

## PRIVATE SPECULATIONS AND THE PUBLIC INTEREST: N. C. KELKAR'S LAND ACQUISITION BILL

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*In December 2007, in response to protests against the compulsory acquisition of land for special economic zones and other industrial projects, most notoriously at Nandigram and Singur, the UPA-I government proposed changes to the Land Acquisition Act, 1894 (“LAA 1894”) of a scope and significance unprecedented in independent India.<sup>1</sup> There exists, however, a comparable albeit forgotten precedent of reforming intent and ambition from the late (British) Raj. In 1927, the Maharashtrian nationalist N. C. Kelkar (1872–1947) proposed what was described as a ‘revolutionary’ private member’s Bill to amend the LAA 1894, inspired in part by a satyagraha, a few years earlier, against land acquisition for a privately-constructed dam. The Bill met with serious opposition from officials and was ultimately withdrawn, a failure which this article attempts to explain in light of the history of land acquisition and the political economy of the inter-war years.*

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- 1 The changes were set out in two Bills, the Land Acquisition (Amendment) Bill, 2007 and the Rehabilitation and Resettlement Bill, 2007. The Bills were not enacted in the previous Parliament because of opposition by the Trinamool Congress, a member of the governing UPA-I centre-left coalition. The Trinamool Congress opposed land acquisition for companies in any circumstances, and so opposed a provision in the Land Acquisition (Amendment) Bill which would have permitted the acquisition of 30% of the land sought by a company if the company had already secured by private negotiation at least 70% of the land it required for a given project. The Bills were revived by UPA-II in the form of the Land Acquisition, Rehabilitation, and Resettlement Bill, 2011 introduced in the LokSabha on September 7, 2011 and referred a few days later to the Standing Committee on Rural Development. The 70:30 rule has been replaced by a rule requiring the ‘prior informed consent’ of 80% of ‘project-affected people’ if land is to be acquired ‘in the public interest for private companies for the provision of goods for public or provision of public services’ (cl. 3(za)). In that and other respects, the Bill makes promises to those affected by land acquisition which are substantially more generous than those made by the 2007 Bills. For a full analysis, see the contributions in 46(41) ECONOMIC AND POLITICAL WEEKLY, 29–40, 65–72 (October 8, 2011). At time of writing, it is uncertain if the Bill will be enacted.

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## **I. KELKAR AND THE MULSHI SATYAGRAHA**

In March 1919, the Government of Bombay sanctioned a scheme by the Tata Hydro Electric Power Supply Company to build a dam at the confluence of the rivers Nila and Mula 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 to generate electricity for the cotton mills, factories, and railways in Bombay. It was estimated that the reservoir for the dam would submerge around 48 of the 80 villages of Mulshi Peta and in doing so displace thousands of Mawalas (the name by which the residents of Mulshi are known). In June 1919, the government announced that it planned to use the LAA 1894 to compulsorily acquire the land required for the scheme. Aware of grievances regarding compensation for land acquisition for previous Tata dam projects, the Mawalas launched a satyagraha, from May 1922, under the leadership of the former militant nationalist *Senapati* Bapat, by this time a staunch Gandhian. Consisting primarily of non-violent occupations of the dam site and minor damage to Tata property, (for which Bapat and other leaders were imprisoned on several occasions), the satyagraha continued in fits and starts for nearly four years. Despite these efforts, only minor delays were caused to the dam's construction. By the end of 1924, with many Mawalas having accepted compensation for their land from Tata, the satyagraha was

formally called off.

Professor Rajendra Vora, in his definitive account of the Mulshi satyagraha, from which the preceding summary was drawn, explains that one reason for its failure was an unresolved division between those who resisted the acquisition at all costs – a policy of ‘Jan or Jamin’ (life or land) – and those who aimed simply to extract more generous compensation from Tata.<sup>2</sup> N. C. Kelkar, at the time the editor of the renowned Marathi newspaper, the *Kesari*, belonged to the latter camp. Although Kelkar, through the *Kesari*, had been the first to suggest a satyagraha at Mulshi, he had hoped it would be avoided through a settlement with Tata resulting in compensation.<sup>3</sup> According to Vora, Kelkar had serious misgivings about Gandhian mass politics and so ‘a movement in the nature of satyagraha had no place in his political philosophy’.

The trajectory of Kelkar’s career illustrated his preference for ‘working within the defined frameworks of journalistic and constitutional agitation’.<sup>4</sup> Born into a Chitpavan Brahmin family in 1872, Kelkar trained as a lawyer but soon turned to journalism when recruited by Tilak in 1896 as his assistant and editor of the *Mahratta*, a nationalist English language weekly.<sup>5</sup> A prolific journalist, unsparing in his criticism of the Raj, Kelkar edited one or both of the *Mahratta* and its sister paper the *Kesari* for almost three decades. Tilak trusted and respected Kelkar as a colleague and friend and the two worked together closely on the nationalist campaigns of the day, including Tilak’s Home Rule League of which Kelkar was Secretary. Following Tilak’s death in 1920, Kelkar became an important Maharashtrian political figure in his own right. Convinced of the folly of the Congress policy to not contest elections for the political institutions established under the Government of India Act, 1919, Kelkar was amongst those who founded the Swarajya Party in 1923. He was elected to the Legislative Assembly that year. The Swarajists split in 1926 on the issue of the acceptance of executive

2 RAJENDRA VORA, THE WORLD’S FIRST ANTI-DAM MOVEMENT: THE MULSHI SATYAGRAHA, 1920-24, pp. 150–151(2009).

3 *Id.* at 149–150.

4 An observation by the author in RICHARD CASHMAN, THE MYTH OF THE LOKAMANYA: TILAK AND MASS POLITICS IN MAHARASHTRA, 96 (1975).

5 The description of Kelkar’s career in this paragraph is drawn from S. T. Naigaonkar, *N. C. Kelkar: A Political Study*, ch.1-4 (Doctoral thesis, University of Poona, 1979).

office; those in favour, including Kelkar, formed the Responsive Cooperation Party which by its manifesto was committed to ‘working the Reforms, unsatisfactory, disappointing, and inadequate as they are for all they are worth’.<sup>6</sup> In 1927, re-elected to the Assembly, Kelkar would pursue constitutional means to reform the Act which had made possible the acquisitions at Mulshi.

## II. THE KELKAR BILL

As it stood when the Kelkar Bill was proposed in February 1927, the LAA 1894 provided two distinct sets of procedures by which land could be compulsorily acquired. According to the provisions in Part II of the Act, land could be acquired if, in the opinion of the local government, it was needed for a ‘public purpose’.<sup>7</sup> The expression ‘public purpose’ was defined only to the extent that it included ‘the provision of village-sites’.<sup>8</sup> Part VII of the Act was reserved for acquisitions for a ‘company’, defined as any company registered or otherwise incorporated under English or Indian company law.<sup>9</sup> Land could be acquired for a company if, again in the opinion of the local government, the acquisition was needed for the construction of some work that was ‘likely to prove useful to the public’.<sup>10</sup> The Act did not permit a landowner to bring a legal challenge to a proposed acquisition. Objections could, however, be voiced to the local government, which had the responsibility of making a ‘final’ decision on those objections.<sup>11</sup> Only the assessment of compensation made by the local Collector could be challenged in court.<sup>12</sup> The Act entitled landowners to compensation according to the market value of the land plus an extra fifteen per cent ‘in consideration of the compulsory nature of the acquisition’.<sup>13</sup>

The Kelkar Bill represented a challenge to almost every aspect of the LAA 1894. First, the Bill proposed to narrow the definition of ‘company’ so land

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6 *Id.* at 71.

