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Criminal and legal protection of land resources in Ukraine and Latin America: comparative legal analysis

Кримінально-правова охорона земельних ресурсів в Україні та країнах Латинської Америки: порівняльно-правовий аналіз

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Abstract

The purpose of the article is to conduct a comparative study of criminal law protection of land resources under the law of Ukraine and Latin America states. Based on the results of such study, positive experience will be identified, which should be taken into account in the process of further improvement of domestic criminal law, as well as negative practices aimed at avoiding its implementation in Ukraine.

During the course of covering legal framework in selected countries, proving the hypotheses, substantiating conclusions a wide range of scientific methods has been used. Among them are the following: comparative law, formal logic, philosophical (dialectical) methods, methods of systems analysis and modeling.

Based on the analysis, it has been concluded that when improving the current Criminal Code of Ukraine primarily those provisions of criminal

Анотація

Метою статті є проведення компаративістського дослідження кримінально-правової охорони земельних ресурсів за законодавством України та країн Латинського Америки. За результатами такого дослідження має бути виявлений як позитивний досвід, який має бути врахований у процесі подальшого вдосконалення вітчизняного кримінального законодавства, так і негативна практика, що дозволить уникнути її впровадження в Україні.

При дослідженні законодавства обраних держав, доведенні викладених гіпотез, обґрунтуванні висновків використано широкий спектр наукових методів, серед яких насамперед варто виділити наступні: порівняльно-правовий, формально-логічний, філософський (діалектичний), методи системного аналізу та моделювання.

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law of Latin American countries can be taken into account, according to which possession of not only a whole all but also a part of land (real estate) constitutes a crime. At the same time, it has been proved that applying approaches of some states is inexpedient, where parliamentarians: 1) refuse to use aggravating elements, when constructing the relevant corpus delicti, which does not allow to ensure the implementation of the principle of differentiation of criminal liability; 2) provide for criminal liability for land crimes of “environmental” nature in the provisions of special laws on the regulation of liability for environmental crimes.

Keywords: crime, criminal liability, criminal law protection, land resources, land, soil, land rights, illegal possession, environment, pollution.

Introduction

The current Criminal Code (hereinafter – the Criminal Code) of Ukraine is marked by the presence of a fairly extensive system of norms on the regulation of liability for crimes in the field of land relations. Moreover, while corresponding to the relevant provisions of the Constitution of Ukraine, this system takes into account the need for criminal law protection as a “proprietary” function, which is the mission of Art. 197-1 of the Criminal Code of Ukraine, and the “environmental” function of land as the main national asset, which is addressed by Articles 239, 239-1, 239-2 and 254 of the Criminal Code of Ukraine.

At the same time, it should be noted that despite the above-mentioned system of norms and fixing the special status of Ukraine’s land resources at the highest legislative level, their current condition is close to critical, and overall the situation in the field of criminal counteraction to land violations remains unsatisfactory. The existence of the latter fact should be attributed not least to the shortcomings of the relevant criminal law prohibitions, which indicates the need for research aimed at developing proposals for their improvement.

На підставі проведеного аналізу висновується, що такими, що можуть бути враховані під час удосконалення чинного Кримінального кодексу України, насамперед є положення кримінального законодавства латиноамериканських країн, відповідно до яких злочинним визнається незаконне заволодіння не лише всією, а й частиною земельної ділянки (нерухомістю). Водночас доведено недоцільність запозичення досвіду тих держав, парламентарії яких: 1) при конструюванні відповідних складів злочинів відмовилися від використання кваліфікуючих ознак, що не дозволяє забезпечувати реалізацію принципу диференціації кримінальної відповідальності; 2) передбачили кримінальну відповідальність за земельні злочини «екологічної» спрямованості у нормах спеціальних законів, присвячених регламентації відповідальності за екологічні злочини.

Ключові слова: злочин, кримінальна відповідальність, кримінально-правова охорона, земельні ресурси, земельна ділянка, земля, ґрунт, права на землю, незаконне заволодіння, довкілля, забруднення.

It should be kept in mind that recently there had been an axiomatic provision under which in order to achieve the highest efficiency of criminal law of Ukraine, including those devoted to the regulation of criminal liability for crimes in the field of land relations, the latter must take into account all best achievements of world criminal law and foreign criminal law doctrines. In order to do this, it is important to conduct comparative research and skillfully dispose of their results in lawmaking (Khavronyuk, 2013), since one of the tasks of comparative law is to develop specific proposals for improving national legal systems based on critical and comprehensive research of foreign countries’ legal experience (Dodonov, 2009).

