

## CONSTITUTIONALITY AND LEGALITY OF THE DEMONETIZATION POLICY IN INDIA

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### *Abstract*

*Demonetization is a monetary step whereby a currency unit's status as a legal tender is declared invalid. It is usually done to replace the old currency with new one whenever there is a change of national currency. For example, gold was demonetized when it ceased to be used as an everyday currency. Demonetization has earlier happened in India in 1946 and second time in 1978. On the 8<sup>th</sup> of November, 2016 the same step was taken by the Government of India for the third time whereby the Prime Minister Narendra Modi declared the withdrawal of Rs.500 and Rs.1000 currency notes from circulation. The step was claimed to be aiming at curbing of black money and counterfeit currency used for funding terrorism. Thereafter, the Supreme Court has heard several public interest litigations challenging the constitutional validity of the act of demonetization by the Government. The main objective of this paper is to study the impact of demonetization by the present government on the fundamental rights of the citizens of India. The paper thus, aims to analyze the constitutional validity of the notification of demonetization dated 8<sup>th</sup> November, 2016 issued by the Government of India.*

**Keywords:** *Demonetization, currency, notification, rights, constitutionality*

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## INTRODUCTION

The Government on 8<sup>th</sup> November, 2016 by a notification in the Gazette of India declared the demonetization of Rs.500 and Rs.1000 currency notes. The notification by the Department of Economic Affairs, Ministry of Finance published in the Gazette of India<sup>1</sup> read that the bank notes of existing series of denomination of the value of five hundred rupees and one thousand rupees shall cease to be legal tender on and from the 9th November, 2016.

The preamble to the notification stated that its objective was to eliminate fake currency used for financing terrorism and to address the problem of “unaccounted money” in the economy. The notification also imposed limits on ATM and bank withdrawals. Since then, the government has made many changes to the applicable limits. The authority for the same according to the notification is derived from Section 26(2) of the Reserve Bank of India Act, 1934<sup>2</sup> (hereinafter referred to as the RBI Act).

According to estimates, 86% of the currency was in the form of the demonetized Rs.500 and Rs.1000 notes. Considering the fact that the Indian economy is largely cash based<sup>3</sup> with a large percentage of transactions happening in cash, such a drastic step was bound to lead to chaos. The slowdown of trade and commerce and the many deaths of the old & infirmed people who had to stand in queues for long hours, have led to people questioning the merits of this move. Accordingly, various High Courts and the Supreme Court of India have received several petitions challenging the constitutional validity of the act of demonetization by the Government on several grounds.

The demonetization notification can be challenged as illegal since the same is not only *ultra vires* section 26(2) of the RBI Act but it is also not saved by the Banking Regulation Act, 1935

<sup>1</sup> Notification by the Ministry of Finance, Available at: [http://www.finmin.nic.in/press\\_room/2016/press\\_cancellation\\_high\\_denomination\\_notes.pdf](http://www.finmin.nic.in/press_room/2016/press_cancellation_high_denomination_notes.pdf) (Accessed on 12/11/2016)

<sup>2</sup> See, the Reserve Bank of India Act, Section 26(2)

Legal tender character of notes.—

(1) Subject to the provisions of sub-section (2), every bank note shall be legal tender at any place in 1[India] in payment, or on account for the amount expressed therein, and shall be guaranteed by the 2[Central Government].

(2) On recommendation of the Central Board the 2[Central Government] may, by notification in the Gazette of India, declare that, with effect from such date as may be specified in the notification, any series of bank notes of any denomination shall cease to be legal tender 3[save at such office or agency of the Bank and to such extent as may be specified in the notification]. 4[\*\*\*]

<sup>3</sup> Reserve Bank of India Annual Report, 2015-2016, Available at: <https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/ORBIAR2016CD93589EC2C4467793892C79FD05555D.PDF> (Accessed on 12/11/2016)

or any other Act of Parliament. The notification further violates the right to equality under Article 14, the right of trade and commerce under Article 19 (1) (g) and right to life under Article 21 of the Constitution of India. It also violates the constitutional right to property enshrined under Article 300A of the Constitution of India.

