Research Article

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Legal-dogmatic controversies between civil law and criminal law: the case of the exercise of the right of possession in Colombia

Abstract

The Colombian civil legal protection framework for persons who exercise the tenancy of another's thing with the spirit of lord and owner is determined and the criminal legal consequences of the agent who exercises the tenancy of another's real estate to the detriment of the person who holds the right of dominion are elucidated. The above using as a methodological tool mainly the documentary analysis of binding international and national regulations, jurisprudence of the Colombian high courts, and related doctrine. Thus, it is concluded that the crimes of encroachment of real estate and land invasion are inoperative, given that a Social State of Law cannot criminalize the exercise of fundamental rights and related rights, without becoming a tyranny. The above using as a methodological tool mainly the documentary analysis of binding international and national regulations, jurisprudence of the Colombian high courts, and related doctrine. Thus, it is concluded that the crimes of encroachment of real estate and land invasion are inoperative, given that a Social State of Law cannot criminalize the exercise of fundamental rights and related rights, without becoming a tyranny. The above using as a methodological tool mainly the documentary analysis of binding international and national regulations, jurisprudence of the Colombian high courts, and related doctrine. Thus, it is concluded that the crimes of encroachment of real estate and land invasion are inoperative, given that a Social State of Law cannot criminalize the exercise of fundamental rights and related rights, without becoming a tyranny.

Keywords: possession, invasion, encroachment, legitimate exercise of a right, fundamental rights

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Introduction

Colombia is a country that has historically been characterized by long periods of violence and wars, to such an extent that it can be said that the republican history of the country has developed parallel to an unfinished conflict. Among the various causes of violence in the country, one has remained present throughout history, that is, land tenure,[1] an etiology of bellicosity that has been evidenced since the colonial years, in all of Latin America;[2] The researchers Fals Borda, Umañana Luna and Guzmán Campos already referred, in relation to the causes of the period called "La Violencia" in Colombia, that one of the main causes of conflict in our country is the inequitable distribution of land, as the conflicts of their tenure, as well as the forced sales of land at ridiculous prices.[3] At present, the problem of land tenure is a phenomenon that continues to afflict Colombian society, since the owners of the land are fewer and fewer, being that "only 0.4% of the farms concentrate more than 67 % of productive land..[4] If, in addition to this, we add that as a result of violence, more than 752,964 victims of forced displacement have been generated, between 1985 and 2019,[5] we have as a consequence large mobilizations of people towards the main cities of the country, settling in these new territories under informal urbanization, that is, occupations of land without ownership title where houses are built to inhabit.

In Colombia, the phenomenon of informal urbanization is frequent, according to the statistics provided by UN Habitat,[6] by 2018 Colombia ranked third as the country with the highest cases of occurrence, reaching figures that estimate that 28% of the inhabitants of the national territory were in this situation, which means that around 11,300,000 people live in these settlements. This year there have also been reports of invasion of properties in the north of Cauca, as a result of the annoyance and petition of the indigenous communities on issues related to land. However, all these behaviors of invasion, possession or informal urbanization, have in common, broadly speaking, the factual assumption, given that the required behavior in any of these behaviors is to obtain possession of a movable property to use it. Well, the primary reason for the present investigation is given from the fact that the Colombian legislator recently issued Law 2197 of 2022, also known as the Citizen Security Law, since this norm adds the crime of Subjugation of Real Estate to the Code Colombian Criminal, since the crime of Land Invasion already existed.

However, all States are constituted by legal systems that are their own, that is, they obey their own traditions and social and historical evolution, but, even so, all of them examined together usually contain certain characteristics that classify them as legal systems.. Thus, the General Theory of Law establishes that legal systems are identified by being full, united and coherent, being that the last of these must be studied from the understanding of the system as a system, or rather, as a "unit systemic" and in turn the latter must be understood according to what is order, in such a way that: In order to speak of order, it is necessary that the constitutive entities are not only in relation to the whole, but that they are also in a coherent relation among themselves. (...) when we ask ourselves if a legal system constitutes a system, we ask ourselves if the norms that compose it are in a relationship of coherence with each other, and under what conditions is this relationship possible.[7]

However, within the stated factual assumption, we find the concurrence of two applicable regulations belonging to different jurisdictions, these are, criminal law and civil law, the first cataloging the possession of foreign land as crimes, and the second understanding

it as the exercise of possession, in turn activating the owner's legal civil defense mechanisms.

