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**APPLICATION OF THE DOCTRINE OF ADVERSE POSSESSION
UNDER ENGLISH AND NIGERIAN LAW: A COMPARATIVE
STUDY.**

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A thesis presented for the degree of PhD in Law

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Declaration

As per the Postgraduate Assessment Regulations for Research Degrees, I confirm:

That this thesis was written by me;

That it is my work;

That it has not been submitted for any other degree or professional qualification

Abstract

This thesis engages a comparative study of the application of the doctrine of adverse possession under English and Nigerian law. Whilst the pre-colonial geographical entity which later became known as Nigeria had both the customary and Islamic systems of land tenure in place before the British rule, the ensuing colonial administration facilitated the reception of English law which introduced the English land tenure system including the doctrine of adverse possession into Nigeria, subject to local circumstances and local legislation. Consequently, a plural system of land tenure emerged with an attempt by the Land Use Act enacted in 1978 to consolidate them and streamline the system of landholding in the country. This historical background informed this comparative study of the application of the doctrine of adverse possession in its pristine form under English law (applicable in England and Wales), and its application in Nigeria - a country driven by a plural legal system. Using the qualitative/doctrinal research methodology, the thesis engages an inquiry into the application of the doctrine of adverse possession under English and Nigerian law against the backdrop of the peculiarities of the prevailing social circumstances and divergent legal systems applicable in the jurisdictions under study. A summary of the findings in this thesis is that whilst the doctrine of adverse possession may be of general application in the common law and civil law jurisdictions, the historical evolution of the Nigerian legal system, the peculiar social circumstances of the Nigerian land tenure systems, the divergent pieces of local legislation and the extant state land policy, have streamlined the application of the English doctrine of adverse possession in Nigeria.

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LIST OF ABBREVIATIONS

A.C	Appeal Cases (Third Series)
A.C.H.P.R	African Charter on Human and People's Rights
All E.R	All England Reports
All N.L.R	All Nigerian Law Reports
App. Cas	Appeal Cases (Second Series)
A.U	African Union
Bing N.C	Bingham's New Cases
Bos. & P	Bosanquet and Puller's Reports
C.A	Court of Appeal
Ch.	Chapter
Ch.	Chancery Reports
Ch. D	Chancery Division
Chi. L. Rev.	Chicago Law Review
Civ.	Civil Division
C.J	Chief Justice
C.J.N	Chief Justice of Nigeria
C.L.R.	Commercial Law Reports
CLR	Commonwealth Law Reports
Cowp.	Cowper's Reports
D.E.T.R	Department of the Environment, Transport, and the Region
D.L.R	Dominion Law Reports
Dru. & War.	Drury & Warren's Report
Ed.	Edition or Edited
E.C.H.R	European Convention on Human Rights

ECtHR	European Court of Human Rights
E.G.L.R	Estates Gazette Law Reports
E.H.R.R	European Human Rights Reports
E.R	Exchequer Reports
E.R	English Reports
E.T.S	European Treaty Series
E.U	European Union
E.W.H.C	England and Wales High Court
E.W.C.A	England and Wales Court of Appeal
Ex. D	Exchequer Division
Ed.	Edition
F.C.T	Federal Capital Territory
F.S.C	Federal Supreme Court
F.W.L.R	Federation Weekly Law Reports
Gev. LJ	Georgia Law Journal
Har. L. Rev.	Harvard Law Review
H.L.C	House of Lords Cases
H.L	House of Lords
H.M	Her Majesty
H.R.A	Human Rights Act
Ir. Eq. Rep.	Irish Equity Reports
J.C.A	Justice of the Court of Appeal
J.S.C	Justice of the Supreme Court
K.B	King's Bench
LTD	Limited
L & T	Law of Landlord and Tenant

LASPO Act	Legal Aid Sentencing and Punishment of Offenders Act
L.D	Legislative Division
L.F.N	Laws of the Federation of Nigeria
L.J	Law Justice of Appeal
L.L.R	High Court of Lagos Law Reports (Nigeria)
L.P.A	Law of Property Act
L.Q.R	Law Quarterly Review
L.R	Law Reports
L.R.A	Land Registration Act
L.R.L	Land Instrument Registration Law of Lagos State
L.R.P.G	Land Registry Practice Guide
L.T	Law Times Reports
L.U.A	Land Use Act
M & W	Meeson & Welshy's Reports
Mi. L. R.	Miami University Law Review
M.P	Member of Parliament
Nig.	Nigeria
Nw. U. L. R	New York University Law Review
N.L.J	Nigerian Law Journal
N.L.R	Nigerian Law Reports
N.M.L.R	Nigerian Monthly Law Review
N.N.L.R	Northern Nigeria Law Review
N.S.C.C	Nigerian Supreme Court Cases
N.S.W	New South Wales
N.W.L.R	Nigerian Weekly Law Reports
OAU	Organization of African Unity

Para.	Paragraph
Pt.	Part
P & CR	Planning (Property) and Compensation Reports
P.C	Judicial Committee of the Privy Council
Ph. D	Doctor of Philosophy
Q.B	Queen's Bench
Q.U.T	Queensland University of Technology
R.T.A	Registration of Titles Act
S.C	Supreme Court
S.R	State Reports
Taunt.	Taunto's Reports
T.B.E	Tropical Built Environment Journal
U.B.H.L	University of Botswana Law Journal
U.N.T.S	United Nations Treaty Series
U.K	United Kingdom
U.K.H.L	United Kingdom House of Lords
U.K.S.C	United Kingdom Supreme Court
Vol.	Volume
V.S.C	Victoria Supreme Court
W.A.C.A	West Africa Court of Appeal
Wash C.A.	Washington's Court of Appeal
W.L.R	Weekly Law Reports
W.R	Weekly Reports

CHAPTER 1

GENERAL INTRODUCTION

1.1 Research Overview

This thesis engages a comparative study of the application of the doctrine of adverse possession in relation to land¹ under the English and Nigerian law against the backdrop of the diverse legal structures, the peculiarities of the applicable local circumstances and the existing land tenure systems. The thrust of the research is basically and particularly comparative and meant as a contribution to knowledge in contemporary law of adverse possession as applied in England and Wales, and in Nigeria.

Although Nigeria statutorily received the English common law² consequent upon almost a century of British rule,³ the imperial law was made subject to local circumstances and local statutes for the time being in force.⁴ It follows therefore that the application of the English common law and by implication, the English land tenure system, the doctrines of equity, and statutes of general application including the English statutes of limitations, that were in force in England on January 1 1900 were made applicable in Nigeria.⁵

However, there were indigenous laws and institutions⁶ including the indigenous land tenure systems⁷ already in place before the advent of colonial rule, and consequently operating parallel to the English system of land tenure. This interaction between the English and the Nigerian land tenure systems and the enactment of the

¹Adverse possession in relation to chattels is beyond the scope of this thesis.

² See Law (Miscellaneous Provisions) Act Cap 89 Laws of Nigeria 1958.

³ The British colonial rule in Nigeria took effect from the signing of the Treaty of Cession in 1861 by King Dosumu of Lagos up until 1960 when Nigeria became an independent country.

⁴ Law (Miscellaneous Provisions) Act (n 1), s.45(2).

⁵ *ibid* s.45(1).

⁶ The High Court Law of the various States within the Federation of Nigeria contains provisions on the application of customary law in Nigeria. See e.g. the High Court Law of Lagos State Cap H3 2003, s.26; and section 28 of the High Court Law applicable in the Northern states of Nigeria.

⁷See *Amodu Tijani v Secretary Southern Nigeria* (1921) AC 399.

Land Use Act in Nigeria in 1978, led to the evolution of a plural system of land tenure in Nigeria with legal consequences.⁸

A comparative study of the application of the doctrine of adverse possession under the English and Nigerian law is therefore worthwhile considering the historical credentials and diversity in the land tenure systems of the jurisdictions under study.

1.2 What is Adverse Possession?

‘Adverse possession’ which is a product of Anglo-Nigerian law is defined as:

...the process by which a person can acquire title to someone else’s land by continuously possessing it [with the requisite intention and without the consent of the owner] for a set limitation period, in circumstances where the owner either has, or is deemed to have the right to recover the land.⁹

Failure of the owner to take legal steps to recover the land within the set limitation period extinguishes his title in favour of the adverse possessor in the case of unregistered title, and in the case of registered title, entitles the adverse possessor to be registered as the new registered proprietor in place of the previous registered proprietor.¹⁰ The set limitation period and the circumstances under which adverse possession may arise vary as between jurisdictions.¹¹

In many common law jurisdictions including Nigeria, one of the potent ways of acquiring or proving title is through acts of possession with *animus possidendi* (that is, the intention to possess) over a long period of time.¹² This not only forms the basis of action by the ‘real’ owner against squatters and trespassers in particular, but has been recognised in law generally as justification for the claim in adverse possession

⁸ See Chapter 5 *infra*

⁹S Jourdan and O Radley-Gardner, *Adverse Possession*, 2nd ed. Bloomsbury Professional Limited 2011, West Sussex, England – U.K. at 3.

¹⁰*ibid* at 4.

¹¹For a detailed comparative study in this regard, see the *Report of the British Institute of International and Comparative Law for Her Majesty’s Court Service*, September 2016, available online at https://www.biicl.org/files/2350_advposs_sept_ftnsv3.pdf. Accessed on October 3, 2019.

¹² See *Pye (Oxford) Ltd & Ors v Graham & Anor* [2002] UKHL 30 at 41, 43, 70, 76; *Buraimoh v Bamgbose*(1989) 3 NWLR (Pt 109) 352 at 355.

by such squatters and trespassers, and as a defence in an action for declaration of title by the 'real' owner under a system of unregistered conveyancing.¹³ Sequel to putting in place a system of title registration in some of the common law jurisdictions,¹⁴ it became imperative for the adverse possessor to register his or her title in order to defeat the interest of the pre-existing registered owner.

The claim of the adverse possessor at common law has been bolstered up by the statute of limitation put in place in different jurisdictions stipulating the period within which the 'real' owner is expected to bring an action in court against the adverse possessor for declaration of title, or have his or her title extinguished in favour of the adverse possessor after the time prescribed by law. Thus, a valid adverse possession claim is dependent on meeting the legal requirements for adverse possession coupled with the lapse of time under the relevant limitation statute.

1.3 Background and objectives of study

The reason for engaging the two jurisdictions (England and Wales, and Nigeria) for comparison is as a result of the divergent systems of land tenure applicable in these jurisdictions.¹⁵ Whilst the English land law and relevant statutes¹⁶ apply in England and Wales in a uniform manner within a monolithic legal system, Nigerian land tenure system is an amalgam of both the English and the indigenous systems of land tenure operating side by side within a plural legal system, but subject to the Nigerian Land Use Act,¹⁷ which is the principal legislation regulating title to land. Thus, while the English common law doctrine of adverse possession is applicable in both the English and Welsh jurisdiction as well as in the Nigerian jurisdiction, the

¹³*Oyebamiji v Lawanson* (2008) 15 NWLR (Pt 1109) 122, *Duzu v Yunusa* (2010) 10 NWLR (Pt 1201) 80

¹⁴ See for example, the Land Registration Act, 2002 applicable in England and Wales, and the Land Registration Law of Lagos State Nigeria, 2015.

¹⁵ While both jurisdictions are known to have the common law tradition which recognises the rule of adverse possession, Nigeria, unlike England and Wales, operates a plural legal system consisting of customary law and Islamic law in addition to the English common law, while the Nigerian Land Use Act enacted in 1978 Cap L5 2010, harmonises these systems and streamlines landholding in accordance with its provisions.

¹⁶ Such statutes include the Limitation Act, 1980; and the Land Registration Act Cap 9 2002.

¹⁷ Cap L5 Laws of the Federation of Nigeria, 2010.

indigenous land tenure systems in Nigeria and the Land Use Act are systems unknown to England and Wales. The essence of this work therefore, is to demonstrate the application of the doctrine of adverse possession under diverse considerations as dictated by the peculiar circumstances of the different land tenure systems, and to show that whilst the doctrine may generally be of universal application in both the common law and civil law jurisdictions,¹⁸ its application as a means of acquiring title to land varies.¹⁹

While England and Wales have a uniform legislation on limitation of actions and land registration (both having a bearing on application of the doctrine of adverse possession), in Nigeria, the content of the legislation on land registration vary as to whether registration pertains to land instrument or land title – a difference unknown to English law. Consequently, while the law on limitation of actions is generally the same across the component states within the Nigerian federation, registration law varies as between Lagos State and the Federal Capital Territory on the one hand, and other states of the federation on the other hand.²⁰

This research engages the question whether the Nigerian land tenure system can accommodate the application of the doctrine of adverse possession as known to England and Wales, in view of the Land Use Act and other municipal laws in place. It examines the efficiency or otherwise of the Registration Law of Lagos State of Nigeria 2015 which, unlike the Land Registration Act (LRA) 2002 applicable in England and Wales, allows the adverse possessor to register legal title without giving the owner the opportunity to object. It probes into the question whether the English Land Registration Act 2002 has not made adverse possession an unattractive method of acquiring title to land given the fact that there can be no registration of such adverse title without notice to the actual owner of the land who would then

¹⁸ See the *Report of the British Institute*, supra (n 11).

¹⁹ For example, apart from the fact that the period after which the 'real' owner may no longer bring an action to repossess his land varies across jurisdictions, the effect of proof of good faith or lack of it on the part of the adverse possessor may determine the Limitation period. Also, the question whether the land is registered or not may determine the application or otherwise of the rule of adverse possession: See the *Report of the British Institute*, supra (n 11).

²⁰ While Lagos State has a Law on title registration, other states have the Land Instrument Registration Law.

have the opportunity of not only showing a better title, but also the right to 'flush' the squatter out using due process cognizable in law.²¹

Whilst a combination of the common law and the Limitation Laws of both jurisdictions appear to automatically extinguish the title of the owner in favour of the adverse possessor after 12 years of adverse possession, section 48 of the Nigerian Land Use Act makes such Law applicable subject to the provisions of the Act. Under the Land Use Act, no title is acquired except by grant; actual or deemed, or by way of formal alienation with the consent of the Governor or the Local Government. Any other form of acquisition of title is subject to the provisions of the Act. Under this dispensation, could it be said that the doctrine of adverse possession is efficacious in Nigeria?

This work examines the historical credentials of the doctrine of adverse possession at common law as a fall out of the English doctrine of *seisin*;²² the applicability of the doctrine under Nigerian customary and Islamic law of land tenure; the legitimacy or otherwise of the retention of the doctrine under the Nigerian land tenure system following the advent of the Nigerian Land Use Act;²³ the watering down of its effect under the Land Registration Act 2002²⁴ applicable in England and Wales following the recommendations of the Law Commission;²⁵ the question whether the doctrine is subject to human rights challenge in the jurisdictions engaged; and the criminalisation of peaceful entry and peaceable possession in both countries.²⁶

²¹This inquiry is necessary in view of the fact that it may be impossible to register a fresh title in the name of the adverse possessor under the LRA 2002, except the owner delayed, acquiesced or expressly consented to acquisition of title by such adverse possessor and therefore making it possible for the latter to register his adverse title.

²² 'Seisin' refers to the measure of interest in land under English law.

²³ Land Use Act 1978 Cap L5 Laws of the Federation of Nigeria, 2010.

²⁴Schedule 6 paras 3 and 4.

²⁵ Report No. 271 of the Law Commission in the United Kingdom, 2002

²⁶ See for example, s.144 of the U.K Legal Aid Sentencing and Punishment of Offenders Act; ss.278(10) and 279(2) of the Criminal Law of Lagos state 2011. The law of theft in the UK requires the dishonest appropriation of property belonging to another with the intention of permanently to deprive another of it. To be guilty of theft, it is said that 'the individual defendant must know that the property belongs to another and the land theft approach to adverse possession extends his analysis to the knowingly unauthorized use of land.' See generally, N Cobb and L Fox, 'Living outside the system? The (im) morality of urban squatting after the LRA 2002.' (2007) Legal Studies 27(2).

1.4 Research Questions

In undertaking a comparative study of the application of the doctrine of adverse possession in both jurisdictions, this research work shall engage the following questions:

1. Is the application of the doctrine of adverse possession under a unified system of land tenure applicable in England and Wales the same in content and effect under the Nigerian plural system of land tenure harmonised by the Land Use Act?
2. With the advent of the Nigerian Land Use Act, has there been a radical departure from the English model of adverse possession as a mode of acquiring title to land in Nigeria?
3. Whether the land registration regime in the jurisdictions engaged renders the doctrine of adverse possession impotent in content and effect?
4. Whether the doctrine of adverse possession is challenged in the jurisdictions engaged, by both the local and international legal regimes on the sanctity of right to property and the entrenched right to compensation upon violation?
5. Whether the criminalisation of peaceful entry and peaceable possession by an adverse possessor in jurisdictions engaged has defeated the efficacy of adverse possession as a mode of acquisition of title in both jurisdictions?

1.5 Research Methodology

In engaging the research questions, the study applies the qualitative/doctrinal research methodology, and looks for research findings in primary and secondary sources. The primary sources include the principles of common law, customary and Islamic law relating to adverse possession; pieces of legislation applicable in England and Wales, and in Nigeria, in relation to the content and application of the doctrine of adverse possession; the human rights provisions in the European Convention on Human Rights domesticated as the Human Rights Act 1998 applicable in England and Wales, the Constitution of the Federal Republic of Nigeria 1999 and the provisions of the African Charter on Human and Peoples' Rights domesticated as such in Nigeria; case law generally emanating from within and

outside the two jurisdictions; and Reports of the relevant Law Commissions as they affect adverse possession. The secondary sources include textbooks, scholarly writings on adverse possession; journal articles by authors from the common law jurisdictions; working papers; conference papers; reports on Parliamentary hearings and government agencies; gazettes; news reports and relevant essays on websites.

These materials were collated, studied, synthesised and analysed to appraise the application of the doctrine of adverse possession as one of the ways of acquiring title in contemporary societies. From the perspective of a comparative study of the doctrine of adverse possession in England and Wales, and in Nigeria, were deduced various evolutionary changes in the functionality and efficiency of the rule of adverse possession as a mode of acquisition and enjoyment of land titles within social contexts.

Being a comparative study of two jurisdictions with diverse legal systems, this work identifies with and adopts the most recent methodology on comparative studies. Tourkochoriti, in her essay on Law and Methodology²⁷ identifies three main approaches in this regard, pointing out that the 'the methods that can be helpful to a comparative legal research depend on the research question and the goal of the researcher.'²⁸ According to her, there is first, the interdisciplinary approach which focuses on the sociopolitical context of discourse, enabling the researcher to understand the social basis for differences;²⁹ second, there is the normative enterprise approach in which the 'legal similarities or differences under comparison would provide inspiration for theoretical arguments for and against a solution in one area or another;³⁰ and third, an amalgam of the two approaches earlier

²⁷I Toukochoriti, 'Comparative Rights Jurisprudence: An essay on Methodologies.' Special Issue-Comparative Law LaM November 2017, DOI: 10.5553/REM/.000030. Although the article dealt specifically with comparative rights jurisprudence, it is a useful guide on methodologies on comparative study generally.

²⁸ibid para.1.

²⁹ ibid.

³⁰ ibid.

mentioned.³¹ In the case of the third approach, the aim could be to challenge 'the sociopolitical frame that led to the emergence of legal rules'³² where injustice or other iniquities could result from the application of the rules in concrete cases; it could be aimed at reaching 'a reflective equilibrium' between the *is* and the *ought*- 'a back and forth movement from the formation and operation of the rules in their context to a normative principle as to how they should be operating and the other way round.'³³

The foregoing approaches amount to the jurisprudential role of law either as a product of social factors (the first approach); or as an instrument of social dynamics (the second approach); or as an amalgam of the two. This thesis adopts the third approach in which the essence of law in the social context could explain the peculiarities in the application of the doctrine of adverse possession, and in determining its efficacy as a mode of acquisition of title in the two jurisdictions. Consequently, whilst for example, the peculiar sociopolitical dynamics of each jurisdiction under study could explain the social underpinnings of the application of the doctrine of adverse possession in those jurisdictions, the way in which the extant laws tend to harmonise its operation in light of land rights and other legal considerations, provides a stimulus for a case study in applied legal philosophy in reconceptualising the operation of the doctrine of adverse possession towards law reform.

However, this thesis does not involve any form of field work, collection or collation of data for analysis. It is strictly a doctrinal analysis of the content and application of the rule of adverse possession in both jurisdictions and an assessment of how the relevant concepts of land use, control and management impact on the application of the doctrine.

³¹ *ibid.*

³² *ibid.*

³³ *ibid.*

1.6 Literature Review

A critical review of the existing literature on the subject is undertaken in this thesis. From the old work of Ballantine,³⁴ to the modern treatises of Merrill,³⁵ Rose,³⁶ Stake,³⁷ Clarke,³⁸ Fennell,³⁹ Claey's,⁴⁰ Katz,⁴¹ Nicole,⁴² Pawlowski and Brown,⁴³ Smith,⁴⁴ and Okeoma⁴⁵ among others, a cursory exposition of the application of the rule of adverse possession formed the basis for asking questions which this thesis is meant to address. The various literature have been chosen to analyse and discuss the parameters for evaluating the efficacy of the doctrine of adverse possession, and providing the avenue for an objective assessment of its continued relevance in contemporary societies represented by the two jurisdictions under consideration.

1.7 Theoretical Foundation

A theoretical understanding of adverse possession is germane to the understanding of the application of the doctrine. This work therefore evaluates the traditional theories in demonstrating the inherent utility of the doctrine as a catalyst for effective land use and economic development, while its relevance in producing the results intended is being examined in both jurisdictions under inquiry using the

³⁴HW Ballantine, 'Title by Adverse Possession', *Harvard Law Review*, vol.32 No.2 (Dec 1918) 135.

³⁵TW Merrill, 'Property Rules, Liability Rules and Adverse Possession' (1984-85) 79 *Northwestern University Law Review*, 1122.

³⁶CM Rose, 'Possession as the Origin of Property' 52 *U. Chi. L. Rev.* 73 (1985).

³⁷JE Stake, 'The Uneasy case for Adverse Possession' (200-2001) 89 *Georgetown Law Journal* 2417.

³⁸JA. Clarke, 'Adverse Possession of Identity: Radical Theory, Conventional Practice', *Oregon Law Review* (vol 84, 2005).

³⁹LA Fennell, 'Efficient Trespass: The case of bad faith', 100 *Northwestern University Law Review* (2006) 1037.

⁴⁰ER Claey's, 'Locke Unlocked: Productive Use in Trespass, Adverse Possession, and Labour Theory,' (2012) *George Mason University Law and Economics Research Paper Series*, 1-70.

⁴¹L Katz, 'The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law' (2010) 5 *McGill Law Journal*, 47.

⁴²M Nicole, 'The Fiction of Adverse Possession: An alternative conceptualization of the right to control land' 2017 (A thesis submitted for the degree of Doctor of Philosophy), Lancaster University).

⁴³M Pawlowski and J Brown, 'Adverse Possession and the Transmissibility of Possessory Rights-The Dark Side of Land Registration.' [2017] (2) *Conv.* 116-131. Also available online at www.https://research.aston.ac.uk.

⁴⁴IO Smith, 'The Relevance of Adverse Possession as a Registrable Interest under the Lagos State Land Registration Law.' *Essays on Lagos State Land Registration Law.* A publication of the Department of Private and Property Law, University of Lagos-Nigeria (2017) 1.

⁴⁵I Okeoma, 'The Future of Adverse Possession of Registered Land...' Available online at <http://www.academic.edu>. Accessed on 11/11/2019.

windows provided by those theories. Thus, the traditional theories such as the *occupation theory*, the *labour theory*, the *personhood theory*, the *utilitarian theory*, the *economic theory* and the *social function of property theory* are examined against the backdrop of the dynamics of the contemporary legal and institutional frameworks driving the land law regimes in both jurisdictions under inquiry. From the standpoint of existing literature, and case law, these theories form the rationale behind the doctrine of adverse possession.

However, it is shown in the course of this thesis that whilst these traditional theories often canvassed in favour of adverse possession may explain the quintessential rationale behind the doctrine, they do not usually explain the basis for the efficacy or otherwise of the doctrine within the extant legal regimes of these jurisdictions. It is therefore necessary to evaluate these theories against the relevance of the doctrine in modern times and, in the course of this work, to develop a number of theoretical foundations such as the *relativity theory* which explains the inapplicability of the doctrine under certain local circumstances; the *grant theory* which streamlines the source of possessory title with impact on the application of the doctrine; the *indefeasibility theory* in relation to registered land; and the *incompatibility theory* inherent in the criminalization policy of the State. The development of these theories by the researcher explains to a large extent, the limitations in the application of the doctrine generally, and in particular, the variation shown in juxtaposing the position applicable in the jurisdictions under study in chapter 6.

1.8 Summary of Chapters

Apart from this chapter which is a general overview of this thesis, Chapter 2 is a critical review of existing literature relevant to the topic of this thesis. It x-rays the content, application, challenges and prospects of the doctrine of adverse possession in probing into the supposed justification and its relevance in contemporary property law. The gaps in the literature are identified with a view to addressing same in subsequent chapters.

Chapter 3 discusses the theoretical foundation for the work by taking a general overview of the traditional theories of the doctrine of adverse possession as a mode of acquisition of title to real property, and also as indicators of justification for sustainability of the doctrine. A critical evaluation of the theories reveals not only the pitfalls in them but also, and in particular, the gaps in them in relation to relativity and relevance of the doctrine under different legal backgrounds, necessitating an engagement with such modern theories as the *relativity theory*, the *grant theory*, the *'indefeasibility theory,'* and the *'incompatibility theory'*. These modern theories lay a foundation for the comparative study in this thesis.

Chapter 4 focuses on the doctrinal analysis of adverse possession under English law. It examines the historical evolution of the doctrine from remote antiquity through its development at common law; its nexus with the limitation statutes at different times; its content and scope; and its application to registered and unregistered land. It also examines whether the doctrine is open to human rights challenge and whether it is affected by the criminalization policy of the State. This Chapter provides the parameter for a comparative study with the Nigerian jurisdiction which is undertaken in Chapter 5.

Chapter 5 deals with the doctrinal analysis of adverse possession in Nigeria and its application under a plural land tenure system harmonized by the Land Use Act in that jurisdiction. It examines the applicability of the doctrine under the customary and Islamic law of land tenure and its compatibility with the provisions of the Land Use Act 1978 - the principal legislation harmonizing the land tenure systems in Nigeria. Its impact on the dual systems of land registration applicable in Nigeria, and its effect on the system of unregistered land are engaged. The Chapter also examines the question whether the application of the doctrine is subject to human rights challenge, and discusses the impact of the State criminalization policy on the doctrine. This Chapter, along with Chapter 4 provides the foundation for a comparative study undertaken in Chapter 6.

A comparative study of the doctrine of adverse possession is robustly engaged in Chapter 6. It commences with a comparative analysis of the different land ownership structures existing in both jurisdictions and the dichotomy in the land rights that may be acquired in these jurisdictions, which underpins the variation in the applicability of the doctrine. The Chapter engages a comparative analysis of the effect of the peculiar local circumstances on ground in the jurisdictions under study, and impact of the diversity of the land tenure systems on the doctrine of adverse possession. It also addresses the application of the doctrine under different registration systems; addresses the question from a comparative perspective, whether the doctrine is susceptible to human rights challenge; and compares the criminalization policies in the different jurisdictions, in determining the effect on the application of the doctrine. In engaging the comparative study, issues are classified and dealt with, each with a summary of the position of this thesis at the end.

Chapter 7 of this work discusses the research findings, addressing the various issues raised in the research questions earlier formulated. Discussion of the findings borders on the relativity of the doctrine of adverse possession; the radical departure of the Nigerian Land Use Act 1978 from the construction of adverse possession under English law; the disparity in the application of the doctrine under diverse systems of land registration in the jurisdictions under study; application of the doctrine within the confines of the human rights regime and the applicable criminalization policies of the jurisdiction engaged.

Chapter 8 outlines various recommendations for reforms and draws conclusion from the study and lessons learnt from other jurisdictions accordingly. Recommendations proffered ranges from a general re-think of the doctrine of adverse possession and its application under diverse legal systems and peculiar social circumstances prevailing at any time, to an appraisal of major determinants for its just application.

1.9 Contributions to knowledge

To the best of the researcher's knowledge, this is the first research work on a comparative study of the application of the doctrine of adverse possession under English and Nigerian law. The thesis demonstrates the limitations facing the application of the doctrine as a result of the variations in the social circumstances, the diversity in the legal and institutional frameworks between the jurisdictions under study and the differences in state policies formulated against the backdrop of peculiar challenges facing acquisition of title to land by adverse possession. This research work identifies the pitfalls in the application of the doctrine in diverse circumstances and makes recommendations as appropriate.

On the whole, the research work provides a veritable window for subsequent researchers in this area of study to appreciate the fact that whilst the doctrine may be universally recognized in the common law and civil law jurisdictions, the historical and social antecedents of their land tenure systems and the peculiarities of the state land policies may streamline the application of the doctrine.

Chapter 2

LITERATURE REVIEW

2.1 Introduction

Since this thesis is meant to be an addition to the existing literature on the doctrine of adverse possession, it is necessary to proceed from a review of the existing literature on the subject in order to appreciate the various perspectives of its contexts and applications. The literature herein discussed revolve around the central thesis of this work, which is an inquiry into the application of the doctrine of adverse possession as a mode of acquisition of title to land in contemporary property law, using a comparative study of the English and Nigerian law on the subject as the barometer. The purpose is to engage the views of writers on the various issues relating to this thesis with a view to identifying the gaps meant to be filled. Consequently, the literature review is subsumed under different sub-heads for ease of robust engagement.

The views of writers as expressed in the various literature have bearing on the discourse in subsequent Chapters by laying foundation for the understanding of relevant state policies, judicial decisions, statutory and human rights instruments, as well as concepts and principles generated by the doctrine of adverse possession. A ready understanding of relevant literature on the subject will foster an appreciation of the various arguments canvassed across the chapters following, with a view to giving this thesis the appropriate focus.

2.2 Policy behind the Statutes of Limitation

One of the early literature on the doctrine of adverse possession probes into the policy and operation of the statute of limitations. In his work on 'Title by Adverse Possession,' Ballantine⁴⁶ finds the main rationale for the application of the rule of adverse possession in the policy behind limitation statutes which is not necessarily to reward a squatter or trespasser on land for his wrongdoing, or to penalise the

⁴⁶HW Ballantine, 'Title by adverse possession' Harvard Law Review vol 32, No. 2 (December 1918) 135-159. Available online at <https://www.jstor.org/stable/1327641>. Accessed on 07/09/2019.

‘sleeping’ owner for sleeping on his right, but essentially to quiet all titles openly and consistently asserted ‘to provide proof of meritorious titles, and correct errors in conveyancing.’⁴⁷

He posits that while rightful ownership and just title to land is one thing, ‘proof of a right which can be laid before a purchaser’ is another thing.⁴⁸ He explains that proof of a paper title adequate to establish a *prima facie* right of possession may be difficult without proof of possession;⁴⁹ title may be difficult to deduce in land transactions where the muniment of title is lost, making it imperative to trace title back to the earliest possessor or the first settlor.⁵⁰ Relying on the views of Pollock and Maitland⁵¹ that ‘[every] title to land has its root in seisin’ and that ‘the title which has its roots in the oldest seisin is the best title,’ Ballantine states that ‘with the help of the statute of limitations,...it is now ordinarily sufficient for the English conveyance to go back forty years for a root of title.’⁵²

Ballantine notes that under a crude system of recording land transactions at the time, the doctrine ‘[was] indispensable as a protection to just titles’⁵³ and possession remained an important muniment and potent quietor of titles to land. He identifies two impairments to the efficacy of adverse possession namely, disabilities such as ‘absence from the state, infancy, insanity, coverture or imprisonment;’⁵⁴ and the existence of future estates, adding that if titles were quieted by possession regardless of disabilities and reliance is on lapse of time coupled with proof of continuity of possession and claim of title, all defects are cured and titles quieted.⁵⁵

⁴⁷ibid (n 46) at 135.

⁴⁸ibid at 136.

⁴⁹In the words of Ballantine: ‘It involves proving the signature and delivery of every deed; the corporate existence of every corporation in the chain of title; the execution of all powers of attorney; all the statutory notices and formalities in execution; tax and probate sales; all the descents and probate proceedings; in short, every legal step of the transfer of the title, voluntary and involuntary, simple and complex, from a recognised source down must be shown by paper evidence...’ supra, at 136.

⁵⁰ibid at 137.

⁵¹Pollock and Maitland, *History of English law*, 46.

⁵²Ballantine, supra (n 46) at 137.

⁵³ibid at 145.

⁵⁴ ibid.

⁵⁵ ibid.

However, Ballantine's conception of adverse possession belonged to an age of unregistered transactions on land or, at best when only muniments of title as evidence of title were registrable; a process which would not cure a defect in title.⁵⁶ Obviously, where title was found defective, the paper title became void, and the only option available was tracing back title to the earliest possessor or settlor on the land. Registration of title was unknown at the time, and putting it in place would have obviated the need to reckon with adverse possession as opposed to the register 'as a protection to just titles.'⁵⁷ This lacuna in Ballantine's literature regarding title registration is one of the areas to be addressed by this thesis. The question would be examined in this thesis whether a good system of title registration would affect the efficacy of the rule of adverse possession positively.

2.3 Possession as the root of Property

In her work: 'Possession as the Origin of Property,'⁵⁸ Rose lays foundation for the application of the rule of adverse possession premised on the common law position that possession or occupancy is the root of property. Interpreting the common law maxim that 'possession is the root of title,' she posits that possession is a clear cut act 'whereby the world understands that the pursuer has an unequivocal intention of appropriating...to his individual use.'⁵⁹Analysing the decision of the American court in the old case of *Pierson v Post*,⁶⁰ Rose claims that there are two principles established at common law in this regard namely, 'notice to the world through a clear cut act,' and 'reward to useful labour'⁶¹ which underlines what Blackstone

⁵⁶ *ibid.*

⁵⁷*ibid.*

⁵⁸CM Rose: 'Possession as the origin of property.' 52 Univ. Chicago L.Rev. 74 (1985)

⁵⁹*ibid* at 76 quoting the American court in the wild animal case of *Pierson v Post* 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

⁶⁰*Supra* (n 59). In that case, Post, a hunter who was hunting a Fox, almost had the beast in his gun sight when an interloper appeared, killed the Fox and ran away with it. Post sued the interloper for the value of the Fox on the ground that his pursuit of the Fox established his property right to it. This argument was rejected by the court when it held that "occupation" or "possession" went to the person who "killed the animal" or who "wounded it mortally" or "caught it in a net." The court held that 'these acts brought the animal within control that gives rise to possession and hence, a claim to ownership.'

⁶¹ Rose, *supra* (n 58) at 77.

referred to as a 'declaration of one's intent to appropriate.'⁶² Consequently, according to her:

[t]he doctrine of adverse possession...operates to transfer property to one who is initially a trespasser if the trespasser's presence is open to everyone, lasts continuously for a given period of time, and if the title owner takes no action to get rid of him during that time.⁶³

In the same vein, she says the doctrine is susceptible to a different interpretation which is that it could serve not to require the owner to assert her right publicly.⁶⁴ However, the most important element in this regard is 'communication' or 'notice' since possession entails acts which 'apprise the community, arrest attention, and put others claiming title upon enquiry.'⁶⁵ Thus, the possibility of transfer of title by adverse possession ensures that members of the public can rely on 'their own reasonable perceptions, and an owner who fails to correct misleading appearances may find his title lost to one who speaks loudly and clearly, though erroneously.'⁶⁶

The rationale behind the requirement that the property owners keep their communications of titles clear is that it facilitates trade and minimises resource-wasting conflict. Owner's carelessness about encroachers may encourage contentions, insecurity and litigation.⁶⁷ It is said that all will be richer when property claims are unequivocal, such as where there is adequate notice of possession, and the unequivocal status enables property to be traded and used at its highest value.⁶⁸ In any case, it is not enough, according to Rose, to merely communicate the claim of right to the public through some overt act, it must be so understood by the relevant audience who takes it seriously, for it to have any force.⁶⁹

⁶²W Blackstone, *Commentaries on the Laws of England* referred to by Rose supra note 58 at 77. Rose says 'society is worse off in a world of vague claims; if no one knows he can safely use the land, or from whom he should buy it if it is already claimed, the land may end up being used by too many people or by none at all.'

⁶³ CM Rose, supra (n 58) at 79.

⁶⁴ *ibid.*

⁶⁵ *ibid* at 80 relying on *Slatin's Properties Inc v Hassler*, 53 Ill. 2d 325, 329 where the court quoted *Chicago Title & Trust Co. v Drobnick*, 20 Ill. 2d, 374, 379.

⁶⁶CM Rose supra (n 58) at 80.

⁶⁷*ibid* at 81.

⁶⁸*ibid* at 82 relying on R Posner, *Economic Analysis of Law* 27-31 (2nd ed. 1977).

⁶⁹*ibid* at 85.

However, Rose postulations lack empirical credentials as to the nature of conduct or quantum of acts of possession sufficient to establish 'communication,' neither is it clear what to look for in determining whether the relevant audience so understood what was communicated as such. It is also not clear whether the tests as laid down by Rose apply in all cases of adverse possession including boundary disputes, to arrive at the same conclusion. These are some of the gaps which this thesis is meant to address and fill in probing into the application of the doctrine of adverse possession under English and Nigerian law.⁷⁰

2.4 Property Rules, Liability Rules and Adverse Possession

Merrill, in his work: 'Property Rules, Liability Rules and Adverse possession'⁷¹ examines the doctrine of adverse possession against the backdrop of events challenging conventional understanding of the doctrine, namely, the groundbreaking work of Helmholz⁷² and the decision of the California Supreme Court in *Warsaw v Chicago Metallic Ceilings Inc.*⁷³(Warsaw). He adopts the position of Helmholz that traditional theories suggesting automatic transfer of entitlement to the adverse possessor upon the expiration of the limitations period without drawing a distinction between a possessor acting in good faith and another acting in bad faith, provides an incomplete account of the relevant concerns.⁷⁴ He expresses the view that the intentional dispossessor (one who acted in bad faith) is blameworthy and therefore deserves punishment from both the conventional moral terms,⁷⁵ and

⁷⁰ See Chapters 4 and 5 *infra*.

⁷¹79 Nw. U.L. Rev. 1122 (1985). Available at https://scholarship.law.columbia.edu/faculty_scholarship/373 accessed on 07/09/2019.

⁷²HR Helmholz, Adverse 'Possession and Subjective Intent', 61 WASH. U.L.Q 331 (1983).

⁷³35 Cal. 3d 564, 676; 199 Cal Rptr 373 (1984).

⁷⁴TW.Merrill, *supra* n.71 at 1133.

⁷⁵This is the position in the Roman law of prescription and a requirement for adverse possession in civil law jurisdictions. Courts in common law jurisdictions are quick to grant injunctive relief to restrain encroachment on land by a squatter acting in bad faith, rather than limiting the relief of the true owner to damages mainly: See Holmholz, *supra* (n 72).

from the viewpoint of economic theory.⁷⁶ Rationalising the work of Holmholz, Merrill posits that:

[i]n the case of good faith possessor, courts have implicitly balanced the interest in punishing the dispossessor against the systemic justifications for the institution of adverse possession, and have come out in favour of adverse possession.⁷⁷

This is not the case where the adverse possessor acted in bad faith in which case, implicit balancing of punishing the adverse possessor as against systemic justifications for adverse possession has generally come out against adverse possession.⁷⁸

In addition to his recommendation of considering subjective intent of the adverse possessor along with other requirements for adverse possession, Merrill examines the suggestion of both the California Court of Appeal and the Justices of the Supreme Court in *Warsaw v Chicago Metallic Ceilings Inc.*⁷⁹ 'that there is a need for indemnification in order to insure fair treatment of the true owner.' This is more so in cases where the adverse possessor acted in bad faith leading to coerced transfer of property. In these regards, he suggests a 'rule of limited indemnification which would in effect impose a fine on bad faith dispossessors equal to the value of the property at the time of original entry' to discourage the adverse possessor from taking unconscionable advantage of the true owner.

Whilst the distinction drawn by Merrill between an adverse possessor acting in good faith and another acting in bad faith may be more popular with the civil law jurisdictions as opposed to common law jurisdictions, it provides a guide in resolving the dilemma engendered by the criminalization policies in England and

⁷⁶ In the words of Merrill, 'In economic terms, the intentional dispossessor is distinguishable from the inadvertent or negligent dispossessor because he has more clearly turned his back on consensual (i.e., market) mechanism for the transfer of property rights...': Merrill, *supra* (n 71) at 1135.

⁷⁷Merrill, *supra* (n 71) 1136.

⁷⁸ *ibid.*

⁷⁹*Supra* (n 73).

Nigeria as discussed in this thesis.⁸⁰ It also provides the platform for part of the recommendations proffered by this thesis.⁸¹

2.5 Efficient Trespass as basis for the Application of the Rule of Adverse Possession

Fennell⁸² disagrees with Merrill on the idea of bad faith negating either the adverse possessor's claim to title or justifying liability for a fine equal to the value of the property at the time of original entry. She posits that rather than triggering moral condemnation and legal disadvantage, the adverse possessor's knowledge of the encroachment should be a prerequisite for obtaining title under the rule of adverse possession.⁸³ She argues that 'only the claimant who knew that she was encroaching- and who documented that awareness-should be able to take title to land through adverse possession.'⁸⁴ She proposes two additional requirements for the rule of adverse possession to apply namely, that the encroacher must be aware of the trespass, and must document her knowledge of the encroachment typically through a purchase offer at the time of entry.⁸⁵ Consequently, it is her view that the rule of adverse possession should be reformulated and streamlined in a way that makes land available to 'higher valuing users.'

Fennell considers as tenuous the distinction between good and bad faith as a prerequisite for the exercise of adverse possession. For example, unless the adverse possessor does an overt act such as making an offer for the purchase of the property, it may be difficult to know whether his entry was 'knowing or inadvertent'. It is also said that 'even if the ideal line between good and bad faith could be drawn as a conceptual matter based on what the claimant reasonably should have known, proof problems complicate the test's application.'⁸⁶ She deprecates the idea of supposedly

⁸⁰. See I. Okeoma, para 2.8 below.

⁸¹See the thesis recommendation on this in chapter 8 *infra*.

⁸² LA Fennell, 'Efficient Trespass: The Case for 'Bad Faith' Adverse possession' 100 Nw Univ. L.R 1037 (2006).

⁸³ibid at 1038.

⁸⁴ ibid.

⁸⁵ibid at 1041.

⁸⁶ibid at 1050.

watering down the painful effect of encroachment by trespassers by accommodating 'good faith' mainly, adding that 'if we simply believe as a moral matter, that ownership interests in land should never be extinguished under any circumstances in favour of a trespasser, then that argues for abolishing adverse possession, not for limiting it to the good faith case.'⁸⁷

Fennell identifies two doctrinal prescriptions flowing from the specification of the ends of trespass, namely, that the law should not encourage inefficient trespasses while selectively encouraging a certain class of very efficient trespasses.⁸⁸ In refining the meaning of efficient trespass, the law, according to her, 'substitute liability rules in a number of property contexts.'⁸⁹ She cited 'trespass and pay' in lieu of actual bargain to that effect; the case of 'eminent domain' which enables the government to acquire land compulsorily upon payment of compensation; and the case of 'unintentional encroachment' such as where a person built over his property line in good faith believing that he is on his own property, as typical examples of cases where the law considers that 'it is efficient that the trespass continue'.⁹⁰

Defining an 'inefficient trespass' as one that 'harms the owner more than it benefits the trespasser,'⁹¹ it is argued that inefficient trespasses ought not to be encouraged, adding that 'the current approach to adverse possession encourages trespasses to the extent it departs from a requirement of knowing entry onto another's land.'⁹² In the words of Fennell, '[i]f possessors can cultivate or feign a no-knowledge state with impunity, then a property system that rewards that mental state will create perverse incentives.'⁹³ She concludes that treating good faith claimants the same way or better than bad faith claimants "has obscured what adverse possession is uniquely designed to accomplish in modern times,"⁹⁴ namely, 'facilitating certain classes of very efficient transfers where markets cannot do so' adding that, if the idea is to

⁸⁷ibid 1057.

⁸⁸ibid 1059.

⁸⁹ibid 1065.

⁹⁰ibid 1065, 1066.

⁹¹ibid 1066.

⁹²ibid 1066.

⁹³ibid 1072.

⁹⁴ibid 1095.

categorise bad faith claimants as morally defunct, then adverse possession should be discarded.⁹⁵

However, Fennell's postulations have pitfalls. Her argument against drawing a distinction between good and bad faith runs counter to the common law notion of 'right' and 'wrong'; the moral content of the law meant to distill fairness in human relations including land matters.⁹⁶ This philosophy forms, not only the bedrock of the modern trend in the protection of title registration, it appears to be the justification for the legislative incursions into the doctrine of adverse possession through the criminalization of the wrong of criminal trespass both in England and Nigeria. These observations are taken further in subsequent Chapters of this thesis.⁹⁷

2.6 Efficiency of the doctrine of Adverse Possession in Modern Property Law

In his work, 'The Uneasy Case for adverse possession,' Stake⁹⁸ examines the efficiency of the doctrine of adverse possession in modern property law. After a careful examination of the rationales advanced for the doctrine,⁹⁹ he concludes that 'the traditional rationales fall far short' as 'some rest on shaky or outdated normative foundations' while 'others do not fit the doctrinal contours.'¹⁰⁰

While nursing the belief that the doctrine of adverse possession may still be relevant in modern jurisprudence, its application, according to him, 'generates litigation, creates wasteful incentives and will produce less justice than injustice.'¹⁰¹ Apart from what he considers as absence of fairness and justice, he identifies five types of costs associated with the statute of limitations and the doctrine of adverse possession as:

⁹⁵ *ibid.*

⁹⁶ It is said that '[t]he basic social theory underlying our legal system is that the law protects the rights of the citizenry and punishes those who do wrong.' J Hiatt and J Hladik: *Adverse to Change: A modern look at adverse possession*. Centre for Rural Affairs available online at www.cfra.org. Accessed on 5/10/19.

⁹⁷ See Chapters 4 and 5 *infra*.

⁹⁸ JE Stake, 'The Uneasy Case for Adverse Possession.' *The Georgetown Law Journal*, vol. 89 No. 2419. Available online at www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1220&context=facpub. Accessed on 6/10/2019.

⁹⁹ *ibid* 2434-2454.

¹⁰⁰ *ibid* 2421.

¹⁰¹ *ibid.*

the cost of diminishing utility of the land by ‘discouraging owners from letting others use their land’;¹⁰² the cost of monitoring by the owner, amounting to a waste of resources; the cost of encouraging wasteful improvement by the adverse possessor or displacement of more productive activities; the cost of reducing the incentive for owners to put their improvements in the correct location; and the cost imposed on the judicial system.¹⁰³

He criticises the idea that it is wasteful for the owner to leave land undeveloped or unproductive, arguing that it is not out of place for the government to compensate farmers for taking land out of production to preserve soil nutrients.¹⁰⁴

Stake disagrees with the notion that adverse possession quiets title adding that modern developments in the nature of improved record-keeping technology in recording titles and the regime of title insurance, are more effective means of quieting title.¹⁰⁵ On the whole, Stake’s literature depicts a modern trend in the application of the rule of adverse possession towards limiting ‘the perceived unfairness of the process’ while protecting ‘established property rights.’¹⁰⁶

However, Stake’s thesis failed to appreciate efforts of the courts in balancing the private property right against the public interest in many cases in modern times,¹⁰⁷ and glossed over the challenges of title registration under the Land Registration Act 1925 in force at the time of his writing. Even the Land Registration Act (LRA) 2002 applicable in England and Wales still fails to make registered title completely indefeasible in view of the pervasive nature of overriding interests cognizable in law. Also, the requirement of notice to the registered owner of the existence of the adverse possessor has been shown to reduce the chances of the latter’s application succeeding and consequently the proliferation of possessory titles outside the

¹⁰²ibid 432.

¹⁰³ibid 2432-2434. These are treated in detail in the next chapter.

¹⁰⁴ibid 2435-2436.

¹⁰⁵ ibid 2441-2442, 273

¹⁰⁶ J Hiatt and J Hladik, ‘Adverse to change: A modern look at adverse possession.’ Centre for Rural Affairs available at www.cfra.org. Accessed on 6/10/2019.

¹⁰⁷ See e.g. the decision of the Grand Chamber of the European Court of Justice in *UK V. Pye* [2007] ECHR 700 [65]; and the decision of England and Wales Court of Appeal in *Best v. The Chief Land Registrar & The Secretary of State for Justice* [2015] EWCA Civ 17 [46].

register, thereby weakening the 'mirror principle which the LRA 2002 was meant to strengthen.'¹⁰⁸ These gaps in Stake's literature are addressed in subsequent chapters.¹⁰⁹

2.7 Effect of Adverse Possession on Registered Title

Different writers focus on the effect of adverse possession on registered title. While Griggs¹¹⁰ dwells on the indefeasibility of title under the Torrens system of registration in Australia, Pawlowski and Brown¹¹¹ examine the registration of the interest of an adverse possessor under the Land Registration Act of 2002 applicable in England and Wales, while Smith¹¹² examines the relevance of adverse possession as a registrable interest under the Land Registration Law of Lagos State-Nigeria.

2.7.1 *Adverse Possession and indefeasibility of Registered Title*

In his article on 'Possession, Indefeasibility and Human Rights,' Griggs examines the utility of title registration as cognisable under the Torrens system.¹¹³ He identifies the foundation of unregistered titles generally with the exercise of possessory rights, while registered land ownership depends on registration as opposed to possession, with the traditional reasons to justify adverse possession losing much of their weight.¹¹⁴ He analyses the decision of the Grand Chamber of the European Court of Human Rights (ECtHR) in *UK v. Pye (Oxford) Ltd*¹¹⁵ (*Pye*) noting that adverse possession shows disrespect for the rights and responsibilities of legitimate

¹⁰⁸Pawloski and Brown, para 2.7.2 below.

¹⁰⁹ See Chapters 4 and 5 *infra*, and in one of the recommendations proffered in chapter 8 *infra*.

¹¹⁰ L Griggs, 'Possession, Indefeasibility and Human Rights' (2008) 8(2) QUT Law JJ 286.

¹¹¹M Pawlowski and J Brown, 'Adverse Possession and the Transmissibility of Possessory Rights-The Dark Side of Land Registration,' [2017] (2) Conv. 116-131. Also available online at [www.http//research.aston.ac.uk](http://research.aston.ac.uk)

¹¹²IO Smith, 'The Relevance of Adverse Possession as a Registrable Interest under the Lagos State Land Registration Law.' *Essays on Lagos State Land Registration Law*, Department of Private and Property Law, University of Lagos-Nigeria (2017) 1. See also JA Omotola, 'The Adverse Possessor of Registered Land.' 7 NLJ 38 (1973) which was an article earlier written but in respect of the Registration of Title Law in Lagos which law was repealed by the Lagos State Land Registration Law No. 1, 2015.

¹¹³L Griggs, *supra* (n 110).

¹¹⁴*ibid* at 292.

¹¹⁵[2007] All ER (D) 177.

registered owners,¹¹⁶ encourages illegal possession of property and the growth of squatting.¹¹⁷ Griggs deprecates the interpretation of the Grand Chamber of the ECtHR which runs counter to the concept of indefeasibility of title under the Torrens system and diminishes the functional utility of title registration. He notes that while possession appeals and speaks to third parties, the market and the world as to the state of affairs of real property at any point in time, 'undermining of the legal formalism of registration will reverberate on economic markets, and on the faith in title based systems.'¹¹⁸ In the absence of 'tolerance and respect of the ownership rights of others' recognised by a public registration system, he says, 'the regime of land ownership that presently operates in Australia would soon fail.'¹¹⁹ He suggests that as the scope of human rights expands and penetrates real property transactions, the system of title registration 'needs to resolve the inherent tension that may arise between it and human rights.'¹²⁰

However, whilst Gregg's appreciation of the utility of title registration in pursuit of indefeasibility of title has considerable merit, his criticism of the decision of the Grand Chamber of the European Court on Human Rights in *Pye* on the ground that it berates the significance of title registration under the LRA 2002, appears to have missed the point. Apart from the fact that the Grand Chamber, like the local courts did not see the need to consider this since the Act was not in force when the cause of action arose in *Pye*,¹²¹ the climate of judicial opinion after *Pye* suggests strongly that the Limitation Act of 1980 is not open to human rights challenge, and the equitable procedure involving the adverse possessor and the registered proprietor in determining whether the register shall be altered or not coincides with human rights expectations. This arguments shall be taken further in chapter 4 of this thesis.

¹¹⁶ Griggs, supra (n 110) at 292

¹¹⁷ ibid.

¹¹⁸ ibid at 300.

¹¹⁹ ibid.

¹²⁰ ibid.

¹²¹ *UK v Pye* (supra) (n 107) [81].

2.7.2 *The registration of the interest of an adverse possessor under the Land Registration Act (LRA) 2002.*

In their work, 'Adverse Possession and the Transmissibility of Possessory Rights-The Dark Side of Land Registration,'¹²² Pawlowski and Brown examine the potency of the provisions of the Land Registration Act (LRA) 2002 on registration of the interest of an adverse possessor after ten years of adverse possession.¹²³ The writers note that an application for registration by an adverse possessor after 10 years of adverse possession places an obligation on the lands registry to notify interested parties including the registered proprietor asking for objection if need be against such registration within sixty five (65) business days, failure which the applicant-adverse possessor may be registered as the new proprietor. But where there is objection, the adverse possessor will not be registered unless he comes under any of the three exceptions named under the Act.¹²⁴

The writers note that considering 'the very limited grounds under which an adverse possessor may be registered as proprietor in the event of an objection,' he is more likely to avoid the risk of applying for registration if this would alert the registered proprietor of his existence and prompts him to oppose the application.¹²⁵ Consequently, such adverse possessor may decide to stay quiet and enjoy his possessory interest off the register, adding that the principle of relativity of title in English property law and the possibility of the transmission of possessory interest between possessors give impetus to 'a dark market in possessory rights falling outside the registered land system.'¹²⁶

Given the fact that where title is registered, the basis of title is primarily the register rather than possession, the writers find it preposterous to have possessory interest endure indefinitely off the register and passing through a succession of possessors,

¹²²Pawlowski and Brown, *supra* (n 111).

¹²³ Paragraph 1, Schedule 6, Land Registration Act 2002.

¹²⁴ Paragraph 5, Schedule 6 of the LRA listed the grounds as where: '(1) it would be unconscionable for the registered proprietor to object to the application; (2) the adverse possessor is otherwise entitled to the land; or (3) if the possessor is the owner.'

¹²⁵Pawlowski and Brown *supra* (n 111) at 2..

¹²⁶ *ibid.*

in the absence of a provision of the law compelling the adverse possessor to apply for registration.¹²⁷ They suggest an amendment of the LRA 2002 to provide for a limitation period within which such adverse possessor is compelled to apply for registration 'following his adverse possession for 10 years or, alternatively, within a limited period of his becoming aware of his right or following written notice from the registered proprietor.'¹²⁸ The effect, according to the writers, would be either to facilitate registration of a possessory title by an adverse possessor with legitimate claim or to extinguish such possessory title where a squatter has no likelihood of successfully registering his title within the grounds prescribed by law.¹²⁹

The positions of Pawlowski and Brown have considerable merit, and are taken further in subsequent chapters of this thesis,¹³⁰ and suggestions made along the line of those arguments in making recommendations for reform.

2.7.3 *The Relevance of Adverse Possession as a Registrable Interest under the Land Registration Law, 2015 in Nigeria*

In a work titled, 'The Relevance of Adverse Possession as a Registrable Interest under the Lagos State Land Registration Law,'¹³¹ Smith queries the registrability of adverse possession and guarantee of its efficacy as against the accurate and definitive record of estate ownership¹³² without the opportunity of objection, and rectification of the register in a manner prejudicial to the legitimate interest of the registered proprietor, and without compensation.¹³³ He argues that 'this poses challenges to the indefeasibility of registered title and raises fundamental issues of fairness and expropriation of property rights' contrary to the provisions of the Constitution and the African Charter on Human and Peoples' Rights.¹³⁴

¹²⁷ibid at 16.

¹²⁸ ibid.

¹²⁹ ibid.

¹³⁰ See chapters 4 and 7 *infra*

¹³¹ Smith, *supra* (n 112).

¹³²ibid at 1.

¹³³ibid.

¹³⁴ibid.

He contends that the relevance of adverse possession in the scheme of title registration remains doubtful arguing that the conflicts engendered by its application need be addressed in light of the backdrop of relevant provisions of existing Laws such as the Land Use Act, the Criminal law of the state and the State Land Law. These arguments are canvassed further in chapter 5 of this work.

2.8 The Rationale for Adverse Possession of Registered Land in light of the Legal Aid, Sentencing and Punishment of Offenders Act (Applicable in England and Wales)

In a work on 'The Future of Adverse Possession of Registered Land [in light of the decision in *Best v. Chief Land Registrar*,'¹³⁵ Okeoma discusses the implications of the Court of Appeal decision in *Best v. Chief Land Registrar and the Secretary of State for Justice*¹³⁶ in resolving the apparent conflict between the entitlement of the adverse possessor to registration under the Land Registration Act (LRA) 2002 on the one hand, and the commission of criminal trespass (which forms the basis of an adverse possession claim) punishable under section 144 of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO Act) 2012, on the other hand.

Reacting to the decision of the court that the squatter's application for registration should be allowed (in spite of commission of an offence under LASPO Act) on the ground that 'Parliament had not intended that adverse possession be prevented because it was based on a criminal trespass,'¹³⁷ the writer opines that 'adverse possession would continue to operate as it did prior to the enactment of the 2012 Act' unless *Best* is overturned in the Supreme Court.¹³⁸ She notes that the fact of successful application for registration of the interest of the adverse possessor under the LRA 2002 does not obviate liability of the adverse possessor for criminal trespass under the LASPO Act 2012, pointing out however, that the decision also 'has the

¹³⁵ I. Okeoma, 'The Future of Adverse Possession of Registered Land...' Available online at <https://www.academic.edu>. Accessed on 11/11/2019.

¹³⁶ [2015] EWCA Civ 17; *Best v Chief Land Registrar* [2014] EWHC 1370 (Admin).

¹³⁷ *ibid* para. 34.

¹³⁸ Okeoma, *supra* (n 135) at 16.

effect of making it easier for landowners to evict trespassers,¹³⁹ and thus creating 'further tension between the civil and criminal law in relation to adverse possession.'¹⁴⁰

Given the conundrum of uncertainties generated by juxtaposing the LRA 2002 and the LASPO Act 2012 and the consequent decision of the Court of Appeal in *Best*, and considering the functional utility of adverse possession in encouraging productive land use in aid of socio-economic development, the writer interrogates 'what scheme can be introduced to replace the current operation of adverse possession in a way that is not only fair and just to both registered proprietor and squatter, but also functional and achievable.'¹⁴¹

She found the solution in the French law on adverse possession which prescribes good faith as one of the requirements for title to pass to an adverse possessor.¹⁴² In this case, it is required that to be eligible for registration under the LRA 2002, the squatter must have an honest but mistaken belief that the land occupied belonged to him,¹⁴³ suggesting therefore, that bad faith trespassers (that is, squatters who are aware that they are encroaching on land that does not belong to them) are precluded from claiming title to land based on their criminal trespass.¹⁴⁴ In addition to this, the writer suggests that in the case of bad faith trespassers, the period of limitation should be extended, while government should levy higher council taxes on landowners who have left their land unused for some time to propel them to either

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ *Ibid* at 21.

¹⁴² *ibid* at 22.

¹⁴³ *ibid* at 22, 23, citing RH Helmholz, 'Adverse Possession and Subjective Intent' 61 Wash U. L. Q. 331 at 69. See also TW Merrill, *supra* (n 71) for further discussion on this.

¹⁴⁴ *Ibid* at 23.

take steps to evacuate the squatter, or to grant a lease or license to make the occupation lawful.

The substance and rationale of this literature would be examined further in chapter 4, and taken further in chapter 8 on recommendations and conclusion.

2.9 Conclusion

A review of the existing literature on the application of the doctrine of adverse possession has revealed the various juristic views on the nature, content, scope and application of the doctrine in contemporary legal systems. Together with the theoretical foundation discussed in the next chapter which forms the pedestal for many of the views canvassed by the various literature, a background is formed for the central thesis of this work and provision is made for the necessary juristic instrumentality meant to address critical issues pertaining to the application of the doctrine as a mode of acquisition of title to land in the jurisdictions under inquiry.

CHAPTER 3

THEORETICAL FRAMEWORK

3.1 Introduction

Understanding the theoretical foundation of the doctrine of adverse possession is a clue to appreciating its content and application from remote antiquity to the present time. It explains the justification or otherwise for the application of the doctrine under the English and Nigerian law, and provides the foundation for inquiry into its efficacy from a comparative perspective. It also demonstrates how existing theories influence judicial law-making process with reference to the two jurisdictions in focus.

3.1.1 The two segments of theoretical framework

The theoretical foundation has two segments. First, there are the traditional theories¹⁴⁵ well known as the bedrock of the doctrine and as the basis of arguments for sustaining its rationale and application. These traditional theories are alluded to in the existing literature on the subject, and they form the basis of parliamentary reactions and government policies on the application of the doctrine. Some of these traditional theories informed the reasoning underlying judicial pronouncements in both jurisdictions as rationale for their tenacious application by the municipal and international courts.

Second, there are certain theories developed from the peculiar circumstances of a land tenure system such as the non-applicability of the doctrine under the Nigerian customary and Islamic land tenure system (the 'relativity theory'); or from the peculiar nature of landholding introduced by the regime of the Nigerian Land Use Act and the emergence of the compulsory state grant (the 'grant theory') exhibiting peculiar characteristics unknown to English law; or resulting from the emergence of the regime of title registration in both jurisdictions and consequently, the emergence of the 'indefeasibility theory' sometimes alluded to as a factor rendering the doctrine

¹⁴⁵The traditional theories are the occupation theory; the labour theory; the utilitarian theory; the personhood theory; the economic theory; and the social function of property theory; discussed in this chapter: See paragraphs 3.2.1 to 3.2.6 below.

irrelevant in modern times. Also inclusive in this category are the 'sanctity of title theory,' a product of the local and international legal regimes applicable in both jurisdictions; and the 'incompatibility theory' resulting from the criminalization of certain forms of trespass which ordinarily is a civil wrong.

The distinction between these two categories of theories is one with a difference. Whilst the first category of theories (the traditional theories) relate to the rationale behind the recognition of the doctrine of adverse possession as a universal concept, the second category directly focuses on the operation of the doctrine and determines its efficacy or otherwise in each jurisdiction under study. A study of one without the other would amount to an exercise in futility for, although a probe into the application of the doctrine must essentially proceed from the question whether there are justifications for it at all; but that may not explain whether it is efficacious or not. The efficacy of the doctrine can only be determined through a study of its application and functionality given certain circumstances and peculiarities.

3.1.2 Theories of Adverse Possession and Private Property

The justificatory theories of the doctrine of adverse possession are intertwined with the theories of private property in modern property law. Getzler¹⁴⁶ categorised the theories of property law into two in his writing as follows:

There is a notion of property as pre-social, a natural right expressing the rights of persons which are prior to the state and law, this being the view of Hugo Grotius, Samuel von Pufendorf, John Locke, Immanuel Kant, and George W.F. Hegel; and there is a notion of property as social, a positive right created instrumentally by community, state, or law to secure other goals-the theory of Thomas Hobbes, David Hume, Adam Smith, Jeremy Bentham, Emile Durkenheim and Max Weber.

This classification depicts the divide between the natural law theorists and the positivists.

The natural law theorists on the one hand postulate that 'the earth's resources were given to mankind in common'.¹⁴⁷ In the words of Blackstone:

¹⁴⁶J Getzler, 'Theories of Property and Economic Development.' *Journal of Interdisciplinary History*, XXVI: 4 (1996). See also J Waldron, *The right to Private Property* (Oxford, Clarendon Press, 1988); S. Munzer, *A Theory of Property* (Cambridge University Press, 1990); MJ Radin, *Reinterpreting Property* (University of Chicago Press, 1993).

¹⁴⁷ See H Grotius, *On the Law of War and Peace*, Book 2 Ch.2, 1, 4-5 (Kesley translation, Oxford Clarendon Press, 1925); S Pufendorf, *Of the Law of Nature and Nations*, J Churchill et.al. (ed) (1703).

