

RGICS



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RGICS
LEGISLATIVE BRIEF
(March, 2017)

The Enemy Property (Amendment & Validation) Bill,
2016

KEY MESSAGES

- The provisions of the Bill may be legally flawed as the Government has not provided a rationale for how enemy property inherited by an Indian citizen can still be termed as enemy property. The Bill also does not provide rationale for transfer of ownership of enemy property to State which would be tantamount to nationalization and would potentially violate rights of the successors without justification. Bonafide onus of property is being deprived from non-enemy owners. It is not clear under what legislative power the Government would take this action. The provisions of the Bill have been widely criticized and are contrary to the Supreme Court's judgment on the issue of enemy property.
- It is a communally biased and politically motivated legislation which has received widespread criticism. Since properties owned by enemies of Chinese origin are very few, the Bill would primarily target properties owned by enemies from Pakistan and Bangladesh, which are both Muslim dominated countries. Further, there has been a sudden increase in identification of enemy properties in states with high proportion of Muslims like Uttar Pradesh and West Bengal. This may be construed as discriminatory and anti-minority and espouses the Government's majoritarian stance.

PART I: THE BIG PICTURE

NDA Government may have found another way to push the anti-Muslim agenda by introducing legislation which will have strong implications for the Muslim community. This can be seen in three examples of legislation which may attack the citizenship rights and cultural rights of Muslim minorities, i) The Uniform Civil Code ii) The Citizenship (Amendment) Bill, 2016 and iii) The Enemy Property (Amendment & Validation) Bill, 2016.

The Uniform Civil Code

When asked to opine on whether UCC is targeting the minorities, Flavia Agnes, a well-known woman's rights lawyer stated that "Yes, it is. The questionnaire circulated by the Law Commission seeking a public view on triple talaq is targeting Muslims and this has resulted in a backlash among the Muslims and caused polarisation of communities. In a 2002 ruling, Shamim Ara already lay down the correct procedure through which a Muslim couple can get divorced and invalidated triple talaq. But this landmark judgement did not receive much media publicity. It is important to know about this judgement and use it when Muslim women are given arbitrary triple talaq. That would have been far more effective than approaching the Supreme Court and challenging triple talaq, which has now led to the present controversy. If an issue is already decided, what is the point of again asking for the same relief from the Supreme Court, that too in a communally vitiated manner? The way the questionnaire has been formulated and the response of Muslim organizations like AIMPLB etc. indicates a polarisation. Both men and women Muslims will rally around the board. Now it is difficult to bridge the gap and bring about a consensus. How can this bring about national integration? If national integration was the aim, then the approach had to be different."

"Convention on the Elimination of all Forms of Discrimination Against Women was signed in 1993 with a reservation that section 16 which deals with uniform personal laws, was not attested. This is because it was felt that a compulsory uniform civil code cannot be enforced. The present government seems to have gone back on this position."

Thus, the Government has changed its position on UCC and the move may not be aimed at national integration, which was the original purpose of the Code in the Constituent Assembly debate on Directive Principles, Article 44 of the Constitution. ¹The Governments proposal on UCC is considered by many experts to be an attack on the personal laws of the Muslim minorities in India.

The Citizenship (Amendment) Bill, 2016

The Citizenship (Amendment) Bill, 2016 was enacted to provide for the acquisition and determination of Indian citizenship. Under the existing provisions of the Act, persons belonging to the minority communities, such as Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan, who have either entered into India without valid travel documents or the validity of their documents have expired are regarded as illegal migrants and hence ineligible to apply for Indian citizenship. It is proposed to make them eligible for applying for Indian citizenship.² The Bill seems to aim to save religious minorities from violence and blasphemy laws in Pakistan, Bangladesh and Afghanistan. The rationale for selecting just these three countries, which are Muslim dominated countries, seems to be cause for concern. The Bill at first glance seems like a humanitarian effort to help persecuted minorities but, it only seeks to help Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from the neighboring Muslim countries. The Muslim minority communities facing oppression in the region have been completely ignored. If the Bill was really an attempt to provide a safe haven for minorities facing violence in their countries then, it would also offer the same provisions to the minority Muslim community in China and Myanmar as well. The Rohingya Muslims in Myanmar and the Ahmaddiya Muslims in Pakistan and Bangladesh have been facing persecution for years. Further, the Burmese Hindus have also been ignored in the Bill. The Bill aims to reduce criteria for citizenship from eleven years to six years for Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan but, does not allow Muslims staying in the country for six years to gain citizenship.

¹ Part IV, Directive Principles of State Policy, Article 44, Constitution of India

² The Citizenship (Amendment) Bill 2016: Statement of Objects and Reasons

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Also, the Bill brought back the debate regarding the issue of ‘foreigner’ in Assam. “In pursuance of a bid to make golden Assam, All Assam Students Union (AASU) launched the Assam movement in 1979 demanding the detection and deportation of foreign nationals (especially Bangladeshis) illegally living in Assam as AASU assumes that their existence poses a threat to the socio-economic condition and demographic pattern of Assam and the movement had continued for six years resulting in a huge loss of life and property during the movement period as a result of violence in Assam. After six long years, the Assam movement came to an end after signing the historic Assam Accord on 15 August 1985. The Government has tried to politicise and communalize the foreigner issue by demanding the refugee status for Hindu foreigners and the expulsion of Muslim foreigners from Assam. It aims at polarising the voters of Assam on communal line and thereby trying to derive narrow political mileage.”ⁱ

This is a discriminatory clause for granting citizenship and seems to follow the trend of anti-minority legislations.

