

SEXUAL SPHERE: THIN LINE BETWEEN FREEDOM AND CRIME

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Abstract: *The paper addresses the issues of sexual sphere, which is protected by criminal law. Given the special sensitivity of this area, the question is raised on the need to clearly define the limits of criminal behavior. A range of behavioral acts, related to sexual intercourse, which are recognized as socially acceptable and should not entail the application of criminal law repression measures, is defined. At the same time, an attempt to simulate the optimal system of criminal violations in sexual sphere is made. Modern trends in the area of criminal law protection of sexual sphere in the countries of continental Europe are researched. Specific attention is given to the Istanbul Convention as the international law document, which has a significant impact on the formation of criminal law policy in the mentioned area. Achievements and flaws of the Criminal Code of Ukraine, concerning liability for crimes of sexual freedom and sexual integrity of a person and related to the implementation of the Istanbul Convention provisions, are found.*

Keywords: *Istanbul Convention, sexual sphere, sexual abuse, rape, voluntary consent, sexual harassment*

1. INTRODUCTION

There is no doubt that the state's involvement in sexual, that is, intimate sphere of human as a social and biological actor, must occur only, when there is a need to protect individual from encroachments on her freedom and integrity (sexual, physical, mental), health, honor and dignity. In other words, it is about the need to protect the most socially meaningful values, which can suffer while in sexual sphere. Human rights are non-absolute and under certain situations may be limited even in a democratic society. On the other hand, the inability of some act of sexual behavior to cause significant damage to the above-mentioned values should serve as a guarantee that sexual sphere in society cannot be subjected to criminal law regulation. This aspect becomes equally important, since excessive intervention by the state into the mentioned sphere can lead to serious negative consequences, while simultaneously violating person's inalienable rights and freedoms.

The relevant approach, presupposing the balance of interests of a human being with its inalienable right to privacy, on the one hand, and society, on the other, which has been time-tested and is axiomatic for legal scholars, and therefore, the establishment of criminal law prohibitions in the field of sexual relations, is considered both social, historical and scientifically proven. The system of crimes in the areas of sexual sphere, fixed in the criminal law of a country, is determined by many factors, in particular by the structure of sexual relations, established in a particular society, by the dynamics and prevalence of certain acts of conduct, public opinion, existing traditions and proclaimed priorities of legal protection, caused, among other things, by civilizational and religious factors.

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Nevertheless, in recent years there has been a trend in European law towards unification of legislation in terms of determining the grounds for criminal liability for sexual offenses. There is a search for the most successful concept of the construction of criminal law norms on relevant offenses, the characteristic feature of which is the expansion and clarification of criminal behavior limits. To this end, several international acts, which are designed to develop the minimum standards for protecting a person from sexual assaults, have already been adopted. However, not all countries are in a hurry to implement these standards into national legislation, while others do such implementations differently.

Taking the above into account, the purpose of this article is to study modern approaches to the definition of criminal acts in the sexual sphere, which are inherent in the countries of continental Europe, with a focus on those, where significant changes in the relevant area of legal regulation have occurred. Particular attention is focused on Ukraine as the country, where the most recent changes (starting on January 11, 2019) in the legislation on liability for crimes in sexual sphere have been introduced. As a result, taking into account the globalization and integration trends of development, which are inherent in modern society, we will try to establish where line should be drawn between criminal violations of sexual relations and types of behavior in the sexual sphere that are lawful, as well as to establish, in what manner such line should be regulated. The structure of the article provides for the initial consideration of the typical approaches to the definition of guiltiness of acts in the sexual sphere, with the allocation of the most controversial approach (Section I). The Istanbul Convention as an international legal document, designed to unite positions of different countries of the world, while developing a single standard for the legal protection of human rights in the sexual sphere is further analyzed (Section II). In the third section (section III), based on the example of Ukraine, the approach of this country to the introduction of such unified standard into the national legislation through the reproduction of the relevant international legal norms is highlighted. After that, in view of the analyzed practices, an attempt to determine the structural (theoretically applied) model of sexual crimes is made (Section IV). The last section (conclusions) accumulates the key aspects of the issues researched, forms the final provisions and outlines the prospects for further research.

2. PERSON'S SEXUAL BEHAVIOR AND CRIMINAL LAW: OUTBOUND PRINCIPLES

The study of modern approaches to the criminal law regulation in the field of sexual relations in the countries of continental Europe allows to distinguish the following three types of human behavior.