The earth...and all things therein are the general property of mankind, exclusive of other beings, from the immediate gift of the creator...all was in common among them, and that everyone took from the public stock to his own use such things as his immediate necessities required.¹⁴⁸

This was derived from the general notion of property as a natural right existing prior to the state and law and to which positive law is susceptible. This natural law theory underlines the justification for the 'occupation theory' and lays the foundation for the 'labour theory' and the 'personhood theory' of adverse possession discussed below, and it is said to be the basis for the legal maxim that 'possession is nine-tenth of ownership' often alluded to as the bedrock of adverse possession under the Anglo-Nigerian law of adverse possession.

On the other hand, the positivists regard property as a positive right (as opposed to a natural right) created by the instrumentality of the law. In the words of Bentham,¹⁴⁹ 'law and private property are born together and die together'. 'Without laws' he says, 'there is no private property'. He argues that all laws flow from the state and deprecates the idea of natural rights as '...rhetorical nonsense - nonsense upon stilts'.¹⁵⁰ This forms the basis for the 'utilitarian theory' or 'economic theory' sometimes alluded to as justification for the doctrine of adverse possession. These theories are also discussed below.

The traditional theories often canvassed in favour of adverse possession include the *occupation theory*; the *labour theory*; the *utilitarian theory*; the *personhood theory*; and the *economic theory*. Each of these theories provides the supposed rationale for the pervasiveness of the doctrine as a means of acquiring title to real property in modern times.

¹⁴⁸Blackstone's *Commentaries on the Laws of England*. Available online at http://Avalon.law.yale.edu/blackstone_bk2ch1. Accessed on 4/10/2019.

¹⁴⁹ J Bentham, *Anarchical Fallacies Nonsense upon stilts*. Bentham, Burke, and Max on the rights of Man, J Waldron ed., (London, Methuen, 1987) 53.

¹⁵⁰ *ibid*.

However, apart from the various shortcomings identified with these theories in this chapter, it is observed that the theories presuppose the existence of unregistered titles in land where possession is the hallmark of title and adverse possession is seen as the clue to title to land at any given time. The regime of title registration applicable in the various common law jurisdictions including England and Wales, and Nigeria has allegedly set limitations to the perspectives of the role of adverse possession as a potent instrument of construction of title based on possession,¹⁵¹ while it is argued that the peculiarities of the legal and constitutional frameworks in Nigeria have eroded the efficacy of the doctrine and necessitated an appraisal of some other theories with adverse consequences.¹⁵²

3.2 The Traditional Theories

3.2.1 *The Occupation Theory*

The occupation theory of private property suggests as a rule that 'objects become the private property of individuals when such individuals have taken occupation of them'.¹⁵³ Occupation is actualised when there has been an unambiguous act of appropriation which has been communicated to the whole world.¹⁵⁴ It is said that 'pursuits and acts which fall short of such an unequivocal act of appropriation, are insufficient because of the problem of assigning possession when there are two or more overlapping efforts to take occupation'.¹⁵⁵

Panesar explains that:

[T]he essence behind the occupation theory is that, given that all material resources are given to mankind in common, such material resources become the private property of individuals through the consent of, or agreement with the rest of mankind.¹⁵⁶

¹⁵¹ See Chapter 6 *infra*.

¹⁵² *ibid*.

¹⁵³ S Panesar, (2000) 'Theories of Private Property'. *Denning Law Journal*, vol. 15, 113 at 118.

¹⁵⁴ *ibid*.

¹⁵⁵ *ibid*.

¹⁵⁶ *ibid* at 116.

He posits that the division of such property is by reference to either an express agreement that the property would be distributed on a mutual understanding, or under an implied agreement to be found on the basis of first occupation, giving rise to private property which amounts, in the words of the common law, to the maxim that 'possession is the root of title'.¹⁵⁷

This theory justifies the fulcrum of the doctrine of adverse possession which is the act of possession coupled with *animus possidendi*. It is different from the labour theory¹⁵⁸ discussed below because the prospective occupier or squatter is not required to exert labour in any form to be in possession; it suffices like an adverse possessor, that he has appropriated the property and communicated the same to the whole world by evincing the intention to possess in any form adverse to the interest of the true owner.

In the law and policy relating to adverse possession of land like the occupation theory, 'rule of notice and communication sufficient to give occupation'¹⁵⁹ is a key requirement, 'and the principle of adverse possession recognises that long and uncontested possession of land by a trespasser confers upon such a person an effective title to the land'.¹⁶⁰

It has been queried whether the occupation theory has any significance in contemporary property law. Lowie¹⁶¹ criticises the theory as 'a mere description of the origin of property, without any significant relevance to property law concept'.¹⁶² It is said that the theory 'is based on facts which are both historical and primitive',¹⁶³ adding that the situation prevalent during the time of Grotius and Pufendorf (the natural law theorists) when resources were commonly held, do not apply to a complex system of resources in contemporary societies where resources are parceled into private property. The greatest challenge of the theory 'relates to the actual point

¹⁵⁷ *ibid.*

¹⁵⁸ See sub-head 3.2.2 next.

¹⁵⁹ Panesar (n 153) at 120.

¹⁶⁰ *ibid.*

¹⁶¹ R Lowie, 'Incorporeal Property in Primitive society' 37 *Yale Law Journal* at 551 (1928).

¹⁶² *ibid.*

¹⁶³ *ibid* at 118

at which and the amount of labour needed to take first possession', especially when there are overlapping efforts to take possession.¹⁶⁴

However, despite the claim that the theory belongs to the realm of facts 'which are both historical and primitive',¹⁶⁵ Panesar recognises its importance to 'present day property law'¹⁶⁶ for various reasons: Apart from explaining how the chain of ownership began, he says the principles enunciated by the theory are relied upon by the courts in resolving 'modern day property law disputes', and particularly in adverse possession cases where the courts find the rule of notice and communication useful in resolving adverse possession disputes.¹⁶⁷ He reckons that the occupation theory facilitates trade and functioning of an effective market, adding that 'such clear titles facilitate trade by introducing certainty in the marketplace'.¹⁶⁸

As discussed subsequently in this work,¹⁶⁹ the importance of physical possession coupled with *animus possidendi* (intention to possess) cannot be overemphasized as the foundation of adverse possession.

3.2.2 *The Labour Theory*

Locke, in his *Second Treatise of Government*,¹⁷⁰ finds justification for the rule of adverse possession in the old labour theory. He argues that the interest of a squatter who has improved the property through concerted labour has overriding interest in it over an owner who has abandoned it. The *raison d'etre* of this theory is that since labour belongs to the person performing it, exerting it in developing or cultivating the land brings the land out of the commons and makes it a subject matter of acquisition by the labourer to the exclusion of all claims by other persons.¹⁷¹

¹⁶⁴Panesar, *supra* (n 153) at 116-117.

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid* at 119-120.

¹⁶⁸ *ibid* at 122.

¹⁶⁹ See Chapter 4 *infra*.

¹⁷⁰ J Locke, *Two Treatises of Government* (1690, Laslet P ed. 1963) Oxford Blackwall (1966) para 25.

¹⁷¹ *ibid* at paras 26-28.

Locke however qualifies his theory by stating that it would only become a valid method for acquiring property 'at least where there is enough left in common for others'¹⁷² suggesting that the labour theory suffices as long as there remains enough un-owned things in the commons for others to appropriate.¹⁷³ He states that no person is free to appropriate from the commons than he is able to enjoy otherwise, the person appropriating is taking to be 'spoiling' the remainder which will revert to the commons from where other persons are able to appropriate them.¹⁷⁴

The theory suggests that land being a finite resource is best when being used, and has limited value when neglected or abandoned.¹⁷⁵ Consequently, neglected or abandoned land may 'become a financial burden for owners, state and local governments, and neighboring property owners'.¹⁷⁶ A piece or parcel of land not maintained becomes a nuisance and diminishes the value of surrounding properties resulting in infringement of the rights of others by the absentee owner.¹⁷⁷

This theory however presupposes land that was not originally the subject matter of ownership or possession ('the commons'), which is not the situation in adverse possession cases. Adverse possession deals with the extinguishment of the existing right of the owner of land who has either abandoned it or who has been dispossessed of it by an adverse possessor, which makes any improvement on it illegitimate and wrongful. Also, it is said that 'without a prior theory of ownership, it is not self-evident that one owns even the labour that is mixed with something else'.¹⁷⁸

The Lockean labour theory does not determine how much labour need be expended before the labourer becomes entitled to the property in cases where other people

¹⁷²ibid at paras 27, 33.

¹⁷³ ibid.

¹⁷⁴ibid at paras 31-32. See also K. Green, 'Citizens and Squatters: Under the surfaces of land law' in S Bright & JK Dewar (eds) *Land Law: Themes and Perspectives* (1998) 229 at 243.

¹⁷⁵ J Hiatt and J Hladik, *Adverse to change: A modern look at Adverse Possession*. Centre for Rural Affairs, 2019 at 1, accessed online at www.cfra.org on 25/09/2019

¹⁷⁶ ibid.

¹⁷⁷ibid.

¹⁷⁸ CM Rose, 'Possession as origin of property.' 52 Univ. Chicago L. Review 73 (1985)

have equally exerted labour on the property, and left unanswered the question as to whether labour has to reflect the value added to the resource in question.¹⁷⁹

However, the labour theory justifies the recognition of the possessory rights of the squatter who has developed or put the acquired land to use, and not allowing it to lie fallow. This theory generally underlies squatters' claim to adverse possession as discussed in this work.¹⁸⁰

3.2.3 *The Personhood Theory*

This theory which may justify adverse possession of both private and public property¹⁸¹ recognises that a squatter in possession of land after a certain time, forms a personal attachment to it than the actual owner 'who has presumably become detached from the land'.¹⁸² In the words of Oliver Wendell Holmes:

A thing which you have enjoyed and used as your own for a long time whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.¹⁸³

Describing the essence of the theory, Radin says the strength of a person's relationship with an object is measured by taking into account the kind of pain that would be suffered should the object be lost in some way: an object is closely bound up with the custodian's personhood if its loss causes pain that cannot be relieved by replacing that object with its monetary value.¹⁸⁴ Radin refers to two different types of property relationship namely, 'personal property' involving property to which individuals are attached; and 'fungible property' to which the individuals are not. The first kind of relationship, according to her, gives rise to a stronger moral claim than the other, and in the case of adverse possession, it could be argued that the

¹⁷⁹ibid 73-74.

¹⁸⁰See Chapters 4 and 5 *infra*.

¹⁸¹ See generally, A Klass, 'Response Essay: The Personhood Rationale and its Impact on the Durability of Private Claims to Public Property.' 103 GEO L.J 41 (2014) available at http://scholarship.law.umn.edu/faculty_articles/53. Accessed on 10/11/2019.

¹⁸²A Klass, *supra* (n 181) 14 at 45.

¹⁸³OW Holmes, 'The Path of the Law,' 10 Harvard Law Review 457, 477 (1897). As Holmes succinctly put it: '[t]he true explanation of title by prescription seems to me to be that man, like a tree in the cleft of a rock, gradually shapes its roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life.' See Holmes, *supra* at 476-477.

¹⁸⁴MJ Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957 at 959.

personal relationship existing between the squatter and the land, is more worthy of protection than the absentee owner's fungible relationship with his property.

Finding justification for the doctrine of adverse possession in this theory, Singer states that:

...the adverse possessor comes to expect and may have come to rely on the fact that the owner will not interfere with the possessor's use of the property. If the adverse possessor were to be ousted from the property, she would experience a loss. The adverse possessor's interests grow stronger over time as she develops legitimate expectations that the true owner will continue to allow her to control the property.¹⁸⁵

This is true especially in situations where the adverse possessor values the property more than the true owner by using and cultivating it if it is 'constitutive to such squatter's personhood'.¹⁸⁶

In the context of homeless persons, Rosendorf¹⁸⁷ posits that 'property theories [such as this] provide a means to argue for recognition of limited property interests in abandoned or government owned buildings based on both economic utility and a squatter's personal identification with the property'. Squatting by the homeless, according to him, has proven to be an effective tool for the homeless, not only in the direct manner of producing low-income housing, but also as 'a means of mobilising public opinion'.¹⁸⁸

However, the theory is not foolproof. First, it undermines the interest of the true owner and of society generally in preserving the integrity of the set of entitlements grounded in law.¹⁸⁹

¹⁸⁵JW Singer, 'The reliance interest in property,' 40 Stanford Law Review 611 at 666-667 (1988). Also, MJ Radin, 'Time, Possession and Alienation' 64 WASH U L.Q 739, 739-74.

¹⁸⁶ *ibid.*

¹⁸⁷ DL Rosendorf, 'Homelessness and the Uses of Theory: An Analysis of Economic and Personality Theories of Property in the Context of Voting Rights and Squatting Rights.' 45 U. Miami L. Rev. 701, 722 (1990-1991) .

¹⁸⁸*ibid* at 724.

¹⁸⁹TW Merrill, 'Property Rules, Liability Rules, and Adverse Possession,' 79 Nw. U.L.Rev.(1985)1122 at 1132.

Following Bentham,¹⁹⁰ there is a presumption that property rights are creatures of law as opposed to unilateral expectations outside the law.¹⁹¹ It is said that ‘a policy of transferring entitlements to individuals in order to protect extra-legal expectations would inevitably undermine the general security of property rights’.¹⁹²

The theory makes an assumption that the true owner out of possession no longer believes in his ownership;¹⁹³ an assumption which may turn out to be rebuttable in circumstances where the land is left fallow for the purpose of recuperation of the soil or pending when a development loan is released by a lender. Sometimes, the true owner still values his ownership but is unaware of the fact of adverse possession of his property¹⁹⁴.

It has also been argued¹⁹⁵ that ‘squatters are not a homogenous group’ for, whilst some have a genuine need of the property, some may have political objectives, some may prefer the ‘lifestyle of squatting and its cheapness’,¹⁹⁶ and others may be ‘a disaffected group or individuals who welcome the freedom and anonymity of squatting’¹⁹⁷ among other reasons.

The personhood theory like the labour theory, also underlie the squatters claim to possession and has been a potent justification for the doctrine of adverse possession where homelessness is rife.

3.2.4 *The Utilitarian Theory*

Utilitarianism is generally known in legal theory as promoting ‘the greatest happiness of the greatest number,’ regarding this as ‘the measure of right and

¹⁹⁰ See J Bentham, *Theory of Legislation* 111-13 (1914).

¹⁹¹ TW Merrill, *supra* (n 189).

¹⁹² *ibid.*

¹⁹³ See JE. Stake, ‘The Uneasy Case for Adverse Possession’ (2001) 89 *Georgetown Law Journal* 2419, 2474

¹⁹⁴ See *Pye (Oxford) Ltd and Another v Graham and Another* [2000] Ch. 676.

¹⁹⁵ Department of Environment, Consultation paper on squatting (London, HMSO 1975) .

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

wrong'¹⁹⁸. JS Mill in his *Principles of Political Economy*¹⁹⁹ says that in the case of land, 'no exclusive right should be permitted in any individual which cannot be shown to be productive of positive good.' 'When land is not intended to be cultivated,' he says, 'no good reason can in general be given for its being private property'.²⁰⁰ He states that possession ought to be recognised as ownership if it has not been challenged within a moderate number of years, pointing out that 'revival of a claim which had long been dormant, would generally be a greater injustice, and almost always [cause] a greater private and public mischief, than leaving the original wrong without atonement'.²⁰¹ This reasoning has its root in rule-utilitarianism²⁰² which states that utility is maximized in a legal system by having a rule, namely, the acquisition of property through adverse possession, thereby resolving conflicting claims and promoting legal certainty.

However, apart from the fact that 'use of land' or 'productive use' is not a legal requirement for a valid adverse possession, the basic consequence of adverse possession both at common law and under the Statute of Limitations goes beyond mere recognition of use of land by the adverse possessor, but fundamentally and automatically extinguishes the owner's title in favour of the adverse possessor who may go ahead to register his 'statutory title.' The fact that the 'paper owner' of the land had no knowledge of squatter's presence on the land is of no moment and the use of the land by the adverse possessor may be detrimental to the overall interests of the adjacent land or the general public.

Also, there is no empirical evidence to show that adverse possession of land would have a positive impact on the socio-economic expectations of society. For example, it

¹⁹⁸JA Bentham, *Fragment of Government and an Introduction to the principles of Morals and Legislation*(1776, Harrison W ed 1948) 3 para 2.

¹⁹⁹ JS Mill, *Principles of Political Economy* (1902), University of Chicago Press 1993 at 35.

²⁰⁰ JS Mill (n 199).

²⁰¹Ibid.

²⁰²Knowles distinguishes between two types of utilitarianism namely: 'act-utilitarianism' which takes the consequences of an act into account to determine whether that act maximize utility; and 'rule utilitarianism' which takes the view that utility is maximized in a legal system by having a rule which resolves conflicting claims and promotes legal certainty, regardless of consequences. See D. Knowles, *Political Philosophy*. Routledge (2001) 25.

is said that the interpretation of 'productive use' in contemporary times could mean passive as well as active use;²⁰³ 'fallow fields and static wetlands are just as much considered a productive use as planted fields'.²⁰⁴ This view is corroborated by Clarke²⁰⁵ who does not see 'productive use' of property as a potent rationale behind adverse possession. Citing the position of the U.S Supreme Court on the point in *Lessee of Ewing v. Burnet*,²⁰⁶ he argues that 'activities of the adverse possessor mimicking the legal role of a true owner, such as ejecting trespassers and paying taxes, established adverse possession'.²⁰⁷

While generally, contemporary utilitarian scholars justify possession of squatters in adverse possession on the ground that it promotes 'investment, commercialisation, civic diversity and political decentralisation'²⁰⁸, it is said that modern society 'now routinely enforces and, one presumes, places social utility in conservation and preservation restrictions'²⁰⁹ and sometimes, 'less productive uses may be best for society'.²¹⁰

However, to the extent that the utilitarian theory postulations go against stale claims and supports productive use of land as opposed to allowing land to lie fallow with attendant negative consequences such as economic wastes, enormous costs of renovation and maintenance of abandoned property, as well as depreciation in the

²⁰³J Hiatt and J Hladik, *Adverse to change: A modern look at Adverse possession*. Centre for Rural Affairs, www.cfra.org 1. Accessed on 10/11/2019.

²⁰⁴ *ibid.*

²⁰⁵ JA Clarke, 'Adverse Possession of Identity: Radical Theory, Conventional Practice.' *Oregon Law Review* vol. 84 (2005) 563 at 566-567.

²⁰⁶36 U.S. 41, 49 (1837). In that case, Ewing claimed a sand and gravel lot adjacent to his property relying on evidence of tax payments on the lot, exclusive right of digging and removing sand and gravel, and brought an action of trespass against others who attempted to remove sand and gravel without his permission. Accepting these acts as evidence of adverse possession, the Supreme Court held that "[n]either actual occupation, cultivation nor residence, are necessary to constitute actual possession, when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim."

²⁰⁷ Clarke, *supra* (n 205) at 567.

²⁰⁸ ER Claeys, *Locke Unlocked: Productive Use in Trespass, Adverse Possession, and Labour Theory*. George Mason University Law and Economics Research Paper Series February 21 2012 at 61.

²⁰⁹*ibid.*

²¹⁰JE Stake, 'The Uneasy Case for Adverse Possession' 89 *Geo L.J* 2419 at 2435 (2001).

value of other properties in the neighborhood, it provides justification for limitation statutes and rationale for the doctrine of adverse possession in the jurisdictions engaged in this work.

3.2.5 *The Economic Theory*

The economic theory provides a rationale for adverse possession from the perspective of economic efficiency. Providing a structure for assessing such efficiency, Calabresi and Melamed argue that legal rules should allocate entitlements efficiently in order to reduce societal costs or costs to third parties.²¹¹

The theory is predicated on 'the assumption that production and use are socially preferable to stagnation and disuse'²¹² with positive effect on valuation of property. In allocating entitlements, it is said that 'society should assess the end-result of distributional goals sought to be achieved'²¹³ adding that '[t]here are also preferences which are linked to dynamic efficiency concepts' such as 'producers ought to be rewarded since they will cause everyone to be better off in the end'.²¹⁴

Apart from adding productivity to the social network, Posner²¹⁵ points out that adverse possession has the advantage of shifting a property right from the passive title owner who attaches no significant economic value to the property, to another who has shown a higher valuation through use. Also, Demsetz is of the view that 'the general welfare will be better served if material resources are owned and controlled by private individuals'.²¹⁶

²¹¹ G Calabresi and AD Melamed, 'Property Rules, Liability Rules, and Inalienability: One view of the Cathedral,' 85 Harv. L. Rev. 1089, 1093-94 (1972).

²¹² MR Baron, 'Weeks v. Krysa: Cultivating the Garden of Adverse Possession' 62 Me. L. Rev. 289 (2010) citing G Calabresi and AD Melamed, supra n 211 above. Available at: <http://digitalcommons.maine.gov/mlr/vol62/iss1/10> .Accessed on 27/9/ 2019.

²¹³ibid at 297.

²¹⁴Calabresi and Melamed, supra (n 211) at 1098.

²¹⁵RA Posner, 'Savigny Holmes, and the Law and Economics of Possession' 86 VA.L.Rev.535, 559-60 (2000).

²¹⁶H Demsetz, 'Towards a Theory of Property Rights.' American Economic Review: Proceedings and Papers (1967) 57 at 348.

The economic approach to adverse possession has found rationale in minimising transaction costs where a party to a potential transaction is absent, holds out or fails to accurately assess the market value of the property. In such cases, property owners should be subject to potential adverse possession, encouraging them to make themselves known thereby reducing transaction costs for any potential buyer.²¹⁷

The economic theory of adverse possession complements the utilitarian theory and provides justification from pure economic implications.

3.2.6 The social function of property theory

One of the theories advanced as justification for the doctrine of adverse possession in contemporary time is the social function of property. The social function of property theory deprecates the idea of property as a subjective and nearly absolute right to property.²¹⁸ It opposes the idea of the classical liberal conception of property that property is an independent positive exercise of bundle of rights to private property such as the right to 'use, reap the benefits of and dispose of assets' limited only by 'the legal order and the common good.'²¹⁹

Duguit,²²⁰ a proponent of this theory, argues that 'property is not a right but rather a social function.'²²¹ The idea is, creating an obligation on the part of the owner of property to put it at the service of the community which is tantamount to putting it into production- an obligation which the state superintend by intervention when there is a breach.²²² The rationale for this theory lies in interdependence between people as the 'central element of social reality.'

²¹⁷ TW Merrill, *supra*(n 189).

²¹⁸ See generally SR Foster & D Bonilla, 'The Social Function of Property: A comparative Law Perspective.' *Fordham Law Review* [2011] vol. 80 101.

²¹⁹ L Lomansky, *Persons, Rights, and the Moral Community* 111-51 (1987) cited in Foster and Bonilla, *supra* (n 218).

²²⁰ L Duguit, *Las Transformaciones Del Derecho Publico Y Privado* (Editorial Heliasta 1975).

²²¹ Duguit, *supra* (n 220) at 236. According to him, the idea of property right dates back to the Declaration of the Rights of Man of 1789 (Art 2) and the Napoleonic Code (Art 544 and 545). See Foster & Banilla, *supra* (n 218) at 104.

²²² The intervention may be by way of taxation and expropriation. See Foster & Bonilla, *supra* (n 218).

Duguit criticises the individualism of the liberal right to property on three main grounds: First, he argues that a foundation resting on the presumption of the existence of an isolated individual 'does not correspond with an accurate description of reality;' individuals 'are deeply interconnected beings that need each other to meet their physical and spiritual needs.'²²³ Secondly, he says there is inconsistency between the idea of an isolated individual exercising the right of property and the negative duties on third parties, since third party obligation would not be necessary where property rights are enjoyed by isolated individuals. Thirdly, that it is puzzling that 'classical liberal property exists only to serve individual interests.'²²⁴ This obscures the greater function of property which is to serve the larger interests of the community and tantamount to putting it into production. It is said that 'the wealth concentrated in property cannot remain unproductive' and may lead to negative social circumstances thereby putting social cohesion in jeopardy.²²⁵

This theory underscores the extinction of title over unproductive land at the end of the limitation period in many jurisdictions²²⁶ and informs constitutional provisions safeguarding public interest in the occupation and use of abandoned land.²²⁷ Many international instruments²²⁸ on the protection of right to private and family life, the state obligation in making provision for adequate and affordable housing available for the homeless are all reminiscent of the social function of property. This discourse is taken further in chapters 4, 5, 7 and 8 of this thesis.

²²³ Duguit, *supra* (n 220) at 181 cited in Foster and Bonilla, *supra* (n 218) 104-105.

²²⁴ *ibid* 237.

²²⁵ Foster & Bonilla, *supra* (n 218) at 105.

²²⁶ See for example, the Limitation Act 1980 applicable in England and Wales discussed in chapter 4 *infra* and the Limitation Act 1966 applicable in Nigeria and discussed in chapter 5 *infra*.

²²⁷ See for example, s. 44(2)(i) of the Constitution of the Federal Republic of Nigeria 1999 as amended which excludes acquisition of land by the operation of the statute of limitation from the ambit of provision for compensation. See also s. 26 of the Constitution of the Republic of South Africa, 1996 in balancing competing interests and, in particular sub section (3) on protection of squatters' rights.

²²⁸ See for example, International Covenant on Civil and Political Rights (ICCPR), Art. 6 with a corresponding provision on Right to adequate standard of living including Housing as contained in the International Covenant on Social, Cultural and Economic Rights (ICSCER), Art. 11.

3.3 Limitations to the traditional theories and the emergence of new theories

Apart from the general critique against the traditional theories of adverse possession earlier discussed, it would appear that there are limitations to the perspectives of the role of adverse possession in modern property law, necessitating an appraisal of other theories affecting the application of the doctrine from a broader perspective.

The application of the concept of property in modern times is not constant but dynamic depending, *inter-alia*, on the existing legal and institutional frameworks in operation within the jurisdiction(s) in view at the relevant time. It is also said that the traditional rationales fall short, as 'some rest on shaky or on outdated normative foundations [while] others do not fit the doctrinal contours'.²²⁹ It is said, the fact that the doctrine of adverse possession applies in varying circumstances has been responsible for the difficulty in finding a sustainable rationale for it.²³⁰ Whilst the doctrine may be associated with title disputes generally, it may be contextual in the sense that it may not relate substantially to the question of ownership over the entire land, but may be narrowed down to the extent of ownership in boundary dispute matters, necessitating justification under a different rationale.²³¹

The perceived universality of the doctrine of adverse possession is subject to local circumstances thereby subjecting it to the '**relativity theory**' and making it inapplicable. This is the case under the Nigerian legal system where the legislature has expressly made the Statute of Limitation inapplicable under customary law,²³² thereby obviating the application of the doctrine of adverse possession.²³³ In England and Wales,²³⁴ and to some extent Nigeria,²³⁵ the regime of title registration would propel the '**indefeasibility of title theory**' operating on the doctrine of

²²⁹ JE Starke, *supra* (n 210).

²³⁰ *ibid.*

²³¹ *ibid.*

²³² Limitation Act 1966, s.1(2).

²³³ The Act provides that time runs in favour of an adverse possessor only. See the Limitation Act 1966, s.67.

²³⁴ See the Land Registration Act 2002.

²³⁵ See e.g the Lagos State Land Registration Law No.1, 2015.

adverse possession and tweaking its application and *ipso facto*, the basis for it.²³⁶ Also, the regime of the Land Use Act in Nigeria has paved way for the **grant theory of title** resulting in adverse consequences for the efficacy of the doctrine. The human rights regime in both jurisdictions have been affected by local²³⁷ and international²³⁸ instruments on the sanctity of land rights resulting in the evolvement of the **sanctity of property rights theory**. Also, the criminalisation policy affecting adverse possession in both jurisdictions has brought about a controversial regime of **incompatibility** between a property law right (adverse possession) premised on civil law, and criminalization of trespass penalised with terms of imprisonment. These developments as this thesis demonstrates, have given another dimension to the effectiveness of adverse possession as a mode of acquiring title in the jurisdictions under discourse.

As could be seen from the ensuing discussion, these modern theories are fall-outs from decades of judicial pronouncements, various reception statutes overtime, extant constitutional provisions, specific pieces of local legislation and international human rights instruments.

3.3.1 *The Relativity Theory*

One of the legacies of colonialism in many parts of the world and particularly in Africa, is the reception of foreign law by the colonised.²³⁹ In Nigeria where English

²³⁶ In the England and Wales for example, an adverse possessor intending to protect his acquired title is expected to register it, while the application for such registration is brought to the notice of the actual owner, thereby giving him the opportunity to oppose such registration and to eject the adverse possessor.

²³⁷ The Human Rights Act, United Kingdom, 1998 applicable in England and Wales; Constitution of the Federal Republic of Nigeria, 1999 (Cap C23 Laws of the Federation of Nigeria, 2010), s. 43.

²³⁸ Protocol 1 of the European Charter on Human Rights applicable in the United Kingdom; African Charter on Human and Peoples' Rights domesticated and passed as an Act of the National Assembly in Nigeria: See Cap A10 Laws of the Federation of Nigeria, 2010.

²³⁹ This is known as legal transplant. This could come in different shapes and sizes. It could be major or minor; voluntary or imposed. It is voluntary where a country never experienced the domineering might of colonialism but propelled by the drive to attain radical transformation, embarked on the process of legal transplantation. This drive made countries such as Turkey, Ethiopia, Thailand to mention a few, to borrow alien systems to their advantage. Legal transplant is imposed consequent upon conquests and/or colonisation. This was the situation in the 19th Century Europe with the dissemination of the Napoleonic Code following conquests by Napoleon Bonaparte resulting in countries such as Spain, Portugal, Austria, the Germanic States to mention a few, adopting the Code.

law was received through an Act of Parliament,²⁴⁰ the legal transplant took place subject to local laws and local circumstances.²⁴¹ The relevant clauses to that effect make the application of English law in Nigeria subject to local Laws and local circumstances, and the application of the doctrine of adverse possession is not an exception.

One characteristic feature of legal systems affected by a process of legal transplant²⁴² is the existence of indigenous laws and institutions albeit in rudimentary form, prior to the advent of the colonialists. This has generated socio-cultural conflicts and the need to adapt the foreign laws to suit same.²⁴³ In Nigeria for example, this has resulted in the enactment of reception statutes stipulating conditions for the application of the English common law and statutes.²⁴⁴ But as discussed in this thesis,²⁴⁵ there is a conundrum of uncertainties in applying the English land tenure concepts to local systems of landholding, particularly with the advent of the Land Use Act 1978.

The relativity theory played out in the comment of Lord Denning in *Nyali v. Attorney General*²⁴⁶ when interpreting the clause: ‘subject to such qualifications as local circumstances may render necessary,’ as contained in the East Africa Protectorate Order in Council 1900 as follows:

Also, many countries in Africa such as Nigeria, Ghana, Sierra Leone and other commonwealth countries which experienced colonisation at one time or the other, had no option but to adopt the laws of their colonial master. See generally, W Alan, *Legal Transplants*, 1974 Edinburg Scottish Academic Press Ltd, 21; JH Beckstrom, ‘Reception of Law in Ethiopia.’ *American Journal of Comparative Law* vol. 21, 557; AN Allot, *New Essays in African Law*, Butterworth at 10; AN Allot, *The Future of African Law*, Butterworth 220; IO Smith, ‘Legal Transplant in a Developing Society: A critical Appraisal of the Reception of English Law in Nigeria.’ Lagos State University (1987) Faculty of Law Seminar Series, vol. 1 at 1; IM Valderrama, ‘Legal Transplants and Comparative Law.’ Available online at https://researchgate.net/publication/256014383_Legal_Transplants_and_Comparative_Law (December 2004); JO Ogbonnaya, H Chioma, ‘Jurisprudential Issues Arising from Legal Transplant: An Appraisal’ *Journal of Law, Policy and Globalisation* vol. 50 (2016).

²⁴⁰ See the Law (Miscellaneous Provisions) Act Cap 89 Laws of Nigeria 1958, s.45

²⁴¹ *ibid* s.45 (2) and (3).

²⁴² See n 239 above.

²⁴³ See literature cited in n 239 above.

²⁴⁴ See n 239 above.

²⁴⁵ See chapters 5, 6, 7 and 8 *infra*.

²⁴⁶ [1955] 1 All ER 646 at 652-653

...the common law cannot be applied in a foreign land without considerable qualification. Just as with English oak, so with the English common law. You cannot transfer it to the African continent and expect it to retain the tough character, which it has in England. It will flourish indeed but it needs careful tending. So, with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folks. These offshoots must be cut away. In these far off lands, the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications...

The relativity theory has been put to use by the legislature in Nigeria where the doctrine of adverse possession is made inapplicable under customary law by legislative fiat.²⁴⁷ It is also argued in this thesis, that the doctrine does not apply post Land Use Act 1978,²⁴⁸ although Nigerian courts are often not at home with this reality.²⁴⁹ A study of the traditional theories on adverse possession earlier discussed offers no explanation for this diversity.

3.3.2 *The Indefeasibility Theory*

The theory of indefeasibility of title proposes that once a person is registered as a proprietor of a certain estate or interest in land, such title cannot be vitiated except as prescribed by the registration of title law itself.²⁵⁰ It is said that the regime of registered title not only protect the title of the registered proprietor from unregistered interests, but also obviates the need to go 'behind the register in order to investigate the validity of title or possible rival claims to the land'.²⁵¹ As discussed

²⁴⁷ For a detailed analysis on this, see Chapter 5 *infra*.

²⁴⁸ Cap L5 Laws of the Federation of Nigeria, 2010. This is so because section 48 of the Act which preserves pre-existing land tenure systems makes them subject to the provisions of the Act; provisions which have rendered the doctrine of adverse possession impotent. For a detailed analysis, see Chapter 5 *infra*.

²⁴⁹ In fairness to Nigerian judges, running through decided cases, that point has never been canvassed by counsel before them. For a critique of these decades of decisions post 1978 when the Land Use Act was enacted, see Chapter 6 *infra*.

²⁵⁰ See *Custodian of Expropriated Property & Anor v Tedep & Ors* [1964] 113 CLR, 331-332; and the Nigerian case of *Majekodunmi v Abina* (2002) 1 SC 92.

²⁵¹ See SL Martin, 'Adverse Possession: Practical Realities and an Unjust Enrichment Standard' Frank G Zarb School of Business, 2008. Available online at alsb.roudtalivelive.org/Resources/Documents/NP%202008%20Martin.pdf. Accessed on 10/10/2019; Griggs, 'Possession, indefeasibility and Human Rights.' (2008) 8(2) QUT Law JJ. 286; *Gibbs v Messer* [1891] AC 248 at 204.

in Chapter 6 of this thesis, the English Land Registration Act 2002, and to some extent, the Lagos State Registration Law 2015 in Nigeria provide for a system of title registration which serves as 'mirror' of title, and sometimes prompting the real owner to act timeously to protect his or her title to land. The Land Registration Act 2002 applicable in England and Wales provides an alert for the paper owner to challenge the occupation of the adverse possessor, makes the basis of title primarily the fact of registration as opposed to possession, and makes it generally difficult for the adverse possessor to be registered as a proprietor.²⁵² To the extent that the indefeasibility theory makes the register as opposed to possession a relevant fact in the acquisition of title to land, it runs contrary to the traditional theories of adverse possession.

3.3.3 *The Grant Theory*

The regime of the Land Use Act²⁵³ in Nigeria has brought radical changes to the ownership structure in Nigeria²⁵⁴ resulting in a new concept of 'right of occupancy' which confers no absolute right of ownership,²⁵⁵ and with radical title vested in the chief executive of the state,²⁵⁶ who has the sole prerogative to make a grant of statutory right of occupancy.²⁵⁷ From the Land Use Act arises the '**grant theory**' impacting on the natural effect of adverse possession known to common law which recognises absolute but relative title; a title which simply passes to an adjudged

²⁵² For the flip side of the indefeasibility theory applicable in title registration, see M Pawlowski and J Brown, 'Adverse Possession and the Transmissibility of Possessory rights-The dark side of Land Registration'. [2017] (2) Conv. 116-131. Also available online at www.https://research.aston.ac.uk

²⁵³ Land Use Act, Cap L5 laws of the Federation of Nigeria, 2010.

²⁵⁴ Absolute ownership became streamlined and reduced to a right of occupancy which is, for all intent and purposes, a lease: See *Majiyagbe v AG Northern Nigeria* (1957) NNLR 158, a case decided under the old Land Tenure Law of the old Northern Region with similar provisions to those of the Land Use Act Cap L5 Laws of the Federal Republic of Nigeria 2010; *Savannah Bank (Nig) Ltd v Ajilo* (1989) 1 NWLR (Pt. 97) 305 at 328. For a contrary argument as to whether a right of occupancy is a lease, see Chapter 7 *infra*.

²⁵⁵ As to whether the Land Use Act gives a term of years, See Chapter 7 *infra*.

²⁵⁶ See *ibid* s.1.

²⁵⁷ *ibid* s. 5(1). The Local Governments in the state may also register a person as a holder of a customary right of occupancy. Title holders existing before the advent of the Land Use Act continue to hold the land as deemed grantees of right of occupancy: See the Land Use Act, *supra* n.85, ss. 34 and 36.

adverse possessor without much ado.²⁵⁸ In a situation such as the regime of the Nigerian Land Use Act where radical title is vested in the Governor of the State (or in the Minister on behalf of the President with regard to Federal land) who makes a grant, actual or deemed²⁵⁹ to a citizen with a right to occupy and use land without a proprietary right, and, in some cases, for a definite term, the effect of the extinction of the paper owner's title at the end of the limitation period (if at all) cannot be the same. This is complicated by the prohibition of adverse claims (referred to as false claims) to land and the provisions of sanctions for breach.²⁶⁰ This argument is canvassed robustly in Chapter 5 of this dissertation.

3.3.4 *Sanctity of Property Right Theory*

In England, the Human Rights Act 1998²⁶¹ which domesticated the European Convention on Human Rights²⁶² on the one hand, and in Nigeria, both the Constitution of the Federal Republic of Nigeria 1999 as amended, and the African Charter on Human and Peoples' Rights as domesticated by an Act of the National Assembly²⁶³ on the other hand, have the right to property enshrined in them. These instruments have made it generally wrongful or unlawful to deprive a person of his or her right of property except in some limited justifiable circumstances²⁶⁴, and created international obligations on the part of both jurisdictions to uphold the

²⁵⁸ Whereas adverse possession in its pristine state generally presupposes the existence of the real owner and the adverse possessor, the position under the Land Use Act involves three parties namely, holder of a right of occupancy, the claimant of adverse possession (if recognised by law) and the State represented by the Governor, or the Minister, or the Local government.

²⁵⁹ Actual grant is made directly to a citizen of Nigeria by the Governor under section 5(1) of the Act whether the land is situate in urban or non-urban area, whilst all holders of unlimited interest in land such as the fee simple estate or customary right before the advent of the Land Use Act in 1978 had their titles streamlined and converted to rights of occupancy by the Act under sections 34 and 36 of the Act respectively. In the same vein, the President of the Federal Republic of Nigeria through the Minister of the Federal Capital Territory can make an actual grant with regard to Federal lands in the State or lands within the Federal Capital Territory: See s. 47 of the Act.

²⁶⁰ Land Use Act *supra*, (n 253) ss. 37, 43.

²⁶¹ Human Rights Act Cap 42, 1998. Information on this is online at <https://www.Legislation.gov.uk>.

²⁶² See in particular, Protocol 1 Art. 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Paris, 20.III.1952.

²⁶³ Cap A10 Law of the Federation of Nigeria, 2010.

²⁶⁴ See e.g. proviso to Art. 1, Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; s.44(1) of the Constitution of the Federal Republic of Nigeria 1999 as amended, *supra* (n 237); and Art. 14 of the African Charter on Human and Peoples' Rights, *supra* (n 238) .

sanctity of property rights. However, while the fore-mentioned legal instruments are literally clear in their intent, judicial interpretation of their provisions may constitute a barrier to the realisation of the social objective. This discourse is taken further in Chapters 4 and 5 of this work.

3.3.5 *The Incompatibility Theory*

In both England and Nigeria, there are laws criminalising peaceful entry and peaceable possession by an adverse possessor²⁶⁵ making the trespasser or squatter liable to prosecution despite his legitimate claim and 'smart' reliance on the limitations statute to bolster up a claim in adverse possession. The effect of this is the incongruity of different civil and criminal law intendments, and a 'comedy' of confusion in the administration of justice in both jurisdictions under study. While the ensuing conundrum of uncertainty in this regard awaits the court's intervention in Nigeria, the English Court of Appeal held in *Best v Chief Land Registrar and the Secretary of State for Justice*²⁶⁶ that the adverse possessor's application for registration should be allowed by the Registrar on the ground that Parliament did not intend that adverse possession 'be prevented because it was based on criminal trespass'.²⁶⁷ From this incongruous model of the civil and criminal dispensation arises the '**incompatibility theory**' behind the legal maxim, '*ex turpicausa non orituractio*' with far reaching consequences. This argument is taken further in Chapter 4 of this work.

The foregoing developments tend to affect the efficacy of the rule of adverse possession in both jurisdictions with far reaching consequences.²⁶⁸

3.4 CONCLUSION

This Chapter has demonstrated that whilst the traditional theories underlie the rationale behind the doctrine of adverse possession thereby justifying its essence, the

²⁶⁵ See the Legal Aid, Sentencing and Punishment of Offenders .Act 2012 applicable in England and Wales, and the Criminal Law of Lagos State 2011(Nigeria) for provisions on criminal trespass.

²⁶⁶*R (on the application of Best) v. The Chief Land Registrar and the Secretary of State for Justice* [2015] EWCA Civ 17.

²⁶⁷*ibid* para. 34.

²⁶⁸ For the practical implications of these developments, see chapters 6, 7 *infra*.

contemporary theories which dictate the contextual application of the doctrine underlie its efficacy as discussed in Chapters 4, 5, and 6. From a comparative perspective, it lays a foundation for investigating the research questions posed in this study and for a discussion of the subsequent findings in Chapter 7.

CHAPTER 4

DOCTRINAL ANALYSIS OF ADVERSE POSSESSION UNDER ENGLISH LAW

4.0 Introduction

The last two chapters intertwined to provide the foundation for a robust study of the application of the doctrine of adverse possession under English and Nigerian law. The central thesis of this study commences with a doctrinal analysis of adverse possession under English law in this chapter, providing the road map for the comparative study engaged since the doctrine is, and remains a colonial legacy acquired through the reception of English law during the British rule in Nigeria.

This chapter discusses the historical antecedent of the doctrine of adverse possession and its application in England and Wales. It examines the root of title of the adverse possessor within the context of the statute of limitation and discusses the legal requirements for acquiring title by adverse possession under English law. The efficacy of the doctrine in its application is also engaged against the backdrop of the Land Registration Act 2002, the Human Rights Act 1998 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

4.1 Historical Background

The origin of adverse possession could be traced to remote antiquity. As far back as 2000 BC, King Hammurabi of Babylon, Mesopotamia laid out one of the first set of laws.²⁶⁹ Law 30 of the code provides:

If a chieftain or a man leaves his house, garden and field...and someone else takes possession of his house, garden, or field and uses it for three years: if the first owner returns and claims this house, garden, and field, it shall not be given to him, but he who has taken possession of it and used it shall continue to use it.²⁷⁰

²⁶⁹Out of the 282 rules, three focus on adverse possession: See J Hiatt and J Hladik, 'Adverse to Change: A modern look at adverse possession.' Center for Rural Affairs, 2019 at 2. Available at <https://www.cfra.org/sites/www.cfra/files/publications>. Accessed on 5/10/19.

²⁷⁰'Code of Hammurabi: Translated by LW King', Yale Law School. Lilian Goldman Law Library, The Avalon Project, 2008, Avalon.law.yale.edu/ancient/hamframe.asp. Accessed 5/10/19.

This coincides with the historic view that ‘land was not seen to be of intrinsic value,’ but valuable only when put into productive use.²⁷¹ Thus, while the social policy underlying many legal systems is generally the protection of the rights of the citizenry including their property rights while penalising violators of those rights, the doctrine of adverse possession postulates that a land owner who failed to put his land to productive use²⁷² is considered a ‘legal wrongdoer’.²⁷³ It is said that a neglected or abandoned land may become a nuisance and a financial burden for owners and the State, while lowering the value of neighbouring land owners.²⁷⁴

The two exceptions to the doctrine of adverse possession provided by the Hammurabi’s Code namely: its non-applicability in the case of a soldier-landowner ‘captured or killed during a battle, or in the case of a landowner’s juvenile son’,²⁷⁵ afforded underlying justification for the neglect or abandonment of land by the land owner. These, among other reasons, may constitute the defence of disability or lack of capacity in a claim of adverse possession in modern times.

In the old Roman law under which the common law concept of property drew its major components,²⁷⁶ possession was taken to be nine-tenths of ownership, and a person having possession of land had greater claim to it than the paper title holder who was not in possession.²⁷⁷ This Roman law concept formed the basis of the doctrine of adverse possession in many common law and civil law jurisdictions.²⁷⁸

²⁷¹J Hiatt and J Hladik, *supra* (n 269).

²⁷² Productive use could mean passive or active use. It is said that “fallowed fields and static wetlands are just as much considered a productive use as planted fields.” See J Hiatt and J Hladik, *supra* (n 269).

²⁷³ *ibid.*

²⁷⁴ *ibid.*

²⁷⁵ *ibid* at 2.

²⁷⁶ See Holdsworth, *History of English Law* vol. 1

²⁷⁷ *ibid.* It is said that the ‘[a]ncient Romans believed the land itself had a spirit that had to be nurtured and cared for by the person using the land. This gave the person who possessed the land greater claim to it than the person who merely held paper title to the land...’ See J Hiatt and J Hladik *supra*, (n 269).

²⁷⁸ The rule applies generally in all common law jurisdictions. Thus, apart from the United Kingdom, Nigeria and other common law jurisdictions such as Australia, New Zealand and the United States, it applies to civil law jurisdictions. Prominent amongst the civil law jurisdictions are France (Art 2229C Civ); Spain (Art 41 of the Spanish Civil Code); the Netherlands (Art 3.99(1), 3.105(1)); Sweden (Cap 16 Real Property Code); Hungary (s. 121(1) Civil Code Act IV 1959); Poland (Art 172-176 Polish Civil Code); Germany (Para 900 BG-B German Civil Code); See the Report of the British Institute of

Historically, '[t]he common law tradition in England went through a substantial transformation from a system that promoted heredity and limited access to land to a system that emphasised protection of individual property rights and free alienation'.²⁷⁹ In the feudal times, land was essentially the pivot of the society and 'the monarchy in England maintained property rights through primogeniture,²⁸⁰ultimogeniture²⁸¹ and other hereditary system that kept land from being freely alienated'.²⁸² However, with the development of the middle class in the 14th Century, an economy based upon wages as opposed to rendering services led to the emergence of individual property rights in real property.²⁸³

The nearest equivalent of the Roman legal concept of possession known to the English land tenure was *seisin* which was the landholder's interest in a freehold estate.²⁸⁴*Seisin* in the old English law was an estate in land amounting to possession of land by one who owns it for at least a period of his life, and having the right to possession of it as against all others.²⁸⁵ It was supplemented by the writ of 'novel disseisin' which was an action in which 'the plaintiff alleged a recent, novel *dissesein* by the person now seised of the land in dispute'.²⁸⁶ It does not matter that the action was brought by a person who acquired seisin wrongfully.²⁸⁷ The known remedy for

International and Comparative Law for Her Majesty's Court Service, September 2006 on 'Adverse Possession' accessed online at http://www.biicl.org/files/2350_advposs_sep_ftnsv3.pdf on 10/10/2019.

²⁷⁹B Gardiner, 'Squatters' Rights and Adverse Possession.' [1997] IND. International and Comparative Law Review, vol. 8:1 at 125.

²⁸⁰ The 'right of primogeniture' is the right of succession belonging to the first born child, especially the feudal rule by which the whole real estate of an intestate passed to the eldest son: See Oxford Dictionary of English, 10th ed.

²⁸¹Compared with 'primogeniture,' 'ultimogeniture' is a principle of inheritance in which the right of succession belongs to the youngest child: See Oxford Dictionary of English, supra (n 280).

²⁸² *ibid.*

²⁸³J Dukeminier & J Krier, *Property* 112 (1981) cited in B. Gardiner supra (n 279) at 126.

²⁸⁴H Hausmaninger, R Gamauf, *A case book on Roman Property Law*. Oxford University Press, USA 2012, 1.

²⁸⁵M Rayned, *Adverse Possession of Land*. Encyclopaedia Britannica, last updated February 2020, accessed on 3/03/2020.

²⁸⁶S Jourdan, O Radley-Gadner, *Adverse Possession* 2nd ed, Bloomsbury Professional Limited, UK 2011, 19 para 2-01.

²⁸⁷*ibid.*

loss of possession at the time was to 'oust the disseisor by force...[and] if one did not do so promptly, one lost the right'.²⁸⁸

The limitation period for real actions at the time depended on the judges' discretion and subsequently on Acts of Parliament with fixed dates being chosen 'before which allegations of the *seisin* of an ancestor might not be made'.²⁸⁹ The Statute of Westminster of 1275 limited claims of *seisin* starting after 1189, and effectively established an 86-year statute of limitations on adverse possession claims. However, it is said that 'the establishment of this fixed date for *seisin* greatly disadvantaged those who were trying to establish adverse possession claims since it became more difficult to establish clear claims as the years passed'.²⁹⁰ This State policy changed with the passing of the Limitation Act of 1623 which fixed the period of limitation for 20 years.

The modern English land law has since de-emphasised *seisin* as root of title to land and freehold estates could then be transferred by deed and registration. But whilst proof of unregistered title in English law would often take the form of production of deeds or other instruments of title showing transfer of title to land from one person to another beyond the period of limitation and showing in practical terms that it is secure against adverse claims, 'they do not prove that the transferor was in possession or entitled to possession'.²⁹¹ English courts have held that in proof of title to land, mere production of document of title without proof of possession is to no avail; the party adducing the documentary evidence as proof of title must support it by proof of possession.²⁹²

²⁸⁸*Thompson on Real Property*, para. 87 (David A. Thomas ed. 1994) cited by B. Gardiner, *supra* (n 279).

²⁸⁹Jourdan and Radley-Gadner, (n 286) 19 para 2-02.

²⁹⁰B Gardiner, *supra* (n 279) at 126-127.

²⁹¹Jourdan and Radley-Gadner, *supra* (n 286) at 61 para 4-07.

²⁹²Summing up the position of the English courts in *Lord St Leonards v Ashburner*(1870) 21 LT , 595 at 596Bramwell B said: 'Title deeds come to little without evidence of actual enjoyment, for otherwise anyone might pretend to give away the lands of anybody else. Parchment, of itself, comes to little; the real question is as to actual enjoyment.' See also *Malcolmson v O'Dea* (1863) 10 HLC 593 at 614; *Bristow v Cormican* (1878) 3 App Cas 641 at 668; *Johnston v. O'Neill* (1911) AC 552.

The early statutes of limitation in England²⁹³ recognised the tenacity of possessory rights and protected it by barring the right of action in court for recovery of possession by the holder of a superior title after a period of time prescribed by statute, while keeping his title intact. Thus, prior to the Real Property Limitation Act 1833, an entry on land by whatever means (short of an action in court) by a superior title holder after the limitation period was possible, since 'the older statutes barred only the remedy and not the right'.²⁹⁴ The right of the superior title holder ('the paper owner') caught by the limitation statute was not extinguished.

4.2 The Limitation Act 1632

The enactment of the Limitation Act of 1632 set the limitation period for the action of ejectment for 20 years. The expiration of the limitation period barred an action to recover the land as opposed to extinction of the true owner's title; in other words, there was no divesting of estate, only the remedy was barred.²⁹⁵ Although the Act laid down what appeared to be a single limitation period for rights of entry and ejectment, the courts developed a rule that before time would run under the statute, there had to be adverse possession.²⁹⁶ However, the question whether possession was adverse or not was dependent on circumstances of the possession. For example, case law decided that possession by a person with the consent of the true owner was treated as being under a tenancy at will, and was not adverse;²⁹⁷ that 'where the possession was at first lawful, it did not become unlawful by his continuance in possession after the period when he was in possession by right';²⁹⁸ and that 'where there were co-owners on property, the exclusive possession by one of them was treated as exclusive possession by all'.²⁹⁹

²⁹³ See e.g. the Statute of Westminster 1275; Limitation Act 1623.

²⁹⁴ *per* Griffith J. in *Bellew v Bellew* [1983] ILRM 128.

²⁹⁵ *ibid* at 23 para 2-13.

²⁹⁶ *ibid* at 24 para 2-15.

²⁹⁷ *Doe d Thompson v Clark* (1828) 8 B & C 717; *Do ed Milburn v Edgar* (1836) 2 Bing NC 498.

²⁹⁸ *Roe d Pelatt v Ferrars* (1801) 2 Bos & P 542; & Ry KB 38.

²⁹⁹ *Reading v Royston* (1703) 91 ER 3687.

The Limitation Act 1632 'reflected an early desire in England to prevent the waste of land resources'³⁰⁰ by encouraging landowners to put their land to productive use. It provided a warning signal for landowners to monitor their land and keep squatters in check. Also, 'by avoiding legal actions and quieting title, it provided a framework for decreasing the often high transaction costs associated with land disputes, and allowed for greater economic development based on the new certainty of title'.³⁰¹

4.3 The Real Property Limitation Act 1833

The Real Property Limitation Act, 1833 ('the 1833 Act') laid the foundation for modern law of limitations in England.³⁰² It was enacted sequel to the First Report of the Commissioners on the Law of Real Property in 1829 which contained significant suggestions regarding limitation of actions for the recovery of real property.

The 1833 Act provided in section 2 that 'no person shall make an entry or...bring an action to recover any land or rent but within twenty years next after the time at which to make such entry...or to bring such action shall have first accrued'.³⁰³ The time at which to make an entry or bring an action shall first accrue as provided for in section 3 of the Act which provided inter alia, that:

When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession...or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such...rent ...was received.

³⁰⁰B. Gardiner, *supra* (n 279) at 127.

³⁰¹ *ibid.*

³⁰²This Act was enacted following the First Report of the Commissioners on the Law of Real Property in 1829. Describing the state of the law on limitation of actions as "very unsystematic and very defective, the Commissioners made a number of recommendations culminating in the Real Property Limitation Act 1833.

³⁰³This period was reduced to 12 years by The Real Property Limitation Act 1874 which shortened the limitation period(s.1) and was retained by the Limitation Act 1939 (s.4(3)) and subsequently by the extant Limitation Act, 1980 (s.15(1)).

There are other deeming provisions concerning the determination of the date of accrual of rights to make an entry or to bring an action to recover land in four other cases.³⁰⁴

A remarkable feature of the 1833 Act was its departure from the old construction of adverse possession in the sense of requiring something more than a right for the true owner to recover possession from the squatter.³⁰⁵ Interpreting the provisions of sections 2 and 3 of the Act, Lord Denman LJ in *Napean v Doe d Night*³⁰⁶ held that the two sections 'have done away with the doctrine of non-adverse possession and...the question is whether twenty years have elapsed since the right accrued whatever be the nature of the possession.' This was followed by a long line of judicial authorities.³⁰⁷

The consequences following from the expiration of the limitation period recommended by the Commissioners on the Law of Real Property in 1829 went the whole hog: it was recommended that 'wherever by the provisions aforesaid all remedy is barred, the right shall be considered as extinguished to the party out of

³⁰⁴ These other cases are: (i) In the case of successor in title of a deceased person who was before death entitled to an estate or interest in land or rent in respect thereto, the right is deemed to have accrued to such successor in title at the time of death of the title holder; (ii) In the case of a person entitled under an instrument (save a will), to an estate or interest in land or rent in respect of same, the time was deemed to have first accrued at the time the person or the person through whom he claims is entitled to such possession or receipt by virtue of such instrument; (iii) In the case of an estate or interest in reversion or remainder or other future estate or interest, and no person had obtained possession of the land or receipt of profits or rent in respect thereto, such right was deemed to have accrued when such estate or interest became an estate or interest in possession; (iv) Where the person claiming land or rent or a person through whom he claimed became entitled by virtue of any forfeiture or breach of condition, such right was deemed to have accrued when such forfeiture was incurred or such condition was broken: These deeming provisions were retained by the Real Property Limitation Act 1874; retained in a modified form in the 1939 Act, ss. 5, 6, and 8 and retained in the 1980 Act as modified. Also, the Act provided that the right of a person holding an estate or interest in reversion to make an entry was due to accrue when the estate or interest fell into possession, even if the person had previously been in possession (s.5). The right to make an entry by the landlord in the case of a tenant at will was deemed to accrue from the determination of the tenancy, or if earlier, from one year after the commencement of the tenancy (s.7) As regards oral periodic tenants, it provided that the right to make an entry was deemed to accrue at the end of the first period or at the last time when rent was received, if later (s.8).

³⁰⁵ Jourdan and Radley-Gadner, *supra* (n 286) at 33 para 2-50.

³⁰⁶ 2 M&W 895; Barn & Adolph, 86.

³⁰⁷ See *Smith v Lloyd* (1854) 9 Exch 562; *Governors of Magdalen Hospital v Knotts* (1878) 8 ChD 709; *Re Jolly* [1900] 2 Ch 616; *Paradise Beach and Transportation Co. Ltd v Price-Robinson* [1968] AC 1072; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, paras 33-35, to mention a few.

possession, and absolutely vested in the party in possession'. But this recommendation was not fully implemented by the Act for, whilst the Act extinguished the right or title of the person against whom time had run upon the expiration of the period of limitation,³⁰⁸ it did not vest such right or title in the party in possession.

Some of the common law rules which prevented possession from being adverse under the Limitation Act 1623 were reversed. For example, mere entry was not to be deemed possession,³⁰⁹ and no continual claim on or near the land would preserve a right of entry.³¹⁰ There are also other important provisions regarding extension of the limitation period in cases of disability³¹¹ or concealed fraud.³¹²

4.4 The Real Property Limitation Act 1874

The Real Property Limitation Act 1874 which came into force in 1879 preserved the earlier legislation of 1833 with certain modifications.³¹³ Amongst other provisions, it reduced the limitation period from 20 years to 12 years for any action, entry or distress brought or made after its commencement;³¹⁴ it altered the rule regarding persons under disability by shortening the extension allowed from ten to six years with maximum extension allowed from 40 to 30 years; and it took out persons beyond the seas from the category of persons under disability.³¹⁵

4.5 Adverse Possession and Registered Land

In the case of registered land, section 21 of the Land Transfer Act 1897 protected a registered proprietor from adverse possession by a squatter. However, if at the date of registration of land with a possessory title time was already running against the applicant for registration under the Real Property Limitation Act of 1833 or 1874, it

³⁰⁸Real Property Limitation Act 1833, s. 34. This was an important change from the previous law under which only the remedy and not the right to possession was barred by the expiry of the limitation period.

³⁰⁹*ibid* s.10.

³¹⁰*ibid* s.11.

³¹¹*ibid* ss. 16-19.

³¹²*ibid* s. 26

³¹³Real Property Limitation Act 1874, s.9

³¹⁴*ibid* s.1.

³¹⁵*ibid* ss.3-5.

would continue to run against him after registration, and a title adverse to the registered title could be acquired.³¹⁶ To perfect the title of the adverse possessor, section 12 of the Land Transfer Act 1897 made provision for rectification of the register to accommodate a squatter who acquired title by possession to registered land; but the squatter's title would be defeated where there was a disposition of the land for valuable consideration before he was registered.³¹⁷

Section 173 of the Law of Property Act 1922 which became substituted for the provision of section 12 of the Land Transfer Act 1897 contained provisions adopted by the Land Registration Act (LRA) 1925.³¹⁸ Section 75 (1) of the LRA 1925 provided that the Limitation Acts shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered. However, where the estate of the registered proprietor would have been extinguished if it were not registered:

...such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said Acts, has acquired title against any proprietor, but without prejudice to the estates and interests of any other person interested in the land whose estate or interest is not extinguished by those Acts.³¹⁹

It is also provided that any person who claims to have acquired title under the Limitation Acts to a registered estate in land may apply to be registered as proprietor thereof and, if the Registrar is satisfied that the person is so entitled, register him with absolute, leasehold, qualified or possessory title as the case may be, but without prejudice to any estate or interest protected by any entry on the register which may not have been extinguished under the Limitation Acts.³²⁰ Such registration shall have the same effect as the registration of a first proprietor or the applicant or any other person interested may apply to the court for the determination of any question thereby arising.³²¹

³¹⁶ Jourdan and Radley-Gadner, *supra* (n 286).

³¹⁷See the Land Transfer Act 1875, s.18 as amended by the Land Transfer Act 1897, Sch.1.

³¹⁸See s.75 of the Act. The whole Act was subsequently repealed by the Land Registration Act 2002.

³¹⁹*ibid.*

³²⁰LRA 1925, S. 75(2).

³²¹*ibid.*

4.6 The Limitation Act 1939

Following the publication of the Fifth Interim Report of the Law Revision Committee on Limitation of Actions in 1936, the recommendations of the Committee were substantially implemented by the Limitation Act 1939. Although the Act re-enacted the provisions of earlier statutes to a large extent, it made a number of significant amendments.³²²

Significantly, the 1939 Act re-introduced the expression 'adverse possession' though not with the same meaning it had before 1833.³²³ Adverse possession was defined to mean 'possession of some persons in whose favour the period of limitation can run'.³²⁴ This definition was retained by paragraph 8(1) Schedule 1 to the Limitation Act 1980³²⁵.

4.7 The 21st Report of the Law Reform Committee

Following the publication of the 21st Report of the Law Reform Committee in 1977³²⁶, Parliament enacted first, the Limitation Amendment Act 1980 which amended the Limitation Act 1939, and subsequently, the Limitation Act 1980 which consolidated the existing Limitation statutes.

³²²Limitation Act 1939, 33(b). Such amendments included introduction of new rules for limitation against the Crown; a 30 year period for "all actions to recover possession other than those relating to the foreshore, where the previous 60 year period was retained, and gold and silver mines, where no limitation period applied." Limitation Act 1939, ss 4, 30. It also introduced new rules for extension of the limitation period in case of disability, acknowledgement, part payment and fraudulent concealment: Limitation Act 1939, ss22-26;; while new rules were introduced dealing with claims between beneficiaries and trustees: Limitations Act 1939, s.19.

³²³ *ibid.*

³²⁴ See s.10(1) thereof.

³²⁵ Lord Brown-Wilkinson in *Pye (Oxford) Ltd v Graham* (2003) AC 419 at 36 referred to the re-introduction of the expression 'Adverse Possession' as unfortunate for, it creates the impression that 'in order for a squatter to gain title by lapse of time, he has to act adversely to the paper title owner... he has to "oust" the true owner in order to dispossess him; that he has to intend to exclude the whole world including the true owner; that the squatter's use of the land has to be inconsistent with any present or future use by the true owner...much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Acts. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.'

³²⁶Cmnd 6923 (1977).

As part of the recommendations of the Committee relevant to adverse possession, the Committee recommended that there should be no change to the various limitation periods relating to actions for recovery of land;³²⁷ that the law should be amended to ensure that no licence to possess the land is implied unless the evidence warrants it;³²⁸ that in the case of tenancy at will, a gratuitous licence or a periodic oral tenancy, time shall not begin to run in favour of the occupier until the tenancy or licence has been determined;³²⁹ that there should be no change in the law relating to the running of time against persons entitled to future interests in land;³³⁰ that there should be no limitation period for rectification of the land register;³³¹ that a claim for indemnity in cases of erroneous registration of title should not be defeated by a defence of limitation except where, had the land not been registered, the claim to the right itself would have been lost by lapse of time;³³² and that a trustee who was also a beneficiary who acted prudently and honestly in distributing trust property should be able to rely on a defence of limitation except in respect of the share which he would have had to pay to the late-comer had all the beneficiaries (including himself) been sued in time.³³³

4.8 The Limitation Amendment Act 1980

This Act which came into force consequent upon the various recommendations of the Law Reform Committee contained in the 21st Report on the limitation of actions applied in all causes of action accruing, and things taking place before and after the commencement of the Act.³³⁴ It provided that no action may be brought which was barred by the Limitation Act 1939 before its commencement, nor affected any action or arbitration commenced before its commencement, nor the title to any property which was the subject of any such action or arbitration.³³⁵ It abolished the rule that

³²⁷ibid paras 3.38-3.42.

³²⁸ibid para 3.52.

³²⁹ibid paras 3.55, 3.56.

³³⁰ibid para 3.65.

³³¹ibid para 3.72.

³³²ibid paras 3.77-3.79.

³³³ibid paras 3.84.