7 S. 6(1), Land Acquisition Act, 1894.

8 S. 3(f), Land Acquisition Act, 1894.

9 S. 3(e), Land Acquisition Act, 1894.

10 S. 39 and 40, both in Part VII of the Act.

11 S. 5A, Land Acquisition Act, 1894.

12 See the provisions in Part III of the Act.

13 S. 23(2), Land Acquisition Act, 1894. .

could be acquired only for companies which held their capital in rupees and had either a majority of Indian directors or a majority of Indian shareholders.<sup>14</sup> Second, the Bill proposed to devolve power away from local governments, so that it would be local legislatures which would decide on whether acquisitions would occur and local courts which would decide on objections by landowners to acquisitions.<sup>15</sup> Third, the Bill proposed a number of changes to the provisions for compensation, all of which were intended to be in the interests of landowners: first, the introduction of a system of arbitration to decide on compensation;<sup>16</sup> second, various additions to the criteria for assessing market value;<sup>17</sup> and third, the imposition of an obligation on the beneficiary of an acquisition to re-house landowners in the event that more than thirty persons would be evicted by an acquisition.<sup>18</sup>

Those conversant with the law and practice of land acquisition would have recognised these proposals as having ‘a somewhat revolutionary character’, in the words of the responsible Minister.<sup>19</sup> Kelkar, though, framed the Bill as being no more than an ameliorative measure. The first paragraph of the Statement of Objects and Reasons accompanying the Bill made clear that no change was proposed to the *compulsory* nature of acquisitions under the LAA 1894 because, Kelkar wrote, 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 because more equitable’. Twice in his speech introducing the Bill to the Legislative Assembly, Kelkar said it had been conceived in a ‘constructive spirit’.<sup>20</sup>

14 Cl. 2.

15 For the devolution to local legislatures, *see* cl. 6(2) and 24–27; for the devolution to courts, *see* cl. 5.

16 Cl. 10–22.

17 Cl. 17.

18 What would have been S. 16(2) of the Act, to be introduced by cl. 11 of the Bill.

19 LEGISLATIVE ASSEMBLY DEBATES (OFFICIAL REPORT) VOL. I: FIRST SESSION OF THE THIRD LEGISLATIVE ASSEMBLY, 19 JANUARY–21 FEBRUARY 1927, 845 (1927). [Hereinafter ‘L.A.D. VOL. I’]

20 *Id.* at 363, 366.

Kelkar said that he anticipated an honest difference of opinion on the Bill and chose to move for the Bill to be circulated for official and public opinion rather than to be referred directly to a select committee.<sup>21</sup> In the ensuing debate in the Assembly on the motion to circulate, the degree of opposition to the Bill was made very clear. J. W. Bhore, the Secretary for Education, Health and Lands, said that the government had serious objections to the Bill, which he said bristled with difficulties.<sup>22</sup> H. C. Greenfield, a nominated official (that is, a member of the Assembly who had been nominated by the Governor-General rather than elected),<sup>23</sup> objected to ‘every point of detail’ and ‘every principle’ in the Bill.<sup>24</sup> Abdul Aziz, another nominated official, described it as a ‘chaos of pious wishes’.<sup>25</sup> None of the elected members in the Assembly, who by law comprised a permanent majority, spoke in favour of the Bill.

Though the motion was won and the Bill circulated for opinion, its reception outside the Assembly was hardly less hostile, as is amply clear from the over two hundred pages of opinions on file.<sup>26</sup> Except for a few, usually qualified, endorsements,<sup>27</sup> the provincial governments, municipalities, bureaucracy, and judiciary were all against the Bill. The common complaint was that the Bill was ‘unworkable’ and, if enacted, would bring land acquisition to a halt;<sup>28</sup> some suspected that was Kelkar’s actual intention.<sup>29</sup> Many complained

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21 L.A.D. VOL. I, *supra* note 19, at 844.

22 L.A.D. VOL. I, *supra* note 19, at 847.

23 Of the 143 members of the Legislative Assembly, 103 were elected and 40 were nominated by the Governor-General: S. 63B of the Government of India Act, 1919.

24 L.A.D. VOL. I, *supra* note 19, at 850.

25 L.A.D. VOL. I, *supra* note 19, at 853.

26 IOR/L/E/7 – File 1126, at the British Library. The Papers referred to below are contained in this file.

27 E.g. letter (no. 333, May 7, 1927) from Miles Irving, Esquire, O.B.E., I.C.S., Commissioner, Lahore Division, at para. 14, *in GoI*, Legislative Department, *Paper No. II: Opinions no. 8–13 on the Land Acquisition (Amendment) Bill*, 61: ‘I think that almost every clause of the Bill is unsound as drafted, but that it is an inarticulate attempt to express a sense of grievance which deserves a respect which need not be extended to its specific proposals’.

28 E.g. letter (April 28, 1927) from C. E. Jones, Special Officer for Land Acquisition, South Indian Railway, Trichinopoly, at para. 15, *in GoI*, Legislative Department, *Paper no. IV: Opinion no. 17 on the Land Acquisition (Amendment) Bill*, 9.

29 E.g. letter (March 31, 1927) from H. S. Shield, Esq., M.A., I.C.S., Collector of Tanjore, *in Paper No. IV*, p. 30.

that the Bill was badly drafted.<sup>30</sup> In one of the more intemperate opinions, a Collector wrote that the Bill was ‘a piece of buffoonery’ that he could ‘hardly imagine a man so stupid as to mean it seriously’.<sup>31</sup> Other opinions were more diplomatically expressed: ‘The Bill is the natural outcome of Mr. Kelkar’s well-known sympathy with the expropriated ryots of Mulshi Peta, and the only explanation of its extraordinary character is that his heart has run away with his head’.<sup>32</sup>

The few opinions on file other than from officials were more favourable to the Bill,<sup>33</sup> though there were reservations and contrary views. In what was, perhaps, a revealing contrast, the Burma Indian Chamber of Commerce was in favour of the Bill but the Burmese Chamber of Commerce against.<sup>34</sup> One reason for the lack of public response, if that is what can be assumed from the small number of opinions on file,<sup>35</sup> may have been that the (English language) press generally paid little attention to the Bill.<sup>36</sup> Except for a negative editorial in an Allahabad daily,<sup>37</sup> and positive editorials in two Poona weeklies (one being *Mahratta*, Kelkar’s old paper),<sup>38</sup> the press did no more than report the debates in the Assembly.

30 E.g. Letter (no. 259 | 12-11, April 7/9, 1927) from the Registrar, High Court of Judicature at Rangoon, *in GoI, Legislative Department, Paper no. I: Opinions no. 1–7 on the Land Acquisition (Amendment) Bill*, p. 56.

31 Letter (no. 1785/27, March 21, 1927) from A. M. A. C. Galletti, Esq., I.C.S., Collector of Ganjam, at para.7, *in Paper No. IV*, *supra* note 28, at 16.

32 Memorandum (no. 4734-B, May 13, 1927) from the Acting Commissioner in Sind, at para.2, *in GoI, Legislative Department, Paper No. III: Opinions 14–16 on the Land Acquisition (Amendment) Bill*, 88.

33 E.g. letter (April 29, 1927) from Gunendra Rath Noy, Esq., M.L.C., Pleader, at para.2, *in Paper No. I*, *supra* note 30, at 50.

