

Land Acquisition in British India
c. 1894–1927

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This study offers the first instalment of a general history of land acquisition in British India, c. 1894–1927. It advances eight principal theses: (i) that the first law of land acquisition was enacted in 1668, as part of a political settlement by the East India Company with the Portuguese landlords of Bombay island; (ii) that, to a remarkable degree, land acquisition law was shaped in the interest of the sterling railway companies; (iii) that the state habitually used land acquisition not so much to effect non-consensual transfers but to ‘launder’ titles free of encumbrances and other claims; (iv) that the primary beneficiaries of land acquisition were public bodies, the sterling railway companies, and elite private interests; (v) that the executive was hostile to legislative and judicial oversight of land acquisition, and successfully resisted or co-opted attempts to impose such oversight; (vi) that the courts were in any event content with the role they were assigned under the 1894 Act, and generally deferred to the executive in land acquisition cases; (vii) that the land-acquiring executive, although hostile to and unencumbered by meaningful legislative and judicial oversight, as a general rule displayed a legal fastidiousness; (viii) that, despite an appearance of impartiality, land acquisition bore the stain of imperialism. These theses are advanced in the course of explaining the failure of the forgotten Kelkar Bill (1927), an attempt by the Maharashtrian nationalist N. C. Kelkar (1872–1947) to enact far-reaching amendments to the Land Acquisition Act 1894. Kelkar’s fellow nationalists withheld their open support from the measure and thereby guaranteed its failure: a counterintuitive choice that, it is argued, exemplifies the tactical compromises of nationalism.

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Table of Abbreviations

BL	British library
Bom Sub	Bombay Surburan District
Bom City	Bombay City
CP	Central Provinces
GoI	Government of India
Home	Home Department of the Government of India
Land Rev	Land Revenue branch, Revenue and Agriculture Department, Government of India
Legislative	Legislative Department, Government of India
NAI	National Archives of India
PWD	Public Works Department, Government of India
Rev & Ag	Revenue and Agriculture Department, Government of India
Rwy Brd	Railway Board, Government of India
Rwy Cons	Railway Construction branch, Railway Board, Government of India
UP	United Provinces

Glossary

<i>Adivasi</i>	Original inhabitant (tribal)
<i>Basti</i>	Slum
<i>Bigha</i>	A measurement of land area that varied from region to region: approximately a quarter or third of an acre
<i>Chawl</i>	Working-class urban tenement in Bombay
<i>Crore</i>	Ten million
<i>Doab</i>	Tract of land between two rivers
<i>Lakh</i>	One hundred thousand
<i>Mofussil</i>	Rural hinterland/countryside
<i>Muballa</i>	An area of a town or village
<i>Panchayat</i>	Village council
<i>Patwari</i>	Village/ <i>zamindari</i> accountant or record-keeper
<i>Raja</i>	Prince/King
<i>Ryot</i>	Peasant cultivator
<i>Sarkar</i>	Ruler/Government
<i>Satyagraha</i>	A Gandhian non-violent resistance movement
<i>Swadeshi</i>	Of one's own country
<i>Swaraj</i>	Self-rule
<i>Taluka/Taluk</i>	Regional sub-division
<i>Zamindar</i>	Local revenue-officials under the Moghul administration, defined by the British as proprietors

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Abbreviations for Law Reports

AIR	All India Reporter. All: Allahabad Series. Bom: Bombay Series Cal: Calcutta Series. Mad: Madras Series. P&H: Punjab & Haryana Series. Raj: Rajasthan Series. SC: Supreme Court Series.
AC	Appeal Cases (England & Wales)
ALJ	Allahabad Law Journal
Bom HCR	Bombay High Court Reports
CLJ	Calcutta Law Journal
CWN	Calcutta Weekly Notes
IA	Indian Appeals
IC	Indian Cases
ILR	Indian Law Reports. Bom: Bombay Series. Cal: Calcutta Series. Mad: Madras Series
SCC	Supreme Court Cases
SCR	Supreme Court Reports
WR	Sutherland's Weekly Reporter (Calcutta)

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INTRODUCTION

Before Nandigram

Land Acquisition in British India

You have the right to use force, you can order the policemen, how long does it take to set straw on fire? But this is not justice. In ancient times when a raja began getting his garden made, an old woman's hut came in the way. The raja called her and said, 'Give me this hut and I'll give you as much money as you want, I'll get a house built wherever you want.' The old woman said, 'Let my hut be. When the world sees that there's the old woman's hut in a corner of your garden, it will praise you for your dharma and justice. The garden's wall will be crooked for a few feet, but your name will be immortal forever because of it.' The raja left the old woman's hut. Is it sarkar's dharma to take care of the public or to ruin its homes and to destroy it?

– Soordas to the Chairman of the Municipality:
Premchand, *Rangbhoomi*¹

Excluding the common law of India and the few laws of Parliament hardly in use, all our laws are decrees of the bureaucracy under the triple name of Acts, Regulations and Ordinances. None of these is law as known in civilised countries. None of these is enacted by the people through their representatives; hardly any of them is a reflection of Indian public opinion. ... The triple bundle of Acts, Regulations and Ordinances are the kaleidoscopic product of one and the same bureaucracy. The whole of British India is one Scheduled District – one backward tract without the name.

– C. Vijayaraghavachariar, quoted in Satyamurthy, *Rights of Citizens* (1919)²

In December 2006, it was announced that 10,000 acres of the rural locality of Nandigram, home to some 95,000 people, would be compulsorily acquired by the state of West Bengal and designated a 'Special Economic Zone'.⁴ Within that new Zone, a

¹ Premchand, *Rangbhoomi* (Manju Jain tr, Penguin 2011 [1925]) 550.

² S Satyamurthy, *Rights of Citizens* (Ganesh & Co 1919) 1–2.

⁴ A Special Economic Zone is 'a geographic region within a nation-state in which a distinct legal framework provides for more liberal policies and governance arrangements than prevail in the (ctd. on next page)

‘chemical hub’ would be constructed by an Indonesian conglomerate in a joint venture with the state government, controlled – implausibly – by the Communist Party of India (Marxist), a recent convert to state-sponsored capitalism. Villagers opposed to the acquisition, and opposition party cadres keen to enflame an incipient controversy, raised a barricade around Nandigram. On the morning of 14 March 2007, hundreds of police and Communist cadres made a violent incursion, determined to recapture the area. Controversy remains as to exactly what ensued and why, save that the police shot and killed fourteen persons. According to witnesses, police and cadres also injured dozens and raped an unconfirmed number of women and girls.⁵

While the Calcutta High Court could thunder against the illegality of the killings,⁶ the proposed acquisition was perfectly legal. It was settled legal doctrine that acquisitions for private ventures such as factories, industrial estates, and Special Economic Zones were lawful uses of the Land Acquisition Act 1894, a British-Indian statute that independent India had sustained substantially intact. Judges in independent India had consistently held that land acquisition⁷ for private industry fell within the power to

country at large’: Rob Jenkins, ‘The Politics of India’s Special Economic Zones’ in Sanjay Ruparelia et al (eds), *Understanding India’s New Political Economy: A Great Transformation?* (Routledge 2011). On Special Economic Zones in India and the controversy that they have provoked, see, in addition to the Jenkins chapter, P Arunachalam, *Special Economic Zones in India: Principles, Problems and Prospects* (Serials 2008); Rob Jenkins et al (eds), *Power, Policy, and Protest: The Politics of India’s Special Economic Zones* (OUP 2014).

⁵ —, *Nandigram: What Really Happened?* (Daanish Books 2007), based on the Report of the People’s Tribunal on Nandigram (26–28 May 2007). The Report is the most comprehensive account of the events at Nandigram. As Jenkins notes, however, ‘[c]onsiderable controversy surrounds what took place there, the apportioning of blame following largely party lines’: Jenkins (n 4) 57. A second incursion in November 2007 resulted in seven further deaths: National Human Rights Commission, ‘Commission’s order on Nandigram issue - New Delhi Feb 08, 2008’ <<http://nhrc.nic.in/dispArchive.asp?fno=1527>> (last accessed 15 February 2014).

⁶ *Association for the Protection of Democratic Rights v State of West Bengal* (2007) 4 CWN 842.

⁷ ‘Land acquisition’ is the term used in India for what is known as compulsory purchase in England and the exercise of the power of eminent domain in the United States. Hereafter, ‘land (ctd. on next page)

acquire land for a ‘public purpose’ if – as was invariably the case – promoters of land acquisition schemes could advert to benefits that would accrue to the public, such as the generation of foreign exchange, greater industrialisation, or increased employment.⁸

Critics of such acquisitions have assumed that, in land acquisition (as elsewhere), the British in India committed the original sin by enacting an exemplar of ‘colonial’ law – meaning, by their implicit definition, law both despotic and rapacious.⁹ As this study shows, however, the assumption is unfounded. In its most controversial application, the 1894 Act was a post-colonial invention. While the Raj gave itself great legal power to take land for the British companies that built India’s railways, as a general rule it refrained from using that power to take land for industry, fearful of provoking rural unrest and unmoved by the logic of colonialism to risk doing so. It was independent India that co-opted the Act to introduce successive ‘regimes of dispossession’ designed to make space for capital, first for the public-owned steel towns and industrial areas of

acquisition’ and ‘compulsory acquisition’ are used interchangeably.

⁸ See, e.g., *Somavanti v The State of Punjab* [1963] 2 SCR 774; *Government of Haryana v Hakam Singh* AIR 1979 P&H 122 (HC Punjab & Haryana); *Abdul Sattar v State of U. P.* AIR 1994 All 77 (HC Allahabad); *SS Darshan v State of Karnataka* (1996) 7 SCC 302; *Mohan Lal Sharma v Union of India* AIR 2007 Raj 244 (HC Rajasthan); *Joydeep Mukherjee v State of West Bengal* (2008) 2 CWN 546; *Sooraram Pratap Reddy v District Collector, Ranga Reddy District* (2008) 9 SCC 552; *Fomento Resorts and Hotels v Minguel Martins* [2009] 3 SCR 1.

⁹ See, e.g., Abhijit Guha, *Land, Law and the Left: The Saga of Disempowerment of the Peasantry in the Era of Globalization* (Concept Publishing Company 2007) 47–48; Kannan Kasturi, ‘Land Acquisition from Colonial Times to the Present’ *Ghadar Jari Hai* (Delhi, 20 January 2008) <http://www.ghadar.in/gjh_html/index.php?q=node/32> (accessed 16 February 2014); Anthony Dias, ‘Eminent Domain, Displacement and Impoverishment’ in Renu Modi (ed), *Beyond Relocation: The Imperative of Sustainable Resettlement* (Sage 2009) 183–184; Hari Mohan Mathur, ‘Making resettlement work: policy, planning and management’ in Hari Mohan Mathur (ed), *Resettling Displaced People: Policy and Practice in India* (Routledge 2011).

the Nehruvian developmental state and then, particularly after 1991, for private industrial and commercial ventures to which the liberalising state lent generous aid.¹⁰

For a brief period (1919–1921), however, the provincial governments of the Raj did indeed deploy the Act for industry on a significant scale, ostensibly licensed by the Indian Industrial Commission (1916–1918) to do so. The Government of Bombay, to take the extreme example, agreed to acquire 1,500 acres for an industrial township, 6,000 acres for a sugar company, and hundreds of acres for ‘industrial development’ at large.

Although this profusion of acquisitions ended by 1922, once the Government of India reasserted the old caution, it endured for a time in nationalist literature and politics. An acquisition for industry in Benares is said to have influenced Premchand’s *Rangbhoomi*, a Hindi novel published in 1925 to popular acclaim.¹¹ The protagonists of the sprawling novel – the *Neel Darpan* of land acquisition in ideology and tone¹² – are Soordas, a blind Dalit beggar, and John Sevak, an Anglo-Indian industrialist. Sevak covets Soordas’s ten *bighas* of ancestral land as a site on which his cigarette company could build a factory. Soordas refuses to sell the land, explaining that doing so would be disrespectful to his

¹⁰ Michael Levien, ‘Regimes of Dispossession: From Steel Towns to Special Economic Zones’ (2013) 44 *Development and Change* 381. Levien’s article is a valuable contribution to a large and growing literature. See, e.g., Guha (n 9); Lancy Lobo and Shahikant Kumar, *Land Acquisition, Displacement and Resettlement in Gujarat 1947–2004* (Sage Publications 2009); Felix Padel and Samarendra Das, *Out of This Earth: East India Adivasis and the Aluminium Cartel* (Orient Blackswan 2010). To date, however, a comprehensive history of these developments has not yet been written.

¹¹ Madan Gopal, *Munshi Premchand: A Literary Biography* (Asia Publishing House 1964) 204–205, 212; Robert O Swan, *Munshi Premchand of Lamhi Village* (Duke University Press 1969) 3; VS Naravane, *Premchand: His Life and Work* (Vikas Publishing House 1980) 113; Alok Rai, ‘Introduction’ to Premchand, *Rangbhumi: The Arena of Life* (Christopher King tr, OUP 2010).

¹² See Ranajit Guha, ‘*Neel Darpan*: The Image of a Peasant Revolt in a Liberal Mirror’ in his *The Small Voice of History* (Partha Chatterjee ed, Permanent Black 2009 [1974]). C.f. Geetanjali Pandey, ‘Premchand on Industrialism: A Study in Attitudinal Ambivalence’ (1982) 19 *IESHR* 201.

ancestors and would harm the *muhalla-vallas* of Pandeypur (a fictional *basti* near Benaras), who used the land as a commons for grazing their cattle. Sevak argues that the factory will bring prosperity to Pandeypur, but Soordas fears the wickedness that prosperity will bring. Sevak, well-connected, persuades officials to acquire Soordas's land and later the whole of Pandeypur on the company's behalf using their powers under the 1894 Act. Inspired by Soordas's courage and goodness, the *muhalla-valas* unite against the acquisition in a *satyagraha*, which is eventually dispersed by police fire that kills Soordas and a dozen others.

While *Rangbbhoomi* is still celebrated, twice translated into English recent years,¹³ its real-life counterpart has been entirely forgotten. In 1927, in a belated response to the acquisitions for industry in 1919–1921 and contemporaneous acquisitions for a Tata hydro-electric dam in Poona, the nationalist legislator Narsinh Chintaman Kelkar (1872–1947) introduced a private member's Bill that proposed far-reaching amendments to the 1894 Act. Had they passed, those amendments would have improved the position of landowners at the expense of the state and industry. To illustrate, had the Bill become law, John Sevak's cigarette company would have found it more difficult and expensive for Pandeypur to have been acquired on its behalf. The company would have been obliged (i) to prove that it was registered in India and that a majority of its directors or shareholders were Indian; (ii) to secure the permission of the provincial legislature (not merely that of the executive); and (iii) to promise to re-house the displaced *muhalla-vallas* in addition to paying them compensation, with the level of compensation set by private arbitrators (as opposed to the executive) according to new, more generous, criteria.

¹³ Premchand (n 1); Premchand (n 12).

As one would expect, officials inside and outside the Legislative Assembly (then the lower house of the Indian Parliament) opposed the Bill. What is most surprising is that the Indian National Congress, then the largest nationalist party in the Assembly, withheld its open support from the measure and thereby guaranteed its failure. Even members of Kelkar's own party, the United Nationalists, stayed silent. The Bill was withdrawn and soon forgotten.

Why might the nationalists in the Assembly have left the Kelkar Bill to fail? In the course of venturing an answer from the contextual evidence – the archives have not yielded a direct answer – this study offers the first instalment of a general history of land acquisition in British India.¹⁴ The closest attention is given to the period from the enactment of the 1894 Act to the proposal of the Kelkar Bill in 1927. Earlier and later developments are also discussed so far as they are relevant.

The absence of a history of land acquisition has been keenly felt.¹⁶ Indian scholars and journalists seeking to historicise the practice of land acquisition today have been obliged

¹⁴ That is, British Indian territory on the subcontinent. Except in passing references, this study does not consider the position in the princely states (in which the 1894 Act was not in force, although there were equivalent measures in the larger states) or in Burma (in which the Act was in force, but fewer records are available in British and Indian archives). See, further, 68 below (n 101)). Naturally, such a broad geographical scope as British India means that the theses advanced here must be read as contingent on further research at the level of the region/locality. That said, as Marc Galanter observed, legal studies can usefully supplement the 'localism' of other disciplines by 'providing a picture of the standards and procedures injected into each local situation by the nationwide network of legal agencies': 'The Uses of Law in Indian Studies' in his *Law and Society in Modern India* (Rajeev Dhavan (ed), OUP 1989) 10. C.f. Nandini Chatterjee, *The Making of Indian Secularism: Empire, Law and Christianity, 1830–1960* (Palgrave Macmillan 2011) 19.

¹⁶ The existing literature is limited to (i) spare (and incomplete) accounts of relevant statutes in legal treatises (e.g. Walter Russell Donagh, *The Law of Land Acquisition and Compensation in British India* (Thacker, Spink & Co. 1913) 1–19; Samatul Chandra Dutt, *Compulsory Sales in British India* (S. Miller & Co. 1915) 41); (ii) brief treatments of land acquisition for the railways (see 42 below (n 1)); and (iii) a study of land acquisition for New Delhi: David A Johnson, 'Land Acquisition, Landlessness, and the Building of New Delhi' (2010) 108 *Radical History Review* 91.

to made broad guesses as to what happened before 1947 and why.¹⁷ With that audience foremost in mind, this study poses and seeks to answer five questions: *(i)* when, why, and on what basis did the Raj first assert a legal power of land acquisition?; *(ii)* what influenced the development of land acquisition legislation?; *(iii)* for what purposes were the power of land acquisition deployed?; *(iv)* what role did the legislatures and courts play in relation to the land-acquiring executive?; *(v)* to what extent (if any) did the practice of land acquisition further imperial ends?.

In answer to those questions, this study advances eight principal theses:

- (i)* That what could be described as the first law of land acquisition was enacted as early as 1668 – a century and a half earlier than hitherto thought – as part of the Aungier Convention: the East India Company’s political settlement with the Portuguese landlords of Bombay island, agitated by naked expropriations of Jesuit land during the preceding years of Crown rule (1665–1668). (This, as it happens, is yet another instance in which the power of eminent domain was asserted contemporaneously with state formation¹⁸ – a coincidence that would reward further study¹⁹);

¹⁷ See e.g. Sumit Sarkar and Tanika Sarkar, ‘A Place Called Nandigram’ in Ray (n 5) 30. A recent author went so far as to posit that land acquisition before independence was a marginal phenomenon: Sanjoy Chakravorty, *The Price of Land: Acquisition, Conflict, Consequence* (OUP 2013) 90–91.

¹⁸ William Stoeckel, ‘A General Theory of Eminent Domain’ (1972) 47 *Washington Law Review* 553.

¹⁹ The issue is not tackled by recent contributions to the comparative history of eminent domain, which include Michael Taggart, ‘Expropriation, Public Purpose and the Constitution’ in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press 1998); and, for an earlier period, Susan Reynolds, *Before Eminent Domain: Toward a History of Expropriation of Land for the Common Good* (University of North Carolina Press, 2010). The legal-philosophical questions raised by eminent (ctd. on next page)

- (ii) That, to a remarkable degree, land acquisition law was shaped in the interests of the British-controlled ('sterling') railway companies operating in India, a significant privilege overlooked by the historiography of Indian railways;²⁰
- (iii) That the state habitually used land acquisition not so much to effect non-consensual transfers but to 'launder' titles free of encumbrances (or fractional property rights, often held in common), thereby avoiding structural problems in the market for land that the state could not solve (or, less charitably, was not prepared to incur the costs of solving);
- (iv) That, sampling the practice of land acquisition by the Government of India (1894–1927) and the Government of Bombay (1918–1927), the primary beneficiaries of land acquisition were public bodies, the sterling railway companies, and elite private interests, whereas the interests of the poor (both urban and rural) and Indian industry were comparatively neglected. As presaged above, the Raj refrained from acquiring land for Indian industry on any significant scale except during 1919–1921;
- (v) That the authorities were hostile to legislative and judicial oversight of land acquisition, seen as a characteristically executive function. The various attempts

domain have spawned a much larger literature e.g. the seminal contribution by Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press 1989).

²⁰ In a useful survey of the literature, Kerr notes that law is a 'much neglected' topic in railway history: 'Introduction' in Ian J Kerr (ed), *Railways in Modern India* (OUP 2001) 29.

by nationalists in the 1920s to assign legislatures and courts a greater role – such as the Kelkar Bill – were successfully resisted or co-opted by the executive.

- (vi) That, as one might expect,²¹ the courts were in any event content with the limited role they were assigned under the 1894 Act (of deciding on appeals on the compensation offered by the executive for acquired land). They generally deferred to the executive in land acquisition cases by, for instance, taking an expansive ‘public benefit’ interpretation of ‘public purpose’ (a position that happens to concur with the modern American position so controversially affirmed in *Kelo v City of New London* 125 S Ct 2655 (2005)).²²
- (vii) That, unencumbered by meaningful scrutiny, from time to time the land-acquiring executive bent the law to suit its will, although as a general rule officials displayed a legal fastidiousness;²³

²¹ “... the notional independence of the judiciary from the executive, proclaimed in the Permanent Settlement, was never realized. Colonial India had no independent legislature or written constitution to act as a check on the executive, which actually appointed the judiciary as part of the civil service and changed the law as it pleased. The supposed autonomy of the judiciary was an illusion, perpetuated by colonial legitimating ideology, and the law was a department of the executive”: DA Washbrook, ‘Law, State and Agrarian Society in Colonial India’ (1981) 15 MAS 649, 714.

²² For comment, see Abraham Bell and Gideon Parchomovsky, ‘The Uselessness of Public Use’ (2006) 106 Colum L Rev 1412; c.f. Charles E Cohen, ‘Eminent Domain after *Kelo v. City of New London*: An Argument for Banning Economic Development Takings’ (2006) 29 Harv J L & Pub Pol’y 491.

²³ ‘The law may be rhetoric, but it need not be empty rhetoric. ... the rulers were, in serious senses, whether willingly or unwillingly, the prisoners of their own rhetoric: they played the games of power according to rules which suited them, but they could not break those rules or the whole game would be thrown away’: EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin Books 1977) 263. See, further, Nasser Hussain, *Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003); Rande W Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (OUP 2008).

(viii) That, despite an appearance of impartiality, land acquisition bore the stain of imperialism. Although the Raj was willing to engage in what amounted to land acquisition for the benefit of industries controlled by British capital (by annexing Berar and Nagpur for the Lancashire cotton industry and enclosing 'waste' land for sterling tea companies in Assam), it studiously refused to take land for Indian industry except when doing so happened to align with imperial priorities (which it nearly never did).

As these theses illustrate, the history of land acquisition is worthy of study not only for its own sake but also for what it offers a number of related fields (for instance, the study of the rule of law under colonialism). In explaining the failure of the Kelkar Bill, this study also aspires to contribute to the historiography of nationalism in the late colonial period. It analyses the use that nationalists made of the fledgling Montagu-Chelmsford legislatures by identifying the following categories of the private member's Bills they introduced therein: (i) those Bills that represented a straightforward attempt at technical law reform; (ii) those Bills that were no more than a bare vehicle for anti-imperialist propaganda; and (iii) those Bills that sought to engage with a divisive issue of public policy. Bills of the first two kinds were supported by nationalist legislators, whereas the Kelkar Bill fell into the problematic third category. It is argued that, despite its unabashedly nationalist aims, the Bill was left to fail by nationalists because they feared that the Bill would exacerbate their internal divisions and distract from the making of propaganda against the Raj. As told here, the story of the Kelkar Bill exemplifies the compromises of nationalism.

The chapters that follow seek to explain the failure of the Kelkar Bill and, in so doing, reconstruct some central aspects of the history of land acquisition. Chapter 1 introduces

Kelkar and the Bill and then proceeds to examine, but ultimately reject, the argument that party-politics alone was responsible for the Bill's failure. In doing so, the chapter explores the relationship between various nationalist factions in the 1920s. Chapters 2–4 consider the attractions of a single clause in the Bill which provided that only 'rupee' companies with a majority of 'Indian' directors or shareholders could be beneficiaries of land acquisition. Chapter 2, a history of land acquisition for the sterling railway companies, argues that (as Kelkar would have intended) this clause would have forced the pace at which those companies were nationalised. Chapter 3, an account of the law governing land acquisition for industry, is a preface to Chapter 4, a comprehensive post-mortem of the authorities' short-lived experiment with such acquisitions in 1919–1921. Both chapters show, among other things, the degree to which land acquisition was an imperial phenomenon. Chapter 5, which makes the argument on the failure of the Kelkar Bill presaged above, surveys the law and practice of compensation and resettlement and reveals the degree to which the executive guarded land acquisition from legislative and judicial scrutiny.

This is a legal history, in the sense that *(i)* many of its primary sources are legal (principally legislation, as the courts were excluded from all else but the level of compensation); *(ii)* it pays close attention to the content, structure, and application of legal rules (the 'quiddity of law')²⁴; and *(iii)* it lingers over subjects of particular interest to lawyers and legal historians, such as the attitude of the courts in land acquisition cases, the strength of the rule of law in land acquisition, and the origin of rules and doctrines that have persisted to the present day (for example, the phrase 'public purpose', which

²⁴ Kunal Parker, 'The Historiography of Difference' (2005) 23 Law and History Review 685, n 2.

has defined the permissible bounds of land acquisition in India since 1824). Although considerably more than an ‘internal’ legal history of land acquisition statutes and case law – an exercise that would overlook much of interest and value in the history of land acquisition²⁵ – this study does not follow either the thematisations of recent works in South Asian legal history or their engagement with social theory.²⁶ Given the newness of the subject and constraints of time and space – and, for that matter, training: unusually, this is Indian legal history by a non-historian lawyer²⁷ – what is attempted here is an analytical narrative that answers the questions above (with a generous degree of context and digression) and opens up the subject for further study.²⁸

²⁵ Not to belittle the value of such works in South Asian legal history: see e.g. HCL Merillat, *Land and the Constitution in India* (Columbia University Press 1970), still a standard reference. The distinction between ‘internal’ and ‘external’ legal history was first proposed in RW Gordon, ‘Introduction: J Willard Hurst and the Common Law Tradition in American Legal Historiography’ (1975) 10 *Law & Soc’y Rev* 9. For recent analyses of the distinction, see David J Ibbetson, ‘What is Legal History a History of?’ in Andrew Lewis and Michael Lobban (eds), *Law and History* (OUP 2004) 33–34; Kunal M Parker, ‘Law “In” and “As” History: The Common Law in the American Polity, 1790–1900’ [2011] 1 *UC Irvine Law Review* 587; David M Rabban, *Law’s History: American Legal Thought and the Transatlantic Turn to History* (CUP 2013).

²⁶ See e.g. Ritu Birla, *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India* (Duke University Press 2009) (a cultural history of the law governing indigenous merchant-capitalists); Mithi Mukherjee, *India in the Shadows of Empire: A Legal and Political History* (OUP 2010) (which draws on Foucault in making broad claims about the basis of the Indian democratic polity); Rachel Sturman, *The Government of Social Life in Colonial India: Liberalism, Religious Law, and Women’s Rights* (CUP 2012) (a historical ethnography of state practice in relation to various aspects of Indian social life). There is a closer resemblance between the present study and those that hew more closely to cases and/or legislative materials e.g. Rohit De, ‘Mumtaz Bibi’s broken heart: the many lives of the Dissolution of Muslim Marriages Act’ (2009) 46 *IESHR* 105; Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (CUP 2010); Chandra Mallampalli, *Race, Religion and Law in Colonial India: Trials of an Interracial Family* (CUP 2011); Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community* (CUP 2013).

²⁷ Kunal Parker observed in 2005 that colonial Indian legal history, unlike American legal history, is the province of historians rather than legal scholars in law faculties: ‘The Historiography of Difference’ (2005) 23 *Law and History Review* 685, n 2.

²⁸ For examples of self-described analytical narratives in legal history, see RW Kostal, *Law and English Railway Capitalism 1825–1875* (Clarendon Press 1994); Kostal (n 23) ch 1–7. The usual disclaimers as to objectivity apply: see, generally, Partha Chatterjee, ‘Introduction: History and the Present’ in Partha Chatterjee and Anjan Ghosh, *History and the Present* (Anthem Press 2006); Sumit Sarkar, *Beyond Nationalist Frames: Relocating Postmodernism, Hindutva, History* (Permanent Black 2002) ch VI. In particular, present-day concerns will inevitably have refracted the historical account, (ctd. on next page)

The evidence is far from exhausted. The voluminous colonial records on land acquisition at the National Archives of India and the Maharashtra State Archives – running into many thousands of files – have only been test-drilled thus far. Other archives (of other British Indian provinces and the larger princely states, for instance) await consultation. Vernacular newspapers and literature might yield rich returns, if *Rangbhoomi* is any guide. Oral histories, crucial for a social history of land acquisition,²⁹ await collection.

Sources permitting, future studies might listen closely for the small voices of land acquisition history – the urban poor, the peasant, the forest-dweller – almost entirely absent from records and judgments.³⁰ One might study how the heavy litigation on compensation for acquired land affected the colonial legal culture³¹ or the legal profession.³² Valuable insights may be drawn from how officials and judges construed the ‘public’ in whose name land acquisition law was deployed.³³ More generally, land acquisition may serve as a useful case-study for understanding, say, (i) law-making, law-adherence, and law-breaking by the colonial state; (ii) divergences in law and practice

including in the selection of aspects of the history of land acquisition for study.

²⁹ C.f. Nandini Sundar, *Subalterns and Sovereigns: An Anthropological History of Bastar (1854–2006)* (2nd ed OUP 2007).

³⁰ Ranajit Guha, ‘Introduction to the Subaltern Studies Reader’ in *The Small Voice of History* (Partha Chatterjee ed, Permanent Black 2009 [1997]). As Elizabeth Kolsky notes, however, ‘due to the unavailability of sources, Indian legal histories framed from the bottom up are few and far between and difficult to produce’: ‘A Note on the Study of Indian Legal History’ (2005) 23 *Law and History Review* 703, 705–706

³¹ C.f. Kostal (n 28).

³² See, generally, Mitra Sharafi, ‘A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire’ (2007) 32 *Law & Social Inquiry* 1059.

³³ C.f. David Gilmartin, ‘The Irrigating Public: The State and Local Management in Colonial Irrigation’ in Stig Toft Madsen (ed), *State, Society and the Environment in South Asia* (Curzon 1999).

between metropolis and colony; (iii) claim-making on the state before the advent of human rights; (iv) the relationship between British India and the princely states;³⁴ and (v) the use by the successor states to British India of a common statute inherited on their independence.

That final enquiry is particularly promising. In another instance of the longevity of colonial law in South Asia, the 1894 Act stayed on the statute books in Bangladesh until 1982 and is still in force in Pakistan and Burma (Myanmar). The Act remained law in India as late as September 2013 until, in a delayed response to Nandigram and many other confrontations over land acquisition for industry in the late 2000s – notably in Singur, West Bengal (2006–2008); Kalinga Nagar, Orissa (2006); Raigad, Maharashtra (2007–2008)³⁵ – the Congress-led central government repealed the Act in favour of a new law of land acquisition: the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013.

The Preamble to the new Act declares its intention ‘to ensure ... a humane, participative, informed and transparent process for land acquisition’ and to provide ‘just and fair’ compensation and ‘adequate’ rehabilitation and resettlement to affected persons, such that they ‘become partners in development leading to an improvement in their post acquisition social and economic status’.

³⁴ See 69 below.

³⁵ There has been extensive reportage and commentary on these events. See, e.g., P Banerjee, ‘Land Acquisition and Peasant Resistance at Singur’ (18–24 November 2006) 41 *Economic and Political Weekly* 4718; ‘No SEZ in Kalinganagar’ (Bhubaneswar, Orissa 29 March 2007) <<http://www.hindustantimes.com/india-news/bhubaneshwar/no-sez-in-kalinganagar/article1-212414.aspx>> accessed 12 April 2014; M Gadgil, ‘Farmers start stir against RIL SEZ in Raigad’ *Business Standard* (Pun, Maharashtra 18 June 2008) <http://www.businessstandard.com/article/economypolicy/farmers-start-stir-against-ril-sez-in-raigad108061801004_1.html> accessed 12 April 2014; Chakravorty (n 17) ch 4.

Whatever the new Act will actually achieve,³⁶ Kelkar would be forgiven for drawing some solace and vindication from its declared intentions. For the Communists of West Bengal, however, there would be no vindication. In 2011, they were deposed by voters enraged by the events at Nandigram and Singur, an ignominious end to thirty years in power.³⁷

³⁶ See 273–274 below.

³⁷ Kheya Bag, ‘New Bengal’s Rise and Fall’ (2011) 70 *New Left Review* 69, 95.

Kelkar and the 1927 Bill

The Party-Political Context

Mr. N. C. Kelkar's Amending Bill ... is intended to prevent the [Land Acquisition] Act being turned into an engine of oppression in the interest of an individual or a public company or even the Government. In these parts, the poor Mavalas, the expropriated land-owners of the Mulshi Peta, are a living example of the havoc wrought by the unscrupulous operation of the Act. Examples can be cited of other provinces also where the people have suffered a good deal on account of these acquisition operations. To all of them, Mr. Kelkar's Bill comes as a relief.

— *Mahratta* (Poona, 20 February 1927)

In the end there is nothing in all their faith in the law, the civil service, the Lieutenant-Governor, and the Queen that can save the Basus of Swarapur from being utterly ruined. *Neel Darpan*, written by a liberal in the midst of a peasant revolt, shows where the liberal stands at the time of a peasant revolt: he stands close to the power of the state seeking cover behind the law and the bureaucracy. It also shows what happens to him if he does so: he is destroyed.

- Ranajit Guha, '*Neel Darpan*: The Image of a Peasant Revolt in a Liberal Mirror'³⁸

This chapter introduces Kelkar and his Bill to amend the Land Acquisition Act 1894. In the course of doing so, the chapter discusses the Mulshi *satyagraha* (a crucial influence on the Bill), the Congress's attitude toward land acquisition, and the politics of the various nationalist factions in the 1920s. The principal argument will be that party politics alone cannot explain the failure of the Bill.

³⁸

Ranjit Guha, '*Neel Darpan*: The Image of a Peasant Revolt in a Liberal Mirror' in his *The Small Voice of History* (Partha Chatterjee ed, Permanent Black 2009 [1974]) 180.

N. C. Kelkar³⁹

Born in 1872 in Miraj Senior, a princely state in southern Maharashtra, Narsinh Chintaman Kelkar's early life was typical for a member of the Chitpavan Brahmin elite.⁴⁰ After an early education in Miraj, he read for a B.A. at Deccan College, Poona and graduated in 1891. In 1894, after studying privately in Bombay, he graduated LL.B. Kelkar began legal practice but in 1896, his heart in literature and not the law, eagerly accepted an invitation from B. G. Tilak to be the joint editor of the nationalist weekly the *Mahratta*. Kelkar moved to Poona and began what proved to be a long and prolific career in journalism, in which he edited one or both the *Mahratta* and its Marathi sister paper the *Kesari* until 1932.⁴¹

Tilak found in Kelkar not only a capable editor but also a loyal assistant and friend in his public life, precisely as he had sought. Kelkar was deputed by Tilak on anti-famine and anti-plague work in 1896–7; he worked with Tilak on the Maharashtrian *swadeshi* and boycott campaigns of 1905; from 1907 or so, he served as secretary to the Nationalist (or 'New' or 'Revolutionary') party, the vehicle of the so-called Extremists in Congress like

³⁹ Unless otherwise indicated, the biographical information on Kelkar in this chapter is drawn from RM Gole, *N. C. Kelkar* (Sahitya Akademi 1976) and Sudhakar Trimbak Naigaonkar, 'N.C. Kelkar: A Political Study' (PhD thesis, University of Poona 1979). Both Gole and Naigaonkar draw on the extensive Marathi-language sources by and on Kelkar, including Kelkar's autobiography, *Gatagosti Arthat Majhi Jivan-yatra* (Past Events or the Story of My Life) (1939). Gole's monograph, a literary biography, does not comment on Kelkar's politics except in a brief postscript. Although Naigaonkar's thesis is valuable as the single extensive study of Kelkar's political career, it has several weaknesses: (1) it is incomplete in important respects, for instance in saying too little about Kelkar's communalism; (2) it does not draw on Kelkar's private papers, held at the Jayakar library, University of Pune, and the Bharat Itihas Sanshodhak Mandal, Pune; and (3) when read in light of other sources, it verges on hagiography.

⁴⁰ Ravinder Kumar, 'The New Brahmins of Maharashtra' in DA Low (ed), *Soundings in Modern South Asian History* (Weidenfeld and Nicolson 1968) 113–114.

⁴¹ Also a biographer, dramatist, and critic of some distinction, in 1937 Kelkar was feted as *Sabitya Samrat* (Emperor of Marathi literature).

Tilak who disparaged the constitutionalism of Moderate nationalists; as secretary to Tilak's Home Rule League from 1916, Kelkar wrote its manifesto⁴² and travelled to London in 1919 as part of its deputation. Kelkar's role as Tilak's lieutenant was not quite the sum total of his public work during Tilak's lifetime – Kelkar had a long association with the Poona Municipality, for instance, culminating in his election as the first mayor of the city in 1918⁴³ – but it was close to being so.

For so close and loyal a Tilakite, Kelkar was surprisingly heterodox. Wary of the mass politics that Tilak had pioneered, Kelkar preferred to work 'within the defined frameworks of journalistic and constitutional agitation'.⁴⁴ He opposed the revolutionary violence at which Tilak intrigued.⁴⁵ In contrast to the aggression of Tilak's prose, Kelkar's was known for its 'fair presentation, appeal to reason, and overall literary flavour'.⁴⁶ Late in 1908, Kelkar offered to resign from the *Mahratta*, feeling that Tilak thought him 'wanting in [his] duty as a party man'.⁴⁷ Tilak persuaded Kelkar to stay, writing that it would be 'extremely painful' to part with him. Theirs was a close friendship and Kelkar was too valuable a lieutenant to lose: as a prodigious journalist, Kelkar was an effective propagator of Tilak's views; moreover, precisely because of his

⁴² NC Kelkar, *The Case for Indian Home Rule* (Indian Home Rule League 1917).

⁴³ 'Mr. N. C. Kelkar's Birthday: Poona Celebrations' *The Times of India* (Bombay, 25 Aug 1932).

⁴⁴ Richard I Cashman, *The Myth of Lokamanya: Tilak and Mass Politics in Maharashtra* (University of California Press 1975) 96.

⁴⁵ Dhanajay Keer, *Lokamanya Tilak: Father of the Indian Freedom Struggle* (2nd edn, Popular Prakashan 1969) 295.

⁴⁶ *Mahratta* (Poona, 8 August 1920), quoted in Cashman (n 44) 48; J Natarajan, *History of Indian Journalism: Part II of the Report of the Press Commission* (Ministry of Information and Broadcasting, GoI 1955) 138.

⁴⁷ See the correspondence in MD Vidwans, *Letters of Lokamanya Tilak* (Kesari Prakashan 1966) 256–260. On Kelkar's differences with Tilak and the other Tilakites, see Keer (n 45) 170, 181, 274–275, 279; Cashman (n 44) 89.

heterodoxy, leavened with his 'genial temper and rational views', Kelkar could act as the 'recognised link' between the Extremists and the Moderates.⁴⁸

On Tilak's death in 1920, Kelkar, scholars have argued, was the best poised of the likely successors. Amongst other advantages, Kelkar inherited the editorship of the *Kesari*, a powerful influence on Maharashtrian public opinion.⁴⁹ However, although he was recognised as the de-facto leader of the Tilakites and a person of 'tremendous influence' in Maharashtra,⁵⁰ Kelkar's stature never rivalled Tilak's. Richard Cashman has argued that Kelkar was 'not equipped to lead', as he lacked both the forcefulness to unite the heterogeneous Tilakites and the political imagination to reinterpret Tilak's legacy.⁵¹ Sudhakar Naigaonkar has argued that Kelkar had neither the talent for mass politics nor the charisma to attract a new generation of followers (echoing an intelligence report that said that Kelkar 'lacked the spirit of his master').⁵² As was said of M. R. Ranade, a kindred spirit to Kelkar, there was a 'lack of the qualities that make the demagogue'.⁵³ Kelkar, for his part, denied having 'pretensions to distinction'.⁵⁴ He understood that as a

⁴⁸ MR Jayakar, *The Story of My Life: Volume I: 1873–1922* (Asia Publishing House 1958) 401; and his *The Story of My Life: Volume II: 1922–1925* (Asia Publishing House 1959) 156.

⁴⁹ Rosalind O'Hanlon, 'Acts of Appropriation: Non-Brahmin Radicals and the Congress in Early Twentieth Century Maharashtra' in Mike Shepperdson and Colin Simmons (eds), *The Indian National Congress and the Political Economy of India* (Aldershot 1988) 113.

⁵⁰ Jayakar, Vol II (n 48) 136.

⁵¹ Cashman (n 44) 205–206. See, also, Rajendra Vora, *The World's First Anti-Dam Movement: The Mulshi Satyagraha, 1920–1924* (Permanent Black 2009) 147.

⁵² Naigaonkar (n 38) 82–83; NR Phatak, *Source Material for a History of the Freedom Movement in India: Vol III: Mahatma Gandhi: Part I: 1915–22* (Directorate of Printing and Stationery, Maharashtra State 1965) 411.

⁵³ Kumar (n 40) 113; Gole (n 38) 11.

⁵⁴ NC Kelkar, 'A Statement of Personal Explanation' *Mahratta* (Poona, 3 September 1921), reproduced in his *A Passing Phase of Politics* (S. W. Awathi 1925) 174; extract from NC Kelkar, *Gatagosti Arthat Majhi Jivan-yatra* (n 38) reproduced and translated in Gole (n 38) 33.

golden-mean rationalist he would struggle for mass popularity. In the event, none of Tilak's other putative heirs fared any better than Kelkar. The un-crowned leadership of the nationalist movement, perhaps once Tilak's, was Gandhi's after 1920 and never returned to Maharashtra.

It was 'a very good attitude of mind to be loyal to Mahatma Gandhi if one can conscientiously do so', Kelkar once wrote.⁵⁵ During the non-cooperation movement (1920–1922), Kelkar displayed if not loyalty then at least a pragmatic accommodation to the reality of Gandhi's leadership. However, whether for reasons of conscience or electoral calculation, Kelkar's political manoeuvres in the years after non-cooperation reflected a progressive estrangement from Gandhi and so, as it turned out, a movement away from the centre of gravity of the nationalist movement – a change in political fortunes might have affected the prospects of the 1927 Bill.

'Responsive cooperation' under the 1919 reforms

In explaining Kelkar's change of fortunes as well as the opportunities that his Bill sought to exploit, we begin with the Montagu-Chelmsford constitutional reforms of 1919. Those reforms reconstituted the central and provincial legislatures (or 'councils', as they were more commonly known) so that elected members, whose ranks were considerably increased by the reforms, would, for the first time, enjoy a permanent majority over those members nominated by the Governors (in the provinces) and the Viceroy (at the

⁵⁵ Kelkar's evidence to the Civil Disobedience Enquiry Committee (20 July 1922), reproduced in his *Pleasures and Privileges of the Pen: Book IV – Speeches and Addresses* (KN Kelkar 1929) 133.

centre). A bicameral structure was introduced at the centre, comprising the Legislative Assembly as the lower house and the Council of State as the upper house. The electoral franchise was extended in the provinces and the centre by the creation of general constituencies delineated by territory and circumscribed only by tax and property qualifications, confining to a minority those constituencies that represented special interests or particular religious or caste groups. In the most striking of the changes, a system of 'dyarchy' was introduced in the provinces by which Ministers, appointed from the ranks of elected legislators, were made responsible for the administration of certain 'transferred' subjects of public policy such as public health, education, and the development of industries.

More sensitive subjects, however, such as land revenue and policing, were 'reserved' to the Governors and their (nominated) Executive Councils. This was characteristic of the reforms as a whole, which devolved a certain measure of popular control over legislative and executive authority, particularly in the provinces, but left the power of the Governors and the Viceroy constitutionally unchecked. Those officials had the power to pass into law any bills and budgets rejected by the legislatures. Bills passed by the central legislature required the Viceroy's assent before becoming law and, even then, could be disallowed by the Crown. Notwithstanding dyarchy, neither the provincial Ministers nor the Governors and their Executive Councils were responsible to, in the sense of being removable by, the legislatures. Whatever criticism it attracted or legislative defeats it suffered, the Government of India, responsible only to Parliament, could not be brought down by the Legislative Assembly. By these means, the reforms maintained the essential character of British government in India as an 'autocracy of hierarchically organised

officials’,⁵⁶ although this autocracy was now more exposed to public criticism in the political forums it had enlarged and empowered.

The Congress at Amritsar in December 1919 criticised the reforms as ‘inadequate, unsatisfactory, and disappointing’ but encouraged its members to manipulate the reforms in order to secure the ‘early’ establishment of responsible government.⁵⁷ Despite their qualms, Congress members were eager to enter the councils to press the nationalist cause and to shore up their power in the provinces, as well as to secure the instant honour and fame in Indian public life that came with a council seat.

In the opening round in a struggle with Gandhi for the control of the Congress, Tilak launched a new political party to contest the inaugural elections for the councils.⁵⁸ The Congress Democratic Party – which, like nearly every nationalist faction of the period, remained within the umbrella of the Congress⁵⁹ – pledged to ‘work the Montagu Reforms Act for all its worth’ whether by offering cooperation or resorting to constitutional agitation, ‘whichever may be expedient and best calculated to give effect to the popular will’.⁶⁰ This policy of ‘responsive cooperation’ meant responding to like with

⁵⁶ Sumit Sarkar, *Modern India 1885–1947* (Manohar 1996) 12.

⁵⁷ BR Nanda, ‘The Swarajist Interlude’ in Ravinder Kumar (ed), *A Centenary History of the Indian National Congress: Volume Two, 1919–1935* (All India Congress Committee 1985) 114.

⁵⁸ Stanley A Wolpert, *Tilak and Gokhale: Revolution and Reform in the Making of Modern India* (University of California Press 1962) 94–95.

⁵⁹ Gopal Krishna, ‘The Development of the Indian National Congress as a Mass Organisation, 1918–23’ (1966) 25 *Journal of Asian Studies* 413, 428; RK Parashar, *Party Politics in Indian National Congress* (Anamika Publishers 2002).

⁶⁰ Parashar, *ibid*, 62–63.

like: that is, cooperating with the authorities if they were prepared to do the same and acting non-cooperatively if they were not.⁶¹

Kelkar made plans to stand for a seat on the Legislative Assembly on the platform of Tilak's new party. He remained committed to responsive cooperation throughout the 1920s, explaining the policy as 'strenuously working the reforms for what they are worth to get more reforms'.⁶² When he was pressed to explain the practical implications of the policy for legislators in the councils, he said that if part of a majority he would 'at once proceed for a deadlock which may end either in the alteration of the Reforms Act or something else' and if in a minority he would 'oppose bad measures and support good measures'.

Kelkar would maintain that the Congress had adopted the policy of responsive cooperation by its resolution at Amritsar but had not given it a fair trial.⁶³ Gandhi, having lost faith in British goodwill after the Khilafat and Punjab 'wrongs', persuaded the Calcutta Congress of September 1920 to adopt his incipient programme of non-cooperation, the centrepiece of which was a triple-boycott of the councils, courts, and state-funded schools. With Congress members prevented from contesting the elections,

⁶¹ Wolpert (n 58) 291; Vishwanath Prasad Varma, *The Life and Philosophy of Lokamanya Tilak* (Lakshmi Narain Agarwal 1978) 415.

⁶² Kelkar, *Speeches and Addresses* (n 55) 130–132.

⁶³ Kelkar, *Speeches and Addresses* (n 55) 131.

the inaugural councils were populated by independent candidates and Liberals (that is, the Moderates, who seceded from the Congress in 1918).⁶⁴

The Mulshi *satyagraha* and the 1920 resolutions

Of the old Extremists, the Tilakites were the least reconciled to non-cooperation.⁶⁵ ‘Mr. Gandhi himself [is] on trial’ for the success or failure of the programme, Kelkar wrote.⁶⁶ Although Kelkar opposed neither non-cooperation nor civil disobedience in principle,⁶⁷ he disagreed with much of the programme adopted provisionally at Calcutta. Like many in the Maharashtrian middle classes, he frowned on the boycott of courts and schools.⁶⁸ He was particularly opposed to the council-boycott, saying later that it ‘[took] away from the people one more opportunity for putting up a fight’.⁶⁹ Kelkar asked the ‘saintly’ non-

⁶⁴ M Rashiduzzaman, *The Central Legislature in British India 1921–1947* (Mullick Brothers 1965) 109–111; *Report of the Indian Statutory Commission: Vol I – Survey* (Cmd. 3568, 1930) [218]–[226]. An exception was the Madras council in which a Non-Brahmin party won a majority.

⁶⁵ Richard Gordon, ‘Non-Cooperation and Council Entry 1919 to 1920’ in John Gallagher et al (eds), *Locality, Province and Nation: Essays on Indian Politics 1870–1940* (CUP 1973) 152–153.

⁶⁶ ‘The Non-Co-Operation Resolution’, *Mahratta* (Poona, Sept 1920), reproduced in Kelkar, *Passing Phase of Politics* (n 54) 15.

⁶⁷ At the Calcutta Congress, Kelkar supported an amendment that endorsed the principle of non-cooperation but recommended a diluted form of the programme eventually adopted: BR Nanda, *Gandhi, Pan-Islamism, Imperialism and Nationalism in India* (OUP 1989) 233. For Kelkar’s views on civil disobedience, see his ‘What is Passive Resistance’ (1918) *Quarterly Journal of the Poona Sarvajanic Sabha*, reproduced in Kelkar, *Passing Phase of Politics* (n 54) 3–4; see, also, Judith M Brown, *Gandhi’s Rise to Power: Indian Politics 1915–1922* (CUP 1972) 340.

⁶⁸ Ravinder Kumar, ‘From Swaraj to Purna Swaraj: Nationalist Politics in the City of Bombay, 1920–32’ in DA Low (ed), *Congress and the Raj* (Arnold-Heinemann 1977) 90; Naigaonkar (n 38) 65–66, 75–77.

⁶⁹ Kelkar, *Speeches and Addresses* (n 55) 132. See, also, Brown (n 67) 255 for a 1920 intelligence report that records Kelkar’s views on council entry.

cooperators to stand aside and let politicians enter the councils and conduct themselves according to the 'usual impulses of worldly-minded men'.⁷⁰

Despite their reservations, Kelkar and the other Tilakites made formal resolutions to comply with the council-boycott.⁷¹ Indeed, Kelkar went so far as to help to initiate the Mulshi *satyagraha* (1921–1924):⁷² Maharashtra's first experiment with the Gandhian method and, as it turned out, one of the main inspirations for the 1927 Bill.

In March 1919, the Government of Bombay sanctioned a project by the Tata Hydro-Electric Power Supply Co. to build a dam at the confluence of two rivers in the Mulshi Peta tract of Poona district. The dam (250 feet in height, 150 feet in width, and half a mile in length) was designed to generate electricity for Bombay's mills, factories, and railways. Tata, which expected an annual profit of Rs. 1 crore 35 lakhs from the project, argued that the dam would benefit the public by boosting industry and employment. It was estimated that the reservoir for the dam (18,000 million cubic feet in capacity) would submerge 48 villages and displace thousands of Mawalas (the Maratha-Kunbi peasants and labourers of Mulshi Peta).⁷³ In June 1919, the Government declared that it would

⁷⁰ Jayakar, Vol II (n 48) 144. This echoed Tilak's view that politics was a 'game of worldly people and not of *sadbus* ...': *Young India* (28 January 1920). Gandhi, naturally, disagreed. See Wolpert (n 58) 291–292.

⁷¹ Naigaonkar (n 38) 65. For an explanation of the Tilakites' compliance, see Brown (n 67) 278–279.

⁷² Unless otherwise indicated, the account below relies on Vora (n 51). Another useful source that was found too late to be consulted closely is Livi Rodrigues, *Rural Political Protest in Western India* (OUP 1998) ch 4.

⁷³ Gail Omvedt, *Cultural Revolt in a Colonial Society: The Non-Brahman Movement in Western India: 1873 to 1930* (Scientific Socialist Education Trust 1976) 68–69.

use the Land Acquisition Act 1894 on Tata's behalf to acquire the land needed for the project.

The Mawalas began agitating against the dam, fearful that Tata would pay too little in compensation for their land. According to M. R. Jayakar, then a prominent Bombay lawyer called to intercede in the dispute, the Mawalas also had a genuine fear that emigration might corrupt their centuries-old communal life.⁷⁴ In April 1921, after a protracted series of meetings and negotiations, the Mawalas launched a *satyagraha*, first led by Vinayakrao Bhuskute, a journalist, and later by Senapati Bapat, a militant nationalist turned convert to Gandhi. Several other prominent Poona Congressmen also lent their support. At the height of the *satyagraha*, hundreds of Mawalas and volunteers occupied the dam site and inflicted minor damage to Tata property. Dozens were imprisoned. Their efforts, however, caused only a small delay to construction. By the end of 1924, with many Mawalas having accepted improved offers of compensation, the *satyagraha* was formally called off.

In his history of the Mulshi *satyagraha*, Rajendra Vora isolated several reasons behind its failure to stop the dam.⁷⁵ First, the conflict of interest between the Mawalas and the Brahmin and Gujur moneylenders to whom they were indebted, whose interest lay in the level of compensation to be paid to Mawalas rather than ensuring the Mawalas stayed on the land. Second, the divisions in Maharashtrian politics between, on the one hand, the Congress (supportive of *satyagraha*) and, on the other hand, the Moderates (sanguine

⁷⁴ Jayakar, Vol I (n 48) 458.

⁷⁵ Vora (n 51) 122–152.

about land acquisition) and the Non-Brahmin opposition (suspicious of the motives of the Brahmin instigators of *satyagraha*), both factions critical of the uncompromising 'life or land' position to which the *satyagrahis* held for a time. Third, the decision by Gandhi and the Congress outside of Maharashtra to withdraw their support for the *satyagraha*.

Prior to its withdrawal, that support had been public and unequivocal. In April 1921, the month that the *satyagraha* was launched, Gandhi wrote in *Young India* that in his experience of land acquisition cases 'people never got the exact equivalent' in compensation. He urged Tata to come forward for conciliatory talks:

What is the value of all the boons that the Tata scheme claims to confer upon India, if it is to be at the unwilling expense of even one poor man? I dare say that the problems of disease and poverty can be easily solved, and the survivors will live in luxury if the three crore half-starved men and women, and lakhs of decrepit humanity were shot and their bodies utilised for manure, or their bones utilized for making knife-handles. And yet no one but a lunatic will put up such a suggestion. Is the case any weaker when men and women are not to be shot, but compulsorily dispossessed of their valued lands about which sentiment, romance, and all that makes life worth living, have grown up? I suggest to the custodians of the great name [of Tata] that they would more truly advance India's interest if they will defer to the wishes of their weak and helpless countrymen.

In a speech in May 1921, Gandhi endorsed the *satyagraha*:

When I was asked about the people of Mulshi Peta starting a *satyagraha*, I had replied that, if the people had the necessary strength, the experiment was certainly worth trying. They have proved that they possess that strength. Whatever they have been able to achieve is good, so far as it goes. But they can have complete peace only when they are permanently assured of their rights. If a man does not want to relinquish his rights over a plot of land, it is not in keeping with the traditions of our country to obtain possession of it by recourse to law ... It may be European civilization to acquire land by recourse to a Land Acquisition Act, but I should have nothing to do with a civilization which I believe to be Satanic.

The next month, however, Gandhi wrote in *Young India* that however brave, noble, and praiseworthy, the Mulshi *satyagraha* could not further the cause of *swaraj* because the *satyagraha* was directed against only the misuse of a single Act rather than the government as a whole – a claim that Vora found perplexing because of Gandhi's record in bringing other single-issue movements to national prominence (e.g. the Champaran movement of

1917). In 1923, Gandhi advised the *satyagrahis* to cease because the Mawalas had accepted compensation, the construction of the dam was already half complete, and their leader Bapat did not believe in complete non-violence.⁷⁶

Vora suggested that Gandhi's equivocation over Mulshi reflected a conflict between his principles and his political interests, in which the latter prevailed. If the target of the *satyagraha* had been the Government of Bombay or a foreign concern, Vora argued, Gandhi would not have withdrawn his support. Tata, however, was owned by Parsi and Gujarati businessmen who, as a class, had consistently supported Gandhi since 1919 and stood to profit from the Mulshi scheme. (Moreover, all but a handful of Tata's directors and the partners of its managing agents were Indian, Vora could have added).⁷⁷

Staying at a remove from Mulshi also allowed Gandhi to gauge the loyalty of the Tilakites in the years after Tilak's death, Vora observed. Well aware of the wariness with which Maharashtrian nationalists had greeted his rise, Gandhi made efforts to win more support from the province but remained sceptical about its support for him, saying frequently that Maharashtra, in spite of its capabilities, lacked 'faith'.⁷⁸ Gandhi's secretary recorded a telling incident at a 'ladies' meeting' in Poona in 1920 at which, on Gandhi's exhortation, coins and ornaments were donated to the non-cooperation movement;

⁷⁶ Bapat later vindicated that suspicion: Vora (n 51) 117–121.

⁷⁷ FR Harris, *Jamsetji Nusserwanji Tata: A Chronicle of his Life* (2nd edn, Blackie & Son 1958) 228–229, 241.

⁷⁸ Indira Rothermund, 'Maharashtra's Response to Gandhian Nationalism' in AR Kulkarni and NK Wagle (eds), *Region, Nationality and Religion* (Popular Prakashan 1999) 76–77; Mahadev H Desai, *Day to Day with Gandhi: Vol III* (9 vols, Sarva Seva Sangh Prakashan 1968) 78; Mahadev H Desai, *Day to Day with Gandhi: Vol IV* (9 vols, Sarva Seva Sangh Prakashan 1969) 165.

Gandhi said to Kelkar – only half in jest, the secretary recorded – ‘Let at least the sight of women’s faith infect you’.⁷⁹

The failure of the Congress to support the Mulshi *satyagraha* left a ‘deep sense of wrong’ in the minds of Maharashtrians, wrote Jayakar. ‘More vividly than ever before’, he observed, Maharashtra realised that ‘with all its devotion and sacrifice, it was, and must be content to be, the Cinderella of the Gandhi movement’.⁸⁰

Even Kelkar had equivocated in his support for the *satyagraha*.⁸¹ A reluctant Gandhian but always a pragmatist, Kelkar was the first to suggest through the *Kesari* that a *satyagraha* might be necessary to stop the Tatas’ hydro-electric project, after news emerged in early 1920 of strong-arm tactics by Tata employees. By the end of the year, he had come out forcefully in favour of *satyagraha* as a legitimate protest against a perverse acquisition at the behest of a foreign capitalist (as he incorrectly, perhaps mischievously, characterised the company). The *Times of India* reported his speech to a large public meeting in Mulshi Peta:⁸²

... [Mr Kelkar] traced the history of the question and then dealt with the legal aspect of the Land Acquisition Act. He said public purpose was not defined in the Act, but even granting that the Bombay residents and millowners would be provided with electric lights and power from this source and the local Bombay trains would be propelled by the electric power, to deprive fifteen thousand people of their hearths and homes and turn them out of their ancient lands and temples of ancient sanctity, was both illegal and unjust. He asked the Government to take a plebiscite of the Bombay residents and

⁷⁹ Desai, Vol III (n 78) 81–82.

⁸⁰ Jayakar, Vol I (n 48) 463.

⁸¹ Vora (n 51) 37–40, 48–51, 57–60, 91–94, 102, 147–150.

⁸² ‘Bombay Progress: The Few Who Suffer’, *The Times of India* (Bombay, 18 Dec 1920) 13. See, also, ‘Mulshi Valley Scheme: Mr Tata’s Statement Criticised’, *The Times of India* (Bombay, 7 Jan 1921) 7.

inquire whether they were willing to make fifteen thousands of their countrymen homeless in order to get smokeless mills and railways.

Further, he said that the Tata firm at present was in no sense purely Indian, the capital was mostly foreign, and the management also was foreign. He blamed Government for the injustice, adding that it was their support which gave Messrs. Tata's their power. He deplored that the Governor had not condescended even to meet a deputation. The people of Maval, he said, were the famous Mavlis of Shivaji, and the part which would be submerged by the hydro-electric scheme was a great rice producing tract knowing no famine, and rice was the staple food of the country. It was, he declared, injustice to deprive the people of their lands. The compensation was merely nominal, and could never be a recompense for the loss.

A resolution protesting against the injustice and expressing the sense of the meeting in favour of Satyagraha and drawing the attention of Indian National Congress to the grievance, was proposed by the local agriculturalists and was passed.

Kelkar, however, played only a minor role in the *satyagraha* itself, which was sustained at great personal cost by others. Indeed, when *satyagraha* had appeared inevitable, he suggested that it should be suspended so that a compromise could be reached with Tata. Although Kelkar signed the declaration of *satyagraha* in April 1920, his editorial in the *Kesari* a few months later took a conciliatory stance, rejecting the 'life or land' position in favour of a just compromise between the Mawalas, the Government, and the company. The *satyagraha* could have been justified if it had been undertaken at the very beginning of the project, Kelkar argued, but now that Tata had spent lakhs it should be required only to pay adequate compensation. Later accused of having been a turncoat, Kelkar argued that he had supported the *satyagraha* only because he thought it would help the Mawalas avert further damage and induce amendments to the Land Acquisition Act: a revealing admission that suggests – contrary Vora's assessment that 'a movement in the

nature of a *satyagraha* had no place in [Kelkar's] political philosophy'⁸³ – that Kelkar understood very well that *satyagraha* could provide momentum for law reform.