³³⁴The Limitation Amendment Act 1980, s.12(2).

time ran against a landlord under a tenancy at will from the anniversary of the grant of the tenancy.³³⁶ A new provision of the Limitation Act 1939 was introduced in its section 10(4) which provided that:

...there was to be no implication of law that a squatter's occupation was by permission of the person entitled to the land merely by virtue of the fact that the squatter's occupation was not inconsistent with the person entitled to the land's present or future enjoyment of the land.³³⁷

4.9 The Limitation Act 1980

The extant Limitation Act 1980 consolidated the pre-existing limitation statutes and repealed the Limitation Act 1939 and the Limitation Amendment Act 1980.³³⁸ In addition, it contains transitional provisions so far as it relates to adverse possession cases. In particular, it provides that nothing in the extant law shall enable any action barred by the previous statutes to be brought premised on the provisions of the extant law.³³⁹

The relevant provisions of the Limitation Act 1980³⁴⁰ ('the Act') which applies in the case of unregistered title generally are sections 15(1), 17, Schedule I paragraphs 1-8.

Section 15(1) of the Act provides:

No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

The right of action is said to accrue in case of present interests on land, on the date when a person entitled to possession or a person claiming through him is dispossessed or discontinued his possession.³⁴¹ In the case of a deceased person who was, on the date of his death, in possession of the land being the last person entitled

³³⁵ibid s.12(1).

³³⁶ibid s.3(1).

³³⁷ibid s.4. The provision is incorporated in the extant Limitation Act 1980 in Schedule 1, para 8(4).

³³⁸Limitation Act 1980, s. 40(3) and Sch 4.

³³⁹ibid Sch 2, para 9(1).

³⁴⁰The Limitation Act 1980, c58.

³⁴¹Schedule 1 paragraph 1.

to the land in possession, the right of action is deemed to accrue on the date of his death.³⁴²

Section 17 of the Act provides:

Subject to-

(a) section 18 of this Act, [...]

at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.

As for accrual of right of action to recover land, Schedule 1(1) of the Act provides:

Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action shall be treated as having accrued on the date of the dispossession or discontinuance.

The expression, 'Adverse possession' is contained in the provisions of Schedule 1 paragraph 8(1) and (2) which provide:

- (1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as 'adverse possession'); and where under the preceding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land
- (2) Where a right of action to recover land has accrued and after its accrual, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be treated as having accrued and no fresh right of action shall be treated as accruing unless and until the land is again taken into adverse possession

The foregoing provisions are clear and unambiguous: First, an action for recovery of land is barred after 12 years of accrual of the cause of action to recover the land. The

³⁴² Schedule 1 paragraph 2. In the case of an estate or interest insured otherwise than by will to him, or to some person through whom he claims and the person making the assurance was on the date when the assurance took effect was in possession of the land charged and no person has been in possession of the land by virtue of the assurance, the right of action is deemed to accrue on the date when the assurance took effect: See Schedule 1 paragraph 3. For accrual of right of action in case of future interests, see Schedule 1 paragraphs 4-6.

right of action accrues in this case when the land is in the possession of a person in whose favour the period of limitation can run (i.e adverse possession), provided that the right of action shall not accrue unless there is a person in adverse possession of the land both at the time the right of action accrued and before the right of action is barred. Secondly, after the period of limitation, the title of the person outside possession is extinguished.³⁴³

While the requirement of adverse possession is germane in determining the running of time under the Limitation Act 1980, there is still a thorny issue to be dealt with as a result of the patent lacunae in the Act. The argument goes that it is not sufficient that the title of the paper owner is extinguished after the limitation period, the nature of the interest acquired by the adverse possessor is germane. While it is trite from statutory provisions earlier discussed that the person in whose favour time has run has title to the land, there have been disagreements over the nature and source of that title. This is particularly important since the Limitation Act 1980 does not specifically vest any form of title in the adverse possessor at the end of the limitation period and upon the extinguishment of the owner's title.

One view based on the *parliamentary conveyance theory* is that upon the expiration of the limitation period, the estate of the owner is statutorily conveyed to the adverse possessor. This is a legal fiction meant to ensure efficacy of the provisions of the law, and it was the view taken by the Real Property Commissioners in their first report on Limitation of action in respect of real property,³⁴⁴ culminating in the Real Property Limitation Act 1833. The Commissioners had recommended that:

Wherever by the provisions aforesaid all remedy is barred, the right shall be considered as extinguished to the party out of possession, and absolutely vested in the party in possession³⁴⁵

This recommendation was not implemented by Parliament in enacting the Real Property Limitation Act 1833 or subsequent limitation statutes, including the

³⁴³ibid s.17.

³⁴⁴First Report of the Commissioners on the Law of Real Property, 1829.

³⁴⁵ibid at 81.

Limitation Act 1980. Although favoured by some old English cases,³⁴⁶ the parliamentary conveyance theory was rejected unanimously by the Court of Appeal in *Tichborne v Weir*³⁴⁷, *Fairweather v St. Marleybone*³⁴⁸ and *Buckinghamshire County Council v Moran*.³⁴⁹ Indeed, the provision of section 17 of the Limitation Act³⁵⁰ 1980 contradicts this theory. It also appears illogical to conceive of a transfer of title which has been extinguished by statute, for 'extinguishment imports annihilation'; while 'transfer imports continued existence'.³⁵¹

Some logic was found in the *commensurate estate theory* by Darby and Bosanquet who held the view that the 'rights...remaining un-extinguished [after the limitation period] is clearly commensurate with the interest which the rightful owners have lost by the operation of statute...and must therefore...have the same legal character...'.³⁵² Apart from the fact that section 17 of the Limitations Act 1980 runs contrary to this theory, the theory has generated criticism by legal commentators both in form and content,³⁵³ and has been rejected by the House of Lords in *Fairweather v St Marleybone* where Lord Ratcliffe said:

[a squatter] has not the title or estate of the owner or owners whom he has dispossessed nor has he in any relevant sense an estate 'commensurate with' the estate of the dispossessed. All that this misleading phrase can mean is that, since his possession only defeats the rights of those to whom it has been adverse, there may be rights not prescribed against...which are no less enforceable against him in respect of the land than they would have been against the owners he has dispossessed.³⁵⁴

While the theory may sit well with the position of an adverse possessor of registered land under the Land Registration Act 2002 where the law entitles the adverse

³⁴⁶ See *Doe d Jukes v Sumner* (1845) 153 ER 380, 381; *Cp Incorporated Society v Richards* (1841) 1 Dru & War 258, 289; *Scott v Nixon* (1843) 6 Ir Eq Rep 8, 17; *Dawkins v Lord Penrhyn* (1877) 6 Ch D 318(CA) 323.

³⁴⁷ (1892) 67 LT 735

³⁴⁸ [1963] AC 510 (HL) 535 (Lord Radcliff) 544 (Lord Denning) 553 (Lord Morris)

³⁴⁹[1990] Ch 623, 644 (Nourse LJ).

³⁵⁰ The provision of this section provides that, upon the expiration of the limitation period, 'the title...to the land' of the person against whom time has run 'shall be extinguished.'

³⁵¹ See AC Meredith, 'A paradox of Sugden's' (1918) 34 LQR 253, 255.

³⁵²JGN Darby and FA Bosanquet, *A Practical Treatise on the Statute of Limitations in England and Ireland* (W Maxwell & Son 1867) 390.

³⁵³ See for example, W Hayes, *An introduction to Conveyancing* (5thedn, Sweet 1840) vol 1, 269-270; N Curwen, 'The Squatter's Interest at Common Law' [2000] Conv 528, 532-33.

³⁵⁴supra (n 348) at 536.

possessor to be entered into the register as against the registered proprietor who is disqualified where he qualifies to be so registered,³⁵⁵ it does not explain the situation with unregistered land on which he acquires no estate commensurate to that of the person against whom time has run.

It would appear that the modern view on the source of the squatter's title lies in *presumption of possession as legal evidence of ownership*. This presumptive status of possession may be traced to the words of Cozen-Hardy MR in the case of *Re Atkinson and Horsell's Contract*³⁵⁶ that:

Whenever you find a person in possession of property that possession is prima facie evidence of ownership in fee, and that prima facie evidence becomes absolute when once you have extinguished the right of every other person to challenge it...

This view was adopted by Fletcher Moulton LJ that:

Possession is prima facie evidence of right, and that evidence becomes conclusive when the rights of all other people are extinguished. That is the effect of the [statute of limitation].

This presumption is not irrebuttable, as there may be superior title to which the possessory title may be subject and which may defeat it. This point was made clear by Holroyd Pearce LJ in *Marylebone Property Co. v Fairweather*³⁵⁷ when he said:

In such circumstances, the squatter obtains a pragmatic or defeasible fee simple. If the title which the squatter has destroyed is the true immediate fee simple, then he has in practice acquired the best available title and he will prevail against all. If, however, the title that he has destroyed is not the true immediate fee simple, but some lesser title, he is still vulnerable, for he can be ejected when he is subsequently challenged by a stronger immediate title. While that stronger title is only a title in reversion, he is safe, but when the reversion comes into possession, the reversioner's right to eject him arises.

The logical implication of the exercise of a possessory title therefore is that it gives rise to a possessory right which is alienable³⁵⁸ and not possession-dependent;³⁵⁹ a

³⁵⁵ Land Registration Act 2002, Sch 6; Sch 6 para 9(1).

³⁵⁶[1912] 2 Ch 1 (CA) 9.

³⁵⁷[1962] 1 QB 498 (CA) at 513.

right to non-interference;³⁶⁰ and a power to convey it inter vivos, or to devise the interest by will.³⁶¹ But the interest of the adverse possessor remains defeasible and vulnerable if the title destroyed is not an immediate fee simple absolute in possession but a form of lesser title with a reversioner holding a fee simple absolute with the right to enter into possession and defeat the interest of the adverse possessor. This is actualised in modern time by bringing an action of ejectment against the adverse possessor. There lies the frailty of the doctrine of adverse possession under English law, which frailty affects its efficacy as a mode of acquisition of title to land.

4.10 The Land Registration Act 2002

The advent of the Land Registration Act in 2002 streamlined the application of the doctrine of adverse possession by giving the registered proprietor of registered land the opportunity of discovering the presence of a squatter on his land. Where the registered proprietor failed to take steps to eject the squatter within a certain period stipulated by law, the adverse possessor may be put on the register as the new registered owner and the register rectified without compensating the former proprietor. The effect of the Act on the doctrine of adverse possession is examined later on in this chapter.

4.11 Possession, Relativity of Title and Adverse Possession in English Law

The origin of adverse possession in modern English law lies in possession³⁶² and relativity of title. A person in possession is the one having the control of, and

³⁵⁸*Asher v Whitlock* (1865) LR 1QB 1; *Perry v Clissod, Ex parte Winder* (1877) 6 Ch D 696.

³⁵⁹*Ezekiel v Fraser*[2002] EWHC 2066 .

³⁶⁰ This is a basic attribute of exclusive possession.

³⁶¹*Asher v Whitlock* supra (n 341); *Wheeler v Baldwin* (1934) 52 C.L.R 609 (High Court of Australia); *Allen v Roughley* (1955) 94 C.L.R 98 (High Court of Australia).

³⁶² Possession in English law is a combination of the exercise of acts of possession and the intention to possess known as *animus possidendi*. In relation to land, possession replaced the old regime of *seisin* following the abrogation of real actions in 1833. *Seisin* in medieval law is the possession of land by a freeholder either directly or through a tenant. Where possession was wrongfully taken, the possessor (the *disseisor*) acquired a fee simple title good against the whole world except the dispossessed owner (the *disseisee*), "and the dispossessed owner was left with a mere right of entry." The doctrine of *seisin* has since lost relevance in modern times following the conveyancing regime

exercising exclusive rights over land and the use and enjoyment of it to the exclusion of all other persons.³⁶³ A person in possession enjoys possessory rights tantamount to a right of ownership on the land.³⁶⁴ The proprietary nature of possession allows not only the exclusive control, use and enjoyment of land, but also enables the possessor to transfer the land to another absolutely, create lesser interests in the form of leases on it, and devise the land to successors by will or allow it to devolve on heirs at law upon intestacy.³⁶⁵ It has since become a yardstick for investigation of title under a system of unregistered conveyancing³⁶⁶, and the length of period for its enjoyment is the basis for the application of statutes of limitation. Possessory rights may be exercised as a superior title to the extent that the possessor could bring an action against a trespasser to protect his possessory rights even where the possession is wrongful, and it is not a defence that a superior title belongs to a third party somewhere.³⁶⁷

However, the enjoyment of possessory rights inure only for as long as there is no superior title in place for, exclusive possession, although exercisable against the whole world, it is subject to the right of a person having a superior title. It follows therefore that the concept of possession in English law is based on the theory of relativity of title against which to determine its efficacy and validity. The provision of section 1(5) of the Law of Property Act 1925³⁶⁸ enabled this when it unequivocally states that: "A legal estate may subsist concurrently with or subject to any other legal estate in the same land in like manner as it could have done before the commencement of [the] Act." In the words of Jordan CJ in *Gatward v Alley*³⁶⁹:

...in English Law, all title to land is founded on possession. Thus a person who is in possession of land, although wrongfully, has a title to the land, which is good against all except those who can show a better title; that is, can prove that they or their predecessors had earlier

whereby freehold estate became transferable by deed and registration "not by livery" of *seisin*: See Jourdan and Radley-Gardner *supra* (n 286) at 20 paras. 2-04-2-05.

³⁶³ See *Powell v McFarlane* (1977) 38 P & CR 452 at 469.

³⁶⁴ *Perry v Clissold* [1907] AC 73 (PC) at 77

³⁶⁵ *Asher v Whitlock* (1865) LR 1QB 1; *Perry v Clissold* *supra*, (n 347).

³⁶⁶ The English Vendors and Purchasers Act 1874, s.1

³⁶⁷ Not even the Crown:

³⁶⁸ Law of Real Property 1925, c20.

³⁶⁹ (1940) 40 SR (NSW) 174 at 176.

possession, of which they were wrongfully deprived...In the case of real property, a person who seeks to establish in a Court of law that he has a good title must either prove that, during what the law regards as a sufficiently long period for the purposes of the particular proceedings, he and any persons upon whom he relies as predecessors in title have had actual possession, or else that at a sufficiently remote period a predecessor in title assumed to deal with the property as a person having a good title in possession, and a chain of subsequent assurances under that dealing leading to himself.

The possession meant here is exclusive possession with the requisite *animus possidendi*.³⁷⁰ It also includes acts of possession 'to support a claim to title based on title deeds, and to make good, deficiencies in those deeds'.³⁷¹ This requirement of long possession as proof of title is however a rebuttable presumption and may be rebutted by evidence to the contrary.³⁷²

Whilst proof of unregistered title in English law often take the form of production of deeds or other instruments of title showing transfer of title to land from one person to another beyond the period of limitation and showing in practical terms that it is secure against adverse claims, 'they do not prove that the transferor was in possession or entitled to possession'.³⁷³ English courts have held that in proof of title to land, mere production of document of title without proof of possession is to no avail; the party adducing the documentary evidence as proof of title must support it by proof of possession.³⁷⁴

³⁷⁰ For what constitute possession and *animus possidendi*, see para 4.12.1 below.

³⁷¹ Jourdan and Radley-Gardner, supra (n 286) at 4-08 relying on *Doe Barres v Shey*(1874) 29 LT 592; *Re Alston's Estate* (1856) 5 WR 189.

³⁷² See *St Magdalene College v AG* (1857) 6 HL Cas 189; *Jayne v. Price* (1814) 5 Taunt 326.

³⁷³ Jourdan and Radley-Gardner, supra (n 286) at 61 para 4-07.

³⁷⁴ Summing up the position of the English courts in *Lord St Leonards v Ashburner*(1870) 21 LT , 595 at 596 where Bramwell B said: 'Title deeds come to little without evidence of actual enjoyment, for otherwise anyone might pretend to give away the lands of anybody else. Parchment, of itself, comes to little; the real question is as to actual enjoyment.' See also *Malcolmson v O'Dea*(1863) 10 HLC 593 at 614; *Bristow v Cormican* (1878) 3 App Cas 641 at 668; *Johnston v O'Neill* (1911) AC 552.

4.12 Legal Requirements

At common law applicable in England and Wales, a squatter or other person³⁷⁵ relying on adverse possession to claim title under the statute of limitations is required by law to prove certain legal requirements to succeed. It is not enough that the claimant is able to show that he has been in possession of land for the requisite number of years under the statute of limitation³⁷⁶; he must go further to prove certain legal requirements³⁷⁷ to the satisfaction of the court, namely that:

- (i) The defendant has been in factual physical possession of land with the requisite intention to possess (*animus possidendi*);
- (ii) The possession is adverse;
- (iii) The defendant's stay has been continuous for the period of limitation set by the requisite statute of limitations;
- (iv) Possession has been peaceful and uninterrupted; and
- (v) Possession has been open and notorious.

4.12.1 *The act of physical possession coupled with the requisite intention to possess*

This requirement of physical possession coupled with the requisite intention to possess has been adumbrated by the courts in England. In *Pye (Oxford) Ltd v Graham*,³⁷⁸ the House of Lords defined factual possession as 'a sufficient degree of physical custody or control'³⁷⁹ while an intention to possess is defined as 'an intention to exercise such custody and control on one's own behalf and for one's own benefit'³⁸⁰.

³⁷⁵While the appellation 'squatter' is used in decided cases to describe a person in adverse possession, the word may be inappropriate to describe other persons in adverse possession such as 'a mortgagee or mortgagor in possession, a tenant under an oral periodic tenancy after the end of the first period where rent is not paid and a person without title who takes possession believing he is the true owner...': See Jourdan and Radley-Gardner *supra*, (n 286) at 3. See also the Nigerian case of *Davies v. Ajibona* (1994) 5 NWLR (Pt 343) 234

³⁷⁶Limitation Act 1980; Schedule 1, Paragraph 8(1).

³⁷⁷ By way of a preliminary but vital consideration, the property must be in existence and must either be owned or be a registered land.

³⁷⁸[2003] 1 AC 419 HL.

³⁷⁹*ibid per* Lord Browne-Wilkinson at para 40.

³⁸⁰ *ibid*.

Act of physical possession

The possession required is factual possession, signifying an appropriate degree of exclusive physical control³⁸¹. What acts constitute a sufficient degree of exclusive control depends on the circumstances of each case particularly, 'the nature of the land and the manner in which land of that nature is commonly used or enjoyed'³⁸². The most obvious of what constitutes exclusive physical control is the physical enclosure of the land³⁸³, physical presence or cultivation of land,³⁸⁴ or the making of unexhausted improvements³⁸⁵ thereon. However, it may not always be necessary for the defendant to take such active steps in relation to the land, for the type of conduct which indicates possession must vary with the type of land.³⁸⁶ It is however important to show that the defendant had an appropriate degree of physical control of the land 'sufficient to exclude other persons from interfering'³⁸⁷.

The test which has been adopted by the courts in recent years is whether the squatter 'has been dealing with the land in question as an occupying owner might have been expected to deal with and that no one has done so'³⁸⁸. However, the fact that the squatter might have done more will not be sufficient to defeat a claim for adverse

³⁸¹*Powell v McFarlane* (1977) 38 P & CR 452, per Slade J. at 470; *Pye (Oxford) Ltd v Graham*, supra (n 361) para 40.

³⁸²*ibid.*

³⁸³*Pye (Oxford) Ltd v Graham*, supra (n 381) para 41.

³⁸⁴*ibid.* See also *Pye (Oxford) Ltd v Graham* supra (n 381).

³⁸⁵ *ibid.*

³⁸⁶Per Lord Guest in the Privy Council case of *Wuta- Ofei v. Danquah* (1961) 3 All ER 596 at 600. It is said that 'where land is suitable for very limited uses, it will be easier to demonstrate the required degree of physical control.' Thus, in *Red House Farms (Thornton) Ltd v Catchpole* [1977] 2 EGLR 125, a small island formed when a river changed course was found to be unsuitable for any agricultural purpose, in which case, a trespasser, who was regularly using it for hunting, was able to establish adverse possession.

³⁸⁷ Thus, in *Powell v. McFarlane* (1977) 38 P&CR 452 at 470, it was held that 'grazing of cows coupled with making hay and limited repairs to fencing' were not sufficient; but 'enclosing the land by erecting a new fence' as in *Buckinghamshire County Council v Moran* [1989] 2 All ER 225 or 'fitting new locks to doors' as was the case in *Lambeth LBC v Blackburn* (2001) 82 P&CR 494, 'are generally the types of action that will be required.'

³⁸⁸*Powell v. McFarlane* (1977) 38 P&CR 452 at 470-471.

possession³⁸⁹, nor is it required that the use made of the land is profitable in a commercial sense³⁹⁰.

In addition, the possession must be singular and not shared severally³⁹¹ by persons, for the law does not allow concurrent possession of land by adverse parties³⁹². The possession must be exclusive in that, the possessor exercises act of possession to the exclusion of all other persons including the true owner³⁹³.

Intention to possess (animus possidendi)

There must be the intention to possess the land (*animus possidendi*)³⁹⁴; but this does not imply an intention to own it³⁹⁵. It also involves the intention to exclude others and to show that the squatter 'was not merely a persistent trespasser but was seeking to dispossess the true owner'³⁹⁶. In the words of Slade L.J in *Powell v McFarlane*³⁹⁷, 'the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow'.³⁹⁸

This mental element of possession entails both the subjective intention to possess and some outward manifestation of such intention 'which makes clear that intention to the world at large'³⁹⁹ otherwise known as the objective intention. The court will

³⁸⁹ See *Purbrick v London Bureau of Hackney* [2004] 1 P & CR 34 at paras 22-23.

³⁹⁰ See *Roberts v Swangrove* [2007] 2 P & CR 17 at para 39.

³⁹¹ *Onovo v Mba* (2014) 14 NWLR (Pt. 1427) 391 at 439 paras. F-H. Possession by many squatters jointly however amounts to single possession.

³⁹² *Onovo v. Mba* supra (n 374).

³⁹³ See *Pye (Oxford) Ltd v. Graham* supra (n 381).

³⁹⁴ Rejecting Counsel's argument in *Pye (Oxford) Ltd v. Graham* supra (n 381) at para 40 that there was no need to demonstrate an intention to possess in order to establish actual possession, the court, per Lord Browne-Wilkinson, held that '...there has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical possession. Such intention may be, and frequently is, deduced from the physical acts themselves...So far as English law is concerned, intention as a separate element is obviously necessary.'

³⁹⁵ *Buckinghamshire County Council v. Moran* supra (n 387).

³⁹⁶ That was the situation in *Buckinghamshire County Council v. Moran*, supra (n 387) above.

³⁹⁷ (1977) 38 P&CR 452 at 471-472.

³⁹⁸ This dictum was approved by the House of Lords in *Pye (Oxford) Ltd v. Graham*, supra (n 381) at para 43.

³⁹⁹ *Smith v. Waterman* [2003] EWHC 1266 (Ch) at para 19.

normally infer the squatter's subjective conduct from his conduct⁴⁰⁰; but in addition, there must be the manifested intention to exercise control over the land for the time being, excluding all others including the true owner from possession⁴⁰¹. This is easily proven by the defendant showing that he made full use of the land as the owner of the land would have done; but where the conduct of the squatter is equivocal, it is expected that additional evidence be adduced to establish intention to possess.⁴⁰²

Where the squatter enters into possession under a mistaken belief that he owns the land, the necessary intention is formed, and there is no requirement that the squatter intends to exercise exclusive physical possession over the land wrongfully⁴⁰³. In the same vein, a mistaken belief that a tenancy exists in favour of a squatter does not affect the requisite intention to possess the land by him⁴⁰⁴. However, there are conflicting decisions on the question whether a licensee, believing that his license may be terminated at any time has the intention to possess⁴⁰⁵, but it has been argued that '[t]here is no practical difference between the intention of a tenant holding under a tenancy which can be determined at any time by notice from the landlord and a licensee entitled to exclusive possession'⁴⁰⁶ since '[b]oth intend to possess for the time being for their own benefit, and both know that they may be required to vacate at any time'⁴⁰⁷.

Once there is a manifested intention to exercise control over the land by the squatter, it is of no moment that the true owner makes limited use of the land, although not in a way amounting to effective control of the land⁴⁰⁸. The intention required is not an indefinite one; it is one to possess the land in the meantime, that is, during the period

⁴⁰⁰ibid.

⁴⁰¹ibid.

⁴⁰²Per Lord Hutton in *Pye (Oxford) Ltd v. Graham*, supra (n 381) at para 76.

⁴⁰³*Pye (Oxford) v Graham* supra (n 381) at para 41(5).

⁴⁰⁴See *Tower Hamlets London Borough Council v Barrett* [2006] P & CR 132 at para 42. Cited with approval in para 43 of *Pye's* case.

⁴⁰⁵See e.g. *Adams v Trustees of MichealBatt Charitable Trust* (2001)82 P & CR 404; *Clowes Developments (UK) Ltd v Walters* [2005] EWHC 669 (Ch) at paras 39-40 where the courts held that there was no intention to possess; and *Wretham v Ross* [2005] EWHC 1259 (Ch) at para 41, *Alston & Sons Ltd v BOCM Chemicals Ltd* [2009] 1 EGLR 93 at paras 86-105, where a contrary decision was reached.

⁴⁰⁶*Jourdan and Radley-Gardner, Adverse Possession*, (n 286) at 201 para 9-51.

⁴⁰⁷ibid.

⁴⁰⁸ibid at 130 para 7-51.

of limitation. Thus, an intention to exercise control pending when the actual owner would need it, does not detract from the squatter's *animus possidendi*⁴⁰⁹.

Since proof of intention to possess requires a manifested intention to exercise exclusive control of the land, allowing access to the disputed land to a third party (e.g by handing over the keys to the main entrance to him) without an unequivocal assertion that the squatter retains control over access to the land, would deny the squatter of intention to possess.

A squatter who offers to buy disputed land or pay rent for it does not cease to have *animus possidendi*. While such conduct may amount to an acknowledgement by the squatter of the true owner's title which would affect the running of the limitation period, it does not alter the squatter's intention to possess⁴¹⁰.

4.12.2 *Adverse Possession*

For the period of limitation to run against the title holder under the statute of limitation, it must be proven by the defendant that his possession was adverse to the title of the real owner⁴¹¹. To make a possession adverse, there must be an entry under the colour of right claiming title inconsistent with that of the true owner, and against the whole world. In other words, the possession must be inconsistent with, and in denial of the true owner, and must be without legal title. In the words of Romer LJ⁴¹²:

...if one looks to the position of the occupier and finds that his right to occupation is derived from the owner in the form of permission or agreement or grant, it is not adverse, but, if it is not so derived, it is adverse, even if the owner is, by legislation, prevented from bringing ejectment proceedings.

⁴⁰⁹ See *Buckinghamshire County Council v Moran* supra (n 387) at 643E.

⁴¹⁰ Per Lord Browne Wilkinson in *Pye (Oxford) Ltd v Graham* supra (n 381) at para 46.

⁴¹¹ It is said that time runs against the owner of land under the limitation statutes, 'if the land is in continuous adverse possession for the limitation period.' See Jourdan and Radley-Gardner, supra, (n 286).

⁴¹² *Moses v Lovegrove* (1952) 2 QB 533 at 539-540.

Thus, where possession is enjoyed pursuant to some agreement made with the title holder such as the existence of a lease or licence, it cannot be adverse⁴¹³.

Proof of adverse possession is crucial for three reasons⁴¹⁴: In the first place, proof of adverse possession would show that the occupation was unauthorised by the title holder and that the occupation was inconsistent with the right of the owner in the sense that it was meant to dispossess the owner. Secondly, the intention of the defendant to displace the title holder becomes manifest. Thirdly, the cause of action in trespass arose and the time would start running against the title holder under the statute of limitation from the moment adverse possession was being exercised. It is immaterial that the title holder had no knowledge of the presence of the adverse possessor⁴¹⁵ except the title holder is under some form of disability or the defendant is 'guilty' of fraudulent concealment,⁴¹⁶ nor is it of moment that he had a future use of the land in mind.⁴¹⁷

Although possession by a squatter or a trespasser may generally qualify as an adverse possession, possession delivered by the title holder to another person may also turn out to be adverse in certain circumstances. For example, where a purchaser in possession of the land sold pays the purchase price without transfer made to him, his possession becomes adverse to that of the vendor who becomes a bare trustee for him, and consequently, the vendor's title will be extinguished after the limitation period⁴¹⁸. In the same vein, a defendant with a defective document of title who remains in possession for the limitation period may plead adverse possession in defence if the plaintiff he dispossessed, or his successor-in-title, brings an action in court subsequently⁴¹⁹. Also, a tenant at sufferance who initially entered into possession under an agreement with the landlord but who holds over against the

⁴¹³*Buckinghamshire County Council v Moran* supra (n 387) at 636, paras G-H; *Pye (Oxford) Ltd v Graham* supra (n 381) at para 37.

⁴¹⁴J E Stake, 'The Uneasy Case of Adverse Possession' (2000-2001) 89 *Georgetown LJ* 2417 at 2426-2427. See www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1220&context=facpub. Accessed on 6/10/2019.

⁴¹⁵*Elabanjo v Dawodu*(2006) 15 *NWLR* (Pt. 1001) 76 at 142 paras. B-E.

⁴¹⁶*Davies v Ajibona* (1994) 5 *NWLR* (Pt. 343) 234.

⁴¹⁷ See *Pye v Graham* supra (n 381).

⁴¹⁸*Davies v Ajibona*(1994) 5 *NWLR* (Pt. 343) 324.

⁴¹⁹ *ibid.*

will of the said landlord at the expiration of the lease or tenancy becomes an adverse possessor in favour of whom time runs, and may be entitled to title upon the extinction of the former landlord's title at the expiration of the limitation period⁴²⁰. The crucial question in all cases is whether the defendant, in whatever capacity, has been exercising a right inconsistent with the right of the title holder.

4.12.3 *Continuous adverse possession for the period of limitation*

Adverse possession must be continuous for the period set by the statute of limitation for an action to be brought by the title holder or to have his title extinguished. It must run without a break in-between for that period, for anytime the trespasser abandons his possession, the right of the title holder revives⁴²¹. Where there is a break in the adverse possession and a fresh intruder enters, there is a fresh dispossession, the period of limitation starts running afresh under the relevant statute of limitation, and a right of action accrues again to the title holder⁴²².

The significance of the requirement of continuous possession is manifest in the case of successive squatters in adverse possession. Adverse possession of successive squatters may operate cumulatively to extinguish a pre-existing title only if the periods of adverse possession are strictly continuous. Thus, if A, a squatter who has occupied X's land for a continuous period of seven years out of twelve years limited by statute, transferred the land to D by conveyance, or will or on intestacy, X would be barred after D has held the land continuously for another five years⁴²³. In the same vein, where a squatter X is dispossessed by another squatter Y, the latter may add X's period of occupation to his own as against the true owner⁴²⁴. Thus, time runs against the true owner from the time when adverse possession began, and so long as adverse possession is not broken⁴²⁵.

⁴²⁰Harpumet. et al., Megarry & Wade, *The Law of Real Property* 6th ed. Sweet & Maxwell (2012) para 17-107.

⁴²¹*Roy v Lagona*[2010] VSC 250 at para. 35; The English 1980. Sch 1 para 8(2) Limitation Act.

⁴²²*ibid.*

⁴²³*Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078.

⁴²⁴*Asher v. Whitlock* (1861) L.R 1 QB 1; *Willis v. Earl Howe* [1891] 2 Ch. 545.

⁴²⁵*Mount Carmel Investments Ltd v Peter Thurlow supra*, (n 423).

However, time of successive squatters cannot add up where a squatter abandons possession before the full period of limitation has run and some time passes before either someone else takes possession, or before he re-takes adverse possession of the land⁴²⁶. It follows therefore that during the gap between the two squatters, the owner has possession in law and there is no person he can sue. Consequently, the land ceases to be in adverse possession during that period, and when the second squatter comes in, a fresh cause of action accrues to the title holder⁴²⁷.

4.12.4 *Peaceful and Uninterrupted Possession*

It is imperative that the possession should be peaceful in the sense that entry must have been without violence; a forceful acquisition of possession is wrongful and cannot ripen into adverse possession⁴²⁸. Also, such peaceful possession must have continued uninterrupted by the true owner, or by a third party. Where the adverse possession is challenged from time to time so that it becomes intermittent and interrupted, it is not considered to be an adverse possession.⁴²⁹ It follows therefore that each time the adverse possessor relinquishes possession, the true owner is deemed to have resumed possession and the period of limitation stops counting, and would only start counting afresh upon encroachment by another adverse possessor.⁴³⁰

Adverse possession need not be hostile⁴³¹ except in the sense of the squatter's presence being 'hostile to the title of the true owner',⁴³² since both the act of possession of the squatter and the title of the true owner are incompatible and irreconcilable. It follows therefore that adverse possession may occur 'through

⁴²⁶*Roy v Lagona*[2010] VSC 250 at para. 35; The English Limitation Act 1980, Sch 1 para 8(2) Limitation Act.

⁴²⁷ *ibid.*

⁴²⁸*Brown v Perry* [1991]1 WLR 1297 at 1302A. It has been held, however, that aggressive defence of his boundaries reinforces his adverse possession claim rather than detract from it: See *Beever v Spaceline Engineering Property Ltd* *supra*, (n 2).

⁴²⁹*King (t/a Oakland Services UK) v Job* [2002] EWCA Civ 181

⁴³⁰*Trustees, Executors and Agency Co. Ltd v Short* (1883) 13 App. Cas. 793.

⁴³¹*Pye (Oxford) Ltd v Graham* *supra* (n 361) per Lord Hope of Craighead at para 69.

⁴³²*Beever v. Spaceline Engineering Property Ltd* *supra* (n 428).

ignorance or mistake' of the adverse possessor, or through lack of awareness of the true ownership of the property by the claimant.⁴³³

4.12.5 *Open and Notorious Possession*

It is said that 'the sort of entry and exclusive possession that will ripen into title by adverse possession is the use of the property in the manner that an average true owner would use it under the circumstances'⁴³⁴. The conduct of the possessor should be such that 'marks the conduct of owners' in relation to 'holding, managing and caring for property of like nature and condition'⁴³⁵; the kind of conduct that would amount to holding out as the true owner of the property.⁴³⁶ This may take the form of making unexhausted improvements on the land such as building, fencing or farming on the land, but it need not be; it is said that '[a]cting like a landowner can mean mimicking the legal formalities of land ownership'.⁴³⁷ This can be actualised by public acts of ownership such as the adverse possessor would exercise if he was the true owner of the property.

However, it is not enough that the adverse possessor holds himself out as the owner; he must be seen and taken as such by the public at large.⁴³⁸ It is therefore not so much of the subjective notion of the publicity or notoriety as perceived by the adverse possessor; but more of an objective perception of the publicity or notoriety by the public.

4.13 **Registered Title and Adverse Possession**

Some of the arguments often canvassed against the efficacy of adverse possession is

⁴³³ K Gray and S F Gray, *Elements of Land law*, 5th ed. Oxford University Press (2009), 1183, citing *Pye (Oxford) Ltd v Graham* supra (n 361) per Mummery L.J at para 34(5).

⁴³⁴ J Dukeminier & J.E Krier, *Property* 131 (4th ed. 1998).

⁴³⁵ JA Clarke, Adverse Possession of Identity: Radical Theory, Conventional Practice, *Oregon Law Review*, vol.84 [2005] 563 at 566, relying on *Howard v. Kunto*, 477 P.2d 831, 861 (Wash C.A 1970).

⁴³⁶ *ibid.*

⁴³⁷ JA Clarke, supra (n 435).

⁴³⁸ *ibid.*

the emergence of title registration in contemporary times,⁴³⁹ with reliance on the register as the mirror of title. This is in accordance with the theory of indefeasibility of registered title.⁴⁴⁰

The transformation of adverse possession from being an overriding interest to the status of a registrable title, it is argued, has rendered the application of the doctrine unnecessary⁴⁴¹ and making it more relevant, if at all, to the regime of unregistered titles.

4.14 The Regime of Title Registration under the Land Registration Act 1925

The old English Land Registration Act of 1925 made first registration of a freehold or leasehold title subject to overriding interests, and one of such overriding interests was rights acquired or in the course of being acquired under the Limitation Acts.⁴⁴²

Where the squatter was in adverse possession of unregistered land which title was subsequently registered, the registered title was made subject to the squatter's possessory title. If the registered proprietor subsequently made a disposition of the land in respect of which a squatter was an adverse possessor, the disposition was made subject to the squatter's rights,⁴⁴³ and where the limitation period is still running, it continues to run against the disponee⁴⁴⁴.

As to the effect of the squatter's rights at the expiration of the limitation period, section 75 of the Registration Act 1925 provided that the title of the proprietor 'shall not be extinguished,' but the proprietor was said to hold such title in trust for the squatter in favour of whom time had run under the limitation statute, 'but without

⁴³⁹JE Stake, 'The Uneasy Case for Adverse Possession.' *supra* (n 397).

⁴⁴⁰See Chapter 3 *infra* for discussion on this.

⁴⁴¹JE Stake, *supra* (n 439).

⁴⁴² See the Land Registration Act 1925, s. 70(1) (f).

⁴⁴³*ibid*, ss. 5(b) and 9(c).

⁴⁴⁴*Charwood v Lyall* (No.2) [1930] 2 Ch 156.

prejudice to the estates and interests of any other person interested in the land whose estate or interests in the land is not extinguished by those Acts'.⁴⁴⁵

Any person claiming to have acquired title under the Limitation Act to a registered estate in the land may apply to be registered as proprietor,⁴⁴⁶ and where the registrar is satisfied as to the applicant's title, he shall enter the applicant as proprietor either with absolute, good leasehold, qualified or possessory title, as the case may require, but without prejudice to any estate or interest protected by any entry on the register which may not have been extinguished under the Limitation Act, and such registration shall, subject as aforesaid, have the same effect as the registration of a first proprietor.⁴⁴⁷

Notwithstanding that the proprietor's title was not extinguished in favour of the squatter upon the expiration of the limitation period but was said to be held on trust for the squatter, initial judicial authorities suggested no difference in substance between adverse possession of registered and unregistered land.⁴⁴⁸ The trust mechanism employed by the provision of section 75(1) was said to be 'wholly inconsistent with the conceptions of the Limitation Acts as previously understood'⁴⁴⁹ but had the effect of a "parliamentary conveyance" (through the medium of trustee and cestui que trust)⁴⁵⁰. The trust mechanism was also said to be inconsistent with the provision of section 75(2) which allows the squatter to register 'his independent possessory title acquired by adverse possession'⁴⁵¹. However, later judicial authorities support the 'parliamentary conveyance' principle⁴⁵². It was held, for example, that a squatter in adverse possession of land under an unregistered lease

⁴⁴⁵ *ibid*, s.75(1). It was observed that were it not for this provision, the title of the registered proprietor would have been extinguished: See *Belize Estate and Produce Co. Ltd v Quilter* [1897] AC 367; *Brogden v Brogden* (1920) 53 DLR 362.

⁴⁴⁶ *ibid* s. 75(2).

⁴⁴⁷ *ibid* s. 75(3). The applicant and any other person may apply to the court for the determination of any question arising under the relevant section of the law.

⁴⁴⁸ *per* Lord Denning in *Fairweather v St Marylebone Property Co. Ltd* (1963) A.C 510, HL at 514. See also, *Jessamine Investment Co. v Schwartz* [1978] QB 264 at 275A; *Mount Carmel Investments Ltd v. Peter Thurlow Ltd* *supra*, (n 423) at 189C.

⁴⁴⁹ *per* Lord Radcliffe in *Fairweather v. Marylebone* *supra* (n 448) at 542.

⁴⁵⁰ *ibid*.

⁴⁵¹ *ibid*.

⁴⁵² See *Spectrum Investment Co. v. Holmes* [1981] 1 WLR 221; *Central London Commercial Estates Ltd. v. Kato Kagaku Ltd* [1998] 4 All ER 948.

beyond the limitation period was entitled to be registered as proprietor of the registered lease⁴⁵³, and that the registered proprietor could not effect a surrender of the lease.⁴⁵⁴

4.15 The Land Registration Act 2002

The Land Registration Act (LRA) 2002, the extant Law which came into effect on 13 October 2003, repealed the statutory trust imposed under the old Law and provides in Schedule 12, paragraph 18(1) that where a registered estate in land was held in trust for a person by virtue of section 75(1) of the 1925 Act immediately after 13 October 2003, that person 'is entitled to be registered as proprietor of the estate' not with a new title, but as the new registered owner of the existing registered estate. He has a defence to any action for the possession of the land, and the court shall order the registrar to register him as the proprietor of the estate where the court determines that such a person is entitled to such a defence.

The LRA 2002 has made inapplicable to registered land, the provision of section 15 of the Limitation Act 1980 which automatically extinguishes the title of the original title holder after the limitation period⁴⁵⁵, but instead, entitles a squatter in adverse possession for a minimum of ten years to apply to be registered as the proprietor of the land.⁴⁵⁶

The squatter may apply for first registration of title to the land.⁴⁵⁷ Upon registration of a freehold estate, the estate is vested in the proprietor subject to interests the subject of an entry in the register in relation to the estate;⁴⁵⁸ unregistered interests falling within any of the paragraphs of Schedule 1,⁴⁵⁹ in particular, any interest belonging to a squatter in adverse possession for the limitation period;⁴⁶⁰ and

⁴⁵³See *Spectrum Investment Co. v. Holmes* supra, (n 452).

⁴⁵⁴ Surrender of the lease was initially made possible by the court in *Fairweather v. Marylebone* supra (n 448).

⁴⁵⁵ See s. 96 of the Land Registration Act 2002.

⁴⁵⁶ *ibid* Sch 6 para 1.

⁴⁵⁷ *ibid* s. 3(2).

⁴⁵⁸ *ibid* s. 11(4)(a).

⁴⁵⁹ *ibid* s. 11(4)(b).

⁴⁶⁰ See Sch 1, para 2.

interests acquired under the Limitation Act 1980 of which the proprietor has notice.⁴⁶¹

Where a squatter has been in adverse possession of land with a registered title for more than ten years, he may apply to be registered as proprietor of that land.⁴⁶² The registrar shall, upon receipt of the application, serve a notice of it on the registered proprietor and other interested persons.⁴⁶³ The notice shall warn that 'failure to serve a counter notice in time will lead to the squatter being registered'.⁴⁶⁴ Where the person served fails to object by filing a counter notice within sixty five (65) business days, the squatter will be registered as proprietor.⁴⁶⁵ The effect of registration consequent upon failure to file a counter notice is that the squatter becomes the successor in title of the previous registered proprietor by virtue of a statutory assignment, and if the title is leasehold, the squatter becomes the lessee under the lease from the date of registration.⁴⁶⁶ However, the squatter takes the estate subject to interests affecting it other than any registered charge.⁴⁶⁷

Where a counter-notice is served by any of the persons served with the notice of application, the application will be dismissed unless the squatter can satisfy one of three conditions namely: that it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and the circumstances are such that the applicant ought to be registered as the proprietor;⁴⁶⁸ or that the applicant is for some other reason entitled to be registered as the

⁴⁶¹ LRA 2002, s. 11(4)(c). However, where the squatter is not in actual occupation at that date, his rights bind the registered proprietor only if the latter has notice of those rights.

⁴⁶² *ibid* Sch 6, para. 1. Application can also be made under sub-paragraph 2 if the squatter "(a) has in the period of six months ending on the date of the application ceased to be in adverse possession of the estate because of eviction by the registered proprietor, or a person claiming under the registered proprietor, (b) on the day before his eviction he was entitled to make an application under sub-paragraph (1), and the eviction was not pursuant to a judgment for possession." Sub-paragraph 3 prohibits a person from making an application "if-(a) he is a defendant in proceedings which involve asserting a right to possession of the land, or (b) judgment for possession of the land has been given against him in the last two years." Sub-paragraph 4 provides that, "for the purposes of sub-paragraph 1, the estate need not have been registered throughout the period of adverse possession."

⁴⁶³ Sch. 6 para 2 (1).

⁴⁶⁴ Sch.6 para 2(2).

⁴⁶⁵ Land Registration Rules 2003.

⁴⁶⁶ Sch. 6 para 9.

⁴⁶⁷ Sch. 6 para 9(2) and (3).

⁴⁶⁸ Sch 6 para 5(2).

proprietor of the estate;⁴⁶⁹ or that the land to which the application relates is adjacent to the land belonging to the applicant, and the exact line of the boundary between the two has not been determined under rules provided in section 60⁴⁷⁰ for at least ten years of the period of adverse possession ending on the date of the application; or that the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and the estate to which the application relates was registered more than one year prior to the date of the application.⁴⁷¹

The squatter succeeds to the registered title sequel to non-service of the counter-notice, but may be subject to any registered charge affecting the estate immediately before his registration, with provision for the apportionment of such charges.⁴⁷² However, where the squatter's application is rejected and he subsequently remains in adverse possession for two years from the date of that rejection, he acquires the right to be registered as proprietor of the land.⁴⁷³ A successful application made under paragraph 6 of Schedule 6 aforesaid entitles the squatter to be entered on the register as the new proprietor of the estate.

The certainty provided by the register of titles and the indefeasibility of title registration as opposed to reliance on possessory title were the underlying rationale of the LRA 2002. Making the register a mirror of title entails encouraging the adverse possessor to apply for registration as a proprietor in deserving cases without prejudicing the right of an existing proprietor to the protection afforded by law. Thus, landowners are now better placed to resist adverse possession claims while landowner's title assures him of notice of any adverse possession on the land and enables him to resist by way of counter-notice when notice of adverse possession is served on him upon the squatter's application to be registered.

⁴⁶⁹Sch 6 para5(3).

⁴⁷⁰Sch 6 para5(4).

⁴⁷¹Sch 6 para 5(4).

⁴⁷²Sch 6 para 9

⁴⁷³Sch 6 paras 6 and 7.

Clear cases of proprietor's discontinuance of possession or prevailing circumstances showing that it would be inequitable or unconscionable to refuse the adverse possessor access to registration, especially when it is apparent that the registered proprietor is no longer protective of his title, are acknowledged and considered by the registrar in taking a decision to register the adverse possessor. This reasoning accords with one of the underlying objectives of the 2002 Act, namely that:

The title that registration confers should be capable of being overridden by adverse possession only where it is essential to ensure the marketability of land or to prevent unfairness.⁴⁷⁴

It is therefore apt to say that 'the land registry's adverse possession regime is based on the principles of neutrality and fairness to both parties'.⁴⁷⁵

However, considering the limited grounds under which the adverse possessor may be registered as proprietor in the event of an objection, it is said that the adverse possessor is more likely to avoid the risk of alerting the registered proprietor of his existence and thereby prompt opposition to the application for registration.⁴⁷⁶ In the words of Pawlowski and Brown:

The incentive to stay quiet is made even more attractive given the principle of relativity of title in English property law and the possibility of transmission of possessory rights between possessors creating in effect a dark market.⁴⁷⁷

The Law Reform Consultation Paper⁴⁷⁸ reveals that the past 8 years indicated a steady drop in the number of such application brought under the 2002 Act.

In a recent study by Pawlowski and Brown⁴⁷⁹ using questionnaire sent to 200 conveyancing solicitors throughout England and Wales, it was revealed that:

...as many as 67 percent of solicitors who responded indicated that they had advised clients who had been in adverse possession of land not to apply for

⁴⁷⁴ See Law Commission/H.M. Land Registry, *Land Registration for the Twenty-First Century : Consultative Document*, (1998) No. 254, at para. 1043.

⁴⁷⁵ *ibid.*

⁴⁷⁶ M Pawlowski and J Brown, 'Adverse Possession and the Transmissibility of Possessory Rights - The Dark Side of Land Registration?' [2017] (2) *Conv.* 116 at 117.

⁴⁷⁷ *ibid.*

⁴⁷⁸ See Law Commission Consultation Paper, *Updating the Land Registration Act 2002*, No. 227, (2016). at para 17.66.

⁴⁷⁹ *Supra* (n 476) at 127-128.

registration because of the risk of alerting the registered proprietor to the adverse possession and prompting opposition to the application.

The result has been a proliferation of a 'dark market' in possessory estates 'given that such estates may pass through a succession of possessors and endure indefinitely off the register'⁴⁸⁰ in the absence of any compulsion on the part of the possessor to apply for registration as proprietor in place of the registered proprietor of the land. Consequently, an amendment to the 2002 Act has been suggested which would require the squatter to bring his application to be registered as a proprietor during a stated period following his adverse possession of the land for ten years.⁴⁸¹ It is said that failure in this regard 'would have the effect of automatically extinguishing the squatter's possessory title in respect of the land, so that it would cease to exist for all purposes.'⁴⁸²

4.16 Impact of the Human Rights Act 1998 on Adverse Possession

The right to property is a concept cherished by many common law jurisdictions.⁴⁸³ In England and Wales—jurisdiction without a written constitution, the domestic sources of rights are the common law, and the Human Rights Act of 1998 (HRA)⁴⁸⁴ which incorporates into English law, the rights contained in the European Convention on the Protection of Human Rights and Fundamental Freedoms also known as the *European Convention on Human Rights* (ECHR),⁴⁸⁵ consequent upon her membership of the Council of Europe.⁴⁸⁶ The *European Commission on Human Rights* was

⁴⁸⁰M Pawlowski and J Brown, *supra* (n 476) at 131.

⁴⁸¹*ibid.*

⁴⁸²*ibid* at 130.

⁴⁸³ This is demonstrated by the Constitution in many African countries.

⁴⁸⁴*Human Rights Act 1998* (UK).

⁴⁸⁵*European Convention on Human Rights* (213 U.N.T.S 221, E.T.S 5). It was signed in 1950 and came into effect in 1953.

⁴⁸⁶ The Council of Europe was created in 1949 with the initial membership of ten. Today, the membership has gone up to almost fifty (50) member states with Headquarters at Strasbourg, France. Its main purpose is to foster European unity and facilitate economic and social progress. Its main concern is the issue of human rights amongst others. Although it has a close relationship with the European Union (EU), it is not part of the EU. It is not affiliated with the "European Council" which is a special meeting of the EU's Council of Ministers. See generally, *Theory and Practice of the European Convention on Human Rights*, 4th ed. (KJC5132.A4195 V36 2006) and *Practitioner's Guide to the European Convention on Human Rights*, 3rd ed. (KJC5132.R45 2008).

established in 1954 while the *European Court of Human Rights* (ECtHR) was established in 1959.⁴⁸⁷

The HRA 1998 which came into force on October 2, 2000 provides that so far as possible, domestic legislation shall be read and given effect in a way which is compatible with Convention Rights.⁴⁸⁸ Where a provision of the domestic legislation is found to be incompatible with a Convention right, the court may make a declaration of incompatibility under the HRA;⁴⁸⁹ and this may necessitate amending legislation by statutory instrument under the Act.⁴⁹⁰

One of the rights protected under the Convention is the right of property under the ECHR. Article 1 of Protocol No. 1 provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

For ease of reference the three rules contained in the above provision are:

Rule 1: Every natural or legal person is entitled to the peaceful enjoyment of his possession.

Rule 2: No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

Rule 3: Rules 1 and 2 shall not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Another provision meant to protect the right of property is Article 8 which provides:

⁴⁸⁷ See generally, *Short Guide to the European Convention on Human Rights*, 3rd ed. (KJC5132.G66 2005).

⁴⁸⁸ HRA 1998, s.3.

⁴⁸⁹ *ibid* s.4.

⁴⁹⁰ *ibid* s.10.

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The two provisions are germane to a determination whether the application of the doctrine of adverse possession in England and Wales is affected by the regime of human rights. Whilst Article 1 of Protocol 1 to the ECHR may be invoked generally by a paper owner of unregistered land and a registered proprietor of registered land against the adverse possessor, the adverse possessor who has been putting property to use particularly where the property is his home, may generally be entitled to protection under Article 8.

The connections between Article 8 on the one hand and Article 1 of Protocol No.1 on the other hand, have been highlighted in the *European Court of Human Rights Guide on Article 8 of the European Convention on Human Rights*⁴⁹¹, under 'Right to respect for private and family life'⁴⁹² as follows:

1. There may be an overlap between the concept of home in Article 8 and that of property under Article 1 Protocol No. 1, but the existence of a "home" is not dependent on the existence of a right or interest in respect of real property.⁴⁹³ Thus an adverse possessor in occupation of residential accommodation is entitled to protection under Article 8 notwithstanding lack of interest in the property itself. This principle supports the occupation theory, the labour theory and the utilitarian theory earlier discussed in this thesis.⁴⁹⁴
2. An individual may have a property right over a particular building or land for the purpose of Article 1 of Protocol 1 without having sufficient ties with

⁴⁹¹ Available online at www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf updated on 31 August 2019, Accessed on 18 /4/2020. However, these Guides are not binding on the court and may be subject to review from time to time.

⁴⁹² *ibid* paras 60-62.

⁴⁹³ *ibid* para 60. See *Surugiu v Romania* no. 48995/99 of 20 April 2004.

⁴⁹⁴ See Chapter 3 ante for the exposition of these theories.

the property for it to constitute his or her “home” within the meaning of Article 8.⁴⁹⁵ This principle complements the first one in that the owner of an abandoned property may not have sufficient ties to property for it to constitute a home. Following the personhood theory earlier discussed in this work,⁴⁹⁶ this principle justifies the right of the adverse possessor under Article 8.

3. In view of the crucial importance of the rights secured under Article 8 to the individual’s identity, self determination, physical and mental integrity, the margin of appreciation afforded to states in housing matters is narrower in relation to the rights guaranteed by Article 8 than to those protected by Article 1 of Protocol 1.⁴⁹⁷
4. A violation of Article 8 may result from a finding of a violation of Article 1 of Protocol 1. Some measures that constitute a violation of Article 8 will not necessarily lead to a finding of a violation of Article 1 of Protocol 1.⁴⁹⁸
5. There is a significant mark of difference between the interests protected by the two Articles and hence, the disparity in the extent of the protection they can afford, particularly when it comes to applying the proportionality requirements to the facts of a particular case.⁴⁹⁹

The application of the provisions of Article 1 Protocol 1 of the HRA is discussed in this Chapter against the backdrop of the decision of the Grand Chamber of the European Court on Human Rights in *United Kingdom v. Pye*.⁵⁰⁰ Although a full discussion of Article 8 of the HRA which deals with squatter’s rights in eviction cases outside the statute of limitation is outside the main focus of this thesis, a quick discourse of this is necessary for completeness. A cursory look is therefore taken of this in paragraph 4.18 of this thesis.

⁴⁹⁵ibid. See *Khamidon v Russia* no. 72118/01 of 15 November 2007.

⁴⁹⁶ For an exposition of the personhood theory, see Chapter 3 ante.

⁴⁹⁷ ibid para 61: See *Gladysheva v Russia* n 7097/10 of 6 December 2011.

⁴⁹⁸ibid para 62. See *Ivanova and Chakezor v. Bulgarian*. 467577/15 of 21 April, 2016.

⁴⁹⁹ibid para 62. See *Ivanova and Chakezor v. Bulgaria* supra, n. 13.

⁵⁰⁰(2008) 46 EHRR 1083.

4.17 Judicial Interpretation of Article 1 Protocol 1 in relation to Adverse Possession of Registered Land.

Since the advent of the Human Rights Act 1998 applicable in England and Wales, courts have had to consider in different cases the implications of Article 1 Protocol 1 thereof on adverse possession of registered land. The question is whether the doctrine of adverse possession in relation to registered land under the Land Registration Act 1925 breached one of the Rules under Article 1 Protocol 1. Different conclusions were reached based on variety of reasons until the question was finally resolved in *United Kingdom v. Pye*⁵⁰¹ by the Grand Chamber of the European Court of Human Rights (ECtHR).

4.17.1 *Decisions of municipal courts up to the first decision of the ECtHR in Pye*

The question whether the doctrine of adverse possession applies to registered land was first raised by Neuberger J. at the court of first instance in *J.A. Pye (Oxford) Ltd v Graham*.⁵⁰² In his lordship's view, the justification advanced for right to acquire title to land by adverse possession – namely the avoidance of uncertainty – had little relevance to the use of registered land where the owner was readily identifiable by inspecting the register of the relevant title at the Land Registry. On Appeal however, Mummery and Keene LLJ⁵⁰³ held that Article 1 Protocol 1 did not infringe on the relevant provisions of the Limitation Act 1980 on the ground that it did not deprive a person of his possession nor interfered with his peaceful enjoyment of them, but only deprived a person of his right of access to court for the purpose of recovering property lost through dispossession at the expiration of the limitation period. However, the matter was not further considered by the House Lords since the event giving rise to the cause of action pre-dated the Human Rights Act 1998.

In *Family Housing Association v Donnellan*⁵⁰⁴ Park J. rejected the argument based on Article 1 Protocol 1 on the ground that the rule governed only deprivations by the

⁵⁰¹(2008) 46 EHRR 1083.

⁵⁰²(2000) Ch 676.

⁵⁰³[2001] Ch 804

⁵⁰⁴[2002] 1 P&CR 449, Park J.

state itself, or for public purposes authorised by the state and hence, had no application to the doctrine of adverse possession.

The decision in *Donnellan* was however disapproved subsequently by Nicholas QC (sitting as a Deputy High Court Judge) in *Beaulane Properties Ltd v. Palmer*.⁵⁰⁵ In that case, the court found that adverse possession in relation to registered land under the Land Registration Act 1925 did infringe Rule 2 of Article 1 Protocol 1.⁵⁰⁶ His lordship reasoned that compatibility could only be achieved by implying into adverse possession in relation to registered land under the 1925 Act that the possession of the squatter was inconsistent with the rights of the registered proprietor.

The question whether the doctrine of adverse possession in relation to registered land infringed Article 1 Protocol 1 of the HRA 1998 came before the European Court of Human Rights for the first time in *Pye v United Kingdom*⁵⁰⁷ following an appeal by *Pye* from the judgment of the House of Lords, and subsequently before the Grand Chamber in *United Kingdom v. Pye*.⁵⁰⁸ The question for determination was whether the law of adverse possession in relation to registered land infringed Article 1 of Protocol 1 of the European Convention on Human Rights.

4.17.2 *The Pye Case*

In 1983, JA Pye (Oxford) Ltd, a professional real estate developers and the registered proprietor of land which it intended to develop, entered into a contract with Graham, allowing him the use of a portion of the land adjacent to Graham's farm for grazing purposes. The only access to the land was through a gate, for which Graham had a key. At the expiration of the agreement which lasted for 11 months, parties were unable to re-negotiate a new agreement, but Graham and his family continued to use the land from September 1984, without permission. In 1985, Graham sought to contact *Pye* about an agreement, but *Pye* refused to respond. In 1997, Graham lodged cautions with the Land Registry claiming to be entitled to the land based on adverse

⁵⁰⁵[2006] Ch 79 at paras 64-204.

⁵⁰⁶ This provides that: 'No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.

⁵⁰⁷[2005] 3 EGLR 1.

⁵⁰⁸(2008) 46 EHRR 1083.

possession. *Pye* sought to challenge those cautions and when Graham died, his wife and estate lodged further cautions against the land. In 1999, *Pye* began proceedings to seek possession of the disputed land.

Facts before the court showed that from the period 1984 to 1997, Graham had tilled the lands, fertilised and limed it, and never vacated the land during that period. The land was used primarily for grazing though in 1994 parts of the land became arable. The House of Lords, reversing the decision of the Court of Appeal and restoring the decision of Neuberger J., held that Graham had factually possessed the land coupled with an intention to possess it, and had therefore acquired beneficial ownership of it by adverse possession under the Limitation Act 1980, section 15(1), Schedule 1, paragraphs 1, 8(1)⁵⁰⁹, and entitled to be registered as the owner under section 75 of the Land Registration Act 1925. However, in the House of Lords, no argument was canvassed based on human rights as the matter arose prior to the enactment of the Human Rights Act 1998.⁵¹⁰

Dissatisfied with the House of Lord's decision, *Pye* took the matter to the European Court of Human Rights arguing that it had lost its property as a result of a law that was inconsistent with Article 1 of Protocol No.1 referred to above.

Before the first Chamber of the European Court of Human Rights, the U.K government canvassed four arguments why the Limitation Act of 1980 did not breach human rights. In the first place, that the acquisition of land by the owner became subject to the limitation as an integral component of ownership after registration.⁵¹¹ Secondly, that what was deprived was *Pye's* right of access to court,

⁵⁰⁹ Its decision notwithstanding, the House of Lords passed critical comments. Lord Bingham of Cornhill, quoting from the trial judge Neuberger J., said that the decision was arrived at 'with no enthusiasm;' and in the words of Lord Hope of Craighead, it was unfair, not 'in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor.'

⁵¹⁰ But passing comments were made by two judges of the Court of Appeal. For example, Mummery LJ framed the matter as involving blocking access to court after limitation periods as opposed to a deprivation of property, and more so, that the limitation period 'was reasonable and did not impose undue burden on the landowner.' Also, Keene J. regarded the matter as one "concerning limitation rights, and as these were not incompatible with the Convention, no breach had occurred." See L. Griggs, 'Possession, Indefeasibility and Human Rights' vol 8 No. 2 QUT Law Journal at 289.

⁵¹¹ *JA Pye (Oxford) Ltd & Ors v. Graham & Ors* supra (n 507) para 49.

not their property.⁵¹² Thirdly, that the State through its limitation provisions was controlling use rather than removing the proprietary or possessory rights of *Pye*.⁵¹³ Finally, that given that government had recognised the inadequacies of the law through amendments of the Land Registration Act 2002, a fair balance was struck between the demands of the public and protection of the individual's fundamental rights.⁵¹⁴

These arguments were rejected by the majority of the court who held that the registered title was absolute and not subject to any limitation or restriction;⁵¹⁵ that the legislation for which the State was responsible alone, operated to deny the registered proprietor (*Pye*) of its title which was transferred to the Grahams;⁵¹⁶ that the fact that the land was transferred between individuals rather than to the State, led to the conclusion that this was a deprivation rather than a control;⁵¹⁷ and that given that government had recognised the inadequacies of the Law through an amendment of the LRA 2002 was suggestive of the conclusion that this upset the fair balance between the public interest and the individual's enjoyment of their own possessions.⁵¹⁸ Consequently, the court held that there had been a breach of Article 1 of Protocol No. 1 of the HRA 1998.

Upon appeal to the Grand Chamber, the court held by a majority of ten votes to seven that there had been no violation of Article 1 of Protocol No. 1.⁵¹⁹ The majority held that *Pye* did not lose its land because of a legislation permitting the State to transfer ownership in particular circumstances nor as a result of social policy, but 'rather as a result of the operation of the applicable rules on limitation periods for actions for recovery of land'.⁵²⁰ Consequently, the statutory provisions which had eliminated *Pye's* title were not intended to deprive paper owners of their title, but to

⁵¹²ibid at para 53.

⁵¹³ibid para 58.

⁵¹⁴.ibid para 60.

⁵¹⁵ In the words of the court, '[i]t was the operation of the [legislation] which brought to an end ...the applicant's title and not any inherent defect or limitation in that title:' ibid, at para 50.

⁵¹⁶ibid para 56.

⁵¹⁷ ibid paras 58-62.

⁵¹⁸ibid at para 75.

⁵¹⁹*Pye (Oxford) Ltd & Anor v The United Kingdom* supra (n 507) 132.

⁵²⁰ ibid para 65

regulate questions of title in a system in which 12 years of adverse possession extinguished title.⁵²¹

The court recognised that limitation periods were a common feature of domestic legal systems and ‘serve several important purposes’ such as ensuring legal certainty and finality; protecting potential defendants from stale claims; and preventing the injustice which might result from the court’s reliance on ‘evidence which might become unreliable and incomplete because of the passage of time’.⁵²² Explaining the rationale behind limitation periods, the court observed that:⁵²³

It is a characteristic of property that different countries regulate its use and transfer in a variety of ways. The relevant rules reflect social policies against the background of the local conception of the importance and role of property. Even where title to real property is registered, it must be open to the legislature to attach more weight to lengthy unchallenged possession than to the formal fact of registration.⁵²⁴ The court accepts that to extinguish title where the former owner is prevented as a consequence of the application of the law from recovering possession of land cannot be said to be manifestly without reasonable foundation. There existed therefore a general interest in both the limitation period itself and the extinguishment of title at the end of the period.”

The court reasoned that the operation of the doctrine of adverse possession leading to the extinction of registered title was not without foundation which was embellished in paragraph 2 of Article 1 of Protocol No. 1, enabling a fair balance to be struck within the legislation.⁵²⁵

The court held that whilst accepting that there must be a reasonable relationship of proportionality and that a fair balance must be struck, States are to enjoy a wide margin of appreciation, ‘with regard to both choosing the means of enforcement and

⁵²¹ibid para 66.

⁵²²ibid paras 68, 69.

⁵²³ibid para 74.

⁵²⁴ One of the strong arguments of the minority of the Grand Chamber was the distinction drawn between registered and unregistered land. They argued that while a system of limitation had good justification in the case of unregistered land which depends on possession, there is no justification for its application to registered land which depends not on possession, but on registration of the proprietor.

