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# MAKING LAND TITLES IN INDIA MARKETABLE: USING TITLE INSURANCE AS A VIABLE ALTERNATIVE TO CONCLUSIVE TITLING

**Anirudh Burman\***

*Abstract:* Though land comprises a significant component of the total asset portfolio of Indian households, the quality of land titles is poor. So far, policies have been directed at improving government records, with the objective of being able to issue titles that are “conclusive” in nature, and an indemnity system run by the state that compensates those who suffer from errors or omissions of government agencies maintaining such records. This paper explores an alternative method of reaching the same objective—title insurance. Recently, the 2016 Real Estate Regulation Act has allowed state governments to require title insurance for real estate projects. There is, however, no title insurance available in the Indian market yet. This paper examines the nature of title insurance to propose mechanisms by which title insurance can be introduced in India and highlights important regulation considerations to help introduce title insurance market in India successfully.

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## I. INTRODUCTION

“Title records are deeply intertwined with transfers of property.”<sup>1</sup>

Land is a significant share in the total asset value of Indian households. Land and buildings comprise seventy-two percent of assets of Indian households and ninety-two percent of the value of assets of Indian households.<sup>2</sup> Title assurance and the methods of title assurance have

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<sup>1</sup> See THOMAS W. MERILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (Foundation Press ed., 2d ed. 2012).

<sup>2</sup> NATIONAL SAMPLE SURVEY OFFICE, MINISTRY OF STATISTICS AND PROGRAMME IMPLEMENTATION, KEY INDICATORS OF DEBT AND INVESTMENT IN INDIA 14–15 (2017), [http://www.mospi.gov.in/sites/default/files/publication\\_reports/KI\\_70\\_18.2\\_19dec14.pdf](http://www.mospi.gov.in/sites/default/files/publication_reports/KI_70_18.2_19dec14.pdf) (India).

significant impact on land values.<sup>3</sup> In addition, land is good collateral and can increase credit availability if the title to land rights is clear.<sup>4</sup>

However, the quality of records of land rights is poor. Cases and complaints of forgery, fraud, and misconduct are common.<sup>5</sup> In addition, the widespread use of informal markets for title transfers ensures that many transactions are unrecorded and thus difficult to discover. This problem is compounded by rapid urbanisation. The rate of urban population growth has surpassed the rate of rural population growth for the first time, as documented in the 2011 census.<sup>6</sup> In 2011, the number of towns with no municipal governments in India increased three times over the 2001 numbers.<sup>7</sup> Rapid changes in land use are taking place without the appropriate governance mechanisms to support it.

India made a significant move towards mandating diligence for land title records through the enactment of the Real Estate Regulation Act (RERA) in 2016.<sup>8</sup> This allowed state governments to mandate title insurance for new real estate transactions.<sup>9</sup> The implementation of this requirement may have a significant impact on the traditionally poor state of land records in India. Though RERA was enacted in 2016, no title insurance is available in the Indian market yet. This paper examines the viability of title insurance as a system of title assurance in the context of India's ongoing efforts to improve land title records. It locates the historical development of title insurance in the United States and argues that many comparable, if not similar, features are exhibited in the Indian land market today. Based upon this comparison, this paper highlights why title insurance is an essential requirement for improving

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<sup>3</sup> See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000); Benito Arruñada & Nuno Garoupa, *The Choice of Titling System in Land*, 48 J.L. & ECON. 709 (2005); Thomas J. Miceli, *Title Systems and Land Values*, 45 J.L. & ECON. 565 (2002).

<sup>4</sup> See Gershon Feder & Raymond Noronha, *Land Rights Systems and Agricultural Development in Sub-Saharan Africa*, 2 WORLD BANK RESEARCH OBSERVER 143, 144–46 (1987).

<sup>5</sup> MCKINSEY GLOBAL INSTITUTE, *INDIA: THE GROWTH IMPERATIVE* 4 (2001).

<sup>6</sup> C. CHANDRAMOULI, REGISTRAR GEN. & CONSUS COMM'R, *RURAL URBAN DISTRIBUTION OF POPULATION (PROVISIONAL POPULATION TOTALS)* (2011), [http://censusindia.gov.in/2011-prov-results/paper2/data\\_files/india/Rural\\_Urban\\_2011.pdf](http://censusindia.gov.in/2011-prov-results/paper2/data_files/india/Rural_Urban_2011.pdf).

<sup>7</sup> CENSUS OF INDIA, *PROVISIONAL POPULATION TOTALS URBAN AGGLOMERATIONS AND CITIES* (2011), [http://censusindia.gov.in/2011-prov-results/paper2/data\\_files/India2/1.%20Data%20Highlight.pdf](http://censusindia.gov.in/2011-prov-results/paper2/data_files/India2/1.%20Data%20Highlight.pdf).

<sup>8</sup> The Real Estate (Regulation and Development) Act, 2016, Gazette of India, pt. II sec. 1 (Mar. 26, 2016), <http://up-rera.in/pdf/reraact.pdf> (India).

<sup>9</sup> See *id.* at § 16.

land titles in India and argues the necessity for introducing title insurance as soon as possible.

The Indian land market may be considered to be divided into two—a rural land market and an urban land market. As this paper demonstrates, the legal regime and administrative structure for both remains bifurcated. While urban land markets are largely under the control of municipalities, rural land markets are governed directly by state governments. Both markets display different degrees of improvement under different initiatives of their respective governments. For rural areas, the Indian central government initiated the National Land Records Modernization Programme in 2008 with the “ultimate goal of ushering in the system of conclusive titles with title guarantee in the country,” as per the Torrens system of titling<sup>10</sup> (now renamed DILRMP or Digital India Land Records Modernization Programme).<sup>11</sup> Progress under the DILRMP has, however, been slow, and as this paper highlights, many deficiencies still remain.

This paper examines a market-based alternative to land titling systems in India—i.e. title insurance. In many ways, title insurance is a private mechanism similar to the conclusive titling system the Government of India seeks to implement under the DILRMP. Title insurance originated in the United States but has also become popular in Canada and Australia (where title insurance is used even under the Torrens system). This paper finds that title insurance firms may be viewed as one of the multiple mechanisms by which titles to land may be improved, especially in areas with high transactions in land rights.

Title insurance is a viable and complementary option for improving land title records in India. Title insurance, by indemnifying the purchaser of insurance against undiscovered defects in title, provides sellers and purchasers opportunities to increase their risk appetite. Title insurance also allows for specialisation and intermediation in the land market by allowing specialised firms to undertake the task of discovering the quality of titles and backing

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<sup>10</sup> The Torrens system of land titling is a method of registering interests in land (including ownership). The Torrens system works on three principles: (a) the land title register is completely accurate and updated at all points of time, (b) no other evidence other than the land title register is required to prove an interest in land, and (c) the government or the maintainer of the register indemnifies any person who suffers a loss because of their reliance on the register of land titles. See VICTORIA ST. GOV'T, TORRENS TITLES (2018), <https://www.propertyandlandtitles.vic.gov.au/land-titles/torrens-titles>.

<sup>11</sup> GOV'T OF INDIA, NATIONAL LAND RECORDS MODERNIZATION PROGRAMME (2008), <http://nlrmpportal.nic.in/sharedDoc/doc/NLRMP-cabinetnote.pdf>.

their due diligence through financial indemnity. However, the manner in which title insurance is introduced and regulated will be critical to the success of the market.

