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Shubhankar Dam

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A constitutional law expert explains why the Modi government can't stop Indians from accessing their money

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Swindled? (Reuters/Jitendra Prakash)

In the late hours of Nov. 08, prime minister Narendra Modi plunged India into an economic unknown. He unveiled a monetary experiment without historical parallels. Overnight, 86% of all Indian currency notes by value became illegal tender. The million haggles, motley exchanges, and many handshakes that motor India's economy screeched to a halt. Cash disappeared.

The demonetisation move came with strict limits on cash withdrawals. Banked citizens abruptly had their accounts restricted. Income, lawfully earned, taxed, and deposited, was fenced out of reach. Individuals, for now, are limited to Rs24,000 ($350) a week, and businesses, big and small, max out at Rs50,000 ($730). But even retrieving this is laborious and, at times, fatal. Long queues snake out of bank branches, and dozens have reportedly died awaiting their turn. As many seethed against the odd fiats and their even application, the government responded with tweaks: The to-be-marrieds, farmers, and few others may now access larger, but still measly, sums. India is on a cash diet.

Is the diet, this rationing, lawful?

The constitutional right to property: a primer

The Indian constitution pledges a right to property. Article 300A says: "No person shall be deprived of his property save by authority of law." The right has a tormented past. The original constitution, the 1950 edition, feted it as a fundamental right, protected through *two* provisions: Articles 19 and 31 respectively. But the constitutional sunrise brought intense wrangles over these provisions. With an eye on land redistribution, legislators batted for a weak reading of the right to property. Judges, especially the ones in supreme court, insisted on the reverse: A strong right to property was their mantra.

Both provisions were amended and re-amended through the 1950s and 60s. The unceasing duels between parliament and the supreme court over the right, its reach, and vigour, made them necessary. Ultimately, bruised and fed up, the Janata Party-led parliament deleted it in 1978. Property was no longer a fundamental right—the only right ever erased from the constitution. But it still lingers; it wasn't deleted, only demoted. Article 300A was inserted and property endures as a *constitutional* right.

What separates fundamental from constitutional rights? Both are rights, scribed in the constitution and, important. But both aren't equally protected. Restrictions on fundamental

rights require just, fair and reasonable laws; restriction on constitutional rights require laws. In other words, restrictions on fundamental rights demand stronger justifications.

So, is the cash-rationing a valid restriction on the constitutional right to property? Three things must be investigated: Is cash "property"? Do withdrawal limits "deprive" persons of their property? If so, which "law" authorises this deprivation?

The first of these is easy. Cash is property. It is hardly in dispute. Strictly, though, cash hasn't been rationed: Anyone in lawful possession of legal tender is free to transact without limit. The restrictions are in accessing bank accounts. But these accounts, too, are property.

The spectrum of deprivations

Deprivation is a vague word. There's a spectrum of possibilities.

At a vicious extreme is the compulsory acquisition of title. The state, say, acquires land and the title to it. The owner loses both: possession and title. This obviously is deprivation.

In the middle are more dignified possibilities. Temporary acquisition is a good example. The owner loses possession. Title, though, remains; the person is still the legal owner. This often happens during emergencies. The state may need, say, land for various uses. The owner is ousted for some time, and possession is returned once the emergency abates. This, too, is deprivation, albeit a temporary one.

Mild options populate the other extreme. The state may simply limit the use of, or access to, one's property. It acquires nothing, neither possession nor title. This commonly happens. Neighbourhood homes, say, are destroyed by a fire. Some are fully razed; others less so. But the police, fire and other authorities may restrict owners from accessing their homes and belongings. Safety concerns and investigative needs may momentarily trump owners' right to their properties.

The limits on bank withdrawals, it seems, are at this mild end. The government hasn't taken over —acquired—bank vaults. Nor has it commandeered people's savings for temporary use. The rationing merely restricts access to bank accounts for some time. (We do not know for how long.) Is this deprivation, too?