⁵²⁵ibid para 75.

to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object in question'.⁵²⁶

Addressing the issue of lack of compensation to *Pye*, the majority expressed the view that as the interference with *Pye's* possession was a control of use rather than a deprivation of possession, 'the case-law on compensation for deprivations is not directly applicable'.⁵²⁷ The court reasoned that a requirement for compensation for the situation brought about by a party failing to observe a limitation period 'would not sit easily alongside the very concept of limitation periods'.⁵²⁸

The court further held that *Pye* was not denied procedural protection for, 'while limitation period was running, it was open to them to remedy the position by bringing a court action for re-possession of the land,' which would have stopped time running.⁵²⁹ It was the view of the majority that the law of adverse possession should not have come as a surprise to *Pye*, and despite amendments tightening the operation of the principle, the facts of the case must be considered in light of the law as it stood at the time.⁵³⁰

Finally, the court held that limitation periods must operate irrespective of the amount, adding that the value of the land lost by *Pye* was of no consequence⁵³¹.

4.17.3 *Rationale for the decision of the Grand Chamber*

Panesar and Wood⁵³² opine that the decision of the Grand Chamber 'is to be welcomed on a number of grounds'.⁵³³ It is said to be in line with the common law

⁵²⁶ibid para 75.

⁵²⁷ibid para 79.

⁵²⁸ ibid.

⁵²⁹ibid para 80.

⁵³⁰ ibid.

⁵³¹ibid para 84.

⁵³² S Panesar, and J Wood (2007) Adverse Possession and the European Convention on Human Rights 1950 Protocol 1 art. 1. Coventry Law Journal, vol. 12(2), 41 at 54.

⁵³³ ibid.

tradition in respect of ownership of land which is a question of fact based on the concept of *seisin*,⁵³⁴ rather than the concept of right. In the words of Gray:⁵³⁵

[T]he pre-eminent position accorded to de facto position in English law ensures that there is no such thing as absolute title to land. All title is ultimately relative: the title of the present possessor will customarily be upheld unless and until a better claim is advanced on behalf of somebody else [and] sustained possession remains the basis of the right to challenge the title of both the registered and unregistered owner.

Apart from the legal justification underlying acquisition through adverse possession, 'there are important social and economic justifications for the rules'.⁵³⁶ One of the social objectives behind the doctrine of adverse possession is said to be 'certainty of title'.⁵³⁷ In the words of Panesar and Wood:⁵³⁸

If claims to land that are based on long possession are nevertheless allowed to be defeated by others showing that they were the owner sometime in the past, it is inevitable that title to land becomes uncertain. Such titles are not conducive to a liberal market engaged in exchange and bargain. The basic premise must be that long unchallenged possession of land should not be disturbed...The resulting uncertainty over title has an impact not only on the person who has been in possession of the land, but also on third parties such as purchasers and mortgagees who may have interests in the land. In other words, title in property law must be seen as operating in a multitude of transactions concerning the same piece of land. Uncertainty over title is undesirable because the effects are far reaching and they affect more than one transaction. It is only on reliance of title that some of these transactions are entered into; therefore subsequent uncertainty is a bad thing. In this sense the law of adverse possession pursues a legitimate objective and is proportional to it.

The foregoing considerations would always weigh more heavily in favour of adverse possession against the dispossession of the paper owner in the event of disputes following the expiration of the limitation period.

⁵³⁴ The concept of *seisin* emphasises that proprietary rights in land are based on physical possession rather than on abstract title: See AWB Simpson, *An Introduction to the History of English Land Law* (1961) .

⁵³⁵ K Gray, *Elements of Land Law* (1989) at 64.

⁵³⁶ Panesar and Wood, *supra* (n 532).

⁵³⁷ *ibid.*

⁵³⁸ *ibid.*

4.17.4 *Effect of the ECtHR decision in Pye for the English courts*

Whilst some academic writers⁵³⁹ are of the view that *Pye* has closed the doors on all human rights challenge against the legality of the system of adverse possession under domestic law, others⁵⁴⁰ seem to tow the delicate path with caution against the backdrop of the contradictory case law sequel to the decision of the Grand Chamber in *Pye*, and the statement from the Land Registry that *Pye v United Kingdom*⁵⁴¹ 'does not affect domestic case law'⁵⁴². It is therefore necessary to examine certain grey areas with a view to identifying the correct legal positions.

It is said that the contention that the *UK v. Pye* has closed the door on a human rights challenge may appear to be misplaced in view of the truism that the European Court of Human Rights case law does not bind English courts,⁵⁴³ and in light of the position in cases such as *Beaulane v Palmer*⁵⁴⁴, lavishly relied on by the Practice Guidance issued by the Land Registry.

In *Beaulane*, the court held that the Limitation Act 1980 operated in such a way that the registered owner of land would be deprived of all of his rights to it, thus violating the European Human Rights Convention. However, the court acknowledged that the Land Registration Act 'is not disproportionate unlike the 1980 Act, as it rightly places the burden on the adverse possessor'.⁵⁴⁵ This case was upturned by the Court of Appeal in *Ofulue and Anor v Bossert*.⁵⁴⁶

⁵³⁹ See for example, M Dixon, 'Human rights and adverse possession: the final nail?' *Conveyancer and Property Lawyer*, 2008, 2, 160-165.

⁵⁴⁰ See for example, I Issaias, *Property Law and Human Rights*, available online at www.researchgate.net/publication/313869735_Property_Law_andHuman_Rights_of_2017/02/21, accessed on 8/6/2020.

⁵⁴¹ *Supra* (n 270).

⁵⁴² Additional Practice Guide LRP005 of September 14, 2007.

⁵⁴³ See *Kay v Lambeth LBC* [2006] 2 AC 465 on how to approach inconsistencies between Strasbourg and House of Lords decisions.

⁵⁴⁴ (2005) EWCA 817. This case requires an adverse possessor 'to establish a degree of possession of the registered title that was inconsistent with the use of or intended use of the land by the registered proprietor' and 'this was despite the fact that the House of Lords in *Pye v. Graham* had earlier described the *Beaulane* approach as a heresy': See M. Dixon (n 539) at 1.

⁵⁴⁵ This reasoning has been questioned on the ground that 'if *Beaulane* is right, then even the process of the 2002 Act is open to human rights challenge.' See M. Dixon, 'Adverse Possession and Human Rights.' (2005) *Conv.* 160-165

⁵⁴⁶ (2009) H.L. 11.

In *Ofulue and Anor v Bossert*, Mr Ofulue, who became the registered proprietor of the property known as 61, Coburn Road, Bow in 1976 had let the property to tenants. In 1981, a former tenant let Ms Bossert and her father into the property and both father and daughter remained in possession since then with Ms Bossert taking on the property when her father died in 1966. Although Mr Ofulue had visited the property during the intervening years and had negotiations for the grant of a lease to Ms Bossert, but this did not materialise, and the possession proceedings initiated by Mr Ofulue was not continued. All along, the Bosserts had improved the property by repairs and renovations, and when Mr Ofulue sought possession again, Ms Bossert claimed title by adverse possession. The trial judge found for Ms Bossert and the Court of Appeal upheld the decision.

In upholding the decision of the lower court, the Court of Appeal considered first, whether *U.K v Pye* should be followed and secondly, even if it should, whether it in fact decided that adverse possession principles as applied under the Land Registration Act 1925 were *per se* compatible with the European Convention on Human Rights. The Court held that every court should follow *U.K v Pye* and other Strasbourg decisions that affect domestic law unless there were good reasons for not doing so⁵⁴⁷. Consequently, the court held that the adverse possession principles as applied under the Land Registration Act 1925 were compatible with the Convention. This is in line with section 2 of the Human Rights Act 1998 as applied by the House of Lords in *R (on the application of Ullah) v Special Adjudicator*⁵⁴⁸ which made it clear that English courts should not depart from Strasbourg on human right matters.

The court held further that the test of proportionality and legitimate aim within Article 1 Protocol No. 1 to the Convention at issue in *Pye* and in this case, had also been settled by the Strasbourg Court claims under the Limitation Act 1980 as it applied to registered land governed by the Land Registration Act 1925; it was

⁵⁴⁷Per Arden L.J in *Pye* at 32. According to Dixon, '[t]his might be where the Strasbourg Court had misunderstood domestic law, or domestic law caused (*sic*) for the exercise of a discretion, and we might add, where there is a contrary House of Lords decision...' M. Dixon, *supra* (n 539).

⁵⁴⁸(2004) UKHL 26, 2 A.C 323, per Lord Bingham at para.20.

therefore not open to a litigant to challenge them in every dispute coming before the court.

It follows from the foregoing therefore, that the Land Registry Practice Statement supporting principles set out in *Beaulane* is *ultra vires* and contrary to the established principle as laid down by the House of Lords in *Kay v Lambeth*⁵⁴⁹ that:

English Courts and national authorities (including in this context, the Land Registry) though not bound, must apply the principles expounded from Strasbourg and follow precedent on human rights matters even if it might involve a conflict with the Convention.⁵⁵⁰

The next question is whether it is necessary to distinguish the impact of *Pye* on registered and unregistered land bearing in mind that the position taken was in respect of registered land, especially against the backdrop of the English doctrine of judicial precedent that 'like cases must be treated alike'. Also, since *Pye* directly concerned registered land under the Land Registration Act 1925, should it apply to cases of registered land under the extant Land Registration Act 2002 in view of the reform introduced into the UK system land registration?

Taking the second question first, it is of note that 'in practical terms, the 2002 Act has brought several reforms to aid the fairness of adverse possession [which] significantly rules out the possibility of a human rights claim against the state on the claimants' part...'⁵⁵¹ It is therefore 'likely that the law in the 2002 LRA will be compliant with the ECHR and its safeguards for the paper owner'⁵⁵². It is safe to

⁵⁴⁹(2006) UKHL 10.

⁵⁵⁰*Kay & Ors v Lambert London Borough Council* [2006] UKHL 10 para. 44. Consequently, it is said that it is 'now time for the Land Registry to rescind its Guidance on this point:' M. Dixon, 'Adverse Possession and Human Rights.' (2005) Conv. 160-165.

⁵⁵¹ I Issaias, *supra*, (n 540) at 5. Not only is the title of the registered owner protected against automatic extinction unlike the case of unregistered land, the registered proprietor is notified of the squatter's application for registration with the opportunity to oppose such application and also set the necessary legal machinery in motion to evict such applicant, the registered proprietor is encouraged to keep an eye on his land thereby obviating the possibility of losing title to the adverse possessor.

⁵⁵² J Duddington, *Land Law*, Second ed. Pearson (2014) at 236.

therefore presume that 'the *Pye* judgment still facilitates having closed the door on a human rights challenge for registered land despite the enactment of a new Act'.⁵⁵³

In the case of unregistered land however, it is observed by a commentator that it cannot be said that *Pye* has drawn the curtain on human rights challenge.⁵⁵⁴ Unlike the case of registered land where the LRA 2002 has introduced a number of provisions that exude fairness and are human right compliant, the unregistered system is governed by the hard core rule of the statute of limitation requiring 12 years of adverse possession for the title of the owner to be extinguished with no safeguards or protection whatsoever for the paper owner.⁵⁵⁵ For example, it is argued that there is no notice of the adverse possessor's presence required, and there is naked deprivation of title without compensation, leading to the conclusion that there is the very high possibility of it being challenged under Article 1 Protocol 1 of the European Convention on Human Rights in future.⁵⁵⁶

However, the preponderance of judicial pronouncements⁵⁵⁷ on the purport of Article 1 Protocol 1 of the HRA 1998 in relation to adverse possession without making a distinction between registered and unregistered land, and the spate of academic writings⁵⁵⁸ on the question suggest strongly that the doctrine of adverse possession is no longer open to human rights challenge in relation to registered or unregistered land. That, indeed, is the position of English law on the question.

4.18 Squatter's right against eviction

Whilst it is correct that acquisition of title by adverse possession is not open to human rights challenge, can the same position hold with respect to eviction of a squatter discovered by the land owner before the expiration of the period of

⁵⁵³I. Issaias, *supra* (n 540) at 5.

⁵⁵⁴*ibid*

⁵⁵⁵*ibid*.

⁵⁵⁶ *ibid*.

⁵⁵⁷See for example, the English Court of Appeal in *Pye (Oxford) Ltd v Graham* [2001] Ch 804, per Mummery and Keen LLJ., at para 52; *Family Housing Association v Donnellan* [2002] 1 P&CR 449, PER Park J.; *Ofulue & Anor v Bossert* (2009) H.L. 11.

⁵⁵⁸See e.g. M. Dixon, *supra* (n 539); B. Baruch, 'Adverse Possession and Human Rights', L&T Review (2008), 12(1), 3-5; 'The Doctrine of Adverse Possession Law. Essays, Law Teacher, U.K.' (Nov. 2013). accessed online at www.lawteacher.net/free-law-/land-law/the-doctrine-of-adverse-possession-law-essays.php?cref=1, on 25/11/2019.

limitation? In other words, can a squatter facing the threat of eviction by the landowner rely on the provision of Article 8 of the ECHR to plead violation of the right to private and family life? Although this question is not the main focus of this thesis, it is necessary to take a quick look at it for completeness of discourse.

4.18.1 *The Position of English Law*

The position of English law before the HRA 1998 and following the decision in *McPhail v. Persons, Names Unknown (McPhail)*⁵⁵⁹ is that, the landowner is entitled to an order against a squatter for trespass and to issue a writ of possession and evict the squatter without any recognition of any form of justification such as homelessness, and the landowner is not obligated to give the squatter time.⁵⁶⁰

The position remained the same even after the passing of the HRA. Whilst judicial interpretation of Article 8 of the Convention is hinged on the common ground that where the squatter has established a home on the land, the prospect of eviction therefrom must engage Article 8, the possibility of engagement of Article 8 in cases of homelessness as demonstrated in a long line of judicial authorities⁵⁶¹ may not defeat contractual and proprietary rights to possession.

It has been established by judicial authorities that ‘in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate’.⁵⁶² This is especially the case where ‘domestic law imposes no requirement of reasonableness and gives an unqualified right to possession’⁵⁶³. Reliance on Article 8 by the squatter to the extent that the eviction would interfere

⁵⁵⁹ (1973) Ch. 447.

⁵⁶⁰ As Lord Denning said at 456-458: ‘What is a squatter? He is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can. He may seek to justify or excuse his conduct. He may say that he was homeless and that this house or land was standing empty, doing nothing. But this plea is of no avail in law.’

⁵⁶¹ See for example, *Harrow London Borough Council v. Qazi* [2004] 1 A.C 983; *Kay v. Lambeth London Borough Council* [2006] UKHL 10; *Manchester City Council v. Pinnock* [2011] UKSC 6 at 54; *Hounslow London Borough Council v. Powell* [2011] UKSC 8; *Birmingham City Council v. Lloyd* [2012] EWCA Civ 969; *Thurrock Borough Council v. West* [2012] EWCA Civ 1437.

⁵⁶² *Manchester City Council v. Pinnock* supra, n.47 at 54.

⁵⁶³ *ibid*, at 57.

with his or her right to private and family life would fail and such an interference would not be disproportionate in violation of Article 8; the fact that the land owner has a legal right to possession would be a very strong factor in support of proportionality.

It is therefore clear from the standpoint of judicial authorities that the law would uphold and protect the property right of a land owner whether as individual or as local authority under Article 1 Protocol 1 of the ECHR as against the occupation of a trespasser. This property right of the land owner is a strong factor in support of proportionality required for eviction of the trespasser and defeats his defence under Article 8. This position holds in England and Wales.

4.18.2 *Reconciling Art. 1 Protocol 1 and Art. 8 of the ECHR*

This position of English law as encapsulated in many judicial authorities⁵⁶⁴ run parallel to the theory of the social function of property⁵⁶⁵ which Article 8 of the ECHR promotes. The idea of absolute or exclusive ownership of land is out of tune with the social realities of contemporary societies in which marginal interests in land are becoming increasingly manifest. Engaging the ownership rights paradigm, Van der Walt⁵⁶⁶ argues that exclusivity of ownership cannot explain the distinct tensions in the correlative equations between an owner on the one hand, and the holder of marginal interest such as a squatter or a prescriptive possessor, on the other hand.⁵⁶⁷ Van der Walt challenges the premise under which property law systems anchor 'extant property holding on the assumption that they are lawfully acquired, socially important and politically and morally legitimate.'⁵⁶⁸ He opines that there is need 'to change the legal culture, the rhetoric, logic and unarticulated assumptions within which the law functions,'⁵⁶⁹ and 'to adapt or redirect our thinking and talking about

⁵⁶⁴ See n 561.

⁵⁶⁵ For discourse of the social function of property theory, see n. 3.2.6.

⁵⁶⁶ AJ Van der Walt, *Property in the Margins*. Oxford: Hart Publishing 2009.

⁵⁶⁷ *ibid* 232.

⁵⁶⁸ *ibid* viii.

⁵⁶⁹ *ibid* 247.

property in ways that could enable us to insist on the simultaneous promotion of rights and justice in the property regime.⁵⁷⁰

On the strength of the theory of social function of property therefore, the right of the squatter or adverse possessor to plead violation of the right to private and family life would assist the courts in harmonising the two human rights perspectives with a view to balancing the interests of the parties. It is interesting to note however, that this lacuna in juristic thinking has been filled by constitutional and international legal regimes dealt with in the next segment.

4.18.3 *From the Trespass Paradigm to Human Rights Paradigm*

The treatment of squatters as trespassers under English law applicable in England and Wales justifies the need for eviction without consequences and without regard to the right of the evictee to life, to private and family life and to freedom from discrimination. It is a fallout of the classical theory of absoluteness of property right without regard to the social function of property earlier discussed.⁵⁷¹

However, apart from the regime of international instruments on provision of adequate standard of living including right to housing⁵⁷² which the UK Government has signed up to, the general attitude of the common law earlier discussed is not replicated under civil law and in jurisdictions where constitutional regimes prevail to balance the right of property and its protection against the state obligation to make housing provision for the homeless.

Whilst it is the case that the right to housing is not included in the ECHR which is the only human rights treaty forming part of the UK's domestic law through the HRA 1998, it is said that the right to housing cannot be considered in isolation from other human rights such as the right to life, to respect for private and family life, and

⁵⁷⁰ *ibid.*

⁵⁷¹ For a discourse of the social function theory, see pp. 44-45 para 3.2.6 *infra*.

⁵⁷² See the International Covenant on Economic, Social and Cultural Rights (ICECSR) Art 11(1); Convention on the Rights of Persons with Disabilities (CRPD) Art 28 (1); Convention on the Elimination of All Forms of Discrimination against women (CEDAW) Art 12(2)(h); Convention on the rights of the Child (CRC) Art 27(3); and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Art 5(e)(iii).

to property.⁵⁷³ It follows therefore that even where the right to housing is not guaranteed such as the situation under English law, other domestic rights such as the rights to life and to private and family life which are protected by the ECHR and ipso facto the HRA 1998, may be interpreted in a way that practically ensures the protection of the right. Appropriate Authorities are therefore obligated to consider these rights in assessing the question whether right to housing has been violated. Thus, the English court held in *Bernard v. London Borough of Enfield*⁵⁷⁴ that the local authority had failed in its obligation to place a family who lived in crowded temporary accommodation in a suitable accommodation. Also, the ECtHR had also held⁵⁷⁵ that the eviction of a long-term established encampment without an independent assessment of the eviction violated the right to respect for private and family life. The Court held further that in evaluating the legitimacy of an eviction, there was need to consider the consequences and alternative solutions, especially where the eviction could lead to homelessness.

In many jurisdictions,⁵⁷⁶ constitutional regimes prevail to balance the right of property and its protection against the state obligation to make housing provision for the homeless. The state's duty towards the land owner has to be reconciled with the state's constitutional duty towards the homeless. In this regard, South Africa stands out amongst other jurisdictions.⁵⁷⁷

⁵⁷³ The UN Special Rapporteur on housing notes that 'the right to life cannot be separated from the right to a secure place to live, and the right to secure place to live only has meaning in the context of a right to live in dignity and security, free of violence.' See UN Special Rapporteur on adequate housing (2016), 'Adequate housing as a component of the right to an adequate standard of living' available at <http://ap.ohchr.org/documents/dpage.aspx?si=A/71/310> accessed 21 November 2020.

⁵⁷⁴ [2002] EWHC 2282.

⁵⁷⁵ See *Winterstein v. France* (Application No. 27013/07) decided on 17/10/2013. See also *ERRC v. Bulgaria* (Application No. 151/2017); and *Yordanova and Others v. Bulgaria* (Application No. 25446/06) decided on 24/04/2012.

⁵⁷⁶ These jurisdictions include Brazil, Columbia and South Africa.

⁵⁷⁷ There is also the 1988 Brazillian Democratic Constitution which protects squatters' rights by establishing parameters of regularisation for squatting on private land up to 250 square metres when uncontested for a period of more than 5 years.

4.18.4 *The Constitution of the Republic of South Africa 1996*

Whilst protecting private right to property within the human rights regime of the South African Constitution 1966,⁵⁷⁸ section 26 of the South African Constitution of 1996 addresses the issue of eviction against the backdrop of the right to adequate housing. It provides:

- (1) Everyone has the right to have access to adequate housing
- (2) The state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

These provisions guarantee access to adequate housing, prohibit arbitrary evictions, and consequently provided a platform for the enactment and application of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*⁵⁷⁹ which makes evictions subject to the requirements of justice and equity and conducted with due process in a fair and equitable manner. The ensuing conflict between the right to property guaranteed by section 25 of the Constitution and the squatter's right to housing guaranteed by section 26 is best illustrated by two decisions of the South African constitutional court. In *Port Elizabeth Municipality v. Various Occupiers*,⁵⁸⁰ the Municipality, in response to a neighbourhood petition against 68 adults and children occupying shacks erected on privately owned land, filed an eviction application. The squatters who had been living on this undeveloped land for upward of eight years were willing to vacate the property subject to reasonable notice and suitable alternative land. The High Court granted the eviction order, but on appeal, the

⁵⁷⁸ *ibid*, s. 25.

⁵⁷⁹ Act No.19, 1998. This Act followed the repeal of the Prevention of Illegal Squatting Act 52, 1951 (PISA) and the Group Areas Act 36 1966 – Apartheid legislation giving landowners the absolute entitlement to evict squatters and thus enabling both the state and the white land owners to take effective control of land and bolster possession by the exercise of regular evictions. In the words of Walt, ' PISA promoted apartheid by granting extensive and arbitrary powers of eviction to state organs and the police...it also obliged white land owners to evict 'unlawful squatters' from their land and provided...with wide-ranging powers for that purpose.' See A.V.Walt, 'Property in the Margins, (Portland: Hart Publishing 2009), at 63

⁵⁸⁰ 2004 (12) BCLR 1268 (CC).

Supreme Court of Appeal (SCA) held that the eviction order should not be granted without an assurance that the occupiers would have some measure of security of tenure. On appeal to the constitutional court, it was held that considering the lengthy period during which the occupiers have lived on the land coupled with the fact that eviction was not necessary for the land to be put to productive use, the Municipality's failure to consider the housing challenges of these occupiers who were homeless and in need, made the order of eviction unjust and inequitable.. The ratio of this case was applied by the SCA in the *Modderklip case*.⁵⁸¹ In that case, SCA reasoned that '[t]he state's constitutional duty towards the land owner has to be reconciled with the state's constitutional duty towards the homeless.'⁵⁸²

The development of squatter's right as human right is a turning point in the evolution of the right to housing as enshrined in a number of international instruments globally,⁵⁸³ but it is yet to be accorded serious recognition under English law.

4.19 Criminalisation of Residential Squatting and Adverse Possession

In England and Wales, squatting became proliferated from the 1960s as a result of many vacant buildings at the time consequent upon hike in property taxes and urban renewal projects.⁵⁸⁴ Social movements with political flavour rose to protest the devastating effect of homelessness and putting pressure on government to effect 'changes in existing property policies.'⁵⁸⁵ But this went too far as 'some squatters

⁵⁸¹ *Modder East Squatters v. Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd* 2004 (8) BCLR 821 (SCA).

⁵⁸² AJ Walt, 'The State duty to protect property owners v. The State's duty to provide housing: Thoughts on the Modderklip case.' (2005) 21 SAJHR 144 at 150. It is noteworthy however, that although the constitutional court in this case arrived at the same conclusion as the SCA to the extent that the state had certain obligations to protect fundamental rights arising from the constitution, it did not embark on resolving the conflict between sections 25 and 26 of the constitution.

⁵⁸³ See International Covenant on Civil and Political Rights (ICCPR), Art. 6 with a corresponding provision on Right to adequate standard of living including Housing as contained in the International Covenant on Social, Cultural and Economic Rights (ICSCER), Art. 11.

⁵⁸⁴ B Gardiner, *supra* (n 279).

⁵⁸⁵ *ibid*.

shifted from urban squatting to residential squatting,' with squatters deliberately taking over the apartments of home owners on holidays.⁵⁸⁶

From the perspectives of the media and government, 'urban squatting has typically been regarded as a serious social problem.'⁵⁸⁷ Public disapproval of squatting was fuelled not only by successful cases of adverse possession in court, but also by 'their perceived proclivities as a social group.'⁵⁸⁸ In particular, media reports associated squatters with the 'popular mythology...that all squatters are parasitic deviants who steal people's houses and constitute a threat to everything decent in society.'⁵⁸⁹ The position of government was encapsulated in the declaration of the Home Office that:

There are no valid arguments in defence of squatting. It represents the seizure of another's property without consent...The Government does not accept the claim that is sometimes made that squatting is a reasonable recourse of the homeless resulting from social deprivation. Squatters are generally there by no more than self gratification or an un-readiness to respect other people's rights.⁵⁹⁰

The defence of some commentators and squatters to the negative responses of government generally bordered on the defence of necessity pointing at the socio-economic injustices in the housing market as justification for squatting.⁵⁹¹ This defence has not worked however, as the courts refused to be sympathetic to the cause of squatters on this ground. The Court of Appeal in *Southwark London Borough Council v Williams*⁵⁹² held that necessity was no defence to trespass by homeless people squatting in empty council houses during acute shortage of housing in London in the 1970s.

Parliament responded by enacting the Criminal Law Act, 1977 section 7 of which makes it an offence for a trespasser to refuse to leave residential premises on being

⁵⁸⁶ *ibid.*

⁵⁸⁷ N Wates & C Wolmar, *Squatting: The Real Story* (London: Bay Leaf Books, 1980).

⁵⁸⁸ N Cobb and L Fox (2007) 'Living outside the System? The (im)morality of urban squatting after the Land Registration Act 2002.' *Legal Studies* 27(2) 1 at 19.

⁵⁸⁹ Wates & Wolmar, *supra* (n 587) at 3.

⁵⁹⁰ Home Office, *Squatting: a Home Office Consultation paper* (London: HMSO, 1991), paras 5 and 62.

⁵⁹¹ Cobb and Fox, *supra* (n 588) at 20.

⁵⁹² [1971] 1 Ch 734.

required to do so by or on behalf of a 'displaced residential occupier' or a 'protected intending occupier'.⁵⁹³

Also, the Criminal Justice and Public Order Act 1994 'enhanced police powers under the Criminal Law Act 1977 by criminalising squatters who displace the occupiers of residential properties from their homes.'⁵⁹⁴ Judicial reluctance to support squatting was manifested in many ways through judicial creativity meant to defeat squatter's claim to adverse possession.⁵⁹⁵

However, the legislative and judicial intervention notwithstanding, commercial squatting sprang up through agencies set up to 'provide information on vacant properties,'⁵⁹⁶ enabling squatters to engage in retail commercial property transactions for profit making.⁵⁹⁷ Consequently, government 'had to differentiate between the squatter who inhabits because of necessity and the squatter who simply is out for profit,'⁵⁹⁸ allowing greater latitude for basic humanitarian reasons.⁵⁹⁹ This policy was complemented by the possibility of a civil action in the courts at considerable expense to the homeowner, and the enactment of criminal legislation aimed at checking the encroachment of squatters.

The early years of the 21st century in England and Wales witnessed a resurgence of the socio-economic preconditions for urban squatting generated by 'spirally housing costs' and high incidence of empty homes across the country.⁶⁰⁰ The resulting high rate of squatting raised public concerns especially against the backdrop of the

⁵⁹³ This provision enabled property owners made homeless as a result of squatters' occupation of their properties to lodge complaints to the Police.

⁵⁹⁴ Cobb and Fox (n 588) at 20.

⁵⁹⁵ *ibid.* For examples of judicial creativity in this regard, see *Leigh v Jack* (1879) 5 Ex D 264 (CA); *Wallis's Holiday Camp v Shell-Max* [1975] 1 QB 94 (CA); *Beaulane Properties Limited v Palmer* [2005] EWHC 817.

⁵⁹⁶ B Gardiner (n 279) at 133.

⁵⁹⁷ *ibid* at 134.

⁵⁹⁸ *ibid.*

⁵⁹⁹ *ibid.*

⁶⁰⁰ Cobb and Fox, *supra* (n 588) at 21. It is said that average house prices in England and Wales rose by almost 12% from 2003-2004, following a rise of 16% from 2002 to 2003; and statistics published by the office of Deputy Prime Minister revealed that 3.8 million new households will be in need of accommodation by 2016: See Social Trends 36, (London: Office for National Statistics, 2006 at 158; Statistics from *Housing Statistics: Projections of Households in England 2021* (London: DETR, 1999). It is also said that properties lying empty are available to accommodate about 600,000 new homes: See Social Trends 36, *supra*.

difficulty encountered by owners of residential property in securing the assistance of the police in evicting squatters there from.

Government responded in July 2011 by issuing a consultation paper⁶⁰¹ to criminalise squatting in cases of residential accommodation. In its Response to Consultation, Government through its Parliamentary Under-Secretary of State for Justice, explained the basis for its proposal to introduce the criminal offence of squatting in residential premises as follows:⁶⁰²

Ministerial colleagues and I are very concerned about the harm that squatters can cause. I have been contacted time and time again by MPs and constituents about the appalling impact that squatting can have on their homes, businesses and local communities. This is not media hype. It does really happen; and when it does it can be highly stressful for the owner or lawful occupier of the property concerned. It is not only the cost and length of time it takes to evict squatters that angers property owners; it is also the cost of the cleaning and repair bill which follows eviction. While the property owner might literally be left picking up the pieces, the squatters have gone on their way, possibly to squat in someone else's property. I accept that the law already provides a degree of protection for both commercial and residential property owners as offences such as criminal damage and burglary may apply in certain circumstances. There is also an offence under section 7 of the Criminal Law Act 1977...But there are many residential property owners, including landlords, local authorities and second home owners who cannot be classified as 'displaced residential occupier' or a 'protected intending occupiers.' There are also many commercial property owners, whose businesses may be seriously affected by squatters, who report that they generally have to rely on civil procedures to get squatters to leave. Given the level of public concern about the issue, the Government has decided as a first step to introduce a new offence of squatting in residential buildings...

Explaining its proposal to introduce what consequently became section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act), Government notes the physical and financial distress caused to victims of squatting including 'private homeowners who could not move into properties that had been occupied, local authorities who have been unable to refurbish social houses to make them available for priority categories, [and] landlords who had been unable to let

⁶⁰¹*Options for Dealing with Squatting* (Consultation Paper CP12/2011).

⁶⁰²*Government Response to Consultation* published on 26 October 2011

their property'.⁶⁰³ It also notes disruption to normal business activity resulting in aggravated damage and huge cost of repairs as a result of squatting.⁶⁰⁴ Whilst Government recognises the availability of civil remedies to landowners and occupiers under Part 55 of the Civil Procedure rules, it appreciates the inadequacy of this remedy and the urgent need for intervention of the criminal law, to offer a greater degree of protection to victims.⁶⁰⁵

The first step taken in this regard by Government deals with squatting in residential properties; a step necessitated by the urgent need to protect the landowners' home. Consequently, the Legal Aid Sentencing and Punishment of Offenders Act (LASPO Act) passed by Parliament entered into force on September 1, 2012.

4.20.1 *Section 144 of the Legal Aid Sentencing and Punishment of Offenders Act 2012*

The provision of section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO Act) applicable in England and Wales which came into force on September 1, 2012 criminalises squatting in residential buildings.⁶⁰⁶ A person commits this offence where he 'is in residential building as a trespasser' and having entered as such, 'knows or ought to know that conduct amounts to trespassing and is living in the building or intends to live there for any period.'

Section 144 does not criminalise all residential squatting;⁶⁰⁷ the squatter must have entered into the premises as a trespasser for the purposes of living there. The offence is not committed by a person who was a licensee or tenant upon initial entry and who subsequently holds over.⁶⁰⁸

⁶⁰³ *ibid.*

⁶⁰⁴ *ibid.*

⁶⁰⁵ *ibid.*

⁶⁰⁶ This Law does not exempt persons already squatting on that date. According to literature premised on official records, '[t]he first person was arrested on 2nd September 2012, convicted, and sentenced to 12 weeks imprisonment,' and "[u]p to September 2013, in the London Metropolitan Police area, 247 people had been arrested, 112 charged, 101 convicted and 22 imprisoned.' See M Dixon, 'Criminal Squatting and Adverse Possession: The Best Solution?' (2014) *Journal of Housing Law* vol. 17 at 94. Available online at <https://www.repository.cam.ac.uk/handle/1810/246191>.

⁶⁰⁷ M Dixon, *supra* (n. 599) at 94.

⁶⁰⁸ LASPO Act 2012, s. 144(1)(a).

The trespass must have been committed in a residential building' and not on bare land; and the said squatter must be living in the residential building or intends to live there for any period.⁶⁰⁹

4.20.2 *Section 144 of LASPO Act and the Regime of Adverse Possession*

While the provision of section 144 of LASPO Act appears to be a straight translation of the government's policy on certain residential squatting into law (especially against the backdrop of the need to enhance the protection given to homeowners when faced with the social malaise of squatting), it does not resolve the apparent conflict with the law of adverse possession. For example, where a person who satisfies all the legal requirements of adverse possession commits a criminal offence under the provision of section 144 of LASPO Act in the course of being in possession, does this provision of the law prevent the acquisition of title by adverse possession? In the case of registered land, can such squatter who has committed a criminal offence apply to be registered as a proprietor under Schedule 6 of the Land Registration Act (LRA) 2002? These questions are very pertinent in view of the deeply rooted old principle of *ex turpi causa non oritur actio* which states that 'no court will lend its aid to a man who found his cause of action upon an immoral or illegal act'.⁶¹⁰

Section 144 of LASPO Act does not expressly criminalise the act of taking adverse possession of a residential building, and it is said that that was not contemplated by Parliament,⁶¹¹ and the comment of the Lands Registry as to the impact of the provision on adverse possession raised in response to the Government consultation⁶¹² was practically ignored⁶¹³ as a result of this.

The difference between the provision of section 144 and the act of adverse possession lies in the fact that whereas an adverse possessor may be 'in possession of property

⁶⁰⁹ *ibid* s.144(1)(c).

⁶¹⁰ *Holman v Johnson* [1775] 1 Cow at 341, 343 per Lord Mansfield CJ; *Tinsley v Milligan* [1994] 1 AC 340, 376 per Lord Brown-Wilkinson.

⁶¹¹ The Court of Appeal in *Best v. Chief Land Registrar and Secretary of State for Justice* [2015] EWCA Civ 17 at para 37.

⁶¹² *ibid* at paras 38, 41.

⁶¹³ *ibid* para 72.

and build up a period of possession asserting his right against the whole world without *living or intending to live in the property*,⁶¹⁴ an offence is committed under section 144 only where the squatter *actually enters into a residential building and lives in it or exhibit the intention to do so*. To constitute a crime, the squatting must take place in a residential building; squatting in the cartilage of a building such as the garden or garage, or securing possession of the residential building without going to live there is not a criminal offence, although it may, upon the fulfilment of conditions prescribed by law, amount to exclusive possession by the squatter.

However, while the distinction between adverse possession and the squatter occupation of property may appear clear cut, circumstances may arise where adverse possession may constitute an offence under section 144 of LASPO Act from the following example:

Suppose a squatter, has been in exclusive possession of a residential building with the intention to possess by way of adverse possession and remains in occupation for the requisite period of time which would entitle him to title over the property, does his criminal conduct preclude a claim in adverse possession in the case of unregistered land under sections 15 and 17 of the Limitation Act 1980, or registration of his interest in the property as a new proprietor of the property under paragraph 1 of Schedule 6 to the Land Registration Act 2002, in the case of registered land?

This question is pertinent in view of the law of illegality expressed in the old maxim: *ex turpi causa non oritur actio* (a claim cannot be founded on a wrong committed by the claimant).⁶¹⁵ What would be the attitude of the courts to an infraction of this old maxim by an adverse possessor? Would such adverse possessor be allowed to benefit from a crime committed by him? How would the court resolve the issue of incompatibility between a claim in the civil law of adverse possession but amounting to a crime under the criminal law, as in section 144 of LASPO Act?

⁶¹⁴ibid para 77. For example, erection and maintenance of a fence around a property might be sufficient to constitute taking possession.

⁶¹⁵ See *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2014] 3 WLR 1257.

4.20.3 *Best v. Chief Land Registrar and Secretary of State for Justice:*

In *Best v. Chief Land Registrar and Secretary of State for Justice*,⁶¹⁶ (*Best*), the High Court was asked through an application for judicial review, to review the decision of the Chief Land Registrar cancelling the Application for registration by the Applicant on the ground that section 144 of LASPO Act prevented a reliance on a period of adverse possession which involved the commission of an offence. In that case, Mr Best had, in 1997, taken possession of an empty semi detached house which he believed to be abandoned although it was actually registered in the name of one Mrs Curtis who had died. Whilst the said property had passed to Mrs Curtis son upon her death, he did abandon possession and Mr Best moved in and undertook construction work with the intention of moving into possession. From 2001 onward, he had treated the house as his own and moved in towards end of January 2012. Section 144 of the LASPO Act came into force in September of that year from which date Mr Best's occupation became a criminal offence. Having met the requirement for registration under the LRA 2002, Mr Best applied to the Land Registry to be registered as a new proprietor, but his application was cancelled by the Chief Land Registrar (CLR) on the ground that the LASPO Act prevented a reliance on a period of adverse possession which involved the commission of an offence. The decision of the CLR was informed by a decision of HHJ, Judge Pelling sitting as a High Court Judge in *R (on the application of Smith) v Land Registry* ⁶¹⁷ which indicated that an unlawful act (i.e obstruction of the highway) could not support a claim to adverse possession of a highway. The CLR invoked rule 16(3) of the Land Registration Rules 2003 which provides that if an application seeking registration as a proprietor of land appears to the Registrar 'to be substantially defective' he may reject it on delivery or cancel it at any time thereafter. Consequently, Mr Best's application for registration was rejected on the ground that it is 'substantially defective' because it revealed that his claim to acquire title by adverse possession was premised on conduct in contravention of section 144 of LASPO Act.

⁶¹⁶[2015] EWCA Civ 17.

⁶¹⁷[2009] EWHC 328 (Admin).

Mr Best brought an application for judicial review of the Registrar's decision to cancel his application for registration before the High Court. It was held that the claimant's application should be allowed on the basis that Parliament had not intended that adverse possession be prevented because it was based on a criminal trespass. The decision was upheld by the Court of Appeal. The court held that the effect on the enactment of section 144, and the commission of an offence under it have no material effect on the operation of the law of adverse possession.

In arriving at its decision in support of the lower court, the Court of Appeal was faced with a number of legal and policy issues. First, there was the argument that the claim of the applicant for registration should have failed on the ground that no court will lend its aid to a man who found his cause of action upon an immoral or illegal act. The basis for this argument was found in *R(on the application of Smith) v Land Registry*⁶¹⁸ a case concerning a rejection of an application by a squatter to be registered as owner of land forming a part of public highway on the ground that it amounted to the criminal obstruction of the highway.⁶¹⁹ Although the decision was upheld on appeal on different grounds (that is, that a highway was incapable of adverse possession), it was argued that the case was meant to show that like *Best*, criminal activity was collateral to the acts of adverse possession that was relied upon by the claimant to qualify for registration, and could therefore not be divorced from his criminal conduct.⁶²⁰

The Court of Appeal rejected this argument on the ground that *R (Smith) v. Land Registry* on Appeal did not apply as a ratio the principle that an unlawful act could not support a claim to adverse possession, but was rather based on the fact that a highway was incapable of adverse possession. Instead, the court relied on *Bakewell*

⁶¹⁸supra (n 610).

⁶¹⁹ ibid at para 14-15; section 137 Highway Act 1980.

⁶²⁰ I Okeoma, 'The Future of Adverse Possession of Registered Land: In light of the recent decision of the court in *Best v. Chief Land Registrar*, does section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 clarify the rationale for the operation of adverse possession in registered land under the new scheme or was *Best* wrongly decided?' Available online at <https://www.academic.edu>, at 14. Accessed on 5/5/2020.

*Land Management Ltd v Brandwood*⁶²¹ and *Hounga v Allen*⁶²² that in some circumstances, an unlawful act was no bar to establishing a proprietary right; a principle endorsed by a long line of authorities.⁶²³

The attitude of the Court of Appeal to the application of the common law maxim, *ex turpi causa non oritur actio* is that of purposive interpretation depending on varying circumstances. Relying on a number of judicial authorities,⁶²⁴ the court reasoned that the application of the *ex turpi causa* policy is based on various reasons as between different situations and as between rules applicable in different contexts.⁶²⁵ The court followed the 'amalgamated approach' of balancing the policy considerations underlying the provisions of the LRA 2002 relating to acquisition of title by adverse possession against the public policy consideration underlying the provision of section 144 of LASPO Act. On this, the court held that 'preserving the way in which adverse possession operates outweighs the fact that criminal trespassers would be profiting from their wrongdoing, i.e by adversely possessing another's land'.⁶²⁶ A strict application of the *ex turpi causa* policy may eventually do more harm than good in this case, 'since priority would not be given to the public policy that serves the more useful purpose'.⁶²⁷

The court reasoned that the mischief intended to be addressed and the objective to be met by section 144 'had nothing to do with the operation of the law of adverse possession.'⁶²⁸ The court found the main object of the section from its clear terms which 'make no reference to adverse possession regimes for either registered land or unregistered land',⁶²⁹ and from the reasons stated by Government 'for seeking its enactment in Parliament'.⁶³⁰ Section 144 was meant to provide deterrence to

⁶²¹[2004] UKHL 14.

⁶²²[2014] UKSC 47; [2014] 1 WLR 2889.

⁶²³ See among others, *Tinsley v Milligan* [1994] 1 AC 340; *Gray v Thames Trains Ltd* [2009] UKHL 33; *Stone & Rolls Ltd v Moore Stephen* [2009] UKHL 39; *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55.

⁶²⁴ See e.g. *Bakewell Land Management Ltd v Brandwood* supra (n.621); *Hounga v Allen* (supra) 615; *Lewisham LBC v Malcolm* [2008] UKHL 43.

⁶²⁵*Best v Chief Land Registrar* supra (n 616) para 52.

⁶²⁶*I. Okeoma*, supra (n 620) at 15.

⁶²⁷ *ibid*

⁶²⁸*Best v Chief Land Registrar*, supra (n 616) para 70.

⁶²⁹*ibid* para 73.

⁶³⁰*Best v Chief Land Registrar*, supra (n 616) para 71. See para 40 for extract of these reasons.

squatters while providing 'assistance to homeowners in removing squatters from the property'.⁶³¹ It was not meant to 're-balance the rights of property owners as against those of adverse possessors'.⁶³²

Also, there is the argument that 'trespass is an intrinsic factor in adverse possession',⁶³³ suggesting therefore that 'the claimant necessarily has to commit the criminal offence that would later enable him to apply for registration'.⁶³⁴ On this, Sales L.J reasoned that what was required in this case was the balancing of the public policies that underlie both the *ex turpi causa* test and that of acquisition of title by adverse possession in registered land.⁶³⁵ Consequently there was the need to weigh the objectives both policies were aimed to serve⁶³⁶ and in doing this, the court held that 'preserving the way in which adverse possession operates outweighs the fact that criminal trespassers would be profiting from their wrongdoing, by adversely possessing another's land.'⁶³⁷ This approach was found reasonable in view of the fact that a mechanical application of the maxim could lead to 'more harm being done than good since priority would not be given to the public policy that serves the more useful purpose'.⁶³⁸

The court further reasoned that Parliament could not have designed section 144 LASPO Act 'to have any impact on the doctrine of adverse possession in view of the public policy concerns underlying adverse possession in registered and especially

⁶³¹ibid para 71.

⁶³² ibid.

⁶³³ ibid.

⁶³⁴Okeoma (n 620) at 14.

⁶³⁵*Best v Chief Land Registrar*, supra (n 616) para 44.

⁶³⁶ ibid.

⁶³⁷ ibid.

⁶³⁸ ibid.

unregistered land'.⁶³⁹

It was also contended that the enactment of section 144 of LASPO Act was due to the public concern over the challenge of securing police assistance in evicting squatters from occupied buildings.⁶⁴⁰ The need for a more efficient way of combating incessant encroachments on property by squatters under the criminal law as opposed to the slow and dull prospect of deterrence of civil procedure was one of the bases for the response by Parliament through criminalisation of illegal occupation of residential accommodation, to protect homeowners. This reasoning is however flawed by the fact that the law before LASPO Act had procedures in place to deal with squatters; the provision of section 144 of that Law 'only adds more force to the argument that Parliament intended the provision of that section to go beyond the function of simply evicting squatters'.⁶⁴¹

Whilst the decision of the Court of Appeal in *Best* is an assurance that applicants would be able to proceed to the next stage of the procedure for registration under the LRA 2002, 'it does not guarantee registration',⁶⁴² and the applicant would still incur liability under LASPO Act, successful registration under the LRA 2012 notwithstanding. The fact that squatters could still be prosecuted and sentenced by the court after successfully bringing an adverse possession claim is disadvantageous to them, and may make acquisition of property through adverse possession unattractive.

The Court of Appeal's decision in *Best* has been criticised⁶⁴³ on two main grounds namely: a misapplication of the decision in *Hounga* and *Bakewell* to the facts in *Best*;

⁶³⁹ibid..

⁶⁴⁰ ibid.

⁶⁴¹ ibid

⁶⁴² Registration of the squatter under the LRA 2012 is not automatic and may fail where the registered proprietor counters the notice of the squatter's intention to register his interest in the property or indeed, where steps are taken by the landowner to evict the squatter..

⁶⁴³.Okeoma, (n 620) at 17.

and failure of the court to place sufficient weight on the question of parliament's intentions for section 144 in light of adverse possession. On the misapplication of the law, Okeoma⁶⁴⁴ argues that the field of law in which *Hounga* applies is materially different from adverse possession⁶⁴⁵ and should not have formed the basis for the court's decision in *Best*; that illegality is a long standing strong policy requirement and therefore makes a significant difference to the balancing of competing public interests and as such, the public policy interests in ensuring that a trespasser-offender does not benefit from his criminal conduct contrary to section 144 of LASPO Act should now outweigh the public policy interests in preserving the operation of adverse possession detailed in Schedule 6 of the LRA 2002. In the case of *Bakewell*, she argues that the court erred in law in applying the reasoning in that case to the facts in *Best* on the grounds that, the illegality principle cannot have the same effect when applied to the case of prescription which is acquired as of right, and the case of adverse possession acquired based on wrong; that the underlying reason for criminalisation of illegal occupation and the Land Registration Act 2002 point to the fact that squatters should not be allowed to acquire rights in other peoples land, 'as it is the only means through which a person can claim title to land by way of adverse possession'.⁶⁴⁶

4.20.4 Evaluation of the LASPO Act within social context

The conflicting positions of the Lands Registry and the English Court of Appeal in *Best* regarding the status of an adverse possessor caught by the provision of section 144 of LASPO Act calls to question the State policy on criminalisation of squatting and the government perspective on the legitimacy of unlawful occupation within the prevailing social context. An appreciation of the appropriate approach in criminal

⁶⁴⁴ *ibid.*

⁶⁴⁵ In *Hounga*, an employee who had been brought to the UK from Nigeria by her employer in breach of the immigration control, to take up employment illegally, was later dismissed by the employer. The claim of the employee for unlawful race discrimination in relation to her dismissal succeeded in the employment tribunal, but the Court of Appeal set the order of the tribunal aside on the ground that the illegality of the contract of employment formed a material part of the claimant's complaint and upholding it would amount to condoning illegality. The Supreme Court however allowed the employee's appeal.

⁶⁴⁶ Okeoma, (n 620) at 20.

jurisprudence would have made the passing of that legislation unnecessary. Given the enormity of opposition from stakeholders,⁶⁴⁷ and considering the way the State 'essentialised squatting as an activity of choice to which criminal deterrence is an appropriate response,'⁶⁴⁸ it is apparent that the motive behind the legislative action was nothing short of 'political strategy to deflect attention away from the underlying social issues of housing, empty properties and homelessness.'⁶⁴⁹

The approach of the English Parliament was punitive and retributive. Section 144 of the LASPO Act was meant as 'a tool by which the State can act directly to discipline a marginal population perceived to be socially deviant or exhibiting anti-social behaviour through punishment or the threat of punishment.'⁶⁵⁰ This is reminiscent of the Austinian concept of command and control⁶⁵¹ with little regard for peculiar social circumstances such as property abandonment with its socio-economic implications, and acute problem of homelessness which often leaves the squatter with no choice but to enter into unlawful occupation of property. It is said to be 'part

⁶⁴⁷ It is said that 'some 96% of respondents opposed the introduction of the legislation and many homelessness charities and organizations highlighted the problems of criminalizing squatting, particularly against a backdrop where there has been a sharp increase in homelessness.' See Squatters' Action for Secure Homes (2013) *The case against section 144* cited by D O'Mahony LF O'Mahony in *Crime as Property: a restorative perspective on the criminalization of squatting and the 'ownership' of unlawful occupation*. University of Essex. Available online at www.researchgate.net, 2. Also the Criminal Bar Association was opposed to the legislation noting that the existing civil and criminal remedies in existence were sufficient to deal with the problem of squatting: See Mahony, n 647. The Law Society equally condemned the provisions on the ground that it was based on the ill informed media campaign misrepresenting the scale of the problem and the available remedies: See C Baksi, 'Lawyers berate new law criminalizing squatters.' Law Society Gazette, 31 August 2012 available online at <http://www.lawgazette.co.uk/news/lawyers-berate-new-law-criminalising-squatters>. Speakers in the House of Lords also noted that the legislation which was rushed through Parliamentary process ran contrary to social and housing policies. See Hansard, HL Debates 20 March 2012 per Baroness Miller and Lord Bach.

⁶⁴⁸ Mahony, n 647 at 25

⁶⁴⁹ *ibid.*

⁶⁵⁰ *ibid* at 4-5

⁶⁵¹ John Austin, in his work, *The Province of Jurisprudence Determined*, postulates that laws are general commands issued by a Sovereign to members of the indigenous political society backed by sanction. See WL Morison, *John Austin* Stanford: Stanford University Press 1982 148-177.

of a broader agenda by government to define and control through the criminal law rather than through social policy,⁶⁵² especially where government has failed in discharging its social responsibility to provide housing.

Whilst government erroneously conceived the core of the problem as a conflict between the State and the offender, it lost sight of the practical, moral and economic bases for adverse possession. In the words of Mahony⁶⁵³:

From a practical perspective, and in the system of unregistered title, the failure to act on your rights within the limitation period created conveyancing problems due to the difficulties of proving 'stale claims.' Yet, the doctrine of adverse possession was also underpinned by a set of moral considerations relating to the hardship to the squatter-claimant of losing the land after long use ...; and the 'punishment' of the inefficient owner who allowed his land to fall into the hands of squatters in the first place. The economic justification to some extent overlaid the practical and moral claims, in light of their concern with effective-and efficient-land use and the marketability of the land.

Consequently, it would be inappropriate a policy to address the challenges of squatting mainly and exclusively from the perspective of punitive and retributive approach to criminalisation. Rather, Parliament should have engaged this complex social issue from the perspectives of the squatter, the landowner and the larger community by taking a restorative approach which furthers understanding of the complex social issues involved towards resolving conflicts in the interest of parties, the government and the larger community.⁶⁵⁴

4.21 Summary

This chapter has provided the background for the common law application of the doctrine of adverse possession. It has examined the evolution, nature, scope and

⁶⁵² Mahony, n 647 at 25

⁶⁵³ *ibid* at 16.

⁶⁵⁴ *ibid* at 27.

contextual application of the doctrine in England and Wales within a monolithic land tenure system characterised by a uniform system of laws.

It dealt with the limitations to the application of the doctrine of adverse possession under the extant regime of the Land Registration Act 2002, demonstrating how a system of land registration has tamed the application of the doctrine. The effect of the new registration regime under the LRA 2002 on adverse possession and limitation of actions is to change the basis of title to land from possession and relativity of *seisin* to the fact of registration. No longer can the passage of time under the limitation statute give an adverse possessor an automatic right to an estate; it merely gives him the right to apply for registration. However, application for registration by the adverse possessor consequently alerts the registered proprietor who, with limited exceptions, reserves the right to oppose the application and take the necessary legal steps to recover possession from the squatter. It is only where the registered proprietor failed to take steps to recover possession within a prescribed period is the squatter enabled to register as the new proprietor of the estate. Also, the extant system of title registration in England and Wales encourages owner of unregistered land to register his estate and *ipso facto*, to defeat the interest of the squatter in adverse possession.

The impact of the human rights regime encapsulated in the Human Rights Act 1998 as interpreted by *U.K v. Pye* on the doctrine has been dealt with and the discourse has demonstrated the tenacity of the doctrine in light of the indelible rationale of the doctrine and the state protection of public interest in the control and use of private property. The law is settled that the doctrine of adverse possession is not subject to human rights challenge, and this is so whether the land is registered or unregistered.⁶⁵⁵

The chapter also dealt with squatter's right against eviction before and after the English Human Rights Act 1998 and found that the position of squatters under English law justifies the need for eviction without consequences and without regard

⁶⁵⁵ See *Kay v. Lambert London Borough Council* [2006] UKHL 10 para 44; *Ofulue & Anor v. Bossert* (2009) HL 11.

to the evictee's basic rights to life, to private and family life and to freedom from discrimination. However, this has been shown to run parallel to the theory of social function of property, the global movement from the old trespass paradigm to the Human Rights paradigm as encapsulated in the constitutions of some jurisdictions such as South Africa and Brazil, and a plethora of international instruments, which recognize squatters' right.

The efficacy of the doctrine is tested under section 144 of LASPO Act against the backdrop of the contextual application of the illegality principle enshrined in the common law maxim, *ex turpi causa non oritur actio* by the Court of Appeal of England and Wales in *Best v. Chief Land Registrar & Secretary of State*. The application of the popular maxim does not affect the application of the doctrine of adverse possession and constitutes no impediment to registration of the squatter's title in any way. The thesis however recognises that the position of the squatter is a two-edged sword as registration of the latter's interest does not obviate the possibility of prosecution of the squatter under LASPO Act. The regime of State criminalization of squatting in residential premises has been critiqued and the point made that the concept of punitive and retributive justice in criminal jurisprudence are not suitable for resolving the conflicts between the parties in a property law system which is a creation of a civil law relationship. Rather, in resolving the conflict, government should have taken a restorative perspective in re-calibrating the conflict between the squatter, the land owner and the State in a way that would allow for a greater scope for understanding the individual needs of the parties, restore relationships and address the needs of the squatter and the land owner as well as those of the larger community.

Consequently, the various segments of the discourse have laid a foundation for the engagement of the application of the doctrine in Nigeria characterised by a plural legal system and peculiar social circumstances, in the next chapter.

CHAPTER 5

DOCTRINAL ANALYSIS OF ADVERSE POSSESSION UNDER NIGERIAN LAW

5.1 Introduction

The last chapter dealt with the historical antecedent of the doctrine of adverse possession and its evolution, development and application at common law applicable in England and Wales. This chapter examines the background to the reception and application of the doctrine in Nigeria under a plural legal system. This requires an analysis of the historical background of the Nigerian land tenure systems portrayed by the customary and Islamic land tenure before the advent of British rule and the reception of English law in the second half of the 19th Century; and thereafter, the intervention of local statutes.

The reception of English law inclusive of the doctrine of adverse possession created a parallel system of land holding with implications for the pre-existing land tenure systems in Nigeria, and informed the enactment of the Statutes of limitation (following similar enactments for England and Wales) in different parts of the country. The advent of the Land Use Act with peculiar land holding features and the dual system of land registration are features unknown to the English and Welsh land tenure systems with implications for the application of the doctrine of adverse possession.

The Federal Capital Territory (FCT) of Nigeria which was created pursuant to the FCT Act 1976⁶⁵⁶ particularly created a neutral system of land tenure which is essentially statute-based vesting all land there in the Federal Government of Nigeria exclusively. The non-recognition of the customary or Islamic land tenure and the non-susceptibility to the provisions of the Land Use Act make the system of land

⁶⁵⁶ Federal Capital Territory Act Cap 128 Laws of the Federal Republic of Nigeria 1990.

tenure in the FCT unique with implications for the application of the doctrine of adverse possession therein.

The question whether or not the application of the doctrine of adverse possession is open to human rights challenge is a matter to be addressed in this chapter, while the effect of criminalisation of acts of adverse possession on land registration is also engaged.

This chapter engages the doctrine of adverse possession within the plural legal system applicable in Nigeria thereby providing the background for comparison with what obtains in England and Wales, in the next chapter. This chapter outlines the politico-legal structure of Nigeria in order to delineate the pluralistic boundaries of the application of the various laws.

5.2 Background to the Nigerian Land Tenure System

An exploration of the political structure of Nigeria would explain the basis for the existence of the plural legal system applicable in the country and lay a foundation for the understanding of the hierarchy of laws which may not be familiar to the English legal system (applicable in Wales).

Nigeria operates a Presidential system of government with a Federal structure under a written Constitution⁶⁵⁷ ('the Constitution').⁶⁵⁸ The federation of Nigeria consists of thirty six States and a Federal Capital Territory.⁶⁵⁹ This federal structure is reflected

⁶⁵⁷ See the Constitution of the Federal Republic of Nigeria 1999 as amended ('the Constitution'), Cap C23 Laws of the Federal Republic of Nigeria 2010.

⁶⁵⁸ Nigeria attained independence from Britain on October 1, 1960. The country passed through Constitutional changes since the independence Constitution in 1960; amongst these were the 1963 Republican Constitution, the 1979 Constitution with amendments up to 1999 when the extant constitution came into force. The current 1999 Constitution is patterned, like the 1979 Constitution before it, and took after the Constitution of the United States of America: For further reading, see C. Nwalimu, *The Nigerian Legal System* vol 1 Public Law 2005, New York. It is worthy of note that Nigeria experienced some periods of Military Rule between 1966 and 1979; and 1983 to 1999. The Supreme Law then was Decree No. 1 enacted by the Supreme Military Council (SMC) or the Armed Forces Ruling Council (AFRC) as opposed to the Constitution. The Land Use Act 1978 the 1979 Constitution and, indeed, the 1999 Constitution, were legacies of the Military Administration in Nigeria.

⁶⁵⁹ *ibid* s. 2(2) and (3). The Federal Capital was moved from Lagos to Abuja on December 12, 1991.

in the legislative, executive and judicial arms of government.⁶⁶⁰ There are three tiers of government namely, the federal, the state and the local government.⁶⁶¹

The Constitution which is the *grundnorm* (the basic law of the land) established inter alia, a Presidential system of government with a federal bicameral legislature and the state legislature. The Constitution is the supreme law, and any other law inconsistent with any of its provisions is void to the extent of its inconsistency⁶⁶². Apart from its provisions on separation of powers, rule of law and fundamental rights and freedoms including the right to property which is of relevance to this thesis among others, it entrenched certain enactments⁶⁶³ including the Land Use Act⁶⁶⁴ in the Constitution to 'continue to apply and have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this Constitution'.⁶⁶⁵ Section 315(6) of the Constitution provides that such enactments including the Land Use Act 'shall continue to have effect as Federal enactments and as if they related to matters included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.' It is in virtue of this provision that the Land Use Act qualifies as an Act of the National Assembly despite the fact that land, the subject matter of the Act, is a residual matter which should ordinarily be within the legislative powers of the State Houses of Assembly.

International treaties such as the African Charter on Human and Peoples' Rights (which is of relevance to this thesis) is binding on Nigeria only to the extent that it is domesticated as an Act of the National Assembly⁶⁶⁶ - a federal legislature created by the Constitution. Although it is an Act of the National Assembly known as 'The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act',⁶⁶⁷ it is a statute with international flavour. Consequently, if there is a conflict

⁶⁶⁰ibid Parts IV, V and VI.

⁶⁶¹ For the establishment of the Local Government system, see section 7 of the Constitution.

⁶⁶² ibid s.1(3).

⁶⁶³ These are the National Youth Service Corps Decree1No. 51 993; the Public Complaints Commissions Act Cap P17 Laws of the Federation of Nigeria 2010; the National Security Agencies Act Cap N74 Laws of the Federation of Nigeria 2010.

⁶⁶⁴Land Use Act Cap L5 LFN 2010.

⁶⁶⁵ibid s.315 (5).

⁶⁶⁶ ibid s. 12(1).

⁶⁶⁷ Cap A10 Laws of the Federation of Nigeria, 2010.

between it and another statute, its provisions shall prevail over those of other statutes for the reason that it is presumed that the legislature does not intend to breach an international obligation.⁶⁶⁸ Nigerian courts not only have jurisdiction to enforce the provisions of the Charter, there is also an avenue for enforcement at the African Court on Human and Peoples' Rights established pursuant to Article 1 of the Protocol to the African Charter. According to the Protocol⁶⁶⁹ and the Rules,⁶⁷⁰ the Court may receive complaints and/or applications submitted to it by the African Commission on Human and Peoples' Rights, State parties to the Protocol, Africa Intergovernmental Organisations, Non-governmental organisations with observer status, and individual from states which have made a Declaration accepting the jurisdiction of the Court. As of the date of this thesis, only nine States have made such a declaration, and Nigeria is not one of them.

The federal legislature known as the National Assembly⁶⁷¹ makes laws 'for the peace, order and good government of the federation or any part thereof' in respect of matters within the exclusive legislative list,⁶⁷² and concurrently with the states with regard to matters on the concurrent list.⁶⁷³ It also makes laws for the Federal Capital Territory (FCT) with regard to all matters in respect of which the states have power to make laws.⁶⁷⁴

The states may legislate 'for the peace, order and good government' on 'any matter not included in the exclusive legislative list,'⁶⁷⁵ any matter within the concurrent legislative list⁶⁷⁶ in respect of which the federal legislature has not made laws, and on all other matters not specified either in the exclusive or in the concurrent list, with respect to which it is empowered to make Laws⁶⁷⁷ otherwise known as residual

⁶⁶⁸*Abacha v. Fawehinmi* (2000) 6 NWLR 228.

⁶⁶⁹ Article 5 of the Protocol

⁶⁷⁰ Rule 33 of the Rules of Court.

⁶⁷¹ The National Assembly consists of the Senate and the House of Representatives: See the Constitution of the Federal Republic of Nigeria, 1999 (as amended), s. 4(1).

⁶⁷² *ibid* s. 4(2)(3) and Part I of the Second Schedule.

⁶⁷³ *ibid* s. 4(4)(a) and first column of Part II of the Second Schedule.

⁶⁷⁴ *ibid* s. 4(4)(b).

⁶⁷⁵ *ibid* s. 4(7)(a).

⁶⁷⁶ *ibid* s. 4(7)(b).

⁶⁷⁷ *ibid* s. 4(7)(c).

matters. Such residual matters over which the States and the Federal Capital Territory have powers to make Laws pertain, among others, to limitation of actions, land matters, registration of land instruments or title to land - matters not covered by either the exclusive or the concurrent legislative list under the Constitution. As regards the Federal Capital Territory, the Limitations Act⁶⁷⁸- a federal legislation regulating limitation of actions, the Land Registration Law of the old Northern Nigeria,⁶⁷⁹ and the Registration of Titles Act⁶⁸⁰ which hitherto applied in the former Federal Territory of Lagos, apply.⁶⁸¹

Although the Land Use Act 1978⁶⁸² was enacted by the then Federal Military Government and subsequently presumed to be an Act of the National Assembly (the federal legislature) by the Nigerian Constitution,⁶⁸³ land titling and management of land have been made the prerogative of the State Governor⁶⁸⁴ with the exception of federal lands within the states,⁶⁸⁵ or lands within the Federal Capital Territory⁶⁸⁶ over which the President exercises powers of management and control through the Minister of the Federal Capital Territory.⁶⁸⁷

The legal system of Nigeria is based on customary law prevalent in Southern Nigeria, and in the Northern Nigeria before the introduction of Islamic law; Islamic law predominantly in the Northern part of Nigeria; the English law and a number of local legislation. Intertwined therefore with the political structure highlighted is the evolution of the multiple system of land tenure discussed in the next section.