As this paper argues in the following sections, land title insurance is a potential alternative method available to the Central Government for improving the marketability of land. In the long run, this would create a social benefit: better titles through private action. The rest of the paper discusses the origin, development, and present market for title insurance in the United States, where title insurance companies are the most developed. It finds that substantial work is required to give effect to the provisions of the government that mandates title insurance and speculates on the regulatory approach required to enable the development of a title insurance market in India.

The first part of this paper discusses the legal and administrative structure of land titles in India. It argues that systems of maintaining land records in India are diverse, fragmented, and difficult to standardise. Legal and administrative regimes governing immovable property differ from state to state and between rural and urban areas. In addition, India does not guarantee the legal conclusiveness of land records maintained by state governments. Such records are presumptive in nature and can be rebutted in a court of law. The Central Government has embarked on a programme to modernise land records with the ultimate objective of creating a system of conclusive titling—where the state guarantees the validity of the records it maintains—and indemnifies persons who suffer losses arising from a defect in the state's guarantee of good title. Progress on this has, however, been slow.

The second part of this paper discusses title insurance as an alternative mechanism for improving land titles. It traces the evolution of this industry in the United States, where this system is most common, in order to provide an understanding of how market development in this industry should take place. As this paper argues, there are some similarities in the conditions that led to the growth of title insurance in the United States and in India today. This has implications for the regulatory strategy that may be adopted to introduce title insurance in India.

The third part of this paper discusses existing constraints to introducing title insurance in India. The role of the insurance regulator in approving title insurance products and regulating the title insurance industry will be critical. In addition, certain legal changes are imperative to ensure that title insurance

can be a viable complement to government-owned systems for land records. In the long run, as this paper argues, other factors such as the development of human capital and overall improvements in land records will also play a critical role in the development of this industry. This paper concludes by arguing for a “soft” approach to title insurance, where this market is allowed to develop organically, and regulation focuses on the protection of consumers availing themselves of title insurance.

## II. LAND TITLING IN INDIA: LEGAL AND ADMINISTRATIVE STRUCTURE

Land is subject to provincial or state jurisdiction under the Constitution of India (as opposed to federal jurisdiction).<sup>12</sup> Consequently, the legal structure of rights over land, including title to land, is fragmented and subject to laws enacted by the legislature of each state. As a by-product of legacies of colonial administration and state-specific land reform efforts, the degree of fragmentation is immense.<sup>13</sup> Professors Abhijit Banerjee and Professor Lakshmi Iyer note at least three major land tenure systems under British rule that continue to have an impact on present day land markets: (a) the permanent settlement system where the landlord was the *de facto* land owner, (b) the direct cultivator system where the cultivator was the land owner, and (c) the village-based system where the village as a whole owned the land and shared revenue responsibilities.<sup>14</sup>

Post-independence, many state governments undertook a variety of reforms intended to end the feudal structure of land holdings, preventing alienation of land held by tillers by imposing ceilings on land ownership and providing a variety of rights to tenants and farmers against dispossession. These measures differed due to differences in both approach and legacy systems.<sup>15</sup> As a result, land revenue records (the record of land rights) differ

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<sup>12</sup> See INDIA CONST. art. 246, (stating, “[l]and, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization”).

<sup>13</sup> Abhijit Banerjee & Lakshmi Iyer, *History, Institutions, and Economic Performance: The Legacy of Colonial Land Tenure Systems in India*, 95 AM. ECON. REV. 1190, 1191 (2005).

<sup>14</sup> *Id.* at 1193–94.

<sup>15</sup> Colonial administration (pre-1947) had introduced three different administrative systems for the collection of land revenue over the then existing Indian provinces—the Zamindari system, the Ryotwari system and the Mahalwari system. Under the first, land revenue was collected by a legally defined landlord or Zamindar, who had absolute rights over the collection of land revenue. In the Ryotwari system, there was no such intermediary landlord. The tenant or the Ryot had the direct responsibility to pay rent to the British government. In the Mahalwari system, the village as a collective, was responsible for the payment of land revenue. Each of these administrative systems necessarily had its own institutional structures and legal requirements.

vastly from state to state. The patterns of land ownership and the creation of land rights are therefore localised.<sup>16</sup> State governments maintain land records in different languages and different scripts.<sup>17</sup> In addition, methodologies for preparing records vary widely.<sup>18</sup>

In addition, there is a vast difference in the land revenue systems between rural and urban areas. For one, land ceiling laws (restrictions on the total size of land holdings) have been progressively removed from many cities and towns, while ceilings on agricultural land holdings persist. Second, there are far greater restrictions on transfers of agricultural land than other kinds of land. Third, land transactions in urban areas are far more frequent and require greater state capacity in maintaining and updating records. This is exacerbated by the rapid pace of urbanisation and migration to urban areas.

A critical feature of the Indian land market is the general presence of restrictions on change of use for agricultural land. For any change of use of agricultural land to residential or commercial purposes, prior permission is required, and in some cases, such use is prohibited.<sup>19</sup> The RERA, which covers all buildings and housing projects within its scope, is therefore restricted in its application to land that can be legally used for residential or commercial purposes.<sup>20</sup> This has important implications for the regulation of land titles, for the requirements mandating increased diligence will not apply to agricultural land.

The transfer of immovable property, including land, is governed by two central laws. The Registration Act of 1908 requires the compulsory registration of agreements for the transfer, sale, and conveyance of immovable property, while other kinds of transfers (such as a lease of less than one year) are not required to be registered.<sup>21</sup> The Registration Act, however, does not require an appropriate public official to evaluate the contents of the title deed. Registration of the title deed only ensures the registration of the assurances in

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<sup>16</sup> See generally AJAY SHAH ET AL., DILRMP IMPLEMENTATION IN RAJASTHAN (2017), <http://macrofinance.nipfp.org.in/releases/DILRMP.html>.

<sup>17</sup> India has eighteen official scripts recognized in the Indian Constitution, many with their own scripts.

<sup>18</sup> KLAUS DEININGER ET. AL., WORLD BANK, INNOVATIONS IN LAND RIGHTS RECOGNITION, ADMINISTRATION, AND GOVERNANCE (Apr. 2010), <http://siteresources.worldbank.org/INTARD/Resources/335807-1174581646324/InnovLandRightsRecog.pdf>.

<sup>19</sup> See, e.g., Rajasthan Land Revenue Act, 1956, Gazette of India, pt. IV(A) sec. 90(A) (Jan. 13, 1958) (prohibiting the use of agricultural land for non-agricultural use similar to other restrictions present in land revenue laws of many other states).

<sup>20</sup> See Real Estate (Regulation and Development) Act, sec. 2(j), 3.

<sup>21</sup> See Registration Act, No. 16 of 1908, INDIA CODE, vol. 2 (1993).

the deed. It is not a record of title.<sup>22</sup> The other law of importance is the Transfer of Property Act of 1882 that provides for the manner in which immovable property may be transferred and the rights and obligations of parties to a transfer.<sup>23</sup> Neither law provides any presumptive recognition of a valid title to the immovable property.