The Enemy Property (Amendment & Validation) Bill, 2016

The latest Bill which fits the trend of anti-Muslim legislation is the Enemy Property (Amendment & Validation) Bill, 2016. The Bill makes it clear that courts would have no jurisdiction over occupation of properties which have been left behind by those who went to Pakistan at the time of Partition. Enemy properties in Mumbai under the jurisdiction of Custodian include Rs 310 crore worth fixed deposits, treasury bill and government stock, Rs 177.6 crore worth bank balance and Rs 37.54 lakh gold and silver jewellery as on 31 December 2015. It is believed there are several thousand crores of rupees worth of 'enemy properties' spread across the country. The Government also seems to be supporting the Bill to control dissent in the country as the Bill leaves no judicial recourse. SP chief Mulayam Singh said the bill would “snatch the rights of the Muslims who stayed back in India” and went against a Supreme Court verdict which had granted them the right over properties which were left behind by their forefathers. “It is a bill that would make Muslims second-class citizens and create an inferiority complex among them,”

After being passed in Lok Sabha, opposition parties labeled the Bill “anti-minority”. Barring TMC and AIADMK, all other Opposition parties wanted it to be sent to a Standing Committee before being passed. Section 18B of the Bill states that no civil court or other authority shall entertain any suit or other proceeding in respect of any enemy property. The Congress party claimed that the Bill will “adversely affect the rights of lakhs of Indian citizens and principally... of the Muslim community”. According to the Congress, there are not too many Chinese properties at stake, and the Bill essentially affects properties of those who went to Pakistan, who “tend to be from only one community”.

The Bill was opposed by members of four political parties in the Select Committee Report when it was tabled in Rajya Sabha. The representatives of the four parties — K C Tyagi (JD-U), K Rahman Khan, P L Punia and Husain Dalwai (all Congress), D Raja (CPI) and Javed Ali Khan (SP) believed that while the original law was balanced, the new provisions violate the basic principle of natural justice, human rights and principles of law. They further stated that while the provision will not have any effect on enemy governments, it will adversely affect lakhs of Indians. The Committee strongly recommended that proper investigation and due and transparent process must be followed during identification and declaration of enemy property. Together the four parties account for around 94 members in the 245-member House.

The NDA Government does not enjoy majority in the upper house and therefore the Bill is unlikely to pass considering the opposition it faces. Meanwhile, the NDA government has been misusing ordinances to guard against claims of succession or transfer of properties left by people who migrated mostly to Pakistan after the wars. No ordinance has ever been promulgated five times, and they lapse in six weeks of a parliament session being convened. Even the President commented that ordinances should be issued only under “compelling circumstances”. He further also stated,

“To meet certain exigencies and under compelling circumstances, the framers of the Constitution deemed it necessary to confer limited legislative power upon the executive by way of promulgation of ordinances when the legislature is not in session and circumstances justified immediate legislation. The framers also deemed it necessary to impose certain restrictions on this extraordinary legislative power by constitutionally mandating replacement of such ordinances within a timeframe by the legislators”

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Despite the opposition, the NDA government has stated,

“Taking advantage of the interpretations of various judgments passed by the courts, claims are being made to regain these properties by the legal heirs and successors of the enemy nationals. To prevent the vested properties, the ordinance for the first time was promulgated on January 7, 2016.”

“The amendments are aimed at plugging the loopholes in the principal Act to ensure that the enemy properties worth thousands of crores of rupees vested in the custodian do not revert to the enemy, enemy subject or enemy firm. Thus, in the larger public interest and to safeguard the interest of central government, the Enemy Property (Amendment and Validation) Fifth Ordinance, 2016 (8 of 2016) has been promulgated”ⁱⁱ

Thus, this legislation may curb the voices of the Muslim minorities and infringe on their property rights and right to judicial recourse.

The Government seems to subscribe to the political philosophy of majoritarianism which asserts that the majority of the population is entitled to enjoying a first-class citizenship while the minorities are treated like second class citizens. This philosophy has no place in a democracy like India where the Constitution protects the rights of the minorities and espouses the principles of equality and equity. India has no right to comment on Donald Trump’s policies for being anti-minority, especially anti-Muslim, as our Government’s policies also seem to be treading along the same lines.

The Enemy Property (Amendment & Validation) Bill, 2016

PART II. INTRODUCTION

The Enemy Property (Amendment & Validation) Bill, 2016 was introduced in Lok Sabha on March 8, 2016 to replace the Enemy Property (Amendment and Validation) Ordinance, 2016 promulgated by the President on 7th January, 2016. It was passed by Lok Sabha on March 9, 2016. The Bill was referred to a Select Committee by the Rajya Sabha on March 25, 2016. The Bill seeks to further amend the Enemy Property Act, 1968 and the Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

The background note on the Enemy Property (Amendment and Validation) Bill, 2016 as furnished by the Ministry of Home Affairs stipulates that in 1962, in the wake of Chinese aggression, the Custodian was called upon to take charge of the Chinese assets in India with the object of vesting the movable and immovable properties of the Chinese subjects left in India under the Defence of India Rules, 1962 specifying the enemy nationals and the properties held by them. Similarly, in the wake of the Indo-Pak war of 1965 and 1971, there was migration of people from India to Pakistan. Under the Defence of India Rules framed under the Defence of India Act, the Government of India took over the properties and companies of such persons who had taken Pakistani nationality. These enemy properties were vested by the Central Government in the Custodian of Enemy Property for India (CEPI). India and Pakistan signed the Tashkent Declaration on 10.01.1966, which inter alia included a clause, which said that the two countries would discuss the return of the property and assets taken over by either side in connection with the conflict. Clause VIII of the Tashkent Declaration read as follows:

“The Prime Minister of India and the President of Pakistan have agreed that the sides will continue the discussion of questions relating to the problems of refugees and evictions/illegal immigrations. They also agreed that both sides will create conditions which will prevent the exodus of people. They further agreed to discuss the return of the property and assets taken over by either side in connection with the conflict.”

