

## EFFECT OF ADVERSE POSSESSION OF REGISTERED LAND\*

### Abstract

*The operation of the doctrine of adverse possession particularly to registered land has been variously interrogated especially in its capability of defeating the notion of indefeasibility of title which is a fundamental characteristic of land registration, conflict with property right, unfairness and unjustness of it, and in terms of economic problems associated with it. The problems have sparked up waves of reform of the doctrine across jurisdictions and works by various scholars tailored towards eliminating or at least reducing the effects of the operation of the doctrine to registered land. This work, using the doctrinal methodology advances the arguments on effects of adverse possession of registered land and finds that adverse possession of registered land is unjust and unfair to registered land owners, incompatible with the concept of indefeasibility of title and conflicts with the concept of property right. The work recommends the application of restitution principle founded on unjust enrichment to the operation of adverse possession as a workable solution to deal with the negative effects of adverse possession of registered land in order to adequately protect the interest of registered land owners.*

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

### 1. Introduction

Several literatures have queried the usefulness of the application of doctrine of adverse possession to registered land arguing that the doctrine has outgrown its usefulness. Mani described the operation of the doctrine as ‘irrational, illogical and wholly disproportionate’.<sup>1</sup> Sprankling<sup>2</sup> saw the doctrine as being ‘dominated by prodevelopment nineteenth century ideology that encourages and legitimates economic exploitation and thus environmental degradation of wild lands and thus fundamentally antagonistic to the twentieth century concern for preservation’. Adverse possession has also been said to mean ‘a hostile possession which is expressly or impliedly in denial of title of the true owner’,<sup>3</sup> and ‘allows for a ‘wrongful’ possessor of land to have their interests ripen into a title.’<sup>4</sup> It is on the bases of these adverse effects associated with adverse possession of registered land which sees the law as seeking to punish a non-diligent title holders for failure to assert their rights within the limitation period, by denying their claim, but the same law on the converse side rewarding wrong doers and trespassers by confirmation of the title by adverse possession upon fulfillment of the stipulated condition<sup>5</sup>, that sparked up the wave of reform of the doctrine which many view as being problematic as it practically defeats the whole essence of registered title and some calling for outright abolition of the doctrine. According to Mani, ‘On the basis of above discussion it can be said that the Parliament should consider abolishing the law of adverse possession or at least amending and making substantial changes in the law in the larger public interest’. The increasing pressure<sup>6</sup> to reform the law on adverse possession of registered land due to its unfairness led to the introduction of the Land Registration Act 2002<sup>7</sup>, which limited the scope of the doctrine for registered land in England and Wales. Also, certain states in the United States of America have recently attempted to make the doctrine fairer by introducing reforms to the doctrine which impose a good faith requirement on the adverse possessor<sup>8</sup>, while some other jurisdictions like Hong Kong have adopted inconsistency use test.

The objective of the work is to reexamine the effects of adverse possession regarding registered and to formulate a reform that will eliminate the adverse effects of the operation of the doctrine and ensure better protection to the registered land owners while preserving the operation of the law of adverse possession. Several literature exist on the effects of adverse possession of registered land including *Park* and *Williamson*<sup>9</sup>, *Fennell’s* case for bad faith

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<sup>1</sup>PK Mani, ‘Adverse Possession: A Critique’ (2006) *Uttarakhand Judicial & Legal Review* <<https://ujala.uk.gov.in>> accessed 26 March 2022.

<sup>2</sup>JG Sprankling, *An Environmental Critique of Adverse Possession* (1994) 79 *Cornell Law Review*, 816-884.

<sup>3</sup>*Annasaheb v B.B.Patil AIR* (1995) SC 895.

<sup>4</sup>TW Merrill, *Property Rules, Liability Rules, and Adverse Possession* (1985) 79 *Nw. U. L. Rev.* 1122-1154.

<sup>5</sup>See Mani, *ibid* note 1.

<sup>6</sup>Following the years of the litigation process and the highly-publicised decision in *JA Pye (Oxford) v Graham* [2003] 1 AC 419.

<sup>7</sup>See the Long Title: The Land Registration Act 2002 is an Act of the Parliament of the United Kingdom which repealed and replaced previous legislation governing land registration, in particular the Land Registration Act 1925, which governed an earlier, though similar, system which came into force in 13 October 2003.

