

BAR COUNCIL OF MAHARASHTRA AND GOA  
2<sup>nd</sup> Floor, High Court Extn., Mumbai 400 032.

( BY EMAIL )

Date : 17/06/2020

**To,**  
Government of India,  
Ministry of Finance  
Department of Financial Services  
Email id : bo2@nic.in

**Subject :- Objections to the proposed  
Decriminalization of Section 138 of the  
Negotiable Instruments Act**

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1] We the Elected members of the Bar Council of Maharashtra & Goa would like to place our **Strong Objection and Protest** to the proposed Decriminalization of Section 138 of the Negotiable Instruments Act.

2] The proposed Decriminalization will cause enormous suffering, hardship on investors, traders and businessman at large, who would lose hopes in the judicial and democratic system and which will eventually encourage them to resort to old modes of recovery. On the contrary proposed Decriminalization will erode public and investors confidence since the entire settled business and trade cycle which works of post dated cheque will be totally hampered.

3] We object this attempt of classifying the offence under Section 138 of the Negotiable Instruments Act and terming the same as "**Minor Offence**", "**Merely as Procedural Lapse**" and "**Minor Non Compliance**" as totally unreasonable and unrealistic approach thereby giving total go bye to the consistent judicial pronouncements and contrary to the legislative history, intention, statement and objects of the past amendment brought in from time to time to make the same as more and more stringent and deterrent.

4] The proposed move virtually tends to negate the very basic scope and object of Section 138 of the Negotiable Instruments Act which was brought into action to inculcate the faith and confidence of trading community in the commercial transaction.

The proposal is inconsistent with the letter and spirit of the very provisions of the Section 138 of the Negotiable Instruments Act and the amendments therein from time to time.

5] Such a drastic and draconian step by the Government, if implemented, will on the contrary certainly create obstacle, severe impediments in ease of doing business and results will be cascading.

6] The sentence imposed will be hardly executable if the offence is decriminalised since there are insurmountable hurdles for recovery of the fine imposed by the sentence in absence of fear of imprisonment thereby rendering the judgement to remain on papers only. It would be **merely paper order making it mockery of the otherwise entire well established existing system.**

7] Execution of the judgment / order after taking its very essence of criminality will be extremely time consuming, tedious, complicated and rather impossible task in absence of fear of any deterrent punishment as contemplated under the Act.

8] The Execution of the judgment / order will also necessarily involve separate proceedings which will lead to **multiplicity of litigation**, increase burden on the existing system, costly and time consuming affair.

9] It appears that existing mechanism and inbuilt safeguards in The Negotiable Instruments Act are ignored while making the proposal. That the law itself protects the interest of honest and bonafide Drawers /Defaulters at different stages which are as under :

i] **Section 138(c)** in the Negotiable Instruments Act which contemplates issuance of statutory notice before taking any action where the drawer/defaulters is called upon and has the opportunity to arrange the payment of the amount covered by the cheque. It is only when the drawer despite such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount that the dishonour would be considered a dishonour constituting an offence under Section 138 of Negotiable Instruments Act will come into play, hence punishable.

ii] Furthermore to protect the interest of honest and bonafide drawers **Hon'ble Supreme Court has in 3 Judge Bench Judgement in the matter of C. C. Alavi Haji vs. Palapetty Muhammed, reported in (2007) 6 SCC 555** held as under:

*“17. .... Any drawer who claims that he did not receive the notice sent by post, **can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount** and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected.”*

- iii] **Section 147** of the Negotiable Instruments Act already makes offence Compoundable at any stage even without permission of the court ;
- iv] Accordingly it is pertinent to note that after 2002 amendment, Section 147 of the Act confers implied power on the Magistrate to discharge the accused if the complainant is compensated to the satisfaction of the Court, where the accused tenders the cheque amount with interest and reasonable cost of litigation as assessed by the Court ( This is also reiterated by Hon'ble Supreme Court in **Meters & Instruments Private Limited V/s. Kanchan Mehta reported in 2018 (1) SCC 560** );
- v] Further the question “as to how proceedings for an offence under Section 138 of the Act can be regulated where the accused is willing to deposit the cheque amount...” was considered by The Hon’ble Supreme Court in **Meters & Instruments Private Limited V/s. Kanchan Mehta reported in 2018 (1) SCC 560** ; wherein inter alia it was held as under :