5.3 The Nigerian Land Tenure Systems and Adverse Possession

⁶⁷⁸No. 88 1966 applicable in the Federal Capital Territory (FCT) of Nigeria and incorporated into the Laws of Nigeria by Cap 552 FCT 2007.

⁶⁷⁹This is due to the fact that the Federal Capital Territory was created on the area formerly belonging to the old Northern Nigeria with her existing Laws: See Land Registration Law, Laws of Northern Nigeria Cap 97 1958.

⁶⁸⁰Registration of Titles Act Cap 181 Laws of Nigeria 1958.

⁶⁸¹See Second Schedule to the FCT Act 1976 now Cap F6 LFN 2010.

⁶⁸²Supra (n 649).

⁶⁸³Supra s. 315(5)(d).

⁶⁸⁴Supra ss.1, 5, 9, 34 and 36.

⁶⁸⁵Supra s.49(1).

⁶⁸⁶Federal Capital Territory Act No. 6 1976 now Cap F6 LFN 2010

⁶⁸⁷ibid s. 51(2).

Before the advent of the Land Use Act⁶⁸⁸ (LUA) in Nigeria, there were multiple land tenure systems applicable in the country depending on the status of the land,⁶⁸⁹ the law of the place where the land is situated (the *lex situs*)⁶⁹⁰ and the law applicable to the propositus.⁶⁹¹ Generally in Nigeria before colonisation by the British with effect from 1861 following the cession of Lagos by the then monarch of the island to the British,⁶⁹² title to land was predominantly governed by the customary land tenure systems applicable in Southern Nigeria,⁶⁹³ and predominantly by Islamic law applicable in the Northern Nigeria.⁶⁹⁴

The original state of the tenurial system in Nigeria intertwined with her political history as captured by the Nigerian Supreme Court in the case of *Attorney General of the Federation v. Attorney General of Abia State & 35 Ors*⁶⁹⁵ in the following words:

Until the advent of the British colonial rule in what is now known as the Federal Republic of Nigeria...there existed at various times various sovereign states known as emirates, kingdoms and empires made up of ethnic groups in Nigeria. Each was independent of the other with its mode of government indigenous to it. At one time or another, these sovereign states were either making wars with each other or making alliances, on equal terms. This position existed throughout the land known as Nigeria...

⁶⁸⁸ Cap L5 Laws of the Federation of Nigeria, 2010.

⁶⁸⁹ The land could be subject matter of customary, Islamic or English law.

⁶⁹⁰ For example, while the common law and the Conveyancing Act 1881 applied to transactions on land in many parts of the country excluding the old Western and mid-western Nigeria, the Property and Conveyancing Law Cap 100 Laws of Western Nigeria applied in those parts of the country.

⁶⁹¹ Personal law applied and still applies in succession matters relating to land except where English law or statute applies. Personal law could be the customary or Islamic law applicable to the propositus: See *Zaidhan v. Mohssen* (1973) 11 S.C 1.

⁶⁹² In 1861, King Dosumu of Lagos (the 13th in succession) signed the Treaty of Cession dated 6 August 1861 purportedly on behalf of himself and the Chiefs, ceding to the British Crown "the Port and Island of Lagos with all the rights, profits and territories and appurtenances whatsoever thereunto belonging". The legal effect of the Treaty of Cession from the standpoint of judicial authorities is that general words of the Cession construed as having related primarily to Sovereign rights only, had nothing to do with the proprietary rights of the various landowning families in Lagos. See *Onisiwo v. Attorney General of Southern Provinces* (1912) 2 N.L.R 77; *Attorney General of Southern Nigeria v. John Holt & Ors* (1910) 2 N.L.R 1 at 6 and 7.

⁶⁹³ See for example, s.26 of the High Court of Lagos State, Cap H3 Laws of Lagos State 2003. The provision is basically the same in the High Court Laws of other states of the federation of Nigeria.

⁶⁹⁴ See for example, s. 22 of Cap 49 Laws of Northern Nigeria, 1963 applicable in the various Northern States. Also s. 12(c) of the Sharia Court of Appeal Law 1960 which directs the Sharia Court of Appeal to hear any matter where all parties to the proceedings have requested the court of first instance in writing to hear the case under Islamic law.

⁶⁹⁵(2006) 1 FWLR (Pt. 298) 480 at 511.

The foregoing observation depicts the significance of ethnicity, tribal and religious groupings indigenous to Nigeria, and explains the background to the pre-existing land tenure systems before the advent of colonial rule.

5.3.1 *Customary land tenure system*

During the period dominated by these ethnic groupings, land tenure system was communal in nature and land was held by the community and later the family, under the control and management of the head chief, the Oba, the Emir, the head of the family etc.,⁶⁹⁶ who held the land as trustees for the community or family. This position characterises the customary law perspective of land ownership in Nigeria. In the words of the Nigerian Supreme Court in *Adejumo v. Ayantegbe*⁶⁹⁷: 'At customary law, ownership of family [and communal land] is vested in the past, existing and future members of the family [or community]. Thus, communal or family land belongs to all members of the society or family'⁶⁹⁸ to be preserved by generations as communal inheritance.

Customary land tenure system is the system of landholding indigenous to Nigeria and made applicable by the various High Court Laws meant to 'observe and enforce the observance of customary law which is applicable and not repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any law for the time being in force.'⁶⁹⁹ Customary law is a 'mirror of accepted usage';⁷⁰⁰ it represents the customs and usages of the indigenous people within a geographical area from time immemorial which the people regard as binding on them, and which the court would apply as law upon proof of same⁷⁰¹ or

⁶⁹⁶IO Smith, *Practical Approach to Law of Real Property in Nigeria* (Revised edition) 2013. Ecowatch Publications (Nig) Ltd at 25.

⁶⁹⁷(1989) 3 N.W.L.R (Pt 110) 417.

⁶⁹⁸ *ibid*, at 444 paras C-D

⁶⁹⁹ See n 693.

⁷⁰⁰*Owoniyi v. Omotosho* (1961) All N.L.R 304

⁷⁰¹ Proof may be through witnesses, books or by calling assessors: See Evidence Act 2011, s.14(3).

upon judicial notice being taken of such custom.⁷⁰² One significant feature of this system of law is its flexibility and gradual response to changes in modern times.⁷⁰³

Members of the community or family under customary law are allocated land to occupy and use, by the head who is a *primus inter pares* (first among equals).⁷⁰⁴ This allocation does not confer any form of proprietary interest on the allottee, although the right of user automatically passes to his heirs in accordance with customary law.⁷⁰⁵ Title to communal or family land cannot be transferred in any form to a third party without the consent of the family⁷⁰⁶ and it cannot be devised by Will. Communal or family grant of right of use to third parties takes the form of customary tenancy to be enjoyed in perpetuity subject to good behaviour including acknowledgement of the overlord's title and payment of tribute to him.⁷⁰⁷

The Nigerian customary law does not permit acquisition of title to land by adverse possession.⁷⁰⁸ As the Supreme Court pointed out in *Agboola v. Abimbola*:⁷⁰⁹

Assuming-and this fact was not proved and was in fact later jettisoned-that Kanyinde was an Egba refugee at the time that he purported to sell the land, he had no more than an interest under native law and custom. *We do not consider that any authorities are now needed to show the inapplicability of Statutes of Limitation to such tenures.*⁷¹⁰ (Italics supplied).

The Limitation Act 1966⁷¹¹ (which supersedes the English Statute of Limitation) - a Federal legislation adopted in the FCT⁷¹² with corresponding Limitation Law

⁷⁰² A judicially noticed custom requires no proof: *ibid*, s. 14(1), (2).

⁷⁰³ *Lewis v. Bankole* (1908) 1 NLR 82.; *Balogun & Ors v. Oshodi* (1931) 10 N.L.R 36.

⁷⁰⁴ *Lewis v. Bankole* *supra* (n 703).

⁷⁰⁵ *ibid*.

⁷⁰⁶ *Ekipendu v. Erika* (1959) 4 FSC 79; *Alao v. Ajani* (1989) 4 N.W.L.R (Pt 113) 1.

⁷⁰⁷ *Aghenghen & Ors v. Waghoregor & Ors* (1974) 1 SC 1; *Abioye v. Yakubu* (1991) 5 NWLR (Pt. 190) 130.

⁷⁰⁸ See MCarthy, Ag. CJ in *Fiscian v. Nelson* (1946) 12 W.A.C.A 21, 22. The customary land tenure system is preserved under the Land Use Act 1978 Cap L5 2010, and the occupier of land under customary law is said to have a customary right of occupancy either by way of an actual grant under section 6(1) of the Act or by way of deemed grant under section 36 of the Act.

⁷⁰⁹ SC.336/67 of 4/7/69 (Unreported) 1; *Mora v. Nwalusi* (1962) 1 All N.L.R 681.

⁷¹⁰ *ibid*, at 7.

⁷¹¹ This Act which was enacted under the Military regime as a Decree became an existing law by virtue of section 315 of the Constitution of the Federal Republic of Nigeria 1999, and deemed to be an Act of the National Assembly. This Federal Legislation was later adopted and re-enacted in the various States of Nigeria as Limitations Law. The Act however applies to the Federal Capital Territory, Abuja.

applicable in the thirty six states of Nigeria- excludes customary law from the ambit of its application.⁷¹³ However, where a party intending to rely on the exclusion under customary law is 'guilty' of laches and acquiescence in equity in circumstances paving way for the application of the principle of proprietary estoppel, he may lose his customary title to the adverse possessor.⁷¹⁴ As the court noted in *Nwakobi v. Nzekwu*⁷¹⁵:

If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me to afterwards assert my title to the land on which he had expended money on the supposition that the land was his own...But it will be observed that to raise such an equity, two things are required first, that the person expending money suppose himself to be building on his own land; and secondly, that the real owner at the time of expenditure knows that the land belongs to him and not to the person expending money in the belief that he is the owner.⁷¹⁶

Clarifying this position earlier in *Akpan Awo v. Cookey-Gam*,⁷¹⁷ the court said:

We do not decide this point in accordance with any provision of English law as to the limitation of actions but simply on the grounds of equity, on the ground that the court will not allow a party to call in aid principles, which, as in this case, were developed in and are applicable to a state of society vastly different from that now existing merely for the purpose of bolstering up a stale claim.⁷¹⁸

The above dictum demonstrates one of the characteristics of customary law which is flexibility and adaptation to changing circumstances. It also demonstrates the

⁷¹² This is made applicable pursuant to the power of the National Assembly to make Laws for the FCT on residual matters, including limitation of actions. See Cap 522 Laws of the FCT 2007.

⁷¹³ See section 67(1) of the Act.

⁷¹⁴ See *Awo v. Cookey Gam* (1913) 2 NWLR 100. This rule known as the rule in *AkpanAwo v. Cookey-Gam* (supra) applies only upon fulfilment of certain conditions by the party relying on it to defeat a claim under customary law namely: 1. that he (the defendant) is an adverse possessor strictly speaking in law as opposed to a tenant, licensee or a person enjoying an occupational right within the title of the plaintiff; 2. that he took possession of the land under a mistaken belief that he had title to it; 3. that the plaintiff had knowledge of the adverse possession but acquiesced in it; 4. that as a result of this reliance on the plaintiff's acquiescence, the defendant has been led to expend money or otherwise alter his position; 5. that there exists no extenuating circumstances negating acquiescence; 6. that the length of time is fairly long enough to establish a prima facie evidence of acquiescence on the part of the plaintiff.

⁷¹⁵(1961) 1 All N.L.R 445.

⁷¹⁶supra at 450.

⁷¹⁷supra (n 699).

⁷¹⁸ibid 101.

application of the rule of equity embellished in the rule of validity contained in the various High Court Laws across the various states in Southern Nigeria which provides that the court will apply a rule of customary law only where it is 'not repugnant to natural justice, equity and good conscience or incompatible with any Law for the time being in force'.⁷¹⁹

The rationale for the rule of equity which bars the application of the customary rule of land tenure was laid down by the court in *Akpan Awo v. Cookey Gam*.⁷²⁰ In that case, the plaintiff's claim to the land in dispute failed because the defendants, under a mistaken belief that they were the owners of the land in dispute, had exercised acts of ownership by making agreements with strangers, granting leases and receiving rents for many years without interference or action taken by the plaintiffs to assert their rights under native law and custom. Formulating the rule in equity, Webber J. explained as follows:

It would be wholly inequitable to deprive the defendants of property of which they have held undisturbed possession and in respect of which they have collected rents for so long a term of years with the knowledge and acquiescence of those who now dispute their title, even if it were...clear...that they entered into possession contrary to the principles of native law...

The rule in *Akpan Awo v. Cookey Gam* cannot be invoked unless the defendant relying on it is able to show by evidence: that his possession is adverse⁷²¹ to that of the customary land owner as he is not a tenant, a licensee or a person enjoying an occupational right within the title of the plaintiff;⁷²² that he took possession of the land under a mistaken belief that he had title to it;⁷²³ that the plaintiff had knowledge of the adverse possession but acquiesced in it;⁷²⁴ that as a result of this

⁷¹⁹ See for example, High Court Law of Lagos State, s.26 (n 678).

⁷²⁰ *Supra* (n 664).

⁷²¹ The word 'adverse' is used in the ordinary grammatical sense as opposed to the technical legal sense.

⁷²² *Epelle v. Ojo* (1926) 1 N.L.R 96. See also *Chairman L.E.D.B v. Sunmonu & Ors* (1961) L.L.R 20; *Nezianya v. Okagbue*(1963) 1 All N.L.R 352.

⁷²³ *AkpanAwo v. Cookey Gam*, *supra* (n 699).

⁷²⁴ *Nwakobi v. Nzekwu* *supra* (n 700) at 450. Knowledge may be presumed not only from the overt acts of the defendant such as expenditure of money on improvements on land, but also from long possession sufficient to impute knowledge to the plaintiff. In the case of family or community,

reliance on the plaintiff's acquiescence, the defendant has been led to expend money or otherwise alter his position;⁷²⁵ that there exists no extenuating circumstances negating acquiescence;⁷²⁶ and that the length of time is fairly long enough to establish a prima facie evidence of acquiescence on the part of the plaintiff.⁷²⁷ The defendant will succeed in invoking the rule in *Akpan Awo v. Cookey Gam* only where the foregoing requirements are met in their totality and fails where any one of those requirements is lacking.

The question whether land ceases to be regulated by customary law so as to be a subject of adverse possession and application of the statute of limitation is a question of fact depending on the nature of transaction and the evidence of it. For example, where the claimant relies on documents couched in English form *and it is not suggested that any reliance is placed on customary law*, any title covered by the documents is subject to the application of the doctrine of adverse possession and the provisions of the relevant statute of limitation. As the court observed in *Green v. Owo*:⁷²⁸

Now what is the plaintiff's position in this case? He has in his possession documents in English Conveyancers' jargon, and plans attached to them. He has nothing but these documents. There is no evidence except the documents as to the title of the grantees to grant them. There is no evidence of possession under them. These documents profess to give to the plaintiff a right to the land in dispute which the defendant and his predecessors have occupied without interference for over twenty years, and which so far as the evidence before me goes -none of the plaintiff's predecessors has ever occupied...The Statute of Limitations in such circumstances in England would certainly bar the plaintiff's present claim. Where is the existing

knowledge by all members is unnecessary; it suffices that important members had knowledge: See *Saidi v. Akinwunmi* (1956) 1 FSC 107.

⁷²⁵*Suleman v. Johnson* (1951) 13 WACA 213.

⁷²⁶ Such extenuating circumstances include intimacy, blood ties or family relationship existing between the parties which motivated moves towards settlement thereby causing delay in bringing the action in court.

⁷²⁷ There is no hard and fast rule as to the length of time required. Although a period of twenty one years was held in *Akpan Awo v. Cookey Gam* sufficient, five years was considered as sufficient in *Okiade v. Morayo*(1940) 15 N.L.R 131. The true rule appears to be that the length of time required where the adverse possessor developed the land is shorter than in cases of undeveloped land since the former situation constitutes an overt act of which the plaintiff ought to have taken cognisance: See for example, *Yaro Ningi v. Dan Katsina* (1991) 3 NWLR (Pt. 177) 76.

⁷²⁸(1936) 13 N.L.R 43.

native custom to the contrary? There is, so far as I know, no native custom as regards the effect of documentary titles in English conveyance form. How would there be?⁷²⁹

It is instructive to note that in cases in which the English type conveyance is involved, it is not the fact of the existence of the conveyance in English form that matters, it is the act of relying on the document to the exclusion of customary law relating to land. This is because customary law recognises the use of writing and, *ipso facto*, the use of Conveyance in English form.⁷³⁰

5.3.2 *Islamic land tenure system*

The indigenous land tenure system discussed above applied to both the Northern and Southern Nigeria until the advent of Islamic law. Unlike customary law which developed amongst, and applies generally to the indigenous people, Islamic law like the English common law is foreign to Nigeria. It originated in Saudi Arabia and through Egypt in North Africa, it came into West Africa through Mali from where it was introduced into Nigeria and subsequently imposed on the people of Northern Nigeria through conquest by the Islamic jihadists led by Usman dan fodio sometime in the 19th Century.⁷³¹ Consequent upon the conquest, the Fulani conquerors took over all parcels of land in the conquered territories in conformity with the Maliki law of Islam which stipulates that 'all lands which come into the possession of the faithful through conquests become wakhf, that is, tied up immediately after conquest'.⁷³² The concept of Wakhf in Islamic law is that land, being public property, is vested in Allah (God), and no individual has radical title to it.⁷³³ Different places were placed under the control of the Emir with the land held in trust for the people.⁷³⁴ The people had land allocated to them for use by the Emir in return for their payment of tribute. This is in contrast to the customary land tenure system where land is communally owned and the individual members of the community or

⁷²⁹ibid at 45. See also *Agboola v. Abimbola* supra (n 694).

⁷³⁰*Rotibi v. Savage* (1944) 17 N.L.R 77; *Balogun v. Oshodi*(1929) 10 N.L.R 36.

⁷³¹ See generally, C. Nwalimu, *Nigerian Legal System* 2005, New York at 158-161.

⁷³²FH Ruxton, *Maliki Law* (1916) OUP 1976.

⁷³³IO Smith, supra (n 681).

⁷³⁴FD Lugard, *Political Memoranda*, No. 10 Lands, para 7.

family is entitled to be allocated land by the head chief or the head of the family without payment of tribute or furnishing of any form of consideration.

Islamic land tenure system is an independent system applicable predominantly in the Northern States of Nigeria. In its classical form, Islamic law derives from the *Qur'an*, the *Sunna of Prophet Muhammad*, the consensus of Islamic scholars known as *Ijma*, and reasoning by analogy known as *Kiyas*. It is made applicable by the High Court Laws and the Sharia Court of Appeal Law of the Northern States of Nigeria.⁷³⁵

Existing literature have shown that despite the introduction of Islamic law in Northern Nigeria, the court system in that region favours enforcement of both Islamic and customary law.⁷³⁶ By virtue of section 13 of the Sharia Court of Appeal Law applicable in the Northern States,⁷³⁷ 'Islamic law courts in Nigeria recognise and enforce not only Maliki law, but also customary law of the various indigenous tribal groups of Nigeria and "common law" to the extent it is the system of law that stipulates application of laws that are consistent with natural justice, equity and good conscience'.⁷³⁸ Also, both the District Court under the District Court Law⁷³⁹ and the High Court under the various High Court Laws⁷⁴⁰ define Customary law to include Islamic law.⁷⁴¹

The choice of Islamic law on land tenure is optional and depends on the consensus of the parties in the determination of any question. Although there are different schools of thought on Islamic law, only the Maliki School of thought is of relevance in Nigeria as it is the case in other West African countries.⁷⁴²

⁷³⁵ See e.g. s.22 of Cap 49 Laws of Northern Nigeria, 1963 applicable in the various Northern States. Also s. 12(e) of the Sharia Court of Appeal Law, 1960 which directs the Sharia Court of Appeal to hear any matter where all parties to the proceedings have requested the court of first instance in writing to hear the case under Islamic law.

⁷³⁶ C Nwalimu, *supra*, (n 716) at 174.

⁷³⁷ See e.g. Sharia Court of Appeal Law, of Kano State 1960 as amended; Sharia Court of Appeal of Niger State 1992.

⁷³⁸ C Nwalimu, *supra* (n 716) at 174.

⁷³⁹ See District Courts Law of Niger State Ch 37 vol. 1 1992 and District Court Law of Katsina State of Nigeria Ch. 39 1991 as amended, s.2.

⁷⁴⁰ See e.g High Court Law of Katsina State of Nigeria, Laws of Katsina State of Nigeria Ch 59 1991, s.2
⁷⁴¹ *ibid* s.2.

⁷⁴² See *Zaidhan v. Mohseen* (1973) N.S.C.C 516.

Islamic law recognises the principle of long possession known as *hauzi* as a mode of acquisition of title. *Hauzi* is the equivalent of the right of prescription under Roman law as opposed to English law. It is rooted in Islamic jurisprudence to protect long possession and ensure land is put to productive use. It is said that the effect of prescription known as *usucapio* in Roman law is:

to confer a positive title to the land upon a person who had remained in possession for a certain time...[it] exemplified what is sometimes called acquisitive prescription in the sense that possession of another's land for a given period conferred a positive title upon the occupier, but English law has never adopted this theory in its treatment of corporeal hereditaments and chattels though it has done so in the case of easements and profits⁷⁴³

In the *Hadith* (one of the sources of Islamic law) however, the principle of *hauzias* interpreted by scholars of Islamic Law⁷⁴⁴ is as follows:

He who sees somebody in possession of his (claimant's) property and claiming and using the same as his own over a long period [10 years] without any objection from him, the person in possession becomes the owner. If the original owner later brings an action to recover it neither the complaint nor evidence in support thereof will be listened to. But there are exceptions to this principle: 1. cogent reason for not complaining in time e.g. blood relationship or fear of harm from authority; 2. minorship; 3. the person in possession is put there by the claimant either as a free or paying tenant; 4. the person in possession is put in there as a trustee; 5. the claimant is a partner or co-proprietor to the person in possession.⁷⁴⁵

The essence of bringing the principle of *hauzi* and its exceptions to the fore is to appreciate the fact that its rule of prescription and the exceptions to it keep the concept of prescription strictly within the ambit of Islamic law as an in-built machinery for dealing with stale claims.

The principle of *hauzi* in Islamic law has peculiar requirements which do not coincide with those of the doctrine of adverse possession or the provisions of the statutes of limitation. The right of *hauzi* accrues to a party who has been in undisturbed possession of the land of another for a period of ten years or more while

⁷⁴³See Cheshire and Burn & Cartwright, 18th ed. O.U.P at 1127-1128.

⁷⁴⁴*Ashalul Madarik* vol. 3 at 236.

⁷⁴⁵*Mayyarah* Vol. II 164; *Maliki Law* (Summary Translation of Mukhtasha Khalil by Ruxton) 309 para 1698. See also *Umani v. Bakosi* [1996] 1 NWLR (Pt 425) 38.

the true owner stood by and did nothing to claim his property, and the parties are not related by blood or marriage.⁷⁴⁶ In *hauzi*, knowledge actual or constructive on the part of the claimant is required; the defendant must have had a mistaken belief that the land belongs to him; the inaction of the claimant must have led the defendant to expend money or to take some steps to his detriment; and the relationship by blood or marriage of the parties is a factor to be taken into consideration – factors which are of no moment in adverse possession cases. Also, whereas, under the Limitation Act, the period of limitation in the case of individual parties is twelve years from the date the right of action accrues,⁷⁴⁷ the period of undisturbed possession in the case of *hauzi* is between ten and forty years depending on whether there exists or not between the parties, the relationship by marriage or by blood.⁷⁴⁸

5.3.3 *The Received English land tenure*

As a result of the contact of the indigenous people of Nigeria with the British during colonisation, and following the advent of trade and commerce and the recognition of the use of writing by customary law,⁷⁴⁹ the use of the English mode of conveyancing was embraced.⁷⁵⁰ The application of the English land tenure system was facilitated by the reception statutes⁷⁵¹ making the common law of England, the doctrines of equity and certain English statutes of general application (in force in England on January 1, 1900) applicable to transactions including land matters generally in Nigeria,⁷⁵² alongside the existing Customary and Islamic law of land tenure. Consequently, the common law doctrine of adverse possession and the successive English statutes of limitation up to 1874 were generally made part of Nigerian law. The colonial regime also facilitated the emergence of Crown grants of land in some

⁷⁴⁶ See *YaroNingi v. Dan Katsina* (1991) 3 NWLR (Pt 177) 76; *Gunku v. Doro* (1992) 3 NWLR (Pt. 228) 190.

⁷⁴⁷ See the Limitation Act, No. 88 1966 now applicable in the FCT as Cap 522 Laws of FCT 2007, s.16(2). and also adopted in the various States. The period of Limitation is twenty years in the case of a State authority: See s. 16(1).

⁷⁴⁸ *Gunku v. Doro* supra (n 746).

⁷⁴⁹ *Rotibi v. Savage* (1944) 17 N.L.R 77.

⁷⁵⁰ *Oshodi v. Balogun* (1936) 2 All E.R 1632

⁷⁵¹ See e.g. Law (Miscellaneous Provisions) Act Cap 89 Laws of Nigeria 1958.

⁷⁵² *ibid* s.45(1). Application is however subject to local circumstances: See s. 45(3).

specific areas in the cities⁷⁵³ later culminating in the designation of State land governed by the State Lands Law.⁷⁵⁴ Also, English law as defined applies in the FCT pursuant to section 13 of the FCT Act 1976.⁷⁵⁵

It is pertinent to note that the application of the English law of land tenure depends on local circumstances and application of local legislation on land tenure.⁷⁵⁶ It does not apply where the customary or Islamic law of land tenure applies, and applies subject to local legislation.

Where English law applies, it is expected that the requirements for the application of the doctrine of adverse possession earlier discussed⁷⁵⁷ would apply subject to local circumstances and local legislation.

5.3.4 *The Land Tenure Law 1962*

In 1962, the Northern Nigeria enacted the Land Tenure Law⁷⁵⁸ subjecting land ownership in that region to state grants, imposing state control and management of land, streamlining unlimited interests in land such as the fee simple estate, and converting same and other indigenous rights to rights of occupancy.⁷⁵⁹ The right of occupancy can only be alienated with the consent of the Minister.⁷⁶⁰ Such rights can be revoked by the Minister for public purpose⁷⁶¹ with the holder of the right of occupancy entitled to compensation.⁷⁶²

The Land Tenure Law is the precursor of the Land Use Act 1978 (LUA) which now applies to all parcels of land within the territory of a state in Nigeria. Although the Land Tenure Law is preserved by the LUA⁷⁶³ - the principal legislation on land titles, control and management of land in Nigeria, it 'shall have effect with such

⁷⁵³ See e.g. the Crown Grants (Township of Lagos) Act No. 18 1947; The Arotas (Crown Grants) Act No. 19 1947; The Epetedo Land Act No. 20 1947; and the Glover Settlement Act No. 21 1947.

⁷⁵⁴ See e.g. State Lands Law Cap S11 Laws of Lagos State, 2003.

⁷⁵⁵Supra (n 656).

⁷⁵⁶ Law (Miscellaneous Provisions) Act 1964, s.45(3).

⁷⁵⁷See chapter 4 para 4.12 *ante*.

⁷⁵⁸ Land Tenure Law Cap 59 Laws of Northern Nigeria 1963.

⁷⁵⁹*ibid*, ss.4, 5, 10(1).

⁷⁶⁰*ibid*, ss.27, 28.

⁷⁶¹*ibid*, s.34

⁷⁶²*ibid*.

⁷⁶³Supra (n 664) s. 4(a).

modification as would bring those laws into conformity with this Act or its general intendment'.⁷⁶⁴

Since the provisions of the LUA supersede those of the Land Tenure Law, the provisions of the LUA are discussed below.

5.3.5 *The Land Use Act Regime*

The Nigerian Land Use Act 1978 (LUA)⁷⁶⁵ is the principal legislation on title to land in Nigeria. Although enacted during the military regime with less regard for due legislative process involving the citizens, it would appear that it was a 'baby of necessity' resulting from compelling social circumstances.⁷⁶⁶

Section 1 of the Act vests radical title of all lands within the territory of each state of the federation in the Governor of the State to be held in trust for the citizens. Unlimited land rights in the form of the English fee simple absolute in possession

⁷⁶⁴ *ibid*, s.4(b).

⁷⁶⁵ Cap L5 Laws of the Federation of Nigeria, 2010.

⁷⁶⁶ The enactment of the Land Use Act was necessitated by a number of socio-economic factors militating against conferment of valid title, the realisation of use and enjoyment of land in Nigeria for the sustenance of Nigerians and the effective utilisation of land by private entrepreneurs and government for purposes of development. The indigenous system of land tenure with strict principles on alienation of customary land rights over large expanse of family and communal land made it difficult for government to acquire land for economic development. Under both the indigenous system of land tenure and the English system of Conveyancing, a prospective purchaser of land would have to contend with the problem of ascertaining the right vendors to convey the land to him. Investigation of traditional title was fraught with difficulties for traditional history could be distorted and the inherent uncertainty paved way for widespread land speculation and heightened the tension between rival claimants resulting sometimes in loss of lives and limbs. The systems of land registration in place did not obviate the problem of insecurity of title. The cost of land in most parts of the country was becoming rather prohibitive making it difficult for industrial entrepreneurs to acquire land for industrial development and where government had to acquire land for public purposes, it had to pay prohibitive compensation for such acquisition. The possibility of alienating land with the aid of the English method of conveyancing coupled with the increasing importance of cash economy paved way for fragmentation of land with title vested in different vendors. This resulted in non-availability of adequate parcels of land for agricultural and industrial purposes as it was difficult to acquire fragmented land from different vendors. There was also the challenge of inequality arising from the mere accident of birth of some Nigerians who were born into and others outside landowning communities. Although the Land Tenure Law of 1962 was introduced in the Northern region of Nigeria as a simple and effective device for government control of the use and occupation of land, the customary right of occupancy created was merely designed to allow indigenous landholders continue their use and occupation of the land until the Federal, State or Local government found a better use for the land, it did not tackle the various challenges highlighted. For a general overview, see IO Smith, *supra* (n 681) 569-471.

were abolished and substituted with a right of occupancy. In the words of Kawu JSC in *Safuratu Salami v. Sunmonu Oke*⁷⁶⁷:

Absolute ownership of land is no longer possible since according to the provisions of section 1 of the Act all land comprised in the territory of each state in the federation are hereby vested in the governor of the state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of the Decree.⁷⁶⁸

The only land not affected by section 1 of the Act which vested all land in the state in the Governor, is the land which is vested in the Federal Government of Nigeria or any of its agencies at the commencement of the Act under section 49 thereof.⁷⁶⁹

Whilst it abolished all unlimited rights existing on land such as the English freehold estates and converted same to rights of occupancy, it preserved pre-existing rights including customary land rights in land subject to the provisions of the Act.⁷⁷⁰ In the words of Nnaemeka-Agu JSC in *Ogunleye v. Oni*⁷⁷¹:

...the Land Use Act never set out to abolish all existing titles and rights to possession of land. Rather, when such rights or titles relate to developed lands in urban areas, the possessor or owner of that right or title is deemed to be a statutory grantee of a right of occupancy under section 34(2) of the Act. Where it is non-urban land, the holder or owner under Customary [and Islamic] law or otherwise is deemed to be a deemed grantee of a right of occupancy by the appropriate Local Government under section 36(2).

Furthermore, in *Ogunola v. Eiyekole*,⁷⁷² the Supreme Court held regarding pre-existing customary land rights that:

Land is still held under customary tenure even though dominium is in the Governor. The most pervasive effect of the Land Use Act is the diminution of the plenitude of the powers of the holder of the land. The character in which they hold remain substantially the same

⁷⁶⁷(1987) 9-11 S.C. 43.

⁷⁶⁸ibid at 63.

⁷⁶⁹ ibid.

⁷⁷⁰ibid ss. 34, 36 and 48.

⁷⁷¹(1990) 2 N.W.L.R (Pt 135) 745 at 784. See also *Ogunola v. Eiyekole & Ors* (1990) 4 N.W.L.R (Pt 146) 632, on the preservation of the customary land tenure system by the Act.

⁷⁷²(1990) 4 NWLR (Pt 146) 632 at 653.

Also, Section 48 of the Act which preserves:

All existing laws relating to the registration of title to, or interest in, land or the transfer of title to or any interest in land shall have effect subject to such modification (whether by way of addition, alteration or omission) as will bring those laws into conformity with this Act or its general intendment.

It follows therefore that the Act, unlike the FCT Act earlier discussed, did not abolish pre-existing titles and rights to possession on land in favour of the State and it would be wrong to describe the Act's intervention on 29 March 1978 as nationalisation of land.⁷⁷³ The Act preserves customary and Islamic law, the common law of England and statutes of general application as at January 1 1900 and pieces of local legislation - all predating the Act, subject to such modifications as will bring those laws into conformity with this Act or its general intendment. Although section 1 of the Land Use Act which vests radical title in the governor of the state⁷⁷⁴ is tantamount to an expropriation of absolute ownership in favour of the governor, this provision is subject to the other provisions of the Act especially sections 34 and 36, which preserve pre-existing rights in land.

A right of occupancy unlike a fee simple estate is by way of state grant actual or deemed, mainly. Section 5(1) of the Act makes it lawful for the Governor of the State 'in respect of land whether or not in an urban area, to grant a statutory right of occupancy to any person for all purposes,' while section 6(1) makes it lawful for a Local Government 'in respect of land not in an urban area, to grant customary rights of occupancy to any person or organisation for the use of land in the Local Government Area for agricultural, residential and other purposes.'

⁷⁷³ An opinion to that effect expressed by Eso J.S.C obiter in *Nkwocha v. Governor of Anambra State* (1984) 6 S.C 362 was dismissed subsequently by the Supreme Court in *Salami v. Oke* (1987) 4 NWLR (Pt 63) 1.

⁷⁷⁴ In the case of the Federal Capital Territory (FCT), radical title is vested in the Federal Government of the Federal Republic of Nigeria while powers of control and Management is exercisable by the President or any Minister designated by him in that behalf: See s.51 of the Land Use Act 1978; and s.1(1) of the FCT Act No.6 of 1976 now Cap F6 LFN 2010.

A holder of a right of occupancy statutory⁷⁷⁵ or customary⁷⁷⁶ lacks the form of proprietary rights associated with the holder of a fee simple estate absolute in possession known to English law.⁷⁷⁷ The holder has no absolute title to the land, only to the un-exhausted improvements made thereon;⁷⁷⁸ lacks the form of exclusive possession known to English law;⁷⁷⁹ and bereft of freedom of alienation of his right or part thereof.⁷⁸⁰ The holder or occupier may have his right revoked with or without compensation by the Governor.⁷⁸¹ Where compensation is payable upon revocation of a right of occupancy, the holder of a right of occupancy is compensated for his un-exhausted improvements on the land mainly,⁷⁸² as radical title is vested in the Governor.

A right of occupancy is said to be 'highly inferior to a leasehold interest...but similar to a license in many respects.'⁷⁸³ It is said that 'it is only when the holder of right of occupancy is issued with a state backed certificate of occupancy that the licence becomes supported with interest by virtue of the contractual obligations of the state under the holder's certificate of occupancy.'⁷⁸⁴

⁷⁷⁵ A statutory right of occupancy is a grant made by the Governor on land in urban and non-urban area pursuant to the power vested in him by section 5(1) of the Act.

⁷⁷⁶ A customary right of occupancy is one granted by the Local Government over land in a non urban area exclusively pursuant to the power vested in it by section 6(1) of the Act.

⁷⁷⁷ It is said that 'the right is less than ownership and therefore cannot amount to a proprietary right over land. It is essentially and inextricably the right to use and occupy land.' See IA Umezulike, *ABC of contemporary land law in Nigeria*, First ed. (2013) Snaap Press Nigeria Ltd. at 81.

⁷⁷⁸Section 15 of the Act.

⁷⁷⁹ Section 11 of the Act provides that '[t]he Governor or any public officer duly authorised by the Governor in that behalf, shall have the power to enter upon and inspect the land comprised in any statutory right of occupancy or any improvements effected thereon, at any reasonable hours in the day time and the occupier shall permit and give free access to the Governor or any such officer to enter and inspect.' Also, section 14 of the Act provides that: '...the occupier shall have exclusive possession to the land the subject of the statutory right of occupancy against all persons **other than the Governor.**'

⁷⁸⁰ The holder of a right of occupancy cannot alienate his interest in the land without the consent of the Governor or Local Government being sought and granted: See ss. 21 and 22 of the Act.

⁷⁸¹ See s. 28 of the Act. For provision relating to revocation without compensation, see s.9(3) of the Act.

⁷⁸² See s. 29 of the Act.

⁷⁸³I.A Umezulike, *supra* (n 777) at 81, 82.

⁷⁸⁴*ibid* at 82. This view appears to be supported by Balogun J. when he said that: 'The holder of right of occupancy under the Act is strictly speaking not a free-holder nor a leaseholder, but he is not a mere licensee.' See Balogun J. in the text of a paper delivered at the Faculty of Law, University of Lagos (1982 Lectures).

The assertion that a right of occupancy is not a lease is said to be potent notwithstanding the references to the granting of sublease or sub-underlease pursuant to certain provisions of the Act⁷⁸⁵ for the following reasons: Unlike a lessee under English law, a holder of a right of occupancy has no exclusive possession for, by virtue of section 14 of the Act, 'the occupier shall have exclusive rights to the land the subject of the statutory right of occupancy against all persons other than the Governor'.⁷⁸⁶ Whereas, a lease cannot be revoked either by the lessor⁷⁸⁷ or by the state, a right of occupancy introduced under the Act is revocable for overriding public interest by the governor under section 28 thereof.⁷⁸⁸ A right of occupancy, unlike the English type lease, is inalienable⁷⁸⁹ without the consent of the Governor⁷⁹⁰

⁷⁸⁵ As Okuniga warned: 'Hence one must be wary: First against rashly inferring that a statutory right of occupancy is a leasehold interest simply because there are references to the grant of sub-lease or sub-underleases. The Act is no doubt sufficiently confusing in its provisions in this regard, but that does not entitle one to adopt the Humpty-Dumpty type of definition. The lease is a concept of English law and has its own characteristics and incidents unknown to our own indigenous system of landholding. The statutory right of occupancy does share with the English leasehold the quality of certainty of duration but that is about all that is invariably common to both.' See A.O Okuniga, 'The Land Use Act 1978 and Private Ownership of land in Nigeria' being text of a paper delivered at the Law Teachers Conference at the University of Ife, 1979.

⁷⁸⁶ A licensee is not given and is not expected to have or exercise exclusive possession over land subject matter of the license: See *Mobil Oil Nigeria Ltd v. Johnson* (1961) 1 All NLR 93.

⁷⁸⁷ Whilst it may be tempting to equate revocation to a right of re-entry for forfeiture under English law, reasons have been adduced for non-equation of the two concepts. According to Umezulike: 'In the first place whilst revocability like inalienability is an inexorable component of a right of occupancy under the Act, the liability of forfeiture is however not inherent in a lease. It arises only from express stipulation in the instrument creating the lease and cannot be exerted in the absence of a forfeiture clause except where the tenant denies the lessor's title, or is in breach of an obligation which is expressly stated to be a condition of the lease.' It is also said that while revocation is peremptory and automatic upon service of the notice of revocation, forfeiture of a lease is not automatic or self operating; it can only be ordered by the court, and the court may even refuse to grant it if there are grounds to grant the tenant relief against forfeiture: See I.A Umezulike, *supra* (n 762) at 86.

⁷⁸⁸In *Premchand Nathu and Co. Ltd v. Land officer*(1963) A.C 177 at 189, the Privy Council held that: 'The right of revocation conferred upon the Governor is a right which is quite unknown in the law of England and bears little resemblance to a lessor's right of re-entry or forfeiture.'

⁷⁸⁹For the right of the lessee to alienate his interest to be streamlined or prohibited, the lease agreement must so stipulate. Thus, unlike the English lease, the requirement of consent is not an element superimposed on the right of occupancy but is an intrinsic component of it.

⁷⁹⁰ Land Use Act 1978 Cap L5 Laws of the Federation of Nigeria, 2010, s. 22 (1).

or the Local Government⁷⁹¹ otherwise, such alienation is void⁷⁹² and in certain circumstances, illegal with penalty in the form of fine or imprisonment.⁷⁹³

Summarising the incidents of a right of occupancy which makes it different from the proprietary land rights under English law, Umezulike observes that:

- (a) The right cannot be alienated without the consent of the Governor first had and obtained.
- (b) The Governor can enter upon the land for inspection without the consent of the holder of statutory right of occupancy free from any civil or criminal sanctions.
- (c) The holder's right is subject to the Governor's wide and uncertain powers of revocation which are free from judicial control [once due process is followed].
- (d) Upon revocation by the state, compensation is not payable to the holder for the land *per se* but for the un-exhausted improvements on the land,
- (e) Devolution upon heirs of a holder under a will or intestate is no longer automatic. The consent of the Governor is necessary for its legal validity.

.....⁷⁹⁴

While the Act preserves pre-existing laws on land rights and land transactions including the statutes of limitation and land registration laws, application of these laws is subject to its provisions.⁷⁹⁵ Any acquisition of title or transactions on land not in accordance with its provisions is null and void.⁷⁹⁶ The root of title by transferees of rights of occupancy relates to the initial grant actual or deemed by the Governor, and that is the rationale behind the requirement of requisite consent by the transferor.

⁷⁹¹ibid s. 21.

⁷⁹² ibid s. 26.

⁷⁹³ ibid s.36(6). This is a situation where there is a total bar on alienation with regard to agricultural land in non-urban areas and in respect of which there is a total bar on alienation and therefore, the land cannot be sub-divided or laid out in plots: See s.36(5) of the Act.

⁷⁹⁴IA Umezulike, supra (n 777) at 82.

⁷⁹⁵ Land Use Act, supra (n 750) s. 48

⁷⁹⁶ibid s.26.

How does a squatter's possession qualify as adverse possession under the dispensation of the LUA, for the limitation period to run in his favour? In the first place, no right or interest in land exists or cognisable under the Act unless it is the subject of a grant by either the Governor or the Local Government, or traceable to that grant; it cannot exist outside a grant. Thus while the basis of adverse possession at common law is the possession of the squatter as opposed to the title of the dispossessed owner, the Act recognises no such exercise of possession that is not tied to a grant by the Governor or the Local Government.

Secondly, the question whether a squatter is in exclusive possession so as to satisfy the requirement of law for him to dispossess the actual owner, is a question of law dictated by sections 11 and 14 of the Act. As an occupier, the squatter 'shall have exclusive rights to the land subject of the statutory right of occupancy against all persons *other than the Governor*'.⁷⁹⁷ In this regard, the Governor on his behalf, or through a public officer duly authorised by him, 'shall have the power to enter upon and inspect the land comprised in any statutory right of occupancy or any improvements effected thereon...and the occupier [the squatter] shall permit and give free access...'.⁷⁹⁸ Thus, the outward exercise of possession by the squatter is understood or taken as exclusive against all but the Governor who retains the residual legal right to enter into possession at any reasonable hour in the day time.

Thirdly, section 37 of the Act frowns against illegitimate claims to land and prescribes penalty there for. The section provides:

If any person other than one in whom any land was lawfully vested immediately before the commencement of this Act enters any land in purported exercise of any right in relation to possession of the land or makes any false claim in respect of the land to the Governor or any Local Government for any purpose under this section he shall be guilty of an offence and liable on conviction to imprisonment for one year or to a fine of N5,000.

The effect of the foregoing provision is to make any claim by a squatter after the coming into effect of the Act on March 29 1978 not merely wrongful or unlawful, but

⁷⁹⁷ibid s.14.

⁷⁹⁸ ibid s. 11.

illegal.⁷⁹⁹ The essence is to discourage any person in whom the land was not lawfully vested by a grant; actual or deemed, from entering any land in purported exercise of any right of possession, and the squatter or trespasser is such a person. If a statute has declared initial entry by an adverse possessor illegal, it is difficult to see the basis for the recognition of such adverse possession in law for, the rule is, *ex turpi causa non oritur action*.⁸⁰⁰

Section 48 of the Act which preserves pre-existing laws provides that 'all existing laws relating to the registration of title to, or interest in, land or the transfer of title to or any interest in land shall have effect subject to such modifications... as will bring those laws into conformity with this Act or its general intendment.' The literal interpretation of this provision is that the Act preserves all pre-existing laws on *land registration* or *transfer of title to, or interest in land*. If that is the case, it could be argued that the doctrine of adverse possession is not preserved by the Act since it is not a *transfer of title to, or interest in land*.⁸⁰¹ Technically, at common law, an adverse possessor gets title at the expiration of the limitation period not by virtue of any transfer of title, but by virtue of his own possession of land; his title is not derivable from the extinguished title of the owner, but consequent upon and rooted in his own possession.⁸⁰² This interpretation accords with the various provisions of the Act which actually frustrate the application of the doctrine, as discussed hereafter. The fact that the common law of England had been received into the Nigerian legal system through the local reception statute⁸⁰³ is of no moment since the received common law is subject to the Nigerian local circumstances and local legislation, and the Nigerian LUA is one of such local statutes.

⁷⁹⁹This is so because it runs counter to the provisions of statute and carries penalty.

⁸⁰⁰ 'From the dishonourable cause, an action does not arise.' It is a legal doctrine which states that a claimant will be unable to pursue legal remedy if it arises in connection with his own illegal act.

⁸⁰¹ Perhaps this is a proper situation where the courts are obligated to discard the strict literal constructionist interpretation and apply a purposive interpretation in a situation such as this, where this approach will lead to absurdity. Such interpretation, if adopted by the court, could interpret the provision of section 48 to cover the doctrine of adverse possession: See *Escoigne Properties Ltd v. IRC* (1958) AC 549, per Lord Denning at 565; *Nigerian Army v. Aminu Kano* (2010) 5 NWLR (Pt 1188) 429.

⁸⁰²See *Gatward v. Alley* (1940) 40SR NSW) 174 at 196.

⁸⁰³ See the Law (Miscellaneous Provisions) Act Cap 89 Laws of Nigeria, 1958, s.45(2).

Under the Limitation Laws applicable in Nigeria, 'a right of action to recover land will not be deemed to accrue unless the land is in possession [referred to as adverse possession] of some person in whose favour the period of limitation can run.'⁸⁰⁴ For the purpose of accrual of right of action to the person entitled to possession, the right of action will be deemed to have accrued on the date of dispossession by the adverse possessor or on the date when the person entitled to possession discontinued with possession accordingly.⁸⁰⁵

However, section 37 of the Act makes it impossible for a holder of a right of occupancy, actual or deemed to be dispossessed by a squatter. That would suggest entry on land by the squatter 'in purported exercise of a right in relation to possession of the land, 'contrary to the provision of that section, and where he seeks consent of the Governor to alienate his right in furtherance of his right of possession, it would amount to making a false claim in respect of the land for that purpose in violation of the provision. Also, it would appear that entry into possession by a squatter following the discontinuance of possession by a person entitled to possession, is also a violation of the provision of section 37, and an attempt to obtain Governor's consent to validate any form of alienation thereafter amounts to making a false claim.

Assuming, *arguendo*, that the limitation period runs in favour of the squatter consequent upon dispossession of, or discontinuance of possession by a person entitled to possession resulting in extinguishment of right of occupancy of the person entitled to possession, the purported title acquired by the adverse possessor is precarious in view of section 27 of the Act which allows the Governor to 'accept ...the surrender of any statutory right of occupancy granted under this Act'. Thus, where the holder of the statutory right of occupancy against whom time has run under the statute of limitation surrenders the right of occupancy to the Governor who accepts same, the possessory title obtained by the squatter although good against the whole world including the holder of the right of occupancy, is not,

⁸⁰⁴ *ibid* s. 19(1).

⁸⁰⁵ *ibid* s. 16.

against the Governor who can exercise the right of re-entry and eject the adverse possessor.⁸⁰⁶ The cause of action will not arise for the purpose of time running under the statute of limitations until the term of the right of occupancy has lapsed.

Also, relevant acts of exclusive possession exercised by any person which is not supported by a right of occupancy or licence is illegal, and penalty imposed for unauthorised use of land. Section 43 of the Act provides:

- (1) Save as permitted under section 34 of this Act,⁸⁰⁷ as from the commencement of this Act, no person shall in an urban area –
 - (a) erect any building, wall, fence or other structure upon; or
 - (b) enclose, obstruct, cultivate or do any act on or in relation to, any land which is not the subject of a right of occupancy or licence lawfully held by him or in respect of which he has not received the permission of the Governor to enter and to erect improvement prior to the grant to him of a right of occupancy.
- (2) Any person who contravenes any of the provisions of subsection (1) of this section shall on being required by the Governor so to do and within the period of time fixed by the Governor, remove any building, wall, fence, obstruction, structure or thing which he may have caused to be placed on the land and he shall put the land in the same condition as nearly as may be in which it was before such contravention.
- (3) Any person who contravenes any of the provisions of subsection (1) of the section shall be guilty of an offence and liable on conviction to imprisonment for one year or to a fine of =N=5000.

⁸⁰⁶ This tallies with the position of the reversioner *vis a vis* the adverse possessor in cases of leaseholds under English law: See *Fairweather v. St Marylebone Property Co. Ltd* [1963] A.C 510.

⁸⁰⁷ Section 34 deals with deemed grants by the Governor in respect of title existing prior to the enactment of the Land Use Act, 1978.

- (4) Any person who fails or refuses to comply with a requirement made by the Governor under subsection (2) of this section shall be guilty of an offence and liable on conviction to a fine of =N= 100 for each day during which he makes default in complying with the requirement of the Governor.

The foregoing provisions have made it clear that acts of exclusive possession which is necessary to be exhibited to qualify a squatter for adverse possession in order for time to run in his favour under the limitation law are not only prohibited under the Act, but are also made illegal with penal consequences. The provisions buttress the fact that unless land is the subject matter of a grant of a right of occupancy or a licence, any form of occupation under whatever motive or mistaken belief as to legitimate entitlement, is unlawful.

It is the position of this thesis therefore that all Nigerian cases on adverse possession decided post March 29 1978 (when the Land Use Act was enacted) in which the cause of action arose after that date,⁸⁰⁸ without taking cognisance of the relevant provisions discussed above would have been decided *per incuriam* and may very likely be overturned by an appellate court on appeal upon a party successfully canvassing the issue before it, or reversed by the Supreme Court in future. The application of the doctrine of adverse possession is indeed, negated by the provisions of the Land Use Act. This is so notwithstanding the extant statutes of limitation applicable in Nigeria - provisions of which apply subject to proof of adverse possession,⁸⁰⁹ and time will not run against a land owner where the claimant does not qualify as an adverse possessor.

5.3.6 *The State Lands Law*

Apart from the Land Tenure Law applicable in the Northern States of Nigeria, the Land Use Act retains the application of the State Lands Law applicable in each state

⁸⁰⁸ Such cases include *Majekodunmi v. Abina* [2002] 3 NWLR (Pt 755) 720; *Akibu v. Azeez* [2003] 5 NWLR (Pt 814) 643; *Ojuko v. Shelle* [2004] 6 NWLR (Pt 868) 17; *Elabanjo v. Dawodu* [2006] 15 NWLR (Pt 1001) 76; *Holloway v. Jimoh* [2020] 2 NWLR (Pt 707) 27.

⁸⁰⁹ Limitation Act Cap 522 Laws of the FCT 2007, s. 19(1).

of the federation 'until other provisions are made in that behalf and subject to the provisions of the Act.'⁸¹⁰

The State Lands Law applicable in the various states of the federation⁸¹¹ does not recognise the interest of the adverse possessor, and excludes the application of the Statute of limitation from its ambit. Section 32 of that Law provides that 'no action or other remedy by or on behalf of the State for recovery of possession of State land shall be barred or affected by any statute, ordinance or other law of limitation'. In addition, 'any person who shall unlawfully occupy State land, in any manner whatsoever, shall be liable to a fine of =N=100.' The claim of adverse possession on State land is undoubtedly an offence and cannot extinguish the title of the State at any point in time. The position of this thesis therefore is that the State Lands Law applicable in the various states within the Nigerian federation makes the common law doctrine of adverse possession inapplicable.

5.3.7 *Federal Government Ownership of land in the Federal Capital Territory (FCT)*

As discussed earlier, the Land Use Act does not apply in the Nigeria Federal Capital Territory, Abuja.⁸¹² However, section 13 of the Federal Capital Territory Act 1976 (FCT Act) provides that:

In addition to any law having effect or made applicable throughout the federation, the laws set out in the Second Schedule to this Act shall as from the 9th May 1984 apply in the Federal Capital Territory

Two categories of laws are applicable in the FCT pursuant to the foregoing provision of the FCT Act. The first is any law having effect or made applicable throughout the federation of Nigeria. This covers the received English law discussed in the last chapter which includes the doctrine of adverse possession; and laws set out in the Second Schedule to the Act. Amongst other local statutes listed under the Second Schedule to the Act, item 53 listed the Limitation Act 1966, while item 85 listed the State Lands Act. Whilst the common law of adverse possession applies along with

⁸¹⁰ Supra (n 750) s.4.

⁸¹¹ See for example, State Lands Law of Lagos State, Law No. 8 2015, s. 100.

⁸¹² *Ona v. Atenda* (2000) 5 NWLR (Pt 656) 244.

the Limitation Act 1966 to enable the application of the doctrine in the FCT, the provisions of the State Lands Act with similar provisions with the states counterpart, renders the doctrine inapplicable to State Land. Consequently, since parcels of land in the FCT are being allocated and statutory right of occupancy granted accordingly, State land can only refer to any unallocated land. Entry into such land is not only an offence as earlier discussed, it does not pave way for the application of the common law doctrine of adverse possession applicable in England and Wales.

5.4 Adverse Possession and Statutes of Limitation in Nigeria

The statute of limitation applicable in the Federal Capital Territory of Nigeria known as the Limitation Act with corresponding statutes of limitation applicable in the various states of the federation (Statute of Limitations Law) are similar in material particulars to the English Limitation Act, 1980, but far from being identical. Relevant provisions of the Limitations Act of Nigeria are reproduced below for purposes of analysis:

Section 16 provides:

- (1) Subject to the provisions of subsection (2) and (3) of this section, no action will be brought by a State authority to recover any land after the expiration of twenty (20) years from the date on which the right of action accrued to the State authority, or if it first accrued to some person through whom the State authority claims, to that person.
- (2) The following provisions will apply to an action by a person to recover land-
 - (a) subject to paragraph (b) of this subsection, no such action will be brought after the expiration of twelve (12) years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom there are claims, to that person;

- (b) if the right of action first accrued to a State authority, the action may be brought at any time before the expiration of the period during which the action could have been brought by the State authority or of twelve (12) years from the date on which the right of action accrued to some person other than the State authority, whichever period first expires.
- (3) For the purpose of this Law, a right of action to recover any land which accrued to the Republic...before the commencement of this Law will be deemed to have become exercisable by an appropriate State authority on the date on which it first accrued to the Republic...

As to when the right of action accrues for the purpose of the application of the Limitation Act, section 17 provides:

Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof and has while entitled to it been dispossessed or has discontinued the possession, the right of action will be deemed to have accrued on the date of the dispossession or discontinuance.⁸¹³

Section 19 of the Act makes adverse possession a pre-requisite for the application of the limitation period. The section provides:

- (1) A right of action to recover land will not be deemed to accrue unless the land is in possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run.
- (2) Where-

⁸¹³ Where a person brings an action to recover land of a deceased person under a will or an intestacy and the deceased person was, on the date of death entitled to the land in possession and was the last person entitled to the land in possession, the right of action shall accrue on the date of the death: See section 18 (1) (2) of the Act.

(a) under the provisions of this Act a right of action to recover land is deemed to accrue on a certain date; and

(b) no person is in adverse possession of the land on that date;

the right of action will not be deemed to accrue unless and until adverse possession is taken of the land.

- (3) Where a right of action to recover land has accrued, after and before the right of action is barred, the land ceases to be in adverse possession, the right of possession will no longer be deemed to have accrued and no fresh right of action will be deemed to accrue unless and until the land is again taken into adverse possession.

By virtue of the provision of section 20 of the Act, 'no person will be deemed to be in possession of any or adverse land by reason only of having made a formal entry on it;⁸¹⁴ and 'no continual or other claim upon or near any land will preserve any right of action to recover the land.'⁸¹⁵

Section 21 of the Act provides that 'on the expiration of the period fixed by this Law for any person to bring an action to recover land, the title of that person to the land will be extinguished.'

The law will not apply to actions in respect of any matter which, immediately before the commencement of the Act was regulated by customary law.⁸¹⁶

5.4.1 *Judicial Interpretation of the Nigerian Statutes of Limitation in relation to Adverse Possession*

It has been held that time begins to run under the statute of limitation when possession is lost save where there is fraudulent concealment;⁸¹⁷ in other words, the period of limitation begins to run from the date of adverse possession of the land by

⁸¹⁴ Limitations Act supra (n 794) s. 20(a)

⁸¹⁵ *ibid* s. 20(b).

⁸¹⁶ *ibid* s. 68.

⁸¹⁷ *Kasandubu v. Ultimate Petroleum Ltd* (2008) 7 NWLR (Pt. 1086) 274.

another person.⁸¹⁸ The effect of the operation of the statute of limitation is, like the position at common law, not merely to deny the right of action; it completely extinguishes an existing right at the expiration of the limitation period⁸¹⁹ so that the adverse possessor acquires rights to the land which are enforceable against the real owner of the land. In the words of Uwaifo JSC in *Majekodunmi v. Abina*⁸²⁰:

Although sections 17 and 21 of the Limitation Law...are about the person bringing an action to recover land, the manner in which they can possibly, in their effect, provide an estate in favour of an adverse possessor is somehow reflected in the observation of Cozens-Hardy M.R in *In re Atkinson and Horsell's Contract* (1912) 2 Ch. 1 at page 9 as follows:

We have had a great deal of discussion as to the effect of the Statute of Limitation in a matter of this kind. As I indicated in the course of Mr Macnaghten's reply, my present view is that the phrase 'statutory conveyance' and so on, is a loose metaphorical term, and that the true view is this, that whenever you find a person in possession of property that possession is prima facie evidence of ownership in fee, and that prima facie evidence becomes absolute when once you have extinguished the right of every other person to challenge it. That is the effect of s.34 of the Real Property Limitation Act, and that explains how the person who has been in possession for more than the statutory period does get an absolute legal estate in the fee, and there is nobody who can challenge the presumption which his possession of the property gives.

It follows therefore that adverse possession may be used as a sword and a person in adverse possession can, upon the extinction of the title of the former owner following the expiration of the limitation period, maintain an action in trespass against the former owner or any person purporting to have acquired interest in the land through him.⁸²¹

However, it is incumbent on the claimant to show not only that he has been in possession for the requisite number of years, but also that the title holder has been dispossessed or has discontinued his possession.⁸²² Mere non user does not amount

⁸¹⁸*Eresia-Eke v. Orikoa* (2010) 8 NWLR (Pt. 1197) 421.

⁸¹⁹*Odekilekun v. Hassan* (1997) 12 NWLR (Pt. 531) 56 at 76-77 paras G-A.

⁸²⁰ (2002) 3 NWLR (Pt 755) 720.

⁸²¹*Odubeko v. Fowler* (1993) 7 NWLR (Pt. 308) 637.

⁸²²*Majekodunmi v. Abina*, supra (n 805).

to discontinuance of possession;⁸²³ 'there must be something in the nature of an ouster of the true owner by the wrongful possessor.'⁸²⁴ Also, there is no abandonment unless there is abandonment of the actual and legal possession of the land.⁸²⁵ In the words of Uwaifo J.S.C in *Majekodunmi v. Abina*⁸²⁶:

...the fact of legal estate in fee being obtained through possession is subject to the adverse possessor proving that the title holder has been dispossessed, or has discontinued possession and that he has extinguished the right of every other person to challenge his having become the absolute owner in fee.

For a claim of adverse possession to succeed, such possession must be adequate in continuity, in publicity and in extent to show that possession was adverse to the competitors;⁸²⁷ it must be one which derogates from, and inconsistent with the ownership title of a person who claims to be the true owner of the land.⁸²⁸ Knowledge of the actual owner of the land is irrelevant for the commencement of the running of the limitation period.⁸²⁹

The Statutes of Limitation do not apply to land held under customary land tenure; no matter how long an adverse possessor remained on land under customary tenure, his possession cannot ripen into rights of ownership in the land against the original owner. In the words of Dongban-Mensem, JCA in *Ogunlana v. Dada*⁸³⁰:

Land possession and ownership is a customary practice which is jealously guarded in different forms by different communities in Nigeria. One common denominator in all these practices is the perpetuity of land ownership by its original owners. In the instant case, it would therefore be importing an alien customary law into the

⁸²³ibid per Uwaifo JSC, relying on the English case of *Littledale v. Liverpool College* (1900) 1 Ch. 19 at 22.

⁸²⁴ ibid per Uwaifo JSC relying on Lord Denning M.R in the English case of *Wallis Ltd v. Shell-Mexand BP* (1974) 3 All ER 575 at 580.

⁸²⁵*Majekodunmi v. Abina*, supra (n 805) relying on the English case of *Norton v. London and North Western Railway Co.* (1879-1880) 13 Ch.D 268 at 273.

⁸²⁶supra (n 72).

⁸²⁷*Adejumo v. Olawaiye* (1996) 1 NWLR (Pt 425) 436.

⁸²⁸*Adedeji v. Oloso* (2007) 5 NWLR (Pt 1026) 133.

⁸²⁹*Ajibona v. Kolawole*(1996) 10 NWLR (Pt. 467) 22; *Akibu v. Azeez*(2003) 5 NWLR (Pt. 814) 643; *Elabanjo v. Dawodu*(2006) 15 NWLR (Pt. 1001) 76.

⁸³⁰(2010) 1 NWLR (Pt.1176) 534 at 564 paras C-D.

Yoruba customary law holding to apply the Statutes of Limitation to divest the Itire people⁸³¹ of their customary law title.

Whilst the above pronouncement is a re-statement of the provision of the Limitation statutes on the non applicability of the statutes to customary land tenure,⁸³² it is necessary to clarify its scope. Contrary to the pronouncement, the provision of the limitation statutes is not limited to 'Yoruba customary law holding' as erroneously suggested, but applies to all customary land tenure systems across Nigeria. The provision of statute is not only unequivocal, judicial authorities emanating from the Supreme Court of Nigeria⁸³³ and other appellate courts⁸³⁴ suggest that the statutory provision applies to customary land tenure generally.

Islamic law of land tenure is not specifically exempted from the application of the Statute of limitation. However, considering the fact that the reception statutes transplanted the English common law subject to local circumstances, and to the extent that the Islamic principle of *hauzi* provides a parallel method of dealing with prescriptive right consequent upon stale claims in land⁸³⁵ while customary law is treated as including Islamic law by statutes applicable in Northern Nigeria,⁸³⁶ it cannot be said that the statutes of limitation apply to holders of title under Islamic law.

5.5 Adverse Possession and Registered Land in Nigeria

Apart from the land instrument registration system which applies in the various states of the federation and the Federal Capital Territory⁸³⁷ under different

⁸³¹ 'Itire people' are indigenous people located in a geographical enclave on the Lagos Mainland area of Lagos-Nigeria

⁸³² See the Limitation Act 1966, s. 68.

⁸³³ See *Majekodunmi v. Abina*, supra (n 805).

⁸³⁴ See *Holloway v. Jimoh* (2020) 2 NWLR (Pt 1707) 27; *Adetula v. Akinyosoye* (2017) 16 NWLR (Pt. 1592). 492.

⁸³⁵ See chapter 6 *infra*.

⁸³⁶ See e.g. District Court Law of Niger State of Nigeria Cap 37 vol.1 1992, s.2; High Court Law of Katsina State of Nigeria Cap 59 1991, s.2.

⁸³⁷ See Land Registration Law Cap 97 Laws of Northern Nigeria 1958, applicable in the Federal Capital Territory of Nigeria.

nomenclature,⁸³⁸ the Registration of Titles system exists in Lagos State⁸³⁹ and in the Federal Capital Territory⁸⁴⁰ mainly.

