

LEGAL REGULATION OF COUNTERACTION TO DOMESTIC VIOLENCE IN RUSSIA AND GERMANY: COMPARATIVE ANALYSIS

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The subject. The article considers a study of regulation of countering domestic violence in Russia and Germany. The author investigates the draft of Russian federal law "On the prevention of domestic crimes" No. 1183390-6 and the law of Germany "On civil protection from acts of violence and persecution" as well as federal and lands' legislation in this sphere. **Purpose of the study.** The comparative study aims to identify the reasons for the draft's unviability in Russian Federation, in particular, and to search for legislative opportunities to solve the domestic crime's problems in Russia, in general.

Methodology. The article is based on the comparative legal method. Due to this method, the article describes the legal protections against domestic violence in Russia and Germany (at the level of the federation and states), the advantages and disadvantages of each system.

The main results. The legal measures in Germany as well as the draft federal law in the Russian Federation contain protective measures that can be applied by police and court. The main feature of German measures from Russian ones is the possibility of temporary violator's ejection from the occupied housing by issuing a judicial or police order. The simplicity of the procedure allows a victim to receive effective help at any time, even at night and on non-working days. The article analyses the allowability of these measures to the offender from the point of view of basic rights' interference; notes the position of the Federal Constitutional Court of Germany about the police order on temporary eviction: the residence ejection is allowable only when the measure aims at preventing criminal acts. The article draws attention to the technique' defects of the Russian draft federal law "On the prevention of domestic crimes" No. 1183390-6, which require correction in order to improve the domestic violence' counteraction in Russia.

Conclusions. It is concluded that in the Russian Federation it is necessary to differentiate heterogeneous phenomena in the law, such as victim's protection from domestic violence and preventive family relationships' measures, unreasonably mixed together in the draft federal law "On the prevention of domestic crimes" No. 1183390-6. Besides the law about victim's protection from acts of violence and persecution should include significant consequences exactly for the violator. In this regard, the German multi-level protection system consisting of police protective measures, preliminary judicial measures as well as judicial measures can be applied. German practice makes it possible to react quickly to an act of domestic violence and provide the necessary victim's support. The experience of applying the police order on the temporary eviction in Germany as well as violator rights' interference may be appropriate for use in Russia.

1. Introduction

On July 13, 2021, in the city of Irkutsk, Roman Terentiev threatened to jump from the balcony of the 14th floor with his young child for over several hours. By his actions, Terentiev tried to attract the attention of his wife, who had filed for divorce. As it was established later, Terentiev, showing jealousy, repeatedly beat his wife, including in front of the child, and the wife's statements to the police about her husband's behavior did not lead to the result. Later, the man was detained for preparing to murder a minor. Effective legal mechanisms of influence on the disturbers of family and domestic relations would have helped to avoid such a situation.

Statistical data on domestic violence in Russia are ambiguous, largely due to the lack of a definition of "domestic violence" and the inability to distinguish criminal and administrative punishable acts and omissions committed in family and domestic relations from other illegal acts. Meanwhile, without going into a discussion about the reliability of these or other statistical calculations¹, it is difficult to deny the presence of the problem of domestic violence in the Russian Federation.

Since the early 10's of the 21st century the problem of domestic violence in the Russian Federation became the subject of study by various sciences: sociological [7, 19, 25], psychological [5, 8] and legal [17]. The literature studied the retrospective of the realization of "family power" [1], the characteristics of victimization in the family and its consequences [11], attention was paid to the differentiation of violence depending on the status of the victim (children [9], adolescents [21], women [20], men [23], elderly persons [4]), and the relationship of the victim with the tortfeasor (family, marriage, partner); there was conducted analysis of the models of family and domestic relations in some regions of the Russian Federation [13], in particular, the Republic of Karelia [14], the

city of Ivanovo [12], the Republic of Bashkortostan [24], the republics of the North Caucasus [18].

The need to pay attention to domestic violence is indicated both by internal strategic documents, for example, the National Action Strategy for Women for 2017-2022², and by the practice of the European Court of Human Rights, including in relation to the Russian Federation³. However, no effective attempts to criminalize domestic violence have been made since 2017. At the same time, the legal neglect of domestic violence is a growing social problem, the aggravation of which was noted during the epidemic associated with the spread of a new coronavirus infection [2, 3].

