

# LAW REVIEW

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VOLUME XX

2011

NUMBER X

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## India's Land Title Crisis: The Unanswered Questions

*This article calls into question the Government of India's National Land Records Modernization Programme, a massive, multi-lakh billion rupee program of land titling based upon the principles underlying Torren Registration. It argues that the Union Government would be better advised to preserve and update the current deeds registration system of the Registration Act. Torrens registration is ill-suited to the current state of Indian governance, and risks not only wasting scarce resources, but injuring those millions of low-income farmers that it is intended to assist. Better methods of empowering low-income rural farmers exist and can be achieved at much lower cost. The paper thus also suggests that in many areas of the Global South, the rush to Torrens registration could represent both another episode of failed economic development planning and a missed opportunity for genuine legal justice for the poor.*

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### I. INTRODUCTION

First-year law students might describe many topics as exciting, but title assurance does not figure to be one of them. Embedded within

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the often-dreary first-year property course,<sup>1</sup> it has few rivals in causing somnolence:<sup>2</sup> as the *Economist* has noted with typical understatement, land titling is "not the world's sexiest topic."<sup>3</sup> Such droopiness, however, probably serves as testimony to the US title system, which, while hardly without its problems, has provided residential, commercial, and industrial owners and investors a stable environment for decades.

Indians should be jealous. No one would call their predicament boring. A developer in Bangalore recently explained that:

The Indian real estate market can be something like the Wild West these days. . . A common situation is this: A developer buys a plot of land that was formerly agricultural land, and starts construction on a commercial building. Then, someone turns up and claims to be another legal heir of the seller's grandfather, etc., who also has rights to the land. Maybe they have a valid claim, or maybe not. But if the builder goes to court, there will be the perception that 'there is litigation on the property.' Builders can't afford to have this negative public perception, so most would just pay the fellow off to go away. It happens quite often.<sup>4</sup>

This is anecdote, but academic and professional studies also testify to it. A 2001 McKinsey study reported that "most, over 90 percent by one estimate, of the land titles in India are 'unclear.'"<sup>5</sup>

The economic development implications of such chaos appear obvious, and the Government of India has responded, embarking upon a nationwide crash program of title registration, a framework sometimes referred to as the "Torrens system." In a nutshell, under the Torrens system the government registers and ensures title: subse-

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<sup>1</sup> See, e.g., JESSE DUKEMINIER ET AL., PROPERTY 559-635 (6th ed. 2006); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 779-99 (4th ed. 2006); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 903-12, 917-36 (2007).

<sup>2</sup> The exception, of course, being the Rule Against Perpetuities, a doctrine so soporific that the California Supreme Court has held that under some circumstances, it might not be professional negligence for a lawyer to misunderstand and misapply it. *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961).

<sup>3</sup> "A Matter of Title (Land Titles in Developing Countries)," *ECONOMIST*, Dec. 9, 1995

<sup>4</sup> Quoted in Priya Gupta, "The Potential Role of Title Insurance in the Indian Real Estate Market" 1 (April 2007)(on file with author).

<sup>5</sup> McKinsey study, at 139.

quent claimants may recover under a public insurance scheme funded by registration charges, but government registration of title is conclusive. Indian officials point with pride to the enactment of the program, which reflects the nearly-universal academic and domestic consensus.

It may seem somewhat churlish in such an environment to criticize, but unfortunately enough, the facts require it. Both the Union and state governments appear to have rushed headlong into a titling project that not only could suck up resources better spent elsewhere, but under the particular conditions of India, might exacerbate the very governance problems that liberalization was supposed to cure. Policymakers at the Centre and in New Delhi should consider the recording system (sometimes known as "deeds registration") currently used in the United States and France before proceeding with the currently envisioned multi-hundred-billion rupee scheme.

To say that policymakers should "consider" something hardly resembles a clarion call. This is purposeful. In this Article, I set forth some what I believe to be crucial and plausible doubts about the current plan for Indian land titling; I do not attempt an ironclad argument about the nation's future system. Instead, I hope to place the burden where it belongs: on policymakers to show why their consensus solution avoids the common-sense problems that title registration raises.

My analysis of the title problem derives more from common sense and well-known facts about Indian governance: indeed, I make no large theoretical and conceptual claims. This modesty, in turn, raises the question of why no one has mentioned any of these ideas before. The title assurance question in India, I suggest, concerns less facts on the ground and more the peculiar interaction between strange bedfellows: international financial agencies and the entrenched bureaucracy of the Indian state. This interaction has created a project that somehow has meshed well with the cultures of these two very different institutions. Put another way, it has created a political win-win for both organizations. The only loser is, unfortunately, the Indian citizen.

To see why, however, we need to understand what the project is, how it emerged, and the choices available to Indian decisionmakers.

## I. Background

India's land title framework rests principally upon the Registration Act of 1908, which despite its name, established the recording system (and has been frequently amended since independence). The Act requires the registration of documents relating to real property rights in "the office of Sub-Registrar of sub-district within which the whole or some portion of property is situated."<sup>6</sup> If the recipient of a document required to be registered does not do so, that document cannot subsequently be introduced in court.<sup>7</sup>

But this framework has hardly ensured anything like an administrable system. India's land records are a mess. Under the Raj, the British were relatively uninterested in determining title; their focus was on collecting revenue, and so they usually recorded the land but not the owner.<sup>8</sup> And after Independence, the new government, either at the center or in the states, did nothing to fix the situation.

By the beginning of the new millennium, a consensus emerged that the lack of land records was causing a significant drag on the Indian economy. The McKinsey study, cited in the Introduction, was not alone. Arun Shourie, an investigative journalist and former World Bank economist who had become the Cabinet Minister overseeing privatization, published a 2002 report in the Indian Express that laid out the problem with more graphic details. He observed that the Indian Tourism Development Corporation (ITDC), a government body slated for privatization, operated 32 hotels around the nation, and eight in the nation's capital. But when his ministry began the privatization process, "we discovered that not one of them, *repeat not one of them* had the title deed or lease documents in order. Documents were either just not available, or the lease was in dispute, and that in spite of the fact that the hotels had been in operation for up to *forty five years*."<sup>9</sup>

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<sup>6</sup> § 28.

<sup>7</sup> § 49.

<sup>8</sup> See DIETMAR ROTHERMUND, INDIA: THE RISE OF AN ASIAN GIANT 123 (2008). Rothermund notes that under the law of land sales, any delinquent tax revenue would be paid by the new owner, and so providing ownership did not assist the Raj in this regard. Arvind Panagariya observes that "the land records, when they exist, contain details such as cultivable land, soil quality, sources of irrigation, and cropping patterns" -- but no owner. ARVIND PANAGARIYA, INDIA: THE EMERGING GIANT 321 (2008).

<sup>9</sup> Arun Shourie, Indian Express, July 8, 2002 (emphasis in original).

One hotel, Shourie related, had operated for nearly four decades without any documents demonstrating title. Two government agencies -- the operator (the ITDC) and the Department of Urban Development -- had battled for more than a decade over the source of the title, because the identity of the land's owner under India's tax law would determine the "tax rate" (i.e. what the ITDC would pay to the DUD). The Delhi High Court ordered the two agencies to come to a settlement, but this simply meant that the two agencies kept "sending letters to each other." All this, Shourie noted, became

handy for thwarting privatisation. The bidders would not bid for the hotel till the issue was resolved, and, on the other side, the various limbs of Government would not resolve the issue. Indeed, they would flag this dispute as one of the reasons why privatisation had to be postponed! Naturally, indefinitely. . . There was no issue of principle that I could detect. There was not even an issue of law. The question was one of fact. It turned on who "owned" the land - the Department of Urban Development or the ITDC, both limbs of the same governmental structures. "But there must be some document - of lease or ownership". I said in exasperation. That was the problem, the officials explained: the original documents were not, as they had not been, available!<sup>10</sup>

D C Wadhwa followed up on Shourie's article with a scathing piece in *The Economic and Political Weekly*, a peer-reviewed journal that also maintains a large popular following and plays a central role in Indian policy discourse.<sup>11</sup> Wadhwa noted that while Shourie's account was grim, it was not confined to state-owned properties: the land market throughout India was hobbled by poor recordkeeping. In Andhra Pradesh, for example, fully 49.5 percent of all land records were either missing, brittle, or torn beyond recognition. He also reproduced for a mass audience the statistic that had originally inspired the McKinsey conclusion: the ratio of land cost per square metre to per-capita-GDP in Indian cities ranges from 7 to 10 times that in other Asian cities.

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<sup>10</sup> Id.

<sup>11</sup> For an excellent description of EPW's value and influence, see RAMACHANDRA GUHA, *Journals of Opinion*, in *THE LAST LIBERAL AND OTHER ESSAYS*, 237, 241-44 (2004).