This fully applies to the legislation of Latin America states, which experience in the field of criminal law protection of land resources will be studied within this research paper. It should be noted that as an object for comparative analysis, legislation of Latin American countries has been chosen not accidentally, since:

- first, like Ukraine, these countries have a significant impact on corruption in all spheres of life (Orlovskiy, Shapoval, & Demenko, 2018; Vasylevych, Mozol,

- Poklonskyi, Poklonska, & Zeleniak, 2021; Kvasha, Zahynei, Shapoval, Kurylo, & Nikitenko, 2019);
- secondly, Latin America region is a powerful center of biodiversity. The large number of flora, fauna and mineral resources in the region makes it vulnerable to environmental crime. Low risks and high returns associated with the environmental crime, including in the field of land relations, attract organized crime groups in both Ukraine and Latin America region (Duri, 2020; Walters, 2014; Bruinsma, & Weisburd, 2014).

Literature Review

A significant contribution to the research of criminal law protection of land relations has been made in the works of such authors as G. Aboso, M. Barreiro, A. Brisman, G. De Medeiros, O. Dudorov, J. Duri, V. Ladychenko, M. Hanneke, O. Oliinyk, A. Savchenko, N. South, D. Rodríguez Goyes, S. Sánchez Zapata, A. Spadotto, Yu. Turlova, O. Uliutina, O. Yara and some others.

At the same time, it should be noted that in these scholars' works, as, by the way, in a number of comparative studies published by the authors of this article, attention had been mainly paid to: studying only international (Lammers, 2001) or European experience in criminal law (Movchan, 2015; Movchan, 2016; Movchan, Vozniuk, Burak, Areshonkov, & Kamensky, 2021); studying legislation of only certain countries (Eshmurodov, 2020); or comprehensively studying issues of criminal liability for crimes against property or the environment in general (Comte, 2003; Turlova, 2016); or studying only environmental aspects of the issues at hand (Rodríguez Goyes, Hanneke Mol, Brisman, & South (eds), 2019; Ladychenko, Yara, Uliutina, & Golovko, 2019; Hollins, & Percy, 1998; Lisova, & Sharapova, 2020; Meiyappan, Dalton, O'Neill, & Jain, 2014; Movchan, Vozniuk, Kamensky, Dudorov, & Andrushko, 2021; Yara, Uliutina, Golovko, Andrushchenko, 2018; Ladychenko, Yara, Golovko, Serediuk, & 2019; Savchenko, Babikov, & Oliinyk, 2017; Savchenko, Drozd, & Oliinyk, 2017). There are currently no separate studies in the legal literature that would include a comprehensive comparative analysis of the criminal law protection of land resources in the legislation of Ukraine and Latin American countries.

Methodology

This research extensively employs comparative legal method, which was used to clarify existing approaches in seventeen Latin American countries to regulate liability for crimes in the field of land relations. This research method is widely used in modern works related to various issues of criminal liability for specific crimes (Minchenko, Lutsyuk, Kamensky, Kolodin, & Shamota, 2021).

The dogmatic method was useful in the course of interpretation of the norms on liability for land crimes.

The philosophical (dialectical) method allowed to comprehend various research issues, its methodological bases, to structure research, to comprehend the object of research on a step by step basis. Using the modeling method, the provisions of the legislation of Latin American countries were determined, which can be used in improving the relevant provisions of the Criminal Code of Ukraine.

As the focus of this research, we have selected the legislation of certain Latin American countries, which provide for criminal liability for crimes in the field of land relations. These are: Argentina, Bolivia, Brazil, Venezuela, Guatemala, Honduras, Ecuador, Colombia, Costa Rica, Mexico, Nicaragua, Panama, Peru, Puerto Rico, El Salvador, Uruguay and Chile. The choice of such a wide range of countries is explained by the proven fact that the study of foreign experience of as many states as possible contributes to the transposition of relevant provisions of criminal law of different foreign countries, their adaptation, convergence, harmonization, unification and more (Movchan, Dudorov, Vozniuk, Areshonkov, & Lutsenko, 2021; Vozniuk, Dudorov, Tytko, & Movchan, 2020).

Results and discussion

Same as in Ukraine, parliamentarians of the vast majority of Latin American countries have followed the path of criminalizing two groups of land offenses, which can be labeled as land crimes of 1) "property" and 2) "environmental" meaning.

