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The Legal Significance of Good Faith in HKSAR's Adverse Possession: Reconstructing the Boundary Between Land Theft and Property Protection

Liuye Chang

Basis International School Park Lane Harbour, Huizhou, China
liuye.chang72253-biph@basischina.com

Abstract. This paper examines the legal significance of good faith in Hong Kong's doctrine of adverse possession during the transition from deed registration to title registration. The current common law approach focuses mainly on factual possession and intention to possess, and it gives limited attention to whether the possessor acted honestly or opportunistically. In a high-value land market, this moral neutrality creates tension between title-cleansing functions and the protection of registered owners. The paper argues that adverse possession should not be abolished because it remains necessary for resolving historical boundary discrepancies, especially in the New Territories, and for preparing older land records for the future title registration system. However, the doctrine should be reconstructed through a substantive good-faith requirement, a notification mechanism for registered land, and a compensation-based liability rule for bad-faith possession. These reforms would preserve the efficiency of adverse possession while reducing unjust enrichment, improving constitutional proportionality, and drawing a clearer boundary between legitimate property protection and perceived land theft.

Keywords: good faith, Hong Kong land law, property protection

1. Introduction

Adverse possession remains one of the most controversial and highly debated legal doctrines in the Hong Kong Special Administrative Region (HKSAR). At its base, the doctrine permits a trespasser to acquire legitimate, guaranteed ownership of land through continuous factual occupation and a manifested animus possidendi to exclude the paper owner [1]. However, its application in HKSAR is a particular case. In a city with soaring land prices and extremely high population density, land is a particularly scarce resource [2]. However, the present common law system for adverse possession is strictly objective and cannot distinguish between good faith possession, such as an innocent neighbour's mistaken belief that the land is rightfully theirs, and bad faith possession that constitutes intentional land appropriation [3]. Throughout this essay, the terms land theft and property protection are employed merely as conceptual shorthand to encapsulate the public controversy and the socioeconomic effects of the doctrine. This terminology is not intended to suggest that all instances of bad-faith possession satisfy the strict mens rea of theft under criminal law; rather, it

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highlights the public's perception of moral hazard and the inequitable deprivation of the registered owner's rights.

Due to its moral indifference, this has led to widespread public dissatisfaction; many people feel that the rights of property owners have been harmed. The need for reform of the doctrine is further emphasized by the forthcoming switch in HKSAR from the deeds registration system (DRS) under the Land Registration Ordinance (Cap 128) to the title registration system (TRS) under the Land Titles Ordinance (Cap 585), which will be implemented in stages for new land grants starting in 2027 [4]. As this transition approaches, the discussion on adverse possession has naturally picked up speed. Can a modern jurisdiction justify a law that effectively legalizes the theft of multi-million-dollar real estate merely because the true owner was negligent?

Instead of merely extending the limitation period for bad-faith possessors, which would introduce insurmountable evidentiary problems and be inconsistent with the fundamental purpose of limitation statutes, this essay proposes that a substantive good-faith requirement should be integrated with a notification mechanism and a liability rule for compensation to address the moral hazard in the current law, solve the evident dilemma, and facilitate a smooth transition to a system of absolute title registration by the 2047 leasehold limit.

2. The existential necessity: retaining adverse possession as a title-cleansing tool

Before examining the reasons for a good faith requirement, the abolitionist view should be addressed and the need for the doctrine in HKSAR defended. The proponents of no adverse possession are pushing to completely eliminate it. Based on the experience in Singapore, scholars Yang and Hong have proposed that adverse possession is fundamentally inconsistent with the concept of absolute indefeasibility as envisaged by the Land Titles Ordinance (LTO) [2]. They believe that the purpose of a title registration system is to establish the government's official registered documents as the conclusive and guaranteed evidence of property rights. Therefore, to maintain a system that allows off-register claims to take precedence over documented rights guaranteed by the state for squatters poses a serious risk. By leaving this loophole open in a city with extremely high land value, the law has actively encouraged bad-faith squatters to intentionally trespass and file opportunistic litigations in hopes of obtaining top-tier real estate for free, thus undermining the very certainty of ownership that the new system aims to protect [2]. However, the call for immediate abolition fails to consider the specific geographical, historical, and administrative constraints of HKSAR.

