

## Problems of Formation of the Concept of Criminal Policy of State in the Theory of Criminal Law

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**Abstract:** This article describes the results of the authors' comprehensive analysis of the essence and principles of such area of state activity as criminal policy. At the present day in the world, the criminality develops and generates new types and ways of crimes commission. Therefore, states need to revise current criminal policy for the purpose of effective countermeasure to criminality. This article contains the opinions of different legal experts on the essence, content and principles of criminal policy on the basis of which the authors have made their own conclusions on that institute. The author considers the criminal policy as a multi-dimensional and multi-level phenomenon with scientific basis. Studying the principles of criminal policy as the basis of its formation and implementation, the author notes that in present, there is a demand in revision of its fundamental principles, strived to humanization of criminal punishment, decriminalization of several criminal offenses and the participation of civil society in the strategic state policy against crime. The author found a certain relationship between criminal policy and criminal law and expressed disagreement with the formulation of some authors of extraordinary preventive measures that are fundamentally unacceptable because of the contradiction to the legal principles and the guilty.

**Key words:** Policy • Criminal policy • Criminality • Principles of criminal policy • Essence • Content

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### INTRODUCTION

In the state policy, two main areas of the state authority are usually highlighted-domestic and foreign policies, each having its tasks, objectives and priorities. The criminal policy is constituent part of the state domestic policy. It should be pointed out that the objectives, tasks and priorities determined and achieved by the state authority are not once and forever designated. They are established, changed and corrected with consideration of social development, intention to realize various interests and needs of state, situations occurring in foreign-and domestic-policy spheres. They also can be modified either in the case of achievement of previous objectives and tasks or determination of impossibility of their implementation due to different reasons or social circumstances.

As for the scope and content of criminal policy, today, the same as before, there are two main positions related to the understanding of criminal policy.

The first position has been formed by A.A. Hertsenzon who believed that the studied concept covers everything that is directly or indirectly oriented to anticriminal fight. Therefore, when interpreting such concept of criminal policy, he included in this sphere not only special measures (criminal-legal, procedural criminal, criminological, correctional-labor, criminalistical), but the measures of namely social character (economic, ideological, medical and etc.) [1, p.179].

Moreover, another point of view has been expressed, the followers of which (S.V. Borodin [2], A.E. Zhalinskiy [3], N.I. Zagorodnikov [4], N.A. Struchkov[5]) believe that only special measures of criminal social prevention based on the criminal, procedural-criminal and correctional-labor law with the use of scientific data, including criminology and criminalistics, constitute this concept. In this context, it is worth to note a definition of criminal policy offered by N.N. Zagorodnikov and N.A. Struchkov: "Criminal policy represents such direction of soviet policy in the frame of which there are

formed basic requirements to anticriminal fight by means of development and implementation of wide range of preventive measures, establishing and application of legal norms of substantive, procedural and criminal executive law stipulating criminalization and penalization and when necessary, decriminalization of acts, as well as by means of determination of the public enforcement measures admissible in the anticriminal fight” [6, p. 51]. It should be noted that the main emphasis in this definition is placed on the basic requirements, i.e. on the principles of the anticriminal fight that is rather important.

N.A. Belyaev determines criminal policy in similar way but with certain specificity. In his opinion, criminal policy is implemented by means of application of punishment or punishment substitutional measures of administrative or social influence to the persons committed criminal offenses, as well as by means of crimes prevention thought the threat of punishment [7, p.5].

S.S. Boskholov thinks that: “Criminal policy should be considered as:

- State policy (doctrine) of the anticriminal fight expressed in associated directives (laws, Decrees of President, governmental regulations);
- Scientific theory and synthesis of relevant political, sociological and legal knowledge;
- Specific type of social activity aimed at the active, assertive countermeasures to criminality and offences of law [8, p.32].

