

THE FUNDAMENTAL FEATURES AND JUSTIFICATIONS FOR ADVERSE POSSESSION***Abstract**

The doctrine of adverse possession enables the transfer of legal title to property from the owner to the adverse possessor upon the fulfillment of certain conditions by the later, one of which is that the property should have been occupied without the owner's consent. The justifications commonly invoked in support of adverse possession same with statutes of limitations generally include the difficulty of proving stale claims, quieting titles to property, punishment to title owners who sleep on their rights, and the system of adverse possession focuses on the possessor, and in particular on the reliance interests that the possessor may have developed through longstanding possession of the property. The article seeks to answer the question whether the fundamental features can still be justified in the land registration system. The article adopts the doctrinal methods and finds that the traditional features though relevant and justifiable to unregistered land are no longer justifiable with respect to registered land as allowing its operation defeats the concept of registration. The work recommends restrictive judicial interpretation of the adverse possession provisions by applying restitution principles as the best way of protecting the interest of registered land owners.

Keywords: Adverse Possession, Land Registration, Security of Title, Reform, Unjust Enrichment and Restitution Standards

1. Introduction

It is settled law that, once the limitation period has run its course, both the owner's right to sue and his title are extinguished by operation of law. A more modern function has been that land which is disused or neglected by an owner may be converted into another's property if continual use is made.¹ Adverse possession makes it possible for the trespasser to extinguish the interest of the real owner of a land if the trespasser possesses the land continuously over period of time specified by Limitation Law. The doctrine of adverse possession is recognized in most jurisdictions. The doctrine enables the transfer of legal title to property upon the fulfillment of certain conditions, one of which is that the property should have been occupied without the owner's consent. If the person in adverse possession (also referred to as a 'squatter') continues to occupy the land, and the owner does not exercise his right to recover it by the end of a prescribed period, the owner's remedy as well as his title to the land is extinguished and the squatter becomes the new owner. The squatter's new possessory title cannot normally exceed, in extent or duration, that of the former owner.² Under the English Law, the common legal justification was that under the Limitation Act 1623, just like a cause of action in contract or tort had to be used within a time limit, so did an action to recover land. This promoted the finality of litigation and the certainty of claims.³ Time would start running when someone took exclusive possession of land, or part of it, and intended to possess it adversely to the interests of the current owner. Provided the common law requirements of 'possession' that was 'adverse' were fulfilled, after 12 years, the owner would cease to be able to assert a claim. Different rules are in place for the limitation periods of adverse possession in unregistered land and registered land.⁴ However, in the LRA 2002, adverse possession of registered land became much harder. The rule of adverse possession is merely a corollary to the general concept of the statute of limitations. Statutes of limitations are laws that limit the amount of time that a party has to bring a claim. For example, in many jurisdictions, tort actions that are based on negligence must be brought within 3 years from the date of the accrual of the cause of action (this is the date on which the event which is the basis for the lawsuit occurred). Actions that are brought after their periods of limitations have run must be dismissed by the court, no matter how meritorious their claims may be.⁵ The doctrine of adverse possession works in a similar manner. Each jurisdiction decides how long a property owner has, after a wrongful possessor enters his or her property, to bring an action to evict the wrongful possessor.⁶

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¹ LD Stimel and SR Roser, Adverse Possession - How to Acquire Land Without Buying It (2021) <<https://www.stimmel-law.com/en/articles/adverse-possession-how-acquire-land-without-buying-it>> accessed 27 January 2022.

² See The Law Reform Commission of Hong Kong Adverse Possession Sub-Committee Consultation Paper: December 2012 <<http://www.hkreform.gov.hk>> accessed 27 January 2022

³ Law Reform Committee, (1977) .21st Report, Final Report on Limitation of Actions Cmnd 6923, para 1.7.

⁴ See TW Merrill and HE Smith, Property: Principles and Policies. University Casebook Series (2017) (3rd ed.). St. Paul: Foundation Press.