Therefore, given the concurrence and direction of protection of the legal good, and considering that "what is civilly lawful cannot be its opposite in criminal law",[8] we formulate as a problem question: In Colombia, the legal-criminal protection of the economic heritage legal asset is viable in its specificity of protection of the right of ownership of the asset, whether of a private or public nature, based on the penalization of the possession of a real estate property with the intention of lord and owner. Thus, in logical coherence to the problem statement, this research will have as its general objective: Establish the feasibility of the legal-criminal protection of the economic heritage legal asset in its specificity of protection of the right of ownership of the asset, whether of a private or public nature, from the penalization of the possession of a property with the intention of lord and owner, in Colombia.

To achieve this goal, the following are specific objectives:

1) Identify the legal nature of the right to decent housing and its struggle with the right to private property in relation to its social function, within the Colombian legal system.

2) Determine the Colombian civil legal protection framework that people who exercise possession of another's thing with the spirit of lord and owner have

3) Elucidate the criminal legal consequences of the agent who exercises possession of a foreign property to the detriment of the person who holds the right of ownership.

Methodology

In order to give a full response to the problem raised, we will proceed to carry out a qualitative legal investigation, for which we will suffice from the documentary analysis that will have the following as primary sources: i) binding international regulations for Colombia regarding decent housing, ii) the Colombian legal system, both at the constitutional level and at the ordinary level, the latter in relation to civil and criminal legal norms that have implications for the behavior of a person who holds possession of another's movable or immovable property, with the spirit of lord and owner, iii) Judgments of the Constitutional Court and, iv) Judgments and orders of the Supreme Court of Justice issued by the Civil Chamber and by the Criminal Chamber in cassation venue.

Legal nature of the right to decent housing and its contribution with the right to private property

Regarding the investigative inquiry into the legal problem raised, it is insurmountable to establish the legal nature of the right to decent housing; This arises as necessary to the extent that a significant percentage of people who decide to make use of the tenure practices of another's real estate, do not enjoy ownership rights over any real estate, either because they do not hold legal status, or not to be able to exercise de facto manor actions due to circumstances beyond their control. In this regard, it is found that, in Colombia, 58% of the population[9] does not live in real estate where they have the right of ownership, since they are tenants, possessors or usufructuaries.

Then, given these factual circumstances, the questioning of the imperative stipulated in article 51 of the National Constitution arises, which proclaims that "All Colombians have the right to decent housing"; In addition to this, the postulates that formulate "the social function of private property"[10] are also refuted, even more so when there is a concentration of the majority of land in the hands of very few. In order to establish then what type of right those who invade real estate have, a normative historical line will be made, which will concentrate on the legal developments around the right to decent housing and the social function that private property must fulfill.

As a result of the above, the following historical record was obtained: (Figure 1).

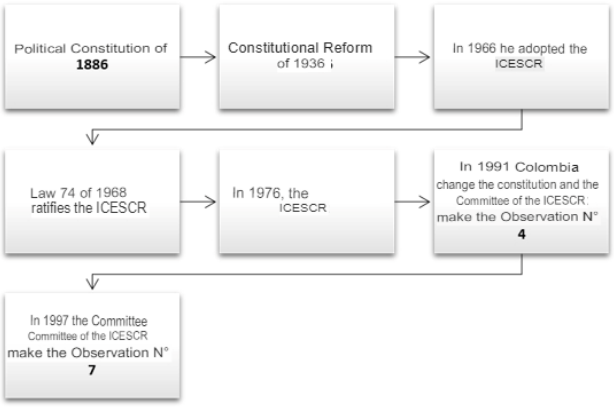

Figure 1 Timeline on regulatory changes regarding decent housing and private property.

Source: own elaboration.

Initially, the Constitution of 1886, based mainly on the postulates of the Regeneration of Rafael Núñez, did not consecrate the protection of the right to decent housing, nor did it establish the social function of private property, on the contrary, it did formulate a prohibition, applicable as a general rule, which consisted in the fact that "no one may be deprived of their property in whole or in part" (Art. 32), leaving in a certain way, thus, unprotected people who did not have the economic capacities to acquire the property. Within the validity of the aforementioned constitutional charter, there was a change in the social paradigm, which materialized in the constitutional reform of 1936, which, in addition to creating the labor jurisdiction, determined that private property should fulfill a social function.. Subsequently, In 1966, at the international level, the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) was forged, stipulating in article 11 the right to adequate housing, although the legal nature of this right was not clarified by its content. It is also important to emphasize that a committee attached to the United Nations was created, which can carry out interpretations of the Pact with the name of Observations; Colombia ratifies the aforementioned international instrument in 1968 through Law 74. The ICESCR came into force in 1976, making it mandatory for the signatory States. It was observed that this international treaty did not have major effects within the internal order in force of the Constitution of 1886, since there were no mechanisms or actions that would allow airing in court.