Without talking about unconditional reception of foreign legislation, it is difficult to overestimate the analysis of the relevant practice of foreign states. Comparative studies of the issues under consideration are devoted to combating domestic violence in England and Wales [6], the United States and Argentina [22], Armenia [10], Kazakhstan [15] and others. The purpose of this article is to study the 20-year experience of the Federal Republic of Germany in implementing a system of protective measures against violence, applied primarily against women, in comparison with the relevant provisions of draft Russian legislation in order to critically evaluate the potential for implementing the latter.

2. Fundamentals of legal regulation

First of all, the legislative basis for protection against violence in the Federal Republic of Germany is the Law of the Federal Republic of Germany "Civil Law Protection against Acts of Violence and Harassment" (hereinafter, the Law of the Federal Republic of Germany on protection against

¹ Korinenko E. The queue for beatings: domestic violence is incalculable. URL: <https://iz.ru/910355/ekaterina-korinenko/ochered-na-poboi-domashnee-nasilie-ne-poddaetsia-podschetu> (retrieved: January 15, 2022).

² On the approval of the National Strategy for Action in the Interests of Women for 2017-2022: Decree of the Government of the Russian Federation of March 8, 2017 No. 410-r // Codes of the Russian Federation. 2017. No. 11. Art. 1618.

³ Case "Volodina v. Russian Federation": Complaint No. 41261/17; Judgment of the ECtHR dd September 07, 2019. URL: <https://hudoc.echr.coe.int/spa?i=001-194321> (retrieved: January 15, 2022).

violence)⁴, adopted on December 11, 2001 and entered into force on January 1, 2002.

The German Law on protection against violence, in comparison with its Russian counterpart, looks graceful and contains only 4 articles. Initially, the Law was aimed primarily at protecting women and children from male violence. It was pointed out that 85% of domestic violence perpetrators were men: in 2014, the European Union Agency for Fundamental Rights published a review: "Violence against women. A Pan-European Dimension"⁵. The study interviewed about 42000 women between the ages of 18 and 74 in the 28 member states of the European Union. Among 1534 women in Germany who took part in the survey, it turned out that about one in three women at least once in their life faced physical or sexual violence from their partner. At the same time, it was noted that domestic violence against women occurs not only in socially disadvantaged families: women with secondary and higher education, the so-called representatives of the "middle" social class, are equally exposed to acts of violence. Later, German researchers began to point to the silence of the problem of violence against men [28, p. 312].

2. Grounds for protective measures applying

The grounds for the adoption of protective measures of the German Law of the Federal Republic of Germany on protection against violence are named: intentional unlawful infliction of bodily harm, damage to health, freedom or sexual self-determination of another person, unlawful intentional intrusion into another person's housing or certain property, or unjustified repeated persecution of a person against his will, including by means of distance communication (par. 2 § 1 of the Law of the Federal Republic of Germany on

protection against violence).

In the initial version of the Law of the Federal Republic of Germany on protection against violence, there was no such basis for taking measures to protect against violence as sexual self-determination, but it was included in the text after Germany's ratification of the Council of Europe Convention on prevention and combating violence against women and domestic violence (hereinafter, Istanbul Convention) on October 12, 2017. In this regard, the relevant sectoral legislation was supplemented with special rules concerning gender options for minors, such as the right to surgical intervention (§ 1631 e of the Civil Code of the Federal Republic of Germany⁶). It was stated that parents have the right to consent to a change of male or female sex only if such intervention cannot be postponed until a later time, when the child can make a decision on his own. At the same time, a complicated procedure was provided for obtaining permission from the interdisciplinary commission. It should be noted that, despite the existing remarks in German society, the norm was generally perceived positively, since before these innovations in the Federal Republic of Germany, operations to transform primary sexual characteristics in children under the age of 10 were very common⁷. It seems that in the absence of a uniform understanding of the importance of sexual identity in Russian society, non-ratification of the Istanbul Convention due to disagreement with the definition of "gender" in the proposed, "European" understanding, it would be more appropriate not to include sexual self-determination as a basis for taking measures against the perpetrator, than not pass the law altogether, since the total rejection of the regulation of domestic violence leaves a huge number of victims throughout the country unprotected.

Compared with the German law, the draft federal law "Prevention of Domestic Violence" in

⁴ Law on civil law protection against acts of violence and snares of December 11, 2001 / Federal Law Gazette I p. URL.: <https://www.gesetze-im-internet.de/geswschg> (retrieved: January 15, 2022).

