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**Criminal liability for crimes against personal and collective security
under the Criminal Code of the Federal Republic of Germany (comparative
legal analysis)**

Distinctive characteristic of German law is that criminal acts are regulated not only by the German Criminal Code¹, but also by other federal laws which include criminal law provisions along with provisions relative to other branches of law. It is obviously one of the factors explaining the fact that the Basic law for the Federal Republic of Germany provides for five types of legal proceedings: civil and criminal proceedings in courts of general jurisdiction, administrative proceedings, labor courts, financial courts and social courts.

In the German Criminal Code Crimes against life are described in section 16 of the Special part of the the German Criminal Code: "Criminal acts against life". Taking into consideration modern commonly accepted scale of human values, it is obvious that the reform of criminal law of this country will result in expansion of offenses against life to be included into the Special part of the Criminal Code.

Crimes endangering life include acts punishable under Section 16, § 218 of the German Criminal Code "Interruption of pregnancy." It should be also noted that in comparison with Criminal Codes of other countries German criminal law contains the largest number of articles that regulate criminal liability for interruption of pregnancy - 7 articles. Interruption of pregnancy is punishable by imprisonment of up to three years or a fine.

¹ Уголовное уложение (Уголовный кодекс) Федеративной Республики Германия: текст и научно-практич. комментарий. – М.: Проспект, 2010. –280 с.

Part 2 of this paragraph provides for liability for aggravated types of abortion. Aggravating circumstances of the crime called by legislators "particularly grave cases" include acts committed against the pregnant woman's will and the acts endangering a pregnant woman's life or health by negligence. This criminal act is punishable by imprisonment from six months to five years.

The provision contained in § 218, part 3 of the German Criminal Code is rather unexpected: interruption of pregnancy committed by a pregnant woman shall be punished by imprisonment of up to one year or a fine. If an attempt constitutes a criminal offence, a pregnant woman shall not be liable for an attempted interruption of pregnancy (§ 218, part 4 of the German Criminal Code).

Thus, § 218 specifies general grounds for criminal penalty for interruption of pregnancy. However, the legislator considers it necessary to provide for exceptions to the general prohibition and restricts criminal liability for interruption of pregnancy to some extent. According to A. Zhalinskyy and A. Reriht, § 218 legitimates in fact interruption of pregnancy, but in such a way as to consider such acts as unlawful, but not criminally punishable.

In our opinion, we should use a slightly different approach in explaining the situation. Blanket rules relative to interruption of pregnancy (in most countries, the term "abortion" is not used in criminal law, and this may lead to some difficulties while interpreting "legal abortion" and "illegal abortion"). German lawmakers, with scrupulousness natural to them, in § 218 a give definition of legal interruption of pregnancy, i.e. legal abortion, in order to avoid ambiguous interpretation of constituent elements of this crime.

§ 218 a "Non-punishable interruption of pregnancy" specifies constituent elements of interruption of pregnancy which, firstly, comply with requirements of § 219 of the German Criminal Code "Consultation of pregnant women in conflict situations and situations that may lead to disaster", secondly, the disposition of the above paragraph is referential and refers to the Federal law on the conflict situation related to pregnancy, thirdly, the said article consists of two parts and its text is so extraordinary and unexpected for domestic and probably not only domestic

criminal law, that we believe it is worth of citing in its entirety as there is good reason to consider this text as a certain kind of manifesto for protection of future life of the unborn child, legal campaign against interruption of pregnancy.

§ 219 (1). Consultation shall protect the unborn child. The purpose of consultation shall be aimed at encouraging a woman to preserve her pregnancy and showing her prospects of life with a child; consultation should help her make a reasonable and responsible decision. A woman should understand that an unborn child has the right to life during the whole period of pregnancy, and therefore, in accordance with law and order, interruption of pregnancy may be permitted only in exceptional situations where child bearing becomes for a woman heavy and excessive burden. Advice and assistance during consultation should contribute to the solution of the conflict situation arising in connection with pregnancy and assist to find a way out of plight. The Federal law on the conflict situation related to pregnancy regulates similar situations in more detail.

§ 218 (2). In accordance with the said Federal law, consultation shall be carried out with relevant competent authorities. After consultation, a pregnant woman shall be given a certificate regarding the final decision on this conflict situation. The certificate shall include the date of consultation, its content, a pregnant woman's name. The doctor who performs an abortion shall not be entitled to be a consultant.