The first type can be defined as lawful, that is, recognized by the state and sanctioned by society. From both moral and legal points of view, such behavior is generally socially acceptable and permissible. It is about sexual communication without any violence, coercion and through the good will of the persons, who are bearers of sexual freedom. The latter means the right of a person to independently choose a partner for sexual communication, the means and form of such communication. This type of behavior usually involves voluntary satisfaction of sexual desires by persons, who have reached a certain age, established by criminal law (“age of sexual consent”), and have no mental defects. In this case, it is necessary to proceed from the postulate that sexual life of adult mentally healthy people is their personal business, which should be subjected solely to criminal law regulation, when there is a violation of others’ rights and interests.

Historical transformation of approaches to the legal assessment of voluntary homosexual principles serves as a vivid example of the legitimacy of behavior in the sexual sphere, which forms the distinct first type. In *“Dudgeon v. United Kingdom”* (1981), the European Court of Human Rights (“ECHR”) found that criminal prohibition on voluntary private homosexual relationships between adult men, who can adequately assess and control their actions, violates provisions of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 “Right to respect for private and family life”. Some time ago, similar decisions, issued by the ECHR, forced legislators in Australia, Ireland and Cyprus to abandon criminal liability for homosexual relationship, while at the same time, for example, criminal liability for voluntary sodomy continues in many Muslim countries (the impact of religious factor). At the same time, the so-called residual criminalization of voluntary sodomy exists in some countries, which means labeling acts of sodomy for remuneration or in a public place, inclining others to such acts, propaganda of sodomy, etc. as crimes.¹

The second type of behavior, being the antipode of the first one, is characterized by illegality with the establishment of the most severe form of legal liability (criminal) for committing acts of sexual nature, which are enforced and are also (or) of violent nature. In this type of behavior, psychics of a person (victim) undergoes mental impact, while his or her body – physical impact, carried out in one way or another with the purpose of restricting his (her) freedom and subduing to the offender’s will. It is about a form of sexual abuse, prohibited by the criminal law, with rape being a classic type of such abuse. International jurisprudence is based on the assumption that rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even among the worst ways of inflicting harm on the victim in cases, when he or she suffers both bodily and mental harm).²

This type of behavior also covers sexual intercourse with persons, who are considered sexually intact (children, persons who are not aware of the consequences and social meaning of sexual intercourse due to a state of mental illness, etc.). Though sexual freedom, as already mentioned, is related to the person’s ability to freely dispose of himself in the sphere of sexual communication, sexual immunity rather means a legally protected status, in which it is prohibited to engage in sexual intercourse with a person, who for some reason is not the bearer of sexual freedom. Sexual integrity, as an absolute concept, means that certain interests of the intact person under no circumstances can be violated by another person, and sexual acts committed against him or her are considered unlawful, moreover – they are punishable by criminal law.

As for the *third type* of behavior, it can be considered intermediate in relation to the previous two. This type is connected with the probable affiliation of certain actions both to lawful and to unlawful (including criminal) behavior. Perhaps the largest number of debatable issues, which remain in the European criminal law agenda, lie in the context of this type of behavior. The point is that some acts in sexual sphere are of obviously controversial nature in the context of the possibility or, conversely, inappropriateness of their

¹ DUDOROV, O. *Criminal law analyses of crimes against sexual freedom and sexual integrity of a person: scientific practical tutorial*. Luhansk: lduvs, 2011, p. 25.

² Questions and Answers on the Crime of Genocide. *Legal Briefing Note*. August 2018, p. 32.

labeling as criminal. Accordingly, criminalization (refusal of criminalization) of such acts is influenced by a number of the above listed factors, one of which is the need for the fulfillment of the international legal obligations and recommendations, taken by the state. Thus, serious renewal of the criminal law of some countries of continental Europe in terms of liability for sexual crimes and, consequently, significant change in the limits of criminal and non-criminal behavior in the sexual sphere has become the result of the acceptance of approaches, elaborated by the Council of Europe.