Kelkar's involvement in efforts to amend the Act began in April 1920, at the Bombay Provincial Congress over which he was elected to preside.⁸⁴ At the instigation of a resident of Ahmednagar district, in which thousands of acres were soon to be acquired for a sugar company,⁸⁵ the attendees passed a resolution calling for an 'early amendment' of the Act so that land could be acquired for a company only if it was majority-owned by Indians and if it gave more in compensation, such as the grant of land in the same locality or the allotment of shares in the company.⁸⁶

In December 1920, a few days after his incendiary speech at Mulshi, Kelkar persuaded the All-India Congress to pass its first resolution on land acquisition. The stated purpose of the resolution was to draw public attention to the forcible acquisition of land 'in the interests of capitalists and especially foreign capitalists by the reckless and unjustifiable use of the Land Acquisition Act', a practice that 'afforded further grounds for non-cooperation'. The resolution ended with an appeal 'to the Indian capitalists concerned to avert the impending ruin of the poor peasant'.

⁸³ Vora (n 51) 150.

⁸⁴ Vora (n 51) 35–36.

⁸⁵ An acquisition discussed at 156 below.

⁸⁶ Vora (n 51) 36. The resolutions are set out at 161 below.

Later disparaged by Jayakar as ‘tame’,⁸⁷ this resolution would remain the only one of its kind. It would represent the sum total of efforts by the All-India Congress to assist the Mawalas or to engage more generally with the question of land acquisition. It was left to Kelkar to press the case.

The nationalist bloc (1923–1927)

Despite Gandhi’s apparent diffidence, the Mulshi *satyagraha* hastened the growth of the Gandhian movement in Maharashtra by bringing younger Gandhians to prominence and further diminishing the ranks of unreconstructed Tilakites like Kelkar.⁸⁸ The outcome of the Calcutta Congress of September 1920 reflected the changing balance of power: more than two-thirds of Maharashtra’s delegation voted for non-cooperation rather than the Tilakites’ strategy responsive cooperation.⁸⁹ The *Bombay Chronicle* reported that Kelkar was ‘quietly persuasive and coldly logical’ in the debate before the vote.⁹⁰ ‘But’, the paper asked, ‘do a mass of 15,000 people want sobriety of judgment or do they want and insist on having the driving power of fervid enthusiasm?’ The Tilakites did not even try to oppose non-cooperation at the Nagpur Congress of December 1920. Their decline was again illustrated by the debate on council-entry, revived after the suspension of non-cooperation in February 1922. In a poll conducted in June 1922 by the Congress, those who wished to maintain the council-boycott – the ‘no changers’ – were in the majority in

⁸⁷ Jayakar, Vol I (n 48) 421.

⁸⁸ Rothermund (n 78) 76.

⁸⁹ Gordon (n 65) 144.

⁹⁰ Jayakar, Vol I (n 48) 401.

Maharashtra.⁹¹ Kelkar, a ‘pro-changer’ who declared himself willing to enter the councils on any mandate the Congress would give,⁹² again found himself in the minority.

In the event, Kelkar joined what proved to be a successful rear-guard action by the pro-changers. In December 1922, under the leadership of C.R. Das and Motilal Nehru, they formed a new party – the Swarajya party, ostensibly still within the Congress – to contest the general election of November 1923. Swarajists were returned in strength to the Central Provinces and Bengal provincial councils, where they represented or could command a majority. Carrying out their manifesto promise to engage in ‘uniform, continuous and consistent obstruction’ unless India was made a dominion,⁹³ Swarajists declined to form ministries, refused supplies, and did whatever else was in their power to frustrate the working of dyarchy. In the Bombay and the United Provinces councils, to which they were returned in lesser numbers, they attempted a similar strategy in concert with other parties, but with mixed results.

The Swarajists secured just under half the elected seats in the Legislative Assembly. Illustrating the continuing influence of the Tilakites, Kelkar was elected with a ‘thumping majority’ from central Maharashtrian constituency to his first role as legislator.⁹⁴ In coalition with Jinnah’s Independents, with whom they comprised a majority in the house, Swarajists achieved notable victories in 1923 and 1924, frustrating the passage of

⁹¹ Cashman (n 44) 210–211.

⁹² *Young India* (30 November 1922), reproduced in MP Sreekumaran Nair (ed), *Aftermath of Non-Cooperation and the Emergence of Swaraj Party* (Indian Council of Historical Research 1991) 60.

⁹³ Nair (n 92) 153.

⁹⁴ Naigaonkar (n 38) 90.

the Budget and passing several resolutions in the face of official opposition. ‘The Swarajist has it all his way’, the Viceroy Lord Reading commented, ‘there is none to withstand him, there is none to compare with him, there is none to attack him’.⁹⁵ Montagu and Chelmsford had hoped that the Assembly would create closer bonds between officials and non-officials, but, for a time, the Swarajists turned it into ‘forum for the dissemination of propaganda’, Tomlinson writes.⁹⁶ At the end of 1924, flush with success, the Swarajists were rehabilitated by the Congress and recognised as agents of the party in the councils. (Around this time, Gandhi described Kelkar and he as ‘Old enemies. New friends’).⁹⁷

That proved, however, to be the height of the Swarajists’ fortunes. In early 1925, Jinnah withdrew the support of the Independents, who thereafter supported the Swarajists on some measures but not others, with much depending on the position that Jinnah himself took. B. R. Nanda has suggested several factors behind Jinnah’s change of heart, such as his personal rivalry with Nehru and the difficulty of keeping the Independents – a heterogeneous group that coalesced under Jinnah’s leadership only after the 1923 election – permanently aligned against the government.⁹⁸ Most of the Independents had no strong political convictions. Some represented commercial and industrial interests and so were reluctant to aggravate the authorities. Others sought various forms of government patronage. The Swarajists made some important concessions to retain their

⁹⁵ Reading to Olivier (21 February 1924), quoted in RP Singh, *The Central Legislature in India 1909-1935* (Naya Prokash 1984) 112–113.

⁹⁶ BR Tomlinson, *The Indian National Congress and the Raj 1929–1942: The Penultimate Phase* (MacMillan Press 1977) 14.

⁹⁷ Desai, Vol IV (n 79) 274.

⁹⁸ Nanda, ‘The Swarajist Interlude’ (n 57) 132–133.

support, including permitting Swarajists to introduce bills and measures ‘necessary for the healthy growth of healthy national life’,⁹⁹ but the coalition could not be sustained.

To make matters worse, at the end of 1925 the party was undermined from within by a number of defections over the issue of whether Swarajists should accept Ministerial office in the provinces. Motilal Nehru was opposed but, to his consternation, some of the leading Maharashtrian Swarajists, including Kelkar and Jayakar (now the leader of the party in the Bombay council), came out in favour.¹⁰⁰ This dispute was one of many among the Swarajists, united more by their opposition to the council-boycott than by any consensus on ideology or tactics.¹⁰¹ As Nehru understood, Kelkar and Jayakar had become Swarajists for expediency’s sake to enter the councils.¹⁰² They were never committed to the policy of obstruction, all along preferring the unabashed pragmatism licensed by responsive cooperation. Nehru was furious, at one point describing the Maharashtrian Responsivists as a ‘diseased limb’ of the party that should be amputated.¹⁰³

⁹⁹ ‘Policy and Programme of the Swarajya Party as Approved by the All-India Swarajya Party Conference, 16–17 August 1924’ in Maurice Gwyer and A Appadorai (eds), *Speeches and Documents on the Indian Constitution, 1921–47* (OUP 1957) 4–5.

¹⁰⁰ For one interpretation of their motivations, see Richard Gordon, ‘The Hindu Mahasabha and the Indian National Congress, 1915 to 1926’ (1975) 9 *Modern Asian Studies* 145, 184–185.

¹⁰¹ Gordon (n 100) 183.

¹⁰² BR Nanda, *The Nehrus: Motilal and Jawaharlal* (OUP 1984) 265. Indeed, Kelkar and Jayakar argued that responsive cooperation had become the de-facto policy of the Swarajists: Jayakar, Vol II (n 48) 40–42, 73–76, 658–659, 663–664; *Young India* (30 Nov 1922), reproduced in Nair (92) 60; Jayakar to Gandhi (26 Nov 1925), reproduced in BN Pandey (ed), *The Indian Nationalist Movement, 1885–1947: Select Documents* (Macmillan 1979) 59.

¹⁰³ Jayakar, Vol II (n 48) 665–666.

Attempts at reconciliation failed. In December 1925, Kelkar, Jayakar, and others resigned from the councils and, in early 1926, formed the Responsive Cooperation party. The new party declared its commitment to working the reforms:¹⁰⁴

... unsatisfactory, disappointing and inadequate as they are, for all they are worth, and using [the reforms] for accelerating the grant of full Responsible Government and for creating opportunities for the people for advancing their interests and strengthening their power and for resisting injustice and misrule.

The Responsivists were also united by their close association with Hindu communalist organisations.¹⁰⁵ Kelkar, for instance, was appointed a provincial organiser for the All-Indian Hindu Mahasabha in 1922 and presided over its annual sessions in 1925 and 1927.¹⁰⁶ Kelkar was a ‘liberal communalist’, Bipan Chandra has argued, in the sense that he practised communal politics but upheld basic liberal-democratic values.¹⁰⁷ In his 1925 presidential address, Kelkar denied being affected by any ‘communal spirit’ and argued that he had taken to communal politics only reluctantly in order to defend the legitimate interests of the Hindu community.¹⁰⁸ Liberal or not, Kelkar’s communalism was resented by secular nationalists like Motilal Nehru, who noted in a letter to Gandhi in

¹⁰⁴ ‘Manifesto of the Responsivist Co-Operation Party, February 1926’ in Gwyer and Appadorai (n 99) 5–6.

¹⁰⁵ DEU Baker, *Changing Political Leadership in an Indian Province: The Central Provinces and Berar, 1919–1939* (OUP 1979) 98–111. Note that the same could be said of some Swarajists and no-changers: Mushirul Hasan, ‘Communal and Revivalist Trends in Congress’ (1980) 8 *Social Scientist* 52.

¹⁰⁶ Gordon (n 100) 169; Kelkar, *Speeches and Addresses* (n 55) 285–337.

¹⁰⁷ Bipan Chandra, *Communalism in Modern India* (2nd rev edn, Vikas Publishing House 1987) 339–346.

¹⁰⁸ Kelkar, *Speeches and Addresses* (n 55) 286–287, 291–295.

1929 that Kelkar had ‘contributed his quota to make rapprochement between the two communities impossible’.¹⁰⁹

Preceded by years of serious and worsening communal violence, the third general election in November 1926 was fought less on policy grounds than on emotive communal questions like cow slaughter.¹¹⁰ In the provinces, the Swarajists lost ground everywhere but Madras. In the Legislative Assembly, they lost 7 of their 45 seats.¹¹¹

A new nationalist party, the United Nationalists, won almost half as many seats. Led by Lala Lajpat Rai and Pt. Mohan Malaviya, the Nationalists were a coalition of the Independent Congress Party – a heterogeneous but unmistakeably Hindu nationalist coalition that absorbed the Responsivists – and a few Moderates.

Although the Swarajists and the Nationalists comprised the notional opposition to the Government of India, they were riven with division and suspicion after a bruising election campaign. Dispirited, Motilal Nehru confided to his son:¹¹²

It was simply beyond me to meet the kind of propaganda started against me under the auspices of the Malaviya-Lala gang. Publicly I was denounced as an anti-Hindu and pro-Mohammedan but privately almost every individual voter was told that I was a beef-eater in league with the Mohammedans to legalise cow slaughter in public places at all

¹⁰⁹ Nehru to Gandhi (14 August 1929), reproduced in Pandey (n 102) 63, 64.

¹¹⁰ Nanda, ‘The Swarajist Interlude’ (n 57) 143–144.

¹¹¹ Rashiduzzaman (n 64) 112. These figures are estimates. As Rashiduzzaman explains at 108, official records of members’ political affiliations were not kept prior to 1934. According to other estimates, the Swarajists won between 35 to 40 seats: *India in 1926–1927* (Central Publication, GoI 1928) 46; BB Misra, *The Indian Political Parties: an Historical Analysis of Political Behaviour up to 1947* (OUP 1976) 226; Manoranjan Jha, *Role of Central Legislature in the Freedom Struggle* (National Book Trust, India 1972) 109.

¹¹² Motilal Nehru to Jawaharlal Nehru (2 Dec 1926) in Jawaharlal Nehru, *A Bunch of Old Letters: Written Mostly to Jawaharlal Nehru and Some Written by Him* (Asia Publishing House 1958) 49.

times. ... Communal hatred and heavy bribing of voters was the order of the day. I am thoroughly disgusted and am now seriously thinking of retiring from public life. ... The Malaviya-Lala gang aided by Birla's money are making frantic efforts to capture the Congress. They will probably succeed as no counter effort is possible from our side. I shall probably make a public declaration after the Congress and with it resign my seat in the Assembly though I am still acclaimed as the leader of the strongest party in the country. We can do no possible good in the Assembly or the Councils with our present numbers and the kind of men we have. I fear there will soon be defections from our ranks but apart from this it is impossible to achieve anything.

The Kelkar Bill (1927)

At the beginning of 1927, B. R. Nanda has observed, 'rarely had the political outlook been bleaker in India ... Communal antagonisms, factional rivalries and personal animosities seemed to have submerged basic issues'.¹¹³ Undeterred, Kelkar, re-elected to the Assembly with another large majority,¹¹⁴ began a full programme of responsive cooperation.

On 1 February 1927, the first day scheduled for non-official business, he sought leave to introduce a private member's Bill to amend the 1894 Act and gave a lengthy speech in support.¹¹⁵ He assured the House that his Land Acquisition (Amendment) Bill had been 'conceived in an entirely constructive spirit'. He took the 1894 Act as a 'necessity' and a 'settled fact', but argued that amendments were necessary to remedy the 'thread of imperfections [running] from end to end of the Act'. This conciliatory tone was reflected in the Statement of Objects and Reasons accompanying the Bill. The first

¹¹³ Nanda, *The Nehrus: Motilal and Jawaharlal* (n 102) 271.

¹¹⁴ Naigaonkar (n 38) 95.

¹¹⁵ *Legislative Assembly Debates (Official Report): Volume I (19th Jan to 21st February, 1927): First Session of the Third Legislative Assembly, 1927* (GoI Press 1927) 363–366.

paragraph made clear that no change was proposed to the compulsory nature of acquisitions under the 1894 Act because cases would occur in which land, ‘however cherished by private owners’, would have to be ‘acquired for uses and purposes which may have a decidedly public and beneficent aspect, and for that reason a superior claim over private need or sentiment’. ‘The Bill’, the statement continued, ‘without impairing the usefulness or the efficiency of the Act in any material particular, only helps to make its operation less unpopular [by making it] more equitable’.

As it stood when the Bill was proposed, the 1894 Act provided two distinct procedures for the acquisition of land:

- (1) *Acquisitions for a ‘public purpose’* – under the provisions in Part II of the Act, land could be acquired if, in the opinion of the provincial government, it was needed for a ‘public purpose’.¹¹⁶ The expression ‘public purpose’ was defined only to the extent that it included ‘the provision of village-sites’.¹¹⁷
- (2) *Acquisitions for a ‘company’* – Part VII of the Act provided for acquisitions for a ‘company’. The term ‘company’ was defined, in essence, as any company registered under British or Indian law.¹¹⁸ Land could be acquired for a company

¹¹⁶ Section 6. Consistently with contemporary administrative parlance, the Act referred to provincial governments as ‘local’ governments. To avoid confusion with what is regarded today as local government (municipalities etc.), the term ‘provincial’ government is used hereafter.

¹¹⁷ Section 3(f).

¹¹⁸ Section 3(e). There was no such thing as ‘British’ (as opposed to English) company law, of course. However, as ‘British’ was the term more commonly used in this context, that usage is followed here.

if, in the opinion of the provincial government, the acquisition was needed for the construction of some work that was ‘likely to prove useful to the public’.¹¹⁹

The Act did not permit legal challenges to the fact of a proposed acquisition. There was, however, an administrative procedure for hearing such challenges: ‘any person interested in the land’ (that is, a landowner or tenant)¹²⁰ could ask the relevant provincial government to reconsider a proposed acquisition.¹²¹ Only the assessment and apportionment of compensation by the district administrative officer (known as the Collector) could be challenged in court.¹²² Landowners were entitled to compensation according to the market value of the land plus an extra 15% ‘in consideration of the compulsory nature of the acquisition’.¹²³

Contrary to the minimalism of his stated aims, Kelkar’s Bill challenged almost every aspect of the 1894 Act. In addition to numerous amendments to land acquisition procedure, the Bill made three major proposals:

- (1) *The exclusion of British companies from the use of the Act* – the Bill proposed to narrow the definition of ‘company’ so land could be acquired only for companies

¹¹⁹ Section 40(1)(a) and (b).

¹²⁰ The term ‘landowner’ will be used hereafter to signify *zamindars*, *ryots*, and all others enjoying the substance of most or all of the rights of ownership under the land tenure arrangements prevailing in any particular locality. On the appropriateness of describing *ryots* as owners, see Dharma Kumar, ‘A Note on the Term ‘Land Control’ in Peter Robb (ed), *Rural India: Land, Power and Society under British Rule* (Curzon Press 1983). ‘Tenant’ is used to refer to all those with lesser rights in land.

¹²¹ Section 5A.

¹²² Part III.

¹²³ Section 23.

registered in India and run by a majority of ‘Indian’ directors or owned by a majority of ‘Indian’ shareholders.¹²⁴

(2) *The devolution of power away from the Executive* – the Bill proposed to devolve power away from the provincial governments so that provincial legislatures would decide for what purposes land would be acquired and district courts would rule on objections to acquisitions.¹²⁵

(3) *The Augmentation of Compensation and the Introduction of an Obligation of Resettlement* – the Bill proposed to augment the compensation payable under the Act by introducing a system of private arbitration and by changing the criteria for calculating the market value of land.¹²⁶ In the event that an acquisition would cause the eviction of more than thirty persons, the Bill also proposed to oblige the beneficiary of an acquisition (whether the government or a company) to re-house the displaced.¹²⁷

The Bill was neither particularly novel,¹²⁸ nor was it the first private member’s Bill for the amendment of the 1894 Act.¹²⁹ In its scope and ambition, however, it was unparalleled.

¹²⁴ Clause 2.

¹²⁵ Clauses 5, 24–27.

¹²⁶ Clause 6.

¹²⁷ Clauses 4, 9–23, 30–31.

¹²⁸ The various sources drawn upon by the Bill are discussed in the following chapters. In addition to these, another likely influence was the following article: DJ Samson, ‘Remarks on Some of the Sections of the Land Acquisition Act, Suggesting Some Modifications’ (1924–5) 2 Bombay Law Journal 469. The author, a former valuer employed by the Bombay Improvement Trust, sent a (ctd. on next page)

As convention required, the motion to introduce the Bill passed without dissent.

On the same day, Kelkar also introduced a single-clause Bill to amend the Societies Registration Act (XXI of 1860). On 15 February, the next day scheduled for non-official business, Kelkar moved for that Bill to be taken into consideration by the Assembly.¹³⁰ He explained that its purpose was to enable societies for the diffusion of political education, like Gokhale's Servants of India Society, to register under the 1860 Act. The 'smallish Bill' – as it was described by the Home Member – was passed by the Assembly without a division.

Kelkar then moved for his Land Acquisition (Amendment) Bill to be 'circulated for the purpose of eliciting opinions thereon'.¹³¹ He explained that he was not asking for the Bill to be referred to a select committee straightaway because, although convinced of the reasonableness of his proposals, he understood that the many public bodies and associations interested in land acquisition might disagree. He expressed hope that even if the Government was not prepared to send the Bill off with a blessing, it would at least refrain from sending it off with a curse.

copy to Kelkar: Samson to Kelkar (12 March 1925), Kelkar papers, Bharat Itihasa Sanshodhaka Mandal, Pune. Samson's proposals that courts should try the issue of public purpose and that persons evicted by acquisitions should be re-housed were included in the Bill. Samson's letter also suggests that Kelkar had begun drafting his Bill as early as 1925. The technical complexity of land acquisition law may explain the two-year delay before the Bill was introduced.

¹²⁹ See 232–233 below.

¹³⁰ *Legislative Assembly Debates: Vol I (19 Jan – 21 Feb 1927)* (n 115) 830–844.

¹³¹ *Legislative Assembly Debates: Vol I (19 Jan – 21 Feb 1927)* (n 115) 844–854.

Kelkar would be disappointed. The *Hindustan Times* reported: ‘A feature of yesterday’s meeting of the Assembly was that official game of obstruction. Our Swarajist friends had preached obstruction; yesterday the officials practised it.’¹³² J. W. Bhore, the responsible minister as the Secretary to the Department of Education, Health and Lands, began by saying that the Government would have opposed any other motion than one to circulate the Bill. The changes Kelkar proposed were ‘of a somewhat revolutionary character’, Bhore argued, on which those intimately concerned – local governments, municipalities, railways, and companies – should be given the fullest opportunity to express their views. At the conclusion of a lengthy speech that detailed the Government’s specific criticisms of the Bill, Bhore concluded with the damning assessment that clause after clause of the Bill ‘bristle[d] with difficulties’. H. C. Greenfield, a nominated official from the Central Provinces, ended his own damning analysis with the emphatic conclusion that he objected to every principle and point of detail in the Bill. The *Statesman* reported:¹³³

When Mr. Greenfield at last came to a full stop with the air of one who still had most of his arguments in reserve, but withheld them to gratify the Chair’s desire for brevity, protests broke out from the legal phalanx opposite. Their appetite for the Bill was naturally increased rather than diminished by Mr. Bhore’s description of it as cumbrous and costly, and there were excited attempts to move that the question [of circulation] be now put. But Mr. Abdul Aziz was on his feet—blithe, debonair and quite unmoved—and he proceeded to pour another hearty broadside into the Bill.

Aziz, a nominated official from Punjab, described the Bill as a ‘chaos of pious wishes’. He was followed by Alexander Muddiman, the Home Member, who objected strongly to

¹³² *Hindustan Times* (Delhi, 17 Feb 1927).

¹³³ *Statesman* (Calcutta, 16 Feb 1927).

a line in the Statement of Objects and Reasons that baldly called into question the competence and impartiality of District Judges.

Kelkar declined to give an extended reply given what he described as the ‘present temper of the House’. To reach those who would not read the account of the debates but who nevertheless would be invited to express their opinion on the Bill, Kelkar asked Bhore to circulate with the Bill some notes on its clauses, which he had not yet had the time to write. Petulantly, Bhore refused. The motion to circulate the Bill passed without a division, but the Bill’s prospects were now far from certain.

The nationalists’ silence

A day after the debate, Kelkar replied to a letter from S. G. Velinker, the author of a treatise on land acquisition law,¹³⁴ who had asked for Kelkar’s assessment of the likelihood that the Bill would become law.¹³⁵ Velinker’s interest was personal: he was worried that the second edition of his treatise, already sent to press, would become redundant if Kelkar’s ‘far reaching’ proposals were enacted. Kelkar wrote:

I am doubtful whether it will be accepted by the Assembly as it is, and even when it is accepted by the Assembly, it is almost sure to be defeated in the Council of State, that as you know is the usual fate of our non-official measures. But even supposing that the best fortune awaits me, a few sections will only be modified, and in that case, you can issue a supplementary pamphlet to your book. But probably it is, rather that very few of my amendments will be accepted, which means sale of your book cannot be affected. I have not attempted anything like wholesale redrafting of the Bill, and therefore, your book will of course have the whole field to yourself. In short, my advice to you will be

¹³⁴ SG Velinker, *The Law of Compulsory Land Acquisition and Compensation* (SG Velinker 1925).

¹³⁵ Velinker’s letter (4 Feb 1927) and Kelkar’s reply (16 Feb 1927) are held at the Kelkar papers, Jayakar library, University of Pune.

that, you need not be afraid of my Bill, and that you will very probably have sold out your second edition ... before I successfully carry the Assembly with me ... to adopt at least some of my amendments.

Kelkar's doubts were well-founded. Although he might have taken heart from the 'excited attempts' from the opposition benches to hasten the passage of the motion to circulate the Bill, the passage of the unexpurgated version of the Bill, even in a House with an elected majority, would be difficult. Kelkar needed at least 73 votes in the 145-member Assembly. The Assembly comprised 105 members elected by the public and 40 nominated members of the 'official bloc', of whom 26 were officials and 15 were non-officials.¹³⁶ Since the Government had declared its position, there would be no support from the nominated officials, who were subject to a de-facto whip.¹³⁷ Of the nominated non-officials, five of whom were appointed to represent special interests – European Commerce, Labour, Indian Christians, Anglo-Indians, and the Depressed Classes – Kelkar could reasonably hope only for the vote of N. M. Joshi, the Labour representative, who voted independently; the others usually sided with the government.

Turning to the elected members, there would certainly be no support from the nine members elected from European constituencies, who tended to vote with the government except when their commercial interests persuaded them otherwise: in this instance, there would be no risk of a breaking of the ranks. The remaining 95 elected seats were divided into five constituencies: Non-Mohammadan (52), Mohammadan (30), Sikh (2), Landholder (7), and Indian Commerce (4). Of these, 38 or so were filled by

¹³⁶ For the composition of the Legislative Assembly by province and type of seat, see the *Report of the Indian Statutory Commission* (n 64); and Joseph E Schwartzberg, *A Historical Atlas of South Asia* (OUP 1992) 67.

¹³⁷ Rashiduzzaman (n 64) 95, 125–126.

Swarajists and 18 or so by Nationalists. Jinnah led 13 Independents, 11 Muslim and two Hindu. Approximately 17 Muslim members loosely organised themselves as the Central Muslim Party under Zulfikar Ali Khan.¹³⁸ The remaining comprised a few Liberals and members unaffiliated with any party, such as Purshotamdas Thakurdas (the nominee of the Indian Merchants' Chamber).¹³⁹

Discounting Joshi's vote, the passage of the Bill required the support of just over three-quarters (73/95) of the elected members (excluding the 9 Europeans). 'Exited attempts' aside, their silence during the circulation debate was ominous. Not one of the Swarajists said a word.

Party politics cannot explain their reticence. While the Swarajya party would have had reservations about embracing a cause taken up by Kelkar, given his recent defection and open communalism, it was unlikely to abandon him to failure on those grounds alone. Despite their differences, the Swarajists and the Nationalists voted in unison on every key nationalist issue of the day.¹⁴⁰ They voted against the Steel Industry (Protection) Bill (1927), a government measure that they feared would introduce imperial preference by the back door. They also voted against the Currency Bill (1927), which set a rupee-

¹³⁸ Jha (n 111) 109.

¹³⁹ Ray T Smith, 'The Role of India's 'Liberals' in the Nationalist Movement, 1915–1947' (1968) 8 *Asian Survey* 607, 616–617.

¹⁴⁰ *Legislative Assembly Debates: Vol I (19 Jan – 21 Feb 1927)* (n 115) 1114; *The Legislative Assembly Debates (Official Report): Volume III (15th March to 29th March, 1927): First Session of the Third Legislative Assembly, 1927* (GoI Press 1927) 2562; *The Legislative Assembly Debates (Official Report): Volume I (1st February to 7th March, 1928): Second Session of the Third Legislative Assembly, 1928* (GoI Press 1928) 505; *Legislative Assembly Debates: Thursday, 13th September, 1928: Vol III – No. 8: Official Report* (GoI Press 1928) 1158. The Steel Industry (Protection) Bill and Haji Bill are considered in detail at 179–181, 187–194 below. On the Sarda Bill, see Sumita Mukherjee, 'Using the Legislative Assembly for Social Reform: the Sarda Act of 1929' (2006) 26 *South Asia Research* 219.

sterling exchange rate that appeared to favour British commercial interests over Indian. They united behind the Haji Bill (1928), a private member's Bill to reserve the coastal shipping trade for Indian vessels. Although with some conservative dissentients, the parties also voted for the Sarda Bill against child marriage (1928). Notably, that Bill, like Kelkar's, was promoted by a Nationalist legislator. All turned their backs on the hated Simon Commission. Given that record, Swarajists were unlikely to have dissented on land acquisition because of party politics alone. A supporting role in a nationalist victory was within reach at cost of only a small loss of face in an internecine conflict.

Equally, party politics cannot explain the lack of open support by Kelkar's Nationalist colleagues: Lajpat Rai, Malaviya – whose views on land acquisition were broadly compatible with the Bill¹⁴¹ – and even the normally voluble Jayakar, Kelkar's friend and closest colleague,¹⁴² all kept silent. Although the Nationalists were 'riven by personal jealousies' – Jayakar did not get on with Malaviya, for instance¹⁴³ – they were unlikely to have hung one of their own out to dry so publicly for that reason alone, let alone one of Kelkar's stature.

Without the support of the nationalist bloc, Jinnah and his Independents – who remained 'ostentatiously non-aligned'¹⁴⁴ – were hardly likely to feel moved to support Kelkar, particularly given his communalist politics.

¹⁴¹ See 147–148 below.

¹⁴² VB Kulkarni, *M. R. Jayakar* (Ministry of Information and Broadcasting, GoI 1976) 146–167.

¹⁴³ Nanda, 'The Swarajist Interlude' (n 57) 145–146.

¹⁴⁴ Nanda, 'The Swarajist Interlude' (n 57) 144.

Even with the Assembly's blessing, the Bill in the form in which it was introduced was likely to have been defeated in the Council of State, in which the Government enjoyed a secure de-facto majority.¹⁴⁵ The Council comprised 60 members, of whom 17 were officials, 9 were nominated non-officials, and 34 elected (from 16 Non-Mohammedan, 11 Mohammedan, 1 Sikh, 3 Non-Communal, and 3 European Commerce constituencies). By official admission, the Council was designed to 'represent the more conservative elements in the country ... which have most to lose by hasty and ill-considered legislation'.¹⁴⁶ Just over half of the non-official (elected and nominated) members of the Council were landowners. Just over half held titles conferred by the state.¹⁴⁷ The elected members – not organised into political parties until 1930¹⁴⁸ – were returned by an electorate of only 18,000 persons.¹⁴⁹ Dr Ganguly, a minor character in *Rangbhoomi*, deprecated the value of his work as a member of the Council:¹⁵⁰

The Council can't do anything. It can't pluck even one leaf. Those who form the Council can also destroy it. God gives life and he also kills. The government forms the Council so it is in the government's power.

As Kelkar mentioned to Velinker, private member's Bills did not fare well in the Council. As at February 1927, three such Bills passed by the Assembly had been rejected by the Council.¹⁵¹ If at all contentious, private member's Bills tended to be quixotic ventures.

¹⁴⁵ Bhawani Singh, *Council of States in India: A Structural and Functional Profile* (Meenakshi Prakashan 1973) 13–19.

¹⁴⁶ *Report of the Indian Statutory Commission* (n 136) [247].

¹⁴⁷ Rashiduzzaman (n 64) 100–103.

¹⁴⁸ Rashiduzzaman (n 64) 127.

¹⁴⁹ Singh (n 145) 103.

¹⁵⁰ Premchand, *Rangbhoomi* (Manju Jain tr, Penguin 2011 [1925]) 410.

¹⁵¹ Rashiduzzaman (n 64) 170–173, 251.

Of 379 introduced from 1921–1947, only 43 were enacted by both Houses, nearly all on more or less uncontroversial subjects (e.g. Kelkar’s Societies Registration Bill, enacted into law in September 1927).

The reaction outside the Assembly

Given the silence of Kelkar’s colleagues to date, the only chance that the Bill would pass lay in any evidence that it enjoyed strong support outside the Assembly walls. If so, the Assembly might be persuaded to send it to select committee. If a few of its more controversial clauses were then watered-down or dropped, perhaps the Bill would be passed by the Assembly and, at a stretch, the Council of State.

However, confounding Kelkar’s professed expectation of a ‘large body of opinion’ in the Bill’s favour – this may well have been bluster – the great majority of the dozens of opinions submitted to the provincial governments, tasked with eliciting opinion on the Bill, were opposed to its provisions.¹⁵² To a man, the provincial Governors, Chief Commissioners, and lesser officials were against the Bill. Few endorsed any of the Bill’s major proposals, or expressed sympathy for its aims, or conceded that any reforms were needed at all. The Bill, they complained, was badly drafted, impractical, unfair, mischievous, animated by racial prejudice, obstructive of nation-building, inimical to development – ‘nothing short of grotesque’, one official was moved to write.¹⁵³

¹⁵² IOR/L/E/7 – File 1126 (BL). This file contains 17 printed sets of opinions organised into four separate ‘Papers’. It is to the numbered pages of these four Papers (I, II, III and IV), rather than individual opinions, to which reference will be made hereafter.

¹⁵³ Paper No. I at 45.

Another, less hyperbolic, suspected that Kelkar's sympathy for the Mawalas had caused his heart to run away with his head.¹⁵⁴

The Collectors – the executors of land acquisition proceedings – were unsparing in their criticism.¹⁵⁵ The Collector of Karachi wrote that there was something wrong with the Assembly's rules of procedure if it was compelled to consider a Bill like Kelkar's and refer it for comment to 'hard-worked' officials and judges all over India. The Collector of Poona berated Kelkar, as a former head of the city's municipality, for favouring the private interests of landowners over the public interest. The Collector of Ganjam disparaged the Bill as a 'piece of buffoonery that he could hardly imagine a man so stupid as to mean it seriously'.

The judiciary was less intemperate but almost equally opposed to the Bill. Aside from one judge who supported the principle behind the Bill and two others who supported some of the provisions relating to compensation, none were in favour. The judges of the Calcutta and Bombay High Courts declared their objections *en masse*.¹⁵⁶

As striking as the near uniformity of opposition is its sheer volume. The Bombay government submitted no fewer than 35 separate opinions from officials and judges against the Bill. The Madras government submitted 27, the Bengal government 13. One reading of this voluminous response is as an expression of concern that the Bill, despite its 'buffoonery' and the difficult arithmetic in the Assembly, might just be passed. 'It is

¹⁵⁴ Paper No. III at 88.

¹⁵⁵ Paper No. III at 96 and 109; Paper No. IV at 16.

¹⁵⁶ Paper No. III at 86–88.

of course to be hoped that the consensus of opinion against this Bill will be so strong throughout India that the Assembly will reject it decisively', the Acting Commissioner in Sind wrote.¹⁵⁷ 'But', he added, 'some curious Bills win acceptance there, and it must not be forgotten that many of the members are themselves the owners of landed property. And consequently no stone must be left unturned to secure the defeat of the Bill'.

The same official regretted that there had not been enough time to seek opinions from municipalities and local boards which, he expected, would oppose the Bill once made aware of its implications. In fact, of the few such opinions on file, a slim, all-Maharashtrian majority (4–3) supported the Bill without reservation.¹⁵⁸ The other non-official opinions, also few in number, were divided almost evenly. Three Chambers of Commerce opposed the Bill; three were at least sympathetic.¹⁵⁹ One Bar Association was convinced of the need for reform but critical of Kelkar's proposals, another supported some proposals but not others, and a third was wholly supportive.¹⁶⁰ A provincial legislator from Punjab and another from Bihar and Orissa criticised the Bill; a third, from Berar, endorsed its main principles.¹⁶¹ In the solitary submission by a Congress organisation, the Bombay Suburban District Congress Committee declared its hearty support for the principles underlying the Bill.¹⁶²

¹⁵⁷ Paper No. III at 89.

¹⁵⁸ Paper No. III at 105–106, 108; c.f. Paper No. II at 45 and Paper No. III at 107.

¹⁵⁹ Paper No. I at 56–57 and Paper III at 123; c.f. Paper No. I at 57 and Paper No. III at 124.

¹⁶⁰ Paper No. II, respectively at 39, 68, and 42.

¹⁶¹ Paper No. II at 52 and 62; Paper No. I at 50.

¹⁶² Paper No. II at 34.

The trivial number of opinions on file other than from officials and judges may simply have reflected a lack of interest in the Bill, although there are a few other explanations. Some opinions were received by provincial governments but not forwarded to the centre.¹⁶³ At least one government did not seek out the opinion of any private individuals.¹⁶⁴ The method of publicising the Bill – publication in official gazettes – would not have been particularly effective at attracting comment.¹⁶⁵

Unfortunately for Kelkar, the press generally ignored the Bill. Only three papers did more than simply report the debates in the Assembly. An editorial in the *Leader* (a Liberal daily from Allahabad) took the position that the Act was certainly capable of improvement but that Kelkar's proposals were impractical.¹⁶⁶ The *Servant of India* (a Poona weekly published by Gokhale's Servants of India Society) hoped that the public would give the Bill its earnest consideration and that 'out of the present Bill a really suitable measure will be hammered which will do justice to private interests while subserving the public interests'.¹⁶⁷

The *Mahratta*, Kelkar's old paper, was naturally the Bill's greatest champion. In a series of editorials in early 1927, the paper offered a point-by-point defence of the Bill and claimed that if 'real public opinion' was consulted it would be in its favour.¹⁶⁸ Kelkar

¹⁶³ Paper No. I at 44; Paper No. II at 61.

¹⁶⁴ Paper No. III at 87 (the Government of Bombay).

¹⁶⁵ The publication of the Bill in the Calcutta Gazette did not attract a single opinion from companies or private individuals: Paper No. II at 61.

¹⁶⁶ *Leader* (Allahabad, 18 Feb 1927).

¹⁶⁷ *Servant of India* (Poona, 10 Feb 1927).

¹⁶⁸ *Mahratta* (Poona, 20 Feb, 27 Feb, 6 March, 13 March 1927).

must be given all possible support if the tragedy of Mulshi was not to be repeated, the final editorial concluded.

The only article on the Bill in the legal press was authored by Velinker, the treatise-writer.¹⁶⁹ Generous in his praise for Kelkar's efforts, Velinker wrote that Kelkar's 'sincerity of purpose and the care he has bestowed on this labour of love are unquestionable and deserve the unstinted thanks of the public'.¹⁷⁰ Notwithstanding this tribute, and contrary to Kelkar's expectation,¹⁷¹ Velinker too had reservations about most of the Bill's proposals.

'Futile solemn trifling'

In December 1927, Kelkar wrote to the Secretary of the Legislative Assembly to give notice of his intention to move the Assembly to send the Bill to a select committee.¹⁷² If the Assembly did so it would be considered committed to the principle of the Bill, leaving only the details of the measure to be settled at select committee.¹⁷³

¹⁶⁹ SG Velinker, 'The Land Acquisition Amendment Bill' (1927–8) 5 Bombay Law Journal 259.

¹⁷⁰ Ibid 260.

¹⁷¹ Kelkar to Velinker (n 135).

¹⁷² Kelkar to the Secretary of the Legislative Assembly (18 Dec 1927), Kelkar papers, Bharat Itihasa Sanshodhak Mandal, Pune.

¹⁷³ Rashiduzzaman (n 64) 157.

In February 1928, however, Kelkar requested that his motion be removed from the agenda for the next sitting day for non-official business.¹⁷⁴ One official in the Legislative Department, making his anxiety about the Bill quite clear, worried that it would be resurrected later in the session and recommended that the Department ‘prepare at once’ for the contingency. Another, however, wrote: ‘No action is necessary. It is unlikely that we shall hear anything from Mr Kelkar for some time. He has bigger game to hunt just now’. That oblique reference may have been to one of the three other private member’s Bills that Kelkar planned to introduce into the House¹⁷⁵ – an intensely controversial measure to repeal the Caste Disabilities Removal Act (XXI of 1850); the 1850 Act had removed all existing legal disabilities affecting religious converts, excommunicants, and outcastes.

Kelkar must have understood by now that his Land Acquisition Bill would not be passed by the Assembly. He spoke bravely while leading it to the slaughter. Seeking the leave of the Assembly to withdraw the Bill, he delivered a short speech, saying he owed an explanation to those who had collaborated with him in drafting the Bill and to those outside the Assembly in whose interests the Bill had been introduced.¹⁷⁶ The opinions received on the Bill were ‘very illuminating’, Kelkar claimed, but ‘not all equally favourable’: opinion was strongest against the principle of legislative control over land acquisition schemes, weaker against the introduction of a system of arbitration, and

¹⁷⁴ ‘Notes’ in GoI, Legislative, ‘Draft Bill by Mr N. C. Kelkar to amend the Land Acquisition Act, 1894, for certain purposes – withdrawn’ (undated), prog. 1–15, file ‘131–I/26 As’ (NAI).

¹⁷⁵ Kelkar to the Secretary, Legislative department (28 Feb 1928) in ‘Draft Bill by Mr N. C. Kelkar’, *ibid.*

¹⁷⁶ *Legislative Assembly Debates (Official Report): Volume II (8th to 27th March, 1928): Second Session of the Second Legislative Assembly* (GoI Press 1928) 1965–1966.

weakest against measures to make compensation more equitable. Not wanting prejudice against one part of the Bill to prejudice the reaction to another part, and not wanting to send the Bill to select committee, where it would be ‘marked out of all recognition like a face marked with small pox’, Kelkar said he would divide the Bill into two or three parts that might each have a better chance of passing when re-introduced in the next session of the Assembly (in Simla later that year).

In the event, Kelkar did not introduce any new Bills. His papers do not reveal why. Certainly, he cannot have been encouraged by the fate of his other efforts at law reform.¹⁷⁷ He was persuaded to withdraw a Bill to curb usury on the ground that another Bill for the same purpose was already before the House. A Bill to amend a certain limitation period was circulated but never enacted. Most influential of all may have been the openly hostile reaction to his Bill to repeal the Caste Disabilities Removal Act. The Home Member described the Bill as ‘extremely reactionary’ and bound to meet a hostile reception if circulated for opinion, as Kelkar sought. An independent member – Dr Hari Singh Gour, the jurist and social reformer – characterised the Bill as a menace to human progress and called for it to be stoutly opposed, as indeed it was: the motion to circulate the Bill did not pass, an even worse fate than that of the Land Acquisition Bill.

In March 1930, Kelkar resigned from the Assembly along with the other Nationalists in protest against a government measure giving preferential tariff treatment to British

¹⁷⁷ Ibid 1979–1990.

textiles.¹⁷⁸ The Swarajists had walked out two months earlier, in advance of the civil disobedience movement.

Kelkar was never again elected to the Assembly. Despite a 'hard fought campaign', he failed to secure a nomination to stand on a Congress ticket in the 1934 general elections.¹⁷⁹ In 1937, he announced his retirement from public life.

Kelkar said very little about the failure of his Land Acquisition Bill. Its brief, unhappy life was mentioned only in passing in his 1939 autobiography. By that time, Kelkar's 'liberal communalism' had darkened. On their failure of their latest political vehicle – the Democratic Swarajya party – he and other old Tilakites withdrew entirely from the Congress to the Hindu Mahasabha.¹⁸⁰ When V. D. Savarkar was released from confinement in 1937, Kelkar is said to have persuaded him to lead the Mahasabha rather than join the Congress.¹⁸¹ Kelkar's criticisms of Gandhi became virulent.¹⁸² The gulf between their world-views can be gauged by Kelkar's endorsement in 1942 of a draft constitution for a free India that proposed to re-name the country 'Hindusthan', on the ground that India was a 'meaningless term'.¹⁸³

¹⁷⁸ Rashiduzzaman (n 64) 24–25; Medha M Kudaisya, *The Life and Times of G. D. Birla* (OUP 2003) 121–122; c.f. 'Why Mr Kelkar Resigned: Personal Reasons', *The Times of India* (10 April 1930) 12.

¹⁷⁹ O'Hanlon (n 49) 137.

¹⁸⁰ Cashman (n 44) 214–215; Gail Omvedt, *Cultural Revolt in a Colonial Society: The Non-Brahman Movement in Western India: 1873 to 1930* (Scientific Socialist Education Trust 1976) 228–247; Rothermund (n 78) 80–83, 85–87.

¹⁸¹ Rothermund (n 78) 87.

¹⁸² Gole (n 38) 19–20.

¹⁸³ Committee of the Bhopatkar Satkar Nidhi, *The Constitution of the Hindusthan Free State* (1942) at [5], (ctd. on next page)

By this time, Kelkar knew that his political influence was long over. In 1940, he declined an invitation from the Collector of Poona to meet and talk politics since neither he nor the Collector were 'in a position to 'deliver goods' in any matters of high political policy'.¹⁸⁴ 'Anything short of that', Kelkar wrote, 'would be futile solemn trifling' – a description that, with some bitterness, he might equally have applied to his efforts to amend the 1894 Act.

Jayakar papers (File 567) (NAI).

¹⁸⁴ Kelkar to Trotman (22 June 1940), Kelkar papers, Bharat Itihasa Sanshodhaka Mandal, Pune.

Land Acquisition for the Railways

... the government having the power of taking at a small valuation the land necessary for [railways], there will be no refractory land-owners to deal with, nor any protracted and expensive parliamentary contest, to fritter away the funds of Companies. This arrangement, besides, its economical effect, will have others of a highly beneficial nature; the natives would be generally impressed in favour of an undertaking thus sanctioned, and supported by the government whose mandates they revere.

– WP Andrew, *Indian Railways and their Probable Results* (T.C. Newby 1848) 59

You won't be able to prevent him from taking the land once he is determined to. Don't you know how many contacts he has among the city officials? His daughter will soon be engaged to the district magistrate. Who can refuse him? You'll get a good price if you give your consent willingly, but you'll lose the land and not get even a kauri if you play any mischief. Did railway proprietors bring any land with them? Wasn't it our land they took? Can this land not be taken over in the same way?

– Tahir, John Sevak's accountant, to Soordas:
Premchand, *Rangbhoomi* (Manju Jain tr, Penguin 2011 [1925]) 22

This chapter is a history of land acquisition for the railways.¹ It makes two principal arguments.² First, to a remarkable degree, land acquisition law was shaped in the

¹ Much of what follows is also relevant to the history of public works in India. Land acquisition has been described as a 'major but sorely underresearched' aspect of that history: Ravi Ahuja, *Pathways of Empire: Circulation, 'Public Works' and Social Space in Colonial Orissa, c. 1780–1914* (Orient Blackswan 2009) 110–111. The existing accounts are brief and confined to the railways: Amit Mukerji and RC Sharma, 'Acquisition of Land for Railway Construction in the Agra District' in *Proceedings of the Indian History Congress, 51st Session (Calcutta)* (Indian History Congress 1991); Hena Mukherjee, *The Early History of the East Indian Railway, 1845–1879* (Firma KLM 1994) 89–100; Manu Goswami, *Producing India: From Colonial Economy to National Space* (Permanent Black 2004) 52–53. (A fourth source – Shanta Kumari Rath, 'Railway Land Dealings in Bombay 1844–1855' (MPhil thesis, University of Mumbai 1997) – could not be consulted at time of writing.) What follows, although the fullest account to date, does not purport to be comprehensive and is (ctd. on next page)

interests of the British-controlled ('sterling') railway companies operating in India, a significant privilege hitherto overlooked by the historiography of Indian railways. Second, and more generally, the state habitually used land acquisition not so much to effect non-consensual transfers but to 'launder' titles free of encumbrances (including fractional claims, often held in common), thereby circumventing endemic imperfections in the market for land that the state was unable or unwilling to solve.

The chapter also isolates a subtle but powerful effect of the Kelkar Bill. Indian opinion had long demanded that the sterling railway companies, resented for their perceived insouciance towards Indian interests, should be nationalised. The Kelkar Bill would have forced the state to do so, by making it unlawful for it to continue to use its compulsory powers to supply those companies with land.

For the most part, the chapter is structured around key statutes, beginning in 1824 with the first general law of land acquisition in British India and ending with the Land Acquisition Act 1894. The concluding sections identify the laundering effect of the successive Acts and the intended effect of the Kelkar Bill.

heavily weighted towards the railways, the task at hand being to explain the development of land acquisition legislation in the 19th century and one of the implications of Kelkar's proposal to confine land acquisition to 'Indian' companies.

² These are the second and third theses outlined in the Introduction: see 8 above.

A 'highly beneficial' arrangement

In 1844, the English civil engineer and entrepreneur R. M. Stephenson, an evangelist for the construction of railways across the Empire, sought and received a public assurance by the Government of India that it would support the private construction of railway lines in Bengal.³ This assurance was vindication for Stephenson's three-year campaign to convince officials that there was a sound military and commercial justification for railways in India. In an article in the *Englishman* of Calcutta, for instance, Stephenson had argued that the eventual extent of railways he proposed – six major lines linking the country from end to end – would improve security and enable the 'rich and varied productions of the country' to be conveyed from the interior to the ports in exchange for the 'manufactured goods of Great Britain'.

Fortunately for Stephenson, neither the Government of India nor its overseers in London – the Court of Directors of the East India Company and the Parliamentary Board of Control – ever seriously questioned the premise that, as in England, railways in India should be built by private enterprise rather than the state. In 1848, to forestall any slippage from this position, Stephenson's East Indian Railway Company ('EIR') (established as a co-partnership in 1845) advanced several lines of argument:⁴ experience had shown that governments could not build railways as well as private enterprise; the

³ Daniel Thorner, *Investment in Empire: British Railway and Steam Shipping Enterprise in India 1825–1849* (University of Pennsylvania Press 1950) 44–68. The correspondence is reproduced in S Settar (ed), *Railway Construction in India: Select Documents; Volume I: 1832–1852* (Northern Book Centre 1999) 22–29.

⁴ Thorner (n 3) 151–152.

East India Company had failed in the past to attend to public works (as indeed it had);⁵ the works that India needed in addition to railways were far too great and numerous to be carried out by the state; finally, the use of private enterprise would serve a vital educative function:

... the establishment of the Railway system by private enterprise would put the people into possession of a principle of association by which they might all be effected. This is a matter of extreme importance in India, where the energy of individual thought has long been cramped by submission to despotic governments, to irresponsible and venal subordinates, to the ceremonies and priesthood of a highly irrational religion, and to a public opinion founded not on investigation, but on traditional usages and observances.

When the Government of Madras later sought permission to construct its own lines, the Parliamentary Board of Control refused, stating that it was of great importance to attract British capital, skill, and enterprise for the undertaking.⁶

Stephenson's request for state aid was carefully calibrated to appeal to the *laissez faire* mind. He made a point of forswearing direct financial assistance, asking only for an as-yet hypothetical railway company to be granted a Charter or Act of incorporation and to be provided all the land it required. Stephenson suggested that the Government of Bengal should use its power of compulsory acquisition in providing land for the company, so that 'all disputes with the proprietors of the land along the lines [would] be avoided, and the expense of litigation prevented'.⁷

⁵ Leland Hamilton Jenks, *The Migration of British Capital to 1875* (Knopf 1927) 208–210; Ahuja (n 38) 44 at n 66.

⁶ Horace Bell, *Railway Policy in India* (Rivington, Percival & Co. 1894) 14–15.

⁷ Stephenson to Halliday (18 July 1844) at [7] in Settars: Vol I (n 3) 23. The significance of this comment will become apparent at 72–76 below.

At the time, the Government's power of land acquisition was set out in Regulation I of 1824 of the Bengal Code. The Regulation authorised officers entrusted with the execution of a 'public work' within the Presidency of Bengal to 'appropriate' land whenever it appeared 'necessary or expedient ... for the construction of a public road, building, canal, drain, gaol, or for any other public purpose', if there was 'any hindrance to the purchase of the said property by private bargain'.⁸ The preamble recorded the competing interests at stake:

Whereas the rights and interests of individuals, in their respective landed Estates, and other property, have been secured to them by the existing Laws and Regulations, and by the Courts of Justice established for their administration; and whereas no provision has been made by any Regulation for enabling the Officers of Government with the sanction of the Governor General in Council, to obtain, at a fair valuation, land or other immoveable property, which may be required for the construction of public roads, canals, drains, jails or other purposes of a public nature, the Governor General in Council, considering the indispensable necessity of providing for the occasional surrender of the property of individuals, in such cases, for the accomplishment of objects of general utility; and being, at the same time, desirous of securing a just and full compensation to all persons holding a right and interest in the property so appropriated; he has enacted the following Rules, to be in force as soon as promulgated, throughout the whole of the Provinces immediately subject to the Presidency of Fort William:—

Under Reg I of 1824, the acquisition of sought-after land was authorised if the owner objected to its disposal or else demanded 'exorbitant consideration'. After 'duly considering the objections urged and the demands made', the Governor-General was authorised 'on grounds of clear and urgent public expediency' to order the election of arbitrators to determine the 'just and full value of the whole of the property intended to be applied to public use...'.⁹ The courts – that is, the *adalat* courts established in 1772

⁸ Section II.

⁹ Section III.

and made formally separate from the executive in stages from 1805¹⁰ – were excluded from deciding on compensation unless the award of the arbitrators could be impeached for corruption or ‘gross partiality’, or was outside their authority.¹¹

Although not the first land acquisition law in British India,¹² Reg I of 1824 has special historical significance for being the first to authorise any acquisition regarded by the state as furthering a ‘public purpose’ (the phrase used in most land acquisition statutes thereafter).¹³ Curiously, the regulation was both initiated and drafted by judges. In 1814, when forwarding to the Government of India a petition from the occupants of houses on land chosen for a new jail at Hooghly, the Sadar Nizamat Adalat – the highest of the East India Company’s criminal courts – suggested that it would be ‘expedient to vest in the several Magistrates a power of compelling the surrender of private property, which may be necessary for purposes of great public utility...’. The Government concurred. The draft prepared by the Court introduced the phrase ‘public purpose’. There matters rested until 1818 when the Chief Judge of the Sadar Diwani Adalat – the highest of the Company’s civil courts – submitted a fresh draft that he and another judge had prepared. This was enacted ‘for the most part ... verbatim’, once revised in light of complaints that

¹⁰ MP Jain, *Outlines of Indian Legal and Constitutional History* (6th edn, LexisNexis Butterworths Wadhwa 2009) 52–62, 118–169.

¹¹ Section VIII.

¹² See 217–218 below.

¹³ ‘Papers relating to Reg I of 1824’, IOR/P/P/59 (BL).

the construction of irrigation canals was being held up by extortionate demands from landowners.¹⁴

Only a few days after proposing that the Government acquire land on a railway company's behalf, Stephenson asked instead for the company's Charter or Act of incorporation to include the power to take land under Reg I of 1824.¹⁵ This amounted to a bid to import the British model of railway legislation, according to which the promoters of a railway company would petition Parliament for a private railway Act to secure three ends: first, to incorporate the company; second, to grant the company limited liability (a privilege not extended to all companies until 1855–1856); and third, to empower the company to take land without any further official intercession.¹⁶

The senior officials of the Government of India opposed the new proposal, advising the Court of Directors that the state rather than railway companies should acquire and continue to own land for all railways to be built in India.¹⁷ One asserted that the state could acquire land with greater facility and with more satisfaction to proprietors than a company. In an unusually single-minded focus on the military advantages of railways, the Law Member (C. H. Cameron) argued that state should be the landlord and the companies only leaseholders (at a peppercorn rent) because the Indian railways ought to

¹⁴ For context, see Ian Stone, *Canal Irrigation in British India: Perspectives on Technological Change in a Peasant Economy* (CUP 1984) 13–16; Daniel R Headrick, *The Tentacles of Progress: Technology Transfer in the Age of Imperialism, 1850–1940* (OUP 1988) 173–176.

¹⁵ Stephenson to Halliday (20 July 1844) at [1] in Settari, Vol I (n 3) 25.

¹⁶ RW Kostal, *Law and English Railway Capitalism 1825–1875* (Clarendon Press 1994) 110–143.

¹⁷ Minute by TH Maddock (1 May 1846); Minute by CH Cameron (1 May 1846); Minute by F Millett (1 May 1846); Reply by TH Maddock, CH Cameron and F Millett to the Court of Directors (9 May 1846); Minute by Lord Hardinge (28 July 1846); all reproduced in Settari, Vol I (n 3) 154–174.

be ‘government institutions’, useful primarily for conveying troops and materials.¹⁸ The commercial advantages of the railways were no more than an incentive to attract the skill and capital of private enterprise for their construction, Cameron thought. Moreover, he continued, the outright transfer of land to ‘private companies’ would not come fairly within the spirit of Reg I of 1824 even if within the letter, and so peppercorn leases were preferable.¹⁹

There were other reasons for the state to retain the exclusive power of land acquisition. By doing so, as well as by dispensing with the model of private Acts and asserting the authority to sanction the route of lines, officials hoped to avoid the mistakes of British railway development.²⁰ With the state as regulator and land-acquirer, it was hoped that there would be no route-duplication, no ruinous competition in a ‘riot of individuality’, no need for thinly-veiled bribes to politically-influential landowners to secure the twin prizes of limited liability and the power of land acquisition.²¹ In India, it was decided, a sanctioned railway company would be incorporated with limited liability as a matter of course and provided with all the land it required. Land was to be provided free of cost to the company. This was more than Stephenson had asked: he had proposed that

¹⁸ Thorner (n 3) 86.

¹⁹ In taking that view, Cameron echoed advice that had been given by the Government of Bengal to Stephenson in 1844: Settars: vol I (n 3) 28.

²⁰ Ian Derbyshire, ‘Private and State Enterprise: Financing and Managing the Railways of Colonial North India, 1859–1914’ in Ian J Kerr (ed), *27 Down: New Departures in Indian Railway Studies* (Orient Longman 2007) 290; see, also, Dalhousie’s Minute of 4 July 1850 to the Court of Directors, reproduced in Settars, Vol I (n 3) 424 at [43].

²¹ For the English experience, see Kostal (n 16) 110–180.

companies pay for land acquired on their behalf.²² All in all, one of Stephenson's rivals noted, a 'highly beneficial' arrangement had been reached.²³

The sterling railway companies

By the middle of 1846, the question of land for the railways could be regarded as having been settled. The same could not yet be said for the question of a public guarantee for railway investments.²⁴ Unlike their British counterparts, the promoters of the competing companies formed to build railways in India demanded that the state guarantee a minimum dividend for their shareholders, irrespective of the profits these companies actually earned. Soon after his initial disavowal of financial assistance, Stephenson too lobbied for a guarantee, falling in line with the EIR's backers. The promoters argued that, without a guarantee, British capital would not be sent abroad for a venture as speculative as railways in India. Hardinge, Governor-General from 1844–1848, was sympathetic, arguing that 'so small an encouragement' as the free supply of land was not commensurate with the advantages to the state of a line from Calcutta to Delhi (the final extent of the scheme proposed by the EIR).²⁵

²² RM Stephenson, 'Our Indian Railways' (March 1847) *Calcutta Review*, in Settars, Vol I (n 3) 266.

²³ WP Andrew, *Indian Railways and their Probable Results* (T.C. Newby 1848) 59. See also Settars: vol I (n 3) 18, 34–35, 89–90, 142.

²⁴ The discussion on guarantees below relies on Thorner (n 3) 119–167 unless otherwise indicated. The two issues of land and guarantees were linked by a publicist for the EIR, who argued that unless the company was provided with land for free, an even more burdensome guarantee would be required: J Bourne, *Railways in India* (2nd edn, John Williams & Co. 1848) 13.

²⁵ Minute by Lord Hardinge (28 July 1846) (n 17).

In 1849, after lengthy negotiations between promoters, the Government of India, and the authorities in London, the two foremost railway companies prevailed. Stephenson's EIR and its counterpart in Bombay, the Great Indian Peninsula Railway Company ('GIP'), secured not only incorporation and limited liability by Acts of Parliament but also lucrative contractual guarantees for short, experimental lines. If in any given year either company failed to earn a 5% return on their invested capital (£1 million for the EIR, £500,000 for the GIP), the East India Company contracted to make up the shortfall out of Indian tax revenues, the advances eventually to be repaid out of the companies' future revenues. Similar guarantees were later granted for the construction of extensions to those lines and for the construction of new lines by six further railway companies incorporated in the 1850s. These were significant concessions on behalf of the Indian taxpayer: the guaranteed return represented a premium over the long-term London market rate of around 3%.²⁶ Even more would be conceded later: in 1869, for reasons that remain obscure, the Secretary of State unilaterally cancelled both the principal and accrued interest of the debt that three companies owed to the Government of India arising from past guaranteed-interest payments.²⁷

Aside from the critical role of the Indian taxpayer as underwriter, the railway companies were unmistakably British affairs. The great surge of capital invested in these enterprises – some £86 million between 1849 and 1869 – was almost exclusively British, from 'widows, barristers, clergymen, spinsters, bankers, and retired army officers' to companies legally domiciled in Britain, capitalised in sterling, and directed by boards of

²⁶ Irfan Habib, *Indian Economy, 1858–1914* (Tulika Books 2006) 36–37.

²⁷ *Ibid*; Bell (n 6) 25–26.

directors based in London.²⁸ More than two-fifths of this capital was actually expended in Britain, from which equipment and materials – rails, locomotives, machinery etc. – were imported almost exclusively until the 1930s.²⁹

The reticence of Indian capital towards the railways has usually been attributed to various systemic factors such as the weakness of domestic capital markets and a preference for more familiar investments.³⁰ There were several instances, however, in which prospective Indian investors were simply outmanoeuvred. Three of the early rivals to the EIR and GIP – the Great Western of Bengal Railway Company, the Northern and Eastern Railway Company, and the Bombay Great Eastern Railway Company – included Indians amongst their backers and, if sanctioned by the state, would have been managed by boards of directors based in Calcutta or Bombay. Although each fell by the wayside for different reasons,³¹ criticism of their Indianness would not have helped their prospects. An engineer with the EIR wrote in the *Artizan*:³²

The constitution of the East Indian Railway Company is, we think, a favourable one for introducing railways into India with success. The governing directory will be located in England, and efficient paid servants will be chosen in India for carrying its instructions into effect. This arrangement – independent of its obvious sequency from the almost exclusive use of British capital – is rendered expedient by the fact, that joint stock companies have never been known to succeed in Calcutta, but have, in every case,

²⁸ Daniel Thorner, 'The Pattern of Railway Development in India' in Ian J Kerr (ed), *Railways in Modern India* (OUP 2001) 92; WJ Macpherson, 'Investment in India Railways, 1845–1875' (1955) 7 *Economic History Review* 177, 181. Institutional investors became more common toward the end of the 19th century: Derbyshire (20) 288.

²⁹ Goswami (n 3) 62.

