Watch out, Narendra Modi is about to pull another sleight of hand to legalise demonetisation during this budget session — Quartz.pdf

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PARLIAMENT? WHAT PARLIAMENT?

Watch out, Narendra Modi is about to pull another sleight of hand to legalise demonetisation

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False dawn. (Reuters/Adnan Abidi)
Demonetisation, along with surgical strikes in Pakistan-occupied Kashmir, is the government’s signature feat, insist prime minister Narendra Modi, his ministers, and their minions. The monetary divestment, an experiment in audacity, for now, is entirely an executive conquest. Nov. 08, 2016: a notification; Dec. 30, 2016: an ordinance.

A legislative battle, though, is imminent. Parliament will spring into session this week. The opposition, at once, will train its artillery on the Specified Bank Notes (Cessation of Liabilities) Ordinance, 2016. The decree will sustain adversarial fire; it may succumb to it, too.

The Modi government must have primed itself for this. It must have a plan. Perhaps, render the upper house irrelevant, and veneer the ordinance with a hint of legislative legitimacy.

The plan is simple and direct. Still, it won’t be smooth sailing. Why?

**Lowering the upper house: predatory ideas**

Inaugurated into office on May 26, 2014, Modi has since wrestled with an irksome reality: His government is in a minority in the upper house. This matters. Legislative proposals—bills—become laws only if majorities in both houses approve them and the president signs his assent.

The constitution, however, occasionally, lowers the upper house. It neuters it. One such occasion: legislation of a money bill.

A money bill regulates taxes, borrowings of and guarantees by the Indian government, and payments from and receipts into the consolidated and contingency funds of India—the two principal accounts of the Indian government. In short, a money bill deals with government monies.
A sharper lens reveals a nuance. Slow-read the prefatory words of Article 110: “[A] Bill shall be deemed to be a Money Bill if it contains only provisions dealing with all or any of the following matters -”.

Noticed the “only”? It narrows the arc. A money bill doesn’t just deal with monies—it deals only with monies. Insert things other than taxes, borrowings, guarantees, payments, and receipts into a bill and it is no longer a money bill.

This definitional narrowing was by design. In May 1949, Ghanshyam Singh Gupta, a constitution framer, batted for a relaxed definition. He urged against the “only.” The constituent assembly, the body that enacted the constitution, vetoed his idea. The framers wrote what they meant: Only finance or money-related bills are money bills.

Who certifies a money bill? The speaker of Lok Sabha, the lower house.

Once certified, usual parliamentary procedures are cast aside. The upper house immediately stands defanged. It can parley over the bill; it can’t prevent it. It can suggest changes; it can’t compel the lower house to accept them.

All this makes a money bill prized. A government bridled in the upper house has reasons to resort to it.

Unsurprisingly, the Modi government has resorted to it.

In March 2016, parliament enacted the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016. Two months later, in May 2016, parliament enacted the Insolvency and Bankruptcy Code, 2016. Both were legislated as money bills. Why?
The bills did many things. Incidentally, they made perfunctory mentions of the consolidated fund. They referred, needlessly, to payments out of or received monies into the fund. And that, the government insisted, was enough to make money bills out of them. A pliant Lok Sabha speaker, Sumitra Mahajan, acquiesced. No questions asked.

It was a foul raid—an insidious assault on Article 110 to wrench it of its carefully crafted limits. It lowered the bar. Now any bill is potentially a money bill.

The Modi government, it is safe to surmise, will summon a similar script to legislate its demonetisation ordinance.

It may be on firmer terrain this time. There’s precedent for it, too. In 1978, prime minister Morarji Desai also legalised his High Denomination Bank Notes (Demonetisation) Act, 1978, as a money bill.

The government, then, looks set. The pieces are in place. A willing speaker, an alternative route, a useful precedent, and a confirmed lower house. The ordinance will soon be enacted into legislation.

Not quite. There are procedural gales headed its way.

**The constitution returns from wonderland**

Ordinances are an oddity. They are like parliamentary laws. But they are made when the parliamentary chambers aren’t in session.

It is an arrogant power. The constitution—Article 123—provisions for it. Fearful of excesses, it provisions a suite of safeguards, too. Ordinances are temporary; they must be presented to the chambers on their return; and they lapse if the chambers don’t legislate them properly.
Of concern to us: the second safeguard.

It says: “Every such Ordinance shall be laid before both Houses of Parliament.” Notice the adamant words—they shoulder a clear command: “every Ordinance”; “shall”; “both Houses.” Every ordinance shall be laid before both houses. No exceptions.

Have governments obeyed? Not always, not everywhere. Not in Bihar certainly.

In 1967, a repulsive practice took hold in that state. The executive arrogated the power to legislate. Ministers toiled at an elaborate fraud: They issued ordinances, reissued them, and kept doing so.

But these ordinances never made it to the legislature. Governments didn’t table them; legislators didn’t demand them, either. It was a symbiotic apathy. To them, the safeguard didn’t exist, or didn’t mean what it said.

