



Enemies of the State

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The Enemy Property (Amendment And Validation) Act was passed in March' 2017. It is an amendment to the existing Enemy Property Act of 1968. Over the course of five decades the definition of 'Enemy' and 'Enemy Property' has changed. This amendment allows the State to confiscate the property held by the citizens of India whose ancestors may have migrated to Pakistan or China. The motivation for seizure of property from the citizens of India lies in the nationalism wave of the current government. The paper will highlight the changing status of Muslims in India since partition. Second, it will examine change in definitions of Enemy and Enemy property through legal analysis. Third, it will investigate the rationale for the recent amendment and economically analyze the outcome of such a move. New Institutional Economics will be invoked to understand such an action by the State. Fourth, the paper will determine whether the State aims at minimizing the transaction cost and attain neo-classical efficiency or rather attempt to favor certain interest groups.

Background

The aftermath of the Indian Independence in 1947 saw a despicable loss of human life and property. The violence engulfed Punjab and by September, 1947 it reached Delhi. Human beings turned into 'subjects' as they migrated across the Radcliffe line just to find a nation where they could settle. Muslims in India left their homes either voluntarily or involuntarily. Even though some of them left temporarily, in most cases these homes were considered abandoned and were used by the Hindu and Sikh refugees coming from Pakistan. The bureaucracy in India justified the exodus of Muslims as a requirement for rehabilitation of the refugees. The occupation of Muslim homes sparked further violence. The deteriorating conditions in Punjab prompted a discussion Joint Defence Council in Lahore on August 29, 1947 for the creation of the office of "Custodian of Refugee's Property".¹ Both governments agreed that the Custodian was meant to maintain the abandoned property and not recognize any occupation or seizure, till the time refugees return. To empower the Custodian, in September, 1947 the East and West Punjab Evacuee Property(Preservation) Ordinances were passed which were later extended as a legislation in Delhi as well. The conversion of Refugee property to Evacuee property led to the difference in treatment of abandoned property ensuring the displacements permanent. Refugees were now categorized in two categories, one of evacuees and other of displaced persons.² Thus, the office of the "Custodian of Evacuee Property" emerged. Considerably large number of property in the form of houses, agriculture land and businesses was left behind by Hindus and Sikhs in Pakistan. An ordinance passed by the government of West Punjab along with Evacuee Property legislation, appointed a rehabilitation commissioner who was vested with the power of taking over the abandoned properties and allotting them to Muslim refugees for a period of one year. At the end of the year an additional ordinance was passed whereby the sale or transfer of evacuee property could be done only by permission of the Custodian.

In response, Indian legislation was altered to do the same for the evacuee property in India. This process became further stringent after the Karachi Agreement, whereby a category of intended evacuee, i.e. persons who were getting ready to migrate were identified and their property was confiscated even before their migration. In Pakistan, the minorities were forced to prove their loyalty in order to stay in their homes otherwise compelled to evacuate. The reciprocity of one nation's action by the other nation led to the transformation of human lives into religious identities, who were once owners, now became refugees and finally evacuees.

From Evacuee to Enemy Property

Post-independence, India's two wars, with China in 1962 and Pakistan in 1965 led to the formation of Defense India Act and Defense Rules of 1962 with a view of preventive detention during wartime. It is in the defense rules of 1962 that the first time definition of an Enemy was stated. Accordingly, "Enemy" means³:-

- "(i) any person or country committing external aggression against India;
- (ii) any person belonging to a country committing such aggression;
- (iii) such other country as may be declared by the Central Government to be assisting the country committing such aggression;
- (iv) any person belonging to such other country;"

And "enemy territory" means-

- "(i) any area which is under the sovereignty of a country referred in sub-clause (f) or a country referred to in sub-clause (iii), of clause (c) of this section;
- (ii) any area which the Central Government may, by notification in the Official Gazette, specify to be enemy territory for the purposes of this Act or any rule made thereunder;"

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Once the definition of “enemy” was expanded from war waging state to include persons belonging (whether citizens of India or not) to the enemy State, the continued external aggression prompted the Indian government to pass the Enemy Property Act in 1968. According to this act, the definition of the enemy and the treatment of the enemy was defined in a better way. According to the Act,

““enemy” or “enemy subject” or “enemy firm” means a person or country who or which was an enemy, an enemy subject or an enemy firm, as the case may be, under the Defence of India Act, 1962 (51 of 1962), and the Defence of India Rules, 1962 2[or the Defence of India Act, 1971 (42 of 1971) and the Defence of India Rules, 1971], but does not include a citizen of India;

“enemy property” means any property for the time being belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm: Provided that where an individual enemy subject dies in the territories to which this Act extends, any property which immediately before his death, belonged to or was held by him or was managed on his behalf, may, notwithstanding his death, continue to be regarded as enemy property for the purposes of this Act;

“Custodian” means the Custodian of Enemy Property for India appointed or deemed to have been appointed under section 3 and includes a Deputy Custodian and an Assistant Custodian of Enemy Property appointed or deemed to have been appointed under that section;