2.1. Resolving boundary discrepancies in the New Territories

The primary reasons for keeping adverse possession provisions include historical errors in the mapping of the New Territories. As shown in the 2014 report by the Hong Kong Law Reform Commission (HKLRC), the original DD sheets and New Grant plans have had various and long-standing boundary deviations [5]. Over a hundred years ago, using crude graphics, these paper boundaries frequently did not match the physical boundaries that residents had been living near and respecting for many decades [5].

Attempting to rectify these discrepancies by conducting a comprehensive, government-led resurvey of the New Territories would require a very large sum of money, potentially billions, and it would inevitably lead to endless lawsuits over the newly drawn boundaries among landowners [5]. As Nadav Shoked has mentioned recently, adverse possession is now often used to address issues of obsolete or invalid formal boundary records, and it is not appropriate to use it as a replacement [6].

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It serves as a necessary mechanism to resolve inevitable boundary disputes without necessitating large-scale, cost-prohibitive resurveys. By allowing the law to eventually validate the long-standing physical reality on the ground, adverse possession quietly cures these historical defects.

2.2. The strategic timeline: the LTO and the 2047 limit

The necessity of the doctrine is further amplified by the government's strategic timeline for the implementation of the TRS and the looming 2047 leasehold limit. The HKSAR government's strategy to implement the TRS starting in 2027 exclusively for newly granted land reflects a highly cautious policy [4]. For the existing 2.9 million land registers, the transition will be gradual.

During this interim period (2027–2047), adverse possession must be retained to perform the vital work of title cleansing. The 2047 limit is of paramount importance here. Under the New Territories Leases (Extension) Ordinance (Cap 150), most leases in the New Territories were statutorily extended to 30 June 2047 [7]. In the landmark case of Chan Tin Shi v Li Tin Sung, the Court of Final Appeal ruled that this 1997 statutory extension did not create a new estate but merely re-wrote the length of the original lease term [8]. Consequently, the accrual of adverse possession periods was not interrupted by the 1997 handover, allowing squatters to continuously accrue time up to the 2047 limit. The two decades between the initial rollout of the TRS in 2027 and the mass lease expiry in 2047 act as a crucial transitional window. During this period, retaining adverse possession provides a practical mechanism to resolve undocumented chains of ownership and obsolete paper boundaries by legally validating long-standing physical occupation. Retaining adverse possession allows historical boundary errors to be legally settled through possessory title before these lands are fully converted into the TRS. Once the 2047 limit approaches, the register will reflect clean, settled titles ready for seamless integration into the new absolute registration system.

3. The flaws of the current regime: the error of state-of-mind neutrality

While retaining adverse possession is practically necessary for land administration, the doctrine in its current common law form is ethically bankrupt and economically flawed. Hong Kong strictly adheres to the Connecticut Rule, an objective test which posits that the possessor's subjective intent should be neglected, provided that factual possession and the intent to possess (animus possidendi) can be proven [3].

3.1. The economic cost of intentional ignorance

The deliberate ignorance of the trespasser's subjective state of mind creates severe adverse incentives. As Professor Jeong-Yoo Kim points out, a regime that ignores intent provides potential encroachers with a direct incentive to remain intentionally ignorant of true property boundaries [9]. If a developer or a neighbour suspects they might be crossing a boundary line, the objective rule encourages them not to verify the boundary. Knowing they are trespassing does not hinder their claim, and discovering the truth might obligate them to retreat. This dynamic results in a significant impairment of economic efficiency, leading to socially wasteful investments on disputed land [9].