## EXCESSIVE DELEGATION

In England, Parliament is regarded as supreme therefore; the courts cannot control Parliament in matters like delegation of legislative power. But the situation in USA is different due to doctrine of separation of power whereby the legislature cannot delegate unlimited power to an administrative body. The legislature should itself perform the essential legislative functions, which include making and laying down the policy of statute, and only the power to lay down details to effectuate that policy may be delegated.

Excessive delegation principle has been laid down in *Panama Refining Co. v. Ryan*<sup>4</sup>, where delegation was held to be invalid because the court found no “standard” in the Act and the power delegated would be “virtually unfettered” due to few restrictions and large discretion. India too, has adopted the same principle.

In India, the Supreme Court’s decision in *In re: Delhi Laws Act case*<sup>5</sup> is a landmark in the area of delegated legislation in which the Supreme Court gave seven different views. However, it can be concluded that although the legislatures can delegate power, since power of legislation includes delegation, but since legislature derives its authority from the Constitution excessive freedom like in the case of British Constitution cannot be given and limitations are needed. Thus, the legislature cannot delegate unlimited power. The essential legislative functions have to be discharged by the legislature and only the power of laying down of details and effectuating the same may be delegated. Further, the Legislature cannot delegate ‘unrestrained, unanalyzed and unqualified’ legislative power to an administrative body.<sup>6</sup> It is essential that guidelines for carrying out of the policy or principles have to be laid down by the legislature.

In *Hamdard Dawakhana*<sup>7</sup>, the Court had invalidated Section 3(d) of the Drugs and Magical Remedies Act, in which the term “or any other disease or condition which may be specified in

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<sup>4</sup> 293 U.S. 388 (1935)

<sup>5</sup> *In re The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension) v. The Part C States (Laws) Act, 1950*, 1951 AIR 332

<sup>6</sup> *Kishan Prakash Sharma v. Union of India*, (2001) 5 SCC 212: AIR 2001 SC 1493

<sup>7</sup> *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & Anr. v. Union of India*, 1960 AIR 554

rules made under this Act” was used on the basis that there was no legislative guidance on how these “diseases” were to be selected.

Issuing of currency or its withdrawal as legal tender is not just a matter of monetary policy. It is something which is bound to have a great impact on the daily lives of all citizens and therefore being an essential legislative function, it should not have been delegated in the first place.

Rule of Law has been held to mean due process and a just, fair and non-arbitrary procedure. This has been given effect through the principle of separation of powers that prevents one organ of the government from over-reaching and acting in an arbitrary manner, by creating a system of checks and balances. Thus, Rule of Law is the antithesis of arbitrariness.<sup>8</sup> It is embodied in Article 14 of the Constitution and it also forms an integral part of its basic structure.<sup>9</sup>

In the present situation, the Act does not lay down any specific conditions or qualifications as to when and for what purpose can it be used. Thus, too much is left to the discretion of the executive authority and it is violative of Article 14.<sup>10</sup> There are no safeguards to control this discretionary power. The only condition that is laid down by the section is that there should be recommendation from the Central Board of the Reserve bank of India. However, practically the same cannot be free from interference and influence of the Central Government provided that various members of the Board including the Governor and the Deputy Governor are nominated by the Central Government and also their term and salaries are fixed by the Central Government.

Although the Government defends its action on the ground that despite causing temporary inconvenience, it is in public interest in the longer run, there is no assurance that in the absence of proper safeguards against the use of this power, the same will not be repeated in future. There is a high possibility of the fresh notes being afflicted by similar problems as the demonetized notes, especially since the Government has introduced an even higher denomination of Rs.2000.

The Constitution gives the power of legislation to the elected representatives of the people of the country. The purpose is that the power exercised is not only in their name but by the people. Thus, the rule against excessive delegation is an important postulate of sovereignty of the people. Also, the fact that there has been excessive delegation is violative of the doctrine of

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<sup>8</sup> *A.D.M. Jabalpur v. Shiv Kant Shukla*, AIR 1976 SC 1283; *Som Raj v. State of Haryana*, 1990 SCR (1) 535

<sup>9</sup> *Indira Nehru Gandhi v. Raj Narayan*, 1975 SCC (2) 159

<sup>10</sup> *State of Punjab v. Khan Chand*, AIR 1974 SC 543

separation of power leading to violation of Article 14 and the same can be expected to happen again in future in the absence of proper safeguards.