Already as a result of the seventh ballot, in 1991, Colombia, through a National Constituent Assembly, changed its political charter, thus repealing the Constitution of 1886. The new national constitution is based on more internationalist precepts (Art. 9); The conception of the social function of private property is also adopted and the right to decent housing is stipulated, placing it within the chapter of Social, Economic and Cultural Rights. In this same year, Observation No. 4 of the ICESCR Committee also came to light, where it is established that the right to decent housing does not translate into the simple fact of having a "roof", but rather that this right entails the guarantee to live in a space of peace, security and dignity.

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Finally, in 1997, the ICESCR Committee made observation No. 7, which is relevant, since it states that: Given the interrelation and interdependence that exist between all human rights, forced evictions frequently violate other human rights. Thus, in addition to clearly violating the rights enshrined in the Covenant, the practice of forced evictions can also give rise to violations of civil and political rights, such as the right to life, the right to personal security, the right to non-interference in private life, family and home, and the right to enjoy their own property in peace.

The entry into force of the Political Constitution of 1991, generates a paradigm shift, given the adoption, respect and guarantee of human rights, from its positivization as fundamental rights, as well as the creation of the Constitutional Court, which It has the mission of safeguarding and interpreting the political charter, which has in turn allowed the implementation of a precedentalist legal system in Colombia. Taking these regulatory changes into account, the jurisprudential development that exists on the legal nature of the right to decent housing will be observed, based on the pronouncements of the highest constitutional court.

Legal development on the nature of the right to decent housing

By virtue of the adoption of the Tutela Action as a judicial remedy for attacks against fundamental rights, the Constitutional Court, at the review site, has been able to generate profound jurisprudence on the legal treatment of the right to decent housing. In total, the Constitutional Court has racked up four different positions, whose extremes are dissimilar (Figure 2).

Figure 2 Evolution of the legal nature of the right to decent housing according to the Colombian Constitutional Court.

Source: own elaboration.

In its early years, the Court considered that the right to decent housing was not a fundamental right, but rather a welfare right. Subsequently, the conception of assistance was maintained, but exceptionally appealable by means of a guardianship action, to the extent that its affectation will present direct connection to the violation of a fundamental right, something very similar to what was seen in Observation No. 7 of the ICESCR Committee. Years later, the position was modulated to the point of considering the right to decent housing as a fundamental right.

The positions of the Constitutional Court obeyed the following jurisprudential dynamics and which will be illustrated "from the conceptualization of opposing points" by Salgado (Table 1).

The pattern that arises from the jurisprudential line, according to what was taught by Prof. Diego López Medina, although it shows a radical change, said change "has been achieved incrementally through successive reorientations of the line".[14] However, as a result of the investigation, it was determined that there were important events that were influencing the hermeneutic evolution by the Constitutional Court. The first changes occurred due to the issuance of various observations of the Human Rights Committee that established a connection between the violation of decent housing and the eventual affectation of human rights, this criterion was adopted by the ICESCR Committee and later by national jurisprudence, establishing thus, its guardianship conditional on connection.

Table 1 What is the legal-constitutional nature of the right to decent housing possessed by persons who exercise ownership of real estate with the intention of lord and owner?

It is a welfare right, which must be promoted by the State, in accordance with the law, to be provided directly by it or through associative entities equally legally regulated. So that it is not a "fundamental right" on which the action of guardianship can fit.	T 423 of 1992	T 308 of 1993			Dignified housing is classified as an autonomous fundamental right with benefit content that can be subject to subjective claims before the judge.
		T021 of 1995			
		T 756 of 2003			
			T 585 of 2006		
			T 514 of 2010		
				T 314 of 2012	
				T 109 of 2015	
				C 291 of 2021	

Source: Own elaboration.

For 2005, DANE reports that approximately 756,000 people were victims of forced displacement as a result of violence, which generated a system of mobilizations towards the capital cities, thus building irregular urbanizations. Faced with this panorama, and given the desire for evictions of the invaded properties, the Constitutional Court issues judgment T 025 of 2004, which declares the state of affairs unconstitutional for those who have been forcibly displaced; For this reason, in the judgments subsequent to that annuity and to the Court's position, it leaned towards understanding that decent housing is a fundamental right for victims of forced displacement, and is therefore subject to protection through constitutional actions. In the last decade, the position of the Court has been linear.

