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# Should the Doctrine of Adverse Possession be Abolished in Hong Kong?

Alfred Lei Yang, Eric Ying Ngai Hong<sup>1</sup>

## Abstract

*With a land mass of 1,073 sq km<sup>2</sup> and a resident population of more than 7 million,<sup>3</sup> Hong Kong has long been famous for its skyrocketing property prices and the level of population density. While it is indeed so difficult for squatters to "survive" in Hong Kong, the authors are surprised that the ancient doctrine of adverse possession still exists, and are therefore keen to seek justifications for its continued existence. In this article, the authors will first examine the elements of this doctrine in Hong Kong, and then specifically examine the requirements of animus possidendi, namely, the intention to possess the land. Building upon this foundation, the authors will juxtapose two common law jurisdictions, namely England and Singapore, with the current situation of Hong Kong, to critically analyse whether there are justifications for maintaining the rules of adverse possession, especially under the prospective registration system in Hong Kong. Finally, a conclusion summarising the authors' arguments will be provided.*

## 1. Introduction

According to the Report on Adverse Possession published by the Law Reform Commission of Hong Kong, adverse possession refers to the process by which "a person can acquire title to someone else's land by continuously occupying it in a way inconsistent with the right of its owner".<sup>4</sup> In *Cheung Yat Fuk v Tang Tak Hong*, Bokhary PJ also nicely summarised the meaning of adverse possession as "possession inconsistent with the title of the persons with the paper title to the land".<sup>5</sup> In other words, if the squatter continues to occupy the land, and the original land owner fails to exercise his right to recover it by the end of a designated period of time, then the original land owner's remedy, as well as his title to the land, is extinguished. As such, the squatter becomes the new owner of the land.

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<sup>2</sup> *The United States Central Intelligence Agency, The World Fact Book* <https://www.cia.gov/library/publications/the-world-factbook/geos/hk.html> [Accessed June 29, 2017].

<sup>3</sup> The current population of Hong Kong, as of end-2016, is 7.37 million: <http://www.censtatd.gov.hk/hkstat/sub/so20.jsp> [Accessed June 29, 2017].

<sup>4</sup> Law Reform Commission of Hong Kong - Adverse Possession Sub-Committee, *Report: Adverse Possession* (Law Reform Commission of Hong Kong 2014), 2.

<sup>5</sup> [2003] HKCFA 12, [2004] 2 HKLRD 86.

As a doctrine with more than 800 years of common law history<sup>6</sup> with its roots in Roman law,<sup>7</sup> the doctrine of adverse possession itself has gone through various stages of evolution, and different common law jurisdictions have varied its extents of application.<sup>8</sup> To this end, since law is always born in light of the society and circumstances that it seeks to govern, the authors have to stress that the operation of adverse possession has to correspond to the actual situation of each jurisdiction. Hence, the degree of applicability in different jurisdictions varies.

In order to review the applicability of such an ancient doctrine in today's Hong Kong, the Adverse Possession Sub-committee of the Law Reform Commission has published a Consultation Paper on 10 December 2012.<sup>9</sup> While the Consultation Paper included detailed discussion on the basic concept of adverse possession and its justifications, it also considered the experiences of several jurisdictions, in order to make preliminary proposals for reforming the law of adverse possession.<sup>10</sup> On 20 October 2014, the Adverse Possession Sub-committee of the Law Reform Commission also published a Report, which summarised the relevant case law and made final recommendations for the reform of the law on adverse possession.<sup>11</sup>

By referring to the two aforementioned publications of the Adverse Possession Sub-committee of the Law Reform Commission, as well as a wide range of literatures and laws, four main issues will be addressed in this article.

Firstly, the authors will highlight the current state of the doctrine of adverse possession in Hong Kong, and then briefly introduce the elements to establish adverse possession within the framework of Hong Kong laws. Secondly, the authors will then specifically examine the requirements of *animus possidendi*, namely, the intention to possess the land. Thirdly, and perhaps the most importantly, the authors will critically analyse whether there are justifications for maintaining the rules of adverse possession in modern Hong Kong, especially under the prospective registration system in Hong Kong. Building upon this foundation, the authors will also seek insights from two common law jurisdictions, namely England and Singapore. Finally, a conclusion summarising the authors' arguments will be provided.

## **2. Adverse Possession in Hong Kong**

### **2.1 Establishing Adverse Possession in Hong Kong**

In Hong Kong, the legal authority regarding adverse possession mainly derives from the Limitation Ordinance (Cap 347) and relevant case law.<sup>12</sup> To establish adverse possession in Hong

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<sup>6</sup> J. Morawetz, 'No Room for Squatters: Alaska's Adverse Possession Law', 28 *Alaska Law Review* 2 (2011), 342.

<sup>7</sup> C. Brown, S. Williams, 'Rethinking Adverse Possession: An Essay on Ownership and Possession', 60 *Syracuse Law Review* 3 (2010), 583.