³⁰ Ian J Kerr, *Engines of Change: The Railroads that Made India* (Praeger 2007) 24; JM Hurd, 'Railways' in Dharma Kumar (ed), *The Cambridge Economic History of India* (CUP 1982) 750.

³¹ Thorner (n 3) 78–79, 134–160; Aruna Awasthi, *History and Development of Railways in India* (Deep & Deep Publications 1994) 36–45.

³² 'Indian Railways', *Artizan* [no date or author specified], annexed to Bourne (n 24) 126–127. With no other author listed, the article can be assumed to be Bourne's.

become the theatre of jobbery and intrigue. Oriental morality appears to be of too lax a quality to render possible the success of the undertakings entrusted to its guardianship; and it appears indispensable therefore that the management of the proposed company should be undertaken by English merchants, who have already given proofs of their eligibility for such a trust.

This would have been understood as a slur on Carr, Tagore and Company – the agency house of the great Bengali entrepreneur Dwarkanath Tagore – which had backed the Great Western.³³ Stephenson too made this argument, prompting even an old supporter to remark: ‘Stephenson recommends that all power should be lodged at home – where no companies were ever mismanaged and where bubbles are unknown’.³⁴

‘Necessary or convenient’ legislation

As had been settled, the East India Company contracted to provide the EIR and GIP with land free of cost.³⁵ As Cameron the Law Member had recommended, the land was to be held on 99 year peppercorn leases. The companies would have had no use for the land after that time. After 99 years, the contracts provided, the companies’ land, buildings, and works would revert to the East India Company. In truth, the companies had no incentive to wait out that full term: at any time beforehand, they were contractually entitled to be bought out with full compensation. For its part, the East

³³ BB Kling, *Partner in Empire: Dwarkanath Tagore and the Age of Enterprise in Eastern India* (University of California Press 1976) 194–196. Justifiably or otherwise, Carr, Tagore and Company had become a ‘byword for jobbery, monopoly, and cliquism in the business world of Calcutta’: 78.

³⁴ RM Stephenson, *Report upon the Practicability and Advantages of the Introduction of Railways into British India* (Kelly & Co. 1845) 8; J Hume, *Calcutta Star* (12 March 1845), quoted in Kling (n 33) 196.

³⁵ The contractual provisions referred to in this paragraph are reproduced in *Copies of all Contracts between the East India Company and any Company formed for Railways etc. under Guarantee* (C (1st series) 259, 1859 (Session 1)) 6, 9–11, 47, 50–52.

India Company reserved the option to buy out the companies at the 25-year or 50-year interval, again at the cost of full compensation.

The East India Company also undertook to promote the passage of any ‘necessary or convenient’ legislation.³⁶ Officials had debated whether the existing law of land acquisition was suitable for the railways. Maddock, the President of Hardinge’s Council, did not think that the procedure under Reg I of 1824 would allow fair prices to be struck for railway land with enough speed and finality.³⁷ Instead of the right of landowners to insist on binding arbitration to fix the level of compensation – an entitlement blamed by railway companies in Britain for inflating the costs of land acquisition³⁸ – Maddock recommended that compensation should be fixed by a jury of three to five valuers. Cameron disagreed, arguing that Reg I of 1824 had worked well enough for a quarter of a century and that – in the first expression of an idea that would recur time and again – prudence dictated against all but absolutely necessary law-making in this field:³⁹

Legislation which authorizes the compulsory appropriation of land of private persons is very necessary, but still it is legislation of a very delicate kind, of a kind likely to excite men’s minds, and to raise questions as to the nature of private property and the State’s rights to interfere with it. The discussion of such questions in the abstract I believe to be beneficial to society, but the discussion of them when practical measures are about to be adopted, when land is actually about to be taken from its proprietors, are I think, much better avoided, and clearly it is more likely to be avoided if we take the land wanted for the purpose under a law which has been acquiesced in for nearly a quarter of a century, than if we make one for the occasion.

³⁶ *Copies of all Contracts* (n 35) 12, 53–54.

³⁷ Minute by TH Maddock (1 May 1846) (n 17).

³⁸ Kostal (n 16) 163–170.

³⁹ Minute by CH Cameron (1 May 1846) (n 17).

Dalhousie, Governor-General from 1848–1856, thought there was ‘great force’ in Cameron’s observations.⁴⁰ All the same, he wrote in 1850, it should be put beyond the power of owners to resist acquisitions by ‘costly and vexatious obstructions’. Accordingly, three far-reaching amendments were made that year to Reg I of 1824.⁴¹ First, presumably to preclude any doubt about the legality of using public power to procure land on behalf of privately-owned concerns, any railway in Bengal was declared to be a ‘public work’ within the meaning of the regulation. Second, in an innovation in Indian land acquisition law that was reproduced in all future enactments, criminal penalties were prescribed for obstructing surveys of planned acquisitions. Third, in another innovation thereafter adopted, provision was made for the immediate taking of land needed urgently for a public work.

Perhaps reflecting a decision that Bengal was to be the laboratory for experiments in land acquisition law, only the first of these amendments were made in the Bombay Presidency. Act XXVIII of 1839, which authorised the taking of land in the islands of Bombay and Colaba for roads and drains, was extended in 1850 to allow takings for railways or any other purpose declared to be of public utility.⁴² By Act XX of 1852, provision was made for the taking of land in the Madras Presidency for a ‘public purpose’ so that land could be acquired for railways.⁴³

⁴⁰ Minute of 4 July 1850 to the Court of Directors, in Settars, Vol I (n 3) 424 at [36], [45].

⁴¹ By Act XLII of 1850.

⁴² By Act XVII of 1850.

⁴³ On the origin of this enactment, see the Court of Directors to the Governor of Madras (18 Aug 1852), in Settars: vol I (n 3) 505 at [7]. Act XX of 1852 was extended to the town of Madras by Act I of 1854.

These enactments represented a landmark in Indian land acquisition law: the introduction of an implied license to take land for the use of private enterprises. That said, the guaranteed-interest railways were really ‘semi-public enterprises’, as Daniel Thorner argued.⁴⁴ They were not only underwritten by the state but also under its complete superintendence. Indeed, in lobbying for the guarantee, the EIR had insisted that it was not a ‘private speculation’ but a great ‘national undertaking’⁴⁵ – a claim less portentous than it might seem as Dalhousie himself urged that the railways should be regarded as ‘national works’.⁴⁶

Consistently with that perception, Dalhousie called for the mobilisation of the administrative machinery to ensure the sustained availability of timber railway sleepers, hundreds of thousands of which were needed by railway companies each year. The Forest Department was formed in 1864 with that purpose foremost in mind.⁴⁷ By legislation enacted in some haste the following year (the Indian Forest Act VII of 1865), the state declared itself as having full control over the forests it identified and demarcated by gazette notification. This declaration was made subject to the ‘existing rights of individuals or communities’ – a guarantee that extended to the rights of ‘wandering tribes’ in the soil and forest produce, according to no less a figure than Henry Maine, then the Legal Member.⁴⁸ However, despite opposition within official circles, a

⁴⁴ Thorner (n 3) 95.

⁴⁵ Thorner (n 3) 149.

⁴⁶ Minute of 4 July 1850 to the Court of Directors, in Settars, Vol I (n 3) 424 at [44].

⁴⁷ Madhav Gadgil and Ramachandra Guha, *This Fissured Land: An Ecological History of India* (OUP 1992) 121–123; EP Stebbing, *The Forests of India: Vol I* (John Lane The Bodley Head 1922) 524.

⁴⁸ Mahesh Rangarajan, ‘Imperial Agendas and India’s Forests: The Early History of Indian Forestry, 1800–1878’ (1994) 31 IESHR 147, 162–163.

later and more comprehensive measure (the Indian Forest Act VII of 1878) effectively nullified that guarantee through what Manu Goswami and others have argued to have been a legal sleight of hand: a policy of recognising only recorded legal rights in forests to the exclusion of the unrecorded customary rights of peasant and tribal communities:⁴⁹

The Forest Act ... codified a distinction between those rights, inscribed in the settlement record or obtained through grants and licenses, that could not be abrogated without compensation and those customary rights that, because unrecorded, were recast as alienable privileges that could be terminated without compensation. In short, existing customary rights and practices were redefined as ‘alienable privileges’. These included grazing, pasture, grass cutting, lopping boughs, gathering leaves, rights to decayed leaves and wood for manure, hunting and fishing, and the like. In a process that mirrored the acquisition of land for railway construction, a simple gazette notification stating that forest and wastelands were reserved as “state forests” effectively erased all such customary rights. Because claims on forest and wastelands⁵⁰ had to be grounded in legal records of ownership, the vast majority of nonliterate subaltern communities were simply disposed of their land.

Now, with the power of land acquisition strengthened and the forests enclosed, the burden of passing all legislation ‘necessary or convenient’ for the railways could be considered fulfilled.⁵¹

Two legal landmarks

The privilege of the free supply of land was extended not only to the guaranteed-interest railway companies formed after the EIR and GIP but also to two canal companies, in

⁴⁹ Goswami (n 3) 58; Gadgil & Guha (n 47) 123–125; Ramachandra Guha, *The Unquiet Woods: Ecological Change and Peasant Resistance in the Himalaya* (20th Anniversary edn, Permanent Black 2010) 105–106; Mike Davis, *Late Victorian Holocausts: El Niño Famies and the Making of the Third World* (Verso 2001) 326–331.

⁵⁰ On the meaning of ‘wastelands’, see 112–113 below.

⁵¹ This is not to forget the passage of successive laws from 1854 onwards to regulate the operation of the railways. A history of this legislation has not yet been written. See, for a useful starting point, Kerr (n 30) 67–68.

what proved to be a unsuccessful experiment in private irrigation development.⁵² The undertaking in Empress Victoria's proclamation of 1858 to 'promote works of public utility and improvement'⁵³ could not be financed by an exchequer depleted by the Mutiny and so, to build the great works of irrigation that officials thought vital, the state turned instead to private capital. Formed in 1858 to construct canals and other works in up-country Madras, the Madras Irrigation and Canal Company was incorporated five years later and given a 5% guarantee on a capital of £1 million. In 1860, the East Indian Irrigation and Canal Company was formed to build canals in the Mahanadi delta in Orissa and incorporated a year later with a capital of £2 million. Unusually, this company was not given a guarantee, so confident were its promoters that there were huge profits to be made. However, after years of underwhelming progress and cost overruns – products of incompetence and over-optimism – both companies were bought-out by the Government of India (in 1882 and 1869 respectively). By 1864, it had already been decided that in the future major irrigation works would be carried out by the state.⁵⁴ Nevertheless, some support was given to small-scale private irrigation works through *takavi* loans and, in Bengal and Punjab, legislative provision for the taking of land.⁵⁵

⁵² For the relevant clause in those railway companies contracts, see *Copies of all contracts* (n 35) 77, 111, 137, 173, 183, 195. The contracts with the canal companies were not published in parliamentary papers. On the failure of the canal companies, see Elizabeth Whitcombe, 'Irrigation' in Dharma Kumar (ed), *The Cambridge Economic History of India* (CUP 1982) 693–694, 702, 710; Headrick (n 14) 181–183; Rohan D'Souza, 'Canal Irrigation and the Conundrum of Flood Protection: The Failure of the Orissa Scheme of 1863 in Eastern India' (2003) 19 n.s. *Studies in History* 41; Ahuja (n 3) 221.

⁵³ For context and comment on this undertaking, see Ahuja (n 3) 83–84.

⁵⁴ Whitcombe (n 52) 695, 721–722.

⁵⁵ Section 3 of the Canals Act (Bengal Act V of 1864); ss 21–30 of the Northern India Canal and Drainage Act 1873 (Punjab Act VIII of 1873).

The railway companies, too, overran their budgets, partly because of the lack of an incentive to economise: the returns from any authorised capital expenditure, however wasteful, were guaranteed.⁵⁶ Payments under the various guarantees became a serious drain on public finances. From 1850–1900, a period in which all the companies except for the EIR earned under a 5% return on capital, around £50 million was paid out.⁵⁷

In an early response to this problem, in 1857 the Company's Court of Directors expressed the hope that it would be possible to attract capital for new railway projects without a guarantee.⁵⁸ It announced that short, local lines should be built entirely with unassisted Indian capital,⁵⁹ perhaps emboldened by the concession in India that year of limited liability by registration.⁶⁰ Helpfully, there was by this time a precedent of a public works project for which Indian investment was forthcoming without a guarantee, albeit in unusual circumstances.

The origin of the project was a proposal in 1845 by a Ferry Fund Committee of Bogra District, Bengal, to make the Kurratiya river navigable throughout the year.⁶¹ Doing so, the Committee argued, would allow *ryots* to secure higher prices for their crops and

⁵⁶ Derbyshire (n 20) 280–281.

⁵⁷ Daniel Thorner, 'Great Britain and the Development of India's Railways' (1951) *Journal of Economic History* 389, 392. From 1900 onwards, the amount recovered by the state from net receipts exceeded the amount paid to railway companies as guaranteed interest: see the *Report of the Acworth Committee*, HCPP (Cmd 1512, 1921) at Appendix 3.

⁵⁸ Mukherjee (n 3) 33–34. See, also, Barnes Peacock, 'Guarantees for Railway Construction (Eastern Bengal Railway)' (25 April 1857) in *Minutes of Barnes Peacock, 1852–1859* (GoI 1901).

⁵⁹ Mukherjee (n 3) 44–46.

⁶⁰ Act XIX of 1857. See Radhe Shyam Rungta, *The Rise of Business Corporations in India 1851–1900* (CUP 1970) 65–70, 212–213.

⁶¹ Secretary to the Government of Bengal to the Legislative Council of Bengal (11 Jan 1856) in GoI, Home, Legislative, 'Papers relating to Act XXII of 1856' (undated) (NAI).

reduce the incidence of illness caused by stagnant waters. Lacking the funds to construct the necessary works, the Committee warmly recommended an offer in 1847 by the *zamindar* whose estate the river flowed through – Prasanna Kumar Tagore, a cousin of Dwarkanath Tagore – to fund the works in exchange for the right to levy tolls on the river for 30 years. However, after a report commissioned by the Government of Bengal concluded that the works would cost far more than budgeted and benefit no one but Tagore, the proposal was dropped – only to be revived in 1853 by fresh report that observed that the closing of the river had caused the abandonment of nine indigo and sugar factories (all expatriate enterprises, it did not need to be said). Tagore re-extended his offer, adding the condition that Reg I of 1824 should be declared applicable for the purchase at his expense of any land required for the works. The Government of Bengal accepted, passing the Tolls on the Kurratiya Act (XXII of 1856) to enable land to be acquired whether the works were constructed ‘at public or private expense’ (and, in the latter case, to permit the levying of tolls).

For the first time in Indian land acquisition law, there was now express license for the government to take land on behalf of private enterprise. The claim in the Act’s preamble that it was ‘expedient to encourage individual enterprise, and the employment of private capital on works of public utility’ could not be doubted in this case. As the Statement of Objects and Reasons appended to the Bill made clear, the Government’s own officers were not confident that the works would succeed in their aim. Nevertheless, Tagore succeeded in making the Kurratiya navigable year-round, according

to his biographer, ‘at great cost’ and in the face of ‘official obstruction and pettifogging contentiousness which would have quenched the ardour of any less determined man’.⁶²

In the event, nothing came of the Court of Directors’ hope to dispense with the guarantee for railway investments, once it became apparent that capital could not otherwise be raised either domestically or abroad. Nevertheless, in 1862, Canning (Dalhousie’s successor) abruptly called a halt to future guarantees and made a fresh attempt to attract unaided private capital for the railways.⁶³

Concurrently, and consistently with the new dispensation, the entitlement to acquired land was extended generally as an incentive to attract private capital for all public works. The Works of Utility by Private Persons and Companies Act (XXII of 1863) authorised the taking of land on behalf of a private person or company if needed for ‘any bridge, road, railroad, tramroad, canal for irrigation or navigation, work for the improvement of a river or harbour, dock, quay, jetty, drainage work, or electric telegraph’, plus any other class of work later sanctioned. The actual taking would proceed as one for a ‘public purpose’ under Act VI of 1857, the first all-India land acquisition law, introduced as a replacement for Reg I of 1824 and other local measures. The 1863 Act represented a broad effort to encourage the type of works for which the Tolls on the Kurratiya Act 1856 had been enacted, with one important difference in emphasis. As the discussions prior to its enactment make clear, this was an Act to attract British capital.

⁶² James W Furrell, *The Tagore Family: A Memoir* (2nd edn, Thacker, Spink & Co. 1892) 130.

⁶³ Derbyshire (n 20) 282.

The 1863 Act had its origin in a proposal by Richard Strachey, then an engineer with the Public Works Department and later its Secretary, to allow land to be taken on behalf of privately-owned collieries so that branch lines could be constructed from pits to adjoining railways.⁶⁴ The Government of Bengal had regarded such lines as ‘private’ rather than ‘public’ works and so did not consider that land acquisition for their construction was authorised under the 1857 Act.⁶⁵ According to Strachey, the Advocate-General had taken the general position that the 1857 Act could not safely be applied for private companies undertaking works for their own profit. Indeed, Strachey confessed, it seemed ‘in truth rather open to doubt whether land for the guaranteed Railways can be legally taken up under that Act’ – a remarkable view that, for obvious reasons, was never aired publicly.

The EIR, which of course had a pecuniary interest in Strachey’s proposal going forward, argued that any principled objections to acquisitions for branch lines to private collieries were overcome by the pragmatic arguments in favour.⁶⁶

Admitting the principle that it is an infringement of the rights of property to take a part of one man’s land for the individual profit of another man, yet I submit that this does not apply in its literal sense to the case of a Coal owner or a body of Coal owners; because if they be prevented by a “dog in the manger” refusing them way leave, they suffer by not sending the Coal to market, the Railway Company suffer in having so much less Coal to carry and the public suffer by having less competition of Coal merchants in the market.

⁶⁴ R Strachey, ‘Note on the Draft Bill to Provide for Taking Land for Public Works Undertaken by Private Persons or Companies’ (11 Oct 1862) in GoI, Legislative, ‘Papers relating to Act XXII of 1863’ (undated) (NAI).

⁶⁵ EIR to the Official Consulting Engineer to the Govt., Railway Dept. (2 Feb 1859); Joint Secretary, Railway branch, PWD, Govt. of Bengal, to Messrs. Gordon, Stuart, and Co., Secretaries, Bengal Coal Company (26 Dec 1860); both in ‘Papers relating to Act XXII of 1863’, *ibid.*

⁶⁶ EIR to the Official Consulting Engineer to the Govt., Railway Dept. (2 Feb 1859) in ‘Papers relating to Act XXII of 1863’, *ibid.*

The pragmatic arguments won the day. They lay behind the subsequent decision that there would be ‘great public benefit’ in expanding Strachey’s straightforward proposal to embrace other ‘works of public utility’ such as roads, canals, and so on.⁶⁷

Nevertheless, the Act in its final form was hardly permissive. Reflecting Strachey’s concern that government ensure that private works were of ‘sufficient public utility to justify the application of the compulsory law...’,⁶⁸ the Act brimmed with safeguards. If it thought fit, the provincial government could appoint a commission of officials to enquire into the probable utility and grounds of any opposition to the proposed work, a procedure not available for other kinds of acquisitions under the 1857 Act.⁶⁹ In another innovation, the public was given the right to sue the promoter of a work for the breach of conditions imposed by the state governing the public use of the work.⁷⁰ Yet another innovation was the right given to a provincial government to confiscate land given to a promoter if he abandoned the work or went bankrupt⁷¹ – a provision that Strachey acknowledged as ‘somewhat exceptional’ but he thought justified to ensure that the acquire land was applied only to the sanctioned public work.

As it happened, the 1863 Act represented the high water mark of the regulation of acquisitions for private enterprises. That may have been one reason for its failure. It

⁶⁷ ‘Statement of Objects and Reasons’ attached to ‘A Bill to provide for taking land for works of public utility to be constructed by private persons or Companies, and for regulating the construction and use of works on land so taken (No. 56 of 1862)’ (5 Nov 1862) in ‘Papers relating to Act XXII of 1863’, *ibid.*

⁶⁸ R Strachey, ‘Note on the Draft Bill’ (n 64).

⁶⁹ Section XIII

⁷⁰ Section XXXIV. The meaning and significance of this provision is discussed at 119–122 below.

⁷¹ Sections XLVIII and XLIX.

was ‘a rather complicated measure ... hardly ever brought into practical effect’, observed the Home member John Strachey, younger brother to Richard.⁷² It was repealed just seven years later by the Land Acquisition Act (X of 1870), a new all-India land acquisition enactment to replace the 1857 Act. In place of the 53 sections of the 1863 Act, Part VII of the 1870 Act purported to govern the ‘Acquisition of Land for Companies’ in just 7 sections: a radical pruning that may have reflected the zeal of the arch utilitarian J. Fitzjames Stephen, then the head of the Legislative Department, for drafting law in the ‘clearest, shortest and most explicit form’ in which it could be put.⁷³

In truth, the more likely culprit for the failure of the 1863 Act was Canning’s moratorium against guarantees. Except for the EIR, the existing private railway and irrigation companies were profitable only because of guarantees. What incentive was there to invest in these sectors unaided, or for that matter in works of unproven profitability like roads and bridges? Only two railway companies were formed during Canning’s moratorium and, in an indication of the tenuous profitability of railways at this time, both came to grief without a guarantee.⁷⁴ The Indian Tramway Company, formed in 1860 to build narrow-gauge lines in the Madras Presidency, suffered losses and went into liquidation in 1870, its lines eventually taken over by the (guaranteed) South Indian Railway Company. The Indian Branch Railway, formed in 1864 to build lines in Oudh and Rohilkund with a state subsidy of £100 per mile, had to be rescued from imminent

⁷² ‘Extract from the Abstract of the Proceedings of the Council of the Governor General of India’ (1 April 1870) in GoI, Legislative, ‘Act No. X of 1870’, May 1870, prog. 36–77 (A) at prog no. 76.

⁷³ Eric Stokes, *The English Utilitarians and India* (Clarendon Press, Oxford 1959) 264, 273–274; J Fitzjames Stephen, ‘Legislation under Lord Mayo’ in WW Hunter, *A Life of the Earl of Mayo, Fourth Viceroy of India* (Vol II) (2nd edn, Smith, Elder & Co. 1876) at 171.

⁷⁴ Derbyshire (n 20) 282; Bell (n 6) 16–19, 72–78, 125–126.

bankruptcy in 1867. Its entitlements under a revised contract with the Secretary of State for India were especially generous: a 5% guarantee on all expenditure, whether or not approved by government, and the right to hold land provided to it in perpetuity rather than on a 99-year lease. In the only example of a disagreement between Calcutta and London on the policy of supplying land to railway companies, Lawrence, the Viceroy after Canning, complained to the Secretary of State that the perpetual grant of land to the Indian Branch Railway was a 'needless concession' that would not in any way facilitate the raising of capital for railways.⁷⁵ The Secretary of State defended the concession,⁷⁶ but it seems that in only one other instance was there a perpetual grant of land to a railway company.⁷⁷

Only one class of public works had returns so assured as to attract capital without a guarantee. By its nature, it needed little or no land. Two companies formed in the 1860s for land reclamation in Bombay were at the centre of the 'share mania' of 1863–1865.⁷⁸ It would have helped that both were allowed by the Government of Bombay to keep the majority of the land reclaimed – a shortcut to riches in the land-scarce city.

⁷⁵ Minute by Lawrence (16 August 1867), in S Settart (ed), *Railway Construction in India: Select Documents; Volume II: 1853–1873* (Northern Book Centre 1999) 263–264.

⁷⁶ Stafford to Lawrence (24 Nov 1868), in Settart, *ibid*, 295, 298.

⁷⁷ One writer noted that the South Indian Railway Company was given land on a 999-year lease: HE Trevor *The Law relating to Railways in British India* (Reeves and Turner 1891) 8.

⁷⁸ Dossal (n 59) 155–164.

A frictionless practice

If land alone could not attract British capital for Indian railways, and if the state was no longer prepared to extend guarantees, the only remaining option was to revisit the founding assumption that private enterprise should be the agent of railway construction.⁷⁹ On the eve of his departure as Viceroy, Lawrence excoriated the railway companies for ‘illustrations of management as bad and extravagant as anything that the strongest opponent of Government agency could suggest...’.⁸⁰ He would have nationalised the entire railway system, but the India Office would only go so far as to allow all new lines to be constructed by the Government of India. From 1870, this policy was pursued with vigour and initially some success: costs of construction were considerably lower. However, the policy soon foundered because of worsening public finances and pressure from British lobbyists to re-introduce private construction.

To interpolate, these periodic policy reversals reflected the contradictory objectives of the policy of constructing public works in India, as Rahul Ahuja has argued.⁸¹ Public works in India were expected to serve the political and fiscal interests of the state as well as those of British investors and industry. In practice, these interests could not easily be reconciled. One gained ascendancy for a time before ceding to the other.

⁷⁹ Unless otherwise specified, this paragraph and the next rely on Thorner (n 57) 393–395.

⁸⁰ Minute by Lawrence to the Secretary of State for India (9 Jan 1869), in Settars, Vol I (n 27) 300 at [15].

⁸¹ Ahuja (n 3) 93–102.

The policy pursued from 1880 or so reflected an uneasy accommodation of interests through a mix of state and private construction. The state constructed mainly strategic and famine-prevention lines and extended moderate guarantees for the private construction of some new commercial lines. A few commercial lines were left to be constructed unaided, with predictably bad results.⁸²

Although most aspects of railway policy were usually in flux, the sterling railway companies' entitlement to acquired land free of cost endured. The scope of that entitlement encompassed all land required for the construction and working of lines, including land for 'stations, workshops, permanent store-houses and the like'.⁸³ Aware that this entitlement gave rise to a 'natural tendency' on the part of these companies to 'take all they could get, and the best they could, regardless of cost',⁸⁴ the railway bureaucracy – the Public Works Department and later the Railway Board – reserved the right to sanction each and every request for land.⁸⁵ From time to time – there is no easy way to know how often – requests were refused: e.g. in 1909 the Railway Board refused to make over certain land in Colaba to the Bombay, Baroda and Central India Railway

⁸² See Kerr (n 20) 77; KT Shah, *Sixty Years of Indian Finance* (D.B. Taraporevala & Sons 1927) 339.

⁸³ 'Rules laid down in 1861 for the Acquisition of Land required for Railway Purposes by the Old Guaranteed Companies' (PWD Circular No. 55, 29 June 1861) at [1]–[5], reproduced as Appendix C to GoI, PWD, 'Orders relating to Land for the Construction of a Railway' (PWD Circular No. IV of 1897), IOR/V/27/721/50A (BL).

⁸⁴ 'Notes' in GoI, Rwy Brd, Rwy Cons, 'Revised Procedure for the Acquisition of Land for Companies' Railways', March 1908, prog. 222–226 (A) (NAI).

⁸⁵ See, e.g., 'Orders Relating to the Acquisition of Land for Railways' (Rwy Brd Circular No. 889-P.–16, 30 Aug 1918) at [6]–[7], reproduced as Appendix II to the Bihar and Orissa Board of Revenue's *Bihar and Orissa Land Acquisition Manual 1928* (Superintendent, Govt. Printing, Bihar and Orissa 1928). This was the procedure in force at the time of the Kelkar Bill. Thus, even if the bill was paid by the state, it was prudent for companies to be concerned about the level of compensation payable: see, e.g., Rev & Ag, Land Rev, 'Question of excessive compensation for land acquired at Bolpur', Oct 1902, prog. 32 (B), file no. 379 of 1902 (NAI).

Company, because it considered too valuable for the growth of Bombay to be used for railway purposes.⁸⁶ Companies were required to pay only for land required for ancillary purposes such as the quarrying of ballast, brick-making, and houses for workmen.⁸⁷ However, even such land had to be leased from the state rather than secured from private vendors or lessors.⁸⁸ This was to avoid the ‘great embarrassment’ of the state having to pay an inflated value for such land when it eventually bought-out a railway company. Once brought under state ownership, a railway company was technically charged the full cost of any and all fresh land; ultimately, of course, the bill was actually paid by the state as owner.⁸⁹

The exchequer regarded the free supply of land to the railway companies as a heavy and growing fiscal burden, which the changes to the compensation regime made by the Land Acquisition Acts of 1870 and 1894 – complemented by the Land Acquisition (Mines) Act (XVIII of 1885)⁹⁰ – were designed to ease.⁹¹ In a petition against the first round of

⁸⁶ GoI, Rwy Board, Rwy Cons, ‘Question of Acquisition by the Bombay, Baroda and Central India Railway of the Land at the Site of the Gun Carriage Factory at Colaba...’, Feb 1910, prog. no. 305 (B) (NAI).

⁸⁷ ‘Rules laid down in 1861 for the Acquisition of Land required for Railway Purposes’ (n 83) [3]; ‘Land required for Dwelling-Houses for Employees of a Railway Company to be paid for as under ‘Class C’’, reproduced as Appendix D to ‘Orders relating to Land for the Construction of a Railway’ (n 83). There was some variation in detail between contracts and over time. Compare, e.g., the scope of the free provision of land in the terms offered to private branch line companies in 1893 and 1896: S Settar (ed), *Railway Construction in India: Select Documents; Volume III; 1873–1900* (Northern Book Centre 1999) 319, 331; see, also, WJK Davies, *Light Railways: Their Rise and Decline* (Ian Allan 1964) 154, 157–158, 160 for several case studies.

⁸⁸ ‘Rules laid down in 1861 for the Acquisition of Land required for Railway Purposes’ (n 83) [6].

⁸⁹ See the references to land supplied to companies at the ‘cost of capital’ in Ziauddin Ahmad, *Indian Railways* (Ever Green Press 1940) 7–19.

⁹⁰ Modelled on English legislation, the 1885 Act was designed to enable the state to acquire only the surface of land acquired for railways, leaving the compensation for minerals underneath to be settled only when they actually came to be worked by the landowner: GoI, Legislative, ‘Land Acquisition (Mines) Act, 1885’, Oct 1885, prog. 129–202 (A).

changes, the Talookdars' Association of Oudh complained that the state was favouring one set of private interests above another:⁹²

We have no doubt that the people of Oudh yield to none in their readiness to sacrifice their private interest to the public weal. But when they see that although such works, as railroads, are beneficial to the public in general, yet a certain party is to obtain a large and particular profit by it, therefore they see no reason why a poor landlord be subjected to losses, when the other party (purchasers of land) is to enjoy a permanent profit by the work. We are perfectly aware that there is no nation in the world more enthusiastic in doing good for their country, and ready to sacrifice their private interest to the public weal, than the people of England ; but on good authority we are informed that they would not give a single *biswa* of land for railroad, till they are paid a full price by Railway Companies. Hence, it is consolatory to us when such works, as railroads, are not considered to be a work of *pure public utility* in such an enlightened country as England, why the poor Natives of India be forced to give up their property on an arbitrary price for such works as are directly for the benefit of a company.

From the perspective of the railway companies, the system worked smoothly.⁹³

According to Hena Mukherjee, land was acquired swiftly and with ease for the first lines of the EIR.⁹⁴ As a company was entitled to take possession of land it sought once the Collector had made an offer of compensation to its owner,⁹⁵ its operations were not

⁹¹ See 208–209 below. The burden of compensation was certainly perceived as heavy and growing: see e.g. GoI, PWD, Rwy Cons, 'Question of Excessive Compensation awarded by the District Judge of Birbhum...', May 1902, prog no. 225–226 (A) (NAI); GoI, Legislative, 'Revised Rules relating to the Acquisition of Land for Railway Purposes, 1918', Oct 1918, prog no. 74 (B) (NAI). The accuracy of that perception cannot be taken up at length here. The promoters of Indian railways had expected land to be cheap: see the correspondence at Settar: Vol I (n 3) 34–35, 89–90, 142; c.f. 167. Mukherjee's estimate that the cost of land for the E.I.R. in 1851–1859 comprised one-seventh of the cost of construction per mile – the only such estimate in the literature – compares favourably with Kostal's estimate that railway companies in Britain rarely had to devote more than 20% of their total expenditures to land: Mukherjee (n 3) 98–100; Kostal (n 16) 93. Naturally, the cost of securing land rose once railways entered urban areas: see the comments by Sir Richard Temple in 'Extracts of the Abstract of the Proceedings of Council of the Governor General of India' (19 March 1869) in 'Act No. X of 1870' (n 72) at prog. no. 37; Mariam Dossal, *Imperial Designs and Indian Realities: The Planning of Bombay City 1845–1875* (OUP 1991) 162, 184.

⁹² 'Objection of Talookdars against the Indian Expropriation Bill' in 'Act No. X of 1870' (n 72).

⁹³ This observation is made with caution. The secondary literature is exceedingly thin and only a fraction of the voluminous railway papers could be surveyed for the purposes of this chapter. More so than usual, the discussion in this and the following two paragraphs should be read as contingent on the results of further research.

⁹⁴ Mukherjee (n 3) 94–95.

⁹⁵ Section 16.

affected by any subsequent legal dispute. It also helped that the authorities acted decisively to forestall legal difficulties. Acquisitions for the railway companies were carried out under Part II of the 1870 and 1894 Acts, which governed acquisitions for a ‘public purpose’. Anticipating the argument that the companies should have to comply with the stricter procedures in Part VII of the Acts, which purported to govern acquisitions for all companies, the 1894 Act declared – prospectively and retrospectively – that all companies with a contractual entitlement to acquired land were exempt from Part VII.⁹⁶ Given that entitlement, an official explained, such companies were really ‘Government undertakings’ and so ‘unnecessary difficulties’ caused by Part VII should be removed.⁹⁷

Difficulties in securing land seem to have occurred only infrequently. Mukherjee recounts two instances in 1857 in which the authorities backed away from acquiring sites of religious significance because of public protests.⁹⁸ This caused only minor difficulties: a reduction of the width of a line and the building of a railway station on an irregular site. Military authorities occasionally resisted giving up cantonment land to railway companies.⁹⁹ The municipal authorities in Bombay clashed with the railway companies from time to time: in 1905, after a substantial area of Matunga was acquired for the GIP without local consultation, the municipal commissioner accused the companies of ‘land

⁹⁶ Section 43. See *B. N. W. Railway Company v Muneshwar Ram* (1937) ALJ 249 (HC Allahabad) at 250.

⁹⁷ Extract from Abstract of the Proceedings of the Council of the Governor-General of India (11 March 1892), included as Appendix C to GoI, Legislative, ‘Papers relating to Act I of 1894’, Feb 1894, prog. 1–83 (A) (NAI).

⁹⁸ Mukherjee (n 3) 97–98. See, further, 208–209 below.

⁹⁹ See e.g. GoI, Rwy Brd, Rwy Cons, ‘Land Acquisition by Great Indian Peninsula Railway at Kirkee Cantonment’, Jan 1908, prog. 80 (A) (NAI).

hunger’ and of seeking ‘to turn the city into a station yard with a few houses dotted about here and there’.¹⁰⁰ The Bombay government came to accept that the railways had been allowed to appropriate far too much urban space and thereafter advocated parsimony.

Some disputes arose where the sought-after land fell within the princely states and thus outside the application of British Indian land acquisition legislation.¹⁰¹ The original policy of the Government of India was to expect states to match its policy of providing land to British-Indian railways free of cost, unless a special case could be made out that the burden was disproportionate.¹⁰² Ordinarily, the states were expected to compensate any displaced landowners and tenants: if they did not do so, an official in the Foreign

¹⁰⁰ Sandip Hazareesingh, *The Colonial City and the Challenge of Modernity: Urban Hegemonies and Civic Contestations in Bombay City 1900–1925* (Orient Longman 2007) 31–33. A petty dispute between the municipality and the GIP was taken as far as the Privy Council: *Municipal Corporation of the City of Bombay v Great Indian Peninsula Railway Company* (1916) 21 CWN 447.

¹⁰¹ The 1857 Act was declared to be in force within the territories governed by the East India Company, which included Lower Burma (from 1853) and a few imperial possessions elsewhere (Prince of Wales’ Island, Singapore, and Malacca): see s 2 of Act II of 1861, which amended Act VI of 1857. The 1870 and 1894 Acts extended to the whole of British India: s 1 of the 1870 Act; s 1(2) of the 1894 Act. A version of the 1870 Act was passed for Upper Burma in 1886, a year after its annexation (Upper Burma Land Acquisition Regulation IX of 1886); it was repealed in 1896 (by Upper Burma Regulation VI of 1896) and the 1894 Act declared in force. In 1896, the 1894 Act was brought into force in Zanzibar: see *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co.* (1900) 28 IA 121 (PC). British Indian land acquisition law may well have been in force in other possessions at other times. The geographical scope of the present study is limited to British Indian territory in the subcontinent, although where possible reference is also made to Burma.

¹⁰² Resolutions No. 2214-I. and 2870-I. of the GoI in the Foreign Department, dated 17 May 1887 and 28 August 1890 respectively. See, e.g., GoI, Rwy Brd, Rwy Cons, ‘Provision of land free of charge in Native States for the Construction and Working of the Nagda-Muttra Railway’, April 1904, prog. 122–131 (A) (NAI). Once provided to the railway companies, such land came under the exclusive criminal and civil jurisdiction of British India: see, e.g., GoI, Rwy Brd, Rwy Cons, ‘Cession to the British Government of jurisdiction over lands occupied by the Chahpur-Kutiana Railway extension...’, Jan 1911, prog. no. 124 (A) (NAI).

Department wrote, it was for the local political officers to 'induce them to act up to their obligations'.¹⁰³

In 1909, after years of pressure from two of the larger princely states (Baroda and Jaipur), companies were directed to compensate states for the compensation paid to occupants and for the loss of land revenue.¹⁰⁴ Jaipur had argued that it was unfair to expect states to give up land without compensation for railways that were, in practice, designed without regard for their interests. The Government conceded only that changed circumstances – e.g. that railways had begun to return a surplus – now justified a change in policy.¹⁰⁵

Given the scale of land that would have been acquired over time, why are there so few recorded instances of protests against railway acquisitions? One factor may have been the small scale of the great majority of acquisitions for the railway companies, contrary to what one might suppose. In the Bombay Presidency from 1918–1927, the median area

¹⁰³ GoI, PWD, Rwy Cons, 'Payment of Land Acquired for the Kalka-Simla Railway...', Aug 1902, prog. 161 (A) (NAI) at prog. no. 161/1 at [3]. Several states with more modern administrative apparatus (Hyderabad, Mysore, Cochin, Travancore, Baroda, and perhaps others) enacted land acquisition legislation modeled on the British Indian Act, by which compensation was payable as of right. Others with a minimal administration may simply have acquired land by fiat, with compensation a matter of discretion.

¹⁰⁴ GoI, Rwy Board, Rwy Cons, 'Additional land required for the extension and re-arrangement of the Baroda Station Yard...', Jan 1908, prog. 49 (A) (NAI); 'Acquisition by the Bombay, Baroda and Central India Railway of Land from the Baroda Darbar...', Sept 1908, prog. 20–29 (A) (NAI); 'Claims preferred by the Jaipur, Bundi and Kotah Darbars for compensation for land required for the Nagda-Muttra and Rewari-Phulera Chord Railways...', July 1909, prog. 43 (A) (NAI); 'Approval of the Secretary of State to the proposals of the Government of India in connection with the payment of compensation for land required for railways in native states', Oct 1909, prog. 24 (A) (NAI). The railways were the subject of many disputes between the princely states and the Government of India: see Barbara N Ramusack, *The Indian Princes and Their States* (CUP 2004) 191–196.

¹⁰⁵ Prog. 43/1 and 43/4 in 'Claims preferred by the Jaipur, Bundi and Kotah Darbars' (n 104).

of such an acquisition was between 0.68–2.15 acres.¹⁰⁶ A contrast can be drawn with the commercial extraction of timber destined for the railways, carried out at a scale to provoke challenges by the Santhal tribal people of Midnapore (first in the courts and later by looting and other direct action).¹⁰⁷ That is not to say, of course, that no private grievances arose. An engineer constructing a line in Bengal remarked that the ‘losses and hardships’ arising from delays in the payment of compensation had ‘cause[d] the coming of a railway to be considered a veritable scourge by the inhabitants of the country through which it passes’¹⁰⁸ – a comment suggestive of the social cost of land acquisition, a subject on which Indian railway history has been silent.

Land acquisition and infeasible title

Oddly enough, another reason why the supply of land to the railway companies appears to have been a frictionless practice was precisely because officials were under strict instructions to use their power of land acquisition rather than purchase land on the open market.¹⁰⁹ Even if an official had succeeded in coming to an amicable agreement with an owner on price, the land was to be compulsorily acquired rather than purchased, with

¹⁰⁶ This is the first of the findings from the Gazette Survey, the sources for which are described in full at 124–125 below.

¹⁰⁷ Sumit Sarkar, ‘The Conditions and Nature of Subaltern Militancy: Bengal from Swadeshi to Non-Co-operation, c. 1905–22’ in Ranajit Guha (ed), *Subaltern Studies III: Writings on South Asian History and Society* (OUP 1984) 303. See, generally, Gadgil and Guha (n 47) ch 5.

¹⁰⁸ Agent and Chief Engineer, Mymeusingh-Bhairab-Bazaar Railway to Secretary, Railway Board (17 Feb 1916) in GoI, Rev & Ag, Land Rev, ‘Examination of the system of land acquisition in Bengal with view to its improvement’, May 1916, prog. no. 21 (A) (NAI).

¹⁰⁹ *Orders Relating to the Acquisition of Land for Railways* (1918) (n 85) [2]–[3] and Appendix H (‘Private Negotiations with Owners of Land to be Acquired for a Public Purpose’ (PWD Letter No. 1780-R.C., 12 Nov 1904)).

compensation at the agreed-upon price. At least in relation to the railways, the names of the Land Acquisition Acts of 1870 and 1894 were perfectly literal descriptions of their function. These were statutes for the acquisition of any and all land required for the railways, not only for the acquisition of land that could not otherwise be secured at market value by private bargain. The implicit restriction in Reg I of 1824 to that effect¹¹⁰ was not reproduced in any of its successors.

The compulsory use of the power of compulsory acquisition was designed to avoid the systemic risk associated with the private purchase of land. In the absence of a Torrens system of title by registration – the law provided only for the compulsory registration of instruments¹¹¹ – a purchaser’s title was vulnerable to challenge on the ground that, for whatever reason, the vendor had lacked good title to convey.¹¹² As the author of an article in the *Bombay Law Journal* (1929–1930) complained, despite cumbersome, lengthy, and costly searches of title:¹¹³

... the protection given is incomplete. The doctrine of constructive notice as to defects in title is applicable. The law reports show cases in which innocent purchasers have

¹¹⁰ Sections I and III.

¹¹¹ The relevant provisions at the time of the Kelkar Bill were s 17(1) of the Indian Registration Act (XVI of 1908) and ss 54 and 107 of the Transfer of Property Act (IV of 1882). See, for context, D Rothermund, ‘The Record of Rights in British India’ in his *The Indian Economy under British Rule and other Essays* (Manohar 1983) 84–85.

¹¹² The problem has persisted: DC Wadhwa, ‘Guaranteeing Titles to Land’ (23–29 November 2002) 37 *Economic and Political Weekly* 4699; Swati Ramanathan, ‘Security of Title to Land in Urban Areas’ in 3iNetwork, *India Infrastructure Report 2009: Land – A Critical Resource for Infrastructure* (OUP, New Delhi 2009) 16. The Land Titling Bill 2010 (revised 2011), a central ‘model law’ for the introduction of the Torrens System, was shelved in mid-2012 because of the ‘large number of intermediary steps’ needed, according to the responsible minister: ‘Jairam Ramesh puts Land Titling Bill on Hold’ *Economic Times* (New Delhi, 25 June 2012).

¹¹³ —, ‘The Land Transfer System and its Applicability to Bombay’ (1929–30) 7 *Bombay Law Journal* 65. The author recommended the introduction of the Torrens System in Bombay city. C.f. —, ‘Ought the Compulsory Land Transfer System to be Applied to Bombay?’ (1929–30) 7 *Bombay Law Journal* 128; —, ‘English Land Transfer System and the Feasibility of its Application to the Town and Island of Bombay’ (1929–30) 7 *Bombay Law Journal* 171.

suffered loss through defects coming to light even after careful examination. Under the system of private conveyancing the title can scarcely ever be affirmatively or positively shown to be good. At best it is inferential and negative. The possibility of its being impeachable cannot be excluded. ... The examiner must know not only what the law is to-day – a sufficiently complicated task – but also what it was at any moment during the years over which his examination extends. His journey is over quicksands which shift, change and disappear in the light of various and often conflicting, Acts of Legislatures and decisions of the Court.

Litigation on title, perceived to be legion particularly in Bengal, formed part of the great flourishing of land litigation between the Mutiny and the First World War.¹¹⁴ Oliver Mendelson ascribed the phenomenon to an agrarian system ‘deeply disrupted’ by British rule, in particular by the heaviness of the land revenue demand.¹¹⁵ Elizabeth Whitcombe suggested other contributing factors: the modernisation of legal procedure, allowing the law to be used most effectively to pursue private ends; the enactment of more sophisticated and ambitious laws affecting land; and conflicts both within and between two legal jurisdictions: the revenue jurisdiction, in which summary decisions were made by the executive on questions arising from the administration of land revenue, and the ordinary civil jurisdiction:¹¹⁶

The revenue and civil jurisdictions were two distinct arms of the civil administration but, since the overriding concern of each was property law, they frequently overlapped. The result was that decisions given under the one head could be played against the other; appeals, earlier exhausted in the revenue courts, where the commissioner of each division was the final authority, could then be transferred to the civil courts in the form of a newly instituted suit involving, with perhaps minor mutations, the same parties.

¹¹⁴ Oliver Mendelsohn, ‘The Pathology of the Indian Legal System’ (1981) 15 MAS 823, 837–849; DA Washbrook, ‘Law, State and Agrarian Society in Colonial India’ (1981) 15 MAS 649, 670–671; c.f. Marc Galanter, “‘To the Listed Field...’: The Myth of Litigious India’ (2009) 1 Jindal Global L Rev 65, 66–68.

¹¹⁵ Mendelsohn, *ibid*; c.f. Washbrook, *ibid*, 671.

¹¹⁶ Elizabeth Whitcombe, *Agrarian Conditions in Northern India: The United Provinces under British Rule, 1860–1900* (University of California Press 1972) 18, 205–233. On the origins and development of the divide between the administrative and civil jurisdictions, see Dieter Conrad, ‘Administrative jurisdiction and the civil courts in the regime of land-law in India’ in Jap de Moor and Dietmar Rothermund (eds), *Our Laws, Their Lands: Land Laws and Land Use in Modern Colonial Societies* (Lit 1994).

Within both revenue and civil jurisdictions, decisions on points of law might differ from court to court and bench to bench. Further, provisions in the statutes conflicted with the personal laws assiduously administered under the civil jurisdiction. Lastly and overall, the meeting points of the law with local politics added fuel to the flames of litigiousness.

The civil courts, on which lay the formal burden of deciding questions of title and tenancy, were hindered by the lack of a conclusive record of rights in land.¹¹⁷ In the areas of Bengal under permanent settlement, a system of land tenure whereby responsibility for paying land revenue fell on *zamindars*, the state had little incentive to enquire into lesser rights until the introduction of tenancy protection legislation in the late 19th century. While this motivated the compilation of a record of rights in parts of Bengal, the record was declared by revenue law to be only a presumptive proof of title so that legal challenges in the civil courts would not hold up the assessment of revenue. In *ryotwari* provinces like Bombay and Madras, wherein the revenue demand was levied in relation to individual fields, there had been little incentive to compile a record of rights so long as someone – the *ryot*, his moneylender, an heir, a mortgagee, or whoever was in possession, it did not matter who – paid the revenue owing for each field. In 1913, Bombay introduced a record of rights with the same limited legal effect as that in Bengal.¹¹⁸ Madras never introduced a record of rights at all. In the parts of Northern India under the *mahawari* settlement, whereby villages were assessed jointly for land revenue, records maintained by *patwaris* to fix individual contributions were used by administrators and judges in determining rights in land but always with a grain of salt,

¹¹⁷ D Rothermund, *Government, Landlord and Peasant in India: Agrarian Relations under British Rule, 1865–1935* (Franz Steiner Verlag 1978) 41–45; Dietmar Rothermund, ‘Land-Revenue Law and Land Records in British India’ in Jap de Moor and Dietmar Rothermund (eds), *Our Laws, Their Lands: Land Laws and Land Use in Modern Colonial Societies* (Lit 1994) 131–133.

¹¹⁸ For brief comment see —, ‘The Bombay Land Revenue Code’ (1915) 17 Bombay Law Reporter (journal section) 25, 26–28.

given the perception of *patwaris* as wily scribes who connived with landowners against tenants. On one occasion, the Privy Council defined the record of rights in the North-Western Provinces as ‘the proprietors’s document’.¹¹⁹ Additional difficulties arose in Punjab and other provinces from challenges to title invoking customary and legal restrictions on the transfer of agricultural land.¹²⁰

The great advantage to the state and its lessees of securing land only under a land acquisition law was that the state secured an indefeasible title by doing so. From Reg I of 1824 onwards, every such enactment declared that the acquisition of land under its provisions had the effect of extinguishing all other estates, rights, and interests in the acquired land.¹²¹ The preamble to Act I of 1850, which extended Regulation I of 1824 to Calcutta, explicitly acknowledged this salutary effect: ‘Whereas the execution of works of public usefulness in Calcutta is liable to be hindered by the difficulty in making good title to the land taken for such purpose, it is enacted as follows...’. Even minor encumbrances did not survive. In 1865, the High Court of Calcutta held that a right of way used by *ryots* to pass between their dwelling-houses and fields had been extinguished

¹¹⁹ Whitcombe (n 116) 257; see, generally, 252–260.

¹²⁰ See 143–144 below.

¹²¹ Section 6(5) of Reg I of 1824; s XVI of Act XXVIII of 1839; s 8 of Act VI of 1857; s 16 of the Land Acquisition Acts of 1870 and 1894. At least in permanently-settled areas, the sale by auction of land to recover arrears of land revenue also cleared any existing encumbrances on title; indeed, to take advantage of this effect, in the late 18th century superior rights-holders in some districts in Bengal would deliberately default on land revenue and then purchase their former estates at auction: BB Chaudhuri, ‘The Land Market in Eastern India, 1793–1940 Part I: The Movement of Land Prices’ (1975) 12 IESHR 1, 7.

by the acquisition of the land under Act VI of 1857 for the Calcutta and South-Eastern Railway Company.¹²²

Land acquisition thus served a dual purpose: first, to eject recalcitrant owners or tenants; and second, whether or not a transfer was consensual, to ensure that the title to land secured would be immune thereafter from legal challenge. The second purpose was at least as important as the first and perhaps even more so, as one official suggested in a related context.¹²³ If this is correct, then land acquisition was primarily a means of laundering title and only secondarily a means of forcing non-consensual transfers.

The doubly-valuable entitlement to acquired land was central to the continued viability of the railway companies, even as late as 1927. Although the total railway network was growing only slowly by this time,¹²⁴ a considerable area of land continued to be acquired each year for and at the expense of railway companies. In the Bombay Presidency from 1918–1927, an average of just over 350 acres per year was acquired for railway companies (albeit the figures fluctuated wildly from year to year). This represented, on average, 7.8% of the land acquired each year in the Presidency:

Table 2.1
Land acquisition for railway companies in the Bombay Presidency, 1918–1927

¹²² *Collector of the 24-Pergunnahs v Nobin Chunder Ghose* (1865) 3 WR 27. See, also, *Municipal Corporation of the City of Bombay v Great Indian Peninsula Railway Company* (n 100); *Mitra v. Municipal Committee, Lahore* (1925) IC 658 (HC Lahore).

¹²³ ‘Notes’ in GoI, Rev & Ag, Land Rev, ‘Proposed Amendment of the Land Acquisition Act, 1894, with reference to the recommendations of the Indian Industrial Commission relating to Land Acquisition in Relation to Industries’, Oct 1920, prog. 26–28 (A) at p. 18.

¹²⁴ See ‘Table 1: Total Miles of Railway Track Open at Year-End 1853–1946-47’ in Morris David Morris and Clyde B. Dudley, ‘Selected Railway Statistics for the Indian Subcontinent (India, Pakistan and Bangladesh), 1853–1946-47’ (September 1975) XVII *Artha Vijnana* 187.

<i>Purpose of acquisition</i>	<i>1918</i>	<i>1919</i>	<i>1920</i>	<i>1921</i>	<i>1922</i>	<i>1923</i>	<i>1924</i>	<i>1925</i>	<i>1926</i>	<i>1927</i>
<i>Land acquired for railway companies (acres)</i>	379	295	818	997	140	145	90	59	460	291
<i>Land acquired in total (acres)</i>	3,931	6,951	13,921	8,821	3,423	4,322	1,626	1,759	2,542	3,010

*Source: the Gazette Survey*¹²⁵

Most acquisitions were for minor projects – the lengthening of sidings, the remodelling of a yard, or the extension of staff quarters – that required fractions of an acre or at most a few acres. Occasionally, large tracts were acquired for the construction of new lines: in 1926, 244 acres were acquired for the Madras and Southern Mahratta Railway for the extension of its line from Hotgi to Sholapur;¹²⁶ in the same year, 147 acres were acquired for the Bombay, Baroda, and Central India Railway Company for the construction of the Jambusar-Kavi Railway. Such large-scale acquisitions would have been virtually impossible if the state was required to purchase land for such projects. Owners would be in a position to demand an extortionate premium over market value if the line would otherwise need to be diverted. Small projects, too, would be more difficult and costlier than before. The title on all purchased land would be vulnerable to challenge, further adding to the costs borne by the state.

In contrast, railways owned and run by the state would encounter none of these difficulties. As a result, it would no longer make practical or fiscal sense for the state to sustain the system of railway companies. In 1927, Kelkar sought to put the state in

¹²⁵ See 124–125 below.

¹²⁶ *Bombay Government Gazette: Part I* (Government of Bombay, 1926) 2297, 2623.

precisely that position, in what amounted to an audacious scheme to force the pace of nationalisation.

Nationalisation

In the late 19th century, the state began to buy-out the pioneer sterling railway companies as and when the contractual options to do so arose, beginning with the EIR in 1879. Reflecting the resurgent confidence in private enterprise, however, only a few companies were fully nationalised; that is, brought under both state ownership and management.¹²⁷ Most were converted into a hollowed-out variant of a state-owned enterprise: while the majority of shareholders in a given company were bought out outright, the remaining were left in place to form a new company – with the same name as the old – that contracted with the state to manage the old company's lines – and, in many cases, new lines constructed by the Government of India and the princely states – with the benefit of a 4% guaranteed return on investment.

In 1882, witnessing the end of the system of exclusive state-construction that they had helped to devise and implement, the Strachey brothers warned against the resurrection of the railway companies:¹²⁸

To speak of the operations of foreign capitalists in India as if they were identical with the spontaneous working of what is commonly described as private enterprise in our own country, is a manifest confusion of thought, and every argument based on such an assumption necessarily involves a serious fallacy. The intervention of great companies

¹²⁷ *Report of the Acworth Committee* (n 57) [190].

¹²⁸ John Strachey and Richard Strachey, *The Finances and Public Works of India from 1869 to 1881* (Kegan Paul Trench & Co. 1882) 409.

of foreign capitalists, having their seat of business out of the country, differs little, indeed, in its ultimate effects, from the establishment of a strong foreign despotism.

It was left unsaid, of course, that the ‘despotism’ of the companies was enabled by that of the Raj. A responsible government in India could not have maintained a system so dominated by British private enterprise. Of the many criticisms of railway policy by Indian nationalists and the nationalist press – that the use of exclusively British-made inputs to railway construction precluded ‘multiplier’ effects that would have stimulated Indian industry; that lines were routed to serve British trading and strategic interests rather than the domestic Indian economy; that the failure to employ Indians in higher management and technical positions precluded the rise of domestic railway companies; that the furious pace of construction was neither affordable nor justified by domestic needs; that too much state aid was given to the railways at expense of irrigation and industry – the most common criticism of all was made against the extension of guarantees to the sterling railway companies.¹²⁹ Nationalists argued that the guarantees exacerbated the ‘drain’ of funds from India to Britain without commensurate benefits.

There were also fears of a political threat from foreign railway capital. Writing in 1884, G. V. Joshi warned of ‘a powerful foreign aristocracy of stock-holders ... created with interests adverse to the nation’.¹³⁰ G. S. Iyer, writing in 1898, argued that foreign railway companies added to the ‘alien vested interests in the country which are already powerful enough and which often operate to the detriment of those of the people’. Some critics favoured replacing British with Indian private enterprise, guaranteed or otherwise. Most,

¹²⁹ Bipan Chandra, *The Rise and Growth of Economic Nationalism in India: Economic Policies of Indian National Leadership, 1880–1905* (People’s Publishing House 1966) ch V; Visalakshi Menon and Sucheta Mahajan, ‘Indian Nationalism and Railways’ in Roopa Srinivasan et al (eds), *Our Indian Railway: Themes in India’s Railway History* (Foundation Books 2006).

¹³⁰ Chandra, *Rise and Growth*, *ibid*, 188.

however, were sceptical that enough capital could be raised domestically and so favoured some form of state ownership and management.

Only on the establishment of the Montagu-Chelmsford legislatures in 1919 did Indian criticism begin to influence railway policy to any substantial degree.¹³¹ In 1920, after pressure from the First Legislative Assembly, the Secretary of State appointed a committee chaired by the railway economist William Acworth to report on the relative advantages of state and private management.¹³² In a few short lines that displayed no deference to decades of railway policy, the Acworth Committee (1921) unanimously recommended that the sterling railway companies in India should ‘cease to exist at the termination of their present contracts’.¹³³ The view of the ‘overwhelming majority’ of witnesses in India in favour of Indian control of the railways was entitled to ‘very great weight’, the committee wrote. The past advantages of British management no longer held true, it observed. The committee split evenly on how the lines currently worked by the companies should be managed. Attaching ‘great importance to the fact that Indian public opinion is against company management’, Acworth and four other members recommended the nationalisation of all company-worked lines. The rest argued that the lines should be turned over to India-domiciled variants of the existing companies: among other reasons, they thought that the state could not adequately finance railway construction and maintenance.

¹³¹ Menon and Mahajan (n 129) 157–159.

¹³² Amba Prasad, *Indian Railways: A Study in Public Utility Administration* (Asia Publishing House 1960) 62–63.

¹³³ Acworth Committee (n 57) [202], [206]–[207], [223].

The Acworth Committee's report effectively presaged the end of the sterling railway companies, with the only live question being what would take their place. In 1924, the Government of India acceded to heavy pressure from the Second Legislative Assembly for nationalisation. The following year, in which contractual options arose for the state to buy out the reconstituted EIR and GIP, both were nationalised. Aside from the availability of the necessary funds, the pace of any further nationalisations would be dictated by when contractual options arose to nationalise the seven remaining sterling railway companies. The dates stretched from 1928 to as late as 1950:¹³⁴

1928 – Burma Railway Company
1931 – Assam Bengal Railway Company
1932 – Bengal and North Western Railway Company
1937 – Madras and Southern Mahratta Railway Company
1941 – Bombay, Baroda, and Central India Railway Company
1945 – South Indian Railway Company
1950 – Bengal Nagpur Railway Company

Although a 'few Indian witnesses' asked it to do so, the Acworth Committee would not recommend that the Government compulsorily expropriate the companies ahead of time.¹³⁵ The Government of India concurred with the Committee and so, Indian public

¹³⁴ Acworth Committee (n 57) [208]; Prasad (n 132) 69. Uniquely, the Bengal Nagpur Railway Company was privately owned as well as managed at the time of the Acworth report. This list excludes the Nizam's Guaranteed State Railway Company, registered in Britain in 1885 to take over the lines constructed to date in the princely state of Hyderabad. On the controversial genesis of the company, see Vasant Kumar Bawa, 'Salar Jung and the Nizam's State Railway 1860–1883' (1964) 2 IESHR 307; Bharati Ray *Hyderabad and British Paramountcy* (OUP 1988) ch V. The company was taken under the direct management of Hyderabad state in 1931. The list also excludes the numerous privately-owned and managed branch line and light railway companies, discussed at 89–90 below.

¹³⁵ *Report of the Acworth Committee* (n 57) [209].

opinion notwithstanding, it was accepted that British private enterprise in Indian railways would persist for thirty more years.¹³⁶

The intended effect of the Kelkar Bill

The Legislative Assembly lacked the power to force the pace of nationalisation directly. Kelkar, however, proposed to take advantage of the Assembly's power under the 1919 reforms to legislate on land acquisition.¹³⁷ While the Assembly could not cancel the Secretary of State's contractual obligation to provide land to the railway companies, it could make it unlawful to carry out that obligation. By doing so, the state would be forced to make an invidious choice: either nationalise the companies ahead of time or incur the political consequences of overruling an elected legislature.

Recall that under the 1894 Act there were two separate procedures by which land could be acquired for a company. The first procedure, set out in Part VII of the Act, could be invoked by companies legally domiciled in Britain or India; that is, by 'sterling' or 'rupee' companies. This was the effect of the definition of 'company' in the Act.¹³⁸

¹³⁶ In the event, only the Burma Railway Company was purchased as scheduled. The others were purchased between 1942 and 1944. The exercise of some of the options was postponed on financial grounds but the contracts, once renewed, were terminated early. See Prasad (n 132) 69–73. Railway historians have not yet explained these early terminations. Kerr notes only that World War II had 'forced the issue' of the nationalisation of the remaining company-worked lines: Ian J Kerr, 'Introduction' in Ian J Kerr (ed), *Railways in Modern India* (OUP 2001) 30.

¹³⁷ See item 15 of Schedule I to Part II of the Devolution Rules, reproduced in *Report of the Indian Statutory Commission: Vol I – Survey* (Cmd. 3568, 1930) 129.

¹³⁸ Section 3(e).