Finally, it is necessary to mention that forced displacement as an intrinsic phenomenon of our social reality, has left a total of 752,964 victims between the period of 1985 and 2019, as evidenced by the Truth Commission in its final report, this situation is the contextual framework by which a tension of interests is vivified among which is the fundamental right to decent housing and the right to property of individuals to whom the right to enjoy the immovable property

of their domain has been transgressed, which have been invaded by the displaced population in order to meet their most basic needs. In this regard, the CSJ[11] tells us that although property has constitutional protection, the same is predicated of decent housing as a prerogative of immediate application for the subjects of special protection already mentioned, therefore, the measures aimed at restoring the right of the owners of the properties, cannot deny in their entirety, the lack of protection of this population group, especially when it is understood that the right to property must fulfill a social function, in this sense, it must be analyzed on a case-by-case basis, so that the final decision at the guardianship headquarters, which settles the conflict of interest, does not disproportionately affect any of the rights in conflict. On this, in the words of Peña: the lack of protection of this population group, especially when it is understood that the right to property must fulfill a social function, in this sense, it must be analyzed on a case-by-case basis, so that the final decision in the guardianship office, which settles the conflict of interest, does not disproportionately affect any of the rights in conflict. On this, in the words of Peña: the lack of protection of this population group, especially when it is understood that the right to property must fulfill a social function, in this sense, it must be analyzed on a case-by-case basis, so that the final decision in the guardianship office, which settles the conflict of interest, does not disproportionately affect any of the rights in conflict. On this, in the words of Peña: The panorama of informal urbanization expresses a clear dispute between, on the one hand, rights such as property, public space and urban order, and, on the other, housing and its guarantee as a prerequisite for a dignified life. On both sides there are constitutional and legal provisions that claim respect and protection as broadly as possible. However, its application characterized by high rates of poverty and inequality makes its realization a steep terrain.[11]

It must be recognized, as the cited author does, that contrary to the previous reality configured by the Constitution of 1886, the Political Charter of 1991, with its important changes, has offered the possibility of this constitutional scenario existing, that is to say, guardianship, as a tool that makes it possible to expeditiously dispute, in a courtroom, the police eviction proceedings.

Civil legal protection framework for persons who exercise the ownership of another thing with an encourage of lord and owner

Before proceeding to establish the civil legal protection framework of the behavior in question, it is necessary to make some dissertations. Initially, it is necessary that even when empirically, from an external spectator, the different scenarios that are created from which a person holds possession of a property, be it movable or immovable, can be seen as similar, the truth is that, from the legal level there are substantial differences. Thus, the Colombian legislator through the Civil Code (hereinafter, CC) understands that a person who exercises possession of a thing, will be a mere holder, possessor or owner depending on the specific circumstances of each case.

In this sense, the conduct that is investigated from the present study has different implications in the light of civil law. Normatively, mere possession is enshrined in art. 775 of the CC and specifies that this legal institution implies the exercise of possession of something, when it is not done in one's own name, but recognizing that another person has control over it. On the other hand, if the same objective behavior is verified, but without the recognition of foreign ownership, but by performing material acts on the thing that express a spirit of lord and owner of the movable or immovable property in question, then we will be before the exercise of possession, resulting that it is the subjective element of possession, which marks a delimiting difference with mere possession, even when the factual phenomenon.

The Supreme Court of Justice, with support in the Civil Code, has decided that in cases where these elements are verified, the corpus and the animus, the domain will be presumed. Consequently, possession is the clearest expression of the subjective right of property, which is constitutionally protected through art. 58, "because through it [possession], in addition to externalizing its attributes [those of property], they ordinarily reflect it because normally each one possesses what belongs to him, that is, the possessor of a thing is also its owner".[12] However, when one is the owner of the real right of domain over a corporeal thing, its possession is not necessary, since it is at the discretion of the owner to enjoy and dispose of the property, considering that the domain stripped of jouissance, is classified as a mere or bare property.

However, delimiting the investigation, its focus will be directed to cases of possession, that is, when there is the exercise of possession of a thing (objective element) coupled with the spirit of lord and owner (subjective element). To this extent, the study of possession will be carried out using as a primary source the different pronouncements that the Supreme Court of Justice (CSJ), which, as a closing body, has issued in relation to this right.

