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LAND: GOVERNANCE, DIGITIZATION AND HUMAN RIGHTS – A COMPARATIVE STUDY

Abstract

The digitization of land records is being promoted by the World Bank at scale, especially in developing countries. Efficiently maintaining land records can improve tenure safety and food security, reduce poverty, and aid democratic urbanization. While the 2030 Agenda for sustainable development encourages the use of new technology to administer land, it also forewarns that such initiatives ought to factor in digital divide. These evolving processes tend to have a detrimental impact on the tenure rights of marginalized people who are devoid of both access and understanding of such modernization efforts. Through this paper, we examine digitization and associated land governance processes from a human rights perspective. To bring them to light, we compare digitization initiatives in both India and South Africa and draw lessons from them to address issues of equity, inclusion, and good governance in an increasingly digital world.

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INTRODUCTION

Land administration creates both duties and responsibilities for a Nation-State making it incumbent on the State to effectively govern land and also ensure there are no ensuing human rights violations.¹ The world over, Nation-States are utilizing digital technology to govern land.² In fact, the World Bank has developed a framework for digital governance of land with the initiative starting in the first half of the 21st century.³ Digitizing land titles is part of the World Bank's framework and it aims to create secure ownership of an owner. However, there are apprehensions about these processes stemming from a lack of transparency, weak implementation of policies, and corruption resulting in violation of human rights. With different countries at different stages of development, a wider debate might help address, and in turn stem, the erosion of rights. The current study is an attempt to understand the digitization and modernization aspects of land governance by comparing two former colonial jurisdictions: India and South Africa. These countries have specifically been chosen for their distinct histories of land governance, issues around land (re)distribution and their approaches to modernization and digitization.

In the words of Hernando de Soto, any such effort should ensure a structure of transparent, secure and enforceable property rights.⁴ The study carries out a socio-legal analysis juxtaposing societal realities; the law and jurisprudence; the implementation of digitization policies and

¹ R. Home, "Land, Property and Human Rights in AU Law and Policy" in O. Amao, M. Olivier, and K. D. Magliveras (eds), *The Emergent African Union Law: Conceptualization, Delimitation, and Application*, Oxford, 2021, p. 289.

² The World Bank, Land Government Assessment Framework, available at: <https://www.worldbank.org/en/programs/land-governance-assessment-framework> [last accessed 22.09.2023].

³ *Ibid.*

⁴ H. De Soto, *The Mystery of Capital*, Blackswan, 2000, p. 182.

violation of rights that follow in order to highlight the potential and pitfalls of these processes. The article employs the Actor Network Theory (ACT) to understand the interplay of different structures.⁵ This theory is grounded in the understanding of the interactions between law; technology, and the implementation of legal policy.⁶ It will help understand the process of digitization of land titles by inspecting it through the lens of networks and the effects of their interaction. The study considers the State, laws enacted, legal machinery, government officers, government offices, and their role in the formalization of land titles. This theory will help unravel for us the difficulties faced by marginal and indigenous communities in securing their land due to the abuse of power, and bureaucracy embedded in technological processes such as the digitization of land titles.⁷ The sources of the study are doctrinal in nature by drawing on legislation; case-law; parliamentary debates, relevant news articles, and scholarly authorship.

The study is divided into five parts beginning with the debate around the idea of ownership of land being a human right under international human rights law. This will be followed by a section on the World Bank's initiatives towards ensuring secure tenures and digitization efforts. The next section will explore land digitization efforts in both India and South Africa and their historical context, discuss existing legislation; critique it and lay out challenges and shortcomings. The fifth section will be a comparative analysis which will attempt to synthesize what can be learnt from these countries' experiences, so that similar initiatives around the world may become more inclusive, justifiable, and equitable.

⁵ The Actor Network Theory was developed at the Centre de Sociologie de l'Innovation around the 1980's by Bruno Latour, Michel Callon, Madeleine Akrich, and John Law.

⁶ L. Barrera and S. Latorre, "Actor-Network Theory and Socio Legal Analysis" in M. Valverde, K. Clarke, E. D. Smith, P. Kotiswaran (eds), *The Routledge Handbook of Law and Society*, London & New York: Routledge, 2021, p. 12.

⁷ S. Lattore, "The making of land ownership: land titling in rural Colombia – a reply to Hernando de Soto", *Third World Quarterly*, 2015, Vol 36, Issue 8, p. 1536, available at: <https://doi.org/10.1080/01436597.2015.1046984> [last accessed 10.07.2024].

I. LAND RIGHT AS A HUMAN RIGHT?

Central to agriculture, industries, urban development, and mineral extraction, land is increasingly under pressure the world over.⁸ Secure tenures are important for poverty alleviation, shared prosperity, food security, preventing social exclusion, and protecting the rights of women, indigenous communities, and minorities.⁹ However, only 30% of the global population have land or homes registered in their names.¹⁰ International law has established land rights for indigenous peoples, marginalized communities, and women, underscoring how other freedoms and rights are affected by access or the lack of it to land.¹¹ The Office of the High Commissioner of Human Rights (OHCHR) rightly observed that ‘land is not a mere commodity but an essential element for the realization of basic human rights.’¹²

Toward the end of 2022 the United Nations declared that it would prioritize land rights as a central issue.¹³ As part of this exercise the UN Committee on Economic, Social and Cultural Rights - a committee overseeing the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) - published General Comment 26 (2022) on land, economic, and cultural rights.¹⁴ Para 31 in this docu-

⁸ FAO & UNEP, “The Future of our Land: Facing the Challenge”, 1999, available at: <https://www.fao.org/4/x3810e/x3810e00.htm#TopOfPage> [last accessed 15.09.2023].

⁹ E. Wickeri & A. Kalhan, “Land Rights Issues in International Human Rights Law”, *Malaysian Journal on Human Rights*, 2010, Volume 4, Issue (10), p. 15, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921447# [last accessed 19.09.2023].

¹⁰ L. Tuck, W. Zakout, World Bank Blogs, *7 reasons for Land and Property Rights to be at the top of the Global Agenda*, 2019, available at: https://blogs.worldbank.org/voices/7-reasons-land-and-property-rights-be-top-global-agenda?CID=ECR_AL_BlogNotification_EN_EXT [last accessed 19.09.2023].

¹¹ Wickeri & Kalhan, *supra* note 9, p. 16.

¹² OHCHR, ‘Land and Human Rights Standards and Applications’, 2015, p. 1, available at: https://www.ohchr.org/sites/default/files/Documents/Publications/Land_HR-StandardsApplications.pdf [last accessed 20.09.2023].

¹³ Land Rights Now, *General Comment 26: A New Era for Land Rights at the United Nations*, 2022, available at: www.landrightsnow.org/general-comment-26-a-new-era-for-land-rights-at-the-united-nations/ [last accessed 20.09.2023].

¹⁴ OHCHR, ‘General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights’ (24 January 2022) UN Doc/E/C.12/GC/26.

ment explicitly talks about how processes of formalization like land titling are essential to securing ownership. It discusses how commodification of property rights may lead to exclusion. It also urges States to be mindful of historical injustices and to protect the rights of the marginalized.¹⁵ Even though this initiative is a positive step towards the codification of land rights, ambiguity over whether the right to land is a human right still prevails.¹⁶ In fact, scholars opine that by treating land merely as a resource and human-land relations as property relations, ICESCR missed the opportunity to recognize land as a universal human right.¹⁷ On the other hand, UN Declaration on the Rights of the Indigenous Peoples (UNDRIP),¹⁸ the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169)¹⁹ and the Convention on the Elimination of All forms of Discrimination against Women (CEDAW)²⁰ have codified and recognized the land rights of the indigenous people and women. The International Covenant on Civil and Political Rights (ICCPR) also provides for the right of indigenous people to enjoy their culture including their right to land.²¹

Article 14 of the African Charter of Human and Peoples Rights (the Banjul Charter)²² talks of right to property and land rights at a pan-African, supra-national level. Article 21(2) of the Charter recognizes the

¹⁵ *Ibid.*, para. 31.

¹⁶ K. Cordes, Columbia Center on Sustainable Investment, *Is there a Human Right to Land?*, 2017, available at: <https://news.climate.columbia.edu/2017/11/08/is-owning-land-a-human-right/> [last accessed 21.09.2023].

