Criminal Legal Measures of Fight against Crime in Russian and German Criminal Law

Sargis Artemovich Terzikyan[1] and Natalya Yuryevna Prikhodko[2][a]
[1]*Research center "Russian law", Law Faculty, University of Potsdam*
[2]*Department of Management Training of Law Enforcement Agencies, Branch of the Academy of Management of the Ministry of Internal Affairs of the Russian Federation, Bolshevo*

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Abstract: This paper presents the systems of Russian and German criminal-legal counteraction, provided for by national legislation and international law. The objective set for the researchers: to consider the theoretical aspects of combating crimes in Russia and Germany, analyzing the obtained material, generalizing, joining and synthesizing the results of study separate elements, the authors tried to formulate similar and distinctive features of two legal systems. The author's paper is interesting for science as a whole and for a private researcher because he offers for the first time to compare the criminal legislation of the Federal Republic of Germany and Russia within the framework of combating crime.

1 INTRODUCTION

Before presenting specific measures of criminal law in the fight against crime, it is necessary to understand the criminal legislation system in Germany and Russia as a whole aimed at combating crime in Russian and German criminal law, which is the study goal and is being developed for the first time. In this part of the cooperative paper, the system of German and Russian criminal law will be briefly presented. The study object is the rules of Russian and German international legislation. Along with this, the sanction system and its features in German criminal law in the context of combating crime will be highlighted, two types of German criminal law – criminal and administrative, and some categories and terminology of the general part of Russian criminal law, such as the concept of preventing crimes or legal torts, suppression as a counteraction element, some elements and content of criminal law, legislation and criminal policy, will be considered.

2 MATERIALS AND METHODS

The study used the sources of scientific developments and materials of practical activities of law enforcement agencies in Russia and Germany; the study used a number of methods, reflecting the comprehensive solution of the problems set in the article: analysis and synthesis, comparison method, method of data processing and interpretation.

3 RESULTS AND DISCUSSION

Studies in the field of legal knowledge, including criminal law, require a response from the scientific world in the narration of theoretical aspects and proposals in solving practical problems facing society in a particular historical period of its development. The study of crime in its various aspects, including with the help of transition to higher levels of knowledge to a systemic study of measures to counter crime, including in the conditions of functioning of a modern legal state, is of primary importance.

Let us consider an overview of the German criminal law system: German criminal law widely consists of criminal law and the law of administrative offenses. Each of these branches of law sets forth its own components of act and the conditions for punishment assignment. The main characteristic features are the legal consequences and opportunities for the prosecution of wrongful acts (Hellmann,

[a] https://orcid.org/0000-0003-3037-9624

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2021). An important feature of German criminal law is that criminal law rules are found not only in the Criminal Code of the Federal Republic of Germany, but also in legislative acts regulating other legal branches. In this connection, the components of a criminal act of tax evasion are established in the Tax Code of the Federal Republic of Germany (§ 370 of the Tax Code). Provisions of a criminal law nature that regulate civil or administrative legal relations can also be found in other regulatory legal acts. Thus, the provisions of the Criminal Code define the main area of substantive criminal law, while the rules of the criminal nature of other laws constitute an additional part of the criminal law. Thus, in German criminal law it is conventional to distinguish between "basic" and "additional" criminal law (Schönke, 2019). It should be pointed out that most of the "traditional" criminal offenses are contained in the Criminal Code, for example, murder, theft, fraud, robbery, extortion, infliction of bodily harm. Additional criminal law regulates special areas of the necessary criminal law impact, for example, tort related to psychotropic drugs or business and financial activities (JuS, 2019, NZWiSt, 2021). Although the term "additional criminal law" is used, this does not mean that this part of the criminal law is in some way or other secondary to the Criminal Code. This designation is used to categorize a formal-meaningful nature. Additional criminal law often regulates misdemeanors and crimes that are also of great importance in practical work (Kindhäuser, 2017). Despite the fact that this part of criminal law is influenced by social changes, its main and most important features are that it includes a list of rules that are taken for granted in legal systems that guarantee subjective rights. The presence of necessary connection with protection of legal benefits in these cases practically does not cause problems (Esser, 2020). The task of additional criminal law – to put the previous special-branch legal rules under criminal law protection. The controversial form of blanket rules is a frequently used technique for resolving such legal relations.