⁵ European Union Agency for Fundamental Rights. Violence against women: an EU-wide survey. Results at a glance. URL.: <https://data.europa.eu/data/datasets/violence-against-women-survey?locale=de> (retrieved: January 15, 2022).

⁶ Civil Code of August 18, 1896 / Federal Law Gazette I p. 42, 2909; 2003 I p. 738. URL.: <http://www.gesetze-im-internet.de/bgb> (retrieved: January 15, 2022).

⁷ Usebach J. Treatment of children with different sex characteristics. URL.: <https://www.anwalt.de/rechtstipps/treatment-of-children-mit-various-gender-characteristics-189629.html> (retrieved: January 15, 2022).

Russia contains a more detailed list of acts that should be classified as domestic violence: physical abuse, psychological, sexual economic, persecution (Art. 3). In this respect, the draft law of the Russian Federation is more thoughtful. At the same time, such acts are covered by “violence”, including in Germany, in accordance with the Istanbul Convention.

The inclusion in the draft federal law of the unlawful denial of basic care needs as violence is commendable. At the same time, the list of acts attributed to psychological violence should be supplemented and include the retention of not only the property of the victim or his relatives, but also the documents of these persons, which are not “property” in the strict sense of the word, especially since further, in subparagraphs 2 par. 3 Art. 25 of the draft No. 1183390-6, these concepts are delineated.

On the contrary, we consider it inappropriate to single out family and domestic debauchery, in the interpretation proposed by the draft federal law. The work with debauchees is not reflected in the draft federal law under consideration, which does not allow to reliably determine the position of the legislator in relation to these acts. On the one hand, “foul language”, “destruction and (or) damage to property” or “noise” can hardly be attributed to the types of domestic violence (Art. 3), on the other hand, an indication of debauchery as an act excluding family violence, opens up opportunities for juggling facts and may complicate the application of the law in general.

Analysis of draft federal law No. 1183390-6 draws attention to these principles (Art. 4), which include, among other things, the principle of “family support and preservation”, which appears to have the potential for practical implementation at the stage of preventing domestic violence, conducting training sessions, conducting explanatory work, implementing state programs, but cannot be guaranteed at the time of protecting the victim from an act of violence by a domestic troublemaker.

The principle of “observance and protection of the rights, freedoms and legitimate interests of a person and a citizen” also raises

doubts. It appears that in practice, doubts may arise about the unconditional observance of some of the rights of the perpetrator when applying protective measures, for example, such as a prohibition on staying in the victim’s place of residence. So we can talk about a temporary restriction of property rights, and in certain cases, some parental rights. Based on this, it seems appropriate to the principles specified in the law on protection of victims from domestic violence, to include the principle of proportionality in the understanding formulated in the legal positions of the Constitutional Court of the Russian Federation in relation to public legal responsibility, in accordance with which the measures applied to a person, should be determined on the basis of the requirement that the consequences generated by them are adequate to the harm caused as a result of the unlawful act, so that the proportionality of the punishment measures to the committed offense is ensured, as well as the balance of the fundamental rights of the individual and the common interest consisting in protecting the individual, society and the state from unlawful encroachments⁸.

It should be noted that such a contradiction is characteristic of the entire draft federal law No. 1183390-6: thus, measures of individual prevention of domestic violence, specified in par. 2 Art. 17, include both the actual preventive measures (preventive register; preventive conversation; specialized psychological programs) and protective (restraining order; judicial protective order). It seems that the noted duality of a normative legal act is an indicator of its non-viability.

4. System of protected measures

1. The Law of the Federal Republic of Germany on protection against violence provides for measures to protect victims, applied by the court. In particular, the protective injunction may relate to:

- prohibition on intrusion into the victim’s

⁸ In the case of checking the constitutionality of subparagraph 1 of Article 1301, subparagraph 1 of Article 1311 and subparagraph 1 of paragraph 4 of Article 1515 of the Civil Code of the Russian Federation in connection with requests from the Arbitration Court of the Altai Territory: Resolution of the Constitutional Court of the Russian Federation dated December 13, 2016 No. 28-P // Codes of the Russian Federation. 2016. No. 52 (Part V). Art. 7729.

home;

- prohibition on being in a certain place of the victim's home or in other places determined by the court, where the victim is regularly located;

- prohibition to contact with the aggrieved person, including using means of remote communication, unless this is necessary to protect legitimate interests.