... a Company registered under the Indian Companies Act, 1882, or under the (English) Companies Acts, 1862 to 1890, or incorporated by an Act of Parliament or of the Governor General in Council, or by Royal Charter or Letters Patent :

The substance of the above definition was introduced by the Land Acquisition Act 1870.¹³⁹ The Works of Utility by Private Persons and Companies Act 1863 had left the term ‘company’ undefined, allowing its use for companies domiciled other than in India and Britain. However, the definition above was unlikely to have been introduced with any protectionist intent. Although there were instances of discrimination against non-British foreign enterprises even in an age of free trade (e.g. the pressure on the sterling railway companies to buy British rather than American or German locomotives),¹⁴⁰ there do not seem to have been any foreign companies other than sterling companies operating in India at the time.¹⁴¹

Prior to 1914, London, not New York or one of the European capitals, was the home of ‘free-standing companies’: that is, companies set up in one country for the purpose of doing business in another.¹⁴² The ample capital of British investors looking for superior

¹³⁹ Section 3.

¹⁴⁰ Frederick Lehmann, ‘Great Britain and the Supply of Railway Locomotives of India: A Case Study of “Economic Imperialism”’ (1964) 2 IESHR 297 at 300. A later and more notorious example was the exclusion of the Standard Oil Company from the Burma oilfields: Lance E Davis and Robert A Huttenback, *Mammon and the Pursuit of Empire: The Political Economy of British Imperialism, 1860–1912* (CUP 1986) 262; c.f. GG Jones, ‘The State and Economic Development in India 1890–1947: The Case of Oil’ (1979) 13 *Modern Asian Studies* 353.

¹⁴¹ None are mentioned in Stanley Chapman, ‘British Free-Standing Companies and Investment Groups in India and the Far East’ in Mira Wilkins and Harm Schröter (eds), *The Free-Standing Company in the World Economy 1830–1996* (OUP 1998). According to Tripathi, mills established by an American entrepreneur in the early 1870s were organised as rupee companies; in the same period, a German-British partnership was established in Calcutta: Dwijendra Tripathi, *The Oxford History of Indian Business* (OUP 2004) 164. A sales office established in the 1870s for Singer, the first American international business, seems to have been organised as a branch of the company’s London headquarters: Mira Wilkins, *The Emergence of Multinational Enterprise: American Business Abroad from the Colonial Era to 1914* (Harvard University Press 1970) 37–43.

¹⁴² Mira Wilkins, ‘The Free-Standing Company Revisited’ in Mira Wilkins and Harm Schröter (eds), *The Free-Standing Company in the World Economy 1830–1996* (OUP 1998) 40–42; Amiya Kumar (ctd. on next page)

returns abroad was thought more likely to be invested in free-standing sterling companies: their shares could be off-loaded on the liquid London market; their directors were subject to British law; and they could purchase factors of production in sterling (an important advantage in periods in which the foreign currency depreciated).¹⁴³ Even for endeavours that were not seeking to tap the London capital market, British registration was perceived to have advantages: there were instances in which large German, French, and American investors made third-country investments through British-registered companies (though not, it seems, in India).¹⁴⁴

Any sterling or rupee company required the consent of the relevant provincial government for land to be acquired on its behalf. This consent was not to be given unless, after an enquiry, the government was satisfied the proposed acquisition was necessary for a work ‘likely to prove useful to the public’. The company was then required to enter into an agreement with the Secretary of State on such matters as the terms upon which the land would be held by the company and the conditions for the execution and maintenance of the work. Each agreement was then to be published in the provincial gazette and the Gazette of India. Once published, the agreement had ‘the same effect as if it had formed a part of [the] Act’.

Bagchi, *Private Investment in India, 1900–1939* (CUP 1972) 161–162.

¹⁴³ Mira Wilkins, ‘The Free-Standing Company, 1870–1914: an Important Type of British Foreign Direct Investment’ (1988) *XLI Economic History Review* 259 at 263; Rungta (60) 172. These considerations did not apply with the same force to closely-held companies that raised most of their capital from their managing agents and their close associates.

¹⁴⁴ Wilkins (n 142) 16.

The second procedure for land to be acquired on a company's behalf applied only to those companies that had a contractual entitlement to be provided land by the state. As mentioned above,¹⁴⁵ from 1894 companies such as the sterling railway companies were exempted from the strictures of Part VII and expressly allowed access to land under 'public purpose' provisions in Part II of the Act. Section 43 provided:

The provisions of [Part VII] shall not apply, and the corresponding sections of the Land Acquisition Act, 1870, shall be deemed never to have applied, to the acquisition of land for any Railway or other Company, for the purposes of which, under any agreement between such Company and the Secretary of State for India in Council, the Government is, or was, bound to provide land.

Clause 27 of the Kelkar Bill would have added this caveat to s 43:

Provided that no Local Government or the Government of India shall enter into or bind itself by an agreement with any railway company or other company to provide land for the company except with the approval of the local or the Indian Legislature, as the case may be.

The phrase 'or bind itself' in addition to 'shall enter into' implied that the caveat applied not only to prospective contractual obligations to provide land but also to any existing obligations. Putting to one side for now the implications for contracts entered into by provincial governments, the caveat would have required the Government of India to seek the sanction of the Legislative Assembly to continue to supply acquired land to the sterling railway companies.

Kelkar would have reasoned that the prospect of securing that sanction was bleak. After all, the Assembly had been the main conduit of pressure for the nationalisation of those companies. If presented with a means to cut off their supply of acquired land and by doing so to make their sustenance too costly for the state, the Assembly would surely

¹⁴⁵ See 70 above.

take it. In a 1925 speech in the Assembly on the railway budget, Kelkar had warned the Railway Board that the Assembly would exercise as much scrutiny and control as it could over railway policy.¹⁴⁶ Now Kelkar proposed to give the Assembly the power to decide as fundamental a question as the pace of nationalisation.

The Kelkar Bill would have also made it impossible for the companies to resort to Part VII. Clause 2 of the Bill would have narrowed the definition of ‘company’ in s 3(e) of the Act so that only at least half-Indianised rupee companies were eligible to be beneficiaries of Part VII. The amended definition would read as follows:¹⁴⁷

... the expression “Company” means a Company registered under the Indian Companies Act, 1882, holding a rupee capital, and having on its directorate a majority of Indian directors, or among its shareholders a majority of Indian shareholders.

Undoubtedly, there were ways in which the sterling railway companies could circumvent the narrowed definition (hereafter, the ‘Indianisation clause’). They could change their legal domicile to India, as other sterling companies had in the 1920s.¹⁴⁸ Their boards, still invariably white,¹⁴⁹ could be stacked with pliant Indian directors (perhaps the ‘brown sahibs’ of Calcutta).¹⁵⁰ Indeed, as the Bill did not define ‘Indian’, the companies might even rely upon Anglo-Indians, regarded by the law for the purposes of defence and

¹⁴⁶ Reproduced in his *Pleasures and Privileges of the Pen: Book IV – Speeches & Addresses* (KN Kelkar 1929) 219–220.

¹⁴⁷ Clause 27.

¹⁴⁸ Rajat K. Ray, *Industrialization in India: Growth and Conflict in the Private Corporate Sector 1914–1947* (OUP 1979) 40–41.

¹⁴⁹ Or at least that is a safe assumption, there being little evidence that much had changed since the companies were established. There were a few instances in which the rulers of princely states invested in British railways that passed through their territories, but we do not know whether they were brought on as directors: Ramusack (n 104) 195.

¹⁵⁰ Omkar Goswami, ‘Then Came the Marwaris: Some Aspects of Changes in the Pattern of Industrial Control in Eastern India’ (1985) 22 IESHR 225, 233.

employment as ‘Statutory Natives of India’.¹⁵¹ Usefully, as a rule the Anglo-Indian community was reflexively sympathetic to British interests and motivated to defend their remaining privileges as a ‘railway caste’ against Indianisation, a process from which they had been excluded in practice.¹⁵²

The basic problem with this strategy, however, was that the Government of India had specifically decided against the Indianisation of the companies in favour of outright nationalisation. Accordingly, the two clauses of the Bill, one compelling sanction by an unfriendly legislature and the other compelling Indianisation, amounted to a pincer movement against the companies from which there was no escape, only defeat in the form of a premature submission to nationalisation.

Unwisely, Kelkar did not explain why he proposed to narrow the definition of ‘company’, prompting one of his critics in the Assembly to wonder whether the clause had ‘slipped in accidentally’.¹⁵³ He said little about the implications for the sterling railway companies, only that the state ‘unnecessarily’ committed itself to acquire land on behalf of railway companies that ought to pay ‘proper compensation to the parties by private arrangement’.¹⁵⁴ However, there can be no doubt that he intended that his Bill

¹⁵¹ Section 6 of the Government of India Act 1870 (32 and 33 Vic. c. 97).

¹⁵² Satoshi Mizutani, *The Meaning of White: Race, Class, and the ‘Domiciled Community’ in British India (1858–1930)* (OUP 2011) 59–65, 187–194, 209–217. On the role of Anglo-Indians in the railways, see Laura Bear, *Lines of the Nation: Indian Railway Workers, Bureaucracy, and the Intimate Historical Self* (Columbia University Press 2007). Kelkar may well have intended the term ‘Indian’ to exclude Anglo-Indians. He criticised the Railway Board of working in a ‘racial spirit’ by giving special preference to their employment in the railways: Kelkar (n 146) 217.

¹⁵³ *Legislative Assembly Debates (Official Report): Volume I (19th January to 21st February, 1927); First Session of the Third Legislative Assembly, 1927* (GoI Press 1927) 848.

¹⁵⁴ *Ibid* 264.

hasten the end of British private enterprise in Indian railways, or at least to draw critical attention to the slow pace of nationalisation. He was a keen student and critic of railway policy,¹⁵⁵ so much so that in the course of two Q&A sessions in the Assembly shortly before the introduction of the Bill he asked no fewer than 29 questions on nearly every conceivable aspect of railway policy, great and small, from company finances, recruitment, fares, and (in one instance) land acquisition.¹⁵⁶

The only railway companies that would emerge relatively unscathed from the Kelkar Bill would have been the 35 ‘rupee railway companies’.¹⁵⁷ These companies had been formed from the 1880s onwards to construct branch lines and ‘light’ railways, usually with district, provincial, or Government of India subsidies or guarantees.¹⁵⁸ All the companies fulfilled, or could easily be reconfigured to fulfil, the narrowed definition of ‘company’ that Kelkar proposed. All were rupee companies. All held their capital in rupees. Although just under half of the companies were directed by boards without a majority of Indian directors – an inference drawn from the names of directors listed in Place, Siddons & Gough’s *Investors’ India Year Book* (1927)¹⁵⁹ – that could be remedied by a change of personnel. Even without a change of personnel, these companies could probably rely on a continued supply of acquired land under Part II, relying on the s 43

¹⁵⁵ See his ‘The Indian Railway Budget’, *The People* (Lahore, 27 Feb 1927).

¹⁵⁶ *Legislative Assembly Debates: Volume I* (n 154) 146–162, 205–214. Note, however, that no less than a quarter of all questions asked in the Legislative Assembly related to the railways: Menon & Mahajan (n 129) 159; see, further, Kerr (n 30) 120).

¹⁵⁷ Place, Siddons & Gough, *The Investors’ India Year Book* (14th ed Place, Siddons & Gough 1927) 24–56.

¹⁵⁸ Kerr (n 30) 78; *Investors’ India Year Book* (n 157) 24–28; WH Cole, *Light Railways at Home and Abroad* (Charles Griffin & Co. 1899) 118–136.

¹⁵⁹ *Investors’ India Year Book* (n 157) 30–56.

exemption from Part VII. Although their current and future contracts for the supply of land would be subject to approval by the provincial legislatures, these imperfectly *swadeshi* companies were likely to be treated sympathetically. To the sterling railway companies, however, the Kelkar Bill represented a mortal threat.

The Indianisation clause was the most bitterly criticised of any in the Bill. Officials characterised it variously as ‘most invidious’, ‘undesirable in common fairness’, ‘mischievous and opposed to the best interests of the country’, and as ‘politics of a quite vindictive character out of place in a measure like the Land Acquisition Act’.¹⁶⁰ ‘As long as British India remains a part of the British Empire’, the Deputy Commissioner of Lucknow argued, ‘racial distinctions of this sort should find no place in the enactments of the legislature’.¹⁶¹ A Commissioner of Settlements went so far as to characterise the proposal as ‘full of the seeds of war and international hatred’.¹⁶² However, only a few of those who submitted opinions on the Bill adverted to the specific threat to the sterling railway companies. The Collector of Madras complained that no railway could possibly acquire land by private negotiation.¹⁶³ His counterpart in Ganjam protested that it would be unjust to impose new conditions on existing railways.

¹⁶⁰ IOR/L/E/7 – File 1126 (BL): Paper No. I at 14, 46; Paper No. II at 67, 71; Paper No. IV at 19. This file contains 17 printed sets of opinions organised into four separate ‘Papers’. It is to the numbered pages of these four Papers (I, II, III and IV), rather than individual opinions, to which reference will be made hereafter.

¹⁶¹ Paper No. I. at 37.

¹⁶² Paper No. III at 122.

¹⁶³ Paper No. IV at 27; Paper No. IV at 16.

Officials suggested that the Assembly lacked the power to pass legislation that would have the effect of frustrating contracts entered into by the Secretary of State. Whether that was the case, the Secretary of State could simply refuse to be frustrated in that manner.¹⁶⁴ The Raj's cronies in the Council of State could be relied upon to scupper the Bill; even if they failed, the Viceroy could withhold his assent.¹⁶⁵ Given the strength of nationalist feeling against the sterling railway companies, however, the political cost of overruling the Legislative Assembly would be high.

Conclusion

For 80 years, the sterling railway companies had enjoyed privileged access to land acquisition law, crafted and regularly revised to better meet their needs and the allied interests of the state as financier. Freed by legislative fiat from the chronic insecurity of title, the companies could build their little empires on a tenurial foundation as secure as that of the state – all the while insulated by the state from the possibility of loss. The Kelkar Bill would have broken up this 'highly beneficial' arrangement, all the better to force the pace of nationalising private enterprises seen to be antithetical to Indian interests. To what could the nationalist mind object? The puzzle deepens as we go on to consider the implications of the Indianisation clause for industry.

¹⁶⁴ Paper No. I at 46; Paper No. I at 43.

¹⁶⁵ Sections 68 of the Government of India Act 1919.

Land Acquisition for Industry

Part 1 – Law

Before concluding I ought to refer to the qualification proposed by this Bill which is necessary to be possessed by a Company for which land is to be acquired. ... I may be forgiven for observing in all humility that it is conceived in a somewhat narrower spirit than the rest of the Bill. Is a valuable industrial scheme, for instance, requiring an enormous expenditure which no company in India can afford to incur but which an English Company having its capital in sterling (not Rupees) can easily afford, to be scrapped to the detriment of the interest of the whole country because land cannot be acquired by such a company for its operations[?] ... I am not a scholar of Economics and therefore do not venture to approach the question from the economic point of view, nor do I wish to fish in the troubled water of politics, so far as they affect the question. My point of view is that of common sense, which I am sure is always the safest.

– SG Velinker, ‘The Land Acquisition Amendment Bill’
(1927–8) 5 Bombay Law Journal 259, 270

Over and above the charge of moral invidiousness, officials alleged that the Indianisation clause in the Kelkar Bill would check the growth of industry.¹ ‘India cannot exist on the capital subscribed in it and if a measure such as this is introduced it will cripple development’, wrote the Collector of Vizagapatam. A Senior Sub-Judge thought that the proposal would create a ‘great obstacle in the way of starting new companies or factories...’. Drawing together the moral and economic lines of argument, the Collector of Karachi thundered against Kelkar:

¹ IOR/L/E/7 – File 1126 (BL) at Paper No. IV at 33; Paper No. II at 58; Paper No. III at 95. This file contains 17 printed sets of opinions organised into four separate ‘Papers’. It is to the numbered pages of these four Papers (I, II, III and IV), rather than individual opinions, to which reference will be made hereafter.

The object is to handicap European, especially British, capital and expertise. ... No doubt Mr Kelkar whose political views are well known wishes that India should not be a part of the British Empire, but so long as it is and derives protection and many advantages from its status as such the proposed provision may be regarded as a piece of impertinence as well as economically unsound.

Velinker (the treatise-writer) echoed his own concerns, grounded on ‘common sense’. As he should have appreciated, however, it was not at all clear that the law of land acquisition could be pressed into the service of industry, whether Indian or British. Although officials would not have been restrained by the courts had they used the law for industry,² their correspondence on the subject displayed a concern for legality for legality’s sake. They maintained one or more of the following positions, regrettably or otherwise:³

- (1) that industrial works were not ‘likely to prove useful to the public’ (the operative phrase in Part VII of the 1894 Act);
- (2) that acquisitions for industry would be contrary to the intention of the authors of the Act;
- (3) that a particular provision in the Act, by which it appeared mandatory to be able to state how the public was to ‘use’ the work in question, implicitly precluded acquisitions for industry.

In Velinker’s partial defence, (2) and (3) were incorrect. This chapter suggests that these were errors of transposition, for which the ahistoricism and formalism of contemporary legal reasoning were partly to blame. In the event, as the next chapter recounts, those

² See 230–231 below.

³ See, e.g., the correspondence in GoI, Legislative, ‘Question as to what extent and subject to what conditions the Land Acquisition Act 1894 (Act I of 1893) can be employed for the benefit of certain Companies...’, May 1918, prog. 150–151 (B) (NAI).

two positions were quietly set aside by provincial governments during a short-lived profusion of acquisitions for industry after the First World War, triggered when public license was given by the Indian Industrial Commission (1916–1918) to reassess (1) and brought to an end once the Government of India reasserted (2) and (3). Aside from advancing our understanding of the attractions of the Kelkar Bill to the nationalist mind, the episode is revealing of the efficacy of law as a self-restraint on official action in the late colonial period.

The company as a public business form

To see why officials were mistaken on (2) and (3) and to continue our history of the power to acquire land other than for government, we begin in 1870. In that year, two key decisions were made concerning, first, the beneficiaries of that power and, second, its scope.

The first decision, reflected in Part VII of the Land Acquisition Act 1870, was to narrow the class of potential beneficiaries to one: companies. This was a departure not only from the Works of Utility by Private Persons and Companies Act 1863, which had allowed ‘single persons’ to be beneficiaries alongside companies,⁴ but also from an early draft of what became the 1870 Act, which had provided that a work was one of ‘public

⁴ See the definition of ‘the Promoters’ in s 1.

utility’ for which land could be acquired even if the work was ‘to be executed by, or directly for the benefit of, private persons, or companies or municipal bodies’.⁵

The exclusion of municipalities in the course of drafting the 1870 Act may have been motivated by concerns about the abuse of power. An official in Madras commented that a local officer might misrepresent a private cesspool as a work of public utility although it really conferred a private benefit.⁶ More likely, it was recognised that there was an easier procedure by which municipalities could arrange to have land acquired on their behalf, rather than have to comply with the relatively strict procedures applicable to acquisitions in what became Part VII of the Act. The municipality would first request the government to acquire land on its behalf on the basis that it was required for a ‘public purpose’ under Part II of the Act. The land, once acquired, would then be transferred to the ownership of the municipality. The Act impliedly endorsed this expedient by providing that compensation for acquisitions under Part II could be paid ‘out of some Municipal Fund’.⁷ The courts disclaimed the power to sustain objections to post-acquisition transfers of this kind,⁸ intervening only in a case in which one municipal body (the Corporation of Calcutta) exceeded the limits of its delegated power in acquiring land for another (the Calcutta Improvement Trust).⁹

⁵ ‘Expropriation Bill’ (23 Feb 1869) in GoI, Legislative, ‘Papers relating to Act X of 1870’, May 1870, prog. 36–77 (A) at prog. 38–39 (Appendix C).

⁶ RS Ellis, Chief Secretary, ‘Precis of Remarks and Suggestions relative to the “Indian Expropriation Bill” (14 Sept 1869) in ‘Act No. X of 1870’ (n 5) at prog no. 66.

⁷ Section 6. See, also, s 56.

⁸ *Babujan v Secretary of State for India in Council* (1906) 4 CLJ 256 (HC Calcutta).

⁹ *Manick Chand Mahata v Corporation of Calcutta* AIR 1921 Cal 150 (HC Calcutta).

The exclusion of ‘private persons’ from the 1870 Act is not as straightforward to explain. Why allow land to be acquired for both individual entrepreneurs and companies in 1863 and then, just seven years later, withdraw the privilege from the former?¹⁰ The crises of corporate governance in the intervening years can hardly have increased confidence in the joint-stock form as a guarantee of sound management and probity. The end of the cotton boom in Bombay in 1865 brought to grief all but a handful of the hundreds of companies formed since 1863 in an unprecedented bout of speculation for ‘every imaginable purpose’ – ‘banks and financial associations, land reclamation, trading, cotton cleaning, pressing and spinning, livery stables, and the manufacture of brick and tiles’ – by promoters, some reckless and others unscrupulous.¹¹ D. E. Wacha described the *modus operandi* of the latter in his history of the ‘share mania’:¹²

The enterprising broker was always a knowing man. He was *paid* in one shape or another to rig the market for the particular concern whose shares he was invited to float. In most cases his commission or brokerage was in the form of an allotment of a certain number of shares with the first call paid up. Thus it came to pass that with the aid of such a manipulator, anything and everything could be easily floated in the market and for a time be quoted at a premium. Four or five individuals would meet together and draw up a paper, christen their bantling, fix a capital of so much divided into so many shares, and make a first call of so much. This precious confederacy of “promoters” would then subscribe each so many shares, generally one-half or two-thirds. As soon as this preliminary ceremony was performed, the usual announcement of their project would be made public, and applications for allotment of the balance of the shares would be invited.

The contemporaneous experience in Assam should have been particularly instructive to the authors of the 1870 Act in demonstrating corporate mismanagement and perfidy in

¹⁰ The decision is especially puzzling in light of the exactly opposite approach taken to prospecting licenses: until 1899, these could be granted to individuals but not to companies or syndicates: Sunil Kumar Sen, *Studies in Industrial Policy and Development* (Progressive Publishers 1964) 54.

¹¹ Radhe Shyam Rungta, *Rise of Business Corporations in India, 1851–1900* (CUP 1970) 72–90.

¹² DE Wacha, *A Financial Chapter in the History of Bombay City* (A. J. Combridge & Co. 1910) 40.

relation to land.¹³ The authorities had been cautious in their early dealings with the incipient tea industry, prevaricating before granting 'waste' land in 1839 to the pioneering Assam Company partly because of doubts whether corporate bodies should be permitted to hold large tracts of land. The grants that were eventually made were fewer and of poorer quality than anticipated, the Company complained. By the early 1850s, however, few other large-scale plantations had been established. The authorities decided to promote the industry by liberalising the rules governing land grants. For example, a rule requiring tea companies to clear and make fit for cultivation a certain proportion of land granted to them by a scheduled time after the initial grant, on pain of the resumption of the entire grant, was suspended in 1859 and dropped in 1861.

What followed in 1863–1865 was rampant and often corrupt land speculation, in which the promoters of a few dozen newly-formed tea companies were either complicit or duped. The more than doubling of land grants from 462,088 acres in 1864–5 to 1,207,043 acres in 1866–7 was largely due to the efforts of speculators, who purchased land at a trifle (Rs. 2.5–5.0 per acre) and then, after representing the land to investors in London or Calcutta as larger and more suitable for tea cultivation than it actually was, sold it at an enormous profit to a newly-formed company with or without the collusion of its promoters. The industry collapsed under the weight of its many sins in 1866 and at least £1 million of investors' capital was lost.

¹³ Blair B Kling, *Partner in Empire: Dwarkanath Tagore and the Age of Enterprise in Eastern India* (University of California Press 1976) 146–149; Rungta (n 11) 97–103; MAB Siddique, *Evolution of Land Grants and Labour Policy of Government: The Growth of the Tea Industry in Assam 1834–1940* (South Asian Publishers 1990) 6–42; Sunil K Sharma, 'Origin and Growth of the Tea Industry in Assam' in Tapan Raychaudhuri (ed), *Contributions to Indian Economic History II* (Firma K. L. Mukhopadhyay 1963) 130–131.

We can only guess, but the decision to privilege companies over individual entrepreneurs for the purposes of land acquisition may have been motivated by two factors. First, the expectation that any undertaking of the scale to construct a work 'likely to prove useful to the public' would be organised as a joint-stock rather than a partnership because of the attractions of limited liability. Thus, reflecting the then Legal Member's zeal for brevity,¹⁴ the Act need only provide for one class of beneficiary. It may be telling that a specific exception was later made to authorise land acquisition for private persons constructing tramways, a less capital-intensive form of public work.¹⁵

The second factor may have been a judgement by officials that the company was the only private organisational form sufficiently public in appearance to be a proper beneficiary of state patronage like land acquisition. This was not so much for the obvious reason that members of the public were entitled to participate in companies as shareholders.¹⁶ That had been the case in 1863. What had changed was the introduction of a stricter company law that made the company the mandatory organisational form for any undertaking of a sufficient scale to fund the construction of a public work.

The Indian Companies' Act X of 1866 brought within its regulatory fold every company, association, or partnership of more than twenty persons formed thereafter with the 'acquisition of gain' as its object, whereas under its predecessor (Act XIX of 1857) only companies of over twenty shareholders wishing to limit their liability had to be

¹⁴ See 64–65 above.

¹⁵ Section 7(3) of the Indian Tramways Act (XI of 1886).

¹⁶ C.f. GoI, Rev & Ag, Land Rev, 'Notes' in 'Proposed Amendment of the Land Acquisition Act, 1894, with reference to the recommendations of the Indian Industrial Commission relating to Land Acquisition in Relation to Industries', Oct 1920, prog. 26–28 (A), p. 8.

registered.¹⁷ Once registered, a company was subject to rules designed to promote public accountability. For example, every company was required to have its accounts audited and to file its balance sheet with the Registrar of Companies each year (rules imposed by Indian but not English company law, the only significant examples of the former diverging from the latter).¹⁸ Importantly, from the perspective of ensuring that acquired land would be used only for the purpose of the public work, a company was prohibited from altering the ‘objects’ section of its memorandum of association.¹⁹ If it deviated from its declared objects, a company could be held to account under the ultra vires doctrine, applied in India for the first time in 1866–1867.²⁰

These constraints were at least formally analogous to those binding public bodies.²¹ Indeed, being sufficiently public, companies could be entrusted with public powers incidental to land acquisition, the exercise of which was backed by the force of the criminal law. The 1870 Act provided that if land was sought by a company for the construction of a public work, the provincial government could authorise any ‘officer’ of

¹⁷ Section 4 of Act X of 1866.

¹⁸ Rungta (n 11) 69–70; Patrick K O’Brien, ‘The Costs and Benefits of British Imperialism, 1846–1914’ (1988) 120 *Past and Present* 163, 182.

¹⁹ Section 12.

²⁰ *Jahangir Rastamji Modi v Shamji Ladha* (1866–67) 5 Bom HCR 185. See PS Sangal, ‘Ultra Vires and Companies: The Indian Experience’ (1963) 12 *Int’l & Comp LQ* 967, 969–971.

²¹ C.f. the young Herbert Spencer on English company law in ‘Railway Morals and Railway Policy’ (1854), reproduced in his *Essays: Moral, Political and Aesthetic* (D. Appleton & Co. 1872) 251–252: ‘As devised by Act of Parliament, the administrations of our public companies are almost purely democratic ... Yet, not only are the characteristics vices of our political state reproduced in each of these mercantile corporations – some even in intenser degree – but the very form of government, whilst remaining nominally democratic, is substantially so remodelled as to become a miniature of our national constitution ... a mixture of the monarchic, the aristocratic, and the democratic elements, is repeated with such modifications only as the circumstances involve’.

the company to enter onto the land and to conduct a survey.²² The wilful obstruction of an officer of a company carrying out those tasks constituted a criminal offence punishable by imprisonment.²³

In contrast, ‘private persons’ – by the very definition of the term being outside of the public sphere – were ‘liable to abuse’ any provision authorising land to be acquired on their behalf: that, at least, was the belief of the Revenue and Agricultural Department of the Government of India, asserted during the consultations for what became the 1894 Act.²⁴ During those same consultations, objections were also made to proposals that would make individuals the incidental beneficiaries of land acquisition for village communities. A Burmese official had proposed that provincial governments be authorised to acquire land under Part II of the Act for the extension of villages, so that crowded villages could expand into neighbouring paddy fields: experience had shown that owners were unwilling to sell their fields for that purpose even at high prices.²⁵ A Bombay official made a similar proposal so that villages at risk of inundation by neighbouring rivers could be relocated.²⁶ With some reluctance, the Select Committee agreed that the governments should be authorised to acquire land for village sites where it had been ‘customary’ to do so.²⁷ Successfully resisting a motion that a wider power be

²² Section 46.

²³ Section 52.

²⁴ Office memo No. 104–48 (18 Jan 1892) from GoI, Rev & Ag to GoI, Legislative, in GoI, Legislative, ‘The Land Acquisition Act, 1894’, Feb 1894, prog. 1–83 (A) (NAI) at prog. 1.

²⁵ Deputy Commissioner, Bassein, to the Commissioner of the Irrawady Division (21 July 1892), enclosed with Appendix K to ‘The Land Acquisition Act, 1894’, *ibid*, prog. no. 1.

²⁶ Under-Secretary to Government, Bombay, to the GoI, Rev & Ag (5 March 1885), enclosed with Appendix A8 to ‘The Land Acquisition Act, 1894’, *ibid*, prog. no. 1.

²⁷ Section 3(e).

granted, the head of the Select Committee argued that the provision it advocated ‘went as far as it was reasonable to go in the direction of taking the land of one man compulsorily for the benefit of another for what cannot possibly be called a public purpose’.²⁸

A concern of that kind was also aired before the decision in 1919 to extend the definition of ‘company’ in the 1894 Act to include co-operatives,²⁹ an organisational form for which enabling legislation had been passed in 1904 and 1912.³⁰ Consulted on the matter, the Legal Department of the Government of India had held that there was no distinction in principle between co-operatives and companies.³¹ Indeed, certain types of co-operatives were entitled to opt for limited liability for their members.³² Other officials, however, worried about the potential for self-serving behaviour. The objects of a housing co-operatives – established to construct houses for their members – ‘can hardly be held to serve a public purpose’, one argued.³³ It was thought, however, that executive instructions could be issued to meet the difficulty if necessary.

²⁸ ‘Extract from the Abstract of the Proceedings of the Council of the Governor-General of India’ (1 Feb 1894) in ‘The Land Acquisition Act, 1894’ (n 24).

²⁹ Land Acquisition (Amendment) Act XVII of 1919.

³⁰ Co-operative Credit Societies Act (X of 1904); Co-operative Societies Act (II of 1912).

³¹ GoI, Legislative, ‘Papers relating to Act XXII of 1919’ (undated) (NAI).

³² Eleanor M Hough, *The Co-Operative Movement in India: Before Partition and in Independent India* (3rd ed OUP 1953) 49.

³³ ‘Notes’ to ‘Papers relating to Act XXII of 1919’ (n 31), p. 5.

The same amending legislation of 1919 extended the privilege of land acquisition to charitable societies, a form for which legislation had been passed as early as 1860.³⁴ Until 1919, charities could receive land acquired under Part VII only by registering as companies under a specific provision in the 1882 Companies Act,³⁵ by which they were conferred the privilege of limited liability in exchange for submitting to the obligations imposed generally on companies.

In these ways, for decades, in charity as in commerce, the company remained the privileged organisational form. Yet officials in 1870 cannot actually have believed that companies were any less likely than individuals, co-operatives or societies to abuse a liberty to receive acquired land. There was early evidence that compliance with the newly-enacted Companies Act was poor. The acting registrar of joint stock companies in Bombay reported that in the first six months of the Act's life there were companies that had probably never sent a single mandatory document to him.³⁶ Such companies had 'called upon capital, [which had probably] disappeared while no accounts whatever [had] been published'.

More to the point, company law left managing agencies, the real locus of power in Indian corporate governance, wholly unregulated until as late as 1936.³⁷ An institution

³⁴ Societies Registration Act XXI of 1860.

³⁵ Section 26.

³⁶ Ritu Birla, *Stages of Capital: Law, Culture, and Market Governance in Late Colonial India* (Duke University Press 2009) 42.

³⁷ This paragraph and the next rely on the following sources: PS Lokanathan, *Industrial Organisation in India* (George Allen & Unwin 1935) ch I and VI, 310–313, 327–331; Maria Misra, *Business, Race and Politics in British India c. 1860–1960* (Clarendon Press 1999) 17–25, 68–84, 89; Rob McQueen, 'The Flowers of Progress: Companies Law in the Colonies' (2008) 17 Griffith Law Review 383 at 392–401; Rungta (n 11) ch 12; Dwijendra Tripathi, *The Oxford History of Indian Business* (OUP (ctd. on next page)

that took a peculiar form in India, managing agencies (usually organised as partnerships) exercised near-absolute control over the companies under their management without necessarily enjoying controlling stakes. This was achieved through long-term and virtually irrevocable shareholder contracts, by which agencies were remunerated by commission for providing management services. Agencies ranged in scale from a single firm controlling the company it had promoted (a common arrangement in the cotton mill industry) to the thirty or so great British firms of Calcutta. Those firms controlled over ninety separate companies in multiple industries (it was estimated in 1875). Managing agencies were ubiquitous: of all the companies included in the *Times of India Directory* of 1872, only three functioned without a managing agency – a reflection of their value in part-financing the enterprises under their management and securing the balance from temperamentally cautious banks and suspicious capital markets.

In this system of industrial organisation, boards of directors were superfluous. In practice, all key decisions were taken by a company's managing agency and then rubber-stamped by directors, who were either partners of the agency itself or handpicked and so reliably servile. Indeed, company law was so lenient that an elected board of directors was not made mandatory until 1914, and even then could be stacked with the agency's nominees.³⁸ A proposal that a majority of directors be independent of the managing agency had to be dropped after pressure from the Bengal Chamber of Commerce, the voice of the Calcutta agencies. Shareholders, too, were content to the passive, becoming

2004) 112–113; Rajnarayan Chandavarkar, *The Origins of Industrial Capitalism in India: Business Strategies and the Working Classes of Bombay, 1900–1940* (CUP 1994) 68–69; Sen (n 10) 145–150; Stanley Chapman, 'British Free-Standing Companies and Investment Groups in India and the Far East' in Mira Wilkins and Harm Schröter (eds), *The Free-Standing Company in the World Economy 1830–1996* (OUP 1998) 207.

³⁸ Indian Companies (Amendment) Act (XI of 1914).

restive only after the war. Primarily because of the role of managing agencies, the distinction between companies and private concerns was not at all sharp, all the more so where ostensibly ‘public’ companies were closely-held (or, from 1914, registered as ‘private’ companies).³⁹

De-regulation?

For these reasons, the decision in 1870 to privilege companies over other business forms was likely made at least in part for appearances’ sake, as a way of burnishing the public character of the power to acquire land for non-government bodies. That management of appearances was perhaps a useful counterpoint to another key decision made in that year concerning the same power.

The 1863 Act had expressly permitted a provincial government to consider a wide array of factors in deciding whether to consent to an acquisition for a company or private person constructing a ‘work of public utility’. These factors were the object, nature, locality, probable utility, and estimated cost of a proposed work, any grounds of opposition to the work, and any other matters on which the government desired to be satisfied.⁴⁰ The Act left no room for a creative interpretation of ‘work of public utility’: the term was defined to mean ‘any bridge, road, railway, tramroad, canal for irrigation or navigation, work for the improvement of a river or harbour, dock, quay, jetty, drainage

³⁹ Ibid.

⁴⁰ Section XIII.

work, or electric telegraph’ along with any other particular work or class of works declared to be a work of public utility by the Governor-General in Council.⁴¹

In an apparent deregulation of these rules, Part VII of the 1870 Act provided only that a provincial government was not to consent to an acquisition for a company unless satisfied:⁴²

- (1) That such acquisition is needed for the construction of some work, and
- (2) That such work is likely to prove useful to the public.

At first glance, it may appear that only a ‘consolidation and simplification’ of the law was intended (as the purpose of the 1870 Act was described at the time).⁴³ The criterion that the work should be ‘likely to prove useful to the public’ could be read as amalgamating into one phrase the two considerations kept separate in the 1863 Act. First, that the work should be a ‘work of public utility’, a term used by officials synonymously with the term ‘public work’ to signify facilities designed for the use and advantage of the public at large.⁴⁴ William Thornton, the economist and inaugural Secretary for Public Works at the India Office, defined the term in that manner in his *Indian Public Works* (1875):⁴⁵

By Public Works are, throughout the following pages, to be understood all such and only such fabrics and excavations as are designed rather for public than for private accommodation, for the use, that is, not of particular individuals but of any of the whole mass of individuals composing the nation who may be in a position to take advantage of

⁴¹ Section II.

⁴² Section 48.

⁴³ Extract from the Abstract of the Proceedings of the Council of the Governor General of India (1 April 1870) in ‘Act No. X of 1870’ (n 5).

⁴⁴ For a critical analysis of the notion of ‘public works’ in colonial India, see Ravi Ahuja, *Pathways of Empire: Circulation, ‘Public Works’ and Social Space in Colonial Orissa, c. 1780–1914* (Orient Blackswan 2009) 80–84; Manu Goswami, *Producing India: From Colonial Economy to National Space* (University of Chicago Press 2004) 45–47.

⁴⁵ William Thomas Thornton, *Indian Public Works* (Macmillan & Co 1875) 3.

them. ... Imperial or Royal palaces or mausolea stand outside the line that marks as a class apart roads, railways, canals of irrigation or navigation, embankments, harbours, docks, lighthouses, law courts, barracks, and a variety of other edifices subservient to the purposes of general administration, civil or military.

The second consideration was that the provincial government should be satisfied that the proposed public work would be of sufficient use to the public, having regard to the nature, locality, cost, and other features of the work (the factors listed in the 1863 Act).

It is possible, however, that a degree of de-regulation was intended. Consider the changes in light of the views of the two men who would have had the greatest role in drafting the 1870 Act: John Strachey, who guided the Bill through the Legislative Council as the head of the Revenue department, which had land acquisition within its purview; and Mayo, the Viceroy, who acted as his own Minister of Works (he was concerned about wastefulness by the Public Works Department).⁴⁶ Although Strachey professed his adherence to *laissez faire*,⁴⁷ he, Mayo, and others in the Council successfully lobbied London for the establishment of a department ‘for securing constant and intelligent efforts on the part of this government for the improvement and development of the agriculture, commerce and industrial arts of India’.⁴⁸ In representations to the Secretary of State, they argued that the state should act as the pioneer to private enterprise, citing the precedent of state-established experimental tea plantations.⁴⁹

⁴⁶ Romesh Dutt, *The Economic History of India in the Victorian Age* (3rd edn, Kegan Paul 1908) 253; WW Hunter, *A Life of the Earl of Mayo, Fourth Viceroy of India* (Vol II) (2nd edn, Smith, Elder & Co. 1876) 263.

⁴⁷ John Strachey and Richard Strachey, *The Finances and Public Works of India from 1869 to 1881* (Kegan Paul Trench & Co. 1882) 404–425; John Strachey, *India: Its Administration & Progress* (4th edn, revised by TW Holderness, MacMillan and Co. 1911) 228, 299.

⁴⁸ Sabyasachi Bhattacharya, ‘Laissez-faire in India’ (1965) 2 IESHR 1, 12–13.

⁴⁹ On the establishment of those plantations, see Sharma (n 13) 119–128.

Although Mayo's chief preoccupation was agricultural development, he argued that that the functions of the new department should also include 'the development of our growing branches of manufacturing industry', a subject that had been under the aegis of the Home Department.⁵⁰

On the establishment of the Department of Revenue, Agriculture, and Commerce in 1871, the subjects of land acquisition and the development of agriculture and industry were brought under the umbrella of a single institution for the first time. In anticipation of this, might Strachey and Mayo – who was reported to intervene in legislation in which he had a particular interest⁵¹ – have caused Part VII to be drafted widely enough to allow for land acquisition for the development of agriculture and industry, such as a plantation for a new crop or a factory for a new industry? This helps to account for two of the changes to the criteria for such acquisitions: first, the change in language from 'works of public utility' to works 'likely to prove useful to the public', the latter phrase unconnected on its face with the concept of public works; and second, the deletion of the bounded list of 'works of public utility' for which land could be acquired.

The imperialism of land acquisition

Whatever the motivation behind the change, the width of the discretion conferred now gave officials an opportunity to use Part VII for the benefit of industry at large, or at

⁵⁰ WW Hunter, *A Life of the Earl of Mayo, Fourth Viceroy of India* (Vol II) (2nd edn, Smith, Elder & Co. 1876) 333; AO Hume, *Agricultural Reform in India* (W. H. Allen & Co. 1879) 17.

⁵¹ J Fitzjames Stephen, 'Legislation under Lord Mayo' in Hunter (n 50) 226.

least for particular industries. It would take little imagination to be able to characterise the works of some or all industries as ‘likely to prove useful to the public’. It is unlikely, however, that this opportunity was taken between 1870 and the enactment of the 1894 Act. Mayo’s death in 1872 was a crucial blow to the new department, which had neither the institutional structure nor the money to carry out its functions effectively (complained A. O. Hume, its first Secretary).⁵² Its agricultural work comprised the publication of scientific papers and establishment of experimental farms, mostly for cash crops. Hume did not report the use of land acquisition to set up these farms: he noted simply that some tobacco farms which proved successful were made over to ‘an energetic European firm ... on very favourable terms by the Government’. The tenuousness of support for the department’s original mission was illustrated in 1879 when it was wound up and its functions redistributed, on the ground that it had failed to achieve its primary goal of increasing state revenue by the development of agriculture.⁵³

Very little was done for manufacturing industry in these years.⁵⁴ Aside from the output of a small number of government factories, stores for the civil and military establishment

⁵² Hume (n 50) 20–24, 101–107.

⁵³ BB Misra, *The Administrative History of India 1834–1947* (OUP 1970) 121–123.

⁵⁴ Vera Anstey, *The Economic Development of India* (3rd revised edn, Longmans, Green & Co. 1939) 210; Frederick Lehmann, ‘Great Britain and the Supply of Railway Locomotives of India: A Case Study of “Economic Imperialism”’ (1964) 2 IESHR 297 at 299–301; Sen (n 10) 11–42, 121–130; Robert I Crane, ‘Technical Education and Economic Development in India before World War I’ in C Arnold Anderson and Mary Jean Bowman, *Education and Economic Development* (Aldine Publishing Co. 1965); Sunil Kumar Sen, *Studies in Economic Policy and Development of India (1848–1926)* (Progressive Publishers 1966) 75–85; Rungta (n 11) 129–134, 277; WJ Macpherson, ‘Economic Development in India under the British Crown, 1858–1947’ in AJ Youngson (ed), *Economic Development in the Long Run* (George Allen and Unwin 1972) 174–175; Clive J Dewey, ‘The Government of India’s ‘New Industrial Policy’, 1900–1925: Formation and Failure’ in KN Chaudhuri and Clive J Dewey (eds), *Economy and Society: Essays in Indian Economic and Social History* (OUP 1979) 220–221; JM Hurd, ‘Railways’ in D Kumar (ed), *The Cambridge Economic History of India* (CUP 1982) 749; Vinay Bahl, *The Making of the Indian Working Class: the Case of the Tata Iron and Steel Company 1880–1946* (Sage 1995) 53–55.

– ‘from the biggest machinery to the smallest door nail’ – were imported from Britain until 1876, from which time the stores rules were gradually relaxed (primarily to reduce the strain on public finances and only secondarily to foster the development of local industry). The railway companies were urged to buy British. With few exceptions, the sum total of government assistance to industry comprised state-funded industrial training and the provision of commercial intelligence – both carried out poorly. In 1882, an ambitious scheme by the Government of India to kick-start the iron and steel industry with a guaranteed order was attacked in the London press as beyond the proper role of government and scuppered by the Secretary of State. The Government succeeded only in purchasing the Barakar Iron Works (formed by a sterling company in 1874), which was failing precisely because of uncertainty over the official procurement policy.

As this desultory record suggests, domestic industrialisation was hardly a priority of the late-Victorian Raj.⁵⁵ To some degree this must have reflected a genuine commitment to *laissez faire* – not only as a matter of principle but also, for some officials, as the best guarantee of industrialisation in the long term. For them, industrialisation could only occur as an organic development funded by the proceeds of the agricultural exports that India, by the international division of labour, was especially suited to produce.⁵⁶ It

⁵⁵ In contrast to the generally supportive attitude of some of the pre-Mutiny Viceroys: Kling (n 13) 69–70.

⁵⁶ See, by way of analogy, Clive Dewey’s observations on the commitment to free trade in his ‘The End of the Imperialism of Free Trade: The Eclipse of the Lancashire Lobby and the Concession of Fiscal Autonomy to India’ in Clive Dewey and AG Hopkins (eds), *The Imperial Impact: Studies in the Economic History of Africa and India* (Athlone Press 1978) 45; see, also, his comments on the motivations of the civil service at 54. As examples of an ideological commitment to *laissez faire*, see the strict limits that Canning (Viceroy from 1856–1862) placed on assistance to Lancashire in improving the supply of Indian cotton, a subject discussed below: Arthur W Silver, *Manchester Men and Indian Cotton 1847–1872* (Manchester University Press 1966) 303–306. Consider, also, the refusal at the turn of the century to give loans to indigo planters, on the ground that it would be a violation of policy to assist private interests out of public funds: Prakash Kumar, ‘Scientific Experiments in British India: Scientists, Indigo Planters, and the State, 1890–1930’ (2001) 38 (ctd. on next page)

undoubtedly helped, however, that *laissez faire* dovetailed with imperial priorities (as did free trade, its close cousin), at least when applied against Indian industrial capital. As M. R. Ranade observed in 1893, India was seen by its rulers as a classic colonial economy:⁵⁷

a Plantation growing raw produce to be shipped by British Agents in British ships, to be worked into Fabrics by British skill and capital, and to be re-exported to the Dependency by British merchants to their corresponding British Firms in India and elsewhere.

Illustrating that perception exactly, Curzon (Viceroy from 1899–1905) was warned by his Secretary of State a decade later that any ‘encouragement of industrial enterprises’ in India would represent the colony ‘gaining at our expense’.⁵⁸

Where the interests of British industrial capital had been at stake in the recent past, however, *laissez faire* was applied less than absolutely.⁵⁹ The departures from doctrine were designed to serve the dual goals of making India a more efficient colonial economy and propitiating important metropolitan and expatriate interests. The major example of

IESHR 249, 255–256. As Kumar explains, state assistance to the industry in the period was limited to the part-funding of scientific experiments to meet the competitive threat of German-made synthetic indigo.

⁵⁷ ‘Present State of Indian Manufactures and Outlook of the Same’ (1893) in his *Essays on Indian Economics* (2nd edn, G. A. Natesan & Co. 1906) 106.

⁵⁸ Quoted in Goswami (n 44) 69.

⁵⁹ Helen B Lamb, ‘The State and Economic Development in India’ in Simon Kuznets et al (eds), *Economic Growth: Brazil, India, Japan* (Duke University Press 1955) 477–478; Bhattacharya (n 48); Bipan Chandra, *The Rise and Growth of Economic Nationalism in India: Economic Policies of Indian National Leadership, 1880–1905* (People’s Publishing House 1966) 101; Bipan Chandra, ‘Reinterpretation of Nineteenth Century Indian Economic History’ (1968) 5 IESHR 35, 64–65. Of course, the influence of Lanchashire or British industry at large cannot explain the entirety of British Indian economic policy in this or any other period. See, for an influential revisionist account emphasising the influence of British financial and commercial interests and the associated imperative of sound state finance, PJ Cain and AG Hopkins, *British Imperialism: Innovation and Expansion 1688–1914* (Longman 1993) 327–350; c.f. their ‘Afterword: The Theory and Practice of British Imperialism’ in Raymond E Dumett (ed), *Gentlemanly Capitalism and British Imperialism: the New Debate on Empire* (Longman 1999) 218–219.

the indulgence of British capital at Home was, of course, the policy towards Lancashire. Although contrary to caricature the industry was not the puppet-master of the Raj, it succeeded in extracting unprecedented concessions. These included not only the notorious manipulation of tariffs in the late 19th century to protect its position in India, but also various measures taken by the state in fits and starts from 1839 to develop India as a back-up source of raw material: the successive cotton ‘improvement’ programmes to increase the supply of the type of cotton sought; the legislative measures against adulteration; the construction of public works to speed the delivery of raw cotton to the ports; and the far-reaching changes made to land tenure arrangements to increase cotton production in the new British Indian province of Berar, annexed from Hyderabad in 1853.⁶⁰ Indeed, both Berar and the neighbouring princely state of Nagpur – which passed to British India in 1853 under the doctrine of ‘lapse’ – were annexed with their cotton-producing potential ‘very much in mind’.⁶¹ ‘... *Cotton* stuffed the ears of Justice’, excoriated the author of *The Rebellion in India: How to Prevent Another* (1857).⁶²

Shortly after this land acquisition on a grand scale, the state began a programme of what were, in effect, small-scale annexations within British India. These were made in the interests of the tea industry, in the major example of concessions to British capital in

⁶⁰ Peter Harnetty, *Imperialism and Free Trade: Lancashire and India in the Mid-Nineteenth Century* (University of British Columbia Press 1972); Laxman D Satya, *Cotton and Famine in Berar 1850–1900* (Manohar 1997) 52–87, 113–116, 136–203, ; Mike Davis, *Late Victorian Holocausts: El Niño Famines and the Making of the Third World* (Verso 2001) 312–317; c.f. JF Richards and Michelle B. McAlpin, ‘Cotton Cultivating and Land Clearing in the Bombay Deccan and Karnatak: 1818–1920’ in Richard P Tucker and JF Richards (eds), *Global Deforestation and the Nineteenth Century World Economy* (Duke University Press 1983).

⁶¹ Sliver (n 56) 74; see, also, Satya, *ibid.*, 52–53, 58, 68.

⁶² John Bruce Norton, *The Rebellion in India: How to Prevent Another* (Richardson Brothers 1857) 98, quoted in Sarojini Regani, *Nizam–British Relations 1724–1857* (Booklovers Private Limited 1963) 299. Note that Norton was referring to Nagpur and not Berar, contrary to Regani’s suggestion.

India. The industry, which the state had helped to pioneer in the 1830s, remained dominated by British planters: even by 1900, Indians owned only 3% of the land in Assamese tea estates.⁶³ As we have seen, planters bought up ‘waste’ land from the state with great enthusiasm.⁶⁴ They did so under rules that were calibrated by the state to exclude the Assamese, so that revenue-paying holdings would not be abandoned.⁶⁵ One official wrote that the indirectness of the discrimination made it unnecessary ‘to draw an overt distinction between them and Europeans which would be an invidious one’.

The official position was that it was legally impossible for any infringement of private rights to occur in grant of ‘waste’ land from the state – which claimed ownership of such land by fiat – to planters. Such land was ‘not occupied by any owner or allotted to anyone’, B. H. Baden-Powell asserted in his classic account of land tenure.⁶⁶ Nevertheless, Baden-Powell wrote, the state ‘[exhibited] the greatest tenderness to all possible rights either of property or of user, that might exist in such lands when proposed to be sold or granted away’ by establishing a procedure by which private claims could be made to waste land about to be alienated. By the Waste Lands Claims Act XXIII of 1863, the sale or lease of waste land had to be advertised and held in abeyance for a period of at least three months, during which any claimant was called upon to

⁶³ Siddique (n 13) 20, 108–109.

⁶⁴ See 98 above.

⁶⁵ The rules changed over time but there were complaints as late as 1918 that local Assamese were still effectively excluded from land grants: *Minutes of Evidence taken before the Indian Industrial Commission: Vol V – Punjab, Assam, Burma, and General* (Cmnd. 238, 1919) 385, 388, 462.

⁶⁶ BH Baden-Powell, *The Land-Systems of British India: Volume I, Book 1-2* (Clarendon Press 1892) 234–236.

produce ‘evidence or documents upon which he may rely in proof of his claim for objection’.⁶⁷

The operation of the Waste Lands Claims Act has not been studied, but the barriers that such a juridified process would have posed to the poor and illiterate are self-evident. Notwithstanding its provisions, much of the waste land allocated to tea planters in Assam was either actually occupied or used, or else abandoned for causes in which the state was complicit, M. A. B. Siddique has argued.⁶⁸ This appears to have been a matter of public knowledge. A contemporary author, who acknowledged as much, rationalised that the state had a right to land that the people lacked the capital or enterprise to develop.⁶⁹ In the hill districts, several devices were used on behalf of tea planters – the politically dominant class in Assam⁷⁰ – to take land from tribal communities: the implicit regularisation of encroachment by planters on land customarily occupied or used by those communities; a de-facto ban on *jhum* (shifting) cultivation; and, in several instances, the unabashed confiscation of land on which villages stood so that there would be a ready supply of labour for planned tea estates. On the plains, the system of land revenue introduced during British rule was so exploitative that entire villages were abandoned: ‘many of the finest parts of the country are now a dreary waste’, one official reported. Paul Baak reports that a similar process occurred in the South Indian princely

⁶⁷ Sections 1 and 2.

⁶⁸ Siddique (n 13) 75–83.

⁶⁹ W Nassau Lees, *The Land and Labour of India: A Review* (Williams and Norgate 1867) 57.

⁷⁰ Richard P Tucker, ‘The Depletion of India’s Forests under British Imperialism: Planters, Forester and Peasants in Assam and Kerala’ in Donald Worster (ed), *The Ends of the Earth: Perspectives on Modern Environmental History* (CUP 1988) 124–125.

state of Travancore with the active encouragement of the British Resident: land that was ostensibly waste had often been under *jhum* cultivation by hill tribes.⁷¹

Notwithstanding the fact that common rather than private property was taken, the enclosure of waste land for British industry is indistinguishable in substance from the formal exercise of the power of land acquisition, which was denied to Indian industry. It should come as no surprise that land acquisition, like other exercises of public power by the Raj, should bear the marks of imperialism.

The Bliss undertaking (1892)

It is in this context that the second of the ostensible legal barriers to acquisitions for industry – that such acquisitions would be contrary to the intentions of the authors of the 1894 Act – must be understood. There appeared to be unusually clear evidence of those intentions, arising from what can be called the Bliss undertaking of 1892. In that year, Henry Bliss, an official from Madras, was made responsible for steering a replacement of the Land Acquisition Act 1870 through the Legislative Council. The main purpose of the Bill he proposed was to reduce the costs and delays of land acquisition, for which various aspects of the existing system of assessing compensation were blamed.⁷² The only proposed alteration to the rules governing the power to acquire land for companies was the introduction of what became s 43 (the exemption to Part

⁷¹ Paul Erik Baak, *Plantation Production and Political Power: Plantation Development in South-west India in a Long-Term Historical Perspective* (OUP 1997) 72–98.

⁷² ‘Annexure to Bill to Amend the Land Acquisition Act, 1870 (Statement of Objects and Reasons)’ (11 March 1892) in ‘The Land Acquisition Act, 1894’ (n 24).

VII for companies with a contractual right to be supplied land acquired by the state). The Part would otherwise be re-enacted verbatim as Part VII of the new Act.

Nevertheless, Bliss mentioned when introducing the Bill into the Council, the question of the kinds of companies that might benefit from Part VII had ‘more that once been raised’. In response, he promised that the power to acquire land for companies would not be used ‘in furtherance of private speculations’ such as a ‘Spinning or Weaving company’ or ‘Iron Foundry’.⁷³ The provincial governments ‘should not be subject to pressure, which it might possibly sometimes be difficult to resist, on behalf of enterprises in which the public have no direct interest’, he advised.

Read in isolation, the Bliss undertaking is capable of being read as an absolute prohibition against acquisitions for industry. That, certainly, was how it was understood after the war, when the question was considered in earnest.⁷⁴ Understood in context, however, the meaning of the undertaking is rather more subtle and supple in its implications.

The undertaking is best understood as exemplifying the imperialism of land acquisition. ‘Home’ manufacturers were the intended audience.⁷⁵ The message was that they would

⁷³ ‘Extract from the Abstract of the Proceedings of the Council of the Governor-General of India’ (11 March 1892) in ‘The Land Acquisition Act, 1894’ (n 24) at Appendix C.

⁷⁴ See 151 below.

⁷⁵ Landowners may have been a secondary audience to which Bliss’s remarks were directed. In a submission made after Bliss’s undertaking, the Madras Landowners’ Association expressed apprehensions about the loss of land if Part VII was used for spinning and mining companies: Memorial by the Madras Landholders’ Association to the Legislative Council (18 Sept 1893) in ‘The Land Acquisition Act’ (n 73) at Appendix A17. As we shall see in the next chapter, the reluctance to antagonise landowners, large and small, seems to have been the key reason why the 1894 Act was never amended to remove the perceived legal barriers discussed here, despite the (ctd. on next page)

continue to have nothing to fear from the re-enactment of a widely-drawn power to acquire land for companies. This is the implication of the examples that Bliss chose: the cotton textiles and iron industries were precisely the domestic industries whose rise would pose a threat to British capital at Home.

Uniquely among the major industries, cotton was dominated by enterprises owned and controlled by Indians. It was not until 1874 that the first British-promoted mill began operation, by which time it faced no fewer than 17 Indian competitors; of 95 mills started before the war, only 15 were promoted and controlled other than by Indians.⁷⁶ Naturally, as India was Lancashire's single most important export market, the spectre of competition obsessed Home manufacturers from the late 19th century onwards.⁷⁷ Despite the lack of protection, the domestic industry expanded swiftly in the 1880s, pricing Lancashire out of markets for coarse cloth in India and yarn in the far East. There were particular reasons for Lancashire to perceive a greater than usual threat at the time of Bliss's statement in 1892 than, say, at the time of the Land Acquisition Act 1870: the rupee had depreciated considerably since 1882; the cost of constructing new mills in Bombay had fallen to just a third more than that in Lancashire; the introduction of electricity to stretch the working day was imminent; and the preceding decade had been especially profitable for the industry, a point that had been noted in Parliament.⁷⁸

pressures to do so that arose after the war.

⁷⁶ Morris D Morris, 'The Growth of Large-Scale Industry to 1947' in Dharma Kumar (ed), *The Cambridge Economic History of India: Volume 2: c. 1757–c. 1970* (CUP 1982) 579–581.

⁷⁷ BR Tomlinson, *The Economy of Modern India 1860–1970* (CUP 1993) 112.

⁷⁸ Rungta (n 11) 152–160; AK Sen, 'The Pattern of British Enterprise in India 1854–1914: A Causal Analysis' in Rajat Kanta Ray (ed) *Entrepreneurship and Industry in India, 1800–1947* (OUP 1992) (ctd. on next page)

Given this apparently augmented threat, Bliss seems to have thought it important to deny that the state would assist the domestic industry in the procurement of land – a notoriously expensive factor of production in Bombay city, where half of the existing mills were located.⁷⁹ In fact, the histories of Bombay do not mention any particular difficulty in procuring land for mills.⁸⁰ Rajnarayan Chandavarkar mentions in passing that in the late 19th century cotton mills in Bombay city negotiated 100-year leases with the municipal authorities, presumably paying normal market rental.⁸¹ Still, Bliss may have calculated, it was important to allay any suspicions to the contrary. After all, circumstances could change. Moreover, Indian-owned mills, more so than their few British-owned competitors in India, tended to be organised as joint-stocks and so were eligible beneficiaries under Part VII.⁸²

Bliss's reference to the iron industry is also telling, although less obviously so. The dominance of British exports of iron and steel in India was at the time under serious challenge from Belgium.⁸³ There was, therefore, reason to make clear that the position of the British export industry would not be eroded by the use of land acquisition in favour of the incipient domestic iron industry, known to have access to particularly pure

115–116. As it happened, conditions turned against the domestic industry soon after Bliss's statement: Rungta, 160–161.

⁷⁹ DR Gadgil, *The Industrial Evolution of India in Recent Times* (OUP 1924) 85.

⁸⁰ See, e.g., Sandip Harzareesingh, *The Colonial City and the Challenge of Modernity: Urban Hegemonies and Civic Contestations in Bombay City 1900–1925* (Orient Longman 2007) 24–25.

⁸¹ Rajnarayan Chandavarkar, 'Bombay's Perennial Modernities' in *History, Culture and the Indian City: Essays by Rajnarayan Chandavarkar* (CUP 2009) 28.

⁸² Morris David Morris, 'Indian Industry and Business in the Age of *Laissez Faire*' in Rajat Kanta Ray (ed) *Entrepreneurship and Industry in India 1800–1947* (OUP 1992) 222–223.

⁸³ Bahl (n 54) 39–40, 62, 71; Rungta (n 11) 277.

and rich ores. The only domestic producer at this time, however, was a sterling company: the Bengal Iron and Steel Co., which had bought the Barakar iron works from the state in 1889. Nevertheless, it seems, the anxieties of metropolitan capital had to be assuaged even at the expense of expatriate capital in India.⁸⁴ Indian capital, too, was a potential threat: the Tatas had signalled their intention to enter the industry and, though thwarted by official obstruction in 1883, might be expected to try again at a more propitious time (as indeed they did).

For these reasons, Bliss's undertaking is best read as a coded expression of imperial priorities. Deft and nuanced, the undertaking envisaged that practice could change to reflect a change in those priorities. Bliss was not saying that land would never be acquired for industry, only that land would not be acquired for those industries in which the public (read 'state') lacked a direct interest. At present, Bliss made clear, cotton and iron fell into those categories. However, circumstances could change so that the public/state developed a direct interest in the development of those or other industries. If that occurred, Bliss implicitly reserved the right of the state to deploy land acquisition as and when necessary.

