Voter, Citizen, Enemy

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The ruling party's attempts to redefine citizenship seem intent on bringing popular notions of Indianness in line with its cultural sympathies, in time for the general elections in 2019. In a post-truth age of alternate facts, it may be trite to point out that the state can change entire narratives by controlling definitions. This article examines the Citizenship Bill, 2016 and the Enemy Property (Amendment and Validation) Act, 2017 to find out if the erasure of the Muslim as "voter" dovetails with a radical refashioning of an "enemy" who is also a "citizen."

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The Bharatiya Janta Party's (BJP) success in the recent assembly elections in Uttar Pradesh (UP) has made its campaign strategies the subject of several dissections. One of its political strategies was to refrain altogether from appealing to the Muslim electorate, which has historically been important to political fortunes in the state. Arguably, such a strategy of marginalising the community undermines the Muslim citizen's status as a voter with a significant stake in our democracy. Indeed, the party's thumping majority has some convinced that Muslims can no longer rely on traditional electoral politics to protect their interests.[1] Perhaps more worryingly, we note how the government's recent legislative excursions seem to align with, but also ideologically require/reinforce, such an electoral strategy. Reading together the Citizenship Bill, 2016 and the Enemy Property (Amendment and Validation) Act, 2017, we examine whether the erasure of the Muslim as "voter" dovetails with the radical refashioning of an "enemy" that is also a "citizen."

Natural Migrants, Unnatural Citizens

Written amidst the carnage and chaos of partition, the Constitution of 1950 empowered future Parliaments to decide the specific conditions of citizenship. The Citizenship Act, 1955 provides four routes to becoming Indian: birth, descent, registration or naturalisation. The latter two are closed to those without valid passport or permission to stay or those who overstayed the authorised period, defined as "illegal migrants." The Citizenship (Amendment) Bill, 2016 (henceforth, Citizenship Bill) hopes to change this definition by excluding "persons belonging to minority communities, namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan." A September 2015 notification by the Ministry of Home Affairs paved the way for implementation, pre-empting formal discussion on the bill.[2]

The Citizenship Bill laments the difficulties faced by persons of these communities—in proving Indian origin, long years required to establish naturalisation, and denial of opportunities enjoyed by Indian citizens "even though they are likely to stay permanently." (The notification issued by the ministry refers to these communities as facing religious persecution or threat thereof.) It does not explain important omissions in its list—Baha'is, Ahmadis, Sufis, Shias, atheists, etc—minorities that face religious persecution in the enlisted countries, or indeed Tamils from Sri Lanka. It also does not explain the empirical or normative bases on which Hindus, Sikhs, Buddhists, Jains, Parsis and Christians are "more likely to stay permanently" in India than other religious groups. If the real reason behind the Citizenship Bill is to protect religious minorities in the immediate South Asian neighbourhood, it is laudable for recognising the close cultural threads that weave persons living in the region together. However, excluding certain religious communities, especially on a myopic conception of a homogeneous Muslim community (sans persecuted minorities), is contrary to constitutional commitments to equality, fraternity and secularism. It must be noted that the protection of equality—equality before law and equal protection of the law—under Article 14 of the Constitution extends to all persons in India, not just citizens. The mere fact that certain groups of persons are *less likely* or improbable to avail of an option does not make it constitutionally permissible to deny them equal protection from religious persecution.

Oddly, the government of Assam is pledged to the contrary battle before the Supreme Court, that is, expelling illegal Bangladeshi migrants from the state. Calls from ethnic groups like the Asom Gana Parishad that condemn grant of citizenship to all illegal migrants irrespective of their religion, sound reasonable in present circumstances. The centre's enthusiasm to treat certain migrant

communities as prodigal sons and daughters is thus difficult to understand. In any case, the signal the bill sends is clear—Muslims outside the country, even if persecuted, do not belong in India.

Perpetual Enmity

While the Citizenship Bill repels the enemy outside the nation, the amended law on enemy property turns to the enemy within. The law originates from the colonial era Defence of India Rules, 1939, adopted by the postcolonial state during the 1962, 1965 and 1971 wars. These rules aimed to attack commercial interests of an aggressor state ("enemy") in order to prevent it from profiting through trade or business within the home country. One method of doing so included seizing enemy property and vesting it in an official called the Custodian. Once these emergency laws lapsed, the Enemy Property Act (henceforth, EP Act) was passed in 1968 to prolong the Custodian's hold over declared enemy property.