The history of the Land Instruments Registration Law in Nigeria dates back to 1883 when compulsory registration of title deeds was introduced first in the colony of Lagos⁸⁴¹ by the Registration Ordinance of 1883.⁸⁴² Subsequently, the Land Registry Proclamation No. 16 of 1900 introduced the Registration of instruments in the protectorate of Southern Nigeria.⁸⁴³ An amalgamation of the two areas in 1906 resulted in the introduction of a unified system of registration under the Land Registration Ordinance of 1907, which amended the existing laws on registration of instruments.⁸⁴⁴ An enactment similar to this was in force in the Protectorate of Northern Nigeria under the Land Instrument Proclamation No. 10 of 1901; a law which was repealed by the Land and Native Rights Proclamation of 1910 (Part 2).⁸⁴⁵

The unification of the Northern and Southern Protectorates in 1914 resulted in the re-enactment of the pieces of legislation into a single legislation known as the Land Registration Ordinance No. 12 of 1915 applicable throughout the country.⁸⁴⁶ This Law was subsequently amended and became known as the Land Registration Ordinance No. 36 of 1924, which remained the principal legislation regulating land

⁸³⁸ The precursor of the State Laws was the Land Registration Act No. 36 of 1924 (Cap 515 LFN 2004) which was enacted for the whole country and later adopted and re-enacted in the various states under different nomenclature. See Cap 56(W/N) 1959 adopted as Cap 70 Laws of Oyo State of Nigeria 2000, Cap 64 Laws of Osun State of Nigeria 2002, Cap 74 Laws of Ondo State of Nigeria 2006, Cap L54 Laws of Ogun State of Nigeria 2006; Cap 72 (E/N) 1963 adopted for example, as Cap 75 Laws of Anambra State of Nigeria 1991; Cap 58 (N/N) 1963 adopted for example as Cap 83 Laws of Kwara State of Nigeria 2007, Cap 75 Laws of Taraba State of Nigeria 1997, Cap 82 Laws of Jigawa State of Nigeria 1998, Cap 77 Laws of Bornu State of Nigeria 1994, Cap 85 Laws of Kaduna State of Nigeria 1991, Cap 74 Laws of Katsina State of Nigeria 1991, Laws of Niger State of Nigeria 1992, Cap 77 Laws of Kano State of Nigeria 1991; and Cap L58 Laws of Lagos State of Nigeria

⁸³⁹ See the Registration of Titles Law, 2015

⁸⁴⁰ Cap 546 Laws of the Federation of Nigeria (Abuja) 1990.

⁸⁴¹ At that time, the Colony of Lagos was administered as part of the Gold Coast, and the main objective of the Ordinance was to regulate registration of title instruments in the Gold Coast from where the Colony of Lagos was being administered: See O.W. Igwe, *Land Instruments Registration Law and Practice in Nigeria* (2014) Lap Lambert Academic Publishing, 14

⁸⁴² O.W. Igwe, *supra* (n 826) at 13-14.

⁸⁴³ *ibid* at 14.

⁸⁴⁴ *ibid*.

⁸⁴⁵ *ibid*.

⁸⁴⁶ *ibid*.

instrument registration in Nigeria.⁸⁴⁷ Consequent upon the creation of States in Nigeria in 1967, each of the states has since re-enacted the 1924 Act with similar provisions, but under slightly varying titles. The recognition of the Federal Government land under the provisions of the Land Use Act⁸⁴⁸ necessitated the enactment of the Federal Lands Registry (Miscellaneous Provisions) Decree No. 7 1992 (now re-designated as Act) 1992.

5.5.1 *Land Instruments Registration*

A registered title deed under the Land Instrument Registration Law is not a guarantee of the validity of the title covered by it, and *ipso facto*, does not cure any defect in it.⁸⁴⁹ Its main objective is to evidence transfer of title or dealing in the land shown on the registered Survey and assure priority of interest as against subsequent but not prior registration of instrument.⁸⁵⁰

5.5.2 *Registration of Titles*

These shortcomings in the Land Instrument Registration Law were responsible for the enactment of the Registration of Titles Act 1935⁸⁵¹, in Nigeria. This system of title registration was first applicable to the Southern Provinces, and since the regionalisation of the Laws, has become a regional legislation. The Act as amended was subsequently adopted by the Federal Territory of Lagos in 1935 as the Registration of Titles Law, which Law was subsequently repealed and replaced by the Land Registration Law of Lagos State 2015.⁸⁵² The Federal Capital Territory had adopted the Registration of Titles Act 1935 as part of its Laws.⁸⁵³ The aim of the 1935 Act was 'to make conveyancing simple, cheap, speedy and reliable by obviating

⁸⁴⁷ *ibid.* This legislation is preserved under section 48 of the Land Use Act 1978 Cap L5 Laws of the Federation of Nigeria, 2010.

⁸⁴⁸ *Supra* (n 847) s.47.

⁸⁴⁹ See for example, s.24 of Cap 75 Laws of Anambra State of Nigeria 1991, and correspondent provision in other states. See also *Onasanya v. Anifowose* 4FSC 94; *Folashade v. Duroshola* (1951) 1 All N.L.R 87.

⁸⁵⁰ See s. 23 Cap 75 Laws of Anambra state of Nigeria 1991 and corresponding provision in the Law of other states. See also *Amankara v. Zankley* (1963) 1 All N.L.R 304.

⁸⁵¹ Registration of Titles Act, Cap 181 1935.

⁸⁵² Land Registration Law No. 8 2015.

⁸⁵³ See Cap 546 Laws of the Federation of Nigeria (Abuja) 1990.

most of the difficulties and hazards to which a purchase of land is exposed...'⁸⁵⁴ It is said that 'once the title has been investigated and put on the register, proof of title becomes easier as the register becomes an evidence of title.'⁸⁵⁵

5.5.3 *Registration and Adverse Possession*

No system of registration in Nigeria could overreach adverse possession which is regarded as an overriding interest constituting an impediment to the acquisition of clean title to land, and the statutes of limitation applicable fortify this position. A registered title deed under the Land Instrument Registration Law may be defeated by adverse possession of the land beyond the limitation period. The 'paper owner' dispossessed by an adverse possessor or who discontinued possession allowing time to run in favour of a squatter, would have his title defeated and extinguished under the limitation statute, notwithstanding registration of his title deed.⁸⁵⁶

The same is the position of an adverse possessor vis-a-vis a registered proprietor whose title is bound by overriding interests of which adverse possession is one.⁸⁵⁷

Also, the title of the registered owner may be extinguished under the limitation law. Section 62 of the Registration of Titles Act (RTA) applicable in the FCT provides:

Where it is shown to the satisfaction of the court that the title of the registered owner of any land or charge has been extinguished under the provisions of the Limitation Law, the court may order the register to be rectified accordingly and the person suffering loss by such rectification shall not receive any compensation.

In the same vein, the provision of section 100 of the Land Registration Law of Lagos State (LRL) which is *in pari materia* with that of the RTA above provides:

Where the court is satisfied that the title of the registered holder of any land or any mortgage has been extinguished under the Limitation Law,

⁸⁵⁴ CO Olowoye, *Title to land in Nigeria*, 2nd ed. Evans, 132

⁸⁵⁵ *ibid.* See also *Onagoruwa v. Aderemi* (2001) 13 NWLR (Pt 721) 38 at 56, 63.

⁸⁵⁶ *Majekodunmi v. Abina*, *supra* (n 805) .

⁸⁵⁷ Registration of Titles Act Cap 181 Laws of Nigeria 1958, s.52(h); Land Registration Law of Lagos State 2015, s.66(f). See *Onagoruwa v. Aderemi*, *supra* (n 804).

the Court may order the register to be rectified accordingly, and the person aggrieved by such a rectification shall not receive any compensation.

Thus, apart from the fact that the title of an adverse possessor constitutes an overriding interest to which any registered land is subject, the adverse possessor may register such title after rectification of the register pursuant to an order of court upon satisfactory proof that the title of the registered owner has been extinguished under the Limitation Law. It follows therefore that the adverse possessor of registered land has no obligation to register his title since same constitutes an overriding interest binding on the registered proprietor and any person deriving title from such registered proprietor; but he is also at liberty to register same as he may wish.

However, while the title of the adverse possessor may be registered after rectification of the register pursuant to a court order, this procedure for registration is affected by delays experienced in courts as the title of the adverse possessor remains inchoate until the court exercises its discretion in his favour. That the Registrar of titles is incapacitated to facilitate the registration of an adverse possessor without a court order is very clear from the observation of the Supreme Court of Nigeria in *Majekodunmi v. Abina*,⁸⁵⁸ regarding the RTA that:

The duty of the Registrar is to investigate the title of an applicant; he is required to act strictly on legal evidence or evidence ordinarily required by conveyancers. His power is confined to acceptance or refusal of the application for registration and he cannot be expected to decide the question as to ownership of land arising from long possession which is a decision on the Limitation Law.⁸⁵⁹

Thus, in the absence of evidence of adverse possession such as the judgment and order of a court of competent jurisdiction, it would appear that there is no avenue for the adverse possessor to seek to register his title under the RTA applicable in the FCT, or the LRL of Lagos State.

⁸⁵⁸ *supra* (n 805).

⁸⁵⁹ *ibid.*

The situation is compounded by the provision of section 112(2) of the LRL of Lagos State 2015, which requires the adverse possessor prior to application to court for an order, to advertise or give notice in a manner as the Registrar may require, although no response is required from the registered proprietor.

Upon rectification of the register and registration of the adverse possessor, no compensation is payable to the 'aggrieved person' or 'the person suffering loss' as a result of such rectification. The rationale for non payment of compensation after rectification is that since the registered owner has always held the land subject to the title of the adverse possessor which constitutes an overriding interest, the registered owner cannot be said to have suffered any loss.⁸⁶⁰

5.6 Adverse Possession and Human Rights in Nigeria

The question whether the doctrine of adverse possession is subject to human rights challenge in Nigeria shall be engaged by examining the relevant provisions of the Nigerian Constitution and the African Charter on Human and Peoples' Rights domesticated as part of Nigerian law.

5.6.1 *The Nigerian Constitution*

Nigeria operates a constitutional democracy, and successive written constitutions made provisions for the protection of right to property.⁸⁶¹ The extant constitution of the country guarantees right to property,⁸⁶² subject to a number of exceptions.⁸⁶³ Section 44 of the Constitution of the Federal Republic of Nigeria as amended provides:

- (1) No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things-

⁸⁶⁰ That was the construction ascribed to s.83(1) of the English Land Registration Act 1925 per Clouston J. in *Re Chowood Registered Land* [1933] Ch 574 at 580, 582.

⁸⁶¹ See e,g, The Nigerian Republican Constitution, 1963, s.31; The Constitution of the Federal Republic of Nigeria 1979, s. 40; The Constitution of the Federal Republic of Nigeria 1999 as amended, s. 44.

⁸⁶² See the Constitution of the Federal Republic of Nigeria, 1999 as amended, s. 44(1).

⁸⁶³ *ibid*, s. 44(2).

- (a) requires prompt payment of compensation therefore
 - (b) gives any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.
- (2) Nothing in subsection 1 of this section shall be construed as affecting any general law:
- ...
- (i) relating to limitation of actions.

The foregoing constitutional provisions protect property rights save in circumstances prescribed by a law which allows for prompt payment of compensation, and gives the owner of the right access to court for purposes of determining the extent of such right and the amount of compensation payable.

However, the protection of this right shall not affect 'any general law relating to limitation of actions;' in other words, the exercise of adverse possession by a squatter over the period stipulated under the limitation law shall not be affected by the constitutional protection of property right. The effect of section 44(2)(i) of the Nigerian Constitution therefore, is to make the enforcement of the limitation law non-susceptible to human rights challenge.

5.6.2 *The African Charter on Human and Peoples' Right*

On June 22 1983, Nigeria ratified the African Charter on Human and Peoples' Rights⁸⁶⁴ and subsequently domesticated its content as part of Nigerian law,⁸⁶⁵ pursuant to the provision of section 12(1) of the Nigerian Constitution 1979.⁸⁶⁶ Article 14 of the African Charter provides that:

⁸⁶⁴ The African Charter on Human and Peoples' Rights was adopted by member States of the then Organisation of African Unity (O.A.U) now known as the African Union (A.U) in 1981 in Nairobi, Kenya and came into effect on 21 October 1986.

⁸⁶⁵ The African Charter (Ratification) Act 1983. See Cap A10 Laws of the Federation of Nigeria 2010.

⁸⁶⁶ Section 12(1) of the Constitution of the Federal Republic of Nigeria 1979 (the same provision in the extant Constitution of the Federal Republic of Nigeria 1999), provides that: 'No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.'

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community in accordance with the provisions of appropriate law.

Whilst the status of the provision of the above Article as a guarantee of right to property is not in doubt, the vagueness of the circumstances for derogation by the State betrays its effectiveness as an instrument meant to curb the despotism and flagrant violation of property rights by many governments in Africa prior to its coming into effect. It is said that 'the provisions of the African Charter are [too] brief and vague and in some circumstances, allow national laws [which it was meant to check] to limit or derogate from these rights without setting any standard for such national law.'⁸⁶⁷ This is said to be contrary to the well defined clauses on circumstances for derogation from those rights by the State set out in many international instruments on human rights⁸⁶⁸ including the European Convention on Human Rights ECHR. In particular, section 44 of the Nigerian Constitution on protection of property rights which the Charter was meant to compliment, contains a better and much more detailed provisions on circumstances under which the right may be derogated from by the State, than the Charter. For example, whilst the question whether the derogation clause in Article 14 of the Charter covers limitation of actions in relation to adverse possession would depend on the court's interpretation of the vague clause on derogation by the State from the property right guaranteed, section 44(2) of the Nigerian Constitution catalogued the various circumstances under which the right may be derogated from by the State which includes the general law on limitation of actions. Consequently, section 44(2) of the Nigerian Constitution is a better protection and affords a better defence to an adverse possessor than the provision of Article 14 of the African Charter on Human and Peoples' Rights.

⁸⁶⁷ N Ogbu, 'The African Charter on Human and Peoples' Rights as Incompatible with despotism: The Nigerian Experience' (2005) 8 UBLJ 113 cited by E Ekhaton in 'The impact of the African Charter on Human and Peoples' Rights on domestic law: A case study of Nigeria.' (2015) Commonwealth Law Bulletin vol. 41, No. 2 253 at 255.

⁸⁶⁸ A Ali, 'Derogation from Constitutional Rights and Its Implications under the African Charter on Human and Peoples' Rights' (2013) 1 LDD 78.

5.6.3 Adverse Possession within social context in Nigeria: Informal settlements and forced evictions.

Given that the approach of this thesis is the application of the doctrine of adverse possession within social context,⁸⁶⁹ it is necessary to examine the issue of proliferation of informal settlements⁸⁷⁰ on land over a long period of time far beyond the limitation period in law, by persons and communities, resulting in forced evictions by the State.⁸⁷¹ This is necessary in order to give a complete picture of the efficacy of the doctrine of adverse possession in Nigeria.

The history of successive governments in Nigeria is replete with 'grandiose commitments to improve housing conditions and the failure to take adequate measures to realise those commitments.'⁸⁷² The Federal Mortgage Bank of Nigeria estimated the housing deficit at a staggering figure of 22 million units.⁸⁷³ In Lagos alone, the State government put the average population living in informal settlements at 70% out of the total inhabitants of the State, with the housing deficit standing at 2.5 million units.⁸⁷⁴ In cities such as Lagos, Ibadan, Kano and Abuja, it is said that 'housing demand is growing by about 20% each year.'⁸⁷⁵ The recurrent failure of government to fulfil housing obligations has resulted in the proliferation of informal settlements by the homeless. These informal settlements actually provide shelter for the homeless, keeping their privacy and family safe and putting the land to productive use while remitting taxes to government.

⁸⁶⁹ See paragraph 1.5 ante.

⁸⁷⁰ L Farha refers to UN Habitat as suggesting that '69 per cent of the urban population lives in informal settlements.' Also, in 2014, both WHO and UNICEF 'estimated that 69% of urban population in Nigeria is living in slums': See generally L Farha, 'Visit to the Republic of Nigeria by Ms Leilani Farha, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context. End of Mission Statement, 23 September 2019.' Available online at www.ohchr.org/EN/Pages/Home.aspx, 3 accessed on 9 December 2019.

⁸⁷¹ Amnesty International reported that 'between 2000 and 2009, authorities across Nigeria forcibly evicted over 2 million people,' and more evictions have taken place in different parts of the country since then. In Rivers State, forced evictions involving 28,600 people took place between 2009 and 2016; while there were forcible evictions in Lagos involving 50,000 people since 2013. Many of these evictions took place along the water front. See generally, Amnesty International Report 2016/2017.

⁸⁷² L. Farha, (n 855) at 2.

⁸⁷³ *ibid.*

⁸⁷⁴ *ibid.*

⁸⁷⁵ *ibid.*

However, recent Reports⁸⁷⁶ on informal settlements by various communities in Lagos, and other towns and cities in Nigeria including the Federal Capital Territory Abuja show that government takes no cognisance of their long possession against the backdrop of gross inadequacy of housing, and lack of access to decent accommodation. Instead, for reasons ranging from labelling the communities as a public health and safety threat, to the quest for provision of luxury apartments, facilities and infrastructure in transforming places such as Lagos and Abuja to mega cities, government embarked on forced evictions in defiance of constitutional⁸⁷⁷ and international⁸⁷⁸ obligations. Paradoxically, while ‘forced evictions are often justified by the government as “slum upgrading,” or “development” projects, they consistently fail to benefit vulnerable Nigerians and seem to serve only the interests of private investors.’⁸⁷⁹

Since forced evictions are carried out without notice to, or consultation with the communities, and accomplished with ‘inadequate or no compensation and/or resettlement, resulting in homelessness or further impoverishment’ of the evictees, they constitute serious infraction of basic human rights. Such evictions violate the provisions of the Nigerian constitution and the African Charter on Human and Peoples’ Rights on the right to housing and shelter, equal treatment by the law, the right to property and freedom from discrimination.⁸⁸⁰ Forced evictions also violate a number of international conventions⁸⁸¹ and contradict the *United Nations Basic Principles and Guidelines on Development based Evictions and Displacements, 2007*.

⁸⁷⁶ See Amnesty International, Nigeria: ‘Analysis of The Air Force Raid In Adamawa State’ in www.amnesty.org/en/documents/afr44/7785/2018/en/ accessed on 19/11/2019; Amnesty International Nigeria: ‘The human cost of a megacity: Forced evictions of the urban poor in Lagos’ in www.amnesty.org/en/documents/afr44/7389/2017/en/ accessed on 19/11/2019.

⁸⁷⁷ Constitution of the Federal Republic of Nigeria, 1999 ss. 13-17, 33, 34, 37, 42, 43, 44.

⁸⁷⁸ African Charter on Human and Peoples’ Rights Act Cap 10 Laws of the Federation of Nigeria, 2010, Art. 4, 5, 14, 18, 19.

⁸⁷⁹ L. Farha, (n 855) at 4.

⁸⁸⁰ See n 877, 878 above.

⁸⁸¹ See the International Covenant on Economic, Social and Cultural Rights (ICECSR) Art 11(1); Convention on the Rights of Persons with Disabilities (CRPD) Art 28 (1); Convention on the Elimination of All Forms of Discrimination against women (CEDAW) Art 12(2)(h); Convention on the rights of the Child (CRC) Art 27(3); and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Art 5(e)(iii). For global responses to housing rights, see P. Kenna, ‘Globalization and Housing Rights.’ *Indiana Journal of Global Legal Studies*, vol. 15, No.2 (2008) 436.

In carrying out these evictions, no regard is given to any claim of right on the land based on adverse possession beyond the limitation period. Surprisingly, the High Court of the Federal Capital Territory, in erroneously holding the right to housing unenforceable in Nigeria, held in *Residents of Tudun Wada Community v. FCT Minister & Anor*⁸⁸² that:

...even if the people of Tudun Wada had an enforceable fundamental human right to property under chapter 4 of the constitution, they had failed to prove that they had legally acquired their land and homes in Tudun Wada with the approval of the FCDA...[and] merely *possessing the land in Tudun Wada for over twenty years* [as prescribed by the limitation statute] *did not entitle them to the land...*⁸⁸³

The reasoning of the court in that case not only runs counter to the African Commission's recommendations given previously in *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria*⁸⁸⁴ that forcible eviction by Nigeria was a violation of the African Charter, latest judicial decision has concluded that forced eviction is unconstitutional. For example, in a more recent decision of the High Court of Lagos State in *Akakpo Agemo & Ors v. Attorney General of Lagos State & Ors*,⁸⁸⁵ the court held that:

...the eviction/threat of forcible eviction of any citizen from his home at short notice and without any immediate alternative accommodation or sufficient opportunity to arrange for such alternative accommodation before being evicted from his current abode [is] totally undignifying and certainly inhuman, cruel and degrading.

It is said, and rightly too, that '[t]his ruling is in line with international human rights law established by the UN Committee against Torture, the UN Human Rights Committee, and the European Court of Human Rights, among others.'⁸⁸⁶

⁸⁸² *Residents of Tudun Wada Community v. FCT Minister & Anor* (Citation unavailable but case cited and discussed by IHRDA online at www.ihrda.org/2011/03/tudun-wada-high-court-decision-mar2011/)

⁸⁸³ *Supra* (n 882).

⁸⁸⁴ Communication 155/96 para 63.

⁸⁸⁵ Suit No. LD/4232MFHR/16.

⁸⁸⁶ Joint Public statement of Amnesty International, Justice and Empowerment Initiatives and Nigerian Slum/Informal Settlement Federation of 3 February 2017 (AI Index: AFR 44/5618/2017).

In addressing the property right of the evictees, the High Court of the Federal Capital Territory in the *Tundun Wada* case held that merely *possessing the land in Tudun Wada for over twenty years* [as prescribed by the limitation statute] *did not entitle them to the land*. This pronouncement may appear to be contrary to the provision of the Limitation Act 1966 which applies in the FCT. Section 16 (1) of the Act provides:

Subject to the provisions of subsection (2) and (3)⁸⁸⁷ of this section, no action will be brought by a State authority to recover any land after the expiration of twenty (20) years from the date on which the right of action accrued to the State authority, or if it first accrued to some person through whom the State authority claims, to that person.

The above provision of the Act forecloses stale claims by the State in respect of land at the expiration of twenty years. Perhaps the FCDA in *Tundun Wada* case ought to have lost the right of action to declaration of title over the land in dispute at the expiration of the period of 20 years limited by law for the recovery of such land by the State. Also, section 19 (1) of the Act provides that: '[a] right of action to recover land will not be deemed to accrue unless the land is in possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run.' A combination of these two provisions may appear to have defeated the reasoning of the court and support the evictees' claim to adverse possession in that case. This is more so, since the Land Use Act which would have made it impossible for it to apply⁸⁸⁸ does not apply in the FCT.

However, reading together the provision of section 13 of the FCT Act and Item 85 of the second Schedule to the Act earlier discussed,⁸⁸⁹ it is clear that the doctrine of adverse possession does not apply in the FCT. The provision of the State Land Act made applicable by Item 85 of the Second Schedule to the FCT expressly excludes the application of the doctrine of adverse possession to the FCT.⁸⁹⁰ Thus, while the evictees could not rely on a claim in adverse possession against the State, they were

⁸⁸⁷ These sub sections deal with action to be brought by a person.

⁸⁸⁸ See ss. 11, 14, 27, 37, and 43 of the Act.

⁸⁸⁹ See pp. 152-153 ante.

⁸⁹⁰ FCT Act 1976, s.32.

protected by several provisions of the Nigerian Constitution,⁸⁹¹ the African Charter of Human and Peoples' Rights (Ratification and Enforcement) Act⁸⁹² and the various international instruments to which Nigeria is a signatory⁸⁹³ against violation of their basic rights.

5.6.4 Finding solution in the social function of Property theory

Informal settlements often result from failure of the State to make adequate provision for housing. Whilst such informal arrangements may violate planning regulations and infringe on private and State land rights to land, it has been found to be a catalyst for a change in attitude of government for good. Panalver and Katyal⁸⁹⁴ see the efforts of 'property outlaws' [squatters] as catalyst for inclusivity of property as an institution.⁸⁹⁵ It is said that to the extent that those outside of the property system frequently bring about a change in the content of property rights by flouting established property rules, 'property law is broadly reflective of evolving community values, as opposed to a fixed set of entitlements rooted in abstract moral and economic theory.'⁸⁹⁶ Consequently, the 'law breakers' concerted efforts 'have provided the citizens, the law makers in the legislature, and the judiciary with valuable opportunities to reconsider and deliberate on the underlying justice of existing property arrangements.'⁸⁹⁷

Informal settlements are generally characterised by lack of formal legal titles and 'may exhibit irregular development patterns' with 'lack of essential public services such as sanitation, and occur on environmentally vulnerable or public land.'⁸⁹⁸ The development may be sporadic or progressive depending on the level of homelessness within the locality. The idea of regularisation and integration of

⁸⁹¹ Supra n 877.

⁸⁹² Supra n 878.

⁸⁹³ See n 881..

⁸⁹⁴ EM Panalver & SK Katyal, 'Property Outlaws' (Univ. of Pennsylvania Law Rev. [2007] vol. 155 No. 5 1095

⁸⁹⁵ *ibid* at 1099.

⁸⁹⁶ *ibid* at 1102

⁸⁹⁷ *ibid* at 1103.

⁸⁹⁸ E. Fernandes, 'Regularisation of Informal Settlements in Latin America: Policy Focus Report (2011) Lincoln Institute of Land Policy available online at www.lincolnst.edu/sites/default/files/pubfiles/regularisation-of-informal-settlements-in-latin-america-full_0.pdf at 2, accessed on 16th January 2021.

informal settlements is the focus of many Latin American countries following the global trend against forceful evictions. It resonates the human rights agenda in the area of housing and reflects the theory of the social context of property in modern times. The pace setters in this regard are Peru and Brazil.

Influenced by the idea of Peruvian economist –Hernando de soto,⁸⁹⁹ Peru undertook a ‘narrow legalisation of tenure through titling.’⁹⁰⁰ and over a period of ten years, it issued a total of 1.6 million freehold titles at an average of \$64 per household without charging fees to the households.⁹⁰¹ The success of this land titling process has influenced other countries such as El-Salvador, Cambodia and Vietnam in their regularisation of informal settlements with positive but modest impact on access to credit and investment, while exhibiting great potentials in poverty reduction.⁹⁰²

The Brazillian approach is an all-inclusive integration of the various communities into the socio-economic opportunities and benefits of the formal settlements of the urban centres. It is said that while ‘titling per se provides legal security of tenure to the residents...it is not sufficient to promote socio-spatial integration and may undermine the permanence of the legalised communities.’⁹⁰³ The process of integration therefore ‘involves the right of all to live in dignified conditions and to participate fairly in the opportunities and benefits created by urban development.’⁹⁰⁴ Consequently, there were improved infrastructure and enhancement of the living environment at a cost of between \$3,500 to \$5000 per household although without charging fees to the households.

Whilst the regularisation and integration processes have not been full-proof,⁹⁰⁵ both provide a veritable panacea to the problem of homelessness from the human rights

⁸⁹⁹ E Fernandes, ‘The Influence of de Soto’s *The Mystery of Capital*. Available online at www.lincolnst.edu/publications/articles/influence-sotos-mystery-capital.

⁹⁰⁰ E. Fernandes, *supra* (n 141) at 5.

⁹⁰¹ *ibid* at 35.

⁹⁰² *ibid*.

⁹⁰³ *ibid*.

⁹⁰⁴ *ibid*, at 31.

⁹⁰⁵ The two models have been criticised. Among other criticisms, both are said to encourage proliferation of informal settlements hoping for government regularisation of titles or upgrading of the living standards of residents. Abuse by land speculators and developers hoping to make huge

perspective and fulfil the reasonable expectation of the individual right to decent accommodation. The models represent a departure from the common law notion of trespass with the attendant painful consequence of eviction at short notice and without provision of alternative accommodation. The two models embrace instead, the global standard engendered by respect for the right to decent accommodation and the assurance of a home.

5.7 Criminalisation of Illegal Occupation of Land and Adverse Possession in Nigeria

5.7.1 *Background to the position in Nigeria:*

Squatting and other illegal occupation of land in Nigeria exhibit certain peculiar characteristics which might be unknown to a more advanced country such as England and Wales. This may be due to the peculiarities of the prevailing social structure and the varying policies of government on housing at the federal and state levels.⁹⁰⁶ The inadequacy of housing in Nigeria as a result of the mounting population pressure especially in the cities, the high cost of renting accommodation, the inadequate provision of housing by government generally at the federal and state levels and the general neglect of the populace by successive governments in Nigeria since independence, have been responsible for the staggering number of squatters many of whom exist in urban areas.⁹⁰⁷

In urban centres, squatters perch in and around built up areas and developing sites, constituting nuisance to property owners, subjecting them to the rigours and

profits from purchase of large expanse of land off residents at rock-bottom prices, is another pitfall identified: See e. Fernandes, *supra* (n 111) at 35-37.

⁹⁰⁶ See generally, A Bello, 'Review of the Housing Policies and Programmes in Nigeria.' (2019) *International Journal of Contemporary Research and Review* 10(02) 20603; BN Obiadi et al, 'Housing Inadequacy in Nigeria: The Case of Failed Housing Policies.' *Tropical Built Environment Journal* (TBE) vol. 1 No. 6, 2017 at 52.

⁹⁰⁷ See generally, Obiadi et al, (n 906); PK Makinwa-Adebusoye (1988) 'Upgrading an Urban Squatter Settlement in Nigeria: The Experiment in Olaleye-Iponri' in: *Urban Services in Developing Countries*, DA Rondinelli et. al (eds) Palgrave, London.

expense of eviction exercise. The situation is well captured by the editorial opinion of This Day Newspapers⁹⁰⁸ as follows:

Thriving communities exist in most partially completed buildings and in some completed structures that have remained in the property market for a long time. Owners are sometimes pushed to the threshold of using violence to remove illegal occupants from their property...Only owners of uncompleted buildings or properties put up for let/lease know how difficult it is to keep squatters at bay...Recently, the owner of a storey building at Airways area of Apapa, Lagos had to remove the roof and windows to evict a thriving colony of stragglers occupying the building that was put in the property market by an estate surveyor.

The foregoing information shows the incessant encroachment on property by squatters and the difficulty encountered by owners in evicting them.

The proliferation of urban slums due to the discriminatory planning policies of government at the state and federal levels encouraged squatting by the unfortunate poor who live in shanties and dumping sites.⁹⁰⁹ These poor settlements have been allowed to thrive to 'ease' government worries over housing needs of the squatters.

One significant feature of squatting in the Nigerian cities generally and in the Lagos metropolis in particular, is the activities of land grabbers and land speculators.⁹¹⁰ This category of squatters use force and/or violence to 'rob' land owners of their possessions⁹¹¹ and, in most cases, without consequences as a result of the impecuniousness of the landowners to ventilate their right in court.⁹¹² Sometimes, unoccupied or uncompleted building, or undeveloped parcels of land are the main targets, and peaceable entry in such cases may become adverse possession and the landowner's title subsequently extinguished by law at the expiration of the

⁹⁰⁸ Nigeria: The Agony of Repossessing Buildings from Squatters. This Day Newspapers of 28 September 2013, distributed by All Africa Global Media (Nigeria).

⁹⁰⁹ Obiadi et al, (n 879).

⁹¹⁰ See L Akintola, 'Why Land Grabbers Are On The Prowl.' *Independent Newspapers Nigeria*, 15th December 2018 available online at www.independent.ng/why-land-grabbers-are-on-the-prawl. Accessed on 11/6/2020.

⁹¹¹ *ibid.*

⁹¹² *ibid.*

limitation period. Where violence is applied, the landowner may be forced to abandon possession.⁹¹³

However, while the Nigerian courts may find adverse possession in favour of a squatter in cases where possession by him was acquired unchallenged over the limitation period, without violence, secrecy, consent or permission of the land owner, no such finding may be held where the initial occupation amounted to naked trespass without any claim of right.⁹¹⁴

The nefarious activities of the land grabbers and land speculators coupled with the terror usually unleashed on landowners by them,⁹¹⁵ the threat to public peace, and the embarrassment caused to government when land meant for public use is taken over by squatters,⁹¹⁶ consequently resulted in passing Laws at the Federal and State levels criminalising the nefarious activities of land grabbers and speculators to keep them in check.⁹¹⁷ Provisions in this regard are available in statutes on criminal offences such as the Criminal and Penal Codes⁹¹⁸ applicable in the Southern and Northern Nigeria respectively, as well as specific provisions in the Criminal Law of Lagos State⁹¹⁹ and the Property Protection Law⁹²⁰ of the State. Also, the specific

⁹¹³ There were reported cases of killings and maiming by land grabbers in different parts of Nigeria including the Federal Capital Territory, Abuja. See CJ Musa, 'Effects of Activities of Land Speculators on Women Farmers' Crop Output and Income in Kuje Area Council, FCT Abuja Nov. 2015. Available online at www.kubanni.abu.edu.ng/jspui/btstream/ at 11.

⁹¹⁴ For example, under section 342 of the Penal Code applicable in the Northern Nigeria, whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with the intent to commit an offence, or to intimidate, insult or annoy any person in possession of such property, commits an offence.

⁹¹⁵ See CJ Musa, *supra* (n 886).

⁹¹⁶ Their activities tend to defeat one of the objectives of the Land Use Act 1978, Cap L5 Laws of the Federation of Nigeria 2004 as contained in its long title, and renders ineffectual the purpose of revocation under section 28 of the Act.

⁹¹⁷ These are provisions criminalising forcible entry and illegal occupation of land in possession of another.

⁹¹⁸ See Schedule to the Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2010 enacted as an Act to establish a code of Criminal law, and re-enacted in the various States of Southern Nigeria as State Law: See e.g. the Lagos State Criminal Law 2011. The Penal Code is a Code of criminal law applicable in the States of Northern Nigeria including Kwara State, and in the Federal Capital Territory of Nigeria, Abuja. See Penal Code Law Cap 89 Laws of Northern Nigeria 1963.

⁹¹⁹ Criminal Law of Lagos State, No.11 2011.

⁹²⁰ Lagos State Property Protection Law 2016.

provisions of the Land Use Act 1978⁹²¹ earlier discussed⁹²² and the State Lands Law of the various States in Nigeria,⁹²³ contain provisions criminalising false claims to land and thereby affecting the efficacy of the regime of adverse possession, as known to law.

5.7.2 *The Nigerian Criminal and Penal Codes*

Both the Criminal Code⁹²⁴ and the Penal Code⁹²⁵ contain provisions protecting possession of land, to forestall a breach of the peace. Consequently, forcible entry into, or detainer of land in actual and peaceable possession of another, or against a person entitled by law to the possession of the land respectively, is an offence punishable with terms of imprisonment.

Section 81 of the Criminal Code for example, provides:

Any person who, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace enters on land which is in actual and a peaceable possession of another, is guilty of a misdemeanour, and is liable to imprisonment for one year.⁹²⁶

This is a situation of forcible entry often involving violence such as breaking of doors or locks to access land (including building) in peaceable possession of another. This situation does not fit into the legal regime of adverse possession which requires the squatter to take possession without violence, and an encroachment premised on force simply amounts to criminal trespass punishable under that provision. A criminal trespasser not being an adverse possessor, time does not run in his favour under the statute of limitation,⁹²⁷ and he could be evicted at any time using due process.

The provision of section 82 complements the provision of section 81. It provides that:

⁹²¹ Supra (n 765).

⁹²² See para 5.3.5 above.

⁹²³ See e.g. State Lands Law of Lagos State, Law No.8 2015.

⁹²⁴ Supra (n 918).

⁹²⁵ Supra (n 918).

⁹²⁶ This is replicated in section 52 of the Criminal Law of Lagos State No. 11 2011, although the term of imprisonment prescribed is 'two (2) years.' See also the Penal Code for a similar provision.

⁹²⁷ For time to run in under the Limitation Act, there must be definite acts of adverse possession cognisable in law.

Any person who, being in actual possession of land without a claim of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of a misdemeanour, and is liable to imprisonment for one year.⁹²⁸

This provision is an extension of section 81. Adverse and continuous possession for the purpose of the running of the limitation period must not be actualised by violence, and the person entitled to possession, upon discovery of the presence of an adverse possessor, is allowed by law to set the necessary legal process in motion to recover possession.⁹²⁹

Except in the two instances covered by the fore-going provisions to forestall breach of the peace, neither the Criminal Code nor the Penal Code contains provisions directly affecting the regime of adverse possession involving peaceful entry and peaceable possession. For example, land as an immovable, is not a 'thing capable of being stolen'⁹³⁰, and therefore the assertion of 'a right which is inconsistent with that of the true owner,' as in the case of adverse possession is feasible. This lacunae which has festered the regime of adverse possession in Nigeria, has been identified as the reason for the failure of the Nigerian criminal law to give adequate protection to the true legal and beneficial owners of land.⁹³¹ In the words of Adeyemi:⁹³²

...It is not unusual for a bold and clever intruder to divest them, for all practical purposes, of their interests in the land. Once the intruder can gain a peaceful entry on to the land and is in "actual and peaceable possession" of it, then the right of the owner forcibly to eject the intruder will seem to end as otherwise, he may find himself charged with and convicted for forcible entry. This situation is now encouraging a number of problems which are now undermining confidence in dealings in land, and also disorderly behaviour particularly in the Lagos area.

⁹²⁸ This is replicated in section 53 of the Criminal Law of Lagos State No. 11 2011, although the term of imprisonment prescribed is 'two (2) years.' See also the Penal Code for a similar provision.

⁹²⁹ Both provisions of sections 81 and 82 must be read together with sections 292 and 293 of the Criminal Code, which lay down the degree of force which may lawfully be used by a person in peaceable possession of any land against a trespasser or, if he is in possession with a claim of right, even against a person entitled by law to possession.

⁹³⁰ The definition of 'things capable of being stolen' in section 382 of the Criminal Code for example, covers only movables to the exclusion of immovables such as land.

⁹³¹ AA Adeyemi, 'The Criminal Process as a Selection Instrument for the administration of justice' in *The Nigerian Criminal Process*, AA Adeyemi ed. (1977) University of Lagos Press, 26.

⁹³² AA Adeyemi, *supra* (n 931) at 48.

The concerns of commentators such as this persuaded the Lagos State House of Assembly to introduce certain reforms in the area of criminal justice bordering on 'land theft,' and the nefarious activities of the land owning families in the Lagos metropolis.

5.7.3 *The Criminal Law of Lagos State, 2011 and 'land theft'*

One of the innovative features of this Law⁹³³ is the criminalisation of conversion of real property thereby making theft of land possible as an offence in law. Section 278(1)(b), (2) provides:

- 278 (1) Any person who dishonestly:
- (a) ...
 - (b) converts the property of another person for his own use or to the use of any other person, is guilty of the offence of stealing."
- (2) A person is deemed to dishonestly...convert the property of another if he does so with:
- (a) intent to permanently deprive the owner of the property;
 - ...

Also, section 279 of the Law provides that:

- 279 (1) Anything which is the property of any person or a body corporate is capable of being stolen.
- (2) 'Property' includes money and all other properties, *real* or personal, including things in action and other intangible properties which is the property of another.

While section 278(1)(b) of the Law makes dishonest conversion of the property of another an offence of stealing, section 279(2) of the Law defines the nature of property capable of being stolen to include real property amongst other properties. A person is said to dishonestly convert the property of another if he does so, *inter alia*, 'with intent to permanently deprive the owner of the property';⁹³⁴ it does not

⁹³³ *ibid.*

⁹³⁴ *ibid* s. 278(2)(a)

matter that the conversion is effected without secrecy, or by an attempt at concealment.⁹³⁵

The combined effect of these provisions of the Law is the introduction of 'land theft' as a feature of the criminal law applicable in Lagos State, departing from the general law of stealing known to the English and the Nigerian criminal law jurisprudence.⁹³⁶ 'Asportation,' which is generally an element of the offence of stealing under both Criminal and Penal Codes,⁹³⁷ is no longer a consideration in Lagos State, and the legal concept of conversion has been tailored to accommodate the subject matter of land. Thus, conversion of land by the squatter, intruder or trespasser for his own use and benefit, may constitute an offence of stealing for which an adverse possessor may be prosecuted, convicted and sentenced by a court of competent jurisdiction.⁹³⁸ The offence is committed notwithstanding that the land 'is at the time of the conversion in the possession of the person who converts it.'⁹³⁹ This provision of the law obviously has some implications for the doctrine of adverse possession.⁹⁴⁰

5.7.4 *Effect of the Nigerian Criminal Law on the Regime of Adverse Possession*

As suggested earlier, the provisions of sections 81 and 82 of the Criminal Code protect possessions of land from forcible entry and against forcible retention, and therefore, makes inapplicable the running of time under the Statute of Limitation. A trespasser who enters into possession or remains in possession through violence is not an adverse possessor and time does not run in his favour. Such trespasser may be evicted at any time and may be prosecuted and convicted under those provisions.

These provisions are premised on the provisions of section 382 of the Criminal Code and its counterpart provision under the Penal Code⁹⁴¹ which restricts 'things capable of being stolen' to movables and thereby excluding immovables such as land from

⁹³⁵ *ibid* s.278(4).

⁹³⁶ See s. 382 of the Nigerian Criminal Code; s.286 of the Penal Code and s. 4 of the English Theft Act 1968

⁹³⁷ *ibid*. Both the Criminal and Penal Codes in Nigeria make movability of the thing stolen an *actus reus* requirement. See *Ojiko v. Police* (1956) 1 F.S.C 62

⁹³⁸ Criminal Law of Lagos State 2011, s.285(1).

⁹³⁹ *ibid* s.278 (5)(a).

⁹⁴⁰ See below.

⁹⁴¹ Penal Code, s.286.

the object of stealing under the Codes.⁹⁴² Thus, the exercise of right over land which is inconsistent with that of the true owner and *ipso facto* tantamount to adverse possession, does not amount to conversion of land as it were. Consequently, the regime of adverse possession is not affected in any way under the main criminal code legislation in Nigeria.

However, conversion of land by a squatter or an encroacher is criminalised under section 278(1)(b) of the Criminal Law of Lagos State as an offence of stealing for which such an adverse possessor may be prosecuted, convicted and sentenced by a court of competent jurisdiction. This position is obvious from the specific provision of 278(5)(a) which provides that, 'in the case of conversion, it is immaterial whether...[the land] is at the time of the conversion in the possession of the person who converts it...' suggesting that peaceable possession which is germane to acquisition of title by adverse possession is negated. Also, section 278(4) of the Law provides that '...conversion may be dishonest, although it is effected *without secrecy or attempt at concealment*,' suggesting that acts of possession exercised openly and without concealment-characteristic of adverse possession, do not negate the mental element required for the commission of the offence of stealing.

The provisions of the Criminal Law of Lagos State contain phrases directly negating the operation of the doctrine of adverse possession, unlike the provisions of section 144 LASPO Act which are quiet over this; a position taken by the Court of Appeal in *R (on the application of Best) v. Land Registry*.⁹⁴³ While there is no judicial authority in Nigeria on this point, Nigerian courts are not likely to be persuaded by the Court of Appeal decision in *Best* in the face of very strong indication to the contrary in the relevant provisions of the Criminal Law of Lagos State discussed earlier. Thus, in the Lagos State of Nigeria, the criminal law in force is meant to affect the efficacy of the doctrine of adverse possession unlike section 144 of LASPO Act

⁹⁴²s.383 of the Criminal Code and section 286 of the Penal Code.

⁹⁴³[2010] EWCA Civ 200. On this, the Court of Appeal said '[i]t is not plausible to suppose that Parliament would have been silent about the impact of a provision like section 144 on the delicate and comprehensive balance of interests set out in the Limitation Act 1980 and in Schedule 6 to the LRA, had it truly intended that section 144 should have any impact at all on those regimes.' *ibid*, at para 73.

which does not affect the operation of adverse possession as decided by the Court of Appeal of England and Wales, in *Best*.

However, in other parts of Nigeria outside Lagos State, both the Criminal Code applicable in the Southern States of Nigeria, and the Penal Code applicable in the Northern States of Nigeria and the Federal Capital Territory, have no equivalent provisions on land theft, and land is not capable of being stolen. Consequently, in other parts of Nigeria outside Lagos State, peaceful entry and peaceable possession of land by a person which fulfils other conditions in law over a limitation period qualifies as adverse possession.

5.7.5 '*Land Grabbers*' and the Lagos State Property Protection Law, 2016

This Law was enacted against the backdrop of the menace of land grabbers exhibited in acts of forceful entry and illegal possession of land, and the need to protect the proprietary interest of land owners in Lagos State. The main object of the Law as contained in its long title is 'to prohibit forceful entry and illegal occupation of landed properties, violent and fraudulent conducts in relation to landed properties in Lagos State and for connected purposes.'⁹⁴⁴ As noted by a commentator, the Law is meant to 'frontally address the problems of *Omo-Onile* [land grabbers] which is engendered by the skewed national land policy and practice as exemplified in the provisions of the Land Use Act...'⁹⁴⁵ The law is meant 'to deter potential offenders and curb the scourge of illegalities pervading the sector.'⁹⁴⁶

Section 2 of the Law prohibits the use of force or self-help by any person or group of persons, to take over any landed property, or to *engage in any act inconsistent with the proprietary right of the owner*. This offence applies by extension to persons who have used force to take over the property of another before the commencement of the law

⁹⁴⁴Long title to the Lagos State Property Protection Law 2016.

⁹⁴⁵ A.K. Otubu, 'Land Use Act and Land Administration in the 21st Century Nigeria: Need for Reforms.' *Journal of Sustainable Development Law and Policy* (2018) vol. 9(1) 80-108.

⁹⁴⁶ This is exemplified by 'its strict penal sanctions of long prison sentences ranging between six (6) months to twenty one (21) years, and high premium on fines, ranging between 500,000 Naira and 5,000,000 Naira.' A.K Otubu, 'Statute Review: Lagos State Property Protection Law 2016'. *SSRN Electronic Journal*, DOI: 10.2139/ssrn.3505638, accessed on 20/5/2020.

and remain in possession 3 months after the commencement of the Law.⁹⁴⁷ The penalty for the offence is ten years imprisonment.

Section 3 compliments the provision of section 2 by criminalising the use of violence or threat of violence by any person without lawful authority, for the purpose of securing entry into land, notwithstanding that the person using or threatening force has a right over the property. It is immaterial that the violence is directed against the person or against the property and/or that the violence is intended to secure entry for the purpose of acquiring possession of the property or for any other purpose. The penalty for the offence is ten years imprisonment.⁹⁴⁸

Where a person encroaching on land or any person deriving title from him fails to vacate the property on being required to do so by or on behalf of the owner of the property, he commits an offence and on conviction shall be liable to a fine not exceeding five million naira or five years imprisonment or both.⁹⁴⁹

The foregoing provisions frown against any form of force or self help to takeover any landed property,⁹⁵⁰ and prohibits exercise of *any act inconsistent with the proprietary right of the owner*. An 'act inconsistent with the proprietary right of the owner' suggests adverse possession which may have been actualised through dispossession of the owner or takeover of land abandoned by the owner without the use of force, but with the intention of continuously exercising acts of possession for the period of the limitation prescribed by law. Consequently, adverse possession of land in Lagos State after the commencement of that law is an offence punishable under section 2(3) of the law. The irresistible conclusion therefore is that any form of use of force in taking possession of land, or the exercise of peaceable possession of

⁹⁴⁷ It has been argued that '[t]o the extent that this provision is retroactive in nature, it will be contrary to the provision of the Constitution [citing section 36(8)] and therefore a nullity.' See A.K Otubu, 'Statute Review' (n 945) at 7.

⁹⁴⁸ Four (4) years imprisonment where the forceful entry is accompanied with offensive weapons.

⁹⁴⁹ Lagos State Property Protection Law 2016, s.4.

⁹⁵⁰ This is particularly directed at the owner of land whose land is wrongfully possessed by a squatter or trespasser and who intends to evict such person. The only permitted method of eviction in law is through a court order. This is buttressed by the provision of section 3(2) of the law which provides that 'a person's right of possession or occupation of any property shall not for the purpose of subsection (1) of this section constitute lawful authority for the use or threat of violence by him...for the purpose of securing entry into that property.'

land in Lagos State is a criminal offence punishable under the Property Protection Law.

In view of criminalisation of adverse possession under the Criminal Law of Lagos State and the Lagos State Property Protection law, section 100 of the Lagos State Land Registration Law⁹⁵¹ has been rendered otiose. That section provides that:

Where the court is satisfied that the title of the registered holder of any land or mortgage has been extinguished under the Limitation Law, the court may order the register to be rectified accordingly, and the person aggrieved by such rectification shall not receive any compensation.

The incongruity in establishing a right of adverse possession in civil law before the court when the claimant's act amounts to an offence in law is incomprehensible. This is more so in view of the clear provisions of the various provisions of the law in Lagos State criminalising adverse possession. Such a situation would trigger the operation of the rule of illegality encapsulated in the legal maxim: *ex turpi causa non oritur actio* (meaning: 'a person shall not benefit from his illegality'). Express or implicit admission of adverse possession by the claimant in his pleading before the court is sufficient for the court to invoke this rule of public policy and to refuse the relief sought.

Whilst this situation does not suggest that the rule of illegality applies mechanically in all situations where a civil claim is based on a criminal act,⁹⁵² it is a good example of situations where the rule would apply without exceptions; a situation where, unlike the situation in *Best v. Chief Land Registrar and Secretary of State for Justice*⁹⁵³ Parliament has specifically criminalised adverse possession and has therefore, left no discretion to the courts in applying the *ex turpi causa* principle.⁹⁵⁴

⁹⁵¹Law No.1 2015.

⁹⁵² See *Hounga v. Allen* [2014] UKSC 47; *Tinsley v. Milligan* [1994] 1 AC 340; *Gray v. Thames Trains Ltd* [2009] UKHL 33; *Stone & Rolls Ltd v. Moore Stephens* [2009] UKHL 39; *Les Laboratoires Servier v. Apotex Inc* [2014] UKSC 55.

⁹⁵³*supra* (n 136).

⁹⁵⁴ See in contrast, the position in the cases cited in n 952.

5.7.6 Implications of the rhetorical claim by the State within the context of property relations

The contradiction in the criminalisation policy of Lagos State vis-à-vis adverse possession as against the other parts of Nigeria, stems from the government erroneous perception of the essence of property claims within the context of property relations. As earlier discussed,⁹⁵⁵ whilst many states in the Northern and Southern Nigeria criminalise only forcible entry of land or forcible displacement of the land owner by a trespasser to the exclusion of peaceful entry and peaceable possession of land which characterise adverse possession, Lagos State criminalises both violent and peaceful entry and peaceable possession of land. This was achieved by making land 'a thing capable of being stolen' and by applying the element of conversion to it, thereby enabling the state to criminalise any form of possession of land (an immovable) which is inconsistent with the right of the actual owner. The result has been an indirect criminalisation of adverse possession.

The inclusion in the Criminal Law of Lagos State the subject matter of land as 'a thing capable of being stolen' through conversion of same was meant to protect the property owner against intruders taking possession of the land and thereby obviate the need by the owner to assert his right to possession through forcible entry which might ironically result in his criminal prosecution and conviction for forcible entry. To this end, the State appears to be using the instrumentality of the criminal law to protect the proprietary interest of the landowner while seeking to avert a breach of public peace.

However, whilst there is every legal and moral justification for the State to protect

⁹⁵⁵ See para 5.7.2 -5.7.5

the individual from harm including criminal trespass and avert a breach of public peace, there is little to commend an incursion into property relations. In addition to the arguments canvassed against this in Chapter 4 of this work,⁹⁵⁶ there could be justification for excluding land from things capable of being stolen by the Criminal and Penal Codes in Nigeria. For example, the immovability of land suggests that it cannot be a subject matter of asportation from one place to another, and that the rights existing thereon are indelible and susceptible to judicial adjudication over the rights which may be restored subject only to the provisions of the Statute of Limitation, and the *res* recoverable. These are rare possibilities in the case of personal chattels such as goods which may be asported, destroyed or irrecoverable, and rights thereon may only be quantified in damages.

Also, the State policy behind adverse possession encapsulates the need to discourage stale claims, support effective conveyancing while promoting land use and development. This runs parallel to the criminalisation of trespass associated with forcible entry into possession or forceful ejection or displacement of the actual owner from possession - conducts which fall within the province of criminal law. Thus, while there may be justification for the offence of criminal trespass such as it is the case under the Criminal and Penal Codes applicable in the Southern and Northern Nigeria respectively, criminalising any form of possession as it is the case with the Lagos State of Nigeria is tantamount to throwing the baby out with the bath water. It undermines the State policy on stale claims, stifles land use and development and derogates from the larger interest of the community.

⁹⁵⁶ See para. 4.20.4

5.7.7 Summary and Conclusion

This chapter has engaged the application of the doctrine of adverse possession within the Nigerian legal system with a plural land tenure system characterised by peculiar legal framework, structure and diversification unknown to the common law applicable in England and Wales. It is interesting to note that this divergence exists in spite of the history of statutory reception of the common law of England and despite the adoption of similar statutes of limitation across the federation of Nigeria.

Whilst the Nigerian courts are meant to apply the English common law doctrine of adverse possession, they are constrained by peculiar social circumstances and certain indigenous laws from doing so. The customary law and the Islamic law of land tenure have peculiar principles affecting the application of the doctrine of adverse possession which peculiarity is recognised by the statutes of limitation across the federation of Nigeria. Interestingly, both systems have in-built legal mechanism for dealing with stale claims without recourse to the doctrine of adverse possession of the statute of limitation.

Also, the Land Use Act which is the principal legislation on title to land in Nigeria has several provisions frustrating the application of the doctrine which raises the question whether the Nigerian courts have been applying the correct principles in this area of law given the peculiarities of its provisions. From a cursory research inquiry into judicial decisions on adverse possession in Nigeria, Nigerian courts continue to apply the doctrine of adverse possession hook, line and sinker after the enactment of the Land Use Act in March 29th 1978 notwithstanding the various provisions of the Act frustrating its application. In the FCT where the Land Use Act does not apply, the State Land Act, like the State Land Law of the States, expressly exclude application of the doctrine therein.

With regards to evictees of informal settlements, it is found that while the doctrine of adverse possession may be a potent weapon of defence based on the applicable statutes of limitation, the requisite provisions of the Land Use Act and the State Land

Laws across the states within the federation, as well as the State Land Act applicable in the FCT render the doctrine non-*efficacious*.

There is also a divergence in the application of the doctrine of adverse possession to registered land in Nigeria. In Nigeria, unlike in England and Wales, the statute of limitation is applicable to registered land and the registration of the adverse possessor is dependent on the extinguishment of title of the registered proprietor under the statute of limitation.

Engagement of the question whether the application of the doctrine of adverse possession is open to human rights challenge in Nigeria reveals a striking difference from the position in England and Wales as discussed in the last chapter. Also, where the adverse possessor desirous of registration under the RTA applicable in the FCT and the LRL applicable in Lagos State has committed an offence of criminal trespass, it is shown that the position of the Nigerian courts cannot be the same as that of the Court of Appeal for England and Wales in *Best v. Chief Lands Registrar*.

This chapter therefore provides a striking contrast worthy of comparison with the common law applicable in England and Wales. The next chapter is a comparative study of the application of the doctrine in England and Wales, and in Nigeria.

CHAPTER 6

JUXTAPOSING APPLICATION OF THE DOCTRINE OF ADVERSE POSSESSION UNDER THE ENGLISH AND NIGERIAN LAW

6.1 Introduction

In the last two chapters, this thesis engaged an analysis of the doctrine of adverse possession under English and Nigerian law respectively. In the course of it, the divergent legal systems in the jurisdictions under study and the implications of this on the prevailing land tenure systems were discussed. This chapter furthers the discourse by juxtaposing the application of the doctrine of adverse possession in those jurisdictions with a view to appraising the application of the doctrine contextually and relatively.

The efficacy of the doctrine of adverse possession under the English and Nigerian law may be determined by juxtaposing its application under the different legal systems prevailing in England and Wales on the one hand, and in Nigeria on the other hand. This chapter is meant to show that the application of the doctrine is relative depending on the country's legal structures generally, and the nature, content and application of the operating land tenure systems in particular, and other relevant laws in general.

A comparative study of adverse possession in England and Wales, and Nigeria engaged in this chapter will proceed in the following chronological order of inquiry:

- i. What are the effects of the prevailing social circumstances and the extant legal systems in the jurisdictions under inquiry on the application of the doctrine of adverse possession?
- ii. To what extent is the Nigerian legal system receptive of the common law doctrine of adverse possession applicable in England and Wales?
- iii. What is the comparative effect of adverse possession on unregistered title in the jurisdictions under inquiry?
- iv. What is the comparative effect of adverse possession on registered title in the jurisdictions under inquiry?

- v. From a comparative study of the jurisdictions under inquiry, to what extent is the application of the doctrine of adverse possession open to human rights challenge?
- vi. How efficacious is the doctrine of adverse possession in the jurisdictions under inquiry in light of various pieces of legislation on criminal trespass?

6.2 Effect of the Prevailing Social Circumstances and the Extant Legal Systems on the Application of the doctrine of Adverse Possession.

The common law system applicable in England and Wales is a monolithic system encapsulating a uniform land tenure system evolving originally from a feudal system of land tenure 'which promoted heredity and limited access to land, to a system that emphasised protection of individual property rights and free alienation'.⁹⁵⁷ The development of the middle class and an economy based upon wages as opposed to rendering services led to the emergence of individual property rights in real property.⁹⁵⁸

Whilst the Crown technically holds land by way of absolute ownership, in practical terms, an individual is referred to as the 'owner' of the land.⁹⁵⁹ However, what the individual owns is not the land, but an estate in it, which is the right to *seisin* 'or possession, of the land for a period of time'; certain or uncertain.⁹⁶⁰ Since the Law of Property Act 1925, the estates that can exist at common law are limited to fee simple absolute in possession, and term of years absolute,⁹⁶¹ although 'this did not change the nature of land ownership or of the doctrine of estate.'⁹⁶² Thus in English law, ownership of land is premised on the doctrine of estate 'which itself is inextricably linked to the notion of right to possession of the land.'⁹⁶³

⁹⁵⁷ B Gardiner, *Squatters' Rights and Adverse Possession.* [1997] *IND. International and Comparative Law Review*, vol. 8:1 at 125.

⁹⁵⁸ J Dukeminier & J Krier, *Property* 112 (1981) cited in B. Gardiner *supra* (n 928) at 126.

⁹⁵⁹ Burn & Cartright, *Modern Law of Real Property*, 18th ed. Oxford at 12-13.

⁹⁶⁰ *ibid* at 13.

⁹⁶¹ LPA 1925, s.1(1).

⁹⁶² Burn & Cartright, *supra* (n 959) at 13.

⁹⁶³ *ibid* at 13

Possession is the root of title and the possessor is a title holder from the day he enters into possession or from the day he disposes another, although the title is relative to the extent that a person who could show a better title could recover the land.⁹⁶⁴ Consequently, the concept of possession as root of title is the foundation of adverse possession at common law applicable in England and Wales and entitles the adverse possessor to fee simple absolute upon extinguishment of the owner's title.

The social circumstances and the legal position in Nigeria before colonisation by the British in 1861⁹⁶⁵ and consequently the reception of English law, were different. Contrary to the position at common law which recognises individual ownership through the concept of possession as root of title, the idea of individual ownership before colonisation was foreign to the indigenous system of land tenure applicable within the geographical entity.

It is said regarding ownership under the indigenous land tenure system that 'land belongs to the community, the village or the family, never to the individual.'⁹⁶⁶ The head of the village, family or community is said to hold the land in trust with the power to allocate to members of the village, family or community.⁹⁶⁷ When a member of the family or the community is allocated portion of land, he acquires a usufructuary right - a right to occupy and use the land mainly, devoid of any form of proprietary right unlike the holder of a fee simple under English law. Thus, unlike the freeholder at common law, the holder of customary land right cannot alienate or encumber the land in any way without the consent of the family, and cannot devise the land by Will. These social circumstances form the background to the Nigerian customary law, and impacts on the application of the doctrine of adverse possession. Encroachment by third parties is prohibited, but customary tenancy on the land may be created in favour of third party individual, family or community for occupation

⁹⁶⁴ *ibid.*

⁹⁶⁵ *ibid.*

⁹⁶⁶ Per Lord Heldane in *AmoduTijani v. Secretary of Southern Nigeria* (1921) A.C 399 at 404.

⁹⁶⁷ *Lewis v. Bankole*(1908) 1 N.L.R 82.

and use mainly, subject to exhibition of good behaviour such as acknowledgement of the overlord's title and payment of tribute.⁹⁶⁸

The customary tenancy is a parallel concept to the English leasehold in terms of creation, incidents and determination.⁹⁶⁹ It lacks the certainty of duration which characterises the English lease, and the incident of the tenure is payment of tribute not rent by the customary tenant to the overlord.⁹⁷⁰ The interest of a customary tenant, unlike the English lease with certainty of duration, enures in perpetuity subject to good behaviour⁹⁷¹; its character is said to be akin to an *emphyteusis*; a perpetual right in the land of another.⁹⁷²

The position of Islamic law is also reminiscent of the social circumstances prevalent in Northern Nigeria before the advent of British rule. As discussed earlier on in the last chapter, the jihad of Uthman dan Fodio in 1804 revolutionised the land tenure system in that region. Upon conquest, ownership of the whole land acquired was said to belong to Allah represented by the Emirs who held the land in trust for the people. Land allocated to the individual by the Emir was to be occupied and used mainly subject to the payment of tribute; alienation in any form was prohibited, and encroachments by outsiders frowned upon.

Fundamentally, both the customary and Islamic land tenure systems cannot be equated with the common law feudal system of landholding as modernized by the Law of Property Act 1925. Whilst English law recognises the Crown as the absolute owner of land with the individual or person holding either a fee simple absolute in possession or a term of years absolute, neither the customary head of family or community, nor the Emir under Islamic law, has absolute ownership of land like the Crown under English law. The head of the family or the community, or the Emir are

⁹⁶⁸*Aghenghen v. Waghoreghor & Ors* (1974) 1 SC 1; *Abioye v. Yakubu* (1991) 5 N.W.L.R (Pt.190) 130.

⁹⁶⁹*Aghenghen v. Waghoreghor & Ors* supra, (n 939).

⁹⁷⁰ The difference between rent at common law and tribute under the Nigerian customary law lies in the fact that rent represents the economic value of the leasehold in the property market and quantifiable in monetary terms, tribute under customary law represents a mere acknowledgment of the overlord's title without reference to the economic considerations and paid in kind (as opposed to cash) such as presentation of some portions of farm produce, alcoholic drinks, etc. See *Lasisi & Anor v. Oladapo Tubi & Anor* (1974) 1 All N.L.R (Pt II) 438.

⁹⁷¹*Abioye v. Yakubu* (1991) 5 NWLR (Pt 190) 130.

⁹⁷²Per Elias CJN in *Aghenghen v. Waghoreghor* (1974) 1 SC 1 at 6.

mere trustees holding title in trust for the people. However, the trust reposed is a trust with a quasi-beneficiary having some but not all the rights enjoyed by the beneficiary under an English trust. It is no more than an obligation owed by the headship to exercise powers of control and management of land bona fide and in the interest of the family or community as a whole as opposed to selfish interest.⁹⁷³ Members of the family or community under customary law do not derive title from the head of the family or community but from the family or community as a corporate entity, or from Allah under Islamic law. In the event of allocation of land, the member of the family or community has a mere *usufructuary* right to occupy and use the land bereft of any proprietary interest, unlike the holder of an estate under English law.

The social circumstances under customary law prevalent in the Southern Nigeria and Islamic law predominant in the Northern Nigeria underline the exclusion of these indigenous land tenures from the ambit of the various statutes of limitation in Nigeria - statutes copied from English law, but disguised as local legislation.⁹⁷⁴ It constitutes, in effect, a significant exception to the universality of the doctrine of adverse possession and demonstrates the relativity of its application as a foreign concept to indigenous circumstances.

As pointed out earlier in the last chapter, the reception statutes in Nigeria received English common law subject to local circumstances and local legislation. It was in response to this that the various limitation laws in Nigeria excluded customary land tenure, and by extension, Islamic land tenure⁹⁷⁵ from the ambit of its application, and makes the application of the common law of land tenure subject to the provisions of the Land Use Act, 1978.

⁹⁷³For example, both customary and Islamic law will not condone an avaricious or corrupt head and the court will not hesitate to come to the aid of the people or the community: See *Akande v Akanbi*(1966) NBJ 86; *Onwusike v Onwusike* (1962) 02/81/59 reported by RW James, *Modern Land Law of Nigeria* (1973 University of Ife Press) at 83.

⁹⁷⁴ The provisions of the various statutes of limitation in Nigeria pertaining to adverse possession are substantially the same in England and Wales, and Nigeria.

⁹⁷⁵ Both the District Court Laws and the High Court Laws in Northern Nigeria treat Islamic Law as part of Customary Law. See e.g. the District Courts Law of Niger State Cap 37 Laws of Niger state of Nigeria 1992, s.2 ; and the High Court Law of Katsina States Cap 52 Laws of Katsina state of Nigeria 1991, s.2.