The listed measures may be imposed by the court, regardless of whether the perpetrator was under the influence of alcoholic, psychotropic or other similar substances at the time of the domestic violence, or acted without the influence of drugs that alter consciousness (par. 3 § 1 of the Law of the Federal Republic of Germany on protection against violence).

If the victim and the perpetrator live together, the court, at the request of the victim, may order the sole use of the dwelling by the victim. In the event that the property rights to the dwelling or property belong to the perpetrator or a third party, the right of ownership, lease or usufruct to the property may be granted to the victim for a period of up to six months. This period may be extended by the court, but not for more than another six months, provided that the aggrieved person was unable to find another suitable accommodation during the first prescribed period.

At the same time, the perpetrator must refrain from any actions that may complicate or make impossible the realization of the victim's right to use the dwelling, at the same time, the perpetrator has the right to demand from the victim a fair payment for the use of dwelling, if there are grounds for this. These orders are not issued if the court has reason to believe that further cohabitation of the victim and the perpetrator is excluded due to the nature of the procedural restraint measures applicable to the perpetrator; if the victim has not filed a claim with the court for more than three months from the date of the domestic violence; or if there are other circumstances and significant objections of the perpetrator.

In the event that domestic violence or its threat was committed against children or persons under the guardianship or trusteeship of the

perpetrator, the Law of the Federal Republic of Germany on protection against violence does not apply, but special rules apply. In particular, § 1666 of the German Civil Code stipulates that in the event that the physical, mental or emotional well-being of a child or his property is threatened and the parents are unwilling or unable to prevent it, the family court must take the measures necessary to prevent such danger. Judicial measures may include, for example, an injunction to make use of social services or health care facilities, an injunction to enforce compulsory schooling, a temporary or indefinite prohibition on staying in the place of residence or other place where the child is regularly located, a prohibition to contact with the child, or to meetings with a child, cancellation of a decision on recognition as a guardian or trustee, as well as partial or complete deprivation of parental rights. At the same time, measures related to the separation of the child from the parent, including on grounds related to the prohibition of one of the parents from being at the child's place of residence, are admissible only in exceptional cases when the damage to the health and interests of the child cannot be eliminated in any other way, including with the participation of state social services (par. 2 § 1666a of the Civil Code of the Federal Republic of Germany). The corresponding protective measures must be cancelled as soon as the need for them no longer exists and the threat to the interests of the child ceases to exist (par. 2 § 1696 of the Civil Code of the Federal Republic of Germany).

In turn, the draft federal law No. 1183390-6 contains a similar list of judicially imposed protective measures (Art. 24). However, unlike the German law, draft No. 1183390-6 calls for a prohibition on the acquisition and use of any type of weapon. At the same time, the possibility of practical implementation, as well as the legality of this measure as a limitation of constitutional law, raises doubts, for example, if its addressee are persons who have the right to use weapons due to their professional activities, in particular, law enforcement officials, in certain cases, sportsmen⁹, persons

⁹ On measures to regulate the circulation of civilian and service weapons and cartridges for them on the territory of the Russian Federation: Decree of the Government of the

engaged in the protection of wildlife¹⁰.

At the same time, we evaluate positively the imputed obligation to undergo a specialized psychological program and reimbursement of the incurred costs. As an additional measure, a judicial protective order, similar to its German counterpart, may cover the temporary eviction of the perpetrator from the housing. However, based on foreign experience, subparagraph 1 par. 3 Art. 24 of the draft law, it is advisable to reformulate, including an indication of the indifference of possession not only of the right of ownership, but also of any property right to housing.

2. The legislation of the Federal Republic of Germany, as well as the draft federal law No. 1183390-6 (par. 3 Art. 24), provides for the possibility of issuing a preliminary injunction when there is an urgent need for immediate action aimed at protecting the victim from violence (§ 214 of the Law of the Federal Republic of Germany on the procedural order for resolving family disputes and questions of voluntary jurisdiction¹¹).

The Law of the Federal Republic of Germany provides that violation of the prohibitions established by the court, as well as the terms of a settlement agreement concluded on grounds of domestic violence in accordance with par. 1 § 214 a of the Law of the Federal Republic of Germany on procedural order for resolving family disputes and questions of voluntary jurisdiction, entails a restriction of freedom for a period of up to 1 year or the imposition of a monetary fine. If there are other grounds, the perpetrator is subject to criminal liability in accordance with the current legislation of the Federal Republic of Germany.