However, the Government of Pakistan unilaterally sold or otherwise disposed off all the enemy properties and assets, movable and immovable, of Indian nationals, firms, companies etc. in their country in the year 1971 itself. While in India, the enemy properties continue to vest in Custodian of Enemy Property for India (CEPI). In this background, The Enemy Property Act, 1968 was enacted on the 20th August, 1968 by the Government of India. The Enemy Property Act as amended in 1977, provides for the continued vesting of enemy property vested in the CEPI under the Defence of India Rules, 1962, and the Defence of India Rules, 1971 and the matters connected therewith. The Central Government through the CEPI is in possession of enemy properties spread across many States in the country. The properties vested in the CEPI include both movable and immovable properties.ⁱⁱⁱ At present, total number of immoveable enemy properties belonging to Pakistani nationals are 9,280 comprising of 11,882 acres. The value of the total vested immoveable properties stands to the tune of Rs. 1,04,340 crores. Moveable vested properties consist of shares in 266 listed companies having valuation of Rs. 2,610 crore; shares in 318 unlisted companies with a value of Rs. 24 crores; Gold and Jewellery with a value of Rs. 0.38 crores; bank balance of Rs. 177.60 crores; Investment in Government securities of Rs. 150 crores and Investment in Fixed Deposits of Rs. 160.58 crore. Besides this, there are 149 immovable enemy properties of Chinese nationals vested in the Custodian, spread over in States of West Bengal, Assam, Meghalaya, Tamil Nadu, Madhya Pradesh, Rajasthan, Karnataka and Delhi.

“The Enemy Property (Amendment and Validation) Ordinance, 2016, comes at a time when Raja Mohammad Amir Mohammad Khan, known as Raja Mahmudabad, is fighting a legal battle in the Supreme Court³ to get back his property from the "custodian", entitled to him by a previous Supreme Court order. In October 2005, Khan had won a 40-year battle to free his inheritance from the

³ In its judgment in Union of India Vs Raja MAM Khan, 2005 (8) SCC 696, the Supreme Court on 21 October, 2005 held that:

- (a) On the death of an “Enemy”, the property devolves in succession and ceases to be “Enemy Property” if the successor is a citizen of India.
- (b) The Enemy subject has the power to sell the property by virtue of section 6 of the Act.
- (c) The Custodian has no right or title in the property and the Enemy continues to have the right, title and interest in the property.
- (d) Natural legal heirs and successors, who are “citizens of India” would be entitled to the property under the “Law of Succession”.
- (e) The Central Government does not have absolute power for divesting under section-18 of the Act and the power of the Court is not taken away to pass an appropriate order in a case where the property which vested in the Custodian ceases to be Enemy Property.
- (f) On divestment of the property, the divestee would be entitled to the actual mesne profits by filing a suit, if so advised.
- (g) The Custodian’s power is limited to managing, preservation and control of Enemy Property for a limited purpose and for a temporary period only. A Review Petition filed by Union of India was dismissed on the 16 December, 2005. Consequently, the judgment was implemented.

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infamous tag of "enemy property". Raja Mahmudabad's father had migrated to Pakistan in 1957, while his mother, Rani Kaniz Abid, and he chose not to migrate and remained Indian citizens at all times. In 1965, after hostilities between India and Pakistan broke out, the Enemy Property (Custody and Registration) Order, 1962, was issued. Under this, all immovable properties in India belonging to Pakistani citizens were taken over by the custodian. This vesting of property continued till 1977. Reacting to the amendments that have been brought with the new ordinance, Raja Mahmudabad, whose assets are spread across Uttar Pradesh and Uttarakhand, said: "The matter is sub judice. But, as I understand, the Indian government is trying to take away rights of the Indian citizen. I am fighting that."

It was in 1973, when his father died in London, that Raja Mahmudabad inherited properties under the Oudh Estate Act, 1869, and as a citizen of India himself, contested that he be handed over the properties. When Raja Mohammed Amir Ahmad Khan had won a long battle in the Supreme Court over his property worth millions, the Home Ministry in July 2010 issued an ordinance blocking all legal heirs from going to court to reclaim enemy properties. The Home Ministry told Parliament that the court's orders were diluting the powers of the custodian, and the Government of India, vested in the 1968 Act. Immovable property worth hundreds of crores of rupees would go to persons making illegitimate claims, said the Government, as it issued the ordinance." There are many Indians like Raja Mahmudabad who are fighting for their rights for legitimately inherited or bought property. ^{iv}

The Statement of Objects and Reasons of the Bill says that in view of various interpretations of the provisions of the Enemy Property Act, 1968 by various courts, the Custodian is finding it difficult to sustain his actions under the Act. It has, therefore, become necessary to amend the Enemy Property Act, 1968, inter alia, to clarify the legislative intention with retrospective effect. The Bill amends the Enemy Property Act, 1968, to vest all rights, titles and interests over enemy property in the Custodian. It declares transfer of enemy property by the enemy, conducted under the Act, to be void. This applies retrospectively to transfers that have occurred before or after 1968. Further, it aims to prohibit civil courts and other authorities from entertaining disputes related to enemy property. The Act allows transfer of enemy property from the enemy to other persons. The Bill declares all such transfers as void. This may be arbitrary and in violation of Article 14 of the Constitution. It prohibits civil courts from entertaining any disputes with regard to enemy property. It does not provide any alternative judicial remedy (e.g. tribunals). Therefore, it limits judicial recourse or access to courts available to aggrieved persons. Various recommendations were made by the Select Committee but, only one amendment has been incorporated. Further, the dissent note submitted stated that the Bill violates the very basic Principle of Natural Justice, Human Rights and settled principles of law. Furthermore, it adversely affects and results in punishing lakhs of Indian Citizens and will have no effect on any Enemy Government. It also stated that succession, which is automatic, cannot be stopped by bringing in any legislation, which is settled law in India and across the globe. The principle of Natural Justice must be upheld and that the Courts should have power to adjudicate on matters related to enemy property. Thus, the debate on Enemy Property in Rajya Sabha will be very heated and the ordinance may lapse again.