<sup>8</sup> For example, experts Park and Williamson noted that by 2003, all the Canadian provinces, except, Alberta do not allow adverse possession; on the other hand, in Australia, Victoria, Western Australia, and Tasmania were the only states that retained the doctrine of adverse possession. For details, see M. Park, I. Williamson, 'The need for Boundary Adjustments in the Proposed Hong Kong Titles Registration Bill', 5 *Journal of Geospatial Engineering* (2003) 29, 33-34.

<sup>9</sup> Law Reform Commission of Hong Kong - Adverse Possession Sub-committee, *Adverse Possession: Consultation Paper* (Law Reform Commission of Hong Kong 2012).

<sup>10</sup> *ibid.*

<sup>11</sup> Consultation Paper 2014 (n 3) 4.

<sup>12</sup> Consultation Paper 2012 (n 8) 6.

Kong, the adverse possessor needs to show three elements. First, that he has been in actual possession of the land. Second, the possession has been ‘adverse’ in nature, namely, he has the intention to possess the land. Thirdly, such possession has lasted for a certain period of time stipulated by law.<sup>13</sup>

## 2.2 Statutorily-prescribed limitation period

The Limitation Ordinance (Cap 347) stipulates that the limitation period for bringing actions to recover land by the Government is 60 years, while for others the period is 12 years.<sup>14</sup> It further provides that the clock starts counting against an actual landowner only where: (1) he has been dispossessed of his land; or (2) he has stopped using his land, and the adverse possessor has taken possession of the land.<sup>15</sup> Moreover, it also allows the accumulation of continuous period,<sup>16</sup> e.g. after a squatter has begun to possess the land and he then grants a tenancy or license on the behalf of himself, such period of tenancy or license can be admitted to prove adverse possession.<sup>17</sup> Although the provisions regarding the accumulation of continuous period shows certain reasonableness, in fact, the Consultation Paper has also acknowledged that these provisions can cause hardship to landowners under certain situations.<sup>18</sup>

## 2.3 The possession requirements

*Powell v. McFarlane* established two additional components for the ‘possession’ requirement, namely: ‘factual possession’ and ‘an intention to possess’.<sup>19</sup> It is also observed that this approach is still applicable to recent Hong Kong cases like *Chu Kwok Wai v Tang Wing Tung Anthony*<sup>20</sup> and *Lam Kin Chun v Lin Xiumei*.<sup>21</sup>

## 2.4 ‘Factual possession’

Although enclosure (e.g. by erecting fences) is the strongest possible evidence of showing physical control or ‘factual possession’,<sup>22</sup> it can be dispensable.<sup>23</sup> Hence, the degree of physical control is a matter of fact, which depends on the land nature and circumstances of the case.<sup>24</sup> Additionally, Slade LJ in *Powell’s* case held that factual possession “must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly.”<sup>25</sup> Thus, an adverse possessor would be entitled to claim for possessory title of the land if he or his tenant or licensee has adversely dispossessed the landowner for a continuous and sufficiently long period of time.<sup>26</sup>

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<sup>13</sup> L. Chen, B. Chuan, G. Song, 'Whither Adverse Possession in Hong Kong? A Comparative and Statistical Study', 5 *The Conveyancer and Property Lawyer* (2014) 413, 416.

<sup>14</sup> Section 7, Limitation Ordinance (Cap 347).

<sup>15</sup> *ibid.*, Section 8.

<sup>16</sup> *Wong Kar Shue & Others v Sun Hung Kai Properties Ltd & Anor* [2006] 2 HKC 600.

<sup>17</sup> *ibid.*

<sup>18</sup> For details, see Consultation Paper 2012 (n 8) 8.

<sup>19</sup> [1977] 38 P & CR 452.

<sup>20</sup> [2013] HKEC 545.

<sup>21</sup> [2011] HKEC 932.

<sup>22</sup> *George Wimpey & Co Ltd v Sohn* [1967] Ch 487.

<sup>23</sup> *Seddon v Smith* [1877] 36 LT 168 at 169.

<sup>24</sup> *Buckinghamshire County Council v Moran* [1990] Ch 623.

<sup>25</sup> *Powell v McFarlane* [1977] 38 P & CR 452, 470.

<sup>26</sup> Chen and Gordon (n 12), 416.

By citing *Mulcahy v Curramore PEY Ltd*<sup>27</sup>, Nield precisely summarised that the possession ought to be “open, not secret; peaceful, not by force; and adverse, not by consent of the true owner.”<sup>28</sup> The possession has to be ‘open’, hence allowing objection from the landowner.<sup>29</sup> Moreover, as the law “cannot condone violent acts”, the dispossession or assumption of possession shall be peaceful.<sup>30</sup> Most importantly, as “the requirement for adversity goes rather to the nature of the possession”, the consensus from landowner (e.g. by leasing or licensing) should be absent.<sup>31</sup> All these have been acknowledged by the 2012 Consultation Report as well.<sup>32</sup>

Equally importantly, such factual possession must be ‘adverse’. The ‘adverse’ means that the possession by the squatter shall be inconsistent with the title of the paper owner,<sup>33</sup> or without the consent from the true owner,<sup>34</sup> and ultimately the squatter can acquire a possessory title, which intrudes the interests of the paper owner.<sup>35</sup> In the following text, unless otherwise indicated, the meaning of ‘factual possession’ is the factual possession, which is regarded as adverse defined above.