*“19. In view of the above, we hold that where the cheque amount with interest and cost as assessed by the Court is paid by a specified date, the Court is entitled to close the proceedings in exercise of its powers under Section 143 of the Act read with Section 258 Cr.P.C.”*

- vi] **Thus it is pertinent to note that before launch of criminal prosecution as well even later on at different stages sufficient opportunities are afforded and interest of honest and bonafide drawers are totally safeguarded by the Act itself.**
- vii] Thus the Drawer of cheque always have been given a choice to make payment upon demand thereby avoiding being prosecuted.

viii] In view thereof the concern raised by You in the statement of reason for decriminalization about the alleged

" The risk of imprisonment for actions or omissions that aren't necessarily fraudulent or the outcome of malafide intent is a big hurdle in attracting investments. " is already taken care of.

ix] That the conduct of the unscrupulous drawers who are determined to withhold / retain the amount of dishonoured cheque clearly disentitles them from claiming any leniency in the matter of imposition of deterrent sentence.

10] With the proposed Decriminalization of Section 138 of the Negotiable Instruments Act, the trading and investor community in particular in the present situation Post COVID19, is likely to be more adversely affected as it is impracticable for the trading community to conduct business without having any guarantee of payment of cheque and recourse to Section 138 as criminal prosecution in event of dishonor.

11] As matter of fact Post COVID19 strict implementation of the existing provisions of Section 138 of the Negotiable Instruments Act would rather help repose faith by the traders and invariably revive the economic growth.

12] Per se, it appears that this move is more aimed at protecting the defaulters interest who would be rather enjoying the money payable by them to honest Traders, Businessman, Individuals Creditors and Investors.

13] That efforts to defeat the objectives of Section 138 of the Negotiable Instruments Act by resorting to such innovative measures and methods ( by proposed Decriminalization ) are vehemently opposed, as it will certainly affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of the country particularly post COVID19.

14] That this is the Act which has tested the times and achieved the objects it has sought to achieve in bringing trust, confidence, faith and assurance that in case of failure to pay the dishonoured cheque amount the deterrent provisions of Section 138 will take its own course. Contrary to the grounds stated in the statement and reason, the provisions of Section 138 instilled hope in the individuals and business community and helped to generate economic as well as business growth.

On the contrary the proposed act of Decriminalizing the same will impact business sentiment and hinder investments both from

domestic and foreign investors and obstruct the economic growth and hamper the progress and development.

15] That the proposed Decriminalization of Section 138 of the Negotiable Instruments Act is likely to encourage the gullible offenders having similar criminal tendency to issue the Cheque in commercial transaction casually without realizing or worrying the consequences of dishonour of such Cheque. In order to carry out the legislative object of the provisions of the Section 138, it is absolutely just proper and reasonable to give it more teeth, make it more stringent, further deterrent and scrap the proposed move to Decriminalization of Section 138 of the Negotiable Instruments Act and to set an example in the minds of such gullible offenders to prove the commission of such offences in future.

**16] Lastly, it is equally pertinent to note that majority of the lawyers are practicing in this field of the law. That proposed move to Decriminalization will certainly affect their livelihood, careers and their survival will be put to great stake.**

**17] The legislative and judicial discipline in bringing Section 138 of the Negotiable Instruments Act into force makes it obligatory to follow the deterrent path.**

**18] In order to carry out the legislative object of the aforesaid provisions of Section 138, it is absolutely just proper and reasonable not only to scrap/drop the proposal of Decriminalization but rather make it more stringent and deterrent so that such matters could be resolved expeditiously as per Section 143 of the Negotiable Instruments Act.**

Accordingly, by this Letter, We request your goodself to scrap the proposed Decriminalization of Section 138 of the Negotiable Instruments Act

Thanking you,

Yours faithfully,



SUBHASH J. GHATGE  
CHAIRMAN

cc. to : Law Ministry.