⁵ Acquisition by Adverse Possession. (2021) <<https://lawshelf.com/coursewarecontentview/acquisition-by-adverse-possession/>> accessed 27 January 2022

⁶ *Ibid.*

2. The Fundamental Features and Justification for Adverse Possession

The first justification is one that is commonly invoked in support of statutes of limitations generally—the difficulty of proving stale claims. According to these proponents, as time passes, witnesses die, memories fade, and evidence gets lost or destroyed. Consequently, more resources must be expended in finding them and corroborating their veracity. The statute of limitations recognizes this problem by adopting a conclusive presumption against attempting to prove claims after a certain period of time has elapsed. A rule requiring prompt resolution of claims is thus efficient in that it helps to minimize the costs of litigation and trial. The lost evidence rationale probably carried greater force in the seventeenth century, when the English Parliament passed the first general statute limiting the right to recover possession of land,⁷ than it does today. In seventeenth-century there were no recording acts, and surveys were probably expensive or unreliable, or both. In modern time, in contrast, most jurisdictions, Lagos for instance, has statutes which provide for permanent public recordation of deeds to real property and which generally establish the primacy of the recorded deed over unrecorded interests.⁸

The second is ‘quieting titles’ to property. The proponents here include Walsh,⁹ Sternberg, and Callahan.¹⁰ The proponents state that the institution of adverse possession is designed to reduce the drag on the market by extinguishing most of the older claims. Ballantine,¹¹ states that the English statute, which limited the right to recover possession of land, expressly stated that the limitations period was enacted ‘for the quieting of men’s estates, and avoiding of suits.’ The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping on his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.¹² This will lead to injustice for the registered land but the injustice and unfairness of this justification will better be solved by the restriction of the operation of adverse possession by restitution in order to preserve the essence of registration.

The third reason is that it punishes title owners who ‘sleep on their rights.’ At first blush, this rationale seems to rest on a social policy favoring ‘active’ owners of property, who develop or exploit their land, rather than ‘passive’ owners. Such a policy, according to Callahan¹³ seems dubious, because it ignores the possibility that passive owners, such as land speculators, may perform a valuable social function by preserving the property for use by future generations.¹⁴ Moreover, the notion that a property owner must engage in active exploitation or development or risk losing his property runs counter to the principle that a property owner can do whatever he wants with his property, at least so long as he does not injure others. This principle is reflected in the traditional maxim of nuisance law; *sic utere tuo ut alienum non laedas*.¹⁵ Why not then let him ignore the property, if by ignoring it he does not injure others? The trend is that limitation statutes that bar owners from claiming their land from adverse possessors are contested as inconsistent with the constitutional provisions on property rights but applying the doctrine of restitution will be in tune with the constitutional provision and preserve the rationale behind registration.

The fourth justification for the system of adverse possession focuses on the possessor, and in particular on the reliance interests that the possessor may have developed through longstanding possession of the property. The proponents of this include R. Perry,¹⁶ and Holmes¹⁷. They argue that after a sufficient period of time has elapsed, the adverse possessor’s attachment to the property will be so strong that any attempt by the title owner to reassert dominion may lead to violence. They further argue in another form, that upon the personality theory of property rights, the adverse possessor may have developed an attachment to the property which is critical to his personal identity.

⁷ TW Merrill, Property Rules, Liability Rules and Adverse Possession (1985) 79 *NW. U.L.Rev.* 1122

⁸ M Nicol, The Fiction of Adverse Possession: an Alternative Conceptualisation of the Right to Control Land (being a thesis submitted for the degree of Doctor of Philosophy in Lancaster University 2017) See further RA Powell, The Law of Property (1949) 24(3) *Bender & Company* 287.

⁹ WF Walsh, Title by Adverse Possession, (1939) 16 *N.Y.U. L.Q. REV.* 532.

