. While

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<sup>44</sup>Ranade, A. (2020). Opinion | A bounced cheque should remain a criminal offence. [online] mint. Available at: <https://www.livemint.com/opinion/columns/a-bounced-cheque-should-remain-a-criminal-offence-11592237875682.html> [Accessed 17 Sep. 2020].

<sup>45</sup> Supra note 15

<sup>46</sup> Supra note 43

signing a cheque the directors of these companies automatically become parties to the cheque dishonour<sup>47</sup>.

Thirdly, the provision averts the civil contract law.

#### **(A) DOES IT AFFECT ANY OTHER LAW?**

Sadly, Indian courts take up to 1,420 days to solve a contract dispute, moreover, it takes more than a year to implement such judgment. This is a highly embarrassing system for India.

Since contract enforcement has always been a weak system in India after the 1988 amendment post-dated cheques became the most used mode of payment. It became the mode to ensure regular payments. In some cases, landlords take a post-dated cheque for an entire year's rent amount. The intention of the landlords to do so is to ensure smooth rent control and avoid court in case the rent is not paid on time. Now, if this cheque gets dishonoured the tenant has to face criminal liability if the landlord files a criminal complaint about dishonour.

This is an inefficient system of contract enforcement. The provision in such cases proves to be one-sided i.e. inclined more towards the receiving end of the cheque and has no consideration for the one making the payment.

Moreover, the punishments provided by the section are drastic, especially in the cases of innocent mistakes<sup>48</sup>.

#### **1. Difference Between The Court Proceedings**

There exists a major distinction between the proceeding of a civil court and a criminal court. Criminal courts tend to pressurize the defendant because the debtor is well aware of the direct imprisonment of two years along with paying twice the amount mentioned on the cheque.

The reasons for non-payment due to situations arising in the daily course of life such as poor health or medical expenses are not taken into consideration. With the provision carrying a criminal nature, it does not look into the mens rea of the defendant.

In a civil court breach of contract only leads to an order to pay damages and compensate the landlord, banker etc. The Civil law in India does not have a punitive nature.

If cheque dishonour is taken to a civil court, the defendant naturally gets a chance to pay the compensation if he is willing to. In addition to this, he also has an opinion to let the court auction his property in case he does not have sufficient funds for repayment to the creditor. In

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<sup>47</sup>Mukherjee, D. and Pandey, A. (2019). The Liability Regime For Non-Executive and Independent Directors in India A Case for Reform Report |. [online] Available at: <https://vidhilegalpolicy.in/wp-content/uploads/2019/09/Final-Director-Liability-Report-September-19-2019.pdf> [Accessed 17 Sep. 2020].

<sup>48</sup> Supra note 4

case such property is insufficient to pay off the debts, the debtor can be jailed under civil law as well i.e. to the debtor's prison. In the case *Jolly George Verghese vs Bank of Cochin*<sup>49</sup> the supreme court refused to overrule the provision for civil imprisonment<sup>50</sup>.

Both the laws provide for imprisonment but civil law is more fair and just as it provides equality to both the payer and payee. It definitely becomes more time consuming but is the right way to justice.

## VIII. CONCLUSION AND RECOMMENDATIONS

The provision in question is an ignominy to the Indian legal system because it violates the basic law by converting the civil nature of contractual agreements into criminal. It is imbecile that a person has to end up in prison due to the non-performance of a civil contract.

Moreover, India is in a major need to use the digital platform as a mode of money exchange as it fastens and secures the process. The old cheque method has not proved efficient as it has led to various misleading cases. The section has been used as a tool for harassment and blackmail.

With decriminalization, cheque will be used carefully and people will only take cheque from a payer who is trustable. The drawer will be careful while taking the payment.

The digital platform and technological advancement needs to make its room in the society for the security and efficiency of business.

There are no laws in India that prevent a person from issuing cheques even in the case of repeated dishonour. The service charge levied on the defaulters is insignificant to deter such actions. The decision to decriminalize the provision will be accompanied by various amendments that will be further required by the civil system. The civil system will have to innovate sometimes as effective as section 138 but less harsh and more just. Although, while decriminalizing the provision, the retrospective aspect has to be kept in mind as it is necessary to protect the interest of people who are already seeking relief at present.

The parliament needs to come up with a new system where it allows the bank to record the names of frequent defaulters in a central database. The bank should be allowed to charge fine as per the amount of cheque which increases with the increasing number of default by the same defaulter. This will prove to be an effective deterrent<sup>51</sup>.

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<sup>49</sup> *Jolly George Verghese & Anr vs The Bank Of Cochin* on 4 February, 1980 AIR 470, 1980 SCR (2) 913

<sup>50</sup> *Supra* note 4

<sup>51</sup> *Supra* note 4

Going ahead with the civil remedy to cheque dishonour the courts will have to design a summary process and permit civil reliefs. There has to be a strict deadline and a time-bound procedure.

Since all these cases were of criminal nature before, transfer to civil nature will need an effective system of transfer. If due diligence while performing this task is not taken care of it may lead to failure to invoke civil jurisdiction etc.

Parties need to be pushed towards a better system of ADR, settlement, conciliation, settlement through Lok Adalat etc<sup>52</sup>.

The essence of this proposal is a bigger picture. It aims at changing the way this economy works. The proposal does not intend to stop people from using cheque as a negotiable instrument, rather it will create awareness amongst the citizens about being responsible while accepting a mode of payment. Government has only decriminalized it, the instrument is still backed up by law. This proposal is a step toward economical innovation.

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<sup>52</sup> Supra note 4