### NOTIFICATION IS *ULTRA VIRES* SECTION 26(2) OF THE RBI ACT

The doctrine of *ultra vires* is the basic doctrine in administrative law. The word ‘ultra’ means beyond and ‘vires’ means powers. Thus the term *ultra vires* means any act performed in excess of the power that is conferred on the person or authority performing the act.<sup>11</sup> It envisages the exercise of only as much power as is conferred by law.

The Supreme Court in *Supreme Court Employees Welfare Association v. Union of India*<sup>12</sup> has held that “Power is no less abused even when it is exercised in good faith, but for an unauthorized purpose or on irrelevant grounds”.

Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely that is to say, it can be vividly used only in the right and proper way which parliament when conferring it presumed to have intended<sup>13</sup>. If it is used for any other purpose<sup>14</sup> or on considerations extraneous to the legislation which conferred the power, it is a case of ‘Abuse of power’.

Section 26(2) of the RBI Act reads that the Government may declare by a notification in the Gazette of India, with effect from such date as may be specified in the notification, **any series** of bank notes of any denomination shall cease to be a legal tender. The above sub section refers to the power of the government to scrap the legal tender of only a particular series of notes of any denomination, not all notes of that denomination as has been done in the present case, which makes the use of the words ‘any series’ entirely redundant.

It is important to understand that RBI is not a tax authority and therefore demonetization cannot be used as tax enforcement or an anti-money laundering measure. Thus, withdrawal of legal tender from bank notes for the purpose of addressing tax evasion or money laundering does not fall within the ambit of Section 26(2) of the RBI Act. Further, the fact that the previous two attempts at demonetization have been made through an ordinance by the Legislature and not on

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<sup>11</sup> B.C. Sarma, *The Law of Ultra vires*, (New Delhi: Eastern Book Company), 2004, p 1

<sup>12</sup> AIR 1990 SC 434

<sup>13</sup> *R. v. Tower Hamlet London Borough Council, ex. P v. Chetnik Development Ltd.*, [1988] AC 858; *Porter v. Magill*, [2002] 1 All ER 465

<sup>14</sup> *Cf. Iron & Steel Co. v. Workmen*, AIR 1958 SC 130 (137); *Chartered Bank v. Employees' Union*, AIR 1960 SC 919

the basis of Section 26(2) alone go on to prove that the Legislature never intended the Section to be used in this manner for the removal of black money from the economy. If discretionary power has been exercised for an unauthorized purpose, it is immaterial whether its repository was acting in good faith or bad faith<sup>15</sup>. It will be gross abuse of power<sup>16</sup>. Therefore, it is immaterial that the power was used to curb black money, the purpose may have been in public interest, yet it is different from what is contemplated by the Legislature.

According to the notification issued by the Ministry of Finance on 8<sup>th</sup> November, 2016, notes of Rs.500 and 1000 would cease to be legal tender and this was done in the exercise of the powers conferred by sub-section(2) of the RBI Act. Section 26(2) of the RBI Act authorizes the government to declare “any series” of notes as illegal tender. The section does not give the government the authority to impose a withdrawal cap. The money deposited in a bank by an individual is his property and the bank performs the role of his custodian.<sup>17</sup> Since there is no bar or limitation on people as far as keeping their legitimate income in cash is concerned, cash does not *prima facie* equal black money. A notification under Section 26(2) can only make certain currency notes illegal from a particular date; it cannot change the legal status of the personal accounts. However the notification issued under Section 26(2) imposes a cap on withdrawal from banks and ATMs which is a restriction imposed on the right of the citizens to access their own tax paid money and the same is without any authority of law. Therefore, the act of the Government is *ultra vires* Section 26(2) of the RBI Act.