### 2.5 An intention to possess (*animus possidendi*)

While the requirement of an intention to possess by the squatter, namely, *animus possidendi*, is now a fixed element of the modern law of adverse possession as shown in the 2012 Consultation Paper,<sup>36</sup> the element of *animus possidendi* for adverse possession has been widely accepted after long period of time.<sup>37</sup> Early in 1900, the case of *Littledale v Liverpool College* was the very first case that mentioned about the requirement of *animus possidendi* (per Lindley MR).<sup>38</sup> Before this case was decided, there were virtually no textbooks that have mentioned this element.<sup>39</sup> Moreover, *Littledale* started to gain its binding force after it was cited by Carson and Bompas in 1902.<sup>40</sup> Interestingly, the case law seemed to have taken a rather long period to develop the nature of *animus possidendi* because the next case after *Littledale* which formally discussed the issue of intention was *Ocean Estates v Pindar*<sup>41</sup>, which took place 69 years later.<sup>42</sup> In *Buckinghamshire CC v Moran* (above) which has been recognized as the classic formulation of *animus possidendi*,<sup>43</sup> Slade LJ held that the ‘requisite’ intention was “the intention to exclude the world at large, including the owner with the paper title, so far as reasonably practicable and so far as the process of the law will allow”.<sup>44</sup> It is, therefore, quite logical to argue that the adverse

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<sup>27</sup> [1974] 2 NSW LR 464, 475.

<sup>28</sup> S. Nield, *Hong Kong Land Law* (Hong Kong: Longman 1997), 165.

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*, 166.

<sup>31</sup> *ibid.*

<sup>32</sup> Consultation Paper 2012 (n 8) 10.

<sup>33</sup> *Cheung Yat Fuk v Tang Tak Hong & Others* (2004) 7 HKCFAR 70.

<sup>34</sup> *ibid.*

<sup>35</sup> Consultation Paper 2014 (n 3) 15.

<sup>36</sup> *ibid.*, 3.

<sup>37</sup> O. Radley-Gardner, ‘Civilized Squatting’, 25 *Oxford Journal of Legal Studies* 4 (2005) 727, 729.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.*

<sup>41</sup> [1969] 2 AC 19.

<sup>42</sup> Gardner (n 36) 729.

<sup>43</sup> *ibid.*

<sup>44</sup> [1990] Ch 623 CA, 640.

possessor must intend to possess (rather than to dispossess),<sup>45</sup> and this intention of possess is particularly important “where the acts of possession are equivocal”, just as Smith argued.<sup>46</sup>

Since the doctrine ignores the differences between innocent and wilful trespassers, it can still operate even if the adverse possessor is an opportunist or consciously wilful trespasser who acts in bad faith and fully understands that the land he occupies does not belong to him.<sup>47</sup> Manifestation and proof of such intention is necessary.<sup>48</sup> Yet, it does not mean that the law totally turns a blind eye on bad faith. Scholars highlighted that if a paper owner “can establish that he was the victim of a fraud perpetrated by the adverse occupier or that any fact relevant to his right of action was deliberately concealed from him by the occupier”, then the period of limitation does not run before the paper owner discovers such fraud or concealment.<sup>49</sup>

Moreover, the degree of intention of the adverse possessor and the paper owner is also an important issue. Generally speaking, for cases where no fraud or concealment is involved, it is irrelevant if the paper owner is unaware of his dispossession because modern case law has emphasised a “sufficient manifestation” of the squatter’s *animus possidendi*, otherwise it will downplay the claim of paper owner.<sup>50</sup>

While the basic requirements of *animus possidendi* are both required by English law and Hong Kong law, there is a notable discrepancy between the two with regard to the “declaration of a hypothetical willingness to pay rent or a licence fee if demanded” since 2002.<sup>51</sup> In a nutshell, the Hong Kong Court of Final Appeal in *Wong Tak Yue v Kung Kwok Wai David*<sup>52</sup> held that if such a declaration is made, the adverse possessor would have lacked the intention to possess.<sup>53</sup> Contrary to this, the House of Lords in *JA Pye (Oxford) Ltd v Graham* held that such a willingness is irrelevant, so long as the possession of land has been maintained.<sup>54</sup>

Therefore, the doctrine of adverse possession in Hong Kong is similar with that in English law. However, being different from the U.K., Hong Kong is an international metropolis with high level of population density, which makes land become extraordinarily valuable and significant. This necessitates the scrutiny of the reasonableness of adverse possession in Hong Kong. The authors will then critically analyse whether the maintenance of adverse possession is justified in Hong Kong.