¹⁰ CC Callahan, Adverse Possession (Columbus, OH: Ohio State University Press 1961)

¹¹ HW Ballantine, Adverse Possession (1918) 32 *Harvard Law Review*, 135-159.

¹² See Michelman, Property, Utility, Fairness Comments on the Ethical Foundations of ‘Just Compensation’ Law, (1967). 80 *HARV. L. REV.* 1165.

¹³ JP Dawson, Unjust Enrichment: A Comparative Analysis (1951) *La. L. Rev.* 40-60.

¹⁴ See RO Williams, The Problem of Exhaustible Resources (1978) 7 *J. Legal Stud.* 165-185.

¹⁵ No one should use his land so as to injure that of another. See, eg., *Fontainebleau Hotel Corp. v Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959).

¹⁶ See OW James, *The Thought and Character* (Vanderbilt University Press 1996)

¹⁷ OW Holmes, *The Path of the Law* (Harvard Law Review 1897)

Callahan¹⁸ made the best effort at a systematic restatement of the policies of adverse possession, although some have argued that even here the treatment is highly discursive and unduly dismissive of certain points of view¹⁹. The first justification is one that is commonly invoked in support of statutes of limitations generally—the difficulty of proving stale claims. According to these proponents, as time passes, witnesses die, memories fade, and evidence gets lost or destroyed. The statute of limitations recognizes this problem by adopting a conclusive presumption against attempting to prove claims after a certain period of time has elapsed. The concern about lost evidence is commonsensical. As the quality and quantity of evidentiary material deteriorates over time, the process of fact-gathering and proof becomes more difficult. Surrogate witnesses and documents generally are not as accessible or as reliable as originals; consequently, more resources must be expended in finding them and corroborating their veracity. A rule requiring prompt resolution of claims is thus efficient in that it helps to minimize the costs of litigation and trial. There is also a fairness concern underlying the lost evidence rationale. Requiring that disputes be resolved promptly prevents the plaintiff from unfairly surprising the defendant with a claim that may be difficult or impossible to refute because evidence that would allow the defendant to defeat the claim no longer exists. To be sure, the lost evidence rationale probably carried greater force in the seventeenth century, when the English Parliament passed the first general statute limiting the right to recover possession of land,²⁰ than it does today. In seventeenth-century there were no recording acts, and surveys were probably expensive or unreliable, or both. In modern time, in contrast, most jurisdictions, Lagos for instance, has statutes which provide for permanent public recordation of deeds to real property and which generally establish the primacy of the recorded deed over unrecorded interests.²¹ It would therefore be better if adverse possession is restricted to the application of restitution principle, not based on non-availability or destruction of evidence as opined.

A second concern which has frequently been advanced in the literature on adverse possession is the interest in ‘quieting titles’ to property. This objective is related to, yet analytically distinct from, the problem of lost evidence.²² Imagine a state where lost evidence of title is never a problem—there is a universal recording system, accurate and indestructible boundary markers, and so forth.²³ Nevertheless, if that state has no mechanism for eliminating old claims to property, the information costs, transaction costs, and hold out problems involved in discovering and securing the releases of these claims would very likely impose a significant impediment to the marketability of property. Title examiners would have to trace every deed back to its source; ancient easements, unextinguished spousal rights, grants of future interests, unreleased mortgages or liens could well be discovered; these interests would have to be traced to present-day successors; and releases of these interests would then have to be secured. If the buyer always purchased subject to such claims, no matter how old they might be, he would have to go through a complicated process of fact-gathering and negotiating in order to obtain clear title to the property. Buyers have learned to cope with these problems, in part because of the development of title insurance. Thus, whether the buyer incurred the costs of actually securing releases or paid huge insurance premiums, the net effect would be the same: transactions in property would become costlier. According to the proponents, the institution of adverse possession is designed to reduce this drag on the market by extinguishing most of the older claims. Ballantine,²⁴ states that the English statute, which limited the right to recover possession of land, expressly stated that the limitations period was enacted ‘for the quieting of men’s estates, and avoiding of suits.’ The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping on his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.²⁵ The injustice and unfairness of this application will better be solved by the restriction of the application of adverse possession to restitution in order to preserve the essence of registration.