Professor Lee Anne Fennell provides a contrasting economic argument, suggesting that adverse possession ought to actively favor bad faith through efficient trespass—moving land to a party who appreciates it much more than the dormant proprietor [10]. Fennell argues that by requiring the trespasser to know they are encroaching and to document that knowledge, the law can ensure the transfer only happens when a market transaction is unavailable but the value shift is positive [10].

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However, in an ultra-high-value, geographically constrained market like Hong Kong, sanctioning efficient theft without compensation fundamentally destabilizes the real estate market.

3.2. Moral perspectives and empirical judicial reality

From a moral standpoint, the objective test violates fundamental ethical norms. As Miller and Milliron argue from a Catholic and Canon Law perspective, good faith should become a mandatory requirement for any legitimate acquisition of property [11]. They contend that any secular system permitting a knowing trespasser to gain title without compensation effectively rewards theft, violating the natural law written on the human heart and the principle of the universal destination of goods [11].

Fascinatingly, the rigidity of the objective rule has led to a jurisprudential phenomenon: empirical judicial moralism. Professor R.H. Helmholz's seminal study reveals a stark deviation between the expressed law and the law in action. Through an analysis of hundreds of appellate cases, Helmholz demonstrated that judges and juries consistently favor the honest possessor who acts in good faith, while covertly placing a significantly higher evidentiary burden on the knowing trespasser [3]. In Hong Kong, the Court of Final Appeal's decision in Wong Tak Yue—where a squatter's hypothetical willingness to pay rent was held to negate their animus possidendi—reflects a similar judicial inclination to penalize possessors who lack a genuine, honest belief in their own ownership [12]. It is far better for the legal system to explicitly acknowledge the importance of good faith than to force judges to rely on covert moral manipulation of legal tests.

4. Addressing the evidential dilemma: the limitation period debate

Recognizing the flaws of the objective test, early proposals for reform often suggest a two-tiered statute of limitations: retaining a relatively short period for good-faith occupiers and a long one or bad-faith trespassers to prevent land theft [10]; however, imposing a very long limitation period on bad-faith claims introduces serious procedural problems.

Extending the limitation period to 30 years would introduce serious and potentially insurmountable evidentiary problems. The basic purpose of any statute of limitations is to prevent stale claims [5]; therefore, if the law demands an inquiry into factual possession and subjective intent that extends for three decades, it is likely to fail systemically. Over the past 30 years, witnesses have passed away, memories have inevitably faded, and the original fences or boundary lines no longer exist. Forcing the courts to determine the specific circumstances of land occupation decades ago runs contrary to the intention of adverse possession as a rapid title-clearing device.

In addition, this loss of evidence also points out a structural problem in Hong Kong's current property law. A fundamental structural reason adverse possession has a relatively short 12-year limitation period is that titles under the current Deeds Registration System are not guaranteed. Since a paper title does not provide absolute proof of ownership, the law cannot afford to wait 30 years for a dispute to be resolved; a quick and practical way to align legal ownership with factual reality is required [5]. Therefore, punishing bad-faith actors simply by extending the limitation period is not feasible in practice. The reform should have good faith and not harm the evidence.

5. A reformed mechanism: integrating good faith without evidential decay

To correct the above deficiencies in the system and meet the evidence requirements mentioned above, Hong Kong should establish good faith as a material legal condition for adverse possession

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rather than merely extending the limitation period. A notification system can be established for registered land and a liability rule will be applied to unregistered land.

5.1. Defining good faith

Given the context of Hong Kong land law, good faith should be specified in the statute as a sincere and reasonable belief held by the possessor that the land in question legally belongs to them [11]. This norm must incorporate both a subjective element (the sincere belief) and an objective element (the reasonableness of that belief). The application of this definition would cover circumstances where the occupier's mistaken belief is due to invalid deeds, old DD sheets, or genuine errors in property descriptions [10].