### **3. Can Maintenance of Adverse Possession Rules be Justified in Hong Kong?**

#### **3.1 The Difficulties in establishing Adverse Possession**

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<sup>45</sup> *Hughes v Cork* [1994] EGCS 25.

<sup>46</sup> R. Smith, *Property Law* (London: Pearson 2011), 76.

<sup>47</sup> K. Gray, S. Gray, *Elements of land law* (Oxford: OUP 2009), 1185-1186.

<sup>48</sup> Chen and Gordon (n 12) 417.

<sup>49</sup> Gray and Gray (n 46) 1186.

<sup>50</sup> *ibid.*, 1187.

<sup>51</sup> Chen and Gordon (n 12) 417.

<sup>52</sup> [1998] 1 HKLRD 241.

<sup>53</sup> *ibid.*

<sup>54</sup> [2002] 3 W.L.R. 221.

As Chiang correctly observed, the ‘only practical solution’ to the encroachment problems in Hong Kong today is the doctrine of adverse possession.<sup>55</sup> Based on current law, it is imperative for the squatter to prove his intention to possess, namely ‘an intention to possess the land to the exclusion of all other persons, including the owner’.<sup>56</sup> Yet, we believe that proving the “intention to possess” is not an easy task. In the following, we will outline the difficulties that we have identified.

### 3.2 The ambiguous meaning of intention to possess

In principle, the squatter is required to intend to possess the land,<sup>57</sup> which would be interpreted as the squatter pursuing exclusive possession of the land to others, rather than acquire the ownership of the land. However, this will cause troubles and ambiguity in certain situations, especially in cases of lease or license.

In the case of *Pye*,<sup>58</sup> since in the lease relationship, the tenant is granted exclusive possession from others including the landlord<sup>59</sup> subject to restrictions,<sup>60</sup> so the judges held that the willingness to pay the rent does not negate the intention to exclude the landlord’s possession, it merely indicates the squatter’s recognition of the paper owner’s ownership. Therefore, it seems that the intention to possess in *Pye*’s case is interpreted as the intention of exclusive possession and unawareness of the paper owner’s ownership.

However, in another case of *Lau Wing Hong v Wong Wor Hung*,<sup>61</sup> judges held that the willingness to pay rent demonstrates that the squatter was not intending to exclude the paper owner; hence the squatter fails to show the intention of exclusive possession in this case.<sup>62</sup> This judgment indicates that the squatter’s willingness to pay rent could negate his intention of exclusive possession, which is contradicted with the view in the aforesaid judgment of *Pye*’s case.

From the authors’ perspective, the reason for the discrepant interpretation is due to the failure in distinguishing the intention to exclude the ownership of the paper owner from the intention to exclude only the possession of the property. Indeed, the intention to exclude possession of the property does not equal to the exclusion of ownership of such property. For example, in lease agreements, the tenant enjoys exclusive possession of the leased property, but this does not mean that the tenant has the intention to deny the landlord’s title over the leased property. Therefore, the intention to possess under the background of adverse possession shall be interpreted as the intention to acquire ownership of the disputed property by showing exclusive possession.

### 3.3 The requisite intention to possess is better to be presumed

To establish the squatter’s possession, both factual possession and intention to possess must be satisfied. However, once the factual possession by the squatter of the disputed land has been proved, from the authors’ perspective, there should be a rebuttable presumption of intention to

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<sup>55</sup> D. Chiang, 'In Search of a Legal Solution for Boundary Encroachments in Hong Kong: Adverse Possession vs Statutory Encroachment', 10 *Hong Kong Journal of Legal Studies* (2016) 59, 65.

<sup>56</sup> *Buckinghamshire* (n 23).

<sup>57</sup> *JA Pye (Oxford) v Graham* (2003) 1 CA 419.

<sup>58</sup> *ibid.*

<sup>59</sup> S Goo, A. Lee, *Land Law in Hong Kong* (Hong Kong: LexisNexis 2010), 386.

<sup>60</sup> See e.g. *Street v Mountford* [1985] AC 809.

<sup>61</sup> (1990) 61 P & CR 487.

<sup>62</sup> *ibid.*

possess, therefore the squatter no longer needs to establish the intention to possess, unless what is proved otherwise.

According to the current legislation, if the intention to possess were equivocal enough, the court would deny its existence.<sup>63</sup> Therefore, it shows that the current approach is that the actual possession and intention to possess are two separate things, and must be proved independently. Indeed, few people will deny such an approach, as in certain situations, the squatter actually possesses the disputed land, but never realized the existence of such land, therefore he has no intention to possess it, e.g. in the case of *Tsun Wai Man v Cheung Yung*.<sup>64</sup>

As the squatter's requisite intention to possess must be clear to the world,<sup>65</sup> it is frequently inferred from physical acts of the squatter.<sup>66</sup> Thus, the actual possession and *animus possidendi* always interact heavily and are usually co-existent.<sup>67</sup> Moreover, in most situations, the proof of intention to possess is based on the evidence of actual possession. For example, if the actual possession is symbolised by fencing the land, then the intention to possess is likely to be proved by the evidence of building of the fence. In so saying, the view that factual possession can imply the squatter's intention to possess,<sup>68</sup> seems reasonable. This presumption can make a difference in cases where the intention to possess is equivocal, according to current case laws, it is likely that courts will deny the intention to possess; however, such intention to possess can be proved if the presumption above works.