I.E. Zvecharovskiy offers the following definition: “Criminal policy means the area of activity worked out by state and based on objective laws of society development which is carried out by specially authorized governmental agencies and organizations on protection of the rights and liberties of an individual and a citizen, society and state as a whole from criminal infringements through the application of punishment and other criminal-law measures to offenders as well as through the prevention of crimes by means of legal education, threat of the application of criminal sanction and preventive individual and special criminological measures” [9, p.74]. This definition confirms once again that the criminal policy content is not limited by the criminal legislation only. Although, namely the criminal legislation is the substantive ground and the essence dictating respective form for the criminal-procedural policy.

In the opinions of N.A. Zagorodnikov and N.A.Struchkov, “criminal policy represents such direction of... the policy, which forms initial requirements to anticriminal fight through the working out and implementation of wide range of preventive measures, creation and application of legal norms of substantive, procedural and criminal executive law stipulating criminalization ... and decriminalization of acts, as well as by means of determination of the range of public enforcement measures admissible in anticriminal fight” [6, p.53].

It should be noted that A.I. Korobeyev highlights in the meantime: social policy in anticriminal fight, criminal policy considered as the general line identifying principal directions, objectives and means of influence on criminality through establishing the criminal, procedural criminal and criminal executive legislation, regulation of practice of its application, as well as through the working out and implementation of the measures aimed at crimes prevention and also criminal-legal policy which produces major tasks, principles, directions and objectives of criminal-legal influence on the criminality and the means towards their achievement and which is expressed in criminal standards, their interpretation acts and application practice [10, p.46].

G. Yu. Lesnikov notes that “modern criminal policy is substantially wider in its matter than criminal-legal policy. With respect to the criminal, procedural-criminal and criminal executive branches of law, the criminal policy performs methodological role” [11, p. 102].

A.L. Repetskaya treats the criminal policy as follows: “criminal policy determines initial requirements to the anticriminal fight. Criminal policy includes elaboration and implementation in the activity of competent authorities the norms of criminal (substantial, procedural and executive) law establishing criminalization (decriminalization) and penalization (depenalization) of acts, the system of measures of criminal-law response to their commission, conditions and procedure of these measures application ... system and procedure of implementation of measures of direct preventive influence on the criminality producing factors” [12, p.8].

The modern concept is offered by A.V. Arendarenko: “criminal policy is the policy in the area of anticriminal fight by means of criminal penalty. This policy includes three sub-types: criminal-legal, criminal-procedural and criminal executive policy” [13, p.265]. The division of criminal policy to legal, procedural and executive is also carried out by foreign researchers [14].

N.A. Lopashenko gives the following definition: "criminal-legal policy can be defined as a part of domestic policy of state, the underlying component of state anticriminal policy, area of state activity in the sphere of protection of the benefits, legitimate interests and social relations most important for personality, society and state, from criminal infringements; this protection lies in the working out of principles of identifying a circle of criminal acts and their legislative signs and formulation of ideas and doctrines, patterns and methods of the criminal-legal influence on criminality for the purposes of its decline and reducing its negative effect on social processes [14, p.26].

Summarizing the foregoing opinions of scientists, we can say that the criminal policy should be understood as:

- State policy (doctrine) of anticriminal fight expressed in associated directives (laws, Decrees of President, governmental regulations);
- Specific type of social activity aimed at active countermeasures to criminality and other offences of law;
- Scientific theory and synthesis of relevant political, sociological and legal knowledge. Therefore, in the determination of its matter the criminal policy relies on the integrative characteristics of state social policy, provisions of management theory and sciences of criminal law cycle and also the achievements of sociology and politology.

Criminal policy is the purposeful vigorous activity of state for protection of society from criminality, working out and implementation of optimal strategy oriented to approaching the purpose of stabilization and limitation of crime rate, creation of pre-conditions.

Criminal policy represents the multilevel and multiple-aspect concept. To understand its sense, the following levels can be distinguished:

- Working out of theoretical background and scientific researches enabling to form and justify criminal policy ideas (conceptual level);
- Working out, acceptance and improvement of legal framework directed at the implementation of objectives and tasks of criminal policy (legislative level);
- Formation on the basis of the state Constitution the laws and main provisions of state criminal policy conception in the program documents at different management levels (regulatory level).