Further, according to Section 26(2), it is not just a consultation with the RBI that is required but also, the central government must give it enough scope to deliberate and give an independent view in the form of a recommendation, initiated by the RBI itself rather than by government prompting. To fulfill its duty as the central bank in the financial system, the RBI is supposed to be free from any sort of influence of the executive and act independently. Keeping this in mind, it is doubtful that the recommendation in the present case came from the RBI independently, although the same was claimed by the government.

Also insofar as the Government has allowed several exemptions as far as the legal tender status of the cancelled bank notes is concerned, in hospitals, petrol pumps etc., the Government has

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<sup>15</sup> *Collector, Allahabad v. Raja Ram Jaiswal*, AIR 1985 SC 1622; *Narayan Govind Gavase v. State of Maharashtra*, AIR 1977 SC 183; *Supreme Court Employees, Welfare Association v. Union of India*, AIR 1990 SC 334

<sup>16</sup> *S.R. Venketeraman v. Union of India*, AIR 1979 SC 49; (1979) 2 SCC 491

<sup>17</sup> See, Section 17(9), Reserve Bank of India Act, 1934

again exceeded the scope of authority under Section 26(2) of the RBI Act. This is because Section 26(2) itself mandates that once any bank notes series has ceased to be a legal tender, such notes can only be exchanged at an agency or office of the RBI as notified. The Government's exemptions permitting the use of these notes in other places are arbitrary and violative of Article 14.

## THE NOTIFICATION IS WITHOUT RELEVANT CONSIDERATIONS

'Rule of Law' as defined by Dicey, means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government."<sup>18</sup>

In India, we have adopted the British System of Rule of Law under our Constitution. Absence of arbitrary power is the first essential of Rule of Law upon which our whole constitutional system is based.<sup>19</sup>

Further, apart from the contents of equal protection the guarantee of equality before the law under Article 14 of the Constitution ensures fairness, reasonableness and non-arbitrariness.<sup>20</sup>

Non application of mind is a facet of arbitrary exercise of power.<sup>21</sup> A subordinate legislation may be struck down as arbitrary or contrary to the statute if it fails to take into account the very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or say, by the Constitution.<sup>22</sup> Further, non-consideration of public interest also shows non application of mind.<sup>23</sup>

The decision of the Government to demonetize has been taken without application of mind to any of the relevant considerations. Given that people have died while standing in queues before banks, clearly points towards the fact the country in terms of its infrastructure and high cash reliance was not ready for demonetization on such a large scale. The government before taking such a huge decision of removing 86% of currency from circulation should have considered facts like whether the number of ATM's and banks would be sufficient to cater to such a large

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<sup>18</sup> Dicey, A.V., *The Law Of The Constitution* 198 (8<sup>th</sup> Ed.)

<sup>19</sup> *S.G. Jaisinghani v. Union of India*, AIR 1967 SC 1427; *Godavarman v. Ashok Khot*, (2006) 5 SCC 1

<sup>20</sup> *Maneka Gandhi v. Union of India*, 1978 AIR 597

<sup>21</sup> *Onkar Lal Bajaj v. Union of India*, (2003) 2 SCC 673

<sup>22</sup> *Indian Express Newspapers v. Union of India*, AIR 1986 SC 515; *Union of India v. Dinesh Engineering Corpn.*, (2001) 8 SCC 491; AIR 2001 SC 3887

<sup>23</sup> *Bharat Gold Mines Officers' Association v. Union of India*, AIR 2001 Kant 257



population after demonetization and what effects could the decision have on the citizens especially the rural and informal sector of the society. Considering that India is a cash based economy, where most people don't have access to alternate modes of payment and thus depend majorly on cash for most of their transactions, it was quite predictable that such a step would lead to formation of such long queues before banks and ATMs. People were not only prevented from accessing their cash at their will and without any inconvenience but in some cases also completely denied of it as in the case of the people who have died in queues. All this can be attributed to the absolutely unplanned manner in which the decision has been taken. The size of the notes was changed because of which the ATMs throughout the country had to be recalibrated. This further worsened the cash crunch as these ATMs did not work at all for this entire period. The fact that the Government clearly had no idea that a large number of ATM's weren't even functioning since a long time at the time of demonetization, makes the claim of months of preparation by the government extremely difficult to believe.

