

# INACCURATE DIAGNOSIS, DRACONIAN REMEDY

Relevant for: Indian Economy | Topic: Issues relating to Growth & Development - Public Finance, Taxation & Black Money incl. Government Budgeting

The Income Tax Act has, since 1989, provided for up to three times penalty on escaped tax. | Photo Credit: [Getty Images/iStockphoto](#)

India's fight against foreign black money has returned a whimper. The government's intent cannot be faulted, but since the problem itself was misdiagnosed, the ensuing legislative measures have been bereft of constitutional and economic common sense. They relied too little on persuasion, and far too much on browbeating. The economic results are nothing to rave about.

High on populism, low on constitutional wisdom, the Black Money Act was a draconian law that was bound to fail. At minimum tax rate of 60%, it gave marginal incentive for the hoarders to come clean. Lawmakers overestimated the writ of international laws and made no economically persuasive case. Resultantly, as of May 2019, the total untaxed foreign assets mined was 12,500 crore. Wholly recovered, this wouldn't even pay Prasar Bharati's bills for four years. Even this recovery was aided greatly by international exposes such as the Panama Papers in which the government's legislation had no role to play. In comparison, Indonesia recovered about 25 lakh crore under similar schemes. The government's initial obsession with browbeating had an ominous start. But, instead of doing course correction, it passed an even more confiscatory law, the Fugitive Economic Offenders Act.

The intent of both the laws could have been achieved by a few tweaks in the existing laws. The Income Tax Act has, since 1989, provided for up to three times penalty on escaped tax. Similarly, wilful attempts to evade taxes have, since 1975, been punishable with imprisonment of up to seven years. A protocol for automatic exchange tax information, under which India is now receiving data from Switzerland, was signed in 2011, as was the amendment requiring all citizens to disclose foreign assets with their domestic tax returns.

Post-May 2014, tax control policy is different only in three aspects, all constitutionally suspect. The first relates to retrospective application of tax and penal laws that are so confiscatory and brazenly discriminatory that they walk all over a citizen's right to life, carry on business and own property. The second is about shifting the burden of proof onto the citizen to establish that he is not an offender. Lastly, and this is what makes this new policy rather wicked, citizens can be subjected to criminal trial, without the taxman first proving that there has been tax evasion. The results of giving such unbridled powers to agencies have been disastrous.

The Enforcement Directorate, India's money laundering watchdog, secured conviction in less than 1% of case but attached assets worth 29,468 crore. In contrast, the agency's equivalents in the U.S. and the U.K. secured conviction in about 50% cases. The Income Tax Department's records were not inspiring either, hovering at near 2% conviction rates in Financial Year (FY) 2016-2017. A Comptroller and Auditor General report showed that in FY 2016-2017 — the demonetisation year — the number of raids more than doubled, as compared to FY 2013-2014, the last year of UPA-II; but in the same period, the undisclosed income detected was less than one-fourth the amount during the latter period.

In medical sciences, intrusive methods of treatment are generally resorted to when diagnosis shows evidence that less risky methods may not be restorative. But, India's fiscal policy seems to be driven by the opposite logic: intrusion first, diagnosis later.

No clear estimate of black money owned by Indians and stashed abroad is available. Between 2008 and 2012, various reports quoted anywhere between \$500 billion and \$1.5 trillion, some relying on estimates of a Swiss Bankers Association (SBA) report. These turned out to be false. James Nason, an officer of the SBA, has said that the SBA had never published any such report. In March 2019, National Institute of Financial Management reported to the Lok Sabha Standing Committee on Finance, that the estimate is about \$216 billion-\$490 billion. This is one-seventh the estimate quoted ahead of the 2014 elections. In essence, India's foreign black money problem was misdiagnosed and unverified, exaggerated numbers went into satisfying Parliament that draconian financial laws are justified.

For the judiciary, one question that arises is: if the conventional wisdom on black money was based on disinformation, should it take cognisance of it? If yes, how? For example, should the Supreme Court take a relook at its verdict in Ram Jethmalani's case against black money, especially to guide lower courts in their examination of financial crime allegations?

A democratic state cannot unjustly enrich itself by making citizens pay for what is not rightly owed. The belief that the government will act on principles of honour and good faith is an invaluable but fragile national asset, Nani Palkhivala wrote in an article in 1993. He said that fiscal system must have not just legality but also legitimacy. It is denuded of all legitimacy when there is a breach of faith on the part of the government in its dealings with the taxpayer.

International media called demonetisation, among the government's purported measures to fight the black money menace, as a 'massive theft of people's property'. Similarly, the announcement that 15 lakh will be deposited in each citizen's account was found to be nothing more than a political bait. In civil cases if a trustee breaches faith this way, trust laws provide recourse. As do penal laws in similar circumstances against agents, servants and even against wives. There is, however, no punitive recourse against political skulduggery. The doctrine of promissory estoppel deserves to be tried in political jurisprudence also.

The government should give up the belief that being an intrusive, browbeating confiscator enriches Indians. It doesn't. This approach is reminiscent of India's imperialistic past and, in its current form, is impoverishing us into an economic depression. The draconian fiscal laws must at once be repealed. Increased international cooperation, technological advances and banking penetration implodes black money more than any law or sermon on patriotism. India's war on black money can only be won through democratic, persuasive and economically-sound means.

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