# Demonetisation Judgment
## Too Little Too Late

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The Supreme Court's judgment, upholding the constitutional validity of the demonetisation of ₹500 and ₹1,000 notes, is legally right but comes too late to be of any appreciable legal interest. It highlights the phenomenon of the Court determining the outcome of a case without actually deciding the case, and raises worrying questions about the abdication of responsibility by the Court.

Was the 2016 demonetisation of the ₹500 and ₹1,000 notes legally valid? The question which probably had relevance in 2016 has become stale in 2023. The answer afforded by the Supreme Court in *Vivek Narayan Sharma v Union of India* (2023) that indeed it was legal is, at best, academic. Nonetheless, the five-judge bench judgment provides the public a glimpse into the exercise and also an occasion to reflect on the demonetisation itself.

In this column, I propose to go into the Court's interpretation of Section 26 of the Reserve Bank of India (RBI) Act, 1934, why it upheld the demonetisation exercise as legally valid and what the judgment tells us about the state of two institutions: the Supreme Court of India and the RBI.

The majority judgment in Vivek Narayan Sharma, on behalf of four of the five judges, was authored by Justice B R Gavai and the dissenting judgment by Justice B V Nagarathna. Reference to Justice Gavai's judgment should be assumed to be a reference to the views of the majority in the judgment.

### Legality of the Notification

The core of the legal challenge to the demonetisation move centred around the interpretation of the phrase "any series" in subsection (2) of Section 26 of the RBI Act which was invoked by the union government to demonetise the bank notes in 2016. The legal argument was that the union government could not use this section to demonetise "all series" of bank notes of any denomination as it did with the notification dated 8 November 2016.

Justice Gavai's judgment rejects this argument pointing out that applying the canons of interpretation, "any" can mean "all" unless the interpretation would go contrary to the intent of the law, while Justice Nagarathna argues that such an interpretation would not be sustainable.

On the face of it, Justice Gavai's interpretation is more legally sound and within the framework of the RBI Act itself. As I have argued in this column in the past (Kumar 2016), this is an interpretation that finds support in the General Clauses Act, 1897 and also in the past precedents of the Supreme Court (from other legislation) which the judgment cites.

The interpretation offered by Justice Nagarathna, on the other hand, contends that in this context, "any" cannot mean "all." Her judgment does not account for the provisions of the General Clauses Act which explicitly state that when a law uses the singular, it includes the plural as well. It is an altogether strange interpretation of the word "any"—that it means as many as possible so long as it does not include the entirety. In her view, any should mean "specified" or "particular," else the section would result in the powers of the union government being unguided and arbitrary. There is a conflation here of the RBI's role and that of the union government's—the RBI on its own cannot demonetise notes nor can the union government invoke its power under Section 26. The union government's power here is guided by the RBI, the expert body on matters of money and currency, and cannot be considered unguided and arbitrary merely because of its scope. One other way to approach it is, if the RBI were to do away with the ₹10 note entirely for sound reasons, would it have to necessarily wait for Parliament to make a law for just this purpose and not simply recommend the same to the union government?

Justice Nagarathna argues instead that demonetisation of all notes is possible only through the plenary legislation made by Parliament. While this is certainly a desirable way to do it, her judgment does not exactly point out why the Constitution intends that this is the only way to undertake such an activity.

At the heart of it, the petitioners' claims and Justice Nagarathna's dissenting judgment are the consequentialist

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reading of Section 26(2)—that because demonetisation had ill effects and caused undeniable harm, it must also necessarily be illegal and unconstitutional. While the failure of demonetisation to meet its stated objectives has been pointed out by experts over the years (PTI 2022; Chakravarty 2018), the legality of a governmental act does not depend solely on its intent or whether it met its intended purpose.

Legality is just one attribute of a governmental act (an important one, no doubt) but not the sole one. A legal action on the part of the government may be fiscally ruinous for the exchequer, may cause unhappiness and a reduction of general welfare among the people, and may bring international opprobrium. Equally, a measure that is fiscally responsible, supported by the majority and improves welfare may go contrary to the law and Constitution. It does not get attributed with legality or constitutional validity simply by virtue of being a good measure.

That said, the more important aspects of this judgment might lie in what they tell us about the two institutions at the heart of the discussion—the RBI and the Supreme Court.

### The RBI and the Supreme Court

It is quite telling that the RBI, which opposed the much smaller-scale demonetisation exercises of 1946 and 1978, was happy to go along with the much larger-scale demonetisation exercise of 2016. As the judgment notes, there was a back and forth between the RBI and the union government for six months in 2016 on the merits of demonetisation until it gave the recommendation that the same can be done. The Central Board of the RBI, having gone into the "pros and cons" of the move, recommended that the demonetisation exercise be carried out and even suggested a mechanism to implement it, with apparently minimal inconvenience to the public.

The Supreme Court obviously does not have the expertise or the competence to judge whether the RBI did its job properly on both of these metrics, and wisely declined to comment on the merits of these matters. The Supreme Court judgment gives us a rare glimpse into the manner in which the RBI functions and its role in the lead-up to demonetisation. Though the RBI and the union government may have followed the letter of the law in taking the decision to demonetise currency, it can hardly be said that demonetisation was implemented in a smooth manner with little inconvenience to the public or that it achieved all of its stated objectives, no matter what they may be. It raises the question though: Did the RBI do its job properly? In recommending the demonetisation exercise, did the RBI exercise its judgment properly? Did its recommendations on the implementation take into account the serious challenges that would be faced in trying to replace more than 85% of the currency overnight?

Even as these questions are left hanging, as other authors have pointed out, the RBI is being increasingly subjected to greater judicial scrutiny in the way it undertakes regulatory functions, even if it does not always result in the immediate

review of its actions in all situations (Datta 2023). Much of the material discussed in the judgment was not available in the public domain (Mathew and Vyas 2023), and the judgment has, among other things, brought to light the manner in which the RBI's stand in the demonetisation matter may have been ill-considered or influenced by the government's pressure to approve the exercise (Misra 2022).

However, the judgment equally exposes how the Supreme Court abdicated its responsibilities in the demonetisation case. While the challenges were filed within a few weeks from the announcement, the Supreme Court referred the challenges to a larger bench of five judges which delivered its judgment six years later. The order of referral simply framed a few questions and decided to refer the matter to a five-judge bench because of the "general public importance and the far-reaching implications" of the decision (*Vivek Narayan Sharma v Union of India* 2017). No doubt, the case has far-reaching implications and is of great importance, but nowhere does the court justify why the case needed to be heard by a five-judge bench.

By posting the case for a later date and to be heard by a larger bench, the court effectively decided the case without actually delivering a judgment. The judgment, such as it is, delivered by the five-judge bench, feels like an academic exercise without much bearing on the development of the law or in defining boundaries within which institutions may act.

The entire demonetisation exercise, starting with the notification and ending with the judgment, brings to mind a profanity-laden exchange at the end of the satirical, dark comedy film, *Burn After Reading* (2008) where a CIA supervisor and his underling, Palmer Smith have this exchange while reflecting upon the events shown of the film:

CIA Supervisor: What did we learn, Palmer?
Palmer: I don't know, sir.
CIA Supervisor: I don't [...] know either. I guess we learned not to do it again.
Palmer: Yes, sir.
CIA Supervisor: I'm [...] if I know what we did.
Palmer: Yes, sir. It's, uh ... hard to say.

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*Vivek Narayan Sharma v Union of India* (2017): 1 SCC 388.

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