34 Letter (no. G.L. | 2 | 27-28, April 13, 1927) from the Secretary, Burma Indian Chamber of Commerce; letter (no. 297 | 27, April 11, 1927) from the Honorary Secretary, Burmese Chamber of Commerce; both *in Paper no. I*, *supra* note 30, at 57.

35 One official in enclosing a letter from a pleader described it as ‘giving the most reasoned non-official criticism received’, suggesting that others were received but not forwarded. Letter (no. 344 | I-L.-62 R.R., Ranchi, May 30, 1927) from R. E. Russell, Esq., I.C.S., Offg. Secretary to the Government of Bihar and Orissa, at para.13, *in Paper No. I*, *supra* note 30, at 44. There is no way of knowing whether this was an isolated instance.

36 I have not yet consulted the vernacular press.

37 THE LEADER, February 18, 1927.

38 THE MAHRATTA, February 20, February 27, March 6 and March 3, 1927; SERVANT OF INDIA, February 10, 1927.

A year later, in March 1928, Kelkar withdrew the Bill, saying that he would take account of the opinions received and split the Bill into two or three parts that might each have a better chance of passing when re-introduced in the next Assembly session.<sup>39</sup> No such Bills were ever put forward before Kelkar resigned from the Assembly in 1930 in the wake of the civil disobedience movement.

Many questions could be asked about the Bill and its brief, unhappy life. Were Kelkar's proposals foolish or wise, unworkable or tractable? Is the Bill better understood as a statement of nationalist politics – a 'pamphlet masquerading in Bill form'<sup>40</sup> – rather than as an earnest attempt at legal reform? Does the episode reveal anything new about Kelkar and the Responsive Cooperativists, or about the nationalist movement at large, or about the reality of law-making in the late colonial state? Might the story of the Kelkar Bill provide a fresh perspective with which to understand and evaluate the contemporary proposals to amend the LAA 1894? These are big, difficult questions for the on-going doctoral research of which this article is an early summary. The discussion here only goes so far as to suggest some reasons for Bill's swift demise, through a study of the reaction to three of its more controversial proposals.

### **III. THE FIRST PROPOSAL: THAT LAND SHOULD BE ACQUIRED ONLY FOR INDIAN COMPANIES**

Kelkar proposed to narrow the definition of 'company' in the LAA 1894 so that land could be acquired only for companies which held their capital in rupees and had either a majority of Indian directors or a majority of Indian shareholders. In effect, one might say, Kelkar proposed to reserve the benefit of the Act for companies which were sufficiently Indian. The Act as it then stood permitted acquisitions for any company registered under Indian or English company law, or incorporated by statute, Royal Charter, or Letters Patent.<sup>41</sup>

39 LEGISLATIVE ASSEMBLY DEBATES (OFFICIAL REPORT) VOL. II: SECOND SESSION OF THE THIRD LEGISLATIVE ASSEMBLY, 8–27 MARCH 1928, 1 (1928).

40 Letter (no. 1785/27, March 21, 1927) from A.M.A.C. Galletti, Esq., I.C.S., Collector of Ganjam, at para.7, in *Paper No. IV*, *supra* note 24, at 16.

41 S. 3(e), Land Acquisition Act, 1894.

The proposal seems to have emerged just before the Mulshi satyagraha. In response to acquisitions of land for industries in Bombay, a provincial session of the Congress in Solapur in April 1920 passed a resolution that a majority of shares in an acquiring company should be held by Indians.<sup>42</sup> Opponents of the dam at Mulshi criticised the alleged foreign ownership of the Tata Power Company. After visiting Mulshi in December 1920 and discussing the possibility of a movement against the dam, Kelkar successfully moved a resolution at the Nagpur session of the Congress which referred specifically to acquisitions for ‘foreign capitalists’.<sup>43</sup>

*...the government, making wanton misuse of the Land Acquisition Act, is forcibly acquiring lands in the different provinces of India on a large scale in the interests of capitalists, especially foreign capitalists, and thus destroying the hearths and homes and the settled occupations of the poor classes and landowners. These actions afford further grounds for non-co-operation with the government. This Congress calls upon the capitalists concerned to prevent the impending ruin of the lives of the poor peasants.'*

Later, Kelkar and others claimed that the Tata Power Company was dominated by European shareholders and officials.<sup>44</sup> The claim was refuted by R. D. Tata, according to whom European shareholdings did not exceed seven per cent.<sup>45</sup> Vora speculates that Gandhi extended only lukewarm support for the satyagraha because he could not afford to alienate the Parsi and Gujarati shareholders in Tata who had extended him support consistently since 1919.<sup>46</sup>

Kelkar must surely have anticipated the controversy this proposal would attract but, unaccountably, did not offer a defence or even an explanation in either the Bill’s ‘Statement of Objects and Reasons’ or in the Assembly. In the debate on circulation, Greenfield said he was inclined to think that the clause had ‘slipped in accidentally’ and argued that full discussion was needed on a principle as important

42 VORA, *supra* note 2, at 36.

43 VORA, *supra* note 2, at 40.

44 VORA, *supra* note 2, at 39, 56, 81, 96.

45 VORA, *supra* note 2, at 41.

46 VORA, *supra* note 2, at 145–146.

as the country's attitude towards external capital.<sup>47</sup> Many officials thought the proposal had been inspired by racial prejudice,<sup>48</sup> though one was willing to allow that Kelkar had been intending instead to encourage indigenous industries.<sup>49</sup> A common complaint was that the proposal would prejudice India's economic development by discouraging foreign investment, since Indian capital was not forthcoming for investment in public works or industries.<sup>50</sup> One Collector wrote:<sup>51</sup>

*The object is to handicap European, especially British, capital and enterprise. No doubt the author hopes to catch votes by putting this clause in the forefront. ... 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.'*

These criticisms should be understood in their historical context. The power to acquire land for companies had its origin as an incentive to attract private capital for public works that the exchequer would not, or could not, fund. Throughout the protracted discussions on the construction of railways, it was always accepted that a necessary inducement for private investment in railway construction was the compulsory acquisition and free supply of all required land.<sup>52</sup> Legal provision to that effect was made in 1850,<sup>53</sup> when railways were declared to be public work within the meaning of Regulation I of the Bengal Code (1824), the first enactment to provide for land acquisition in British India.

47 L.A.D VOL. I,*supra* note 19, at 848. At the conclusion of the debate, Kelkar, noting the 'present temper of the House', chose not to offer a reply at that time and instead asked Bhore to circulate notes on the Bill's clauses in addition to its Statement of Objects and Reasons. Bhore refused.

48 Letter (March 31, 1927) from H. S. Shield, Esq., M.A., I.C.S., Collector of Tanjore, in *Paper No. IV*,*supra* note 28, at 39.

49 Jagannath Prasad, L.A.O., 'Note on the proposed Land Acquisition Amendment Act', at para. 1, in *Paper No. III*,*supra* note 32, at 46.

50 E.g. letter (no. 609 | I-4-427, April 7, 1927) from the District and Sessions Judge, Raipur, at para. 4, in *Paper No. II*,*supra* note 27, at 38.

51 Letter (no. 5485 of 1927, May 11, 1927) from the Collector of Karachi, at para. 2, in *Paper No. III*,*supra* note 32, at 95.

52 There are numerous discussions to this effect in the correspondence collected in RAILWAY CONSTRUCTION IN INDIA: SELECT DOCUMENTS: VOLUMES I-III(S. Settar ed., 1999).