There are implications flowing from the prevailing social circumstances and the extant legal systems in the jurisdictions under enquiry vis-a-vis the application of the doctrine of adverse possession. In the first place, the ownership structure differs as between the common law of England on the one hand and the customary and Islamic law on the other hand. Whilst possession characterised by proprietary interests is the root of title under English law, occupation and user rights with no proprietary interest characterise individual holdings under customary and Islamic law; right of ownership lies with the family or community represented by the head chief, Oba or head of the family in the case of customary land tenure, and with the Emir who is the representative of Allah in the universe in the case of Islamic law.

Secondly, from the result of the foregoing inquiry into the position of both the customary and Islamic law of land tenure, it is clear that both indigenous land tenures have in-built mechanisms for tackling stale claims outside the statute of limitation and, *ipso facto*, present an alternative approach as against the common law doctrine of adverse possession. As discussed in the last chapter, customary law is subject to certain rules of validity imposed by local legislation in both the Northern and Southern Nigeria. For example, the various High Court Laws in Nigeria empowers the High court to observe and enforce the observance of customary law that is not repugnant to natural, justice, equity and good conscience nor incompatible with the local legislation for the time being in force⁹⁷⁶. It was on that basis that the court in *Akpan Awo v. Cookey Gam*⁹⁷⁷ preferred to enforce the equitable principle of laches and acquiescence against stale claims other than the exception made for customary law under the statutes of limitation:

...on the ground that the court will not allow a party to call in aid principles of native law, and least of all principles, which, as in this case, were developed in and are applicable to a state of society vastly different from that now existing merely for the purpose of bolstering up a stale claim.⁹⁷⁸

⁹⁷⁶ See e.g. the High Court Law of Lagos State Cap H3 2003, s.26.

⁹⁷⁷ *ibid* at 101.

⁹⁷⁸ *ibid*.

The court found a fair and just principle in equity rather than in the common law doctrine of adverse possession. As the court made clear in that case: 'We do not decide this point in accordance with any provision of English law as to the limitation of actions, but simply on the grounds of equity...'⁹⁷⁹

In the case of Islamic law, the principle of *hauzi* which is the equivalent of the right of prescription under Roman as opposed to English law is rooted in Islamic jurisprudence to protect long possession and ensure land is put to productive use. It is said that the effect of prescription known as *usucapio* in Roman law is:

to confer a positive title to the land upon a person who had remained in possession for a certain time...[it] exemplified what is sometimes called acquisitive prescription in the sense that possession of another's land for a given period conferred a positive title upon the occupier, but English law has never adopted this theory in its treatment of corporeal hereditaments and chattels though it has done so in the case of easements and profits⁹⁸⁰

In the *Hadith* (one of the sources of Islamic law) however, the principle of *hauzias* interpreted by scholars of Islamic Law⁹⁸¹ is as follows:

He who sees somebody in possession of his (claimant's) property and claiming and using the same as his own over a long period [10 years] without any objection from him, the person in possession becomes the owner. If the original owner later brings an action to recover it neither the complaint nor evidence in support thereof will be listened to. But there are exceptions to this principle: 1. cogent reason for not complaining in time e.g. blood relationship or fear of harm from authority; 2. minorship; 3. the person in possession is put there by the claimant either as a free or paying tenant; 4. the person in possession is put in there as a trustee; 5. the claimant is a partner or co-proprietor to the person in possession.⁹⁸²

The essence of bringing the principle of *hauzi* and its exceptions to the fore is to appreciate the fact that its rule of prescription and the exceptions to it keep the concept of prescription strictly within the ambit of Islamic law, thereby constituting

⁹⁷⁹ *ibid.*

⁹⁸⁰ See Burn and Cartwright, *supra* n.3 at 1127-1128.

⁹⁸¹ *Ashalul Madarik* vol. 3 at 236.

⁹⁸² *Mayyarah* Vol. II 164; Maliki Law (Summary Translation of Mukhtasha Khalil by Ruxton) 309 para 1698. See also *Umaru v. Bakosi* (1996) 1NWLR (Pt 425) 38.

an in-built machinery for dealing with stale claims in Islamic law outside English law.

6.2.1 *Summary*

An inquiry into the English common law applicable in England and Wales on the one hand, and the Nigerian Customary and Islamic law of land tenure on the other hand exhibit parallel social circumstances excluding or inhibiting the application of the doctrine of adverse possession. Whilst the evolution of possession as root of title under English law facilitates the application of the doctrine of adverse possession in England and Wales, the peculiar social circumstances in Nigeria which does not permit possessory right as root of title to land but communal ownership and right of occupation and user right mainly, inhibit the application of the doctrine.

6.3 **How are the Land Tenure Systems in the jurisdictions under inquiry receptive of the doctrine of Adverse Possession?**

In Nigeria, the period of limitation regarding State land is 20 years as opposed to 30 years applicable to the Crown land in England and Wales. Whereas actions to recover possession of the foreshore by the Crown in the United Kingdom is 60 years, the statutes of limitations in Nigeria contains no limitation period in this regard.

Whilst the English Limitation Act in relation to land applies to successive and future interests which are features of the English land tenure, the Nigerian Land Use Act allows only 'a plain transfer of the whole of the rights of occupation over the whole of the land'⁹⁸³ thereby jettisoning the common law tenure of successive and future interests.⁹⁸⁴ This obviously obviates the possibility of creating interests in succession or future interests in Nigeria sequel to the enactment of the Land Use Act. It would therefore be out of context in Nigeria to consider the implications of the running of time under the limitation statutes on future interests such as entailed interest, settlement made by person out of possession, entitlement to successive interests; settled land and land held on trust. The basis for non recognition of lesser estates

⁹⁸³ See s. 25 of the Act.

⁹⁸⁴ G. Ezejiolor, 'The Land Use Decree: A critique.' Paper presented at an International Conference in New York, September 1980.

and beneficial, successive and future interests by the Act lies in the distinction between proprietary freehold interests which is tantamount to absolute ownership at common law applicable in England and Wales, and a non proprietary interest in the form of a right of occupancy created by grant.

The common law concept of *seisin* is the bedrock of adverse possession as required by the statute of limitation. The Limitation Act of 1980 applicable in England and Wales states that:⁹⁸⁵

Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession the right of action shall be treated as having accrued on the date of the dispossession or discontinuance.

The provision is the same in the limitation statutes of the thirty six states of the federation of Nigeria and the Federal Capital Territory.

A significant factor common to dispossession and discontinuance of possession is the *act of possession* taken upon the *entry* of a squatter.⁹⁸⁶ Possession must be singular, exclusive, adverse, open, and continuous for the period of limitation. At the expiration of the limitation period, the title of the owner is extinguished and the squatter becomes a title holder in fee simple by virtue of his possession.

Before the advent of the Land Use Act 1978 in Nigeria, this common law position was applied by the Nigerian courts in a plethora of cases. However, the extant regimes of the Land Use Act and the State land Laws appear not to be receptive of the doctrine of adverse possession as known to the common law of England and Wales, considering the various derogatory provisions and express exclusions of the doctrine respectively.

As shown in the previous chapter, a right of occupancy which is the only right cognisable under the Land Use Act, is not a fee simple estate and is far from being a lease. Thus, the regime of the Land Use Act does not create a tenure which could be

⁹⁸⁵Limitation Act 1980, s. 15(6) Sch 1, para 1.

⁹⁸⁶*J.A Pye (Oxford) Ltd v. Graham* [2003] A.C 419 at para.38 per Lord Brown Wilkinson; *Powell v. McFarlane*(1977) 38 P& CR 452 per Slade J at 470.

likened to the English feudal system modernized by the Law of Property Act 1925. Whereas section 1 of the Act appears to vests radical title in the Governor of the State, the provision of that section is made subject to the overall provisions of the Act. For example, the land held by the Federal Government of Nigeria before the enactment of the Act shall continue to vest in the Federal Government absolutely,⁹⁸⁷ while land held by persons either individually or under customary land tenure before the advent of the Act shall continue to be so held as if a right of occupancy had been granted by the Governor.⁹⁸⁸ Not only is the title vested in the Governor not absolute, the trust purportedly created in favour of the citizens of Nigeria is a bare trust which cannot be likened to the English trust in any respect.⁹⁸⁹

The fact that the Act allows sub-leases and sub-underleases to be created from a right of occupancy is of no moment. As Okuniga⁹⁹⁰ warned:

...one must be wary: First against rashly inferring that a statutory right of occupancy is a leasehold interest simply because there are references to the grant of sub-lease or sub-underleases. The Act is no doubt sufficiently confusing in its provisions in this regard, but that does not entitle one to adopt the Humpty-Dumpty type of definition. The lease is a concept of English law and has its own characteristics and incidents unknown to our own indigenous system of landholding. The statutory right of occupancy does share with the English leasehold the quality of certainty of duration but that is about all that is invariably common to both.

Also, the anomalous situation created by the use of the nomenclature such as sub-lease or sub-underlease when the person creating it has no estate in the property but a mere license, is not unusual. For example, the House of Lords in *Brunton v. London and Quadrant Housing Trust*⁹⁹¹ held that a Trust that had no estate out of which it

⁹⁸⁷ibid s. 49(1).

⁹⁸⁸ibid ss.34 and 36.

⁹⁸⁹ For example, although the Governor has the power to grant a right of occupancy to the citizen-beneficiary (s.5), he has no duty at all and a writ of Mandamus does not lie against him; the right of the citizen-beneficiary may be revoked for overriding public interest or for public purpose with or without compensation (ss. 10, 28), etc.

⁹⁹⁰AO Okuniga, 'The Land Use Act 1978 and Private Ownership of land in Nigeria' being text of a paper delivered at the Law Teachers Conference at the University of Ife-Nigeria, 1979.

⁹⁹¹ [2000] 1 AC 406.

could create a tenancy was held liable under a tenancy created by it in favour of Brunton, although Brunton himself had no estate binding on third parties.⁹⁹²

Every right to land in Nigeria lies in, or traceable to an actual or deemed grant by the Governor. A right of occupancy is not the equivalent of a free simple estate absolute in possession which forms the bedrock of title of an adverse possessor in England and Wales. It is consequently bereft of the incidents which characterise a fee simple estate including relativity of title. In the words of Ezejiofor⁹⁹³:

Since in Nigeria, the fee simple is equivalent to absolute ownership under customary law, that interest cannot also now be held in land. Since an estate tail can be created only out of a fee simple or its equivalent it cannot also now exist in the country. A series of beneficial interests or trusts in land in favour of a succession of persons can only be created out of the fee simple or its equivalent which has been withdrawn from individuals and groups. Besides, where it possible to create such interest, that cannot be validly done unless the required consent is obtained. Nor is it likely that such consent will be given if sought. Consequently settlements including future interests and the rule against remoteness under the received English law will henceforth have no place in our law...Also to be laid to rest is the conceptual argument about the applicability of the fee simple in Nigeria.

The holder of a right of occupancy lacks the form of proprietary rights associated with a holder of a fee simple estate absolute in possession in English law. It is said that a right of occupancy is less than ownership and cannot therefore amount to a proprietary right; it is essentially and inextricably the right to occupy and use land.⁹⁹⁴

A squatter cannot enter any land in purported exercise of any right in relation to possession necessary to acquire title by adverse possession at common law, under the Land Use Act regime. Section 37 of the Act prohibits and makes it unlawful for any person other than the holder of a right of occupancy from such entry, or from

⁹⁹²In arriving at that decision, the House of Lords relied on the criteria for determining a valid tenancy as laid down earlier in *Street v. Mountford* [1985] A.C 809 namely: that exclusive possession, tenure and payment of rent would create a valid tenancy.

⁹⁹³ G. Ezejiofor, 'The Land Use Decree: A critique'. Paper delivered at an International Seminar in New York, September 1980.

⁹⁹⁴ I.A Umezulike, *ABC of Contemporary Land Law in Nigeria*, First ed. (2013) Snaap Press Nig. Ltd at 81.

making false claim in relation thereto. Consequently, no action of dispossession of the holder of a right of occupancy required by the statute of limitation is cognisable under the Act nor is it of moment that the holder has discontinued possession. Any purported exercise of right of possession including right of alienation which is inchoate without the consent of the Governor⁹⁹⁵ or the Local Government⁹⁹⁶ depending on the status of the land,⁹⁹⁷ is tantamount to making false claim punishable under the provision.⁹⁹⁸

One of the critical requirements of adverse possession at common law is the act or series of acts of physical possession which is prohibited of any person who is not a holder of a right of occupancy.⁹⁹⁹ Thus, it is illegal to build or farm on the land, erect fences, make unexhausted improvements of any kind etc.¹⁰⁰⁰

Acquisition of title by adverse possession at common law requires exercise of exclusive possession which is not possible under the Land Use Act for, not only is the Governor exempted from such exclusive possession,¹⁰⁰¹ the Governor or any officer duly authorised by him is statutorily empowered to enter into and inspect the land or any improvement thereon at any reasonable hours of the day 'and the occupier shall give free access to the Governor or any such officer to enter and inspect.'¹⁰⁰²

However, since the Land Use Act is not applicable in the Federal Capital Territory (FCT), all the derogatory provisions against the application of the doctrine of adverse possession do not apply therein. It is therefore most probable that time would run in favour of an adverse possessor of allocated land in the FCT under the Limitation Act.

⁹⁹⁵ The Land Use Act Cap L5 Laws of the Federation of Nigeria 2010, s.22

⁹⁹⁶ *ibid* s.21

⁹⁹⁷ Alienation of right to land the subject of a statutory right of occupancy is subject to Governor's consent, while land right the subject of a customary right of occupancy is subject to consent of the Local Government.

⁹⁹⁸ The Land Use Act s.37.

⁹⁹⁹*ibid* s.43.

¹⁰⁰⁰ *ibid* s.43(3).

¹⁰⁰¹*ibid* s.14.

¹⁰⁰²*ibid* s.11.

As discussed earlier in the last chapter, the whole land comprised in the FCT is acquired land with all pre-existing rights abolished. Barring land allotted by the Minister on behalf of the President of the Federal Republic of Nigeria therefore, vacant land qualifies as State land and susceptible to the application of the State Lands Act.¹⁰⁰³ The State Lands Act in the FCT and the State Land Laws applicable in the various states of the federation excludes all state Lands from the ambit of the statute of limitation; an exception unknown to English law.

6.3.1 *Summary*

The position of this thesis is that whereas the jurisdictions under inquiry have similar provisions in their statutes of limitation on adverse possession, and whereas Nigeria received the common law of England including the common law requirements for acquisition of title by adverse possession, the prevailing land tenure system is largely not receptive of the application of the doctrine. Not only are the derogatory provisions of the Land Use Act contradictory of the common law requirements for acquisition of land by adverse possession, the provisions of the State Lands Law applicable in the various states within the federation prevent the application of the doctrine to state lands. Also, with the exception of allocated land in the FCT, the doctrine does not apply to state land, that is, the unallocated acquired land, by virtue of the State Lands Act applicable there.

6.4 **Adverse Possession of Unregistered Land**

The position at common law applicable in England and Wales is that a squatter on unregistered land is not regarded as the successor or transferee of the person barred by the statute of limitation.¹⁰⁰⁴ It is said that 'the squatter enters and acquires a title by virtue of his possession.'¹⁰⁰⁵ The title acquired is a fee simple absolute in possession, and this is so 'notwithstanding the possibility of determination by

¹⁰⁰³ State Lands Act Cap 45 Laws of Nigeria, 1958.

¹⁰⁰⁴MS Dockray: 'Adverse Possession and the Limitation of Actions to Recover land.' Thesis submitted for the degree of Ph.D in Laws of the University of London, 1984 at 414. Available online at <https://kclpure.kcl.ac.uk/portal/> visited on 11/8/2020

¹⁰⁰⁵ibid.

ejection by title paramount.¹⁰⁰⁶ However, the time-barred owner's title is extinguished as against the squatter but not as against interested third parties such as a lessor when time has run against the lessee.¹⁰⁰⁷ This position would ordinarily apply in Nigeria under the received English law and it is buttressed by the Statutes of Limitation applicable in the federating states and the Federal Capital Territory.¹⁰⁰⁸

However, in the case of customary law and by extension Islamic Law,¹⁰⁰⁹ the running out of the limitation period by an adverse possessor does not extinguish customary or Islamic title on land. However, it is said that 'where the claimant relies solely on documents couched in English form and it is not suggested that any reliance is placed on customary law, such claimant has excluded the application of customary law and cannot be heard to say that there cannot be adverse possession of the land.'¹⁰¹⁰ This position is explicated in the words of Graham Paul J. in the Nigerian case of *Green v. Owo*¹⁰¹¹ as follows:

Now what is the plaintiff's position in this case? He has in his possession documents in English Conveyancers' jargon, and Plans attached to them. He has nothing but these documents. There is no evidence except the documents as to the title of the grantees to grant them. There is no evidence of possession under them. These documents profess to give to the plaintiff a right to the land in dispute which the defendant and his predecessors have occupied without interference for over twenty years and which so far as the evidence before me goes none of the plaintiff's predecessors has ever occupied...The Statute of Limitations in such circumstances in England would certainly bar the plaintiff's present claim. Where is the existing native custom to the contrary? There is, so far as I know, no native custom as regards the effect of documentary titles in English Conveyancer form. How would there be?

¹⁰⁰⁶ibid.

¹⁰⁰⁷*Fairweather v. St Marylebone Property Co. Ltd* [1963] A.C 510.

¹⁰⁰⁸ See e.g. Limitation Act 1966, s. 30.

¹⁰⁰⁹ See s.2 of both the various District Court Laws and the various High Court Laws of Northern Nigeria which define customary law to include Islamic law.

¹⁰¹⁰JA Omotola: 'The Adverse Possessor of Registered Land'. *Nig Law Journal* vol. 7, 38 at 39.

¹⁰¹¹(1936) 13 NLR 43 at 45.

In such cases the statute of limitation extinguishes the title of the claimant at the expiration of the limitation period under the general law. This position of the law has been replicated by the courts in subsequent cases.¹⁰¹²

6.4.1 *Summary*

The effect of adverse possession on unregistered land in the jurisdictions under inquiry is the same. It extinguishes the title of the owner at the end of the limitation period and entitles the adverse possessor to title in respect thereof. But where the title is one existing under customary or Islamic land tenure, time generally does not run against the holder of such title except the matter falls within the exceptions discussed in the last chapter.

6.5 **Effect of Adverse Possession on Registered Land.**

6.5.1 *The System of Land Registration*

Unlike the situation in England and Wales where there is a single and uniform system of land registration namely, the Land Registration Act 2002 (LRA) which deals with title registration, Nigeria has two types of land registration system namely, land instrument registration and title registration. The system of title registration in Nigeria comparable to the LRA 2002 applicable in England and Wales, are the Registration of Titles Act 1935 (RTA) applicable in the Federal Capital Territory Abuja¹⁰¹³ (FCT), and the Land Registration Law (LRL) of Lagos state 2015.

6.5.2 *The Land Instrument Registration Law and the Statute of Limitation*

In Nigeria where the Land Instrument Registration Law applies throughout the thirty six states of the federation and in the FCT. Unlike the situation in England and Wales where this is not applicable, registration of Instrument without possession could be defeated by the statute of limitation in favour of an adverse possessor. The

¹⁰¹² See Coker Ag CJ in *Agboola v. Abimbola* (Unreported) SC.336/67 OF 4/7/69; *Oyedele v. Ogun* (Unreported) LD/40A/69 of 14/8/71.

¹⁰¹³ This Law which was formerly in force in the former Federal Territory of Lagos but which was later repealed in 2015 by the Land Registration Law was made applicable in the Federal Capital Territory, Abuja by the Federal Capital Territory Act 1976: See s.13 of the Act and Schedule 2 thereto.

futility of land instrument without possession was described by the English court as follows:

Title deeds come to little without evidence of actual enjoyment, for otherwise anyone might pretend to give away the lands of anybody else. Parchment, of itself, comes to little; the real question is as to actual enjoyment.¹⁰¹⁴

Consequently, adverse possession of land by a party for the duration of the limitation period without eviction by the owner extinguishes the title of the latter against the adverse possessor.¹⁰¹⁵

6.5.3 *Title Registration and the Limitation Period*

One significant feature of the LRA 2002 applicable in England and Wales is that no period of limitation runs against a registered proprietor¹⁰¹⁶ and consequently, a squatter's exercise of adverse possession for the limitation period does not extinguish the title of the registered proprietor.¹⁰¹⁷ However, such adverse possessor may apply to be registered after ten years of adverse possession through a procedure set out in Schedule 6 to the Act. The procedure which has been discussed in chapter 4 is administrative through the Lands Registry involving service of Notice, engagement of due process and fulfilment of certain statutory conditions by the applicant¹⁰¹⁸ before alteration of the register. Where the adverse possessor becomes registered consequently, he becomes the new registered proprietor of the estate after taking a Parliamentary transfer of the existing proprietor's title,¹⁰¹⁹ and his former title based on possession is extinguished. The emphasis therefore shifted from a consideration of possession to the register as root of title. This is not the case under

¹⁰¹⁴*Lord St Leonards v. Ashburner* (1870) 21 LT , 595 at 596 per Bramwell B. See also *Malcolmson v. O'Dea* (1863) 10 HLC 593 at 614; *Bristow v. Cormican* (1878) 3 App Cas 641 at 668; *Johnston v. O'Neill* (1911) AC 552.

¹⁰¹⁵*Green v. Owo* supra (n 51); *Agboola v. Abimbola* supra (n 52).

¹⁰¹⁶ LRA 2002, s.96(1).

¹⁰¹⁷ *ibid*, s.96(2).

¹⁰¹⁸ See Schedule 6 to the LRA 2002.

¹⁰¹⁹ This new title does not affect the priority of any interest affecting the estate: See LRA 2002, Sch 6, para 9(2), and is subject to the estates and interests that bound the original paper owner except for any registered charge affecting the estate immediately before his registration: *ibid*, para 6(3).

both the Registration of Titles Act 1935 (RTA) made applicable in the FCT pursuant to section 13 of the FCT Act 1976 and the Second Schedule to the Act.

Under the RTA applicable in the FCT, the register of title may be rectified only upon an order made to that effect by the court where it is shown to the satisfaction of the court that the title of the registered owner has been extinguished under the provisions of the Limitation Law.¹⁰²⁰ Contrary to the position of the LRA 2002, the period of limitation under the RTA and the running of time against a registered proprietor and consequently, a squatter's exercise of adverse possession for the limitation period, extinguish the title of the registered proprietor. In this case, the adverse possessor shall not only bring an action in court for declaration of title based on adverse possession and seek an order of court for rectification of the register, but must necessarily do so only upon the expiration of the limitation period. The implication of this provision is to make the basis of title to registered land possession as opposed to registration.

This position which makes the court the only arbiter on the question whether or not the register shall be rectified so as to give effect to the title gained by the adverse possessor is reminiscent of the old position in England under the Land Transfer Act 1897¹⁰²¹. But this position has changed since the enactment of the Land Registration Act 1925¹⁰²² which made the Registrar the arbiter in this regard. This new position which is adopted by the LRA 2002 is a better approach considering the enormous delay experienced in the Nigerian courts and the adverse effect on 'the right of the adverse possessor which remains inchoate and contingent on the court's willingness to exercise this discretion in his favour.'¹⁰²³ Thus, the position under the LRA 2002 appears to be better.

The effect of the Limitation Law on the provisions of the Lagos State Land Registration Law 2015 is contained in section 112 (1) and (2) as follows:

¹⁰²⁰Registration of Titles Act Cap 181 Laws of the Federation of Nigeria 1958 (made applicable in the FCT by virtue of section 13 of the FCT Act 1976 and the Second Schedule thereto), s.62.

¹⁰²¹ Land Transfer Act 1897, s.12.

¹⁰²² Land Registration Act 1925, s.75(2) and (3).

¹⁰²³J.A. Omotola, *supra* (n 981) at 44.

- (1) The holding of land may be acquired by uninterrupted adverse possession:
 - a. against the State after a period of twenty (20) years, and
 - b. in any other case after a period of twelve (12) years
- (2) Any person claiming to have acquired land by virtue of the provisions of sub section (1) of this section shall, having advertised or given notice in such manner as the Registrar may require, apply to the court for an order directing him to be registered as the holder of such land.

Section 100 of the Law provides that:

Where the court is satisfied that the title of the registered holder of any land or mortgage has been extinguished under the Limitation Law, the court may order the register to be rectified accordingly, and the person aggrieved by such a rectification shall not receive any compensation.

The above provision of section 112(2) of the Land Registration Law (LRL) of Lagos state on registration of an adverse possessor as a registered proprietor is vague¹⁰²⁴ and do not, unlike the LRA 2002, afford the registered proprietor adequate notice and time within which to respond. Also, unlike the LRA 2002 which disapplies the Limitation Act 1980 in relation to registered land by placing emphasis on registration as opposed to possession,¹⁰²⁵ the basis of the section 100 of the LRL is clearly shown to be the limitation statute with emphasis on possession. It is said with regards to the LRA 2002 that ‘...the mere fact that the squatter has been in possession of the land for a period of time does not give him a right to the land; merely a right to apply to be registered – a right which the registered proprietor can resist.’¹⁰²⁶

Whereas the LRA 2002 contains inbuilt processes superintended by the Registrar of titles for registration of an adverse possessor in deserving cases while generally

¹⁰²⁴ For example, there is no clue as to whom to serve a notice on unlike the LRA, or what form the advertisement should take.

¹⁰²⁵ See s. 96(1) of the LRA 2002. Thus, for example, Sch 6 Para. 1(1) of the LRA 2002 allows the squatter to apply for registration if he has been in adverse possession for a period of ten years as opposed to a longer period set by the Limitation Act 1980.

¹⁰²⁶EH Burn, J Cartwright, Maudsley & Burn’s *Land Law: Cases and Materials*, 9th ed. Oxford University Press 2009, 280.

protective of the registered proprietor, the LRL like the RTA 'is not that protective of the existing registered proprietor.'¹⁰²⁷ Aside from isolating the existing registered proprietor in the process and denying him of an early response to the claim of the squatter through a counter notice, there is no indication in the provision of section 112(2) of the LRL as to whom the notice shall be served on or whether a response is required.

A spontaneous application to court by the squatter after advertisement or notice without a response from the existing proprietor cannot be a satisfactory compliance with the condition precedent before the action is brought.¹⁰²⁸ While the court may likely request that the squatter put the existing proprietor on notice of the application for registration, 'it may be difficult to see through the fraudulent designs of a squatter in bye-passing the existing proprietor since, in most cases, the intention of the adverse possessor is in bad faith.'¹⁰²⁹

6.5.4 *Registration and overriding interests*

The concept of overriding interests is recognised under the LRA 2002 as it is under the RTA and the LRL. Overriding interests are interests which do not appear on the register but which are binding on both the registered proprietor and any person who acquires an interest in the property.¹⁰³⁰ These interests 'detract from the principle that the register should be a mirror of title'¹⁰³¹ and contradicts the theory of indefeasibility of registered title.

The provision of Schedule 1 paragraph 2 of the LRA 2002 lists as one of the interests that will override first registration, 'an interest belonging to a person in actual occupation...except for an interest under a settlement under the Settled Land Act 1925', while the Act listed in Schedule 3 paragraph 2 with reference to a registered disposition:

¹⁰²⁷IO Smith (n 681) at 18, 19.

¹⁰²⁸ibid at 18.

¹⁰²⁹ ibid.

¹⁰³⁰ This definition captures the meaning ascribed to it by the LRA 1925 replaced by the LRA 2002, as well as the RTA and LRL.

¹⁰³¹Burn & Cartright supra (n 997) at 1100.

an interest belonging at the time of the disposition to a person in actual occupation,...except for an interest which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and of which the person to whom the disposition is made does not have actual knowledge at that time.

The rationale behind these provisions appears to be the 'protection against purchasers where needed but it is either not reasonable to expect nor sensible to require any entry on the register.'¹⁰³² It does not necessarily protect the interest of the adverse possessor, the basic policy of the Act being the creation of a complete register of land as much as possible.¹⁰³³ Does this underlying rationale behind the provisions of Schedules 1 and 3 of the LRA 2002 referred to above, the same as the provisions of section 52(h) of the RTA and section 66(f) of the LRL?

The provisions of section 52(h) of the RTA and section 66(f) of the LRL make all registered land subject to certain overriding interests including 'rights acquired or in the process of being acquired by virtue of *any enactment relating to the limitation of actions* or by prescription.' The right of an adverse possessor as an overriding interest is preposterous and obviously confronting the existing proprietor with a *fait accompli*. This common provision in both statutes which recognises such overriding interest without a legal obligation to register same clearly defeats the notion of indefeasibility of title often associated with registration. It blurs the distinction between registered and unregistered land in determining the status of a registered owner vis-à-vis the squatter in adverse possession and appears to put the adverse possessor in a stronger position as regards registered land than unregistered land.

It is said that '[t]he simple lesson from a juxtaposition of the position in England and Wales, and the position in Nigeria...is that in Nigeria, the register of title has practically ceased to be a mirror of title and no longer serves as notice to the existing registered proprietor to beware'. Thus, 'the same measure of supervision expected of

¹⁰³² *ibid* at 1101, relying on the Consultative Document on Land Registration for the Twenty First Century (1998), para 4.17: See Law Com No.254.

¹⁰³³ *ibid*.

the owner of unregistered land is expected of the registered proprietor with respect to registered land.'¹⁰³⁴

6.5.5 *Summary*

The position of this thesis is that the effect of adverse possession on registered land varies as between the jurisdictions under inquiry. Whilst the LRA 2002 applicable in England and Wales disapplies the Limitation Act 1980 in relation to registered land by placing emphasis on registration as opposed to possession, the basis of both the RTA and the LRL is clearly shown to be the limitation statutes with emphasis on possession.

The LRA 2002 contains in-built mechanism for registration of an adverse possessor in deserving cases whilst generally protective of the registered proprietor and making his title more secure. It significantly reduces the ability of a squatter to obtain title to the land and brightens the chances of the existing registered proprietor to resist the claim of the adverse possessor and to take steps to recover possession. On the contrary, both the RTA and LRL in Nigeria are not protective of the registered proprietor. Whereas the main objective of the LRA 2002 is to balance the interest of the registered proprietor against public interest, make land available for the market, and make the register a true mirror of title, in Nigeria, the register of title has practically ceased to be a mirror of title and does not serve as notice to **the** registered proprietor to beware; the same measure of supervision expected of the owner of unregistered land is expected of the registered proprietor with respect to registered land.

6.6 **Adverse Possession and Human Rights Challenge**

One striking difference as between the jurisdictions under inquiry before 1998 is that whilst successive Nigerian Constitutions had always guaranteed and protected property rights including possessions along with the right to compensation,¹⁰³⁵ there

¹⁰³⁴ *ibid.*

¹⁰³⁵ The Nigerian Republican Constitution, 1963, s.31; The Constitution of the Federal Republic of Nigeria 1979, s. 40; The Constitution of the Federal Republic of Nigeria 1999 as amended, s. 44. See the Constitution of the Federal Republic of Nigeria, 1999 as amended, s. 44(1).

was no such specific protection offered under any codified domestic law with regards to England and Wales. With no bill of rights in place, it was difficult to subject any law on deprivation of possession to human rights scrutiny and consequently, there was no basis for the courts to hold whether or not statutory provisions relating to adverse possession violated any rule of human right contained in any instrument.

The extant Constitution of the Federal Republic of Nigeria 1999 like the earlier constitutions, not only guarantees and protects property right, but also provides circumstances under which such right may be derogated from to include 'any general law relating to limitation of actions.'¹⁰³⁶ The consequence of that constitutional provision is that any deprivation of property right including possession resulting from the operation of a "general law" relating to the statute of limitation shall not amount to deprivation of property right under section 44(1).

The Land Registration Act 1925, the precursor of the Land Registration Act 2002 applicable in England and Wales, had certain features which exposed it to human rights challenge. It is said of registered and unregistered land where the period of limitation is completed under the LRA 1925 that:

...the paper owner could lose his title in favour of an adverse possessor. There is no requirement for the adverse possessor to give him any formal notice of his possession, or that he is approaching the completion of the limitation period; nor is there any provision for the paper owner to be compensated for his loss of title.¹⁰³⁷

This dilemma was confronted by the human rights regime with the advent of the European Convention on Human Rights and its domestication under the Human Rights Act 1998 (HRA) and in particular, its provisions on property rights as contained in Article 1 of the First Protocol to the Convention which provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

¹⁰³⁶ *ibid*, s.44(2)(i).

¹⁰³⁷ Burn & Cartwright, *Modern Law of Real Property*, *supra* (n.3) at 1164.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Both the Human Rights Act of 1998 and the Nigerian Constitution protect the interest of the property owner from encroachment or acquisition except in prescribed circumstances. However, derogation from such protection by the State depends on varying circumstances as between the two jurisdictions: whereas in England and Wales, derogation from protection shall be *in the public interest and subject to the conditions provided for by law and by the general principles of international law*; in Nigeria, the constitutional provisions on protection of property right may be derogated from *in the manner and for purposes prescribed by a law that provides for prompt payment of compensation and access to court by the property owner, to determine the extent of interest and quantum of compensation*. Thus, the scope of appreciation left to the State for the purpose of striking a fair balance between the individual property right and public interest in both jurisdictions differs. Also, whilst the requirement of prompt payment of compensation is a *sine qua non* for taking control or for acquiring such interest compulsorily under the Nigerian Constitution, this is not so provided under the HRA 1998 applicable in England and Wales.

However, both the HRA applicable in England and Wales and the Nigerian Constitution contain common exceptions from their provisions on guarantee and protection of possessions. In the case of Nigeria, any deprivation of property right including possession resulting from the operation of a 'general law relating to the statute of limitation' shall not amount to deprivation of property right under section 44(1)¹⁰³⁸, whilst in the case of England and Wales, the second paragraph of Article 1 of the First Protocol of the HRA which provides that 'the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest...' is an exception to the general protection of property right under the general rule.

¹⁰³⁸ *ibid* s.44(2)(i).

It follows also that the provisions as to the manner and conditions for such acquisition including payment of compensation are inapplicable. With regard to compensation, the Grand Chamber of the European Court of Human rights held in *UK v. Pye*¹⁰³⁹ that:

A requirement of compensation for the situation brought about by a party failing to observe a limitation period would sit uneasily alongside the very concept of limitation periods, whose aim was to further legal certainty by preventing a party from pursuing an action after a certain date.

This position applies in Nigeria consequent upon the provision of section 44(2)(i) which makes the provisions of section 44(1) on guarantee and protection of property and provision on compensation in section 44(1) (a) and (b) inapplicable to *the general law relating to the statute of limitation*.

Also, under the provisions of the Land Registration Act 2002, no compensation is payable by a person who is registered as a new owner of registered after the fulfilment of the conditions in Schedule 6 of the Act¹⁰⁴⁰. Same applies in Nigeria under the RTA applicable in the Federal Capital Territory¹⁰⁴¹, and under the Land Registration Law of Lagos State.¹⁰⁴²

The African Charter on Human and Peoples' Rights domesticated in Nigeria as part of the Nigerian domestic law¹⁰⁴³ has a similar provision on property rights with implications for the statute of limitation and adverse possession. Article 14 of the Charter guarantees property right which may be encroached upon 'in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

In terms of content, the provision of Article 14 is vague compared to either section 44 of the Nigerian Constitution which it is meant to complement as a human right instrument, or the provision of Article 1 of the First Protocol of the HRA with which

¹⁰³⁹(2008) 46 EHRR 45.

¹⁰⁴⁰ This case falls outside the provision of Schedule 8 Paragraph 1 of the LRA, 2002.

¹⁰⁴¹ Registration of Titles Act Cap 181 Laws of Nigeria 1958, s. 62.

¹⁰⁴² Land Registration Law, Lagos State 2015, s. 100.

¹⁰⁴³ See the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 2010.

it shares international flavour. It therefore requires judicial interpretation which may be given but not yet, by the domestic court pursuant to Article 26, or by the African Court on Human and Peoples' Rights in respect of which no declaration recognising its jurisdiction is yet to be deposited by Nigeria pursuant to Article 36(4) of the Charter.¹⁰⁴⁴

Article 1 of the First Protocol of the HRA contain a better and much more detailed provisions on circumstances under which the right may be derogated from by the state, than the African Charter. For example, whilst the question whether the derogation clause in Article 14 covers limitation of actions in relation to adverse possession would depend on the court's interpretation of the vague clause on derogation by the state from the property right guaranteed, the second paragraph of Article 1 of the First Protocol of the HRA contains a much more detailed and definitive provision on the subject appropriately interpreted in *Pye* by the Grand Chamber of the ECtHR. Thus, unless the provision of Article 14 of the African Charter is interpreted in light of Section 44(2)(i) of the Nigerian Constitution to exempt the 'general law relating to statute of limitation' from its ambit, it may be difficult to take a definitive position as the Grand Chamber of the ECtHR did in *Pye*.

Unlike the position in England and Wales where *Pye* has shed light on the impact of the human rights regime on the doctrine of adverse possession, there are no judicial decisions in Nigeria on the point, and this may be critical in cases of registered land where, unlike the LRA 2002 which provides some measure of protection for the registered proprietor against the adverse possessor-applicant for registration as a new proprietor of title, both the RTA and the LRL in Nigeria contain no such safeguards. Both statutes entitle the adverse possessor to apply for registration upon showing that the court is satisfied that the title of the registered holder of the land has been extinguished under the limitation law without advance notification of imminent loss of title to the existing proprietor or the opportunity to object to such registration.

¹⁰⁴⁴ See Article 36(4) of the Charter which requires a deposit of a Declaration recognising jurisdiction of court to accept cases from individuals and Non Governmental Organisations.

The tenacity of the doctrine without some palliatives for loss of title and in circumstances which may appear unfair or unconscionable due to absence of good faith, may open doors for human rights challenge in the Nigerian jurisdiction in future. In the case of unregistered title or where only land instrument is registered, enforcement of the limitation law without compensation to the actual owner may work injustice particularly as the law does not take cognisance of the owner's lack of knowledge of the presence or the motive of the adverse possessor.

6.6.1 *Harmonising Property right and Squatters' right*

In both jurisdictions under study, the lacuna in harmonizing the property right of the landowner with the right to private and family life has been filled by the wave of constitutional and international legal regimes across the globe. In particular, there are international conventions to which both jurisdictions are signatories and which may assist the courts in harmonizing the two human rights perspectives with a view to balancing the interest of the parties. Whilst positive law may not provide for right to housing locally, there are other rights such as the right to life, right to the dignity of human person and right to private and family life guaranteed under various international instruments which may add up to recognition of that right locally.

6.6.2 *Summary*

The position of this thesis is that the law in England and Wales and other European countries is that the application of the doctrine of adverse possession is not a violation of the right to property. This is the position of the European Court on Human Rights in *U.K v. Pye* and it is in tandem with the letters and spirit of the extant Land Registration Law 2002. Whatever impression formed by the Land Registry with regards to registered land has to change sequel to that decision.

In Nigeria, the enjoyment of rights in land is subject, among other exceptions, to the law relating to limitation of actions and *ipso facto*, the law of adverse possession. Although there are no judicial decisions unlike the position in England and Wales streamlining the parameters of application of the constitutional provisions to the registered or unregistered land, those provisions and the African Charter on Human

and Peoples' Rights (ACHPR) would ordinarily apply to unregistered land from the unambiguous provision of section 43(2)(i) of the Constitution and, on the face of it, the provision of section 14 of the ACHPR, thereby making it impossible to impugn the application of the doctrine of adverse possession from the human rights perspective. But the same cannot be said of registered land where both the RTA and the LRL do not exude the kind of fairness and equity associated with the reform of the registration procedure under the LRA - a reform which makes vast concessions for registered land owners in England and Wales. Thus, the enforcement of the limitation law against registered proprietors in Nigeria may be subject of human rights challenge in future.

6.7 Adverse Possession and Criminalisation of Squatting

Apart from the local circumstances and the various local statutes making the application of the doctrine of adverse possession by the Nigerian courts questionable, there are statutes criminalising unlawful entry under English and Nigerian law with consequences. First, there is the question whether the acquisition of title by adverse possession which constitutes an offence under a statute criminalising the act of adverse possession is valid. This question is fundamental as the adverse possessor, if found guilty, is not absolved from punishment under the law. The second question is whether the commission of an offence by an adverse possessor may defeat his application for registration under the extant registration laws in England and Wales, and Nigeria. These questions are examined seriatim from the comparative perspective in this segment.

6.7.1 *When will acquisition of title by Adverse Possession constitute an offence?*

In England and Wales, and in Nigeria, forceful entry into possession is criminalised and does not amount to peaceful possession required to acquire title by adverse possession. In England and Wales, both the criminal law statutes¹⁰⁴⁵ and judicial creativity¹⁰⁴⁶ meant to defeat squatter's claim to adverse possession exist. In Nigeria

¹⁰⁴⁵ See for example, the Criminal Law Act 1977, s.7; Criminal Justice and Public Order Act 1994

¹⁰⁴⁶ See *Leigh v. Jack* (1879) 5 Exch.D 264; *Wallis's Holiday Camp v. Shell Max* [1975] 1 QB 96; *Beaulane Properties Ltd v. Palmer* [2005] EWHC 817.

under the Criminal Code (applicable in Southern Nigeria except Lagos State), the Penal Code (applicable in the Northern Nigeria including the Federal Capital Territory), and the Lagos State Property Protection Law¹⁰⁴⁷, forceful entry amounting to criminal trespass is also an offence punishable by law.¹⁰⁴⁸

However, different positions prevail between England and Wales on the one hand and Nigeria on the other hand regarding peaceful entry and acquisition of possession in relation to residential building. A distinction was drawn by the Court of Appeal for England and Wales in *Best v. Chief Land Registrar and Secretary of State for Justice*¹⁰⁴⁹(*Best*) between a peaceful entry into a residential building and consequent exercise of exclusive possession against the whole world *without living or intending to live there* over a period of limitation on the one hand, and peaceful entry into a residential building by a squatter who *actually lives in it or intend to do so*, which may constitute an offence under section 144 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO Act). The distinction which is fine but significant is that between a squatter who took possession of a residential building technically through the exercise of physical possession¹⁰⁵⁰*with no intention of living therein* on the one hand, and a squatter who actually enters the building *to live there, or having the intention to do so*. Whilst the first scenario may lead to acquisition of title by adverse possession at the expiration of the limitation period and is not caught by section 144 of LASPO Act, the second scenario which may also constitute adverse possession, amounts to criminal trespass which constitutes an offence there under.

It is instructive to note that this distinction applies only in respect of residential buildings mainly in England and Wales and does not apply to commercial properties. Also, the position under LASPO Act does not apply across the federation of Nigeria due to disparity in social circumstances.

¹⁰⁴⁷Lagos State Property Protection Law 2016, s. 2.

¹⁰⁴⁸ See the Criminal Code Law applicable in the Southern states of Nigeria, ss.81 and 82; and the Penal Code Law of the various Northern states of Nigeria including the Federal Capital Territory, s.342.

¹⁰⁴⁹[2015] EWCA Civ 17.

¹⁰⁵⁰ These may include among others, fencing, renovation of the premises and warding off trespassers.

Over the decades, government for England and Wales has been battling with challenges arising from illegitimate occupation of residential accommodation by squatters at the slightest opportunity with serious consequences for the home owners and the local councils. The concerns of the public heightened over the difficulty encountered by home owners of residential property in securing the assistance of the Police in evicting squatters there from.¹⁰⁵¹ In response to consultation published on 26 October 2011, the Parliamentary Under-Secretary of State articulated the position of government as follows¹⁰⁵²:

...I have been contacted time and time again by MPs and constituents about the appalling impact that squatting can have on their homes, businesses and local communities. This is not media hype. It does really happen; and when it does it can be highly stressful for the owner or lawful occupier of the property concerned. It is not only the cost and length of time it takes to evict squatters that angers property owners; it is also the cost of the cleaning and repair bill which follows eviction. While the property owner might literally be left picking up the pieces, the squatters have gone on their way, possibly to squat in someone else's property.

This was the position in England and Wales in spite of the enactment of the Criminal Law Act 1977 meant to frustrate the illegitimate occupation of squatters on residential premises¹⁰⁵³, and the Criminal Justice and Public Order Act 1994 which enhanced Police powers under the Act. Both legislative efforts and judicial creativity¹⁰⁵⁴ meant to defeat squatters' claim to adverse possession on residential premises failed to yield fruitful results. It was against this backdrop that the provision of section 144 of LASPO Act was conceived.

The social circumstances in Nigeria are different. What is prevalent in Nigeria is land grabbing and land speculation tantamount to acquisition of land by forcible entry. The relevant provisions of both the Criminal Code¹⁰⁵⁵ and the Penal Code¹⁰⁵⁶ were

¹⁰⁵¹*Options for Dealing with squatting* (Consultation Paper CP12/2011).

¹⁰⁵²*Government Response to Consultation Paper*, n.91 published on 26 October 2011.

¹⁰⁵³ Criminal Law Act, s.7. This section enables property owners made homeless as a result of squatters' occupation of their properties to lodge complaints to the Police.

¹⁰⁵⁴For examples of judicial creativity in this regard, see *Leigh v. Jack* (1879) 5 Ex D 264 (CA); *Wallis's Holiday Camp v. Shell-Max* [1975] 1 QB 94 (CA); *Beaulane Properties Limited v. Palmer* [2005] EWHC.

¹⁰⁵⁵ Criminal Code Act Cap C42 Laws of the Federation of Nigeria 2004, s.381,382.

¹⁰⁵⁶ Penal Code Laws of Northern Nigeria, s.342

meant to criminalise such forcible entry and penalise the trespasser, and the same situation obtains under the Lagos State Property Protection Law.¹⁰⁵⁷ These laws prohibit forcible entry and illegal occupation mainly; none of these laws prohibits peaceful entry and possession of land whether in respect of residential accommodation or any other. Also, the kind of distinction drawn by the England and Wales Court of Appeal in *Best* between *peaceful possession* by a squatter living or having the intention to live in the residential accommodation and another not living in or having such intention, does not obtain in Nigeria.

Sections 81 and 82 of the Criminal Code and section 342 of the Penal Code contain no provisions directly affecting the regime of adverse possession and the reason is not farfetched. For example, under both Laws, an immovable property such as land is not capable of being stolen; asportation is required. Hence, any other interference with the land by peacefully taking possession of it, or having taken peaceful possession, by peacefully remaining in possession of it and exercising a right inconsistent with that of the land owner, may lead to a claim of adverse possession after the period of limitation, without constituting an offence. On the contrary, the land owner may commit an offence by interfering with the peaceful possession of the squatter through forceful entry.¹⁰⁵⁸ Section 81 of the Criminal Code provides:

Any person who, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace enters on land which is in actual and a peaceable possession of another, is guilty of a misdemeanour, and is liable to imprisonment for one year.¹⁰⁵⁹

This provision which has festered the regime of adverse possession in many parts of Southern Nigeria, has been identified as the reason for the failure of the Nigerian

¹⁰⁵⁷Lagos State Property Protection Law 2016.

¹⁰⁵⁸ However, recovery of possession may be possible through an action for recovery of possession in court.

¹⁰⁵⁹ This is replicated in section 52 of the Criminal Law of Lagos State No. 11 2011, although the term of imprisonment prescribed is "two (2) years." See also s. 256 of the Penal Code, and s. 16 of the Lagos State Property Protection Law 2016 for similar provisions.

criminal law ¹⁰⁶⁰ to give adequate protection to the true legal and beneficial owners' of land. In the words of Adeyemi:¹⁰⁶¹

...Once the intruder can gain a peaceful entry on to the land and is in "actual and peaceable possession" of it, then the right of the owner forcibly to eject the intruder will seem to end as otherwise, he may find himself charged with and convicted for forcible entry. This situation is now encouraging a number of problems which are now undermining confidence in dealings in land, and also disorderly behaviour particularly in the Lagos area.

The Lagos State Criminal Law is the only criminal legislation which criminalises peaceful possession which could amount to adverse possession at the expiration of the limitation period. Unlike the position under the Criminal and Penal Codes, conversion of land by a squatter or an encroacher is criminalised under section 278(1)(b) of the Criminal Law of Lagos State as an offence of stealing for which such an adverse possessor may be prosecuted, convicted and sentenced by a court of competent jurisdiction. This position is made clearer from the specific provision of 278(5)(a) which provides that, 'in the case of conversion, it is immaterial whether...[the land] is at the time of the conversion in the possession of the person who converts it...' suggesting that peaceable physical possession which is germane to acquisition of title by adverse possession is an offence under this Law.

Also, section 278(4) of the Law provides that '...conversion may be dishonest, although it is effected *without secrecy or attempt at concealment*,' suggesting that acts of possession exercised openly and without concealment-characteristic of adverse possession, do not negate the mental element of *dishonesty* required for the commission of the offence of stealing.

These provisions, apply to any type of property including residential and commercial property in Lagos State, deviates from the position of criminal law in

¹⁰⁶⁰AA Adeyemi, 'The Criminal Process as a Selection Instrument for the Administration of Criminal Justice.' in the *Nigerian Criminal Process*, A.A Adeyemi ed. (1977) University of Lagos Press, 26.

¹⁰⁶¹AA.Adeyemi, *supra* (n 1031) at 48.

relation to adverse possession in other parts of the country, and runs counter to the criminal legislation on adverse possession and criminalisation of trespass in England and Wales. Also, unlike the decision of the Court of Appeal for England and Wales in *Best* that section 144 LASPO Act does not affect the application of the doctrine of adverse possession, the provisions of the Criminal Law of Lagos State is meant to affect the efficacy of the doctrine and make it inapplicable.

6.7.2 *Is the commission of criminal trespass by an adverse possessor a bar to Registration?*

The legal doctrine which states that a person will be unable to pursue legal remedy arising out of illegality (*ex turpi causa non oritur actio*) is an age long common law doctrine applicable in all cases where it would be against public policy to entertain a claim which would be unconscionable or repulsive to public morality.¹⁰⁶² A typical example of a situation such as this is where a person seeks to benefit from his own wrongdoing or crime. However, while the doctrine remains a matter of public policy, it is lacking in consistent legal principles, and 'that policy is not based upon a single justification but on a group of reasons which vary in different situations.'¹⁰⁶³ This was demonstrated by the England and Wales Court of Appeal in *Best v. The Chief Land Registrar & Secretary of State for Justice*¹⁰⁶⁴ (CLR) (*Best*).

As discussed in chapter 4 of this thesis, the question which the Court of Appeal had to resolve in *Best* was whether an application for registration under the LRA 2002 by reason of a period of adverse possession is valid where part of the relevant period of possession consisted of the occupation of a residential building in circumstances constituting an offence under section 144 of LASPO Act. Whilst the provision of section 144 of LASPO Act is silent on its effect on adverse possession, rule 16(3) of the Land Registration Rules 2003 vests the Registrar with the power to reject an application for registration on delivery or cancel it at any time thereafter, if it appears to be substantially defective. The Registrar rejected Mr Best's application for

¹⁰⁶² See *Gray v. Thames Trains* [2009] 3 W.L.R 167.

¹⁰⁶³ Per Lord Hoffman in *Gray v. Thames Trains*, supra (n 100).

¹⁰⁶⁴[2015] EWCA Civ 17.

registration on this ground because the application revealed that he was relying on conduct in contravention of section 144 of LASPO Act. This reasoning could be said to be in consonance with the principle *ex turpi causa non oritur actio*. However, the England and Wales Court of Appeal, like the lower court, for the various reasons discussed in chapter 4 of this thesis, held that the commission of an offence under LASPO Act is not a bar to registration of the offender as a proprietor of registered land after fulfilling the conditions prescribed by the LRA 2002.

There is no judicial decision in Nigeria akin to that in *Best* and various reasons could be responsible for this. First, under both the Registration of Titles Act (RTA) applicable in the Federal Capital Territory (FCT), and the Lagos State Land Registration Law (LRL), the Registrar has no role to play in determining whether or not the title of the adverse possessor is registrable; the Registrar merely acts on the court order for rectification of the register in favour of the adverse possessor as his responsibility is administrative in that regard. The question whether or not adverse possession was acquired in circumstances constituting the commission of a criminal offence ought to have been raised and dealt with (if raised at all) by the court before making an order for rectification of the register. Second, there is no replica of rule 16(3) of the Land Registration Rules of the LRA regarding the rejection or cancellation of a defective application for registration on the ground contemplated by the Registrar. Third, there is no replica of section 144 in the criminal laws applicable in Nigeria as discussed earlier on.

However, where the Nigerian court is requested to determine the validity of the adverse possession on the same ground as in *Best*, the court will have to construe the existing criminal statutes accordingly to determine the appropriate approach in applying the *ex turpicausa* rule within the parameters of the prevailing circumstances, as it was done in *Best*. Thus, whilst *Best* may not be a binding authority in Nigeria, it could be a valuable compass showing the way to go.

6.7.3 *Construing the Nigerian Criminal Law*

As discussed in the last chapter of this thesis, the provisions of the Criminal Code¹⁰⁶⁵ and the Penal Code¹⁰⁶⁶ applicable in the Southern states (except Lagos State) and the Northern states (including the FCT) respectively, criminalise only forceful entry; peaceful entry and exercise of adverse possession for a period limited by the statutes of limitation is not an offence. It follows therefore that the title of such adverse possessor is registrable under the RTA and may be registered upon an order for rectification made by a court of competent jurisdiction.

On the contrary, in Lagos State, the unequivocal provisions of the Criminal Law of the State and the Property Protection Law run parallel to the requirements of adverse possession and make it impossible for time to run in favour of the squatter who may have committed an offence under the relevant Law. Thus while both section 144 of LASPO Act and section 278(1)(b),(4) and (5)(a) of the Criminal Law of Lagos State criminalise peaceful entry and possession, the effect of their provisions on the application for registration of the title of the adverse possessor cannot be the same.

Amongst other reasons adduced by the Court of Appeal in *Best* are: that 'Parliament could not have intended section 144 to have any impact on the operation of the doctrine specified in the LRA because of the public policy concerns underlying adverse possession in registered and especially unregistered land';¹⁰⁶⁷ and that 'the Act was for the purpose of providing practical assistance to homeowners in removing trespassers from their property in a less cumbersome and more efficient way under the criminal law instead of the procedures that exist at civil law'.¹⁰⁶⁸ These two reasons falter when applied to the Nigerian situation.

¹⁰⁶⁵ *ibid* s. 81, 82

¹⁰⁶⁶ *ibid* s.342.

¹⁰⁶⁷ Law Commission and HM Land Registry Report No. 254, *Land Registration for the Twenty-First Century : A Consultative Document* (1998)

¹⁰⁶⁸ I Okeoma, 'The Future of Adverse Possession of Registered Land etc.' Accessed online at www.academic.edu at 15.

Whilst there might be no evidence in the provisions of LASPO Act that ‘parliament could not have intended section 144 to have any impact on the operation of the doctrine specified in the LRA’ as the provisions of the Act coincides with the requirements for adverse possession through peaceful possession, the provisions of the Criminal Law of Lagos State and the Property Protection Law of the State run parallel to the requirements to be met for adverse possession and make any entry into possession an offence *in limine*. Again, whilst the LASPO Act may seek to assist the homeowners in removing trespassers from their property, the main objective from the tenor of the Criminal Law of Lagos State and the Property Protection Law of the State is to forestall and make impossible any act of adverse possession in the first place.

Consequently, while under the LASPO Act regime, a squatter may qualify as an adverse possessor in favour of whom time runs under the Limitation Act 1980 albeit his conduct constituting an offence under the LASPO Act, a squatter cannot attain the status of an adverse possessor under the Criminal Law of Lagos State and the Property Protection Law of the State, and automatically commits a crime under that Law.

Thus, where a claimant of adverse possession approaches the court for an order of rectification of the register and registration as a new proprietor under the Land Registration Law of Lagos State on the ground that the limitation period had run out against the land owner who opposes his claim on the ground that the claimant cannot benefit from his crime under the Criminal Law of Lagos State or the Property Protection Law of the State on the ground of illegality (*ex turpi causa non oritur actio*), the court would be faced with the issue of correct interpretation to place on the principle of *ex turpi causa*.

In *Best*, the Court of Appeal observed that the principle is susceptible to different interpretations depending on the peculiar circumstances of each case, and consequently bent towards the “amalgamated approach” of balancing the policy consideration underlying the provisions of the LRA 2002 relating to acquisition of title by adverse possession against the public policy consideration underlying the

provision of section 144 of the LASPO Act. That approach may not be appropriate in a situation posed by the provisions of section 278 of the Criminal Law of Lagos State and the relevant provisions of the Property Protection Law¹⁰⁶⁹ which unlike the LASPO Act, do not recognise adverse possession, but outlaws same so that there are no two policies to balance, one against the other as the Court of Appeal did in *Best*.

The Nigerian Court may instead be influenced by the statutory policy objectives which is one of the main principles guiding the application of the test of *ex turpi causa* in decided cases.¹⁰⁷⁰ The main policy objective from the tenor of the Law is to criminalise any form of entry or possession albeit peaceful, unlike the provision of LASPO Act. In this situation, the court may apply the principle of *ex turpicausa* from the standpoint of this statutory policy objective and may refuse to make an order for the rectification of the register in favour of the squatter.

In view of the criminalisation of adverse possession under the Criminal Law of Lagos State and the Lagos State Property Protection Law, section 100 of the Lagos State Land Registration Law¹⁰⁷¹ has been rendered otiose. Section 100 provides:

where the court is satisfied that the title of the registered holder of any land or mortgage has been extinguished under the Limitation Law, the court may order the register to be rectified accordingly...

Going by the criminalisation of all acts of adverse possession in Lagos State, it is not likely that the title of the existing registered owner of land would be extinguished under the Limitation Law, and the possibility of admitting such title on the register is remote. It is also yet to be seen how the Nigerian courts would construe the doctrine of adverse possession against the backdrop of the legal principle of illegality enshrined in the maxim, '*ex turpi causa non oritur actio*.'

6.7.4 In both jurisdictions under study, the State criminalization policy affecting the application of the doctrine of adverse possession is basically punitive and retributive in outlook. This approach only portrays the adverse possessor as a law breaker

¹⁰⁶⁹ibid ss. 2 and 3.

¹⁰⁷⁰ See e.g. *Revill v. Newberry* [1996] 2 W.L.R 239.

¹⁰⁷¹Law No.1 2015.

meant to be punished and consequently ‘framing a complex social issue into a simplistic conflict between the State and the offender exclusively.’¹⁰⁷² It therefore jettisoned the social policy underlying welfare-based issues such as the motive to squat based on necessity rather than choice. It has also emasculated the roles of the competing parties such as the land owner who has left the property to waste, the community who is bereft of development, and the government who has failed in meeting its social responsibility of making provision for adequate housing and thereby averting the agonizing and harrowing experience of squatting.

6.7.5 *Summary*

The criminalisation policy underlying section 144 of LASPO Act applicable in England and Wales differs from that underlying the various criminal statutes criminalising peaceful possession in Nigeria from the angle of the varying social circumstances and the main objectives of those statutes. While the criminalization policy against forceful entry in the jurisdictions under inquiry generally coincide, there is disparity between the kind of peaceful entry and peaceable possession tolerable by the various jurisdictions. Indeed, the Criminal Law of Lagos State unlike the Criminal Code applicable in other parts of Southern Nigeria, or the Penal Code applicable in the Northern states of Nigeria including the FCT, do not allow peaceful entry or peaceable possession of another person’s land thereby foreclosing acquisition of title by adverse possession. Also, the policy behind the Criminal and Penal Codes in Nigeria in adverse possession cases involving peaceful entry and peaceable possession is not the same as in section 144 of LASPO Act.

Whilst there is nothing from the tenor of section 144 of LASPO Act suggesting that it was meant to jettison the doctrine of adverse possession, the provisions of section 278 of the Criminal Law of Lagos State and the relevant provisions of the Property Protection Law of the State¹⁰⁷³ are apparently opposed to the operation of adverse possession. Consequently, the application of the principle of *ex turpi causa* in both cases cannot be the same for, whilst the situation in *Best* may require weighting the

¹⁰⁷² Mahony, *supra* n 647 at 27.

¹⁰⁷³ *ibid* ss. 2 and 3.

public policies that underlie both the *ex turpicausate* and that of acquisition of title by an adverse possessor in registered land, the provisions of section 278 of the Criminal Law of Lagos State of Nigeria and relevant provisions of the Property Protection Law of the State are driven by strong statutory policy against adverse possession.

It is therefore difficult to suggest that the Nigerian courts will follow the decision of the Court of Appeal for England and Wales in *Best* when faced with the same situation, and it is unlikely that a Nigerian court will make an order directing the Registrar of titles in the Lagos State of Nigeria to register an applicant who purportedly acquired title by adverse possession in the course of committing an offence punishable under the Criminal Laws of the State.

6.8 Overall Summary of the Comparative Study and Conclusion

Bringing forward the thoughts articulated in the last two chapters as foundation for the comparative study engaged in this chapter and the actual comparative study in this chapter, it is imperative to capture the main highlights of the study against the backdrop of the aims and objectives of this thesis and against the backdrop of the research questions posed earlier on in chapter one. The essence of this is to give an overview of the main areas of comparison in beaming searchlight on the application of the doctrine of adverse possession under English and Nigerian law.

From the historical perspective, the English and Welsh jurisdictions have always recognised the right to *seisin* or possession of land as root of title and that acquisition of possession of the land is tantamount to acquisition of title to land. Possession being a root of title, entitles the dispossessor claiming adverse possession to proprietary rights in the land which may be transferred inter vivos, devised by Will or devolve on intestacy on heirs. However, such title is relative, and anyone who shows a better title could recover the land. Successive Statutes of limitation since 1832 including the extant Limitation Act 1980 applicable in England and Wales therefore relies on possession as the basis for acquisition of title after the expiration of the limitation period, upon proof of adverse possession.

The reception of English law in Nigeria consequent upon colonization introduced the English common law, doctrines of equity, and statutes of general application in force in England on the 1st of January 1900 subject to local circumstances and legislation. Consequently, the common law doctrine of adverse possession and successive English statutes of limitation became applicable in Nigeria.

Comparatively in Nigeria generally, the customary and Islamic land tenure systems in existence before the advent of colonial rule recognised occupational and user rights which gave mere *usufructuary* as opposed to proprietary rights in land cognizable under the English fee simple estate and consequently, not capable of forming the basis of acquisition of title by adverse possession. Incidentally, the nature and incident of customary and Islamic land tenure systems informed its exclusion, as both systems of land tenure developed in-built mechanisms to deal with stale claims.

Whilst the reception of the English law of adverse possession in Nigeria would normally extend to Nigeria the requirements for, and application of the doctrine of adverse possession, certain local circumstances and local legislation affect the application of the doctrine in its pristine form. Both the indigenous customary law and, by extension Islamic law in Nigeria are excluded from the ambit of its application, while the Land Use Act and the State Lands Law applicable in Nigeria have frustrated the application of the doctrine as known under English law.

Whilst the effect of adverse possession on unregistered land may be similar in the jurisdictions under study, the effect of it on title registration under the extant laws applicable in those jurisdictions differs. Under the provisions of the Land Registration Act 2002 (LRA) applicable in England and Wales, the effect of land registration for adverse possession and limitation of actions is to change the basis of title from possession to the fact of registration, making it difficult for the adverse possessor to go on the register while protective of the title of the registered proprietor. On the contrary, in Nigeria, the fact of possession by the adverse possessor is still paramount and the limitation statutes have full effect in extinguishing the title of the registered owner at the expiration of the limitation

period. This is the position under the Registration of Titles Act (RTA) applicable in the Federal Capital Territory (FCT) and the Land Registration Law of Lagos State. Under the Land Registration Law of Lagos State 2015 (LRL) for example, the squatter may, after the expiration of the limitation period, apply to court for an order to be registered as the new proprietor of the land. What he is required to prove before court is exclusive, adverse and continuous possession for the limitation period consequent upon which the title of the registered proprietor became extinguished under the limitation law. Once the court order is shown to the Registrar of Titles, the latter has no choice but to register the new title based on possession. The LRL is bereft of the kind of protection given to the registered owner of land under the LRA 2002

Whereas the position under English law with regards to registered and unregistered land is that the doctrine of adverse possession is not open to human rights challenge, the position is not the same in Nigeria with regards to registered land where the RTA and the LRL do not exude the kind of fairness and equity associated with the reform of the registration procedure under the LRA. A definite pronouncement of the Nigerian court to the contrary is necessary to change this position.

Application of the doctrine of adverse possession in Nigeria against the backdrop of the criminalization of the state does not coincide with the position under English law. Whilst there is nothing from the tenor of section 144 of LASPO Act suggesting that it was meant to jettison the application of the doctrine in view of the criminalization policy of the State, the provisions of section 278 of the Criminal Law of Lagos State and sections 2 and 3 of the Property Protection Law of that state are apparently opposed to application of the doctrine.

In conclusion, a comparative study of the application of the doctrine of adverse possession under the English and Nigerian law suggests relativity in terms of varying local circumstances and divergence in local legislation and relevant state policies. Whilst the recognition of adverse possession as a potent remedy against stale claims may be of general application in both the common law and civil law

jurisdiction, application of the doctrine may depend on a number of variables as discussed in this thesis.