For Wadhwa, the answer was obvious: the state needed to guarantee titles. This was not simply a matter of efficiency: for Wadhwa, social justice demanded it. His justification is worth quoting in full:

There are millions of small, illiterate, backward, poor farmers in our country whose only evidence of title to their holdings is the entry in the record-of-rights in land maintained by the state governments. But the entire exercise is drained of all significance if this entry in the record-of rights in land has only a presumptive value. If they are dispossessed of whatever little they have in the form of small pieces of land, which is happening in all parts of the country, the poor fellows are pitted against the might of the mighty and do not get back their lands. Rights in land also carry with them, as a necessary concomitant, the right to have those rights recorded in the records maintained by the government, as conclusive proof of their ownership. This is not happening with the result that the rights of the poor are being allowed to go by the state's default. In a welfare state, the state must protect those who cannot protect themselves. Under the system of conclusive title to land, the record maintained by the government is an authoritative record and the state accepts the responsibility for the validity of the entries in the record. The state guarantees title to land. This system does away with the need for investigation of title to land by the buyers.<sup>12</sup>

Literally for decades, Wadhwa had vigorously argued that the title problem was crippling India's growth and just as vigorously had pushed state title guarantees. His ideas, however, fell on deaf ears, especially from the state governments that held jurisdiction over land policy. But there is nothing like an idea whose time has come, and his 2002 intervention finally awakened the policy elite; it also bred a consensus that state title guarantees were the way to proceed.

In August 2008, the Cabinet approved the Department of Land Resources "National Land Records Modernisation Programme" (NLRMP, or the "Programme"), which would implement title registration throughout the country, although the scheme did depend upon

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<sup>12</sup> Wadhwa, *supra* note --, at 4705.

states' matching the Centre's resources.<sup>13</sup> The Programme aimed to institute three key principles for land records throughout the Republic:

1. A single agency for all property records, eliminating the current system where the Revenue Department prepares and maintains the textual records; the Survey and Settlement Department prepares and maintains the maps; and the Registration Department verifies encumbrances and registration of transfers, mortgages, and all other property transactions;
2. The "Mirror" Principle, under which written records should accurately reflect the actual state of title on the ground; and
3. The "Curtain" Principle to establish conclusiveness.<sup>14</sup>

Rita Sinha, the Secretary of the Department of Land Resources for the Ministry of Rural Development, expressed the conventional wisdom on the issue. A Torrens system, Sinha argued that "the bane of presumptive titling is litigation, which will be considerably reduced once the titles are conclusive and tamper-proof."<sup>15</sup>

Conclusive titling soon became the rage of policy elites outside of New Delhi. The Chief Minister of Rajasthan, in her 2008 budget speech, committed to state guarantee of title, which the Assembly duly enacted with a special ordinance shortly afterwards.<sup>16</sup> The National Capital administration in Delhi quickly jumped on the bandwagon, moving from deeds to registration in a project partially funded by USAID.<sup>17</sup> Maharashtra, which traditionally had resisted central interference in its land system, started to follow suit three months

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<sup>13</sup> See "New Land Records Scheme Approved," *The Hindu*, Aug. 22, 2008, at <http://www.hindu.com/2008/08/22/stories/2008082255261300.htm> (last visited July 27, 2009). DLR's complete guidelines and technical specification may be found at the Department's website: <http://www.dolr.nic.in/>

<sup>14</sup> Rita Sinha, "Moving Toward Clear Land Titles in India: Potential Benefits, A Road-Map and Remaining Challenges," presentation at World Bank Conference, Washington, DC, August 2008.

<sup>15</sup> Sinha, *supra* note --, at 3-4.

<sup>16</sup> See "First Urban Land Title in India," Sept. 18, 2008, at <http://www.praja.in/blog/srkulhalli/2008/10/18/first-urban-land-title-india> (last visited July 27, 2009). Note how even a relatively sophisticated and well-informed observer conflates state *guarantee* of title with title itself. Cite to Rajasthan statute.

<sup>17</sup> Esha Roy, "Capital Set to Switch from Deed to Title Registration System," *Indian Express*, Dec. 28, 2008, at <http://www.expressindia.com/latest-news/capital-set-to-switch-from-deed-to-title-registration-system/403782/> (last visited July 27, 2009).

later.<sup>18</sup> Orissa committed nearly 18 billion rupees as part of its state share under the Programme.<sup>19</sup> Even Uttar Pradesh, not generally viewed as maintaining the most cutting edge bureaucracy, has begun moving toward the computerization of land records.<sup>20</sup> The effort has become so prodigious that even the US press has begun to notice.<sup>21</sup> The most magisterial recent survey of the Indian economy concludes that the “fundamental problem” is “the absence of state guaranteed titles. . . . While politically complex, this reform has a very large payoff. Not only will it give millions of farmers peace of mind and avoid millions of lawsuits in the future, it will also give rise to a highly efficient rural land market in India.”<sup>22</sup> The NLRMP is supposed to be completed by 2017.<sup>23</sup>

For a Programme that loudly proclaims the necessity of conclusive titling, the NLRMP's Guidance Documents and associated materials remain highly ambiguous concerning the precise method of

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<sup>18</sup> “Land Records to be Computerized in 5 Districts,” Times of India, Mar. 11, 2009, at <http://timesofindia.indiatimes.com/Cities/Pune/Land-records-to-be-computerized-in-5-districts/articleshow/4251413.cms> (last visited July 27, 2009).

<sup>19</sup> Prafulla Chandra Gadai (Orissa Finance Minister), 2009-2010 Budget Speech, at [http://orissagov.nic.in/finance/Budgets/2009-10/Annual/Speech/BudgetSpeech\\_English.pdf](http://orissagov.nic.in/finance/Budgets/2009-10/Annual/Speech/BudgetSpeech_English.pdf) (last visited July 27, 2009).

<sup>20</sup> Tarannum Manjul, “State Begins to Digitise Land Records,” Indian Express, June 24, 2009, at <http://www.indianexpress.com/news/state-begins-to-digitise-land-records/480601/1> (last visited July 27, 2009).

<sup>21</sup> See Rama Lakshmi, “In India, Old Land Records Go Digital: Aim Is Reducing Fraud, Litigation,” Wash. Post, July 17, 2009, at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071604175.html> (last visited July 27, 2009).

<sup>22</sup> ARVIND PANAGARIYA, INDIA: THE EMERGING GIANT 322 (2008). McKinsey seems to agree; see McKinsey study at 407 (recommending “streamlin[ing] of land registration procedure by eliminating the intermediate (validation) steps.”).

<sup>23</sup> *Drive to Confer Conclusive Titles to 140 Million Rural Landowners*, FINANCIAL EXPRESS, THE INDIAN EXPRESS ONLINE, May 21, 2009, available at WLNR 9618756. According to a Special Report by the Executive Director of the Centre for Human Settlements in India:

There are three major aspects of the updating procedure. It can be done through surveys/re-survey with the aid of modern technology such as ETS/GIS, aerial photography or satellite imagery. It will be a regular procedure by interconnecting textual land records, survey maps and registration offices. The citizen will gain access to his/ her land records as the updated records will be available on the website. This will facilitate checking of the land records. Eventually the citizen will be able to obtain loans and credit on-line.

Special Report by Executive Director, Centre for Human Settlements (Calcutta, India), Mar. 27, 2009. See also Madhumita D. Mitra, “Introducing Guaranteed Land Titles in India,” Halsbury’s Law Monthly, Aug. 2009, at <http://www.halsburys.in/Introducing-Guaranteed.html> (last visited July 25, 2011) (summarizing the system).



doing so.<sup>24</sup> The vast majority of the Programme as currently set forth focuses on the sorts of technical issues that any land title reform will require: land record computerization; surveying and updating of settlement records; computerization of data entry and scanning of old documents; modernizing physical space; training and capacity building of title records officials; and GIS mapping, mostly working from satellite data. But it is obvious where the Programme is headed: the Guidelines' work program specifically envisions amendments to the Registration Act and the creation of a "model law for conclusive titling." That draft Model Law has now been issued. Interestingly (and, as I will suggest below, tellingly), the Guidelines contain precise and at times mind-numbing detail concerning the technical specifications for surveys, GIS mapping, and computerization, and the Model Law sets up a general structure establishing land tribunals for titling literally millions of pieces of property. But these documents have literally nothing to say on how the new Model Law will be implemented, how more vulnerable parties will be protected, or the ways in which the "curtain" and "mirror" principles will be upheld.