53 S. I of Act XLII of 1850 (Bengal).

The story behind the Tolls on the Kurraiyā Act, 1856,<sup>54</sup> the first enactment specifically to provide for land acquisition for a non-state entity, is revealing. A local committee submitted a proposal to the Government of Bengal to render the Kurraiyā river navigable throughout the year, in order to bring produce to market without delay and to reduce the incidence of disease caused by its stagnant waters.<sup>55</sup> Unwilling or unable to expend the funds to do so, and sceptical that the work could be executed successfully, the Government gratefully acceded to an offer by a ‘wealthy and enterprising’<sup>56</sup> zamindar to do the work himself in exchange for the ability to compulsorily acquire any land needed and the right to levy tolls on the river for thirty years.<sup>57</sup> The zamindar, in extending the offer, wrote that ‘such works should, in general, be left to the enterprise and industry of private persons as we find to be the case in the British Islands’, a view was reflected in preamble of the Act passed in 1856 to authorise the compulsory acquisition and the levying of tolls for the work.<sup>58</sup>

In 1863, legislation was passed to authorise more generally the kind of work undertaken on the Kurraiyā river. The Works of Public Utility Companies Act, 1863<sup>59</sup> authorised land acquisition for private persons or companies constructing works such as bridges, canals, and branch lines of railways.<sup>60</sup> In the note on the Bill which would become the 1863 Act, Richard Strachey, the Secretary to the Government of India, explained that there was a need to attract English capital

<sup>54</sup> Act XXII of 1856.

<sup>55</sup> Letter from the Secretary to the Government of Bengal to the Members of the Legislative Council of India for Bengal (January 11, 1856), *in* GoI, Legislative Department, *Papers relating to Act XXII of 1856* (at the National Archives of India [Hereinafter “NAI”]).

<sup>56</sup> As he was described in ‘Mr. A.J.M. Mill’s Report on the district of Magoorah, Zillah Ringpore’ (May 6, 1853), *id.*

<sup>57</sup> Letter (December 26, 1855) from Prasanna Kumar Tagore to the Secretary to the Government of Bengal, *supra* note 55.

<sup>58</sup> ‘... it is expedient to encourage individual enterprise, and the employment of private capital on works of public utility’.

<sup>59</sup> Act XXII of 1863. Strictly speaking, the 1863 Act set out the conditions and procedures for land to be acquired for a private enterprise under Act VI of 1857, the first all-India land acquisition Act.

<sup>60</sup> S. II.

to fund works of public utility and so a clear rationale for legislation.<sup>61</sup> An official who commented on the Bill was hopeful that it would also attract local capital: ‘... the main difficulty is to induce large native capitalists to embark in such undertakings... the Bill under consideration, will certainly smooth the way for those who are anxious to construct such works’.<sup>62</sup> The Statement of Objects and Reasons which accompanied the final draft of the Bill concluded:

*The whole intent of the Bill is to increase the wealth and traffic of the Country generally, whether by public or private lines, and to unlock and render available for export, the Mineral, and Agricultural, and Commercial resources of the Empire, which are either hidden and unexplored, or are in part wasted and useless.’*

As it would be understood today, the 1863 Act was a statutory framework for public-private partnerships for infrastructural development, the public contribution being the exercise of coercive state authority to acquire land to make possible, or more profitable, the project in question. The 1863 Act, however, was ‘rather a complicated measure’ and hardly ever put into effect.<sup>63</sup> Much-simplified provisions were set out in Part VII of the Land Acquisition Acts of 1870 and 1894.

After the First World War, and the pronounced shift in government policy towards a more interventionist role in economic affairs, land acquisition was acknowledged as a valuable incentive for investment not only in public works but also in industry. The Indian Industrial Commission (1916–1918), appointed to recommend government policy for encouraging industrial development, advocated the acquisition of land for industrial concerns.<sup>64</sup> The Commission argued that there was no reason not to acquire land for an industry that was otherwise deserving of other forms of assistance at the public expense. As for the source

61 ‘Note on the Draft Bill to provide for taking Land for Public Works undertaken by private persons or Companies’ (October 11, 1862), at paras. 12 and 23, *in* GoI, Legislative Department, *Papers relating to Act XXII of 1863*, NAI.

62 Letter (288, September 3, 1861) from the Supg. Engr. 2<sup>nd</sup> Circle N.W.P. to the Offig Secy. to the Govt. N.W.P. in the P.W. Dept, enclosed with a letter (13 December 1861) from Sir George Compera, Baronet, Secretary to the Government of the North-Western Provinces to MacLeod Wyllie, Esquire, Clerk of the Legislative Council, Calcutta, *id.*

63 *Abstract of the Proceedings of the Council of the Governor General of India* (April 1, 1870) in ‘Act No. X of 1870’, *in* GoI, Legislative Branch, May 1870, ‘A’ prog. 37–77 at 76, at the NAI.

64 *Report of the Indian Industrial Commission, 1916–18* (1919) Cmnd. 51, at para. 202.

of the investment in industry, the Indian Fiscal Commission (1921–1922) was convinced that foreign capital was required urgently for the country's industrial development given the paucity of Indian capital.<sup>65</sup> The Commission deprecated as impractical and unwise any restrictions on foreign capital, such as the proposals put before it that companies operating in India should be registered in India with rupee capital, with a certain proportion of capital held by Indians.

With this history in mind, it is not difficult to see why, quite apart from its alleged racial prejudice, Kelkar's proposal inspired such negative official comment. Officials gave examples of projects that would be made impossible if the proposal was enacted, such as railway lines constructed by companies registered in England, because 'no railway could possibly embark on the acquisition by private negotiation of the lands required for their purposes'.<sup>66</sup> Even in an opinion that was otherwise supportive of the Bill, there was anxiety that this proposal would prejudice industrial development since the 'innate shyness' of moneyed men in India towards investing in joint stock companies would take some years to disappear.<sup>67</sup>

Kelkar could have defended his proposal as a measure to protect and encourage Indian industry, drawing an analogy to the steel tariffs which were being debated in the same legislative session, or citing the qualification the Indian Fiscal Commission had added to their opposition to restrictions on foreign capital: in the event that the government had granted 'anything in the nature of a monopoly or concession', it was 'reasonable that special stress should be laid on the Indian character of the companies thus favoured' by insisting that those companies were registered in India with rupee capital and that there should be a reasonable proportion of Indian directors on the board. Kelkar could have argued that land acquisition, as the exercise of coercive state power to appropriate private property rights, was a concession which justified discrimination in favour of Indian

65 *Report of the Indian Fiscal Commission, 1921–22* (1922, Sess II) Cmnd. 1764, at paras. 289–291.

66 Letter (March 30, 1927) from E. F. Thomas, Esq., C.I.E., I.C.S., Collector of Madras), in *Paper No. IV*, *supra* note 28, at 27.

67 'Land Acquisition Act Amending Bill: Opinion of the Bar Association, Akola (Berar)' at 2, in *Paper No. II*, *supra* note 27, at 39.

companies. His silence meant that the proposal could only be attractive on its face only to those already ambivalent or hostile towards foreign capital.<sup>68</sup> At the outset, the debate had been conceded to those hostile to swadeshi economics – an unfortunate tactical failure.