The third reason commonly advanced in support of a system of adverse possession is that it punishes title owners who ‘sleep on their rights.’ On this view is Ames, Lectures²⁶ Under this view, the shift in entitlement acts as a penalty to deter title owners from ignoring their property or otherwise engaging in poor custodial practices. Since forfeiture is a stiff penalty (frequently deemed unconscionable in other contexts)²⁷ presumably the objective will be realized in most cases. At first blush, this rationale seems to rest on a social policy favoring ‘active’ owners of

¹⁸ *Ibid* note 10.

¹⁹ *Ibid* note 7.

²⁰ *Ibid* note 11.

²¹ See RR Powell, *The Law of Real Property* (1949) I Matthew Bender & Company 287.

²² *Ibid* note 17.

²³ *Ibid* note 18.

²⁴ *Ibid* note 20.

²⁵ *Ibid* note 12.

²⁶ JB Ames, *Lectures on Legal History* (1913) Publisher. Harvard University Press 197.

²⁷ As held in the case of *Williams v Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

property, who develop or exploit their land, rather than ‘passive’ owners. Such a policy, according to Callahan²⁸ seems dubious, because it ignores the possibility that passive owners, such as land speculators, may perform a valuable social function by preserving the property for use by future generations.²⁹ Moreover, the notion that a property owner must engage in active exploitation or development or risk losing his property runs counter to the principle that a property owner can do whatever he wants with his property, at least so long as he does not injure others. This principle is reflected in the traditional maxim of nuisance law, *sic utere tuo ut alienum non laedas*.³⁰ Why not then let him ignore the property, if by ignoring it he does not injure others? On closer examination, however, these criticisms overstate what is required of the title owner in order to avoid forfeiture. The title owner does not have to develop his land or even occupy it; all he has to do periodically is assert his right to exclude others. Moreover, there is at least an arguable economic justification for imposing such an affirmative obligation on the landowner. The passive (and presumably absentee) owner will be harder to negotiate with, if only because he will be harder to locate. When the title owner is required to assert his right to exclude, therefore, he is in effect being asked to ‘flush out’ offers to purchase his property, to make a market in the land.³¹ On this view, then, the sleeping-owner rationale is again a justification based on the desirability of encouraging market transactions in property rights. The trend is that limitation statutes that bar owners from claiming their land from adverse possessors are contested as inconsistent with the constitutional provisions on property rights but applying the doctrine of restitution will be in tune with the constitutional provision and preserve the rationale behind registration.

The fourth justification for the system of adverse possession focuses on the possessor, and in particular on the reliance interests that the possessor may have developed through longstanding possession of the property. The proponents of this include R. Perry,³² and Holmes³³ who state that having distinct echoes of a frontier society, invokes the interest in ‘preserving the peace.’ They argue that after a sufficient period of time has elapsed, the adverse possessor's attachment to the property will be so strong that any attempt by the title owner to reassert dominion may lead to violence. They further argue in another form, that upon the personality theory of property rights, the adverse possessor may have developed an attachment to the property which is critical to his personal identity. As Holmes colorfully put it, ‘the true explanation of title by prescription seems to me to be that man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life’.

Thus, a policy of transferring entitlements to individuals in order to protect extra-legal expectations would inevitably undermine the general security of property rights. Arguably, this generalized interest in the security of legal entitlements could outweigh-or at least counterbalance-the expectations of the adverse possessor which have grown up through longstanding possession of the property. The appearance of title particularly the appearance of title consistently maintained for a long period of time necessarily becomes a rough and ready substitute for an expensive and time consuming title search. Omotola³⁴ submitted that the court should in future ignore the intention of the true owner when considering whether or not the various acts committed by the squatter amount to adverse possession of the land in dispute. The question should be whether a reasonable man seeing his land used in the way the squatter does ought to have challenged the user whatever may be his own plan for the land.³⁵ This thesis agrees with the views of Omotola succinctly stated above but adds that the application of adverse possession subject to restitution is the best approach to preserve the constitutional right of the title holder to own property and the basis of registration.