The NLRMP is staged; one or two districts in each State/Union Territory will take on the program at first (supposedly in 2008), and then more districts will subsequently take on the program.<sup>25</sup> "Initially, 19 states are expected to launch the programme."<sup>26</sup> The government has already set up advisory committees for training and monitoring the Program, as well as evaluating its progress throughout the country.<sup>27</sup> The Indian government estimates the total cost of the program at roughly 50 billion rupees, or a little more than \$1 billion, with the national government taking a slightly higher percentage of the total.<sup>28</sup>

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<sup>24</sup> See the Ministry of Rural Development's NLRMP website at [http://dolr.nic.in/land\\_reforms1.htm](http://dolr.nic.in/land_reforms1.htm) (last visited July 25, 2011). References to Guidance Documents derive from GOVERNMENT OF INDIA, MINISTRY OF RURAL DEVELOPMENT, DEPARTMENT OF LAND RESOURCES, THE NATIONAL LAND RECORDS MODERNIZATION PROGRAMME (NLRMP) GUIDELINES, TECHNICAL MANUALS, AND MIS 2008-2009, at <http://dolr.nic.in/Guidelines%20%20NLRMP%2017.4.2009.pdf> (last visited Oct. 4, 2009).

<sup>25</sup> A. Srivathsan, *State to Guarantee Title of Registered Property*, 11 HINDU, Aug. 31, 2008. Also, if states choose to, they can start earlier and "go in for a public-private partnership model in the non-sensitive districts." Special Correspondent, *New Land Records Scheme Approved*, HINDU (INDIA), Aug. 22, 2008.

<sup>26</sup> *Drive to Confer Conclusive Titles*.

<sup>27</sup> *Id.*

<sup>28</sup> Srivathsan, *States to Guarantee Title*. "The Centre's share will be Rs. 3,098 crore and the States Rs 2,558 crore." More specifically, "[t]he Centre will fully fund computerization of land records including data entry/re-entry, data conversion, digitization of maps and integration of textual and spatial data...training and capacity building...village index maps and core GIS, legal

All of this seems relatively straightforward. Finally, the government is tackling a serious problem that impairs the country's future. But let us pause for a moment and get a clearer sense of the choices that the government and policy elite has made.

## II. Pulling Back -- The Basic Choice

The MRD proposes to implement what is commonly called the "Torrens system" of title assurance, in which the registration of title with the state guarantees that title. Registration of title is determinative of it; registration thus requires some sort of fact-finding process to decide on title. Once this process is complete, however, then the system envisions that future proceedings will not be necessary; this is why MRD anticipates reducing litigation. If someone with a better claim later comes forth with evidence that the registration was in error, then she does not receive title but rather damages paid out of a state insurance fund; in theoretical terms, she is protected by a liability rule, not a property rule.

The chief alternative to a Torrens system is usually referred to as a recording system, or "deeds registration." Under a recording system, documents in a registration office provide *evidence* of title, but not proof of it; the state guarantees nothing. Title can be held, purchased, transferred, abandoned, mortgaged, sold, leased, just about anything without depositing copies of documents in the governmental recording office. But recording documents is obviously a wise strategy, because it can help establish a claimant's priority if she took a piece of property first.<sup>29</sup> Recording also puts adverse claimants on notice of a claim. This notice can be crucial in jurisdictions with recording statutes, which generally give title to a bona fide purchaser if the original owner did not record.

Recording systems traditionally carry the administrative headache of requiring prospective owners to search through records in

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changes and programme management." Special Correspondent, *New Land Records*. (see article for entire list of what each entity will pay for). Furthermore, "[t]he Centre and States will equally share the cost of survey/re-survey and updating of survey and settlement records," and, "the Centre will give 25 percent funds and the rest will be contributed by States for computerization of registration, scanning, and preservation of legacy mutation records, and providing connectivity to the sub-registrar offices with revenue offices." *Id.*

<sup>29</sup> The common law long ago established the rule of "first in time, first in right." An excellent analysis is found in Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

order to determine who has title to property. These systems can organize records through an index tract by tract, and this is the dominant practice west of the Mississippi River. Many American jurisdictions, however, do not do so because through the 19<sup>th</sup> century, parcels did not have numbers and were only described through metes and bounds. Instead, indexes are based on grantors and grantees, listed alphabetically and chronologically by surname. This process can be cumbersome, leading to cases that provide entertainment (and warnings) to law students,<sup>30</sup> but place a burden on purchasers and sellers of real estate. Grantor-grantee indexes generally dominate in older American jurisdictions close to the Atlantic seaboard.

If the state does not guarantee title, then under a recording system, who does? Generally, the private sector in the form of title insurance. Instead of the government guaranteeing title to the owner of record, and giving liability protection to the victim of registration error, in a recording system, the purchaser gets liability protection from the insurer in the event of a successful action by claimants with superior claims.

Although Torrens and Recording are ideal types, some land systems depart from these types. Most importantly, some Torrens-type systems rely upon state-granted titles but forego the insurance system, thus denying original rightful owners any protection if state determinations are in error.<sup>31</sup> One could argue that registration-without-guarantee represents a mix of Torrens and recording, but it is more accurate to say that it represents a particularly strong form of Torrens. If under recording, the original owner is protection by a property rule, and under Torrens she is protected by a liability rule, then if she is protected by nothing this does not make the system more like recording, but rather puts even more weight upon the title determination by the state. If the Ministry of Rurral Development's documents are any indication, then it appears to be adopted Torrens-without-guarantee; no references to state insurance have been produced as of summer 2011.

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<sup>30</sup> See, e.g., *Orr v. Byers*, 244 Cal.Rptr. 13 (Cal. App. 1988)(holding that original purchaser of property lost title when his attorney misspelled his name on the grantee index, thereby failing to give notice to subsequent bona fide purchasers.).

<sup>31</sup> See TONY BURNS ET AL., *LAND ADMINISTRATION REFORM: INDICATORS OF SUCCESS, FUTURE CHALLENGES* 113-14 (2006), at [http://www.landequity.com.au/publications/Land%20Admin%20Reform%20Final\\_Draft%20May2007.pdf](http://www.landequity.com.au/publications/Land%20Admin%20Reform%20Final_Draft%20May2007.pdf) (last visited July 25, 2011). Burns and his colleagues are researchers with Land Equity International, a prominent Australian land administration management firm.

### III. Torrens v. Recording: Does India Have a Choice?

Before considering the choice of title assurance for India, one must first ask whether it is a choice at all. After all, if India's land records are in such a mess that title is unknowable, then titles will have to be adjudicated at some point or another; the only question is whether they will be done by the courts, or the Torrens process. And given what is rapidly approaching a 30 million-case backlog in the regular court system, it is hard to see the existing framework as being anywhere near up to the job. When in fact there are *no* (or close to no) title records at all, Torrens is virtually mandatory. Cook County Illinois adopted a Torrens system after the Chicago fire of 1871, where public land records were destroyed.<sup>32</sup>

But that is not, in fact, India's situation on the ground. India's land records are incomplete and obsolete, but they are not nonexistent. They may be chaotic, but they reflect the aphorism of Salman Rushdie's fictional US Ambassador to New Delhi Maximilian Ophuls, who quipped that "India is chaos making sense."<sup>33</sup> Consider Andhra Pradesh, the state that Wadhwa highlighted as a national basket case: even he conceded that a majority of title records were clear and usable (if just barely). The state government adopted a far less expensive strategy for making land titles available – computerization of existing records, the basis for the US recording system.<sup>34</sup> No one adjudicated rights, and no one outside the land titling system received formal title. But the costs of accessing the record that *do* exist was considerably reduced, and it allowed third parties such as banks to access these records as well.

How did this experiment fare? Quite well. Klaus Deininger and Aparajita Goyal accessed quarterly administrative records on credit disbursed by commercial banks for an eleven-year period.<sup>35</sup> Their theory was straightforward: greater access to records would yield greater access to external credit. They found that although compute-

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<sup>32</sup> See John T. Durkin, *Torrens Title*, ENCYCLOPEDIA OF CHICAGO, at <http://www.encyclopedia.chicagohistory.org/pages/1262.html> (last visited Oct. 6, 2009).

<sup>33</sup> SALMAN RUSHDIE, *SHALIMAR THE CLOWN* 25 (2005).

<sup>34</sup> This is not to suggest in any way that Andhra Pradesh was seeking to emulate the American system.

<sup>35</sup> Klaus Deininger & Aparajita Goyal, "Going Digital: Credit Effects of Land Registry Computerization in India," World Bank Development Research Group Policy Research Working Paper, March 2010.

rization had no credit effect in rural areas, it led to significant increased in credit supply in urban ones.<sup>36</sup>

Just as importantly, they found that the greatest increase in credit was caused by the reduction of stamp duty.<sup>37</sup> This stamp duty effect carries important implications for the Torrens v. recording choice. First, it suggests that the current system can be reformed effectively and does not need a wholesale overhaul. While Hyderabad might be far from New York, New York, as that song might say: if reform can make it in Andhra Pradesh, it can make it anywhere. Second, it implies that Torrens – which if anything would carry *higher* administrative costs – could potentially run into quite large enforcement and compliance problems: after all, if land holders will rush to record in stamp duties are *reduced*, it seems reasonable to suppose that they will be very reluctant to comply with a Torrens system that asks them to shoulder an even higher burden of those costs.