#### **IV. THE SECOND PROPOSAL: THAT PROVINCIAL LEGISLATURES AND DISTRICT COURTS, NOT LOCAL GOVERNMENTS, SHOULD DECIDE WHETHER ACQUISITIONS SHOULD OCCUR**

Kelkar proposed a substantial dilution in the autonomy of the decision by local governments to undertake acquisitions under the 1894 Act, through devolution of power to provincial legislatures and district courts. First, he proposed that no declaration under Part II of the Act that land was needed for a ‘public purpose’ shall be made unless:<sup>69</sup>

*‘the purpose for which the land may be needed to be acquired has been approved as a public purpose by a specific resolution of the Legislative Council of the Province in which the land may be situated’.*

Second, he proposed that the provincial legislative councils rather than the provincial governments should decide in every case whether land should be acquired for a company under Part VII of the Act.<sup>70</sup> Third, he proposed that neither provincial governments nor the Government of India should enter into an agreement with any company to provide land except with the approval of the local or central legislature.<sup>71</sup> This third proposal was directed at a provision in the Act which, in effect, allowed land to be acquired for a company under Part II rather than Part VII if the company was contractually entitled to be provided land by government; this provision enabled railway companies, for example, to avoid the

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68 Such the Chairman of the Poona Municipality who wrote that the 1894 Act had ‘only too often been veritably prostituted for furthering the interests of such Companies and Societies as drain India’s life-blood out of India’: ‘Opinion’ at 2, enclosed with letter (no. 759 of 1927-28, May 5, 1927) from the President, Poona City Municipality, in *Paper No. III, supra* note 32, at para. 106.

69 Cl. 6(2).

70 Cl. 24–26.

71 Cl. 27.

more onerous procedures otherwise applicable to Part VII acquisitions.<sup>72</sup> Fourth, he proposed that district courts, not local governments, should hear objections from landowners to planned acquisitions;<sup>73</sup> this would mean that courts would have the power to stay acquisition proceedings if they sustained, say, the objection that the acquisition was not actually for a ‘public purpose’.

In the Statement of Objects and Reasons to the Bill, Kelkar argued that, aside from the payment of ‘really adequate compensation’, much of the public opposition to compulsory acquisitions could be tempered by ‘the establishment of a *bona fide* public purpose making the acquisition morally inevitable’. Reading that claim in light of his speech on the introduction of the Bill, it seems that by ‘*bona fide*’ Kelkar meant an acquisition that was truly *necessary* in the public interest. Kelkar expressed scepticism that in practice the acquisitions being made for companies met the standard of necessity. He argued that government sometimes unnecessarily went into ‘fantastic’ schemes of land acquisition for industrial development and that land was unnecessarily acquired for railway companies which ought to have bought the land by private purchase.<sup>74</sup>

Kelkar’s comments were the latest in a long history of doubt about whether acquisitions for companies could be described, either in principle or in practice, as being for a public purpose (or, in the formulation in Part VII, ‘likely to prove useful to the public’). This doubt first appeared in the consultations prior to the enactment of the Works of Public Utility Companies Act 1863. These consultations were prompted by a proposal to enable proprietors of coal mines to compulsorily acquire private land on which to construct branch lines from pits to adjacent railways. In a letter in favour of the proposal, the East Indian Railway explained why the public interest justified the infringement of property rights on behalf of private enterprises:<sup>75</sup>

72 S. 43.

73 Cl. 5.

74 L.A.D. VOL. I, *supra* note 19, at 363–364.

75 Letter (February 2, 1859) from the East Indian Railway to the Official Consulting Engineer to the Govt., Railway Department, *in GoI, Legislative Department, Papers relating to Act XXII of 1863*, NAI.

*'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[s] in having so much less Coal to carry and the public suffer by having less competition of Coal merchants in the market.'*

There was reason to make an argument of this kind: the Advocate-General had apparently been of the opinion that under the prevailing land acquisition legislation – Act VI of 1857 – land could not safely be acquired as being for a ‘public purpose’ for private companies undertaking works for their own profit.<sup>76</sup> For example, as the Government of Bengal had held, an acquisition for a tramway to a private colliery, to be used only by its owners, would be a private not a public work and so could not be taken up under the 1857 Act.<sup>77</sup> Strachey went so far as to express doubt whether under that Act land could in truth be acquired for the guaranteed private railways.<sup>78</sup> As mentioned above, however, Strachey thought that the need to attract English capital for public works justified supplementing the 1857 Act to make clear that, in appropriate circumstances, such acquisitions were permissible.<sup>79</sup> He did acknowledge the risk of abuse: there was a need for the ‘greatest care’ in ensuring that the public advantages of such works were not ‘needlessly exaggerated’, and the Bill was designed so that the Government would proceed with ‘all proper caution in determining whether the work be really one of sufficient public utility to justify the application of the compulsory law’.<sup>80</sup> Referring, in particular, to the enumeration in the Bill of public works for which land could be acquired, Strachey thought, however, that there could be ‘no practical risk of any improper use being made of the powers given under the Bill’.<sup>81</sup>

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76 *Note on the Draft Bill to provide for taking Land for Public Works undertaken by private persons or Companies, supra* note 61, at para. 4.

77 Letter (December 26, 1860, Fort William) from the Joint Secy. to the Govt. of Bengal, P.W.D., Railway Branch, to Messrs. Gordon, Stuart, and Co., Secretaries, Bengal Coal Company, in GoI, Legislative Department, *Papers relating to Act XXII of 1863*, NAI.

78 *Note on the Draft Bill to provide for taking Land for Public Works undertaken by private persons or Companies, supra* note 61, at para. 4.

79 *Id.*

80 *Supra* note 78, at paras. 7-8.

81 *Supra* note 78, at para. 6.

The Land Acquisition Act, 1870, in which the provisions of the 1863 Act were reproduced in a much simplified form, was intended primarily to stem what officials regarded as excessive awards of compensation generated by the system of arbitration under the 1857 Act. In a dissenting view, the Talookdars Association of Oudh argued that it was especially unjust that landowners were forced to give up their land at an ‘arbitrary price’ for works which would reward private interests:<sup>82</sup>

*‘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 not 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 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?’.*

Part VII of the 1870 Act, which permitted the acquisition of land for a company if the acquisition was needed for the construction of some work that was ‘likely to prove useful to the public’, was reproduced in the LAA 1894, with the addition of a section to the effect that, if the government was contractually obliged to do so, land could be acquired for companies as a ‘public purpose’ under Part II.<sup>83</sup> The purpose of that addition, explained Bliss, the mover of what became the 1894 Act, was to remove ‘unnecessary difficulties’ for companies, such as railway companies, for which the government had contracted to provide land ‘and which are therefore, so far, Government undertakings’.<sup>84</sup>

82 At para. 6; enclosed with letter no. 2331 from Major I. F. MacAndrew, Secretary to the Chief Commission of Oudh, to the Secretary to the Council of the Governor General for making Laws and Regulations, *in* GoI, Legislative branch, ‘A’ prog. 36–77 at 37, NAI.

83 S. 43, Land Acquisition Act, 1894.

84 *Abstract of the Proceedings of the Council of the Governor-General of India* (11 March 1892), reproduced in ‘The Land Acquisition Act, 1894’, GoI, Legislative branch, February 1894, ‘A’ prog. 1–83 at Appendix C, NAI.

