

Demonetisation as such may not be unconstitutional, says top lawyer Nishith Desai

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NISHITH DESAI Leading lawyer

Whether Nov 8 move is constitutional will depend on closer examination of facts

Ever since the Centre announced its demonetisation decision, there has been a debate on how the move will impact the economy. However, a recent PIL filed in the Supreme Court has also raised questions on its legality. *BusinessLine* spoke to lawyer Nishith Desai on this. Excerpts:

Do you think the step to demonetise was arbitrary and unconstitutional?

Demonetisation is generally constitutional but whether this particular demonetisation is constitutional or not will depend on closer examination of more facts, which may not be available to the public right now.

Based on current facts, demonetisation *as such* may not be unconstitutional. Legally, the standard for determining whether an executive act is arbitrary (and possibly unconstitutional) has been explained by the Supreme Court in several cases. Interestingly, in 1981, the Supreme Court upheld the constitutionality of issuance of Special Bearer Bonds, which were issued to deal with black money in the Indian economy. The court rejected the challenge to constitutionality of issuance of Special Bearer Bonds in *RK Garg v. Union of India*.

While demonetisation may be an economic decision, it would need to be shown that it is based on clearly stated economic and fiscal objectives to claim it is not arbitrary. Additionally, merely because it is a policy matter, it does not per se exclude it from the scope of judicial review. The ultimate decision on constitutionality and legality would also depend on the powers of authorities to whom functions have been delegated under different statutes.

Does the design of the new currency violate the intent of Article 343?

Article 343 provides for use of international form of Indian numerals. The Proviso to the Article says:

Provided that the President may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union.

Therefore, the usage of Devanagari numerals may not be per se unconstitutional. It may be called an irregularity which the President by an order may be able to ratify. Since there is no authoritative pronouncement on usage of numerals by the Union Government, this may be subject to the court's decision.

The Centre says the demonetisation is meant to tackle black money. Do you question the intent or the outcome ?

As a matter of law, intent cannot ordinarily be challenged unless any prejudice is shown. The outcome will be evaluated based on bank remittances and recoveries from persons with undisclosed income. It may be premature to determine the outcome just yet.

How would you have implemented it in a way that makes life easier for everyone?

I would have issued government sponsored digital cash and given further support to crypto currencies like Bitcoin, and link related transactions with Aadhar. In any case, most Bitcoin traders like Unocoin and Zebpay have refused to accept cash and adopt strict KYC norms so that the government can have access to any illegitimate transactions. The importance of crypto currency needs to be quickly recognised by the government for the benefit of the most marginalised people, as there is no transaction cost and is safer than pure cash besides an ability to track trails of the transactions.

To tackle the issue of black money, more comprehensive measures are required, including long-term policies. We are not privy to measures which the government plans to roll out in the future and other decisions possibly already taken.

Please note, inconvenience is relative — but undoubtedly, concerns, particularly of the economically weaker sections, would have to be addressed.

There are reports that tax enquiries from hitherto non-tax paying sections have gone up...

Given the gross under-recovery of income taxes, efforts to ensure that the tax base is broadened will be good — it will be beneficial for the economy and people of India.

If you were to argue the case, what would be your key points?

In the absence of complete information, I cannot comment on this.

Has demonstration affected you personally?

Not at all but the poor service providers that our family engages with — vegetable sellers and street vendors — have been affected.

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