Similarly, the government of Karnataka instituted a major project of computerizing the state's extant land records. Although we do not have outcome data concerning credit, the outcomes we do have suggest that existing records, although incomplete, are adequate for millions of farmers, particularly small and marginal ones. Consider, for example, the issue of crop insurance, which is mandatory for anyone in Karnataka who takes out a farm loan. In order to get crop insurance, land title records are necessary. Computerization of land records for all sub-districts was completed in 2002: between 2000 and 2003, the number taking out crop insurance trebled, from 0.38 million to more than one million, approximately 15% of the state's farmers. Insurance payouts exploded from 40 million rupees to nearly 3 *billion* rupees, possibly indicating that the greater accuracy of records enabled more farmers to make claims. We certainly know that farmers are using the system: after computerization, requests for "mutations" – changes in land records – jumped 85%. All this indicates that while formidable challenges remain for India's land title

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<sup>36</sup> At this stage, we do not know whether or not this is a systemic effect, i.e. that in general urban records are better than rural ones. Deininger & Goyal do not comment on the matter, and Wadhwa's first article highlighted difficulties with title records to major urban hotels.

<sup>37</sup> This viewpoint is echoed in other World Bank studies. See, e.g., Patricia Clarke Annez, Financing Indian Cities: Opportunities and Constraints in an Nth Best World 25 (Nov. 16, 2010), downloaded from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1709846](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1709846) (last visited Mar. 11, 2011); James Alm, Patricia Clarke Annez, & Arbind Modi, Stamp Duties in Indian States: A Case for Reform (Sept. 22, 2004), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=625290](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=625290) (last visited Mar. 11, 2011).

system – not the least of which remains illiteracy, making *any* written system difficult – current records remain serviceable.<sup>38</sup>

Indeed, the more we examine closely the failings of India's title system, we can see that while those failings are real and serious, they are not overwhelming. Consider the McKinsey study cited earlier, which estimated that 90% of the nation's title records are unclear. That study does not where it got this information from: it only says that "it is believed" that this is the case "by one estimate,"<sup>39</sup> which by the policy recommendations section turns into "some estimates."<sup>40</sup> This is very frail reed upon which to rest such an expensive and risky policy reform. Moreover, we know little from it about what precisely is unclear. Without Torrens, one could argue that *every* title is unclear because even the most well-kept records under a recording system constitute only evidence of title and not title itself. In any event, more recent McKinsey work suggests that while the title issue might indeed be a problem, it does not rank high in developers' minds.<sup>41</sup>

None of this means that maintaining a recording system is superior to Torrens. Rather, it serves to show that maintenance of the current system is a plausible alternative to Torrens. The various states could attempt to get by with more limited reforms such as computerization and Bhoomi, allowing title companies to insure those properties that need it and claimants would bring only selective litigation as necessary. As we will see, Torrens would require adjudication of virtually

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<sup>38</sup> See Rajiv Chawla & Subhash Bhatnagar, "Online Delivery of Land Titles to Rural Farmers in Karnataka, India," paper presented at "Scaling Up Poverty Reduction: A Global Learning Process and Conference," Shanghai, May 25-27, 2004, at <http://info.worldbank.org/etools/docs/reducingpoverty/case/96/fullcase/India%20Bhoomi%20Full%20Case.pdf> (last visited Mar. 21, 2011).

<sup>39</sup> MCKINSEY GLOBAL INSTITUTE, INDIA: THE GROWTH IMPERATIVE, chap. 4, p. 19 (2001).

<sup>40</sup> Id. at chap. 6, p. 6.

<sup>41</sup> See *generally* MCKINSEY GLOBAL INSTITUTE, INDIA'S URBAN AWAKENING: BUILDING INCLUSIVE CITIES, SUSTAINING ECONOMIC GROWTH (April 2010). This major study completely fails to mention title problems in discussing attempts for cities to achieve fiscal self-sustainability through property taxes. Unless a government knows who owns property, it cannot tax them; thus the failure to mention title seems relevant. See also Ranjit Pandit, "Putting a Roof Over India: A Interview with the Country's Biggest Developer," *McKinsey Quar.*, November 2007, at [https://www.mckinseyquarterly.com/India/Putting\\_a\\_roof\\_over\\_India\\_An\\_interview\\_with\\_the\\_country\\_s\\_biggest\\_developer\\_2066](https://www.mckinseyquarterly.com/India/Putting_a_roof_over_India_An_interview_with_the_country_s_biggest_developer_2066) (last visited Mar. 11, 2011). The interview is with Rajiv Singh, the vice-chairman of DLF. Singh says that the developers' two biggest problems are restrictive land use laws and the land ceiling laws – although as of this writing, most of the ceiling laws have been eliminated (at least formally) by the Jawaharlal Nehru National Urban Renewal Mission. Singh never mentions title problems. He does allude to large numbers of illegal dwellers in urban areas, making property tax collection difficult, and also suggests that the easiest way to develop in agricultural areas would be to buy out individual owners.

every parcel in the country in order to establish conclusive title. Maintenance of the recording system would yield litigation on a spotty, case-by-case, “as needed” basis. Torrens would be far more expensive, and recording would be far less complete. India has a choice.

#### IV. Torrens Versus Recording: The Theory

It is hard not to be attracted by the theoretical superiority of the Torrens system. Title registration rids a land parcel of clouds on title, which obviously enhances marketability and development. Moreover, the conclusive nature of the title deed rids the system of potentially massive transactions costs. The framework rids the land system of lengthy and complex searches for chain of title in future transactions.

Torrens might also carry with it important equity considerations, which underlay Wadhwa’s argument. Recording claims protect those with prior unrecorded claims with a property rule, and thus they threaten to destroy important subjective value arising from property. Oliver Wendell Holmes famously observed that “a thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.”<sup>42</sup>

Recording opens up the possibility that long-time possessors, who have put down deep Holmesian roots, will suddenly find themselves stripped of their property because of ancient claims that they could not have known anything about. To be sure, the prospect of such a loss might lead them to buy off the surprise claimant, but one might well ask why their subjective value that they created should go to someone who has only recently appeared and has not lived on or used the property to begin with.

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<sup>42</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). This was not a passing thought for Holmes. Ten years later, he told William James that “man, like a tree in a cleft of a rock, gradually shapes roots to its surroundings, and when the roots have grown to a certain size, can’t be displaced without cutting at its life.” Letter from Oliver Wendell Holmes, Jr. to William James (Apr. 1, 1907), in *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS* 417, 417-18 (Max Lerner ed. 1943).

Closer inspection reveals, however, a host of potential practical difficulties that emerge from a Torrens system. These difficulties center upon a key empirical question: does Torrens achieve the sorts of transactions costs reductions that its adherents claim?

Title registration is hardly a ministerial act. Instead, it requires some sort of process to ensure accuracy and give rival claimants a chance to be heard. Under a Torrens system, then, registration amounts to something like a quiet title action in court. More recently, US jurisdictions have experimented with an administrative registration system, and this has shown promise, but even an administrative system must have the safeguards that would allow it to withstand constitutional muster in just about any country that claims to protect both property rights and due process.

Torrens might not deliver the conclusiveness that it promises. John McCormack, the legal scholar who has studied the comparative effectiveness of assurance systems most comprehensively lists, at least 8 ways that title registration might not be conclusive<sup>43</sup>:

1. Caveats: notices on certificates of possible claims or interests which are not technically registered
2. Governmental Interest Exceptions: a) rights under federal law in nations with federal systems of government, b) liens or equivalent interests which secure payment of taxes, c) governmental lands for uses such as streets and highways;
3. Private Special Interest Exceptions, such as mechanics' liens or judgment creditor/execution liens
4. Possessory Interests, such as short term leases or easements by implication;
5. Equity: equitable title due process, and fairness claims or interests: a) rights to appeal or contest initial registrations, b) exceptions in certain cases of fraud, c) exceptions to protect the relatively weak or disadvantaged such as contract vendees or the uninformed, d) equitable title interests
6. Administrative Errors
7. Encroachments, either from the subject property or onto it<sup>44</sup>; and

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<sup>43</sup> John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 *Wm. Mitchell L. Rev.* 61, 90 (1992).

<sup>44</sup> Title insurance also provides protection against illegal building structures. Critical in a developing country such as India, where these structures figure to be quite common. Title



8. Non-title related exceptions, e.g. zoning and planning laws, building codes, environmental laws, or lack of property access.