This makes entries in public record “relevant facts” and, thereby, presumptive records. Land title records in India are maintained exclusively by state governments pursuant to two separate sets of laws. The first is the Registration Act, 1908,<sup>24</sup> and the other are the state revenue laws.<sup>25</sup> The state revenue departments maintain record-of-rights that are deemed to be conclusive for the purposes of revenue administration in some states and presumptive in others.<sup>26</sup>

All entries in the record-of-rights prepared . . . shall be presumed to be true until the contrary is proved . . . [and] be binding on all revenue Courts in respect . . . of such disputes; but *no such entry or decisions shall affect the right of any person to claim and establish in the Civil Court any interest in land . . .*<sup>27</sup>

Entries in the record of rights are therefore either presumptive generally or conclusive for the purposes of revenue administration. The Indian Supreme Court has clearly held that revenue records are not a valid proof of title.<sup>28</sup> As a result, there is no mechanism by which title to land is “registered” in India. Similar to other jurisdictions that have a “recording” system for land titles, courts are the final arbiter of title, not the state.<sup>29</sup> The onus of determining the quality of title therefore rests on a potential purchaser of title, who has to incur

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<sup>22</sup> Priya S. Gupta, *Ending Finders Keepers: The Use of Title Insurance to Alleviate Uncertainty in Land Holdings in India*, 17 U.C. DAVIS J. INT’L L. & POL’Y 63, 85 (2011).

<sup>23</sup> Transfer of Property Act, No. 4 of 1882, INDIA CODE, vol. 2 (1993).

<sup>24</sup> The Inspector General of Registrars in each state is in-charge of maintaining the registry of deeds and agreements, including those pertaining to the transfer of immovable property. *See* Registration Act, No. 16 of 1908, INDIA CODE, vol. 2 (1993).

<sup>25</sup> *See e.g.*, The Arunachal Pradesh (Land Settlement and Records) Act, 2000, No. 10, Acts of Parliament, 2000 (India).

<sup>26</sup> *Id.*

<sup>27</sup> Karnataka Land Revenue Act, No. 12 of 1964, INDIA CODE, vol. 2 (1993) (emphasis added) (other states, however, declare the record of rights to be of presumptive value) (India).

<sup>28</sup> *Corporation of the City of Bangalore v. M. Papaiah and Anr.*, (1989) 3 SCC 612 (India).

<sup>29</sup> A record of title in a jurisdiction with a recording system does not seek to indicate that the record of ownership in the public records will reflect the actual state of ownership. Unrecorded interests are also treated as valid even if they are not easily discoverable.



the cost of going through public records and face risks of adverse judicial determinations.

The efficacy of this Indian recording system is particularly critical since the public record under the Registration Act and land revenue laws are “relevant facts” in judicial disputes.<sup>30</sup> Such public records are, however, poorly maintained to varying degrees. Land surveys are done infrequently, and the records are either incomplete or not updated.<sup>31</sup>

To summarise, rights in land in India are driven largely by state laws apart from central laws on registration of documents and transfer of property. The land records held by the state revenue departments vary significantly, as does the quality and integrity of such land records. Lastly, the evidentiary value of land records varies. Some states make land records presumptively valid while others make them conclusive evidence only for purposes of revenue administration, and the Indian Supreme Court has held that revenue records are not a valid proof of title.

A. *A Radical Shift: Conclusive Titling and Land Titling Reforms*

From a fragmented localised system of incomplete and difficult to access records, the Indian state decided to make a bold leap forward towards a system of conclusive titling as per the Torrens system. Professor Jonathan Zasloff traces this radical shift to the emphatic arguments made in this regard in the early years of this millennium by D.C. Wadhwa.<sup>32</sup> D.C. Wadhwa made a strong argument to introduce a conclusive titling system in India. He argued that owing to the large amount of errors in land records, the lack of clarity in the underlying legal system, and studies showing vast amounts of litigation originating in property related issues, a conclusive titling scheme was “the only sensible solution” for improving land titles in India.<sup>33</sup> In 2008, the DILRMP was established with the explicit intent to create a uniform system of

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<sup>30</sup> Under the Indian Evidence Act, a court can only admit evidence that is necessary to prove a relevant fact. Section 36 of the Indian Evidence Act, states that statements made in maps and charts under the authority of any state or central government are relevant facts. This heightens the evidentiary value of such maps, charts and documents.

<sup>31</sup> See D.C. Wadhwa, *Guaranteeing Title to Land: A Preliminary Study*, 24 ECON. & POL. WKLY 2323, 2324 (1989); see also D.C. Wadhwa, *Guaranteeing Title to Land*, 37 ECON. & POL. WKLY 4699, 4702–03 (2002); see also Jonathan Zasloff, *India’s Land Title Crisis: The Unanswered Questions*, 3 JINDAL GLOBAL L. REV. 1, 12 (2011).

<sup>32</sup> See Zasloff, *supra* note 31, at 6–7.

<sup>33</sup> See Wadhwa, *Guaranteeing Title to Land* (2002), *supra* note 31.

conclusive titling in India. Almost a decade later, the achievements made under the programme remain unsatisfactory relative to the intended objective.

As conceived, the DILRMP has four components, each with separate sub-components. The central government would provide financial assistance, while state governments would implement the necessary changes. The four components were: (1) the computerisation of property records, (2) the implementation of surveys and spatial mapping using modern technological systems, (3) the computerisation of registration under the *Registration Act*, and (4) capacity building. The Planning Commission<sup>34</sup> stated that the modernisation efforts undertaken were largely with regard to computerisation and amounted to very little on other aspects.<sup>35</sup> A look at the existing websites of land titles across various states reveals various shortcomings.

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<sup>34</sup> The Planning Commission was an executive body created to develop Five-Year Plans for India's economic growth. The Commission produced twelve five-year plans, and also had a role in the process of allocating fiscal resources to state governments from the Centre. The Commission was replaced by the NITI Aayog in 2015.

<sup>35</sup> PLAN. COMM'N GOV'T. OF INDIA, REPORT OF THE WORKING GROUP ON LAND RELATIONS FOR FORMULATION OF 11TH FIVE YEAR PLAN, NO. M-12018/1/2005-RD, at 34 (2006).

*Table 1: Availability of e-records made available pursuant to the DILRMP  
(as of December 31, 2015)*

<b>Information</b>	<b>Andhra Pradesh</b>	<b>Karnataka</b>	<b>Uttar Pradesh</b>	<b>Rajasthan</b>	<b>Maharashtra</b>	<b>Arunachal Pradesh</b>	<b>Gujarat</b>
Survey Number	Yes	Yes	Unclear	Unclear	Yes	No	Yes
Cultivated Area	Yes	Unclear <sup>36</sup>	No	Unclear	Yes	No	Yes
Owner's Name	Yes	Unclear	Unclear	Unclear	Yes	No	Yes
List of Tenants/Enjoyers	Yes	Unclear	Yes	Yes	Unclear	No	Yes
Field Measurement Book	Yes	No	No	No	No	No	No
Village Map	Yes	No	No	Unclear	No	No	No
Land Use	Yes	Yes	No	Unclear	Yes	No	No
Revenue	Yes	Unclear	No	Unclear	Unclear	No	Yes
Khata Number	N/A	N/A	N/A	Yes	N/A	No	Yes
Notice for Mutation	Unclear	Unclear	No	Unclear	No	No	Yes
Mutation Extract	Unclear	Yes	No	Unclear	No	No	No
Mutation Status	Unclear	Yes	No	Unclear	No	No	No
RR5	Unclear	Yes	Unclear	Unclear	No	No	No
RR6	Unclear	Yes	Unclear	Unclear	No	No	No
Tippan (Sketch)	N/A	Yes	No	Unclear	No	No	Unclear
Crop Details	Partly available	Unclear	No	Unclear	Yes	No	No
Other Rights	No	Unclear	Unclear	Unclear	Yes	No	Yes
Official Translation	No	No	No	No	No	No	Partly available

As seen above, almost a decade after the DILRMP was launched, its achievements have been far from satisfactory.