Unlike the treatment that the 1886 constitution gave to private property, as a right of absolute freedom, the constitutional reform of 1936, brought with it a transcendental innovation by making said right more flexible, mentioning that "Property is a social function that implies obligations" and, therefore, submits it to the interests of the community. In carrying out said constitutional framework, from the outset, the CSJ[13] had recognized the elements of animus and corpus, as possession requirements, also indicating that this: It is above all a fact whose continuity produces far-reaching legal consequences and can definitively link the possessor with the thing possessed. If such link is not abruptly broken by the consummation of an act foreign to the will of the possessor, the determinative fact of the phenomenon is destined to produce important legal effects and to solidify the tenure as owner with the moral bond that constitutes the domain right.

An important precision that this Corporation made in light of the social function that property must fulfill, was to eliminate and detract from the classification that, through its pronouncements, had been made of possession, that is, to subdivide it into registered possession and material possession. This arose when the debate focused on the existence or not of a just title in the head of the possessor, which could be constitutive or transferable of ownership. In those cases in which it was a translating title of ownership over immovable property, such as the sale, the Supreme Court provided for the need for it to have been registered in the public instrument registry office, under penalty of that the possession became irregular and the time legally required to prescribe was greater.

In this regard, although the general concept of possession has already been elucidated, it should be noted that our Civil Code provides for a subdivision of it, determining that it can be regular, irregular or, finally, vicious. The first two classes are necessary elements to acquire ownership through either ordinary or extraordinary prescription, being that in regular possession the possessor acts in good faith and having fair title, and in irregular possession one of these two elements is missing. It must be taken into account that both forms are subject to civil legal protection and permission, to the extent that their differentiation only has an impact on the time required for the acquisitive prescription of ownership to operate, concluding that, if regular possession is verified, in the case of movable things, 3 years

are required, real estate 5 years and in the case of irregular possession, for both types of property 10 uninterrupted years of possession will be required. In relation to the acquisitive domain prescription, let us remember that it also works with a double connotation of reward-sanction: At the same time that it operates as acquisitive for the one who owns the asset for the time and with the other requirements demanded by the positive law, the extinctive prescription is taking place simultaneously for the one who up to now is the owner of the asset.

Following the order of ideas, in the third subdivision, the flawed, to the extent that they are violent or clandestine possessions, they do not have the capacity to configure any right, being that the possession must be "public, peaceful and uninterrupted".[14] In addition to all of the above, in 1997 the Alta Corporación already pointed out the scope of legal protection for people who, in a non-violent or clandestine way, obtain the status of possessors, mentioning that, in addition to the double legal presumption of being owners of the things, and to act in good faith and the waivable power of which they are holders to request before the competent judicial authority the declaration of having acquired the domain through a process of belonging, In relation to the membership process and the substantive decision made by the hearing judge to settle the matter, in the words of the Court, this resulting judgment: It is not constitutive of the real right of ownership, but simply declarative, since it is not the sentence, but the possession exercised over the property, accompanied by fair title and good faith, if it is the ordinary acquisitive prescription, or the mere possession of the property same for a space of twenty years [today 10 years], the source from which arises the right that the judicial decision is limited to declaring.[15]

As already indicated, a presumption of acting in good faith falls on the possessor, this finds support in the economic nature of possession and the much welcomed social function that private property assumes, an aspect that was vindicated with the 1991 Constitution, which is not only concerned with giving validity to this aspect but also brings with it a series of fundamental principles and rights (among which are private property with all that it implies), which radiate the legal system in its entirety in the measure that the hierarchically inferior norms must be in coherence with these and the same will have to be interpreted by the judicial operators using them as optimization mandates.

Thus, in a broader interpretation of the constitutional and legal protection that possessors have, in 2016, the CSJ concluded that the possession exercised by the person who invades or steals, although it begins as a flawed possession, either due to the violent or clandestine, this can mutate and "must be transformed into possessio iusta, that is, nec vi, nec clam, without rebellion in order to obtain effective judicial protection", that is, to cease violent and clandestine acts, and therefore, of peacefully and publicly exercise as irregular possessors and in this sense, gradually build the right of domain from acts of dominion in an uninterrupted manner, domain which may be declared in a process of belonging through the extraordinary acquisitive prescription if fulfilled and verify compliance with legal requirements. The foregoing brings as a consequence that what initially could be seen as a crime, is subsequently legitimized by civil law.

In short, some of the positions that the Corporation has managed in appointment, after Legislative Act No. 1 of 1936, are the following: (Figure 3).