3. ISTANBUL CONVENTION AND ITS IMPACT ON THE FORMATION OF THE CRIMINAL LAW POLICY ON THE PROTECTION OF SEXUAL SPHERE

The adoption and opening for signature of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention)³ on May 11, 2011 has become an important step towards unification of approaches to the criminal law regulation of sexual relations. The analysis of this document reveals, among other things, efforts by the European community to develop and implement common standards to enforce criminal law protection of sexual sphere.

It is worth noting that as of 2019, the Istanbul Convention was signed by 46 countries and the European Union (among the Council of Europe member states, the convention was not signed only by Azerbaijan and the Russian Federation). At the same time, 33 of these countries have already ratified it.⁴ As one can see, most European countries have welcomed the standards, imposed by the Istanbul Convention, including provisions on the determination of the limits of sexual misconduct. The Istanbul Convention is undoubtedly described as a revolutionary document. It is the first international legally binding act, which is potentially open to any country in the world and which provides a comprehensive range of measures to prevent and combat violence against women and domestic violence⁵ (including sexual sphere). The instrumental value of the Istanbul Convention is fairly seen, in particular, in that its action is based on the Four Pillars: Prevention (preventing all forms of violence against women); Protection (protecting against all forms of violence against women); Prosecution (prosecuting anyone accused of committing acts of violence against women); Policy integration (integrating policies, that is, overcoming violence against women not only by means of criminal law and criminal procedural, but also through the introduction of substantive equality between women and men).⁶

In the context of issues that are dealt with in this article, the Istanbul Convention poses particular interest, since the implementation of its provisions by a particular state imposes

³ Istanbul Convention Action against violence against women and domestic violence, CETS No. 210. In: *Council of Europe* [online]. 11. 5. 2011 [2019-03-29]. Available at: <<http://www.coe.int/en/web/istanbul-convention/home>>.

⁴ Council of Europe Convention on preventing and combating violence against women and domestic violence. In: *Council of Europe* [online]. 16. 3. 2019 [2019-03-29]. Available at: <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>>.

⁵ FISHER, G. *Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention): Directory for Members of Parliament*. Kyiv: K.I.C., 2014, p. 15.

⁶ KHARITONOVA, O. Bread, love and fantasy, or notes on the sides of the Istanbul Convention and the Criminal Code (part 1). In: *Jurliga* [online]. 11. 1. 2019 [2019-03-28]. Available at: <https://jurliga.ligazakon.net/analitics/183288_khhlb-lyubov—fantazy-a-bo-notatki-na-polyakh-stambulsko-konvents-ta-kriminalnogo-kodeksu-chastina-1>.

criminal liability for specific acts in the sexual sphere. Thus, according to the Istanbul Convention, parties, who have adopted its provisions, must adopt legislative or other measures, aimed at determining the grounds for legal liability (including criminal liability) for the commission of such acts of sexual conduct in the national legislation:

1) *sexual violence* in the form of exercising, without consent, vaginal, anal or oral penetration of sexual nature into the body of another person, using any part of the body or object; exercising, without consent, other acts of sexual nature with a person; coercing another person into the commission, without consent, of acts of a sexual nature with a third person (Article 36);⁷

2) *sexual harassment* in the form of unwanted verbal, non-verbal or physical behavior of sexual nature, the purpose or effect of which is to harm person's dignity, in particular by creating a threatening, hostile, humiliating or offensive environment (Article 40).

As one can see, voluntary consent is the key element, by which Article 36 of the Istanbul Convention defines the criminal nature of behavior, which is labeled as sexual violence. Obviously, involuntariness is a broader concept than mental coercion or physical violence – the means, which are typical for the second type of behavior in the field of research.⁸ Under such approach, the limits of criminal behavior are significantly expanded – criminal liability for committing any acts of sexual nature is imposed even in the absence of the person's voluntary consent to commit them.⁹

⁷ It is worth mentioning the Council of Europe's consistency, with which this organization advocates for the adoption of measures, in particular those related to the improvement of national legislation with regard to penalizing any sexual act, committed against non-consenting persons, even if they do not show signs of 'resistance', providing relevant recommendations much earlier than the Istanbul Convention (See: Recommendation Rec(2002)5 of the Committee of Ministers to Member States on the Protection of Women against Violence, adopted by the Committee of Ministers at the 794th meeting of the Ministers' Deputies. In: *Council of Europe* [online]. 30. 4. 2002 [2019-03-29]. Available at: <<https://wcd.coe.int/ViewDoc.jsp?id=280915>>).