¹⁷ G. Wadlig, *Beyond Property Relations: Why the Committee on Economic, Social and Cultural Rights' Narrow Understanding of Land Limits the Protection of Human-Land Relationships*, 2023, available at: <https://voelkerrechtsblog.org/beyond-property-relations/> [last accessed 05.07.2024].

¹⁸ United Nations Declaration on the Rights of the Indigenous Peoples UNGA RES/61/295 (adopted 13 September 2007). Only South Africa has ratified this.

¹⁹ (adopted 07 June 1989, entered into force 27 June 1989) (1989) 28 ILM 1382. Both India and South Africa have ratified this.

²⁰ UNGA Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 03 September 1980) (1980) UN Doc/A/RES/34/180.

²¹ UNGA Res/2200A (XXI)/ 21 U.N. GAOR Supp. (No. 16) p. 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23 1976.

²² OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (adopted 27 June 1981, entered into force 21 Oct 1986).

rights of dispossessed people to lawful recovery and adequate compensation. Article 22 (2) reminds the States of their duty to individually and collectively ensure the exercise of the right to development. However, the treatment of this right is subject to national laws in each member State. Interestingly, the Banjul Charter was also the first to discuss the right to development under Article 22.²³ Subsequently, the UN also adopted the right to development in 1986 although failing to mention the importance of land to development.²⁴

The Courts in the African region have time and again protected the rights of indigenous communities. In the *Endorois* case,²⁵ the African Commission-responsible for implementing the Banjul Charter- recognized the Endorois' right to property, culture, religion, and health, and ruled that they could not be evicted. This case can be interpreted as alluding to these peoples' right to land and development.²⁶ At the national level, the Constitutional Court in South Africa in the *Richtersveld* case²⁷ made clear that its interest lies in protecting the rights of the indigenous communities. It was one of the first cases to come up with the doctrine of aboriginal titles based on the principles of justice and equality and to recognize land ownership as a human right.²⁸ The judgment paved way for the judicial protection of indigenous communities in other Southern African states like Namibia, Botswana, and Zimbabwe.²⁹ The South Af-

²³ Article 22, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

²⁴ UNGA Res/41/128 (adopted 04 December 1986).

²⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, available at: <http://www.unhcr.org/refworld/docid/4b8275a12.html> [last accessed 07.07.2024].

²⁶ *Ibid.*

²⁷ *Richtersveld Community and Others v. Alexkor Ltd and Another* 2001 (3) SA 1293 (LCC); In appeal *Alexkor Ltd and Another v. Richtersveld Community and Others* CCT19/03, para. 29.

²⁸ T. W. Bennet and C. H. Powell, "Restoring land: the claims of the aboriginal title, customary law and the right to culture", *Stellenbosch Law Review*, 2005, p. 41, available at <https://hdl.handle.net/10520/EJC54569> [last accessed 07.07.2024].

²⁹ D. Timmers, *The Richtersveld Cases: Aboriginal title applicable in South Africa?*, p. 4, available at: <http://arno.uvt.nl/show.cgi?fid=107540> [last accessed 07.07.2024]. ; See Also *Mbiankeu Genevieve v. Cameroon Commission*, Comm No 389/10 (2015); *The Social and Economic Rights Action Center and the Center for Economic and Social Rights (SERAC) v. Nigeria*, Commission Comm No 155/96 (2001-02); *Bakweri Land Claims Committee (BLCC) v. Cameroon*, Commission Comm No 260/2002; *Front for Liberation of the State of Cabinda v. Repub-*

rican Parliament in its white paper on land policies has discussed the importance of creating titles and ensuring tenure security to those marginalized by apartheid.³⁰ While Section 25 of the South African Constitution also guarantees the right to property, the Parliament has categorically stated that these policies shall not be at loggerheads.³¹

Moving to the Indian context, there is no supranational human rights court in this region. India is a signatory to the above mentioned international conventions though it has not ratified some of them. In India, the *Adivasis* (indigenous peoples) and the *Dalits* (the ‘untouchables’, at the bottom of the caste pyramid) are amongst the most marginalized. In India too, there are no direct provisions that categorize land as an essential aspect of human rights. Article 51 of the Indian constitution stipulates that the State shall endeavour to foster respect for international law and treaty obligations. It guarantees the right to life (Article 21) and courts have often interpreted this right to grant land rights. Article 19 (1) (f) guaranteed the right to property as a fundamental right, but it was removed through the 44th constitutional amendment and Article 300-A was inserted which stipulated that no person shall be deprived of their property except according to the law. The Indian Constitution also specifically protects the lands of indigenous communities under Schedule V and Schedule VI. Regardless of these provisions, multinationals and the state, have often attempted to appropriate land from these communities in the name of development.³²

There are three landmark cases where the right to land for indigenous communities has been highlighted by the Supreme Court, the apex court of India. In the *Samatha* case³³ and the *Dongria Kondhs*

lic of Angola, Commission Comm No 328/06 (2013); *Nubian Community in Kenya v. Republic of Kenya*, ACHPR Comm No 317/06 (2016); *Amnesty International v. Zambia*, Commission Comm No 212/98 (2009); African Court App No 006/2012, *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, Judgment, 2017.

³⁰ Department of Land Affairs, *White Paper on South African Land Policy*, 1997, p. 101, available at: https://www.gov.za/sites/default/files/gcis_document/201411/whitepaper-landreform.pdf [last accessed 06.07.2024].

³¹ *Ibid.*

³² N. Wahi and A. Bhatia, Centre For Policy Research, *Understanding Land Conflict in India and Suggestions for Reform*, 2019, available at: <https://cprindia.org/understanding-land-conflict-in-india-and-suggestions/> [last accessed 21.09.2023].

³³ *Samatha v. State of A.P. and Others*, MANU/SC/1325/1997

case³⁴ the court protected the rights of the *Adivasis* (indigenous peoples). In the former, the court ruled that even the state could not lease out tribal lands to multi-national corporations for extractive purposes, and it held that all *Adivasi* lands regardless of title belonged only to indigenous peoples.³⁵ It also discussed the *Adivasis'* right to development and the obligations of the State to protect them.³⁶ In the *Dongria* case too, the Supreme Court ruled in favour of the *Adivasis*. The judgment upheld the Free Prior and Informed Consent (FPIC) of the *Adivasis* and stipulated that the consent of the village council be taken before the State leased out the land. It has not used the words free prior informed consent (FPIC) which are part of both these international instruments, but has taken the same from section 41 of the Right to Fair Compensation and Transparency in the Land Acquisition, Rehabilitation and Resettlement Act, 2013 that stipulates the consent of the village council before the State leases the land to any private party. The judgment specifically lays stress upon the protection of *Dalit* and *Adivasi* against illegal eviction and land grabbing.³⁷

However, in the *Narmada Bachao Andolan* case,³⁸ the court agreed to an increase in the height of the dam, which increased the number of *oustees*, even if it ordered that adequate compensation/resettlement be provided to them. The judgment is problematic for it shows the polyvocality of the Supreme Court. The Supreme Court justified this displacement by citing its accordance with the ILO Indigenous and Tribal Peoples Convention, 1957 (No. 107),³⁹ which stipulated that indigenous people could not be displaced without their free consent except when in the interest of national economic development.⁴⁰

It is also compelling to see how courts in both jurisdictions draw the right to land out of the right to housing. They both use the language of

³⁴ *Orissa Mining Corporation v. Ministry of Environment & Forest & Others*, Writ Petition (Civil) No. 180 of 2011.

³⁵ Samatha, *supra* note 33, at para. 21, 45.

³⁶ *Ibid.*, para. 74,75.

³⁷ *Orissa Mining Corporation*, *supra* note 34, para. 15,49.

³⁸ *Narmada Bachao Andolan v. Union of India*, MANU/SC/0640/2000.

³⁹ Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, adopted in 1957 entered into force 02 June 1959. This was later revised by C. 169.

⁴⁰ *Narmada Bachao Andolan*, *supra* note 38.

