Demonetisation and the Rule of Law

ALOK PRASANNA KUMAR

The challenge in the Supreme Court and high courts to the current demonetisation exercise requires some serious discussion for what it tells us about the state of the rule of law and constitutional government in India.

Alok Prasanna Kumar (*alok.prasanna@vidhilegalpolicy.in*) is Visiting Fellow, Vidhi Centre for Legal Policy, New Delhi.

Since 8 November 2016, for the third time in modern Indian history, the central government has declared notes of certain denominations to no longer be valid legal tender. When announced by the Prime Minister on 8 November, it was pitched as a measure, inter alia, to tackle the "black money" problem in India. Since then, the justification has changed; it is now supposed to make India a "cashless society." The chaotic effects of demonetisation have been in the banks and ATMs which are out of cash, the businesses suffering severe losses, and the loss of income and assets of the poorest (Bharadwaj 2016; Gopalakrishnan 2016). Not to mention the people who are said to have died as a result of standing in the queues (*Wire* 2016), the shock of having lost their money or some proximate reason, whose ultimate cause lies in the unprepared and ill-thought-out manner in which the demonetisation exercise has been carried out.

The larger effects of demonetisation on the Indian economy are debatable. There are, however, questions that have been raised about the manner in which demonetisation has been carried out by the government. Several petitions have been filed in the high courts and in the Supreme Court as well, challenging the demonetisation or its specific aspects. No final verdict has been rendered at the time of writing this, but if the approach of the Madras, Karnataka and Bombay High Courts is anything to go by, the courts seem reluctant to interfere in the process. While the Supreme Court did make a few stray observations about the difficulties being faced by people as a result of demonetisation, it has not stepped in either.

This does not mean that there are no legal problems with the current demonetisation exercise. The petitioners challenging it have questioned the legality of the manner in which it has been done, the specifics of certain moves and the rights violations it possibly entails. These require some serious discussion, not only in the context of demonetisation, but also for what it tells us about the state of the rule of law and constitutional government in India.

To this end, therefore, this article will address the legality of demonetisation in

three parts. In the first part, the legality of the demonetisation through notifications will be discussed. In the second part, the implications of demonetisation on the right to property will be discussed. In the final part, I argue that the way demonetisation has been carried out is against the rule of law.

Legality of Demonetisation

Unlike in the past two instances in 1946 and 1978, on this occasion, demonetisation has been done through the issuance of notifications (Notification Nos SO 3407[E] and 3408[E]) under subsection (2) of Section 26 of the Reserve Bank of India Act, 1934. Under this section, the central government has the power, in consultation with the Reserve Bank of India (RBI), to declare "any series" of notes of any denomination to no longer be legal tender. It has been contended by some petitioners that the said power cannot be exercised to declare all series of a note to no longer be legal tender. They point to the fact that the previous demonetisation exercises were carried out through ordinances which later became laws passed by the competent legislature, to contend that the present exercise cannot be carried out merely by the central government issuing notifications for this purpose.

While there is some merit in this line of thinking, it is not legally tenable. The interpretational argument—that "any" cannot mean "all"—finds no support in the principles of interpretation or in well-established Supreme Court precedents. Section 13 of the General Clauses Act, 1897 states that unless the context otherwise requires, in a statute, the singular includes the plural. Moreover, contrary to the assertions of the petitioners, in *L D A v M K Gupta* (1994) and in *Sk Mohammed Omer v Collector of Customs* (1970), the Supreme Court has held that the term "any" includes "all." "Any series" in Section 26 of the RBI Act should, in all circumstances, include "all series" of a given denomination and there is no other provision in the RBI Act or any other law which requires it to be given a more restricted meaning.

What of the constitutional argument that demonetisation necessarily requires a law to be passed by Parliament?

For context, the Janata Party government enacted the High Denomination Bank Notes (Demonetisation) Act, 1978 after promulgating an ordinance to this effect first. Like the notifications in the context of ₹500 and ₹1,000 notes, the demonetisation act declares ₹1,000, ₹5,000 and ₹10,000 notes as no longer being legal tender. It also provides for a mechanism for deposit and exchange of these notes within a specified time. Crucially, however, the demonetisation act prohibits persons from accepting or tendering the demonetised notes in any context, though it does not make it a criminal offence to do so.

Under the present demonetisation exercise, there is no legal prohibition against accepting or tendering ₹500 and ₹1,000 notes. It only means that it is not against the law to refuse to accept such notes. The matter has however been confused by the "exemption" clauses in Notification No 3408 (as amended, repeatedly since the announcement). It does not make clear if the places where the note is required to be accepted are obligated under law to do so, and, if they do not, whether they are liable for any penalty.

Under the Constitution, certain things can only be done by a law made by Parliament. The fixing of Supreme Court and high court judges' salaries for instance, appropriations from the public exchequer, and limitations on the right to life and liberty, among other things, can only be done by a law enacted by the legislature. This does not imply that everything that the government does automatically requires a law made by legislature, and certainly not demonetisation.

Right to Property and Legitimate Expectation

Another plausible argument that could be made against the demonetisation exercise is that it is a violation of the right to property protected under Article 300-A of the Constitution (Reddy 2016). Unlike in the Constitution as it was originally brought into force, the right to property now is merely a right against expropriation of property without the authority of law. Even though the words of Article 300-A are analogous to those in Article 21, the protections against the deprivation of property are not in the nature of substantive due process as Article 21 has been interpreted to mean.