A Jharkhand public servant, Jitendra Srivastava retired in 2002. Soon after, his pension accrued over 36 years was paid out. Only 90% was disbursed; the remainder was docked. Srivastava had allegedly committed pecuniary irregularities and sleuths were on his trail. The state promised to pay out his 10% once cleared of wrongdoing.

An annoyed Srivastava challenged the state's miserly conduct. The matter wound up in the supreme court. Pension, gratuity, and superannuation pay aren't rewards, judges emphasised; they are "property." Persons have a right to them. They command the protection of Article 300A. To withhold pension is to deprive a person of his property, the judges seem to hint. The state was directed to pay out in full, for no law authorised such docking.

Srivastava was under an investigative cloud. Yet, his pension couldn't be withheld.

Most banked Indians aren't suspected of any wrongdoing. To restrict their accounts is to interrupt their orderly lives, violate their plans and, hurl them into crises. If this isn't deprivation, it means nothing at all. As the supreme court once put it, to deprive is to interfere with the right to enjoyment of property. The rules on cash rationing certainly do that.

Lawful deprivations

Cash is property and restricted access, even transitory, is deprivation. A law, therefore, is necessary.

Prime minister Modi's address to the nation was accompanied by a "notification" under the Reserve Bank of India Act, 1934, section 26(2). The authority to restrict access to bank accounts, officials insist, comes from this RBI law.

But does it? Section 26(2) merely authorises the government to notify the RBI central board's decision to demonetise bank notes; nothing more, nothing less. It certainly makes no reference to bank accounts.

Perhaps an authority to restrict accounts may be implied, that is, read into, the provision? No.

Super Cassettes Industries is the owner of T-Series, India's largest music label. Radio City, India's first private Frequency Modulation (FM) radio station, began broadcasting Super Cassettes' songs in 2001 and financially benefited from it. This was odd: a third party exploiting the copyrighted works of another entity.

Copyright law confers on the creators of original works a bundle of rights. These rights are exclusive to the copyright holders; they count as property. The law also recognises an exception: compulsory licensing. Simply put, the registrar of copyrights may grant a third party the right to exploit copyrighted works if the owner unreasonably refuses to make them available.

An important caveat: Under Indian law, a compulsory licence may be granted after both parties are heard and the matter is finally decided. Radio City, however, was granted permission early. Hearings were underway, and the matter awaited final disposal. Super Cassettes objected to this implied power to grant interim licences.

The supreme court agreed. Copyright, judges reiterated, is a property and, thus, constitutionally protected. "Law" in Article 300A, they clarified, refers to an explicit law. There's no room for tacit powers. The idea is simple: Deprivation is a big deal; it hurts people and violates their lives. Parliament must specifically confer the power to it; it cannot be inferred by reasoning.

This principle fatally undermines the government's claim about the RBI law. It does not explicitly authorise restrictions on bank accounts. Nor can it be inferred.

We are, then, left with a void. To limit access to bank accounts is to deprive persons of their property. But no law, it seems, authorises this. The policy is obviously in breach of Article 300A.

Why law matters

Former prime minister Manmohan Singh, in an unusually sharp retort, took the Modi government to task in parliament. He berated the policy and its execution as an "organised loot, [and] legalised plunder." Is there any country, he pointedly asked prime minister Modi, "where people have deposited their money in the banks but… are not allowed to withdraw [it]"? Singh should have continued: Is there any law, prime minister Modi, which authorises restrictions on the people's right to withdraw their deposits?

Soon, the supreme court will referee the legality of this policy. A battery of lawyers, for and against, will canvass many questions. The court, too, must do its part. It should ask what Singh did not: What law authorises this cash rationing?

It is worth belabouring: Policies, howsoever worthy, aren't exempt from the burdens of legality. The constitution, its laws, and limits matter. They aren't trifles, irritants awaiting sacrifice at the altar of popular will, fierce convictions, and righteous causes.

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