General Comment 4 on the right to housing.⁴¹ It is evident from cases like *Grootboom*⁴² in South Africa and *Chameli Singh*⁴³ and *Olga Tellis*⁴⁴ in India. While recognizing land rights as crucial, it is also important to map these rights to land records and titles so these rights are realized. Improving the governance of land goes a long way in securing tenures and preventing conflicts, the scale and impacts of which can be staggering in developing countries. An astonishing 66% of civil cases in India and 70% mediation cases in South Africa⁴⁵ are related to land/property disputes, highlighting the recognition of the universal right to land, the importance of formal land titling, and the need for good land governance.⁴⁶

II. THE WORLD BANK'S INITIATIVES TO IMPROVE LAND GOVERNANCE

Though there is an acute pressure on land in the Global South, comprehensive land records are not available.⁴⁷ While in some countries surveys have not been conducted, in others, they are outdated. Does the land belong to the government or to private persons? Is it an individual right or a collective right? Is it a common property resource? These are questions and uncertainties that abound in land administration. The World Bank attempts to address some of these ambiguities by modernizing land records. To this end, land surveys (land mapping) are being carried out with the help of modern equipment including drones, cadastral maps, and Geographic Information System (GIS).

⁴¹ UNGA Res 2200A (XXI)/ adopted on 16 December 1966 (Entry into force 3 January 1976).

⁴² *Government of the Republic of South Africa and Others v. Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46.

⁴³ *Chameli Singh and Others v. State of Uttar Pradesh*, (1996) 2 SCC 549.

⁴⁴ *Olga Tellis v. Bombay Municipal Corporation & Ors*, (1986) AIR 180.

⁴⁵ D. Bosch, *Land conflict management in South Africa: lessons learned from a land rights approach*, available at: <https://www.fao.org/4/j0415t/j0415t0a.htm> [last accessed 08.07.2024].

⁴⁶ Wahi and Bhatia, *supra* note 32.

⁴⁷ N. C. Saxena, "Updating Land Records: Is Computerisation Sufficient?", *Economic and Political Weekly*, (2005), Vol 40, Issue 4, p. 315, available at: <https://www.jstor.org/stable/4416106> [last accessed 09.07.2024].

The World Bank wants to improve land governance by enhancing the efficiency of maintaining land records. Doing so can improve tenure safety and food security, reduce poverty, and aid democratic urbanization.⁴⁸ The World Bank supports government policies that recognize and record all forms of legitimate tenures, public and private, rural and urban, formal and customary (including those of pastoralists or those with weak rights), collective and individual, (whether they be of small holders or large-scale producers).⁴⁹ Additionally, the World Bank is partnered with the Food and Agriculture Organisation (FAO), UN Habitat, the International Fund for Agricultural Development (IFAD), the International Food Policy Research Institute (IFPRI), and the African Union to develop the Land Governance Assessment Framework (LGAF).⁵⁰

A participatory process, LGAF is facilitated by a country coordinator who is a locally recognized independent legal expert with a broad network within and outside the government.⁵¹ These experts evaluate data on land tenure recognition; rights to forest and commons and rural land use regulations; urban land use, planning and development; public provision of land information (Registry and Cadastre); land valuation and taxation; dispute resolution processes, and review of institutional arrangements and policies.⁵² Thus far, the World Bank has partnered with 40 countries to use the LGAF as the basis for dialogue on land governance.⁵³

The World Bank has also brought changes to the land registration/formalization processes, encouraging the shift from conventional deed registration systems to the digital, Torrens system.⁵⁴ The Torrens sys-

⁴⁸ Wahi and Bhatia *supra* note 32.

⁴⁹ The World Bank, Land Government Assessment Framework, available at: <https://www.worldbank.org/en/programs/land-governance-assessment-framework> [last accessed 22.09.2023].

⁵⁰ K. Deininger, The World Bank, *Land Governance and Assessment Framework – Implementation Manual*, 2013, p.21, available at: <https://thedocs.worldbank.org/en/doc/a91b90185037e5f11e9f99a989ac11dd-0050062013/original/LGAF-Manual-Oct-2013.pdf> [last accessed 22.09.2023].

⁵¹ *Ibid.*, p. 23.

⁵² Deininger, *supra* note 50, p. 24.

⁵³ The World Bank, *Land*, 2023, available at: <https://www.worldbank.org/en/topic/land#2> [last accessed 25.09.2023].

⁵⁴ Deininger, *supra* note 50, p. 45.

tem is based on a careful mapping of parcels of land to create a registry. Each parcel is shown on a large map with its unique number, with a register for that parcel identified by the same unique number.⁵⁵ According to the World Bank, transitioning to the Torrens system would help reduce litigation and make titling easier. Digitization of land records is another initiative promoted by the World Bank.⁵⁶ Land administrations are computerizing and uploading manual land records onto official web portals. The United Nations Office of Information and Communication Technology (OICT), United Nations Habitat, and the Organisation for Economic Cooperation and Development (OECD) also promote the use of block chain technology to register titles.

The objective of the World Bank is to modernize land records to facilitate developmental activities, improve the ease of doing business, and reduce the scope of litigation. However, if this transition to digital is not participatory and transparent, it could adversely impact marginalized communities. Bureaucratic corruption, erroneous entries by technical staff, and private fraud could further complicate this transition and create problems. These and other apprehensions have to be addressed while bringing about and implementing these reforms.⁵⁷

2.1. APPREHENSIONS

There are researchers who oppose digitization fundamentally citing the threat of increased surveillance by the state.⁵⁸ Easy access to data and uploading it in the public domain is a healthy practice, but this information can also be misused. Moreover, the implementation of these digitization processes can be non-participatory and may further exclude and deny

⁵⁵ J.W. Bruce, R. Giovarelli, J. L. Rolfes, D. Bledsoe, R. Mitchell, *Land Law Reform: Achieving Development Policy Objectives. Law, Justice, and Development*, World Bank, 2006, p. 48.

⁵⁶ A. Goyal, World Bank Blogs, *Benefits of Land Registry Digitisation*, 2012, available at: <https://blogs.worldbank.org/digital-development/benefits-of-land-registry-digitisation> [last accessed 01.10.2023].

⁵⁷ *Ibid.*

⁵⁸ E. O. Pedersen, M. Brincker, "Philosophy and Digitisation: Dangers and Possibilities in the New Digital Worlds", *North European Journal of Philosophy*, 2021, Volume 22, Issue (1), p. 3, available at: <https://doi.org/10.1515/sats-2021-0006> [last accessed 02.10.2023].

the rights of the marginalized.⁵⁹ While the 2030 Agenda for sustainable development encourages the use of new technology to administer land, it also forewarns that such initiatives ought to factor in the digital divide.⁶⁰ This is because such processes could be detrimental to the interests of the marginalized communities, who are less aware and have little access to these evolving systems. Developing countries also have poor access to the internet. This is more prevalent in rural areas where most of the population is e-illiterate. While promoting e-registrations, international organizations should consider this digital divide so as to insulate the marginalized from further disenfranchisement. In countries like India, the digitization of land records is well underway. Evolving technologies such as Block chain are also being used in states like Andhra Pradesh to facilitate land titling. Rather than opposing these processes fundamentally, it would be more prudent to understand and address the shortcomings of these initiatives.

III. INDIA

The British East India Company established the Survey of India in 1767 to survey and map Indian territory for the purpose of taxation, administration, and defence.⁶¹ No comprehensive survey of land however was conducted after independence. The Union of India today consists of 28 states and 8 union territories, i.e. 36 provincial units. According to Entry 18 and 45 of List II of the Seventh Schedule of the Constitution of India, the state/provincial governments are primarily responsible for the maintenance of land records. Multiple departments within the State government maintain these records: the sale of immovable property is recorded by the registration and stamps department; the re-

⁵⁹ *Ibid.*, p. 8.

⁶⁰ Department of Economic and Social Affairs Youth, United Nations, *Reducing Inequalities through Digital Public Goods and Youth Collaboration for the SDGs*, 2022, available at: <https://www.un.org/development/desa/dspd/2022/01/digital-public-goods-and-youth-collaboration-for-the-sdgs/> [last accessed 05.10.2023].