It is vital to note that both the EP Act and the Defence of India laws do not include Indian citizens in the definition of "enemy" or "enemy subject." They do not suggest that a person or organisation should be considered a perpetual enemy of India. Moreover, the Custodian's role appears to have been managerial; for instance, Section 8 of the EP Act empowers him to maintain the enemy and his dependents out of the property or make payments to them. However, Indian authorities were loath to return confiscated properties, especially as Pakistan had immediately liquidated Indian-held properties.

The raja of Mahmudabad, with a vast inheritance spread over Uttar Pradesh and Uttarakhand, is one of the figures worst hit by the law on enemy property. Although his father had migrated to Pakistan in 1957, he and his mother remained Indian citizens. On the death of his father in 1973, the raja sought return of the properties arguing that he could inherit the properties as an Indian heir. At the end of a protracted battle, the Supreme Court settled the issue in 2005.[3] A citizen could never be an enemy under the EP Act, it held. Further, it found that custodianship was managerial in nature and did not confer absolute ownership of enemy property in the Custodian. It directed the government to release the raja's properties.

In 2010, the United Progressive Alliance (UPA) government unsuccessfully tried to reverse the judgment through an ordinance, converted into a bill, for continued vesting in the Custodian. Crucially, it did not change the definition of an enemy to include Indians. A second bill was introduced in Parliament to return confiscated properties to owners (provided they were citizens by birth) and restrict litigation, which lapsed.

The Enemy Property (Amendment and Validation) Ordinance (henceforth, EP Amendment) was first promulgated by the President in January 2016; within the short span of a year, it would be re-promulgated four more times. The corresponding bill was passed by the Lok Sabha a day after its introduction and was passed by the Rajya Sabha on 10 March 2017 through a voice vote amidst walkout by the opposition. It received the assent of the President on 14 March 2017 and was notified to the public the same day. The Statement of Object and Reasons provides the following purpose for its existence:

> Of late, there have been various judgments by various courts that have adversely affected the powers of the Custodian and the Government of India as provided under the Enemy Property Act, 1968. In view of such interpretation by various courts, the Custodian is finding it difficult to sustain his actions under the Enemy Property Act, 1968.[4]

However, the EP Amendment significantly alters the original position. Since it makes these changes retrospective, the law has to be read as if it always stood this way. To put it simply, the EP Amendment creates two legal fictions and then deems them to have always been true: (i) citizen–heir as "enemy," and (ii) Custodian as absolute owner. First, the definition of "enemy" now includes Indian heirs and successors of so-called enemies, notwithstanding their citizenship. Next, the EP Amendment says that the new enemies (who are Indians) do not have, and never had, any right to inherit or transfer their property. Any transfer made by such persons after 1968 is void in the eyes of the law. Contrary to the EP Act and 2005 judgment, it installs absolute rights over the confiscated property in the Custodian in order to dispose of the property, the proceeds going to the Consolidated Fund of India. Arguably, the EP Amendment changes the purpose of the parent act—from preserving the enemy property to selling it.

The political rhetoric accompanying the amendment speaks of "natural justice" and "plugging legal loopholes" in the parent act. It repeated ad nauseam the ₹1 lakh crore valuation of enemy property to a demonetisation-struck public. The raja of Mahmudabad, with his large wealth and troubled history becomes a convenient elite against which to pit the public, but what of the EP Amendment's impact on non-elite enemies? One cannot deny that the actual effect of the amendment is to denude countless Indian citizens of their lawful ownership of property sans compensation, to enrich the treasury.

One would hope that five decades of general peace would be enough time for both sides to reconsider the decision to use a label like "enemy." Far from it, the changes incorporated by the EP Amendment fashion a new category of legal persons—"citizen–enemies." Much like the colloquial "frenemy," it may be collapsed into the portmanteau "cinemy" to imply one who appears to be a citizen but is, in fact (and now in law), dealt with as an enemy. How will the new definition vis-à-vis enemy property law impact a cinemy's enjoyment of other legal, constitutional and fundamental rights? Is she exempt from performances of nationalism and other fundamental duties, such as standing up for the national anthem in theatres? The EP Amendment does not clarify. Nor does it pause to consider how the connotation of "enemy" will affect the everyday lives of these citizens.

In any case, the EP Amendment will likely run into constitutional roadblocks. Citizens, except when historically disadvantaged, are equal in terms of Article 14. Here, the amendment categorises citizens into two classes, those who are heirs/successors to enemies and those who are not, depriving the former of crucial rights to property and succession. It also affects third-party owners' settled rights over property bought from Indian enemies.