The important thing to note about these rationales is that, at least at the level of general justification, they are mutually supportive. All the rationales for adverse possession really only justify barring the title owner's action for possession. They do not explain why the passage of the statute of limitations should also give rise to a new title in the adverse possession. The problem of lost evidence, for example, tells us why we do not permit the title owner to sue, but does not account for why the adverse possessor should now be rewarded with a legal title to the property, rather than simply an undisturbed right of possession. One can like some and dislike others, or one can subscribe to all four, and the result is still the same-the entitlement should be transferred to the adverse possessor

²⁸ *Ibid* note 23.

²⁹ See J Williams, *Principles of the Law of Real Property*. (1886) T. & J.W. Johnson.

³⁰ No one should use his land so as to injure that of another. See, eg., *Fontainebleau Hotel Corp. v Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959).

³¹ See the case of *Texaco v Short*. 454 U.S. 516, 529 (1982). 1130 79:1122 (1984-1985)

³² *Ibid* note 26.

³³ *Ibid* not 22.

³⁴ JA Omotola, *Possession of Land*. (1st ed.) (Florence & Lambard Nig. Ltd. 1987)

³⁵ *Ibid*. See also per Joyce J. in *Kynoch Ltd v Rowland* (1912) Ch. 527, 531.

after the statute of limitations runs.³⁶ Indeed, standing alone some of these rationales may appear too weak to overcome the presumption in favor of a system of property rights rather than of possessory rights. But taken together, they represent a rather imposing case for transferring the entitlement to the adverse possessor after a significant period of time has elapsed.

The traditional theories as advanced by the above scholars suggest that the entitlement should be transferred to the adverse possessor after the expiration of the limitations period, and provide no basis for distinguishing between the good faith and bad faith possessor. A better approach would be to ask whether the inclination of the courts has some ale, sleeping owner rationale, and reliance rationale are essentially explanations for cutting off claims by the title owner or preserving the status quo, not for creating a new root of title. The thesis of this work calls for restrictive and rigorous judicial interpretation of the LRL 2015 with the aim of protecting registered land owners against adverse possession which will require the application of the established restitution principles as a way of compensating the registered title holders.

Nevertheless, there is a sound economic reason for giving the adverse possessor a new title rather than merely a right to undisturbed possession. If the title owner is forever barred from suing the adverse possessor for possession, then the adverse possessor will be forever free to use and consume the property as he likes. Actually, it is not hard to identify a countervailing concern: the interest in punishing or deterring those who engage in purely coercive transfers of property.³⁷ A number of scholars like Elfant, Stake and Merrill have argued that the law in this area should be reformed by making provision for the payment of compensation by adverse possessor to the registered land owner.³⁸ Such a reform would effectively result in the squatter acquiring a right of pre-emption in relation to the property on the expiry of the limitation period.³⁹ Amokaye defined compensation as the amount required so far as money can do to put a deprived land owner in the same position as if the property has not been acquired.⁴⁰ This approach recognises the physical relationship which the squatter may have developed over time in relation to the land⁴¹ but it also recognises that the absent owner may be deeply attached to its financial value.⁴² Achieving a fairer balance between the squatter and the owner making a title by adverse possession conditional on the payment of compensation has the potential to achieve a number of efficiencies as it lessens the burden on the owner to inspect for trespassers; it allows development to be postponed until it will yield the best return; it permits a tolerated squatter to use the land in the meantime; and it gives the squatter the opportunity to purchase the property on the expiry of the limitation period. The constitutionally guaranteed right of the title owner further protected by registering the land makes the doctrine of restitution more desirable than compensating the land owner. The compensation should apply the other way round where the adverse possessor could be compensated by the title holder for any improvement on the land. Katz⁴³ advocated the adoption of the inconsistent use test applicable in Canada otherwise known as the rule in *Leigh v Jack*. The rule states that there cannot be adverse possession if the purposes to which adverse possessor puts the land is not inconsistent with the future plan that the true land owner has for the land.