#### 3.4 The intention to possess impairs the predictability and fairness of judgment

The intention to possess is assessed subjectively. For instance, in *Lau Wing Hong v Wong Wor Hung*,<sup>69</sup> as mentioned above, the court held that the willingness to pay the rent failed to show the intention to possess with on persuasive reasoning,

Moreover, in another case *the Hong Kong Buddhist Association v Cheng Ka Leung Michael*,<sup>70</sup> the court held that the change of lock failed to reflect the intention to possess but only for security. Regarding this point, the judges fail to render a sound logical reasoning, which makes the conclusion unpersuasive. Moreover, in modern society, it is difficult to show the occupier's intention to possess the property, especially for the apartments in high-rising buildings, as it is hard for the authors to find any stronger evidence than locking the door. Conversely, based on the same principle, some other modest proof of intention to temporary possession, e.g. living in the property, has been allowed.<sup>71</sup>

Therefore, these cases indicate that the determination of intention to possess inevitably involves a high level of subjective judgment, which may harm the fairness and predictability of cases regarding adverse possession.

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<sup>63</sup> *Powell* (n 24).

<sup>64</sup> [2001] HKCFI 721.

<sup>65</sup> [2001] HKCFI 721.

<sup>66</sup> *Gray and Gray* (n 46) 163.

<sup>67</sup> *ibid.*, 154.

<sup>68</sup> *Powell* (n 24).

<sup>69</sup> (1990) 61 P & CR 487.

<sup>70</sup> [2006] HKCU 1520.

<sup>71</sup> *Lambeth LBC v Blackburn* (2001) 82 P & CR 494.

### 3.5 The Lack of Consideration Regarding the Intention of the Paper Owner

It seems that the paper owner's intention is generally 'irrelevant in practice'.<sup>72</sup> However, this idea lacks validity, as to some extent, the intention of paper owner plays a significant rule. From the authors' perspective, in most cases, the intention of the paper owner determines whether the possession is adverse or not.

Generally, 'adverse' means that the paper owner had available right of entry against the squatter, but did not assert such right effectively<sup>73</sup> and subsequently it has been simplified as 'possess without the consent of the owner',<sup>74</sup> or 'possess with the consent under fraud'.<sup>75</sup> For example, if the landowner allows the squatter to possess his or her land as if the squatter were the owner, it shall not raise any dispute about adverse possession. Thus, the 'adverse' can be never established if the possession is under a lawful title,<sup>76</sup> or by the leave,<sup>77</sup> or lease<sup>78</sup> and license<sup>79</sup> of the paper owner.

However, sometimes the intention of paper owner is hard to perceive and will be inferred by legal implication,<sup>80</sup> e.g. the possession by the 'squatter' as a family member or relatives of the true owner,<sup>81</sup> or the paper owner lack of knowledge of the existence of his land<sup>82</sup> or the dispossession by the squatter.<sup>83</sup> Although English law has already abolished the implied license<sup>84</sup> from the true owner,<sup>85</sup> the case *Man Kam Tong v Man Lin Tai*<sup>86</sup> did not follow this in Hong Kong, and it is advisable to abolish the legal implication as to the intention of paper owner that adversely impacts the paper owner's interest.<sup>87</sup>

Thus, the authors deem that the intention to possess sometimes is optionally used by the court to balance the interest between the squatter and the true owner, and agrees the view that the intention to possess was regarded as 'yet another weapon in the armory to be deployed against squatters', imposing such onerous restrictions on the notion that 'few squatters, if any, could satisfy it.'<sup>88</sup>

### 3.6 The Need for Reform

Hong Kong has always been known as a place with plenty of people, but insufficient land.<sup>89</sup> A basic economic analysis of 'demand and supply' will render a logical explanation as to why the

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<sup>72</sup> *Buckinghamshire* (n 23).

<sup>73</sup> *Gray and Gray* (n 46) 1181.

<sup>74</sup> *Pye* (n 56) 419.

<sup>75</sup> *Ellis v Lambet LBC* (1999) 32 HLR 596.

<sup>76</sup> *Buckinghamshire* (n 23).

<sup>77</sup> *Canadian Pacific Ltd v Paul* (1989) 53 DLR.

<sup>78</sup> *Hayward v Chaloner* [1968] 1 QB 107.

<sup>79</sup> *Pye* (n 56).

<sup>80</sup> *Leigh v Jack* (1879) 5 Ex D 264.

<sup>81</sup> *Murphy v Murphy* [1980] IR 183.

<sup>82</sup> *Hughes v Cork* [1994] EGCS 25.

<sup>83</sup> *Rains v Buxton* (1880) 14 Ch D 537.

