

Classification of Criminal Offenses according to the Criminal and Criminal Procedure Legislation of Germany, Austria, and Switzerland

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The article is devoted to the questions connected with classification of criminal actions in criminal codes of three states of Romano-Germanic legal family – Germany, Austria and Switzerland. The article notes that the classification of the criminal act originated in the French criminal law and has been adopted in most of the countries belonging to the continental legal family. The Criminal Code of 1810 (Code Penal Imperial) secured a three-member structure of the criminal act: crime – *délit* – contravention. The German Criminal Code (RGSt) of 1871 divided all criminal acts, depending on their severity into three groups: crime (*Verbrechen*), offense (*Vergehen*) and violation (*Übertretung*). The two-member stricter of the criminal act is adopted in the current CC of Germany, Switzerland and Austria: crime and offense. The author analyzes the criminal legislation and the criminal and procedural legislation of the aforementioned countries with a particular focus on value of division of criminal actions on crimes and offenses for criminal and criminal procedural law of the respective countries.

Keywords: Germany, Austria, Switzerland, criminal law, criminal code, criminal procedural law, code of criminal procedure, classification of criminal actions, crime, offense.

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The Problems related to the Classification of Criminal Actions

The problems related to the classification of criminal actions have always been of a great interest to the legislator and law enforcement officials of any modern state. This issue has acquired a special relevance to our country as a result of the

changes made in Article 15 of the Russian Federation Criminal Code of the Federal Law of 07.12.2011. Hence § 6 of this norm was negatively assessed by the criminal and law doctrine representatives because it allowed the court under certain circumstances to change the crime category to a less grievous one.

In this regard, it is very opportune to study the experience of foreign countries, namely, Germany, Austria and Switzerland on the issue of classification of criminal actions.

Criminal law of Germany, Austria and Switzerland besides the Criminal Codes (CC) also contains other laws referred to the so-called supplementary criminal law (*Nebenstrafrecht*).

The sources of the **German** criminal law are the Fundamental law (Constitution) of the Federal Republic of Germany, 1949, the Criminal Code (CC) of 15.05.1871¹ in force as of 13.11.1998, federal criminal laws, criminal laws of land, foreign criminal law. The criminal law of the Federal Republic of Germany is not fully codified: alongside with the Criminal Code, there are other criminal law standards contained in various laws relating to the so-called supplementary criminal law (*Nebenstrafrecht*).

It is well known, that the classification of criminal actions for the first time has been used in the French criminal law and accepted by the most of the countries belonging to the continental legal system. The Criminal Code of 1810 (Code Penal Imperial) recognized tripartite structure of the criminal action: crime – *délit* – contravention. It was reflected in the German Criminal Code (RGSt) of 1871, dividing all criminal actions into three groups according to their gravity: crime (*Verbrechen*), offense (*Vergehen*) and violation (*Übertretung*). The tripartite structure of the criminal action and the type of imposed punishment for committing certain criminal action are determined, as follows: for a crime, one was sentenced to capital punishment or convict prison; for offense – to imprisonment, and for violations one usually was detained for a short time period or fined.

While carrying out the reform of the criminal law in Germany in 1974–1975, the tripartite structure of criminal action was replaced by the binomial one: crime (*Verbrechen*) and offense (*Vergehen*), still preserved in the criminal law of Germany. Criminal violations (*Übertretungen*) were eliminated, but some of them became public order offenses (*Ordnungswidrigkeiten*).² Since then in Germany, instead of convict prison and jail, a single and common form of punishment was introduced – deprivation of liberty, with some norms concerning committing crimes together with deprivation of liberty, providing the fine as a type of imposed punishment.

The binomial classification of the criminal action in the CC of Germany, Switzerland and Austria is stipulated by law: crime and offense.

Chapter two of the first section of the General Conditions of the Criminal Code of Germany is called “Explanation of terms”. § 12 of this chapter contains purely

¹ RGBl. S. 127.

² If the punishment for committed crime is prescribed in form of fine (*Geldbusse*), it is a so-called violation. For example, public order offense (*Ordnungswidrigkeit*) is covered by Riot Act of 24.05.1968, in force as of 19.02.1987. The field of its application is determined in § 1: “The public order offense is illegal and reprehensible (blameworthy) action, which provides the structure of the action, which determines the penalty in form of fine (*Geldbusse*)”. The current law consists of several parts: 1 – “General instructions”, 2 – “Court proceedings on imposing a fine (*Geldbusse*)”, 3 – “Specific public order offense.” In the latter a list of public order violations is determined and penalties for them are defined.

formal concept of crime and offense. There are two types of criminal action: crime and offense. This division is based on the minimum punishment.

