

# *De Jure*

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**Decriminalisation of 'minor offences': factors to be considered and its probable implication**



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In the wake of COVID-19 pandemic and the consequent lock-down, the Finance Minister of India on June 08, 2020 has proposed to decriminalise minor offences for improving business sentiment and unclogging court processes. The Central Government has also sought suggestions and objections from public on the same.

Decriminalisation of minor offences was under Government's consideration since 2019, but the decision on the same was in pipeline. However, given the present economic crisis, decriminalisation of minor offences at this stage will be a significant step towards improving the economy.

The proposed decriminalisation of minor offences includes cheque bounce cases under section 138 of the Negotiable Instruments Act, 1881 ("**NI Act**") and few other statutes, *inter alia*, pertaining to the financial sector. Introducing decriminalisation of minor offences will re-categorise these offences of criminal nature into civil (and compoundable) offences, which means there would no longer be a

punishment in form of imprisonment for such offences. The proposal aims to substitute criminal liability with (stiff) compoundable monetary penalties of a civil nature that can act as deterrents and help encourage investor sentiment.

As per Finance Ministry's proposal dated June 08, 2020, certain provisions of the following nineteen (19) Acts are proposed to be decriminalised:

1. Insurance Act, 1938,
  2. The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("**SARFAESI Act**"),
  3. The Pension Fund Regulatory and Development Authority Act, 2013 ("**PFRDA Act**"),
  4. Reserve Bank of India Act, 1934 ("**RBI Act**"),
  5. Payment and Settlement Systems Act, 2007,
  6. The National Bank for Agriculture and Rural Development Act, 1981 ("**NABARD Act**"),
  7. The National Housing Bank Act, 1987 ("**NHB Act**"),
  8. State Financial Corporations Act, 1951,
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9. Credit Information Companies (Regulation) Act, 2005,
  10. Factoring Regulation Act, 2011,
  11. Actuaries Act, 2006,
  12. Banking Regulation Act, 1949,
  13. General Insurance Business (Nationalisation) Act, 1972,
  14. Life Insurance Corporation Act, 1956 ("**LIC Act**"),
  15. Banning of Unregulated Deposit Schemes Act, 2019,
  16. Chit funds Act, 1982,
  17. The Deposit Insurance and Credit Guarantee Corporation Act, 1961 ("**DICGC Act**"),
  18. Negotiable Instruments Act, 1881, and
  19. Prize Chits and Money Circulation Schemes (Banning) Act, 1978.

The Finance Minister on June 12, 2020 has further proposed to decriminalise certain sections under the Securities and Exchange Board of India Act, 1992, the Securities Contract Regulation, Act, 1956 and the

Depositories Act, 1996. Public comments and suggestions are called for on the same.

In addition to the above proposal, the Ministry of Corporate Affairs ("**MCA**"), on June 19, 2020, released a statement of reason proposing decriminalisation of compoundable offences under the Limited Liability Partnership ("**LLP**") Act, 2008 ("**LLP Act**"), for greater ease of doing business for law abiding LLPs and de-clogging of criminal justice system. MCA has further called upon the stakeholders to provide their comments and suggestions on such proposition. The exercise to identify and decriminalize the provisions of LLP Act is aimed at incentivizing compliance, de-clogging of criminal justice system and promoting congenial business climate.

The LLP Act as it stands today, *inter alia* criminalises minor violations which impinges upon the business sentiments. Therefore, with a view to provide business ease, MCA plans to review the penal provisions of LLP Act, to decriminalize compoundable offences involving

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minor, procedural or technical violations of the LLP Act, or offences which may not involve any harm to public interest.