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<sup>36</sup> Unclear refers to situations where, due to the unavailability of precise input, it is unclear whether the information referred to would have been available had the record been accessible. It also covers situations where, due to translation issues, it is unclear whether a particular category of information applies to and is available for a particular state or not.

An examination of the records of rights across states highlights the divergences in nomenclature, fields to be recorded, and languages that are present across states. Table 2 highlights the diversity in the kinds of entries recorded and the languages in which revenue records are kept.<sup>37</sup>

*Table 2: Distinctive features in revenue records across states in India*

<b>State</b>	<b>Additional / Distinctive Features in Revenue Records</b>	<b>Language</b>
Andhra Pradesh	Record both registered and unregistered encumbrances	Telugu
Chattisgarh	Revenue dues are recorded. So are acquisitions under eminent domain	Hindi
Jammu and Kashmir	Method and unit of calculating revenue is also recorded against each entry	Urdu
Andaman and Nicobar	Details of the tenant of the land are also recorded.	English
Bihar	Records land cess and land type against each record	Hindi
Goa	Has separate revenue recording systems for cities and rural areas.	English and Hindi
Gujarat	Records details of tenants.	Gujarati
Haryana	Records rights of cultivators.	English and Hindi
Karnataka	Record soil type	Kannada
Maharashtra	Records boundaries and landmarks	Marathi

As evidenced by the table above, the differences in the revenue record maintenance systems are substantial and require a coordinated effort towards greater standardisation. While the idea of a clear system of conclusive titling sounds appealing when confronted with this apparent chaos, no study has provided any reasonable estimate for how to bring the entire country under a single system of conclusive titling. There has not yet been an examination of the significant administrative costs of creating a national conclusive titling system. As Professor Zasloff points out, India has multiple land title recording systems in existence, and the effects that these systems have on the quality of land titles varies from state to state.<sup>38</sup> This is, however, not a sufficiently

<sup>37</sup> GOV'T of INDIA'S MINISTRY OF COMM. & INFO. TECH., LAND REC. INFO. SYS. DIV., ROR IN PRACTICE AND CODING SCHEME IN MAJOR STATES (2008).

<sup>38</sup> See Zasloff, *supra* note 31, at 12–13.

strong argument to completely supplant existing systems with a single national system without having estimated the costs and benefits of doing so.

Academic literature raises some questions concerning the ability of the Torrens system to make a substantial difference to the cost of credit against land, as even the Torrens system has significant exclusions to the proposition of clear titles.<sup>39</sup> This is especially true in India, where the progress under DILRMP has been extremely slow and the prospects for complete implementation look bleak.<sup>40</sup> Professor Benito Arruñada of Pompeu Fabra University suggests that title insurance is the most appropriate system of guaranteeing clear titles if the jurisdiction has a system of recording title deeds. Professor Arruñada and Professor Nuno Garoupa of George Mason University argue that the combination of title assurance with a *recording* system of land titles is economically superior to a registration-only system.<sup>41</sup> John L. McCormack of Loyola University ascribes the failure of the adoption of the Torrens system in the United States to: (a) inadequate thought given to the financial and administrative requirements for implementation, (b) acceptance of the status quo within the market, and (c) the belief among the proposers of the Torrens system that the inherent superiority of the Torrens system would be sufficient to create adequate demand for its adoption.<sup>42</sup>

Critically, due to the duality of land administration in urban and rural areas, the DILRMP applies only to rural areas in states. Land record management in urban areas is under the control of local urban bodies and state governments. There is no clear articulation yet of whether conclusive titling is envisaged for urban areas. A significant exception is the enactment of a conclusive titling law in the state of Rajasthan.

The Rajasthan Urban Land (Certification of Titles) Act provides for a title certification system and requires the state government to indemnify any person who suffers a loss due to a defect other than those recorded in the title.<sup>43</sup> The law, however, applies only to urban areas that may be notified by the state government.<sup>44</sup> There are administrative and legal deficiencies that need to be addressed, and the success of this law relies on the capacity of the

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<sup>39</sup> Gupta, *supra* note 22, at 75–76.

<sup>40</sup> *Id.* at 79–80.

<sup>41</sup> Arruñada & Garoupa, *supra* note 3, at 724.

<sup>42</sup> John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 WM. MITCHELL L. REV. 62, 64–65 (1992).

<sup>43</sup> The Rajasthan Urban Land (Certification of Titles) Bill, No. 9, Acts of Parliament, 2016 (India).

<sup>44</sup> *Id.*

state administration to implement the law.<sup>45</sup> Conclusive titling, even if properly implemented, is not a comprehensive solution to the problem of land records.

U.S. title insurance companies have started providing title insurance in Australia (the jurisdiction that first implemented the Torrens system) due to deficiencies in the public indemnity systems that operate under the Torrens system.<sup>46</sup> The public indemnity policies under the Torrens registration system in Australia exclude many defects and encumbrances that title insurance covers, including:

1. the validity of priority of interests that have not been registered;
2. unregistered easements, rights of way, and tenancies;
3. adverse possession;
4. rates, taxes, and statutory encumbrances created by overriding legislation; and
5. losses caused by fraud or negligence.<sup>47</sup>

This has led to the increasing reliance on title insurance for land transactions, especially by lenders.<sup>48</sup> Similarly, title insurance is gaining traction in the European Union, even though most countries follow a registration system. Title insurance is used due to the ability to insure purchases and loans against defects once notaries and lawyers have disclosed such defects and to enable indirect real estate transactions (that may not necessarily be recorded in land registries) such as the acquisition of shares of real estate companies and investments by Real Estate Investment Trusts.<sup>49</sup>

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<sup>45</sup> See Bhargavi Zaveri, *Rajasthan's Land Title Reforms: The Need to Identify the Right Interventions*, LEAP BLOG (May 21, 2016), <https://blog.theleapjournal.org/2016/05/rajasthans-land-title-reforms-need-to.html> (Zaveri notes that the law does not clarify whether title certificates under the law will reflect encumbrances that are common methods of alienating control over land, such as development rights or powers of attorney. Additionally, the nature of land use is not to be stated in the title certificate. Significantly, the law allows the competent administrative authority to cancel title certificates issued by mistake.).

<sup>46</sup> Pamela O'Connor, *Double Indemnity – Title Insurance and the Torrens System*, 3 QUEENSLAND U. TECH. L. & JUST. J. 141, 142–43 (2003).

<sup>47</sup> *Id.* at 149–58.

<sup>48</sup> *Id.* at 147–48.

<sup>49</sup> Jean-Bernard Wurm, *How US-Style Title Insurance is Transforming Risk Management in European Real Estate Markets*, 16 HOUSING FIN. INT'L 17 (2006).