Finally, in a recent pronouncement,[11] the importance of all these measures or guarantees aimed at the protection of holders was highlighted, as follows: The possessory relationship deserves protection because «by protecting it, it is meant to protect the property rights of which it is normally a consequence. The protection of private rights is a fundamental postulate of a legal order that seeks to respect the personality and its main power: the will", in addition, "the protection of possession is necessary to achieve social peace and allow an adequate economic exploitation of things", hence it is "legally protected against attacks or injuries from other people", among other legal instruments, through "protective measures whose purpose is to prevent possession from being disturbed or unknown by a unlawful conduct of others".

Figure 3 Pronouncements of the Colombian Supreme Court of Justice regarding the right of possession.

Source: Own elaboration based on the rulings of the CSJ.

Criminal legal consequences that fall on the ownership of other real estate property

Whether it is informal urbanization or possession, the truth is that these are behaviors where an agent enters a property, of which he does not hold the right of ownership and exercises possession of it. Said behavior is not restricted, insofar as its legal treatment, to the scope of civil law, but it transcends, objectively configuring an infringement of criminal law. It will be observed in which typical behaviors the behavior of the described agent fits, to carry out a technical-legal analysis of its compositional elements and end by analyzing what assumptions the legislator could think of when he elevated it to a crime. Initially, we will proceed by exposing the structural elements of the criminal types of land invasion (article 263 Penal Code) and subjugation of immovable property (article 264A Penal Code) (Table 2).

After carrying out the study of the elements that make up the criminal types of land invasion and encroachment on immovable property and adjusting it with the different classes of possession that are enshrined in the civil statute, we can arrive at the following details: On the one hand, the Constitutional Court,[16] ruling on the crime of land invasion, has differentiated it from possession based on the subjective ingredient that consists of the purpose of obtaining illicit profit, to the extent that, analyzing only the behavior objective, this would fit into irregular possession as the possession of another's immovable property with the intention of lord and owner, which does not require good faith or fair title. Complications then arise, from the hermeneutics of this element of the type, that is, what the illicit advantage really means.. On this, the Court, by way of example, brings up the act of those who invade the land as a business and not to meet basic needs. However, this is not illustrative enough to build a concept of it, therefore, in light of the Colombian doctrine, we find that the illicit benefit is based on obtaining an "illegitimate economic benefit",[17] which leads us to understand that the subjective ingredient as an essential element for the formation of typicity of the conduct, will be configured when the economic benefit is not allowed by law or does not arise by virtue of the exercise of a right, such as it is, possession. Thus, in remembrance of what was previously explained, possession that does not create a right and that is not legitimized by the legal system.

Table 2 Comparison between the elements of the type of land invasion and encroachment on immovable property

Typical description	Land invasion	Attacking of Real Estate atttacks
Active subject	Indeterminate and individual	Indeterminate and individual, it can be done by third parties
governing verb	Singular: invade	Plural, alternative: actually occupy, usurp, invade, evict.
material object	Real. Land or building of another	Immovable property of another
legal object	economic heritage	economic heritage
modal circumstances	On base type, N/A	With violent or peaceful incursion.
		With temporary or continuous incursion.
subjective ingredient	Purpose of obtaining illicit advantage	N/A
prison sentence	Minimum: 48 months. Maximum: 90 months	Minimum: 48 months. Maximum: 120 months
AggravatingAbout material object	When the conduct falls on a property located in a rural area, with agricultural or agricultural exploitation.	When the conduct falls on assets owned by the State, assets in the public domain, cultural heritage or fiscal real estate
	When the conduct falls on state property.	The prison sentence is increased: Min. 64 months, Max. 160 months
	The prison sentence is increased: Min. 54 months, Max. 120 months	When it falls on fiscal assets necessary for the provision of an essential public service
		The prison sentence is increased: Min. 72 months, Max. 180 months.
Aggravating On modal circumstances	When it is done by overcoming security measures that have the purpose of preventing the invasion	When done with violence or intimidation
	When it is done with violence with respect to who legitimately occupies the land or building	The prison sentence is increased: Min. 72 months, Max. 180 months.
	The prison sentence is increased: Min. 60 months. Max 144 months	When performed by a plural number of people
		The prison sentence is increased: Min. 64 months, Max. 160 months
Early termination of criminal proceedings	If before the accusation, the conduct ceases, the process may be terminated early if the damages to the victims have been compensated	N/A
Opportunity principle	It is applied when before the imputation the eviction of the invaders occurs without resistance due to a measure of restoration of the right, as long as the victims have been compensated and it is not a case of recidivism	N/A

Source: Own elaboration.