3. A distinctive feature of the system of protective measures against domestic violence of the Federal Republic of Germany is the possibility of applying police temporary eviction orders. Such

measures are relevant in cases where immediate protection is required, and a court order cannot be obtained at this moment, for example, when violence is committed in the evening, at night or on weekends.

Provisions for temporary eviction are governed by the land laws: for example, par. 3 § 27a of the North Rhine-Westphalia Police Act¹²; par. 2 § 13 of the General Land Safety and Order Regulations Act of Rheinland-Pfalz¹³.

The measure under consideration provides for the issuance by the police of an order for the temporary expulsion of the perpetrator from the shared apartment and the prohibition on returning to the dwelling¹⁴. Despite the regional legal regulation, different naming of this measure in the lands, the legal literature in Germany notes that the procedure for issuing a prohibition of return is mostly standardized [27, p. 461].

According to the idea of the German legislator, in the case of unlawful actions, the housing should not remain a “refuge” for the perpetrator, therefore it would be wrong to move the victim of violence from the home environment, depriving her of her usual comfort and changing her way of life [30, p. 18]. The order for temporary eviction of the perpetrator gives the injured party an opportunity in a calm and familiar environment, without the risk of being exposed to acts of violence again, to think over their further actions, to decide on subsequent actions, including those related to appeal to a court. Thus it is the perpetrator who must bear the negative consequences of the act committed.

A police prohibition on returning to housing can be exclusively temporary in nature (in most states up to 14 days). According to the Constitutional Court of the Federal Republic of Germany, such temporary measures allow the authorities to initiate

Russian Federation of July 21, 1998 No. 814 // Codes of the Russian Federation. 1998. No. 32. Art. 3878.

¹⁰ On the Animal World: Federal Law No. 52-FZ of April 24, 1995 // Codes of the Russian Federation. 1995. No. 17. Art. 1462.

¹¹ Act on Procedure in Family Matters and in Matters of Non-Contentious Jurisdiction / URL.: <https://www.gesetze-im-internet.de/famfg> (retrieved: January 15, 2022).

¹² Police Act of the State of North Rhine-Westphalia of July 25, 2003 // GV. NRW. p. 441. URL.: <https://beck-online.beck.de> (retrieved: January 15, 2022).

¹³ Rhineland-Palatinate Police and Regulatory Authority Act of November 10, 1993 // GVBl. 1993. P. 595. URL.: <https://beck-online.beck.de> (retrieved: January 15, 2022).

¹⁴ General police and regulatory law / Götz V., Geis M.-E. – 17th edition. C.H. Beck. 2021. P. 29. URL.: <https://beck-online.beck.de> (retrieved: January 15, 2022).

short-term emergency intervention in order to resolve acute conflicts with a danger to human life, health and freedom¹⁵.

The Federal Constitutional Court of the Federal Republic of Germany indicated that temporary eviction from housing does not infringe on the fundamental right enshrined in Art. 14 of the Basic Law of the Federal Republic of Germany (right of ownership)¹⁶, as well as the inviolability of the dwelling, provided for in Art. 13 of the Basic Law of the Federal Republic of Germany, since the measure under consideration does not imply the expropriation of the housing, and the invasion of the territory takes place on the basis of the law in order to prevent the danger to individuals, to prevent threats to public safety and order, as required by part 7 of Art. 13 of the Basic Law of the Federal Republic of Germany.

At the same time, the application of the order on temporary eviction presupposes the restriction of the freedom of movement of a person (Art. 11 of the Basic Law of the Federal Republic of Germany), however, such interference with fundamental rights and freedoms is allowed in accordance with part 2 of Art. 11 of the Basic Law of the Federal Republic of Germany in the case that it is intended to “prevent criminal acts”. Consequently, based on the provisions of the Basic Law of the Federal Republic of Germany, the issuance of an order for temporary eviction is legitimate only when the actions of the perpetrator constitute a criminal offence, for example, in the case of bodily harm of varying degrees of severity (§ 223 of the Criminal Code of the Federal Republic of Germany¹⁷), threats of murder (§ 211 of the Criminal Code of the Federal Republic of Germany), unlawful deprivation of liberty (§ 239 of the Criminal Code of the Federal Republic of Germany),

violation of the freedom of sexual self-determination (§ 174 of the Criminal Code of the Federal Republic of Germany). The relevant provisions of the Land Police Acts provide for the existence of a real danger to the life, health, bodily or gender freedom of the inhabitants of the same dwelling as grounds for the application of the measures under consideration. However, the need to extend protection is noted not only in the case of serious beatings, torture or cruel treatment, but also in the case of single slaps, punches or kicks¹⁸.

