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## **BROKEN WILLS AND GHOSTS OF PARTITION: UNRAVELLING THE CONSTITUTIONALITY OF ENEMY PROPERTY ACT, 1968**

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During the Partition of India, around twenty million people, across religions, were displaced. The numbers were no better during the Sino-Indian War of 1962. Masses migrated, leaving behind immense property in India. It was an ugly and disheartening sight.

The Enemy Property Act, of 1968, governs the matters relating to the property of these very people, property they had to leave behind to protect their lives because of course, there was no time to sell it, and no other option during this horrific time which changed the course of history forever. A bloody war with one neighbour, and a bloodbath from religious tensions thanks to the British Raj's 'divide and rule' policy with another neighbour, crumbled families. Some made it across the border, while others arrived in trains full of dead bodies at several railway stations. The war with China, which only lasted one month, had an equally devastating long-term impact.

Whereas the Enemy Property Act, of 1968 was much-needed to deal with the vast properties, the Act termed the owners of the property as 'enemies' forever. The war was never with individuals, it was always one country against another. But, in this political crossfire, several people became 'enemies'. Section 2(c) of the Enemy Property Act, of 1968 defines "enemy property" as property belonging to an enemy, enemy subject or enemy firm, regardless of whether or not they are alive now. Section 2(b) of the Enemy Property Act, 1968 defines an "enemy" as 'a person or country who or which was an enemy'. Further, it includes all legal heirs and successors of such person as enemy, irrespective of their citizenship status being Pakistani, Chinese, Indian, or literally any other country at all. Basically, it is safe to say that under this Act, once an enemy, always an enemy. Not even death can take away that label.

As ruthless as it sounds, this is what the Government of India believed was absolutely necessary for the protection of national interest. The 2017 amendment to the Enemy Property Act, of

1968, only made it harsher by strengthening the control of the government over enemy property. The ownership of such property was immediately shifted to the Custodian of Enemy Property for India, a government department responsible for ownership, interests, and all rights related to such property, as outlined in Section 3 of the Act. The retroactive approach of the Act declared void, all transfers of enemy property including those made prior to 1968, the year of enactment of the Act, immensely hampering claims of inheritance.

Section 5B of the Act made all succession laws and customs inapplicable concerning “enemy property”. Moreover, Section 18B of the Act restricts any civil court from entertaining suits with respect to such property. Only an appeal can be filed to the High Court if a person is aggrieved by the Central Government’s orders. This emphasis on labelling one as an “enemy” especially if they are a citizen of India, and violating their property rights and right to equality under Article 14, has been a major criticism of the Act.

The right to equality enshrined under Part III of the Constitution of India ranging from Article 14 to Article 18, is a fundamental human right that guarantees equality before the law. It ensures that no citizen will be discriminated against by the State, and extends to the private sphere but with a limited scope. Article 16 ensures equality of opportunity when it comes to public employment. Further, Article 17 and Article 18 abolish untouchability, and titles, respectively. The right to equality extends to citizens of India, firms, companies, as well as foreigners.

The right to equality offers two main elements, namely, equality before the law, and equal protection of the law. Equality before the law refers to the similarity of treatment given to all before the law, irrespective of their social or economic background. This is a form of formal or procedural equality. Equal protection of the law ensures that laws are applicable to all in an alike manner, without discrimination. This comes under substantive equality. Right to equality fosters the formation of a just and fair society, and allows citizens to have faith in the legal framework.

The Enemy Property Act has been criticised for its potential infringement of fundamental rights. The Act creates a classification of citizens – those who have been categorised as ‘enemies’ because their ancestors migrated to Pakistan and China during partition and the 1962 war, respectively, and those whose ancestors had no connection with such events. In 1958, the Supreme Court in *Ram Krishna Dalmia v. Justice S.R. Tendolkar*, held that reasonable

classification is permitted under the law as long as it is not 'arbitrary, artificial, or evasive.'<sup>1</sup> Further, in *State of West Bengal v. Anwar Ali Sarkar*, the Court laid out the test for valid classification which lays out two criteria for a classification to be valid – firstly, intelligible differentia meaning reasonable basis of classification, and secondly, rational nexus, meaning there must be a prudent relation between the classification and the intended objective.<sup>2</sup> Keeping this test for valid classification in mind, it is safe to say that the basis of classification or the intelligible differentia is ancestral property, while the rational nexus is unclear at best, and irrational at worst. The government justifies the Act by deeming it important for national security, but at the same time, there is a difference between supporting an enemy nation and being an innocent civilian who is or was a citizen of that enemy nation. The lack of a rational nexus makes the Act controversial.