For these reasons, in the first place, it is possible to conclude that a peaceful land invasion is not possible, since the subjective ingredient would be missing because the behavior is permitted and regulated by Civil Law. Secondly, it is possible to conclude that the alternative hypothesis by which the crime of land invasion is possible would be to carry it out clandestinely, since it is the other reason that rules out possession, however, this is an easily overthrowable circumstance since that it would be enough for the agent subject to carry out acts of possession in a public manner, enabling the true and current owner to find out about the situation and take actions that allow the restitution of the real estate, either from the actions provided by police law or the civil law. Third, we have to almost always.

Notwithstanding the foregoing, the CSJ ruling, previously referenced, in which the closing court[18] foresees the possibility that an invader can transfer an irregular possessor, thus eliminating the required subjective ingredient, is relevant. Said transmutation implies that the violence with which possession of the property is obtained, once ceased and carrying out material acts of conservation and transformation of the property, that is, acts of manor, in a peaceful, public and uninterrupted manner for a period of 10 years, the person who was once an invader, can be declared the legitimate owner of the property through a process of belonging, constituting the domain by virtue of the extraordinary acquisitive prescription.[19]

Likewise, remember that the analysis of crime cannot be detached from the reality in which it is configured, a reality that is linked to forced displacement as a product of violence in Colombia. Said displacement is carried out with the use of force, dispossessing people of the properties in which they are living and fully affecting human

dignity and the right to decent housing as one of its manifestations, likewise, it is common knowledge, that the occurrence of this crime occurs from systematic or generalized acts that consequently convert the conduct into an international crime against humanity, a circumstance that, without prejudice to the position of the CSJ,[18] can never generate rights of property for the subject agent of the conduct. The above could mean that However, in the case of the crime of encroachment on immovable property, a much broader typical wording is stipulated that covers a number of hypothetical factual assumptions, including, in fact, the guiding verb of invading, which implicitly entails a normative reference to the crime of invasion of lands, being applicable all the previously indicated dissertations.[20–23]

In the same way, it is necessary to illustrate some others. So, reading the art. 264A, see that irregular possession is penalized, which, as has been said, is different from vicious possession (violent or clandestine) and, in addition, is an element of the acquisitive prescription of the extraordinary domain right, in other words, the conduct by which a person who exercises possession of immovable property, either invading or actually occupying it, in a peaceful and continuous manner, behavior that fits perfectly into irregular possession, is being elevated to the category of typical behavior. Even when legitimate possession is carried out by several people, as in the case of community members, this is not only typified by subjugation, but is done as an aggravating circumstance, increasing the penalty by one third.[24,25]

Regarding the subjugation committed by means of one of its alternative guiding verbs, which is to invade, we can also ask ourselves if this conduct would not configure an apparent contest with the crime of land invasion since the base types, without aggravating circumstances, sanction the same conducts: I) indeterminate subject, II) real material object, foreign property, II) legal object, economic heritage, and III) can be done violently or peacefully. Being then that the only perceptible change would be the elimination of the subjective ingredient, therefore, according to this hermeneutic, subjugation can only be configured, to the extent that the invasion is peaceful, since otherwise, as already seen, it would refer to the crime of land invasion; However, Starting to consider the other configurative governing verbs of the type, we have that all of them basically obey synonyms of "invade", therefore, the sphere of protection of the criminal type does not differ, broadly speaking, from the crime of land invasion Therefore, all the statements outlined are also applicable to them. This being the case, it must be debated which offense prevails and which offense should be stopped, since there is a double penalty for the same behavior. To this extent, using the general criteria of conflict of laws, we would have to resort to the chronological criterion and conclude that the crime of subjugation prevails because it is a criminal law created later, in the year 2022, by means of Law 2197 on Citizen Security., however, Since the conflict is located in a legal context of penal guarantees, the correct thing to do is to obey the principle of favourability, which regains importance to the extent that, from the table illustrated at the beginning of this section, the most serious sanction entailed by the crime of encroachment is extracted.. And not only is the application of the crime of land invasion more favorable due to its less burdensome criminal sanction, but also because an early termination is expressly provided for and the application of the principle of opportunity, once certain legal requirements have been met. Then, in primacy of the crime of invasion of land by favorability, this is the one that is applicable, remembering that there are very few cases in which its typicity can be configured as we already indicated at the beginning which regains importance to the extent that, from the table illustrated at the beginning of this section, the most serious sanction entailed by the crime of encroachment is extracted. And not only is the application of the crime of land invasion more favorable due to its less burdensome criminal sanction, but also because an early termination is expressly provided for and the application of the principle of opportunity, once certain legal requirements have been met. Then, in primacy of the crime of invasion of land by favorability, this is the one that is applicable, remembering that there are very few cases in which its typicity can be configured as we already indicated at the beginning. Which regains importance to the extent that, from the table illustrated at the beginning of this section, the most serious sanction entailed by the crime of encroachment is extracted. And not only is the application of the crime of land invasion more favorable due to its less burdensome criminal sanction, but also because an early termination is expressly provided for and the application of the principle of opportunity, once certain legal requirements have been met. Then, in primacy of the crime of invasion of land by favorability, this is the one that is applicable, remembering that there are very few cases in which its typicity can be configured as we already indicated at the beginning. And not only is the application of the crime of land invasion more favorable due to its less burdensome criminal sanction, but also because an early termination is expressly provided for and the application of the principle of opportunity, once certain legal requirements have been met. Then, in primacy of the crime of land invasion due to favourability, this is the one that is applicable, remembering that there are very few cases in which its typicity can be configured as we already indicated at the beginning. And not only is the application of the crime of land invasion more favorable due to its less burdensome criminal sanction, but also because an early termination is expressly provided for and the application of the principle of opportunity, once certain legal requirements have been met. Then, in primacy of the crime of invasion of land by favorability, this is the one that is applicable, remembering that there are very few cases in which its typicity can be configured as we already indicated at the beginning.[26–30]