⁸⁴ This helps to explain the treatment of the jute industry, the other great British-dominated industry in India. The crop was purchased from peasant cultivators so there was no reason for de-facto land acquisition as for tea: Omkar Goswami, *Industry, Trade and Peasant Society: the Jute Economy of Eastern India, 1900–1947* (OUP 1991) 41–51, 62–86. However, there are no reports of land acquisition for the establishment of the Calcutta mills, run exclusively by British managing agencies. As for cotton, however, no such concession could be made without antagonising metropolitan interests. Dundee was both a vigilant buyer of the raw crop and an antagonistic competitor in the finished product: Goswami, 10–16; Gordon T Stewart, *Jute and Empire: the Calcutta Jute Wallahs and the Landscapes of Empire* (Manchester University Press 1998) 62–86. Indigo, too, was largely purchased from peasant cultivators. There were, however, no 'mills': the raw product was exported to the textile and dye industries in Britain: Tirthankar Roy, 'Indigo and Law in Colonial India' (2011) 64 *Economic History Review* 60, 61–63.

Perhaps precisely to preserve this flexibility, Bliss chose not to legislate to amend Part VII to give his undertaking direct legal effect. It had been easy enough in 1870 to burnish the public character of Part VII by confining its use to companies. However, what formulation of statutory language could capture the complex message that Bliss was attempting to convey? Better to assuage with words alone in Legislative Council and preserve the virtually unfettered prerogative of the state to pick the private beneficiaries of its power of land acquisition.

The post-war interpretation of the undertaking as an absolute and immutable prohibition on acquisitions for industry was, therefore, an error of transposition – an ahistorical reading by those operating in a quite different political and economic context.

The public-use condition

Presumably to mollify those who might wonder why cotton and iron were singled out in his undertaking, Bliss went so far as to concede that the works of spinning companies and iron foundries were ‘likely to prove useful to the public’ – the key question for the decision of the provincial governments under s 40(1)(b) of the Act. Having dabbled in heterodoxy,⁸⁵ Bliss then explained why such acquisitions were nevertheless outside the Act. It would not be possible in such cases to state the ‘terms on which the public shall be entitled to use the work’, Bliss claimed.

⁸⁵ C.f. Adam Smith, *The Wealth of Nations* (Methuen & Co. 1904 [1776]) at Book V, Chapter 1 at [129]: ‘The English copper company of London, the lead smelting company, the glass grinding company, have not even the pretext of any great or singular utility in the object which they pursue...’.

That phrase comprised the fifth of the five conditions set out below that were to be the subject of an agreement concluded between the company and the Secretary of State before an acquisition could be executed, according to what was enacted as s 41:

... if the [Provincial] Government is satisfied that the proposed acquisition is needed for the construction of a work, and that such work is likely to prove useful to the public, it shall ... require the Company to enter into an agreement with the Secretary of State for India in Council, providing to the satisfaction of the [Provincial] Government for the following matters, namely :—

- (1) The payment to Government of the cost of the acquisition;
- (2) The transfer, on such payment, of the land to the Company;
- (3) The terms on which the land shall be held by the Company;
- (4) The time within which, the conditions on which, the work shall be executed and maintained; and
- (5) *The terms on which the public shall be entitled to use the work.*⁸⁶

On that basis alone, Bliss concluded that the Bill as drafted precluded such acquisitions.

Bliss was mistaken. In his defence, so were all others who turned their minds to the question. At the cost of only a modest departure from a literal reading of the provision, it was indeed possible to state how the public could ‘use’, say, a cotton mill. Put simply, any member of the public was free to purchase its products. An argument of this kind was consistent with the history of the provision. Section 41(5) originated as a provision in the 1863 Act, a measure first mooted to authorise the acquisition of land for the construction of branch lines to privately-owned collieries.⁸⁷ The public could not ‘use’ such branch lines in any other manner than as consumers of the colliery’s output.

More to the point, contrary to what a literal reading of s 41 suggested, it should not have been considered mandatory to fulfil the public-use condition in each and every case of an acquisition under Part VII. Consider the language of the predecessor to s 41.

⁸⁶ Emphasis added.

⁸⁷ See 62–63 above.

Section 15 of the 1863 Act provided that provincial governments had the discretion rather than the obligation to impose conditions relating to public use on promoters seeking land under the Act's provisions:⁸⁸

... the [Provincial] Government shall ... prescribe the conditions which such [Provincial] Government shall consider it necessary to impose on the promoters, having regard to the special circumstances of the case, in respect to the provision and payment of the price of the proposed work; the construction, maintenance, or working of the same; *the regulation of the use of the work, as regards the security and convenience of the public*; and such other matters as to the [Provincial] Government may from time to time seem right; and the [Provincial] Government shall inform the promoters of such conditions.

The most obvious instance in which a provincial government might have chosen to impose a public-use condition was if the work was of a type to constitute its operator a 'common carrier'; that is, 'a person ... engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately', as the term was defined in an 1865 statute.⁸⁹ Common carriers were under a duty at common law to serve any and all members of the public at a reasonable price and without discrimination, on pain of damages.⁹⁰ By s 15 of the 1863 Act, provincial governments were given the power to impose an express duty of that kind in contract, perhaps a useful precaution if there was any room for doubt as to the meaning and scope of the common law duty in a particular case. By a statutory cause of action introduced by s 34, set out below, the duty would also be enforceable by any member of the public who suffered damage from its breach:⁹¹

⁸⁸ Emphasis added.

⁸⁹ Section 2 of the Common Carriers Act (III of 1865), a measure that defined the liability of common carriers for loss or damage to the property but did not touch upon the common law duty discussed below.

⁹⁰ Walter Gordon Macpherson, *Law of Indian Railways and Common Carriers* (Thacker, Spink & Co. 1880) 30, 180–182.

⁹¹ Note that these provisions did not apply to the sterling railway companies, for which land was acquired independently of the 1863 Act under the 'public purpose' provisions in Act VI of 1857. (ctd. on next page)

Every work under this Act shall be available for the use of the public in accordance with, and to the extent provided by, the conditions aforesaid ... it shall be lawful for any person whatsoever to sue the owners of such work, for any damage he may incur by reason of any neglect of the said conditions, by the said owners, in respect of any such public use of such work, as though such person had been a party to the said conditions.

If the operator was *not* a common carrier, however, there would be little reason to impose a public-use condition.

The problem arose during the ‘consolidation and simplification’ of the 1863 Act to create Part VI of the 1870 Act. The cause of action in s 34 was dropped, removing a valuable clue as to the primary rationale for imposing a public-use condition. Worse still, what had been s 15 of the 1863 Act was rephrased rather clumsily so that it appeared mandatory to impose a public-use condition in each and every instance of the use of Part VII. Formalists in legal reasoning, Bliss and others did not think to read the public-use condition other than literally and felt bound to conclude that it represented a decisive legal barrier against acquisitions for industry.

Conclusion

It has been argued that of the three perceived legal barriers to acquisitions for industry, two were the result of errors. We have ascribed those errors to the ahistoricism and formalism of the then prevalent mode of legal reasoning, but it must be acknowledged that these were convenient errors to have made. Given the logic of imperialism, it suited

It was not until 1937 that railway companies were expressly prohibited from giving undue preference to any particular customer or type of traffic, whereas companies in England had been under such a duty since 1854: s 42A of the Indian Railways Act (IX of 1890), inserted by the Government of India (Adaptation of Indian Laws) Order 1937; c.f. s 2 of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31).

the authorities to believe and contend that there were technical legal objections to acquisitions for industry, notwithstanding the expropriation of land for Home and expatriate industrial capital. In truth, the only live legal question was whether some or all kinds of industrial works were 'likely to prove useful to the public'. That was essentially a question of political philosophy that the state could choose to answer in the affirmative. As we shall see, imperial priorities would continue to require that domestic industry should be denied the privilege of land acquisition, until war effected a temporary realignment in those priorities.

Land Acquisition for Industry

Part 2 – Practice

The salvation of our country lies in artistic expertise and industrial development. This cigarette factory will solve the problem of livelihood for at least a thousand people so that they won't be a burden on agriculture. It's futile for the entire household to be involved in ploughing and sowing a piece of land which one man alone can do well enough. My factory will give an opportunity to such unemployed people to earn a living. ... I don't think it proper to take the government's help in a personal matter but I can't think of any other way in these circumstances. And this isn't just something personal. Both the municipality and the government will earn thousands of rupees a day because of this factory; thousands of educated as well as uneducated people will benefit. It is public work if you look at it from this angle, and I won't be violating propriety if I take the government's help.

– John Sevak, the industrialist:
Premchand, *Rangbhoomi* (Manju Jain tr, Penguin 2011 [1925]) 52, 57

The Gazette Survey

Fortunately for historians of land acquisition, the 1894 Act required provincial governments to publish a record of each and every instance of its proposed use.¹ All agreements to acquire land in a particular province for a company under Part VII of the Act were published in the *Gazette of India*, the public journal of the Government of India. Those agreements varied in their details but usually set out all of the basic facts about each proposed acquisition, such as the area of the land to be acquired and to what use it

¹ Sections 4, 6(2), and 42. The obligation to publish has endured to the present day.

was to be put.² The same obligation applied to the use of the power to acquire land for a ‘public purpose’ under Part II of the Act. Declarations that the Part II power would be invoked to acquire a particular parcel of land for a particular purpose were published in the gazette of the acquiring provincial government.

To re-construct the practice of land acquisition for industry from 1894–1927, the subject of this chapter, every Part VII agreement published in those years has been surveyed, along with every Part II declaration published by one provincial government – the Government of Bombay – during 1918–1927 (a more manageable period than 1894–1927 as such declarations were far more numerous). It proved necessary to study the use of Part II in addition to Part VII because some acquisitions for industry in Bombay, and undoubtedly other provinces, were carried out as acquisitions for a ‘public purpose’.

Had time permitted there would have been rewards from surveying the gazettes of provinces other than Bombay. Nevertheless, there are two reasons why a focus on that province – specifically, ‘the Bombay Presidency proper’, excluding Sind and the overseas territories³ – in relation to Part II acquisitions is a reasonable compromise for our purposes. First, Kelkar would have been most strongly influenced by his knowledge and experience of acquisitions in Poona, where he lived and played a leading role in

² A fifth of agreements surveyed in this chapter did not state the area of land to be acquired. On several occasions, this was because the agreements were open-ended in providing for the acquisition of land in a stated *taluka* on later the request of the company e.g. *Gazette of India: Part II* (GoI 1911) 1189; *Gazette of India: Part II* (GoI 1913) 893, 1543.

³ Neil Charlesworth, *Peasants and Imperial Rule: Agriculture and Agrarian Society in the Bombay Presidency, 1850–1935* (CUP 1985) 10. Although Sind fell within the limits of the Presidency, it published its own gazette in which Part II declarations would have been published. In the period studied, no acquisitions were reported in the *Bombay Government Gazette* for Aden and other overseas territories administered from the Presidency.

municipal affairs.⁴ Bombay city itself provides a second reason to study the Presidency. The city's unique confluence of characteristics – being, at once, perennially land-scarce as the most densely populated city in India, the bastion of Indian industrial capital, and a city in which local Indian elites enjoyed an unusual degree of influence over provincial and municipal government⁵ – made it the most likely site of any sustained departure from *laissez faire* with respect to Indian industry in the practice of land acquisition.

The use of Part VII: an overview

Table 4.1
Part VII acquisitions categorised by beneficiary and nature of primary activity
(1894–1927)

	<i>Transport</i>	<i>Energy</i>	<i>Banking</i>	<i>Industry</i>	<i>Housing</i>	<i>Charitable</i>	Total
<i>Co-operatives</i>	0	0	28	5	9	-	42
<i>Charitable Societies</i> ⁶	-	-	-	-	-	71	71
<i>Companies</i>							
▪ <i>'British'</i>	17	18	-	23	-	-	58
▪ <i>'Indian'</i>	1	6	-	5	-	-	12
▪ <i>Unknown</i>	0	11	-	3			14
<i>Presidency banks</i>	-	-	7	-	-		7
Total	18	35	35	36	9	71	204

Rather confusingly for a Part entitled 'Acquisition of Land for Companies', fewer than half of the Part VII agreements between 1894–1927 were with companies proper (see Table 4.1 above). Over a third of prospective beneficiaries were charitable societies and

⁴ See 5–6 above.

⁵ Rajnarayan Chandavarkar, *The Origins of Industrial Capitalism in India: Business Strategies and the Working Classes of Bombay, 1900–1940* (CUP 1994) 25–28.

⁶ Included in this category for simplicity's sake are the few charities that registered as companies or co-operatives instead of as societies under the Societies Registration Act.

a fifth were co-operatives, in addition to a few instances in which agreements were made to acquire land for the Presidency Banks.⁷

At first glance, the figures for charitable societies appear surprisingly high, given that acquisitions for societies and co-operatives were sanctioned by the law only in 1919.⁸ In practice, however, land was regularly acquired for societies (and occasionally for co-operatives) under Part VII before the change in the law, in what appear to be instances where expedience overcame legality. The reasons for this practice merit investigation for their own sake, but it may be that the pre-dyarchy provincial governments considered that they were receiving something for nothing in sanctioning the acquisition of land for charitable societies. In 1913–14, roughly halfway through the period under review, non-capital spending on public education and health amounted to no more than 6% of total central and provincial expenditure: a fourth of spending on defence, a half of expenditure on tax collection, and a little less than expenditure on debt servicing.⁹ Ready acquiescence to requests to acquire land from charities such as private schools and hospitals that agreed to shoulder the full burden of compensation, as they almost invariably did, may have been seen as a way to deflect the charge of neglect of social services in a way that imposed no burden on the exchequer.

⁷ That is, the Banks of Bengal, Bombay, Madras, which merged into the Imperial Bank of India in 1921. All performed various public functions in addition to their commercial operations: Raymond W Goldsmith, *The Financial Development of India, 1860–1977* (Yale University Press 1983) 26–27.

⁸ See 101–102 above.

⁹ Dharma Kumar, 'The Fiscal System' in Dharma Kumar (ed), *The Cambridge Economic History of India* (CUP 1982) 931.

The same extra-legal concession was extended to co-operatives in only a few instances.¹⁰ Nevertheless, the fact that no fewer than 42 agreements were signed from 1920–1927 suggests a good deal of indirect support by many provincial governments towards the co-operative movement. The Government of Bombay was the exception. Perhaps reflecting its ambivalence towards co-operative finance,¹¹ the Government was responsible for only one of the 28 Part VII agreements pursuant to which co-operative credit societies or banks secured land on which to build their premises.¹² The Government's attitude towards housing co-operatives was more typical, publishing two of the nine such agreements.¹³ This, indeed, was precisely the use of the Act that officials had feared once co-operatives were brought within its fold.¹⁴ Still, the fact that a province with a city as land-scarce as Bombay agreed to only two acquisitions of the kind in seven years – the first for the Salsette Catholic Co-operative Housing Society Ltd and the second for the Salsette Parsis Association – suggests a general policy against such acquisitions, departed from only in isolated instances (perhaps when the entreaties of well-connected religious groups prevailed).

Our particular interest, of course, is the use of Part VII for companies proper. With the Kelkar Bill in mind, the Gazette Survey categorised such acquisitions according to two variables. The first variable was the type of economic activity engaged in by the

¹⁰ *Gazette of India: Part II* (GoI 1915) 336 and 582; *Gazette of India: Part II* (GoI 1916) at 1427.

¹¹ IJ Catanach, *Rural Credit in Western India 1875–1930: Rural Credit and the Co-operative Movement in the Bombay Presidency* (University of California Press, Berkeley 1970) 46–54.

¹² *Gazette of India: Part II* (GoI 1923) 1793.

¹³ *Gazette of India: Part II* (GoI 1920) 1461; *Gazette of India: Part II* (GoI 1921) 122.

¹⁴ See 102 above.

company for which land was proposed to be acquired: ‘transport’, ‘energy’, ‘banking’, or ‘industry’, with ‘industry’ defined capaciously to include manufacturing, agricultural, and mining industries. The second variable was whether the company was ‘Indian’ or ‘British’, measured in terms of its eligibility to have land acquired on its behalf if the Indianisation clause of the Kelkar Bill had become law. As explained earlier, the clause proposed a three-fold criteria of eligibility: (1) the company had to be an Indian-registered (‘rupee’) company; (2) a majority of its directors had to be ‘Indian’; and (3) in the alternative to (2), a majority of its shareholders had to be ‘Indian’.

Kelkar did not explain what he sought to achieve by the clause. We have already concluded that one of his goals was to force the nationalisation of the sterling railway companies.¹⁵ Contemporary proposals of the kind give clues about what might have been his other intentions. Criterion (1), we can surmise, was designed to advance a number of goals. The first was to ensure that the company’s board of directors would be located in India, to make it more likely that the company would identify more closely with Indian interests. The second aim was to make it more likely that the company would use local raw products. Third, the criterion sought to facilitate investment by Indians – by removing the foreign exchange risk – so that the company would be more likely to be Indian-controlled and so that a greater proportion of profits would remain within the country.¹⁶

¹⁵ See 102 above.

¹⁶ See the *Report of the Indian Fiscal Commission 1921–22* (Cmnd. 1764, 1922) 159, 201, 204–205.

Criteria (2) and (3) were presumably designed to advance these aims more directly, in addition to excluding the many rupee companies that were vehicles for British rather than Indian capital. All but a handful of the companies controlled by the resolutely white managing agencies of Calcutta were rupee companies, not sterling companies.¹⁷ This applied equally to the tea industry, the site of the largest concentration of sterling capital.¹⁸ Indeed, even the Tea Districts Labour Association – formed by the industry in 1892 to coordinate the recruitment of labour¹⁹ – was organised as a rupee company. No fewer than five Part VII agreements were signed with the Association from 1920–1923 for land on which labourers would be housed en route to Assam.²⁰

It did not prove practical, however, to apply Kelkar's criteria fully and exactly. First, for simplicity's sake, the racial composition of a company's board of directors has been inferred from the names listed in the 1927 edition of Place, Siddons & Gough's *Indian Investors' Year Book* – the same procedure adopted in Chapter 2 – rather than as at the year of the acquisition.²¹ Second, as the *Indian Investors' Year Book* was not exhaustive in its coverage, some companies could not safely be categorised as either 'Indian' or 'British'. Third, as information on the racial composition of a company's shareholders was only rarely available, the third criterion was ignored in favour of the first two. This

¹⁷ Maria Misra, *Business, Race and Politics in British India c. 1860–1960* (Clarendon Press 1999) 22–23; Stanley Chapman, 'British Free-Standing Companies and Investment Groups in India and the Far East' in Mira Wilkins and Harm Schröter (eds), *The Free-Standing Company in the World Economy 1830–1996* (OUP 1998).

¹⁸ *Statistical Abstract for British India ... from 1915–16 to 1924–25* (Cmnd. 2793, 1927) 545.

¹⁹ HA Antrobus, *A History of the Assam Company 1839–1953* (T. and A. Constable Ltd 1957) 141, 182–183.

²⁰ *Gazette of India: Part II* (1920) 2696; *Gazette of India: Part II* (1921) 93, 1511; *Gazette of India: Part II* (1923) 937, 1162.

²¹ Place, Siddons & Gough, *The Investors' India Year Book* (14th edn, Place, Siddons & Gough 1927).

means that a rupee company with a majority non-Indian board would have been categorised as 'British' even though a majority of its shareholders were Indian. The literature does not suggest, however, that such companies were common.²² With those caveats, the Part VII agreements for companies engaged in industry are categorised in Table 4.2 below. These acquisitions for industry represented just over a third of the 84 agreements with companies proper during the period.

²² Michael Kidron, *Foreign Investments in India* (OUP 1965) 10. It was highly unusual to come across a sterling company with majority Indian ownership: Rajat K Ray, *Industrialization in India: Growth and Conflict in the Private Corporate Sector 1914–1947* (OUP 1979) 49. See, in relation to the jute industry, Morris D Morris, 'The Growth of Large-Scale Industry to 1947' in Dharma Kumar (ed), *The Cambridge Economic History of India* (CUP 1982) 568.

Table 4.2
Part VII agreements for companies engaged in industry (1894–1927)

<i>Year</i>	<i>Province</i>	<i>Company</i>	<i>Work for which land was to be acquired</i>	<i>Area (acres)</i>
(a) ‘British’ companies				
1895	UP	Muir Mills Co.	Railway siding to East Indian Rwy. goods shed	0.83
1902	Assam	Alinagar Tea Co.	Road between railway station and tea gardens	4.91
1907	‘ ’	Imperial Tea Co.	Diversion of portion of road that floods in rains	5.00
	‘ ’	Scottpur Tea Co.	Tramway	[T.b.c]
1908	Bombay	Hosur Gold Mines of Dharwar	Road	30.33
1909	‘ ’	‘ ’	‘ ’	2.42
1917	Punjab	New Egerton Woollen Mills Co.	Accommodation for labourers in a Criminal Tribes settlement	48.74
1919	Bengal	Marshall Sons & Co.	Manufacture of tea machinery	29.75
	‘ ’	Bengal Iron and Steel Co.	Extension of works; railway siding	123.40
	‘ ’	Indian Iron and Steel Co.	Iron and steel factory; offices; accommodation	129.74
	‘ ’	Thornycroft (India)	Office and factory for manufacture of lorries etc.	4.61
1920	B & O	Tea Dists. Labour Assoc.	Accommodation for emigrants to Assam	4.74
1921	‘ ’	‘ ’	‘ ’	4.66
	‘ ’	‘ ’	‘ ’	1.35
1923	Madras	East India Distilleries and Sugar Factories	Tramway for public traffic	16.64
	B & O	Tea Dists. Labour Assoc.	Accommodation for emigrants to Assam	8.73
	‘ ’	‘ ’	‘ ’	3.62
1925	‘ ’	Indian Copper Corp.	Smelting and refining plant	536.93
1926	Bengal	Indian Iron and Steel Co.	Extension of works; sidings and stockyards	2.68
	B & O	Cawnpore Sugar Works	Tramway to transport cane to factory	12.55
	Bengal	Indian Iron and Steel Co.	Extension of works	94.15
	‘ ’	‘ ’	‘ ’	17.09
1927	‘ ’	Belapur Co.	Road and tramway	6.45
(b) ‘Indian’ companies				
1909	B&O	TISCO	Works of the company	3571.49
1917	Madras	Buckingham Mill Co.	Immediate extension to mill to meet the urgent needs of Government	[T.b.c]
1918	B&O	TISCO	Extension of works and other purposes, including the establishment of agricultural farms	7200.39
1919	B&O	‘ ’	Extension of works and to promote and develop subsidiary industrial undertakings	9.20
1921	Bengal	Bengal Chemical and Pharmaceutical Works	Chemical factory	28.10
(c) Unknown (i.e. rupee companies but board composition unknown)				
1907	Bengal	Nilgiri Granite & Stone Co.	Tramway	36.00
1920	Bombay	Khopoli Land Co.	Factories, houses, buildings, and works of the company	1499.11
	Bengal	Rajshahi Tannery Co.	Tannery	40.48

As we shall see, the early acquisitions for industry were not controversial. The definitive breach of *laissez faire* occurred only in 1909, and, in the event, remained a solitary precedent until 1919, when a profusion of transgressive acquisitions occurred.

This breach of *laissez faire* and the pattern of post-1919 acquisitions call for explanation, as does the disparity between the numbers of beneficiaries of Part VII classed as ‘British’ and ‘Indian’ in the eyes of the Kelkar Bill. The great majority of agreements for acquisitions for industry and otherwise were with ‘British’ companies. The figures (in Table 4.1) suggest that ‘British’ companies were particularly dominant in the transport sector – only one out of 17 agreements was with an ‘Indian’ company – but this exaggerates the disparity: 14 of those agreements were with a single sterling company (the India General Steam Navigation Co. and its later avatar). The largest disparity in numbers was in relation to companies engaged in industry. Only 5 of the 31 agreements were with rupee companies with Indian-majority boards. Indeed, that figure is even less impressive than it seems. Three of the agreements were with a single company, Tata Iron and Steel Co. (‘TISCO’), for a single purpose: the establishment of the Tata iron and steel works at the town later named Jamshedpur.

Yet, there are obvious reasons to pause before concluding from the figures alone that ‘British’ industrial companies were treated more favourably than ‘Indian’. Most obviously, British capital was dominant in all the key industries apart from cotton, and so would inevitably be over-represented in land acquisition.

While the state had laid bare its partiality in the early decades of land acquisition, its practice from 1894–1927 requires an extended and more nuanced interpretation, the task of the sections below.

1894–1918: the singularity of TISCO

Despite what Table 4.2 suggests at first glance, the policy of *laissez faire* envisaged in the Bliss undertaking (1892) was maintained for almost fifteen years. Although the beneficiary of the first use of Part VII for industry fell exactly within Bliss's description of a 'Spinning or Weaving company' – Muir Mills Co., a large British concern in Cawnpore²³ – the acquisition was for a railway siding rather than for the works of the company itself. Such a use of the Act had been considered legitimate since the Works of Utility by Private Persons and Companies Act 1863.²⁴ As the policy was later justified – not altogether convincingly – such acquisitions were not so much for the company as for the railway itself, so that the railway would become a more efficient public carrier.²⁵ The same could be said of the acquisitions in subsequent years for tramways and roads for tea companies in Assam and a gold mining company in Bombay.

Indeed, for a brief period, the authorities took a more conservative position than Bliss had taken in 1892. In 1902, the Government of India refused to sanction the acquisition of land for a pipeline for the Burma Oil Co., explaining that the legal advice it had received was that the proposed work was not 'likely to prove useful to the public'.²⁶

²³ Place, Siddons & Gough (n 21) 162.

²⁴ See 62–63 above. There were, however, lingering doubts. See, e.g., the correspondence in GoI, Rwy Brd, Rwy Cons, 'Proposed Acquisition of a Certain Strip of Land in the District of Cachar for the Construction of a Private Tramway Line...', Feb 1907, prog. 142–144 (A).

²⁵ *Minutes of Evidence taken before the Indian Industrial Commission, 1916–18: Vol 2 – Bengal and Central Provinces* (Cmnd. 235, 1919) 283.

²⁶ This refusal may have been motivated in part by ulterior motives. Officials were concerned to prevent the company securing a monopoly over the Burma oil industry: GG Jones, 'The State and Economic Development in India 1890–1947: The Case of Oil' (1979) 13 *Modern Asian Studies* Jones 353, 360.

That advice was based on dicta in a thirty-year old English case in nuisance. In *AG v Terry* (1873-74) LR 9 Ch App 423, a municipality applied to restrain a mill-owner from constructing an extension to a quay adjoining the mill, on the ground that the extension constituted a nuisance in obstructing a navigable river. The mill-owner argued that any nuisance was far outweighed by a countervailing benefit to the public. Jessel MR held that there was no evidence of benefit to the public: the encouragement of the trade of a single person (that is, the mill-owner) was too remote to be considered as such. Drawing an analogy, the legal advisors to the Government of India took the position that public benefits arising from the proposed pipeline were too remote for the pipeline to be a work 'likely to prove useful to the public'.

The very next year, however, the government resiled from this position with Curzon's 'benediction'.²⁷ The question was thereafter left entirely to the discretion of the provincial governments, whose immunity from legal challenge on such questions was endorsed by the High Court of Calcutta and the Privy Council in the *Ezra* decisions of 1902 and 1905.²⁸

Again with Curzon's blessing, the first decisive breach of *laissez faire* occurred in 1909. In that year, 3,500 acres in what was later renamed Jamshedpur (just over 150 miles from Calcutta) were acquired for the construction of a TISCO iron and steel works. According to Jamsetji Tata's biographer, the land had been thinly populated, mostly by

²⁷ 'Notes' in GoI, Rev & Ag, Land Rev, 'Proposed Amendment of the Land Acquisition Act, 1894, with reference to the recommendations of the Indian Industrial Commission relating to Land Acquisition in Relation to Industries', Oct 1920, prog. 26-28 (A) (NAI) at p. 4.

²⁸ See 230-231 below.

Santhals ('a still primitive tribe').²⁹ Although this acquisition was several orders of magnitude larger than any before, it was among the least important of what Tata acknowledged were 'very generous concessions' by the Government of India.³⁰ The Government simplified import arrangements, facilitated access to water rights, arranged the construction of a branch line on which the production of the works would be carried at reduced rates, and, crucially, guaranteed an order of 20,000 steel rails every year for ten years at import prices.

Why this unprecedented munificence, especially toward a company almost exclusively owned and controlled by Indian capital? Tata's timing was especially fortuitous, which allowed it to benefit from the unusual alignment of certain domestic and imperial political forces.³¹ Curzon, the first Viceroy to be openly contemptuous of *laissez faire* as an absurd and counter-productive fiction, considered that a robust iron and steel industry would help to fortify India as an industrial base from which to project imperial power. Helpfully, a domestic industry could also check the growth of continental imports into a dependency already lost to British producers. Sterling investment for the purpose was not forthcoming, the authorities had learned to their regret, but an industry

²⁹ FR Harris, *Jamsetji Nusserwanji Tata: A Chronicle of his Life* (2nd edn Blackie & Son 1958) 193. In addition to the acquired land, TISCO leased 11,500 acres from an adjacent *zamindari* so that the company would be able to 'prevent undesirable characters from settling within easy reach of the works': 192–193. A further 12,800 acres was leased in the hills of the adjacent princely state of Mourbhaj; those hills were the primary source of iron ore for the plant: 182–183.

³⁰ Sunil Kumar Sen, *The House of Tatas (1839–1939)* (Progressive Publishers 1975) 42–44; Rudrangshu Mukherjee, *A Century of Trust: The Story of Tata Steel* (Portfolio 2008) 25–26.

³¹ Sen (n 30) ch 1–3; Ray (n 22) 82; Rajat K Ray, 'Introduction' in Rajat K Ray (ed), *Entrepreneurship and Industry in India, 1800–1947* (OUP 1992) 47; Clive J Dewey, 'The Government of India's 'New Industrial Policy', 1900–1925: Formation and Failure' in KN Chaudhuri and Clive J Dewey (eds), *Economy and Society: Essays in Indian Economic and Social History* (OUP 1979) 223; Vinay Bahl, *The Making of the Indian Working Class: the Case of the Tata Iron and Steel Company 1880–1946* (Sage 1995) ch 1; Claude Markovits, *Merchants, Traders, Entrepreneurs: Indian Business in the Colonial Era* (Permanent Black 2008) 159–160.

built with Indian capital would have the advantage of generating a potent and savvy response to the *swadeshi* movement. By supporting a company endorsed by the movement, engaged in an industry as central to visions of progress as iron and steel,³² yet run by a business house as openly loyalist as the Tatas, the state could advance domestic and imperial interests while looking as if it was responding not to ‘clamour’ (an image that Curzon was generally determined to avoid)³³ but to educated Indian opinion in favour of industrialisation.

Almost to a man, the early nationalists – Naoroji, Ranade, R. C. Dutt, and others – accepted an identity between industrialisation and economic development.³⁴ They thought that a rapid growth in large-scale manufacturing industry would be the only way to ease dependence on the ‘single and precarious resource’ of agriculture and to make up for the decline in indigenous industries (for which imperialist policies were blamed). Indeed, such was their faith in industrialisation that it was considered necessary not only for material progress but also the building of national character and identity. Factories and mills, wrote Ranade in 1870, could ‘far more effectively than schools and colleges give new birth to the activities of the nation’.³⁵

³² See, e.g., MR Ranade, ‘Iron Industry – Pioneer Attempts’ (1892) in his *Essays on Indian Economics: A Collection of Essays and Speeches* (2nd edn, G. A. Natesan 1906) 170, 192.

³³ Norman G Barrier, *The Punjab Alienation of Land Bill of 1900* (Duke University Program in Comparative Studies on Southern Asia 1966) 70.

³⁴ Unless otherwise indicated, this paragraph and the next rely on Bipin Chandra, *The Rise and Growth of Economic Nationalism in India: Economic Policies of Indian National Leadership, 1880–1905* (People’s Publishing House 1966) ch II–III.

³⁵ Ibid 69.

All accepted that self-help would have to be the primary agency of industrial revolution. Industrialisation should be ‘the ocean to the rivers of all [our] thoughts’, Bholonath Chandra was moved to write as early as 1873.³⁶ Indians were exhorted to engage in or support industry. Indian public figures formed associations, convened conferences, and held exhibitions to promote industrialisation, and in many instances, set a personal example as participants in pioneer industrial ventures. The *swadeshi* movement – which inspired an unprecedented profusion of new ventures³⁷ – was conceived of as the ‘one resource left to a subject people’.³⁸ Although the Indian leadership was unanimous in calling for state aid to industry – in the form of a better system of technical education, reform of the stores policy, the organisation of industrial finance, and direct financial assistance to infant industries – the demand was pressed with less vigour at this time than in the inter-war period. In light of the continuing refusal to reform tariff policy, few supposed that the government would adopt an industrial policy that would threaten Home manufacturers.

Even if he were minded to, of course, Curzon would never have been allowed to break with *laissez faire* to the extent that nationalists urged. There was at least consensus behind the imperative for industrialisation. Curzon and the nationalists divided sharply, however, on whether British industrial capital should continue to play a dominant role.³⁹ Curzon was characteristically unapologetic, remarking that the world was ‘one great field for the tiller to till: and if the man who lives on the spot will not cultivate it with his own

³⁶ Ibid 66.

³⁷ Sumit Sarkar, *The Swadeshi Movement in Bengal 1903-8* (2nd edn, Permanent Black 2010) ch 3.

³⁸ Chandra (n 34) 134–135.

³⁹ Chandra (n 34) 90–112.

spade, then he has no right to blame the outsider, who enters with his plough'.⁴⁰ Though not all nationalists were opposed to foreign investment in industry because of the perceived difficulty in mobilising Indian capital for the purpose, the majority were convinced that the costs of foreign capital invested under colonial conditions substantially outweighed any benefits. Indeed, the benefits were illusory, they suggested: what appeared to be the injection of fresh funds was actually the ploughing back of earlier profits earned under policies that favoured foreign over Indian capitalists, thus contributing to a 'self-expanding drain' of wealth.⁴¹ Those policies ensured that foreign capital crowded out Indian capital.

Critics also alleged that foreign capital was as much a political as an economic threat, creating a constituency of capitalists who perceived their continued prosperity to depend on the continuation of colonial rule. Genuine economic development was possible only if industrialisation was driven by Indians themselves, it was thought, even if the required capital took time to emerge. In the meantime, economists like Naoroji argued, the state should nationalise the key industries that Indian entrepreneurs lacked the capital to start and use its credit to borrow cheaply on the international markets. These were quixotic proposals under colonial conditions, of course, although for a brief period after the First World War it appeared that such a developmental state might come into being.

⁴⁰ Chandra (n 34) 98–99.

⁴¹ Chandra (n 34) 103. See, further, BR Tomlinson, *The Economy of Modern India 1860–1970* (CUP 1993) 118.

The turning point (1919): the report of the Indian Industrial Commission

Illustrating the uniqueness of the forces behind the TISCO acquisition, the use of Part VII for industry stopped abruptly. After Curzon's departure, Clive Dewey has argued, officials sympathetic to an interventionist industrial policy were overpowered by those in the India Office and elsewhere still committed to *laissez faire*.⁴² Provincial initiatives such as loans and pioneer factories remained small in scale and limited in ambition. The manufacturing industries – still predominantly jute, iron and steel, and cotton – remained an insignificant proportion of economic activity, producing only 3.8% of national income in 1913–1914.⁴³ Agriculture continued to be overwhelmingly important.

During the second year of the war, however, 'the icepacks of *laissez faire* prejudice broke up'.⁴⁴ The war revealed the deep connections between industrial policy and statecraft: a totally free market could neither be mobilised sufficiently to make war nor, anticipating the peace, defend economic incursions by foreign powers. Domestic political pressures had also finally aligned in favour of an interventionist industrial policy. Officials not only responded to nationalist pressure for industrialisation but also helped to mobilise its expression to convince the India Office of the inevitability of change. Their motivations, however, were distinct: some thought a new policy would demonstrate the benevolent motives of British rule; others thought that the change would ease unrest in

⁴² Dewey (n 31) 223–233. See, also, Sunil Kumar Sen, *Studies in Industrial Policy and Development* (Progressive Publishers 1964) 132–134; Amiya Kumar Bagchi, *Private Investment in India, 1900–1939* (CUP 1972) 50–51.

⁴³ Morris (n 22) 566, 592.

⁴⁴ Dewey (n 31) 233–237.

the long run by reducing middle-class unemployment; and free-traders hoped state support for industrialisation might outflank the constant calls for protection.

Papering over these differences, in 1916 the Government of India secured the India Office's consent to appoint a commission to craft a policy of 'direct encouragement to industrial development'.⁴⁵ Presided over by the scientist and administrator T. H. Holland, the membership of the Indian Industrial Commission comprised two other officials, four industrialists – three of whom were Indian (Dorabji Tata, Fazulbhoy Currimbhoy, and Rajendranath Mukherjee) – and Pt. Mohan Malaviya, the senior Congress leader from Allahabad.

The Commission toured the provinces and heard from almost 500 businessmen, investors, and officials concerned with industry or agriculture, most of whom appeared for questioning before the Commission as 'witnesses'.

Published in 1919, the Commission's lengthy report revealed the frailty and lop-sidedness of domestic industry, capable of turning out a locomotive with a few essential imports but lacking even one machine to make nails and screws.⁴⁶ The Commissioners proposed dozens of reforms to every aspect of industrial policy: investment in infrastructure, the establishment of pioneer factories in new industries, the encouragement of new industrial banks, and, in certain circumstances, the provision of direct assistance to industry – all proposals designed to give priority to heavy industries as the drivers of an industrial revolution in India.

⁴⁵ *Report of the Indian Industrial Commission 1916–1918* (Cmnd. 51, 1919) 1.

⁴⁶ *Ibid* 50.

Particularly notable was the recommendation that industrial undertakings receiving direct forms of government aid (such as guarantees and investment) should be rupee companies, the share allotment in which should be controlled by government to encourage investment by small investors and the Indian public.⁴⁷ This position, though bold when measured against previous standards, was consistent with the assurance by government in the debate leading to the Commission's appointment that 'the building up of industries where the capital, control and management should be in the hands of Indians' was 'the special object ... in view'.⁴⁸

The Commission expressed confidence that its major proposals were 'substantially supported by the best-qualified opinion of this country'.⁴⁹ In the event, as we shall see, very few of these were implemented successfully. In contrast, the Commission's comparatively minor proposals on the acquisition of land for industry had an immediate if short-lived effect on the practice.

Land acquisition was one of several matters concerning the supply of land to industry on which the Commission had specifically invited comment. Summarising the evidence it had heard, the Commissioners reported that 'many witnesses representing both small and large interests' had complained of difficulties in obtaining land for factories and other industrial concerns.⁵⁰

⁴⁷ Ibid 185.

⁴⁸ Ibid 246.

⁴⁹ Ibid 243.

⁵⁰ Ibid 131, 308–309.

The most common complaint was of insecurity of title. According to a representative of Shaw Wallace & Co. (a leading Calcutta managing agency), solicitors in Calcutta and Bihar and Orissa would certify a title on coal lands as ‘marketable’, never as absolutely sound.⁵¹ The man from Bird & Co. said that some collieries had spent more on legal costs than on machinery; the firm’s own lawyers had even been caught advancing money to the other side to prolong litigation. Some witnesses attributed the problem to complex land tenure rules and others to the ease with which Hindu inheritance law generated potential plaintiffs.⁵² An official in Madras mentioned a case in which land was bought and greatly improved by a factory; ostensible heirs under Hindu law then made claims, triggering litigation that lasted 19 years. The Director of Industries of Madras noted that some planters had devised a partial workaround which could hardly be endorsed by authorities: if a planter apprehended litigation over title, he would secure a lease from any putative owner and then plant as large an area as possible; to evict the planter, a plaintiff would have to pay into court the full value of the improvements.⁵³

A related set of complaints made by witnesses in Punjab concerned challenges to the consensual sale of agricultural land to industry by various kinds of plaintiffs: reversioners with rights at customary law to object to a sale made without legal necessity; agnates and tenants with rights of pre-emption under the Punjab Pre-emption Act (I of 1913); and applicants under the Punjab Alienation of Land Act (XII of 1900), a paternalist measure

⁵¹ *Minutes of Evidence: Bengal etc.* (n 25) 713, 872–878.

⁵² See, e.g., *Minutes of Evidence taken before the Indian Industrial Commission, 1916–18: Vol III – Madras and Bangalore* (Cmnd. 236, 1919) 34, 389, 493.

⁵³ *Ibid* 150.

that restricted the sale of agricultural land to non-agriculturalists.⁵⁴ Restrictions of some kind were necessary to protect Punjabi agriculturalists 'from the clutches of the *bania log*', the manager of the New Egerton Woollen Mills Co. acknowledged. However, he argued, the law must be reformed so that plaintiffs could not abuse their rights to extort settlements from companies: he described a four-year legal battle to see off what he regarded as meritless challenges by third parties to a consensual purchase of land by the company.

Another set of complaints was made against landowners. They were alleged to be too apt to exploit the position of industrialists constrained in their choice of site. The owner of land adjoining a tannery in Madras had apparently demanded ten times the value of the land, knowing that it was sought for extensions.⁵⁵ According to the representative of a mining association, miners seeking to follow a vein onto adjoining holdings were often frustrated because of the 'exorbitant' sums demanded.⁵⁶ Particularly acute difficulties arose where land had to be assembled and the owners of a crucial plot refused to sell in order to 'blackmail' the company, the Director of Industries in the United Provinces observed.⁵⁷

⁵⁴ See, e.g., *Minutes of Evidence taken before the Indian Industrial Commission: Vol V – Punjab, Assam, Burma, and General* (Cmnd. 238, 1919) 67, 339; see, also, 568, 586–587 for similar complaints in Burma. C.f. *Minutes of Evidence taken before the Indian Industrial Commission, 1916–18: Vol IV – Bombay* (Cmnd. 237, 1919) 568: the conversion of agricultural land into non-agricultural land in Bombay is 'easily accomplished'. For context to the 1913 Act, see Norman G Barrier, 'The Punjab Disturbances of 1907: The Response of the British Government in India to Agrarian Unrest' in David Hardiman (ed), *Peasant Resistance in India 1858–1914* (OUP 1992) 220. On the 1900 Act, see Barrier (n 33).

⁵⁵ *Minutes of Evidence: Madras* (n 52) 316.

⁵⁶ *Minutes of Evidence: Bengal etc.* (n 25) 207.

⁵⁷ *Minutes of Evidence taken before the Indian Industrial Commission: Vol I – Delhi, United Provinces, and Bihar* (ctd. on next page)

The Director made the same accusation of blackmail against municipalities: companies seeking to lease municipal land were offered exploitative terms, ‘despite the indirect public benefits’ that would arise.⁵⁸ This was one of several complaints against local and provincial government. The man from Shaw, Wallace & Co. complained of difficulty in securing a municipal license to trade.⁵⁹ Municipalities controlled by Indians were particularly prone to hinder development, the representative of a match company in Cawnpore was convinced from his experience.⁶⁰ A common refrain was that municipalities and provincial governments should take a more liberal approach in supplying their land to industry, granting land on longer leases and on more generous terms.

Those who expressed an opinion on the subject almost invariably went further, recommending that provincial governments acquire private land for industry. Some witnesses left it at that: what had been done for railways should be done for the mines, the man from Bird & Co. argued.⁶¹ Others suggested specific restraints on the use of the land acquisition: say, that only ‘approved undertakings’ or those ‘in the public interest’

and Orissa (Cmnd. 234, 1919) 149, 506.

⁵⁸ Ibid 132.

⁵⁹ *Minutes of Evidence: Bengal etc.* (n 25) 713.

⁶⁰ *Minutes of Evidence: Delhi etc.* (n 57) 72.

⁶¹ His specific recommendation was the extension of the exceptional power in tenancy legislation in Chota Nagpur – a separately-administered division corresponding to much of present-day Jharkhand – whereby landowners could compulsorily acquire tenancy rights in land sought for mining, with compensation paid according to the provisions in the 1894 Act: *Minutes of Evidence: Bengal etc.* (n 25) 879–880. See s 50 of the Chota Nagpur Tenancy Act (Bengal Act VI of 1908). By s 49, tenants were given the power to alienate their rights to mining concerns without landowners’ consent. The origin of these powers merits research.

should be beneficiaries, or that tenants of sought-after land should be ejected only in the event that the owner was a willing vendor.⁶²

There were a handful of dissenters.⁶³ The Deputy Commissioner of the Santal Parganas thought it a 'very delicate matter to interfere with proprietary rights'. The Bengal National Chamber of Commerce – the Indian counterpart to the British-dominated Bengal Chamber of Commerce – thought owners would 'make a grievance of it' if land was acquired for industry. The representative of the Central Provinces Industrial Advisory Board thought that such acquisitions would create an 'amount of dissatisfaction amongst the resident public' and that, in any event, land was 'easily obtainable' in the province. The Indian Economic Society of Bombay asserted that 'private owners must not be made to part with property compulsorily for industrial purposes'. Perhaps exemplifying attitudes in the Gandhian heartland, the Ahmedabad Millowners' Association argued against the use of the 1894 Act for industry on the ground that government officials were at risk of persuasion by 'lame arguments' to acquire land for a particular industry at the cost of 'great injustice' to landowners.

Predictably, given its composition and mandate, all but one of the Commissioners recommended that provincial governments should acquire land for companies engaged in industry. They proposed the following criteria to govern such acquisitions, by which land could be taken for an industry that would otherwise be unable to develop:⁶⁴

⁶² *Minutes of Evidence: Delhi etc.* (n 57) 87, 505; *Minutes of Evidence: Punjab etc.* (n 54) 67.

⁶³ *Minutes of Evidence: Delhi etc.* (n 57) 335; *Minutes of Evidence: Bengal etc.* (n 51) 283, 564; *Minutes of Evidence: Bombay* (n 54) 449, 536.

⁶⁴ *Report of the Indian Industrial Commission* (n 46) 132.

The [Provincial] Government may acquire land compulsorily from private owners on behalf of an industrial concern, when it is satisfied—

- (1) that the industry itself will, on reaching a certain stage of development, be in the interest of the general public;
- (2) that there are no reasonable prospects of the industry reaching such a stage of development without the acquisition proposed;
- (3) that the proposed acquisition entails as little inconvenience to private rights as is possible, consistently with meeting the needs of the industry. In this connection we wish to draw particular attention to the desirability of avoiding, as far as possible, the acquisition of areas largely covered by residential buildings.

These were stringent criteria: in how many cases could it really be shown that the acquisition of a particular site was vital to the development of an industry? The criteria were swiftly undermined, however, by the following addition that sanctioned a far more permissive approach, essentially devolving the entire question to the provincial governments:⁶⁵

Further, when Government considers an industrial undertaking deserving of substantial assistance in other ways at the public expense, especially when it adopts such a course as an alternative to carrying on the industry itself, there seems no reason why land, when necessary, should not be acquired compulsorily.

In the event, however, this concession was overlooked by readers of the report, who focused exclusively on the three-part criteria.

As the Commission acknowledged, the three-part criteria was a slight variation on that proposed by the Bombay Advisory Committee (which counted among its members some of the great and the good of Bombay business, appointed by the Government of Bombay in 1915 to advise on industrial policy).⁶⁶ The Committee explained in its evidence that its criteria were devised with one purpose foremost in mind: the establishment of factory-run sugar plantations in Bombay province.⁶⁷ To compete

⁶⁵ *Report of the Indian Industrial Commission* (n 46) 133.

⁶⁶ *Report of the Indian Industrial Commission* (n 46) 73.

⁶⁷ *Minutes of Evidence: Bombay etc* (n 54) 568.

against Javanese imports, the Committee and other witnesses argued, the domestic industry had to be remodelled so that sugar factories controlled at least part of their cane supply.⁶⁸ The few existing factories were small and inefficient because of a serious problem of coordination between factory and field. Reliant solely on purchases of cane from peasant cultivators, factories could not be assured of the timely and secure supply of the quantities of cane needed to work at a competitive scale: purchasing from numerous, widely-scattered cultivators was cumbersome and costly; *ryots* on nearby land could not always be convinced to grow cane; and ‘combinations of cultivators’ might threaten factories, suggested the manager of a sugar company in the Central Provinces.⁶⁹ Given the fragmented ownership of land in Bombay province, the Committee continued, private negotiations alone could not assemble a sufficiently large block of land for plantations. The only remedy, it argued, was for the provincial governments to be empowered to use their power of land acquisition for the purpose.

The merchant-statesman Lalubhai Samaldas, the most vocal of the Committee members on this subject, explained the various difficulties that had been faced by a sugar company in which he had a financial interest.⁷⁰ Among these was the refusal by the Bombay Legal Remembrancer to approve a plan whereby cultivators would be supplied with water from irrigation canals only on the condition that they grew sugarcane and sold it to the company’s factory at a certain rate.

⁶⁸ See, e.g., *Minutes of Evidence: Madras* (n 52) 468–469, 498–499. See, also, Donald W Attwood, ‘Peasants versus Capitalists in the Indian Sugar Industry: The Impact of the Irrigation Frontier’ (1985) 45 *Journal of Asian Studies* 59, 61–62, 64; and his *Raising Cane: The Political Economy of Sugar in Western India* (Westview Press 1992) 68–72; c.f. Shahid Amin, *Sugarcane and Sugar in Gorakhpur: An Inquiry into Peasant Production for Capitalist Enterprise in Colonial India* (OUP 1984) 105–109.

⁶⁹ *Minutes of Evidence: Bombay etc* (n 25) 695.

⁷⁰ *Minutes of Evidence: Bombay etc* (n 25) 588–589.

Samaldas endorsed an even bolder plan endorsed by other witnesses – including the Director of Agriculture of Bombay⁷¹ – to create, in effect, miniature canal colonies in the Deccan with sugar factories at their heart. Three times the area of land a sugar factory sought would first be compulsorily acquired, pooled as one estate, and then improved with irrigation and better communications. Dispossessed *ryots* – of whom there would be many, as these colonies, unlike those in Punjab,⁷² would be established on already-settled tracts – would be granted two-thirds of the area of their original holdings, along with top-up cash compensation as necessary, with the balance of their old holdings transferred to the factory. Questioned by T. H. Holland on whether safeguards were necessary to protect the interests of *ryots*, Samaldas said only that most of the companies concerned ‘would have some Indian members and they would have as much sympathy for the *ryots* who are their own countrymen as others’.

This otherwise agreeable dialogue was enlivened by a spirited breaking of the ranks by one of the committee members, the Parsi industrialist J. B. Petit.⁷³ Petit opposed the sugar colony scheme: *ryots* would grow cane if it was profitable to do so, in his view, and industry could buy land privately as long as tact and understanding were brought to bear, he thought. This prompted the scornful question of whether he would have given up a development like TISCO’s at Jamshedpur. In response, Petit pointedly asked whether the *ryots* at Jamshedpur had been approached privately before the 1894 Act was invoked.

⁷¹ *Minutes of Evidence: Bombay* (n 54) 414. See, also, G Keatinge, *Agricultural Progress in Western India* (Longmans, Green & Co. 1921) 84–88.

⁷² Imran Ali, *The Punjab under Imperialism, 1885–1947* (Princeton University Press 1988) 8.

⁷³ *Minutes of Evidence: Bombay etc* (n 25) 586–590. Petit was unusual amongst industrialists for openly identifying with the Congress and its allies rather than with the Moderates: ADD Gordon, *Businessmen and Politics: Rising Nationalism and a Modernising Economy in Bombay, 1918–1933* (Manohar Book Service 1968) 157, 162.

(Dorabji Tata ‘could not say off hand’). Petit would agree to the Committee’s criteria only if certain safeguards were introduced. Principally, a party whose land was to be acquired by industry ought to have the right to appeal to the Legislative Council of the province, which could veto the acquisition (so that ‘powerful private organisations’ could not always have their way, Petit explained).

Pt. Malaviya, the only member of the Commission to dissent from its recommendations on land acquisition, took an even firmer stance against such acquisition than Petit’s. In a lengthy note expressing reservations on several of his colleagues’ recommendations (although agreeing with the gist of their approach), Malaviya reminded them that it had been accepted that industrial development by and for the benefit of Indians was to be given priority. Yet, despite the opinion of many Indian witnesses such as Samaldas that land acquisition could usefully assist Indian industry, Malaviya refused to countenance land acquisition as a proper use of public power. After (correctly) noting that acquisitions for industry simpliciter were unknown to English law – like so many of the Congress old guard, Malaviya was a trained lawyer⁷⁴ – he argued from first principles:⁷⁵

The justification for depriving a man of his property against his will, may be found in the fact that it is being done for the benefit of the public of which he is also a member, and that he will be entitled to share the benefit of the undertaking as much as any other person. Where an undertaking is not “likely to be useful to the public” ... the provisions of the Act, or the power of the Government, cannot in my opinion be rightly used to compulsorily acquire land for it. In my opinion, when an industrial concern, the members of which have the right to shut out every one outside their body from participation in the benefit of their business, desires to acquire land, it must do so by exchange, negotiation or moral suasion.

⁷⁴ John R McLane, *Indian Nationalism and the Early Congress* (Princeton University Press 1977) 53–54; Mithi Mukherjee, *India in the Shadows of Empire: A Legal and Political History 1774–1950* (OUP 2010) ch 4.

⁷⁵ *Report of the Indian Industrial Commission* (n 46) 280.

By ‘exchange’, Malaviya meant the consensual exchange of land as compensation to the landowner.⁷⁶ The only concession that the other Commissioners made in that respect was to recommend that it should be a ‘*sine qua non*’ of acquisitions for industry to offer the dispossessed party land in exchange or part exchange.⁷⁷ They thought that this would mitigate, more effectively than money could, ‘the hardship and sense of unfair treatment caused by expropriation’.

Those Commissioners stayed silent, however, on the justice of acquisitions for industry. They also adroitly avoided the question of whether such acquisitions were permitted by the 1894 Act as it stood, simply noting a difference of opinion on the subject.⁷⁸ In fact, only one witness (the Director of Agriculture in Madras) thought that a ‘wider interpretation’ could be taken of existing powers.⁷⁹ All others who expressed an opinion on the point suspected, or were convinced, either that amendments to the 1894 Act or a separate enactment would be necessary to implement their favoured proposals.⁸⁰ The Director of Agriculture and Industries in the Central Provinces recalled that a cotton mill company was refused an acquisition under Part VII because it could not show how the work would be ‘likely to prove useful to the public’ or satisfy the public-use condition. His counterpart in the United Provinces noted the same potential restrictions in arguing that it was ‘doubtful’ whether such acquisitions were permitted. Even the Bombay

⁷⁶ This is clear from the thrust of his questioning of witnesses. See, e.g., *Minutes of Evidence: Delhi etc.* (n 57) 149.

⁷⁷ *Report of the Indian Industrial Commission* (n 46) 133.

⁷⁸ *Report of the Indian Industrial Commission* (n 46) 132.

⁷⁹ *Minutes of Evidence: Madras* (n 52) 510.

⁸⁰ *Minutes of Evidence: Bengal etc.* (n 25) 575; *Minutes of Evidence: Delhi etc.* (n 57) 91; *Minutes of Evidence: Bombay* (n 54) 568.

Advisory Committee thought that a special enactment would be necessary to give effect to the criteria it proposed, saying that it ‘entertained doubts whether it was ever contemplated that the Act should be used for acquiring land on behalf of private companies for industrial purposes, in which the public can have no more than an indirect interest’ – a clear reference to the Bliss undertaking of 1892.

It was possible, however, to reconcile the Commission’s criteria with Bliss’s undertaking. As we have seen, Bliss was promising only that land would not be acquired for those industries in which the public/state was considered to lack a direct interest at any given time.⁸¹ In the post-war dispensation, the public/state was now understood to have a direct interest in the development of certain infant industries. Iron and steel had been regarded as such an industry from 1909. Cotton, however, was still to be excluded: as one of the Commissioners (Ernest Low, Secretary to the Government of India) later explained, the Commissioners had fixed upon criteria that would exclude ‘e.g., land to be acquired for a cotton mill in Bombay island’⁸² – apparently the archetype of an industry of wholly private concern.

As it happened, the Commission’s criteria would be swiftly stretched to their limit and then abandoned by a spectacularly transgressive acquisition in Bombay. The reassertion of doubts as to the legality of acquisitions for industry and the failure to legislate for their removal had the effect of reinstating *laissez faire* in large measure.

⁸¹ See 118–119 above.

⁸² ‘Notes’ in ‘Proposed Amendment of the Land Acquisition Act, 1894’ (n 27) 8.

1919–1920: the initial response

Immediately prior to the Commission's report, provincial governments that acquired land for industry felt pressed to state reasons for the acquisitions that could be related to some aspect of public policy.⁸³ In 1917, the Government of Madras agreed to acquire land for an 'immediate extension' of a cotton mill 'to meet the urgent needs of Government'. That same year, the Government of Punjab agreed to acquire 49 acres for the New Egerton Woollen Mills Co. (the company whose manager had complained at length to the Commission), ostensibly for the 'accommodation of labourers in a Criminal Tribes settlement'.⁸⁴

As if releasing long pent-up pressures, the Commission's endorsement of acquisitions for industry emboldened governments to dispense with such formalities. Thereafter, the needs of industry alone were put forward as a justification, regarded as sufficient to satisfy the requirement in Part VII that works be 'likely to prove useful to the public'.

For the most part, the public-use condition was quietly ignored: a tactic that, like the pre-1919 acquisitions for charitable societies, illustrated the imperfectness of the adherence to the law in the practice of land acquisition. An early hint of past disobedience was a provision in Act XLII of 1850 – Dalhousie's supplement to Regulation I of 1824⁸⁵ – that regularised the taking of land 'otherwise than according to'

⁸³ *Gazette of India: Part II* (GoI 1917) 640, 1126.

⁸⁴ On such settlements, see 239 below.

⁸⁵ See 55–56 above.

the 1824 regulation if no competing claim had been made within five years.⁸⁶ It may be that legality varied with geography. In the hill districts of Assam, far from the seat of imperial power, private land was taken by executive fiat rather than under the Land Acquisition Act because, the Chief Commissioner explained, ‘elaborate’ statutory procedures were not suitable for ‘uncivilised localities’.⁸⁷ Even after the Government of India pointed out the dubious legality of the practice, the Chief Commissioner, unabashed, decided that the practice would nevertheless continue unless ‘extra judicial acquisition [was] not possible or advisable in any particular case...’. The courts, we shall see in the next chapter, penalised obvious illegality but were deferential in deciding upon the legality of sharp practice.⁸⁸

Returning to our narrative, acquisitions for TISCO dwarfed all others, as before. In 1918, the Government of Bihar and Orissa agreed to acquire no fewer than 7,200 acres for the Jamshedpur works⁸⁹ (part of a programme of state assistance for the ‘Great Extensions’ to the works after a war effort to which its output – 1,500 miles of steel rails and 300,000 tonnes of steel for munitions and other defence purposes – had been acknowledged by the Viceroy as vital).⁹⁰ Notably, the acquisition at Jamshedpur went

⁸⁶ For complaints that a railway company had entered onto land in advance of legal authority to do so, see Lushington, Railway Commissioner, to Grant, Secretary to the Government of Bengal (23 Jan 1851), reproduced in S Settar (ed), *Railway Construction in India: Select Documents: Volume I – 1832–1852* (Northern Book Centre 1999) 471–472.

⁸⁷ GoI, Rev & Ag, Land Rev, ‘Procedure to be Followed when Acquiring Land for Public Purposes in the Hill Districts of Assam’, Feb 1917, prog. 12–13 (A) (NAI) at p. 2, 7; and ‘Decision of the Chief Commission not to proceed with the application for the withdrawal of the Land Acquisition Act, 1894, from the Hill Districts in Assam, where it is now in force’, April 1918, prog. 21–22 (A) (NAI) at p. 4.

⁸⁸ See 230 below.

⁸⁹ *Gazette of India: Part II* (GoI 1918) 1407.

⁹⁰ Sen (n 30) 44.

beyond the needs of the works themselves: among several purposes to which the acquired land was to be put was ‘the establishment of experimental agricultural farms’. The same applied to another acquisition at Jamshedpur the following year: part of the acquired land was to be used by TISCO to promote and develop subsidiary industrial undertakings.⁹¹

In 1919, the Government of Bengal agreed to acquire 30 acres for a tea-machinery factory and 5 acres for a lorry factory. Both factories were to be constructed by locally-registered subsidiaries of British multinationals, representing the first use of Part VII for the ‘India Limiteds’.⁹² Neither of these cases, it should be noted, uncontroversially met the Commission’s three-part criteria. Could it really be said that there were ‘no reasonable prospects’ of the tea machinery or lorry industries reaching the stage of development at which it would benefit the public at large ‘without the acquisition proposed’? The same could be said about another acquisition by the Bengal Government in the same year: 253 acres were taken for the works of two producers of pig iron: the Bengal Iron and Steel Company and the Indian Iron and Steel Company.

⁹¹ *Gazette of India: Part II* (GoI 1919) 1846. This generous arrangement reflected the hopes that the extensions to the Jamshedpur works would encourage ancillary industrial development: see, e.g., HM Surtees Tuckwell, ‘The Tata Iron and Steel Works: Their Origin and Development’ (1918) LXVI *Journal of the Royal Society of Arts* 193, 201. It may also have helped that the Tatas maintained an excellent relationship with the authorities during the war, followed up with a policy of recruiting former civil servants. One notable recruit in light of the present discussion was the former First Land Acquisition Collector of Calcutta, J. C. K. Peterson, taken on as a director of Tata Sons Ltd in 1919 and appointed managing director of TISCO after his resignation as the Controller of Munitions and Director of Industries. See Bagchi (n 42) 198, 303–307; Dileep M Wagle, ‘Imperial Preference and the Indian Steel Industry, 1924–39’ (1981) 34 *Economic History Review* 120, 125.

⁹² *Gazette of India: Part II* (GoI 1919) 356, 1461, 1714, 2178.

