New Direction

SQUATTERS RIGHTS

A Comparative Study

New Direction

Founded by Margaret Thatcher in 2009 as
the intellectual hub of European Conservatism,
New Direction has established academic networks
across Europe and research partnerships
throughout the world.

newdirection.online @europeanreform

New Direction is registered in Belgium as a not-for-profit organisation and is partly funded by the European Parliament.
REGISTERED OFFICE: Rue du Trône, 4, 1000 Brussels, Belgium. EXECUTIVE DIRECTOR: Witold de Chevilly.

CONTENTS

1

INTRODUCTION

Historical Context: The Social Phenomenon of Squatting

The phenomenon of illegal squatting emerged in Europe during the 1960s and 1970s as a radical social movement advocating the occupation of temporarily or permanently uninhabited houses or premises. These spaces were repurposed as housing, farmland, meeting places, or centers for social, political, or cultural activities, among other uses. The primary motivation was to highlight and respond to the economic challenges that impede the realization of the right to housing.

The squatter movement encompasses a wide variety of ideologies, often linked to specific urban tribes, which justify their actions as a form of political and social protest against speculation and to defend the right to housing in the face of economic or social difficulties. The squatter movement also supports the use of vacant plots, buildings, and abandoned spaces for public use as social or cultural centers.

In Spain, squatting emerged in the mid-1980s, modeled after the English squatters, following some initial uncertainty with terminology, as there was no Spanish word to describe the cultural occupation of houses, vacant buildings, and premises. The distinction between “ocupar” and “okupación” lies in the political nature of the latter, where taking over an abandoned building is not just an end but also a means to protest the difficulties of accessing housing.

The term “okupa movement” to refer to the sociocultural movement around squatting has also been received with mixed feelings. Some assert unequivocally that such a movement does not exist, but rather a multiplicity of occupation processes not necessarily connected. Others prefer the plural “squatting movements” or “social center movements” for those who consider the social center as the identity of the movement.

The initial phase of squatting in Spain spanned from 1980 until the enactment of the Penal Code in 1995. During these years, it is notable that the number of squats doubled that of evictions, owing to the slow legal processes, The initial phase of squatting in Spain spanned from 1980 until the enactment of the Penal Code in 1995. During these years, it is notable that the number of squats doubled that of evictions, owing to the slow legal processes, providing time to find other places to occupy, and the leniency of sanctions, mostly fines. Most detentions were due to the insubordination of the squatters rather than the act of squatting itself. These factors contributed to a significant increase in this cultural and social phenomenon.

Between 1996 and 2000, with the implementation of the new Penal Code, which criminalized the usurpation of property, measures became stricter and the number of evictions increased significantly. However, the number of squats also rose in response, as the harsher measures radicalized squatters, leading to street disturbances and clashes. During these years, the phenomenon began to gain national attention due to media coverage.

The third phase began in 2001 and ended in 2006. During this period, there was a decline in squatting, which became virtually nonexistent in many Spanish cities, primarily persisting in the metropolitan area of Barcelona and the Basque Country. Eviction processes became faster and harsher; however, the sentencing processes were lengthy, with few cases resulting in prison terms. This leniency encouraged squatting as squatters did not face immediate or excessively harsh penalties.

The Problem of Housing Access in Spain

The 2008 financial crisis resulted from housing policies that encouraged home ownership through excessive personal debt. According to data from the European Statistical Office, 75.8% of the Spanish population owned their homes in 2021, while 24% lived in rental housing. This has led some authors to assert that “Spain is a country of homeowners,” as both the wealthy and the poor were able to obtain mortgage loans due to a generous credit market with significant tax incentives. This situation fostered speculation in a fundamental necessity like housing.

Once the so-called housing bubble burst, the level of private debt became unsustainable. Individuals could not meet their mortgage payments, and the government had neglected to invest in social housing, creating a breeding ground for the emergence of social squatting. Social squatters respond to a clear issue: the real and economic need for housing, an exclusionary situation that drives many desperate families to resort to squatting in order to have a place to live.

However, these families cannot be recognized as acting lawfully, as the rule of law cannot be established through the occupation of others' properties without legal title, to the detriment of the rights held by other families or the vacant official protection housing awaiting allocation.

In recent years, criminal squatting has increased exponentially. Criminal gangs have exploited loopholes in our legal system to establish themselves in occupied properties and conduct illegal activities there. These include well-known "drug flats" used for drug dealing and numerous properties occupied by gangs to rent out to third parties through what is known as "key sales."

This is a widespread problem, especially in large Spanish cities where the rest of the property owners often have to endure the presence of troublesome individuals within the building. This generates numerous coexistence problems, which are exacerbated by the lack of legal mechanisms to provide a swift and effective solution.

The fact is that Spain has a severe housing problem, with a scarcity of public housing. The nearly seven million official protection homes built over more than half a century have not been converted into social housing but into free-market housing. The rental market is excessively expensive, causing many families to lack the resources to secure housing. Currently, acquiring a home is within the reach of few families, leading to excessive demand for rental housing with skyrocketing prices. There is a significant affordable housing crisis, within which the phenomenon of illegal squatting is situated, alongside a great inefficiency of legal mechanisms to mitigate it.

As Matilde Cuena Casas states, "We face the consequences of a double failure: the social state has failed to meet the housing needs of those expelled from the economic circuit. But the rule of law has also failed, having been undermined by the tolerance of property rights violations. The sum of these two failures results in a spiral of illegalities that chain and feed off each other."

Objective of the Study

This study examines the illegal occupation of properties in Spain from various legal perspectives, including constitutional, civil, criminal, and procedural law. Initially, the historical evolution of the squatter movement is addressed, followed by a contemporary legal analysis of the phenomenon of illegal property occupation through civil and criminal jurisdictions. This includes an analysis of recent legislative reforms in Spain aimed at addressing a situation that has become a social problem, generating concern and a sense of insecurity among citizens.

2

LEGAL ANALYSIS OF THE CONCEPT OF PROPERTY

Definition of Property Rights from a General Perspective

Property rights are defined by the Real Academia Española as "the right or authority to possess something and enjoy it within legal limits."

Article 348 of the Spanish Civil Code defines property as "the right to enjoy and dispose of a thing, without further limitations than those established by the laws. The owner has an action against the holder and the possessor of the thing to claim it." This definition draws from the Napoleonic Code, which had a significant bourgeois influence that enshrined free property outside the feudal burdens established by the Ancien Régime, along with the autonomy of the will, among other aspects.

From this definition, two main points can be gleaned: first, that property is only limited by the laws, which is not entirely true in the realm of real estate, as will be analyzed later. This primarily refers to the expropriatory power of the State in the presence of a justified cause of public utility. Second, the right of property is characterized by granting its holder three powers: enjoyment, disposal, and reclamation. However, given that such a broad and significant concept in our entire legal system is based on these three simple aspects, doctrine has offered a broader definition: "the fullest sovereignty that one can have over a thing."

Thus, any occupation by an unauthorized person would constitute an effective disturbance and limitation of the right of property without any legal basis.

Traditionally, property has been considered a real right that grants its holder direct and immediate power over a thing, a right that bestows upon its holder an erga omnes right, which can be asserted against anyone.

Property is the most comprehensive real right; it is the essence and the example of ownership, the epitome of the enjoyment and use of things. The owner can enjoy, use, and freely dispose of the thing and, ultimately, recover or reclaim it from anyone who possesses it without any legitimizing title, from anyone who possesses it improperly.

The Spanish Constitution recognizes private property not as an unlimited right but one that is meant to fulfill a social function.

Article 33 of the Spanish Constitution:

1. The right to private property and inheritance is recognized.
2. The social function of these rights shall determine their content, in accordance with the laws.
3. No one may be deprived of their property and rights except on justified grounds of public utility or social interest, through appropriate compensation and in accordance with the provisions of the laws.

In line with the above and in accordance with our Constitutional Court (e.g., STC No. 93/2015, of May 14, ECLI: ES:TC:2015:93), the right to private property "is configured and protected, indeed, as a set of duties and obligations established, in accordance with the laws, considering the values or interests of the community, that is, the social purpose or utility that each category of property subject to ownership is called to fulfill."

In our Constitutional Law, property is not absolute. In addition to fulfilling a social function, it is subject to a series of limitations. The ownership of a plot is limited above by the Air Navigation Law and below by the Water and Mining Laws. The restrictions imposed on the right to property arise from private or public interest. The limits to the right of property stem from neighborhood relations, party walls, pre-emption rights, historical heritage, public hydraulic domain, coastal regulations, national security, etc. Other limitations derive from ownership type; communal ownership is different from individual ownership. The Latin maxim also highlights this: *Nulius est quod multorum esse potest*: what belongs to many cannot be owned by any single person.

The social function implies that property is subordinate to the general interest or the common good. This finds its foundation in Article 128 of the Constitution, which establishes that "All the wealth of the country, in its different forms and whatever its ownership, is subordinated to the general interest."

Despite this, our country is still far from realizing the desideratum of implementing a social housing policy, which has been almost nonexistent in recent year.

Squatting, Property Rights, and the Possession of Real Estate

Property and possession are distinct concepts in the legal domain. As mentioned earlier, property refers to the legal and legitimate right of a person to possess, use, enjoy, and dispose of an asset according to the law. This right grants the owner the exclusive power to control and utilize the asset, as well as the ability to transfer or sell it to others.

Possession, on the other hand, refers to the actual control or occupation of a property, regardless of whether the possessor has a legal right to it. While ownership confers a legal title, possession pertains to the factual state of holding or using a property. In legal disputes, possession can sometimes be protected, especially if it is peaceful and uncontested, but it does not equate to ownership unless it is supported by a legal right or title.

In conclusion, any unauthorized occupation represents a clear disturbance and limitation of property rights without legal justification. This underscores the significance of distinguishing between ownership and possession and the legal implications that arise from unauthorized occupation.

On the other hand, possession refers to the fact of having physical custody or control of a property. The person who possesses a property does not necessarily have to be its legal owner.

Possession is regulated by Article 430 of the Spanish Civil Code, which states, "Natural possession is the holding of a thing or the enjoyment of a right by a person. Civil possession is the same holding or enjoyment accompanied by the intention to have the thing or right as one's own."

Scientific doctrine has formulated a definition that aims to unify its characteristics and effects. This definition is supported by Article 438 of the Spanish Civil Code, located in the chapter dedicated to the acquisition of possession, which states, "Possession is acquired by the material occupation of the thing or right possessed, or by the fact that they are subject to the action of our will, or by the acts and legal formalities established to acquire such a right." Therefore, possession would be the factual dominion or power, with or without contact, over a thing that remains under the action of a person's will.

From the initial definition, it can be observed that physical contact with the thing is not necessary for the existence of possession; it has been spiritualized throughout its evolution.

There are two elements that constitute possession, derived from Roman Law, which protected possession but not mere detention. On the one hand, *corpus*, as the objective element, is the material holding of the thing and the ability to exclude all others from its influence. On the other hand, *animus*, as the subjective element, is the will to exercise possession of the property or right, as these can also be objects of possession.

The occupation of real estate affects the concept of private property as recognized not only by Article 33 of the Spanish Constitution and Article 348 of the Civil Code. Although occupants cite Article 47 of the Constitution to oppose eviction, arguing that all Spaniards have the right to enjoy decent and adequate housing, it is the public authorities' responsibility to promote the necessary conditions and establish regulations to make this right effective, regulating land use in accordance with the general interest to prevent speculation.

Consequently, there is no fundamental right to housing. However, this does not imply that public authorities should not adopt certain policies aimed at establishing the appropriate legal tools to ensure that all individuals enjoy dignified and adequate housing.

The right to housing, therefore, will be enforceable against the administration, but never against an individual or a company, as they are not required to sacrifice their property rights so that another person can enjoy dignified housing. This is because they are not the obligated party to satisfy the housing need and instead hold the right to private property, also recognized in Article 1 of the Additional Protocol to the European Convention on Human Rights or the Additional Protocol to the Rome Convention of June 19, 1950, which allows for an appeal to the Strasbourg Court for any violation of property rights (although amparo appeals are not allowed in Spain).