Title insurance is therefore used to complement land recording systems in jurisdictions with systems of conclusive titling, as well as other registration-based land recording jurisdictions.

### III. TITLE INSURANCE AS AN ALTERNATIVE METHOD OF INCREASING THE MARKETABILITY OF LAND TITLES

Title insurance is designed to protect purchasers of real estate and lenders from losses that may arise due to unknown encumbrances, liens, or defects in title that existed prior to settlement.<sup>50</sup> Gerard Antetomaso, Secretary of the Executive Committee of the New York Bar Association Real Property Law section, describes title insurance as “an opinion as to the history and current status of the title of real property (something that has always been the domain of attorneys), backed by the financial wherewithal of an insurance company . . . .”<sup>51</sup>

Title insurance is predominantly used in the United States though title insurance exists in more than sixty-five countries. The historical reason for this, as explained below, is owed to the poor public recording mechanisms in the United States throughout the 1800s. Today, title insurance has become a critical requirement for most land related transactions and the secondary mortgage market in the United States.<sup>52</sup>

#### A. *Origin and Growth of Title Insurance*

Title insurance originated in the United States in the last decades of the 19th century.<sup>53</sup> Most attribute the origin of title insurance to the U.S. case *Watson v. Muirhead*<sup>54</sup> where the purchaser of property sued the conveyancer who failed to disclose a title defect in good faith. The court, however, held that the conveyancer was not negligent and that the purchaser was left without

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<sup>50</sup> David Keleher, *Title Insurance: Overview and Key Regulatory Concerns*, CIPR NEWSLETTER (NAT'L ASS'N OF INSURANCE COMMISSIONERS), July 2012, at 19; AMERICAN LAND TITLE ASSOCIATION, TITLE INSURANCE: A COMPREHENSIVE OVERVIEW 2 (2005), <https://www.alta.org/press/TitleInsuranceOverview.pdf>.

<sup>51</sup> Gerard G. Antetomaso, *The History of Title Insurance*, 36 N.Y. ST. B. REAL PROP. L.J. 6, 6 (2008).

<sup>52</sup> Hugh A. Brodkey, *Use of Title Insurance in International Transactions*, 9 INT'L BUS. LAW. 257, 258 (1981).

<sup>53</sup> Charles B. Dewitt III, *Title Insurance: A Primer*, 3 TENN. J. PRAC. & PROC. 15, 15 (2000); Daniel D. Gage Jr., *The Land Title Underwriter*, 14 J. LAND & PUB. UTILITY ECON. 56, 63 (1938); James G. Smith, *The Insurance of Titles to Property*, 8 J. LAND & PUB. UTILITY ECON. 337, 337 (1932).

<sup>54</sup> *Watson v. Muirhead*, 57 Pa. 161, 161 (1868).

any remedy.<sup>55</sup> The first title insurance company, the Real Estate Title Insurance Company, was subsequently founded in 1876 in Philadelphia.<sup>56</sup>

Title insurance became dominant in the United States due to the suboptimal quality of land records, which also varied significantly across states.<sup>57</sup> Professor Priya Gupta ascribes the rise in demand for title insurance to the increased requirement from out-of-state institutional investors for indemnification against defects in the destination state due to the poor quality of land records.<sup>58</sup> Another reason was the creation of the secondary mortgage market. As title insurance companies started creating title plants (and therefore, much better records than public records of land titles and encumbrances), institutional investors had much higher security of transactions.<sup>59</sup>

Like all markets, the title insurance market in the United States has evolved over time. One scholar asserted there were approximately 260 title insurance companies in 1930 in the United States.<sup>60</sup> On the other hand, another researcher found the number of title insurance companies to be 147, as per a 1957 survey.<sup>61</sup> With the growth of federal intervention to promote affordable housing, the character of title insurance companies shifted from local to national. Today, there are over 20 major national and regional firms in this industry in the United States.<sup>62</sup> Over 85% of residential sales had title insurance taken for the transaction by the end of the 1990s.<sup>63</sup>

Four major insurance groups account for 90% of the available market, with the largest accounting for 36% of the market share with approximately \$3.2 billion in direct premiums in 2012.<sup>64</sup>

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<sup>55</sup> See Dewitt III, *supra* note 53, at 17; see also Antetomaso, *supra* note 51, at 6–7.

<sup>56</sup> Dewitt III, *supra* note 53, at 17.

<sup>57</sup> See Benito Arruñada, *A Transaction-Cost View of Title Insurance and Its Role in Different Legal Systems*, 27 GENEVA PAPERS RISK & INS. 582, 583 (2002).

<sup>58</sup> Gupta, *supra* note 22, at 72–73.

<sup>59</sup> *Id.* at 73.

<sup>60</sup> Harry Mack Johnson, *The Nature of Title Insurance*, 33 J. RISK & INS. 393, 393 (1966); Gage Jr., *supra* note 53, at 56–65.

<sup>61</sup> See Dewitt III, *supra* note 53, at 17.

<sup>62</sup> *Id.*

<sup>63</sup> Arruñada, *supra* note 57, at 583.

<sup>64</sup> Keleher, *supra* note 50, at 20.



Title insurance companies are present today in over 65 countries throughout the world.<sup>65</sup> However, they do not constitute a significant share of real estate transactions in these countries.<sup>66</sup> Title insurance as a form of indemnity is prominent in the United States because of the recording system followed in most parts of the country. The United States does not follow a land registration system (one that makes a determination of the rights to the title of land), but rather a recording system similar to India. This makes the courts the final arbiter of rights over title. Since rights over title require interpretation by courts, property buyers and lenders indemnify themselves against the risk of loss through title insurance.<sup>67</sup>

There are some marked similarities in the Indian land market today compared to the U.S. land market during its period of growth of title insurance. This includes increased activity by non-resident investors in other regions and states due to increased non-agricultural economic activity. Foreign direct investment in real estate has increased substantially over the past few years.<sup>68</sup> There is, therefore, a latent demand for financial risk-mitigation against defects in land titles. In addition, there is a supply-side push towards creating affordable housing. To the extent that this includes provisioning credit for housing, lenders will be better off if loans are backed by financial indemnities guaranteed by title insurance.

#### IV. HOW DOES TITLE INSURANCE WORK?

Risks to titles usually arise from two sources: incomplete public records and unrecorded facts (for example, if a prior owner was single or married at the time of conveyance).<sup>69</sup> Incomplete title records are further created due to two reasons:<sup>70</sup> “(1) failure to include all instruments available in public records; and (2) judicial interpretation of the facts found.”<sup>71</sup>

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<sup>65</sup> Antetomaso, *supra* note 51.

<sup>66</sup> *Title Insurance United States*, ASSOCIATED REALTY OF THE AMERICAS, <http://www.areamericas.com/pdf/Title-Insurance-United%20States.pdf> (last visited Nov. 18, 2018).

<sup>67</sup> See Johnson, *supra* note 60, at 405–10.

<sup>68</sup> See generally FEDERATION OF INDIAN CHAMBERS OF COMMERCE & INDUSTRY, SURVEY REPORT ON IMPACT OF FDI REFORMS ON INDIAN REAL ESTATE SECTOR (Dec. 2015), <http://ficci.in/Sedocument/20342/survey-fdi-retail.pdf>; and INDIA BRAND EQUITY FOUNDATION, REAL ESTATE (Nov. 2017), [https://www.ibef.org/download/Real\\_Estate-November-2017.pdf](https://www.ibef.org/download/Real_Estate-November-2017.pdf).