1. ***Land crimes of "proprietary" orientation.***
As one might know, Latin American countries (except for Paraguay and partially Ecuador, which, according to historical traditions, belong rather to the "German"

and “French” Romano-Germanic criminal justice systems, respectively) have based their criminal law on the Spanish model, based on 1870 Criminal Code of Spain. Therefore, it is not surprising that, same as for the Spanish, the criminal law of the analyzed countries is characterized by a fairly extensive system of rules that provide for liability for violations of land rights.

In particular, just like in Spain, within the structure of criminal codes of almost every country in Latin America there is a separate chapter “Illegal appropriation” (*«De la usurpación»*), which is traditionally classified as a crime against property (criminal codes of Argentina, Brazil, Venezuela, Guatemala, Honduras, Colombia, Costa Rica, Mexico, Nicaragua, Panama, Peru, El Salvador, Chile). And only in the criminal law of countries such as Ecuador, Puerto Rico and Uruguay, this title was given not to a chapter, but to a separate article(s), placed (or) or simply in the section “Crimes against property” (criminal codes of Ecuador and Puerto Rico), or in a separate chapter V “Crimes against real estate rights” (Criminal Code of Uruguay) (Movchan, 2017).

As for the content, we must note that all acts, which are held liable by the rules of the above mentioned chapters, can be divided into two major groups:

- 1) well-known to the criminal law of European countries, representatives of the Italo-Iberian group of criminal law, three types of offenses that are considered criminal in all countries of the analyzed group:
 - a) **occupation or seizure of real estate** (*«Usurpaciones de inmuebles»*), which consists in unlawful obstruction of possession or attempt to unlawfully deprive the right of ownership of immovable property, or unlawful invasion or occupation of immovable property;
 - b) **change of boundary markers** (*«Remoción o alteración de linderos»*) – change of boundaries or boundary signs with the purpose of seizing or illegally using real estate or its part;
 - c) **illegal change of the channel (appropriation) of the reservoir** (*«Usurpación de aguas»*) – illegal use of public or private reservoirs to which the perpetrator is not entitled, committed in personal interests or in the interests of others and to the detriment of third parties, as well

as obstacles to the exercise of the legal right of others to use water bodies;

- 2) the second group of criminally punishable violations of land rights is represented by such type of tort as “**violation of possession**” (*«Violenta perturbación de la posesión»*), recognized as criminal by parliamentarians of only some Latin American countries (Argentina, Brazil, Guatemala, Costa Rica, Nicaragua, Peru, Puerto Rico, El Salvador, Uruguay). The content of this act is the use of violence or other acts that interfere with the exercise of the right to own real estate by third parties.

Separately, we note that parliamentarians of El Salvador have allocated a special rule on the regulation of liability for illegal use or occupation of immovable property (Article 345-A).

Interestingly enough, in some states, liability for all the above mentioned acts is provided for within two or more criminal law provisions (Articles 228, 230 of the Criminal Code of Bolivia, Articles 471-472 of the Criminal Code of Venezuela, Articles 256-260 of the Criminal Code of Guatemala, Articles 378-380 of the Honduran Criminal Code Articles 200–201 of the Ecuadorian Criminal Code, Articles 261–264 of the Colombian Criminal Code, Articles 225–226 of the Costa Rican Criminal Code, Articles 288–292 of the Nicaraguan Criminal Code, Articles 228–229 of the Panama Criminal Code, Articles 202, 204 of the Peruvian Criminal Code, Articles 219– 220 of the Criminal Code of El Salvador, Articles 354-355 of the Criminal Code of Uruguay, Articles 457-462 of the Criminal Code of Chile), in others – within one prohibition (Article 181 of the Criminal Code of Argentina, Article 161 of the Criminal Code of Brazil, Article 395 of the Criminal Code of Mexico, Article 196 of the Criminal Code Puerto Rico).

At the same time, it should be noted that the extensive system of regulations contained in the countries of the first of these two groups does not actually affect the differentiation of liability for various violations of land rights, since sanctions of the relevant criminal law norms are about the same severity. In view of this, the experience of those countries (conditionally of the second group) in which the responsibility for all types of violations of land rights is unified seems more convincing.

When analyzing the experience of criminal law protection of land rights in Latin America, we

cannot neglect two distinctive features related to the legislative description of the characteristics of the objects of the studied crime category.