Thus, pursuant to § 218 a, lawful acts shall be the following:

- 1) if a woman has been given consultation referred to in § 219 and has an appropriate certificate obtained at least three days before the surgery which a pregnant woman insists on;
- 2) if pregnancy is interrupted by a doctor;
- 3) not more than twelve weeks have passed from the date of conception.

§ 218 a, part 2 contains a provision according to which interruption of pregnancy performed by a doctor with the consent of a pregnant woman is not considered to be illegal in the event that in view of the living conditions of a pregnant woman at that date and in the future interruption of pregnancy is based on

therapeutic grounds in order to prevent the danger to a pregnant woman's life and health (physical or mental) and if the danger may not be prevented in a different way. So, it is obvious that there is a situation called an extreme necessity in domestic criminal law.

Interruption of pregnancy performed by a doctor with the consent of a pregnant woman shall be permitted if pregnancy has resulted from criminal acts and not more than twelve weeks have passed from the date of conception. The legislator expressly indicates the term of pregnancy - twelve weeks, considering that an unborn child is viable, although killing the child is allowed only in exceptional cases as extreme necessity. In general, the German legislator considers that interruption of pregnancy is actually murder of an unborn child, regardless of the duration of pregnancy. § 218 states that a pregnant woman shall be liable for interruption of pregnancy, but § 218 a (4) contains provisions according to which a pregnant woman shall not be liable if interruption of pregnancy is performed by a doctor after proper consultation and in the case if not more than twenty two weeks have passed from the date of conception. The court may release her from punishment specified in § 218, if at the time of abortion a pregnant woman was under great pressure.

Special types of punishable interruption of pregnancy include offenses specified in § 218 c) "Interruption of pregnancy without medical report or in the case of false medical report". A doctor who deliberately issues a false medical report shall bear liability in this case. A doctor shall have no right to issue such medical reports if he was not allowed to do so by a competent authority in connection with commission of criminal acts related to interruption of pregnancy; § 218 c: "Breach of medical duty during interruption of pregnancy"; § 219 a: "Advertising interruption of pregnancy "; § 219 c: "Introduction of means for interruption of pregnancy". As already mentioned, the German Criminal Code is probably the most progressive in terms of protection of life of the unborn child. Its provisions in some cases are beyond conventional "dry" and clear legal language and represent a "real" effective regulation which performs a protective function.

These provisions are not away from reality, and this experience is especially noteworthy, although the structure of regulatory material stands in stark difference to both the national Criminal Code and criminal codes of other countries.

The text of § 219 was adopted by decision of the Constitution Court of the Federal Republic of Germany and became a compromise whose value may be evaluated in the context of social life in Germany. It is believed that it contains agreed (but controversial) concept of protection of unborn life that determines legal decisions in criminal law. As for social background of such strict regulation of abortion, this may be explained by significant losses and casualties during the wars conducted by Germany. It should be noted, however, that in the former USSR and modern Ukraine the birth rate is a major issue, and even legal abortion is not a problem. This criminal law issue was studied in great detail by A. Zhalinskyy and A. Reriht who, in particular, point out reasonably that from the viewpoint of criminal law, human life is a social value protected by such legal provisions, but protection of this social value is related to both the interests of society as a whole and the woman as a bearer of the value protected. In legal literature and in the public perception, these provisions are considered as extremely important. The battle for prohibition or permission of abortion has involved the church, parties, feminist movement, different political parties, the media, and this struggle is still under way.

We have paid more attention to these crimes because the regulatory material related to protection of life and health of both a pregnant woman and an unborn child under the German Criminal Code is unique in its own way and requires further more detailed study and understanding, since both Ukraine and Germany have been equally affected by birth inclination, and German experience may be useful for our country.

Other crimes against personal and collective security, life and health under the German Criminal Code are more traditional in nature. However, some issues cause surprise. For example, till 2002 genocide which is commonly accepted as a grave crime in all EU countries, was included into Section 16, §220 (a) of the German

Criminal Code "Punishable offenses against life". Today, "Genocide" is excluded from the Criminal Code by virtue of Article 2 (No. and No. 10) of the Federal Law on the introduction of the Code of International Criminal Law (Eg VstgB) dated 26 June 2002 (BgBl.2002.IS.2254). This criminal act is now included into § 6 of the Code of International Criminal Law dated 26 June 2002. In accordance with § 6 and § 1 of the Code of International Criminal Law, genocide shall be punishable regardless of *lex loci delicti commissi* and infliction of harm to internal state interests on the territory of Germany, if in the country where such crime is committed criminal prosecution is unlikely or there is a competing international jurisdiction.