Further, the fact that the government had imposed a withdrawal cap again shows non application of mind. Since demonetization was implemented at such short notice, people could not have been expected to be prepared especially for emergency situations. The authorized withdrawal cap could not have been reasonably predicted to be sufficient for situations like medical treatments. There were reports of around 33 deaths in just the first week of demonetization across the country which can be directly or indirectly linked to the sudden move.<sup>24</sup> Again these were just the official figures, the actual number can be reasonably presumed to have been bigger. There were reports of people committing suicides, getting heart attacks, dying because of their inability to pay in hospitals<sup>25</sup>, etc.

Since the decision could have reasonably been predicted to lead to such direct consequences, the government's action was clearly without application of mind to relevant considerations.

## **EXCLUSION OF DISTRICT CENTRAL COOPERATIVE BANKS IS VIOLATIVE OF ARTICLE 14**

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<sup>24</sup> 'Demonetisation: 33 deaths since government scrapped Rs 500, Rs 1000 notes', *The Indian Express*, Available at: <http://indianexpress.com/article/india/india-news-india/demonetisation-suicides-heart-attacks-and-even-a-murder-among-33-deaths-since-decision-4378135/> (Accessed on 20/12/2016)

<sup>25</sup> 'Baby dies after doctor 'refuses' treatment for want of cash', *The Times of India*, Available at: <http://timesofindia.indiatimes.com/city/mumbai/Baby-dies-after-doctor-refuses-treatment-for-want-of-cash/articleshow/55389684.cms> (Accessed on 20/12/2016)



Only around 30% of the Indian population has access to the banking system as per data compiled by the banking division of the finance ministry. Further, the distribution of banks is highly skewed with a third of all bank branches in only 60 Tier 1 and Tier 2 cities or towns.<sup>26</sup> Consequently, people in rural India are the ones who are bound to suffer the most in such situations like that of demonetization.

Keeping in view the above facts, the notification clearly results in discrimination between holders and non-holders of bank accounts. While the Government defended the action as necessary to curb black money, insofar as it failed to ensure that the entire population had bank accounts before the decision of demonetization was announced, the notification is clearly arbitrary and violative of Article 14.

Further there has also been arbitrariness in excluding the District Cooperative Banks from exchanging or withdrawing currency notes. It is only through these banks that formalized banking services are accessible to rural sections of the country. Rural economies in Punjab, Gujarat, Uttar Pradesh, Maharashtra, Kerala, Odisha and many other states depend heavily on cooperative banks.<sup>27</sup> In Kerala, cooperative banks have total business of more than Rs.1 lakh crore.<sup>28</sup> Because of their high penetration and easier loan disbursements, the rural population relies largely on these banks and therefore the sudden decision of demonetization led to a large number of farmers being denied completely the access to their money.

Since there is clearly no reasonable nexus behind excluding the district cooperative banks during the entire process of demonetization, the same can be said to be violative of Article 14.

### **VIOLATION OF ARTICLE 19(1) (G)**

Article 19(1) (g), provides for the freedom to practice any profession, occupation or trade. The state cannot seek to place restrictions on the same by directly and immediately curtailing any other freedom of the citizen guaranteed by the Constitution.<sup>29</sup>

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<sup>26</sup> Prof Prabhat Patnaik, 'Black Money and India's Demonetisation Project', Global Research, Available at: <http://www.globalresearch.ca/black-money-and-indias-demonetization-project/5557384> (Accessed on 22/12/2016)

<sup>27</sup> Kanchan Srivastava, 'Did RBI ban district coop banks on hearsay?', DNA, Available at: <http://www.dnaindia.com/money/report-did-rbi-ban-district-coop-banks-on-hearsay1-2293192> (Accessed on 22/12/2016)

<sup>28</sup> *Ibid*

<sup>29</sup> *Sakal Papers v. Union of India*, AIR 1962 SC 305, at 314

There are a large number of people who are involved in various economic transactions and undertakings. India is a country where about 90% of the transactions happen in cash and 85% of the workers are paid in cash.<sup>30</sup> This does not only include black money holders but also many innocent citizens like daily waged labourers and poor farmers. The government cannot claim that only those with black money, fake currency or the intent to aid terrorism are bound to suffer. By its abrupt notification and imposition of a withdrawal cap, the government had put a restriction on people to access cash which directly led to restricting the trade and commercial pursuits of the people.