⁶¹ Library of Congress, *Survey of India: Specimens of Map Drawing*, 1904, available at: <https://www.loc.gov/item/2021668463/#:~:text=Summary,administration%2C%20taxation%2C%20and%20defense> [last accessed 12.10.2023].

cord of rights is maintained by the revenue department, and the spatial land records are maintained by the survey and settlement department. Adding to this disaggregated complexity, manual records are also very poorly maintained by the district and village revenue departments and are not easily accessible to the public.⁶²

India is party to the World Bank's LGAF programme. The Department of Land Resources under the Ministry of Rural Development of the Government of India (GOI) launched the Digital India Land Records Modernization Programme (DILRMP) in 2008.⁶³ The DILRMP is demand driven and provides financial assistance based on the state governments' proposals. The main objective of the DLRMP is to develop a modern, comprehensive, and transparent land records management system based on the following four principles:⁶⁴

- a. A single window to handle land records (including the maintenance and updating of textual records, maps, survey, and settlement operations and registration of immovable properties).
- b. Developing cadastral records that mirror the ground reality, popularly known as 'the mirror principle'.
- c. Recording the title which should be the true reflection of ownership status and introducing automated mutation following registration for which past records would not be necessary, also known as 'the curtain principle'.
- d. Title insurance by guaranteeing the title for its correctness and indemnifying the title holder against the loss arising on account of any defect therein.

The State Governments and Union Territory administrations implement the programme with financial and technical support from the Department of Land Records and the Government of India. To meet criti-

⁶² PRS Legislative Research, *Land Records and Titles in India*, available at: <https://prsindia.org/policy/analytical-reports/land-records-and-titles-india> [last accessed 15.10.2023].

⁶³ *Ibid.*

⁶⁴ Ministry of Rural Development, *Government of India The National Land Records Modernization Programme - Guidelines, Technical Manuals and MIS 2008-09, 2009*, p. 9, available at: <https://dolr.gov.in/sites/default/files/Guidelines%20%20NLRMP%2017.4.2009.pdf> [last accessed 16.10.2023].

cal gaps in technological resources, outsourcing to the extent necessary is permitted by the programme.⁶⁵

3.1. EFFORTS TO MODERNIZE AND DIGITIZE LAND RECORDS

3.1.1. COMPUTERIZATION OF LAND RECORDS.

About 95% of land records in 22 states and 95% of the property registrations in 24 states have been computerized, and 95% of cadastral maps in over 20 states have been digitized. However, only 10 states could complete 95% issuance of digitally signed Record of Rights (RORs). While DILRMP sets objectives, targets, and deadlines, and states broadly follow its guidelines, each state approaches data collection differently. Hence each state has its unique set of experiences and people belonging to different states experience different problems.⁶⁶

3.1.2. AUTOMATION OF SUB REGISTRARS' OFFICES.

Land transactions are registered at the Sub Registrar's Office (SROs) and about 92.85% of these SROs have been automated. Copies of sale deeds, and documents about previous transactions are also available at the SROs and are uploaded in the state land portals. Sale and other land transactions are regulated by the Transfer of Property Act, 1882 and property registration is done under the Registration Act, 1908. The Registration Act, 1908 does not however facilitate online registrations. The applications and documents can be uploaded online, but the final act of registration is done offline by the SRO. Furthermore, the SROs do not have records of assigned lands - lands that the government assigned to the landless poor, scheduled castes, and scheduled tribes in the post-independence period. Sometimes the only proof that exists is the *patta*

⁶⁵ *Ibid.*

⁶⁶ S. Bhartiya, *Down To Earth, Dalits and Adivasis in Madhya Pradesh allege digital land records fudged; no longer landowners*, 2022, available at: <https://www.downtoearth.org.in/blog/governance/dalits-and-adivasis-in-madhya-pradesh-allege-digital-land-records-fudged-no-longer-landowners-84724> [last accessed 16.10.2023].

(a type of land deed) issued to the assignee, which puts vulnerable people at risk.

3.1.3. LAND PORTALS.

Each of the state governments has launched an online land web portal where computerized land records are available. They are useful to e-literates who have the knowhow of accessing them. However, these portals are not without their problems. The *Bhoomi* portal in the state of Karnataka has been observed to have been used by richer farmers to dispossess the marginalized who are unaware of digitization. Reports of delayed complaint resolution (mistakes in entry of names, survey numbers etc.) and increased corruption have emerged which directly impact small and marginal landholders. The portal was also subject to multiple hacks, with the hackers attributing what was government land to a private individual. Importantly, the validity of the *Telangana* (another Indian state) portal was challenged in the state's High Court.⁶⁷ The main contention was that this portal did not have statutory recognition. For that matter the entire DILRMP programme is an administrative action not supported by a statute.

3.1.4. SURVEY AND RESURVEY OF LANDS.

Simultaneous modernization efforts to comprehensively document land records are being undertaken with the help of GIS and drones. However, only 13.87% of these surveys have been completed.⁶⁸ Ideally, these efforts should have preceded the computerization of land records. While computerization is a desk job, modernization is an empirical exercise in-

⁶⁷ ET Legal World, *The Economic Times, Hyderabad High Court wonders what is wrong in digitization of land records?*, 2020, available at: <https://legal.economicstimes.indiatimes.com/news/industry/hyderabad-high-court-wonders-what-is-wrong-in-digitisation-of-land-records/79577715> [last accessed 20.10.2023].

⁶⁸ Ministry of Rural Development, Government of India *Survey and Re-survey Records 2023*, 2023, available at: <https://dilrmp.gov.in/faces/rptstatewisephysical/rpt-surveyAgency.xhtml> [last accessed 01.02.2024].

volving revenue department staff, surveyors, and data entry operators, making it consultative in nature. State land survey laws mandate that the villagers be informed of the survey.⁶⁹ Therefore, the stakeholders have a choice of whether to participate and raise their objections while the survey is carried out, which reduces the room for erroneous entries. There is also a space for review of the administrative decision. However, even this exercise could be tainted by existing hostile social relations, which prevent the marginalized from seeking redressals.⁷⁰

3.1.5. OTHER PENDING TASKS.

76.09% of the properties registered have been integrated with land records, 75.64% of cadastral maps have been digitized, 64.93% of textual and spatial data have been integrated⁷¹, and 24 states have rolled out the ULPIN (Unique Land Parcel Identification Number).⁷² The government seems to be keen to link the e-courts with land and other official portals to facilitate speedy justice. The Andhra Pradesh *Meebhoomi* (the state's land portal) website uploaded the details of court cases pertaining to land disputes in twelve districts.⁷³ Of the 45 cases that were filed between 2008 and 2018, all, except for two cases, were still pending before the courts. A press release of the Department of Land Resources, Ministry of Rural Development, Government of India states that e-courts would be linked with Land Records and Registration database to make authentic first-hand data available to the courts to facilitate speedy disposal of cases.⁷⁴

⁶⁹ Section 5, The Andhra Pradesh Survey and Boundaries Act, 1923 [India].

⁷⁰ The Hindu Bureau, Human Rights Forum AP & TS, *Andhra Pradesh: HRF urges Anakapalli District Collector to get enjoyment survey done to ascertain cultivation by Adivasis at Kothaveedhi*, 2023, available at: <https://www.thehindu.com/news/cities/Visakhapatnam/andhra-pradesh-hrf-urges-anakapalli-district-collector-to-get-enjoyment-survey-done-to-ascertain-cultivation-by-adivasis-at-kothaveedhi/article66656709.ece> [last accessed 21.10.2023]

⁷¹ Press Information Bureau, Government of India, *Government of India Year-End Review -2022: Department of Land Resources (M/o Rural Development)*, 2021, available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1989671> [last accessed 16.10.2023].

⁷² *Ibid.*

⁷³ Press Information Bureau, *supra* note 71.

⁷⁴ *Ibid.*

3.1.6. LAPSES IN MODERNIZATION AND DIGITIZATION, THE DIGITAL DIVIDE, AND THE CORPORATIZATION PUSH ARE DIVIDED INTO FOUR LAPSES.