The concept of adverse possession has always been frowned upon to the extent it benefits a rank trespasser who wrongfully acquires possession of the property belonging to another. It had, attached to it, a negative connotation. The movement against the doctrine gained more momentum in the last decade when the English Supreme Court deprecated the law in its decisions in *Hemaji Waghaji v Bhikhabhai Khengarbhai Harijan & Ors.*⁴⁴ and *State of Haryana v Mukesh Kumar*⁴⁵ and observed that legislature may consider changing the law. Globally too, this was a moot point in view of the observations made by European Court of Human Rights (ECHR) in *J.A. Pye (Oxford) Ltd. v United Kingdom*⁴⁶ that the law was 'illogical', 'disproportionate' and a 'windfall for a squatter'. The Court will not take cognizance of any suit, which is barred by limitation even if issue of limitation is not taken as a defence. Thus, the law of limitation bars remedy but not the right. If such situation occurs, a true owner

³⁶ See generally Merrill, *ibid* note 19 at 1122–54.

³⁷ See AK Klevorick, On the Economic Theory of Crime, (1985) 27 *Criminal Justice* 289-309.

³⁸ See N Elfant, Compensation for the Involuntary Transfer of Property between Private Parties: Application of a Liability Rule to the Law Of Adverse Possession (1984-1985) 79 *Northwestern University Law Review* 758; JE Stake, The Uneasy Case for Adverse Possession (2001) 89 *Georgetown L.J.* 2440-41 and Merrill, *ibid* note 36.

³⁹ Elfant, *ibid* at 761-762.

⁴⁰ OG Amokaye, Planning and Compulsory Acquisition Law & Practice in Nigeria (n Publishing Ltd: Lagos 2016).

⁴¹ As Oliver Wendell Holmes commented in a letter to William James (April 1, 1907), 'The true explanation of title by prescription seems to me to be that man like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life.'

⁴² See Martin Dockray's seminal article Published by the *Conveyance and Property Lawyer* in 1985.

⁴³ *Bellew v Bellew* [1982] IR 447.

⁴⁴ (2009) 16 SCC 517.

⁴⁵ (2011) 10 SCC 404.

⁴⁶ (2008) 46 EHRR 45, 23 BHRC 405.

extinguishes his ownership over the property. But at the same time property cannot be left ownerless. It must be in the name of any other person or any other person must be entitled to have right over it. This situation gives origin to the concept of adverse possession. If any person possesses any property in adverse to the interest of true owner and true owner fails to file a suit for recovery of possession within a period of limitation, then the person in possession becomes owner of property by way of adverse possession. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts rights over it and the person having title omits or neglects to take legal action against such person for years together. Thus, a method of gaining legal title to real property by the actual, open, hostile, and continuous possession of it to the exclusion of its true owner for the period prescribed by law is adverse possession. The Limitation Act prescribes a limitation period for a suit for possession of immovable property or any interest therein based on title. It is important to note that the starting point of limitation period is counted from the point of time 'when the possession of the defendant becomes adverse to the plaintiff'. An important thing to note is that this rationale and all the rationales for adverse possession really only justify barring the title owner's action for possession. They do not explain why the passage of the statute of limitations should also give rise to a new title in the adverse possession. The thesis of this work calls for restrictive and rigorous judicial interpretation of the LRL with the aim of protecting registered land owners against adverse possession which will require the application of the established restitution principles as a way of restoring and preserving the right of the registered title holders.