<sup>84</sup> *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] QB 94.

<sup>85</sup> Limitation Act 1980, Schedule 1, paragraph 8(4).

<sup>86</sup> [1984] HKLR 181.

<sup>87</sup> Consultation Paper 2014 (n 3) 114.

<sup>88</sup> *Powell* (n 24).

<sup>89</sup> For example, experts Chen and Gordon commented that "[w]ith a land mass of 1,054sq km and a resident population of more than 7 million, Hong Kong is one of the most densely populated cities in the world." See Chen and Gordon (n 12) 414.

property price of Hong Kong has been so high (and in fact the highest in Asia).<sup>90</sup> Although the majority of cases regarding adverse possession merely involve small portions of land,<sup>91</sup> some do involve areas which can be enormously profitable.<sup>92</sup> Based on the analysis in the previous section, the authors agree that the possibility for claiming adverse possession may seem “to invite ‘opportunistic litigations’, especially when the land can be so valuable.<sup>93</sup> Therefore, there have been heated debates regarding the justifications behind and application of this old-fashioned doctrine in Hong Kong and many other jurisdictions.

Besides, adverse possession also has constitutional implications in Hong Kong. The Basic Law offers protection to property (article 6) and emphasised the right to compensation for lawful deprivation of property (article 105). However, the court’s reasoning in previous judgments was not fully justified.

Most importantly, the Land Title Ordinance (hereinafter “LTO”) (Cap. 585) has already been enacted in 2004. In common law jurisdictions, there are two main systems for land registration, namely, the deeds registration system (hereinafter “DRS”) and the land title registration system (hereinafter “LTRS”).<sup>94</sup> Given that LTRS has not come into effect yet, the DRS still operates under the Land Registration Ordinance (Cap 128). The major difference between the two systems, in short, is that while the DRS is a register of documents that affect a certain property, LTRS is proof of ownership. Hence, under the current system, a person might still subject to uncertainties or defects in his title to the property, even though he has been registered as the property’s owner because “title to land is relative and depends ultimately upon possession”, as Yip noted.<sup>95</sup>

In fact, it has been generally perceived that the underlying principles of adverse possession are in conflict with LTRS, and most common law jurisdictions have already abandoned the operation of adverse possession once a LTRS is in effect.<sup>96</sup> As adverse possession conflicts with LTRS the authors agree with the Adverse Possession Sub-committee of the Law Reform Commission that a reform is needed.

### 3.7 The Reasoning in the Consultation Paper and Report

As shown in the Consultation Paper and Report published by the Law Reform Commission, there are four main justifications for adverse possession in Hong Kong, namely “protection against stale claims”, “avoid land becoming neglected and undeveloped”, “prevent hardship in cases of mistake” and “Facilitate conveyancing in unregistered land”.

Logically, in order to decide whether or not adverse possession should be maintained or abolished in Hong Kong, it is necessary to fully examine those four justifications because they were proposed by the Law Reform Commission in the light of the high-level population density in

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<sup>90</sup> *Global Property Guide, "Square Metre Prices - Hong Kong Compared to Continent"* [www.globalpropertyguide.com/Asia/Hong-Kong/square-meter-prices](http://www.globalpropertyguide.com/Asia/Hong-Kong/square-meter-prices) [Accessed October 29, 2014].

<sup>91</sup> M. Dixon, 'Adverse Possession in Three Jurisdictions', *The Conveyancer and Property Lawyer*, (Mar/Apr 2006) 179.

<sup>92</sup> For example, in *Lee Theatre Realty Ltd v Tong Wah Jor*, CFI HCA 1251/2003 (unreported), the land concerned is located in somewhere near the Lee Theatre, which is a highly developed area in Causeway Bay.

<sup>93</sup> Chen and Gordon (n 12) 413.

<sup>94</sup> L. Chan, 'Hong Kong Land Titles Ordinance: The Shape of Things to Come', 35 *Hong Kong Law Journal* (2005), 627.

<sup>95</sup> A. Yip, 'Filling in the gaps on squatter’s title' *South China Morning Post* (30 January 2013) BIZ2.

<sup>96</sup> M. Park and I. P. Williamson (n 7), 33-34.

Hong Kong.<sup>97</sup> After reviewing a wide range of literature, the authors are particularly impressed and persuaded by the approach adopted by Chen and Gordon (the “Two Experts”) who counter-argued against these four justifications in their recent publication.<sup>98</sup> However, it is the authors’ view that the Two Experts’ arguments are unassailable and forceful because they have listed statistics and public policy concerns to support their arguments. Based on the Two Experts’ opinions, novelty can be contributed to this academic discussion by addressing the following three issues. Firstly, the authors will try to respond to the two experts’ call for the consideration of the Singaporean experience in dealing with the conflicts between adverse possession and LTRS, so as to argue why adverse possession should also be abolished in Hong Kong. Secondly, the authors will also try to draw some insights from the English experience. Last but not least, the authors will also consider the feedback from the general public, especially regarding the Consultation Paper and the Report.