McCormack does say that a Torrens registration is "probably more reliable and, thus, promotes security of titles more than the record in the typical records system." But "[t]he prudent purchaser of a registered interest will still need professional title services. The exceptions to the conclusiveness of the register may make title insurance advisable in many cases."<sup>45</sup>

The experience of Torrens jurisdictions over the last 17 years appears to support McCormack's advice. Although theoretically title insurance should have no place in a Torrens jurisdiction, it does and has been growing rapidly.<sup>46</sup> The Torrens system originated in Australia and "slowly but surely conquered most of Canada,"<sup>47</sup> which its advocates attribute to its "superiority."<sup>48</sup> This supposed quality, however, has not prevented a dramatic increase in the availability of title insurance, theoretically unnecessary under a Torrens regime. Title insurance is common in Canada<sup>49</sup> (indeed, even typical<sup>50</sup>) and increasingly prevalent in Australia.<sup>51</sup> Indeed, independent analysts foresee that the greatest business growth for US title insurance companies will occur in Torrens jurisdictions such as Australia, Canada, Eastern Europe, South Korea, and the United Kingdom.<sup>52</sup> The conclusion of the leading Canadian property scholar is apt: "many of the touted benefits of Torrens title are not fully realized."<sup>53</sup>

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Insurance, Questions and Answers, at <http://www.aicsa.com.au/displaycommon.cfm?an=1&subarticlenbr=53> (last visited July 15, 2009). Interesting here because this is a conveyancing lawyers' website, and usually one would think that the conveyancers don't like the title insurance business.).

<sup>45</sup> McCormack, *supra* note --, at 98-99.

<sup>46</sup> Pamela O'Connor, *Double Indemnity: Title Insurance and the Torrens System*, QUT Law & Justice Journal (2003).

<sup>47</sup> GREG TAYLOR, *THE LAW OF THE LAND: THE ADVENT OF THE TORRENS SYSTEM IN CANADA* 195 (2008).

<sup>48</sup> *Id.*

<sup>49</sup> Secured Lender, July 1, 2009, Vol. 65, Number 5, 2009 WLNR 14811134.

<sup>50</sup> See Michael Moldenhauer, "Tax credit would help first-time Home Buyers," Toronto Star, Sept. 27, 2008 (noting that proposed tax credit on purchases could be applied to closing costs such as "title insurance.").

<sup>51</sup> First American's insurance business has declined as the securitization market has dried up. Its head of international operations estimates that while only 1% of new purchases use insurance, 35% refinances have done so. Telephone Interview with JC Calder, Vice President for International Underwriting, First American Title, Sept. 23, 2009.

<sup>52</sup> Hoover's In-Depth Company Records, "The First American Corporation," 2009 WLNR 11560271, June 17, 2009.

<sup>53</sup> BRUCE ZIFF, *PRINCIPLES OF PROPERTY LAW* 439 (3<sup>rd</sup> ed. 2000).

Why is this happening? Property law generally does not require redundancy.<sup>54</sup> Part of the answer lies in the globalization of investment capital. Homeowners might not want title insurance, but their bankers will, especially if those bankers are overseas. International investors will not want to investigate the particular laws of every country they invest in; it will be much more congenial for them to acquire title insurance from global firms (such as Stewart or First American) with whom they are repeat players, and thus from whom they can demand better performance. The local official in charge of managing the county registration system can take her own sweet time in determining and processing a Torrens claim; Stewart Title's international underwriting manager cannot. This development became particularly important as real estate became securitized, because the vast armies of tranche holders wanted (or at thought that they wanted) more security in determining the worth of their investments.

Mixing Torrens with international investment capital, then, might create a sort of belt-and-suspenders, redundant system of title assurance. For international investors, this redundancy is hardly a problem because they can always pass the costs of such extra assurance onto the homeowner. Such a system, however, poses a problem for Torrens advocates since a key point of their argument is that the system avoids transactions costs such as title insurance. None of this destroys the pro-Torrens argument, but it makes the advantages far less than is commonly assumed.

The advent of computerized records also reduces Torrens' comparative advantage. Critics of recording systems, most famously Myres McDougal, have pointed to the possibly interminable wading through dusty records simply to find the best title evidence.<sup>55</sup> Whether or not

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<sup>54</sup> Nor does it repeat itself. Or say the same thing over and over again.

<sup>55</sup> See Myres S. McDougal & John W. Braber-Smith, *Land Title Transfer: A Regression*, 48 YALE L.J. 1125, 1126-27 (1939):

As he ploughs through the Joneses, Smiths, and Johnsons and through the deeds, mortgages, judgments, taxes, and mechanics' liens [the title searcher] can never be sure that he isn't missing something fatal to his title. Worse yet, all this laborious retracing of the torturous path of title is perpetual motion. Every time the land is subdivided or mortgaged or subdivided -- no matter into how small parts -- it all has to be done over again; or else private title plants, better ordered than the public records, must be constructed and maintained at great expense. Furthermore, whether our searcher maintains a plant or continually retraces his steps, the accelerating fecundity of records, added to the disorder, scarcely lessens his labors.

such scenarios were accurate when McDougal portrayed them, however, they are certainly vastly overstated now, because the sort of detective-like search through obscure recorders' offices is a thing of the past. Most title officers in the United States have never seen the inside of a recorder's office. Instead, they receive digital copies of all recorded documents at the end of the day, and enter them into their own system overnight, a task accomplished – ironically enough – through outsourcing to Indian providers.

Computerization is expensive, but it represents only a small fraction of the cost of going with Torrens whole hog. Consider the example of Los Angeles County. Los Angeles is the largest county in the United States. A county supervisor represents more people than 22 members of the United States Senate. So the county certainly carries an enormous burden in maintaining land record. Moreover, California's fiscal system is notoriously dysfunctional: because counties have large burdens but no independent way to raise money, they routinely face severe fiscal shortfalls and often come very close to bankruptcy. Yet somehow through all of this, Los Angeles County has managed to computerize its records smoothly enough to deliver a complete set of recorded documents to title companies at the end of each business day.

Doesn't a recording system still require attorneys and title insurers to search through decades if not centuries of title records? Not necessarily. Most American states have established "marketable title acts", which seek to limit title searches to a reasonable period, usually 30 or 40 years.<sup>56</sup> Either they require recording of interests within an amount of time of their establishment, or they create a statute of limitations on claims older than a certain period. "Thus, except for the interests excepted from the statute, title searches may be safely limited to the number of years specified in the statute."<sup>57</sup> And of course marketable title acts can be strengthened by limiting or extinguishing any excepted interests.

## V. Torrens Versus Recording: Empirical Evidence

Thus, developments in technology and international investment flows, as well as the practical operations of Torrens on the ground, erode somewhat Torrens' theoretical benefits. The truest test, however, lies

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<sup>56</sup> See generally Walter E. Barnett, *Marketable Title Acts – Panacea or Pandemonium?*, 53 CORNELL L. REV. 45 (1967).

<sup>57</sup> JESSE DUKEMINIER ET AL., PROPERTY 612 (6<sup>th</sup> ed. 2006).

in how either system affects the market for land. Which system has shown itself as more effective in creating an efficient market?

Thomas Miceli of the University of Connecticut has pioneered the comparative study of assurance systems, conducting studies with several co-authors over many years. In general, they have found that Torrens systems have resulted in higher land values than recording. This appears to favor a Torrens approach: after all, the greater title security, the more valuable an asset should be.

But we should exercise extreme caution about extrapolating such conclusions to developing countries, as the bulk of the data underlying them derive from the United States. More recently, Miceli and Joseph Kieyah have examined the distribution of costs and benefits of land title systems,<sup>58</sup> and their model has important implications for India.

In order for Torrens to be cost-effective, it must have a large amount of coverage in order to cover the high start-up costs of the system. In order to have this coverage, of course the vast majority of land in the jurisdiction need to register.

We find, however, that in many jurisdictions – particularly those in the developing world—have not achieved this coverage. Why? The answer is simple: registration is expensive. Under a registration system, title must be adjudicated, and large numbers of property owners do not have the incentive to register, and thus pay the cost of the system. Their traditional indicia of title, which might not be a deed, but can include such varying documents as wills, sales contracts, prescriptions, or even mere possessions.<sup>59</sup> And this only reflects what might be called “quasi-legal” means of securing title. Large landowners might be able to hire thugs or buy off local officials to ensure that they maintain security of title: entering into a registration system means entering a less secure and more expensive unknown.

One might say that a Torrens system creates a huge commons problem. The more people register their property, the less the charge is for any individual. But this of course means that everyone has the incentive to let others incur the highest charges up front., and only

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<sup>58</sup> Thomas J. Miceli & Joseph Kieyah, *The Economics of Land Title Reform*, 31 J. COMP. ECON. 246 (2003).

<sup>59</sup> See Steven E. Hendrix, *Myths of Property Rights*, 12 ARIZ. J. INT'L & COMP. L. 183, 187-88 (1995).

join in at the end, when the charges can be relatively cheap. Benefits are externalized; thus, there can be multiple equilibria, many of which are inefficient.

Moreover, a voluntary Torrens system creates a huge adverse selection problem: those owners that register are the ones that stand to reap the greatest gains from the system, i.e. those with the weakest title. But government doesn't really have the capacity to discriminate between landowners based upon the incremental additional value to their property.

And it's worse than that. Miceli's model assumes that all owners will benefit from title registration. This makes sense given what they are attempting to show – it is a conservative assumption. It does not take much imagination, however, to show that many landowners will not benefit from registration. Effective title registration will increase the supply of marketable land in the system, which could actually reduce many landowners' property values even if their own title is more secure.