Such documents can include, for example, the program for the intensification of anticriminal fight;

- Management of criminal policy implementation (management level), which includes the organization of law enforcement practice in the anticriminal sphere as a whole and by its separate lines, measures oriented to the increase of the effectiveness of means, patterns and methods of criminality suppression.
- direct law-enforcement activity of the officers in law-enforcement agencies related to fulfillment of the criminal policy tasks (law enforcement level).

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According to the opinion of N.A. Lopashenko, the criminal policy subject consists of strategy and tactics of criminal-legal influence on the criminality.

#### **The Criminal Policy Content Includes:**

- Determination of principles of criminal legal influence on criminality which consist of the criminal legal principles and law enforcement principles (principles of unavailability of liability, priority of crimes prevention activities, saving criminal repression measures);
- Determination of criminal acts circle by means of development of criteria of the criminal and punishable and making exemption from criminal acts with due account for such criteria;
- Working out general principles of imposition of punishment and other criminal-legal measures, their application and conditions of relief from criminal responsibility and punishment;
- Execution of criminal responsibility individualization [15, p.32].

Criminal policy content assumes the necessity of setting goals and tasks, determination of means, patterns and methods of anticriminal fight as follows: first, unconditionally legal, based on the system of constitutional and other laws of state and associated bylaws enacted on the basis of these laws; second, effective, i.e. meet expenses of state allocated to criminality prevention; third, protecting in full (preserving) the rights of citizens of a nation, rights of foreign citizens and stateless persons staying in the territory of state, from criminal infringements. In this regard, the opinion of some foreign authors in formulation of the goals and objectives, as well as forms, means and methods of criminal policy of the institutions of civil society is also correct [16].

According to the opinion of A.I. Korobeyev, the criminal-legal policy matter includes lawmaking and law enforcement activities [10, p.256].

P.N. Panchenko believes that criminal-legal policy matter is limited by criminal legislation, criminal-legal activity and the system of management thereof [17, p.106].

Besides the criminal policy matter, A.I. Korobeyev also highlights its “conceptual side”, which is formed by the following elements as he thinks:

- Determination of basic principles of criminal legal influence on the criminality;
- Criminalization and decriminalization;
- Penalization and depenalization;
- Identifying punishment substitutional measures of criminal nature, as well as the measures applied in common with punishment;
- Interpretation of effective legislation in the anticriminal sphere;
- Law enforcement activity [10, p.60].

Criminal policy means the purposeful vigorous activity of state on protection of society from criminality, development and implementation of optimal strategy oriented to approach of the purpose of stabilization and limitation of crime rate and creation of pre-conditions for positive trends of criminality [16, p.98].

It should be noted that a number of western researchers interpret the criminal policy by the terms “industry for crime control” [18, p. 95], “control of crime” [19, p. 173], what indicates a narrow realizing of the nature of the criminal policy.

For describing criminal policy in its general, one must clearly comprehend that criminal policy is involved in associated social relations and is determined by general trends in the state activity.

Criminal policy is the important and integral part of domestic policy of state in whole and provides operation of its other directions and elements.

At the same time, criminal policy represents integration of development and implementation of directives and practical measures, theoretical and practical anticriminal activities (its separate types and forms).

And finally, criminal policy assumes the relevance of objectives and tasks of state and practical activity for the selection of means, forms and ways of protection of person, society and state from criminality. It also means that the effective protection of personality and society is impossible without powerful state authority, well-established system of governmental agencies fighting against criminality, without their support by population. Effective state authority is the ground for protection of personal and public interests and the existence of state. Therefore, while forming and implementing criminal policy, state authorities solve the tasks of strengthening the statehood as whole, specific social-economic, political and ideological tasks, stabilize society and provide progressive process of development of society and state.