Conclusions

From everything observed, it is concluded that possession is a right related to a fundamental right, given that its exercise is carried out due to the social function of private property, pursuing the achievement of decent housing. In the same way, property is also a constitutionally protected right.[31–33]

The Colombian legal system recognized the existence of the tension between the right of possession and the right to private property, for which reason it established mediation mechanisms such as acquisitive prescription, on the one hand, and the claim action, on the other.[34]

The Colombian State has failed to achieve the right to decent housing for all citizens, which is why it has been tolerant of informal urbanization as a palliative means to alleviate its failure, which has produced such high rates of land invasions in Colombia, which has among other causes violence.[35]

In addition to this, the inoperativeness of the crimes of encroachment on immovable property and land invasion is concluded. Given that a Social State of Law cannot penalize the exercise of fundamental rights and their related ones, without becoming a tyranny. Faced with the aggravating circumstance of the public nature of the property, it must be said that both conducts violate the principle of material illegality, given that being located in Title VII of the Penal Code, their

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duty of protection is with the legal asset of the economic patrimony, which is illogical, to the extent that the assets that are intended to be protected, due to their very public nature, as stipulated in article 63 of the National Constitution, are simply "inalienable, imprescriptible and unseizable, therefore, the patrimony State economy will never be in danger.[36]

The other difficulty that these behaviors entail is that they are called to yield within the judgment of social adequacy, because, as a result of the State's own impossibility, they have become habitual and socially accepted behaviors.

Regarding the resolution of the problem question, it was determined that the legal-criminal protection of the economic heritage legal asset in its specificity of protection of the right of domain of the asset, whether of a private or public nature, is not viable, from the penalization of the possession of real estate with the intention of lord and owner, in Colombia, given that the ultimate ratio parameters that nourish our criminal legal system are unknown by Serpa and García, being that the solutions most aimed at the realization of restorative justice by Romero are civil actions.

In addition, if the teleology that nourishes the paragraphs of the crime of land invasion is examined, it is easy to see that what the legislator is looking for is the restoration of the right of the owner, which axiologically is a legitimate purpose, but the path chosen to achieve it is the wrong one, given that State violence is used to resolve conflicts inherent to civil law.[36]

Therefore, it is considered that the existence of the crimes of land invasion and encroachment on immovable property is inadequate, because, in most of the cases, one is in the legitimate exercise of a right, and therefore it is not punishable, and in the rest, dogmatics, along with apparent bankruptcies, do not allow them to be applied. In an attempt to avoid confusion and discharge the legislative overproduction of the Penal Code, their elimination is ideal.[37,38]

Finally, it must be said that the State cannot create crimes, as a consequence or response to its inability to comply with international standards, given that, paraphrasing Gargarella,[39] before a State that claims a person for having failed to comply his obligations to not abide by the criminal law by invading a piece of land, the citizen will answer that he first failed to comply more severely, by not guaranteeing his human rights.

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Conflicts of interest

There is no conflict of interest in the study.

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