Thus, the crime is a wrongful act, and for that two consequences are set: the minimum punishment in the form of deprivation of liberty for the period of not less than one year, and more grievous punishment; and the offense is a wrongful act, for which the minimum punishment is set in the form of deprivation of liberty for a shorter time period or a fine (*Geldstrafe*). However, aggravating or mitigating circumstances, provided for by the stipulations of the General Conditions, or prescribed for especially grave or less grave cases, are irrelevant for this classification.³

While relating a specific action to crime or offense, the defining factor does not consist of the imposed type and amount of penalty in this case, but in the clearly worded criminal law sanction.⁴ Such binomial classification of the criminal action is not only of a practical nature; – first and foremost, it allows to estimate the degree of misstatement (*Unrecht*) and the guilt of a person (*Schuld*).

The main features of a criminal act in the German, Austrian and Swiss criminal law are criminal wrongfulness, guilt, corresponding to the structure of action and penalty.

The main source of criminal law of **Austria** is the Criminal Code. It entered into force on January 1, 1975. The official title of this document is Federal Law of January 23, 1974 on the actions exposed to punishment, imposed by the court (Criminal Code – CC).⁵ The last amendment to the Austrian Criminal Code was passed in 2000.⁶ The sources of the Austrian Criminal Law are other laws containing criminal law standards (such as Federal Juvenile Justice Act of October 20, 1988,⁷ Federal Law on narcotic drugs, psychotropic substances and precursors of 1997,⁸ Federal Law on fighting pornography of March 31, 1950⁹ and many others.)

This system of criminal law sources is typical, as already stated, for a number of other foreign countries involved. Hence, the sources of criminal law of **Switzerland** are Constitution of Switzerland of 1874, the Criminal Code of 1937, provisions to the Swiss Criminal Code of November 13, 1973, December 6, 1982 December 16, 1985, criminal laws of the Federation (Federal Law on Criminal Justice of 1934, Military Penal Code of June 13, 1927,¹⁰ Juvenile Justice Act and others), cantonal criminal law, foreign criminal law.

Swiss Criminal Code (CC) was adopted by the Federal Assembly of the Swiss Union on December 21, 1937 and entered into force on January 1, 1942. Afterwards, numerous changes have been made therein, and currently it constitutes a modern legal document.

The Criminal Code of Austria and the Criminal Code of Switzerland, as well as the Criminal Code of the Federal Republic of Germany contain formal definition of the criminal act.

³ Strafgesetzbuch. 50. Auflage. Muenchen, 2014.

⁴ Wessels, J., Beulke, W. Strafrecht. Allgemeiner Teil. Die Straftat und ihr Aufbau. Heidelberg, 2008.

⁵ BGBl. 1974/60.

⁶ BGBl. 2000 I/34.

⁷ BGBl. 1988/599 idFBGBl. 1994 /522.

⁸ BGBl. 1997 I/112 idFBGBl. 1998 I/30.

⁹ BGBl. 1952 /81 idFBGBl. 1988I/599.

¹⁰ SR 321.0.

The Criminal Code of Austria accepted binominal categorisation of the criminal acts: crime and offense.¹¹ It is based on one criterion – amount of penalty. On the basis of § 17 of the Criminal Code of Austria, the crimes are considered to be intended criminal acts that are punished by life imprisonment or an imprisonment exceeding 3 years. All other criminal acts, including those committed through negligence, are classified as offenses. The greater part of criminal acts provided for by the Criminal Code of Austria is classified as offenses. The concept “breach,” that is often encountered in the literature and judicial practice, is not a criminal one, i.e. it refers to an administrative offense.¹²

Binominal categorisation of the criminal act is also enshrined in the article 10 of the Criminal Code of Switzerland. The differentiation is achieved, based on the amount of penalty for the committed act. The crime is considered to be a criminal act that is punishable with more than 3 years of imprisonment, the offense – a criminal act that is punishable with imprisonment not exceeding 3 years of or monetary fine.

What is the importance of categorising the criminal acts as crime and offense in the criminal codes of the concerned countries?

According to the researchers of the criminal law in Germany, Austria and Switzerland, such division has a very limited criminal importance. For example, such a division is important for attempt penalty (§ 23, Art. 1 of the Criminal Code of Germany, § 15 of the Criminal Code of Austria).