Criminal policy represents the multilevel and multiple-aspect concept. To understand the conceptual sense, the following levels can be distinguished:

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- Working out, acceptance and improvement of legal framework directed at implementation of objectives and tasks of criminal policy (legislative level);
- Formation on the basis of state Constitution the laws and main provisions of state criminal policy conception in the program documents at different management levels (regulatory level). Such documents can include, for example, the program for the intensification of anticriminal fight;
- Management of criminal policy implementation (management level), which includes the organization of law enforcement practice in anticriminal sphere as a whole and by its separate lines, measures oriented to the increase of the effectiveness of means, patterns and methods of criminality suppression.
- Direct law-enforcement activity of the officers at law-enforcement agencies related to fulfillment of the criminal policy tasks (law enforcement level).

Separation of the abovementioned levels is necessary in order to understand “technology” and “procedure” of development and implementation of criminal policy of

state. These levels show the evolution of criminal policy regulations from the generation (formation) of idea through the respective stages:

- Conceptual [20, pp. 255-269];
- Legislative regulation (when necessary);
- Programming;
- Management of the activity on application of the norms providing anticriminal fight;
- Direct law enforcement.

Even just citation of levels (states) of development and implementation of criminal policy shows that this process involves (more or less all elements of political system, all branches of government and the whole society. For example, identified problems in the anticriminal sphere are discussed in print media, radio and television, that provides formation of public opinion which can not be disregarded by state authorities of different levels and law-enforcement agencies-the criminal policy participants. In the United States, the position on the criminal policies of the two rival parties is actively used by them for the struggle for the votes [21].

The situation arises where legislative, executive and judicial authorities must response to specific attitude of population at all levels (stages) of development and implementation of criminal policy-from conceptual to practical law enforcement.

Depending on the scope in the criminal law theory, criminal policy can be considered in its following aspects:

- Federal, state (within the whole country);
- Regional;
- Local (at the level of certain territory, place).

In this regard, it should be remembered that at the level of state the criminal policy is mainly developed and at the regional and local level-is implemented. However, this relation does not have absolute character, as far as at the regional and local levels the criminal policy is developed and implemented on the basis of the competence of state, regional or local management level.

Executive officers of internal affairs agencies of federal states have certain difficulties as under the conditions of federal structure it is required on the one side to strictly and steady fulfill the state tasks specified in the Constitution and to solve specific tasks of regional and municipal level resulted from certain conditions and situation in republic, region, city, district.

Objectives, tasks and matter of criminal policy are formed under the influence of changes in the status of

economy, law, ideology and social psychology, in the quality of social life, specifics of status and trends of criminality. These circumstances should be constantly analyzed and used for corrections of ideas and tasks of criminal policy, determination of tactic aspects of its implementation.

Criminal policy value is updated in the circumstances of restructuring of society, in switching from one status to another one in essence. In the situation of relative instability of our society over recent years there is a trend of quantitative and qualitative changes of criminality: its significant growth, increase of grave and especially grave crimes, strengthening of its organization. In this connection, criminal policy value rises steeply in the current climate. Specificity of the criminal policy is determined also by involvement of the states into globalization process. The influence of globalization on the formation of the criminal policy was noted in several studies [22 p. 183].

It should be noted that “criminal policy” as the term implies three relatively independent but associated phenomena: first, the policy of state in anticriminal sphere; second, the branch of science gaining growing value in the structure of the law knowledge; third, the discipline in higher education institutions. It should also be noted that criminal policy as an academic discipline was first introduced by the University of California in the United States in 1916 [23].

Also, the science highlights the sources of criminal law policy. P.N. Panchenko understands these sources as the factors generating this policy and speaks about social, ideological and legal sources [24, p.108].

At the same time, A.V. Tretiyakov considers the criminal policy sources as the form of expression of criminal policy of various states, as these sources declare objectives, tasks and directions of criminal policy of state, basic principles of its implementation, determine the sphere of prohibited by criminal law, solve other questions of criminal policy [25, p.82].

In any area of theoretical and practical activity, the principles means governing basic ideas identifying main subject of this activity, its major tasks and directions. Applying general concept to the criminal policy sphere, it can be defined that principles of criminal policy mean governing basic ideas specifying the matter of legislation and practice of its application both as whole and at the level of separate functions, directions, means and methods of anticriminal fight. The principles somewhat “penetrate” the whole structure of criminal policy, represent its core and orienting point in the anticriminal activity.