3

LEGAL ASPECTS OF OCCUPATION IN SPAIN

The responses that the legal system has provided to the illegal occupation of properties are multidisciplinary, including criminal, civil, and administrative measures.

Criminal Jurisdiction

Until the enactment of a new penal code at the end of 1995, there was no specific legal provision in Spain penalizing the occupation of abandoned places. In fact, this practice had enjoyed a certain tolerance in previous decades as a partial solution to the problems caused by the influx of people from rural areas to cities. In the early years of democracy, thousands of illegal occupations of state-owned housing were legalized.

Until 1995, the legal recourse was the charge of coercion: the owner of the occupied house would report the illegal tenants, claiming that they were preventing him from using his property, which constituted coercion. This would initiate a generally lengthy judicial process that usually ended with an eviction order for the occupied house. There were, however, numerous exceptions: sometimes judges ruled in favor of the occupiers, considering factors such as the years of abandonment of the building, its condition, and any indication that suggested an absence of "social function" of the property.

Although most cases ended in eviction, the slow pace of civil proceedings offered a certain expectation of duration for the occupation. Combined with the rapid increase in housing prices, this led to an exponential growth in occupations in the 1990s. The new penal code of 1995 aimed to restrict these practices by classifying them as the crime of usurpation. The classification of the act as a crime significantly accelerated the eviction process, allowing for evictions to occur unexpectedly, i.e., without prior notification to the illegal occupants. However, courts usually considered the matter resolved with the eviction of the occupied property, subsequently closing the case. This means that the penalties legally prescribed for the crime of usurpation have almost never been imposed, which has created a sense of excessive permissiveness among some property owners and local public authorities.

In criminal jurisdiction, a distinction is made between trespassing, when the usurped property is the home or second residence of a person, and the usurpation, violent or peaceful, of properties or buildings that do not constitute a residence.

The Crime of Usurpation

Although the term occupation is commonly used, the correct legal term is usurpation. According to the Royal Spanish Academy, to usurp literally means "to take over a property or a right that legitimately belongs to another, generally by force."

Under the heading "of usurpation," four punishable behaviors are typified in Chapter V of Title XIII of Book II of the 1995 Penal Code:

- The occupation of property or the usurpation of a real right using violence and intimidation against people (Article 241.5 of the Penal Code).
- The unauthorized occupation of property that does not constitute a residence (Article 245.2 of the Penal Code).
- The alteration of terms or boundaries of both public and private domain (Article 246 of the Penal Code).
- The unauthorized diversion of public or private water courses (Article 247 of the Penal Code).

We will focus on the occupation of properties, as provided and penalized in Article 245 of the Penal Code:

> "1. Anyone who occupies a property or usurps a real estate right belonging to another person with violence or intimidation will be subject to a prison sentence of one to two years, in addition to any penalties incurred for the violence used, based on the utility obtained and the damage caused.
>
> 2. Anyone who occupies, without proper authorization, a property, dwelling, or building that does not constitute a residence, or remains in it against the will of the owner, will be punished with a fine of three to six months."

The most common form of usurpation today is non-violent, although it is not necessarily peaceful, as it usually involves force, almost always with the aim of seeking an alternative housing solution rather than for ideological reasons.

We must acknowledge that social reality has changed; initially, the crime of peaceful usurpation seemed intended to address the social movement of the urban tribe "okupa," which promoted the occupation of vacant properties, homes, and premises for residential, work, or political and cultural purposes (STS 1318/2004 of November 15, 2004). However, since 2008, coinciding with the economic crisis that hit the country, the crimes of usurpation have ceased to be associated with that social movement and are now committed by people in vulnerable situations, social exclusion, lack of resources, or state of necessity. Nowadays, the affected party is often a bank or investment fund that owns a vacant property, likely acquired through foreclosure proceedings, and the occupants are often former owners, victims of fraudulent rentals, homeless individuals, or those at risk of social exclusion. There are also ideological occupiers and criminals, often advised by criminal groups dedicated to profiting from the occupation.

The reform introduced by Organic Law 5/2010 of June 22 changed the penalty, establishing imprisonment for the usurpation of real estate. From 1996 until the approval of this reform, the penalty for this crime, when violence or intimidation was involved, was a fine of six to eighteen months.

It is important to clarify that not all disturbances of possession can be classified as criminal, as this right is already protected civilly. The intervention of criminal law, inspired by the principles of proportionality and minimal intervention and ultima ratio, should therefore be reserved for the most serious cases where the disturbance of possession has greater significance.

Thus, concerning the crime under Article 245.2 of the Penal Code, STS 800/2014 of November 12 requires the following elements for its commission:

- The occupation without violence or intimidation of a property, dwelling, or building that at the time does not constitute the residence of any person, carried out with the intention of permanence.
- That this disturbance of possession can be criminally classified as occupation, since the interpretation of the typical action must be made from the perspective of the protected legal asset and the principle of proportionality that informs the penal system.
- That the perpetrator of the occupation lacks a legal title that legitimizes that possession, since if they had been authorized to occupy the property, even temporarily or as a precarist, the action should not be considered criminal, and the owner must resort to civil actions to recover possession.
- That there is a contrary will to tolerate the occupation on the part of the property owner, either before it occurs or afterward.
- That there is intent in the perpetrator, encompassing knowledge of the property belonging to another and the absence of authorization, along with the will to affect the legal asset protected by the crime, i.e., the effective disturbance of the possession of the occupied property owner.

In recent years, there has been a worrying increase in occupations, to the point where criminal groups seem to have been established with the purpose of facilitating the commission of usurpation crimes for people in need of housing, in exchange for a one-time or periodic cash payment.

The courts are aware of the problem, as evidenced by the Provincial Court of Barcelona (Order 240/2020 of May 11):

> "Certainly, among the social phenomena caused by the current economic crisis is what is generally known as the 'okupa movement,' which has been useful in raising awareness of a real problem for many families who find themselves in a situation of residential exclusion and social marginalization. It is equally true that in recent times, certain pathologies have been detected whereby, under the false appearance of an occupation based on necessity, certain groups or individuals operate with absolute opacity and impunity, obtaining economic benefits from the occupation of a dwelling through clandestine fictitious rental contracts, so that the owner can recover possession of the property. The forensic practice even shows extreme cases of extortionist attitudes and behaviors to release the property by unscrupulous individuals, some in organized groups. Not overlooking the concern and even indignation of the neighbors who see how apartments and spaces are invaded and subsequently used for illicit activities, mainly drug trafficking, narco-flats, prostitution, marijuana plantations, and illegal subletting, with noise, unsanitary conditions, dirt, and fights, etc. They often encounter the frustration of the judicial response through the well-worn principle of minimal intervention or the shift to civil jurisdiction through interdiction mechanisms, with negative repercussions for the societies that have become owners of these occupied properties in terms of their profitability projection, market sale, or rental, with the economic impact this entails."

If sufficient elements are found to infer that there is a solid and lasting connection between the people and the usurped properties that can be classified under Article 570 ter of the Penal Code or 570 bis, they could be charged with the crime of belonging to a criminal organization or group.

Statistically, from 2016 to 2019, of the total number of cases initiated for the crime of usurpation (both violent and non-violent), 57.58% ended with a conviction and 42.42% acquitted or archived, which has currently maintained the feeling of impunity and alarm in the citizenship.

ith the declaration of the state of alarm by Royal Decree 926/2020, of 25 October, for the first time, protection was given to persons without title who, illegitimately, remain in the property against the will of its owner, empowering the Court to suspend the evictions of those considered vulnerable, Therefore, it can be seen that the tendency of the legislator is to convert the problem into a question of civil law, reserving criminal proceedings for those attacks that are more serious or violent.

The crime of breaking and entering and the principle of inviolability of the home

The basic type of crime is contained in art. 202 PC, in the following terms:

"The individual who, without living in it, enters another's dwelling or stays in it against the will of its speaker, shall be punished with imprisonment from six months to two years".

The protected legal right is the inviolability of the home and personal and family privacy, fundamental rights included in art. 18 CE. This line of jurisprudence is reflected, among others, in STS 100/1994, of January 20 (RJ 1994/40), which states:

"...the crime of breaking and entering protects the privacy of the human person, safeguards the most valued intimacy of men and women, neither possession, nor property, nor any other real or personal right in a patrimonial sense is defended".

And, in STS 731/2013, of October 7 (RJ 2013/7646):

> "...we have stated that the concept underlying art. 18.2 CE must be understood in a broad and flexible way since it seeks to defend the areas in which the private life of individuals develops, and must be interpreted in the light of the principles that tend to extend to the maximum the protection to the dignity and privacy of the person, to the development of his privacy through which he projects his "soul self" in multiple directions. As also stated in the Decision of this Chamber of November 7, 1997, the fundamental right to personal privacy is embodied in the possibility of each citizen to establish private spheres, that is, spheres that exclude the observation of others and of the authorities of the State. This right derives directly from the right to free development of personality (art. 10.1 CE). Consequently, the protection of the home is but one aspect of the protection of privacy that serves the free development of personality".

The fundamental right to privacy has in inviolability one of its most transcendent manifestations, being this the essential redoubt in which every person can develop his life with full freedom. This constitutional substratum permeates art. 202 PC, to the point that an extensive interpretation of the concept of dwelling is necessary for its application, as established in STS 1803/2002, of November 4 (RJ 2002/10007):

> "In short, the interpretation of domicile, for the purposes that concern us, cannot be strictly limited to the place that serves as the habitual abode of the individual. The concept underlying art. 18.2 CE must be understood in a broad and flexible manner, since it seeks to defend the spheres in which the private life of individuals develops, and must be interpreted in the light of the principles that tend to extend to the maximum the protection of the dignity and intimacy of the individual, to the development of his privacy through which he projects his "soul self" in multiple directions".

This circumstance has meant that, over the years, the condition of "dwelling" has been attributed to different spaces such as:

- Caravans (SAP of Madrid 263/2007, of June 21 [ARP 2007/577]).
- Boats, although it is difficult to extend the concept of domicile in any case to some areas of these, such as decks or holds (STS 312/011, of April 29 [RJ 2011/4272]).
- Motor homes and vans suitable for constituting habitual or accidental domicile (STS 84/2001, of January 29 [RJ 2001/405]).
- Hotel rooms (STS 11/2002, of January 16 [RJ 2002/1068]).
- Rooms in military residences (STC 189/2004, of November 2 [RTC 2004/189]).
- Terraces, if their external signs reveal the clear will of their owner to exclude such extension from third parties (STSJ of Granada 13/2013, of April 8 [JUR 2013/274535]).

In addition to the concept of dwelling, it is important to analyze another fundamental concept of the type which is the "will of the dweller". As stated in STS 2/2008, of January 16 (RJ 2008/1560):

> "The positive conduct - entering or remaining in another's dwelling - has to be carried out against the will of the dweller or of the one who has the right to exclude, a will that can be express, tacit and even presumed: it is not necessary that it be express and direct, it being sufficient that it can be logically and rationally deduced from the circumstances of the fact or from other antecedents."

According to the doctrine of the Supreme Court, there is no consent when there is a prior denial of entry, it being unnecessary for the inhabitant to reiterate his opposition to the entry, it being understood that there is an express manifestation of opposition to the entry from the very moment in which the police are called to try to prevent it (STS 159/2007, of February 21 [RJ 2007/3182]), regardless of whether or not the entry is carried out, or when there is a deception or a defect in the will of the inhabitant, considering that consent does not

exist when a false identity is provided in order to gain access to the dwelling (STS 692/2014, of October 29 [RJ 2014/5026]).

Finally, it is also necessary to analyze the concept of malice in the realization of the type contained in art.202 CP. After the reform of the Criminal Code in 1995, which introduced this type of crime in our legal system, the courts had been demanding in their decisions a specific intent for the commission of the crime, considering atypical all those conducts in which the breaking and entering pursued another purpose, as for example in STS 100/1994, of January 20 (RJ 1994/40) and in STS 71/2001, of April 30 (RJ 2001/3606). However, this interpretation was abandoned by the majority jurisprudence, which currently limits itself to requiring a generic intent, this being present when the accused has the will to enter a home that he knows belongs to others and accesses it without caring about the consequences or the will of its inhabitants, being indifferent the intentionality pursued by the accused (STS 692/2014, of October 29 (RJ 2014/5026)).