<sup>69</sup> Gage Jr., *supra* note 53, at 58.

<sup>70</sup> SMITH, *supra* note 1, at 338.

<sup>71</sup> Gage Jr., *supra* note 53, at 58.

Title insurance requires that the insurance company provides protection to a purchaser against all risks or losses if the purchaser assumes that the title is represented in the document of conveyance.<sup>72</sup> A guarantee that a given title is good requires an indemnification contract “backed by a guarantor with adequate searching facilities.”<sup>73</sup>

Title insurance usually covers the following kinds of risks:

1. *Title defects*: The insurance company protects the buyer against (a) any defects in the title, (b) incompleteness in the title search that later caused injury, and (c) loss arising from undiscovered defects in existence at the time the policy was issued.<sup>74</sup>

2. *Marketability*: Insurance against an unmarketable title is provided in cases where the buyer and seller have entered into an agreement, but a title search then reveals that the *title to the land* is “unmarketable” (i.e., if there are material defects or serious doubts about whether a court would consider the title marketable). The insurance company will protect the holder of the title from the risk of an unmarketable title. Life insurance companies and national mortgage lending companies in the United States insist on this kind of coverage.<sup>75</sup> This is, however, dependent on the legal presence of marketable title; an insurable title is not necessarily a legally marketable title even if it is commonly accepted as marketable. In general, the value of property at the time of injury has been held to be the effective value of the marketable title rather than the value of the property at the time of insurance. This is one reason why insurance companies try to clear up minor imperfections before title insurance is issued.<sup>76</sup>

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<sup>72</sup> SMITH, *supra* note 1, at 341.

<sup>73</sup> Gage Jr., *supra* note 53, at 58.

<sup>74</sup> The American Land Title Association provides a list of risks insured. AM. LAND TITLE ASS'N, *supra* note 50, at 7 (“(1) Mistakes in the interpretation of wills or other legal documents; (2) Impersonation of the owner; (3) Forged deeds, mortgage releases, etc.; (4) Instruments executed under fabricated or expired powers of attorney; (5) Deeds delivered after death of seller or buyer; (6) Undisclosed or missing heirs; (7) Wills not probated; (8) Deeds or mortgages by those mentally incompetent or of minor age (or supposedly single but actually married); (9) Birth or adoption of children after date of will; (10) Mistakes in the public records; (11) Falsified records; (12) Confusion from similarity of names; (13) Transfer of title through foreclosure sale where requirements of foreclosure statute have not been strictly met”); *see also* Johnson, *supra* note 59, at n.56.

<sup>75</sup> *See* Johnson, *supra* note 60, at 396.

<sup>76</sup> *See* Smith, *supra* note 2, at 345.

Put together, the coverage of undiscovered title defects and protection against unmarketable titles provide powerful risk-mitigation capacity for purchasers of land titles. In addition to the actual insurance, a title insurance company provides the buyer of the insurance with two additional services:

1. An opinion of title, prior to the issuance of the policy, that notifies the applicant of the insurer's opinion of the title including potential defects, objections, etc. This is not a legal opinion but it represents the basis on which the company is willing to insure;<sup>77</sup> and
2. A defense of the title of the insured based on a claim or encumbrance that arose prior to the effective date of the insurance policy. This also includes a right to settle claims out of court on behalf of the insured, without his permission if necessary. Legal costs are borne by the insurance company.<sup>78</sup>

The process of issuing insurance usually commences with a search of public records such as court records.<sup>79</sup> This includes an inspection of the register of deeds, inspection of the property, special taxes, levies, and other encumbrances. Large title insurance companies create "title plants" that replicate public land records but are indexed consistently for their own purposes.<sup>80</sup>

The plant consists of all records concerning a property within the purview of a title insurance company and any additional information that may come to light throughout the course of the company's services.<sup>81</sup> As a title insurance company issues more and more policies over specific pieces of property, its title plant for such properties becomes stronger and more "conclusive."<sup>82</sup>

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<sup>77</sup> Johnson, *supra* note 60, at 398.

<sup>78</sup> *Id.*

<sup>79</sup> See AM. LAND TITLE ASS'N, *supra* note 50, at 5.

<sup>80</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-401 TITLE INSURANCE: ACTIONS NEEDED TO IMPROVE OVERSIGHT OF THE TITLE INDUSTRY AND BETTER PROTECT CONSUMERS (2007) (The report states that title plans "contain copies of the documents obtained through searches of public records, and they index the copies by property address and update them regularly. Insurers, title agents, or a combination of entities may own a title plant. In some cases, owners allow other insurers and agents access to their plants for a fee . . .").

<sup>81</sup> See Smith, *supra* note 2, at 341.

<sup>82</sup> In some states, title insurers are mandated to maintain title plants by statute. CHARLES NYCE & MARTIN M. BOYER, AN ANALYSIS OF THE TITLE INSURANCE INDUSTRY (Feb. 1998), <https://>

Due to the importance of the title search process, a major part of the premium is devoted to the costs of searching and preparing title abstracts and opinions on the quality of the title.<sup>83</sup> Only three to five percent of the earned premium is paid out in losses.<sup>84</sup>

The process of title search is followed by a technical review that leads to the creation of a title report. This then leads to an interpretative exercise where the documents on record are analysed and an opinion is provided regarding their impact on the title to the property. Next, the company holds an inspection of the site to supplement the title report with records of any encroachments or off-record matters. If there are defects that cannot be insured, the insurer may exclude them from coverage altogether.<sup>85</sup> In essence, the title insurance company states the status of the title and agrees to indemnify the purchaser of the policy if a loss results from its assessment of the title.<sup>86</sup>

Defects and liens listed in the insurance policy, defects known to the buyer, and changes brought about by zoning are usually excluded from coverage.<sup>87</sup>

Title insurance differs from other forms of insurance in five key aspects:

First, it is retrospective in nature. Title insurance indemnifies the purchaser of the policy from defects on the property that existed on the date of purchase. The insurance policy is therefore not based as much on a probabilistic assumption of risk but on what defects to title are discovered before issuing the insurance policy.<sup>88</sup>

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[www.researchgate.net/publication/5063829\\_An\\_Analysis\\_of\\_the\\_Title\\_Insurance\\_Industry](http://www.researchgate.net/publication/5063829_An_Analysis_of_the_Title_Insurance_Industry). This usually becomes a barrier to entry, as title plants take time to build up and are difficult to sell.

<sup>83</sup> Johnson, *supra* note 6060, at 398.

<sup>84</sup> *Id.*; see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 80, at 9 ("losses and loss adjustment expenses incurred by title insurers as a whole were approximately 5 percent of the total premiums written, while the amount paid to or retained by agents (primarily for work related to title searches and examinations and for commissions) was approximately 70 percent . . .").

<sup>85</sup> NYCE & BOYER, *supra* note 82, at 6. See also Arruñada, *supra* note 57, at 589.

<sup>86</sup> WILLIAM C. NIBLACK, ABSTRACTERS OF TITLE: THEIR RIGHTS AND DUTIES WITH SPECIAL REFERENCE TO THE INSPECTION OF PUBLIC RECORDS, TOGETHER WITH A CHAPTER ON TITLE INSURANCE 158 (1908).