Special feature of criminal policy principles is their mainly regulatory nature, what is accepted by foreign authors; citing John Hall “principles are the basis for the structure of the criminal law” [26].

As far as the criminal policy principles have the nature of standard bound for all, all decisions made at theoretical-conceptual levels must be associated with these principles. Compliance with the system of criminal policy principles, their orientation to the implementation of strategic and tactical tasks of anticriminal fight at all levels is the necessary condition for decision-making by officials, participants of criminal policy. Only in this case, relevant decision can be considered as legally valid, rational and justified in social and legal aspects. And otherwise, deviation from the principles, their violation entail “within the meaning” the recognition of decision as null and void regardless of whoever has made it. Therefore, the criminal policy principles should be the guidance for theoreticians of criminal policy and law, developers of criminal policy, law-makers, law enforcement executors and also citizens. Interpretation of the criminal policy principles through constitutional principles such as respect for human rights is specific [27]. However, this interpretation indicates the facilitating approach which is not always reflecting the essentials of the criminal policy [28].

Scientists of criminal, procedural criminal and criminal executive branches of law oriented to anticriminal fight have to be focused not only on literal interpretation of the law principles content, but on the development and correction of their system as far as practical. For example, for the developers of criminal policy, the criminal law principles are the orienting points because the concepts and proposals regarding the influence on the social and criminal situation are feasible only within the law including through amendments into criminal legislation. This can refer, in particular, to the provisions on fighting against organized criminal activity, corruption, terrorism and mobstery.

Any attempts to oppose criminal policy and criminal law in order to achieve identification of legal and social notions (as it was with the intend to frame criminal-legal norms on corruption), or phrasing extraordinary preventive measures, are essentially unacceptable due to discrepancy with the principles of legality and fault-based responsibility of offenders.

On the basis of analysis of social and criminal situation, law maker has to reasonably determine the range of acts found as criminal and punishable and taking into consideration that this range is limited at a given time

to indicate clearly the constituent elements of each crime. This also is the condition of implementation of the principle of legality.

It is also obvious that law maker is bound by the principles of law while working out bylaws on the anticriminal fight. For example, following the principles of legality and responsibility for fault, the law-maker places the necessity of changes in criminal laws of state related to reasons for responsibility for negligent acts. In general, bind of law maker by the principles of criminal policy is the indicative of seeking to achieve supremacy of law and justice. Criminal law must be “legal” not only formally (issuance by appropriate authority, within its competence and etc.), but also completely conform to the principles of law including criminal law.

Therefore, principles of criminal policy are the ideas providing the basis for the elaboration of laws, bylaws and carrying out of activity of state bodies and officials in the anticriminal fight. The principles of criminal policy may include:

- Legality;
- Justice;
- Complexity;
- Conformity of tasks, powers and resources;
- Forward-looking character of strategic decisions.

Formation of the criminal policy based on the principles is specific for the Western states. In United States, conservative social movement “Right on Crime” suggests the crime control based on the principles of transparency of crime policy, priorities of the interests of victims of crime and social security, socialization of convicts after sentence, repeated warnings of criminal activity and the efficiency cost management and economy [29]. The author of another American source suggests the justice, proportionality, clarity, consistency, transparency, cost efficiency and reflection of the urgent needs of society as the main principles of criminal policy [30].

British researcher Roger Grimshaw believes that criminal policy should be guided by the principles of objectivity, transparency, efficiency of the measures of cost and time, priority of crime prevention and the minimum suffering [31].

A press release of the European Commission on Human Rights, introduced the concepts of criminal policy as the use of criminal sanctions as a last resort, the restriction of the criminal sanctions against less serious crimes and the account of the fundamental human rights [32].

## CONCLUSION

Therefore, of interest is the area of state activity covering elaboration and implementation in the activity of authorized governmental bodies the norms of criminal, criminal-procedural and executive law establishing criminalization (decriminalization) and penalization (depenalization) of acts, conditions and procedure of these measures application ... system and procedure of the implementation of measures of direct preventive influence on the factors contributing to commissions of crimes.

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