Lack of consent: the revenue department is responsible for computerizing land records. This department, with help from outsourced technical staff, enters and uploads data pertaining to land titles and record of rights into official web portals. The title deed owners are, however, not personally informed, nor is there a general notification issued to inform them that their land rights are being digitized. It is therefore not *per se* participatory in nature.⁷⁵

Poor grievance redressal: typographical errors creep into the records. The errors might be related to the name of the title deed owner, survey numbers, extent of the land, or any other related issue. The grievance redressal mechanisms and procedures, which were earlier carried out at the village level, are now centralized at the district level. Small and marginal farmers, have to go through several trials to get their records corrected. Title deed owners are often at the mercy of the revenue officers and the outsourced technical staff leading to an increase in corruption. In some states like Andhra Pradesh title deed owners can raise their objections only through *Meeseva*, an e-governance portal with very little impact on the ground.⁷⁶

Lack of technical expertise: the State governments are organizing orientation programmes for the staff to digitize and modernize land records. The master trainers who attend the sessions delegate the work to the outsourcing staff who may not have the necessary expertise.⁷⁷ Even if the staff have the knowhow, they may be limited by the devices and by poor internet connectivity, especially in remote rural areas.⁷⁸

Unreasonable Deadlines: there is pressure on the ground level staff to meet the deadlines. A village revenue officer (VRO) allegedly com-

⁷⁵ D. Rabha, "Integration of Bhoomi and Kaveri: A case study on Land Records Management System in Karnataka" in S. Mishra, A. Ahmed, D. Rabha (eds), *Best Practices Study On Land Resources Management In India*, 2013, p. 18.

⁷⁶ The Hindu Bureau, *supra* note 70.

⁷⁷ Rabha, *supra* note 75.

⁷⁸ *Ibid.*

mitted suicide as he could not handle the work pressure.⁷⁹ The said officer was working on modernizing land records. As the revenue department staff are under constant pressure to meet their time-bound targets, they are unable to consult the stakeholders, settle long pending land rights, resurvey disputed lands, and address many issues which are complex in nature.⁸⁰ Consequently, the digital land records are turning out to be a poorer replica of the already poorly maintained manual records.

3.1.7. DIGITAL DIVIDE.

According to Curtis Kularski 'the digital divide is composed of a skill gap and a gap of physical access to Information Technology (IT) and the two gaps often contribute to each other in circular causation'.⁸¹ The Supreme Court of India recognized the right to internet access as an integral part of the freedom of speech and expression.⁸² However, the digital divide continues to persist, especially among marginalized communities.⁸³ The *Adivasis*, the *Dalits*, and women have to overcome this divide to get their land rights recognized. According to the 2011 census, the Scheduled Tribes are 8.6% of the total population of India⁸⁴ with

⁷⁹ ABN Andhra Jyoti, పని ఒత్తిడితో వీఆర్‌డీ ఆత్మహత్య!, 2022, available at: <https://www.andhrayjothy.com/2022/andhra-pradesh/vro-committed-suicide-due-to-work-pressure-969279.html> [last accessed 24.10.2023].

⁸⁰ S. Chowdhary, *Without Addressing Legacy Issues, Can Digitising Land Records in India Be a Game Changer?*, The Wire, 2021, available at: <https://thewire.in/rights/land-digitization-ulpin-land-records-legacy-digital-india> [last accessed 25.10.2023].

⁸¹ C.M. Kularski and S. Moller, "The Digital Divide as a continuation of traditional systems of inequality", *University of North Carolina Journal*, 2012, p. 51, available at: <https://papers.cmkularski.net/documents/20121214-2699.pdf> [last accessed 27.10.2023].

⁸² *Anuradha Bhasin v. Union of India*, WP (C) No. 1031 of 2019, 10 January 2020, New Delhi.

⁸³ E. Mukherjee, O. Mazar, R. Aggarwal, R. Kumar, Digital Empowerment Foundation, *Exclusion from Digital Infrastructure and Access*, 2016, p. 6, available at: https://definidia.org/wp-content/uploads/2017/09/India-Exclusive-Report_DEF-Chapter.pdf [last accessed 27.10.2023].

⁸⁴ Ministry of Tribal Affairs, Government of India), *Honouring and Empowering the Adivasis of India*, 2022, available at: <https://pib.gov.in/FeaturesDeatils.aspx?NoteId=151222&ModuleId%20=%202> [last accessed 28.10.2023].

a majority of them living in the forests.⁸⁵ Though the Scheduled Tribes and other Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA Act) was passed to recognize the rights of the *Adivasis* and traditional forest dwellers over forest lands and forest produce, the exercise of actually recognizing their rights is not yet complete.

A 2019 report of Tata Institute of Social Sciences, Mumbai states that only 14.67% of potential forest land has been recognized under the FRA Act.⁸⁶ Non-enforcement of this enactment gets in the way of improvement of land governance.⁸⁷ There are other reports that indicate how people with vested interests use the digitization drive to usurp land from the *Dalits* and the *Adivasis*.⁸⁸ Women too are discriminated against when it comes to their claim to land and property. While the Hindu Succession (Amendment) Act, 2005 guarantees equal rights to a daughter over her father's property, titles registered under women remain low.^{89,90}

⁸⁵ S. Agarwal, Environmental Pollution, *Forest Tribes in India: History and Classification in Forestry*, 2010, available at: <https://www.environmentalpollution.in/forestry/forest-tribes/forest-tribes-in-india-history-and-classification-forestry/4820> [last accessed 29.10.2023].

⁸⁶ U. K. Sahoo, G. Sahu, Tata Institute of Social Sciences, *Trends and Directions in The Implementation of The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 After Twelve Years*, 2019, p. 7, available at: <https://slic.org.in/uploads/2020/05-May/22-Fri/fra-tiss-report.pdf> [last accessed 30.10.2023].

⁸⁷ The World Bank, International Bank for Reconstruction and Development, *India – Land Governance Assessment, National Synthesis Report*, 2015, p. 50, available at: <https://documents1.worldbank.org/curated/en/643361468038336423/pdf/AUS18306-WP-PUBLIC-P153485.pdf> [last accessed 29.10.2023].

⁸⁸ *Bhartiya*, *supra* note 66; See also The Vidarbha Gazette, *Mutation of Land Records Suspended in Jiwti Block*, 2023, available at: <https://thevidarbhagazette.com/mutation-of-land-records-suspended-in-jiwti-block/> [last accessed 30.10.2023].

⁸⁹ H. G. A. Valera, T. Yamano, R. Puskur, P. C. Veetil, I. Gupta, P. Ricarte, R. R. Mohan, Asian Development Bank Working Paper Series, *Women's Land Title Ownership and Empowerment: Evidence from India*, 2018, p. 4, available at: <https://www.adb.org/sites/default/files/publication/453696/ewp-559-women-land-title-ownership-empowerment.pdf> [last accessed 05.11.2023]; See Also S. Dave, P. Choudhury, Land Portal, *Women's Land Rights in India and the Sustainable Development Goals (SDGs)*, 2017, available at: <https://landportal.org/node/62786> [last accessed 07.11.2023].

⁹⁰ P. Ghosh, Gaon Connection, *Digital Divide: Adivasi Women are Most Disadvantaged*, 2023, available at: <https://www.gaonconnection.com/lead-stories/digital-divide-adivasi-women-internet-penetration-india-tribes-jharkhand-odisha-disparity-access-technology-51767> [last accessed 07.11.2023].

3.1.8. CORPORATIZATION OF LAND.

While transnational companies cannot directly purchase land in India, land that they need to establish industrial units, to carry out trade and commerce, or to take up corporate farming and other forms of private enterprise, a company or its subsidiary which is registered under the Companies Act, 2013 can do so. Foreign players are increasingly taking this route. Central and various state governments are acquiring large tracts of land to establish Special Economic Zones to invite such investments. Using digitization and other modernization measures to their advantage, governments are creating land banks by dispossessing marginalized people. The three farm laws which were repealed in 2021, following significant farmer protests, sought to further corporate farming.⁹¹

IV. SOUTH AFRICA

Land reform was one of the core issues addressed by the anti-apartheid movement in South Africa. By enacting the Natives Land Act, 1913 the apartheid government had forcibly removed thousands of black families from their lands.⁹² African land ownership was reduced to 7%, though it later increased to 13% through other reformative legislation. The Natives Land Act was repealed when the Abolition of Racially Based Land Measures Act, 1991 came into force. While the anti-apartheid government formed in 1994 stated that 'land reform in South Africa is a moral, social and economic imperative'⁹³ the reforms continue to be in a state of disarray.⁹⁴ Even the working papers of the World Bank have reflected upon the confusion prevailing in the land reforms initiatives tak-

⁹¹ V. Jawandiyaa, A. Dandekar, *The Wire, Three Farm Bills and India's Rural Economy*, 2020, available at: <https://thewire.in/agriculture/farm-bills-indias-rural-issues> [last accessed 08.11.2023].