<sup>8</sup>For example, Oregon introduced a mandatory good faith requirement in 1989 while New York introduced a more limited good faith requirement in 2008.

<sup>9</sup>MM *Park* and I *Williamson*, *The Need to Provide for Boundary Adjustments in a Registered Title Land System* (The Australian Surveyor 2003).

adverse possession,<sup>10</sup> the payment of compensation by adverse possessor to the registered land owner as advanced by scholars like Elfant, Stake and Merrill,<sup>11</sup> the adoption of the inconsistent use model of adverse possession as advanced by Katz,<sup>12</sup> the Qualified Veto Rule as advanced by Smith,<sup>13</sup> and the mandatory court application as adopted by the Land Registration Law of Lagos State (LRL) 2015.<sup>14</sup> A review of the literature on the alternative methods of reform of adverse possession shows that none of the alternative options of reforming the concept of adverse possession is capable of adequately protecting the interest of registered land owners against undeserving adverse possessors which is in the remedy proposal put forward by the work. The primary methodology used by the work is doctrinal in analysing certain existing alternative methods of reform of the law on adverse possession in its application to registered land and finds that the application of the principles of restitution founded on unjust enrichment as the best protection for registered land owners against undeserving adverse possessors while preserving the doctrine.

## 2. The Effects

Adverse possession of registered land has some severe effects which are inherently problematic namely: it violates the constitutional right to own a property, conflicts with the principles of indefeasibility of title, unfair and unjust to registered land owners, the economic problems associated with it.

### Conflict with and violation of Constitutional right to own a property

Adverse possession of registered land extinguishes the title of the registered owner and is not the registered title owner is even entitled to compensation contrary to the constitutional right to ownership of property and payment of compensation when acquired for public interest.<sup>15</sup> Property rights are the social institutions that define or delimit the range of privileges granted to individuals of specific resources, such as parcels of land or water.<sup>16</sup> Property right is hence viewed as a natural right. The right to property is universally recognised by international instruments and national laws. Article 17 (1) Universal Declaration of Human Rights provides: 'Everyone has the right to own property alone as well as in association with others, while sub Article (2) provides that 'No one shall be arbitrarily deprived of his property'. Also, Article 14 of the domesticated African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act which provides that: 'The right of property shall be guaranteed'. It may only be encroached upon 'in the interest of public need or in the general interest of the community and in accordance with the provisions of the appropriate laws.

Ownership of land is the right of every citizen in Nigeria, the right to acquire as well as the right to dispose of is enshrined in the constitution and legislation. However, this right to acquire and hold land is subject to the power given to the governor of each state by the Land Use Act as well as the right given under the constitution, therefore, the government can only acquire individuals' lands compulsorily upon the payment of compensations the title holder<sup>17</sup>. Where any individual finds the acquisition of his/her land to be unlawful, such an individual can successfully challenge the acquisition in the court of law<sup>18</sup>. The framers of the constitution understand clearly that private property is the foundation not only of prosperity but of freedom itself, thus, through the common law, state law, and the Constitution, they protected property rights — the rights of people to acquire, use, and dispose of property freely. Every citizen of Nigeria is empowered to acquire and own immovable property

<sup>10</sup>LA Fennell, Efficient Trespass: The Case for 'Bad Faith' Adverse Possession (2000) 100 *Northwestern University Law Review*, 1037; Yale Law & Economics Research Paper No. 312, U Illinois Law & Economics Research Paper No. LE05-021, 1037-1096.

<sup>11</sup>N Elfant, Compensation for the Involuntary Transfer of Property Between Private Parties: Application of a Liability Rule to the Law of Adverse Possession (1984) 79 *Northwestern University L. Rev.* 758.

<sup>12</sup>L Katz, The Moral Paradox of *Adverse Possession*: Sovereignty and Revolution in Property Law (2009) *McGill Law Journal* 551-37.

<sup>13</sup>IO Smith, The Relevance of Adverse possession under the Lands Registration Law of Lagos State, 2015, *Essays on the Lagos State Lands Registration Law 2015* (Department of private and property Law, University of Lagos, 2016) 1-22.

<sup>14</sup>Section 112(2) Land Registration Law of Lagos State 2015.

<sup>15</sup>See for example section 44 of the *CFRN*, 1999 (as amended) which provides that no individual land should be acquired without compensation.