Regarding the aggravated subtype, the Penal Code contemplates in section 2 of art.202 a higher penalty for those cases in which the access without consent to another's dwelling is carried out with violence:

> "If the act is carried out with violence or intimidation, the penalty shall be imprisonment of one to four years and a fine of six to twelve months".

In relation to the term "violence", in STS 12/1993, of January 14, 1993 (RJ 1993/163), it is stated that "violence must be understood as referring both to persons and things. In any case, it is necessary that the vis in re is exercised on things as a means of execution for the trespass"; while, in relation to the concept of "intimidation", STS 9/2016, of 21 January (RJ 016/310), states that "it consists of the threat of an evil, which is not essential that it be immediate, it being sufficient that it be serious, future and credible".

According to what has been explained, violence can be projected on things as well as on persons, while intimidation can only be projected on persons:

"This aggravated subtype includes those cases in which violence or intimidation have been exercised to enter or remain in another's dwelling and also includes cases of vis in re, with case law understanding violence or intimidation on persons to be comparable to that exercised in rebus ,provided that the material violence on things is the means of execution of trespassing" (STS 179/2007, of March 7 [RJ 2007/3248]).

The precautionary measure of eviction for the immediate restitution of the property object of the crime to its legitimate owner and the flagrancy of the crime

When a property is occupied, the owner may become a delinquent if he acts in flagrante delicto, therefore, he must resort to the judicial system (except in cases involving a crime in fraganti, which we will analyze later). However, it is notorious that the time taken by the courts is not usually short, which can lead the victim to a state of deep frustration, having to wait even more than a year to receive a favorable sentence and during this time he must continue to pay the IBI and other taxes levied on the property, without being able to rent the property, or to carry out any other act of use or ordinary exploitation of the same.

Well, art. 13 LECrim allows the dispossessed owner to request the adoption of the precautionary measure of eviction:

"The first diligences are considered to be that of consigning the evidence of the crime that may disappear, that of collecting and placing in custody whatever leads to its verification and to the identification of the offender, that of detaining, as the case may be, those presumed responsible for the crime, and that of protecting those offended or harmed by the same, their relatives or other persons, being able to agree for this purpose the precautionary measures referred to in art. 544 bis or the protection order provided for in art. 544 ter of this law".

As indicated in STC 328/1994, of December 12, 1994 (RTC 1994/328), the absence of any statute of limitations in the Criminal Procedure Act that establishes the existence of an investigative phase does not prevent the judge from urgently carrying out the preliminary or preparatory actions aimed at preparing the oral trial by carrying out the necessary investigative acts to determine the act and its alleged perpetrator. In spite of this lack of express mention of the possibility of adopting the measure of eviction, there is a consensus that this precept empowers the judicial authority to adopt, in addition to those measures necessary to protect the life or physical and moral integrity of the victims, all those that may be necessary to preserve and protect the legal assets violated by the commission of a crime.

This consensus has recently been reinforced with the publication by the Attorney General's Office of Instruction 1/2020, of September 15, on criteria for the application of precautionary measures in the crimes of breaking and entering and usurpation of real estate, although this is not the first document published by the Public Prosecutor's Office in this regard, given that some particular responses had already been given at territorial level, such as the Instruction of the High Prosecutor's Office of the High Court of Justice of the Balearic Islands, of June 10, 2019, and the Decree of the Provincial Prosecutor's Office of Valencia, of August 20, 2020, of unification of criteria for action regarding the crime of Article 245. 2 of the Penal Code.

As Instruction 1/2020 reads:

"In the first term and in general, it will be considered pertinent to request the precautionary measure of eviction and restitution of the property in those cases in which solid indications of the execution of the crime of trespassing or usurpation - fumus boni iuris - are appreciated, and the existence of harmful effects for the legitimate possessor that reasonably justify the need to put an end to the unlawful situation before the termination of the proceeding, thus restoring the violated legal order as soon as possible - periculum in mora - is also verified.

Thus, "in the crime of breaking and entering, the precautionary measure will be requested when there are relevant indications of the commission of the crime, with the exception of those cases in which it is established that the illegal possession of the property has been carried out with the tolerance of the legitimate inhabitant, which will reveal the inexistence of periculum in mora".

As for the misdemeanor of usurpation of real estate, the Prosecutor's Office considers that "it will be appropriate when the passive subject is a natural person, a legal person of a public nature or a non-profit entity of public utility, provided that it is established that the specific usurpation, in addition to harming the ius possidendi - right to possess that is held over a good that, nevertheless, is materially possessed by another -, could produce a serious breach of the ius possessionis - material and concrete possession of the good - .

As far as private legal entities are concerned, the adoption of precautionary measures may also be requested, "provided that the existence of an effective risk of relevant damage to the legal assets of the same is established, which must be assessed in the above terms in those cases in which the property does not appear to enjoy a current use or expectation of use".

Once the material assumptions of the criminal precautionary measures have been met, it will be necessary to resort to them after applying the principle of proportionality, which is made up of three requirements or conditions that are set forth, among others, in STC 28/2020, of February 24:

1. that the measure is likely to achieve the proposed objective (judgment of appropriateness).

2. it must also be necessary, in the sense that there is no other more moderate measure for the achievement of such purpose with equal efficacy (judgment of necessity).

3. that it is weighted or balanced, in that it derives more benefits or advantages for the general interest than harm to other conflicting goods or values (judgment of proportionality in the strict sense).

For all this, it will be taken into consideration, in addition to the victims or injured parties of the crime, the neighbors and/or neighbors to whom the crime could suppose a direct damage for the enjoyment of their rights. The aforementioned Instruction indicates that in the event that a situation of special vulnerability is evidenced in the persons who occupied the property, such as the presence of minors, persons with disabilities, etc., "it will be requested that the facts be investigated in order to determine whether or not they are in a situation of special vulnerability. It is also stated that "the facts should be brought to the attention of the Social Services so that they may adopt - necessarily prior to the eviction - the appropriate measures for their protection, providing, if necessary, the appropriate residential solutions".

The Prosecutor's Office considers that, although art. 13 LECrim allows the adoption of precautionary measures inaudita parte, the judicial action must be prudent and respectful of the guarantees of the person under investigation, given the unquestionable importance of the precautionary measure of eviction. However, the precautionary measure of eviction inaudita parte should be adopted in those cases in which the investigated persons do not comply with the summons without alleging just cause, while ensuring that the defense attorney is notified of the request so that he may make the allegations he deems appropriate, in accordance with the provisions of art. 967.1, paragraph 2 of the Criminal Procedure Act (LECrim). I would also be interested in the adoption of the precautionary measure of eviction inaudita parte.

in those cases in which the summons of the person under investigation or even his identification cannot be carried out due to the deliberate action of the latter.

Without prejudice to what is stated in the preceding paragraphs, it should be recalled that police officers can act even without a warrant in cases of flagrancy, whose concept, characteristics and requirements are summarized, among others, in STS 1386/2000, of September 18 (RJ 2000/8001), and in STS 758/2010, of June 30 (RJ 2010/7183):

"... the dictionary of the RAE refers to flagrante as an adjective that expresses "that is currently being executed", "of such evidence that it does not need proof", and in flagrante as an adverbial mood that means "at the very moment a crime is being committed, without the perpetrator having been able to flee". The Diccionario del Español Actual refers to "being carried out at the moment of speaking" and to being "something very evident and undeniable". In synthesis, actuality and immediacy of the fact and direct and sensorial perception of it, which excludes suspicion, conjecture, intuition or deductions based on it".

"... Jurisprudence has been demanding the following notes to consider its presence:

in the first place, the immediacy of the action being committed or having been committed moments before, that is, the actuality in the commission of the crime or its temporal immediacy, which is equivalent to the offender being surprised at the moment of committing it, although this requirement has also been considered fulfilled when the offender is surprised at the moment of going to commit it or at a time subsequent to its commission; secondly, personal immediacy, which is equivalent to the presence of an offender in relation to the object or instrument of the crime, which supposes evidence of the crime and that the person caught has participated in it, in such a way that it can result from the direct perception of the offender at the scene of the crime or through the perceptions of other persons who warn the police that the crime is being committed, in any case, the evidence can only be affirmed when the trial allows to relate the perceptions of the agents with the commission of the crime and/or the participation of a determined subject practically instantaneously, and if it would be necessary to elaborate a more or less complex deductive process to establish the reality of the crime and the participation

in it of the offender, it cannot be considered a case of flagrancy; and thirdly, the urgent need for police intervention, in such a way that, due to the circumstances, the police are compelled to intervene immediately to prevent the progression of the crime or the spread of the evil that the offense entails, the arrest of the offender and/or the obtaining of evidence that would disappear if judicial authorization were to be sought.

Well then, the most appropriate tool that citizens can use to prove the immediacy of the occupation is the installation of a the alarm system, whose notification entails flagrancy, which allows the immediate intervention of the police.

In other cases, the agents are reluctant to intervene by entering the supposedly occupied property, since, as stated in art. 534.1.1º CP, "shall be punished with fines of six to twelve months and special disqualification for employment or public office for two to six years the authority or public official who, mediating cause for crime, and without respecting the constitutional or legal guarantees, enters a home without the consent of the inhabitant".

There are even mobile applications, such as "Alertcops", which offer a help service to citizens in dangerous situations, in order to send warnings, even geolocated, with photographs or audios, to the agents to warn of the commission of a crime. Well, the aforementioned application includes a specific functionality so that those affected, owners, neighbors or any user who detects a case of illegal occupation of real estate can immediately report the facts to the National Police and Civil Guard.

Response to Illegal Occupations from the Civil Jurisdiction

Civil actions aimed at combating the illegal occupation of real estate: summary protection of possession, eviction for precariousness and for the effectiveness of registered rights in rem.

In recent months there have been two legislative reforms in Spain that have modified the regulation of civil actions related to the recovery of possession of real estate, on the one hand the approval of Law 12/2023, of May 24, for the right to housing, which came into force on May 26, 2023, and on the other hand, more recently, Royal Decree Law 6/2023, of May 24, 2023, for the right to housing, which came into force on May 26, 2023, more recently the Royal Decree Law 6/2023 by which the government approves urgent measures for the execution of the recovery, transformation, resilience plan in the field of public service of justice, public function, local regime and patronage that has reformed some precepts of the Civil Procedure Law related to the verbal trials for the recovery of possession.

The summary judgment of protection of special possession of occupied housing

This action is divided into two modalities: the general one and the one known as express modality.

The first is included in art. 250.1. 4ª paragraph 1 of the LEC and is also known, due to its origins in Roman Law and its name in the Civil Procedure Act of 1881, as an interdict to recover possession. It is a summary proceeding governed by the verbal trial procedure.

Its procedural requirements are as follows:

- Exercise within one year: art. 460.4º CC indicates that "the possessor can lose his possession: by the possession of another, even against the will of the former possessor, if the new possession had lasted more than one year". Therefore, the claim must be filed within one year from the moment of the act of dispossession or possessory disturbance, having expired in case of not timely exercise.

- Prior possession: the plaintiff must be the possessor prior to the act of dispossession by the illegal occupant. Generally, it is the victim of the dispossession who has the legal standing to file suit, but it must be taken into account that the mediate possessor also has this quality, even if the immediate possession was exercised by another subject.

- Author of the act of dispossession: the defendant must be the author of the harmful act, although the passive standing of the third party acquirer in bad faith is admitted, and for some authors, as is the case, e.g., of GONZÁLEZ PÓVEDA, even of the third party in good faith.

This modality, unlike the express modality that we will analyze below, protects all possible possessory situations, and not only possession with title, in accordance with the provisions of art. 446 CC.

With regard to its objective and subjective spheres, it should be noted in relation to the former that it extends to any type of property or right, which means that it is not limited to dwellings; in relation to the latter, there is no limitation of any kind, and legal entities are also fully entitled to exercise this action. If the ownership of the occupied dwelling belongs to more persons, only one of them can exercise the action for the benefit of the rest, as long as there is no opposition from the rest of the co-owners (SAP of Badajoz 262/2019, of December 19 [JUR 2020/51640]).