The Government's defence could be that reasonable restrictions can be put upon 19(1) (g) by virtue of Article 19(6) since the restrictions are in the interest of general public. However, the grounds cited cannot justify adopting extreme measures like invalidating 86% of printed currency in circulation overnight. These restrictions neither have a reasonable connection nor are proportional to the mischief which they sought to control that is curbing of black money and therefore cannot be said to be reasonable.<sup>31</sup>

The test of reasonableness is whether the measure was necessary to achieve the objective of the government and whether less risky or less harmful alternatives were available, which is clearly not fulfilled in the present case.

In *Saghir Ahmad v. State of UP*<sup>32</sup>, the Supreme Court held that the reasonableness of a law must be assessed in terms of its "immediate effects" on the affected population. Unlike the 1978 demonetisation that impacted only 1% of currency held, the one in 2016 had an impact on 86% of the currency which led to punitive effects on many sections of the population especially those without bank accounts and those depending upon the informal cash economy for their livelihood and business.<sup>33</sup>

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<sup>30</sup> Wade Shepard, 'A Cashless Future Is The Real Goal Of India's Demonetisation Move', Forbes, Available at: <https://www.forbes.com/sites/wadeshepard/2016/12/14/inside-indias-cashless-revolution/#184a8fc74d12> (Accessed on 1/1/2017)

<sup>31</sup> 'Five reasons why the recent Demonetisation may be legally unsound', The Wire, Available at: <http://thewire.in/81325/demonetisation-legally-unsound/> (Accessed on 2/1/2017)

<sup>32</sup> 1954 AIR 728

<sup>33</sup> Namita Wahi, 'Why Demonetisation notification is illegal and violates the Constitution', The Economic Times, Available at: [http://economictimes.indiatimes.com/articleshow/55916594.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://economictimes.indiatimes.com/articleshow/55916594.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst) (Accessed on 1/1/2017)

Informal sector makes up for 45% of the GDP of the country and 80% of all jobs. These are the people who earn on a day to day or week to week basis like the manual labourers on farms, the construction workers, rickshaw drivers, street vendors, domestic workers, etc. The sector is traditionally financed by what are called non-banking financial institutions including money lenders. However, the fact that the cash crunch rendered their employers and these money lenders incapable of paying them led to losing of their jobs and thus violation of their right to occupation. Standing in the queues for hours to withdraw cash again led to loss of wages for the daily waged laborers.

Agriculture is another sector that was greatly affected especially considering that the decision of demonetization came during the Rabi sowing season. Farmers had difficulty buying seeds and fertilizers, employing agricultural labor and selling crops and perishable produce. Consumer goods sales had dropped. The construction and fishing industry also suffered.

Further there seems no reasonable nexus between the restriction and the objective. Black money is generated through evasion of taxes on income from lawful activities or money generated from illegal activities. In order to actually address the problem of black money there are several steps like improving transparency and accountability in the system, which need to be taken. However, the step taken by the Government does not target any of these. In absence of efforts to curb the very generation of black money, demonetization is a futile exercise as was proved in 1978. Again as far as stopping the use of counterfeit currency is concerned, the step of demonetization only acts as a temporary method of destroying the fake currency and the apparatus used to generate it. The same problem is bound to be faced by the country again.

Thus, since the restrictions imposed by the Government neither correspond to the object sought to be achieved nor are proportional to it, the same cannot be termed as reasonable and are therefore violative of Article 19(1)(g) of the Constitution.