Along with international commitments incriminal law (due to ratification, for example, of statute of the International Criminal Court or the International Convention for the Protection of Human Rights and Fundamental Freedoms), the law of the European Union (EU) has a great influence on German criminal law. In accordance with normal legislative procedure, the European Parliament and the Council may, through the adoption of decrees and directives, establish minimum rules for the establishment of crimes and punishments in areas of particularly serious crime that are of a cross-boundary nature, as well as because of the nature or consequences of criminal acts, or because of a special need to require joint action against them (Art. 83, sub-paragraph 1, of the Treaty on the Functioning of the European Union). Terrorism, human trafficking, sexual abuse of women and children, illegal drug and arms trade, money laundering, corruption, organized crime and computer crime are identified as such spheres. With the entry into force of the Lisbon Treaty (Vertrag von Lissabon, 2009), the EU gained additional opportunities to influence the criminal legislation of the member states. Thus, the EU strives to ensure a high security level through the adoption of measures to prevent and combat crime, as well as to combat racism and xenophobia, coordination and cooperation of police departments and bodies administering criminal justice, including through the mutual recognition of criminal decisions and, if necessary, approximation of criminal law (Art. 61, sub-paragraph 3 of the Lisbon Treaty). If the approximation of the criminal law of the Member States is particularly necessary for the effective implementation of the Union's policy in the area in which harmonization measures have been taken, appropriate directives establishing minimum rules for the determination of criminal acts and punishments in the relevant area may be adopted (Art. 69b, sub-paragraph 2 Lisbon Treaty). Thus, for example, Directives were issued to combat money laundering, to prevent and combat trafficking in persons and to provide protection to victims, as well as on the implementation of preliminary investigation in criminal cases (Richtlinie 2018/1673/EU, Richtlinie 2011/36/EU, Richtlinie 2014/41/EU). In addition, according to Art. 83, sub-paragraph 3 of the Treaty on the Functioning of the European Union in the Development of Crime, the Council may, with the consent of the European Parliament, unanimously determine other areas of crime that meet the criteria of this sub-paragraph.

The German Administrative Offenses Act establishes an administrative monetary penalty as a means of influence.

The Criminal Code provides for punishment in the form of a monetary penalty and imprisonment as an ultima ratio of criminal pressure. In this sense, it should be noted that the sanctions system of the Criminal Code of the Federal Republic of Germany distinguishes between punishments (§ 38 et seq. paragraphs) on the one hand, and remedial and security measures (§ 61 et seq. paragraphs) on the other hand. Therefore, when talking about the sanctions system in Germany, the concept of legal

effect dualism is used (Münchener Kommentar zum, 2020).

The theoretical concept establishes a categorical division of punishments: 1) justified by the law breaker's fault and being a limited state mechanism for inflicting harm in the sense of a repressive response to the committed injustice, or 2) independent of the perpetrator's guilt, measures to correct and improve security, which are justified by the (expected) future threat posed by the performer and are a proportionate limited response of the state in order to provide preventive protection (see. BVerfG 4.5.2011 – 2 BvR 2365/09) (Müller-Dietz, 1979). According to the law concept, remedial and security measures (§ 61 et seq. paragraphs of this chapter of the Criminal Code) are the so-called second way of the system of criminal sanctions and serve to prevent future danger posed by such actual doers whose predicted danger potential as a result of imposing a custodial sanction or a monetary penalty in the context of preventive protection of legal benefits cannot be reflected in whole or sufficiently (Münchener Kommentar zum, 2020).

Remedial and safety measures include, for example, psychiatric detention, supervision of behavior, prohibition to engage in certain activities, etc. (see § 63 et seq. paragraphs of this chapter of the Criminal Code).