Dockray's seminal article⁴⁷ highlighted the valuable role played by the doctrine in facilitating unregistered conveyancing transactions and was highly influential in the formulation of the reforms to the doctrine introduced by the LRA 2002. The Law Commission of England and Wales, in their 1998 consultative document,⁴⁸ certainly saw the adverse possessor as a possessor of wrong and a land thief; a departure from the position adopted in an earlier report,⁴⁹ where it was acknowledged that any rights acquired by adverse possession 'should be undertaken separately and ought not to be considered for registered conveyancing'.⁵⁰ However the 1998 report disagreed, explaining the policy considerations that justified a system of adverse possession with regard to unregistered land have far less weight in relation to registered title,⁵¹ because 'the basis of registered title is in fact registration'.⁵² Their recommendation led to the enactment of the LRA 2002. One of the avowed intentions of the Act was to offer 'much greater security of title for a registered proprietor' than existed and 'would confine the acquisition of land by adverse possession to cases where it was necessary either in the interests of fairness or to ensure the land remained saleable'.⁵³ However, LRA 2015 which seems to have borrowed ideas from LRA 2002 when it was to be enacted ended up making adverse possession to be capable of overriding the registered title by merely making application to the Court and registering the court judgment thereby threatening the security of title of registered land owner and the concept of indefeasibility of registered title to land.

3. Conclusion

In the words of Mani⁵⁴

The Law of adverse possession, which ousts the owner on the basis of inaction within limitation, is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law

Therefore, the justification provided by the theories for the doctrine of adverse possession as highlighted in this article notwithstanding, the justification has been said to be only relevant regarding unregistered land, since title to unregistered land is relative and, thus, depends on possession.⁵⁵ As rightly pointed out by the Law Commission of England any uncertainty pertaining to the status of title is removed once it is registered and the register provides

⁴⁷*Ibid* note 42.

⁴⁸*Ibid* at 254.

⁴⁹ Law Commission for England and Wales, *Third Report on Land Registration* (Law Commission No. 158, 1987).

⁵⁰ *Ibid* at 2.36.

⁵¹ *Ibid* at 10.3

⁵² *Ibid*.

⁵³ Law Commission, *Land Registration for the Twenty First Century: A Consultative Document* (Law Com No 254, 1998) para. 10.2.

⁵⁴ P K Mani, *Adverse Possession: A Critique* (2008) *Uttarakhand Judicial & Legal Review*, 43- 51.

⁵⁵ *Land Registration for the Twenty-First Century: A Conveyancing Revolution – Number 271* (July 2001) paras 2.73. See the Report of the United Kingdom's Law Commission on adverse possession of registered land. The Law Commission reasoned that this justification does not take into account the significance of registration of title

conclusive proof of ownership of land⁵⁶ To allow adverse possession in such a framework would be inconsistent with the principle that the register is conclusive concerning the ownership of land.⁵⁷ Through this evaluation of the traditional justifications for adverse possession, the operation of unqualified adverse possession regarding registered land suddenly seemed to some to ‘endorse’ a form of ‘land theft’.⁵⁸ The disappearance of the conveyancing justification led the Law Commission to conclude that it can no longer be justified to have adverse possession in relation to registered land.⁵⁹ Therefore, the Law Commission found that the doctrine of adverse possession ‘runs counter to the fundamental concept of indefeasibility of title. The unfairness of the rule, hostility and criticism towards the doctrine particularly in its application to registered land therefore gives merit to restricting its operation by unjust enrichment and restitution standards.

⁵⁶ *Ibid* at paras 2.73, 14.3, 14.6, 14.10, 14.54.

⁵⁷ *Ibid* at paras 2.73, 14.2-14.6, 14.54.

⁵⁸ *Ibid* at paras 10.11, 10.44.

⁵⁹ *Ibid* at paras 14.1-14.8.