PART III: KEY PROVISIONS

The Supreme Court in **Union of India & Another vs Raja Mohammed Amir Mohammad Khan**⁴ has clearly stated its stance on Enemy Property. The judgement states that:

- 1) **Owner is not divested of title:** Due to vesting of the property in the Custodian, the owner is not divested of his right, title and interest in the property as under the Act title does not come to vest in the Custodian.
- 2) **Vesting with Custodian was temporary:** The vesting is limited to the temporary taking over of the possession, management and control over the property only. Reading of Section 18 makes it evident that divesting the custodian of enemy property is contemplated. Natural legal heirs and successors, who are “citizens of India” would be entitled to the property under the law of succession.
- 3) **The Objective of Enemy Property Act:** The object of the Enemy Property Act is to prevent a subject of an enemy state from carrying on business and trading in the property situated in India. It is, therefore, contemplated that temporary vesting of the property takes place in the Custodian so that the property till such time as it is enemy property cannot be used for such purpose.
- 4) **Can property owned by an Indian Citizen be Enemy property? No:** The question that falls for determination is whether the properties in question after its inheritance by the respondent who is a citizen of India can be said to be enemy property. Can he be termed as enemy or enemy subject within the meaning of Section 2(b) or can the property of an Indian citizen be termed as enemy property within the meaning of Section 2(c)? Answer is emphatic No. The definition of enemy provided under Section 2(b) excludes citizens of India as an enemy, or enemy subject or enemy firm. Under the circumstances, the respondent who was born in India and his Indian citizenship not being in question cannot by any stretch of imagination be held to be enemy or enemy subject under Section 2(b). Similarly, under Section 2(c) the property belonging to an Indian could not be termed as an enemy property. Once the property is succeeded to by a citizen of India the property ceases to be covered by proviso to Section 2(c). In law, the vesting in the Custodian of the property belonging to an Indian citizen cannot be permitted to be continued under the Enemy Property Act as Indian citizen is excluded from being an enemy in terms of the provisions of Section 2(b).
- 5) **Mala fide intention of Government:** On 4.9.2001 the High Court directed the appellants to place on record copy of note put up for release of property of the respondent's father and the decision taken thereon by the Cabinet. The respondents refused to place a copy of the note of the Cabinet claiming privilege in regard to the said document as in their opinion the public interest required that the same should not be disclosed. This shows the mala fide intentions of appellants to retain the possession of huge properties without any authority of law.
- 6) **Power of court cannot be taken away:** To be just and act in a just manner is writ large in our Constitution and the laws. The Legislature is to act in a just manner by enacting just laws within the frame work of the Constitution. The executive is enjoined with a duty to act or apply the laws in a just manner and if an individual or institution is dissatisfied with the State action in enacting the laws or their implementation he can approach the court seeking redressal of his grievances. The Central Government does not have absolute power for divesting under section-18 of the Act and the power of the Court is not taken away to pass an appropriate order in a case where the property which vested in the Custodian ceases to be Enemy Property. Unfortunately, a dangerous attitude resulting in doing institution damage is developing, that the justice is required to be done only by the Courts. This attitude is betrayal of Constitution as well as laws. Every and any authority working under the statute has to discharge its duties in a just manner otherwise people will lose faith in the governance.

The Government in response to this judgment has introduced a Bill which, if passed, would allow enemy property inherited by heirs who are Indian citizens to be labelled as enemy property. This goes against the objective of the Act which clearly states that the property was vested in the custodian temporarily and to prevent a subject of an enemy state from carrying on business and trading in the property situated in India. The provisions of the Bill may be legally flawed as the Government has not provided a rationale for how inherited enemy property by an Indian citizen can still be termed as enemy property. It does not provide a rationale for acquiring Enemy property or provisions for treatment of enemy property. The Bill also does not provide rationale for transfer of ownership of enemy property to State which would be tantamount to nationalization and would potentially violate rights of the successors without justification. Bonafide onus of property is being deprived from non-enemy owners. It is not clear under what legislative power the

⁴ Union of India Vs Raja MAM Khan 2005 (8) SCC 696 Supreme Court 21 October 2005

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Government would take this action. The main aim of the Bill is to negate the ownership rights of the enemy subject by vesting all rights and titles over enemy property with the Custodian. Multiple provisions of the Bill are applicable retrospectively.

	Enemy Property Act, 1968/ Public Premises Act, 1971	Enemy Property (Amendment and Validation) Bill, 2016
Definition of Enemy Subject	Any country, person or firm which was designated an enemy of India under the Defence of India Acts, 1962 and 1971. It does not include a citizen of India.	Also includes, <ul style="list-style-type: none"> • legal heirs of enemies even if they are citizens of India; • enemies who have changed their nationality; • enemy firms include succeeding firm whether or not partners or members of such succeeding firm are citizen of India or the citizen of a country which is not an enemy or such firm which has changed its nationality. • Does not include a citizen of India other than those citizens of India, being the legal heir and successor of the "enemy" or "enemy subject" or "enemy firm".
Definition of Enemy Property	'Enemy property' means any property belonging to or managed on behalf of an enemy; includes any property held by an enemy immediately before his death if he dies in India (excluding Jammu & Kashmir).	Includes property held by an enemy before his death even if he dies outside India; clarifies that property of an enemy will continue to be considered enemy property even after his death, or winding up of business, or change of nationality, etc.; also, enemy property includes all rights, titles and benefits arising out of the property.
Vesting of enemy property in the Custodian	Enemy property vested in the Custodian under the Defence of India Acts, 1962 and 1971, will continue to vest under the 1968 Act.	Adds retrospectively from 1968: (i) enemy property will continue to vest in the Custodian even if the enemy dies, (ii) or the legal heir is an Indian, or citizen of a country which is not an enemy, (iii) winding up of business, (iv) change of nationality. <ul style="list-style-type: none"> • Succession laws will not apply to such property. • 'vesting' implies that all rights and titles over the enemy property will be with the Custodian. • Adds a provision which requires the Custodian to issue a certificate declaring a property to be enemy property
Powers of Custodian	<ul style="list-style-type: none"> • Custodian may take measures to preserve enemy property, and may maintain enemies or their families in India from the income derived from the property. • For the above-mentioned purposes, the Custodian may: (i) carrying on enemy's business; (ii) make contracts on behalf of the enemy; (iii) sell, mortgage, lease or otherwise dispose of the enemy property; (iv) make payments to the enemy or his dependents; etc. • Under the Public Premises Act, 1971, estate officers are appointed by the government to evict unauthorised occupants, remove illegal construction, etc. from public premises; public premises include premises belonging to, or leased by the central government, state government, or a government company, or a public university, etc. • Custodian has the power to summon people to get information regarding enemy property, and call for documents. 	<ul style="list-style-type: none"> • Removes the duty to maintain the enemy or his family in India. • Adds the power to: (i) fix and collect rent, license fee and other charges with respect to the enemy property; and (ii) evict unauthorised occupants and trespassers, and remove unauthorised construction. • Includes enemy property within the definition of public premises; also, the Custodian will be considered the estate officer for enemy properties. • In addition, provides that the Custodian will have the powers of a civil court with respect to the following: (i) discovery and inspection of documents; (ii) summoning persons; (iii) calling for documents; and (iv) examining witnesses and documents. • Increases fees to five per cent.