The Government of Bombay went the furthest of all on behalf of private industry. In May 1920, it entered into a Part VII agreement so transgressive of the Indian Industrial Commission's criteria that it represented a complete renunciation of its constraints.⁹³ The Government agreed to acquire 1,500 acres in Kolaba for the Khopoli Land Co. for the construction of India's second industrial township after Jamshedpur. The township was to be supplied with the tail water (from a Tata-constructed dam) emerging at the foot of the Ghats. The company had been granted a monopoly on the use of that water at nominal rates, starting at Rs. 5,000 per year in the first five years and rising in stages to Rs. 26,000 per year from the 16th year onwards. The agreement permitted the company to erect 'factories works and buildings' on the acquired land for the following 'industrial purposes', beginning with exactly the purpose that the Commission had sought to exclude by its criteria:⁹⁴

:– Spinning and Weaving Factories Dyeing Bleaching and Cloth Printing Factories Wool Combing and Woollen Spinning and Weaving Factories for extracting and refining oil Paper Manufacturing Factories Tanneries Dairies Flour Mills and Factories for the manufacture of Aerated Water Ice Scap and Glycerine Paint and Casein and such other factories for industrial purposes as may from time to time be approved by Government and also houses and buildings for the accommodation and benefit of the staff workmen and employees of the factories such as schools shops recreation rooms and dispensaries ...

Why was this company, registered only in 1919, granted such generous concessions? The company may have been controlled or funded at least in part by British capital, judging by the complaint by the Indian Merchants' Chamber – the premier Indian industrial lobby in Bombay – that there should have been a call for tenders before the

⁹³ *Gazette of India: Part II* (GoI 1920) 721. The agreement was also unprecedented in including provisions relating to the protection of the environment (clauses (g)–(j)). These provisions obliged the company to avoid polluting nearby water sources and to indemnify the state if pollution occurred.

⁹⁴ *Ibid* 723.

company was granted a monopoly over tail water.⁹⁵ However, the identity of the two Indian directors who signed the Part VII agreement may have been more important. The first of those directors, A.J. Billimoria, was a trusted representative of the Tatas, a business house whose relationship with the authorities can only have grown closer after R. D. Tata's role in establishing the Anti-Non-Cooperation Committee.⁹⁶ The second director, the 'cotton king' Purshotamdas Thakurdas, was a member not only of that committee but also the Bombay Advisory Committee, whose recommendations on land acquisition had been taken up by the Commission.⁹⁷ Thakurdas also enjoyed an amicable relationship with the Government of Bombay as one of its nominees to the Bombay legislature. At the very least, the involvement of Billimoria and Thakurdas cannot have hurt in securing a notably generous Part VII agreement.⁹⁸

In July–August 1920, the Government of Bombay used Part II rather than Part VII of the Act – for reasons that will become apparent – to acquire 6,122 acres in Ahmednagar and Nasik for the expressed purpose of the 'better development of an irrigation area by sugarcane plantation' (see Table 4.3 below).

⁹⁵ 'Council Questions: Hydro-Electric Scheme', *The Times of India* (17 March 1920) 13.

⁹⁶ Harris (n 29) 72; Dwijendra Tripathi, *The Oxford History of Indian Business* (OUP 2004) 262. The Khopoli scheme may have been a venture of the Tatas though not under their name. In his evidence to the Indian Industrial Commission, B. D. Mehta, the trusted manager of the Tata-owned Empress Mills of Nagpur, had recommended the development of a 'large and efficient industrial colony' at Khopoli for 'one or more bleaching, dyeing and [calico] printing works': *Minutes of Evidence: Bengal etc.* (n 25) 518.

⁹⁷ Sumit Sarkar, *Modern India: 1885–1947* (Macmillan India 1996) 238; Gordon (n 73) 159; Frank Moraes, *Sir Purshotamdas Thakurdas* (Asia Publishing House 1957) 25–30.

⁹⁸ Oddly, given its bright prospects, the company was voluntarily wound-up in Nov 1921: 'Public notifications', *The Times of India* (4 Nov 1921) 3. The fate of the land and the project merits further research.

Table 4.3
Part II declarations for 'development' in the Bombay Presidency (1918–1927)

Year	District	At whose expense	Further details of 'public purpose'	Area (acres)
(a) Acquisitions 'for industrial development'				
1919	Thana	Public		79.78
1920	' ,	' ,		5.00
1921	' ,	' ,		1283.40
	Bom Sub	' ,		106.31
(b) Other 'development' acquisitions for industry				
1920	Ahmed-nagar	Public	'Better development of an irrigation area by sugarcane plantation'	4491.05
	Nasik	Public	' ,	1630.80
(c) Acquisitions for the 'development' of stated part or whole of Bombay city				
1920	Bom City	Bombay Municipality		1.20
1921	' ,	Public		0.64
	' ,	' ,	Bombay Municipality	91.42
1922	' ,	' ,	' ,	13.08
1923	' ,	' ,	' ,	30.69
1925	' ,	' ,	' ,	0.78
1926	' ,	' ,	' ,	0.59
1927	' ,	' ,	' ,	0.14
(d) Acquisitions for 'development' of Bombay suburban area				
1920	Thana	Public		905.53
1920	Bom. Sub.	' ,		152.38
1921	' ,	' ,		1325.33
1922	' ,	' ,		138.36
1923	' ,	' ,		17.70
1924	' ,	' ,		2.48
1925	' ,	' ,		1.79
1926	' ,	' ,		486.45
1927	' ,	' ,		7.05
(d) Other 'development' acquisitions				
1918	Ahmed-nagar	Public	'Redistribution of land for the better development of the irrigation area'	601.43
1920	Ahmed-nagar	' ,	'Better development of the irrigation area under the Pravara canals'	287.83
	' ,	Poona	'For development purposes'	132.88
1921	Thana	' ,	'Development of Ambernath Taluka'	31.03
1923	Sholapur	Sholapur Municipality	'Development scheme...'	0.11
1924	Poona	Public	'Development of a suburb...'	1.28
1927	Sholapur	' ,	'Development scheme...'	0.13

Rather than the method envisaged in the sugar colony proposal, the entire area of the acquired land was leased to the Belapur Co.,⁹⁹ the sugar company in which Samaldas had declared his interest.¹⁰⁰ The Government also entered into a long-term agreement with the company for supply of irrigation water ‘on very favourable terms’.¹⁰¹

Other companies engaged in industry are likely to have been the ultimate beneficiaries of at least some of the land acquired in Thana and the suburbs of Bombay from 1919–1921 for the public purpose of ‘industrial development’. That, it seems, was the contemporary practice of the Bombay Improvement Trust.¹⁰² Established at the turn of the century to carry out major surgery on the city to improve sanitation, transport facilities, and working class housing, the Trust was vested with vacant government and municipal land and granted the entitlement to acquire private land more cheaply and easily than even the government itself. The Trust’s empowering legislation entitled it to pay compensation calculated according to an especially favourable criteria and without the usual 15% ‘solatium’.¹⁰³ The level of compensation it awarded was capable of appeal only to a

⁹⁹ Attwood (n 68) 72. Attwood’s figure of 7,368 acres does not tally with the area of 6122 acres in the Part II declarations. The balance may have been ‘waste’ land leased to the company.

¹⁰⁰ Samaldas as well as Thakurdas were directors of the company, at least as at 1927: Place, Siddons & Gough (n 21) 329.

¹⁰¹ *Report of the Irrigation Inquiry Committee* (Government of Bombay 1938) 36.

¹⁰² Rajnarayan Chandavarkar, *History Culture and the Indian City: Essays by Rajnarayan Chandavarkar* (CUP 2009) 20; Chandavarkar (n 5) 43–44; J Masselos, ‘Changing Definitions of Bombay: City State to Capital City’ in Indu Banga (ed), *Ports and their Hinterlands in India (1700–1950)* (Manohar 1992) 305–311; Frank F Conlon, ‘Industrialization and the Housing Problem in Bombay, 1850–1940’ in Kenneth Ballhatchet and David Taylor (eds), *Changing South Asia: Economy and Society* (Centre of South Asian Studies, SOAS, University of London 1984) 161–163; Prashant Kidambi, *The Making of an Indian Metropolis: Colonial Governance and Public Culture in Bombay, 1890–1920* (Ashgate 2007) ch 4; Sandip Hazareesingh, *The Colonial City and the Challenge of Modernity: Urban Hegemonies and Civic Contestations in Bombay City 1900–1925* (Orient Longman 2007) ch 1.

¹⁰³ The solatium was (and still is) the name for the premium over market value granted as compensation ‘in consideration of the compulsory nature of the acquisition’: s 23(2) of the 1894 Act. It was first introduced by s 42 of the 1870 Act. For the rationale for doing so, see GoI, (ctd. on next page)

specially-constituted tribunal (rather than, as was ordinary, to court).¹⁰⁴ For all the expectations and resources with which it was invested, however, the Trust was conspicuously unsuccessful in achieving its brief because of failures in its strategy. Two-thirds of the enormous estate it assembled – 19% of the area of the Bombay island by 1924, the 25th and penultimate year of its operation – was left untouched. The ‘development’ of the remainder did less to alleviate the chronic state of sanitation and housing of the poor areas of the city than to assist the wealthy by improving the city’s commercial infrastructure. In at least one case, the Trust assisted industry more directly. Rajnarayan Chandavarkar mentions in passing that in the 1920s the Trust as good as gave away some of its estate to cotton mills by entering into thousand-year leases on peppercorn rents.¹⁰⁵

It is less likely, though still possible, that cotton mills and other industries were leased or sold some of the hundreds of acres acquired for the ‘development’ of the city and elsewhere from 1920 onwards. In that year, the Government of Bombay established a Development Department with the remit of coordinating the various agencies ‘engaged

Legislative, ‘Papers relating to Act X of 1870’, May 1870, prog. 36–77 (A) (NAI) at prog. 39–40. The general repeal of the solatium was proposed in 1918 but not acted upon: GoI, Rev & Ag, Land Rev, ‘Proposed amendment of section 23(2) of the Land Acquisition Act...’, March 1918, prog. 28 (A) (NAI). For criticisms of the immunity of the Bombay Improvement Trust from paying a solatium, see DJ Samson, ‘Remarks on Some of the Sections of the Land Acquisition Act, Suggesting Some Modifications’ (1924–5) 2 Bombay Law Journal 469 at 488, 498–499.

¹⁰⁴ Sections 47–49 of the City of Bombay Improvement Act (Bombay Act IV of 1898), supplemented by the City of Bombay Improvement Act (XIV of 1904). By s 48(11) of the former, the High Court could hear a further appeal only with leave from the tribunal. Similar entitlements were granted to other city improvement trusts: see the extracts of legislation in Om Prakash Aggarawala, *Compulsory Acquisition of Land in British India: Law and Practice* (University Book Agency 1942) 819–865. In 1925, the Bombay Trust was dissolved as a separate entity and transferred to the control of Bombay Municipality, before a full amalgamation with the Municipality in 1933: Masselos, *ibid*, 311–312.

¹⁰⁵ Chandavarkar (n 102) 20. This episode would be a fruitful subject for future research.

in the development of [Bombay] island' and with special responsibility for 'all questions regarding the acquisition of land in Bombay city'.¹⁰⁶ The Department worked to assist industry indirectly by carrying out an ambitious programme in the early 1920s to build better *chawls* for mill hands and other workers: a long-delayed public initiative to do what the private sector would not, despite periodic threats to compel industry to house at least some of its workers.¹⁰⁷ However, the Department's programme was ill-conceived and eventually suspended (the same fate as an earlier initiative of the Improvement Trust).¹⁰⁸

In addition to the Mulshi episode, the profusion of acquisitions for industry in Bombay in 1919–1920 and the prospect of more to come motivated the first of two Congress resolutions on the subject (mentioned in Chapter 1).¹⁰⁹ The Bombay Provincial Congress at Sholapur in April 1920, over which Kelkar presided, passed the following resolution:

... that the recent application of the Land Acquisition Act for the benefit of capitalist syndicates as in the case of the Poona, Satara, Kolaba and Ahmednagar districts, is unjustifiable, as causing serious hardships to thousands of cultivators threatened with expropriation. It strongly urges upon the Government the equitable character of the demands made by the land owners concerned as a condition precedent to their expropriation. It further recommends an early amendment of the Land Acquisition Act so that the character of the public purposes for which the Act may be put into operation should be clearly defined and if the lands are to be acquired it may be done only under the following conditions: – (a) Lands may be given to commercial companies only and (b) where the bulk of the capital is Indian and (c) the lands may be acquired by paying the highest market rate and (d) by giving in exchange another land yielding the same income in the same locality or by his consent in another locality or by allotting shares at par in the concern for which the land is taken.

¹⁰⁶ Masselos (n 102) 311; Hazareesingh (n 102) 189.

¹⁰⁷ Conlon (n 102) 158, 160, 163–164. See, also, *Report of the Bombay Development Committee* (Government Press, Bombay 1914) [24]. C.f. *Report of the Indian Industrial Commission* (n 46) [246].

¹⁰⁸ Kidambi (n 102) 104–107; Hazareesingh (n 102) 46–51.

¹⁰⁹ See 21 above.

In a December 1920 resolution of which Kelkar spoke in favour, the All-India Congress in Nagpur cast the issue as one of national concern:

IX. LAND ACQUISITION ACT

Resolved that this Congress invites the attention of the public to the policy pursued by the Government in the different Provinces of India of forcibly acquiring lands on a large scale in the interests of capitalists and especially foreign capitalists by the reckless and unjustifiable use of the Land Acquisition Act, thus destroying the hearths and homes and the settled occupations of the poor classes and landholders and is of opinion that it affords further grounds for non-cooperation against the Government. This Congress further appeals to the Indian capitalists concerned to avert the impending ruin of the poor peasant.

As it happened, by this time the various provincial governments had already begun to wind down their programmes of acquisitions for industry.

1921–1927: the retreat to *laissez faire*

In its April 1919 despatch to London on the Montagu-Chelmsford reforms, the Government of India mentioned that the 1894 Act was ‘not sufficiently liberal’ to permit acquisitions for industrial enterprises.¹¹⁰ It said that it proposed to examine the ‘practicability’ of amending the Act to allow for such acquisitions, subject to the safeguards that the Commission had proposed. In June 1920, the Government issued a circular to provincial governments that sought their views on amending the Act. In the course of that circular it reiterated its position that acquisitions according to the

¹¹⁰ GoI to the Secretary of State (16 April 1919) at [63], reproduced in *East India (Constitutional Reforms: Lord Southborough's Committees): Vol III* (Cmd. 176, 1919) 36.

Commission's criteria were not sanctioned by the 1894 Act as it stood, principally because of the constraint posed by the public-use condition.¹¹¹

Although by law and convention the interpretation and use of the Act had been matters left by Government of India to the discretion of provincial governments,¹¹² after June 1920 there was a sharp drop in the use of Part VII for industry: now that the received interpretation of the law had been reasserted publicly, practices of uncertain legality could no longer be quietly tolerated. The Government of Bengal agreed to a 40-acre acquisition for a tannery in mid-1920 but late in the year cited the June 1920 circular in refusing to agree to an acquisition for the Bengal Chemical and Pharmaceutical Works – foremost among the *swadeshi* industrial concerns, established by P. C. Roy in 1893¹¹³ – until the question of amending the Act was settled.¹¹⁴ An official claimed that the public-use condition was 'practically incompatible' with the normal operations of a business. After Roy petitioned Delhi, however, the parties reached a compromise. In the Part VII agreement published in November 1921, the company agreed to give 'reasonable facilities to the public to enjoy the benefits of the acquisition of the land' by training one student in its laboratory each year, carrying out research for the government, installing

¹¹¹ Circular No. 593 from GoI, Rev & Ag, to all Local Governments and Administrations (21 June 1920), the outcome of the correspondence in 'Proposed Amendment of the Land Acquisition Act, 1894' (n 27).

¹¹² A point that was reaffirmed in the following comment in the Legislative Council in March 1919 in response to a question on the acquisition of land for industrial labour: 'The Land Acquisition Act is administered by Local Governments who are thereby empowered to decide in each case whether land can be compulsorily acquired'. GoI, Rev & Ag, Land Rev, 'Question asked by the Hon. Mr. W. A. Ironside and the answer given at the meeting of the Indian Legislative Council held on 7th March 1919...', May 1919, prog. 3–4 (A) (NAI) at 1.

¹¹³ Sarkar (n 97) 105.

¹¹⁴ GoI, Rev & Ag, Land Rev, 'Memorial from the Manager of the Bengal Chemical and Pharmaceutical Works...', Dec 1921, prog. 45–49 (B) (NAI).

hydrants outside the factory to supply drinking water the public, and reserving places in its employees' hospital and primary school for the public.¹¹⁵

Despite this rather canny solution, the Government of Bengal used Part VII for industry only once more in the years to the Kelkar Bill, agreeing in 1926 to acquire 97 acres for the Indian Iron and Steel Company.¹¹⁶ Elsewhere in British India, there was only one other Part VII agreement of any significance in those years, allowing 537 acres in Bihar & Orissa to be acquired for a copper plant.¹¹⁷ In these isolated instances, the problem of the public-use condition was simply ignored. The Bihar & Orissa agreement, for example, provided that the company would respect such public rights as the provincial government prescribed. The Bengal agreement said nothing at all about public use.

In these years, the Government of India vacillated over the amendment of the Act. Debates dragged on year after year, with round after round of inter-governmental consultations. (These were old habits: the laboriousness of the consultations for the 1894 Act had drawn the attention of a French observer.)¹¹⁸ The paltry result more than 15 years after the Indian Industrial Commission's report – and even then only after the prodding of the Royal Commission on Labour¹¹⁹ – was a minor amendment to the Act in 1933 to allow companies to use Part VII to acquire land 'for the erection of dwelling

¹¹⁵ *Gazette of India: Part II* (GoI 1921) 1477.

¹¹⁶ *Gazette of India: Part II* (GoI 1926) 298.

¹¹⁷ *Gazette of India: Part II* (GoI 1925) 861.

¹¹⁸ Joseph Chailley, *Administrative Problems of British India* (William Meyer tr., FAB Publications 1979 [1909]) 402–403.

¹¹⁹ *Report on the Royal Commission on Labour in India* (1930–1931) (Cmnd. 3883, 1919) 291.

houses for workmen...'.¹²⁰ (In a novel extension of Part VII, the same concession was granted to 'industrial concerns' other than companies, but only those that employed at least 100 workmen. That restriction was imposed in response to concerns raised in the Assembly that the new power would be misused by enterprising land-grabbers: 'any small blacksmith or silversmith or anybody [who could] claim the right to have the houses near about his concern', one member worried.¹²¹ That a canny blacksmith or silversmith could avoid that requirement by acting through a closely-held company was not raised as a possibility. As in 1870, companies were treated as a form of business organisation above the suspicion to be levelled at others).

From the outset, officials had anticipated that amending the 1894 Act to allow acquisitions for industry would be fraught with political risk. Since the early 1900s, one official observed in 1920, amendment of the Act had been considered 'likely to involve issues of a controversial nature' and it had been thought 'unwise to tinker with it in any way'¹²² – the same claim that Cameron, Hardinge's Law Member, had made in the mid-19th century.¹²³ Ernest Low, consulted on the matter, expected 'strong opposition' to the proposal from the 'extremist politician', suspicious that new powers would be used mainly for the benefit of Europeans and influenced 'largely by sentimental

¹²⁰ Section 40(1)(a) of the 1894 Act, inserted by s 3 of the Land Acquisition (Amendment) Act (XVI of 1933).

¹²¹ *Legislative Assembly Debates (Official Report): Vol IV (5th September to 19th September, 1932); Fourth Session of the Fourth Legislative Assembly, 1932* (GoI Press 1933) 468–475; *Legislative Assembly Debates (Official Report): Vol I (1st February to 21st February, 1933); Fifth Session of the Fourth Legislative Assembly, 1933* (GoI Press 1933) 258–260; *Legislative Assembly Debates (Official Report): Vol V (22nd August to 4th September, 1933); Sixth Session of the Fourth Legislative Assembly, 1933* (GoI Press 1934) 723.

¹²² 'Notes' in 'Proposed Amendment of the Land Acquisition Act, 1894' (n 27) 2.

¹²³ See 55 above.

considerations', Low wrote.¹²⁴ Some sections of elite Indian opinion were certainly in favour of acquisitions for industry – such as the industrialists on the Commission and many of those who had given evidence – but it must have been feared that Pt. Malaviya's position was the more widely-held.

The fate of the Punjab Purchase of Land Bill 1921 was instructive as to the difficulties that could arise.¹²⁵ The Bill was designed by the Government of Punjab to implement the most modest of the Commission's recommendations in relation to land: the removal of the statutory and customary restrictions on the consensual transfer of agricultural land in the province to a purchaser who proposed to put the land to industrial use. 'No question whatever arises of compulsory acquisition', the mover of the Bill was careful to emphasise. Nevertheless, the *zamindars* in the Legislative Council accused the Government of breaking faith with their class by making it easier for land to be lost to capitalists. That allegation would have been taken extremely seriously, of course. The support of the landholding peasantry had long been considered the bulwark of British rule in the province and the larger *zamindars* the most dependably loyal of subjects.¹²⁶ Even after the Bill was watered down to permit only the 'use and occupation' of land by industry, it had to be dropped.

The turn against industry, or at least against Indian industry, was mirrored in the Punjab Government's grants of land in the Nili Bar canal colony, the last of the great colonies created from desert. On fiscal grounds, the Government declined to follow its past

¹²⁴ 'Notes' in 'Proposed Amendment of the Land Acquisition Act, 1894' (n 27) 8.

¹²⁵ 'The Punjab Land Acquisition (Industrial) Bill (1923)', IOR/L/E/7/1156 – File 1638 (BL)

¹²⁶ Ali (n 72) 63–64, 82–83.

practice of leasing canal land on concessionary terms for agro-capitalist ventures.¹²⁷ In what was perhaps a telling exception, the British Cotton Growing Association – established by Lancashire in 1904 to increase the supply of cotton from the Empire – was allowed to lease large tracts of land in the colony for the cultivation of a crop for export. At one point the Association held nearly 70,000 acres of land in the canal colonies, making it the largest single occupier. In contrast, the Government refused to sanction a proposal to grant 20,000 acres to cultivators who would supply a sugar factory with cane.

The sugar industry was never again allowed the use of the 1894 Act, again because of the fear of antagonising landed interests. The use of Part II to acquire land for Samaldas's Belapur Company – a tactic of dubious legality,¹²⁸ presumably designed to circumvent the June 1920 circular – was never repeated in Bombay or elsewhere. The Indian Sugar Committee, appointed in 1919 to advise on the development of the industry, came out against the use of land acquisition.¹²⁹ Such a practice would reduce peasant-cultivators to tenants compelled, on threat of expulsion, to grow cane for sugar factories, the Committee observed. The paternalist economic justification for doing so – that cultivators would earn better returns to the benefit of all – could be 'carried to very dangerous lengths' in respect of all important crops. The 'logical conclusion' of such

¹²⁷ Ali (n 72) 34–43; WF Tewson, *The British Cotton Growing Association: Golden Jubilee 1904–1954* (British Cotton Growing Association 1954) 15–18, 25–26. For a complaint about the policy of auctioning land in new colonies for industrial purposes, see *Minutes of Evidence: Punjab etc.* (n 54) 172–173.

¹²⁸ Unless the Government had entered into a contract to supply the company with land, thus invoking the s 43 exemption to Part VII.

¹²⁹ *Report of the Indian Sugar Committee 1920* (Government Central Press, Simla 1921) 228–231. The Committee would, however, countenance more limited acquisitions for purposes such as land for factories to grow demonstration crops and seedlings: 130–131, 231–234.

thinking would be that that India would benefit 'if all land were handed over to be exploited by capitalist enterprise'. Such a 'drastic interference with the laws of supply and demand' was not called for. The Committee warned of risks to *ryots*' interests: to ensure continued possession of his land, a *ryot* might be induced to agree to almost any terms proposed by a factory.

The Committee's main concern, however, seems to have been the risk of rural unrest. In a memorable turn of phrase, it said that it could not 'contemplate with equanimity the establishment of factories in the midst of an aggrieved and sullen peasantry'. In a debate in the Council of State on the implementation of the Committee's recommendations, the industrialist and politician Maneckji Dadabhoy voiced the same concern, arguing that it would be 'politically dangerous' to 'depopulate whole villages and send people away'.¹³⁰ 'You will be asking for serious trouble if you uphold and enforce a policy of this kind in this country', Dadabhoy warned. '[We] must know we are not writing on a clean slate', another member observed.

These were old worries, of course. They were of the kind aired by the East India Company in the late 18th century to justify its prohibition, dating from 1766, on the holding of land by British-born subjects (one expression of its general opposition to the large-scale colonisation of India).¹³¹ A leading figure in the Governor-General's Council argued in 1775:¹³²

¹³⁰ *The Council of State Debates (Official Report) Volume II: Second Session of the Council of State, 1921* (Government Central Press, Simla 1921) 273, 276.

¹³¹ Unless otherwise indicated, this paragraph and the next two rely on David Arnold, 'White Colonization and Labour in Nineteenth-Century India' (1983) 11 *Journal of Imperial and Commonwealth History* 133, 134–138. As Arnold explained, the Company was opposed to the settlement of substantial numbers of those for whom India would be a permanent home. The (ctd. on next page)

The soil of right belongs to the natives. Former conquerors contended themselves with exacting a tribute from the lands, and left the natives in quiet possession of them. To alienate them in favour of strangers may be found to be a dangerous as well as an unjust measure.

The perceived danger was to the Company's own interests. Colonists might stir up native opposition to Company rule or themselves rebel, it was feared. If poor, their very presence might diminish the prestige of whites and thereby that of the Company in native eyes. Moreover, it was thought, colonisation might prejudice the efficient collection of land revenue, an increasingly important source of taxation for the Company.

In the early 19th century, to encourage the growth of the plantation industries, the first significant exceptions were made to the 1776 prohibition. In 1824, the Government of Bengal permitted 'Europeans of respectability' to negotiate leases of private land for coffee cultivation in their own name (rather than in the name of Indian intermediaries, as had been the usual practice).¹³³ In 1828, the exception was widened to leases for plantations of any kind. Few planters took advantage of the new provisions, however, apparently because of the stringent conditions attached: the state reserved the right to decide any disputes arising from a plantation lease and to cancel a lease if, for example, a planter breached his obligations to the private lessor.¹³⁴

Company was prepared, however, to allow small numbers of 'sojourners' (mostly planters) to reside in India on a temporary basis. For context, see John Rosselli, *Lord William Bentinck: The Making of a Liberal Imperialist, 1774–1839* (Sussex University Press 1974) 272–297.

¹³² *Report from the Select Committee on the Affairs of the East India Company* (HC 1831–32, Vol XIII) 26, 259.

¹³³ *Select Committee on the Affairs of the East India Company*, *ibid*, 345–347.

¹³⁴ Clauses 17 and 19 of the Resolution of the Government of Bengal dated 7 May 1824, reproduced in *Select Committee on the Affairs of the East India Company* (n 131) 346.

In 1833, on renewing the Company's charter, Parliament went further and wholly overturned the 1776 prohibition by declaring it lawful for 'any natural-born Subject of His Majesty' to 'acquire and hold' land in Company's territory.¹³⁵ That was as far, however, as the authorities would go. It was made clear even to Lancashire at the height of its influence and the hour of its greatest need – when the supply of American cotton was interrupted during the civil war – that the state would not 'interfere with the just rights of the *ryots*[,] who were not merely tenants-at-will of the Government'.¹³⁶

No doubt it was sound policy to leave *ryots* and other landowners undisturbed so far as possible. The acquisition of private land for industry on any significant scale, controversial in any time and place, would have been an especially difficult given the illiquidity of the contemporary market in land. Although land prices rose ahead of inflation from the mid-19th century to the onset of the 1930s depression, the rate of transfers remained low. According to one set of all-India estimates, no more than 0.4% of the area of land changed hands each year in the 1870s, rising only to 1% from the late 19th century onwards. In a separate estimate for Bengal, only 0.5–1% of the area of land under secure cultivation rights changed hands each year from 1882–1945. In a South Indian district in the first decade of the 20th century, the rate was estimated at 1.5–2.2%.¹³⁷ Sales, both consensual and coerced, were slow for various reasons. For

¹³⁵ Section 86 of the Government of India Act 1833 (3 & 4 Will. 4, c. 85), read with s 81.

¹³⁶ Arthur W Silver, *Manchester Men and Indian Cotton 1847–1872* (Manchester University Press 1966) 183–184. The rights of tribal peoples in Assam vis-à-vis the tea industry was another matter, as we have seen.

¹³⁷ Dietmar Rothmund, *An Economic History of India: From Pre-Colonial Times to 1991* (2nd edn. Routledge 1993) 62; Vasant Kaiwar, 'The Colonial State, Capital and the Peasantry in Bombay Presidency' (1994) 28 *Modern Asian Studies* 793, 818–819; Tirthankar Roy, *Company of Kinsmen: Enterprise and Community in South Asian History 1700–1940* (OUP 2010) 203–204.

peasants in *ryotwari* areas, where tenancy rights were relatively unprotected, the purchase and retention of land was a rational subsistence strategy so that land could be held securely across the generations and, crucially, mortgaged when necessary. Where land alienation in favour of superior rights-holders or money-lenders was occurring in politically sensitive regions (e.g. Chota Nagpur or the Punjab), the state intervened with protective legislation. Money-lenders, in any event, usually found it more convenient to keep even hopelessly indebted owners in debt-bondage than to confront the legal and extra-legal means by which foreclosure and eviction was resisted. By the mid-19th century, the state itself had retreated from its policy of selling off *zamindari* estates for land revenue arrears, because of the perceived political value of keeping *zamindars* on the land.¹³⁸ In this context, the taking of land would have been conspicuous and, particularly where industry rather than the state would be the beneficiary, liable to be resented – a point that may not have been fully appreciated by the Indian Industrial Commission and its like-minded witnesses.¹³⁹

Closer in time, a separate but related worry to antagonising the peasantry was the prospect of creating a politically dangerous proletariat if peasants were forced off the land. That fear, Neil Charlesworth argued, explains some of the opposition to two Bills proposed in Bombay in 1918 and 1927 to tackle the problem of fragmented

¹³⁸ Kaiwar, *ibid*; Jacques Pouchepadass, 'Land, Power and Market: The Rise of the Land Market in Gangetic India' in Peter Robb (ed), *Rural India: Land, Power and Society under British Rule* (Curzon Press 1983) 92–93; Elizabeth Whitcombe, *Agrarian Conditions in Northern India: The United Provinces under British Rule, 1860–1900* (University of California Press 1972) 231–232; Oliver Mendelsohn, 'The Pathology of the Indian Legal System' (1981) 15 MAS 823, 844–846. For further factors behind the illiquidity of the market, see Chandavarkar (n 5) 53–54; Roy, *ibid*, 207–208.

¹³⁹ C.f. the argument by David Washbrook that the Raj was paranoid to fear that the capitalist transformation of agriculture would lead to widespread social unrest: 'Law, State and Agrarian Society in Colonial India' (1981) 15 MAS 649, 685–686.

landholdings.¹⁴⁰ The latter Bill would have allowed the Government of Bombay to ‘re-strip’ land if two-thirds of the holders of plots and half of the owners gave their assent. Both Bills were harshly criticised and withdrawn. That same worry was perhaps the real meaning of an observation in 1938 by yet another government-appointed committee in arguing against the use of land acquisition for the sugar industry:¹⁴¹

... if any pressure is put by Government on local occupants to part with their land either by acquisition or by compulsory leasing there will be a storm of opposition and the situation may develop into one of CAPITAL versus LABOUR.

In its reluctance to use coercion to rationalise and industrialise agriculture, Vasant Kaiwar has observed, the Raj ‘behaved more like an agricultural bureaucracy than a capitalist state’.¹⁴² Registering a fiery dissent against this orientation, B. J. Padshah, the Tatas’ man on the 1919 Sugar Committee, defended the Belapur Co. acquisition and denied that *ryots* would be prejudiced if the acquisition was repeated in appropriate cases, as long as certain restraints were observed.¹⁴³ Padshah eviscerated his colleagues for their timidity: ‘Statesmen should not, like my colleagues, behave like shamed-face school-boys in [the] presence of large ideas’, he wrote; ‘they should not change colour as if they were detected growing too big for their boots, and they should not shiver because people criticise those ideas as transformation and not reformation’.

¹⁴⁰ Charlesworth (n 3) 249–250. See, also, Kaiwar (n 137) 796–798.

¹⁴¹ *Report of the Irrigation Inquiry Committee* (Government of Bombay 1938) 38–39 (emphasis in original). Note that during the Depression the Government of Bombay gave some assistance to the industry by leasing and (in one case) purchasing land that was then granted to prospective sugar industrialists on 99-year leases: Kaiwar (n 137) 798–799. No compulsion, however, appears to have been involved: c.f. Attwood (n 68) 73 at n 7.

¹⁴² Kaiwar (n 137) 803.

¹⁴³ *Report of the Indian Sugar Committee 1920* (n 129) 331–337, 356–357. Among the restraints Padshah suggested (at 336) was that land should not be acquired without the consent of a majority of cultivators and villages.

By now, however, even Samaldas had appreciated the strength of opposition to the reformation, let alone the transformation, of the use of the 1894 Act for industry. There had been little opposition to the Belapur Co. acquisition, ‘probably because the *ryots* realised that their economic condition as agricultural labourers will be better than as mere agriculturists’, Samaldas claimed, but there was now a ‘sentimental objection’ to the dispossession of cultivators, he acknowledged.¹⁴⁴ The only way forward for industrialists and agriculturalists would be ‘to be friends and to work together’, he now thought. Perhaps reflecting this change in sentiment, the use of Part II for ‘industrial development’ in Bombay ceased entirely after 1921.

Padshah had thought that government might avoid the risk of disorder because the 1894 Act would only be put into motion by an Indian Minister responsible to an Indian-majority legislative council. However, he had misunderstood the effect of the 1919 reforms. Land acquisition was not one of the subjects transferred under dyarchy. The use of the Act remained under the absolute control of the provincial executives. There had been talk of giving the provincial legislatures some oversight over acquisitions for industries,¹⁴⁵ but it was never contemplated that the provincial executives should cede control over the use of the Act.¹⁴⁶

In contrast, the authorities in London decided to transfer the development of industries to the control of the dyarchic ministers and their departments of industries,

¹⁴⁴ *Council of State Debates Volume II: Second Session, 1921* (n 130) 269–270.

¹⁴⁵ See 222–223 below.

¹⁴⁶ *East India (Constitutional Reforms: Lord Southborough's Committees): Vol II: Report of the [Functions Committee]* (Cmnd 103, 1919) 41. The provincial governments were unanimous that land acquisition should be a ‘reserved’ subject: 68.

constitutionally responsible to the reconstituted provincial legislative councils. This was done in the teeth of opposition by T. H. Holland and other officials in Delhi who were convinced that central coordination was essential to the success of the Indian Industrial Commission's proposals. 'Fancy the Tatas placing their industrial schemes before a temporary political ministers with his friendly and family interests in competing concerns...', Holland wrote, ultimately in vain.¹⁴⁷

Now that the development of industries was split away from land acquisition, companies seeking land faced the challenge of petitioning provincial governments divided against themselves. The clear mandate they had been given by the Commission, however, should have made the departments of industries effective advocates for such acquisitions, notwithstanding the institutional division. As it happened, they were hardly capable of fulfilling that or any other significant role on behalf of industry.¹⁴⁸ 'Transferred' departments like industries were given no new money to carry out their functions. Their expenditure was narrowly watched by the provincial finance departments, which remained on the 'reserved' half of dyarchy.¹⁴⁹ Indeed, funds and staffing were cut in the great retrenchment of 1922.¹⁵⁰ The industries departments suffered disproportionately, for a number of reasons. *Laissez faire* was resurgent now that war was over; the shipping magnate Lord Inchcape, a true believer, was appointed

¹⁴⁷ Dewey (n 31) 242.

¹⁴⁸ Unless otherwise indicated, this paragraph relies on Dewey (n 31) 237–248. See, also, Misra (n 17) 148–149.

¹⁴⁹ KM Panikkar, *The Working of Dyarchy in India 1919–1928* (D. B. Taraporevala Sons & Co. 1928) 72–75; c.f. A Appadorai, *Dyarchy in Practice* (OUP 1948) 175–201.

¹⁵⁰ See, e.g., AZM Iftikhar-ul-Awwal, *The Industrial Development of Bengal 1900–1939* (Vikas Publishing House 1982) 33–39.

to chair the committee charged with devising a scheme of retrenchment. The business community was too divided on the merits of intervention to act as an effective lobby against such cuts: old firms had little to gain from aid to new competitors; the managing agencies were opposed in principle to state aid, all the more so when such aid would embolden their competitors; even Indian industrialists worried that state aid would lead to state control. Within the provincial councils, the landed – whom the 1919 reforms had favoured – lobbied for money for agricultural development and the urban members tended to focus on ‘nation-building’ subjects like education rather than industry.¹⁵¹ In 1924, the Bombay council went so far as to vote to abolish the post of Director of Industries as a retrenchment measure.¹⁵² In a province as populous as Bengal, expenditure on industrial development did not rise above Rs. 1 lakh until as late as 1930.¹⁵³

Deprived of the formal central coordination that the Commission had thought essential and left in the hands of isolated and emaciated departments, the Commission’s recommendations were either implemented badly or not at all.¹⁵⁴ (The only significant exception – the progressive Indianisation of government procurement from the late 1920s – required little of the provincial administrations).¹⁵⁵ The few pioneer factories

¹⁵¹ ‘... a study of the debates in the Councils suggests the observation that Education, Co-operation and Irrigation were highly appreciated, and could generally get all they wanted, but that the Councils looked askance, with varying degrees of suspicion, upon most other expenditure’: Appadorai (n 149) 91.

¹⁵² Bagchi (n 42) 54.

¹⁵³ Iftikhar-ul-Awwal (n 150) Appendix I.

¹⁵⁴ Bagchi (n 42) 55–57; c.f. Vera Anstey, *The Economic Development of India* (3rd edn. Longmans, Green & Co. 1939) 221–226.

¹⁵⁵ Partha Sarathi Gupta, ‘State and Business in the Age of Discriminating Protection’ in Dwijendra Tripathi (ed), *State and Business in India: a Historical Perspective* (Manohar 1984) 185, 187; Tomlinson (ctd. on next page)

started in Madras and elsewhere the early 1920s were badly conceived and soon collapsed. The State Aid to Industries Acts passed by Madras (Act V of 1923) and Bihar & Orissa (Act VI of 1923) were admitted failures, discredited by the default of the largest debtors in each province and, indeed, most of the enterprises to which loans had been made (the latter was also true of a similar scheme in the United Provinces).¹⁵⁶ Another criticism of the Madras State-Aid to Industries Act was its parsimony. Most applicants were refused, some because they lacked assets that could be offered as the required security and others because they were not considered to be engaged in ‘new or nascent’ industries, as the Act required.¹⁵⁷

That latter predicament suggests, by way of analogy, what is perhaps the key reason why so few Part VII acquisitions were agreed upon after the June 1920 circular. Before the circular was issued, as we have seen, the provincial governments went well beyond the bounds of the Commission’s three-part criteria. After the circular, however, the provincial governments appeared to have been chastened into acceding only to acquisitions that could be said to fall uncontroversially within the criteria: only three applicants, engaged in chemicals, copper, and iron respectively, succeeded. The truth was that, throughout the 1920s, there remained few other companies that could meet those criteria. There was some growth and diversification away from the established industries during the period towards new manufacturing industries (safety-matches,

(n 41) 134–135.

¹⁵⁶ Saroy Kumar Basu, *Industrial Finance in India* (University of Calcutta 1939) 197–215, 224–235.

¹⁵⁷ Nasir Tyabji, ‘State Aid to Industry: Madras 1921–37’ (1988) 23 EPW 52–54. The first of those criticisms was also made against the Bengal State Aid to Industries Act (Bengal Act III of 1931), designed to aid small-scale and cottage industries: AZM Ifthikar-Ul-Awwal, ‘Genesis and Operation of the Bengal State Aid to Industries Act, 1931’ (1980) 17 IESHR 409.

cement, paper, and glass) but only at a slow pace, particularly after the end of the post-war boom of 1920–1922.¹⁵⁸ Many enterprises – including those allocated land at Jamshedpur – never materialised; many of those that did had only a short life.¹⁵⁹ The production of nearly every sector of manufacturing industry (apart from cotton) continued to represent the efforts of one or at most a few companies.

In addition to the exogenous influence of foreign competition, the domestic barriers to establishing or entering new industries – high capital costs, the scarcity and price of capital willing to take considerable risks for a long period, the low productivity and skill-level of labour, problems of technology and marketing, slow-growing demand for many products, and, perhaps, ‘entrepreneurial failure’ – remained as formidable as ever.¹⁶⁰ Of course, even the perfect implementation of the Commission’s recommendations would not have conjured an industrial revolution. Rajat K. Ray, for instance, has argued that supply-side constraints could have been broken only by ‘massive social overhead investment in irrigation, power supply, transport, education and other infrastructural

¹⁵⁸ Morris (n 22) 624–640; Ray (n 22) 40–47, ch 3; Bagchi (n 42) ch 10–13.

¹⁵⁹ Bagchi (n 42) 438.

¹⁶⁰ Morris (n 22) 632; Ray (n 22) ch 4; PS Lokanathan, *Industrial Organisation in India* (George Allen & Unwin 1935) 154, 164; Dewey (n 31) 251. Such barriers help to explain why the interventionist industrial policies pursued by a few of the larger princely states met with only scattered success, although the impact of British Indian policy must be taken into account: Barbara N Ramusack, *The Indian Princes and Their States* (CUP 2004) 197–201; CV Subbarao, ‘Role of the State in Industrialization: The Case of Hyderabad’ in Sabyasachi Bhattacharya et al (eds), *South Indian Economy: Agrarian change, industrial structure and state policy c. 1914-1947* (OUP 1991); John Hurd II, ‘The Influence of British Policy on Industrial Development in the Princely States of India, 1890–1933’ (1975) 12 IESHR 409. The subject cannot be taken up here, but see the following sources for references to states supplying industrialists with ‘cheap’ or ‘free’ land: Dietmar Rothermund, ‘The Industrialization of India: Technology and Production’ in BB Chaudhuri (ed), *History of Science, Philosophy and Culture in Indian Civilization: Volume VIII, Part 3; Economic History of India from Eighteenth to Twentieth Century* (Centre for Studies in Civilizations, New Delhi 2005) 452; George B Baldwin, *Industrial Growth in South India* (Free Press 1959) 85, 108, 110; Hurd, ‘The Influence of British Policy’, 414.

facilities', precisely the facilities that would also stimulate demand.¹⁶¹ However, Dewey suspects, proper implementation would have made a substantial difference to the pace of industrialisation.¹⁶² Instead, as A. K. Bagchi observed, 'the twenties were a period of waiting for the growth of Indian industrial capitalism'.¹⁶³

The disparity between 'British' and 'Indian' companies

Given this context, it is probable that the disproportionate degree to which Part VII was used for 'British' companies engaged in industry was not the direct result of racial favouritism. It was unusual for authorities to overtly favour British companies over their Indian competitors¹⁶⁴ (the shipping industry was a major exception, as we shall see in Chapter 5).¹⁶⁵ It was more common for the same end to be achieved, intentionally or otherwise, by the application of apparently rational and even-handed policies: e.g. the allocation of railway wagons to collieries on ostensibly economic lines, a policy that

¹⁶¹ Ray (n 22) 231. C.f. Bagchi (n 42) 426.

¹⁶² Dewey (n 31) 240.

¹⁶³ Bagchi (n 42) 438.

¹⁶⁴ Ian MD Little, 'Indian Industrialization before 1945' in Mark Gersovitz et al (eds), *The Theory and Experience of Economic Development: Essays in Honour of Sir W. Arthur Lewis* (George Allen & Unwin 1982) 365–366; c.f. Ray (n 22) 121–122, 243; Bagchi (n 42) 165–170.

¹⁶⁵ At 189 below. Another example of an exception, which may or may not have been typical, was the difficulty that the Bengali industrialist Rajendranath Mukherjee faced in winning public contracts until he took on a British partner: Amiya Kumar Bagchi, 'European and Indian Entrepreneurship in India, 1900–1930' in Edmund Leach and SN Mukherjee (eds), *Elites in South Asia* (CUP 1970) 226–227.

advantaged the kind of collieries that were exclusively British-owned and thus gave rise to suspicions that it was designed to do so.¹⁶⁶

In land acquisition, *laissez faire* could be left to do its work. Without an industrial policy worthy of the name, a colour-blind approach on land acquisition generated results that reflected the dominance of British industrial capital. That could not be admitted publicly, of course. When the disparity was raised in the Bengal Legislative Council in 1920, the responsible member gave an assurance that the Government of Bengal would ‘emphatically welcome an extension of the profitable employment of Indian capital in commerce and industry’ but that few Indian firms had taken the initiative to seek land under Part VII.¹⁶⁷

Indeed, the member continued, the disparity was less troubling than it seemed: several successful applicants had offered their capital for subscription in India and so should be considered envoys of Indian capital. That was surely too lenient a standard. The Indianisation clause in the Kelkar Bill at least demanded that a company actually had ‘among its shareholders a majority of Indian shareholders’. Yet even this was not strict enough to ensure that a majority of profits would remain in India or that the company would be Indian-controlled, presumably among the goals of such a provision. There was an obvious loophole: just because a company had a majority of Indian shareholders, it

¹⁶⁶ Ratna Ray and Rajat Ray, ‘European Monopoly Corporations and Indian Entrepreneurships, 1913–1922: Early Politics of Coal in Eastern India’ (1974) 9 *Economic and Political Weekly* M-53.

¹⁶⁷ *Proceedings of the Bengal Legislative Council: January to December 1920* (Bengal Secretariat Book Depot 1921) 286–290.

did not follow that Indian shareholders held a majority of shares and so a controlling interest.

Kelkar's alternative criterion that a majority of directors were to be Indian also missed the point. The racial composition of the managing agency, still ubiquitous as an institution,¹⁶⁸ was the key marker of control. This was recognised by Gandhi in the late 1930s when asked by representatives of the Indian shipping industry whether a 'foreign company' could 'call itself Indian only on the basis of having some Indians on its Board of Directors'.¹⁶⁹ The 'foreign company' concerned was the Bombay Steam Navigation Co., then engaged in a rate war with its unmistakably Indian rivals. The company claimed that it was as *swadeshi* as its competitors because it had both Indian shareholders and directors. In a ruling later endorsed by the Congress Working Committee, Gandhi found against the company, holding that it was decisive that it remained under the control of white managing agents (Killick Nixon & Co.).

Consider the position of a sterling company that required access to the 1894 Act if the Kelkar Bill had become law. As we have discussed,¹⁷⁰ its almost invariably all-white managing agency could simply re-incorporate the company in India and stack its board with pliant Indian directors, thus satisfying the Bill's criteria while preserving the agency's absolute control. Rupee companies were less likely to be under the control of an all-white managing agencies but, despite the steady Indianisation of company boards in the

¹⁶⁸ Goldsmith (n 7) 54–55.

¹⁶⁹ NG Jog, *Saga of Scindia 1919–1969* (The Scindia Steam Navigation Co, Ltd 1969) 95–100.

¹⁷⁰ See 178–179 above.

1920s,¹⁷¹ in 1927 just under half of such companies were managed by agencies that did not have a single Indian as a partner.¹⁷²

Naturally, there were borderline cases under either standard. Some companies, examined closely, were not obviously 'Indian' or 'British'. Take the Bengal Iron and Steel Company and the Indian Iron and Steel Company. Both were sterling companies and so classified as 'British' under Kelkar's criteria. Both, however, were managed by the only agency with an Indian as a partner, indeed a senior partner (Rajendranath Mukherjee in Martin Burn & Company).¹⁷³ In an opposite case, the Buckingham Mill Company, classified as 'Indian' under Kelkar's criteria because it had a majority Indian board, was managed by Binny & Co., an all-white agency.¹⁷⁴ To complicate that case further, Gandhi was persuaded during the boycott movement of the early 1930s that Binnys' mills were basically *swadeshi* because their market, supplies, and workforce were Indian.

Nevertheless, over the run of cases, the managing agency criterion more accurately distinguished between 'British' and 'Indian' companies. No doubt the point would have been picked up had the Kelkar Bill been forwarded to a select committee. On any standard, however, the disparity would be striking.

¹⁷¹ MM Mehta, *Structure of Indian Industries* (2nd edn. Popular Book Depot 1961) 333, 340–341.

¹⁷² Ray (n 22) 51. See, respectively, for the numbers in earlier and later periods: BR Tomlinson, *The Political Economy of the Raj 1914–1947: The Economics of Decolonization in India* (Macmillan 1979) 53–55; Bagchi (n 42) 176–179.

¹⁷³ Misra (n 17) 75, 133; Dwijendra Tripathi, *Historical Roots of Industrial Entrepreneurship in India and Japan: A Comparative Interpretation* (Manohar 1997) 112.

¹⁷⁴ Tripathi (n 96) 134, 215–216.

The puzzle deepens: the debate on the Steel Industry (Protection) Bill

In addition to the failures in industrial policy, a further reason for the continuing disparity in land acquisition between 'British' and 'Indian' companies might have been that protective tariffs, the policy that would have such a powerful effect in the 1930s, were yet to be deployed widely.¹⁷⁵ While the 1919 reforms had the incidental effect of blocking the implementation of an interventionist industrial policy, an accompanying development – the concession of 'fiscal autonomy' to the Government of India, partly in the hope that it would accede to a scheme of imperial preference – had enabled the introduction of an interventionist tariff policy. Now at last in a position to conciliate Indian political opinion on one of the sorest of economic grievances, the Government of India appointed an expert committee – the Indian Fiscal Commission (1921–22) – and accepted its two key recommendations. First, that the question of imperial preference would be left to be decided by the Legislative Assembly as and when it arose. Second, that a policy of 'discriminating protection' would be followed: tariff protection would be given to those domestic industries with 'natural advantages' that would eventually be capable of facing world competition alone after being assisted temporarily with protection, without which they would not develop at all or as rapidly as desirable.

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This discussion relies on Clive Dewey, 'The End of the Imperialism of Free Trade: The Eclipse of the Lancashire Lobby and the Concession of Fiscal Autonomy to India' in Clive Dewey and AG Hopkins, *The Imperial Impact: Studies in the Economic History of Africa and India* (Athlone Press 1978); Basudev Chatterji, *Trade, Tariffs and Empire: Lancashire and British Policy in India 1919–1939* (OUP 1992) ch 4; Gupta (n 155) 157–187; Sunil Kumar Sen, *Studies in Economic Policy and Development of India (1848–1926)* (Progressive Publishers 1966) 118–125.

Before the onset of the depression, however, protection had been granted on only a few occasions. Only the first was of more than marginal significance.¹⁷⁶ As in land acquisition, TISCO was the pioneering beneficiary. Losing money rapidly because of the dumping of continental steel on the domestic market after the war, the company turned to the authorities and was obliged in 1924 with a three-year protective tariff under the Steel Industry (Protection) Act (XIV of 1924). Conditions deteriorated further, however, and in late January 1927 the authorities introduced a second Steel Industry (Protection) Bill to maintain protection for a further seven years. There would be, however, one crucial and controversial change: a scheme of ‘differential duties’ that had the effect – but not the intention, authorities insisted – of favouring British steel over continental steel. Denying any intention to favour the British industry, the authorities maintained that the preference could be justified on economic and practical grounds.

However, suspecting that differential duties were the thin end of the wedge of imperial preference, the Swarajists and Nationalists united against the Bill. In the course of debates held from late January to mid-February, all of their stalwarts – Motilal Nehru, Srinivas Iyengar, Pt. Malaviya, Lajpat Rai, Birla, and Jayakar – rose to speak in opposition.¹⁷⁷ Memorably, Nehru was willing to sacrifice even TISCO rather than yield to the introduction of imperial preference. ‘Whatever be the advantage of the Bill’, he said, ‘I would rather have twenty Tatas go by the board than consent to the principle which introduces any Imperial Preference or British Preference into the tariff of our

¹⁷⁶ Bagchi (n 42) 346–347, 396–397; Wagle (n 91); 47–50; Sen (n 30) 47–50.

¹⁷⁷ *The Legislative Assembly Debates (Official Report): Volume I (19th January to 21st February, 1927); First Session of the Third Legislative Assembly, 1927* (GoI Press 1927) 104–144, 746–785, 890–939, 988–1007, 1059–1115.

country'.¹⁷⁸ Astonishing though it was, given the degree to which TISCO was regarded as a national institution, the sentiment was reflected in the final vote. On 21 February, the Bill was passed by a margin of only 52 votes to 40 to cries of 'shame'. Indeed, the Bill would have been defeated if Jinnah, unconvinced that imperial preference was at issue, had not led his Independents to vote in favour.

Just a week earlier, however, Kelkar's Bill had been consigned to failure when nobody, not even his fellow Nationalists, stood up to the determined attack from the government benches. This was a missed opportunity not only to force the nationalisation of the sterling railway companies, but also to reaffirm Indian opposition to imperial preference. Although the definition of 'company' in the 1894 Act had not been devised with that principle in mind,¹⁷⁹ it had the same effect by excluding all foreign companies except those registered in Britain. Kelkar's proposal to exclude sterling companies would have removed any semblance of British advantage. The choice presented to all foreign companies would be to re-incorporate in India – or at least establish an Indian-registered subsidiary – or lose access to acquired land.

While the exclusion of sterling companies would have been unthinkable at the height of the Raj, by the inter-war years sterling capital had considerably weakened as a political force.¹⁸⁰ Although still very large in absolute terms and dominant in the old industries, it

¹⁷⁸ Ibid 907.

¹⁷⁹ See 84–86 above.

¹⁸⁰ This paragraph and the next rely on Ray (n 22) 41–53, 262–272; *Report of the Indian Fiscal Commission* (n 16) 159; Misra (n 17), 56–60, 86–103, 124–136; Tripathi (n 96) 219; Omkar Goswami, 'Then Came the Marwaris: Some Aspects of Changes in the Pattern of Industrial Control in Eastern India' (1985) 22 IESHR 225, 231–234; BR Tomlinson, 'Foreign Private Investment in India 1920–1950' (1978) 12 MAS 655.

was relatively stagnant as a category. Whereas paid-up rupee capital had tripled from 1914–15 to 1926–7, paid-up sterling capital only doubled. To a large degree, this was probably because of economic incentives for sterling companies to re-incorporate in India: that is, the rises in both British income tax rates and in Indian tariff barriers. Though only of minor importance at this stage, a contributory factor may have been the reluctance of the Calcutta managing agencies to diversify into new industries, ceding opportunities for growth to Indian competitors and multinationals.

Another reason for the decline in the political influence of sterling capital was the straining of the relationship between the managing agencies of sterling companies and the authorities over the issue of race. Whereas the state had capitulated to nationalist opinion by submitting to the greater Indianisation of the services, the Calcutta agencies remained immovably opposed to racial integration in both the public and private sectors. Marwaris were taken on as directors of their jute companies only because they forced their way in as shareholders. In contrast to the slow but steady Indianisation of rupee capital in the 1920s, the whiteness of sterling capital was by now an anachronism.

A measure of how much had changed was the affirmation in the Assembly in 1922 that it was the ‘settled policy’ of the Government of India that:¹⁸¹

... no concession should be given to any firms in regard to industries in India, unless such firms have a rupee capital, unless such firms have a proportion, at any rate, of Indian directors, and unless such firms allow facilities for Indian apprentices to be trained in their works.

¹⁸¹ Quoted in the *Report of the Indian Fiscal Commission* (n 16) 161.

The Madras and Bihar State Aid to Industries Acts of 1923 were drawn on exactly these lines. The policy was reaffirmed by two expert committees that considered the issue (the Indian Fiscal Commission and the External Capital Committee of 1925).¹⁸²

Surely, one could argue, the grant of acquired land was as much of a ‘concession’ as those that could be given under the 1923 Acts, such as loans or guarantees?¹⁸³ Measured against the ‘settled policy’ of the Government of India, Kelkar’s proposal to force land-seeking companies to incorporate in India was not particularly controversial, nor was his related proposal to force their partial Indianisation.

Naturally for a follower of Tilak, Kelkar was deeply committed to *swadeshi*: he acceded to the non-cooperation resolution at the Calcutta Congress of September 1920 only after Gandhi included a request to merchants to withdraw gradually from foreign trade; he was on the committee that devised the boycott of imports after the session at Nagpur in December 1920; in the pages of the *Kesari* and *Mahratta*, he preached *swadeshi* and celebrated the achievements of Maharashtrian industrialists; indeed, he went further by acting as the patron of *swadeshi* banking, insurance, glass, and sugar companies.¹⁸⁴ However, Kelkar’s economic nationalism remained as pragmatic as his politics. Content to demand only that land-seeking companies were at least half-Indianised, he did not go

¹⁸² Section 5(2) of the 1923 Act; *Report of the Indian Fiscal Commission* (n 16) 160–161.

¹⁸³ See, by way of analogy, the ‘Minute of Dissent’ to the *Report of the Indian Fiscal Commission* (n 16) 201–204. See, also, the comment by the Collector of Benares on the Kelkar Bill at IOR/L/E/7 – File 1126 (BL) at Paper No. I, 18, that the proposal had precedents in the State Aid to Industries Acts and therefore was less objectionable than other aspects of the Bill.

¹⁸⁴ Judith Brown, *Gandhi’s Rise to Power: Indian Politics 1915–22* (CUP 1972) 294; BR Nanda, *Gandhi: Pan-Islamism, Imperialism and Nationalism in India* (OUP 1989) 264; Sudhakar Trimbak Naigaonkar, ‘N.C. Kelkar: A Political Study’ (PhD thesis, University of Poona 1979) 208, 263; ‘A Good Cause: Helping Indian Industries’, *The Times of India* (14 Sep 1926) 15; ‘Revered Maharashtra Leader Dead: N. C. Kelkar’, *The Times of India* (15 Oct 1947) 7.

anywhere as far as the two Professors of Wilson College, Bombay, who suggested in 1927 that there should be a legislative ban on companies with foreign shareholders.¹⁸⁵

Of course, as Kelkar would have understood, his proposals were no guarantee that companies would be more likely to act in Indian interests by, say, avoiding the acquisition of heavily-populated land. Especially after Mulshi, he – unlike Samaldas – could hardly think that Indian lions could be trusted to lie down with Indian lambs. Yet the Indianisation of industry was surely a worthy cause in and of itself, precisely the kind of cause that we would have expected Kelkar's colleagues, Swarajist and Nationalist, having united against imperial preference, to have supported. To have given up not only that but also the opportunity to nationalise the railways must have meant that they had serious reservations about proposals in Kelkar's Bill other than Indianisation, we are driven to conclude.

Conclusion

The inter-war years saw the first rounds of modern debates on land acquisition for industry. Until 1919, with only one significant exception (the acquisition for Jamshedpur), the Raj did not regard it in its interests to use the Act for the benefit of industry. Imperial priorities told against departures from *laissez faire* that might be seen as threats to metropolitan capital and landed interests. For a short period after the war, however, imperial priorities shifted so that acquisitions for industry were countenanced, to the delight of Indian industrialists who had complained of how difficult it was to

¹⁸⁵ PA Wadia and GN Joshi, *The Wealth of India* (MacMillan and Co. 1927) 394.

secure access to land. However, the realignment of those priorities after 1920 and the apprehension of rural unrest swiftly brought the practice to an end.

An imperfect adherence to the law allowed these shifts in policy despite the constancy of the law. When the law and imperial priorities pulled in the same direction, the former was cited to justify the latter. When they were seen to diverge, the law was subordinated. When that perception was reassessed so that law and imperial priorities dovetailed once more, the law was again relied upon to play a justificatory role. That is not to say that the law itself exerted no restraining force. It is to say, however, that contrary to the boast by Fitzjames Stephen (the Law Member a generation earlier) that the law gifted by Britain to India was a ‘compulsory gospel’ that admitted of ‘no dissent and no disobedience’,¹⁸⁶ the force exerted by the law was not always sufficient to overwhelm other imperatives.

¹⁸⁶ J Fitzjames Stephen, ‘Legislation under Lord Mayo’ in WW Hunter, *A Life of the Earl of Mayo, Fourth Viceroy of India (Vol II)* (2nd edn, Smith, Elder & Co. 1876)

Law Reform, Propaganda, Government

The Failure of the Kelkar Bill

... whose freedom are we particularly striving for, for nationalism covers many sins and includes many conflicting elements? There is feudal India of the princes, the India of the big zamindars, of small zamindars, of the agriculturalists, of the industrialists, of the bankers, of the lower middle class, of the workers. There are the interests of foreign capital and those of home capital, of foreign services and home services. The nationalist answer is to prefer home interests to foreign interests but beyond that it does not go. It tries to avoid disturbing the class divisions or the social *status quo*. It imagines that the various interests will somehow be accommodated when the country is free. Being essentially a middle class movement, nationalism works chiefly in the interests of that class. It is obvious that there are serious conflicts between various interests in a country, and every law, every policy which is good for one interest may be harmful for another.

– Jawaharlal Nehru, ‘Whither India?’ (1933) in his *Recent Essays and Writing on the Future of India, Communalism and Other Subjects* (Kitabistan 1934) 4

Scathing of the Kelkar Bill and anxious that it might be passed by the Assembly, officials disparaged the Bill as mere propaganda against the Raj. The Bill was no more than ‘a pamphlet or libel masquerading in Bill form’, the Collector of Ganjam argued.¹ His counterpart in Madras suggested that the Bill was a ‘political gesture rather than a genuine attempt to improve the law and machinery of land acquisition’.² Kelkar, on the other hand, conceived of his Bill as more or less a straightforward exercise in law reform, offering ameliorative proposals with immanent rational appeal. ‘The Bill, without impairing the usefulness or the efficiency of the Act in any material particular, only helps

¹ IOR/L/E/7 – File 1126 (BL): Paper No. IV at 16. This file contains 17 printed sets of opinions organised into four separate ‘Papers’. It is to the numbered pages of these four Papers (I, II, III and IV), rather than individual opinions, to which reference will be made hereafter.

