

November 27, 2016

The wall between the RBI and government must not be breached post-demonetisation - The Economic Times.pdf

Shubhankar Dam

04:05 PM | 28 NOV

MARKET STATS ▾

SENSEX

26,350 ▲ 33.83

NIFTY 50

8,127 ▲ 12.60

GOLD (MCX) (Rs/10g.)

28,737 ▲ 139.00

USD/INR

68.77 ▲ 0.30

CREATE
PORTFOLIODownload ET
MARKETS APPCHOOSE
LANGUAGE
ENG

View: The wall between the RBI and government must not be breached post-demonetisation

Updated: Nov 27, 2016, 10.39 AM IST

[Post a Comment](#)By **Shubhankar Dam**

Prime Minister [Narendra Modi](#) unveiled his [demonetisation](#) policy with an address to the nation and a gazette notification. Rarely has a government policy post-1947 affected so many Indians, honest or otherwise, so directly. The merits of the policy — its efficacy, proportionality and outcome — are still a matter of debate. What about its legality?

At least eight high courts and the Supreme Court have attracted challenges to the policy. The apex court, incidentally, has refused to transfer the petitions and hear them jointly. Some courts, though, have already rejected the challenge. The Karnataka High Court was among the first. On November 11, dismissing a petition, Chief Justice SK Mukherjee commended the move. It is a "good step," he reportedly said. "It is laudable and good for the economy." This conflates merits with legality. The two are distinct, and should be kept as such.



Demonetisation, once introduced, would have remained permanently valid. The Rajya Sabha would be powerless to prevent it.

The demonetisation was effected through a notification under the [RBI Act](#), 1934, Section 26:

"On recommendation of the Central Board the Central Government may, by notification" declare that any series of bank notes shall cease to be legal tender. Notice the onus in the provision: the board must recommend. The government is a conduit; it doesn't decide. It merely gives effect to the recommendation. An analogy will help. Imagine a statute that authorises a vice-chancellor of a public university to make an appointment.

The vice-chancellor must apply her mind and make the appointment. No one else may do it on her behalf. Similarly, the vice-chancellor cannot simply relinquish her power. She must decide or stand aside. Nor can she retrospectively approve an appointment made by some other body. She and she alone must apply her mind, and do so while making the appointment.

The principle behind all this is well-established. When a law empowers an authority, it excludes all else from exercising that power. No other body may cannibalise it. In *KN Guruswamy's case* (1954), the Supreme Court was emphatic: "Fetters imposed by legislation cannot be brushed aside at the pleasure of either the government or its officers."

A Secret Initiative?

All this applies to the [RBI](#) and its power to demonetise. So, did the RBI recommend demonetisation? If so, when was it done? Union power minister Piyush Goyal, defending the policy in the [Rajya Sabha](#), claimed that the decision was taken by the RBI board. But he soon contradicted himself. An ordinance, that is, a new piece of legislation, he said, was unnecessary because the PM was authorised to take the steps. Goyal cannot have it both ways. The RBI board needn't have decided if the PM is authorised to do it. Conversely, the PM cannot do it if the board is authorised to do so.

Importantly, Goyal's claim that the RBI board recommended the policy hasn't been independently confirmed. All indications, in fact, are to the contrary. RBI Governor Urjit Patel is curiously silent. Attempts to contact RBI officials have gone unanswered. Nor has the bank released the minutes of the meeting in which the policy was supposedly recommended.

Patel's silence, the absence of minutes, the haphazard implementation and the almost daily ad-hoc tweaks lend credence to what many believe — it was a sudden and secret PMO initiative, not an orderly RBI recommendation. Therein lies the legal rub.

To salvage itself, the government may point to its power in the RBI Act, Section 7, "to give directions to the Bank... in the public interest". Perhaps the board has been directed to demonetise in public interest? This, however, wouldn't help. Why? A specific provision always overrides a general one. A special power to demonetise is provided in the RBI Act. It shall take precedence over any general grant of authority elsewhere. Otherwise, specific powers are meaningless.

Another provision, RBI Act, Section 30, makes this clear. It authorises the central government to supersede the board if the RBI fails to carryout its obligations. Even then, the government cannot exercise the board's powers. It must appoint some other agency to perform them.

The proposition, therefore, couldn't be clearer: a wall separates the government from the RBI. They aren't one and the same. They are distinct entities with distinct powers, and must function as such.

In 1978, the Morarji Desai government understood this. Rather than notify, it "ordained" the demonetisation of the `10,000 note. Should PM Modi have taken a similar route? Perhaps he anticipated opposition in the Rajya Sabha. The high drama, the constant bickering, the repeated adjournments have proved him correct. Some of it,though, is of his own doing; he should have addressed both Houses.

What if the ordinance had failed in the Rajya Sabha? Here's the constitutional trick: it would have made no difference. All actions taken under a failed ordinance remain permanently valid. This is the current law of ordinances.

Demonetisation, once introduced, would have remained permanently valid. The Rajya Sabha would be powerless to prevent it. Over-caution, it seems, has brought about this legal dilemma for the Modi government.

The notification is unlawful; an ordinance wouldn't be. It is still an option, and far better than the cloddish attempts to generate government-sponsored evidence of public support for the policy.

(The writer, a constitutional expert, is a Hong Kong-based professor of law)

DISCLAIMER: Views expressed above are the author's own.

Stay on top of business news with The Economic Times App. [Download it Now!](#)

Live Market	News	Portfolio	Mobile	Live TV	Newsletter	Commodities	Speed	QnA	Blogs	Alerts	RSS
Other Times Group news sites		Living and entertainment		Hot on the Web			Services				
Times of India इकनॉमिक टाइम्स छत्रपती शिवाजी टाइम्स Mumbai Mirror Times Now Indiatimes नवभारत टाइम्स महाराष्ट्र टाइम्स ವಿಜಯ ಕರ್ನಾಟಕ Lifehacker Gizmodo Eisamay IGN India NavGujarat Samay		Timescity iDiva Zoom Luxpresso Gaana Happytrips Cricbuzz Get Smartapp		Budget 2017 Sensex, Nifty Live Blog Gold Rate US Presidential Elections Live Updates Festival Guide 2016 Google expected to unveil Pixel smartphones Live: India's surgical strikes on PoK			ads2book Gadgetsnow Free Business Listings Simplymarry Astrospeak Timesjobs Magicbricks Zigwheels Timesdeal dineout Filmipop Remit2India Gaana Greetzap Techradar Alivear Google Play				
		Networking									
		itimes MensXP.com									