In practice, difficulties often arise in establishing the factual circumstances of the case and, in this regard, in determining the legitimacy of issuing an order to evict the offender. The presence of a danger to life, health or freedom is a fact to be established by police officers in each specific case [27, p. 469]. Arriving at the scene, police officers are faced with an ambiguous picture of events. The first thing to find out is whether there has been a physical attack on a person living in the premises by another occupant of that dwelling. The next step is an assessment of the committed act of violence, since it is the nature of the primary episode that is the main and principal criterion by which police officers must determine the likelihood of a recidivism and identify the potential danger [28, p. 522]. At the same time, if the attack has not (yet) occurred, then the existence of a “real danger” is rather difficult to prove, even if there are other signs indicating an escalation of the domestic conflict: for example, alcohol intoxication, verbal abuse that turned into an altercation, therefore, so the issue of a prohibition will be denied [27, p. 469].

The police should determine if the victim has any injuries (bruises, cuts), and, by interviewing the victim and witnesses, obtain information about the causes of these injuries. Once the perpetrator is identified, he or she has the opportunity to explain the circumstances: such as whether the act of violence was primary, of a one-time nature, or whether there was intent to commit the act. In the case that the offender insists on causing harm in self-defense, he bears the burden of proof in accordance

¹⁵ Federal Constitutional Court (1st Chamber of the First Senate). Resolution of February 22, 2002 - 1 BvR 300/02 // New legal weekly. 2002. P. 2225. URL.: <https://beck-online.beck.de> (retrieved: January 15, 2022).

¹⁶ Basic Law for the Federal Republic of Germany of May 23, 1949 / Federal Law Gazette I p. URL.: <https://www.gesetze-im-internet.de/gg> (retrieved: January 15, 2022).

¹⁷ Criminal Code of May 15, 1871 // Federal Law Gazette I p. 2363. URL.: <https://www.gesetze-im-internet.de/stgb> (retrieved: January 15, 2022).

¹⁸ Administrative Court of Lueneburg. Resolution of June 13, 2003 – 3 B 47/03. URL.: <https://beck-online.beck.de> (retrieved: January 15, 2022).

with § 227 of the Civil Code of the Federal Republic of Germany. If both parties to the conflict are injured, in order to apply measures on temporary eviction, law enforcement officers should identify the person who caused the greatest damage. If it is impossible to unambiguously identify the offender, the police make a decision on the use of protective measures, based on considerations of reasonableness [26, p. 12]. A person who has been temporarily evicted has the right to appeal against the application of protective measures to him.

In practice, it is especially difficult to reliably determine the severity of a domestic conflict and the degree of the existing danger for the victim, if the latter refuses to cooperate with the authorities. The reason for this behaviour may be intimidation by the offender, threats, suppression of the will of the victim caused by systematic “sustained violence”¹⁹. In practice, this can be expressed in the understatement of unlawful acts, the suppression of facts, or even the denial of the act of violence by the injured party. Situations are also possible in which the injured person obstructs the use of protective measures by the police and opposes the eviction of the offender from the home, thereby voluntarily exposing himself to danger. The police are faced with a difficult task, to identify the voluntariness of the parties’ behaviour and assess the possible consequences of the decision made in this or that case²⁰. At the same time, the analysis of judicial practice indicates that in the case “if the freedom of behaviour of the victim from violence ... cannot be determined unambiguously and with due confidence” when deciding on the temporary eviction of a person, the protection of the life, health and legitimate interests of the potential victim must take precedence²¹. Thus, the adoption of protective measures by police officers does not

depend on the will of the injured party.

The provisions of the Land Police Acts, as well as the Law of the Federal Republic of Germany on protection against violence, do not require that the injured person be the owner or tenant of the dwelling before issuing an order for temporary eviction of the offender. The presence or absence of ownership or other right to provide protection is irrelevant in this case, since the victims may be children who may not have real rights to housing²².