German criminal law also distinguishes between basic and additional types of punishment (BVerfGE 128, 326 (376)) (Jung, 2002). However, as an additional punishment in the Criminal Code, only the prohibition of operating the vehicle (§ 61 of the Criminal Code) applies, since the property punishment was found by the Federal Constitutional Court (FCC) of the Federal Republic of Germany to be inconsistent with the Basic Law, and, therefore, became invalid (see BVerfG – BvR 794/95). Along with this, a law came into force in 2017 reforming the sphere of criminal forfeiture of property and objects obtained as a result of a crime or intended to commit wrongful acts (Bundesgesetzblatt (BGBl.) I 2017, 872). This institution enables law enforcement authorities, among other things, to confiscate the property of unexplained wealth (§ 76a, sub-paragraph 4 of the Criminal Code). As a result of these changes, the need in the judicial establishment of the committed wrongful act and the performer's guilt absent. For the purpose of property confiscation, an initial suspicion of committing one of the criminal acts defined in § 76a (sub-paragraph 4, sentence 3) of the Criminal Code and the conviction of the court of a gross discrepancy between object value and legal income of the affected party is sufficient (§ 437 of the Criminal Procedure Code) (Terzikyan, 2019, Köllner/Mück, 2017). Thus, the legislator tried to ensure the principle operation that crimes should not compensate for themselves (Reitemeier, 2017). The FCC describes the goal of the criminal-legal confiscation of property as follows: “If law-breakers could keep property benefits acquired by criminal means for a long time, this could harm the population confidence in fairness and inviolability of law and order” (BVerfG Beschl. v. 14.1.2004 – 2 BvR 564/95 – BVerfGE 110, 1-33, Rn. 103). It should be pointed out that the need to make these changes is due to the fight against organized crime and was a requirement of the European Union Directive dated April 03, 2014 (2014/42/EU) “On securing and confiscating the objects of the act and what was acquired by criminal ways” (Heim, 2017). In German criminal law, provisions related to confiscation are defined as coercive actions of their own nature (§ 11, item 8 of the Criminal Code) (Schönke, 2019, Kindhäuser, 2017). In this context, in the literature and in judicial practice, discussions about the essence of these measures, which have a repressive nature similar to punishment, have been and are being conducted (Bittmann, 2016, Höft).

The logic of scientific research development in Russia and the practical tasks put forward in carrying out daily activities on criminal counteraction to crime as a whole, set the goals of a more detailed and multilateral study of its individual measures in the mechanism of criminal fight against crime, the search for best means of its prevention measures. It is necessary to point out that research or scientific thought requires its confirmation by practical data, including at the international level (Kucher O., 2015). All conducted research is suggestively aimed at improving legislation, thereby increasing the effectiveness of combating crime. In this case, we cannot but agree with the scientists' opinion about digitalization of the law enforcement environment, which can lead to streamlining and simplifying the interaction of “citizen-society”, “citizen-state” (Nikitin Ye., 2020, Tagirov Z.I., 2018). Understanding the mechanism of counteraction in the criminal sphere includes all the teachings, institutions and components of criminal law as a scientific research. Such as, the structure of provision for law, objective and subjective signs of a crime, crime as a legal fact and much more.

It is also required to consider cumulative, interdisciplinary, generalizing and integrative studies, since it is they that allow the most general and complete consideration of all of the above institutions and categories in the process of interaction, contact,

interchangeability. However, all the shortcomings are visible here: erroneousness and misleadings of scientific views, violations of law enforcement, rules conflict, failure to function in the system of criminalization or decriminalization, loss of a methodological understanding of combating crime.

In the Russian scientific literature, an integrated approach is used in the research of any field of study, the maximum number of published works is covered. This is of great importance for moving forward in the field of interaction in the law enforcement environment, it allows to rationally use the obtained information, to tried out it, to justify the rationality of using one or another of its components.

For example, Lopashenko N.A. defines the criminal law impact – this influence is generally positive, since it supposes a focus on the prevention of harm – crime It includes various methods, measures, including the most severe, that the state and society can afford (Lopashenko N.A., 2016).

The criminal measures of counteraction, which are considered by the authors, can be attributed to the main methods of influencing criminal behavior, as methods of restraining persons from crimes. The study and development of criminal countermeasures should be continuous, associated with the development of statehood, society, technology. This correlates with the principles of criminal legislation, the severity of criminal law, unlawful behavior of a person (individual person), the severity of crime. Criminal law guards, protects and preserves what is not questioned.

The system of general measures of criminal counteraction to crime, as fundamental elements that accumulate in themselves the concepts of the criminal and the punishable and everything connected with them, includes:

- criminal law;
- criminal legislation;
- criminal policy.

First, criminal law includes the protection of public relations in society and the state from crimes; carries out the function of crime prevention, including the element of prevention of repeated administrative violations. Protects the individual, society and the state, property and state structure. Criminal law formulates not only repressive methods of managing society, but also offers conditions and grounds for attenuating, liberating, eliminating responsibility and punishment. It is known that *the criminal law subject* is made up of three main types of social relations, the content of which is very specific and ambiguous.