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	<ul style="list-style-type: none"> • Custodian will levy fees equal to two per cent on income derived from the property (for example, dividends, interest and profits), or on sale or transfer or divestment of property. 	
Transfer of enemy properties by enemies	Custodian has the power to sell enemy property only if it is required in the interest of: (i) preserving the property, or (ii) maintaining the enemy or his family.	<ul style="list-style-type: none"> • Prohibits all such transfers retrospectively. Any such transfers conducted before or after 1968 are deemed to be void. • Custodian has the power to dispose or sell enemy properties; it may do so within a time period specified by the central government irrespective of any court judgements to the contrary; in this regard, the Custodian may take the help of police; the sale proceeds will be deposited in the Consolidated Fund of India. • The central government may: (i) issue guidelines for disposal of property; (ii) give binding instructions to the Custodian; (iii) direct that another Ministry or Department of the government will dispose of an enemy property instead of the Custodian; and (iv) deal with and utilise the enemy property in any manner it considers fit. • In case of sale of immovable enemy property, the Custodian may issue a certificate of sale in favour of the buyer; this certificate will be a proof of ownership. • Income earned by the Custodian from an enemy property will not be returned even if the property is sold or transferred.
Divestment of enemy property by the central government from the Custodian	<p>The central government may order for enemy property to be divested from the Custodian and returned to the owner or other person.</p> <p>The central government may make rules regarding how the property may be returned.</p>	<ul style="list-style-type: none"> • The central government may order for an enemy property to be returned to the owner only if: (i) a person aggrieved by the order declaring a property to be an enemy property applies to the government; and (ii) the property is not an enemy property. • Rule-making power in this regard removed. • Income earned by the Custodian from such an enemy property will not be returned even if the property is returned
Transfer of enemy property by enemy	Transfer of enemy property by an enemy may be void if it is against public interest or if it was intended to evade vesting of property in the Custodian.	Prohibits all transfers of enemy properties by enemies.
Penalty	A fine up to Rs 500 for, (i) not complying with the Custodian's order summoning people or documents; and (ii) not submitting their returns relating to enemy property.	Fine increased to Rs 10,000.

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Power to remove difficulties	No power to remove difficulties.	Central government may pass orders to remove difficulties in the implementation of the Ordinance for a period of two years.
Bar against jurisdiction of civil courts	No bar against jurisdiction of courts.	Civil courts will not hear disputes related to enemy property.

Defence of India Act, 1971,

2(b)"enemy" means -

- any person or country committing external aggression against India;
- any person belonging to a country committing such aggression;
- such other country as may be declared by the Central Government to be assisting the country committing such aggression;
- any person belonging to such other country.⁵

Any Indian citizen who is an heir to enemy property would be added to this definition which includes people committing aggression towards India and belonging to other countries. For any property to be declared as enemy property, the owner must fall within these categories. Thus, properties cannot be declared as enemy property without acknowledging Pakistan as an enemy. It is difficult for properties to be classified under these categories but, the Government has been increasingly declaring properties as enemy property in the last three years.

Right to Property

The Constitution of India states that “no person shall be deprived of his property save by authority of law”. This means that the executive arm of the Government cannot extinguish property rights without legislative consent. Thus, without the passing of the Bill, the property rights of the Indians cannot be revoked.⁶ Further, the provision mentions ‘persons’ and not ‘citizens’, making the provision applicable to the heirs in India as well as people to whom these properties were sold.

Land Acquisition Act, 2013

Land can only be acquired by the Government for public purposes and the Government has justified this public purpose by using the defense rationale. But, when the property is not owned by an enemy (Pakistan/Bangladesh have not been declared an enemy of India) the rationale is not applicable. The reasoning behind categorizing this as a matter of national security is vague.

We're not at war with any country. So why has the number of seizures of 'Enemy' Properties sky-rocketed? (Infographic: **The Quint**, Pallavi Prasad, Available at : <https://www.thequint.com/deqoded/2016/12/23/how-the-govt-is-abusing-a-wartime-law-to-grab-enemy-property-muslim-discrimination>.)

⁵ Defence of India Act, 1971, Section 2 (b)

⁶ Constitution of India Article 300A

PART IV. CRITIQUE OF THE BILL

“The new ordinance/ bill is draconian as it retrospectively rewrites the Act of 1968 and renders all judgments made on the basis of the original act null and void. It seeks to undo decades of legal proceedings with little care for all the effort that countless Indians had spent on getting justice. Essentially, it closes the door to judicial recourse and transforms a “custodian” to “owner” as it mandates the government to sell all these properties. Faced with a choice during Partition, millions of Muslims opted to remain in India. Sadly, the new amendments make some Indian citizens’ identities wholly contingent on whether a relative went to Pakistan. Also, many properties are not owned by Muslims but by people from other communities who have bought them over the course of the last 40 years. The ramifications of the bill will also undo their ownership.”^{vi}

- **Identification of Enemy Property:** The Select committee report on the amendments included dissent notes from representatives of four parties and expressed their concerns regarding the process for identification and declaration of enemy property. The Select Committee report lists the stages of identification and declaration but, it does not mention the criteria used.⁷⁸ Initially 2,100