If the occupation is carried out by a plurality of subjects ("co-possession occupies"), a priori, all of them should be sued, as there is a situation of necessary passive joinder of the art. 12.2 LEC. However, it should be noted that art. 441.1 bis LEC states that a lawsuit may also be filed against unknown occupants of the dwelling, so it will not be necessary to provide the identifying data of the defendants who are unknown.

It is important to highlight that the action for claiming compensation for damages cannot be combined with this action, since we are dealing with two actions that must be dealt with by different types of judicial procedures (art. 73.1.2º LEC), without it being expressly excepted in art. 437.4 LEC. The actions that make up a summary process (the possessory) and a plenary process (the compensatory) cannot be processed together, given that the judgment issued in a summary process does not produce the effect of res judicata, while the one issued in a plenary process does, so that if exercised together, the same judgment would have to resolve both accumulated actions, having in part the effect of res judicata and in part not, which is not possible.

However, subjective joinder against the different occupants of the dwellings in the same building is appropriate, as provided for in art. 437.5 LEC, as long as the general requirements established in arts. 72 and 73.1 LEC are met, and there is a connection by reason of the title or cause of action between the actions whose joinder is sought.

In the case of what is known, with a somewhat technical denomination, as the "express modality", this has been incorporated into our legal system through Law 5/2018, of June 11, amending Law 1/2000, of January 7, on Civil Procedure. The origin of this measure is found in the draft reform of the Civil Procedure Law arising within the Council of Illustrious Bars of Catalonia (CICAC), which decided to form a working group composed of experts in different legal areas, who prepared a proposal that was eventually presented in the Congress of Deputies by the Mixed Parliamentary Group. In its original version, it proposed the creation of a new ad hoc procedural figure consisting of a summary eviction trial for illegal occupation of dwellings, with anticipatory precautionary measures inaudita parte that would allow the immediate recovery of possession by the owner and any other right holder by just title, whether a natural person, social entity, or public administration, postponing the hearing for the defendant to a moment after the delivery of the dwelling's possession.

After its parliamentary process, the reform of the LEC operated by Law 5/2018 failed to achieve its initial purpose, remaining a simple reform of possessory protection as provided in the current art. 250.1.4ª, paragraph 2.

This new procedural tool strictly protects possession, not real estate assets, without prejudice to the fact that the right to possess is based on a real right (such as the right of ownership) or personal right (such as a leasehold right), unlike other actions for the recovery of possession that protect the right of ownership (such as the vindicatory action) or real estate assets (such as eviction due to precarious tenancy). Therefore, this restrictive characteristic of this new procedural tool makes it ineffective to combat the phenomenon of occupation, as it exceeds the exclusively possessory scope.

By incorporating the aforementioned Law, greater summary proceedings have been granted to the traditionally known as interdict for the recovery of possession, providing for a sui generis precautionary measure by which the defendant has a period of five days to provide the title that legitimizes their occupation, provided that, by virtue of art. 437.3 bis, the plaintiff requests immediate delivery of the same in the lawsuit.

The legislator has not provided any exception regarding the obligation of legal representation of art. 23 LEC for this special process, so it must be understood that the defendant must appear represented by a lawyer and solicitor.

If the defendant does not provide any valid title in due time and form, or if SSª considers it insufficient, the judge will issue a final order in which he will condemn the occupant to the immediate delivery of possession, without prejudice to the fact that opposition may be filed in the main lawsuit. It should be noted that this order does not put an end to the procedure, but only to the incidental procedure of art. 444.1 bis LEC, so the process must continue according to the procedures of the verbal trial. That the order is final is a specialty of this process, since, in general, there is an appeal against judicial decisions that are final, by virtue of what is established in art. 455 LEC. No specialty is foreseen regarding the enforceability of said order, being able to deduce the applicability in this case of art. 549 LEC, which establishes the need to file a lawsuit to issue the execution of final judicial decisions.

It is common for new occupants to appear during the process, resulting in a succession of occupants in the property with the aim of obstructing and paralyzing the action of justice and delaying the eviction order as much as possible. This circumstance has been taken into account in art. 441.1 bis LEC, providing that, against the order deciding on the immediate delivery of possession of the occupied dwelling, not only is there no appeal, but it will also be enforced against any of the occupants who are found at that moment in the dwelling.

Once a favorable judgment has been obtained, if the occupant reoccupies the dwelling after the eviction, it will not be necessary to repeat the entire procedural path, as it will be sufficient to file an execution lawsuit as long as there is already a judicial title condemning the occupant to eviction, provided that the expiration period of five years provided for in art. 518 LEC has not expired.

It should be specified that the notification of the request for the provision of the possessory title must be personal: the fact that art. 437.3 bis empowers the plaintiff to file a lawsuit against the unknown occupants does not exempt the judicial body from the obligation to personally notify the defendant in accordance with the provisions of art. 161 LEC, in order to guarantee the defendant's right of defense and the development of contradictory proceedings, with notification by edicts being appropriate only as a subsidiary measure.

The objective scope of this express modality is limited to dwellings, being inappropriate when the occupation occurs in other types of properties: however, the law does not specify whether it must be a habitable, habitual dwelling, a residence, etc. Therefore, we understand that where the rule does not make restrictions, none can be made, so it is appropriate to exercise this action even when the occupied object is a dwelling under construction.

The different types of eviction processes. Eviction for precarious tenancy

There are three different eviction processes regulated in article 250.1.1º and 2º of the Civil Procedure Law:

- Eviction for non-payment
- Eviction for expiration of the term
- Eviction for precarious tenancy.

On the other hand, two special procedures are also regulated for the recovery of possession:

- Summary possession protection trials (article 250.1.4º LEC).
- Process for the protection of registered real rights (250.1.7º LEC).

Focusing on the summary eviction trial for precarious tenancy, it is one of the most commonly used processes by those who have been dispossessed of the possession of a property against their will or who have tolerated or voluntarily and gratuitously ceded their possession but are forced to resort to this judicial process to recover it due to the occupant's refusal to return it.

In the case at hand, we are in the presence of a "factual situation that implies the gratuitous use of another's property, whose legal possession does not correspond to them, although we are in possession of it and therefore without just title that justifies the enjoyment of the possession, either because it was never had, because it was lost, or also because it grants a preferential situation with respect to a possessor of lesser right," as stated in STS 134/2017, of February 28 (RJ 2017, 605), which cites in the same sense STS 110/2013, of February 28 (RJ 2013,2162), 557/2013, of September 19 (RJ 2013, 7428), and 545/2014, of October 1 (RJ 2014, 4613).

In light of the above, is it correct to resort to this process to recover possession of a dwelling illegally occupied? This question arises after Law 5/2018 of June 11, amending the Civil Procedure Law, created a new interdictal process for the immediate recovery of the property, which, in its statement of reasons, states:

"The channel known as eviction for precarious tenancy presents a problem of conceptual inaccuracy, with the consequent insecurity in achieving the intended protection, since in cases of illegal occupation there is no such precarious tenancy, as there is neither a tolerated use by the owner or legitimate right holder nor any prior relationship with the occupant."

The majority of jurisprudential doctrine has admitted that this procedural channel can be used in cases of occupation against the will of the owner or their legitimate possessor (STS 134/2017, of February 28 (RJ 2017, 605), SAP of Tarragona 95/2018, of March 13 (JUR 2018/87587), SAP of Barcelona 187/2018, of March 13 (JUR 2018/93583)), but there is still discrepancy between the different Provincial Courts, which entails the risk that the lawsuit may be dismissed for this reason. The Supreme Court has declined on more than one occasion to resolve this discrepancy, stating that "the review of procedural content rules is not subject to appeal" and that "clarifying the meaning of the expression 'granted in precarious tenancy' is strictly a procedural matter."

The prerequisites for the action to succeed are:

1. That the plaintiff has a title that legitimizes them to possess the property as an owner, usufructuary, or any other real or personal right that gives them the right to enjoy it.
2. That the defendant has material possession.
3. That the defendant enjoys the property without a title justifying the use or enjoyment of the property without paying rent or any fee. The lawsuit can be filed even without knowing the details of the occupants of the dwelling.
4. The perfect identity of the property.

In any case, dispossessed owners or tenants must avoid taking justice into their own hands and taking initiatives against the occupant such as cutting off utilities or changing the lock of the occupied dwelling: although it may seem incomprehensible, especially for those citizens who are unaware of the norms of our legal system, the occupant without title holds the de facto possession of the dwelling, which is protected by art. 446 CC, being protected against dispossession by any third party, even the one who holds a better possessory right, such as the owner of the occupied dwelling. This is due to the prohibition of self-help by citizens, so no one can be dispossessed against their will by direct action, and anyone with a better right to possess must seek the assistance of the courts. If the possessor dispossessed by the occupant tries to recover possession of their dwelling, we would find ourselves in a Kafkaesque situation where the occupant would be legitimized to exercise the classical possessory recovery action of art. 250.1.4º paragraph 1º LEC against the legitimate possessor, and their actions could even constitute a crime of coercion. 3.1.b)

Lawsuit for the effectiveness of registered real rights

It is provided for in art. 250.1.7ª of the LEC and foresees a summary verbal trial based on the presumption granted by the principle of registry legitimacy established in art.38 LH to those who hold the ownership of a real right registered in the Property Registry over the occupied property against those who oppose them or disturb their exercise without having a registered title that legitimizes the opposition or disturbance.

In other words, it is a legal presumption by virtue of which it is considered that registered real rights exist and, consequently, belong to their holder as determined by the respective entry: therefore, protection is sought based on the registration in the Property Registry and not on the fact of possession itself, unlike what occurs in interdicts (SAP of Barcelona 154/2017, of March 8 [AC 2017/741]).

Those passively legitimized to bear the consequences of these actions are the perpetrators of the disturbance or dispossession or those who seek to assert any limitation or denial on the plaintiff's right to possess.

With this procedure, the legislator aims to provide special protection to those who enjoy registry inscription in their favor, requiring for its viability the submission by the plaintiff of the Property Registry certification that accredits the validity without any contradiction to the corresponding entry, as inferred from arts. 41 LH and 444.2 LEC.

It is important to emphasize that in the same article of the LEC, a list of grounds for opposing the lawsuit is provided as a numerus clausus system:

1. Falsity of the registry certification or omission therein of rights or conditions registered that invalidate the action exercised.
2. The defendant possesses the property or enjoys the disputed right by contract or any other direct legal relationship with the last holder or previous holders or by virtue of prescription, provided that this should prejudice the registered holder.
3. The property or right is registered in favor of the defendant and this is justified by presenting certification from the Property Registry accrediting the validity of the registration.
4. The registered property is not the one effectively possessed by the defendant.

It is also worth asking: is there criminal prejudice if, parallel to the criminal process for the alleged commission of a crime of home invasion or usurpation of real estate, an eviction lawsuit is being processed? According to art. 40. LEC, it is necessary to examine whether the following procedural assumptions are met:

- That the existence of a criminal case in which facts with apparent criminality are being investigated is accredited, some of which may substantiate the claims of the parties in the civil process.
- That the decision of the Criminal Court regarding the fact for which the criminal case is proceeding may have a decisive influence on the resolution of the civil matter.

The Courts have been rejecting the exception of suspension of the eviction process due to criminal prejudice. This has been unanimously stated, for example, by the SAP of Toledo 216/2017, of March 22 (JUR 2017/123714), the SAP of Barcelona 378/2020, of May 25 (JUR 2020/187556), and the Order of the AP Barcelona 356/2017, of December 22 (JUR 2018/18526).

On the other hand, the suspension due to civil prejudice of the execution of the resolution condemning eviction is not appropriate if the executed party initiates a declaratory judgment to declare that they have a better right to possess, as in the execution process, suspension due to civil prejudice is not applicable, since it is not among the legal grounds for suspension of arts. 565 et seq. LEC, requiring a restrictive interpretation of this precept.