5.2. The notification system for the LTO era

To resolve the evidential dilemma and protect property rights, Hong Kong can look to the model in the English Land Registration Act 2002, which the HKLRC has also recommended for Hong Kong's planned TRS [5]; under this system, the 12-year limitation period is still effective, but its automatic operation has been suspended.

When a squatter has met the requirements for the length of time of occupation, they are not entitled to title automatically and must apply for registration. The Land Registry will inform the owner of the property that has been encroached upon, and then the owner has the right to object to or reject the application within a specific time period [5]. Generally speaking, the squatter can only win against the owner's objection if they meet certain conditions; for example, they must own a neighbouring plot of land and have been occupying that plot for a long time based on the mistaken belief that it was their property [5].

The above mechanism has effectively addressed the problems mentioned above. It avoids loss of evidence as the squatter will still file a claim after a reasonable time. It does not fall under land theft because a bad-faith squatter will be vetoed by the notified owner and cannot invoke the reasonable mistake exception. Therefore, it has introduced a demanding standard of good faith into the settlement of boundary disputes and is well-suited to the new era of LTO.

5.3. The liability rule for bad faith trespass

For land that remains under the unregistered system prior to the full implementation of the LTO, a liability rule should be introduced. Drawing on the theories of Thomas Merrill, if a bad faith trespasser successfully establishes factual possession for 12 years (satisfying the need to quickly quiet title and avoid evidential decay), they should not receive the land for free [13]. Instead, the law should force the bad faith squatter to compensate the original owner at fair market value [10]. This preserves the administrative efficiency of clearing up possessory titles while entirely removing the unjust enrichment that makes bad faith adverse possession morally offensive.

6. Constitutional scrutiny: alignment with the Basic Law

The proposed good-faith-based reform is not merely a policy preference; it is a constitutional imperative. The current framework of adverse possession has narrowly survived constitutional challenges, but its moral arbitrariness makes it increasingly vulnerable [14].

In Harvest Good Development Ltd v Secretary for Justice, the court upheld adverse possession as consistent with the Basic Law because it pursues a legitimate aim—namely, clearing titles and

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preventing stale claims [14]. However, Justice Hartmann acutely noted in his judgment that the mechanism is inherently clumsy and frequently operates inequitably [14]. Human rights jurisprudence requires property deprivation laws to pass a fair balance test, as established by the European Court of Human Rights in J.A. Pye (Oxford) Ltd v United Kingdom [15].

The current objective law struggles to achieve a true fair balance because it disproportionately punishes the registered owner regardless of the squatter's culpability. By distinguishing between the honest person and the land thief, the proposed reform injects proportionality into the doctrine. It ensures that the harsh punishment of uncompensated property loss only occurs when the social and economic need to protect an honest neighbor outweighs the moral claim of the original owner [5].

Furthermore, the introduction of a compensation requirement for bad faith possession aligns the doctrine with the strict protections of Basic Law Article 105, which explicitly guarantees the right to compensation for the lawful deprivation of property [16]. It transitions adverse possession from a tool of arbitrary expropriation into a constitutionally sound mechanism of dispute resolution.

7. Conclusion

However, for the doctrine to remain legally robust and morally justifiable, it must evolve past the archaic objective test. Extending the limitation period for bad faith actors is a flawed solution that generates massive evidential difficulties and offends the purpose of limitation statutes. Instead, the introduction of a substantive Good Faith requirement—enforced through a notification/veto system for registered land and a liability compensation rule for unregistered land—solves multiple systemic issues simultaneously. It resolves historical boundary disputes fairly, removes the perverse incentives that promote intentional ignorance, and strikes a true constitutional balance.

By the time the Land Titles Ordinance is fully operational, this reformed doctrine will have achieved its ultimate purpose: transforming a regime previously criticized as state-sanctioned Land Theft into a highly legitimate system of Property Protection.

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