### 3.8 The Singaporean Experience

Singapore has always being compared with Hong Kong. Just as Chen and Gordon pointed out, both two places have the heritage of common law, and are “similar in its population density, urbanisation and land prices”.<sup>99</sup>

However, Singapore moved ahead of Hong Kong in tackling the issue of adverse possession, after it enacted the Singapore Land Titles Act 1993 (hereinafter “LTA”).<sup>100</sup> In view of the difficulty for adverse possession to coexist with the underlying principle of indefeasibility in a registered land system, Singapore, alongside with jurisdictions like Malaysia and Canada (except Alberta) has completely abolished the doctrine of adverse possession.<sup>101</sup> The indefeasible nature of a registered title, as Woods noted, is that it precludes the loss of ownership through subsequent adverse possession.<sup>102</sup> In other words, allowing possessory title to be planted would permit rights which has not been recorded in the registry to prevail over registered title, “as title could be acquired by possession unsupported by the registration of an instrument evidencing the acquisition”.<sup>103</sup> Hence, in order to ensure a greater degree of security of tenure, and that all titles are acquired through registration, the Singaporean authority decided to abolish the doctrine of adverse possession completely.

The abolition of the doctrine of adverse possession, like many other legal doctrines, naturally drew some opposition Hence, the Singaporean officials realised there was a need to compromise between “the principle of indefeasibility of title and the policy that documentary owners who sleep on their rights should not be protected by the law as against persons who have established long possession”.<sup>104</sup> The above concern is addressed by adding certain “transitional provisions”

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<sup>97</sup> Consultation Paper 2012 (n 8).

<sup>98</sup> Chen, Gordon (n 12), 418-421.

<sup>99</sup> Chen and Gordon (n 12), 428. For a quick reference of overall land price in Singapore, see <http://www.globalpropertyguide.com/Asia/Singapore/Rental-Yields> [Accessed April 1, 2015].

<sup>100</sup> Singapore Land Titles Act (Act No.27 of 1993).

<sup>101</sup> U. Woods, 'The English Law on Adverse Possession: A Tale of Two Systems', 38 *Common Law World Review* (2009) 27, 32.

<sup>102</sup> *ibid.*

<sup>103</sup> Chen and Gordon (n 12) 424.

<sup>104</sup> T. Yee, 'Adverse Possession of Land under the Land Titles Act', 2 *Singapore Journal of Legal Studies* (1992) 481, 482.

into Division II of the LTA.<sup>105</sup> Specifically, Yee praised that subclause (9) of clause 172 as an “eminently fair” provision because it seeks to give a ‘grace period’ for applicants under section 42 of the old LTA to make such an application.<sup>106</sup>

### 3.9 The English Experience

The Consultation Paper and the Report has already considered the impact after Land Registration Act 2002 came into effect.<sup>107</sup> Adding a minor point here: according to Burn and Cartwright, the most obvious impact after the Land Registration Act 2002 has come into effect is that the ability of a squatter to obtain title to the land has reduced drastically because the mere passage of time does not grant an adverse possessor the right to an estate; instead, it only grants a right to apply to be registered.<sup>108</sup> Here, the registered proprietor will naturally be alerted by the application, hence allowing him to resist the application in most cases.<sup>109</sup> Unless the registered proprietor failed to take certain steps within a further period of time, he would have recovered his possession against the squatter.<sup>110</sup>

### 3.10 Hong Kong citizens’ Feedback on the Latest Report

While the doctrine of adverse possession is said to be particularly helpful in dealing with boundary problems,<sup>111</sup> which are more common than in the New Territories, many leaders of the Heung Yee Kuk actually objected to the doctrine. For example, Lam Kwok-cheong, an executive member of the Heung Yee Kuk, strongly criticized that the recommendations made by the Law Reform were unreasonable, and “such laws should not even exist” because owner’s benefits are not protected sufficiently.<sup>112</sup>

Another noteworthy point highlighted in the recent Report published by the Law Reform Commission is that while the squatters of registered title land will have the right to apply for registration after 10 years’ of uninterrupted adverse possession, they need to go one step further by ‘notifying’ the registered owner.<sup>113</sup> The authors believe that while it would be harder for squatters to apply for adverse possession, there is also a need to clarify the meaning of ‘notify’ in English case laws. This issue will be discussed in the following text.

Currently, the dispositive Land Registration Ordinance (Cap 128) preserves the adverse possession,<sup>114</sup> and it indeed can solve most residual disputes over the land boundaries and surveys in the New Territories.<sup>115</sup> However, once the Land Titles Ordinance (Cap 585) comes into force, adverse possession has no application,<sup>116</sup> for it is no longer compatible with the infeasibility of

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<sup>105</sup> Section 42(2), Land Title Act.

<sup>106</sup> Yee (n 103) 495.

<sup>107</sup> See Chapter 3 of the Consultation Paper.

<sup>108</sup> E. Burn, J. Cartwright, *Cheshire and Burn's Modern Law of Real Property* (Oxford: OUP 2006), 147.