The recent reform of the Civil Procedure Law that came into effect on March 20, 2024, has eliminated the requirement for the defendant to provide a bond to oppose the lawsuit, a bond that had to be provided even if the right to free legal assistance was recognized. Therefore, prior to the elimination of this requirement, many procedures were processed with some speed because, in the absence of the bond to oppose, and without the need for a hearing, the favorable judgment was relatively quick. A different issue is the execution of the judgment and the incident of suspension of eviction due to social and economic vulnerability, which is also applicable to this procedure.

The Vindicatory Action and the Cessation Action in Communities of Property Owners in a Horizontal Property Regime

Vindicatory Action

The vindicatory action is the one held by the holder of the immovable property who is not in possession against the possessor who is not the owner. Its purpose is to defend the property and can be exercised to claim, as its name indicates, any property, not necessarily an immovable one, its foundation being found in art. 348 CC, from which it follows that, through the vindication, the property will return to the owner's power. It is precisely in this purpose where the reason for the vindicatory action lies, as the owner has many other actions to protect their property depending on how it is being disturbed by third parties. If this recovery purpose did not exist, the owner could use other actions.

However, the concept of "restitution of the property to the owner" must be understood in a broad sense, since, as indicated

in STS 832/2005, of October 24, 2005 (RJ 2005/8285), "[...] the exercise of the vindicatory action involves both the claim for a declaration of ownership and the restitution of the property to the owner, restitution that would not exist if any works and installations limiting the right of enjoyment inherent to the property were maintained on the other's property."

As reiterated in abundant jurisprudence, its exercise presupposes the concurrence of three requirements:

- That the plaintiff proves their ownership or dominion over the property.
- That the property is identified accurately.
- That the possessor has no right legitimizing that possession.

This action is processed through the verbal or ordinary trial route depending on the amount claimed (verbal if it does not exceed €6,000 and ordinary otherwise).

Its statute of limitations, when it concerns real estate, is thirty years from the day it could be exercised, as can be inferred from arts. 1963 and 1969 CC, although some authors argue that it is imprescriptible, as its prescription is not autonomous from that of extraordinary acquisitive prescription.

The Cessation Action in Communities of Property Owners in a Horizontal Property Regime

On the other hand, in the case of the cessation action by the community of property owners of the building in a horizontal property regime, if the illegal occupants of the property cause disturbances, damage, or perform uncivil acts in the building, the community itself is legitimized to immediately stop these illegal acts by demanding the immediate eviction of the occupant through the exercise of the aforementioned action regulated in art. 7.2 LPH.

As a requirement for the admissibility of this action, it is established that it must be preceded by a request made by the president of the community and addressed to the occupant to immediately stop performing uncivil acts (not to vacate the property). This request must contain, as a requirement for validity, a warning that if it is not heeded, the judicial cessation action will be exercised.

Obviously, as indicated in the SAP of Vizcaya 211/2015, of June 26 (JUR 2015/210592), this must be done through a reliable means in order to preconstitute evidence for the possible future lawsuit, which does not mean it must be done notarized, but it is sufficient to use any means that allows demonstrating it has been materially verified.

If the request is ineffective, a meeting of property owners, ordinary or extraordinary, must be convened, in which the agreement to exercise the cessation action can be adopted. The community of property owners, represented by its president, must file the lawsuit addressing it against the occupant and the owner of the property, who by their passivity has contributed to these disturbances. It is advisable to direct the prior request mentioned in the previous paragraph not only against the occupant but also against the owner to prove their negligent behavior. As a general rule, the Courts deny that the owner has to be responsible for the conduct of the offending occupant, but joint liability can be imposed in cases where the owner has acted in collusion with the occupant or negligently.

In principle, the law does not establish any deadline for making the aforementioned warning, so it could be exercised as long as the 5-year prescription period provided in art. 1964 CC has not expired. Neither is any deadline established for the offender to cease their conduct, so this remains at the discretion of the board, which must assess in each case what period to grant in accordance with the nature of the offense.

It should be noted that the concept of "annoying activity" included in art. 7 of the LPH is an indeterminate legal concept, so it has been left to the Courts to define and outline its limits, with the following characteristics being noteworthy (SAP of Barcelona 80/2005, of February 8 [JUR 2005/80779], 638/2009, of November 20 [AC 2010/291], 419/2013, of September 26 [JUR2013/354160], and 399/2017, of July 5, 2017 [2017/1302]):

1. It must occur within the property.
2. Although administrative formalities are met (e.g., excessive noise exceeding the limits established in municipal ordinances), this does not automatically imply that we are dealing with an annoying activity; rather, an analysis of each specific case must be carried out considering the principles governing neighborly relations.
3. The activity must notably exceed and disturb the usual and ordinary regime or state of affairs in social relations.
4. Conclusive, full, and convincing evidence is required.
5. This annoying activity must be severe and continuous over time.

4

CASES OF SUSPENSION OF EVICTION OF THE VULNERABLE OCCUPANT

Law 5/2018 reforming the LEC introduced a rule in article 150 to refer to the competent social services in matters of social policy in case their action was necessary (provided that the consent of the interested parties had been granted) regarding the resolution that contains the eviction date, which, according to the Preamble of said Law, was justified by the need to seek "a rapid response from public authorities when situations of special vulnerability are detected."

However, a few months later a further step was taken, agreeing to proceed with the suspension of the eviction of the occupant in a situation of special vulnerability so that the owner is responsible for providing the housing solution for the declared vulnerable. Such is the regulation contained in RD Law 7/2016 of March 1 on urgent measures in housing and rental matters, which introduces in article 441.5 of the LEC the suspension of the process in case the eviction is communicated to social services, and they confirm the occupant's vulnerability situation. This suspension will extend until the social services take appropriate measures for 1 or 3 months from the receipt of the communication, depending on whether the plaintiff is a natural or legal person.

Due to the declaration of the state of alarm because of the pandemic, Royal Decree Law 11/2020 of March 31 was approved, adopting urgent complementary measures in the social and economic sphere to deal with COVID-19, providing for an extraordinary mechanism for suspending evictions of vulnerable households without alternative housing. The rule referred to vulnerable tenants of habitual residence and the suspension period has been extended until December 31, 2024. This regulation confirms the trend of placing the consequences of the occupant's economic vulnerability on the owner.

Royal Decree Law 37/2020 of December 22 on urgent measures to address situations of social and economic vulnerability in the field of housing, also called the "Anti-Eviction Decree," extends the suspension of evictions to cases 2, 4, and 7 of article 250.1 of the LEC. This suspension is extended by virtue of the reform operated by Royal Decree Law 1/2021 of January 19 on the protection of consumers and users against situations of social and economic vulnerability, meaning that eviction is suspended for illegal occupants in situations of vulnerability subject to certain requirements. To try to mitigate this expropriatory measure, compensation is provided to the owner who has suffered economic damage if the property was for sale or rent before its illegal occupation. Therefore, the rest of the owners who do not fall into these parameters will not be entitled to it.

There are authors who argue that this regulation is unconstitutional and, in fact, several appeals of unconstitutionality have been filed against it, since it not only violates Article 33 of the Constitution but also Article 14, as such discrimination between owners is not justified. Furthermore, the suspension of evictions that affect criminal proceedings is carried out through a decree-law, violating Article 86 of the Constitution, due to a lack of extraordinary and urgent necessity and because it is an exceptional instrument.

Law 12/2023 of May 24 on the right to housing reforms the LEC again, introducing limits to the eviction action initiated by the owner. Among the novelties of the regulation are:

1. It does not establish differences between situations of illegitimate tenure.
2. All owners are affected by the limitations, but especially large holders.
3. The owner must specify whether the occupied dwelling constitutes the habitual residence of the occupant.
4. The large holder owner must also specify whether the occupant is in a situation of economic vulnerability, either by providing a document issued by the services of the autonomous and local administrations competent in housing, social assistance, evaluation, and information of situations of social need and immediate attention to people in a situation or at risk of social exclusion, who have been specifically designated according to the legislation and autonomous regulations on housing obtained with the prior consent of the occupant, and such document cannot have a validity of more than three months. Alternatively, the owner must include a responsible declaration that they have approached the aforementioned services within a maximum period of five months before the filing of the lawsuit, without having been attended to or without the corresponding procedures having been initiated within two months from the date they submitted their request, along with supporting documentation of the same. As can be seen, the law itself grants another two months to the squatter and obliges the owner to prove a negative fact: that their request has not been attended to within the said two-month period.

The owner also has another option, which is to provide a document issued by the competent services indicating that the occupying person does not expressly consent to the study of their economic situation in the terms provided for in the legislation and autonomous regulations on housing. This document cannot have a validity of more than three months. In other words, again, the owner has to prove through another document issued by the administrations that the squatter has not consented.

While the owner spends their time and resources obtaining this documentation and covering all the property expenses, the squatter continues to enjoy someone else's home at no cost.

From this process, two outcomes can arise:

- That the occupant is not vulnerable or it is not their habitual residence. After this period, their eviction can be carried out, which currently takes a minimum of 18 months.

- That the occupant is vulnerable, the occupied house is their habitual residence, and the owner is a large holder. In such a case, the lawsuit will not be admitted until the owner proves that they have undergone the conciliation or mediation procedure established for this purpose by the competent Public Administrations, based on the analysis of the circumstances of both parties and the possible existing aids and subsidies in housing matters according to the provisions of the legislation and autonomous regulations on housing.

One year after the entry into force of the law on the right to housing, practice has shown its ineffectiveness regarding the requirement to request the economic vulnerability report of the occupant prior to the filing of the lawsuit, as there is no regulatory development governing who should prepare these reports. Therefore, the various involved administrations, municipalities, and autonomous communities choose to pass the responsibility to each other. In most cases, the only result is a two-month delay in the filing of lawsuits for the recovery of possession in the case of large holders. Coupled with the slow processing of judicial procedures in Spain and the possibility for the occupant to request the suspension of the eviction once the procedure is completed, it leads to the conclusion that it has been a useless reform that only increases bureaucracy, generating more expenses for owners who, in addition, see their requests almost entirely ignored by the administrations.

In short, the reforms introduced by the Housing Law only follow the trend initiated by other regulations and add another obstacle for the owner seeking the eviction of the occupants of their property. While such a process is ongoing, the occupant continues to live in someone else's property, and the owner bears the costs.

The regulation is limited to establishing procedural obstacles to eviction. Added to this is the slowness of the Administration of Justice, which has become the main ally of this Government in carrying out its housing policy. With this reform, free housing is guaranteed to the occupants without the owner receiving any compensation.

It should be noted that the Housing Law also modifies and expands the suspension of eviction procedures due to the tenant's economic vulnerability as provided in Article 441.5 of the Civil Procedure Act (LEC). The maximum suspension period is increased to two months if the landlord is an individual and up to four months if the landlord is a legal entity, extending the application of this suspension to other non-lease possession recovery proceedings (Articles 250.1.2º, 4º, and 7º of the LEC).

In any case, it is unsurprising that this regulation will have negative effects, as property owners will likely reduce the supply of rental housing due to the legal uncertainty created, leading to an increase in rental prices. The limited properties available will be offered to individuals with high income levels, as landlords cannot assume the risk of non-payment given that they will bear the consequences of the tenant's vulnerability.

5

DATA ON PROPERTY OCCUPATIONS IN SPAIN

Occupations-related offenses have seen a slight downward trend throughout Spain since the Prosecutor's Office and the Ministry of the Interior issued orders to combat this issue in September 2020. Specifically, the number of cases decreased from 17,247 in 2021 to 16,726 (-3%) a year later, and as of August 2023, the latest consolidated data shows 10,345 occupations.

Illegal occupation is a real problem that varies in magnitude across the country. Although there are no reliable data that accurately reflect the number of occupied homes, some studies have attempted to estimate the number of people occupying other people's homes. According to the November 2023 report from the Institut Cerdá, there are approximately 78,800 illegally occupied homes in Spain, a 10% decrease from 2016. Despite this decline, the foundation considers the phenomenon chronic and warns of an increase in "inquilinos okupas"—people who sign a rental contract, pay the initial months' rent, but then stop paying and remain in the property.

The Institut Cerdá's analysis suggests that the reduction in occupations since 2016 is due to fewer vacant buildings, improved management of housing stock by both public and private operators through preventive measures such as surveillance and security systems, and the impact of precautionary evictions.