<sup>16</sup>B Klein and R Crawford and A Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process (1978) 21(2) *Journal of Law and Economics: The University of Chicago Press*, 297-326.

<sup>17</sup>Section 28 authorise the Governor to revoke C of O on ground of public interest but section 29 require that compensation be paid to the holder of the revoked C of O.

<sup>18</sup>See the case of The Court in *National University Commission v Oluwo* [2001] 3 NWLR (Pt. 699) 90 at 105 stated that the rights of an individual to acquire properties anywhere in Nigeria is enshrined in the constitution and it carries with it the right to dispose of such properties, thus, any individual whose land the government compulsorily acquired is entitled to prompt payment of reasonable compensation.

anywhere in Nigeria.<sup>19</sup> The law of compulsory acquisition of land in Nigeria is rooted in the country's constitution. It is enshrined in the Nigerian Constitution that every Nigerian has the right to own private property and that such property shall not be acquired compulsorily, except in the manner and for the purposes prescribed by a law that requires both the payment of prompt compensation and compliance with the rule of law on access to the court. The Constitution thus not only guarantees and safeguard the right to acquisition of property but also prohibits the compulsory acquisition of private property without compensation hence owners today can get compensation when the title is actually taken, when the property is physically invaded by government order, either permanently or temporarily; when regulation for other than health or safety reasons takes all or nearly all of the value of the property; and when government attaches conditions to permits that are unreasonable, disproportionate, or unrelated to the purpose behind the permit requirement. An uncompensated loss of beneficial ownership of property as in the case of adverse possession of registered land amounts to an unprincipled, inequitable and unconscionable expropriation of the private citizen's right to land for the benefit of another.<sup>20</sup> The extinction of the State guaranteed title under the land registration statutes by adverse possession can neither be justified in the interest of public need nor in the general interest of the community. It is a mere expropriation of the private citizen's right to land for the benefit of another, contrary to the intentment and spirit of the Charter.

### **Unfairness and injustice of the application of the adverse possession rule to registered land**

Adverse possession doctrine is considered to be manifestly unjust and unfair in its harshness on the land owner, an illogical and a disproportionate consequence for the innocent owner's neglect of his land.<sup>21</sup> As rightly opined by Taiwo Ajala<sup>22</sup> the height of the injustice and unfairness is that in its effect the doctrine does not even consider the honesty or good faith of the adverse possessor. Thus, a dishonest trespasser who deliberately occupies another person's land is eventually rewarded with title to the land after the limitation period.<sup>23</sup> It has been argued that justice and fairness can be introduced into the doctrine by allowing the acquisition of title only through good faith possession and preventing it in cases of bad faith possession.<sup>24</sup> Indeed, across jurisdictions justice and fairness considerations now find a role in adverse possession cases through the notion of reasonable belief on the part of the adverse possessor.<sup>25</sup> Thus, in the interest of justice and fairness there is a trend in judicial and legislative efforts at reducing or avoiding the unfair and unjust effect of adverse possession doctrine.<sup>26</sup> Adverse possession is arbitrary and does not differentiate between just and unjust claims.<sup>27</sup> A fundamental policy underlying property law is the notion that property cannot be taken against the owner's wishes. It has been argued that the doctrine of adverse possession is justified on the basis that it prevents a plaintiff from sleeping on his rights. Merrill, Fennell and Stake however view this social policy of punishing a 'sleeping owner' and rewarding a 'working possessor' as 'dubious' or a 'straw man argument worthy of ridicule,'<sup>28</sup> as the rationale ignores the prerogative of a property owner to do whatever he wants with his property, so long as he does not injure others.

The compulsory acquisition of title is seen as the last resort when all other attempts to encourage the landowner to comply with his obligations have failed. This gentler or more nuanced approach to promoting the oversight of land in fact mirrors the early warning system of adverse possession introduced by the United Kingdom Land Registration Act 2002. According to Painter and Clint:

..., the concept of adverse possession of registered land is inherently problematic. The doctrine is not easily reconcilable with the concept of indefeasibility of title that underpins the system of land registration in the UK. The uncertainties as to ownership which may justify adverse

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<sup>19</sup> Ibid note 15 section 44.