Thus, the enemy was categorically specified in the act to be not a citizen of India thereby implying that Chinese and Pakistani nationals not having a citizenship of India were deemed as enemies and the property held by them was considered 'enemy property'. Further, the Custodian was vested with powers of retaining the enemy property as was confiscated after the Defence Rules, 1962. Any transaction by which property was transferred before or after the commencement of the Act, which maybe injurious to the public interest or was done to defeat the purpose of the act, was considered void but an opportunity to be heard was provided. The Custodian was authorized to preserve the property vested in him by incurring expenditures out of the property and also maintain the individual or his family left behind in India. Additionally, the Custodian could carry out business from that property, raise on the security of the property such loans, sell or mortgage or lease the property, incur out of property the expenditure to pay taxes, wages, salaries, pensions, etc. The Central government could direct the Custodian to either divest the property or return it to the owner. The Act gave a safeguard to the Central government and the Custodian against any suit or legal proceeding, so long as anything that was done or intended to be done in good faith.

In 1980, there were 389 enemy properties. Whereas in 2011, there were 2111, in 2014 there were 12090 and in 2016 there were 15143.⁴ This sudden increase in the number of properties can be attributed to the ordinance passed in 2010. This ordinance held that the property would continue to vest with the custodian even after death or extinction of the enemy despite the legal heir being an Indian citizen. The government was authorized to declare a transfer void if “(i) a transfer made through oral will or gift, (ii) transfer made by concealment of enemy nationality, (iii) a transfer made without the permission of competent authorities such as the Reserve Bank of India if such permission is required, and (iv) without the permission of the custodian.” The Custodian was empowered to sell the immovable property and divest it as ordered by the government. The Civil Courts retained the power of deciding whether a particular property is enemy property, however they could not direct the Custodian to divest the property.

The Enemy Property (Amendment And Validation) Act, 2017: Rhetoric v. Economics

With the new wave of nationalism, in March 2017 a new amendment was passed by the current government. The Enemy Property (Amendment And Validation) Act, 2017 has extensively altered the original act thereby changing the basic tenets of the Act. First, the definition of the Enemy includes the legal heirs even if they are citizens of India and enemy or enemy firms that have changed their nationality or the enemy firms whose partners are citizens of India or another country which is not an enemy. A property will be considered an enemy property even after death or change of nationality and will include all rights, benefits and titles arising from the property. The property will be vested with the Custodian and is provided with the powers of the civil courts to⁵ “(i) discovery and inspection of documents; (ii) summoning persons; (iii) calling for documents; and (iv) examining witnesses and document”. The Custodian is empowered to collect rent, licence fee and other charges accrued from the property. Further, the Custodian has no duty to maintain the enemy or his family in India and can evict unauthorised occupants, trespassers and remove unauthorised construction. The Custodian can sell the property and deposit the revenue in the Consolidated fund of India. This amendment will take place retrospectively, thereby classifying all properties as enemy properties according to the 2017 Act from the date of commencement of the 1968 Act. All transfers of divestments that had taken before this Act will be considered ineffective. Once this Amendment is implemented, it is expected that the revenue from the sale of immovable property earned by the government would be more than 1 lakh crores.⁶ The Finance Minister on 10th March' 2017 in the Parliament, laid the rationale for the amendment of the Act as follows⁷: -

1. Security and Integrity of a Nation: The enemy nation should not be able to wage a war or create internal security challenges through the Enemy Property.
2. Nationalism: The enemy nation should not profit from one's own soil. Deep rooted is the sentiment of Nationalism or Economic Nationalism, so that the State is uses the enemy property for furthering the economic interests of the nation.
3. Reciprocity: If the enemy nation has already confiscated the properties of the own State's individuals, thus the need to reciprocate.

It is evident that unfortunately instead of an economic rationale, it is the achievement of the Nationalism which has driven to such an amendment of the Enemy Property Act of 1968. The new amendment is going to have a detrimental effect on the citizens of India of Pakistani or Chinese origin. In most cases, even if the persons are of Indian origin and citizen of India, yet would be deemed enemy subjects due to migrating to the enemy nation by their ancestors. The Amendment is against the principles of natural justice.

This historical aspect of enemy property and the changing status of citizens of a nation at the hands of the government prompts an investigation of the rationale of Nationalism embedded in the Act. In the next section, I investigate economic efficiency of nationalism prompted by Hindutva ideology. I will further examine the economic reason for the State to promote an ideology which may yield an inefficient outcome.

Nationalism: Is it efficient?

The primary rationale provided by the State for the amendment is nationalism. The idea of nationalism of the present government is rooted in the ideology of “Hindutva” and thought of uniting a nation as one “Hindu nation”.⁸

Ideology plays an important role in the survival of the State as the property rights are then distributed in the favour of the powerful.