<sup>87</sup> NYCE & BOYER, *supra* note 82, at 6.

<sup>88</sup> Smith, *supra* note 2, at 342; see also Arruñada, *supra* note 57, at 586.

Second, the purchaser of the insurance pays a one-time premium. Unlike other forms of insurance, there is no regular premium payment. The payment for title insurance is made at the time of sale to the title agent. The period of insurance coverage subsists as long as the property is not transferred. It usually passes down to natural successors along with the property.<sup>89</sup>

Third, the role of a title insurance agent is different from agents of other kinds of insurance firms. Agents involved in other kinds of insurance are primarily sales persons. In title insurance, by contrast, agents are also involved in making title searches and examining and clearing titles in addition to sales and marketing.<sup>90</sup>

Fourth, title insurance companies help reduce defects. In comparison to other forms of insurance, a title insurance company is able to remedy past defects in title. Such steps help reduce the insurer's risk of loss while improving the quality of the title.<sup>91</sup>

Lastly, title insurance covers litigation costs. Title insurance policies undertake to cover the costs of litigation or dispute settlement with regard to any covered defect. This is of significance for India where land is a litigious subject.

To summarize, title insurance has the potential to increase the marketability of land titles in India substantially through three major effects:

1. *By insuring against defects:* As discussed earlier, a key bottleneck in the marketability of land titles is the poor quality of land records that make the discovery of defects in title difficult. As Professor Gupta points out, the incentives of the insurer and the insured are aligned to avoid the risk of payouts. Title insurers have the incentives to perform title searches well and to ensure that records of the property and titles insured by them are maintained properly and updated regularly.<sup>92</sup>

As discussed earlier, state governments in India impose significant restrictions on the transfer and alienation of land, especially agricultural land. Title insurance has the potential to clearly signal the degree of marketability

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<sup>89</sup> See Johnson, *supra* note 60, at 399.

<sup>90</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 80, at 3–4.

<sup>91</sup> See Arruñada, *supra* note 57, at 588.

<sup>92</sup> Gupta, *supra* note 22, at 77.

of a given land title, especially agricultural land titles, and signal policymakers to remove restrictions that reduce marketability.

2. *By creating private records of titles:* Due to the alignment of incentives towards maintaining good records, title plants maintained by insurers become privately managed repositories of information that hold vastly superior knowledge regarding insured titles than public records.<sup>93</sup>

3. *By covering a wide range of defects and encumbrances:* As discussed in Section II.A, the scope of coverage under title insurance policies is much broader than under the public indemnity policies of the Torrens system. As Professor Pamela O'Connor points out, Australian states have initiated a review of the indemnity provisions under their respective laws in order to deal with the fallacies within their Torrens indemnity systems.<sup>94</sup> Title insurance is beginning to provide a viable complement to Torrens indemnity in these states.

#### A. *Introducing Title Insurance in India*

It is, however, important to note that certain prerequisites are essential for title insurance to develop in a given jurisdiction. As Professor Arruñada states:

In order for both land registration and title insurance to function correctly, clear laws and a competent judicial system are required. Title insurance did not arise in the USA to make up for the absence of laws or the shortcomings of courts but, as stated above, to complement the errors and omissions insurance of conveyancers.<sup>95</sup>

It is therefore important to understand that land title insurance is not necessarily a complete or uniform solution towards improving land titles in India. As pointed out earlier, title insurance today complements land titling systems, even Torrens registration systems in Australia. The viability of title insurance also depends on other factors.

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<sup>93</sup> *Id.*

<sup>94</sup> O'Connor, *supra* note 46, at 1.

<sup>95</sup> Arruñada, *supra* note 57, at 595.

### 1. *Existing Records*

*The quality of public records:* Poor quality public records increase administrative costs for insurers since a large part of the underwriting process is based on an examination of public records. In India, these are generally distributed between the Registrar under the Registration Act, land revenue records maintained in the Record of Rights, and courts where land disputes are decided. Since the quality of records across these wings of the state is suboptimal today, it is conceivable that premiums may be disproportionately high compared to a market such as the United States or Australia. Significant improvements to the public recording system (such as electronification, availability, English translations, and standardised terminology) will help to reduce underwriting costs and therefore premiums in many cases.

*The quality of titles:* Titles may often be completely unmarketable. Today, there is no independent assessment of the marketability of a title except for an assessment by the contracting parties. In addition, there is no clear definition of a “marketable title.” Titles that are owned and can be ascertained are bought and sold. As the high number of land-related court disputes indicates, many such transactions are problematic. It is not clear to what extent titles in India may be marketable and therefore insurable. If a large proportion of titles in India are in fact not marketable, title insurance will not be able to provide any significant utility to the market. Making titles marketable will require an assessment of the restrictions on land use and transfer that exist under state laws and their systematic rationalization to unlock the marketability of land titles.

### 2. *Legal Framework*

A key requirement of any form of indemnification is the ability to quantify and assess the risk of insurance. If the risk is too high or unquantifiable, the commodity or person cannot be insured. This is a challenge given the legal framework affecting titles to land. The Limitation Act allows for a land title to be challenged on grounds of fraud or mistake twelve years from the date a person discovers a defect in the title.<sup>96</sup> The actual defect may have existed many decades prior to the defect’s discovery. This makes the task of pricing the risk of a defect in title extremely difficult, if not

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<sup>96</sup> See Limitation Act, 1963, Gazette of India, pt. 11 sec. 4 (Nov. 9, 1963), <http://www.advocatekhaj.com/library/bareacts/limitation/index.php?Title=Limitation%20Act,%201963>.

impossible. Legal changes are therefore required to ensure that a legal curtain is drawn over defects in land beyond a specified period of time.

The critical legal requirement is the approval of title insurance as a line of insurance in India. This must be done by the Insurance Regulatory and Development Authority of India (IRDAI). Section 3 of the Insurance Act prohibits any person from offering insurance unless such person has been registered with IRDAI for such specific business of insurance.<sup>97</sup> Therefore, IRDAI has to frame regulations that allow for title insurance to be offered in India.

In 2016, IRDAI set up a working group on title insurance. The report has been released, but it does not sufficiently explain the mechanisms through which title insurance businesses are expected to operate.<sup>98</sup> In addition to making title insurance a permissible business activity in India, other regulatory requirements IRDAI imposes will be key to the development of the market.

Indian state governments have not waited for the introduction of title insurance, and most have required alternative documentary proof of clear titles under RERA. Most states have required project developers to furnish an opinion from an experienced attorney regarding the title of the property.<sup>99</sup>

This is interesting because title insurance developed due to the difficulty in getting financial indemnity, assurance against conveyancers, and lawyers who give opinions as to the quality of title in immovable property. India has historically suffered from weak enforcement against regulated

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<sup>97</sup> Insurance Act, No. 4 of 1938, INDIA CODE (1993), vol. 2.

<sup>98</sup> See WORKING GROUP ON TITLE INSURANCE, INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY OF INDIA, TITLE INSURANCE IN INDIA (Oct. 26, 2016), [https://www.irdai.gov.in/ADMINCMS/cms/firmGeneral\\_Layout.aspx?page=PageNo3349&flag=1](https://www.irdai.gov.in/ADMINCMS/cms/firmGeneral_Layout.aspx?page=PageNo3349&flag=1).