<sup>20</sup>See I.O Smith, Essays on the Lagos State Lands Registration Law 2015 (Department of Private & Property Law, Faculty of Law, University of Lagos 2017); In *Goldmark (Nig.) Ltd. v Ibafo Co. Ltd.* (2012)10 NWLR (Pt. 1308) 291, the Court held that there is no doubt the government has the power and authority to acquire land compulsorily for public use, however, such power is exercisable in accordance with the proper procedure for acquisition, that is, proper notice must be given to the owner of the land and reasonable compensation must be paid.

<sup>21</sup>See the judgment of Neuberger J in the case of *Pye (Oxford) Holdings Ltd vs Graham (2000) ch 676*. According to the Justice; 'I believe the result is disproportionate, because it does seem draconian to the owner, and a windfall for the squatter.'

<sup>22</sup>Equitable Access to Land For Poverty Reduction in Africa: Expanding the Orthodox Justifications for the Adverse Possession Doctrine (2000) 7(2) NAU.JCPL, 17-34.

<sup>23</sup> Ibid.

<sup>24</sup>Y Emerich, Comparative Overview on the Transformative Effect of Acquisitive Prescription and Adverse Possession (2015) *Revue Internationale De Droit Compare* 459-496.

<sup>25</sup> Ibid note 22.

<sup>26</sup> Ibid.

<sup>27</sup>HY Teo, A Critique of the Doctrine of Adverse Possession (2008) 1V *Cross sections* <<https://citeseerx.ist.psu.edu>> accessed 5 April 2022.

<sup>28</sup> See in particular, JE Stake, The Uneasy Case for Adverse Possession (2000-1) 89 *Geo. L.J.* 2419; Merrill *ibid* note 4.

possession of unregistered land do not apply to registered land where the legal estate is vested in the registered proprietor who is identified in the register.<sup>29</sup>

One of the biggest problems with the adverse possession doctrine is that it can produce results that people perceive as completely unfair. Being fair and creating a perception of fairness have always been important elements in the legal system. The results of taking away property from owners of record who have, in the eyes of lay observers who have never heard of adverse possession, done nothing wrong, encourages those observers to react negatively to the law and to their neighbors who are the adverse possessors.<sup>30</sup> Also, adverse possession doctrine is considered to be manifestly unjust and unfair in its harshness on the land owner, an illogical and a disproportionate consequence for the innocent owner's neglect of his land<sup>31</sup> and gives the adverse possessor the opportunity of defeating the interest of the registered title owner.<sup>32</sup> Thus, a dishonest trespasser who deliberately occupies another person's land is eventually rewarded with title to the land after the limitation period.<sup>33</sup> Neuberger's J. criticised adverse possession and in his conclusion in his dissenting opinion and states that the doctrine 'does not accord with justice and [that it] cannot be justified by practical considerations'. He confirms that the traditional justification for adverse possession was to prevent uncertainties in relation to the ownership of land but emphasises that these uncertainties are – but for a few exceptions – unlikely to arise in the context of registered land, since owners of registered land can be identified by simply inspecting the Land Register. He criticises this rationale and states that it is difficult to see why an adverse possessor should be able to acquire land from an owner merely because such owner had no immediate use for it and was 'content' to let such adverse possessor trespass on the land.<sup>34</sup>

The results of taking away property from owners of record who have, in the eyes of lay observers who have never heard of adverse possession, done nothing wrong, encourages those observers to react negatively to the law and to their neighbors who are the adverse possessors. People do have the perception that taking someone else's property without paying for it and without their permission is wrong and, if the law allows it, then the law is wrong, unfair, and should be changed.<sup>35</sup> As mentioned, the Law Commission of England and Wales justified the reforms to the law on adverse possession introduced by the LRA 2002 by explaining that the qualified veto system, in conferring additional protection on the registered owner and limiting the extent to which undeserving squatters can rely on the doctrine, strikes a fairer balance between the owner and the squatter.<sup>36</sup> For the Law Commission, the problem of forgotten properties was one for which landowners were regarded as blameless.