First, legislation of the vast majority of countries in this group considers criminal protection of land rights as an integral part of a broader object of protection – that is real estate rights. That is why the titles and dispositions of the relevant norms mostly refer to such universal concept as “real estate” and not “land” or “land parcel”¹³⁵.

Secondly, legislators of the vast majority of countries (Argentina, Bolivia, Brazil, Venezuela, Colombia, Costa Rica, Panama, Peru, El Salvador, Uruguay) integrate not only full but also partially possession of certain types of real estate property, including land parcels, into the area of criminal activity. In such way, the criminal law of the covered group of countries positively differs from the current version of Art. 197-1 of the Criminal Code of Ukraine, the literal interpretation of the provisions of which makes it impossible to prosecute for the unauthorized occupation of part, and not the entire land parcel. Such experience must be taken into account in the process of further improvement of domestic criminal law.

It is also noteworthy that, despite the existence of a fairly extensive system of rules governing liability for various land rights violations, when constructing the relevant provisions, parliamentarians of the vast majority of Latin American countries refused to refer to aggravating circumstances. Thus, within all the countries under our research, criminal law of only five states can “boast” availability of qualified staff of certain types of illegal possession of real estate, in the vast majority of which there is increased liability for illegal possession by a group of persons or leadership (organization) of such a group, or with the use of weapons (Articles 228, 230 of the Criminal Code of Bolivia, Part 2 of Article 472 of the Criminal Code of Venezuela, Part 2 and Part 3 of Article 395 of the Criminal Code of Mexico, Article 204 of the Criminal Code of Peru, Part 2 of Article 220 of the Criminal Code of El Salvador). We believe that, given the need to ensure the implementation of the principle of differentiation of criminal liability, such experience, unlike the previously mentioned, should not be copied by the Ukrainian legislator.

2. **Land crimes of “environmental” orientation.** Having analyzed criminal legislation of Latin America, it is safe to say that, when compared to combating violations of land rights, the issue of criminal law protection of the ecological function of land in it receives much less attention. First of all, this should be explained by the fact that the efforts of public authorities in environmental protection in Latin America have generally faced expansionist policies of large industries, whose representatives, in particular, have argued that control over industrial and entrepreneurial activities by public authorities will lead to rising unemployment (Aboso, 2021).

An eloquent illustration of this is the fact that within criminal codes of many Latin American countries such regulations are either non-existent or limited to a single ban. This is despite the fact that, as in some other countries (Hamidah, Hamzani, & Mariyono, 2021), exploitation of natural resources by corporations in Latin American countries has already led to unprecedented negative consequences for the environment.

It is also noteworthy that, in contrast to the rather unified regulations on the criminal law protection of land rights, the norms on liability for land and environmental crimes sometimes have no common features whatsoever.

Thus, in some countries, liability for land pollution is provided under the universal provision on pollution of not only land but also water resources and air (Article 347 of the Criminal Code of Guatemala), in some cases including subsoil (Article 334-A of the Criminal Code of Colombia), as well as flora, fauna and ecosystem in general (Articles 414–416 of the Criminal Code of Mexico).

In turn, Art. 311 of the Criminal Code of Peru describes acts similar in content to those provided for in Part 1 of Art. 254 of the Criminal Code of Ukraine, namely: “unauthorized use of agricultural land for urban development, extraction and processing of building materials”. As one might see, in contrast to Part 1 of Art. 254 of the Criminal Code of Ukraine, this rule is not about any wasteful use of land, but only about one of the types of such actions – improper use of *agricultural land* for a clearly defined purpose

¹³⁵ Articles 261 and 263 of the Colombian Criminal Code serve as exceptions here.

– urban development, extraction and processing of building materials.

If the content of the act provided for in Part 1 of Art. 254 of the Criminal Code of Ukraine has many common features with the features of the tort mentioned in Art. 311 of the Criminal Code of Peru, the consequences, as similar to those referred to in Part 1 of Art. 254 of the Criminal Code of Ukraine, serve as crime constituting elements provided by Art. 252 of the Criminal Code of Ecuador and Part 2 of Art. 403 of the Criminal Code of Panama, which establish liability for the burning of forest or vegetation, which has caused *loss of fertility, soil erosion or drought*. We should also note that Art. 252 of the Criminal Code of Ecuador provides for liability for such illegal use of land, which leads not only to the destruction of the fertile soil layer and erosion, mentioned in Part 1 of Art. 254 of the Criminal Code of Ukraine, but also to the desertification; at the same time, the level of liability is increased in the case when relevant acts have been committed for selfish purposes or led to serious and irreversible consequences. The maximum punishment provided by the sanction of the corresponding criminal law norm (5 years of imprisonment) is imposed for such acts.