## **THE NOTIFICATION IS VIOLATIVE OF ARTICLE 21**

Right to Life under Article 21 embraces within its sweep not only physical existence but the quality of life. It includes all those aspects of life which go to make a man's life meaningful, complete and worth living.<sup>34</sup> It includes the right of food, clothing, decent environment and

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<sup>34</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *Board of Trustee of the Port of Bombay v. Nadkarni Dilip Kumar Raghavendra*, AIR 1983 SC 109

reasonable accommodation to live in<sup>35</sup> and if any statutory provision runs counter to such a right, it must be held unconstitutional.<sup>36</sup> It is needless to say that in a cash reliant country like India where a large percentage of transactions happen through cash, a denial or restriction on people to access their cash would directly lead to denial of all these facets of Right to Life and therefore a violation of Article 21.

In *Olga Tellis v. Bombay Municipal Corporation*,<sup>37</sup> it was held that that alone which makes it possible to live, leave aside what makes it livable must be deemed to be an integral component of Right to Life. The petitioners need to eat to live; they can eat only if they have means to livelihood. Thus, Right to livelihood was held to be a part of Right to Life, since a person cannot live without means of living. Clearly demonetization attacked the livelihood of a large number of people as has been discussed earlier.

Further drawing an analogy from the above case, it can be said that the right of the people to access their money is also an integral part of Right to Life guaranteed under Article 21 of the Constitution of India. India is a country where most of the people rely on cash for meeting their everyday needs since they have no access to other modes of payment. This means that if people are denied access to their cash, they cannot buy food, they cannot pay their rent, buy medicines, etc. Thus, in essence they are deprived of their means to live and thus their Right to life. The formation of long queues before banks and ATM's and the fact that people have died in these queues shows that cash is their necessary means to survive and by demonetization the government has left them with no other alternative to meet their daily needs which form a part of Right to Life.

Therefore, since the Government's action resulted in people not being able to avail the various facets of their Right to Life, the notification is in violation of Article 21 of the Constitution of India.

## **VIOLATION OF 300A OF THE INDIAN CONSTITUTION**

Article 300A lays down that “no person can be deprived of his property except by authority of law”.<sup>38</sup> It has already been established by the Court that ‘public debts’ are property and ‘the

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<sup>35</sup> *Shantisar Builders v. Narayanan Khimalal Totame*, (1990) 1 SCC 520

<sup>36</sup> *Confederation of Ex-servicemen Association v. Union of India*, (2006) 8 SCC 399

<sup>37</sup> 1986 AIR 180

<sup>38</sup> See, Constitution of India, Article 300(A)

extinguishment of such debt amounts to compulsory acquisition of that debt<sup>39</sup> which can only be done through authority of law that is, by an ordinance or Act of the Parliament in accordance with Article 300A of the Constitution.

The Supreme Court has also held that temporary deprivation of property also constitutes deprivation under this provision. The same was held by the Supreme Court in *Jayantilal Ratanchand Shah v. Reserve Bank of India & Ors*<sup>40</sup>, in the context of the 1978 demonetization, that insofar as the demonetization wiped out the RBI's debt to the bearer of notes which were declared illegal, it constituted compulsory acquisition of property.

It has been held that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a competent legislature.<sup>41</sup> Thus legal tender is property in the hands of the citizens which they use to buy goods and services or transact anything else. The same cannot be taken away by an executive order without legislation.

Compulsory acquisition should be for public purpose and should be accompanied with payment of compensation. However, rationing of currency constitutes a form of creeping expropriation for which there has been no compensation<sup>42</sup> and also the restrictions being unreasonable are not for public purpose. Thus, the government's failure to issue an ordinance to extinguish the RBI's debt to the people violates the constitutional right to property.

## THE NOTIFICATION DEFEATS LEGITIMATE EXPECTATION

The doctrine of legitimate expectation is considered to be a part of natural justice.<sup>43</sup> At its root is the principle of rule of law, which requires regularity, predictability and certainty in Government's dealings with public.<sup>44</sup> Failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of legitimate expectation forms part of the principle of non-arbitrariness.<sup>45</sup> It imposes a duty to act fairly on all public authorities and therefore people can have a legitimate expectation that they will be

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<sup>39</sup> *Madan Mohan Pathak v. Union of India*, 1978AIR 803

<sup>40</sup> JT 1996 (7)

<sup>41</sup> *K.T Plantation (P) Ltd. v. State of Karnataka*, (2011) 9 SCC 1: (2011) 4 SCC (Civ) 414: AIR 2011 SC 3430.