Failure to give assistance to persons in mortal danger is a crime against personal security (§ 221 (1)). This crime is punishable by imprisonment from three months to five years; liability for this crime is borne by a special subject of crime - a person who is obliged to render assistance or has put an aggrieved person in a helpless state which endangers life or health.

The German Criminal Code does not give a specific definition to consequences. A great number of constituent elements of crime include "serious bodily harm" that requires additional interpretation as it may imply grave bodily injuries and other consequences.

At least one year's imprisonment is prescribed to a person whose actions endanger life or health of the person under wardship (or endanger physical or spiritual development) (§ 225 (3)). § 225 has the title "Torture of persons under wardship".

According to some authors, in particular A. Zhalinsky, legal concept of "Involvement in a fight" under § 231 of the German Criminal Code may be interesting and helpful in resolving a number of practical complicated issues known to each investigator. This author, in particular, says that this is an intentional formally defined crime in the form of offense of abstract danger, making reference to research papers of German experts. This opinion is shared by M. Havronyuk, making reference to another monograph by A. Zhalinsky who

states that according to the opinion of the Supreme Court of Germany, the provision regarding involvement in a fight aimed at protecting life and health of all persons who were exposed to danger as a result of the fight, and to the monograph by G. Serebriannikova who believes that a perpetrator's intent is only aimed at involvement in a fight or assault. In our opinion, this approach to understanding these elements of crime is not adequate. Analysis of this crime, rather than mere citation enables to conclude that involvement in a fight is a materially defined crime as § 231 specifies a particular consequence: "if a fight or attack resulted in the person's death or serious bodily injuries". In our opinion, it is obvious that this is not an offense of creating danger and therefore not a formally defined crime.

Crimes endangering life and health shall include: «Kidnapping" (§ 234), "Abduction za people abroad" (§ 234 (a)), "Child abduction" (§ 235). Aggravating circumstance of "Child abduction" is, for example, endangering the victim's life or health. This crime is punishable by imprisonment of one to ten years. Other crimes endangering life and health: "Trafficking in children" (§ 236) punishable by imprisonment of six months to ten years, "Groundless persecution" (§ 238) modus operandi of which is danger to life, physical integrity, health or freedom of a person or his/her relatives, "Hostage-taking" (§ 239) and "Suspicion leading to political persecution" (§ 241 a). If these acts are committed by denunciation entailing political persecution, and at the same time the use of such acts as violence and arbitrary treatment which are contrary to the rule of law, endangering life, health, freedom or economic and professional status of a person.

Almost all crimes endangering human ecological safety have constituent elements endangering human health. For example, land pollution is punishable by imprisonment up to five years or a fine if the act may endanger another person's health (§ 324 a "Land pollution"). The same punishment is provided for air pollution if changes in the composition of air endanger another person's health (§ 325). An interesting and unconventional provision is stipulated in § 325 a "Creating noise or vibration and release of non-ionizing radiation". In our opinion, this article is of relevance, since increased noise during the use of buildings,

assembly units and machines is proved to endanger human health. However, this does not apply to noise caused by different modes of transport. Such an offence is punishable by imprisonment for up to three years or a fine. The subject of almost all crimes against the environment is a person who violates administrative and legal obligations, by virtue of express reference in the disposition of articles. Although constituent elements of the crime "Unauthorized actions with dangerous objects" (i.e. hazardous waste (§ 326)) are conventional, specification of consequences that may be caused by processing, storage, storekeeping and other activities with hazardous waste is unconventional: for example, criminal liability arises if waste contains or carries pathogens of commonly dangerous diseases that may be transmitted to people or animals, may cause human cancer, endanger human foetus or lead to a hereditary changes. This crime is punishable by imprisonment for up to five years or a fine. Illegal actions with radioactive substances and other hazardous substances and resources if they endanger another person's life and health as a result of ionizing radiation are punishable by imprisonment for up to five years or a fine (§ 328). Grave crimes against environment include damage to water bodies, if it endangers public water supply. This is just one example. This crime is punishable by imprisonment of six months to ten years (§ 330). Extremely serious crimes against the environment under German law include environment crimes if they endanger a person's life or health or if they endanger health of a large number of people. The punishment for such offenses is more severe: imprisonment of one to ten years. The same punishment is provided for creating grave danger due to poison emission.