The specific findings of this thesis on the research questions formulated in chapter 1 of this thesis follows in the next chapter.

CHAPTER 7

RESEARCH FINDINGS

7.1 Introduction

The main objective of this thesis as pointed out in Chapter 1 of this work is a research inquiry into the application of the doctrine of adverse possession as a mode of acquiring title to land within the scope of a comparative study of England and Wales, and the Nigerian legal systems. Whilst the doctrine is seen as generally having a universal application within the common law and civil law jurisdictions, there are empirical evidence from the spate of existing literature that it varies in its application amongst those jurisdictions.¹⁰⁷⁴ Many factors such as diversity in the legal structure and the applicable system of land tenure within a jurisdiction, the peculiarities of the prevailing social circumstances and the extent to which local laws are receptive of the doctrine are responsible for the variation in application.

This thesis engaged a comparative study of the subject in the jurisdictions under study and arrived at the various findings discussed in this chapter in line with the five research questions formulated earlier on in Chapter 1. These findings are considered under the various heads following.

7.2 Application of the doctrine under different Land Tenure Systems.

One of the findings of this research is that the application of the doctrine of adverse possession is relative and that local circumstances and local legislation may streamline or make inapplicable the doctrine. Thus, whilst the reception statute in Nigeria¹⁰⁷⁵ received English law including the doctrine as part of Nigerian law, its application is made subject to local circumstances and Laws. Consequently, the

¹⁰⁷⁴ Apart from the United Kingdom, Nigeria and other common law jurisdictions such as Australia, Newzealand and the United States, the doctrine applies to civil law jurisdictions. Prominent amongst the civil law jurisdictions are France (Art 2229C Civ); Spain (Art 41 of the Spanish Civil Code); the Netherlands (Art 3.99(1), 3.105(1)); Sweden (Cap 16 Real Property Code); Hungary (s. 121(1) Civil Code Act IV 1959); Poland (Art 172-176 Polish Civil Code); Germany (Para 900 BG-B German Civil Code); See the Report of the British Institute of International and Comparative Law for Her Majesty's Court Service, September 2006 on 'Adverse Possession' accessed online at http://www.biicl.org/files/2350_advposs_sep_ftnsv3.pdf on 10/10/2019. This Report highlights the distinctive features of the doctrine as it applies under the diversity of jurisdictions.

¹⁰⁷⁵ See the Law (Miscellaneous Provisions) Act 1945.

application of the doctrine is made inapplicable to customary law, and by extension, Islamic law of land tenure.¹⁰⁷⁶ Fundamental concepts and the various principles of customary and Islamic land tenures are justifications for this exclusion.

In the first place, the preservation of land at customary law for generations yet unborn¹⁰⁷⁷ and the enjoyment of mere right of user as opposed to the proprietary right of a possessor of land under English law would preclude a third party from taking possession of the interest of a family member or member of the community.¹⁰⁷⁸ Under Nigerian customary law, land belongs to the family or the community as a whole, with the individual having a mere right of user¹⁰⁷⁹ which is inalienable to a third party unless consent is sought and obtained from the family or community,¹⁰⁸⁰ or until the land is partitioned by the family or the community¹⁰⁸¹ or consequent upon an order of court,¹⁰⁸² and the individual portion formally vested in the individual members at which point, the land ceases to be subject to customary law.¹⁰⁸³

Secondly, customary land tenure system recognises and encourages shifting cultivation of agricultural land for purposes of recuperation of the soil and consequently, no 'wrong' is done by the individual user in such situations and the

¹⁰⁷⁶ See Chapter 5 infra.

¹⁰⁷⁷ As the Supreme Court of Nigeria put it in *Adejumo v. Ayantegbe* (1989) 3 NWLR (Pt 110) 417 at 444: 'At customary law, ownership of family land is vested in the past, existing and future members of the family. Thus communal or family land belongs to all members of the society or family...'

¹⁰⁷⁸ In the words of Oluyede, 'group ownership in African context [Nigeria inclusive] is an unrestricted right in the group to run stock on what is held to be the common asset of land; the right of all in the group to claim support from the group's land and the tacit understanding that absolute ownership is vested in the community as a whole'. See P.A.O Oluyede: *Modern Nigerian Land Law*, Evans Bros. (Nigerian Publication) Limited (1989) 12.

¹⁰⁷⁹ See generally, *AmoduTijani v. Secretary, Southern Nigeria* [1921] 2 AC 399; *Lewis v. Bankole* (1908) 1NLR 82.

¹⁰⁸⁰ *Agblo v. Sappor* (1947) 12 WACA 187; *Oyebanji v. Okunola* (1968) NMLR 221; *Akerele v. Atunrase* (1968) 1 All NLR 201; *Lukan v. Ogunsusi* (1972) 1 All N.L.R (Pt.2) 41; *Adejumo v. Ayantegbe* (1989) 3 NWLR (Pt 110)417 at 444 paras H; 44 para B; *Ojoh v. Kamalu* (2005) 18 NWLR (Pt 958) 523

¹⁰⁸¹ *Gbajumo v. Ogunsanya* (1970) 1 All NLR 223; *Balogun v. Balogun*(1943) 9 WACA 78.

¹⁰⁸² *Lopez v. Lopez* (1924) 5 NLR 50.

¹⁰⁸³ *Olorunfemi v. Asho* (2000) 2 NWLR (Pt 643) 143.

user member cannot be said to have abandoned possession¹⁰⁸⁴ for purposes of the running of the statute of limitation in favour of a squatter.¹⁰⁸⁵

Thirdly, running of time would not normally change or alter customary rights in land to the disadvantage of the holder¹⁰⁸⁶ unless a third party is encouraged expressly or tacitly to take and remain in possession of land subject of customary land tenure and, to the knowledge of the customary right holder, allowed to expend money or otherwise to alter his position;¹⁰⁸⁷ a situation which may equally amount to proprietary estoppel under English law.

The foregoing background would ordinarily obviate the application of the doctrine of adverse possession and provide the underlying justification for its exclusion from customary land tenure under the Nigerian Limitation Laws.

The only situation where the customary right to land may be lost as discussed earlier is where the rule in *Awo v. Cookey-Gam*¹⁰⁸⁸ applies. The rule enables the courts in the exercise of their equitable jurisdiction to protect a person who has been in continuous and undisturbed possession for many years in the belief that he has a valid title thereto.¹⁰⁸⁹ In such situation and unlike the situation in adverse possession, the defendant should have a bona fide claim to possession;¹⁰⁹⁰ the holder of right under customary law must have had knowledge of the presence of the defendant but simply acquiesced in it;¹⁰⁹¹ and the defendant must have expended money on the land or otherwise, altered his position to his own detriment.¹⁰⁹² The

¹⁰⁸⁴ See generally, CO Olawoye, *Title to land in Nigeria* 1974 University of Lagos/ Evans Brothers, London at 240-243.

¹⁰⁸⁵ Even where the user is said to have abandoned the land, there are judicial authorities to suggest that possession reverts to the grantor family or community. See for example, *Olotu v. John* (1942) 8 WACA 127.

¹⁰⁸⁶ The position under customary law is that an established owner of land does not necessarily lose his title to an adverse possessor by merely going out of possession for a long period of time. See *Mora v. Nwalusi* (1962) 1 All NLR 681; *Olohunku v. Teniola* (1991) 5 NWLR (Pt 192) 501 at 513.

¹⁰⁸⁷ See generally, *Awo v. Cookey Gam* (1913) 2 NLR 100. Even at that, the applicable principle is the general principle of equity which frowns at 'sleeping' over rights. It has nothing to do with the doctrine of adverse possession, but distinguishable from it: See Chapter 6 *infra*.

¹⁰⁸⁸ *supra* (n 1057).

¹⁰⁸⁹ Olawoye, *supra* (n 1054).

¹⁰⁹⁰ See *Nwakobi v. Nzekwu* (1961) 1 All NLR 445.

¹⁰⁹¹ *ibid* at 450.

¹⁰⁹² *Suleman v. Johnson* (1951) 13 W.A.C.A 213.

relevance of this rule of equity is buttressed by the court in *Awo v. Cookey Gam* when it held that:

...We do not decide this point in accordance with any provision of English law as to the limitation of actions but simply on the grounds of equity, on the ground that the court will not allow a party to call in aid principles of native law, and least of all principles, which as in this case, were developed in and are applicable to a state of society vastly different from that now existing merely for the purpose of bolstering up a stale claim.¹⁰⁹³

Thus, the power to apply rules of equity by the High Courts in Nigeria derives from the various High Court Laws which empower the courts to apply rules of customary law only where these are not repugnant to natural justice, *equity* and good conscience.¹⁰⁹⁴ Thus, save for the exercise of the court's jurisdiction in equity to apply the rule in *Awo v. Cookey Gam*,¹⁰⁹⁵ the doctrine of adverse possession is inapplicable under customary land tenure.

Islamic law provides for the effect of long possession known as *hauzi* outside the statute of limitation and the doctrine of adverse possession. The rule of *hauzi* (which is analogous to the rule in *Awo v. Cookey-Gam*) provides that where a person has been in peaceful enjoyment or possession of land without challenge for ten years (or forty years in the case of a blood relation), he acquires title against any person who claims to be the true original owner of such land during that period,¹⁰⁹⁶ except there are extenuating circumstances¹⁰⁹⁷ for non-opposition by the true original owner. In other words, save for the Islamic rule of *hauzi* which is generally similar to the English

¹⁰⁹³ *Supra* (n 1057) at 101.

¹⁰⁹⁴ See for example, High Court Law of Lagos State Cap H5 Laws of Lagos State 2015, s. 16. Similar provisions could be found in the High Court Laws of other states within the federation of Nigeria.

¹⁰⁹⁵ *Supra* (n 1057).

¹⁰⁹⁶ *Ummaru v. Bakoshi*[2000] 2 NWLR (Pt 646) at 701-702.

¹⁰⁹⁷ These circumstances were highlighted by the court in *Ummaru v. Bakoshi* *supra* (n 1066) as: (a) the existence of cogent reasons for not complaining in time, e.g. blood relationship (b) the fact that claimant is a minor; (c) the person in possession was put in possession by a claimant either as a free or paying agent; (d) the person in possession is put in possession as a trustee; (e) the claimant is a relative, partner or co-proprietor to the person in possession; (f) in the case of a house the possessor is in permissive occupancy.

principles of laches and acquiescence, the doctrine of adverse possession is not applicable under the Islamic land tenure system.

Consequently, while the doctrine of adverse possession applies under a generally unified system of land tenure across England and Wales, its application under the plural land tenure system in Nigeria is limited to the received English land tenure to the exclusion of the local customary and Islamic land tenure systems, and subject to the regimes of the Land Use Act 1978, and the State Land Law applicable across the federation, or the State Land Act applicable in the FCT.

The thesis also finds that both customary and Islamic law have in-built systems for dealing with stale claims outside the doctrine of adverse possession.

7.3 Adverse Possession and the Advent of the Nigerian Land Use Act 1978.

The research finds that the regime of the Nigerian Land Use Act, 1978 introduced a unique system of land tenure unknown to the English system. Unlike the English land tenure system which recognises unlimited interests in land such as the freehold interests in the form of a fee simple estate absolute in possession, or an estate less than freehold in the form of a leasehold interest; each vesting a proprietary interest in the holder which enures in an adverse possessor at the end of the limitation period and which he could transfer or transmit without hindrance in law, the only land right cognisable under the Land Use Act is a *right of occupancy*.

A right of occupancy (which is a right to occupy and use land) is traceable to an actual or deemed grant by the Governor of a State or by the Local Government or to an actual grant in respect of land within the Federal Capital Territory (FCT) by the Minister acting for and on behalf of the President of the Federal Republic of Nigeria.¹⁰⁹⁸ That every right of occupancy is traceable to a *grant* by the Governor of the State, the Local Government or the Minister of the Federal Capital Territory (FCT) is supported by the provisions of sections 5 and 6 with respect to original actual grants and sections 34 and 36 with respect to original deemed grants; section 22 which requires every transferor of a right of occupancy to seek and obtain the consent of the Governor or the

¹⁰⁹⁸ See ss. 5, 6, 8, 9, 10, 22, 28, 34, 36 and 49 of the Nigerian Land Use Act, 1978.

Minister as the case may be, and section 28 on revocation of the right by the Governor or Minister of the FCT in respect of either actual or deemed grant of a right of occupancy.

This work finds that a right of occupancy exhibit certain peculiar characteristics making the doctrine of adverse possession inapplicable as a mode of acquiring title in Nigeria. This position is not yet appreciated by the Nigerian courts and hence the lavish reliance on judicial precedent built on cases decided before the advent of the Land Use Act on March 29, 1978.¹⁰⁹⁹ As discussed earlier on in Chapter 5, a right of occupancy is less than a proprietary interest; the holder of the right is not in exclusive possession, and is faced with a number of statutory inhibitions (as to entry, exercise of possession, transfer and transmission of interest to third parties), which consequently negative the operation of the doctrine of adverse possession and the running of the limitation period in favour of the squatter or trespasser.

Section 48 of the Act which preserves the pre-existing land tenure including the English doctrine of adverse possession is *subject to such modifications (whether by way of addition, alteration or omission) as will bring those laws into conformity with this Act or its general intendment*. To the extent that the requirements at common law for acquiring the status of an adverse possessor are not in conformity with certain provisions of the Act, they do not add up to a tenure preserved by the provisions of the Act.

Specific provisions of the Act exemplify this extant position and they include: the provision of section 12 which by implication enables the Governor “to grant a licence to any person to enter upon land the subject of a[customary]rightof occupancy”; section 14 which gives exclusive possession to a holder of statutory right of occupancy “other than the Governor” (thereby ‘robbing’ the holder of exclusive possession);¹¹⁰⁰ section 22 which makes a statutory right of occupancy inalienable (including transfer of possession) without the consent of the Governor first had and obtained; section 37 which criminalises unlawful entry ‘in purported

¹⁰⁹⁹ This situation is attributable to failure of counsel to raise the issue of non-applicability of the doctrine in appropriate circumstances.

¹¹⁰⁰ The provisions of sections 12 and 14 of the Act run parallel to the common law requirement of exclusive possession.

exercise of any right in relation to possession of the land' (which is what the squatter or trespasser is doing); and section 43 which prohibits and penalizes unauthorised use of land¹¹⁰¹ by a person who holds no right of occupancy or licence of the Governor in respect thereof.¹¹⁰² These provisions are therefore at variance with the provisions of the limitation statute and consequently, time will not run against a holder of a right of occupancy in favour of the squatter or trespasser.

Contrary to the decisions of the Nigerian courts post March 29 1978, the *de facto* finding of this work is that since the advent of the Land Use Act 1978, there has been a radical departure from the English model of adverse possession as a means of acquiring title in Nigeria, and there is need for the Nigerian courts to shift grounds.

7.4 Adverse Possession and the extant State Land Law or Act.

It is found that both the State Lands Law applicable across the States within the federation of Nigeria¹¹⁰³ and the State Lands Act applicable in the FCT¹¹⁰⁴ expressly exclude the application of the doctrine of adverse possession to State land. The implication of this is that land acquired by any State of the federation before the enactment of the Land Use Act¹¹⁰⁵ or after its enactment by way of revocation of a right of occupancy,¹¹⁰⁶ shall not be susceptible to the application of the doctrine of adverse possession. In the FCT where the Land Use Act does not apply,¹¹⁰⁷ the State Lands Act which applies¹¹⁰⁸ equally excludes the application of the doctrine from its ambit.

¹¹⁰¹ 'Unauthorised use of land' includes acts of possession which the adverse possessor may exhibit in support of his claim of right such as erection of a building, wall fence or other structure upon any land; or enclosure, obstruction or cultivation of the land: See s. 43(1) (a) (b) of the Act.

¹¹⁰² The effects of these provisions have been discussed in Chapter 5 of this thesis and need not be replicated in this chapter.

¹¹⁰³ See for example, the State Lands Law of Lagos State No. 8 2015, s.32.

¹¹⁰⁴ Cap 44 Laws of Nigeria 1958.

¹¹⁰⁵ See for example, the Public Land Acquisition Act No. 33 1976.

¹¹⁰⁶ Cap L5 Laws of the Federation of Nigeria 2004, s.28.

¹¹⁰⁷ See *Ona v. Atenda* (2000) 5 NWLR (Pt 656) 244.

¹¹⁰⁸ See n 1103.

7.5 The Land Registration Regimes and the doctrine of Adverse Possession

This work finds that the land registration regime in the United Kingdom under the Land Registration Act (LRA) 2002 protects the title of a registered proprietor from automatic extinction by the operation of the doctrine of adverse possession,¹¹⁰⁹ and would allow the adverse possessor to be registered only where it is essential to ensure the marketability of land or to prevent unfairness.¹¹¹⁰ However, service of notice of the adverse possessor's application for registration on the registered proprietor and the risk of prompting objection to such application have been responsible for the proliferation of 'dark market' in possessory estates which may enure indefinitely off the register. As shown in the discourse in Chapter 4 of this work, empirical study¹¹¹¹ has shown that the adverse possessor would prefer not to apply for registration which may trigger Notice to the existing registered proprietor who may consequently initiate an action in court for ejection of such squatter or trespasser.

The position is different under the land registration regime in Nigeria. The Land Instrument Registration Law applicable in different states of the federation offers no protection whatsoever to 'paper owners' and such defeasible titles may be overreached by adverse possession. The fact that an instrument of transfer is registered is not a guarantee of title and like any unregistered land, the expiration of the limitation period extinguished the title of the supposed owner of land.

The situation is practically the same under the Land Registration Law (LRL) of Lagos State, 2015. For example, the provision of section 66(f) of the LRL makes all registered land subject to the right of an adverse possessor as an overriding interest and therefore, draws no distinction between registered and unregistered land; the

¹¹⁰⁹ This is distinguishable from effect of the application of the doctrine of adverse possession to unregistered titles which is an automatic extinction of such title at the expiration of the period of limitation under the limitation law.

¹¹¹⁰ See Law Commission/H.M. Land Registry, *Land Registration for the Twenty-First Century* : Consultative Document, (1998) No. 254, at para. 1043.

¹¹¹¹ See M Pawlowski and J Brown, 'Adverse Possession and the Transmissibility of Possessory Rights - The Dark Side of Land Registration?' [2017] (2) *Conv.* 116 at 117.

same measure of supervision by the owner of unregistered land is expected of the registered proprietor with respect to registered land.

The LRL of Lagos State, unlike the LRA of the U.K, does not protect the registered proprietor but simply allows an adjudged adverse possessor to register his interest¹¹¹² without the kind of verification procedure put in place by the LRA. Whereas the LRA 2002 contains inbuilt processes superintended by the Registrar of titles for registration of an adverse possessor in deserving cases while generally protective of the registered proprietor, the LRL is not that protective of the existing registered proprietor. Aside from isolating the existing registered proprietor in the process and denying him of an early response to the claim of the squatter through a counter notice, there is no indication in the provision of section 112(2) of the LRL as to whom the notice shall be served on or whether a response is required.

A spontaneous application to court by the squatter after advertisement or notice without a response from the existing proprietor cannot be a satisfactory compliance with the condition precedent before the action is brought.¹¹¹³ While the court may likely request that the squatter put the existing proprietor on notice of the application for registration, 'it may be difficult to see through, the fraudulent designs of a squatter in bye-passing the existing proprietor since, in most cases, the intention of the adverse possessor is in bad faith.'¹¹¹⁴

Thus, whereas the LRA 2002 technically renders ineffectual the operation of the doctrine of adverse possession with regard to registered land in the U.K except in legally defined circumstances based on the principles of neutrality and fairness to both parties, the doctrine remains operative absolutely in content and effect under the registration regime in Nigeria.

¹¹¹² See s. 100 of the LRL.

¹¹¹³ *ibid* at 18.

¹¹¹⁴ *ibid*.

7.6 Application of the doctrine of Adverse Possession under Local and International Legal Regimes

The research work finds that consequent upon the decision of the Grand Chamber of the European Court of Human Rights in *U.K v. Pye*, the application of the doctrine of adverse possession is not a violation of Article 1, Protocol 1 of the European Human Rights Convention domesticated as the Human Rights Act 1998 applicable in England and Wales. The decision of the court in that case applies to both registered and unregistered land and the Land Registration Act 2002 is in consonance with, and not a derogation from the main rationale behind the decision.¹¹¹⁵

The Grand Chamber was persuaded in its decision by the fact that the land subject of a limitation challenge is not necessarily subject to the right of pre-emption, but was subject to the ordinary laws of the land controlling land use such as the 'Town and Country Planning legislation, compulsory purchase legislation and the various rules of adverse possession.'¹¹¹⁶ Consequently, *Pye* was not affected by a "deprivation of possessions" within the meaning of the second sentence of the first paragraph of Article 1 of the European Convention, but by a "control of land use" within the meaning of the second paragraph of the provision.¹¹¹⁷

Whilst noting with respect to "control of use," that there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be achieved, '[i]n spheres such as housing, the court will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation';¹¹¹⁸ in other contexts, the court cannot remain passive in exercising its powers of supervision 'where a domestic court's interpretation of a legal act appeared unreasonable, arbitrary or inconsistent with the principles underlying the Convention.'¹¹¹⁹ However, in taking necessary measures "to protect the right of property" the court is restricted to ensuring 'the observance

¹¹¹⁵ See generally, Chapter 8 of this work on commentaries relating to the decision of the Grand Chamber of the European Court in *Pye*.

¹¹¹⁶ *U.K v. Pye* [2007] ECHR 700 [62].

¹¹¹⁷ *ibid* para 66.

¹¹¹⁸ *ibid* para 75.

¹¹¹⁹ *ibid*.

of the engagements undertaken by the contracting parties to the Convention, and not to deal with errors of fact or law allegedly committed by a national court unless Convention rights and freedoms may have been infringed.’¹¹²⁰

Whilst noting that the LRA 2002 has put the paper owner of registered land in a better position than *Pye* at the relevant time due to the luxury of notice afforded such owner before the running out of the limitation period and thereby the latitude of time for the owner to take legal steps against the adverse possessor, the court found the Act inapplicable to the *Pye* case.¹¹²¹

Following from the foregoing premises of the court’s decision in *Pye*, this work finds that neither the Limitation Act 1980 nor the LRA 1925 contravenes the European Convention on Human Rights and therefore, a good premise to conclude that the decision applies to both registered and unregistered land in England and Wales. By extension, the fair and equitable provisions of the LRA 2002 make the Act much more compliant with the Convention than the LRA 1925 which does not make any substantial difference between the application of the doctrine to both the unregistered and the registered owner.¹¹²² To the argument that the criticisms (including judicial criticisms) against the former regime of registration under the 1925 Act led to a reform of the Law with an equitable and fair approach, thus showing that the 1925 Act was perhaps non-compliant with the Convention, the court held that ‘[i]n any event, legislative changes...take time to bring about, and judicial criticism of legislation cannot of itself affect the conformity of the earlier provisions with the Convention.’¹¹²³

Although there are provisions under the local and international legal regimes on human rights in England and Wales for the protection of property rights, there are no provisions on compensation in the event of violation. However, since the decision

¹¹²⁰ *ibid.*

¹¹²¹ *ibid* para 81.

¹¹²² The bottom line in both cases is that upon the end of the limitation period, the title of the paper owner becomes extinguished, although in the case of the registered owner, he holds the land title on trust for the adverse possessor.

¹¹²³ *U.K v. Pye*, *supra* para 81.

of the Grand Chamber in *Pye*, the correct position is that ‘a requirement of compensation for the situation brought about by a party failing to observe a limitation period would sit uneasily alongside the very concept of limitation periods whose aim is to further legal certainty by preventing a party from pursuing an action after a certain date.’¹¹²⁴ In the jurisdictions under inquiry, the registration Laws do not compensate a landowner whose interest is extinguished as a result of the alteration or rectification of the register.¹¹²⁵

This research work finds that the position in Nigeria is that the constitutional guarantee of property right¹¹²⁶ does not affect the application of the provisions of the statute of limitation and *ipso facto*, the doctrine of adverse possession.¹¹²⁷ The position under the African Charter on Human and Peoples’ Rights¹¹²⁸ is the same. However, unlike the situation in England and Wales, violation of the right of property generally attracts compensation payable to the victim by the state,¹¹²⁹ but that provision ‘does not affect any general law on limitation of actions,’¹¹³⁰ thereby excluding the ‘victim’ of adverse possession from compensation.

This thesis also finds that in both jurisdictions under study, the lacuna in harmonizing the property right of the land owner with the squatter’s right to private and family life has been impacted by the wave of constitutional and international legal regimes across the globe. Harmonising the human rights perspectives would assist the courts in balancing the interest of the parties and pave way for the appreciation of the right to housing and enforcement of same locally as a panacea to proliferation of squatting and informal settlements.

The summary of the research findings under this head therefore is that in both jurisdictions under comparison, the doctrine of adverse possession is not challenged

¹¹²⁴ *ibid* para 79.

¹¹²⁵ See e.g. the Registration of Titles Act applicable in the FCT, s.62; and the Land Registration Law of Lagos State, 2015, s. 100 forecloses the former proprietor from compensation, while the Land Registration Act 2002 applicable in England and Wales makes no provision for compensation.

¹¹²⁶ Constitution of the Federal Republic of Nigeria, 1999 (The Nigerian Constitution 1999), s.44(1).

¹¹²⁷ *ibid* s.44(2)(i).

¹¹²⁸ African Charter on Human and Peoples’ Rights Cap 10 Laws of the Federation of Nigeria 2004, s.14.

¹¹²⁹ The Nigerian Constitution, 1999, s. 44(1) (a)(b).

¹¹³⁰ *ibid*, s.44(2)(i).

by the local and international legal regimes on the sanctity of right to property or the entrenched right to compensation upon violation.

7.7 Criminalisation of Possession of Residential Buildings by Squatters and the Efficacy of Adverse Possession

This research work finds that criminalisation of possession of residential buildings by squatters in England and Wales was precipitated by the menace of squatting in residential buildings, and the need to protect the possessory right of owners of such residential buildings as well as their right to private and family life. Government responded by passing the Legal Aid Sentencing and Punishment of Offenders Act (LASPO Act) section 144 of which provides that 'where a person is in a residential premises as a trespasser having entered it as a trespasser, knows or ought to know that he or she is a trespasser and is living in the building or intends to live there for any period,' an offence is committed punishable by a term of imprisonment.¹¹³¹

The difference between the provision of section 144 of LASPO Act and the act of adverse possession lies in the fact that whereas an adverse possessor may be in possession of property and exercise exclusive possession against the whole world *without living or intending to live in the property*, an offence is committed under section 144 of LASPO Act where the squatter actually enters into a residential building *mala fide* and without a claim of right, and *lives in it or exhibit the intention to do so*. To be in adverse possession of a residential building without contravening the provision of section 144 of LASPO Act therefore, the trespasser or squatter shall exercise acts of exclusive and continuous possession over the residential building for a limitation period *without living in it or without exhibiting an intention to do so*.

This work finds that criminalisation of unlawful occupation of property is limited to forceful entry or eviction of the owner by a trespasser or squatter, or where such trespasser or squatter enters into a residential building *mala fide* and without a claim of right and lives in it or exhibit an intention so to do. All other forms of exclusive possession (albeit unlawful) exercised without violence, secrecy or

¹¹³¹ For details of rationale behind the passing of LASPOA, see *Government Response to Consultation* published on 26 October 2011 in *Options for Dealing with Squatting* (Consultation Paper CP12/2011).

permission over the limitation period are true cases of adverse possession protected by law.

Sequel to the passing of LASPO Act, the conflict or incompatibility between the civil right of adverse possession on the one hand, and the offence of criminal trespass committed upon unlawful entry into possession by the adverse possessor on the other hand, became apparent. This became an issue in light of the principle at common law that the law will not allow a person to benefit from his own wrong (*ex turpi causa non oritur actio*), and against the backdrop of rule 16(3) of the Land Registration Rules 2003 which restrains the Registrar from dealing with an application to be registered as a proprietor of land if such application appears to the Registrar “to be substantially defective”; in which case, the application may be rejected on delivery, or cancelled at any time thereafter.

This apparent conflict was to be resolved subsequently by the court and the question which the court had to answer was whether an adverse possessor in respect of registered property caught by the provision of section 144 of LASPO Act could apply and be registered as the new registered proprietor in respect of the said property. In *Best v. Chief Land Registrar and the Secretary of State*,¹¹³² the English Court of Appeal held, affirming the decision of the lower court, that such application should be allowed on the ground that Parliament had not intended that adverse possession be prevented because possession was based on a criminal trespass. The court found inapplicable, the principle *‘ex turpi causa non oritur actio.’*

However, whilst the English court has laid to rest the issue of conflict between the civil right of the squatter in adverse possession and the criminal offence committed under section 144 of LASPO Act, this research work finds that the prospect of the squatter’s registration under the LRA 2002 does not obviate the possibility of prosecuting and convicting the squatter under section 144 of LASPO Act thereby rendering unattractive the assumption of adverse possession of residential building in any event.

¹¹³²[2015] EWCA Civ 17.

This work finds that in Nigeria, neither the Criminal Code applicable in the South, nor the Penal Code applicable in the North and in the Federal Capital Territory contains provisions affecting the efficacy of the doctrine of adverse possession.¹¹³³ The reason for this is the fact that land as an immovable property is not capable of being stolen¹¹³⁴ and therefore, the assertion of 'a right which is inconsistent with that of the owner' as in the case of adverse possession is feasible.

It also finds that the provisions of sections 81 and 82 of the Criminal Code only protects possessions of land from forcible entry and against forcible retention and therefore makes inapplicable the running of time under the statute of limitation. Thus, similar to the position in England and Wales, a trespasser who enters into possession or remains in possession through violence is not an adverse possessor and time does not run in his favour; such trespasser may be evicted at any time, and may be prosecuted and convicted accordingly.

In Lagos State however, there are provisions of the criminal law of the state which impacts directly on the efficacy of the doctrine of adverse possession. This research work finds that certain provisions of the Criminal Law of Lagos State ('CLLS') 2011 affect the doctrine of adverse possession directly. It is noted that the CLLS in particular included 'land' as one of the properties capable of being stolen.¹¹³⁵ This actually facilitated the creation of offences bordering on conversion of land.

The CLLS criminalises conversion of land by a squatter or trespasser under section 278(1)(b). Section 278(5)(a) specifically provides that, 'in the case of conversion, it is immaterial whether [the land] is at the time of conversion in the possession of the person who converts it...' suggesting therefore that peaceable possession which is germane to acquisition of title by adverse possession is negated. Also, the provision of 278(4) provides that '...conversion may be dishonest, although it is effected without secrecy or attempt at concealment' suggesting that acts of possession

¹¹³³Criminal Code s.382; Penal Code s.286.

¹¹³⁴ibid ss. 383 and 287 respectively.

¹¹³⁵ ibid.

exercised openly and without concealment characteristics of adverse possession, do not negate the mental element for the commission of the offence of stealing.

Unlike the position taken by the Court of Appeal in the case of *Best v. Chief Land Registrar and Secretary of State* wherein the court held that in passing the LASPO Act, Parliament did not mean to affect the application of the doctrine of adverse possession,¹¹³⁶ the various provisions in the Nigerian CLLS by necessary implication, point to the fact that the doctrine was meant to be affected. Consequently, this work finds that the provisions of CLLS unlike the LASPO Act applicable in England and Wales, make inapplicable the doctrine of adverse possession in the Lagos State of Nigeria.

This research work finds that the Lagos State Property Protection Law (LSPPL) 2016¹¹³⁷ also contains provisions criminalising not only forceful or violent entry into land (situation also negating the application of the doctrine of adverse possession), but also *any act inconsistent with the proprietary right of the owner*¹¹³⁸, which is a principal requirement for adverse possession. The irresistible conclusion is that any form of use of force in taking possession of land or the exercise of peaceable possession of land in Lagos State is a criminal offence punishable by law.¹¹³⁹

In view of the criminalisation of adverse possession under the Criminal Law of Lagos State 2011 and the Lagos State Property Protection law 2016, this work finds that section 100 of the Lagos State Land Registration Law¹¹⁴⁰ has been rendered otiose. That section provides that:

Where the court is satisfied that the title of the registered holder of any land or mortgage has been extinguished under the Limitation Law, the court may order the register to be rectified accordingly, and the person aggrieved by such rectification shall not receive any compensation.

¹¹³⁶Supra (n 1103) at para 113 per Lady Justice Arden.

¹¹³⁷Lagos State Property Protection Law 2016.

¹¹³⁸ibid s.2.

¹¹³⁹ ibid s.2(3).

¹¹⁴⁰Law No.1 2015.

The incongruity in establishing a right of adverse possession in civil law before the court when the claimant's act amounts to an offence in law is incomprehensible. This is more so in view of the clear provisions of the various provisions of the law in Lagos State criminalising adverse possession. Such a situation would trigger the operation of the rule of illegality encapsulated in the legal maxim: *ex turpi causa non oritur actio* (meaning: 'a person shall not benefit from his illegality'). Express or implicit admission of adverse possession by the claimant in his pleading before the court is sufficient for the court to invoke this rule of public policy and to refuse the relief sought.

In addition, this work finds that the criminalization policy of the State in both jurisdictions under study is mainly punitive and retributive in outlook. This perspective has jettisoned the social policy underlying welfare based issues connected with squatting accentuated by necessity rather than choice. Whilst government erroneously conceived the core problem as a conflict between the State and the offender, it lost sight of the practical, moral and economic bases for adverse possession. An alternative social policy which takes a restorative perspective of resolution of conflicts would allow greater scope of understanding of parties' interests and concerns within the property relations. It would 'seek to repair any harm caused, restore relationships and address the needs of the offender and victim as well as those of broader community.'¹¹⁴¹

7.8 Conclusion

The findings of this research work have shown that whereas the Nigerian legal system admitted the English land tenure into its system, the structure of the Nigerian legal system, the local circumstances and the peculiarities of the Land Use Act and other pieces of legislation have impacted on the scope and content of the doctrine leaving behind questions to be asked and suggestions to be made. These tasks are the main objectives of the last chapter of this work.

¹¹⁴¹ R Classen, 'Restorative Justice-Fundamental Principles' presented to the UN Alliance of NGO'S Working Party on Restorative Justice, 1996.

CHAPTER 8

RECOMMENDATIONS AND GENERAL CONCLUSION

8.1 Summary

A critical overview of the comparative study regarding the application of the doctrine of adverse possession in the jurisdictions under study reveals the social realities facing the application of the doctrine in both jurisdictions. It suggests that the peculiarities of every legal system determines to a large extent, the efficacy of the doctrine. It demonstrates that the need to balance the individual interests in land against a larger public interest is also as crucial as recognising and protecting possessions and property rights. Above all, the study has driven home the need for governments to discharge their social responsibility by meeting the housing needs of their citizenry not only as a human right obligation but also as a potent mechanism for solving the problem of homelessness endemic in many jurisdictions.

I. RECOMMENDATIONS

This thesis proffer the following recommendations based on the findings in the last chapter; the contextual overview of the doctrine of adverse possession in contemporary world; the lessons learnt from the application of the doctrine in other jurisdictions outside the focus of this research work, and suggested proposals for relevant law reform.

8.2 Re-thinking the doctrine of Adverse Possession

8.2.1 *Adverse Possession and Putting Land to Productive Use*

Amongst the well known factors of production¹¹⁴², land occupies a vantage position; it is not only the platform for the operation of the other factors of production such as labour and capital, it is the whole essence of human existence. The control and management of land use in the public interest is therefore a major concern of governments the world over. Whilst the ownership structure may differ from one

¹¹⁴² Adam Smith recognised Land, Labour and Capital as major factors of production. See Adam Smith (1776) *The Wealth of Nations* B.I. Ch.6

jurisdiction to another, certain basic necessities of life such as food, shelter and medication cannot be met, major facilities for decent living and major revenue generating activities on land cannot be accomplished without an effective legal framework regulating ownership and use of land. Intrinsically therefore, mass acquisition or preservation of land is not an end in itself, it is the use of it which the law appreciates and protects.

The doctrine of adverse possession from the Roman law to the English legal jurisprudence facilitates land use, quietens title towards ensuring its certainty, and forecloses stale claims in ensuring an end to land litigation. However, the very essence of adverse possession which is putting the land to productive use is not assured by law. Whilst the statute of limitation may extinguish the title of the landowner in favour of the adverse possessor of unregistered land or registers his title upon fulfillment of certain legal conditions, there is no assurance that the land would be put to productive use. There is therefore a need to ascertain not only that the real owner has been dispossessed of land or has discontinued possession over a period stipulated by the statute of limitation, but also, that the land is being put to productive use by the adverse possessor. This lacuna in English law ought to be filled otherwise, the doctrine meant to fulfill the reasonable expectations of people may turn out to be an avenue for illegitimate land acquisition and land speculation tantamount to 'robbing Peter to pay Paul.'

8.2.2 *The requirement of good faith as a mental element*

This study finds that in many parts of Nigeria and particularly in Lagos State, land grabbing or land speculation is rife resulting in the state criminalising even peaceful entry and peaceable possession of another's land exercised without violence, secrecy or permission¹¹⁴³. Also, in England and Wales, not all squatters take adverse possession due to homelessness or penchant for use¹¹⁴⁴. These facts make it

¹¹⁴³Criminal Law, 2011, s.278.

¹¹⁴⁴ It is said that 'squatters are not a homogenous group' for, whilst some have a genuine need of the property, some may have political objectives, some may prefer the 'lifestyle of squatting and its cheapness' and others may be a disaffected group or individuals who welcome the freedom and

imperative to factor some mental element or motive into the doctrine in contemporary times to enhance its utility as a mode of acquisition of title and separate genuine cases of adverse possession in the public interest from naked 'land theft'¹¹⁴⁵.

In a 2006 Report of the British Institute of International and Comparative Law¹¹⁴⁶, it was found that good faith had a role to play in the application of the statutory period of limitation in some common law and civil law jurisdictions. For example, it was found that in jurisdictions such as France and Spain, 'good faith on the part of the [adverse] possessor of the land will significantly reduce the limitation period'¹¹⁴⁷, whilst the limitation period for acquisition of prescriptive title is shorter in Poland and Sweden when possession was in good faith as opposed to a longer period when possession was in bad faith.¹¹⁴⁸ These findings, when compared with findings on other jurisdictions (such as Hungary, Germany, and Massachusetts in the United States of America) where evidence of good faith is of no consideration,¹¹⁴⁹ demonstrate the relativity of the doctrine of adverse possession in spite of its recognition generally in the civil and common law jurisdictions.¹¹⁵⁰

There are strong arguments in favour of considering good faith as one of the requirements for acquiring title by adverse possession. Apart from the fact that acquisition of adverse possession in bad faith (such as where the squatter is aware that he is trespassing on another person's land) upsets the market mechanism for the

anonymity of squatting...': Department of Environment, *Consultation Paper on Squatting* London HMSO 1975.

¹¹⁴⁵ A phrase first used by PJ Proudhon in his work *What is Property?* (1840).

¹¹⁴⁶ The British Institute of International and Comparative Law was asked by Her Majesty's Court Service to conduct comparative research in some common law and civil law jurisdictions with respect to the applicable statutes of limitation. The request was made sequel to counsel appearance before the Grand Chamber of the European Court of Human Rights in *JA Pye (Oxford) Ltd v. United Kingdom* wherein the United Kingdom was appealing against an earlier decision of the Court at first instance that 'a failure to provide compensation for loss of title to land acquired on expiry of a statutory period of limitation violates Article 1 of Protocol 1 of the Human Rights Convention (Application 44302/02)': See Report by the British Institute of International and Comparative Law for Her Majesty's Court Service, 'Adverse Possession' available online at www.biic.org/files/2350_advposs_sept_ftnsv3.pdf. Accessed on 5/10/20.

¹¹⁴⁷ *ibid* at 3-5.

¹¹⁴⁸ *ibid* at 7-9.

¹¹⁴⁹ *ibid* at 3, 8, 9, 12.

¹¹⁵⁰ *ibid* at 3.

transfer of property right, it often fails to effectively balance the interest of the individual in his property against public interest of putting land to productive use.

In the jurisdictions under study, there are no assurances that an adverse possessor acting in bad faith is going to put the land into productive use since that is not a requirement for acquiring adverse possession. Also, in many parts of Nigeria and particularly in Lagos State, adverse possessors are known to be land speculators or 'land grabbers', amassing wealth for self aggrandisement rather than putting such land to productive use.¹¹⁵¹

It is said that the dilemma faced by the Court of Appeal for England and Wales in *Best v. Chief Land Registrar*¹¹⁵²(*Best*) in resolving the conflict between the civil right of the adverse possessor and criminalisation of trespass and the criticisms engendered by its decision¹¹⁵³, would be obviated in future by drawing a distinction between adverse possession premised on honest but mistaken belief as to ownership of land (good faith), or lack of it. Where a person enters a residential building under a mistaken belief that he owns it, and subsequently meets all other common law requirements of adverse possession, he is entitled to apply for registration under Schedule 6 of the Land Registration Act 2002 without breaching section 144 of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO Act) 2002. This reasoning removes the paradox in the position of an adverse possessor who was found to have breached section 144 of the LASPO Act, but was held in *Best* to be eligible to apply for registration under Schedule 6 of the LRA 2002 with the attendant risk that he could still be prosecuted for the offence, thereby making such acquisition of adverse possession as in *Best*, unattractive.

It is suggested with regards to trespassers or squatters acquiring possession in bad faith (in the sense that they are aware that they are trespassing on land that does not belong to them), that the limitation period should be extended far beyond what the

¹¹⁵¹ See Chapter 5 of this thesis for an exposition of the problem.

¹¹⁵²[2015] EWCA Civ 17.

¹¹⁵³ See I Okeoma, 'The Future of Adverse Possession of Registered Land in light of the recent decision of the court in *Best v. Chief Land Registrar...*' available online at <https://www.academia.edu> accessed on 5/10/19

law prescribes at the moment to afford the landowner ample opportunity of retaking possession and putting the land to productive use, or enable the squatter to occupy the land lawfully by granting a licence or a lease to him. The law in some jurisdictions fixes the limitation period for individuals at between twenty and thirty years¹¹⁵⁴.

To discourage landowners from going out of possession and encourage them to put the land into productive use (which is one of the main objectives of adverse possession), it has been suggested for England and Wales that government should levy penal Council tax on absentee landowners who are out of possession for more than a year 'in an effort to tackle housing crises in Britain.'¹¹⁵⁵

8.3 Filling the gaps in the legal framework for the application of Adverse Possession:

There are gaps in the legal framework for the application of the doctrine of adverse possession in the jurisdictions under study. The position under the Land Registration Act (LRA) 2002 applicable in England and Wales for example, is that the claim of the adverse possessor may be defeated by an objection from the registered proprietor upon service of notice on the latter by the Registrar and may lead to the eviction of the adverse possessor through eviction proceedings in court. The result as discussed in this work¹¹⁵⁶ is the development over time of a 'black market' for land titles where the adverse possessor goes underground and refuses to apply for registration of his adverse title. This situation may endure indefinitely until the adverse possessor is found out by the registered owner since registration is not compulsory. Consequently, one of the major rationales of adverse possession which is to quiet title and therefore obviate incessant land disputes is defeated.

¹¹⁵⁴ Such as the position in France and Poland. See the Report by the British Institute of International and Comparative Law for Her Majesty's Court Service, 'Adverse Possession' supra (n 7).

¹¹⁵⁵ I Okeoma, supra (n 1121).

¹¹⁵⁶ See Chapter 4 of this thesis.

This thesis recommends, following the suggestion of Pawlowski and Brown,¹¹⁵⁷ that registration of title by an adverse possessor be made compulsory and time bound so that failure to register the adverse title within a stipulated period after lapse of the limitation period extinguishes the title of the adverse possessor. Bringing every land owner on the register in England and Wales would work *in tandem* with the doctrine of adverse possession and strengthen its efficacy in actualising one of its main objectives, which is to quiet title.

In Nigeria, the system of land instrument registration applicable across the thirty six states of Nigeria is a major challenge to balancing the interest of the adverse possessor against that of the innocent third party. Under a system of land instrument registration, a registered deed is not protective of the landowner in any way; not only does it fail to cure defect in title of the landowner, the latter title is subject to existing overriding interests such as adverse possession. Whilst possession of a registered deed of transfer without possession is precarious for the landowner but advantageous to the adverse possessor, an innocent third party purchaser may eventually bear the brunt, since such purchaser would be bound by the interest of the adverse possessor. Even in Lagos State-Nigeria, the interest of the first registered proprietor under what appears to be title registration¹¹⁵⁸, is subject to all overriding interests including the interest of the adverse possessor subsisting at the time of registration¹¹⁵⁹. This is so even where neither the transferor nor transferee had knowledge of the existence of the adverse possessor¹¹⁶⁰. It is suggested that unless the interest of the adverse possessor is registered, a third party purchaser for value without notice of the interest of the adverse possessor should take free

¹¹⁵⁷M. Pawlowski and J. Brown, 'Adverse Possession and the Transmissibility of Possessory Rights – The Dark Side of Land Registration?' [2017] (2) Conv. 116 at 117, discussed in detail in chapter 2 of this thesis.

¹¹⁵⁸ See the Preamble to the Law which indicates that the Law govern registration of title in Lagos State.

¹¹⁵⁹ See s. 66(f) of the Land Registration Law of Lagos State, 2015.

¹¹⁶⁰ Under the Anglo-Nigerian law of adverse possession, Knowledge of the presence of the adverse possessor by an absentee owner is not a bar to the interest of the adverse possessor.

8.4 Amending the Nigerian Land Use Act and the State Lands Law to accommodate the doctrine of adverse possession

In Nigeria, the regime of the Land Use Act 1978 has made the doctrine of adverse possession inefficacious due to the various provisions, making the application of the doctrine difficult or impossible.¹¹⁶¹ Whilst section 48 of the Act gives the impression that the common law of England is retained under its dispensation and in line with the reception Statute,¹¹⁶² many provisions of the Act frustrate its application in spite of the Statutes of limitation.¹¹⁶³ Thus, whilst the application of the doctrine in appropriate cases by the Nigerian courts before March 29 1978 when the Act came into effect was in order, cases decided after that date without taking cognisance of the various provisions of the Act were decided *per in curiam* and tantamount to bad law. If the Nigerian jurisdiction is desirous of retaining the doctrine of adverse possession with modifications regarding registered land in line with the position of English law as encapsulated in the Land Registration Act 2002 applicable in England and Wales, an amendment to the relevant provisions of the Act such as sections 11, 14, 27, 37, and 43 is suggested. It would however take the ingenuity of the draftsman to align the amendment to fit into the concept underlying the Act which is vesting radical title over land within the territory of the state in the federation in the Governor of the state, and radical title over land in the Federal Capital Territory in the Minister on behalf of the President of the Federal Republic of Nigeria.

Also, an amendment to the Land Use Act is, like an amendment to the Nigerian Constitution, very difficult to accomplish; the Land Use Act is entrenched in the Constitution of the Federal Republic of Nigeria 1999 as amended, and can only be amended in accordance with the provisions of the Constitution for its amendment.¹¹⁶⁴ A bold attempt by the regime of President Musa Yar'Adua to amend

¹¹⁶¹ See Chapter 5 of this thesis.

¹¹⁶² *ibid.*

¹¹⁶³ The statute does not apply to title to land unless there is adverse possession: See e.g., the Nigerian Limitation Act 1966.

¹¹⁶⁴ See ss. 9 and 315 (5) (d) of the Constitution. The process of amendment of the 1999 Constitution not being an Act to which section 8 or 9 or Chapter IV of the Constitution applies 'shall not be passed in either House of the National Assembly unless the proposal is supported by votes of not less than

the Act as part of the suggested Land Reform under a seven point agenda of that administration in 2007¹¹⁶⁵ did not see the light of the day. Not only were the relevant provisions of the Act hampering the application of the doctrine of adverse possession as discussed in this thesis not contemplated by the provisions of the Land Use Amendment Bill 2009, the Bill was not passed by the National Assembly. However, pending such amendment of the relevant sections of the Act as suggested, Nigerian courts should only apply the doctrine of adverse possession to cause of action arising before March 28 1978, and hold that time does not run under the limitation statute against a holder of a right of occupancy after that date since the various provisions of the Act earlier mentioned make adverse possession impossible.

The provision of the State Lands Law or Act in Nigeria expressly excluding the application of the doctrine from its ambit also needs to be addressed. An Act of the National Assembly or a Law of the State Houses of Assembly in Nigeria undoubtedly overrides the common law and more so, where there is an express provision against its application. Consequently, the State Lands Act applicable in the FCT and the State Lands Law applicable in the various states of the federation of Nigeria, are not susceptible to the application of the Statutes of Limitation since the requirement of adverse possession is a *sine qua non* for the application of the Statute of Limitation. To preserve the doctrine of adverse possession, an amendment removing the provisions of the Law excluding its application under the State Lands Act/Law is suggested.

8.5 Giving consideration to the social function of property in resolving issues and conflicts in property relations

The concept of social function of property deprecates the idea of property as a subjective and absolute right to property. Property serves a social function in the sense that it creates an obligation on the part of the owner of property to put it into the service of the community which is tantamount to putting it to productive use. It

two, thirds majority of all members of that House and approved by resolution of the House of Assembly of not less than two thirds of all the States’’: See s.9 (2) of the Constitution.

¹¹⁶⁵ For a text of the said Bill, see www.nigeriafirst.org.

underscores the extinction of title over unproductive land at the end of the limitation period and forms the basis for the protection of the right to private and family life and the State obligation in making provision for adequate and affordable housing to accommodate the homeless.

Consequently, it is expected that the State would take cognizance of that significant role of property relations in formulating policies and in making laws to regulate these relations and to resolve conflicts which may arise there from. In appreciating this social function of property, the State is able to harmonise the existing major and marginal interests in property and, through the restorative perspective of criminal justice, re-calibrate the conflict between the squatter, the land owner, the community and the State towards understanding and resolving the conflicts.

8.6 Exploring Alternatives for Nigeria: Lessons from other jurisdictions

There is hardly a jurisdiction globally where stale claim to land title is encouraged.¹¹⁶⁶ Stale claims are generally discouraged either by encouraging positive acquisition of title through adverse possession, or by way of negative acquisition of property through the equitable doctrine of laches and acquiescence or the rule of proprietary estoppel. In Nigeria in particular, in addition to the common law devices highlighted, the rule of prescription as encapsulated in the decision of the court in *Awo v. Cookey Gam*,¹¹⁶⁷ and the rule of *Hauzi*¹¹⁶⁸ in Islamic law, are all geared towards discouraging stale claims. Also, one of the five ways of proving title to land as formulated by the Supreme Court of Nigeria in *Idundun v. Okumagba*¹¹⁶⁹ is 'acts of long possession and enjoyment of land'¹¹⁷⁰ suggesting that it could be used as a defence by a defendant in an action for declaration of title to land by the plaintiff.

¹¹⁶⁶ That generally was the position of the British Institute of International and Comparative Law in a Report submitted consequent upon directive of Her Majesty's Court Service to conduct comparative research in some common law and civil law jurisdictions with respect to the applicable statutes of limitation. For details and source of information, see n 1114 *infra*.

¹¹⁶⁷ [1913] 2 NLR 97.

¹¹⁶⁸ This rule suggests that time runs in favour of the adverse possessor/squatter against the real owner upon fulfillment of certain established conditions. See *Hunare v. Nana* [1996] 1 NWLR (Pt 425) 381; *Gwadanagaji v. Shalele* [2013] All FWLR (Pt 705) 353.

¹¹⁶⁹ [1976] 10 SC 227.

¹¹⁷⁰ *ibid*.

However, while the common law jurisdictions have generally retained the application of the law of adverse possession to unregistered land titles including land covered by mere registration of title deeds, there appears to be consensus of many jurisdictions on its non-applicability or its restricted application to registered land. For example, the Singaporean Land Title Act 1993¹¹⁷¹ generally bars application of the doctrine of adverse possession to registered land,¹¹⁷² while there is restricted application of the doctrine of adverse possession to registered land under the Land Registration Act 2002¹¹⁷³ applicable in England and Wales. The Law Commission in Hong Kong had in 2014, while recommending the retention of the doctrine of adverse possession as a 'practical solution to some of the land title problems,'¹¹⁷⁴ suggested that 'when a registered regime is in place in Hong Kong,¹¹⁷⁵ adverse possession should not extinguish title to a registered estate.'¹¹⁷⁶

Judicial criticism against application of the law of adverse possession is not unknown. In *Pye*,¹¹⁷⁷ Neuberger J. described the law as 'illogical and disproportionate',¹¹⁷⁸ which criticism was echoed by some members of the House of Lords.¹¹⁷⁹ This was followed by the decision of the European Court of Human Rights on further appeal where the court held that the appellant's right under the European Convention on Human Rights (domesticated as the Human Rights Act

¹¹⁷¹ Land Title Act No. 27 1993 which came into force on March 1994.

¹¹⁷² Section 50 of the Act provides that: 'No title to land adverse to or in derogation of the title of a proprietor of registered land shall be acquired by any length of possession by virtue of the Limitation Act (Cap 163) or otherwise, nor shall the title of any proprietor of registered land be extinguished by the operation of that Act.' This provision applies except where an application of an adverse possessor for registration was pending under the repealed Act before the advent of the new Act or where such adverse possessor was entitled to lodge such application for registration before March 1 1994 (See s. 174 (7)(8) of the Act), in which cases the provisions of the repealed Law enabling registration would apply.

¹¹⁷³ Schedule 6 thereof. Therein, a balance has been struck between 'the conclusiveness of the register, protection of private property right and enabling the law on adverse possession to work in very limited range of situations...[on compelling grounds].' See Reference by the Secretary for Justice and Chief Justice to the Law Commission of Hon Kong on review of existing law on adverse possession in the country.

¹¹⁷⁴ Law Commission in Hong Kong: Report on Adverse Possession (October 2014) 147. Available online at www.hkreform.gov.hk

¹¹⁷⁵ Presently, Hong Kong operates a deeds registration system. Although legislation establishing a registration system for title to land has been enacted, it has not come into effect.

¹¹⁷⁶ Report of the Hong Kong Commission on Adverse Possession (n 1142) Para 7.26-7.34

¹¹⁷⁷ *JA Pye (Oxford) Ltd v. Graham* [2000] Ch 676.

¹¹⁷⁸ *ibid.*

¹¹⁷⁹ See Bingham and Hope LJ in the House of Lords [2003] 1 AC 419.

1998) had been violated and that the appellant was entitled to compensation for the loss of the land.¹¹⁸⁰ This decision was overturned by the Grand Chamber of the Court narrowly on a majority of 10 to 7 on appeal by the government of the United Kingdom¹¹⁸¹ There was criticism and reform advocated by the Supreme Court of India in *Waghajijat v. Harijan & Ors*¹¹⁸² (following Neuberger J. in *Pye*), and in *State v. Kumar*¹¹⁸³ where Bhandari J. described the law of adverse possession as ‘archaic’ ‘and needs a serious relook in the larger interest of the people.’¹¹⁸⁴ The court reasoned that ‘if the law is to be retained according to the wisdom of Parliament, then the law must require those who adversely possess land to pay compensation to the title owner according to the prevalent market rate of the property.’¹¹⁸⁵

Whilst its non-applicability to registered land such as it is the case under the Singaporean Land Title Act 1993,¹¹⁸⁶ and its applicability to registered land under the Land Registration Law of Lagos State of Nigeria 2015¹¹⁸⁷ remain examples of two extreme thoughts on the application of the doctrine, the question is: whither Nigeria?

It is argued¹¹⁸⁸ that ‘[t]he law on adverse possession in Nigeria is obsolete and archaic...a legislative endorsement of trespass on land and land theft.’¹¹⁸⁹ Abolition of the doctrine of adverse possession is recommended with the suggestion that ‘the gap should be filled by the equitable rule of *laches and acquiescence*, or the rule in *Awo v. Cookey Gam*, or *Hauzi* in Islamic jurisprudence, depending on the nature of the adverse possession being pushed forward as the basis of title to land.’¹¹⁹⁰

¹¹⁸⁰ *JA Pye (Oxford) Ltd v. United Kingdom* [2005] 3 EGLR 1.

¹¹⁸¹ *United Kingdom v. JA Pye (Oxford) Ltd* [2007] ECHR 700.

¹¹⁸² AIR 2009 SC 103. The court observed that ‘the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate’ and that ‘there is an urgent need of fresh look regarding the law on adverse possession.’

¹¹⁸³ [2011] 10 SCC 404.

¹¹⁸⁴ *ibid.*

¹¹⁸⁵ *ibid.*

¹¹⁸⁶ *supra*, n.1139.

¹¹⁸⁷ As pointed out earlier, it defeats the whole essence of registered title. See Chapter 5 *infra*.

¹¹⁸⁸ G. Ojo, ‘Acquisition of title to land by adverse possession: Need to stop endorsement of land theft.’ *The Gravitas Review of Business and Property Law* March 2019 vol. 10 No.1, 85.

¹¹⁸⁹ *ibid* 98.

¹¹⁹⁰ *ibid.*

It is necessary to probe the preference for these three rules since the basis of their application lies in adverse possession of some sorts – in all the three cases for example, the person relying on them must have been exercising a right inconsistent with the right of the real owner over a fairly long period of time without challenge by the real owner. However, there are significant areas of divergence: first, in all the three cases, there is no link with the statute of limitation in force and each could stand on its own without it;¹¹⁹¹ second, unlike the common law of adverse possession, no reliance could be placed on any of these three concepts where the real owner had no knowledge of the existence or use of the land by the adverse possessor¹¹⁹² – there is no acquiescence and time does not run against the real owner unless the latter had knowledge of the adverse possession; third, in any event, the three cases can only be used as a shield of defence in the event of an action for declaration of title by the real owner and not as a sword of action by the adverse possessor,¹¹⁹³ or as basis for registration of title unlike the common law of adverse possession;¹¹⁹⁴ fourth, unlike the common law of adverse possession, it is unthinkable that, in the three concepts, a trespasser will claim title based on his own trespass without more. It therefore, admits flexibility and a wide range of exceptions.¹¹⁹⁵ The three concepts are therefore based on the general equitable principles of what is fair, just and conscionable in the circumstances, rather than hard core law devoid of minimum moral content. On the strength of these considerations, perhaps the three alternative concepts may constitute the Nigerian law of adverse possession and the Nigerian statutes of limitation may be amended accordingly.

However, while obsolete claim by a plaintiff may be defeated by the defendant's plea of any one of the alternative rules as an adverse possessor depending on whether the claim lies in English law, customary law or Islamic law respectively, the impediment created by sections 11, 14, 27 37 and 43 of the Land Use Act remains to

¹¹⁹¹ The three concepts were developed by the courts without reference to any statute of limitation.

¹¹⁹² See *Ige v. Dobi* [1993] 3 NWLR (Pt 596) 950; *Awo v. Cookey Gam* (supra).

¹¹⁹³ *Mogaji v. Cadbury Nigeria Ltd* [1985] 7 SC 59; *Atunrase v. Sunmola* [1985] 1 SC 349.

¹¹⁹⁴ See Chapter 4 *infra*.

¹¹⁹⁵ For these exceptions, see *Umaru v. Bakosi* [1996] 1 NWLR (Pt 425) 381. These very many exception to the Islamic rule of Hauzi have made it difficult for the adverse possessor to sustain title.

defeat any of those defences. It is also clear that none of the three concepts can override the provisions of the State Lands Act/Law on the exclusion of adverse possession from its ambit.

It is recommended therefore that both the provisions of the Land Use Act which are impediments to the application of the doctrine of adverse possession and the relevant provisions of the State Lands Act/Law excluding the application of the law of adverse possession from its ambit be expunged therefrom for effective application of any of the doctrines suggested as alternatives to fill the gap in the event of abolition of the English doctrine of adverse possession.

8.7 Summary

The following are the summary of recommendations herein discussed:

- 1 It is not sufficient to prove adverse possession by establishing that the real owner has discontinued possession of land or has been dispossessed of it by an adverse possessor; it is necessary to ensure that the land is put to productive use by the adverse possessor and thereby obviate a situation whereby a doctrine meant to fulfill the reasonable expectations of the people is exploited as an avenue for illegitimate land acquisition or land speculation. This requirement may be brought about through judicial activism or legislative intervention.
2. The requirement of good faith is necessary to separate adverse possession for purposes of productive use from land speculation and 'land grabbing.' This would also ensure a balance in the market mechanism for the transfer of property right and engender effective balance of the individual property right against public interest of putting land to productive use.
3. Registration of title by the adverse possessor under the Land Registration Act (LRA) 2002 applicable in England and Wales should be made compulsory and time barred so that failure to register the adverse title within a stipulated

period after lapse of the limitation period under the Act extinguishes the title of the adverse possessor. In the case of Nigeria, unless the interest of the adverse possessor is registered, a third party purchaser for value without notice of the interest of the adverse possessor should take free of it.

4. If the Nigerian jurisdiction is desirous of retaining the doctrine of adverse possession with modifications regarding registered land in line with the position of English law as encapsulated in the LRA 2002 applicable in England and Wales, an amendment to sections 11, 14, 27, 37 and 43 of the Land Use Act ('the Act') is recommended. To actualise this, an amendment to the Nigerian Constitution by taking the Act out of it for purposes of amendment is necessary. Pending such amendment, Nigerian courts shall engage in judicial activism by restricting the application of the doctrine to causes of action which arose before March 29, 1978.
6. To preserve the doctrine of adverse possession, an amendment expunging the provisions of the State Lands Act/Law excluding the application of the doctrine from its ambit is necessary.
7. Where the option of abolishing the common law doctrine of adverse possession in Nigeria and its replacement by the equitable doctrine of laches and acquiescence, the rule in *Awo v. Cookey Gam* or the rule of Hauzi under Islamic law is being considered, the provisions of sections 11, 14, 27, 37 and 43 of the Land Use Act should be expunged through legislative amendment. In the same vein, the relevant provisions of the State Lands Act/Law excluding the application of the law of adverse possession should also be expunged from the law through amendment.

II. GENERAL CONCLUSION

8.8 A comparative study of the application of the doctrine of adverse possession under the English and Nigerian law engaged in this thesis has revealed the nature,

scope and limitations of the doctrine against the backdrop of the diversity in the social, legal and institutional frameworks applicable in the various jurisdictions. The inevitable conclusion is that whereas the doctrine is a universal concept within the common law and civil law jurisdictions, it is not a one cap fits all, and that the doctrine is susceptible to the applicable local statutes and the peculiarities of the land tenure system in existence in each jurisdiction. As the Grand Chamber of the European Court of Human Rights noted in *UK v. Pye*¹¹⁹⁶: 'it is characteristic of property that different countries regulates its use and transfer in a variety of ways. The relevant rules reflect social policies against the background of the local conception of the importance and role of property...'¹¹⁹⁷

One of the lessons drawn from this thesis is that legal transplant such as the reception of the common law doctrine of adverse possession is susceptible to local circumstances including pre-existing laws such as customary and Islamic law, and extant pieces of legislation. The fact that many jurisdictions across the globe have zero tolerance for stale claims as discussed earlier and that the Nigeria's indigenous legal structure has in-built mechanisms to protect adverse possession as opposed to stale claims, suggest that there is need for recognition of the local construction of adverse possession required for the application of the provisions of the statutes of limitation.

Where the common law doctrine of adverse possession is to be applied, recent developments in England and Wales require that the principle of indefeasibility of title be protected and the end of justice met by making it generally inapplicable automatically to defeat registered title. This position which has been adopted by Singapore and recommended by the Law Commission in Hong-Kong has introduced 'checks and balances on acquisition of title to land by adverse possession.'¹¹⁹⁸

In England and Wales with a monolithic system of land tenure, the efficacy of the doctrine is not in doubt as the courts recognise and protect the doctrine within the

¹¹⁹⁶[2007] ECHR 700.

¹¹⁹⁷ibid, para 74.

¹¹⁹⁸ G Ojo, supra (n 1158) at 94.

regime of the statute of limitation and in ensuring the necessary balance between the demands of the public interest and the interests of the individuals. This plays out well in giving effect to the doctrine as against the criminalisation policy of the State.

Although the doctrine was received into the Nigerian legal system consequent upon colonisation, its application is either excluded or frustrated by local circumstances or local laws. Added to these is the peculiar situation in Lagos State which expressly criminalises acts of adverse possession such as peaceful entry or peaceable possession.

On the whole, the position of this thesis is that the doctrine of adverse possession does not sit well with the plural system of land tenure and runs parallel to certain provisions of the Land Use Act (which is the principal legislation on title to land in Nigeria) and the State Lands Act/Law. It is also the position of this thesis that for the doctrine of adverse possession to apply in Nigeria, those provisions of the Act or Law referred to need be amended as suggested.

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