Additionally, in *E.P. Royappa v. State of Tamil Nadu*, Justice P.N. Bhagwati's dissenting opinion stated as under:

*"From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Arts. 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on relevant principles applicable alike to all similarly situated and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality."*<sup>3</sup>

Justice Bhagwati laid out the test for arbitrariness. He was of the opinion that formal or procedural equality is just on paper, which is why we need substantive equality, the end result of which would be equality of outcome. In his opinion, any law that is arbitrary is unequal in

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<sup>1</sup> *Ram Krishna Dalmia v. Justice S.R. Tendolkar* 1958 AIR 538

<sup>2</sup> *State of West Bengal v. Anwar Ali Sarkar* 1952 AIR 75

<sup>3</sup> *E.P. Royappa v. State of Tamil Nadu* 1974 AIR 555

terms of logic and law and thus is in contravention of Article 14. Taking into account, Justice Bhagwati's test for arbitrariness, and the test for valid classification laid out in *Anwar Ali Sarkar* (supra), it can be inferred that the primary issue is whether denial of inheritance rights to descendants on the basis of ancestry is a reasonable means to address national security concerns. Clearly, it does not offer a valid classification but is it also arbitrary? I believe so, but, to a limited extent. While it might be reasonable at one point of time in history, do we really need such a harsh law even after some sixty-odd years? To some extent, it is also fair enough to have certain reservations regarding the returning property of those descendants who are still Pakistani and Chinese citizens, but those who are citizens of other countries, and especially Indian citizens deserve to get their properties back.

Article 300A of the Constitution of India gives every person the right to not be deprived of their property unless by the authority of law. The Enemy Property Act violates this very right to property by prohibiting legal heirs, regardless of citizenship status, from inheriting enemy properties, thereby causing communal tension and partition-related conflicts even after decades.

This right, with respect to the Enemy Property Act, more or less depends on the right to equality itself. The Act is backed by law, and therefore, the government can acquire enemy property as defined under the law. The concern, however, is that the Act in itself should not be valid as it violates the right to equality, and therefore, the deprivation of property under this Act should be illegal. In addition, the retroactive application of this Act weakens the justification of the "authority of law".

The Act denies descendants their right to inheritance, even when the property may have been acquired legally by the ancestors. There are limited judicial recourses available for such descendants and several of them may even face financial hardships because of this. Although Article 300A protects persons from the arbitrary acquisition of property, the Act does the opposite and justifies it as national security. It is unfair to punish someone for their ancestors' decision to migrate. Is the justification of public interest and national security legitimate if it violates the vested rights of individuals? Several would say yes, but a better approach would be to carefully strike a balance between the government's concerns and the rights of individuals. Nevertheless, the Act can only be justified in terms of property rights as long as it does not violate the right to equality, which it clearly does, as established above. In my opinion, it is never reasonable to deny vested rights because of the decisions made by ancestors who are in

most cases, no longer alive. It is even worse if being a citizen of India, the vested rights are denied, as there is no way to prove one's loyalty towards a country. How can some prove they are not an anti-national threat? Can we really prove a negative? Is neither the status of citizenship nor the lack of a criminal record sufficient?

The conflict between vested rights and the interest of the general public is only a valid question as long as the threat is real. So the ideal question to ask is whether or not the descendants and legal heirs to such property are a threat, and so far, there is hardly any good reasoning to show that such heirs are an actual threat. Surprisingly, there has been no landmark case focusing on the Act's violation of Article 300A.

The issues concerning the Enemy Property Act are not limited to the legal framework and rights. It encompasses another very important aspect of loopholes in this evolving digital age. In recent years, it has become a cakewalk to leverage technology and illegally claim property. Interestingly, in the small town of Muzaffarnagar, property valued at 100 crores owned by Aisha Begum is being claimed by several individuals, using fake documentation since there is no record of her existence whatsoever.<sup>4</sup>

What makes the issue more complex than it already is, is the fact that its roots lie in the horrors of partition and war. While the government's concerns might be reasonable to an extent, there is a necessity to come to a balanced strategy that recognises the vested rights of individuals without compromising national security and the need to shield public interest. In finding the perfect balance, we also need to ensure the problem of fake claims. If fake claimants can leverage the tool of technology, can the government not use that very tool to hunt down fake claims? I think they can certainly try, so the question is, do they really want to?

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<sup>4</sup> Pandey O and Sharma M, "The Issue of Enemy Property And India's National Interest" (Sushma Wahengbam, India Policy Foundation 2011) [https://www.ipf.org.in/Encyc/2020/10/15/2\\_02\\_29\\_11\\_Publications\\_1.pdf](https://www.ipf.org.in/Encyc/2020/10/15/2_02_29_11_Publications_1.pdf) accessed March 25, 2024