<sup>99</sup> See e.g., Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016, No. 1438, Acts of Parliament, 2016 (India); Bihar, Bihar Real Estate (Regulation and Development) Rules, 2017; Chhattisgarh, Chhattisgarh Real Estate (Regulation and Development) Rules, 2017, No. F8-41/2016/32, Acts of Parliament, 2017 (India); Haryana, Haryana Real Estate (Regulation and Development) Rules, 2017, No. Misc. 107(A)/ed(R)/196, Acts of Parliament, 2017 (India). The Andhra Pradesh Real Estate (Regulation and Development) Rules, 2017 are an exception. The Andhra Pradesh Real Estate Rules, 2017 requires title insurance to be taken by the project developer, though it is unclear how developers will comply with this requirement in the absence of title insurance.



professions.<sup>100</sup> This regulatory requirement is a suboptimal solution for the following reasons.

First, there is no likelihood of financial indemnity. It is likely that consumers relying on the opinions of attorneys will face significant challenges in indemnifying themselves due to losses caused by the mistakes or negligent actions of attorneys. Malpractice claims against attorneys in India have rarely, if ever, succeeded and the Bar Council of India (the apex regulatory body for the regulation of attorneys) rarely disciplines lawyers for negligence or malpractice. The key benefit of title insurance is to indemnify those who insure themselves.

Second, record management or creation will not become cheaper over time. A specialized title insurance firm is likely to build a private index or record of titles it has insured. Insurance will be cheaper for subsequent transactions in such titles as title insurance companies will have lower administrative costs for underwriting the insurance. On the other hand, an attorney will have to conduct a *de novo* exercise to identify defects in the title for every single transaction and overall costs to the society will not decrease over time.

And third, defects in titles will not decrease over time in a system where attorneys furnish opinions regarding titles. A title insurance company has incentives to remove defects that it has discovered (and can be removed) in order to avoid paying insurance later. This also includes notifying government authorities in charge of land records of any errors, defects, or changes in title. Therefore, the state benefits from the way the incentives in the title insurance market are structured as title insurance companies supplement the state administrative apparatus. This is aligned to the objective of creating better titles to land. Attorneys, however, do not share such incentives as they do not explicitly undertake to indemnify a title holder who has taken an opinion of title from the attorney.

It is therefore important to have a functional title insurance market to allow buyers of immovable property the option of availing themselves of title insurance.

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<sup>100</sup> See generally Ajay Shah, *Overhaul Regulation of Professions*, BUS. STANDARD (July 24, 2016), [https://www.business-standard.com/article/opinion/ajay-shah-overhaul-regulation-of-professions-116072400744\\_1.html](https://www.business-standard.com/article/opinion/ajay-shah-overhaul-regulation-of-professions-116072400744_1.html).

### 3. *Human Capital*

A functional title insurance market depends on the expertise available to carry out the business in India. As there are currently no operating title insurance businesses in India, expertise in this area will have to be built from scratch. As a result, market development is likely to be slow. Underwriting titles requires significant efforts in discovering defects in titles and assessing their impact on the title. Conventional lines of insurance do not require efforts of this scale. Existing insurance companies do not possess expertise in discovering defects in land titles, though they may build such capacity over time.

In conventional lines of insurance, reinsurance provides a prudential buffer against risks to insurance firms. However, if title insurance in India is offered without a correct estimation of the risks to titles in land, or without sufficient expertise by Indian firms, reinsurance is also likely to be expensive. If, however, reinsurance is sought mainly from title insurance companies, expertise in such firms may positively benefit Indian insurance companies.

The development of this market could be accelerated through the encouragement of foreign expertise in this field. National security concerns that typically militate against entry of foreign firms are not valid here for two reasons: (1) data on land ownership is becoming increasingly available to the public through ongoing digitization efforts and therefore increasingly in the public domain, and (2) regulation in many other sectors in finance (such as banking) already permits entry of foreign firms in local industries through a variety of routes with varying degrees of state control.<sup>101</sup> Therefore, smartly designed regulation can help develop domestic capacity by relying on international expertise.

#### *B. Implementation Strategy*

The RERA allows state governments to notify promoters of real estate projects of title insurance requirements.<sup>102</sup> A key consideration is whether

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<sup>101</sup> See PRICEWATERHOUSECOOPERS, FOREIGN BANKS IN INDIA: AT AN INFLECTION 12–13 (2013), <https://www.pwc.in/assets/pdfs/publications/2013/foreign-banks-in-india.pdf> (summarizing the methods by which foreign banks are permitted to conduct operations in India). Similarly, requirements for the entry of foreign insurance providers are specified by the insurance regulator. Section 7(A) of the Insurance Act 1938 restricts the investment of foreign companies into India to twenty-six percent of shareholding in an Indian insurance company. Insurance Act, No. 4 of 1938, INDIA CODE (1993), vol. 2.

<sup>102</sup> See India Real Estate (Regulation and Development) Act, sec. 16.

state governments should make title insurance mandatory under the RERA or whether they should merely make it one of the options available for promoters.

The regulatory choice depends on the costs and benefits of adopting either choice. Making title insurance mandatory is likely to ensure that all new real estate projects are covered by title insurance. It is also likely to provide significant incentives for title insurance firms to provide insurance in the state.

On the other hand, making title insurance mandatory is likely to have significant negative consequences as well. Some of these originate from the nature of title insurance as a product. As discussed earlier, the viability of title insurance depends on the general quality of title records. Examining records and conducting diligence are significant components of the cost of underwriting titles. If title insurance is mandatory, it is likely to create moral hazard issues where firms compromise on the quality of underwriting due to the existence of a captive market that requires insurance. A consequence of this could be the fact that the insurance premium does not actually reflect the true quality of the land title. Alternatively, title insurance firms may underwrite titles, but with a large number of exceptions such as fraud, mistakes, zoning laws, etc., therefore defeating the purpose of insurance.

It is therefore necessary to allow title insurance firms to compete in the market and to develop the skills required to underwrite titles over a period of time. Mandate driven development may create the perception of having achieved quick results but will ultimately lead to losses to those with suboptimal insurance products at a later date.

## V. CONCLUSION

Title insurance is a viable and necessary complementary system for improving land title records in India. Title insurance provides the necessary financial indemnity for consumers and investors in real estate, failing which, transactions will be suboptimal due to the difficulty in discovering defects and pricing the quality of land titles. Title insurance also allows for specialization and intermediation in the land market by allowing specialized firms to undertake the task of discovering the quality of titles and backing their due diligence through financial indemnity. In the long run, this creates a social benefit of better titles in land through private action. However, the manner in

which title insurance is introduced and regulated will be critical to the success of the market.

As this paper highlights, the title insurance industry in the United States (where it is most commonly used) has developed into its current form over a period of time. This process of development has been shaped by both endogenous factors (e.g., increasing expertise and the creation of title plants) and exogenous factors (e.g., the political push for affordable housing, among others). It is therefore necessary to allow this market to grow organically while simultaneously protecting consumers. Mandate driven development may provide the perception of success but it will eventually lead to suboptimal outcomes. Regulatory policy must attempt to encourage competition and specialization rather than short-run universal coverage. Modest expectations may lead to better outcomes for improving land titles in the long run.