Although the primary motivation behind the 1894 Act was to further reduce the costs of acquisition, Bliss took the opportunity to clarify what he regarded as the limited scope of Part VII, in a passage quoted in land acquisition treatises even today:<sup>85</sup>

*'It is not intended ... that the Act shall be used for the acquisition of land for any Company in which the public has merely an indirect interest, and of the works carried out by which the public can make no direct use. The Act cannot therefore be put in motion for the benefit of such a Company as a Spinning or Weaving company or as an Iron Foundry, for although the works of such Companies are distinctly 'likely to prove useful to the public' (to use the words of section 48), it is not possible to predicate of them 'the terms on which the public shall be entitled to use them' —a condition precedent to the acquisition of land laid down in section 49 ... the question of the kind of Companies, for the purposes of which land may be acquired under the Act, has more than once been raised ; and it is important both that the public should understand that the Act will not be used in furtherance of private speculations and that the Local 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.'* [emphasis added]

At this point, having not yet completed a study of the gazette notifications and other records which will reveal the practice of compulsory acquisition under the 1894 Act, I cannot yet gauge the extent to which Bliss's exhortation was followed. It is clear, though, that doubts continued to be raised about the extent to which the public could be said to have a direct interest in the success of industrial undertakings. The Indian Industrial Commission in its 1919 report noted that there was division amongst legal authorities as to whether Part VII could be used to acquire land for an industrial company.<sup>86</sup> The Government of the United Provinces, for instance, apparently refused to consent to acquisitions for mill companies on the grounds that acquisitions of that kind were merely for the benefit of the companies and not for the general public.<sup>87</sup> There was support for that view from a 1925 decision of the Madras High Court which made the following observations about the meaning of 'public purpose':<sup>88</sup>

85 *Id.*

86 *Report of the Indian Industrial Commission, supra* note 64, at para. 202.

87 Letter (no. 767, April 28, 1927) from C. W. Grant, Esq., I.C.S., Collector, Saharanpur, in *Paper No. I, supra* note 30, at 22.

88 *Veeraraghavachariar v. Secretary of State,*(1925) 48 MLJ 204, para 8 (High Court of Madras).

*'Where the primary object is personal gain whether that be of a private individual or of a company, the public benefit resulting from the action of such a person or company is too remote, and the purpose cannot be said to be a public purpose. Every merchant and every dealer can say that he benefits the public because he is catering or providing to the wants of the public. The merchant's first object is to make a gain for himself. The benefit that he may confer upon his constituents or patrons is very remote. Such purposes are not public purposes.'*

The Court made clear, though, that these observations were only ‘for argument’s sake’, because it was precluded by the LAA 1894 from questioning whether an acquisition was indeed for a ‘public purpose’ under Part VII or a work ‘likely to prove useful to the public’ under Part VII. The Act provided that the declaration by a local government that land was needed for a public purpose or for a company was ‘conclusive evidence’ of that need.<sup>89</sup>

To restrain government from undertaking what he regarded as unnecessary acquisitions for companies, it would have been natural for Kelkar, as a former lawyer, simply to propose a restrictive statutory definition of ‘public purpose’ and ‘likely to prove useful to the public’ and to remove the bar on courts questioning whether proposed acquisitions met one or the other of the narrowed definitions. He must have been aware, though, that even if the bar was removed the courts would not necessarily have been enthusiastic policemen of the executive in a sphere of activity perceived to be as central to the public interest as land acquisition.

That was certainly the impression one might have from the tepid judicial reaction to a private members’ Bill a few years earlier that would have conferred exactly that role. In 1922, J.R. Pantulu, an elected member of the Assembly, introduced a Bill that would have allowed landowners to challenge acquisitions in court on the grounds that the purpose for which the land was required was not a public purpose, or that a proposed acquisition was malicious or vexatious.<sup>90</sup> The judges who commented on the Bill were divided on the merits of the proposal. Some were in favour, whereas others argued that local governments were the more appropriate decision maker on

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89 S. 6(3).

90 Cl. 5 of the Land Acquisition (Amendment) Bill, 1921. The Bill and the opinions received when it was circulated are in a file with the following reference number at the British Library: IOR/L/E/7 – File 1126. The Papers referred to below are contained in this file.

the question of public purpose.<sup>91</sup> Having taken the view that the Bill would result in significant delays to land acquisition, the government did not lend its support; instead, in the following year, it succeeded in enacting an amendment to the LAA 1894 which allowed objections to be made to the relevant local government which would have the power of ‘final’ decision on those objections.<sup>92</sup>

Also revealing of judicial attitudes was the approach of successive courts in the leading case of *Hamabai Framjee Petit v. Secretary of State for India in Council*.<sup>93</sup> The case concerned whether the acquisition of land for the accommodation of government officers in Bombay was permissible within the terms of a *sanad* and a lease, both of which permitted the resumption of land if it was needed for a ‘public purpose’. Even though the statutory bar in the 1894 Act on questioning public purpose did not apply to this *contractual* form of land acquisition,<sup>94</sup> the courts nevertheless chose to maintain a deferential attitude towards the executive’s determination of public purpose. In a judgement subsequently endorsed by the High Court of Bombay and the Privy Council, Justice Berman at first instance held:<sup>95</sup>

‘... so long as Government asserts that what it is doing, is being done for a public purpose, and so long as in the very nature of things it cannot be acting in any private interest, it does appear to me extremely difficult to suggest any adequate reason for a Court to say, what the Government professes to do for a public purpose, it is not really doing for a public but for some non-public purpose.’

91 E.g. Letter from A. A. Patterson, Esq., I.C.S., Offg. Registrar of the High Court of Judicature at Fort William in Bengal, Appellate side, at para.2, in Gol, Legislative Department, *Paper No. II: Opinions 5–9 on the Land Acquisition (Amendment) Bill*, 17.

92 Land Acquisition (Amendment) Act, 1923.

93 (1914) ILR 39 Bom 279 (Privy Council). As well as the speech of the Privy Council, this report includes the judgment as first instance and the first appeal.

94 The earliest legal powers of land acquisition in India were contractual rather than statutory. Some 18<sup>th</sup> century leases on Salsette island provided for land to be surrendered at the same rate at which it was originally granted by government; provisions of that kind apparently saved the government ‘very much money’ a hundred years later when land was acquired for a railway: F. G. H. ANDERSON, *MANUAL OF LAND ACQUISITION FOR STATE OF BOMBAY*, 37(4<sup>th</sup> edn., 1941 [corrected up to December 31, 1961]). On the enforcement of such provisions, see *Ruttonji Ardesir Wadia v. Assistant Development Officer, Bandra*, AIR 1940 Bom 260 (High Court of Bombay); *L. Basheshar Nath v. Provincial Government N. W. F. P.*, (1942) 206 IC 188, AIR 1943 Pesh 27, 15 R Pesh 107 (Peshawar Judicial Commissioner’s Court); cf. *Bijoy Kumar Addy v. Secretary of State for India in Council*, (1916) 39 IC 889, 25 CLJ 476 (High Court of Calcutta).

95 (1914) ILR 39 Bom 279, 282.

Kelkar proposed, instead, to make provincial legislative councils the institution with the primary responsibility of deciding what would count as public purposes in each province, and the courts the forum for deciding on whether objections against proposed acquisitions should be sustained. The power of initiating acquisitions would remain with local governments, but the purpose for which land was proposed to be acquired would need to have been approved as a public purpose by a ‘specific resolution’ of the relevant provincial legislative council. Rather than having to decide whether the purpose of an acquisition fell within a statutory definition expressed in necessarily general terms, the courts would have the more discrete and less controversial task of deciding whether a given acquisition fell within the terms of a given resolution. Kelkar proposed stricter requirements applicable to acquisitions for companies: each proposed acquisition under Part VII would need to be approved by the relevant provincial legislative council as being a work likely to prove useful to the public, and the same case-by-case approval was required for any contractual agreements between companies and governments for the provision of land.