### **Conflict with the Principle of Indefeasibility of Title**

The concept of indefeasibility of title is regarded as central to our understanding of the land registration statutes. Indeed, indefeasibility of title has been described as the 'heart' and the 'foundation' of land registration statutes.<sup>37</sup> *Indefeasibility* of title has been defined as a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. But as registered proprietor, and while he remains such, no adverse claim may be brought against him. If indefeasibility of title did not exist, competing claims over land ownership could cause inconsistency in the property law system. The philosophy of a land titles system embodies three principles; namely, the mirror principle, where the register is a perfect mirror of the state of title, the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register, and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and are the essence of the land titles system.<sup>38</sup> If one's title is indefeasible it means, there is an inability to challenge a claim over the land. The immediate indefeasibility of the title occurs when one has registered his title with the Land Registry. This title has the highest priority of ownership above all others. This is because prior interests are set aside once indefeasibility takes effect

<sup>29</sup>S Painter and C Clint, *The Challenges of Adverse Possession of Registered Land* (2000) *BDB Pitmans*

<<https://www.bdbpitmans.com/insights/the-challenge-of-adverse-possession-of-registered-land> accessed 31 March 2022.

<sup>30</sup>See SL Martin, *Adverse Possession: Practical Realities and an Unjust Enrichment Standard* (2008) 37 *Real. Estate Law Journal*.

<sup>31</sup>See the judgment of Neuberger J in the case of *Pye (Oxford) Holdings Ltd v Graham* (2000) ch 676. According to the Justice; 'I believe the result is disproportionate, because it does seem draconian to the owner, and a windfall for the squatter.'

<sup>32</sup> See section 100 LRL 2015; Smith, *ibid* note 20.

<sup>33</sup> *Ibid* note 24.

<sup>34</sup> *Pye* case.

<sup>35</sup> See Katz *ibid* note 12.

<sup>36</sup> 29. Law Com No 254 at para 10.19.

<sup>37</sup> S Struan, *Indefeasibility of Title and the Registrar's 'Unwelcome' S81 Powers* (1999) 7 *Canterbury Law Review* 246-264.

<sup>38</sup> *Duhaime's Law Dictionary* <<http://www.duhaime.org/LegalDictionary/I/Indefeasible.aspx>> accessed 15 April 2022.

The concept of adverse possession of registered land is inherently problematic which is not easily reconcilable with the concept of indefeasibility of title that underpins the system of land registration. The uncertainties as to ownership which may justify adverse possession of unregistered land do not apply to registered land where the legal estate is vested in the registered proprietor who is identified in the register. Two underlying bases of any land market are security of tenure and confidence in title to land. Such security and confidence require the efficient and equitable elimination or resolution of doubts or errors or discrepancies in any aspect of title to any land parcel in the land market. An important characteristic of title registration is the maintenance of the register by continual updating and integration of register information that dispenses with the necessity of reviewing and investigating all but the most recent information.<sup>39</sup> Title registration provides for certainty of title and security of tenure in that the factual details relating to the parcel are open to all through inspection of the register. The mirror characteristic of the register correctly reflects the legal status of the lot in question and the curtain principle dispenses with the necessity of investigation of that legal status beyond that displayed in the register by hiding from view and investigation any transactions prior to the issue of the certificate or register entry. Consequently, the information contained in the register must be accurate, current, and conclusive.<sup>40</sup> The factual details in the register will include the identity of the land parcel and that identity necessarily includes the location of the boundaries of the parcel.

Permitting the acquisition of registered title land by adverse possession can result in the register incorrectly retaining the dispossessed documentary title holder as the proprietor after that proprietor's title has been extinguished. Thus it would seem that permitting adverse possession claims is a disregard of the mirror principle.<sup>41</sup> Guarantee and certification of title by a public authority of publicly registered public transactions available for public inspection. The issue of a certificate of title and the making of an entry in the register are mirrors of the state of the title at the time of issuing the certificate or making the entry in the register. These are corollaries of title by registration, indefeasibility of registered title and the assurance fund which supports the guarantee of title. That some jurisdictions permit legal interests founded upon occupation to survive and override the certification by the public authority is an erosion of the principles underlying title registration.<sup>42</sup> Thus the issue of a certificate and the certification of title by the public authority is negated if prior interests founded upon occupation can continue to exist contrary to the certified title.<sup>43</sup> The registration system simplifies the process of dealing with land, as it relies on the indefeasibility of title concept, where a registered interest has priority over all other interests. This allows property buyers to rely solely on the title registration to determine ownership or interest in the real property. As a consequence, they do not need to investigate whether the prior transfer was valid. This provides a higher level of security in real property transactions.

