Demonetization

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Introduction
The declaration made by honourable Prime Minister Narendra Modi on 8\textsuperscript{th} November can be considered as one of the most decisive experiments in the development of India post liberalisation in 1991. The declaration has both legal and economic aspects attached to it. The declaration has simultaneously resulted in emergence of various debates around the political, social, economic and legal issues concerning the issue. In addition, it is crucial to also see that the consequences of such a declaration cannot be limited to mere remarks about hardships when there are grave ramifications of a significant population of citizens. A special emphasis would be to relate this exercise to earlier declarations of demonetisation.

The scheme of this paper is to analyse the legality and legitimacy of the policy decision taken by the executive and how far they have been efficient in implementing the executive order. The second part of the enquiry relates to the compliance with the requirements of the provisions of the Constitution, especially the ones related to right to property, scope of executive powers of the Union and doctrine of legitimate expectation from the Government.

Legality of Demonetisation
Demonetisation in India is not a new process, it has been undertaken twice i.e. in 1946 and 1978. Thus, various questions arise including what makes this declaration different from what has been already been done in past. Also, important is to distinguish how the issue of legality arises in the case of this declaration?

The answer to this is related to the manner in which the exercise was done this time. Also, it is crucial to recognise that the amount of currency withdrawn from circulation amounted to an overwhelming majority of 86.4 percent of the total currency in circulation. The difference is that earlier it was RBI who was against this very action whereas this time RBI was very much forthcoming the idea of demonetisation. In the past demonetisation was done by the RBI in both 1946 and in 1978. In 1946 there was English govt. which was there and in 1978 there was the Coalition party of Janta Party. Also, the coverage of media has played a big role as at that point of time there was an announcement made by All India Radio whereas this time there was full television media covering every small detail regarding it and the increase in population is also another reason as lot more people have been affected.

When earlier the decision was made in 1978 during Morarji Desai’s government, it had taken assent of president and the process of issuing ordinance was the chosen mechanism whereas this time it has been done by an executive announcement or Notification (Nos. So 3407[E] and 3408[E]) made by the Prime Minister, Narendra Modi. This act of executive has come up for scrutiny and various issues arise due to this.

The first issue regarding this is does the Govt. of India or RBI have power to declare any legal tender as invalid?

A view of sub-section (2) of Section 26 of Reserve Bank of India (RBI), tells that “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.” Hence a plain reading of this Section leads to the conclusion that the action of the govt. was within their scope and hence one can’t challenge the legality of such an action. But it has been contended in the recent Public Interest Litigation (PIL) that this power to declare “any series” of notes is applicable for a particular series and not to declare all series of a note to be illegal tender. Also, as discussed above another line of argument in the PIL is that previous demonetisation exercise was carried out by an ordinance which latter turned out to be laws being made by the competent legislature, in contrast to present one which is carried out by the central govt. by issuing notification for this purpose. Thus, important question regarding the mechanism of consultation and subsequent legal process arise here.

Coming to first issue regarding the interpretation of “any series” where the contention is that “any” doesn’t include “all”. This interpretation fails in front of decisions of the Supreme Court on this point. There has been judicial precedent where the Court has decided on this interpretation issue of singularity and plurality. Referring to Section 13 of General Clauses Act, 1897 which clearly states that “unless the context otherwise requires, in a statute, the singular includes the plural. Also, the Supreme Court in cases of LDA v. M.K. Gupta and in S. K.
Mohammed Omer v. Collector of Customs\textsuperscript{ii}, has held that the term “any” includes “all.” Hence based on the above judgement and reference to general clause act 1897 we can come to the conclusion that in under all circumstances Section 26 under RBI act “any series” include “all series”. Also, no other provision under the RBI act or under any law for the time being requires it to be given a narrow or restricted meaning.

Now, coming to the second contention which is constitutional in nature and this question is whether a law need to be necessary passed by the parliament in context of demonetisation?

Looking at the history and earlier discussion the Janata Party government had enacted the High Denomination Bank Notes (Demonetisation) Act, 1978 after they had promulgated an ordinance to this effect firstly. Similar to present notification which was issued in context of “500” and “1000” notes, the demonetisation act of 1978 declared “1000” “5000” and “10000” notes as no longer be legal tender. Although there is similarity when there comes to mechanism be adopted in regard to deposit and exchange of these notes within a specified time. However, the difference was that the Demonetisation act prohibited persons from accepting or tendering the demonetised notes in any context, although it didn’t make it as a criminal offence to do in contrast. Whereas under the present demonetisation exercise, there is no legal prohibition against accepting or tendering ‘500’ and ‘1000’ notes. It only means that it is not against the law to refuse to accept such notes, and instances of this was shown by the media wherein various petrol pump owners had refused to provide change while filling up tanks. This had created a kind of confusion which was evident that the “exemption” clause in Notification No. 3408 was amended several times by the Union ministry ever since they had made this announcement. It was never made clear that the places where the note was required to be accepted are obligated under law to do so, and what wold be consequences if they act in contrast to it. Since there was no mention of any kind of penalty or fine if they act in contrast to the notification there was wide misuse of this exemption especially by the petrol pump owner. It is clear that under the constitution there are certain aspects on which only the Parliament can make a law for instance on the salary of president or judges etc. However, this nowhere implies that everything that the govt. does inevitably requires a law made by legislature only then its legality can’t be raised in question.