The proposal that provincial legislative councils should decide what would count as a public purpose had two distinct tactical advantages.<sup>96</sup> By law, at least seventy percent of the membership of the eight councils (in Madras, Bombay, Bengal, the United Provinces, Punjab, Bihar and Orissa, the Central Provinces and Assam) comprised elected members, meaning that the councils were outside the direct control of the central executive.<sup>97</sup> In support of Kelkar’s proposal, the *Mahratta* argued that the question of public purpose should be decided by the councils as they were the ‘representatives of the public’; the Executive was ‘not only irresponsible to the people but [also] interested in the development of British trade and industry, British capitalists and British institutions’.<sup>98</sup>

The second tactical advantage of Kelkar’s proposal was its similarity to the private Act procedure in England, under which private enterprises, such as the railways, which sought to wield the power of compulsory acquisition were required

<sup>96</sup> Extract from the Legislative Assembly Debates, Vol III, No 37 in IOR/L/E/7 – File 1126.

<sup>97</sup> S. 72A(2) of the Government of India Act, 1919. See M. P. JAIN, OUTLINES OF INDIAN LEGAL AND CONSTITUTIONAL HISTORY 494-5 (6<sup>th</sup> edn., 2009 ).

<sup>98</sup> Editorials, THE MAHARATTA, March 6 & March 13, 1927.

to persuade Parliament to pass a specific authorising Act. Kelkar effectively cast the onus on detractors to explain why what was good for England was not good for India. This very point had been raised many decades earlier in the consultations on the Bill which would become Act VI of 1857, the first all-India land acquisition statute. In a petition to the Legislative Council against the Bill, the British Indian Association argued against the proposal that local governments should have the absolute right to decide whether land was needed for a public purpose.<sup>99</sup>

*'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 ...*

*... 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.'*

Despite the passage of the Act, the Association persevered in its opposition and, in a memorial to the East India Company's Court of Directors, prayed for

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<sup>99</sup> Petition of the British Indian Association to the Legislative Council of India against the Bill "for the acquisition of land for public purposes" (March 14, 1857), *in* GoI, Legislative Department, *Papers relating to Act VI of 1857*, NAI.

the Act to be disallowed. The Court replied that the private Act procedure if adopted 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’.<sup>100</sup>

As one might have predicted, officials made a number of arguments against Kelkar’s proposal that provincial legislative councils should decide on public purpose. First, that legislatures were institutionally unsuited to the role which Kelkar intended to confer: ‘it would be just as reasonable’, one official wrote, ‘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’;<sup>101</sup> another argued that compulsory acquisition ‘cannot be popular and no Legislative Council consisting of elected members would ever resolve that it was necessary’.<sup>102</sup> Second, that for a variety of reasons the English analogy was not apt: provincial councils in India were too riven with party politics and communal tension to make appropriate decisions on public purpose;<sup>103</sup> the English model was too costly at India’s present state of development;<sup>104</sup> politically influential landowners would compromise the impartiality of the decision on public purpose.<sup>105</sup> Third, that the proposal was redundant because large schemes for land acquisition already went before legislative councils for

100 ‘Despatch in the Legislative Department, No. 3 of 1858 (January 18, 1858) from the Hon’ble the Court of Directors’, at para. 3, in GoI, Legislative Department, *Papers relating to Act VI of 1857*, NAI.

101 Letter (no. 681-C.R., April 14, 1927) from the Deputy Commissioner, Lucknow, in *Paper No. I*, *supra* note 30, at 38.

102 Letter (no. L.A.Q.-112, May 14, 1927) from the Commissioner, Northern Division, in *Paper No. III*, *supra* note 32, at 89.

103 Letter (no. 1620-VIII-81, Benares, April 13, 1927) from V. M. Mehta, Esq., I.C.S., Collector of Benares, in *Paper No. I*, *supra* note 30, at 18. The relevant passage merits quotation if only because of its elaborately mixed metaphors: ‘[Mr. Kelkar] falls back on the British analogy but political life in that country is not poisoned by either the communal or religious virus and the peaceful atmosphere of our council would remain tempest tossed if such an apple of discord be thrown into the cock pit’.

104 Letter (no. 1657/27-B-1, March 14, 1927) from T. G. Rutherford, Esq., M.A., C.I.E., Collector of Anantapur, at para. 2, in *Paper No. IV*, *supra* note 28, at 17.

105 Letter (no. 1870/XIX-26, Naini Tal, May 14, 1927) from W. E. J. Dobbs, Esq., Deputy Commissioner, Naini Tal, at para. 3, in *Paper No. I*, *supra* note 30, at 40.

budgetary approval;<sup>106</sup> in another argument on redundancy, one official argued that 'as the executive is presumably responsible to the country, or will become so, the decision [on public purpose] is that of the public'.<sup>107</sup>

Arguments of this kind constituted only a minority of comments against the proposal. Unfortunately for the Bill's prospects, most officials dismissed the proposal out of hand as unworkable, having relied on a misconception of what Kelkar had proposed. The Bill required that the purpose for which land was proposed to be acquired had been approved as a public purpose by a 'specific' resolution of the provincial legislative council. This was interpreted by most officials as requiring that legislative councils approve *each and every* instance of a proposed acquisition, which was obviously not feasible given the limited number of sitting days and the many hundreds of acquisitions undertaken in each province each year.<sup>108</sup> Kelkar must have meant for legislatures to pass resolutions sanctioning certain *classes* of purposes, such as acquisitions for sanitation purposes, road improvements, and so on. Whether a given acquisition fell within a class provided for in a council resolution would be a question for the district courts if the acquisition was challenged.

The pity for Kelkar was that the contemptuous reaction to what was thought to be his proposal obscured what might have been some nascent official support for the underlying principle of legislative oversight over compulsory acquisition. In an opinion that was otherwise opposed to the Bill, one official said that he would support acquisitions for new railways or extensions being placed before legislative councils for approval.<sup>109</sup> Another official suggested, as a more workable alternative to Kelkar's proposal, a form of legislative veto over compulsory acquisitions for companies: except for land to be acquired for certain specified public utility services, acquisition proceedings would be

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106 Letter (March 28, 1927) from H. L. Braidwood, Esq., I.C.S., Collector of Chittoor, in *Paper no. IV*, *supra* note 28, at 24.

107 Letter (March 31, 1927) from H. S. Shield, Esq., M.A., I.C.S., Collector of Tanjore, in *Paper No. IV*, *supra* note 28, at 29.

108 E.g. letter (April 28, 1927) from C. E. Jones, Special Officer for Land Acquisition, South Indian Railway, Trichinopoly, at para.4, in *Paper no. IV*, *supra* note 28, at 10.

109 Letter (May 12, 1927) from the Consulting Surveyor to the Government of Bombay, in *Paper No. III*, *supra* note 32, at 120–121.

stayed if ten members of a legislative council demanded a resolution on the subject.<sup>110</sup> If not for the ambiguity in what was being proposed, an error in drafting for which the blame must go to Kelkar, more opinions of this kind might have been voiced.

## **V. THE THIRD PROPOSAL: THAT BENEFICIARIES OF ACQUISITIONS SHOULD RESETTLE THE DISPLACED**

In order to make compensation ‘more equitable’,<sup>111</sup> Kelkar proposed what we would now term as an obligation of resettlement: in the event an acquisition would result in the eviction of more than thirty persons, the award of compensation ‘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’. The obligation of resettlement would be in addition to cash compensation measured according to market value of the land plus the fifteen per cent premium.