⁷ Select Committee Report regarding the procedure for identification, declaration, preservation, management and control over the enemy properties is categorized into following four stages:-

- (a) Process case is the identification stage where Immovable properties which have been detected/ identified but are yet to be declared as enemy properties after thorough investigation.
- (b) Declared case is the declaration stage where Immovable properties vested in the Custodian of Enemy Property for India (CEPI), which have been declared enemy property. Authorization in respect of which is issued to the District Revenue Officials for its better/proper preservation and management. No income is generated out of these properties.
- (c) Income Case is the stage of preservation, management and control over the enemy properties. Properties declared as enemy property gets vested in the Custodian of Enemy Property for India (CEPI) by virtue of issue of a vesting certificate, the authorization in respect of which is issued to the District Revenue Officials for its better/proper preservation and management and from which income has been/is being received from district authorities from time to time.
- (d) Court Cases is the stage of preservation, management and control over the enemy properties. At any of the three abovementioned stages, a court case may be involved and pending.

⁸ Select Committee Report:

2.5.1 The procedure followed for identification of immovable property is as under:-

- (i) The Custodian may seek assistance of the District authority for examination of the Tehsil-wise or Block-wise revenue records for the purposes of identifying any immovable property belonging to or held in the name of an enemy.
- (ii) The concerned District authority shall, on identifying any immovable property belonging to or held in the name of an enemy, forward to the Custodian the complete details of such enemy property including the nationality of the owner thereof.
- (iii) If the District authority receives any information or complaint from any person or from any source in respect of an enemy property, he shall forward such information or complaint to the Custodian along with details.
- (iv) The Custodian may direct the District authority in which the enemy property is located, to carry out physical inspection or verification of the enemy property for obtaining the information as specified by the Custodian.
- (v) On receipt of the direction from the Custodian, the District authority shall check the relevant revenue or municipal or police records to verify the location of area and other details of the enemy property and conduct survey for obtaining the information as specified by the Custodian
- (vi) On obtaining the required information and on being satisfied that the property or interest therein is prima-facie enemy property, the Custodian or his authorized representative shall cause a notice to be served on the person claiming title to such property or interest and on any other person or persons whom he considers interested in the property.
- (vii) The notice mentions the grounds on which the property is sought to be declared as an enemy property and shall specify the provisions of the Act under which such property is alleged to be an enemy property.
- (viii) (a) The notice shall be served personally to the person concerned or his manager, or to other members of his family; or be sent through registered post; or affix it on some conspicuous part of the premises concerned or at the last known place of the business of the person concerned.
(b) The Dasti service of notice through police may be resorted to only in the case of persistent non-compliance of the notice.
- (ix) The Custodian or his authorized representative shall observe the principles of natural justice by giving sufficient opportunity to the noticee(s) to present their case before them and hear them or their representative.
- (x) Where a notice has been duly served, the party shall be called upon to show cause as to why the subject property should be declared as an enemy property: also provided that if the party fails to appear on the dates fixed for hearing even after giving reasonable opportunity, the Custodian or his authorized representative may proceed further to hear the matter ex -parte and pass a reasonable order on the material before them as the Custodian or his authorized representative deems fit.
- (xi) Where the party appears and contests the notice, the Custodian or his authorized representative shall state the reasons to be recorded in writing, as to why the subject property should not be deemed to be an enemy property.

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enemy properties were identified in 2013 but, that number had risen to 16,000 by 2015 casting doubt on the mechanism of identification and the complete authority vesting in the Custodian. The Ministry of Home Affairs in response to increased number of enemy properties stated “Earlier, the holding of one person was regarded as one Property (total around 2100), even if it consisted of many plots. But, while doing work at the ground level it was felt necessary that a holding which includes more than one plot must be calculated plot wise. Thus, later in 2013-14 it increased to about 9280.”

There are still approximately 5,000 cases affecting more than 1,000 people. The committee further stated that proper investigation and due and transparent process must be followed. Despite the end of hostilities decades ago enemy properties are still being designated. The rationale behind acquiring the property is defence and national security but, the application of this is vague.

The total number of enemy properties have not been identified, nor have the identified properties been sold yet. The 155th Report on the Enemy Property (Amendment and Validation) Second Bill, 2010 by the Department-related Parliamentary Standing Committee on Home Affairs stated that “The Committee was informed that it would take three or four years to complete the verification and disposal and for winding up of the office of Custodian of Enemy Property. The Committee, however, feels that if the things move at the current pace, it may take even more than four or five years. The Committee takes note of the fact that Pakistan had long back seized properties of Indians and disposed them off in breach of the mutual agreement. It, however, does not mean that the enemy properties and the Office of the Custodian of Enemy Property should remain in perpetuity. The Committee, therefore, desires that a time-bound plan may be drawn and the entire process of identification of enemy properties and disposal may be completed within a stipulated time.” No time bound plan has been prepared yet.

Some properties have been redistributed to the CAPF’s (CRPF, CISF, NSG etc.) for use in public interest. There is no time frame for completing the process of identifying these properties even though the vesting period was between 1962 and 1977.

- **Retrospective Clause:** The Government has given a justification that retrospective amendment of an Act is permitted to remove a defect which has been pointed out by a Court while interpreting that Act. The defect pointed out in the interpretation by courts that enemy properties can be passed down to their heirs and when that happens, the property ceases to be enemy property. To remove this defect, the Government has made an amendment to expand the definition of enemy subject to include the legal heirs of enemy/enemy subjects to prevent the inheritance of enemy property by them. It must be noted that the original section 2(c) of 1968 Act specifically excluded citizens of India. It must be noted that this is not a case of an omission but of express exclusion. The Government also hasn’t clarified the intention behind expressly excluding Indian citizens in the first place.
- **Dispute Resolution:** The Bill does not allow dispute resolution through Civil Courts nor does it provide any alternate judicial remedy. “The attorney general, Mukul Rohatgi, told the committee that it does not bar the jurisdiction of the high courts and the Supreme Court and therefore, it does not violate the basic structure of the constitution, which includes judicial review of laws made by the legislature.”^{viii} The main reasoning for the Bill was to clear the misunderstanding arising out of different interpretations by the courts, affecting the custodian’s powers under the Act. The Select committee stated that after the proceedings of the custodian are over, the aggrieved person should be provided opportunity to represent his case to a designated officer of the Ministry of Home

(xii) Any other person or persons claiming to be interested in the proceedings relating to enemy property, may file an application before the Custodian who shall then, either on the same day or on any subsequent day to which the hearing may be adjourned, proceed further to hear the applicant himself or cause the same to be heard by his authorized representative.