In May 2020, with an objective to rationalise the punishments under the Companies Act, 2013, the Government has already proposed decriminalization of 54 compoundable offences under the Companies Act, 2013. The Government has also undertaken another crucial judicial measures being suspension (for six months) of filing of fresh insolvency proceedings under sections 7, 9 and 10 of the Insolvency and Bankruptcy Code, 2016 ("**Code**"), increasing minimum threshold from Rs.100,000 to Rs.100,00,000 (Rupees ten million) for initiating

insolvency proceedings under the Code, and so on and so forth.

In continuance of these measures, the present proposition to decriminalise minor offences has been introduced by the Finance Ministry with an objective to further help in improving the judicial system by unclogging court processes relating to such offences.



The principles to be considered for deciding reclassification of criminal offences to compoundable offences as suggested by the Ministry are:

- "(i) Decrease the burden on businesses and inspire confidence amongst investors;*
- (ii) Focus on*

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*economic growth, public interest and national security should remain paramount; (iii) Mens rea (malafide/ criminal intent) plays an important role in imposition of criminal liability, therefore, it is critical to evaluate nature of non-compliance, i.e. fraud as compared to negligence or inadvertent omission; and (iv) The habitual nature of non-compliance."*

The objective for proposing decriminalisation of these minor offences is also to focus on economic growth, public interest and national security, decreasing burden on businesses and inspiring confidence amongst investors. The ensuing uncertainty in legal processes, pending cases, and the time taken for resolution of the same in the courts, impacts the ease of doing business. Though the criminal penalties, including imprisonment for minor offences, act as deterrents; the same are also perceived as being amongst the major reasons impacting business sentiments and hindering investment both from domestic and foreign investors. The risk of imprisonment for actions and/or omissions that are not necessarily fraudulent in

nature or outcome of malafide intent is a major impediment in attracting investments. Thus, it is essential to strike a balance so that malafide intent is punished while other less serious offences are compounded.

Currently, as per NI Act, the dishonour of cheque is a criminal offence and is punishable by imprisonment of up to two (2) years or by fine which may extend to twice the amount of the cheque or with both. The intention of NI Act is thus to impose deterrent punishment on the offender for committing a criminal offence of dishonouring the cheque. It has also been made clear through several judicial precedents that NI Act is not a remedy for recovery of monies.



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It is also not out of the place here to mention that the factum of whether or not the cheque has bounced and/or whether or not the procedural compliances provided under the NI Act have been complied with, can be ascertained from mere perusal of documents like cheque, deposit receipt, bank receipt mentioning reasons for return of cheque and demand notice issued by the aggrieved party. Therefore, the punishment in form of imprisonment can be replaced with certain penalty or fine and a mechanism can be developed at administrative level to impose and collect such fixed penalty/fine after ascertaining on basis of the documentary evidence, if the cheque has been deliberately dishonoured. However, the current proposal of decriminalisation does not specify details such as whether the proposal covers dishonour or cheque of large value and what would be the penalty in such cases. Perhaps, a high threshold for initiating proceedings under section 138 of the NI Act could be considered.

Similarly, provisions under other Acts which are merely procedural in nature and do not impact national security or public interest at large should be re-looked at. Decriminalisation of minor offences can accordingly be introduced for those provisions that criminalise procedural lapses and minor non-compliances, which will in turn be highly effective in improving ease of doing business and unclogging the court system and prisons.

Undoubtedly, this present proposition of decriminalisation of minor offences has the potential of conferring long term benefits on stakeholders and investors by facilitating ease of doing business. While imposing penalty, it is not required to establish the element of *mens rea*. This will certainly make the process of imposition of penalty faster than a criminal prosecution. This will also help the courts to focus only on defaults involving elements of public interest. If the proposal is well implemented, decriminalisation of minor offences will promote the ease of doing business for corporates and will make them more attractive to any potential investors.

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The Ministry must also consider providing an additional window to comply with the default or non-compliance along with imposition of a penalty for such minor offences, such as compounding. However, while achieving so, it is necessary to maintain an optimum balance between the objects of promoting ease of doing business and continuing the deterrence of law under the respective Acts.

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