In the context of demonetisation, it has been argued that Notification No 3407 extinguishes the right to property without any authority of law. Specifically, it is contended that limits on withdrawal of cash from bank accounts and exchange of the notes are contrary to the mandate of Article 300-A. Therefore, it has been said, by refusing to let people withdraw their money in cash, the government has restricted the right to property, and, by placing limits on exchange, extinguished the right entirely.

The argument is not without merit. The Supreme Court in *Bishamber Dayal Chandra Mohan v State of Uttar Pradesh* (1982) has held that an Executive Order is not "law" for the purposes of Article 300-A. This could be extended, therefore, to mean that unless the legislature allows imposition of cash withdrawal limits under a specific provision, or passes a new law, the government is constitutionally prevented from doing so.

There are two possible responses to this argument. One is based on the RBI Act itself and the other on the Constitution. In exercising this power under Section 26(2) of the RBI Act, the government has ancillary powers to enable it to carry out the demonetisation smoothly. Arrangements obviously have to be made to replace the currency, and the lawmakers were quite aware that the exercise is difficult in a vast country like India and enough discretion needs to be given to the government to make the necessary arrangements. To that extent, currency withdrawals and exchange limits are also traceable to Section 26(2) of the RBI Act because they are in furtherance of a demonetisation exercise and not for other purposes. The doctrine of ancillary powers is well recognised legally.

A second argument addressing this can be made with reference to the powers of the executive traceable to Article 73 of the Constitution. This provision vests the union executive powers on those subjects that the Parliament has power to make laws on, as listed in Schedule VII. The only limitation on this power is that

it has to be exercised in accordance with law made by Parliament. Therefore, where Parliament has made a law, executive power has to be exercised in accordance with such law, and even where it has not, the executive is still free to act.

At the moment, there is no provision in any law that prohibits the central government from imposing limits on cash withdrawals from banks or exchange of cash. There is also no provision that vests this power with another agency such as the RBI. There is, therefore, no limitation on this power and when the central government has issued Notification No 3407, it has done so partly in exercise of the executive power under Article 73.

The question still remains: Would this amount to an infringement of the right to property without the authority of law?

Even if it is assumed that limiting cash withdrawals and exchanges is a violation of the right to property (it is not necessarily so since it has been held that regulating the use of property is not an infringement on the right itself [*K T Plantation (P) Ltd v State of Karnataka* 2011]), the fact that this has been done by the executive on the basis of either a statutory power or a constitutional power means that it has been done with the authority of law. The Supreme Court, in holding that a mere executive order would not be "law" for the purposes of Article 300-A has also gone on to hold that a rule, delegated legislation, a statutory order or anything that has the force of law, that is, lays down norms (as opposed to specific directions to an individual [*Gulf Goans Hotel Company Private Limited v Union of India* 2014]) is "law" for the purposes of Article 300-A. Notification Nos 1307 and 1308 are not directions to specific authorities, but lay down norms binding on all banks and persons holding accounts. In the absence of any law to the contrary, such norms are valid and enforceable.

There is one problematic aspect of the demonetisation exercise when it comes to cash withdrawals. When demonetisation was announced on 8 November 2016, it was stated by the Prime Minister that cash exchanges would be allowed till 30 December 2016. This was also indicated in Notification No 3407. This information was repeated through advertisement in newspapers and other media. However, in a sudden volte face, all cash exchanges in banks were stopped with effect from 25 November. This was done by giving a four-hour notice on 24 November. This came after cash exchanges were restricted from ₹4,500 to ₹2,000, that too for the entire duration of time till 30 December. Exchanges are now allowed only at RBI branches located in state capitals.

Such a rollback raises serious ethical and moral questions about the government's behaviour. Can it promise one thing to citizens, legally, and repudiate it in less than three weeks? If the government assures citizens that their money is safe and they have plenty of time to have it exchanged, and when people have acted upon it, given the massive queues that have formed around banks, would it be justified in going back on this promise with no notice in a short time?

Legally, such actions of the government could be challenged as a violation of the doctrine of legitimate expectation. Originally evolved by United Kingdom courts (*Schmidt v Secretary of State for Home Affairs* 1968), it has been applied in Indian Courts (*Navjyoti Cooperative Group Housing Society v Union of India* 1992). This doctrine simply means that where a citizen has taken a certain benefit on the basis of the government's promise, the government cannot later deny the benefit to the citizen. It does not apply to the laws made by Parliament, but only to executive acts. A person who has not exchanged her notes and who does not have a bank account could, therefore, make a claim on this basis asking for the original timelines to be restored.

It is a different matter that the government could plead impossibility in complying with the court's orders to restore cash exchanges since it is quite likely that it does not actually have enough cash to meet the demand. This would also expose the utter lack of preparation and foresight in the demonetisation exercise.

Rule of Law

While the demonetisation per se is probably legally sound, the manner in which the government has responded to events afterwards has been chaotic and misguided. The daily announcements with changing rules and new prohibitions not only cause disorder, but also undermine the rule of law in the country. The cornerstones of what constitutes rule of law are stability and certainty in norms (Fuller 1964). The daily barrage of demonetisation announcements, ad hoc and ill-thought-out as they are, also point to a fundamental breakdown in the rule of law. Given the vast scale of the demonetisation exercise, affecting as it does every part of the country and virtually every sector of the economy, the haphazard way in which it is being carried out suggests a regime ill-equipped, or simply incompetent, to do it properly.

Apart from the deaths caused or the jobs lost, demonetisation's lasting impact may be the general populace's loss of faith not only in the currency, but also in the government's ability to govern in accordance with the rule of law.

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