The study also found that the majority of occupations (75%-80%) are concentrated in properties owned by large holders, mainly financial institutions and investment funds, and there is an increase in people occupying ground floors of buildings, such as long-closed bank offices.

Case Analysis of Catalonia

In 2023, Catalonia had more housing occupations than the combined total of Andalusia, Valencia, and Madrid, the three regions with the next highest number of property crimes. The high levels of illegal housing occupation in Catalonia have led some lawyers to warn of new models and profiles of 'okupas' in the region. These are individuals who are not vulnerable and have stable incomes but choose not to accept the termination of their rental contracts or new conditions and remain in the properties.

In February 2022, the Catalan Parliament approved the so-called anti-eviction law, Law 1/2022 of March 3, which amends Laws 18/2007, 24/2015, and 4/2016 to address the housing emergency—currently contested in the Constitutional Court by the central government. This law obliges large property owners to offer below-market rental rates to 'okupas' without a legal title to the property, extending the obligation to make a social rental proposal before filing any judicial claim related to mortgage debt or other eviction claims due to the expiration of the maximum duration of the legal title or lack thereof in certain circumstances.

Such legislative initiatives may inadvertently encourage criminal activities that significantly affect Catalonia. In response, the regional parliament has implemented measures contrary to this regulation. As of February 17, 2023, Law 1/2023, which amends Law 18/2007 on the right to housing and Book Five of the Catalan Civil Code regarding real rights, introduces urgent measures to address owner inactivity in cases of illegal housing occupation that disrupts neighborhood coexistence.

This law aims to expedite evictions, granting authority to communities and municipalities to remove 'okupas' if property owners fail to act when such occupations disrupt neighborhood peace, particularly in cases involving large property holders who have not taken steps to evict the occupants.

6

HANDLING OF PROPERTY OCCUPATION IN OTHER COUNTRIES

The key to protecting property owners lies in the swift eviction of occupiers.

In **ENGLAND AND WALES**, since September 1, 2012, occupying residential buildings is a criminal offense, punishable by six months in prison and a £5,000 fine. The police can evict 'okupas' without judicial authorization, whether the property is residential or not, emphasizing the speed of the eviction process. Property owners initiate the procedure by filling out an online form that is resolved quickly.

SCOTLAND Although Scotland is part of the United Kingdom, its legal system is mixed. Squatting is punishable and allows for rapid police intervention, with simplified court procedures for eviction. Scottish case law supports a balanced approach, protecting the rights of landlords while considering the circumstances of occupiers.

Scotland has developed a legal framework that combines elements of civil and common law, allowing for a rapid and effective response to squatting. Scottish laws facilitate the eviction of squatters and ensure that landlords can recover their properties with minimal delay. An analysis of the Infringement Act and the Scottish Housing Act shows how these laws work together to provide an effective response.

Reports from Police Scotland indicate that rapid interventions have been effective in reducing incidents of squatting. Furthermore, surveys of affected landlords suggest high satisfaction with the ability of the legal system to handle these cases efficiently.

IRELAND follows a similar approach to England and Wales. Squatting is a criminal offence, allowing police to act quickly to evict squatters. Irish laws also impose prison sentences and significant fines. Prompt intervention is key to protecting property owners' rights and preventing squatters from taking up residence on a long-term basis in properties.

Irish legislation emphasises the importance of private property and provides property owners with effective legal tools to tackle squatting. Recent case law has reinforced the need for swift and decisive action by authorities to protect property rights. An analysis of the Miscellaneous Housing Provisions Act 2009 shows how these measures have been effective in reducing squatting cases.

Studies by the University of Dublin indicate that public perception of the effectiveness of these laws has improved, with an increase in confidence in the government's ability to protect property rights. Furthermore, surveys of affected property owners show general satisfaction with the speed and efficiency of the legal system.

GERMANY has also criminalized property occupation (Articles 123 and 14 of the German Penal Code) as an offense against public order, covering the occupation of homes, business premises, or public service areas. The police evict occupiers within 24 hours of a criminal complaint, with penalties including up to one year in prison and fines.

Court proceedings and police intervention are designed to quickly evict squatters. German laws ensure the protection of property rights through criminal and civil penalties. German case law has set clear precedents regarding the protection of private property and the need for a rapid response to squatting.

Germany has a well-defined system for handling squatting, which includes both criminal penalties and the possibility for property owners to seek damages. German courts have been steadfast in applying the law to protect property owners' rights. An analysis of the German Criminal Code and the German Civil Code shows how these legal instruments work together to provide an effective response to squatting.

Reports from the Bundeskriminalamt (Federal Criminal Police Office) show a reduction in squatting incidents since the implementation of stricter penalties. Furthermore, academic studies conducted by the University of Heidelberg suggest that the combination of criminal and civil sanctions has been effective in deterring squatting.

FRANCE recently reformed its regulations with the Law of July 27, 2023, characterized by harsher penalties for illegal occupation and the introduction of new offenses. The penalty for home invasion has been increased to three years in prison and a €45,000 fine (up from one year and €15,000). The law also introduces a new offense of "fraudulent occupation of premises used as a residence or for commercial, agricultural, or professional purposes," punishable by two years in prison and a €30,000 fine, also applying to tenants who fail to pay rent and remain after a final eviction order, facing a €7,500 fine except during winter truce or in social housing cases.

A new offense penalizing propaganda or advertising inciting occupation is introduced, with a €3,750 fine, and a penalty of three years in prison and a €45,000 fine for impersonating the owner of an occupied property.

The law mandates the inclusion of an automatic termination clause in rental contracts in case of non-payment, although judicial authorization is required for enforcement. The judge can only suspend the clause if the tenant can settle the rental debt and resume full payment before the hearing. The suspension ends automatically upon the first non-payment or delay. The text also shortens certain procedural deadlines in rent arrears disputes, particularly for tenants acting in bad faith.

Regarding eviction, France regulates an administrative procedure without the need for judicial authorization.

Overview: According to an article published by the French National Consumer Institute, entering and remaining illegally in a premises now subjects individuals to more severe penalties. Assisting in the commission of these offenses is also punishable, especially when it involves propaganda or publicity in favor of these crimes or providing another's real estate to a third party.

Penalties for Illegal Entry into Residential Premises: Entering a residential premises using deceit, threats, or assault is punishable by two years of imprisonment and a fine of 30,000 euros, except in cases permitted by law.

Penalties for Remaining without Rights or Title in a Residential Premises in Violation of a Judicial Decision: Remaining without rights or title in a residential premises in violation of a final and enforceable judicial decision that has resulted in an ordinary eviction order for more than two months is punishable by a fine of 7,500 euros. This provision does not apply when:

- The occupant benefits from winter truce provisions,
- The execution judge receives a request for deferment until the request is dismissed or the time granted by the judge to the occupant expires,
- The dwelling belongs to a social landlord or a public legal entity.

Penalties for Illegal Entry into a Residence: Entering another's residence using deceit, threats, assault, or coercion, except in cases permitted by law, is punishable by three years of imprisonment and a fine of 45,000 euros. Previously, this offense was punishable by one year of imprisonment and a fine of 15,000 euros.

Penalties for Propaganda or Publicity in Favor of These Offenses: Propaganda or publicity, by any method, aimed at facilitating or inciting the commission of certain offenses is punishable by a fine of 3,750 euros. This is a new offense. According to the circular presenting the provisions of the law, "this offense punishes the dissemination of any information that favors a process enabling the commission of these offenses, inciting or facilitating such acts. This may involve, for example, providing information to force a blockade" (circular CRIM 2023 – 19/H3 – 22/11/2023).

Propaganda or publicity is punishable if it aims to commit the following offenses:

- Entry into residential premises,
- Entry into a dwelling.

When the offense is committed through the written or audiovisual press (Articles 42 and 43 of the Law of July 29, 1881, on Freedom of the Press and Article 93-3 of Law No. 82-652 of July 29, 1982, on Audiovisual Communication), the specific provisions of the laws regulating these matters apply regarding the determination of those responsible.

Penalties for Making Another's Real Estate Available to a Third Party: Making another's real estate available to a third party for the purpose of establishing residence in exchange for a contribution or any benefit in kind, without the authorization of the owner or the holder of the right of use of the property, is punishable by three years of imprisonment and a fine of 45,000 euros. Previously, this offense was punishable by one year of imprisonment and a fine of 15,000 euros.

Law of July 27, 2023 – Procedural Amendments: The Law of July 27, 2023, amended certain points related to the procedure that can be initiated before the State representative in the department (the Prefect). This system is governed by Article 38 of Law No. 2007-290 of March 5, 2007, which establishes the enforceable right to housing and various measures in favor of social cohesion.

Request for Formal Notice to Occupants without Rights or Title: In certain cases, it is possible to request the State representative in the department to give formal notice to the occupant to leave the premises, following the filing of a complaint.

Illegal Entry into Another's Home: This refers to the case of entry and retention in another's residence, whether or not it is their main residence or a premises intended for residential use, using deceit, threats, assault, or coercion.

Individuals Who Can Contact the Prefect: The person whose home is thus occupied, anyone acting in the interest and on behalf of the person or the owner of the occupied premises, can request the State representative in the department to give formal notice to the occupant to leave the premises after filing a complaint.

Proof of Residence Status: The applicant must:

- Have filed a complaint,
- Provide proof that the dwelling constitutes their own home or property,
- Have the illegal occupation verified by a judicial police officer, the mayor, or a justice commissioner (formerly bailiff).

When the owner cannot prove their right due to occupation, the State representative in the department will request, within seventy-two hours, the tax administration to establish this right.

Decision to Notify the Illegal Occupant: The decision to notify will be made, taking into account the personal and family situation of the occupant, by the State representative in the department within forty-eight hours of receiving the request. Only non-compliance with the conditions regarding proof and filing a complaint or the existence of a compelling reason of general interest can lead the State representative in the department not to issue a notice. In case of refusal, the reasons for the decision will be communicated promptly to the applicant.

Conditions for the Execution of the Decision: The notice will be accompanied by an execution period not less than twenty-four hours. When the occupied premises do not constitute the applicant's home, this period will be extended to seven days. The notice is given to the occupants and published by a notice at the town hall and on the premises. If applicable, it is also given to the applicant.

When the order to vacate the premises is not complied with within the set period, the State representative in the department must proceed without delay to the forced evacuation of the premises, unless the author opposes the request within the time set for the execution of the notice.

Italia

The arbitrary and illegitimate occupation of real estate, commonly referred to in practice as "abusive occupation," occurs when an individual occupies a property without the right to do so or under an invalid title. Civil remedies are accompanied by penal protection, regulating various types of offenses, including trespassing under Article 614 of the Penal Code, violent disturbance of the possession of real estate under Article 634 of the Penal Code, the invasion of land or buildings under Article 633 of the Penal Code, and the "new" offense of invasion of land or buildings endangering public health or safety under Article 633 bis of the Penal Code.

Civil Remedies for the Release of Property: In cases of illegal occupation of real estate, where the occupant has no legally valid title to possess the property (either nonexistent or invalid), the property owner may initiate an action aimed at obtaining an eviction order (subject to the obligation of mediation). According to consistent guidance from the Court of Cassation, the action in such cases is of a real nature, with a consequently aggravated burden of proof (proof of the original title of the property). This is because "its foundation does not lie in a personal obligation between parties, but in the right of property protected erga omnes, which requires full demonstration through probatio diabolica" (Cass. no. 23121/2015).

Finally, if immediate protection is deemed necessary, provided that prima facie and periculum in mora requirements are met, it is always possible to resort to the injunctive procedure provided for in Article 700 of the Code of Civil Procedure. In any case, compensation for proven damages as a direct and immediate consequence of the occupation is always allowed.

On the Invasion of Land and Buildings: Article 633 of the Penal Code regulates the invasion of land and buildings. The norm aims to protect the public interest in the inviolability of real estate, ensuring that the owner of a property or land can freely and fully enjoy it. As clarified by jurisprudence, the offense under Article 633 of the Penal Code consists of the arbitrary entry by those without title into another's building or land to exercise a factual relationship from which the acting subject can obtain some benefit (see, Cass. 23758/2021). Doctrine and jurisprudence have addressed the issue of the meaning to be attributed to the term "invasion": jurisprudence has stated that the term invasion should not be understood in the common sense. Consequently, the violent aspect of the conduct may be absent, as the term invasion can also refer to the behavior of someone who enters arbitrarily and against the law, as they lack the right of access (see, more recently, Cass. 27041/2023).