Miceli and his colleagues thus conclude that although Torrens is superior to recording, title registration must be mandatory. This conclusion, however, raises more questions. Because of their research agenda, Miceli et al. do not ask the critical follow-up question, namely: how can a government ensure that a theoretically "mandatory" system becomes an effective one. "Mandatory," of course, does not equal "mandatory and obeyed."

## VI. Applicability to India

Which system's advantages do Indian political, legal and administrative conditions tend to augment and which system's disadvantages do these conditions tend to ameliorate? We can attempt to answer this question by considering several issues, which I will term: 1) Cost Incidence; 2) Administrative Capacity; 3) Corruption Effects; and 4) Equity. Although the lack of hard data makes definitive conclusions impossible, all of the critical policy considerations point not to Torrens, but rather to recording. India's elite policy consensus appears to have struck out.

### 1. Cost Incidence

Suppose that the overall costs of a Torrens system are lower than they are with recording. The inquiry cannot stop there, for these lower costs are born by the government instead of the private sector. This places potentially large burdens on the public fisc. Firstly, the state must ensure the solvency of the insurance fund.<sup>60</sup> This is a genuinely live issue: in 1937, the California Torrens insurance fund essentially went bankrupt.<sup>61</sup> And in a country where land titles are so muddled, one can easily envision disgruntled putative rights-holders crawling out from a very large series of rocks.

Far more importantly, though, the state must administer the system, which also entails potentially large burdens. Despite talk of the "curtain" and "mirror" principles, these are not in fact principles so much as they are practices: curtain and mirror must be maintained. That means a larger bureaucracy, and significantly, a very different sort of bureaucracy. Under recording, the land office's job is to maintain whatever records land claimants present. Under Torrens, that office's job is to determine which records are legitimate. The recording system's median employee is a clerk; Torrens' is a collection of adjudicators and investigators.

What does this mean in terms of a real budget? The question is extremely difficult to answer, because the data on costs is outdated. But the evidence that we do have is not encouraging. In 1980, the US Department of Housing and Urban Development commissioned Booz, Allen & Hamilton to study actual land-recordkeeping activities in the United States. The contract enabled BAH to compare costs in those (relatively few) jurisdictions that maintain both recording and Torrens systems. But the findings were clear: in summary, it found that while "American recorders' offices are profit centers for counties . . . American Torrens offices usually require a subsidy because the income they receive [from registration fees] falls short of operational costs."<sup>62</sup> BAH's conclusions buttressed those of a study done two years previously, which reported that the extra costs of Torrens range "from 50 percent to over 200 percent higher than that for conventional recording."<sup>63</sup> Similar findings have emerged from Ontario, where local

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<sup>60</sup> As noted above, the NLRMP's commitment to an insurance fund is vague at best, so theoretically this fiscal problem might not arise under the NLRMP. But this only creates even more severe equity problems, as detailed below.

<sup>61</sup> See CALIFORNIA STATE LAND COMMISSION, REPORT ON LAND TITLE LAW OF THE STATE OF CALIFORNIA 6-7(1953), *referencing* Gill v. Johnson, 13 P.2d 857 (Cal. App. 1937).

<sup>62</sup> McCormack, *supra* note --, at 112.

<sup>63</sup> BLAIR C. SHICK & IRVING H. PLOTKIN, TORRENS IN THE UNITED STATES 58 (1978).

governments also maintain dual systems: there, registration cost local governments 23% more, and the Ontario registration system was bare-bones compared to the complete Torrens process envisioned in India.

What do the absolute numbers show? Some back-of-the-envelope calculations, while hardly definitive, can get us into the ballpark. The BAH study calculated that in 1972, county recording operations cost \$137 million, which in current dollars is \$706 million. Conservatively, then,<sup>64</sup> similar costs of Torrens' systems would be roughly \$1.4 billion.

Suppose that all we care about is economic development. Is the extra money used for insuring and administering Torrens the highest and best use in India? In one sense, this is an unfair question: using this standard, it might be hard to justify any expense. But it is a question that must be asked. And while it cannot definitively be answered, while many studies done on Indian economic and social development since the economic reforms have discussed the land issue, none have presented any evidence that the recording system is so moribund as to be unsalvageable. Indeed, recent studies of the often-perilous state India's rural areas suggests that other services – public investment in rural infrastructure, irrigation and water management, crop insurance, research and extension support, and crop diversification assistance, just to name a few – all come before titling as a priority, and certainly before the extra \$1.4 billion for an augmented titling system such as would be required by Torrens.<sup>65</sup>

## 2. Enforcement and Administrative Capacity: India's Political Economy of Fee Collection

Torrens advocates might retort that the greater efficiency of their preferred system would make up the difference. After all, if Torrens increases land values, then that should cause concomitant increased property tax revenues. But looking closely at this inference raises a host of problems.

Recall Miceli et al.'s central recommendation: Torrens systems should be mandatory, not voluntary, in order to capture the positive externalities of title registration. This recommendation does not quite

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<sup>64</sup> I am using a 100% multiplier, which is on the low side of the 50-200% figure cited earlier.

<sup>65</sup> See S. MEHENDRA DEV, EMERGING POLICY ISSUES AND REFORMS NEEDED IN AGRICULTURE, *in* INCLUSIVE GROWTH IN INDIA: AGRICULTURE, POVERTY, AND HUMAN DEVELOPMENT 43-72 (2007).

capture the implications of their research because of an elementary point: “mandatory” does not equal “mandatory and effectively enforced.” Put another way, we need to ask whether the Indian states or the central government have the administrative capacity to ensure that all property owners register their title.

Determining whether the states will effectively collection registration fees obviously requires a certain amount of prediction. But it need not be entirely speculative, if we understand that enforcing title registration essentially amounts to form of property taxation: it charges property owners for the maintenance of public goods. States’ records in this regard are not promising, for their inability to levy taxes on land has led to their depending overwhelming on “indirect” levies such as sales taxes, stamps/administrative fees, excise duties, and the “octroi,” basically an internal (and highly distortio-nary) tariff on goods coming from other states.<sup>66</sup> Moreover, in India it hardly needs to be said that many property taxes are not paid because “tax evasion [is] encouraged by corrupt petty officials.”<sup>67</sup>

The analogy is not perfect because while property taxes are theoretically used for any public purpose, Torrens registration fees go to the maintenance of the system itself. Thus, one might argue that the property owners are more likely to pay registration fees since they will recoup the benefits in more secure title.

While true, this scenario is over-optimistic for reasons that we have seen. Even under the best of circumstances, a large proportion of property owners will not benefit from the greater security of a Torrens system because that system provides a public good. In India, there are reasons to suspect that the number of owners that benefit from the system will be considerably lower. And finally, to the extent that payment of a registration fee makes the payment of property tax more likely because it enables the government to locate the owner and the property in question, it will be even less likely to be followed.

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<sup>66</sup> See N. GOVINDA RAO & NIRVIKAR SINGH, *THE POLITICAL ECONOMY OF FEDERALISM IN INDIA* 158-65 (2005). Rao and Singh observe that while taxes and land and agriculture amount to only 3% of state tax composition, indirect taxes are fully 97%, and have been rising over the last three decades. *Id.* at 160.

<sup>67</sup> McKinsey study at 401.



In fact, the situation might in fact be worse than this under a federally-mandated (or highly encouraged<sup>68</sup>) Torrens framework. States have aggressively maximized their constitutional space to pursue beggar-thy-neighbor tax, procurement and fiscal policies. One can easily imagine differing standards for registration depending the location of the property owner, or even differential registration charges based on the same sort of regional discrimination. The distortions following from such policies might chew up the efficiency gains from title assurance.

Along with his call for state title guarantees, Arvind Panagariya mentions almost as an afterthought that “[s]tates that decide to take action will also need to establish special tribunals to resolve the existing disputes quickly.”<sup>69</sup> Very true; but this derives from *any* legal reform, which of course in India has move very slowly. Why choose a title assurance system that also requires very fast front-loading of administrative reform? And how does anyone propose that this be done?

### 3. Corruption: Big Bellies and Small Bellies

Torrens’ additional burden on the government is balanced by greater governmental authority. Bureaucrats must decide about accepting registration documents even in an uncontested conveyance, and if the system is working well, then their word is final.

One need not have a particularly fertile imagination to see the enormous potential for corruption within such a framework. In India, one need not have an imagination at all, for the country’s public sector is notorious for corruption. Transparency International regularly places India near the bottom of its 102-nation survey of corruption,<sup>70</sup> leading the *Times of India* to wonder whether “there is something in

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<sup>68</sup> Although the Union government lacks the constitutional authority to directly regulate land, it has found several ways to do so. The Jawaharlal Nehru National Urban Renewal Mission (JNNURM), an important policy reform to improve the condition of the urban poor, only provides revenues from the Centre if states undertake certain reforms, such as repeal of state-level urban land ceiling legislation. And as will be discussed below, national legislation regulates the time for adverse possession claims, establishing its constitutionality on the grounds that although the Centre cannot regulate land, it can regulate contracts to land. Cite. Thus, although states might be able politically to block Union legislation on land, efforts to do so on legal grounds will most likely fail.