In contrast, in some other Latin American countries, liability for socially dangerous encroachments on the environment is not regulated by criminal codes, but by separate laws that deal exclusively with liability for environmental crimes.

Thus, in Brazil there is a special law on environmental crime (“*Lei de Crimes Ambientais (1998)*”), Art. 54 of which provides for imprisonment for a period of 1 to 4 years and a fine for pollution of any kind that has caused harm to human health, death of animals or significant destruction of flora. At the same time, Art. 53 contains a special reservation, according to which the punishment provided for in Art. 54 should be increased by 1/6 to 1/3, if soil erosion results from contamination (Lei 9605/98, 1998). At the same time, some scholars believe that specific provisions of Brazilian law are more effective than those, for example, contained in the Criminal Code of Colombia (Spadotto, Barreiro, & De Medeiros, 2017), which are currently not considered effective (Burgos Claros, 2018; Sánchez Zapata, 2016).

Venezuela also has a special law on crimes against the environment (“*Ley Penal Del Ambiente*”). Articles 99 and 102 of this document provide for liability for contamination of soil or

subsoil with harmful substances and waste caused by violation of special rules (Gaceta Oficial N° 39.913, 2012). However, Art. 63 is entirely devoted to such land offense as land degradation, which carries a penalty of 5 to 8 years imprisonment or a fine of 5,000 to 8,000 tax units.

In contrast, in Puerto Rico, liability for environmental offenses is provided within “ordinary” environmental law framework – the Puerto Rico Public Environmental Policy Act (“*Ley sobre Política Pública Ambiental*”) (Art. 16).

At the same time, taking into account peculiarities and historical traditions of the domestic legal system, the named approach (conditionally the second) to regulate liability for relevant offenses in the norms of not a separately codified criminal act, but special environmental legislation, obviously should not be implemented into domestic legal system.

Conclusion

Based on the results of a comparative study of criminal law protection of land resources in Ukraine and Latin American countries (legislation of seventeen countries), we can conclude that:

1. Criminal law of Latin American countries contains an extensive system of rules that provide for liability for the following violations of land rights: occupation or seizure of real estate, change of boundary marks, illegal change of course (appropriation) of water (in all countries) and violation of possession (Criminal Codes of Argentina, Brazil, Guatemala, Costa Rica, Nicaragua, Peru, Puerto Rico, El Salvador, Uruguay). However, given the lack of differentiation of liability for most of these actions, the need for an appropriate system is unlikely to exist, as relevant goals could be achieved through the single provision.
2. The Latin American mechanism of criminal law protection of land rights is characterized by two features related to the legislative description of the characteristics of the objects of the researched category of crimes:
 - first, within legislation of the vast majority of countries, criminal protection of land rights is considered an integral part of a broader object of protection – real estate rights. However, given the special status and

- value of land in Ukraine, such borrowing experience is not worth the effort;
- secondly, legislators of the vast majority of countries (Argentina, Brazil, Venezuela, Colombia, Costa Rica, Panama, Peru, El Salvador, Uruguay) include not just full but also partial illegal possession of certain real estate, in particular, land plots within the list of criminal offenses. In such way, criminal law of the covered group of countries differs in a favorable way from the current version of Art. 197-1 of the Criminal Code of Ukraine, the literal interpretation of the provisions of which makes it impossible to prosecute for the unauthorized occupation of partial and not entire land parcel. Therefore, we are convinced that such experience must be taken into account in the process of further improvement of domestic criminal law.

At the same time, we consider it inexpedient to borrow the experience of those Latin American countries, whose parliamentarians, despite having a fairly extensive system of rules governing liability for various violations of land rights, refused to use aggravating circumstances, which does not allow to ensure the implementation of the principle of criminal liability differentiation.

3. Compared to combating violations of land rights, criminal law of Latin American countries pays much less attention to the issues of criminal law protection of the land's ecological function.

It should be noted that while in some countries criminal liability for land crimes of "environmental" substance is provided directly in the articles of criminal codes (Guatemala, Ecuador, Mexico, Panama, Peru), in others (Brazil, Venezuela, Puerto Rico) it is provided in the norms of special laws on the regulation of liability for environmental crimes. Taking into account peculiarities of the domestic legal system, we support the first of these methods of regulating criminal liability for land offenses of "environmental" spectrum.

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