This binominal construction of the criminal act has a particular significance pertaining to formulation of crime threat legislation (see, for example, § 241 of the Criminal Code of Germany), since it is connected with the threat to commit particular crime.¹³

Additionally, as opposed to solicitation to commission of crime, the solicitation to offense will not be criminally punishable (§ 30 of the Criminal Code of Germany, Article 24 of the Criminal Code of Switzerland).

Binominal construction of the criminal act has further importance during assignment of such additional consequences of punishment as deprivation of right to hold specific posts, to exercise powers, gained as a consequence of public election, to publicly elect and vote, the right to be elected and the right to vote (§ 45 of Germany).¹⁴

¹¹ As it was marked above, until 1975, tripartite characteristic of the act: crime, offense and breach was legislatively enshrined in the criminal law of Austria, See, for example, *Kleifel, O. Zum Begriff des “Vergehens” und der “Geldstrafe” nach dem StGB. AnwBl, 1975, p. 213; Zipf, H. Allgemeine Grundsätze des Strafgesetzbuches und die Rechtsprechung, Gutachten 7. OeJT, 1979.*

¹² Detailed in: *Forreger, E., Fabrizy, E. E. Strafgesetzbuch. Kurzkommentar. Wien, 2002, S. 91–92.*

¹³ § 241. Threat of crime

(1) Who threatens the person of committing a crime, directed against him or his close relative is punished by imprisonment for a period of one year or monetary fine.

(2) Also is punished the person that deliberately misleads the person about that is expected a crime against him or his close relative.

¹⁴ (1) A person that, as a result of committing a crime, is imprisoned for a period of less than one year, forfeits a right for a period of 5 years to occupy public office or to use rights obtained as a result of public elections.

(2) The court can deprive the convicted for a period from two till five years stated in the Art. 1 of rights, as far as this is provided by law.

(3) Together with the deprivation of right to occupy public office the convicted simultaneously loses the corresponding legal status and the sequential rights.

What is the procedural importance of the classification of criminal acts in the Criminal Code of Germany, Austria and Switzerland?

In order to achieve the tasks set before the criminal procedure, the legislators of Germany, Austria and Switzerland¹⁵ in the norms of criminal procedure code constructed **three main procedural models of criminal acts' classification**.

The first model stipulates that the criminal legal classification of criminal acts is displayed in the corresponding rules of the code of criminal procedure. For example, § 20 of the criminal procedure code of Austria¹⁶ speaks about the competence of anti-corruption prosecution that is authorized to lead the procedure on particular crimes and offenses. The legislator does not propose any other new classification and fully relies on the consideration that he uses according to the Criminal Code.

The second model specifies that the legislator in the norms of criminal procedure code develops legislator's own criminal procedural classification of criminal acts that is not known to criminal law.¹⁷ Consequently, the Criminal Procedure Code of the Federal Republic of Germany classifies the criminal acts as significant (§ 81 g. p. 1¹⁸ and other), grave (§ 100 a. p. 2¹⁹ and other), especially grave (§ 100 c. p. 2²⁰ and other), and other (the legislator determines them according to the residual principle).²¹

The third model assumes that the issuers of the Criminal Procedure Code have decided not to create any new classification of criminal acts and do not introduce new terms, just state a particular criterion (usually, it is the amount of penalty), according to which the criminal procedural regulation of the corresponding institutes is differentiated. For example, the Criminal Procedure Code of Switzerland in the Art. 22–28²² groups the crimes, judging by the court that is authorized to consider these crimes. The legislator introduced a list of crimes that are subject to consideration in the federal courts (Art. 23 and 24), referring the rest of the acts to the jurisdiction of canton courts. Herewith, the characteristic criterion is the severity of the committed act.

It is necessary to state that in all three analyzed Criminal Procedure Codes (Germany, Switzerland, and Austria) no model is encountered in a pure form.

(4) Together with the deprivation of right to use rights, gained as a result of public elections, the convicted simultaneously loses the corresponding rights and position authority that he possessed, except as otherwise permitted by applicable law.

(5) The court can deprive the convicted of right to publicly elect and vote for a period from two till five years, as far as it is provided by law.

¹⁵ The Criminal Procedure Code of Germany entered into force in 1877, the Criminal Procedure Code of Austria – in 1975, the Criminal Procedure Code of Switzerland – in 2011.

¹⁶ Die österreichische Strafprozessordnung. Wien, 2012, S. 43.