Thus, definitions of crimes against environmental safety are traditional, similar to definitions in most countries. It should be pointed out that in Germany there are a number of Federal laws aimed at protecting environmental safety of people, flora, fauna, etc. These laws include, first of all, the Federal law on protection of environment against harmful effects due to air pollution, noise pollution, shocks and similar processes (as amended pursuant to Article 1 of the Federal Law dated 23 October 2007) and the Federal law on protection against

hazardous substances (as amended pursuant to official publication dated 2 July 2008), the Federal law on the peaceful use of nuclear energy and protection against dangers associated with its use (as amended pursuant to Article 4 of the Federal law dated 28 February 2008), the Federal law on promotion of circular process and ecological waste management dated 27 September 1994. Thus, it should be noted that the German environmental law covers a broad scope of regulation of environment protection. Considering that in this paper we analyze only codified law, it should be noted that all provisions contained in Section 29 of the German Criminal Code "Environment offenses" have a blanket disposition, so their analysis, along with analysis of the German environmental law may be a separate research issue.

The German Criminal Code has no special section for transport offenses. However, Section 28 "Generally dangerous crimes" contains several paragraphs providing for liability for: endangering the operation of railway, sea or air transport (§ 315), violation of safety rules of the above transport (§ 315 a); endangering traffic safety (§§ 315 b and 315 d) violation of road safety (§§ 315 c and 315 d) and driving under the influence of drink (§ 316); assault on the transport driver (§ 316 a) and assault on air and river transport (§ 316 c). All of these crimes should be considered as crimes against collective security, as dispositions of all articles mention endangering health or life of another person.

It should be noted that transport facilities mentioned in the said paragraphs of the German Criminal Code imply any means of transport intended for transportation of people or cargo, regardless of the driving force. In this context, transport facilities include motor-cars, electric cars, motorcycles, bicycles, trams, trailers of any type, motorized and non-motorized wheelchairs.

§ 315 c, part 2 "Violation of traffic safety" is of great current interest and relevance, and therefore worth attention as it specifies such special type of violation as "Failure to manifest the slightest attentiveness." A person fails to manifest the slightest attentiveness in the event if he/she violates his/her obligations in respect of other road users for selfish motives or has no doubt about

his/her behavior on the road and drives in a disorderly manner without hesitation. By the way, such socially dangerous behavior is punishable by imprisonment of up to five years or a fine.

Section 28 includes other offenses endangering collective security: "Aggravated arson" (§ 306 a), "Creating the risk of arson" (§ 306 f), "Creating the risk of explosion while using nuclear energy" (§ 307,) "Execution of dangerous explosion by using explosive materials" (§ 308), "Abuse of ionizing rays" (§ 309), "Production of defective nuclear installations" (§ 312), "Creating a situation related to the flood" (§ 313), and "Danger of public poisoning" (§ 314). This crime endangers life and health by poisoning drinking water sources, wells, water pipes and storage locations of drinking water and by poisoning items that are intended for public sale and consumption by adding harmful substances, by selling or otherwise releasing harmful substances into circulation. This crime is punishable by imprisonment of one to ten years. All crimes endangering public safety include a mandatory constituent element in the disposition indicating that these acts endanger life and health. In addition to the above, the crimes endangering collective security include "Release of ionizing radiation" (§ 311). The subject of this crime is a person who violates administrative and legal obligations, thereby causing processes that may endanger physical integrity or life of another person. This crime is conventional and included into the Criminal Code of Germany pursuant to Article 2 of the Federal Law dated 24 April 1990 to the Convention dated 26 October 1978 on Physical Protection of Nuclear Material (as amended pursuant to Article 6 of the Thirty-first Act on amendments to the criminal law dated 27 June 1994 (as amended pursuant to Article 4 (subparagraph 4) of the Sixth Act on Criminal Law Reform dated 26 January 1998.

As M. Havronyuk notes, there is no special section or chapter in criminal codes of Western countries regarding crimes against industrial safety. However, we believe that particular offenses may be considered as crimes endangering industrial safety. For example, § 319 of the German Criminal Code "Creating risks during construction" provides for criminal liability of a person who violates

generally accepted engineering rules in the process of planning construction facilities, construction management, construction or demolition of the construction facility, thereby endangering life or physical integrity of another person. The person guilty of committing such an act is punishable by imprisonment of up to five years or a fine.

§ 319 part 2 provides for liability for similar acts connected not with construction, but with installation of technical equipment. The punishment is the same as in § 319, part 1. In addition, it should be emphasized that the German criminal law is not fully codified, and contains a significant number of criminal rules in legislative acts of almost all branches of law (so-called "secondary law"). For example, provisions regarding professional liability of doctors are contained in German pharmaceutical criminal law regarding transplantation - in the Federal Law on transfer, removal and transplant of organs dated 5 November 1997.