Secondly, the proposed system of criminal law counteraction is based on a complicated mechanism of the impact of criminal law rules (legislation) on crime, this effect is partially intermediated, and has an exceptional preventive effect, but most of it acts directly and proximately. The system of general measures can be structured in the following scheme: from general to specific: criminal law policy → criminal law → criminal legislation. However, it should be said that the first two elements can change, depending on the breadth of objective properties.

The term "opposition" is defined by legislative regulations as an action that prevents another action or an action that serves as an obstacle to the manifestation, development of another action, opposition.

The concept under consideration is directly used in some regulatory legal acts of federal significance, namely:

1) The Federal Law dated December 25, 2008 No. 273-FZ "On Combating Corruption" in Art. 1 gives the concept of combating corruption as an activity ...a) to prevent ..., identify ..., eliminate the causes of crime, summarizing these terms in the concept of "prevention"; b) on detection, prevention, suppression, disclosure and investigation, considering everything as a "fight"; c) to minimize..., liquidate.

2) The Federal Law dated August 07, 2001 No. 115-FZ "On Counteracting the Legalization (Laundering) of Criminally Obtained Incomes and the Financing of Terrorism" in Art. 4 refers to the measures aimed at countering the legalization of income... the following: various types of control; prohibition on informing clients..., refusal to fulfill the order; other measures, referring to other regulatory documents.

3) The Federal Law dated March 06, 2006 No. 35-FZ "On Countering Terrorism" uses the following concept in Art. 3 countering terrorism as: a) prevention ..., identification, ...elimination of causes and conditions...; b) detection, prevention, suppression, disclosure and investigation of crimes; c) minimization, elimination of crime consequences.

However, as can be noted, opposition at the legislative level is defined as warning, suppression, fight, and in some cases, disclosure and investigation.

Art. 6 "Main Directions of Crime Prevention" (the Federal Law dated June 23, 2016 No. 182-FZ "On the Fundamentals of the Crime Prevention System in the Russian Federation"). 16 positions are indicated as the main directions of activity. All these 16 positions are grouped into four blocks: directions that are implemented through "preventions", directions that are implemented through "provision", directions that are implemented through "counteraction", and others.

The term “warning” is used when it comes to delinquency (item 1.2 of Art. 6), neglect, homelessness, delinquency and antisocial actions of minors, as well as when referring to natural and man-made emergencies.

The term “provision” is used in relation to such areas of activity as ensuring public safety, including traffic safety and transport security, ensuring the protection and protection of private, state, municipal and other forms of ownership, ensuring economic security, ensuring environmental safety, protection environment, fire safety.

The term “counteraction” is used in relation to illegal migration, terrorism and extremist activities, illegal drug trafficking, corruption. Four positions of Art. 6 of the Federal Law dated June 23, 2016 No. 182-FZ - the protection of the individual, society and the state, the development of a preventive accounting system, the protection of public order, an increase in the level of legal literacy and the development of the legal consciousness of citizens - reveal the term “prevention” more broadly than the concepts “warning”, “provision”, “counteraction”.

The criminal legislation of Russia, reflected in the Criminal Code of the Russian Federation, is thus a systematized and codified criminal legislation that includes the entire set of mandatory and comprehensive criminal law norms in force in Russia. The Criminal Code of the Russian Federation is the only source of criminal law, all other regulatory legal acts of the state, decisions of the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, other judicial bodies, orders of the Prosecutor General’s Office of the Russian Federation, other law enforcement and law enforcement agencies, constituent entities of the Russian Federation are only orienting, auxiliary, and explanatory and cannot be a source of criminal legislation.

Thirdly, criminal policy – the state activity on civil society and state safety management against criminal encroachments, development and carrying out a common line in this, strategy and tactics.

Criminal policy is an integral part of the state internal policy and differs from its other spheres in its object, objectives, methods and measures. Its content depends on socio-political and socio-economic conditions. With a change in these conditions, the content of criminal policy as a part of domestic policy also changes.

Scientific analysis, scientific sensemaking of this activity, determination of its goals and objectives, content and forms, directions, its measures and methods, the formation of provisions related to the management of criminal policy implementation, constitute the theoretical basis for its formation and development. That is, the development of problems of the state's activities in the management of fight against crime, its implementation is the main direction of the criminal policy theory.