¹⁷ Although the Criminal Code of the FRG handles such categories as grave accident (for example, in § 212 and other), serious accident (for example, § 221 and other), the statement of what acts are considered to be significant, grave and especially grave in the criminal procedural sense is determined only in the Criminal Procedure Code.

¹⁸ *Trefilov, A. Sistema UPK FRG. Saarbrücken, 2011, pp. 130–132 (in Russian).*

¹⁹ *Ibid.*, pp. 145–149.

²⁰ *Ibid.*, pp. 151–156.

²¹ More detailed information about the tendencies in this sphere: *Trefilov, A. The latest trends in the development of the system of the Criminal procedure code of Germany and its institutions / works of the young researchers of comparative law. M., HSE, 2011, No. 4. pp. 45–50 (in Russian).*

²² *Trefilov, A. New Code of criminal procedure of Switzerland: comment and transfer. Moscow, 2011, pp. 22–26 (in Russian).*

They are “neighbouring” in different chapters of the Criminal Procedure Code and interchange is differentiated by the legislator’s procedural institutes.

What institutes of the criminal procedure are influenced by the classification of criminal acts in the Criminal Procedure Code of Germany, Austria and Switzerland? If not to consider technical regulations, then, as it is introduced by the researchers of the criminal procedural law of the considered countries, ***the classification of criminal acts is the means of criminal procedural differentiation of the five main institutes.***

The first of these is the accusation institute. It is to be recalled, that, based on § 140 Abs. 1 No 2 of the Criminal Procedure Code of Germany, the person accused of crime has a right court-appointed lawyer, if he does not apply for appointment of the lawyer for his defense. The Criminal Code and Criminal Procedure Code of the Federal Republic of Germany single out the acts that are prosecuted only upon complaint,²³ and the other acts, the criminal prosecution of the guilty thereof is implemented *ex officio*.²⁴ Among the latest legislative innovations, it must be noted that, in accordance with the outstanding professor Patric Guidon, the new Criminal Procedure Code of the Switzerland “withdraws from the simplification of the criminal procedure, particularly from known .. institute of the procedure of the private charge. The cause of this lies in that fact that the legislator to the great extent does not free the criminal procedure, ongoing in the general order, from this institute”.²⁵ Thereby, within the given law and order, without separating the private charges into separate category, the legislator anticipates some peculiarities during its hearing in the general order.

The second institution to be discussed is jurisdiction.²⁶ Judgment in cases concerning offenses can be passed by a judge sitting alone (§ 407 of the Code of Criminal Procedure of Germany), and the criminal cases pertaining to a committed crime cannot be terminated on the basis of Art. 153, 153a, 154d of the CCP of Germany.²⁷

Art. 29²⁸ of the CCP of Australia divides the criminal acts into four groups, depending on the level of court (District Court, Land Tribunal, the Supreme Land Tribunal and the Supreme Court), which is empowered to consider the respective cases. Herewith, a criminal procedure legislator after the criminal legal one takes into account the gravity of crimes and offenses.

The third of the institutions is expressed through investigative activities. One of the newest trends in criminal process development is expressed by the fact that those investigative measures, which significantly affect rights and freedoms of a human and a citizen, may not be used in any criminal case, but only in the cases pertaining the most dangerous acts. Thus, according to Art. 100 c of the CCP of FRG,²⁹ is it allowed to hear and record of phrases spoken at home by using technical

²³ See, i.e., Schall, H. Hausbesetzungen im Lichte der Auslegung des § 123 StGB. *Neue Zeitschrift für Strafrecht*, 1983, Heft 6, S. 241–247.

²⁴ Because of position (lat.).

²⁵ Guidon, P. Die Schweizerische Strafprozessordnung. *Jusletter* 15. September 2008 (translated into Russian by Trefilov, A. A.).

²⁶ The question about investigative jurisdiction in the examined laws and orders is not actual because data of the CCP does not stipulate for division of pre-trial proceedings into inquiry and investigation in Russian sense of these procedural categories.

²⁷ See details: Beulke, W. Criminal procedural law of Germany. 6th ed., Krasnoyarsk, 2004, p. 34.

²⁸ Die österreichische Strafprozessordnung. Wien, 2012, S. 51–52.

²⁹ Trefilov, A. Sistema UPK FRG. Saarbrücken, 2011, pp. 151–156 (in Russian).

means, without informing the involved persons, if the facts confirm the suspicion that someone has commenced upon an especially serious crime.