The third legal issue which arises is in respect of Right to Property and Legitimate Expectation. Article 300-A of the constitution of India deals with Right to Property.\textsuperscript{iii} The demonetisation exercise conflicts with this article, as the Notification No. 3407 affects the right protected by article 300-A without authority of law. This issue is based on the argument that there is restriction on the withdrawal limit of cash from the account of any person both from bank and ATM, whereas the exchange of notes is also contradicting article 300-A. Further Article 300-A is corresponding to article 21 to the extent that the protection against the deprivation of property has to be by authority of law and reading in article 21 here, they have to provide for of substantive due process as the interpretation of article 21 is supposed to mean. However, there are no safeguards for any section of people, regardless of how unprivileged they are or the different hardships which they might be facing in the present scenario. This in itself flies in the face of inherent fundamental rights related to article 21 which are articles 14 and 19. Therefore, from the above contention it could be concluded that the govt. by refusing to let people withdraw from their account in cash is restricting the right to property, and they don’t have freedom to enjoy their property, hence this is resulting in extinguishment of the right in entirety.

The contention above argument definitely carries weight as it receives merit from the Supreme court judgment in case of Bishamber Dayal Mohan v. State of Uttar Pradesh,\textsuperscript{iv} wherein it was held that an Executive order is not “law” for the purpose of Article 300-A. This argument could be furthered i.e. that unless a law is made by the legislature with regard to withdrawal limit under specific provision, or a new law is passed, the Constitution prohibits the govt. to act in contradiction profits provisions. This can be responded on two points, one on RBI and another one on the Constitution. Hence, in present case there is doctrine of ancillary power which has an important function. When it exercises power under Section 26(2) of the RBI act, the govt. is provided with ancillary powers to carry out an important measure such as demonetisation smoothly. When the notification was to be released, there was certain kind of policy decisions in the minds of law-makers with respect to the trouble or difficulty that would arise with respect to it. Hence to this extent they need to be granted certain discretion, as a country like India with such huge population there are going to be difficulties in execution of such a huge policy. Hence, section 26(2) helps govt. in currency withdrawals and exchange limits to be traceable for future reference. Hence the doctrine of ancillary powers is well established to be recognized.

The second contention within the above is with respect to powers of executive with reference to
article 73 of Constitution of India. It provides that the Union Executive has power to make law with respect to those subjects on which the parliament has power under schedule VII of the constitution. This power has a limitation and this limitation is that it should be exercised in accordance with the law already laid down. Hence where there is no law with respect to it there it could make law which means that the executive is free to act in open area.

If we look at present moment, then there is no provision or law with regard to which the central govt. could impose restriction on the withdrawal of cash from banks or exchange of new notes for old notes. Also, a point to be noted is that there is no other law or provision which vests such power in hands of any other agency for instance RBI. Therefore, it could be said that the limitation set by the Central Govt. by its Notification No. 3407, it was done in consonance with powers exercisable under article 73. Hence its partly exercise of executive powers vested under article 73 of the constitution.

The question at our disposal still remains unanswered i.e. does this exercise of power where there are no law present amounts to infringement of right to property? i.e. does absence of authority of law amounts to infringement of right to property?

In case of KT Plantation(P) Ltd v. State of Karnataka,³ where in it was held that regulating the use of property is not an infringement on the right itself. And if we go by this precedent it could be said that limiting the withdrawal of cash from account was mere regulating aspect and not a limitation or restriction on the right as a whole. Regarding the authority of law dispute it could be said that since it is being done by the executive on the basis that its either statutory or constitutional power which clearly is authority of law. In case of Gulf Goans Hotel Company Private Limited v. Union of India⁴ wherein the Supreme Court had made an observation that a “mere executive order would not be “law” for the purpose of Article 300-A but when it comes to delegated legislation, a statutory order or anything that has force of law, that is, lays down norms as opposed to specific direction to an individual is “law” for the purposes of Article 300-A”.

Now, some observations with respect to the announcement made by our Prime Minister Narendra Modi, on 8th November with regard to demonetisation.