<sup>69</sup> PANAGARIYA, *supra* note --, at 322.

<sup>70</sup> See PAVAN K. VARMA, BEING INDIAN: THE TRUTH ABOUT WHY THE TWENTY-FIRST CENTURY WILL BE INDIA’S 79 (2004).

the subcontinental soil which makes it particularly hospitable to the growth of graft.”<sup>71</sup> This condition causes one of the most perceptive observers of Indian politics to recommend that first and foremost, “the government must drastically reduce its discretionary powers.”<sup>72</sup>

Nor are corruption findings limited to general assessments: the relatively minor earlier attempts to protect tenants' property rights have found similar problems. For the past 60 years, several states have enacted land reform provisions theoretically designed to protect tenant farmers. Laws in many states required including the names of tenants in land records, but except for West Bengal, most state authorities have routinely ignored their own laws in the face of entrenched political forces: “the names of tenants are seldom recorded, and in many cases the omission is the result of tenant insistence in the face of possible eviction. Even where tenants attempt to record their names, the revenue department functionaries often act in collusion with the landowners and refuse to make such entries.”<sup>73</sup>

Scholars investigating the Torrens/recording dilemma have generally overlooked the corruption problem. One argues that “the incentives for judges, recorders, and registrars have the same objective: to make them independent with respect to the parties.”<sup>74</sup> On the contrary: a corrupt official will want to make himself as much of a client of powerful forces as possible.

In light of India's problems with corruption, adopting a system that could empower corrupt officials appears to head in precisely the wrong direction. To be sure, bureaucrats could engage in corruption under a recording system as well. Officials might require payments to properly file documents or ensure that they are not “misplaced.” But their scope of maneuver will be far smaller: at the end of the day, corruption grows more easily when officials have official discretion.

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<sup>71</sup> Quoted in *id.*

<sup>72</sup> *Id.* at 210.

<sup>73</sup> TIM HANSTAD, IMPROVING LAND ACCESS FOR INDIA'S RURAL POOR: A REVIEW OF PAST EFFORTS AND RECOMMENDATIONS FOR THE ROAD AHEAD 16 (2005), at [http://www.rdiland.org/RESEARCH/Research\\_Reports.html](http://www.rdiland.org/RESEARCH/Research_Reports.html) (last visited Oct. 2, 2009).

<sup>74</sup> Benito Arrunada, *Property Enforcement as Organized Consent*, 19 J.L. ECON. & ORG. 401, 426 (2003). Later in the paragraph, Arrunada seems to sense that the integrity of registrars is particularly important in registration systems, and comments that “extreme measures” might need to be taken to preserve their independence – but he then suggests something akin to nonreviewability, to avoid judicial undermining of the finality of the registration system. This might make good sense, but does not deal with the threshold problem of ensuring that registrar has not already been bought off.

Moreover, under a recording system, records are kept not simply by government officials but also by the private sector, usually title insurers who maintain their own electronic files. This helps undercut the power of an official to “lose” a critical document if it is not accompanied by the appropriate “fee”. If title insurer does the same thing, then you can go to another insurer, at least theoretically -- particularly if the system is computerized.

And perhaps most importantly, corruption undermines the Torrens system’s basic comparative advantage. Advocates of Torrens systems argue that while it might be more expensive, this cost is justified because of greater title security: the land transfer system, they contend, will become much more transparent and efficient. With a highly corrupt administrative machinery, however, Torrens is left with greater costs and fewer benefits because the corruption undermines the security necessary to system maintenance.

#### 4. Equity Concerns, or: Putting the Cart Before the Water Buffalo

We might return, then, to Wadhwa’s initial egalitarian argument for the Torrens system. Closer inspection suggests that the equity justification militates in favor of recording, not Torrens.

Consider Miceli’s finding that property values are higher under Torrens than recording, and assume that the same condition would result in India. From a distributional standpoint, this outcome implies that the government is spending taxpayer resources in order to enhance the wealth of landowners as a group. Many landowners find themselves in the situation sketched out by Wadhwa. It remains, true, however, that landholdings in India are incredibly unequal. Thus, even if title registration assists many poor landowners, it means that the government will be spending resources on assisting many rich landowners. This represents a pretty inefficient way of promoting equality.

In the Indian context, Torrens might carry with it a particularly pernicious anti-egalitarian aspect. McKinsey’s study insists that the winners in a new registration system will be “land owners” and

the losers will be “illegal land owners.”<sup>75</sup> But the whole point is that it is not clear who is legal and who is not legal, and thus the question of who *should* own the land cannot be avoided. Determining who owns the land is first and foremost a political judgment *precisely because* no adequate system of assurance exists. Someone is going to win and someone is going to lose, and sorting them out will not be a mere technical determination.

One might push the argument even farther. Among other things, Torrens protects absentee owners against loss of their land to squatters under adverse possession: squatters obviously will lack title registration certificates, and thus lack title. A just land distribution system in India, however, might favor squatters, millions of whom are poor victims of an often savagely oppressive history, and in any event are the ones making productive use of the land, frequently for several years.<sup>76</sup>

And herein lies the most pernicious aspect of the NLRMP: its attempt to turn these sorts of political judgments into technical ones. Policymakers can, of course, create title assurance systems without considering distributional questions. But this hardly means that their decisions do not have distributional consequences. And in a nation where 85% of the population lives on less than \$2 a day, policymakers must attend to them. To pursue land title reform without also considering land reform risks sweeping the broader considerations under the rug. As I suggest below, for the government, perhaps that was part of the point. But that does not mean that the rest of us have to accept it.

##### 5. Is Formalization Even a Good Idea?

This question of winners and losers raises the issue of whether formalization of land titles is a good idea to begin with. A well-developed literature suggests otherwise<sup>77</sup>; indeed, according to

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<sup>75</sup> McKinsey study at 430. It also asserts that “petty officials” would lose under a formalized system, but as I have suggested, the shoe is really on the other foot: those petty officials could reap large benefits from their new authority under Torrens.

<sup>76</sup> The classic modern statement of this position, in an American context, is Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

<sup>77</sup> A comprehensive literature review and conclusions from new qualitative work can be found in GEOFFREY PAYNE ET AL., SOCIAL AND ECONOMIC IMPACTS OF LAND TITLING PROGRAMMES IN URBAN AND PERI-URBAN AREAS: INTERNATIONAL EXPERIENCE AND CASE STUDIES OF SENEGAL AND SOUTH AFRICA (2008), at <http://www.gpa.org.uk/> (last visited Oct. 6, 2009).

Wadhwa's egalitarian criteria, formalization might be the last thing that either the urban or rural poor need.

Formalization can pose a problem for the poor for several reasons. It forces them to defend their claims, and they may lack the resources to do so. It might undermine customary or collective forms of tenure that work on the ground but are difficult to formalize. The very increase in property value that formalization can achieve might enable a government to levy property tax, and if the poor are unable to pay it, they will be driven from their homes. More darkly, greater land values might encourage those interests with little interest in the niceties of due process to make the poor offers that they cannot refuse.

Does this make the entire Torrens v. recording question moot? I do not believe so, because a well-run recording system takes into account the possibility that formalization might not be a good idea for many communities. If customary or informal tenure works for groups of urban or rural poor, then they can maintain those arrangements. In combination with a faster adverse possession framework, a recording system essentially allows the poor to make the formalization decision themselves.

#### VI. Interlude: Is It Worth Doing *Anything* in India?

Readers even more cynical than myself might point out that my argument proves too much. After all, if India is shot through with corruption and its bureaucracy even under the best of circumstances cannot implement any program, then why specifically criticize Torrens as a waste of money? Such a counsel of despair might provide a useful reason to simply cut taxes, rather than using monies projected for Torrens. But we need not adopt such a counsel if we do not wish to.

First, the entire point of Torrens is its administrative simplicity and cost-effectiveness. While other programs have the same problems as a Torrens system, their justification relies on substance or on policy goals, not on administration. It is one thing to promote a program knowing that it could suffer from corruption and administration problems; it is quite another to promote a program whose entire justification is administrative efficiency while recognizing such problems.

Second, and more importantly, semi-privatized solutions (such as recording) suggests that land titling is a particularly bad place to invest public resources. Contrast land titling with, say, public health for poor families. For the most part, people do not purchase health insurance or health care because they cannot afford it. If the state does not provide subsidies and/or health facilities, they will not appear by themselves. Those looking for land titling assurance, by contrast, have a very different and far less overwhelming problem because they have assets. The state has a role as a keeper and administrator of records, but it does not need to construct a system of guaranteeing title if the market can do so -- which, with recording, it has. The state might also intervene to preserve equality, but as I have attempted to show, Torrens might actually reduce equality.