² Paper No. III at 27.

to make its operation less unpopular became more equitable', he declared in the Statement of Objects and Reasons appended to the Bill. The Indianisation clause was bound to attract criticism, Kelkar would have known, but, as we have seen, it had precedents in provincial legislation.³

If the nationalist bloc in the Assembly had conceived of the Kelkar Bill in either of those two ways, it would have supported the passage of the Bill. Nationalist legislators had shown themselves willing to support private member's Bills that represented either an attempt at law reform (e.g. Kelkar's Societies Registration Bill (1927))⁴ or bare propaganda against the Raj (e.g. the Haji Bill (1928), discussed below). However, it is argued, they would have recognised Kelkar's Bill as quite different in character: as an attempt to impose on the nationalist bloc the burden of government over an issue of public policy as controversial as land acquisition, with all the risks of division that would entail. The Bill's proposals, particularly those intended to democratise the practice of land acquisition, threatened to break the golden rule of nationalist strategy: that, above all, anti-imperialist unity had to be preserved. That, it is suggested, best explains the absence of the nationalist support for the Bill.

Propaganda: the Haji Bill

We begin by looking closely at the Haji Bill, a private member's Bill introduced into the Legislative Assembly in March 1928, a month after Kelkar withdrew his Land

³ See 184 above.

⁴ See 29 above.

Acquisition (Amendment) Bill. In a telling contrast to the fate of Kelkar's Bill, the Haji Bill attracted the open and unequivocal support of the nationalist movement for reasons that merit close examination.

One obvious advantage of the Haji Bill over the Kelkar Bill was that it drew the simplest and most attractive of battle lines: between a champion of Indian industry and a metropolitan rival whose villainy, aided by the Raj, was unusually clear. 'It was, as it was never before, a precise alignment of India vs. Britain', a historian of the affair observed.⁵

With the connivance of officials, the two major British shipping companies operating in Indian waters – the British India Steam Navigation Co. ('BI') in coastal shipping and the Peninsular & Oriental Steam Navigation Co. ('P&O') in the overseas trade – used the power of their respective monopolies to see off successive Indian rivals. Tata's competitor to the P&O was wound-up in 1894 after a brief rate war in which the Secretary of State, petitioned by Jamsetji Tata, refused to intervene. The Swadeshi Steamship Co., founded in 1906 by the South Indian Tilakite Chidambaran Pillai, survived a rate war with the BI, but was sabotaged by officials who held up the clearance of its ships, deterred customers, and harassed its office staff. The final blow was Pillai's imprisonment in 1908 on a widely-criticised charge of sedition.

⁵ Asoka Mehta, *Indian Shipping: A Case Study of the Working of Imperialism* (N. T. Shroff 1940) 91. In addition to the Mehta text, the following account of the Bill draws on these additional sources: SN Haji, *Economics of Shipping: A Study in Applied Economics* (S. N. Haji 1924) 363–398; Michael Kidron, *Foreign Investments in India* (OUP 1965) 16–17; GD Khanolkar, *Walchand Hirachand: Man, His Times and Achievements* (Walchand & Company 1969) 56–78, 171–241; NG Jog, *Saga of Scindia 1919–1969* (The Scindia Steam Navigation Co. 1969) 9–86; Frank Broeze, 'Underdevelopment and Dependency: Maritime India during the Raj' (1984) 18 *Modern Asian Studies* 429; Rajat K Ray, *Industralization in India: Growth and Conflict in the Private Corporate Sector 1914–47* (OUP 1979) 93–115; Medha M Kudaisya, *The Life and Times of G. D. Birla* (OUP 2003) 120, 145, 147–148.

Tacitly protected by the state and awarded lucrative public contracts, the two ‘flagships of imperialism’⁶ continued to dominate shipping in India, despite the growth of Indian capital in other fields. They grew even stronger on their merger in 1914 and the installation of the powerful Lord Inchcape as chairman. Only the Scindia Steam Navigation Co., co-founded in 1919 by the maverick industrialist Walchand Hirachand, survived a rate war and other dirtier tactics by the BI for long enough to extract an entente from the Inchcape companies in 1923, although one on their terms: in exchange for the right to continue to exist, the Scindia company had to confine itself to coastal shipping and constrain the growth of its fleet for ten years.

Resentful of the entente, which he once called a bond of slavery, Hirachand opened up a political front in the battle against the Inchcape companies. The company sponsored the election to the Legislative Assembly of S. N. Haji, a senior Scindia manager. In March 1928, Haji introduced a Bill to reserve coastal shipping for majority Indian-owned vessels in increments over a five-year period.⁷

Though simple in the ends it sought, the Bill showed sophistication in its means. Whereas the Indianisation clause in the Kelkar Bill could easily have been evaded, as we have seen,⁸ the equivalent in the Haji Bill covered its bases. The clause provided that by the fifth year from its enactment coastal shipping would be reserved to tonnage in which ‘British Indian subjects’ had a ‘controlling interest’, meaning:⁹

⁶ Broeze, *ibid*, 444.

⁷ Reservation of the Coastal Traffic of India Bill 1928.

⁸ See 178–179 above.

⁹ Sections 2(3) and 9.

- (a) that the title to not less than 75 per cent of the stock is vested in British Indian subjects free from any trust or fiduciary obligation in favour of any person other than a British Indian subject.
- (b) and that in the case of a Joint-Stock company, corporation or association, the Chairman of the Board of Directors and not less than 75 per cent. of the number of members of the Managing firm of and of the Directors of the Board are British Indian subjects[s],
- (c) and that not less than 76 per cent. of the voting power is vested in British Indian subject[s],
- (d) and that through any contract or understanding it is not arranged that more than 25 per cent. of voting power may be exercised, directly or indirectly, on behalf of any person who is not a British Indian subject,
- (e) and that by any other means whatsoever control of any interest in excess of 25 per cent. is not conferred upon or permitted to be exercised by any person who is not a British Indian subject.

Rather cannily, the Haji Bill also supplied a technical defence against any allegation of racial discrimination. In contrast to the unambiguously racial distinctions drawn by the Kelkar Bill, the Haji Bill allowed its supporters to say that even the expatriate British could benefit from reservation if they submitted to British Indian subjecthood (presumably by declaring the subcontinent to be their permanent place of domicile).¹⁰ Of course, given the stigma attached to the ‘domiciled community’ of poor whites in India, few would deign to do so.¹¹ Usefully, there were precedents for the use of nationality as a protectionist device in shipping: the white Dominions reserved their coastal shipping for their nationals; until 1849, Britain itself defused the competitive threat from India-registered shipping by declaring that Indian seamen were not British

¹⁰ In the eyes of common law, all Indians born in British India were British subjects, although of course that was no guarantee of equal treatment throughout the Empire: Hugh Tinker, *Separate and Unequal: India and the Indians in the British Commonwealth, 1920–1950* (University of British Columbia Press 1976); Reiko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (Frank Cass 2003) 29–30, 41–42; Niraja Gopal Jayal, *Citizenship and its Discontents: an Indian History* (Harvard University Press 2013) 27–36. We can presume that the term ‘British Indian subject’ in the Haji Bill was shorthand for a British subject domiciled in India. For the argument that the Bill was not racially discriminatory because ‘Europeans’ could simply become ‘Indian nationals’, see Lala Lajpat Rai’s speech on the Bill: *Legislative Assembly Debates: Official Report: Vol III: Third Session of the Third Legislative Assembly, 1928* (GoI Press 1928) 1143–1145.

¹¹ Satoshi Mizutani, *The Meaning of White: Race, Class, and the ‘Domiciled Community’ in British India 1858–1930* (OUP 2011).

subjects for the purposes of the Navigation Acts and so could not serve on the India-Britain passage; British authorities initially refused Scindia the right to purchase British-built ships on the grounds that the promoters of the company were foreign nationals for the purpose of wartime regulations still in force.

Again in contrast to the Kelkar Bill, the Haji Bill had the potential to further an ulterior end even if it never become law. Naturally, the introduction of coastal reservation would have delighted the Scindia company as its main beneficiary, but as a columnist in the *Capital* observed:¹²

The brutal truth is, that on such an issue, Argument is subordinate to Power. The Legislative Assembly may pass Mr Haji's Bill ... but it is highly improbable that his Bill will reach the Statute Book unless and until India attains Dominion Status.

As Hirachand understood, however, even a glorious defeat could strengthen his hand against Inchcape in Scindia's efforts to renegotiate the 1923 entente. He wrote to his colleagues in 1925:¹³

This Bill is the salvation of the Scindia company from every point of view. If anything is going to frighten, or rather straighten, Inchcape, it is the passage or at least the agitation for this Bill. All possible "noise" should be made, and I would consider money on this "propaganda" as money well spent.

Quite some noise was made in favour of the Bill, in a campaign described at the time as a 'triumph of propaganda, persistent, well organised and well directed'.¹⁴ The Indian press came out firmly in favour of the Bill, along with every major Indian commercial

¹² Mehta (n 5) 78.

¹³ Khanolkar (n 5) 215.

¹⁴ *Capital* (Calcutta, 22 August 1929), quoted in Kudaisiya (n 5) 120.

association.¹⁵ Although Hirachand was not particularly close to the Congress – he would stand against the party in the 1934 elections to the Assembly¹⁶ – the nationalist movement united behind the Bill. Rallied behind the scenes by Scindia officials, the Congress passed resolutions for the passage of the Bill. Swarajist and Nationalist leaders in the Assembly declared their unqualified support.¹⁷ After denying that the Bill was racially discriminatory, Motilal Nehru and Lajpat Rai took the opportunity to impugn the entire political and economic status quo with the same charge of discrimination. Lajpat Rai argued:¹⁸

There is discriminatory legislation even in the Reforms that were introduced in 1919 ... We cannot be sure of carrying this measure through even if we pass it at this stage, *i.e.*, of enacting it into law. Is this not racial discrimination, is this not discriminatory legislation? For those gentlemen over there to accuse us of discriminating legislation against them is absurd. The whole of their activities, the whole of their trade in this country, is based on discrimination. One comes across discrimination on the railways, discrimination in ships, discrimination everywhere, all down the line.

Denying the allied charge that the Bill was confiscatory, G. D. Birla – who campaigned for the Bill with energy and skill¹⁹ – argued that if the Inchcape companies considered the ‘organised killing of the Indian trade’ a proprietary right, it was one that should be taken away immediately. In a great coup, Gandhi himself was persuaded to take up

¹⁵ ‘Indian Commercial Opinions on the Bill for the Reservation of the Coastal Traffic of India introduced in the Indian Legislative Assembly by Mr. Sarabhai N. Haji, M.L.A.’ (Indian Shipping Series Pamphlet No. 9, 1928). The only note of dissent among these opinions was that of the Bengal National Chamber of Commerce, which recommended a ten-year transition to full reservation.

¹⁶ Claude Markovits, *Indian Business and Nationalist Politics 1931–1939: The Indigenous Capitalist Class and the Rise of the Congress Party* (CUP 1985) 39, 209; c.f. Khanolkar (n 5) 342, 345–348.

¹⁷ *Legislative Assembly Debates: Vol III* (n 10) 721–729, 1124–1131, 1142–1148.

¹⁸ Ibid 1144.

¹⁹ Kudaisiya (n 5) 120.

Scindia's cause. Despite his doubts about 'anything substantial being done under the existing system through legislative effort', he campaigned for the Bill in *Young India*.²⁰

Naturally, the Government of India opposed the Bill, putting itself in the uncomfortable position of dissenting from a committee it had appointed a few years earlier that had come out in favour of the principle of coastal reservation. Characterising the Bill as 'the test case on which the whole fabric of British industries in India depends', the Commerce Member argued:²¹

It is the principle of discriminatory legislation that we fear. The parties behind this Bill have to-day cast their greedy eyes on shipping. To-morrow others may cast jealous eyes on tea, coffee, oil, anything else you like. ... The principle of the Bill is confiscation of the deepest dye. Worse than anything any socialist Government in any part of the world would ever dream of.

Despite the strength of official opposition, the campaign for the Bill won a famous preliminary victory. In September 1928, the motion to refer the Bill to a Select Committee passed by 71 votes to 42, a handsomer margin than any private member's Bill or resolution to date. By such a motion, the Assembly was considered to be committed to the principle of the Bill.²²

²⁰ Jog (n 5) 67.

²¹ *Legislative Assembly Debates: Vol III* (n 10) 718–719.

²² See 40 above.

The imperative of unity

As it happened, the Haji Bill was overtaken by the civil disobedience movement. Gandhi went so far as to demand the passage of the Bill in his eleven-point ultimatum to Irwin of January 1930, but the Bill lapsed when the onset of the movement shortly afterward spurred the resignation of Haji and other legislators. While the battle was lost, Scindia began to win the war. In 1933, the Government of India brokered a new entente between the companies that was considerably more favourable to Scindia.²³

Coastal reservation, however, was ruled out by a prohibition in the 1935 constitution on legislation discriminating against British-registered ships.²⁴ This was the only provision in the new constitution that gave protection to a particular industry over and above the general prohibitions on laws discriminating against British subjects, companies, and capital.²⁵ Although the special protection for shipping was justified on blandly legal grounds – ‘... a ship is a curious entity in the field of law’, the Secretary of State argued, ‘therefore you must mention ships by name’ – it was at least a welcome side-effect that any possible loophole allowing for coastal reservation would be closed, given the concerns expressed by British commercial lobbies that the Haji Bill would be resurrected under the new dispensation.²⁶

²³ Khanolkar (n 5) 259–266.

²⁴ Sections 115 of the Government of India Act 1935 (26 Geo. 5 & 1 Edw. 8 c. 2).

²⁵ Sections 113–114, 116; see, also, ss 12(1)(e) and 52(1)(d), by which the Governor-General and provincial Governors were given the special responsibility of preventing discrimination by executive action against British capital.

²⁶ *Joint Committee on Indian Constitutional Reform: Volume II⁴: Minutes of Evidence...* (Cmnd 112 (IIA), 1932–33) 603, 617, 634, 1299, 1308, 1655.

These various ‘safeguards’ (as they were called) were part of the price levied for quasi-responsible government. Spooked by the growth of unconcealed economic nationalism – the boycotts of British-made goods during non-cooperation and civil disobedience, the minority reports by Indian members of the Fiscal Commission (1921–22) and External Capital Committee (1925) recommending the Indianisation of all new companies, and the calls inside and outside the legislative councils to reserve certain industries for Indian capital (mining, oil, aviation, banking, insurance, and, as we have seen, shipping) – British metropolitan and expatriate capital demanded ‘watertight’ guarantees of equal treatment.²⁷ The author of a polemic entitled *Danger in India* (1932) argued:²⁸

... there is not the slightest reason to suppose that Congress will be willing to take the exceptional course of dividing the spoils of victory amongst the vanquished. The programme of expropriation has been carefully planned and is timed to begin the moment the next substantial instalment of self-government is conferred.

... unless it is guarded against, the steady process of legislation in India’s new Parliament will bit by bit demolish the splendid edifice which through long years of patient toil, sacrifice and the wise spending of their savings our forefathers built up for us to enjoy and preserve.

Against the opposition of mainstream nationalist opinion, which conceded the principle of commercial equality but feared that statutory safeguards would fetter the promotion of Indian industries,²⁹ Parliament enacted provisions that were as watertight as those in the Haji Bill.

²⁷ *Joint Committee: Minutes of Evidence* (n 26) 454, 601–605, 634, 1654–1660; Geoffrey Tyson, *Danger in India* (John Murray 1932) ch IV; Partha Sarathi Gupta, ‘State and Business in the Age of Discriminating Protection’ in Dwijendra Tripathi (ed), *State and Business in India: a Historical Perspective* (Manohar 1984) 197; Maria Misra, *Business, Race and Politics in British India c. 1860–1960* (Clarendon Press 1999) 137–138, 162–173; Aditya Mukherjee, *Imperialism, Nationalism and the Making of the Indian Capitalist Class, 1920–1947* (Sage Publications 2002) 341–348, 351–354.

²⁸ Tyson, *ibid*, 65–66.

²⁹ *The Nebru Report: An Anti-Separatist Manifesto* (Michiko & Panjathan 1975 [1928]) 11; *Indian Round Table Conference ...* (Cmnd 3772, 1930–31) 49; *Indian Round Table Conference (Third Session) (17th November, 1932 – 24th December, 1932)* (Cmnd 4238, 1932–33) 44, 200; *Joint Committee on Indian* (ctd. on next page)

In contrast, the Indian delegates to the Round Table Conferences (1931–1933) registered barely a note of dissent against another safeguard against expropriation – a new constitutional right to property, enacted as follows:³⁰

299. Compulsory acquisition of land etc.

- (1) No person shall be deprived of his property in British India save by authority of law
- (2) Neither the Federal nor a Provincial Legislature shall have the power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning, any commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined.

The full set of ‘fundamental rights’ for which Indian opinion pressed was considered out of the question, naturally, but there was a large measure of agreement between officials and a heterogeneous set of private delegates, British and Indian – Congressmen, Nationalists, Moderates, princes, *zamindars*, and expatriate capitalists – that there should be a right to property and other protections for certain landed interests, including an overarching guarantee for the permanent settlement itself.³¹

The Parliamentary Select Committee justified the departure from orthodox British rights-scepticism by referring to ‘doubts which have been aroused in recent years by

Constitutional Reform: Volume III: Records I to X of the Joint Committee on Indian Constitutional Reform ... (Cmnd 112 (III), 1932–33) 212–216, 310–318.

³⁰ Section 299(1)–(2). On origin of these provisions, see HCL Merrillat, *Land and the Constitution in India* (Columbia University Press 1970) ch 2.

³¹ *Neburu Report* (n 29) 89–90, 101, 179; *Indian Round Table Conference (Second Session): 7th September, 1931–1st December, 1931* (Cmnd 3997, 1931–32) 59–60, 196–197, 215, 323; *Joint Committee: Minutes of Evidence* (n 26) 191–195, 203, 213–214, 222–223, 236, 600, 704–705, 1347; c.f. the trades unionists at *Joint Committee: Minutes of Evidence* (n 26) 2213–2214, 2235, 2247 and *Volume III: Records of the Joint Committee* (n 29) 324. The additional protections for certain land tenures were enacted as ss 299(3) and 300(1).

certain Indian utterances³² – an oblique reference not only to the ordinary expressions of mainstream economic nationalism, one suspects, but also to the escalating rhetoric of Jawarhalal Nehru, in those years an unreconstructed socialist and the rising star of the Congress Left.³³ In an interview in August 1933, Nehru argued that ‘a complete reconstruction of society on a new basis meant the diversion of profits and property from the ‘haves’ to the ‘have nots’ and it was implausible ‘that vested interests will ever voluntarily agree to that’.³⁴ In an elaboration of his widely-read ‘Whither India?’ articles of 1933, in which he had declared India’s destiny as bound up in the ‘ending of all exploitation of nation by nation and class by class’, Nehru made no apologies for his belief that ‘coercion or pressure’ would be necessary to divest the privileged in India.³⁵

Such rhetoric was also of deep concern to the many to Nehru’s right in the Congress, apprehensive of his potential to capture and drag a determinedly centrist party to the left. It need not be laboured, of course, that from its founding the Congress avoided campaigning on issues that could divide Indian sectional interests and so further compromise its fragile claim to speak for the nation as a whole against the Raj.³⁶ All the

³² *Joint Committee on Indian Constitutional Reform [Session 1933–34]: Volume I (Part I): Report* (Cmnd 5, 1933–34) 217.

³³ John Patrick Haithcox, ‘Left Wing Unity and the Indian Nationalist Movement: M. N. Roy and the Congress Socialist Party’ (1969) 3 MAS 17; Bipan Chandra, ‘Jawarhalal Nehru and the Capitalist Class, 1936’ (1975) 10 EPW 1307; Pramit Chaudhuri, ‘The Origins of Modern India’s Economic Development Strategy’ in Mike Shepperdson and Colin Simmons (eds), *The Indian National Congress and the Political Economy of India* (Aldershot 1988).

³⁴ Quoted in Chandra, *ibid*, 1308.

³⁵ Jawaharlal Nehru, ‘Whither India?’ (1933) in his *Recent Essays and Writing on the Future of India, Communalism and Other Subjects* (Kitabistan 1934) 24, 33–36. See, further, his *Autobiography* (OUP 1982 [1936]) ch LXIII.

³⁶ Walter Hauser, ‘The Indian National Congress and Land Policy in the Twentieth Century’ (1964) 1 IESHR 57; John R McLane, *Indian Nationalism and the Early Congress* (Princeton University Press 1977) ch 7; S Bhattacharya, ‘Swaraj and the Kamgar: The Indian National Congress and the Bombay Working Class, 1919–1931’ in Richard Sisson and Stanley Wolpert, *Congress and Indian* (ctd. on next page)

various interests were to be solicited – *zamindar*, peasant, moneylender, sharecropper, industrialist, merchant, and so on, complex categories cross-cut by caste, religion, and region – but not at the expense of the appearance of non-partisanship and unity.

Gandhi exemplified and insisted upon this studied neutrality. His theory of trusteeship envisaged only the conversion rather than coercion of propertied interests. He called for a harmonious, familial relationship between labour and capital, regarding strikes as the very last resort. As a general rule, he chose to ‘nationalise’ only those local agitations that would not risk dividing the bases of Congress support. For example, he withheld his blessing from the Kisan Sabha no-rent movement (1920–1921) in which peasants agitated against their *zamindars*, announcing after it descended into riots that he:³⁷

... deprecated all attempts to create discord between landlords and tenants and advised the tenants to suffer rather than fight, for they had to join all forces for fighting against the most powerful zamindar, namely the Government.

In contrast, he and the Congress gave their blessing to the Bardoli *satyagraha* (1928), in which the peasants of a *ryotwari taluk* agitated directly against the state. As we have noted, he retracted his initial support from the Mulshi *satyagraha* (1920–1924) arguably because its target was Tata, the doyen of Indian industry.³⁸

Nationalism: the Pre-Independence Phase (University of California Press 1988); Bhiku Parekh, ‘The Marxist Discourse on Gandhi’ in Dwijendra Tripathi, *Business and Politics in India: A Historical Perspective* (Manohar 1991); Sumit Sarkar, *Modern India: 1885–1947* (Macmillan India 1996) 186–187, 208–209, 245–246, 274–279, 285–286, 312–313.

³⁷ Sarkar, *ibid*, 209. C.f. WF Crawley, ‘Kisan Sabhas and Agrarian Revolt in the United Provinces 1920 to 1921’ (1971) 5 MAS 95. See, further, the ‘Reassurance to Zamindars’ resolution of the Congress Working Committee in 1931: AM Zaidi and SG Zaidi, *The Encyclopaedia of the Indian National Congress: Volume Ten: 1930–1935: The Battle for Swaraj* (S. Chand & Co. 1980) 219.

³⁸ See 16 above.

Naturally there were always dissentients from neutrality in as broad a church as the Congress: on occasion Pt. Malaviya broke ranks from the early Congress by advocating for tenants against landlords.³⁹ The party's inaction on labour issues led to defections in the 1920s.⁴⁰ The general rule, however, holds.

The party's stance towards the right to property was, therefore, entirely in character. Its acquiescence to the right began with its assent to the version expressed in the constitution proposed by the All Parties' Conference of 1928, which went so far as to preserve *zamindari* absolutely:⁴¹

No person shall be deprived of his liberty nor shall his dwelling or property be entered, sequestered or confiscated, save in accordance with law. *All titles to private and personal property lawfully acquired and enjoyed at the establishment of the Commonwealth are hereby guaranteed.*

The italicised caveat was inserted at the insistence of Malaviya, now the leader of a Nationalist faction (the Independent Congress Party) that was heavy with commercial and landed notables.⁴²

The degree of solicitude towards the landed class in the 1928 constitution earned the scorn of Nehru and the Left.⁴³ In the same year, Nehru had gone so far as to declare his

³⁹ McLane (n 36) 216, 227, 230. C.f. Crawley (n 37) 96.

⁴⁰ Bhattacharya (n 36) 232, 236.

⁴¹ *Nehru Report* (n 29) 179. Emphasis in original.

⁴² Sarkar (n 36) 265; Gyanendra Pandey, *The Ascendancy of the Congress in Uttar Pradesh: Class, Community and Nation in Northern India, 1920–1940* (Anthem Press 2002) 38. See, also, Crawley (n 37) 96.

⁴³ Bhattacharya (n 36) 237. Note, however, that Nehru later secured the passage of the 1931 Karachi resolution that set out a right to property without Malaviya's caveat: Zaidi and Zaidi (n 37) 150, 181, 279, 295.

personal support for *zamindari* abolition without compensation.⁴⁴ The High Command of the party sharply disassociated itself from such sentiments. In 1934, in a rebuke to the ‘loose talk’ of its Left wing, the Congress Working Committee declared that ‘confiscation and class war are contrary to the Congress creed of non-violence’.⁴⁵ In an interview with UP *zamindars* that same year, Gandhi declared that the ultimate aim was ‘the co-operation and co-ordination of capital and labour and of the landlord and tenant’ and so, he assured them, there was ‘nothing in Congress creed or policy’ of which they need be frightened.⁴⁶

Despite rhetorical concessions to the Left, the attempts by some of the inaugural provincial Congress ministries (1937–1939) to carry out land reform were either only tentative in ambition or dropped entirely.⁴⁷ Only when independence was imminent did they train their sights squarely against *zamindari*. What ensued in the first decade of independence – grand legal confrontations over land reform and defiant constitutional amendments⁴⁸ – is a rough measure of the controversy so assiduously avoided earlier.

⁴⁴ Chaudhuri (n 33) 279.

⁴⁵ Haithcox (n 36) 23. See, also, P Spratt, ‘Gandhi and the Communists’ in Sibnarayan Ray (ed), *Gandhi, India and the World* (Temple University Press 1970) 118.

⁴⁶ Haithcox (n 36) 21.

⁴⁷ Peter Reeves, *Landlords and Governments in Uttar Pradesh: A Study of their Relations until Zamindari Abolition* (OUP 1991) ch 5–6; Sarkar (n 36) 362–363; Hauser (n 36) 62–64; c.f. Kishori Mohan Patra, ‘The First Congress Ministries: Problems and Prospects (1937–1939)’ in MN Das, (ed), *A Centenary History of the Indian National Congress: Volume Three: 1935–1947* (All India Congress Committee 1985) 166–174. See, further, Gyanendra Pandey, ‘Congress and the Nation, 1917–1947’ in Richard Sisson and Stanley Wolpert, *Congress and Indian Nationalism: The Pre-Independence Phase* (University of California Press 1988) 127–130.

⁴⁸ Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (OUP 1999) ch 3–4, 8–10; Merillat (n 31) ch 6–9.

Measured against the imperative of preserving unity, the Kelkar Bill scored poorly. Whereas the Haji Bill was always destined to unite at least elite Indian opinion behind the ‘most audacious’ of the bourgeois causes of its time,⁴⁹ the Kelkar Bill promised a long and bruising battle between the champions of various sectional interests in the Assembly, all the while diverting energy from the making of propaganda against the Raj. What was worse, the Bill raised the spectre of ongoing conflicts between interest groups in the provincial legislatures. The apprehension of this potential to divide and distract best explains the failure of the nationalist bloc to support the Bill, it is argued here.

Compensation and resettlement

On a casual reading, perhaps the most obvious sources of discord were the Bill’s clauses on compensation. Kelkar sought to tip the scales in favour of those entitled to compensation – that is, landowners and tenants⁵⁰ – by three means. The first of these means was ‘to enlarge the scope of loss or damage to be considered in calculating compensation’, Kelkar explained.⁵¹ The Bill proposed that compensation should be able

⁴⁹ Sarkar (n 36) 285; Mehta (n 5) 91.

⁵⁰ Since s 3 of Reg I of 1824, compensation for land acquisition had been payable to all persons ‘interested’ in the sought-after land: see ss 9–11, 23–24, 29–30 of the 1894 Act. An exception was s XVI of Act XXVIII of 1839, under which compensation was payable for land that was, or was in the nature of, private property. On the significance of that provision, see Mariam Dossal, *Theatre of Conflict, City of Hope: Mumbai 1660 to Present Times* (OUP 2010) 106–109. Aside from that provision, land acquisition law skirted the question of ownership in the assessment of compensation, while at the same time creating by its operation a single, unchallengeable new owner: see 77–78 above.

⁵¹ *Legislative Assembly Debates (Official Report): Volume I (19th Jan to 21st February, 1927): First Session of the Third Legislative Assembly, 1927* (GoI 1927) 365.

to be granted on a further six bases to the six already in the Act.⁵² The new bases would license compensation for any loss of opportunity to benefit from the development of the sought-after land (a liberalisation of the existing judicial doctrine on the subject)⁵³ and any loss from the disruption to any businesses dependent upon the land (not directly compensable under existing law or doctrine).⁵⁴

The second of those means to increase compensation was to introduce private arbitration as the primary method of fixing compensation for acquired land, in the place of the unilateral determination of the Collector.⁵⁵ Compensation could be settled by negotiation with the Collector as before, but, if there was any dispute, the matter would be sent to a five-person ‘Board of Arbitrators’ (two appointed by the claimant, two by the Collector, and one appointed by the first four to act as chairman). Only if the arbitration award was not unanimous would there be a right of appeal to the District Court and then to the High Court. In contrast, the Act as it stood provided that in the event of a dispute the Collector’s award would be referred to the District Court (in the

⁵² Clause 17.

⁵³ See, among the dozens of reported cases on the point, *Narsingh Das v Secretary of State for India in Council* (1924) 86 IC 556 (PC) at 557; *Daya Khushal v Assistant Collector, Surat* (1913) ILR 38 Bom 37 (HC Bombay); c.f. *Government of Bombay v Mervanji Muncherji Cama* (1908) 10 Bom LR 907 OCJ (HC Bombay); *Manindra Chandra Nandy v Secretary of State for India in Council* (1914) 23 IC 412 (HC Calcutta).

⁵⁴ See, e.g., *Rameswar Singh Bahadoor v Secretary of State for India in Council* (1907) ILR 34 Cal 470 (HC Calcutta).

⁵⁵ Clauses 8–9, 13, and 31.

mofussil) or the High Court (where one existed),⁵⁶ and then could be appealed to the Privy Council (it had been recently confirmed).⁵⁷

In arguing for the introduction of private arbitration, Kelkar impugned District Court judges as ‘paid officers of Government’,⁵⁸ a charge echoed by a character in *Rangbhoomi* (1925):⁵⁹

Sarkar hasn’t come here to do justice, bhai, it has come to rule. Does it get anything by doing justice? There was a time when justice was thought to be the foundation of rule. Times have changed. Now it is the rule of business, and for the person who doesn’t accept this rule, it’s like aiming cannons at stars. What can you do? If you file a case in the civil court, sarkar’s servants are sitting there too on the seat of justice.

Perhaps drawing on his experience of the Mulshi episode, in which those Mawalas who had mounted District Court challenges to compensation withdrew their cases because of the high legal costs involved,⁶⁰ Kelkar argued that arbitration boards would be a fairer forum than ‘an unequal fight’ in the courts ‘between Land Acquisition Officers backed

⁵⁶ SG Velinker, ‘The Land Acquisition Amendment Bill’ (1927–8) 5 Bombay Law Journal 259, 264.

⁵⁷ Section 54 of the 1894 Act, substituted by the Land Acquisition (Amendment) Act XIX of 1921. Overturning the settled understanding, the Privy Council held in *Rangoon Botatoung Co. v Collector, Rangoon* (1912) 16 IC 188 that no right of appeal lay to it from the Indian High Courts in cases under the 1894 Act. The Council of State (the upper chamber of the Indian Legislature) proposed to reinstate the right of appeal but only for cases involving a substantial question of law and an award in dispute exceeding Rs. 10,000. Those restrictions were voted down by the Assembly, one Indian member arguing that it was crucial to retain access to the opinion of an impartial body detached from the perspective of the Indian executive. See GoI, Legislative, ‘Papers relating to Act XIX of 1921’ (undated) (NAI). In practice, given the narrowness of the approach to such appeals that the Privy Council subsequently affirmed in *Narsingh Das* (n 53) 557, successful challenges to compensation would have continued to be rare.

⁵⁸ Second paragraph of the Statement of Objects and Reasons to the Bill.

⁵⁹ Premchand, *Rangbhoomi* (Manju Jain tr, Penguin 2011 [1925]) 423.

⁶⁰ Rajendra Vora, *The World’s First Anti-Dam Movement: The Mulshi Satyagraha, 1920–1924* (Permanent Black 2009) 51, 111.

by the legal and financial resources of Government and private owners ... who as a rule find appeals a costly affair'.⁶¹

Mirroring the language of the dispute settlement procedure under the Bombay District Municipal Act (III of 1901),⁶² in several instances Kelkar described the arbitration boards he proposed as 'Panchayats' and the chairman as 'Sir-Panches'.⁶³ The nomenclature may also have been intended to pique the Congress's interest in the proposal, as a nod to the hundreds of unofficial *panchayats* established by Congress supporters during the non-cooperation movement as an alternative to the law courts.⁶⁴

The third proposal designed to make the law more generous towards landowners and tenants was the introduction of an obligation of resettlement. The Bill provided:⁶⁵

In every case in which the compulsory acquisition of land or house-property results in the eviction of more than thirty persons, the award [by the Collector or the Board of Arbitration] shall make provision for the housing of evicted persons suitable to their position in life or for securing to them approximately the same convenience and comfort as was available in the house or houses from which they were evicted.

⁶¹ Second paragraph of the Statement of Objects and Reasons to the Bill; *Legislative Assembly Debates: Volume I* (n 51) 364–365.

⁶² Section 160.

⁶³ See the third paragraph of the Statement of Objects and Reasons to the Bill and s 13 of the Bill.

⁶⁴ Sarkar (n 36) 208–209. These should not be confused with the *panchayats* officially constituted under provincial legislation: Hugh Tinker, *The Foundations of Local Self-Government in India, Pakistan and Burma* (Praeger 1968) 116–118, 197–199, 206–207. In any event, the Congress under Gandhi favoured arbitration as a method of dispute resolution. Gandhi, no stranger to arbitration and a critic of Indian lawyers' fees as 'sinful', went so far as to proclaim any industrial strike to be a crime once the employer in question had 'accept[ed] the principle of arbitration'. Indeed, the Maharashtra Provincial Congress Committee once called on the Congress itself to act as an 'arbitration board' for different national interests. See Hugh F Owen, 'Non-Co-operation 1920–22' in Sibnarayan Ray (ed), *Gandhi, India and the World* (Temple University Press 1970) 176; Judith M Brown, *Gandhi's Rise to Power: Indian Politics 1915–1922* (CUP 1972) 116–119; Dwijendra Tripathi, *The Oxford History of Indian Business* (OUP 2004) 193.

⁶⁵ Clause 11.

This was a far-reaching proposal, to say the least. Unlike its 1870 predecessor,⁶⁶ the 1894 Act as it stood expressly allowed for the grant of land in exchange for the land acquired, but only as an alternative to cash compensation.⁶⁷

Various justifications had been offered for the use of the land-for-land remedy over the years. During the consultations for the 1894 Act, an official argued that the grant of land would prevent unproductive spending on ornaments or weddings, or the diversion of cash compensation directly to money-lenders.⁶⁸ As we have seen, the Indian Industrial Commission (1916–1918) recommended the grant of land as compensation in every case of an acquisition for an industrial enterprise, arguing that doing so would ‘mitigate more than any mere money payment the hardship and sense of unfair treatment caused by expropriation’.⁶⁹ An article in the *Bombay Law Journal* (1924–5), forwarded to Kelkar by its author, argued that the loss of status and secure income from the taking of agricultural land should be compensated by the grant of new land when practicable.⁷⁰

⁶⁶ On the position under the 1870 Act, see *Narayana v. Ramachandra* (1890) ILR 13 Mad 485 (HC Madras) at 488. There was at least exception. In the years after the Mutiny, to save money the authorities in Delhi compensated those displaced by cantonment and railway building with land confiscated from all Muslims who could not prove themselves innocent of rebellion: Narayani Gupta, *Delhi Between Two Empires 1803–1931: Society, Government and Urban Growth* (OUP 1981) 28–30.

⁶⁷ Section 31(3). See, e.g., GoI, Rev & Ag, Land Rev branch, ‘Grant of land to Kazi Abdul Raheman in inam in exchange for the land taken up for the Khamgaon Jalna Tramway, Hyderabad Assigned Districts’, July 1901, prog. 22 and 23 (B), file no. 233 of 1901 (NAI); c.f. ‘Decision that the compensation to be paid to the Chiefs of Koti and Keonthal for the land acquired from them ... should take the form of a money payment as originally agreed to’, Nov 1917, prog. 57 (B) (NAI).

⁶⁸ Appendix O to Officiating Junior Secretary to Government, Punjab, to the Secretary of the GoI, Legislative (17 October 1892) in GoI, Legislative, ‘Papers relating to Act I of 1894’, Feb 1894, prog. 1–83 (A) (NAI).

⁶⁹ See 150 above.

⁷⁰ DJ Samson, ‘Remarks on Some of the Sections of the Land Acquisition Act, Suggesting Some Modifications’ (1924–5) 2 *Bombay Law Journal* 469, 491–493. See Ch 1 above at n 128. See, also, Messrs. Taraporewa and Bharoocha (Architects), ‘Notes on Land Acquisition Act as (ctd. on next page)

Political considerations also influenced the choice of remedy. In 1921, after pressure from the Punjab legislative council (famously dominated by the landowners), the provincial government declared that its default remedy for agriculturalists displaced by the 1894 Act would be land rather than cash.⁷¹

Kelkar, however, sought more: to oblige the state, in the event of a mass eviction, not only to pay cash compensation but also to grant land in exchange for that acquired. Like the proposal on arbitration, this too may have been inspired by Kelkar's experience at Mulshi. The Mawalas had feared that dispossession from their ancestral lands would disrupt their communal life.⁷² Kelkar might have thought this his proposal would ameliorate the effect of displacement, allowing a community to rebuild in another location and perhaps stave off its disintegration.

All three proposals were heavily criticised by Kelkar's interlocutors in the Assembly and the dozens of officials – high and low, British and Indian – who submitted their opinions on the Bill. A few officials conceded that some of the new criteria for determining compensation might be justified, but most criticised these as either redundant or prone to encourage extravagant claims and litigation over their scope.⁷³

Operating in Bombay and in the Mofussil' (1924–5) 2 Bombay Law Journal 261, 263.

⁷¹ Paper No. II at 62.

⁷² See 14 above.

⁷³ E.g. Paper No. I at 3, 7–9; Paper No. II at 35, 66; Paper No. III at 90, 104; Paper No. IV at 8, 29.

Kelkar's scheme for private arbitration would repeat old mistakes, they argued.⁷⁴ Much the same scheme had been tried under the first All-India land acquisition statute (Act VI of 1857) but had been discredited in official eyes for enabling the 'robbery of the public money' by profligate and perfidious arbitrators.⁷⁵ In 1870, with an eye to reducing the 'hundreds of thousands of pounds sterling' spent on land for railway construction,⁷⁶ arbitrators were replaced by judges of the ordinary civil courts, assisted by public and private 'assessors'.⁷⁷

Assessors, in turn, were expelled by the 1894 Act for tending to act as advocates for claimants, from whom they were said to receive under-the-table payments 'in heavy cases', an official explained.⁷⁸ Thereafter, in a change perceived to be of constitutional significance, Collectors – those little potentates of district administration⁷⁹ – were given

⁷⁴ *Legislative Assembly Debates: Volume I* (n 51) 849–850; see, also, Paper No. I at 42, 46; Paper No. II at 1870.

⁷⁵ Extracts of the Abstract of the Proceedings of Council of the Governor General of India (11 December 1868 and 19 March 1869) in GoI, Legislative, 'Act No. X of 1870', May 1870, prog. no. 36–77 (A) at prog no. 36–37, 40.

⁷⁶ Ibid at prog no. 40. In England, the right to insist on binding arbitration – introduced by the Land Clauses Consolidation Act 1845 – was blamed for inflating the costs of land acquisition for the railways: RW Kostal, *Law and English Railway Capitalism 1825–1875* (Clarendon Press 1994) 161–175. C.f. JR Ward, *The Finance of Canal Building in Eighteenth-Century England* (OUP 1974) 143–150.

⁷⁷ Part III of the Land Acquisition Act (X of 1870).

⁷⁸ Extract from Abstract of the Proceedings of the Council of the Governor-General of India (11 March 1892), reproduced as Appendix C in 'Papers relating to Act I of 1894' (n 68). C.f. *Kashinanth Khasgivala v Collector of Poona* (1884) ILR 8 Bom 553 (HC Bombay) and *Swámirao v Collector of Dhárvár* (1892) ILR 17 Bom 299 (HC Bombay), cases in which assessors appointed by the Collector were disqualified for bias.

⁷⁹ Or so they could be described until the 1919 reforms: Simon Epstein, 'District Officers in Decline: The Erosion of British Authority in the Bombay Countryside, 1919 to 1947' (1982) 16 MAS 493. See, generally, BB Misra, 'The Evolution of the Office of Collector (1770–1947)' (July–September 1965) 11 Indian Journal of Public Administration 347.

the power to make awards of compensation that were binding unless challenged in the civil courts (making them judges in their own cause, one critic alleged).⁸⁰

The new model was at least cheaper and faster than the system of *panchayats* under the Bombay District Municipal Act (1901) that Kelkar now sought to replicate, officials argued. The *panchayats* had proved so slow, cumbrous, and costly, one official reported, that the Ahmedabad Municipality resolved to acquire all the land it required under the 1894 Act.⁸¹

Even so, the new model was soon regarded as over-generous to claimants. Only a few years after its passage, special legislation was proposed for the acquisition of land for the colonisation of the Sind Sagar *doab* in Punjab because, officials explained, too great an outlay of compensation would be required under the 1894 Act.⁸² Land acquisition officers erred on the side of liberality, their superiors boasted or complained;⁸³ and if

⁸⁰ See the comments by the Raja of Bhinga in the Extract from the Abstract of the Proceedings of the Council of the Governor General of India (12 Jan 1893) in GoI, Legislative, 'The Land Acquisition Act, 1894', Feb 1894, prog. 1–83 (A) (NAI). In *Ezra v Secretary of State* (1905) 9 CWN 454, however, the Privy Council held that the Collector's role in making compensation awards was administrative, not judicial.

⁸¹ Paper No. III at 115.

⁸² Revenue Secretary to the Secretary to the GoI, Rev & Ag (15 Nov 1897) at [6] in GoI, Rev & Ag, Land Rev, 'Proposed acquisition of land in the Sind-Sagar-Doab for the construction of a canal from the Indus', Jan 1898, prog. 47–48 (A), file no. 349 of 1897, p. 299 (NAI); 'Statement of Objects and Reasons in 'Draft Bill for the acquisition of land for a canal in the Sindh Sagar Doab', September 1898, prog. 49–50 (A), file no. 26, p 2657 (NAI). In the event the legislation was not passed, probably because the creation of the colony was delayed until 1947: Imran Ali, *The Punjab under Imperialism, 1885–1947* (Princeton University Press 1988) 5.

⁸³ Paper No. IV at 16. C.f. 'Preliminary Report of the Select Committee on the Bill to amend the Land Acquisition Act, 1870' (1 Feb 1893) at [5], reproduced as Appendix V in 'Papers relating to Act I of 1894' (n 68); *Rangbhoomi* (n 59) 540–541; Samson (n 70) 483; Taraporewala and Bharoocha (n 70) 263.

anything, they wrote, the courts were biased against the executive when deciding on references from Collectors' awards:⁸⁴

... District Judges (and Subordinate Judges), so far from being subservient to the Government in the Revenue Department, are inclined to the other extreme. In litigation affecting the Government it is the common experience that the judiciary are very severely critical of the Government's claims. The picture of a Bench in league with executive Revenue Officers is, so far as my experience goes, ludicrously distorted. So also is the picture of the Land Acquisition Officer, "backed by the legal and financial resources of the Government", triumphing over the private proprietor, helpless and wandering in a wilderness of technicalities. The picture I would put against it is of a proprietor (often an organised band of proprietors in the same suit) fully armed with evidence, thoroughly acquainted with his own rights and with legal procedure, waging an unequal battle with a Government Pleader inadequately instructed by a Revenue Officer whose time is taken up with innumerable other affairs.

The proposal to introduce an obligation of resettlement had some sympathisers but was criticised by nearly all as impractical: some claimed that it would commit the state to an 'endless chain' of one acquisition after the other as land was acquired for the housing of those displaced by an earlier acquisition.⁸⁵

All this was to be expected from a bureaucracy that idealised economy and efficiency as the highest virtues.⁸⁶ More troubling for Kelkar was that similar criticisms were also made by several representatives of local government,⁸⁷ the one branch of the executive

⁸⁴ Paper No. I at 12; see, also, Paper No. I at 14–15, 30; Paper No. III at 93; Paper No. IV at 33. One official claimed that the High Courts had in recent years trimmed excessive awards by the District Courts: Paper No. III at 93. See e.g. *Basavaraju Krishna Row Pantulu Garu v Head Assistant Collector, Bezwada* (1912) 15 IC 672 (HC Madras).

⁸⁵ *Legislative Assembly Debates: Volume I* (n 51) at 850–851; see also Paper No. II at 34; Paper No. III at 113; Paper No. IV at 30; c.f. Paper No. I at 46 and Paper No. III at 120.

⁸⁶ See, for e.g., Thomas R Metcalf, *Ideologies of the Raj* (CUP 1995) 200–203.

⁸⁷ Paper No. I at 2–3, 19; Paper No. II at 45; Paper No. III at 108.

put exclusively under Indian control – albeit on a highly restricted franchise – after the 1919 reforms.⁸⁸ An official wrote of the effect of the Bill on local government:⁸⁹

Land has been acquired frequently for Local Bodies and I have not heard of any case in which the Local Body objected to the Collector's award as being too small and desired to pay more.

According to the Government of Bengal, no less than 57–58% of land acquisition proceedings in 1925–1926 were ‘on account of local bodies such as the district boards, union boards, municipalities, etc.’⁹⁰ Although the figures in Bombay were lower, local government there had become a relatively more prolific land acquirer in the years to the Kelkar Bill. The Gazette Survey shows that the share of the number of acquisitions for a ‘public purpose’ funded by local government rose from 27% in 1918 to 37% in 1927 (see Table 5.1 below). This was not because such acquisitions became much more frequent, but rather because those by the Government of Bombay declined sharply after 1920, perhaps a consequence of the Meston Settlement of 1920 (the fiscal arrangement criticised for giving the provinces only inelastic sources of revenue with which to carry out their functions under the 1919 reforms).⁹¹

⁸⁸ Tinker (n 64) ch VI; BB Misra, *The Administrative History of India 1834–1947: General Administration* (OUP 1970) ch VIII; Sandip Hazareesingh, *The Colonial City and the Challenge of Modernity: Urban Hegemonies and Civic Contestations in Bombay City 1900–1925* (Orient Longman 2007) 173–174, 190–191.

⁸⁹ Paper No. I at 3.

⁹⁰ Paper No. II at 70.

⁹¹ BB Misra, *Indian Federal Finance* (4th edn, Orient Longmans 1963) ch IV; ADD Gordon, *Businessmen and Politics: Rising Nationalism and a Modernising Economy in Bombay, 1918–1933* (Manohar 1978) 189. Similarly, the number of acres acquired by the Government of Bombay fell from 3055.4 in 1918 to 2414.5 in 1927, while those acquired by local government rose from 202 in 1918 to 276.2 in 1927.

Table 5.1
Part II acquisitions in Bombay (1918–1927) categorised by funder

	<i>Govt. of Bombay</i>	<i>Local Government</i>	<i>Railway Companies</i>	<i>Other</i>
1918	225	102	36	11
1919	217	104	27	6
1920	250	137	43	9
1921	193	134	48	18
1922	125	126	38	27
1923	175	138	32	20
1924	92	76	13	4
1925	124	72	22	2
1926	143	121	34	16
1927	155	110	31	7

Whereas wealthier land acquirers such as large-scale industry could have absorbed the additional costs imposed by the Kelkar Bill, local government would not have managed as easily. Apart from the comfortably funded Bombay Municipality, local bodies had fragile finances: some municipalities struggled to collect the tax they levied; others carried substantial debt; district boards were heavily reliant on government grants that could be cut without warning and on a source of revenue (the land cess) that had stagnated.⁹²

If the Kelkar Bill passed, the axe may have had to fall on at least a few projects requiring land. In the Bombay Presidency, extrapolating from the pattern of acquisitions from 1918–1927 (see Table 5.1 below), the casualties may have included small-scale public works projects in roading, water, and energy, and the ‘development’ of urban areas and other ‘nation-building’ projects. Such projects were of three types: first, but only rarely, public housing; second, and more commonly, the construction of health facilities like dispensaries and hospitals; third, most commonly of all, the construction and

⁹² Tinker (n 64) ch IX and XV.

improvement of schools (education was a priority of post-1918 local government and the condition of school buildings in Bombay was poor).⁹³

Table 5.2
Land (acres) acquired by local government in Bombay (1918–27) categorised by project

	<i>Roads</i>	<i>Railways</i>	<i>Water/energy</i>	<i>Public buildings</i>	<i>“Development”</i>	<i>Housing/Health/Education</i>	<i>Misc.</i>
<i>1918</i>	89.7	—	0.5	17.3	—	31.8	62.6
<i>1919</i>	135.8	—	958.9	0.2	—	23.0	57.0
<i>1920</i>	611.2	—	14.8	11.7	1.2	38.6	42.2
<i>1921</i>	116.5	—	33.8	2.9	91.4	38.4	293.6
<i>1922</i>	30.4	56.7	50.0	0.2	13.1	77.1	45.7
<i>1923</i>	408.1	—	52.1	2.6	30.8	33.0	33.5
<i>1924</i>	75.8	—	6.5	—	—	59.1	12.3
<i>1925</i>	48.8	0.1	88.7	2.9	0.8	11.0	53.3
<i>1926</i>	54.6	—	19.1	2.3	0.6	24.3	—
<i>1927</i>	113.5	—	11.8	1.3	0.1	118.7	30.8
Total	1648.5	56.7	1236.2	41.4	138.0	455.1	631.0
%	39	1	29	1	3	11	15

Even a Tilakite like L. P. Bhopatkar, then the Chair of the Standing Committee of the Poona City Municipality, may have had some private doubts about the Bill despite his public expression of support.⁹⁴ In 1927, for the first and only time in ten years, the Municipality acquired land specifically for the non-Brahmin community (a fifth of an acre for a ‘School House for Depressed Classes’).⁹⁵ The timing of the acquisition was not without significance, coming soon after allegations that Brahmins had used the Municipality as a ‘marketplace of self-interest’ by concentrating road and electricity

⁹³ Tinker (n 64) 177, 257–261.

⁹⁴ Paper No. III at 106; see, also, the expressions of support by the Malegoan and Lonavla City municipalities and a local board in Nasik: Paper No. III at 105–106, 108. For a profile of Bhopatkar, see Richard I Cashman, *The Myth of the Lokamanya: Tilak and Mass Politics in Maharashtra* (University of California Press 1975) 187–188.

⁹⁵ *Bombay Government Gazette: Part I* (Government of Bombay 1927) 2078.

development in their sections of the city,⁹⁶ and the election of a Non-Brahmin leader (Keshavrao Jedhe) to the Municipality, a challenge to decades of Brahmin dominance.⁹⁷

If, as this suggests, land acquisition was used as a means of dispensing patronage for political ends, local politicians of whatever stripe shared an interest in keeping the costs of acquisition as low as possible. At least a few of their brethren in the Assembly would have had sympathy for their position (perhaps some of those with experience in local politics like Jayakar and M. S. Aney, both ex-members of the Bombay Municipality). For Swarajists, carefully targeted ‘nation-building’ acquisitions could help to improve the party’s position in those local electorates sharply divided on caste or communal lines, in which the party performed less well than in the Congress heartlands.⁹⁸ The same calculation applied even if land acquisition was used as a genuine means to further a programme of municipal works. A Swarajist in the Assembly might ask: why make the work of men like C. R. Das, Mayor of Calcutta, or Vallabhai Patel, President of the Ahmedabad municipality, any more difficult? If Kelkar’s Bill had been law, the latter Municipality’s acquisition of 21.1 acres for a hospital and maternity home in 1927 may have been too expensive to undertake.⁹⁹

⁹⁶ For similar charges against the Calcutta and Bombay Municipalities, see Rajat K Ray, *Urban Roots of Indian Nationalism: Pressure Groups and Conflict of Interests in Calcutta City Politics, 1875–1939* (Vikas Publishing House (1979) 66–68; Rajnarayan Chandavarkar, *History, Culture and the Indian City: Essays by Rajnarayan Chandavarkar* (CUP 2009) 22.

⁹⁷ Gail Omvedt, *Cultural Revolt in a Colonial Society: The Non Brahman Movement in Western India: 1873 to 1930* (Scientific Socialist Education Trust 1976) 236–241. On patronage and corruption in local politics of the era, see Tinker (n 64) 169–170, 189; Ray (n 96) 106–107.

⁹⁸ Tinker (n 64) ch VIII.

⁹⁹ *Bombay Government Gazette: Part I* (Government of Bombay 1927) 1263.

All that said, the conflict of interests between local government and the landed class cannot by itself explain the failure of nationalist support for the Bill. The great Calcutta and Bombay municipalities aside, local government remained a political backwater.¹⁰⁰ Whereas the influence of provincial and national politics on local politics was ‘continuous and all-pervasive’,¹⁰¹ the influence in the other direction was slight, especially now that municipalities and district boards had lost their role as electoral colleges for the provincial councils and, through those, the central legislature.¹⁰² The contest between local government and landowners would be unwelcome but lacked the political salience to single-handedly dissuade nationalists in the Assembly.

Land acquisition as an executive function

Of greater importance, it will be argued, were a number of other contests that would be brought to life by the clauses of the Bill designed to democratise the practice of land acquisition.¹⁰³ Both taking advantage of and side-stepping the constitutional rule that land acquisition was to be governed by central legislation alone, Kelkar proposed to give provincial legislative councils the starring role in decisions on compulsory acquisition. First, the Bill proposed, no provincial government would be able to acquire land for a ‘public purpose’ unless that purpose ‘[had] been approved as a public purpose by a specific resolution of the Legislative Council of the Province in which the land may be

¹⁰⁰ Tinker (n 64) 160–161.

¹⁰¹ Tinker (n 64) 145.

¹⁰² Misra (n 88) 46–56, 72–73.

¹⁰³ Clauses 6(2), 24 and 27.

situated'. Second, it was proposed, each and every acquisition for a company under Part VII of the Act should be subject to approval by the applicable provincial council. Third, the Bill continued, neither the Government of India nor the provincial governments would be allowed to enter into a contract to supply land to a company without the approval of the relevant legislature (a provision aimed at the sterling railway companies, as we have seen).¹⁰⁴

If the obligation of resettlement was controversial, these proposals were little short of revolutionary. Unlike in England where, Blackstone boasted, only the legislature could deprive a man of his property for the common good,¹⁰⁵ the original foundation for the taking of private land in India was not statute but sovereignty.¹⁰⁶ As the Privy Council asserted in an appeal from the Bombay High Court (*Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 Ind App 357), a new sovereign was entitled to wipe the slate of property rights clean:¹⁰⁷

¹⁰⁴ See above

¹⁰⁵ Taggart (n 106) 96–97.

¹⁰⁶ This is theoretical speculation rather than a statement of official or legal doctrine. Colonial Indian courts opined on the foundation of the state's power of land acquisition on only two occasions and came to different conclusions. In *Bahvant Ramchandra Natu v Secretary of State for India in Council* (1905) ILR 29 Bom 480 at 505, the High Court of Bombay stated that the 1894 Act 'aim[ed] at promoting important public interests; *Salus populi suprema lex*. And to interests of such paramount importance, private interests may justifiably be subordinated'. In *Veeraraghavachariar v Secretary of State for India in Council* (1925) 48 MLJ 204 at [5], the High Court of Madras asserted that 'every Sovereign authority has power to acquire private lands for public purposes and has the power to frame laws for the acquisition of land'. Both were no more than passing comments. In colonial India as in present day England, land acquisition was a 'highly practical subject, attended by little constitutional fanfare or theorizing': Michael Taggart, 'Expropriation, Public Purpose and the Constitution' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press 1998) 91.

¹⁰⁷ C.f. *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 at 407, in which the Board held that cession to the Crown is 'made on the footing that the rights of property of the inhabitants were to be fully respected', a principle that 'is a usual one under British policy and law when such occupations take place'. For the argument that *Vajesingji Joravarsingji* was decided incorrectly, see (ctd. on next page)

... when a territory is acquired by a sovereign state for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can only make good in the municipal Courts established by the new sovereign such rights as that new sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to these inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the High Contracting Parties.

Accordingly, acts such as the confiscations of Jesuit land in the islet of Bombay¹⁰⁸ by the Crown during its short rule (1665–1667), and its seizure of the neighbouring islet of Mahim from the Portuguese, were immune from legal challenge.¹⁰⁹ Although the Crown had promised in the articles of delivery by which it took possession of Bombay from the King of Portugal that existing landed rights would be respected, the promise was one owed by sovereign to sovereign and so, applying *Vajesingji Joravarsingji*, could not be enforced at law. The brute exercise of sovereignty sufficed to establish title.

Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press 1989) 161–179. For a recent analysis, see Amanda Perreau-Saussine, ‘British Acts of State in English Courts’ (2007) 78 *British Yearbook of International Law* 176, 184–207. *Vajesingji Joravarsingji* and other Indian Act of State cases to like effect were affirmed in independent India: SK Agrawala, ‘The Doctrine of Act of State and the Law of State Succession in India’ (1963) 12 *ICLQ* 1399. For critical comment, see Chhatrapati Singh, *Common Property and Common Poverty: India’s Forests, Forest Dwellers and the Law* (OUP 1986) 26–35.

¹⁰⁸ That is, the islet known before Portuguese conquest as Mumbai, one of seven islets separated by tidal marshes. The same name, later corrupted to Bombay, was sometimes applied to the entire island group. That group was welded into one by a gradual process of land reclamation in the 19th century and known as Bombay island. See Meera Kosambi, *Bombay in Transition: The Growth and Ecology of a Colonial City, 1880–1980* (Almqvist & Wiksell International 1986) 30, 39.

¹⁰⁹ On those actions, see J Gerson de Cunha, *The Origin of Bombay* (Kegan Paul 1900) 260–272; SM Edwardes, *The Rise of Bombay: A Retrospect* (Times of India Press 1902) 96–108; Dossal (n 50) 3–15. A separate problem was that there were not yet any courts in which such a challenge could be mounted. The first were established in 1670: MP Jain, *Outlines of Indian Legal and Constitutional History* (6th edn, LexisNexis Butterworths Wadhwa 2006) 22–24.

Law (of a kind) came only afterward. By the Aungier Convention of 1668, which contained the first quasi-law of land acquisition in a British possession in India, the executive bound itself to pay compensation for any land that it took. The Convention was an initiative by the East India Company, newly installed as the lessee of Bombay island from the Crown, to make peace with the island's restive Portuguese residents.¹¹⁰ The Governor, Gerald Aungier, negotiated a historic settlement with an assembly of leading *fazendars* (landowners): in return for a collective promise of tribute and the payment of rent for land under *foras* tenure, the Company agreed to return confiscated land and to pay compensation for any land taken thereafter. Private interests in coastal land would be respected unless the land was needed for the 'public good', and then only once private interests had been satisfied 'in a reasonable manner'. The island of Colaba – the only one of the seven islets of Bombay not yet ceded to or seized by the Crown – was to be 'reserved' to the Company 'for the security and defence of this whole isle', but only on the making of 'reasonable satisfaction to the persons interested therein'.¹¹¹

In a similar vein, a contractual form of land acquisition pre-dated the enactment by a conventional legislature of a law of land acquisition. It was common for the executive in the avatar of landowner to reserve the right to 'resume' land needed for public purposes. A number of 18th century leases for agricultural land on Salsette island (immediately north of Bombay island) provided for the surrender of land required for a public

¹¹⁰ de Cunha, *ibid*, 225–226, 300–302; Edwardes, *ibid*, 109–111; Dossal (n 50) 15.

¹¹¹ We do not yet know for how long the Aungier Convention provided a basis for the taking of land in Bombay. The first known enactment of a legislature on the subject in Bombay is Act XXVIII of 1839. Other legal (or quasi-legal) instruments were probably enacted in the intervening years and will be uncovered by further research. For examples of takings in those years, see RP Masani, *Evolution of Local Self-Government in Bombay* (OUP 1929) 68; J Masselos, 'Changing Definitions of Bombay: City State to Capital City' in Indu Banga (ed), *Ports and their Hinterlands in India (1700–1950)* (Manohar 1992) 294.

purpose at the same rate at which it was originally granted by the Government of Bombay. That expedient apparently saved the exchequer ‘very much money’ a century later when land was acquired for the Bombay, Baroda, and Central India Railway.¹¹² By similar provisions in a *sanad* and lease, in 1914 the Bombay Government was able to pay next to nothing to resume land on Malabar Hill on which it proposed to accommodate its officers.¹¹³

As Mariam Dossal has recounted, however, this ploy had its limits.¹¹⁴ A mid-19th century attempt to pay only for improvements on *foras* land in central Bombay – on the basis that *forasdars* held only licenses to cultivate the soil rather than any permanent rights – had to be abandoned in the face of a spirited campaign. In 1842, aggrieved by the proposed taking of their land without compensation for a new site on which to stack hay, 700 *forasdars* submitted a petition to the Government of Bombay against the ‘grave injustice’. The Government had sought to pay only for improvements on *foras* land on the basis that *forasdars* held only licenses to cultivate the soil rather than any permanent rights, a position that the Aungier Convention was said to support. The Government was eventually obliged to pass legislation recognising *foras* land as private property (Act VI of 1851), an unusual instance in which land acquisition drove changes in land tenure.