In terms of sanctions, the offense under Article 633 para.1 of the Penal Code provides for a penalty of one to three years and a fine ranging from 103 to 1,032 euros.

The second paragraph of Article 633 of the Penal Code provides for two distinct special aggravating circumstances if the act is committed by more than five persons or by an armed person. In such cases, there is a significant increase in the penalty, and the offense becomes prosecutable ex officio.

On the Invasion of Land or Buildings Endangering Public Health or Safety, Pursuant to Article 633 bis of the Penal Code: The offense under Article 633 bis was introduced by Law 199/2022: the new offense modifies and replaces the one initially introduced by the so-called "Rave Decree" in Article 434 bis of the Penal Code, which generated significant national controversy.

Article 633 bis of the Penal Code identifies an autonomous type of offense, with the active subjects being solely the organizers or promoters of arbitrary invasions for the purpose of conducting a musical or entertainment event.

According to the law, the offense poses a concrete danger to public health or safety. In particular, the danger must result from the invasion and be caused by non-compliance with regulations on drugs or in the field of safety or hygiene at public shows and entertainment events. In other words, the judge will need to determine, on a case-by-case basis, the concrete existence of the danger description.

The offense under Article 633 bis of the Penal Code also involves specific intent, consisting of the aim to carry out a gathering for musical or entertainment purposes: this subjective element excludes the criminal relevance of arbitrary invasions for non-recreational/musical purposes.

The legislator has provided for a certainly high penalty, namely imprisonment from three to six years and a fine ranging from 1,000 to 10,000 euros, allowing for telephone and environmental interceptions in accordance with Article 266 of the Code of Criminal Procedure and the application of preventive detention measures.

Finally, Article 633-bis, paragraph 2, mandates the confiscation of items "used or intended to commit the offense" (vans, systems, boxes, etc.), those "used to carry out the purposes of the occupation" (mobile phones, laptops, beverage coolers, etc.), and "those that are the product or profit" (collected money). The confiscation pertains to the offense of promoting and organizing illegal musical gatherings and, therefore, will not apply to items owned by participants.

Violent Disturbance of the Possession of Real Estate under Article 634 of the Penal Code: This provision overlaps with that of Article 633 of the Penal Code, with the significant difference that the offense under Article 634 of the Penal Code presupposes violence or threat to a person. This offense was prosecutable ex officio, but the recent so-called Cartabia reform made it prosecutable upon complaint, unless the injured person is incapacitated due to age or illness.

Prospects for Reform: In recent years, there has been a marked increase in the phenomenon of illegal occupations: as noted by the Ministry of the Interior, between January and December 2021, the enforcement measures for the release of residential properties increased by 18%; however, despite this, the evictions actually carried out represent only 20% of the total. In 2023, for this purpose, a bill (proposal AC935) was presented to protect harmed individuals, landowners, and homeowners. As stated in the document submitted to the Chamber of Deputies, it aims to introduce "provisions to make the protection of property owners and the fight against illegal occupations more effective."

The trend in other countries is to toughen penalties for illegal occupation and facilitate police evictions. In contrast, Spanish legislation makes it difficult for property owners to defend their rights and establishes a "right to occupy" for the vulnerable, leading to Spain being regarded internationally as a haven for occupation.

7

CONCLUSIONS

Ineffectiveness of Current Legislation

According to Naveira Manteiga, three conditions must be met for effective action against illegal occupiers:

- Legislation must be properly adapted to current social realities, ensuring continuous legal evolution to achieve fair judicial decisions, avoid litigation, and promote greater equality before the law.
- Interpretation of existing laws must consider the prevailing social reality, as mandated by Article 3.1 of the Civil Code, acknowledging that legislation often lags behind constantly changing social conditions.
- The judicial system must resolve cases swiftly, as slow justice is inherently unjust.

None of these conditions are met regarding illegal property occupation, resulting in a sense of insecurity among citizens and a draw for further occupations.

Although there is no law explicitly protecting occupation understood as the usurpation of property from its legitimate owner, the current procedural legislation lacks swift and effective tools for property owners to reclaim their possessions. Even the legislator acknowledges in the preamble of Law 5/2018 that "none of the legal channels currently provided in civil proceedings to ensure the eviction of forcibly occupied properties is fully satisfactory" and that "the social function that social or instrumental entities of public administrations must fulfill with their housing stock is not sufficiently protected, given that an excessively high percentage of this housing stock is illegally occupied, especially in urban areas."

Judicial Delay in Resolving Cases

In recent years, the problem of illegal occupation has increased exponentially rather than gradually decreasing, as evidenced by data from the State Prosecutor's Office reports. Furthermore, some authors have expressed dissatisfaction with this issue, which is not always attributable to the actions of courts and tribunals, but also to the slow actions of public administration and social services during the execution of judgments. Delays in execution, especially when awaiting measures from municipal social services to find housing for the occupiers, harm not only property owners and possessors but also neighboring communities, who often suffer the consequences more than the owners.

Data from the General Council of the Judiciary (CGPJ) confirm the delay in both process and execution of judgments. In 2019, the average duration of civil proceedings was 36 months to obtain a final judgment, an increase of two months from 2018 (33 months). In criminal proceedings, the average duration was 18 months in 2019, one month longer than in 2018.

Both processes must be added to the execution period of the sentence, which extends up to 6 months in the case of civil jurisdiction and 4 months in the criminal jurisdiction. Regarding the case at hand, the CGPJ states in its report on the panorama of justice in 2019 that "The average estimated durations of all types of verbal trials have increased. [...] For the recently introduced trials, 48 months, much higher than the 2.6 months of 2018," which shows that possession recovery processes are not an isolated case within civil processes. It should be noted that the duration varies in each autonomous community, with Catalonia being one of the communities where verbal trials take the longest (8.3 months) and where the most cases of occupation occur.

8

POSSIBLE REFORMS TO CURRENT LEGISLATION

Some authors have proposed solutions to this inefficiency and slowness in current processes and legislation, both in criminal and civil areas. Given that the crime of Article 245.2, being considered minor due to the imposed penalty, does not allow for the adoption of precautionary measures that enable immediate eviction and subsequent recovery of possession, MAGRO SERVET proposes adding a new Article 544 sexies on criminal precautionary measures, which would be worded as follows: "In cases where a crime under Article 245 of the Criminal Code is being investigated, the Judge or Tribunal shall adopt the eviction measure within a maximum period of 72 hours from the precautionary request, as long as, once the occupants of the property are required, they do not show the possessory title by which they are occupying the property. Before carrying out the eviction, they may inform municipal social services to facilitate rehousing if deemed necessary due to the circumstances of the case." This article would allow for the urgent precautionary request for eviction. Another solution proposed by the author is the inclusion of a third section in Article 245 CP, allowing the processing of this crime as a less serious crime, thereby enabling preliminary proceedings with a precautionary measure request through Article 13 LECrim. The wording would be as follows: "3. Anyone who occupies, without a just title, a foreign property, dwelling, or building that does not constitute a habitual residence, or remains in them against the will of its owner."

In line with MAGRO SERVET, the Normative Commission of the Barcelona Bar Association and the Council of Catalan Bar Associations have also proposed incorporating an Article 544 sexies in the LECrim with the following wording: "In cases of a crime under Article 245 of the Criminal Code, the Judge or Tribunal shall adopt the eviction measure within a maximum period of 48 hours from the precautionary request, as long as, once the occupants of the property are required, they do not show the legal title that legitimizes their stay in the property. Once the eviction is agreed, they may inform municipal social services to facilitate rehousing, taking into account the special vulnerability of the occupants or other circumstances of the case." Furthermore, they suggest modifying Article 13 LECrim to ensure coherence and cohesion: "The first proceedings shall include gathering evidence of the crime that may disappear, collecting and safeguarding anything that leads to its verification and the identification of the perpetrator, detaining, if necessary, the presumed responsible for the crime, and protecting the victims or those affected by it, their families, or others, being able to adopt precautionary measures referred to in Article 544 bis, the protection order provided in Article 544 ter or Article 544 sexies of this law, as well as any other considered adequate and proportionate to protect the rights of victims immediately."

This modification is in line with the proposal by the State Attorney General's Office in its 2017 report, which suggests including a clause in Article 13 LECrim that expressly provides for the possibility of adopting a precautionary measure for the reinstatement of possession to the rightful owners. On the other hand, PÉREZ DAUDÍ and SÁNCHEZ GARCÍA believe that Law 5/2018 left the proper regulation of the execution process pending, as this law only establishes the referral of information to social services without further provisions in this regard. Therefore, they propose adding "a new section to Article 441 LEC that allows for the suspension of eviction for one or three months if the evictor is a natural or legal person, respectively, if those affected by a rental eviction are in a situation of social and/or economic vulnerability."

CUENA CASAS proposes a reform of the LEC to expand the scope of application of Law 5/2018 "and extend the use of the precautionary measure also to legal entities and properties other than housing, and to enable a procedure or hearing within the eviction incident to assess the veracity of the title so that the measure is not blocked by merely presenting a document." NAVEIRA MANTEIGA, in addition to some of the suggestions mentioned in this section, proposes adding a new Article 11 ter to the LEC that grants active legitimacy to Homeowners' Associations, which often suffer more from the consequences of occupation than the legitimate possessors themselves, and to Municipalities based on the extraordinary active legitimacy provided in Article 10 paragraph 2. Additionally, he also proposes reforming Article 449 LEC by adding a section 2 that "establishes the obligation that the occupant who intends to appeal the resolution condemning them to eviction based on the action exercised in Articles 250.1.2 and 250.1.7 of the LEC must make a financial deposit, just as those who intend to appeal the condemnatory sentence in evictions for non-payment must do."

This same jurist makes two recommendations to the courts for the interpretative purposes of current legality:

- On the one hand, he recommends correctly and uniformly defining, by the criminal jurisdiction, the criminal offense violated by the illegal occupants and that, in cases where there is a criminal offense, the precautionary eviction measure under Article 13 and concordant LECrim be taken as the general rule and not the exception.
- On the other hand, he makes the same suggestion in the civil sphere so that the precautionary eviction measure of the occupant provided in Article 727 and concordant, is taken as the general criterion and not the exception. This suggestion to the courts could imply not having to carry out certain proposed reforms, such as the modification of Article 449 LEC, and would somewhat solve the slowness of justice by ending the harm caused to those affected earlier.

9

LEGISLATIVE PROPOSALS TO COMBAT ILLEGAL OCCUPATION OF HOMES

On February 23, 2024, the Senate submitted the "Organic Law Proposal against Illegal Occupation and for Neighborhood Coexistence and the Protection of the Safety of People and Property in Homeowners' Associations," for the start of its processing in the Congress of Deputies. 124/000003 Organic Law Proposal against Illegal Occupation and for Neighborhood Coexistence and the Protection of the Safety of People and Property in Homeowners' Associations.

And, on March 5, 2024, a legislative proposal was also publicly presented at the Barcelona Bar Association, promoted by the Catalan Bar — an Autonomous Community where the "occupation" issue has special incidence —, and by the I+Dret Institute of the Barcelona, Madrid, and Malaga Bar Associations, to present it to the Government Delegate in Catalonia.

These are the legal reforms proposed in both legislative proposals:

Definition of illegal occupation and immediate eviction

The proposed regulation begins by defining what is meant by "illegal occupation of property" in its Article 1:

> "It is understood by illegal occupation of property for the purposes of this law the possession or enjoyment of another's property, without payment of rent or consideration, or reason of right, which is not covered by the mere liberality or tolerance of the owner or actual possessor."

Removing the protection of residence or home from the illegal occupant against the action of the public authority or its agents, since, when required to vacate the property by the public authority or its agents:

- If it were a flagrant crime (defined in Article 795.1.1 LECrim), they will proceed to immediate eviction.
- If the crime is not flagrant, once the complaint for occupation is filed by the owner or actual possessor, they will require the occupant to, within a maximum period of 24 hours:

1. Voluntarily vacate the occupied property, or,
2. Provide the legal title authorizing or attributing possession of the property, or,
3. Provide evidence of the tolerance or liberality of the owner or actual possessor.