It is noted that when deciding on violence, any person whose “place of residence is concentrated in the place in question” should be recognized as a resident [27, p. 472]. At the same time, persons who are in the aggressor’s dwelling temporarily, moreover, who have their own housing, cannot count on the temporary eviction of the perpetrator. However, the provisions of the police laws of some states, for example, § 14 a (1) of the Bremen Police Act²³; par. 1 § 34 a (1) 1 of the North Rhine-Westphalia Police Act, extend this protection: the victim has the right to count on the eviction of the offender from the premises, even if his place of residence is not “concentrated in the place in question” and in fact he has other housing. In this case, the victim may need some time to recover and get back to their previous place of residence.

Moreover, a number of police laws (for example, par. 2 § 13 of the General Land Safety and Order Regulations Act of Rheinland-Pfalz) contain a special indication that the ownership of residential premises should not be taken into account when deciding whether to issue an order on temporary eviction, therefore, the perpetrator cannot invoke his ownership of the housing as an argument against eviction. As for the “living accommodation”, within the meaning of the laws under consideration, it is interpreted quite broadly, and also includes the “immediately adjacent territory”, and if the housing is located in an apartment building, this area includes the entire building, including entrance, stairwells, common premises and even the land plot

¹⁹ Higher Administrative Court of Greifswald. Resolution of February 11, 2004 – 3 M 33/04. URL.: <https://beck-online.beck.de> (retrieved: January 15, 2022).

²⁰ Minden Administrative Court. Resolution of January 6th, 2004 – 11 L 7/04. URL.: <https://beck-online.beck.de> (retrieved: January 15, 2022).

²¹ Aachen Administrative Court. Resolution of June 22, 2004 – 6 L 555/04. URL.: <https://beck-online.beck.de> (retrieved: January 15, 2022).

²² Aachen Administrative Court. Resolution of April 23, 2004 – 6 L 367/04. URL.: <https://beck-online.beck.de> (retrieved: January 15, 2022).

²³ Bremen Police Act of 04/11/1983 // Brem.GBl. p. 1486, 1568. URL.: <https://beck-online.beck.de> (retrieved: January 15, 2022).

on which the building is located²⁴. The purpose of this expansive understanding of the area in which a perpetrator cannot stay is to “demand the provision of effective protection” for the person at risk (par. 1 § 34 a of the North Rhine-Westphalia Police Act).

At the same time, the temporary eviction of the offender and the prohibition on staying in the “immediately adjacent territory” relate exclusively to the victim’s place of residence, but not to his personality or other place where the person may stay, therefore, to provide greater protection, the temporary eviction order may be coupled with a restraining order (e.g. § 34 a of the North Rhine-Westphalia Police Act).

A restraining order implies an order addressed to the perpetrator not to meet with the victim, regardless of where he is located. Thus, the prohibition may apply to the place of work, study or other places that the injured person regularly visits. In addition, a police prohibition may relate not only to a prohibition on physical meetings of a perpetrator with a victim, but also on remote communication. The so-called “stalking” is “characterized by a variety of its manifestations” and can be carried out through phone calls, messages in instant messengers, sending parcels, meeting friends or colleagues of the victim, leaving notifications at the front door or in the car, ordering goods in the name of the victim. It is noted that such acts have a negative impact on the moral and physical state of the injured party: there are often cases when, due to worries, anxieties, accompanied by headaches and sleep disturbances, the victims are forced to hide and change their former place of residence and work²⁵.

The draft federal law No. 1183390-6 establishes the powers and duties of police officers: these are specified in par. 2 of Art. 10 and Art. 11 respectively. We believe that the placement of these provisions in the law against domestic violence is unjustified. It seems that for the

purposes of uniform legal regulation, the section on the rights and duties of police officers should be specified in the relevant law.

Attention is drawn to the imposition of the duty of police officers to respond when “there are grounds for taking individual prevention measures” (Art. 11 of the draft federal law). The evaluative nature of this formulation may complicate the practical application of the norm in question, therefore it seems appropriate to indicate a list of specific grounds for taking police measures: a threat to life, health, freedom, or, on the contrary, already committed violence, etc. In addition, the phrase “measures of individual prevention” is puzzling, since “prevention” implies a set of measures to prevent the occurrence of a negative phenomenon, which is practically impossible in the case of an already committed act of violence, which, obviously, should occur at the time of arrival of police officers, because this is indicated by the nature of the measures to be applied by the police, specified in par. 1 of Art. 11 of the draft.