¹¹² FG Hartnell Anderson, *Manual of Land Acquisition for State of Bombay* (4th edn, Government Press 1963 [1941]) 37.

¹¹³ *Hamabai Framjee Petit v Secretary of State for India in Council* (1914) 31 ILR (Bombay Series) 279. For further examples of cases concerning instruments that permitted resumption at less than full market value, see *Bijoy Kumar Addy v Secretary of State for India in Council* (1916) 39 IC 889 (HC Calcutta) (a lease); *Ruttonji Ardesbir Wadia v Assistant Development Officer, Bandra* AIR 1940 Bom 260 (HC Bombay) (a *kowl* i.e. Crown grant); *L. Bashesbar Nath v Provincial Government N. W. F. P.* (1942) 206 IC 188 (Peshawar Judicial Commissioner’s Court) (a cantonment tenure lease). Anderson, *ibid*, suggests that such instruments were in common use in Bombay.

¹¹⁴ Dossal (n 50) 106–116, 123–124.

Even once the legislature put land acquisition on a statutory basis, it chose to involve itself no further in the use of the power. From Reg I of 1824 onwards, it had always been left to the executive to decide whether a public purpose justified the taking of land, without the need for the intercession of the legislature in each instance or class of instances. Only when challenged during the consultations for the Bill that became Act VI of 1857 – the first all-India land acquisition law – did officials feel it necessary to explain why the law in India had departed so sharply from that at Home. In England, apart from the special case of enclosures, each promoter of a particular scheme such as a railway or canal had to secure a private Act of Parliament to be entitled to acquire land compulsorily.¹¹⁵ In a remarkably frank petition to the Legislative Council against what became the 1857 Act, the *zamindars* of the British India Association urged the Raj to emulate the liberal values of the metropolis.¹¹⁶

Land or any private property so circumstanced, may justly, under responsible sanctions, be appropriated by a forced sale at a full value. Your petitioners, however, crave of your Honourable Council, that in carrying out this just but exceptional principle, the result or practice of which has been characterised by a distinguished judge and statesman (Lord Langdale) as “Acts of Sovereign and imperial power operating in the most harsh shape in which that power can be applied in civil matters” your Honourable Council will not follow or take as a basis and a guide, measures or acts of the Indian Government in days when popular rights, or constitutional maxims were little thought, but that you will follow in the steps and adopt the methods of legislative wisdom which are clearly defined in the Statute Book of England.

... [No British Statute gives] a general and undefined or any power to any authority, not even the Crown, to appropriate private property at discretion. Such a proposition for arbitrary power, your petitioners venture to believe, would not be entertained or listened to by any branch of the Imperial Parliament. And your petitioners are not aware of any thing in the existing circumstances of this country which renders that or any analogous proposition constitutional or justified when offered to your Honourable Council ...

¹¹⁵ Keith Davies, *Law of Compulsory Purchase and Compensation* (3rd edn, Butterworths 1978) 9–18.

¹¹⁶ ‘Petition of the British Indian Association to the Legislative Council of India against the Bill “for the acquisition of land for public purposes”’ (14 March 1857) in GoI, Legislative Department, ‘Papers relating to Acts, 1857 (Act VI of 1857)’ (NAI).

... Such a proposal, your petitioners, with all respect for the good intentions of the honourable gentleman through whom it has been conveyed, consider to be suited to the administration of despotic rule (from whom every limitation and definition of power is a concession and an indulgence), not to the Council Chamber of British India where those projects of law only (as your petitioners humbly conceive) can be welcome, or can be constitutionally entertained, which might be presented to and would be worthy of a British House of Commons, when deliberating on the legislative claims and wants of a well-ordered and peaceably governed British Dependency. Such proposal ignores the inviolable character of private property, which it places at the mercy of executive authority, not for a defined occasion or purpose, but arbitrarily and with no real check upon the will of the individual or individuals in whom, for the time being, that authority may happen to be vested.

The *zamindars* argued that the Legislative Council should replace existing laws with a version of the Land Clauses Consolidation Act 1845 (8 & 9 Vic. c. 18), then the sole public statute governing land acquisition in England, which went no further than to supply standard terms governing compensation for private land acquisition Acts.

Having failed to influence the Legislative Council, the *zamindars* petitioned the Company's Court of Directors to exercise its power to disallow the 1857 Act. The Court's unapologetic reply was that the introduction of the English model of land acquisition in India would 'cause great and unnecessary delay in the execution of public works, to the early completion of which we are desirous of affording every proper facility and encouragement'.¹¹⁷

Left unsaid was another reason why the English model would not be a suitable import. The executive in British India enjoyed enviably sweeping rights in relation to land. These were usefully listed by B. H. Baden-Powell, the authority on land tenure, in the

¹¹⁷ 'Dispatch in the Legislative Department, No. 3 of 1858 (18 January 1858) from the Hon'ble the Court of Directors' in 'Papers relating to Acts, 1857' (n 116).

course of a stylised account of their origin, as those rights that the Crown had chosen to retain from the full panoply it had secured on acquiring sovereignty:¹¹⁸

- (1) Government used its own eminent claim as a starting point from which to recognise or confer definite titles in the land, in favour of persons or communities that it deemed entitled;
- (2) It retained the unquestionable right of the State to all waste lands; ...
- (3) It retained useful subsidiary rights – such as minerals, or the right to water in lakes and streams. In some cases it has granted these away, but all later laws reserve such rights.
- (4) It retained the right of escheat; and of course to dispose of estates forfeited for crime, rebellion, &c.
- (5) It reserved the right necessary for the security of its income (a right which was never theoretically doubtful from the earliest times), of regarding all land as in a manner hypothecated as security for the land-revenue. This hypothecation necessarily implies or includes a right of *sale* in case the revenue is in arrears.

Even this formidable list was incomplete: it excluded, for example, the ‘resumption’ of *lakhiraj* tenures in Bengal.¹¹⁹ Given the array of rights that could be exercised with no legislative interference, once general empowering laws had been passed, what was the sense in compelling the intervention of the legislature for land acquisition alone?

In any event, as the *zamindars* were well aware, having petitioned Parliament in 1852 on the lack of separation of powers in India,¹²⁰ the ‘legislature’ at the time was no more than the three members of central executive (the Governor-General and two Councillors)

¹¹⁸ BH Baden-Powell, *The Land-Systems of British India: Volume I, Book 1-2* (Clarendon Press 1892) 234–235.

¹¹⁹ Chittabrata Palit, *Tensions in Bengal Rural Society: Landlords, Planters, and Colonial Rule, 1830–1860* (Progressive Publishers 1975) ch 3.

¹²⁰ Bimanbehari Majumdar, *Indian Political Associations and Reform of Legislature (1818–1917)* (Firma KL Mukhopadhyay 1965) 40–41. The degree to which government in India should manifest a separation of powers was disputed even within official circles: see, for e.g., Metcalf (n 86) 17–18, 25–27. In the event, different models operated in different provinces, Bengal exemplifying a separation of powers and Punjab a concentration: see, e.g., Dietmar Rothermund, ‘Tenancy Legislation for Chota Nagpur: The Emphasis on Executive Protection’ in Dietmar Rothermund and DC Wadhwa (eds), *Zamindars, Mines and Peasants: Studies in the History of an Indian Coalfield and its Rural Hinterland* (Manohar 1978) 70.

sitting with a Legal Member, the only one of the four appointed from outside the Company's service.¹²¹

Whereas the deliberation of an unelected executive plus one would hardly be that of a representative legislature, Kelkar's proposals would indeed democratise the practice of land acquisition to a meaningful degree. Of course, the nine provincial legislative councils (for Madras, Bombay, Bengal, the United Provinces, Punjab, Bihar and Orissa, the Central Provinces, Assam, and Burma) were still far from arithmetically representative of the population at large.¹²² Only one in ten adult men (and later women in some provinces) received the vote; the rest were excluded by a primarily tax-based franchise. Communally-drawn electorates (primarily for Muslims but also for Punjabi Sikhs, Indian Christians, Anglo-Indians, Europeans) were linked to reserved seats in excess of what numbers alone could justify. Favoured interest groups (landowners, universities, commerce, and industry) returned members from special constituencies. The bureaucracy reserved the right for the (appointed) members of provincial executive councils to be *ex-officio* members of the legislative councils and to nominate a number of others, several of whom were to be spokesmen for other special interests that it was thought might otherwise be unrepresented or under-represented (Depressed Classes, Anglo-Indians, Indian Christians, Labour, and others). Nevertheless, these councils were far more representative than their predecessors.¹²³ In a clear constitutional advance, by

¹²¹ SV Desika Char, *Centralised Legislation: A History of the Legislative System of British India from 1834 to 1861* (Asia Publishing House 1963) ch II.

¹²² *Report of the Indian Statutory Commission: Vol 1 – Survey* (Cmnd 3568, 1929–1930) 132–147; M Rashiduzzaman, *The Central Legislature in British India 1921–1947* (Mullick Brothers 1965) ch 3; Judith M Brown, *Modern India: The Origins of an Asian Democracy* (OUP 1984) 198–200.

¹²³ See the chart in Joseph E Schwartzberg, *A Historical Atlas of South Asia* (OUP 1992) 68.

law at least 70% of their members were to be elected and no more than 20% could be officials.

Notwithstanding the long history of solely executive control, in the heady days following the 1919 reforms it was not considered outlandish that the reconstituted councils should have some role in scrutinising the practice of land acquisition. The Functions Committee (1919) – briefed with advising on a precise division of power between and within the reformed arms of government – thought that while land acquisition should be a function ‘reserved’ to the provincial executives, industry should be allowed to promote private land acquisition bills in the new legislatures.¹²⁴ The Government of India demurred, worrying about ‘expense and delay and the risk of improper influences’, but accepted that the law was ‘not sufficiently liberal’.¹²⁵ The Government proposed to examine the practicality of implementing the recommendations of the Industrial Commission and bringing of applications by industry ‘under the cognizance of the [provincial councils]’. That could be achieved, its officials suggested, by requiring that every draft Part VII agreement be laid before the relevant council and by empowering the council to veto the proposed acquisition by resolution.¹²⁶

Officials in the provinces may always have been less enthusiastic about democratic scrutiny over land acquisition. The members of each of the provincial executive councils

¹²⁴ *East India (Constitutional Reforms: Lord Southborough’s Committees): Vol. II* (Cmnd 103, 1919) 25.

¹²⁵ GoI to Montagu (16 April 1919) in *East India (Constitutional Reforms: Lord Southborough’s Committees): Vol. III: View of the Government of India upon the Reports of Lord Southborough’s Committees* (Cmnd 176, 1919) 36.

¹²⁶ ‘Notes’ in GoI, Rev & Ag, Land Rev, ‘Proposed Amendment of the Land Acquisition Act, 1894, with reference to the recommendations of the Indian Industrial Commission’, Oct 1920, prog. 26–28 (pt. A) at p. 15.

(apart from Bombay) were unanimous that land acquisition should remain a ‘reserved’ subject.¹²⁷ Their opposition persuaded the Government of India against giving legislative councils a role in scrutinising land acquisition for industry. In 1927, asked to comment on Kelkar’s proposals, the provincial executives gave full vent to their scepticism, even contempt.¹²⁸ As a matter of principle, a number argued, the power of deciding on land acquisition should remain the sole prerogative of the executive. ‘It would be just as reasonable to give the courts power to convict a body of men of rioting only when the Legislative Council had agreed that they formed an unlawful assembly’, one wrote.¹²⁹ A classicist in their ranks observed: ‘An attempt was made in ancient Greece to turn the legislative body of the State into the Executive body. All historians know how unsuccessful the result was’.¹³⁰

Others made pragmatic arguments based on their knowledge and experience of the reformed constitution: that the councils already enjoyed ultimate control over land acquisition through their power to sanction provincial budgets and it was not desirable that they exercise greater oversight;¹³¹ that the councils could not be as expert and consistent as government in deciding on individual acquisitions;¹³² that the councils could not be as impartial as government, given the vested interests represented in the

¹²⁷ *Lord Southborough’s Committees: Vol. II* (n 124) 68.

¹²⁸ Only one official was sympathetic to the principle of council scrutiny, though only in relation to proposed acquisitions for industry: Paper No. II at 65.

¹²⁹ Paper No. I at 38.

¹³⁰ Paper No. III at 98.

¹³¹ Paper No. II at 52 and 65

¹³² Paper No. III at 92, 126.

chambers and the temptation for outsiders to exercise influence through wire-pulling or outright bribery;¹³³ that given the usual antipathy of council members towards the executive, public needs would be neglected;¹³⁴ that in minor administrations like Baluchistan there were no legislative councils to play the role that Kelkar envisaged.¹³⁵

The soundness of these criticisms – except for the last, which was correct – cannot be taken up here. However, it is clear that many officials had misunderstood a crucial aspect of Kelkar’s proposals. They thought that Kelkar intended for each and every proposed acquisition for a ‘public purpose’ to go before the applicable council.¹³⁶ Given the number of such acquisitions each year, reaching the hundreds in the larger provinces, the councils would have time for no other work, they argued. Projects urgently needed by the public, such as new latrines during a cholera outbreak, would be subject to delay.

Absent an explanation from Kelkar, the mistake was an understandable misreading of the clause in his Bill, quoted above, that proposed that no Part II declaration should be made unless the stipulated public purpose had been approved as such by a ‘specific’ resolution of the applicable legislative council.¹³⁷ When the Bill is read as a whole, however, it is clear that Kelkar intended only that each and every use of Part VII to acquire land for a company should be put before the applicable legislature for

¹³³ Paper No. I at 40; Paper No. IV at 47.

¹³⁴ Paper No. I at 15, 27; Paper No. II at 34.

¹³⁵ Paper No. I at 11.

¹³⁶ E.g. Paper No. I at 11, 42.

¹³⁷ Clause 6.

sanction.¹³⁸ For Part II acquisitions, by far in the majority, Kelkar intended for councils to pass resolutions governing classes of acquisitions, at whatever level of generality the council chose. A council could decide, for instance, to pass a resolution sanctioning any acquisitions necessary in the interests of public health; or, in the alternative, any acquisitions for public latrines; or, if determined to exert maximum control, any acquisitions for public latrines needed during an epidemic.

The executive would not be harassed by having to seek permission for each and every acquisition: that much Kelkar accepted. Control, nevertheless, would vest in the legislatures – an overturning of 260 years of practice.

Judicial scrutiny

In the event that a landowner disputed whether a proposed Part II acquisition fell within a particular legislative council resolution, the Kelkar Bill proposed that he should be able to turn to the District Courts.¹³⁹ This, too, was another far-reaching proposal. Until 1923, the only course ordinarily open to aggrieved landowners was to petition provincial governments against acquisitions that their own officers had proposed. Most such petitions would have failed, we can safely assume. Whereas the power of their numbers

¹³⁸ Clauses 24–26.

¹³⁹ Clause 5.

helped the *forasdars* of mid-19th century Bombay to prevail, Dossal gives contemporaneous examples of individual petitioners who failed.¹⁴⁰

Given the regard for legality for legality's sake, petitions that appealed to morality alone may have been less successful than those that appealed to the law. In 1905, the forty residents of Cachar, Assam, who pleaded hardship in petitions against an acquisition for a private tea tramway were refused relief.¹⁴¹ In a telling contrast, in 1919 a Mr Thompson saved his Lucknow home (the *Retreat*) by arguing that its acquisition for the extension of a private college would be unlawful.¹⁴²

Mr Thompson's argument relied on the proviso to s 6(1) of the 1894 Act. First introduced in the 1870 Act, the proviso originally required that compensation for an acquisition for a public purpose had to be paid out of public or municipal funds. The proviso was later rationalised as a limit on the otherwise absolute discretion of provincial governments to decide on what counted as a public purpose – the theory being that the willingness of a public body to apply funds gave proof of the public need.¹⁴³ In 1894, the proviso was relaxed to allow for acquisitions paid for institutions like private schools and hospitals that were only 'partly' funded by government. Nevertheless, Mr

¹⁴⁰ Dossal (n 50) 118–120.

¹⁴¹ GoI, Rwy Board, Rwy Cons, 'Proposed Acquisition of a Certain Strip of Land in the District of Cachar for the Construction of a Private Tramway Line...', Feb 1907, prog. 142–144 (A).

¹⁴² GoI, Rev & Ag, Land Rev, 'Memorials against the action of the Government of the United Provinces in directing the acquisition of certain private properties for the extension of Isabella Thoburn College, Lucknow', Aug 1920, prog. 43–50 (A).

¹⁴³ See the 'Report of the Select Committee on the Bill to amend the Land Acquisition Act, 1870' (24 Jan 1894) and the comment by Mr. Lee-Warner in the Extract from the Abstract of the Proceedings of the Council of the Governor General of India (1 Feb 1894), both in 'Papers relating to Act I of 1894' (n 68). C.f. *Ponnaia v Secretary of State* (1926) 51 MLJ 338 (HC Madras) at 340: the s 6(1) proviso is 'intended to be a test of the good faith of the Government'.

Thompson argued, it was a ‘colourable’ evasion of the proviso for the acquisition of the *Retreat* to be carried out as an acquisition for a public purpose under Part II of the Act rather than an acquisition for a charitable society under Part VII. This was because the provincial government intended to pay only a small part (a tenth) of the cost of the acquisition (the balance to be funded by the college). Surprisingly, the legal opinion ordered by the Viceroy came out in Mr Thompson’s favour and the acquisition was dropped.

Mr Thompson had thought that his claim could not be brought before the courts because the 1894 Act expressly allowed for their intervention only on questions of compensation. In truth, neither the domestic courts nor the Privy Council considered themselves quite so narrowly confined. In *Luckmeswar Singh v Chairman of the Darbhanga Municipality*,¹⁴⁴ to take an example, the Board quashed an acquisition by a Collector as ‘colourable’, essentially for being compromised by a conflict of interest. The land had been owned by the Maharajah of Darbhanga, then a minor whose estates were under the charge of the Collector of Darbhanga as the local representative of the Court of Wards. The same Collector purported to use his powers under the Land Acquisition Act 1870 to acquire the land for the local municipality, of which he was *ex-officio* chairman, for only one rupee. The Board held that in his zeal to advance the interests of the municipality the Collector had breached his duty under the Act to pay for the land at its full market value. The offer and acceptance of one rupee as compensation was no more than a

¹⁴⁴ (1890) ILR 18 Cal 99.

‘colourable attempt to obtain a title under the Land Acquisition Act without paying for the land ...’.¹⁴⁵

Taking an expansive interpretation of *Luckmeswar Singh* as authority to quash any acquisition evasive of the law, the Madras High Court in *Ponnaia v Secretary of State*¹⁴⁶ quashed an acquisition on the same ground that Mr Thompson had relied upon to save the *Retreat*. *Ponnaia*, however, was a far clearer case. The appellants alleged that a rival had instigated the acquisition of their lands under Part II ostensibly for a new road and paid all the compensation awarded, except for a contribution from provincial revenues of only one *anna*. That was no more than a ‘particle’ of the compensation, the Court reasoned, and so amounted to a ‘mere evasion’ of the proviso.¹⁴⁷

The very next year, however, in another case of a one-*anna* government contribution to an otherwise privately-funded acquisition, a differently constituted bench of the Madras High Court came to the opposite conclusion. The Court in *K. Senga Naicken v Secretary of State*¹⁴⁸ declined to follow *Ponnaia*, confining both that case and *Luckmeswar Singh* to their facts.¹⁴⁹ If the legislature had intended that a substantial part of compensation for Part II

¹⁴⁵ At 106.

¹⁴⁶ (1926) 51 MLJ 338.

¹⁴⁷ At 341, 347.

¹⁴⁸ AIR 1927 Mad 245.

¹⁴⁹ In *Vedlapatla Suryanarayana v Province of Madras* AIR 1945 Mad 394, the Court followed *Senga Naicken* and overruled *Ponnaia*, while reserving the power to quash acquisitions in which government had ‘acted in fraud of its powers’. This approach is essentially the present position: *Somavanti v The State of Punjab* [1963] 2 SCR 774 at [65]; c.f. *Pratibha Nema v State of M.P.* AIR 2003 SC 3140 at [9]–[11].

acquisitions should be drawn from public revenues, the Court observed, it would have used that language.

This deference towards the executive was more typical of the attitude of the courts in land acquisition cases than the close scrutiny in *Luckmeswar Singh* and *Ponnaia*. Although certainly willing to consider whether acquisitions by or for local government were *ultra vires*, or whether procedural rules had been breached, the courts were not as exacting in applying the law against the executive in such cases as they could have chosen to be.¹⁵⁰

Despite the succour they could have drawn from *Luckmeswar Singh*, the courts refused to entertain the questions of whether acquisitions ostensibly for a ‘public purpose’ (Part II) or a purpose ‘likely to prove useful to the public’ (Part VII) truly met those descriptions. In their defence, it would have been difficult to do otherwise. Both the 1870 and 1894 Acts provided that a declaration by a provincial government that land was needed for a public purpose or a company was ‘conclusive evidence’ of that fact.¹⁵¹ It was telling, however, that the courts were not only respectful of that privative clause but also convinced of its wisdom. In *Ezra v Secretary of State* (1902) ILR 30 Cal 36, the Calcutta

¹⁵⁰ See, for e.g., *Secretary of State v Qamar Ali* (1918) 51 IC 501 (HC Allahabad); *Trustees for the Improvement of Calcutta v Chandra Kanta Ghosh* (1920) 56 IC 32 (PC); *Amulya Chandra Banerjee v Corporation of Calcutta* (1922) ILR 49 Cal 838 (PC); *Municipal Corporation of Bombay v Ranchoardas Vandravandas* AIR 1925 Bom 538 (HC Bombay); c.f. *Sorabji Nassarwanji Dundas v Justices of the Peace for the City of Bombay* (1875) 12 BHCR 250 (HC Bombay); *Gajendra Sahu v Secretary of State* (1908) 8 CLJ 39 (HC Calcutta); *Manick Chand Mahata v Corporation of Calcutta* AIR 1921 Cal 159 (HC Calcutta).

¹⁵¹ Section 6 of the 1870 Act and s 6(3) of the 1894 Act. The first provision of this kind appeared in s 2 of Act VI of 1857 with respect to acquisitions for a public purpose. This protection was extended to acquisitions for private persons and companies by s 26 of the Works of Public Utility by Private Persons and Companies Act (XXII of 1863). In *Veeraraghavachariar v Secretary of State* (n 106) the Madras High Court quickly dispensed with the novel argument that the Legislative Council, as a subordinate legislature to Parliament, had lacked the power to enact s 6(3) of the 1894 Act.

High Court observed that it was ‘expedient and reasonable’ that government should be the sole judge of usefulness to the public, ‘having regard to the economic and social condition of the country’.¹⁵²

Even when not bound by the clause, the courts persisted in their deference. In *Hamabai Framjee Petit v Secretary of State for India in Council*,¹⁵³ the High Court of Bombay and then the Privy Council were asked to rule on a challenge to whether the housing of Government of Bombay officials, for which land was to be resumed on Malabar Hill (as mentioned above), constituted a ‘public purpose’ within the terms of the power of resumption in a *sanad* and a lease. In what is still treated as a leading judgment on the meaning of the phrase despite the unusual facts,¹⁵⁴ the Board adopted the observations by Justice Bachelor in the court below that the ‘public purpose’ must include an ‘object or aim in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned’, rejecting a narrower ‘public use’ interpretation that the land taken must be made available to the public at large.¹⁵⁵ The Government was not an absolute judge of public purpose: it could not say *sic volo sic jubeo* (thus I wish, thus I command), the Board observed. However, it continued, a court would not easily hold it to be wrong. The present case was easy, the Board thought. All the judges below endorsed the Government’s view that the resumption would help

¹⁵² At 50. The judgment was upheld on appeal: *Ezra v Secretary of State* (1905) 9 CWN 454 (PC). See, further, Chandravarkar J in *Hamabai Framjee Petit v Secretary of State for India in Council* (1914) 31 ILR (Bombay Series) 279 at 286.

¹⁵³ (1914) 31 ILR (Bombay Series) 279.

¹⁵⁴ *Pratibha Nema v State of M.P.* (n 149) [7]–[8].

¹⁵⁵ At 295. For a comparison of the ‘public use’ interpretation to the broader interpretation taken in *Hamabai Framjee Petit* and like cases in other jurisdictions, see Taggart (n 106).

maintain the efficiency of public servants: by providing subsidised accommodation for officials in a city as expensive as Bombay, the Government could attract the ablest of those serving in the *mofussil* (and allow them to ‘maintain a superior face ... to the wealthy classes of their fellow subjects’, the trial judge added).¹⁵⁶

Despite the deference exemplified and mandated by *Hamabai Framjee Petit*, there were two attempts prior to the Kelkar Bill to cast the court in the role of defenders of the public against overreach by the executive. In January 1922, the Telegu scholar J. Ramayya Pantulu, an elected member of the First Legislative Assembly, introduced a Bill to enable landowners to bring legal challenges to proposed acquisitions for lacking a public purpose or for being ‘malicious or vexatious’.¹⁵⁷ In justifying why the courts should be pressed to intervene, Pantulu, a Telegu Brahmin, accused the Madras authorities of overzealousness in their programme of acquiring house sites for *Panchamas* (Dalits).¹⁵⁸ Aside from this local grievance – hardly the most sympathetic of examples to have chosen – there were hundreds of cases of hardship all around the country, he claimed.

The bureaucracy’s reaction to the Bill was critical but not hostile. Officials denied any widespread injustice and harped on the delays that allowing resort to the courts would cause. Many, however, were willing to support the introduction of administrative

¹⁵⁶ At 283.

¹⁵⁷ Land Acquisition (Amendment) Bill 1922.

¹⁵⁸ Extract from the Legislative Assembly Debates, Vol. III, No 37 (15 Feb 1923) at 3–4, 10, in IOR/L/E/7/1117 – File 1126 (BL). The submissions referred to below are reproduced in the same file.

hearings for objections to acquisitions.¹⁵⁹ Again illustrating the deferential attitude of the judiciary, few of the judges consulted were keen to assume the supervisory role that Pantulu proposed.¹⁶⁰ The justices of the Calcutta High Court peremptorily declared that ‘the question of whether land should or should not be compulsorily acquired is not ... a proper one for the investigation of the Courts’. In contrast, non-official opinion was said to be firmly in favour of the Bill. Indeed, the Marwari Association took the position that the Bill did not go far enough in protecting landed interests.¹⁶¹ The law should also be amended to define ‘public purpose’, the Association argued, and to introduce the obligation of resettlement mooted by the Indian Industrial Commission.

Despite the likely popularity of the measure, in February 1923, Pantulu failed in his bid to send the Bill to a select committee. He was, no doubt, hampered by the lack of unity among the elected members of the First Legislative Assembly, all of whom had been elected as independents (the Congress having boycotted the inaugural councils).¹⁶²

Meanwhile, another private attempt along the same lines as the Pantulu Bill had failed. In September 1922, Lala Sukhbir Sinha – a banker, *zamindar*, and one of the cohort of

¹⁵⁹ See, e.g., the submissions by the following officials to the Secretary to the GoI, Legislative: Secretary to the Government of Bengal, Revenue Department (19 June 1922); Deputy Secretary to Government, United Provinces Judicial (Civil) Department (8 July 1922); c.f. Secretary to the Government of Bihar and Orissa, Revenue Department (26 June 1922).

¹⁶⁰ See e.g., Registrar, Bombay High Court (Appellate side) to the Secretary to Government of Bombay, Revenue Department (26 April 1922); Offg. Registrar of the Calcutta High Court (Appellate side) to the Secretary to the GoI, Legislative (27 June 1922); Acting Secretary to the Government of Madras, Revenue Department, to the Secretary to the GoI, Legislative (22 August 1922).

¹⁶¹ Honorary Secretary, Marwari Association to the Assistant Secretary to the Government of Bengal, Revenue Department (25 April 1922).

¹⁶² Rashiduzzaman (n 122) 108–111.

the Hindu Mahasabha elected to the inaugural councils¹⁶³ – moved a resolution in the Council of State for the amendment of the 1894 Act so that courts could rule on public purpose.¹⁶⁴ Sinha argued that provincial governments often acquired more land than they strictly needed (taking no fewer than ten acres to house one of their officials, for example). He also argued that the power to acquire land for companies was being abused. As an example, Sinha cited the recent acquisition of 85 acres (some of which he owned) in the UP town of Muzzafarnagar for a Merchants' Association. The Association proposed to create a market by allotting the land to its members.¹⁶⁵ There could be no objection to bona fide acquisitions for, say, the building of a factory or the raising of a commercial crop, Sinha assured the Council, but the Muzzafarnagar acquisition was 'hardly fair'. Illustrating a division that we shall return to below, the landowners in the Council spoke in the favour of the resolution whereas the doyen of industry and commerce Lalubhai Samdas (who we met earlier in connection with the Belapur Co.)¹⁶⁶ argued that allowing resort to the courts would cause serious delays to energy and transport projects. Perhaps on the faith of explicit assurances by the government that it was considering the introduction of administrative hearings, Sinha's resolution failed by a wide margin.

¹⁶³ Richard Gordon, 'The Hindu Mahasabha and the Indian National Congress, 1915–1926' (1975) 9 MAS 145, 153, 156, 164.

¹⁶⁴ *The Council of State Debates (Official Report): Volume III Part I: Third Session of the Council of State, 1922* (Government Central Press 1922) 445–456.

¹⁶⁵ Sinha submitted memorials against the acquisition before and after his Council of State resolution, neither of which succeeded: GoI, Rev & Ag, Land Rev, 'Memorial from the honourable Lala Sukhbir Sinha protesting against the orders of the United Provinces Government in the matter of the acquisition of land for the proposed establishment of a market in Muzaffarnagar, United Provinces', March 1923, prog. 35–36 (B).

¹⁶⁶ See 148–149, 156–157, 172 above.

Such hearings were introduced the next year by a government amendment to the 1894 Act.¹⁶⁷ Thereafter, persons with a legal interest in land sought for a public purpose or a company had the right to make objections to the proposed acquisition to the local Collector. If that right was exercised, the Collector was to hold an inquiry and make recommendations to the provincial government, which was to make a ‘final’ decision on the objections.¹⁶⁸

Few outside official circles would have considered the new procedure to be a serious concession. After all, self-regulation was hardly a check on the hated improvement trusts. Although the Calcutta Improvement Trust was bound by its 1911 empowering statute to hear objections from aggrieved landowners,¹⁶⁹ it was nevertheless pilloried as unsympathetic to the hardships that its acquisitions for roading and other improvement schemes inflicted on the middle class.¹⁷⁰ In Bombay, although the propertied elites were adept at tying up the city’s Improvement Trust in endless litigation and wringing from it every last drop of compensation, the poor of the city, though enjoying the right under the Trust’s 1898 statute to lodge their objections, remained vulnerable to summary eviction for grandiose slum clearance schemes (that were later discredited as failures).¹⁷¹

¹⁶⁷ By s 3 of the Land Acquisition (Amendment) Act (XXVIII of 1923), which inserted s 5A into the 1894 Act.

¹⁶⁸ Like so much of the 1894 Act, the procedure has persisted unchanged to the present day.

¹⁶⁹ Sections 45–47 of the Calcutta Improvement Act (Bengal Act V of 1911).

¹⁷⁰ Rajat K Ray, *Urban Roots of Indian Nationalism: Pressure Groups and Conflict of Interests in Calcutta City Politics, 1875–1939* (Vikas Publishing House 1979) 70–74.

¹⁷¹ Prashant Kidambi, *The Making of an Indian Metropolis: Colonial Governance and Public Culture in Bombay, 1890–1920* (Ashgate 2007) 78–113.

Although administrative hearings would not ordinarily have deviated the land-acquiring executive, the judicial scrutiny that the Kelkar Bill envisaged just might have, at least in clear cases. Importantly, unlike the Pantulu Bill, the Kelkar Bill did not call on the courts to make untrammelled decisions as to whether the object of a proposed acquisition was a ‘public purpose’ without a benefit of a definition of that term. The courts would be given only the circumscribed and more recognisably ‘judicial’ task of deciding whether the purpose of an acquisition under review fell within the terms of a council resolution, each of which essentially provided a partial definition of ‘public purpose’. Kelkar would have realised, however, that such scrutiny would be far too expensive for most to access, given the cost of legal representation.¹⁷² That was precisely why he had proposed elsewhere in the Bill that disputes on compensation should be settled by private arbitration rather than by the District Courts. Kelkar’s hopes of reining in the executive rested not with the courts but with the provincial legislatures.

Democratisation: the promise and the risks

As their critics were all too aware, the Calcutta and Bombay Improvement Trusts could afford to be unpopular because they were outside popular control: provincial officials and their nominees enjoyed a permanent majority on their boards.¹⁷³ Indeed, both trusts had been established precisely in the belief that only strong executive action

¹⁷² Samuel Schmitthener, ‘Development of the Legal Profession in India’ in Indra Devi, *Sociology of Law* (OUP 2005) 126–127.

¹⁷³ Hazareesingh (n 88) 27; Kidambi (n 171) 72; Ray (n 170) 72. In practice, limits were observed so that unpopularity did not blossom into popular revolt. For an example of the Calcutta Improvement Trust backing down ‘in deference to the clamour of Indian opinion’, see Ray at 74–76.

unencumbered by the institutions of local self-government could achieve decisive civic change.¹⁷⁴ Given Indian conditions, so the story went, democracy had to be sacrificed for the good of the public.¹⁷⁵

However, the trusts are alleged to have privileged the most privileged of the public. Patrick Geddes – the pioneering town planner – wrote that improvement trusts in India did not work in the interests of the people but rather ‘derived their advantage, even their survival, from the opposite viewpoint and interest, that of the propertied and land-speculating classes and their economists...’.¹⁷⁶ The Bombay Trust became ‘another mechanism for transferring resources to the city’s propertied elites and millowners’, Rajnarayan Chandavarkar has argued,¹⁷⁷ citing the thousand-year leases of Trust land to cotton mills on peppercorn rentals (largesse that the permanent presence on millowners on its board helps to explain).¹⁷⁸ Other authors have cited instances in which Trust transport and housing schemes benefitted the upper classes directly at the expense of the urban poor.¹⁷⁹ Very little was done to alleviate the conditions in which the majority of

¹⁷⁴ Kidambi (n 171) 72; Partho Datta, ‘How Modern Planning came to Calcutta’ (2013) 28 *Planning Perspectives* 139.

¹⁷⁵ Of course, the authorities were not alone in purporting to speak for public good. Indians in local government were fond of the same idiom: Neeladri Bhattacharya, ‘Notes towards a Conception of the Colonial Public’ in Rajeev Bhargava and Helmut Reifeld, *Civil Society, Public Sphere and Citizenship: Dialogues and Perceptions* (Sage 2005) 141–142.

¹⁷⁶ Martin Beattie, ‘Sir Patrick Geddes and Barra Bazaar: Competing Visions, Ambivalence and Contradiction’ (2004) 9 *The Journal of Architecture* 131, 138.

¹⁷⁷ Rajnarayan Chandavarkar, *The Origins of Industrial Capitalism in India: Business Strategies and the Working Classes of Bombay, 1900–1940* (CUP 1994) 44.

¹⁷⁸ Gordon (n 91) 120–121.

¹⁷⁹ Kidambi (n 171) 103, 111–112; Hazareesingh (n 88) 33–35; Gordon (n 91) 122–127.

Bombay's inhabitants lived, A.D.D. Gordon concluded after his analysis of the Trust's operations.¹⁸⁰

Could the same charge be laid against the provincial governments, equally unaccountable to the public in whose interests they purported to act? The Gazette Survey of acquisitions by the Government of Bombay (1918–1927) provides support for doing so. Various elites were provided for in various ways at the expense of the poor, themselves the victims of neglect and unintended consequences.

Consider the thousands of acres acquired for electricity and water works in those years, the largest single category of acquisitions (see Table 5.3 below). The electricity generated from land acquired in Mulshi Peta and elsewhere was intended only for the Bombay city mills and railways; as late as the 1990s, there were villages in Mulshi Peta still without electricity.¹⁸¹ No doubt some of the land acquired for water-works benefitted the general populace, such as the acquisitions for the Tansa water works that supplied drinking water to Bombay city.¹⁸² Nevertheless, the benefits of the largest of the acquisitions in these years (the Nira Right Bank Canal, the reservoirs at Lake Beale and Lake Arthur Hill, and the Visapur tank) were cornered by richer agriculturalists.¹⁸³ Those projects were originally built to ward off famine in dry years. However, contrary to officials'

¹⁸⁰ Gordon (n 91) 126.

¹⁸¹ Vora (n 60) 162–163.

¹⁸² See, e.g., *Bombay Government Gazette: Part II* (Government of Bombay 1921) 1849.

¹⁸³ On those projects, see Donald W Attwood, 'Peasants versus Capitalists in the Indian Sugar Industry: The Impact of the Irrigation Frontier' (1985) 45 *Journal of Asian Studies* 59, 65–71; Bret Wallach, 'British Irrigation Works in India's Krishna Basin' (1985) 11 *Journal of Historical Geography* 155; Vasant Kaiwar, 'Nature, Property and Polity in Colonial Bombay' (2000) 27 *Journal of Peasant Studies* 1, 25–27.

expectations (which would have been disabused had they thought to consult farmers), there was little demand for canal water to irrigate subsistence crops like sorghum and millet in years of normal rainfall. To recover the heavy costs it had incurred in constructing the canals, the Government sold canal water at a premium to cultivators of sugarcane: a crop that only the more prosperous could summon the capital to grow. In theory, the canals were meant to revert to their original purpose when drought returned, but in practice they did not: officials feared that cane growers would not re-plant their crops if they lost confidence in the continuity of water supply.

Table 5.3
Land (acres) acquired under Part II of the 1894 Act by the Government of Bombay (1918–27), categorised by project

	<i>Roads</i>	<i>Railways</i>	<i>Water / energy</i>	<i>Official facilities</i>	<i>“Development” – industrial</i>	<i>“Development” – other</i>	<i>Housing/Health/ Education</i>	<i>Misc.</i>
<i>1918</i>	364.4	14.8	1777.9	624.4	–	–	11.9	262.0
<i>1919</i>	787.7	732.8	227.3	2584.6	79.8	179.3	358.8	389.7
<i>1920</i>	432.8	92.1	1132.3	316.7	6121.9	1483.6	407.5	1957.1
<i>1921</i>	388.3	462.1	552.3	563.9	1389.7	1357.0	75.6	251.9
<i>1922</i>	127.8	1.9	652.3	231.8	–	138.4	1.2	98.3
<i>1923</i>	150.0	0.3	2369.5	367.0	–	17.8	43.7	86.8
<i>1924</i>	108.5	–	996.2	146.8	–	3.8	6.2	101.7
<i>1925</i>	288.4	211.7	299.3	39.6	–	1.8	1.6	61.2
<i>1926</i>	227.5	355.4	451.5	76.7	–	486.5	2.8	275.0
<i>1927</i>	64.5	1708.9	345.3	112.9	–	7.2	3.1	172.6
Total	2939.8	3579.9	8803.9	5064.3	7591.3	3675.2	912.3	3656.4
%	8	10	24	14	21	10	3	10

In a similar vein, thousands of acres were acquired for the development of industry – the vast proportion for a single company, Samaldas’ Belapur Co. – but none for cottage industries. Industry was also a likely beneficiary of acquisitions for Criminal Tribes settlements, amounting to 243.5 acres over the ten years (reflected in the ‘Miscellaneous’ column above). In a policy pioneered in Bombay, such settlements – essentially forced labour camps for itinerant communities alleged by officials to be habitually criminal – were established next to textile mills as a cheap and (literally) captive workforce: one

report in 1916 estimated that the settlements provided nearly half of the labour force for mills in the district of Belgaum.¹⁸⁴

Other acquisitions displayed a similar bias. Land was acquired from Salsette villagers for the ‘development’ of the Bombay suburban area, meaning in practice the building of middle-class housing so that congestion in the more exclusive areas of the city would ease.¹⁸⁵ The Government acquired five times as much land for its own purposes – for offices, civil lines, police lines, cantonments, state industries like salt works etc. – as it acquired for schools, hospitals, and public housing: perhaps illustrative of the long half-life of old notion that the Indian public comprised the civil service and the military.¹⁸⁶

How would the pattern of acquisitions have changed if Kelkar’s proposals on democratisation became law, so that provincial councils were vested with the power to define ‘public purpose’ by resolution and to decide whether to approve every proposed acquisition for a company? We know too little about the composition and politics of the provincial councils to make firm predictions of how they would have taken advantage of their new powers.¹⁸⁷ However, we can be reasonably confident of no sharp change from

¹⁸⁴ Meena Radhakrishna, *Dishonoured by History: ‘Criminal Tribes’ and British Colonial Policy* (Orient Longman 2001) 110–114.

¹⁸⁵ Hazareesingh (n 88) 57.

¹⁸⁶ Lord Stanley, a future Secretary of State for India, made a comment to that effect in 1857: Ravi Ahuja, *Pathways of Empire: Circulation, ‘Public Works’ and Social Space in Colonial Orissa, c. 1790–1914* (Orient Blackswan 2009) 85.

¹⁸⁷ The most helpful source, though brief in its coverage, is BB Misra, *The Indian Political Parties: An Historical Analysis of Political Behaviour up to 1947* (OUP 1976) 231–250, from which the comment below about the composition of the councils is drawn. The two texts on the Bombay and Central Provinces councils are little more than a narrative of council proceedings: SH Belavadi and SR Kharabe, *History of Maharashtra Legislature* (Maharashtra Legislature Secretariat 1985) 1–75; RR Pateriya, *Provincial Legislatures and the National Movement: A Study in Interaction in Central Provinces and Berar, 1921–37* (Northern Book Centre 1991).

existing practice: radicalism could not be expected from councils elected on a narrow franchise and dominated by lawyers and landlords. Nevertheless, the councils may well have passed resolutions defining the more unpopular practices as outside the scope of ‘public purpose’. The opponents of the use of forced labour in Criminal Tribes settlements may have sought to outlaw the acquisition of land for their establishment.¹⁸⁸ The councils would have been tempted to use their new power to try to scupper unpopular government schemes such as the reclamation of Back Bay in Bombay, for which 88 acres of harbour land used for stake-net fishing were acquired in 1924.¹⁸⁹

Another likely target was the ‘recoupment principle’, according to which municipalities defrayed the cost of improvement schemes by acquiring and then re-selling neighbouring properties.¹⁹⁰ In his opening speech on the Bill, Kelkar inveighed against acquisitions for recoupment as a ‘profiteering sort of arrangement’¹⁹¹ and referred to a clause in the Bill that he thought would ban the practice. However, it is open to question whether it would have been effective in doing so. One problem was the language of the clause itself: in providing only that land ‘surplus’ to the purpose for which it was acquired had to be returned to its original owner, the clause left open the argument that land acquired for recoupment was not, indeed, ‘surplus’. A deeper problem was the uncertainty whether the Kelkar Bill would bind all municipalities. The great city municipalities and

¹⁸⁸ On such opposition, see Radhakrishna (n 184) 88–89.

¹⁸⁹ *Bombay Government Gazette* (Government of Bombay 1924) 3111–3112. On opposition to the Back Bay reclamation, see Chandavarkar (n 25) 56–57; Gordon (n 91) 151–154.

¹⁹⁰ In *Trustees for the Improvement of Calcutta v Chandra Kanta Ghosh* (n 150), the Privy Council upheld the *vires* of acquisitions by the Calcutta Municipality for recoupment. See, further, FG Hartnell Anderson, *Manual of Land Acquisition for the Presidency of Bombay* (Government Central Press, Bombay 1926) [32]; Hazareesingh (n 88) 32.

¹⁹¹ *Legislative Assembly Debates (Official Report): Volume I (19th Jan to 21st February, 1927): First Session of the Third Legislative Assembly, 1927* (GoI Press 1927) 365.

improvement trusts were vested with the power to acquire land under versions of the Act incorporated and amended by their empowering statutes. Accordingly, judging by an appeal decided a few years later, they were probably immune from the changes proposed in the Kelkar Bill. The Privy Council considered it self-evident that the version of the 1894 Act used by the Calcutta Improvement Trust was a separate local Act, unaffected by subsequent amendments to the 1894 Act that did not purport to be of universal application.¹⁹² By extension, unless amended to have that effect, the Kelkar Bill would not have bound such bodies.

Still, even as it stood, the Bill would have given the provincial councils a great deal more control over land acquisition than they had ever exercised before. Armed with both the right to sanction budgets and control over the meaning of ‘public purpose’, the councils may even have found it possible to goad the governments and municipalities towards more ‘progressive’ land acquisition policies, such as acquisitions for the construction of working-class housing.¹⁹³ Acquisitions for official facilities may have been curtailed in favour of more acquisitions for schools and hospitals. The opportunities for ‘nation-building’ (and patronage) were not insubstantial.

Surveying these possibilities, why would the nationalist bloc in the Legislative Assembly have declined to support the Bill? Given what we have seen of the history of land acquisition, the single most important reason may have been an apprehension of the risks of the proposals on democratisation. There were likely to have been fears not only

¹⁹² *Secretary of State for India v Hindusthan Co-operative Insurance Society* (1931) 58 IA 259.

¹⁹³ A proposal made in a paper read to the Bombay Cooperative Housing Association in 1917: Hazareesingh (n 88) 183.

that various sectional interests would clash in the Assembly over the proposals themselves, but also, what was worse, that such conflicts would recur time and again in the provincial councils if the proposals became law.

To begin, consider the most predictable of the divisions: between legislators sympathetic to business and those protective of the landed class. We have already seen the potential for the two camps to divide over land acquisition: recall the debates in the Punjab Legislative Council over the Purchase of Land Bill 1921 and those in the Council of State over implementation of the Indian Sugar Committee recommendations and the Sinha resolution.¹⁹⁴ In the ensuing years, seeing little to gain and much to lose in siding with industry, the Government of India had, by doing nothing, sided with the landed class, its traditional allies. It brought the provincial governments back into line after their enthusiasm for acquisitions for industry in 1919–1920. From 1921–1927, acquisitions still occurred but only infrequently and more in accordance with the Indian Industrial Commission's criteria.

The Kelkar Bill promised to re-open the whole troublesome matter. For industry, the Bill was an opportunity to revive the banner years of 1919–1920. Instead of having to persuade the provincial governments to acquire land on their behalf, companies could turn to the provincial legislative councils. Once a legislature had given its approval to a proposed acquisition for a company, the provincial executive had political cover to carry out the acquisition, safe in the knowledge that any criticism of sacrificing the *ryot* to the capitalist would be directed at politicians, not officials. Of course, the neatest and surest

¹⁹⁴ See 165–167, 232–233 above.

solution from industry's perspective was for 'public purpose' to be defined to include acquisitions for industry, as the Indian Merchants' Chamber (the premier lobby for Indian industry) advocated.¹⁹⁵ It acknowledged, however, that democratisation was 'not a bad solution'. No doubt some legislatures like the Punjab council would invariably come out against acquisitions for industry; some, like the Bombay council, would usually be in favour;¹⁹⁶ the rest, one presumes, were there to be persuaded of the individual merits of each case.

Accordingly, the members of the Assembly sympathetic to industry – probably some of the 16 or so whose main source of income was from business¹⁹⁷ – had the incentive to advocate for democratisation. That said, not all of those would take that view: some might be less sanguine about the prospects of convincing councils to acquire land for industry; others would have had substantial landed incomes to protect against encroachment by industry.¹⁹⁸ Equally, not all of the members with primarily landed incomes – numbering around 40 – would resist democratisation: there were landlords who were industrialists in their own right or invested in or otherwise collaborated with industry (a prominent example was Ibrahim Rahimtoola, one of Bombay's largest landlords as well as a millowner).¹⁹⁹ However, there surely would have been a

¹⁹⁵ Paper No. III at 124.

¹⁹⁶ Consider the stance that an earlier Bombay council took over the Mulshi acquisitions: Vora (n 60) 51–55.

¹⁹⁷ Rashiduzzaman (n 122) 102.

¹⁹⁸ For examples of industrialists investing in land, see Amiya Kumar Bagchi, 'European and Indian Entrepreneurship in India, 1900–1930' in Edmund Leach and SN Mukherjee (eds), *Elites in South Asia* (CUP 1970).

¹⁹⁹ Amiya Kumar Bagchi, *Private Investment in India 1900–1939* (CUP 1972) 214–215, 427. Gordon (n 91) 136–137, 247.

considerable contingent of landowners determined to preserve the protection that they derived from the self-interested conservatism of the executive.

Of course, not all was lost if the Bill became law. Each individual acquisition could be resisted in the provincial councils. Acquisitions for the golden children of Indian industry like TISCO and the Bengal Chemical and Pharmaceutical Works would be difficult to thwart, but lesser companies, particularly if tainted in some way by foreignness, would be more vulnerable targets. Any perceived land-grab by commerce rather than industry – say for another market like that in Muzzafarnagar – would be most vulnerable of all.

The nationalist bloc would not have regarded it in its broader interests for conflicts of this kind to be aired, let alone on an ongoing basis. The Swarajists would not invariably have sided with industry against landowners. Although the Swarajists were friendly to big business, contrary to caricature they were not in its pocket.²⁰⁰ Even in 1927, the apogee of their collaboration with business in pursuit of commercial goals like a new rupee ratio, they were unwilling to sacrifice core nationalist positions for the sake of industry. Their opposition to the Steel Protection Bill was a clear illustration: notwithstanding the prestige and importance of TISCO, imperial preference was thought indefensible and so the interests of the company were put second.

The problem with the Kelkar Bill was the disunity it would reveal and perhaps exacerbate, a clear breach of the golden rule observed by the Congress that anti-

²⁰⁰ Gordon (n 91) 185–187; Bhagwan Josh, 'Indian National Congress and the Politics of the Capitalist Class' and BR Nanda, 'Congress and the Left Critics' in Dwijendra Tripathi, *Business and Politics in India: A Historical Perspective* (Manohar 1991); Mukherjee (n 27) 62–71.

imperialist unity had to be preserved at all costs. While both landed and Indian industry could rally against the imperial targets of the Haji Bill, they would invariably clash over the Kelkar Bill. The legislative debates, first in the Assembly and then in the provincial councils if the Bill became law, would expose the impossibility of ‘capitalism without Gesellschaft, industrial development without attendant structural tensions’, contrary to the conceit of mainstream nationalism.²⁰¹ The democratisation of land acquisition would have the unhappy consequence of revealing the naiveté of the hope that industrialisation in India could follow a uniquely pacific, frictionless trajectory.²⁰²

From the Swarajists’ perspective, the prudent choice was to avoid having to make a choice between industry and the landed interest. The sensible stance to adopt was that which had been taken by the authorities: to leave well enough alone. If an acquisition for an industry proved controversial, it was better for officials rather than politicians to shoulder the criticism. We know too little about the inner workings of the Nationalists to be as confident about their motives, but they too would have wanted to avoid exposing the division in their ranks between commercial men and landowners.

Both sides may have also been influenced by another more urgent consideration: in the febrile first months of 1927, soon after an election fought on communal lines,²⁰³ it would not have been fanciful to worry that the Kelkar Bill could become a flashpoint for

²⁰¹ Manu Goswami, ‘From *Swadeshi* to *Swaraj*: Nation, Economy, Territory in Colonial South Asia, 1870 to 1907’ (1998) 40 *Comparative Studies in Society and History* 609, 630.

²⁰² On that hope, see Goswami, *ibid*, 629–630; Sumit Sarkar, *The Swadeshi Movement in Bengal 1903–1908* (new edn, Permanent Black 2010 [1973]) 88–91. C.f. concurrent strands of thought either ambivalent about or opposed to industrialisation: Geetanjali Pandey, ‘Premchand on Industrialism: A Study in Attitudinal Ambivalence’ (1982) 19 *IESHR* 201; David Arnold, *Science, Technology and Medicine in Colonial India* (CUP 2000) 124–128.

²⁰³ See 25 above.

religious conflict. One could well imagine fears being raised that provincial councils dominated by one community might, say, acquire sites of religious significance belonging to another. The authorities had long ago learned to tread carefully. In 1857, after ‘wide commotion’ had arisen from the acquisition of ‘sacred places’ in Patna for an East Indian Railway Co. line, officials backed away from acquisitions in Rajmahal and Allahabad to which religious objections had been raised.²⁰⁴ Even the usually intransigent Bombay Improvement Trust gave way to religious sentiments from time to time.²⁰⁵ The wisdom of caution was demonstrated by the notorious Cawnpore mosque affair of 1913, in which the acquisition and demolition of part of a mosque at the behest of the city’s improvement trust caused no less than a riot, in which 18 were killed and 23 wounded by police fire.²⁰⁶

Given the communalism of its author, the Kelkar Bill was vulnerable to being cast as a Hindu plot to dispossess Muslims, whether from their mosques, homes, or fields. In Muslim-majority provinces, Hindus too could raise fears of their own dispossession. Depending on local conditions, one Hindu community might also fear the machinations of another: the Marwaris of Calcutta had feared that an improvement trust populated by

²⁰⁴ Hena Mukherjee, *The Early History of the East Indian Railway 1845–1879* (Firma KLM 1994) 97–98.

²⁰⁵ Kidambi (n 171) 81.

²⁰⁶ Martin Yanuck, ‘The Kanpur Mosque Affair of 1913’ (1974) 64 *The Muslim World* 307. To avoid a recurrence of the affair, the provincial governments were urged to review their existing safeguards when acquiring sites of religious significance: GoI, Rev & Ag, Land Rev, ‘Measures for providing explicitly in the rules under the Land Acquisition Act for the adequate treatment of objections to the acquisition of land on which religious buildings exist’, Nov 1914, prog. 71–85 (A).

Bengali notables would not hesitate to cut new roads through Barabazar, the centre of Marwari business.²⁰⁷

In reality, fears of this kind would have been groundless: notwithstanding the democratisation envisaged by Kelkar's Bill, a provincial council would not be able to compel a provincial legislature to acquire a particular parcel of land. Given the vehemence with which inequality of treatment was resented, the authorities would have taken pains to avoid being seen to favour one Indian community over another in the exercise of land acquisition.

In contrast, it was indeed possible that provincial councils dominated by one community might put a stop to existing land acquisition programmes carried out for the benefit of another. Here, caste rather than religion might be the fulcrum of conflict. For example, if given the opportunity, it was not inconceivable that the Brahmin-dominated Swarajists in the Madras council, resurgent at the expense of the non-Brahmin Justice Party,²⁰⁸ would pass a resolution declaring the acquisition of house sites for *Panchamas* as no longer for a 'public purpose'.

At the very least, the possibility that land acquisition would become a site of religious and caste conflict could not be ruled out. Motilal Nehru, for one, would have been reluctant to risk supporting a Bill that might unleash forces he lacked the power to control. Embittered by the communal turn in nationalist politics, Nehru would have hesitated before placing temptation in the way of the Swarajists in Bengal and Punjab,

²⁰⁷ Ray (n 96) 70–73.

²⁰⁸ Misra (n 187) 234.

who were less committed to secularism than he.²⁰⁹ Even a provincial Swarajist in the mould of B. S. Moonje – a Hindu Mahasabha leader and founder of the Rashtriya Swayamsevak Sangh²¹⁰ – eschewed open communal conflict in the provincial councils: he is said to have persuaded the Hindu mover of the Central Provinces Slaughter of Animals (Amendment) Bill 1925 to withdraw the measure because of opposition from Muslim members of the council.²¹¹

Equally, turning to the Nationalists, Lajpat Rai and Malaviya were more or less ‘liberal communalists’: practitioners of communal politics but hardly firebrands of the Savarkar variety.²¹² To avoid any insinuation that Nationalists in the provinces would use public power to favour Hindus, a charge that would damage the credentials of the party as a serious alternative to the Swarajists, Nationalists in the Assembly were likelier to disavow than embrace new powers that would confer a measure of control over Muslim private property. For both Swarajists and Nationalists, there were clear incentives for leaving the Bill to a quiet death.

²⁰⁹ Misra (n 187) 250–251.

²¹⁰ Christophe Jaffrelot, *The Hindu Nationalist Movement and Indian Politics: 1925 to the 1990s* (Penguin 1999) 33–34.

²¹¹ Pateriya (n 187) 104.

²¹² Bipan Chandra, *Communalism in Modern India* (2nd edn, Vikas Publishing House 1987) 341.

Conclusion

All that said, we cannot dismiss the possibility that there might have been rather prosaic reasons for the failure of the Kelkar Bill. Perhaps, having done badly in the 1926 provincial elections,¹ the Swarajists were reluctant to support a Bill that would give new legal powers that would be exercised by their rivals. Perhaps, contrary to our earlier conclusion,² Kelkar was too toxic a figure to be seen to support. Perhaps the Nationalists were too divided to support even an effort by one of their own. Perhaps the Bill was a casualty of apathy or lethargy, at a time in which nationalist politics was too consumed by internecine conflicts to have the time or energy to push forward a measure that would require a large measure of both. Absent further archival evidence coming to light, all these explanations are possible.

Yet, given the signal attractions of parts of the Bill to the nationalist mind – the opportunities it gave to nationalise the sterling railway companies, to reaffirm Indian opposition to imperial preference, to round off the sharper edges of the existing practice of land acquisition, and to dispense patronage – we are driven to find a more powerful explanation for its failure. The explanation offered here is that the Kelkar Bill, derided by officials as a bare-faced expression of nationalism, fell victim to what were perceived as the long-term interests of the nationalist movement. Whereas nationalist legislators in the Assembly supported private members' Bills that sought to achieve no more than technical amendments or those that explicitly made propaganda against the Raj, the

¹ See 24 above.

² See 33–34 above.

Kelkar Bill fell into a problematic third category: a Bill that sought to engage with an issue of public policy that would divide nationalists from one another. If the authorities in their prudence had chosen to avoid tampering with the 1894 Act, anticipating that it would make more enemies than friends in doing so, it was not for nationalists in opposition to assume the burdens of government, whatever the benefits for those outside the Assembly walls.

Kelkar's folly was to suppose that the passionate conflicts of interests aroused by land acquisition could be resolved by a process of well-meaning, technocratic law reform. Then as now, the compulsory reallocation of a resource as valued as land could not be other than the stuff of hardscrabble politics – trade-offs, strategic deals, and even deception and coercion – that nationalists in 1927 had every incentive to avoid. It would take Nandigram and other scandals to force the Congress to yield the 1894 Act.

This is not the place for a critique of its replacement – the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 – save to mention three reasons to doubt whether it will achieve its declared aim ‘to ensure ... a humane, participative, informed and transparent process for land acquisition’ and to provide ‘just and fair’ compensation and ‘adequate’ rehabilitation and resettlement to affected persons, such that they ‘become partners in development leading to an improvement in their post acquisition social and economic status’.³ First, the basic position remains that, within certain restrictions, the state may forcibly transfer land to

³ Preamble to the 2013 Act. For common criticisms, see, e.g., Swagato Sarkar, ‘The Impossibility of Just Land Acquisition’ (2011) XLVI EPW 35; c.f. Chitrangada Choudhury, ‘Adivasis and the New Land Acquisition Act’ (2013) XLVIII EPW 492

itself and to private companies. Second, the major innovation of the Act – an obligation on private companies to obtain the ‘prior consent of at least eighty per cent of those affected families’ who would be displaced by a proposed acquisition – is not self-evidently in the interests of landowners: the new rule is likely to perpetuate, and in some instances to exacerbate, the degree to which land acquisition confers windfalls on companies for whom land is acquired.⁴ Third, although the new Act substantially increases the compensation owed to the displaced and enacts far-reaching rehabilitation and resettlement obligations as law,⁵ to be enforced by an elaborate administrative machinery,⁶ one cannot be confident that these promises will be kept in full or even in large measure. The record of implementing less generous promises has been poor.⁷

This is not to suggest that the Act is merely window-dressing, but that it will not effect a revolutionary break with the colonial past. In land acquisition as elsewhere, colonial practices have possessed an inertia that de-colonisation and changes to the law have only imperfectly overcome. A history of land acquisition after 1947 has not yet been written,⁸ but many of the practices described in this study appear to have endured: the state

⁴ Eesvan Krishnan, ‘Law Reform after Nandigram: An Argument against the 70:30 Rule’ (MPhil thesis, University of Oxford 2010). See, further, Rob Jenkins, ‘The Politics of India’s Special Economic Zones’ in Sanjay Ruparelia et al (eds), *Understanding India’s New Political Economy: A Great Transformation?* (Routledge 2011) 62–63.

⁵ For context, see Walter Fernandes, ‘India’s Half-century search for a Resettlement Policy and the Right to Livelihood’ in Renu Modi (ed), *Beyond Relocation: The Imperative of Sustainable Resettlement* (Sage 2009); Ramaswamy R Iyer, ‘Converting resettlement policy into resettlement law: a welcome initiative but no occasion for celebration yet’ in Hari Mohan Mathur (ed), *Resettling Displaced People: Policy and Practice in India* (Routledge 2011).

⁶ Chapter VI–VIII

⁷ Of a voluminous literature to that effect, see e.g. Felix Padel and Samarendra Das, ‘Resettlement realities: the gulf between policy and practice’ in Mathur (ed) (n 7).

⁸ For some of the legal landmarks, see Colin Gonsalves, ‘Judicial Failure on Land Acquisition for Corporations’ (2010) XLV EPW 37.

continues to acquire land to launder titles;⁹ land acquisition continues to privilege the rich over the poor (or so critics have alleged);¹⁰ and the courts police the land-acquiring executive with only marginally more alacrity.¹¹ The 1894 Act is no more, but the colonial history of land acquisition, deeply embedded in post-colonial practice, has not yet been consigned to the past.

⁹ Sebastian Morris and Ajay Pandey, 'Towards Reform of Land Acquisition Framework in India' (2007) 42 *Economic and Political Weekly* 2083, 2084. The authors label the practice 'title arbitrage'.

¹⁰ See the literature at 3 above (n 8).

¹¹ See the authorities at 3 above (n 7).

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