In Lewis Carrol’s Through the Looking-Glass, Humpty Dumpty schooled Alice on words and meanings. “When I use a word,” Humpty Dumpty scornfully said, “it means just what I choose it to mean—neither more nor less.” Alice, perplexed, replied: “The question is whether you can make words mean so many different things.”

Bihar’s executive clearly thought it could. Not the supreme court, though.

Words do have meanings, the court said. We aren’t at liberty to lather them into senseless jumbles, not Humpty Dumpty, not the Bihar government. The safeguard means only one thing: Ordinances—each one of them—must be presented to both houses. It is a constitutional necessity.
An otherwise welcome verdict, it places two provisions in conflict. Article 109: Only the lower house of parliament has a preventive role against money bills. Article 123: Both houses of parliament have preventive roles against ordinances—all ordinances.

What of an ordinance that is a money bill? Do both houses still play a preventive role or just one of them?

**Parliamentary procedure: trivia that matters**

In keeping with longstanding convention, the demonetisation ordinance will be tabled in both houses of parliament on the first day of the new session.

What then?

Ordinarily, two things will happen.

In both houses, members from the opposition benches will move resolutions opposing the ordinance. The finance minister, separately, will propose a motion to introduce a bill to make the ordinance permanent.

Parliamentary convention dictates that the resolution to disapprove the ordinance and the motion to introduce a bill based on the ordinance will be debated simultaneously but voted serially—first the resolution, then the motion. If the resolution succeeds, the motion automatically fails. The bill no longer proceeds.

This points to something important: Both houses can rebuff ordinances, even those that qualify as money bills.

None of this, however, is a cause for alarm for the Modi government. The resolution to disapprove the demonetisation ordinance will fail in the lower house. Its
fortified numbers will ensure that. Consequently, the motion to introduce a bill, the money bill, will succeed.

The upper house is a different matter. The government is in a minority. The resolution to disapprove the ordinance will likely succeed. Consequently, the motion to introduce the bill will fail.

What does disapproval mean?

It is a parliamentary condemnation—a rebuke—of the executive. There’s shame in it. The executive, it suggests, overstepped its constitutional authority and wrongly promulgated the ordinance. It suggests the government breached Article 123.

Only on three occasions has the upper house disapproved ordinances: in 1991, 1997, and 2002 respectively. It is a rare occurrence. The demonetisation ordinance will register itself alongside this unpleasant record.

What then?

Reddened by a rare rebuke, the Modi government could give up on the ordinance. Of course, it won’t. It will seek an alternative path to legislation.

The government may seek to reintroduce the bill. But this, too, will hit a wall. Specifically, Rule 228 of the Rules of Procedure and Conduct of Business in the Council of States, that is, the upper house: “A motion must not raise a question substantially identical with one on which the Council has given a decision in the same Session.”

Already disapproved, the demonetisation bill cannot be reintroduced in the same session. The rules bar a substantially identical motion.
There isn’t a simple path forward. The government must negotiate its motion out of the rule.

**New age of parliamentary disregard**

Maneuver past the upper house rules, and Modi will get his demonetisation law. Protected by a special procedure—the money bill route— the ordinance this time will alchemise into a legislation.

But other ordinances and bills?

At least two more ordinances are pending: one new, the other ominously old. This latter one has been repromulgated four times—a sad high in our parliamentary annals. Reissuing them to prolong their legislative life will be unconstitutional, the supreme court has recently intoned.

It is no longer an option.

Neither are joint sessions of parliament. They are procedurally laborious to summon—a fact figures confirm. Nearly 70 constitutional years have seen just three legislative joint sessions.

How, then, to legislate? More “money bills”?

Modi and Mahajan may resume their heist of Article 110. They have assaulted it before. In pursuit of legislative gains, they may do it again. Each instance of abuse will normalise the next. It is a classic script.

Modi’s raid on Article 110 is reminiscent of the violence the Nehru-Gandhis wrought on a fellow exception: Article 356. It, too, is a sinister provision. It invests the central government with the tyrannical power to impose president’s rule in the
states: Dismiss state governments in “appropriate” situations, and arrogate their administrations.

India, thus far, has endured 124 instances of president’s rule. Of these, 64 instances, more than half, were commanded by Jawaharlal Nehru, Indira, and later Rajiv Gandhi. They dismissed governments at will: in the mornings and evenings, on middays and midnights. They did so, mostly, without reason. They did so, mostly, in breach of constitutional meaning.

This abuse has almost ceased to be, courtesy a powerful supreme court verdict in 1994.

In disfiguring Article 110 and unveiling a new age of parliamentary disregard, Modi wouldn’t break away from the Nehru-Gandhi tradition, he says he loathes—he will break into their pantheon.

To all sides, for assorted reasons, that is an agonising prospect.

*We welcome your comments at ideas.india@qz.com.*