The whole purpose of the introduction of any registered title scheme was to move away from title by possession and, as already described, the schemes are founded upon title by registration, not title by possession.<sup>44</sup> This writer offers as plausible conjecture that at that time it was believed that the benefits of registration would impel holders of unregistered land to voluntarily convert their holdings to registered title. That belief was misplaced. It is now recognised that compulsion to change is necessary unless the existence of the two systems is to continue indefinitely. That there still is unregistered land in existence is no reason to burden the registered title system which includes almost the whole of the land in Australia. To insist upon catering to the inertia of holders of unregistered land is to permit the tail to wag the dog. It is only the belated recognition that the two systems are fundamentally different and that the older system should not govern the administration of the new that has allowed major reform to the English registered land system.<sup>45</sup> While each of these points in favour of permitting adverse possession of registered title land do not withstand close scrutiny, there does exist instances where occupational boundaries differ from the location of the legal boundaries and these differences have existed for such long periods that the restoration of the legal boundaries would present great difficulty. A recent article cites a sub-division located in Brisbane where all of the occupational boundaries of all the parcels differ from their correct location.<sup>46</sup> It may be that the best argument favouring occupational boundaries over true legal boundaries is the immense practical difficulties of restoring the true legal boundaries. This pragmatic argument is the one least advanced by the proponents of possession as a basis of title in a registered title land system. To this end, the land registration statutes seek to restrict or eliminate off- interests. Unless such overriding interests are eliminated, statements that

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<sup>39</sup>T Ruoff, *An Englishman looks at the Torrens system (1957) Law Book of Australasia Pty. edition*, in English. introduced the 'mirror' and 'curtain' principles to describe this characteristic.

<sup>40</sup> *Ibid.*

<sup>41</sup>MM Park, *The Effect of Adverse Possession on Part of a Registered Title Land Parcel* (Department of Geomatics, University of Melbourne 2003)

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> See *Breskvar v Wall* 1971, 15 per Barwick CJ; see also *Lutz v Kawa* 1980, per Laycraft JA at page 25.

<sup>45</sup> Law Commission 1998; Law Commission 2001; Land Registration Act 2002.

<sup>46</sup> See *McClelland v Elvin & Ors* [2017] EWHC 2795 (QB).

the register reflects the state of the title as it exists at any given time or from time to time are incorrect and may render a title registration scheme unworkable.<sup>47</sup> A title investigator curious enough and wishing to peer behind and beyond the curtain will be unable to do so unless expressly permitted by the registrar. Registration is notice to the whole world, including the adverse possessor who it is incumbent on before dealing on the land to inspect the registrar before dealing on the land. Registration ought to be conclusive ownership and ought not to be defeated by any form of adverse claim, but as it is, the doctrine of adverse possession of registered land if the registered title holder cannot be given assurance of the security of his title after registration. The best approach is by the application of restitution principles which will be the best way of protecting the interest of registered land owners in Lagos State.

### **The Economic Problems Associated with Adverse Possession of Registered Land**

The doctrine of adverse possession reinforces lack of established property rights which often hampers both economic and environmental progress which may be manifested through a lack of title, unclear title, or a lack of recording, but is generally exhibited through insecure title for landowners. The lack of title security compounds economic problems. Titling has been promoted as the key to broad-based sustainable growth while lack of certainty often hampers economic investment because land owners or squatters will have less incentive to invest work into insecure land. Not only does this uncertainly harm economic development, but it often leads to violence and death.

In accordance with the philosophical underpinning of utilitarianism, adverse possession must be equitably applied to promote efficiency and fairness. High levels of this indicator also suggest that eviction may not be a realistic option, but rather calls for policies and programmes which lead to strengthening tenure security.

Also, disputes, which may involve physical conflict, and efforts devoted to protecting things or to taking things from others, are socially undesirable in themselves because they may result in harm and because they do not result in the production of things, only in their possible reallocation. In the absence of certainty of property rights, individuals will often find it rational to devote effort and resources to taking things from others, leading to disputes, and individuals will also find it rational to devote time and resources protecting their things from being taken. These undesirable outcomes will be avoided if the state stands ready to prevent the taking of things; in the ideal, the guarantee of property rights by the state will remove the motive to take or to protect things, and also the occurrence of dispute.<sup>48</sup>