(xiii) The authorized representative of the Custodian shall prepare a detailed report of all cases identified as enemy property in respect of which hearing is complete, and shall submit the same to the Custodian along with his recommendations thereon.

(xiv) All properties under examination and in the process of identification or verification shall be considered as Process Case and details of such cases shall be recorded till its declaration.

2.5.2 The procedure followed for declaration of immovable property is as under:-

(i) On receipt of the report of the authorized representative, the Custodian shall examine and cause further investigation, if considered necessary.

(ii) If, on examination of the report or on further investigation, the Custodian is satisfied that the property is an enemy property, he shall issue a certificate, declaring the property as enemy property and vesting of such property in the Custodian, along with an authorization order, authorizing the District authority to take over the said property immediately on his behalf.

(iii) On receipt of the authorization order from the Custodian, the District authority shall proceed further to take control over the management of the enemy property and shall initiate action for recovery of arrears or dues recoverable from the occupier of the vested property and a notice shall be affixed over the property declaring the said property as vested with the Custodian.

(iv) The District authority shall prepare a list of the vested property pertaining to his district and a copy of the same shall be sent to the Custodian

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Affairs who must be easily available to the aggrieved persons. This should be specifically mentioned in the rules. Clause 18 was amended to include that any aggrieved person may within a period of sixty days from the date of communication or receipt of the order, file an appeal to the High Court on any question of fact of law arising out of such orders, and upon such appeal the High Court may, after hearing the parties, pass such orders thereon as it thinks proper.

- **Article 14:** Mr. K. Rahman Khan opposed the inclusion of clauses 2(b) and 2(c) stating that "it creates two categories of citizens one with 'enemy ancestors' and the other being a 'general citizen'. If an ancestor is a criminal or whatever it is, his son does not inherit those things. A citizen is a citizen with all the rights and cannot be discriminated." On the same issue, Mr. Husain Dalwai stated that "The classification places the descendants of enemy subjects, who otherwise have no ties to the former enemy State, on the same level as the original enemy subjects"

Article 14 guarantees right to equality and protection from arbitrary actions of the state. The provision on transfer of property implies that if the enemy has sold enemy property to any other person, such sale will be deemed to be void. Consequently, if a person who bought enemy property from the enemy has subsequently sold the property, such transfer will also become void. Therefore, the Bill takes away ownership rights retrospectively. It may be argued that this provision is arbitrary, and in violation of Article 14 of the Constitution. This is because it takes away ownership rights of all persons who have bought and sold enemy property in a bona fide manner at any point of time.⁹ The intention of the Bill seems to be to unsettle settled matters and to retrospectively invalidate legitimate actions. Further, the taking away of properties will adversely affect the poor and middle class. Some enemy properties are on rent for financial institutions like banks, LIC and even the common people who have been staying on enemy property as tenant for generations together who may feel unsettled all of a sudden once the proposed amendments, if enacted, are implemented, on ground level. It was also pointed out that the Rent Control Act applies to such properties which have been given on rent basis, therefore, the proposed amendment may play havoc in the minds of such occupants.

- **Anti-Muslim:** The properties in question were primarily owned by people from Pakistan and the Bill affects the rights of their heirs since properties with Chinese origins are very few. As the "enemy properties" were left behind by migrants to Pakistan, not during a war but due to the exigencies of Partition, there was never any justification for the name then or now. Thus, the Bill can be perceived as discriminatory and may be unconstitutional as it is ultra vires Article 15.¹⁰ The anti-Muslim agenda can also be seen by analyzing where the new enemy properties are being found. The highest numbers have been declared in states of Uttar Pradesh and West Bengal which, compared to rest of India, have a very high proportion of Muslims.

- **Rights of an Indian Citizen:** The opposition has stated that if the heirs of the enemy, whose property is vested with the custodian, become Indian citizens, they cannot be defined as 'enemy' of this country just because they were born to persons or inherited from those who belonged to some other nation with whom we have had a war in the past. This would violate the rights of an Indian Citizen under Article 14 and make the Bill unconstitutional. Further, by retrospectively applying the provisions of the Bill, the rights of people who may have bought or sold such properties may also be taken away.

- **Anti-Democratic:** While speaking about the provision against succession under the Bill, Attorney General, Mukul Rohatgi stated that "Really speaking, it is not a case where thousands or millions of people have got rights". In a democracy, the rights of the smallest minority are also relevant. The constitution aims to protect the minorities and all citizens who are legal heirs and successors of enemy or enemy subject or enemy firm are treated as a single class and it is the general right of this class that is sought to be altered by the Bill. Thus, the Bill may be against the values of democracy.

- **Customary Laws:** The Bill has a clause stating that "law of succession or any custom or usage not to apply to enemy property". This clause has received criticism from Mr. K. Rahman Khan who stated that if a person, before he migrates, has given a property on hiba, then that property becomes the wife's property and if the wife has not left that property, then that property is not his property as per law. It is the wife's property. This would make the Bill contradictory to custom laws.

⁹ Part III Fundamental Rights, Article 14, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory India."