⁹² Republic of South Africa Land Reform, 2016 (South Africa).

⁹³ *Ibid.*

⁹⁴ C. Rusenga, "Rethinking Land Reform and Its Contribution to Livelihoods in South Africa", *Africa Review*, 2022, Volume 14, p. 125, available at: https://brill.com/view/journals/bafr/14/2/article-p125_1.xml?language=en&ebody=citedby-117281 [last accessed 15.11.2023].

en up by South Africa.⁹⁵ Black people make up around 81% of the total population, coloured people 9%, whites 8% and Indians, 3%.⁹⁶ However, 23 years after the country attained democracy, 72% of the country's arable land still belongs to white people⁹⁷ with Blacks owning only 4%.⁹⁸ While some (like the African National Congress) attribute the disarray to Constitutional provisions, others opine that it is a lack of political will that has caused the proposed reforms to fail.⁹⁹

4.1. THE GOVERNMENT'S EFFORTS, SHORTCOMINGS, AND NEW DEVELOPMENTS

Section 25 of the Constitution of the Republic of South Africa also envisages the redistribution of land to meet the nation's commitment to land reform and commits to bringing about equitable access to all South Africans' natural resources (Section 25(3)). The state is also obligated to take legislative and other measures to foster conditions, which enable citizens to gain equitable access to land (Section 25(5)). It speaks of protecting the rights of communities whose tenure of land is legally insecure (Section 25(6)). Section 25(7) speaks of the restitution of land and equitable redress to those who were dispossessed of property after

⁹⁵ R. J. E. Van den Brink, H. Binswanger, J. W. Bruce, G. Thomas, F. Byamugisha, *The World Bank Working Paper 71, Consensus, Confusion, and Controversy – Selected Land Reform Issues from Sub-Saharan Africa*, 2005, p. 5, available at: <https://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-6440-6> [last accessed 25.11.2023].

⁹⁶ M. C. Alexander, *South Africa Gateway, South Africa's Population*, 2018, available at: <https://southafrica-info.com/people/south-africa-population/> [last accessed 16.11.2023].

⁹⁷ Rural Development and Land Reform Department, *Republic of South Africa Land Audit Report - Phase II: Private Land Ownership by Race, Gender and Nationality*, 2017, p. 2, available at: https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf [last accessed 17.11.2023].

⁹⁸ J. L. Gibson, "Land Redistribution/Restitution in South Africa: A Model of Multiple Values, as the Past Meets the Present", *British Journal of Political Science*, 2010, Volume 40, p. 135, available at: <https://www.cambridge.org/core/journals/british-journal-of-political-science/article/abs/land-redistribution-restitution-in-south-africa-a-model-of-multiple-values-as-the-past-meets-the-present/33ADAA371D0129B40A8DFD1B4ACD3A8C> [last accessed 20.11.2023].

⁹⁹ T. Ngcukaitobi, *Land Matters: South Africa's Failed Land Reform and the Road Ahead*, Penguin Books, 2021, p. 44.

19 June 1913 because of racially discriminatory laws and practices. To sum it up, it speaks of a commitment to expropriation for the purpose of land restitution; land redistribution, and for effective land tenure reforms. The South African government did initiate land reforms to address the issue of tenure insecurity and to formalize communal land tenures.¹⁰⁰ However, many of these efforts turned out to be ill conceived and are yet to address the dispossessed.

The South African Parliament enacted the Provision of Land and Assistance Act No. 126 of 1993 to redistribute land. The Act's objective was to empower the State to acquire and designate State land under its control, and to develop such land for the purposes of small-scale farming, residential, public, community, business, or similar purposes.¹⁰¹ However, the Act did not clearly identify the beneficiaries and the targeted land. A coordinated effort of various departments was not possible as the enactment placed the onus of redistribution solely on the Department of Rural Development and Land Reform (DRDLR). Moreover, the Prohibition Subdivision of Agricultural Land Act No. 70 of 1970, an apartheid era law that is antithetical to land reforms, remained enforceable, thwarting this act.

The Restitution of Land Rights Act No. 22 of 1994 sought to restore justice to those who were dispossessed of land after 19 June 1913. Based upon this law the government adopted the 'willing buyer, willing seller' approach to acquire and redistribute land and to negotiate compensation for expropriation.¹⁰² However, the enactment placed the onus on the claimants to prove their pre-existing title to the land. The Native Land Act, 1913 and the Prohibition Subdivision of Agricultural Land Act No. 70 of 1970 extinguished whatever rights the claimants had vis-à-vis the

¹⁰⁰ H. Monstert, "South Africa's Communal Land Rights Act: A Plea for Restraint in Reform", *Journal of African Law*, 2010, Volume 54, p. 306, available at: <http://www.jstor.org/stable/41149814> [last accessed 28.11.2023].

¹⁰¹ Advisory Panel on Land Reform and Agriculture, Republic of South Africa, *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture*, 2019, available at: https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_1.pdf [last accessed 29.10.2023].

¹⁰² B. Cousins, "Land reform in South Africa is failing. Can it be saved?" *Transformation: Critical Perspectives on Southern Africa*, 2016, Volume 92, p. 139, available at: <https://doi.org/10.1353/trn.2016.0030> [last accessed 30.10.2023].

land. Therefore, they were hardly able to prove their entitlements. This too did not yield the expected results.

The Land Titles Adjustment Act No.111 of 1993 enabled administrative measures to update title deeds. This enactment was hardly of any use to address the issue of racial discrimination in land distribution. The cadastral system formed during the apartheid regime continued to exclude much of the population from the property law legal system. Thus, even if the deeds registries are digitized, things will remain the same and racial discrimination will persist.

The Ingonyama Trust Act 3 of 1994, passed just before the democratic transition in 1994, established the Ingonyama trust and vested ownership of 2.8 million hectares of communal land. The trust faced charges of converting informal land rights into long-term leases and of perpetrating gender inequality. In the *Council for the Advancement of the South African Constitution and others v. Ingonyama Trust and others*, the Pietermaritzburg High Court rightly declared that the respondents acted unlawfully and in violation of the Constitution and directed the trust to refund the pooled money. It further declared that all lessees were true and beneficial owners under Zulu customary law or the Interim Protection of Land Rights Act 31 of 1996.¹⁰³

The Communal Property Association Act No. 28 of 1996 created Communal Property Associations to hold and jointly manage land. The Constitutional Court of South Africa in *Bakgatla-Ba-Kgafela Communal Property Association v. Bakgatla-Ba-Kgafela Tribal Authority and others* reaffirmed the democratization of the forms of ownership and governance of land.¹⁰⁴

The Land Reform (Land Tenant) Act 3 of 1996 sought to secure tenure, guarantee the rights of current and former labour tenants, prohibit illegal evictions, and enable full ownership of land. However, the failure of the Government to implement the law is evident from the Land Claims Court's finding in *Mwelase and others v. Director-General for the Department of Land Reform and others*, where despite the appointment of a special master, the claimants suffered the frustration of institutional

¹⁰³ *Council for the Advancement of the South African Constitution and Others v. Ingonyama Trust and Others* (12745/2018P) [2021] ZAKZPHC 42, South Africa.

¹⁰⁴ *Bakgatla-Ba-Kgafela Communal Property Association v. Bakgatla-Ba-Kgafela Tribal Authority and others* [2015] ZACC 25, South Africa.

failure.¹⁰⁵ The Court has had to often come up with remedial measures on account of institutional failure.¹⁰⁶

Between 1994 and 1999 the government provided poor households with Settlement and Land Acquisition Grants (SLAG) of R16000 per household to purchase land.¹⁰⁷ The amount was too small to purchase land individually. People pooled their money to purchase land which led to questions popping up around inheritance. The government replaced SLAG with the Land Redistribution for Agricultural Development (LRAD) programme in 2001. According to this programme, the beneficiaries were supposed to contribute to the cost of land, thereby excluding people without means (landless poor).¹⁰⁸ The LRAD programme was yet again replaced with the Proactive Land Acquisition Strategy (PLAS) in 2006.¹⁰⁹ Under this programme the government would buy farms in the open market and allocate them to selected beneficiaries based on leasehold tenure. This was not an equitable solution as the farmers would be tied down to the land for decades without gaining title.