Another advantage of certainty of property rights is that they provide individuals with protection against risk, which is socially valuable due to individuals' general risk aversion. The most obvious way that property rights afford such protection is that the protection of property rights means that individuals' holdings will not be stolen by others. Under a registration system a list is maintained of items of property, each uniquely identified and associated with the name of its owner. When there is a sale of registered property, the acquirer's name is recorded as the new owner. Under this system, if anyone desires to know the identity of the owner of a particular item of property in the registry, he need only check the registry, because the person whose name is in the registry is deemed to be the owner. Further, it is assumed that if an item of property listed in the registry is stolen from its owner and later discovered, it will be returned to the owner. An advantage of registration systems is that they may ease sale and resale of things by assuring buyers of the validity of sellers' claims of ownership. In the absence of a registration system, uncertainty as to the validity of ownership might cause a wary buyer not to purchase. Alternatively, this uncertainty might cause the buyer to spend greater effort investigating the validity of ownership than would be necessary if there were a registry. Furthermore, the existence of a registration system discourages theft in two major ways.<sup>49</sup> First, thieves face a higher risk of conviction if they steal registered property, for if discovered with such property, they cannot claim that they own it.<sup>50</sup>

A different circumstance in which the rule of adverse possession may apply arises because of uncertainty about boundaries.<sup>51</sup> For example, a person may not know whether the garage he is building will encroach on his neighbor's land because he is unsure of the boundary line. The rule of adverse possession is sometimes suggested to be socially beneficial in this context because it alleviates problems of mistake: A person who turns out to have built on another party's land will not have to alter his structure when that would be socially wasteful. If a person builds a garage that turns out to encroach by six inches on his neighbor's land, it would probably be wasteful for the person to incur a large expense to move the garage off his neighbor's property. However, this argument

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<sup>47</sup> See *DiCastrì* 1962, 16; in *re Shotbolt* 1888, 347 per *Crease J.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> S Shavell, *The Foundations of Economic Analysis of the Law* (The Belknap Press of Harvard Press 2004)

<sup>51</sup> See T Miceli and CF Sirmans, *An Economic Theory of Adverse Possession* (1995) 15 *International Review of Law and Economics*, Elsevier, 161-173.

favoring the rule of adverse possession overlooks the possibility that bargaining would result in avoidance of undesirable outcomes. If the garage is more costly to move than the extra six inches of land is worth to the neighbor, the two individuals will often arrive at an agreement under which the garage will not be moved.<sup>52</sup> Moreover, the argument favoring the rule of adverse possession fails to take into account possible disadvantages regarding investments in land, similar to those mentioned in the previous section. For instance, the rule might encourage individuals to invest wastefully (extend the garage when that serves no real purpose) in order to gain ownership of more land. Therefore, the argument favoring the rule of adverse possession does not have clear appeal.

### **3. Conclusion**

An appropriate time for the rules of adverse possession to be limited by unjust enrichment occurs when strict adherence to the legal rules would be harsh or oppressive, creating unfair surprise and hardships for title holders by violating their reasonable expectations as evident in the application of adverse possession to registered land.<sup>53</sup> Restitution is a principle that can be applied when legal rules produce results in particular cases that appear unfair.<sup>54</sup> This use of the unjust enrichment principle would be in keeping with its interpretation as a vehicle for 'covering conduct that was morally wrong although sanctioned by law.'<sup>55</sup> The present society no longer considers letting land lie fallow to be imprudent, unproductive, or unreasonable. To eliminate the unfairness and the perception of unfairness associated with the adverse possession doctrine, courts should modify its results by applying an unjust enrichment standard. If the adverse possessor would be unjustly enriched by a successful claim, and the burden on the titled owner would be harsh or oppressive, causing hardship and unfair surprise, and violating reasonable expectations, then adjustments should be made to balance the interests of the parties, generally by requiring payment by the adverse possessor for the value of the property and any tax payments made by the titled owner during the period of the adverse possession.

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<sup>52</sup>Of course, problems in bargaining might lead to impasse and to the garage being moved. To ameliorate this problem, it is not necessary to accord the encroaching party ownership in land, as under the rule of adverse possession, but rather only to grant the party the right of use for a limited time, such as the normal lifespan of a garage.

<sup>53</sup>Ibid note 30; J McConvill and M Bagaric, *The Yoking of Unconscionability and Unjust Enrichment in Australia* (2002) 13 *DEAKIN L. REV.* 225-247.

<sup>54</sup> Ibid at 2091.

<sup>55</sup> E Sherwin, *Reparations and Unjust Enrichment* (2004) 84 *B.U. L. REV.* 1443-1465.