In contrast to its German counterpart, the draft federal law No. 1183390-6 provides for the possibility of “removing” the injured person from the place that has become the focus of the conflict (par. 5 Art. 11). However, it seems inappropriate for victims of domestic violence to leave their homes, their familiar surroundings, part with some of their belongings and seek refuge in shelters and social service organizations. In this case, the approach of the German legislator to the solution of this issue, which consists in the concept of creating negative consequences for the offender and preserving the familiar environment for the injured party, is impressed.

At the same time, the consolidation of the powers of police officers to temporarily evict the offender and the prohibition on staying in places where the victim regularly stays in the Russian Federation, in contrast to the Federal Republic of Germany, should take place through federal, not regional, legislation, since in accordance with part 3 Art. 55 of the Constitution of the Russian Federation, limitation of fundamental rights and freedoms under the normal legal regime is allowed only through the adoption or amendment of a federal law. It should be noted that the protection of the health, rights and

²⁴ Administrative Court of Gelsenkirchen. Resolution of August 19, 2003 – 17 L 2079/03. URL.: <https://beck-online.beck.de> (retrieved: January 15, 2022).

²⁵ The Federal Court of Justice. Resolution of November 19, 2009 – 3 StR 244/09. URL.: <https://beck-online.beck.de> (retrieved: January 15, 2022).

legitimate interests of victims of violence is fully consistent with the constitutional requirements of the objectives of the supposed restrictions. The question of the admissibility of interference with freedom of movement, choice of place of stay and residence, provided for in part 1 Art. 27 of the Constitution of the Russian Federation, should be decided in each specific case, taking into account the criteria formulated in the legal positions of the Constitutional Court of the Russian Federation: justice, adequacy, proportionality, commensurability and the need for restrictions to strictly defined goals. At the same time, the interference should not have retroactive effect and should not affect the very essence of constitutional law. In order to exclude the possibility of a disproportionate restriction of human and civil rights and freedoms in a specific law enforcement situation, the norm must be formally defined, precise, clear and explicit, not allowing an extensive interpretation of the established restrictions and, therefore, their arbitrary application²⁶.

5. Conclusions

By conducting a comparative analysis of the current German and the intentions of domestic legal regulation of the sphere of combating domestic violence, it can be concluded that the considered legislation of the Federal Republic of Germany is aimed precisely at protecting the victim from acts of violence or the threat of its commission, while the Russian draft federal law combines two categories: on the one hand, this is the support and preservation of the family (par. 4 Art. 4), on the other hand, the protection of the victim from violence, which are oxymoronic in nature, which, as it seems, can cause difficulties in practical application.

Without diminishing the value of individual

measures for the prevention of domestic violence, the role of social services in conducting educational activities, and the importance of state support in this area, effective protection of the injured party from violence, carried out immediately, is of paramount importance in any state, and the Russian Federation is not here exception.

It seems necessary to distinguish between preventive and protective measures in different regulatory legal acts of the federal level. The latter, in turn, should assume significant consequences for the offender, to which, as it seems, preventive register, preventive conversation, specialized psychological programs specified in subparagraphs 1-3 par. 2 Art. 17 of the draft federal law No. 1183390-6, do not apply; however, obstacles to the implementation of protective measures should be minimized. The German approach demonstrates the desire to reduce procedural barriers to the provision of victim protection; there is a multi-stage system of protection: police protective measures, preliminary judicial measures, and judicial measures, all of which are quite strict in nature. It seems that the aforementioned makes it possible to respond quickly to an act of domestic violence and provide the necessary assistance to the victim, regardless of the time of day, days of the week and other similar circumstances.

At the same time, the current rejection to adopt a law in the Russian Federation does not indicate the absence of a problem, but, on the contrary, is an indicator of an unworked decision, demonstrating gaps in the legislation.

²⁶ In the case of checking the constitutionality of certain provisions of the Federal Law "On Basic Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation" in connection with a request from a group of deputies of the State Duma and complaints from citizens S. A. Buntman, K. A. Katanyan and K. S. Rozhkova: Decree of the Constitutional Court of the Russian Federation of 30 Oct. 2003 No. 15-P // Bulletin of the Constitutional Court of the Russian Federation. 2003. No. 6.

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