Given that the purpose of successive reforms to land acquisition legislation had been to reduce the costs of acquisition, it was hardly surprising that the government and its officials were opposed to the proposal. In the debate on circulation, Bhore said that the proposal was expressed in ‘dangerously loose language’ that would lead to grave difficulties.<sup>112</sup> Greenfield foresaw an ‘endless chain of acquisition’: in order to resettle the displaced from one acquisition, the government would need to acquire a second parcel of land, and then to acquire a third parcel to resettle those displaced from the second parcel, and so on.<sup>113</sup> Aside from one official who expressed unqualified support for the obligation of resettlement because, in his experience, its absence had caused much suffering,<sup>114</sup> the prevailing view was that the obligation would be too difficult for the authorities

<sup>110</sup> Letter from Miles Irving, Esquire, O.B.E., I.C.S., Commissioner, Lahore Division, at 8, *in Paper No. II*, *supra* note 27, at 65.

<sup>111</sup> L.A.D. VOL. I, *supra* note 19, at 845.

<sup>112</sup> L.A.D. VOL. I, *supra* note 19, at 847.

<sup>113</sup> L.A.D. VOL. I, *supra* note 19, at 850.

<sup>114</sup> Letter (no. 1006-R, Chaibassa, April 8, 1927) from J. R. Dain, Esq., I.C.S., Deputy Commissioner of Singhbhum, at para. 14, *in Paper No. I*, *supra* note 30, at 48.

to discharge.<sup>115</sup> That was one interpretation of the experience at Mulshi: the government had promised to do its utmost to find alternative land for those of the displaced who preferred land to cash compensation, but said later that no land was available in the district.<sup>116</sup> As Kelkar noted at the time,<sup>117</sup> this was contrary to the recommendation of the Indian Industrial Commission in 1919 that the resettlement of those displaced should be a *sine qua non* for all cases of acquisitions for industry, on the ground that 'such a course will mitigate more than any mere money payment the hardship and sense of unfair treatment caused by expropriation'.<sup>118</sup>

## VI. CONCLUSION

It is a mark of how completely Kelkar's 1927 Bill has been ignored or forgotten by scholars that it is not mentioned even in Sudhakar Naigaonkar's otherwise exhaustive account of Kelkar's political career.<sup>119</sup> Naigaonkar's conclusion that Kelkar had been an 'ideal legislator',<sup>120</sup> already suspect as hagiography, cannot survive a study of the Bill and its reception. Mistakes by Kelkar exacerbated the negative reaction by officials to two of the Bill's more controversial proposals. Had Kelkar been a more astute politician, he would have defended or at least explained the proposal to reserve compulsory acquisition only for Indian companies. Had Kelkar been a better draftsman, he would have anticipated and prevented the misconception about the proposal for 'specific' resolutions on public purpose.

That said, the impression from the dozens of opinions submitted on the Bill by officials is that most were convinced beyond argument that the Act as it stood was more or less just, and would have invariably opposed any proposals, however well-argued and perfectly drafted, that might have made land acquisition slower, costlier, or otherwise more difficult.

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115 E.g. letter (no. 398 -XIV-9-27, Fyzabad, March 25, 1927) from E. M. Nanavati, Esq., I.C.S., District Judge, in *Paper no. I*, *supra* note 30, at 21.

116 VORA, *supra* note 2, at 61, 143.

117 VORA, *supra* note 2, at 44–45.

118 *Report of the Indian Industrial Commission*, *supra* note 64, at para. 202.

119 Naigoankar, *supra* note 5.

120 Naigoankar, *supra* note 5, at 107.

The apparent lack of support for the Bill from the elected members of the Assembly is more difficult to explain. Perhaps land acquisition, by its nature an episodic phenomenon with diffuse effects, was regarded as too marginal a political issue to take up in the absence of a contemporaneous public agitation of the kind that had occurred in Mulshi a few years earlier. The simpler explanation might be that Kelkar, a Tilakite of diminishing influence in a more or less Gandhian age, was too politically isolated to be able to persuade other nationalist legislators to support the Bill. Outside the Assembly, if Vora is correct in his analysis of why Gandhi did not support the satyagraha at Mulshi with his usual fervour, the Congress would not have wanted to antagonise its industrialist backers by rallying public opinion behind Kelkar's Bill. Much more work needs to be done before more definitive conclusions can be reached, but it seems that even the ideal legislator could not have prevailed against these odds.

## VII. EPILOGUE

With the exception of Kelkar's proposal to reserve the benefit of the Act for Indian companies, the other proposals discussed above have come to pass since independence, though probably not in a form Kelkar would have recognised or with practical effects he would have endorsed. The higher judiciary unilaterally appropriated the power to decide whether an acquisition was in substance for a public purpose.<sup>121</sup> In practice, however, judges almost invariably rubber-stamp acquisitions for companies, regarding as sufficient evidence of public purpose any claims by a state government or a company that what are ostensibly benefits to the public (such as, in the Yamuna Expressway case, reduced travelling time) will arise from the project for which land is proposed to be acquired.<sup>122</sup> Kelkar's proposal for resolutions on public purpose can be likened, very roughly, to the many instances of state-level legislation on the meaning of public purpose, though the effect of these in general has been to widen rather than narrow the scope for

121 A declaration of acquisition under the LAA 1894 may be quashed if the exercise of the power of acquisition is 'colourable'; that is, if it appears to a court that what the government is satisfied about is not a public purpose but a private purpose or no purpose at all. For the leading statement of this rule, see *Somavanti v. The State of Punjab*, [1963] 2 SCR 774, para. 42 (Supreme Court).

122 *Nand Kishore Gupta v. State of U. P.*, (2010) 10 SCC 482 (Supreme Court).

acquisitions for companies.<sup>123</sup> The obligation of resettlement, now a matter of policy or law in some states,<sup>124</sup> and a matter of policy at the national level,<sup>125</sup> will become a nation-wide legal entitlement if the Bill proposed by the UPA – the Land Acquisition, Rehabilitation, and Resettlement Bill, 2011 – is enacted.<sup>126</sup> It is, however, an open question whether law reform alone will improve the generally dismal record of implementation.<sup>127</sup>

What would Kelkar have made of these developments? Aside from frustration and disappointment at what is yet to be achieved in making the Act ‘more equitable’ to landowners, he would be forgiven for feeling some measure of solace and vindication that his proposals would have been received with more sympathy in an independent India.

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123 E.g. the Tamil Nadu Acquisition of Land for Industrial Purposes Act, 1997.

124 See V. Upadhyay & C. Sinha, *Regulatory and Policy Regime of Land Acquisition: A State-Level Perspective*, in 31 NETWORK, INDIA INFRASTRUCTURE REPORT 2009: LAND – A CRITICAL RESOURCE FOR INFRASTRUCTURE (2009).

125 Ministry of Rural Development, Government of India, *The National Rehabilitation and Resettlement Policy, 2007* (Resolution, October 31, 2007) GAZETTE OF INDIA: EXTRAORDINARY (Part II, S. 1, October 31, 2007).

126 See Ch. IV–VIII of the Land Acquisition, Rehabilitation and Resettlement Bill, 2011.

127 See the contributions to *RESETTLING DISPLACED PEOPLE* (H. M. Mathur ed., 2011).