The subject of any branch of knowledge determines the limits in which scientific understanding of one or another aspect of reality takes place. The criminal policy subject is the main general laws of the state's activities to ensure the security of society, the state from criminal encroachments. The criminal policy purpose as a state strategic line is the safety of citizens, society and the state from criminal encroachments; the subjects of criminal policy are state and public structures that participate in it.

State policy in the field of fight against crime – an activity that uses various economic, political, legal, religious, cultural, educational, etc. measures and methods. Criminal policy – as one of its elements, an integral part of legal policy. This is an activity to ensure security from criminal encroachments, based on the use of criminal law, procedural, criminal executive and other means used in this.

It is obvious that criminal policy is closely related to legal policy and is a part of it. Alongside with that, criminal policy is a relatively independent link, which is determined by its goals, objectives, principles, and measures.

4 CONCLUSIONS

The authors found in the paper that the European Union can issue directives for approximation of the criminal legislation of the Member States, respectively, and Germany, if this is necessary for the effective implementation of the Union policy in the area in which harmonization measures have been taken, including establishing minimum rules for definitions of criminal offenses and punishments in the relevant field. The proposed system of criminal legal counteraction in Russian legislation is based on a complicated mechanism of the criminal law impact on crime, this effect is partially intermediated, and has an exceptional preventive effect, but most of it acts directly and proximately. These conclusions are not conclusive and give a handle for continuing research in this area, for discussion and rethinking of erroneous assumptions and a search for a way out of scientific misleadings.

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REFERENCES

Alekseyevskaya, Ye., 2020. Modern development of the Russian judicial system. *In Russian law journal*. 8(2). pp. 120-143.

Bittmann, 2016. From Annex to Pillar: Asset Recovery as 3rd Trace of Criminal Law, NZWiSt. 131.

Esser, Tsambikakis, Pandemiestrafrecht, 2020. Auflage. 1.

Exner, 2019. Introduction to narcotics criminal law. p. 211.

Heim, 2017. Law on the Criminal Asset Recovery NJW Special. 248.

Hellmann, 2021. Introduction to Criminal Law of the Federal Republic of Germany, in scientific and practical commentary and text translation of the law "Criminal Code of the Federal Republic of Germany".

Höft, 2021. A new and unconstitutional instrument in the German law on asset skimming, https://www.hrr-strafrecht.de.

Jung, 2002. Was ist Strafe?

Kindhäuser, Neumann, Paeffgen, Hassemer, Saliger, 2017. Criminal Code.

Klose, Insolvency, 2021. Criminal Law, Corporate Fine and Current Developments in Material Commercial Criminal Law and Commercial Criminal Procedure Law, NZWiSt. 92.

Köllner, Mück, 2017. Reform of the criminal asset recovery, NZI. 593.

Kucher, O., Petrenko, A., 2015. International Criminal Responsibility After Katanga: Old Challenges, New Solutions. *In Russian law journal.* 3(1). pp. 143-168.

Lopashenko, N. A., 2016. Criminal law impact: concept, content, ideology, historical and comparative legal experience. Criminal impact and its role in crime prevention (I Saratov criminal law readings): collection of articles on the materials of the I All-Russian Scientific-practical conference. pp. 9-20.

Müller-Dietz, 2019. Basic Questions of the Sanction System.

Munich Commentary on the Criminal Code, preliminary remarks on Section 38, 2020.

Nikitin, Ye., Marius, M. S., 2020. Unified digital law enforcement environment – Necessity and prospects for creation in the "BRICS Countries". *In BRICS law journal*. 7(2). pp. 66-93.

Reitemeier, 2017. The reform of the criminal asset recovery, ZJJ. 354.

Richtlinie, 2011. EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

Richtlinie, 2014. EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters.

Richtlinie, 2018. Directive 2018. EU of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law.

Schönke, Schröder, Hecker, Eser, Schuster, 2019. Criminal Code, preliminary remarks before Section 1 and Section 73a.

Tagirov, Z. I., 2018. Digital operational environment, digital name of a person and network (digital) law enforcement in the domestic model of digital economy. *In Security Issues*. 4. pp. 28-51.

Terzikyan, 2019. Criminal law seizure of property. Development in German law. *In Union of Criminalists and Criminologists.* 4. p. 111.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2009, https://www.auswaertigesamt.de.

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