<sup>42</sup> *Supra* note, 33

<sup>43</sup> *Ashoka Smokeless Coal India (P.) Ltd. v. Union of India*, (2007) 2 SCC 640

<sup>44</sup> *Official Liquidator v. Dyanand*, (2008) 10 SCC 1

<sup>45</sup> *FCI v. Kamdhenu Cattle Feed Industries*, AIR 1993 SC 1601

treated fairly by the State and its instrumentalities.<sup>46</sup> Courts can interfere with change in policy when denial of legitimate expectation amounts to denial of rights guaranteed<sup>47</sup> and the same can be questioned on grounds attracting Article 14.<sup>48</sup>

Thus people have a legitimate expectation of being treated fairly and to have access to their money not just because it arises from past continuance but also because it is important for the enjoyment of their fundamental rights. People can thus have a legitimate expectation that they would be able to access their own money without any restrictions especially in times of emergencies.

## CONCLUSION

Clearly, despite the fact that the claimed objectives of the Government are good for the country, the ends cannot always justify the means. The step apart from clearly being unconstitutional was badly planned and executed in an even worse manner.

If at all demonetization had to be brought about, it could have been done through an ordinance. Since the parliament was not in session at the time this step was taken, issuing of an ordinance, as was done in 1978, would have been a justified step. Why this was not resorted to is a question. According to the Government, the entire step would lose its very purpose, had it been done through an Act since what was required was an element of surprise. But the same could have been maintained by an ordinance which would have the force of law. The fact that this was not done, points to the reluctance of the Government to have the same replaced by an Act that would require debate in the Parliament.

Taking such a huge decision by an executive action alone especially when it is bound to cause so much disruption in the economy, attacks the confidence of the people placed in the Government that they have themselves elected.

Further, with reports of the new Rs.2000 notes being recovered from terrorists<sup>49</sup> and politicians being arrested with black money, again, in form of new currency notes<sup>50</sup>, raises questions on

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<sup>46</sup> *Ibid*

<sup>47</sup> *Punjab Communications Ltd. v. Union of India*, AIR 1999 SC 1801

<sup>48</sup> *Union of India & Anr. v. International Trading*, (2003) 5 SCC 437

<sup>49</sup> 'New notes found on militants proves currency ban won't impact terrorism: Congress', The Hindustan Times, Available at: <http://www.hindustantimes.com/india-news/new-notes-found-on-militants-proves-currency-ban-won-t-impact-terrorism-congress/story-SVgR1pwX2Aw5E6qOZLNccL.html> (Accessed on 2/1/2-17)

how effective the move was to curb black money, counterfeit currency and terrorism which were claimed to be the objectives behind the same.

More importantly, according to reports<sup>51</sup>, RBI's own weekly figures on "currency in circulation" suggest that more than 90% of the demonetised currency had returned to banks by December 30<sup>th</sup>. This could mean that either there was negligible amount of black money in the country, which is hard to believe, or it had been successfully laundered. In both these cases the question that arises is that was the pain that people went through during this entire process worth the gain.

We live in a country governed by the rule of law, and not by the rule of men. Clearly, the goal of withdrawing black money from the economy is something everyone supports, but it must be done under authority of law. The objectives of demonetization may be laudable, but whether they are achieved or not, is debatable. Even if these objectives are achieved to some extent, as it exists, demonetization by the present Government is illegal and violative of the Constitution of India.

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<sup>50</sup> 'Nearly 30 BJP members caught with black money post demonetization?', Narada News, Available at: <http://naradanews.com/2016/12/30-bjp-activists-caught-with-black-money-post-demonetisation/> (Accessed on 3/2/2017)

<sup>51</sup> 'Demonetisation: RBI's own figures indicate return of 15 lakh crore of banned notes', The Economic Times', Available at: <http://economictimes.indiatimes.com/news/economy/finance/demonetisation-rbis-own-figures-indicate-return-of-15-lakh-crore-of-banned-notes/articleshow/56536621.cms> (Accessed on 3/1/2017)