¹⁰ Part III Fundamental Rights, Article 15,

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them

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- **Confiscation not Acquisition:** The Bill gives the Central Government the right to declare properties as enemy properties and confiscate them from heirs or people who have legitimately bought those properties. The contradiction in the Government's logic is that if the property was owned by the Government, why do they need to confiscate it? Mr. Hussain Dalwai has pointed out this inherent contradiction in the Bill, "On one hand the Bill expands the definition of enemy subject to also include the legal heirs or successors of enemy and on the other hand bars the application of laws of succession to enemy subjects. Now all the provision of the Bill are with reference to an enemy property only. So, in effect, if no law of succession applies to an enemy property, then that enemy property cannot be passed on and so with respect to that particular enemy property, there will be no legal heirs or successor making the expansion in the definition of enemy subject infructuous. But by expanding the definition of enemy subject, the Bill recognizes that with respect to enemy property there can be legal heirs or successors. But for such persons to become legal heirs or successors of enemy subjects with regard to enemy property, the law of succession must apply to them. So, in essence, on one hand acknowledging the presence of legal heirs and including them in the definition of enemy subject and on the other hand saying that no law of succession applies to enemy property are entirely two contradictory statements and cannot stand together." Further, he stated that succession is automatic and unless state invokes eminent domain to take away the property, the property will pass on to its successors.

- **Temporary Vesting of Property:** The 1968 Act established that the enmity is not permanent and that vesting is temporary in nature and primarily for preservation, management and administration of properties. The current Bill may take away the rights of Indian citizens and the status of the property as enemy property will be permanent. viii The object of the Enemy Property Act is to prevent a subject of an enemy state from carrying on business and trading in the property situated in India. Accordingly, after the war, all unclaimed property and land that belonged to the enemy state/ nationals or refugees moved to the ownership of this Custodian. The Supreme Court in the Raja Mahmudabad case, interpreted Sections 6, 8 and 18 of the Enemy Property Act and reached a conclusion that a conjoint reading of Sections 6, 8 and 18 of the Act indicates that the enemy subject due to the vesting of his property in custodian is not divested of his right, title and interest in the property. The vesting in the Custodian is limited to the extent of possession, management and control over the property temporarily.

The Government has changed its stand on the matter stating that no right ever existed for the successor over enemy property even if he is an Indian citizen. The properties never belonged to the father. They, stood vested in the Custodian. The stance has been supported by Shri Ram Jethmalani as well, he stated that- 'an heir can only get what the propositus had. When a person is dead, his heir gets what he owned. Even if he is Indian citizen and heir of his father, he gets what his father had, but if the father did not have the property, the property belonged to Indian nation, heir gets zero'. The Standing Committee had strongly felt that enemy properties worth crores of rupees should not go in the hands of those, who do not have any legitimate claim over those enemy properties.^{ix}

- **International Human Rights:** Enemy Property Act in Bangladesh was used as an expedient mechanism to appropriate land belonging to Hindus that had temporarily fled to India in fear of their lives, or those that never left East Bengal, but were accused of supporting India during the War and labeled as "enemies" of Pakistan. Therefore, the language, intent, and application of the Act were discriminatory. The EPA's socio-economic impact on Hindus, however, transcends the pure loss of land, and resulted in the widespread economic marginalization and disenfranchisement of the community. It also led to several mass migrations from Bangladesh and an immense loss in total population. The intent, language, and application of the property laws encompassed by the Enemy Property and Vested Property Acts were in clear violation of fundamental human rights norms and universal legal standards as established under international jurisprudence. International jurisprudence contains multiple sources of law that govern the behavior of nation states and their relationships with individuals. The Act was criticized by UN Declaration of Human Rights, Geneva Convention, The International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which comprise the major human rights treaties that prohibit discrimination based on religion, race, nationality, sex, colour, language, or political affiliation. The Enemy Property Act in India is trying to confiscate land from enemies and their heirs in a similar way and despite the international criticism on declaration of enemies and discriminatory policies, the Government is still pushing for this legislation in India.^x

- **Misuse of Ordinance:** Apart from the criticisms regarding the provisions of the Bill, even the way the NDA government is trying to get the Bill passed is unusual. The President Mr. Pranab Mukherjee re-promulgated the Enemy Property (Amendment and Validation) Ordinance for the fifth time since it wasn't passed as an Act in parliament in the winter session. Under Article 123 of the

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Constitution¹¹, an ordinance will expire at the end of six weeks after the reassembly of parliament if it is not disapproved by both houses or replaced by an Act during the session. The UPA Government had also moved a similar ordinance in 2010 but, it lapsed, as it could not be replaced by an Act of parliament. The ordinance must be used only under compelling circumstances. Thus, a PIL was filed by Husain Dalwai, a Rajya Sabha member from Maharashtra. At the same time, the Supreme Court in **Krishna Kumar Singh vs State of Bihar**¹² ruled that re-promulgation of ordinances is a fraud on the Constitution, and is unconstitutional. The PIL was refused stating that the matter was sensitive and involved national security. Further, the two-judge bench stated that “It was a different kind of legislation, in Krishna Kumar Singh. There is a distinction between legislation which affects individuals adversely and the laws which protect the rights of the citizens.”

¹¹ Chapter III, Legislative Powers of the President, Article 123,

“(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require. (2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President.

Explanation. — Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of the dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.”

¹² Krishna Kumar Singh & Anr vs State Of Bihar, W.P.(C) No. 580/1995, Available at: <https://indiankanoon.org/doc/1441865/>.

“Paragraph 44, the seven-judge bench held thus:

“Re-promulgation of ordinances is constitutionally impermissible since it represents an effort to overreach the legislative body which is a primary source of law making authority in a parliamentary democracy. Re-promulgation defeats the constitutional scheme under which a limited power to frame ordinances has been conferred upon the President and the Governors. The danger of re-promulgation lies in the threat which it poses to the sovereignty of Parliament and the state legislatures which have been constituted as primary law givers under the Constitution. Open legislative debate and discussion provides sunshine which separates secrecy of ordinance making from transparent and accountable governance through law making.”

PART V. BACKGROUND INFORMATION/REFERENCE DOCUMENTS

By Wamika Kapur

Under the supervision of Ms. Barkha Deva

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^x A Legal Analysis of the Enemy Property Act of Bangladesh

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https://www.hafsite.org/sites/default/files/Legal_Analysis_Enemy_Property_Act_Bangladesh.pdf.