The Communal Land Rights Act, 2004 is yet another measure. While Section 25(6) provides that “a person or community, whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices, is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress”,¹¹⁰ the government, by introducing this legislation, unwittingly gave a fresh lease of life to an apartheid created by the authorities. The Constitutional Court of South Africa in the *Tongoane and others v. Ministry of Agricul-*

¹⁰⁵ *Mwelase and others v. Director-General for the Department of Land Reform and others* (107/2013) [2016] ZALCC 23, South Africa; See Also D. Steyn, M. Mafata, *Mail & Guardian*, *Signs of hope for apartheid labour tenants after long wait for land rights*, 2023, available at: <https://mg.co.za/news/2023-04-16-signs-of-hope-for-apartheid-labour-tenants-after-long-wait-for-land-rights/> [last accessed 01.12.2023].

¹⁰⁶ *Linkside & Others v. Minister for Basic Education & Others* [2015] ZAECGHC 36; *Madzodzo & Others v. Minister of Basic Education & Others* [2014] ZAECMHC 5, 2014 (3) SA 441; H. Taylor, “Forcing the Court’s Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation”, *Constitutional Court Review*, 2019, Vol 9, p. 249, available at: <https://doi.org/10.2989/CCR.2019.0010> [last accessed 07.07.2024].

¹⁰⁷ Rusenga, *supra* note 94, p.128.

¹⁰⁸ *Ibid.*

¹⁰⁹ Rusenga, *supra* note 94, p. 130.

¹¹⁰ Section 25 (6) of the Constitution of the Republic of South Africa, 1996.

ture and Land Affairs and others declared the Act as unconstitutional in its entirety, prompting the government to repeal the law.^{111, 112}

According to the 2017 Land Audit report, 94% of the land in South Africa is registered in the Deeds office (DO). However, the registration status of a property is reflective neither of the people residing on it, nor of their rights. Informal settlements abound, comprising mainly black South Africans.¹¹³ The government has been attempting to renew the Interim Protection of Informal Land Rights Act, 1996, to protect poor occupiers from eviction.¹¹⁴ Thus, an ambiguity prevails about the title, possession, and occupancy of the registered lands, which most impacts the livelihoods of the landless poor. The South African Constitution too also guaranteed housing rights, which were, however, actualized with little success.¹¹⁵ 50% of the public land or land held by the government is identified on ground and mapped. But 30% of the lands on which traditional or rural households reside has not been surveyed. Though the outer boundary of the communal land had been surveyed, and mapped, approximately 20 million land parcels were not surveyed by the time that South Africa's final LGAF report was submitted.^{116, 117}

While South Africa is unable to undo racial and gender discrimination in the ownership of land, there is trouble brewing on another

¹¹¹ *Tongoane and others v. Ministry of Agriculture and Land Affairs and others* Case CCT 100/09 [2010] ZACC 10, South Africa.

¹¹² R. Law, The Law, Race and Gender Unit at the University of Cape Town, *Press Statement on the Constitutional Court judgment on the Communal Land Rights Act*, 2010, available at: https://open.uct.ac.za/bitstream/item/2219/CLS_Press_Release_CLRA_11052010.pdf?sequence=1 [last accessed 03.12.2023].

¹¹³ Socio-Economic Rights Institute of South Africa (SERI), *Informal Settlements and Human Rights in South Africa*, 2018, p. 14, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Housing/InformalSettlements/SERI.pdf> [last accessed 04.12.2023].

¹¹⁴ F. Kitchin, W. Ovens, The World Bank Working Paper Series, *Land Governance in South Africa: Implementing the Land Governance Assessment Framework*, 2013, volume 1, p. 9, available at: <https://thedocs.worldbank.org/en/doc/a91b90185037e5f11e9f99a989ac11dd-0050062013/original/LGAF-Manual-Oct-2013.pdf> [last accessed 06.12.2023].

¹¹⁵ Staff Reports, Borgen Magazine, *Informal Settlements in Africa*, 2019, available at: <https://www.borgenmagazine.com/informal-settlements-in-south-africa/> [last accessed 07.12.2023].

¹¹⁶ Kitchin and Ovens, *supra* note 114, p. 10.

¹¹⁷ *Ibid.*, p. 22.

count. The Department of Rural Development and Land Reforms introduced the Regulation of Agricultural Land Holdings Bill, 2017 allowing foreigners to take land on long-term lease ranging between 30 and 50 years.¹¹⁸ The bill is yet to be passed. However, the monitoring through LGAF notes that foreign nationals are buying and leasing land in South Africa making it another concern that needs to be addressed.¹¹⁹

In 2020, the South African Parliament also discussed the possibility of amending Section 25 of the South African Constitution and conducted public hearings. The two important questions debated were the hindrance caused by the existing provision under section 25 to expropriate land without compensation and secondly, the changes to be made under section 25 to effectively implement the anti-apartheid government's mandate of restoring communal lands.¹²⁰ After much debate, it was decided that section 25 had to be amended and sufficient compensation had to be given to those displaced. The latter received heavy criticism. However, the amendment did not come through and scholars say that it was a blessing in disguise to ensure that the protectionist mechanism under section 25 remained intact to establish the rule of law and restore historical injustice done to the indigenous communities.¹²¹

The National Assembly passed the much-awaited Expropriation Bill in September 2022, which permits and lays down the procedures to expropriate property in the public interest. A significant move towards

¹¹⁸ Department Of Rural Development and Land Reform, *Government Gazette Notice 229 of 2017 on Regulation of Agricultural Land Holdings Bill, 2017 and the Explanatory Memorandum for Public Comment, 2017*, available at: https://www.gov.za/sites/default/files/gcis_document/201703/40697gen229.pdf [last accessed 10.12.2023].

¹¹⁹ W. Ovens, J. D. Plessis, M. Napier & F. Kitchin, *Synthesis Report: Issues and Options for Improved Land Sector Governance in South Africa, Application of the Land Governance Framework*, 2013, p. 25, 36, available at: <https://thedocs.worldbank.org/en/doc/a91b90185037e5f11e9f99a989ac11dd-0050062013/related/South-Africa-Synthesis.pdf> [last accessed 01.07.2024].

¹²⁰ Parliament of the Republic of South Africa, *Ad-Hoc Committee on Amending Section 25 of the Constitution*, (2020), available at <https://www.parliament.gov.za/project-event-details/285> [last accessed 01.07.2024].

¹²¹ Statement Issued by Dr. A. P. Lotriet, *Failure to pass the Section 25 Amendment Bill a victory for South Africa's constitutional order*, 2021, available at: <https://www.da.org.za/2021/12/failure-to-pass-the-section-25-amendment-bill-a-victory-for-south-africas-constitutional-order> [last accessed 01.07.2024].

land redistribution¹²², the bill awaits the National Council of Province's approval.¹²³ In another interesting move, the South African government in September 2023 promulgated the Land Courts Act which gave the highest priority to land restitution.¹²⁴ Its primary goal was to strengthen section 25 of the South African Constitution, mandating the state to take up reasonable measures within its means to facilitate non-discriminatory access to land to its citizens. This court has a special mandate to expedite dispute resolution and also replace the land claims court and develop a robust land jurisprudence to address historic injustices.

4.2. TOWARDS MODERNIZATION AND DIGITIZATION: PROGRESSIVE LAND GOVERNANCE REFORMS

Even as political and legal discussions around land (re)distribution evolve, South Africa is bringing in land governance reforms. The Land Survey Act, 1997, the Spatial Planning and Land Use Act, 2013 and the Electronics Deeds Registration Act, 2019 were enacted to digitize and modernize land records. These are remarkable because, unlike in India, they are not merely administrative in nature. Rather, statutory entitlements and obligations emerge out of these formal pieces of legislation which make these processes justiciable.

Under the Land Survey Act, 1997, publication of notice is mandatory for original survey of land to which no title is issued (s 19), land represented by a wrong diagram (s 22), rectification of such diagrams (s 23), resurvey of block of land other than ownership and approval of general plan (s 25), resurvey of townships (s 26), and approval of superseding general plan (s 27). Various other provisions also speak of personal notice, audience, and representation. The Spatial Planning and Land Use Act, 2013 speaks about spatial justice and inclusivity. Under this Act, concerned authorities have to publish a notice in the Gazette and media; invite written representations from the public; and consid-

¹²² Republic of South Africa *National Assembly Passes Two Bills* in 2022.