<sup>109</sup> *ibid.*

<sup>110</sup> *ibid.*

<sup>111</sup> For a simplified illustration on how adverse possession could be particularly practical when dealing with mistakes about boundaries, see E. Cooke, *Land Law* (Oxford: OUP 2012), 249-250.

<sup>112</sup> L. Liu, ‘Squatters May Find it Harder to Get Land’, *China Daily Hong Kong Edition* (21 October 2014), 3.

<sup>113</sup> *ibid.*

<sup>114</sup> Land Registration Ordinance (Cap 128) S28 (1)(k).

<sup>115</sup> Chen and Gordon (n 12).

<sup>116</sup> Consultation Paper 2014 (n 3) 25.

titles, and its application would substantially impair the fulfilment of the purpose for decreasing the transaction cost and enhancing the certainty of ownership.<sup>117</sup>

From the public policy angle, the adverse possession cannot fairly balance the interests between the paper owner and the squatter. As it leads to either the squatter's full possessory title with no compensation for the paper owner,<sup>118</sup> or the paper owner's full title with nothing left for squatter.<sup>119</sup> Some have noticed this drastically all-or-nothing consequence of adverse possession.<sup>120</sup> Moreover, it can also impose negative effects on the public. On the one hand, the intention to possess and non-differentiation of good faith and bad faith will encourage squatters commencing their occupation as trespassers and thus wrongdoers;<sup>121</sup> on the other hand, the irrelevance of the knowledge of dispossession will make the true owner lose his title through inadvertence<sup>122</sup> and undermine the confidence in the law's ability to protect the innocent party.

Besides the above analysis, another reason for adverse possession is that the paper owner should take the responsibility for adverse possession, as the consequence of non-immediate use of his land.<sup>123</sup> From the authors' perspective, such view may only be justified by the precondition that the need for human beings to make full use of the land is urgent and indispensable. As mentioned above, since Hong Kong has a high level of population density, nowadays land becomes increasingly scarce. Therefore, the scarcity of land may require every land owner to fully and timely use the land, and it seems that such precondition is satisfied. However, here another issue rises that when the landowners failed to use the land fully and timely, what kind of consequences should they bear? If the doctrine of adverse possession continues to apply in Hong Kong, the most severe aftermath for such landowners may be the loss of their land property. Therefore, the central issue becomes whether the scarcity of land is sufficient to justify the harsh punishment under the framework of adverse possession for the landowners who failed to use their land.

From the authors' perspective, although land can be regarded as private property, the landowner shall also be subject to certain duties. To deal with the current problem of land scarcity in Hong Kong, it is reasonable to impose a duty onto landowners to fully and timely use their land. However, adverse possession is not the only way to achieve such goal, alternatives are available, e.g. charging extra tax of various amounts depending on the degree of sufficiency in land use, so far, the doctrine of adverse possession is not the only way to solve the problem of land scarcity in Hong Kong. Therefore, it is not persuasive to justify the doctrine of adverse possession is a must for the purpose of encouraging land use.

To expand the answer to the central issue above, it is also necessary to analyse who will obtain benefits under the framework of adverse possession. If a claim of adverse possession succeeds, the most benefited person is the squatter. Therefore, another issue is whether and why the squatter deserves such "gift". Following the logic above, the primary reason for the squatter to gain the

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<sup>117</sup> Chen and Gordon (n 12).

<sup>118</sup> *Pye* (n 56).

<sup>119</sup> *Beaulane Properties Ltd v Palmer* [2005] 4 All ER 461.

<sup>120</sup> Chen and Gordon (n 12).

<sup>121</sup> *Chan Tin Shi & Others v Li Tin Sung & Others* [2006] 1 HKLRD 185.

<sup>122</sup> *JA Pye* (n 56).

<sup>123</sup> *ibid.*

land is perhaps because he or she fully and timely used the land. Therefore, the last question is whether such use of land by the squatter can justify the squatter to gain the land from another “lazy” person. As we know, transfer of property between private parties general necessitates mutual consent. However, adverse possession can be regarded as a transfer of property between private parties without mutual consent; therefore, it deviates from the doctrine of contract autonomy and protection of private property. In so saying, even though the squatter used the land and contributes to the efficiency of land use in Hong Kong, it is still inevitable contrary to basic principles of laws. Therefore, its justification is questionable.

#### **4. Conclusion**

Given that the recent Report published by the Law Reform Commission recommends that the doctrine of adverse possession should still be retained, the authors believe that in a near future, the doctrine will still be effective in Hong Kong.

However, the authors are in line with Chen and Gordon (above) that the justifications proposed by the Commission are not solid and persuasive. Moreover, if the LTRS becomes effective in Hong Kong, the practicality of maintaining the doctrine of adverse possession will be minimal. For clarity and certainty reasons, it is therefore believed that the doctrine should be abolished in Hong Kong. To ease the possible hardship caused by the abolition, it is suggested that transitional provisions similar to those used by Singapore could be useful.