Economists view ideology as mental models used for structuring games/institutions⁹ for maximizing utility and obtain valued outcomes.¹⁰ According to North, ideology shapes the way people perceive fairness and justice and institutions are formal or informal rules of the game devised based on ideology.¹¹ Ideology defines the nature of the institutions and their evolution. Institutions are important as the incentive structure devised by them results in the kind of skill and knowledge development which is perceived to have maximum payoff. The institutional structure in pursuit to maximize output rest partly on the ideology it possesses as the individuals develop mental constructs from cultural heritage as well as from day to day information and problem solving.¹² This gets embedded into the mind and results in construction of lop sided distribution of property rights. Whereas certain new institutional economists like Williamson and Downs hold that institutions based on belief systems will result in slow progress¹³ and ideology is a short run phenomenon as voters are concerned with performance and not party statements.¹⁴ Others like Lin, Acemoglu et. al. and North contend that ideology is embedded in economic growth of a nation¹⁵ and utility function needs to be enlarged in order to encompass ideology.¹⁶ According to Lin, the supply of selective incentives makes ideology useful. It reduces the information cost and covers the problems of free rider and moral hazard.¹⁷ Becker maintains that if loyalty enters the utility function then the tendency to free ride is drastically reduced as the individual does not want violate the rules which are now placed at a high level in his ideological faith.¹⁸ Since the conviction is very high, the act of taking a risk for which the cost will be borne by the Political party, the problem of moral hazard dwindles.

Thus, from the amendment and its rationale, it is apparent that present government wants to pursue a particular ideology of "Hindutva" whereby the free rider and moral hazard problem will be reduced by distributing the property rights in favour of the interest groups. This would help maintain an ideology by prompting the majority of the nation to agree to this kind of redistribution of resources as long as they view their own ideology being victorious. The amendment would most certainly lead to marginalization of Muslims, thereby instilling a sense of superiority and security amongst Hindus, who would now be more likely to agree to various policies and institutions proposed by the present government. This would warrant alleviation of free rider problem in future just as the citizens would consider it their duty to abide by the rules due to high moral conviction. Even when the voters and the political party had varied interests, the ideology of 'Hindutva' is likely to align their interests thereby economizing on the information costs, dissipating moral hazard and ensuring a majority vote in favour of the BJP in future.

The rationale of reciprocity and nationalism invariably implies that the property rights will be confiscated from the individuals and placed at the hands of the state which will have the power to exclude and alienate others from using it. However, in doing so the transaction cost of acquiring information about the property, monitoring and negotiations will be very high. The government has tried to reduce the transaction cost of negotiation by having a provision in the amendment that the citizens cannot approach the Civil Courts against the State.

Yet, the rest of the transaction costs will still be significant due to retrospective application of the amendment.

This would lead to an enforcement of property rights that are inefficient. Both economic as well as political actors aim at economising on transaction costs, in order to attain efficiency. However, the goals of both the actors differ due to one important factor of 'Power'. The political agents will rather incur high transaction costs if that could weaken their political adversary. Thus, economic efficiency may not be the fundamental intent in economic institutional building. The standard neo classical economics propounds that the property rights will distributed by the State in such a manner so that individuals are able to get the benefits of specialization, thereby increasing economic efficiency. In contrast to the theory, the State doesn't distribute property rights that are efficient.¹⁹ The State is more concerned about a steady flow of resources for future campaigns and would thus want to distribute property rights in a way which will not estrange the powerful constituents. If the opportunity cost of efficiently distributing the property rights is very high in terms of alienation of powerful citizens, then such a distribution will not take place. The only transaction cost that the State is worried about is the is the cost of measuring and taxing the economic activity. Further, the demand for efficient property rights emerges from economic actors when it suits their interest and not because of society's interest. Thus, the concept of distribution of property rights by the State even when it is efficient is to satisfy powerful actors and therefore, invariably end up being lop-sided. This is also the reason that the State alters property rights in anti-competitive direction. In the case of the above amendment, it is clear that it is going to lead to inefficient distribution of property rights and will result in socially inefficient outcome with humongous transaction costs. The process of selling the enemy property to the highest bidder²⁰ has already begun thus highlighting the redistribution in favour of the powerful.

Conclusion

From 1947 to 2018 the marginalization and vilification of Muslims in public life has seen shifting set of form from refugees to evacuees and now enemies, despite being citizens of India. As the enemy property is being confiscated and being sold at an auction, the apparent justification by the government seems to be of putting the resource in highest valued use, thereby ensuring efficiency. However, the highest bidder may not be able to put the resource to the most productive use e.g. property may be bought by the real estate agents and would lead to a speculative investment rather than a productive investment. On the other hand, government can choose to apply the principles of equity to dispose of the property. The main argument offered by the State agents is that the enemy property belongs to the wealthy Muslims and is distributive inefficient. I propose that legal mechanisms should be developed whereby the property gets distributed efficiently amongst the Muslims who are below the poverty line. As the poor are already deprived in endowment i.e. assets such as land, labor, savings, etc., they are also disadvantaged in entitlements i.e. ability to translate endowment into goods.²¹ If the government can provide endowment to the underprivileged Muslims in the form of property rights which will transform into entitlements in the form of social and political rights then social exclusion could be eradicated by making the poor Muslims capable. This will prevent a socially inefficient outcome and would translate into higher economic growth.

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