If the occupant does not voluntarily vacate the property and does not provide the evidence mentioned above, the public authority agents will proceed with immediate eviction, without prejudice to the actions available to the occupant to prove that legal title of ownership or possession.

Substantive penal aspects

The regulation proposes the reform of Articles 245 and 269 of the Criminal Code to provide a harsher treatment for the crime of usurpation of property.

Thus, it proposes raising the penalties for violent or intimidating usurpation under Article 245.1 from 1 to 2 years of imprisonment to 1 to 3 years.

Specifically, for the "peaceful" usurpation of Article 245.2 CP, the following novelties are proposed:

1. The penalty is increased from a fine of 3 to 6 months to imprisonment of 6 to 18 months.
2. A mitigated type is included for cases where the occupant fully returns the property to its owner or actual possessor within no more than 48 hours; in this case, the penalty of community service for 31 to 90 days or a fine of 2 to 12 months would apply.

For both types of usurpation — violent and peaceful — it is established:

1. The penalties are aggravated if the illegal occupation lasts more than 15 days.
2. A hyper-aggravation with the penalties provided for organized and criminal groups in Article 570 bis CP when the occupation is carried out by an organized group, applied according to the utility obtained by the occupation, its duration, and the damage caused.
3. A penalty of 3 months to 1 year for anyone who, without participating in the illegal occupation, promotes it through:
   - the preparation or distribution of instructions or recommendations for occupation, or,
   - the identification of properties to be occupied.

These actions are also aggravated when the promoters are authorities or public officials in the exercise of their functions.

4. The crime of usurpation is included in cases of incitement, conspiracy, and proposition to commit it, punished with a penalty lower by one or two degrees than that corresponding to the committed crime of usurpation.

Procedural Penal Aspects

The bill also stipulates that these crimes of illegal usurpation of property (Article 245 CP) and those of home invasion under Article 202 CP be processed through the procedure for the quick trial of certain crimes (Article 795 LECrim). Accordingly, the bill removes these crimes from those that must be processed and tried by the Jury Court Law procedure (Article 1 LOTJ).

Other Possible Reforms

So far, the penal aspects contained in the bill. But it also proposes other legal reforms, including Articles 7.2 and 8 of the Horizontal Property Law, which seeks to "respect the internal regime of the homeowners' association and neighborhood coexistence norms."

And the rules on registration that prohibit illegal occupants from registering in the municipal register. And the provision for future reforms on reducing tax obligations for owners who suffer these illegal occupation situations.

Proposal by the Barcelona Bar Association

This proposal coincides with that from the Senate in proposing the reform of Article 795 LECrim, so that both the crimes of home invasion and usurpation of property are included among those to be tried through the so-called "quick trials."

But it also proposes two other reforms to our Criminal Procedural Law. Briefly:

The first concerns the addition of a new Article 544 sexties on precautionary measures to be adopted in cases of illegal usurpation of homes under Article 245 CP, among which the eviction measure is provided within a maximum period of 48 hours:

- When the occupant does not provide a legitimate possession title; or,
- When the occupation endangers the property; or,
- When the occupation causes serious neighborhood coexistence problems.

The second concerns the drafting of the first section of Article 13 LECrim, regarding the "first proceedings" that, among them, would include those contemplated in the new Article 544 sexties and any others deemed appropriate and proportionate to protect the victims' rights immediately.

In general, both proposals have good intentions: to be more severe, agile, quick, and effective in reacting to these illegal occupation situations, while granting greater protection to the actual owners and possessors of the properties, but not only to them, but also to the other neighbors living in the building.

Today, the issue of property occupation remains of utmost relevance and social significance (and, therefore, political), as it is a criminal behavior that greatly concerns the public, especially those living in poor neighborhoods, who feel unsafe to go out on the street for fear of being assaulted or, upon returning from an accidental absence, such as going shopping or a hospital stay, finding their home occupied.

Evidence of this is the numerous hours dedicated to this issue in many news programs on major television networks and the impact some news has on the population or on social media, although often fueled by some political parties seeking electoral gain.

Analysis and Conclusions

Analyzing data provided by the INE and the Ministry of the Interior concerning convictions for home invasion and usurpation of vacant properties, it can be observed that most occupations occur in vacant properties belonging to banks or other legal entities, such as investment funds or public institutions. Comparing this with other criminal types, few cases involve home invasion, which is what really concerns citizens: in fact, the number of convictions for this crime has been declining since 2016, when 357 convictions were recorded, down to "only" 185 in 2020. The same decline is observed concerning the crime of usurpation of property, with "only" 3,157 cases detected , compared to 6,757 in 2017.

Now, some might say that the pandemic has greatly influenced the data and that, in many cases, the affected parties opt to go directly to civil jurisdiction. Moreover, in many cases, civil judges, without prejudice to the effects of the principle of minimal intervention of criminal law, decide to refer the victims to criminal jurisdiction, making the previously mentioned data unreliable. Given that there are no official data regarding occupied homes in Spain, we proceed to analyze the number of complaints filed with the police or the civil guard.

In this case, it is true that, since 2016, a constant increase has been observed: in that year, 9,998 complaints were filed, compared to 14,675 filed in 2020 (40 per day), with Catalonia accumulating 45% of the cases and reaching a rate of 85 per 100,000 inhabitants, four times the average in the rest of Spain.

In conclusion, the occupation of property constitutes a problem that must be taken into account by the legislator, given that it concerns an element that already has significant importance in people's lives due to its economic and emotional value, which is real estate. Greater protection should obviously be provided when the occupied property constitutes a home. But this problem must be addressed from multiple angles: while it might be useful to produce new regulations, especially regarding the procedural aspect, both in civil and criminal areas, it is also true that such regulation alone would not be enough to eliminate this phenomenon. Therefore, it is necessary to solve the housing access problem within the same process, regulating, for example, rental prices and increasing the stock of social rental housing, which currently represents only 2% of the total, compared to 30% in the Netherlands or 17% in France and the UK.

The legal system must protect, quickly and effectively, both the owner against these criminal behaviors and the truly vulnerable people, with other types of measures. The solution is not simple, no doubt, but it cannot involve occupying other people's homes and supporting those situations, which in many cases affect not only the owners of the occupied apartment but also the coexistence and security of the other members of the homeowners' association and even the neighborhood where the property is located, resulting in episodes that are not only unfair but also scandalous and intolerable, due to the sometimes cheeky, coercive, threatening, and destructive attitudes of the occupants themselves. The current soft and insufficient legislation, unfortunately, fosters this entire problem.

10

FINAL THOUGHTS

A swift, forceful, and effective response is needed. The solution cannot be to usurp someone else's home with the acquiescence of our leaders.

As Matilde Cuena Casas points out: "illegal occupation is a frontal attack on the right to property that cannot be justified on the basis of the right to decent housing. Neither the reasons that motivate the occupant nor the condition of the owner can legitimize an action contrary to the law. It is clear that Spain has a significant housing problem, partly encouraged by different governments, regardless of their political color. Solving the housing problem by encouraging over-indebtedness led us to an unprecedented financial crisis that has caused social exclusion and the concentration of real estate properties in the hands of a few. The current difficulties in accessing homeownership and a general increase in rental prices due to an extraordinary increase in demand have highlighted the failures in a serious housing policy in Spain.

But the solution to the imbalances that have been generated cannot be found by violating the most basic principles of our law and compromising legal certainty. Illegal occupation cannot become a new form of tenure, even with the laudable goal of providing citizens with housing. Budgetary efforts must focus on providing social housing and not expropriating the use without compensation from the owners, regardless of whether they have many or few properties. That is not a serious policy and is far from what has happened in the legal systems around us, which tend to toughen regulations against illegal occupation, protecting ALL owners.

It is bad enough that cases of illegal occupation increase, but it is worse when the legislator itself, from a populist approach and making a twisted interpretation of the principle of proportionality in the defense of human rights, transfers to private owners what the laws and international treaties impose on public authorities. The social function as a limit to the right to property cannot serve as a means to transfer to owners the role of providing other citizens with decent housing. The essential content of the right to property is a limit to the ordinary legislator's action that must be respected. If crossed, it constitutes expropriation and requires pecuniary compensation. Article 33 of the Spanish Constitution cannot be interpreted in a way that deprives the right to property of all constitutional guarantees.

The legislator cannot create incentives for the illegal occupation of homes by excluding certain groups from protection and using the slowness of the Administration of Justice as a means to delay the eviction of the occupants. Unfortunately, this is what our current legislation does, especially the recently approved Law 12/2023, of May 24, on the right to housing. The best protection against illegal occupation is the speed of the occupant's eviction, with the intervention of the State Security Forces being the most efficient way. The police must be provided with legal instruments (prosecutors' instructions are not enough) to achieve the same level of effectiveness as in other legal systems."

BIBLIOGRAPHY

Bibliography and doctrinal and jurisprudential sources

- Cuestiones jurídicas entorno a la ocupación ilegal de inmuebles. María Rosario Martín Briceño. Revista de Derecho Civil, volumen VIII, nº 3 (julio-septiembre 2021)-
- Ocupantes ilegales de inmuebles. Una perspectiva penal y criminológica. Juan Mozas Pillado. Editorial Atelier 2021.
- El delito de usurpación pacífica de bienes inmuebles ¿Una respuesta legal adecuada? Carmen Alcayde Blanes
- GONZÁLEZ POVEDA, P.: Acciones protectoras del dominio y de la posesión, Ed. Bosch, Barcelona, 2002, pág. 250 y ss.
- BROCÁ-MAJADA-COBRAL, Práctica procesal civil, Tomo VI. Ed. Wolters Kluwer, Madrid, 2016.
- LÓPEZ JARA, M.: "El nuevo procedimiento civil para garantizar la posesión de viviendas frente a su ocupación ilegal", Actualidad Civil, nº 6, julio de 2018.
- Nuevos intentos de dar respuesta jurídica a la ocupación ilegal de viviendas. Roberto Guimerá Ferer-Sama
- Naveira Manteiga, J., "Recuperación de la posesión de bien inmueble ante una ocupación ilegal: problemática actual", Consejo General de la Abogacía Española. Durán, L., "La nueva estrategia de los okupas: alegar Covid para retrasar los desahucios judiciales", El Mundo, 23 de noviembre de 2020,
- Naveira Manteiga, J., Jiménez París, J. M., "Desahucio exprés contra la ocupación de viviendas", Diario LA LEY, n. 8448, 2018, p. 4-5. 77
- Matilde Cuena Casas: La Ocupación Ilegal De Inmuebles: Un Necesario Enfoque Global
- Ocupaciones Ilegales: soluciones penales y civiles. Alfonso Codón Alameda, 2ª Edición actualizada a la Ley 12/2023 de 24 de mayo por el derecho a la vivienda. Aferre Editor, S.L.
- Okupación ilegal de viviendas. Procedimientos para recuperar la posesión, coordinada por Jacobo Barja de Quiroga. Editorial Colex.
- Desahucios paso a paso, 3ª Edición 2023. Coordinador Alejandro Fuentes-Lojo Rius.
- Preguntas y respuestas sobre la persecución penal de la "okupación". Vicente Magro Servet.
- Guía práctica sobre soluciones ante la ocupación de bienes inmuebles. Vicente Magro Servet. Madrid 2020.
- Lanzi, A., Giuliani, A., & Marino, D. (Year). Occupazione abusiva di immobili: l'ultima giurisprudenza e le prospettive di riforma.
- Strafgesetzbuch (StGB) - Código Penal Alemán: Define las sanciones penales para la ocupación ilegal.
- Bürgerliches Gesetzbuch (BGB) - Código Civil Alemán: Proporciona un marco para la recuperación de propiedades y la compensación por daños.
- BGH NJW 2004, 3413: Caso que destaca la intervención judicial rápida en casos de ocupación ilegal

newdirection.online @europeanreform

New Direction is registered in Belgium as a not-for-profit organisation and is partly funded by the European Parliament.