India policy change, in no matter which field, will be difficult. It is best to undertake such frustrating challenges in those areas where state intervention is vital and could enhance equality. Title assurance is not one of those areas.

## VII. What Is To Be Done?

Instead of placing the general responsibility on the government for title registration and the necessary social insurance system, a more egalitarian solution would be for the government to take the much more economical route of 1) improving the administration and reliability of the current recording system; 2) providing for free legal counsel to small landholders, squatters, and tenants to fight for their claims; 3) establishing Marketable Title Acts to cut down on record searches; and 4) reducing the length of the adverse possession period from its current 20 to a more manageable 5 years, perhaps retroactively.

### A. Building a Better Recording System

The drive to establish the NLRMP centers upon a strange contradiction: it proposes to replace one statutory framework undermined by poor implementation with a different statutory framework whose implementation will be even more complex, difficult, and expensive. I hope to have shown that doing so makes little sense; moreover, much of what is most explicitly spelled out in current Guidance documents could play a key role in building a better recording system. These steps -- which, unlike the broader adjudica-

tive questions, actually *are* more or less technical -- could serve as a base for such a system. Computerizing records, surveying or resurveying land,<sup>78</sup> training staff, and bringing offices closer to rural villages as well as big cities, do not require moving to Torrens. Indeed, the heretofore most successful experiment in land title reform -- the computer aided delivery of title information in Karnataka province -- occurred within the Registration Act regime, but nevertheless appears to have made great progress in increasing accessibility, improving title security, and reducing corruption.<sup>79</sup>

But a better recording system does not answer the more fundamental question of how to determine the true owner of title in the first place. For that, we need different tools.

## B. A New Life for Indian Legal Assistance

It shocks the conscience that NLRMP makes no provision for legal assistance to those who should be its beneficiaries. This is particular egregious given that Torrens systems essentially require some sort of legal proceeding in order to determine title. The NLRMP, then, essentially sends poor land claimants, particularly in rural areas, "naked into the conference chamber."<sup>80</sup> This omission is

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<sup>78</sup> Doesn't this simply push the adjudication problem to a lower, and less transparent, level? Not necessarily. See BURNS ET AL, LAND ADMINISTRATION REFORM, *supra* note --, at 71-72 (noting that in many countries "the overwhelming majority of disputes are resolved by field teams"). In other words, an effective titling system will leave the expensive and contentious adjudications to the most formal institutions, and resolve other problems in the field. Torrens subverts this principle by adjudicating everything at the most formal level regardless of whether parties on the ground even want to adjudicate it.

<sup>79</sup> See RAJEEV CHAWLA & SUBHASH BHATNAGAR, ONLINE DELIVERY OF LAND TITLES TO RURAL FARMERS IN KARNATAKA, INDIA (2004) (on file with author and at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/EXTGOVERNMENT/0,,contentMDK:20484902~menuPK:1767268~pagePK:210058~piPK:210062~theSitePK:702586,00.html> (last visited Oct. 5, 2009)).

<sup>80</sup> The quotation is from a celebrated speech by British Labour Party statesman Anuerin Bevan, at the Party Conference, Oct. 4, 1957, opposing unilateral nuclear disarmament. The full quote is as follows:

I knew this morning that I was going to make a speech that would offend, and even hurt, many of my friends. I know that you are deeply convinced that the action you suggest is the most effective way of influencing international affairs. I am deeply convinced that you are wrong. It is therefore not a question of who is in favour of the Hydrogen bomb, but a question of what is the most effective way of getting the damn thing destroyed. It is the most difficult of all problems facing mankind. But if you carry this resolution and follow out all its implications — and do not run away from it — you will send a British Foreign Secretary, whoever he may be, naked into the conference chamber. ... And you call that statesmanship? I call it an emotional spasm.

particularly glaring if, as noted above, the NLRMP provides *no* recourse for original owners whose legitimate claims were somehow overlooked in the state's title determination. One can easily see the upshot here: not only will poor farmers lose their title claims, but they will not even receive monetary compensation for their loss due to the lack of Torrens insurance.

The oversight is still more egregious because studies investigating the use of legal assistance in India for land claims suggest great promise. In other words, the model does not have to be transplanted from somewhere else. The Bank trained and hired 434 paralegals and more than 500 community surveyors throughout the state of Andhra Pradesh to represent low-income land claimants; in total the project covered about one out of every eight of the state's villages. The project identified 277,017 cases on 308,127 acres and was able to resolve more than half of them successfully. Similar models in the state of Odisha yielded equivalent results.<sup>81</sup>

#### C. Marketable Title Acts

As noted above, Marketable Title Acts reduce the uncertainty in a deeds registration system by reducing the time period in which property interest claimants can assert their rights. They should form a part of any future Union or state legislation improving deeds registration. It is unclear precisely how much uncertainty they reduce, because they contain exceptions, which means that title searchers will have to look through a longer span of records in order to cover the exceptions. They are hardly a panacea. But even if title searchers have to search through a *longer* time span because of exceptions, they will search for a narrower range of title flaws. That is, at least, worth something, and it will be a useful addition to any future recording regime.

#### D. Developing Title Insurance

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<sup>81</sup> See ROBERT MITCHELL ET AL., LAND RIGHTS, LEGAL AID AND WOMEN'S EMPOWERMENT IN INDIA: EXPERIENCE AND LESSONS, Paper prepared for the World Bank Conference on Land and Poverty, April 2011 (detailing both Andhra Pradesh and Odisha programs). Important differences exist between the two programs: paralegals in the Andhra Pradesh program were better-trained and had more comprehensive authority, and in the Odisha program, the issue was straightening out many titles from a state-sponsored land distribution program, so it diverges from the general problem of unclear titles. Still, both programs point to how low-cost interventions using legal assistance based in local communities can have significant and salutary impacts on rural populations and low-income farmers).



While all these provisions are useful, one more piece is essential: title insurance. And this presents a problem. Given that India already has something like recording already, why has not title insurance arisen to support it?

The answer is simple. India began to allow private insurance only in 2000,<sup>82</sup> and thus, the title insurance business literally has not had the time to develop. Moreover, given the dismal state of titles in India now, prospective title insurers might be forgiven for waiting for some effort to improve record-keeping within the current system: as one international title manager put it, "as a potential title insurance market, India is a car crash."<sup>83</sup>

In any event, traditional Indian protectionism has erected further barriers to solving the problem. The insurers most likely to enter the current land market are those with broad, deep, and highly diversified risk pools; in other words, foreign companies with larger assets. It is surely no accident that the leaders in bringing title insurance to Australia and Canada are First American Title and Stewart Title. In India, however, such a development remains illegal, for foreign participants are permitted to hold only 26% shareholding in an Indian joint venture. First American is currently negotiating with domestic Indian insurers to provide an offshore, broad-based title reinsurance pool, although whether the India Insurance Regulation and Development Authority (IRDA) approves such arrangements remains to be seen: although business has expected the development of title insurance market for years,<sup>84</sup> IRDA rejected the one Indian attempt to market title policies -- even though the firm proposing it was the National Insurance Company, a state-owned firm.<sup>85</sup> Even allowing title insurance and promoting joint ventures with foreign firms will leave IRDA with plenty to do; the very nature of insurance means that it will always be a highly regulated industry. But an easy way to promote title assurance would be to radically lighten the hand of government.

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<sup>82</sup> The insurance industry was nationalized in 1950, but private insurance came back in 2000 after the enactment of the Insurance Regulatory and Development Act in 1999.

<sup>83</sup> Madhumita D. Mitra, *Title Insurance: Securing Property Investments, Restraining Fraudulent Transactions*, July 3, 2009, at <http://www.indefenceofliberty.org/story.aspx?id=2592&pubid=2473> (last visited Oct. 2, 2009).

<sup>84</sup> Barkha Shah, *Title Insurance On Its Way*, BUS. STD. June 22, 2005, at <http://www.business-standard.com/india/news/title-insuranceits-way/213671/> (last visited Oct. 2, 2009).

<sup>85</sup> See Mitra, *supra* note --.

Will these measures establish the sort of clear, unambiguous system of titles envisioned by the NLRMP? Hardly. They will still leave much of the current system in place. But that might be less of a problem than advocates of Torrens currently assume. As I have attempted to show, the current system is inadequate and problematic – but workable. A gradual reform requiring adjudication when landowners and potential purchasers actually want it is a much more promising initiative than an effort to title the entire subcontinent – an effort where political, economic, and technical obstacles mean that it will certainly fail.

### Conclusion

It seems arrogant for someone half a world away to tell Indians how to run their land administration system. So let me repeat the caveat of the introduction: the questions raised here are not unanswerable. But they are unanswered. Perhaps the Union and state governments now embracing Torrens have suitable answers to them. Perhaps there is money in their budgets, or competence in fledgling institutions, that have not been recognized. If so, then we should all be glad that this Article's skepticism will be proved wrong. But it is time for the provers to get on with their work.