Fifty years after the wars, in the absence of a declaration to the effect by the government, it would be difficult to argue that divesting citizens and bona fide third parties from their property and branding them "enemies" serve to attack the commercial interests of China or Pakistan, or plug any loopholes in the parent act. Instead, the government's actions under the amended law are likely to appear arbitrary, not least because of the law's retrospectivity.

Moreover, with the Ministry of Home Affairs pegging the number of immoveable properties belonging to Pakistani nationals at 9,280, compared with a paltry 149 properties belonging to Chinese nationals, it becomes difficult to ignore the communal nature of the classification, that is, the religious identity of the citizens it will most impact.[5] The expanded definition of enemy certainly impacts the Muslim community more than others, and perhaps this amounts to religion-based discrimination, against which Article 15 protects all citizens. We add the usual disclaimer here—the Supreme Court's jurisprudence on equality is whimsical, to say the least. However, one hopes that the fate of the British custodianship system, which was wound up in 1988, would factor in the Court's decision, as it was with a similarly obsolete colonial law in *John Vallamattom v Union of India* (2003).[6]

Changing Narratives

Perhaps the binary between citizen and enemy was long obfuscated and what we are witnessing today is the legal hollowing out of the notion of the "enemy." Arguably, the parent act belonged to an older paradigm that understood the enemy as belonging to a warring nation. With the "nation" as frame, it therefore maintained a clear conceptual binary between "enemy" and "citizen." One could situate the discomfort of the court in the 2005 case through this register. But the EP Amendment radically departs from such a paradigm. By making possible an enemy who is also a citizen, it obfuscates both poles by decoupling them. Binaries of citizen/enemy collapse into new conceptions such as "cinemy." The choicest insults of our age—"porkistani," "porki," "pseudo-sickular," "anti-national," etc—certainly suggest a conceptual change in public imagination.

But once such conceptions migrate from social media to the statute book, it becomes troubling indeed. As Bourdieu hints, such a "power to name" and to create by naming is perhaps the very essence of legal power.

> Law is the quintessential form of the symbolic power of naming that creates the things named, and creates social groups in particular. It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects. The law is the quintessential form of 'active' discourse, able by its own operation to produce its effects. *It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law.*[7]

The ruling party's attempts to redefine citizenship seem intent on bringing popular notions of Indianness in line with its cultural sympathies, in time for the general elections in 2019. In a post-truth age of alternate facts, it may be trite to point out that the state can change entire narratives by controlling definitions. As citizens, we must certainly respect the large mandate and growing national presence of the BJP, but must also take note when the state uses its monopoly over law-making to change legal definitions restrictively, retrospectively. Thus, when coupled with the degradation of the Muslim vote in UP, the seemingly innocuous changes to the meanings of "illegal migrant" and "enemy" portend difficult, if not unconstitutional, times ahead for the country.

NOTES

1 "The Fear of the Hindu Rashtra: Should Muslims Stay Away from Electoral Politics?," *Scroll.in*, 14 March 2017, https://scroll.in/article/831693/the-fear-of-hindu-rashtra-should-muslims-keep-away-from-electoral-politics; Javed Jamil, "Political Empowerment Is Much More Than the Election Results," *The Milli Gazette*, 15 March 2017, http://www.milligazette.com/news/15465-political-empowerment-is-much-more-than-the-election-results.

2 "Collector to Use Powers to Grant Citizenship to Pakistani Refugees in Pune," *Indian Express*, 18 March 2017, http://indianexpress.com/article/cities/pune/collector-to-use-powers-to-grant-citizenship-to-pakistani-refugees-in-pune-4574665/.

3 *Union of India v Raja MAM Khan* (2005) 8 SCC 696.

4 Statement of Objects and Reasons for the Enemy Property (Amendment and Validation) Bill, 2016, paragraph 2.

5 Report of the Standing Committee, p 17.

6 (2003) 6 SCC 611. While construing the validity of a provision that restricted the right of Christians to bequeath property for religious or charitable purposes in the Indian Succession Act, 1925, the Court considered the history and purpose of its inspiration, a British statute of 1735, holding that "while interpreting a restrictive statute, one may consider not only the past history of the concerned legislation but the manner in which the same has been dealt with by the legislature of its origin." Arguably, the legislative history of British enemy property laws ought to be taken into account while testing the present amendment under Article 14.

7 Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (tr Richard Terdiman), *Hastings Law Journal*, Vol 38, July 1987, pp 838–39 (emphasis added).