¹²³ Republic of South Africa *Expropriation Bill*, 2020.

¹²⁴ T. Adams, *SA's New Land Court Act – paving the way for settling land disputes*, 2024, available at: <https://www.phinc.co.za/OurInsights/ArticleDetail.aspx?Title=SAs-New-Land-Court-Act-paving-the-way-for-settling-land-disputes> [last accessed 02.07.2024].

er all their representations for provincial support and monitoring (s10). Inbuilt safeguards are explicit in section 2 of the Electronic Deeds Registration Act, 2019. This provision enables the development, establishment, and maintenance of the electronic deeds registration system and facilitates a smooth transition from the offline deeds registration system to an online one (s6). All three pieces of legislation have provisions through which control over administrative discretion can be exercised. The stakeholders must be informed, and their representations must be heard at every juncture. This leaves very little room for errors to creep into the records and reduces the scope for disputes.¹²⁵

The South African government, according to the World Bank, is doing a commendable job of maintaining land records with 90% of the ownership information in the registry being accurate, up to date, and readily identifiable on maps.¹²⁶ The report states that “the country has demonstrated active use of digital solutions for rapid delivery such as the use of GIS and digital boundaries of municipal boundaries, and has created innovative land governance systems which are accurate, reliable, highly sophisticated, and easily comparable to those of developed countries.”

V. COMPARISON

While India gained independence in 1947, apartheid in South Africa formally came to an end only in 1994. Comparing these countries that are essentially four generations apart would be unfair on any count. For instance, land reform is a failed and bygone project in India.¹²⁷ Popular peoples’ movements demanded such reforms until the 1980s, but not anymore. People do bring up development-induced displacement, but

¹²⁵ *Ibid.*

¹²⁶ Kitchin and Oven, *supra* note 114, p. 21.

¹²⁷ A. Victor, Social and Political Research Foundation, India’s Land Reforms: Exemplifying the gap between principle and realisation, 2022, p. 9, available at: https://sprf.in/wp-content/uploads/2022/08/SPRF-2022_DP_Land-Reforms-2-1.pdf [last accessed 02.01.2024].

not land reforms *per se*.¹²⁸ In contrast, land reforms in South Africa continue to be politically relevant.¹²⁹ In both India and South Africa, the theoretical grounding of ACT further helps understand these jurisdictions better because of the interplay of law, policy, and weak institutional implementation. The systems designed to protect the marginalized further only displace them. Despite some fundamental differences there are four lessons that digitization and modernization initiatives in these countries offer:

Digitization as a governance tool: Digitization and modernization are only tools to ensure the transparency of land records: they do not change land relations. However, these processes can be useful for ideation, policy making, opinion building, and decision-making. For instance, the 2017 land audit report speaks volumes about the persistence of racial, class, and gender discrimination in land holdings in the Republic of South Africa.¹³⁰ Easier access to land records may aid people in their struggle for just land laws and policies. But these efforts can also prove to be counterproductive if factors such as the digital divide are not considered.¹³¹

Right to information and consent: a flaw in the digitization process in India is that stakeholders cannot claim their information as a matter of right. Vital information has been recorded since the 1980s without providing basic information. People can raise objections only when they come to know that their digital records have discrepancies.¹³² If stakeholders had prior information as a matter of right, the way they do in South Africa, they would not have been subject to duress to get their digital records rectified.¹³³ In India, the basic principles of natural jus-

¹²⁸ H. Mander, "Reviving Land Reforms?", *Economic and Political Weekly*, 2013, Volume 38, Issue (45), p. 15, available at: <http://www.jstor.org/stable/2352874> [last accessed 05.01.2024]

¹²⁹ Kitchin and Oven, *supra* note 114, p. 24.

¹³⁰ Socio-Economic Rights Institute of South Africa, *supra* note 113, p. 18.

¹³¹ *Ibid.*

¹³² S. Chaturvedi, India Spend, *Land Reforms Fail, 5% Of India's Farmers Control 32% Land*, 2016, available at: <https://www.indiaspend.com/land-reforms-fail-5-of-indias-farmers-control-32-land-31897> [last visited 16.12.2023].

¹³³ Kitchin and Oven, *supra* note 114, p. 27.

tice and procedural safeguards were either not followed or were absent in the case of digitization.¹³⁴

Importance of participatory digitization processes: India is way ahead in terms of collecting and uploading data in land portals, synchronizing land records maintained by different departments, and giving live updates about the progress on the DILRMP websites.¹³⁵ However, this work seems to have been carried out hastily and without due consultation with key stakeholders. The states were understaffed and lacked technical skill and infrastructure. The exercise could have been more democratic and consultative in nature. Similarly, the transition from the traditional deeds registration system to the Torrens system should not have been done without seeking public opinion, for it is not a department's internal affair.¹³⁶ It is of public importance and people must accept such a transition. Even if their progress may not be visibly spectacular as it is in India, South Africa's statutory architecture of digitization and modernization of land records makes the entire exercise far more participatory and transparent.¹³⁷

Relevance of constitutional mandates: if means are as important as ends, then one ought to be particular about the processes adopted to digitize and modernize records. To facilitate digitization and modernization of land records, South Africa passed distinct enactments like the Spatial Planning and Land Use Act, 2013 and the Electronics Deeds Registration Act, 2019. Though digitization and modernization of land records in South Africa may not match the pace and scale in India, they have laws which regulate the acts of the administration. The authorities are performing statutory obligations and are bound by the statutory limitations, which reduce the scope for misuse of their power.¹³⁸

In India, the entire DILRMP is only a government programme with no specific laws to guide it. The government seems to be less concerned about the initiatives' impact on the peoples' right to life, livelihood, shelter, food, and work. The engaged administrative agencies perform their functions within the scope of the general revenue laws and are subject

¹³⁴ ET Legal World, *supra* note 67.

¹³⁵ PRS Legislative Research, *supra* note 62.

¹³⁶ Deiningner, *supra* note 50, p. 42.

¹³⁷ *Ibid.*

¹³⁸ Kitchin and Oven, *supra* note 114, p. 27.

only to the rules under administrative law.¹³⁹ People too cannot claim a specific relief under a specific enactment, and this greatly restricts the scope for judicial remedy. While the programme mechanically speaks of mirror principle, curtain principles, and title insurance, there are hardly any reports available about them in the public domain. Fixing the quantum of compensation should not be left to the discretion of the courts or the dispute resolution fora. It should rather be a substantive relief provided by a formal legislation.¹⁴⁰

CONCLUSIONS

Land, being the piston of capital generation, is often out of reach of marginalized communities.¹⁴¹ Even when available, these communities are precariously placed since they often do not have the necessary titles and records over their lands. Processes such as record digitization and modernization that aim to bridge this gap, often seem to be widening it. However, opposing these processes may be fruitless. In future, what instead can be emphasized is the necessity of informed consent, transparency, and the participation of different stakeholders especially the marginalized, and the provision of adequate safeguards to protect their interests. The present study attempts to compare the evolution of these processes in two developing countries, India and South Africa, highlighting their respective attitudes to land, while also evaluating their approaches to digitization and modernization. The study by employing ACT highlights how institutional failure, digital divide, and the absence of constitutionally mandated safeguards can serve to further dispossess the already marginalized.

In future, before embarking on modernizing programmes, it is crucial to first secure land titles, protect tenurial rights, and implement comprehensive land reforms that recognize and affirm the land rights of marginalized communities. Such initiatives need to shift from the traditional top-down approaches to more inclusive bottom-up strate-

¹³⁹ PRS Legislative Research, *supra* note 62.

¹⁴⁰ *Ibid.*

¹⁴¹ Lattore, *supra* note 7, p. 1565.

gies, honouring grassroots democracy. Furthermore, stakeholder participation and transparency are key: the digitization and modernization processes should be conducted openly, with the active participation of title deed owners, tenants, and other relevant parties. Lastly, there must be robust, transparent, and user-friendly review processes that allow for thorough oversight and community involvement every step of the way. As the world grapples with emerging technologies such as Artificial Intelligence, ensuring that governance processes incorporating these technologies remain inclusive and accountable becomes ever more necessary and urgent.