The measures of procedural compulsion can be considered as the fourth institution. Choosing of the measures that significantly invade the sphere of individual's constitutional rights directly depends on the gravity of the crime incriminated to the accused person. For example, according to Art. 221, the CCP of Switzerland.³⁰

1. Pre-trial detention and trial detention are allowed only when the accused person is strongly suspected of having committed a crime or a criminal offense and there are serious reasons to fear that the person:
 - a. will escape to avoid involvement in criminal proceedings or expected sanction;
 - b. will influence the persons or evidence to prevent establishment of the truth; or
 - c. through the commitment of *serious crimes or criminal offenses* significantly threatens the safety of other persons, after he/she had already made a similar criminally punishable.
2. Detention is also allowed, if there are serious concerns that the person threatens to commit or complete a *felony crime*.³¹

The fifth institution is the differentiation of the proceedings according to the case, due to the fact that during the recent years its simplified forms increasingly appear in criminal proceedings of Germany, Austria and Switzerland. Among these, a certain interest is caused by the proceedings associated with the pronouncing of the order about the punishment (Art. 407–412 of the CCP of FRG³², Art. 352–356 of the CCP of Switzerland³³). In accordance with Art. 407 of the CCP of FRG, during the proceedings on the cases considered individually and during the proceedings, which belong to the competence of a jury trial, in case of a *criminal law offense*, upon written request of the prosecution, the legal consequences of the criminally punishable act can be appointed by the order about punishment. According to art. 352 of the CCP of Switzerland, if the accused person during preliminary proceedings has answered all the questions about the circumstances of the case, or otherwise made it sufficiently clear, the prosecution issues the order about punishment if it definitely decides on one of the following penalties, including a possible conditional sentence or release:

- a. an administrative fine;
- b. criminal fine not exceeding 180 daily rates;
- c. community service not exceeding 720 hours;
- d. imprisonment not exceeding 6 months.³⁴

As we can see, in both cases the preconditions of writ proceedings are directly related to the category of the committed crime.

³⁰ *Trefilov, A.* New Code of criminal procedure of Switzerland: comment and transfer. Moscow, 2011, p. 111. (in Russian).

³¹ Detailed particularities of Swiss system of measures of procedural compulsion: *Trefilov, A.* Institute measures of procedural coercion in the code of criminal procedure in Switzerland and the criminal procedure code of the Republic of Belarus / Actual problems of modern legal science. Minsk, 2011, pp. 171–173 (in Russian).

³² *Ibid.*, pp. 356–360.

³³ *Trefilov, A.* New Code of criminal procedure of Switzerland: comment and transfer. Moscow, 2011, pp. 174–177.

³⁴ Details about development of the institution of punishment in the observed laws and orders: *Trefilov, A. A.* The newest trends in development of institution of punishment in the criminal law of foreign countries / *All-Russian Journal of Scientific Publications*, 2011, M., No. 6, pp. 100–104.

Summary

Thus, the classification of the criminal act has originated in the French criminal law and is adopted in most of the countries belonging to the continental legal family. The Criminal Code of 1810 (Code Penal Imperial) secured a three-membered structure of the criminal act: crime – *délit* – contravention. The German Criminal Code (*RGSt*) of 1871 categorised all criminal acts, depending on their severity, into three groups: crime (*Verbrechen*), offense (*Vergehen*) and violation (*Übertretung*). In the current CC of Germany, Switzerland and Austria, the two-member stricter of the criminal act is adopted: crime and offense. The author analyzes the criminal legislation and the criminal and procedural legislation of the abovementioned countries, particularly focussing on the value of criminal actions' categorisation into crimes and offenses according to the criminal and a criminal procedural law of the considered country.

The tripartite structure of the criminal act determines the punishment for specific criminal acts: for a crime, the punishment has been a death penalty or imprisonment; for an offense, it was imprisonment; and for violations, as a rule, the punishment was a short-term arrest or a fine.

In the process of the criminal law reform carried out in Germany in 1974–1975, the tripartite structure of criminal acts became binomial: the crime (*Verbrechen*) and the offense (*Vergehen*), still preserved in the German criminal law. The criminal violations (*Übertretungen*) were eliminated, however, a part of these were attributed to public disorder (*Ordnungswidrigkeiten*). The classification of the criminal offenses (the crime and the offense) is very significant in terms of the criminal law and the criminal procedures, which are referred to herein.

Therefore, the CC of Germany, Austria and Switzerland accepted binomial classification of a criminal act defining a crime and an offense, based on a formal criterion: the extent of the penalty in form of imprisonment. Considering the rich experience of the given countries in the construction of a criminal act, the Russian legislator could benefit from that, when reforming the legislation of Russia.

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