(i) Firstly, it was said that cash exchanges were allowed till 30th December 2016.
(ii) Secondly, the initial amount to be exchanged was Rs. 4500, but on 25th November all cash exchanges were stopped by giving a notice of 4 hour on 24th November.
(iii) After this cash exchanges were reduced from 4500 to 2000 to be valid till 30th December.
(iv) Exchanges after that would be allowed at RBI branches located in state capitals.

These kinds of sudden change in laws and issuing of notifications was one of the aspect which not only created confusion in mind of public, the bank employee and every citizen. These kinds of new policies every other day raised various questions. Both ethical and moral questions are raised when these kinds of new policies were being brought in every hour or day. One important question here is can the Govt. promise one thing to its citizens, legally and repudiate it in less than three weeks?⁵⁶

If there is an assurance on the part of the govt. that their money is safe with them and they would have plenty of time to have it exchanged, and when people act upon it with the massive queues forming in front of banks and ATM.⁷ Also, a lot of people who use to be daily wage earner had to leave there work to stand in queues to deposit or withdraw money, then would it be justified on the part of the govt. to go back on its promise with no notice in such a short time?⁸

In dealing with this question the doctrine of legitimate expectation comes to play an important role. This doctrine originated in United Kingdom Courts in case of Schmidt v. Secretary of State for Home Affairs⁹ and in India it was applied firstly in case of Navjyoti Cooperative Group Housing Society v. Union of India.¹⁰ This doctrine briefly states that where a citizen has taken certain advantage or 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. Hence an important point could be drawn that a person who has not exchanged his/her notes and who does not have a bank account could, therefore, make a claim on the basis asking for returning to the time limit prescribed originally for it. Also, the govt. could argue that it doesn’t have that much cash in reserve to deal with the situation in hand thus it won’t be possible for it to return to original time frame. And such a measure does expose the lack of preparation and foresight on the side of govt. before taking such a drastic measure.
RULE OF LAW

Thus, when we look at the legality of demonetisation it could be said that it is per se legally sound, what needs to be noted is the chaos and the measures taken by the govt. after the announcement which caused a sense of confusion and wide spread chaos in the society. The daily proclamations with changed rules and regular new restrictions cause a situation of distress and disorder in the society which resulted in undermining of the rule of law in the country. In the words of Fuller on Rule of Law “The cornerstones of what constitutes rule of law are stability and certainty in norms.”xii The daily announcements, notices with the different dept. of the govt. showed there was lack of coordination among themselves wherein in RBI said different things and then the finance minister comes up with another law. This whole lack of order, coordination somehow results in fundamental break down of rule of law machinery. Considering the vast scale of the demonetisation exercise, affecting every part of the country, every sector of the economy, the way in which it was being carried out showed a complete lack of preparedness and thus competence on the part of the govt. This is to be considered apart from the death of people caused by suffocation and also incidents where people were looted, duped of their own moneyxiii. This shows that there was lack of law and order to deal with the possible situations. Also govt. promoted e-payment but there was a dismal lack of infrastructure to bring the change. Further even if infrastructure would have been there, a behavioural change of this extreme scale requires a lot of initial preparation focusing on training the masses from all backgrounds by simplifying digital processes for them. Hence the general population had to suffer because of misdeeds of privileged few and they consequently have resulted in reduction of faith in the govt. ability to govern in accordance with the rule of law.

If we see the view of the RBI governor IG Patel who in his book titled Glimpses of the Indian Economic Policy: an insider’s View, in which he clearly states that “most people in possession of black money rarely keep their ill-gotten earnings in the form of currency for long. Thinking that black money is stashed away under mattresses or suitcases is naïve,” and he was indeed true as even this time there was no trouble to the top level bureaucrats or minister in getting exchange of their money. Who suffered the whole trouble was the common man and he was the one who was looted, duped or killed in this scheme of demonetisation.

No doubt when it comes to legitimacy of the decision it is completely valid but what about the after effects or the objectives that it sought to achieve in end. None of it was successful and this is why it had completely failed in curbing the black money. It was mere conversion like all the other times when demonetisation was being done.

Conclusion

The step taken by Union Government in the name of executive action was indeed one of biggest step when the development of India is to be considered. When the Prime Minister Shri. Narendra Modi was addressing the nation he said the reason behind demonetisation was to curb the black money. This black money was being used for terrorism which in the hindsight harms the development of the nation. Also, he said that the concentration of the wealth in the hands of few need to be addressed as the rate of inflation was rising drastically.

These kinds of justification resulted in support of the movement of the demonetisation and it was quite evident when there was pole in which more than 95% people voted in the favour of the decision. What changed from there was new laws being coming up and the concern of the citizen. Also, the objective with which the measure was taken looked ineffective and inefficient as there was no significant big fishes being caught. On the other hand, the queue of the common man and the daily struggle to get money exchanged resulted in vast amount of distress and disorder in the society. The common man felt lack of trust and faith when the lawmakers came up with laws which were for the benefit elite society.

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