⁸ Back in 2002, the World Health Organization identified sexual abuse as any sexual act, attempt to commit a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work. As such, compulsion was recognized as an element, which essentially determined the presence of active suppression of personal will in sexual relations, and which was interpreted narrower than the notion of the absence of voluntary consent, envisaging the exercise of only physical or mental influence on the person, who is the bearer of sexual freedom (KRUG, E. G. et al. (eds.). *World report on violence and health*. Geneva: World Health Organization, 2002, p. 149).

⁹ Interestingly, the 2003 *Sexual Offenses Act* (United Kingdom) has clarified the concept of rape by replacing the concept of "sexual intercourse" with the listing of specific actions, which could be considered rape (penetration into vagina, anus, or mouth of another person with a penis), provided that they are committed without victim's consent and in the absence of "reasonable grounds" for perpetrator to assume that the victim has given such consent (Sexual Offenses Act 2003. In: *The National Archives* [online]. 20. 11. 2003 [2019-03-29]. Available at: <<https://www.legislation.gov.uk/ukpga/2003/42>>). That is, the key element of rape is not the use of force or the threat of its use, but the lack of consent to sexual intercourse. Instead, the use of violence is recognized only as proof of the lack of proper consent. The International Criminal Court in the case of former Yugoslavia has also been advocating for a similar broad approach to interpreting rape: the act of sexual penetration is considered rape, if it was accompanied by coercion, force or threat of use of force against victim or another person, as well as when there were other factors, which make the act non-consensual or involuntary on the victim's part. Thus, the key criterion in this case is the lack of consent or voluntary participation by the victim (GAGGIOLI, G. *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law*. *International Review of the Red Cross*. 2014, Vol. 96, No. 894, p. 508).

Such approach, one should be reminded, takes into account the position of the ECHR, which shows that in order to label the act as rape the use of force or threat of its use is crucial, rather than the establishment of a lack of consent by the injured person to the sexual contact. Any rigorous approach to prosecuting sexual offenses (for example, requirement to provide evidence of physical resistance in all cases) poses a threat that some types of rape may be left without punishment, which, in turn, threatens effective protection of the person's sexual independence (*"M.C. v. Bulgaria"*, issued on December 4, 2003).¹⁰ As O. Kharitonova correctly put it, the ECHR in this decision provides the interpretation of 'coercion' not in the narrow sense, but understands it as a violation of the sexual autonomy principle, when the true common denominator of coercion is the lack of voluntary and consensual actions by the victim.¹¹

As an example, similar approach has recently been introduced into Swedish law. The changes made are based on a clear principle: sex must be voluntary – if it is not, then it is illegal. In fact, this is a matter of sexual violence, committed with negligence. The latter means that one participant in sexual relations assumes absence of voluntary consent from the other, that is, he commits a sexual act without being convinced of the good will. The proposal also involves introduction of two new offenses: 'negligent rape' and 'negligent sexual abuse'. Both can be punished by four years in prison maximum. The negligence aspect focuses on the fact that one of the parties did not participate voluntarily. This means that it will be possible to convict more people of sexual abuse than currently, for example, when someone should be aware of the risk that the other person is not participating voluntarily, but still engages in a sexual act with that person.¹²

Experts evaluate introduction of these provisions differently. In particular, Swedish medical workers argue that it is no longer necessary to show signs of physical violence to the victim in order to establish the fact of rape. The reason for such position lies in the fact that only active participation in sexual relations can be interpreted as consenting to them; instead, passive participation does not mean such consent. Representatives of the lawyers' community, however, are more skeptical. They believe that changes to the criminal law will unlikely have a positive effect on the state of countering sexual offenses. Also, convictions for their commission are not expected, since prosecution must cope with the difficult task of proving that sexual violence has been committed in the absence of the victim's consent.¹³ Overall, it should be emphasized that sexual violence is traditionally viewed as a difficult crime to prosecute successfully. Proving beyond a reasonable doubt

¹⁰ ECtHR, *M.C. v. Bulgaria*, no. 39272/98 (4.12.2003).

¹¹ KHARITONOVA, O. Gender accents in the methodology of sexual abuse research. In materials of the International scientific and practical symposium. In: *Humanization of criminal liability and democratization of criminal justice*. Ivano-Frankivsk, 2016, pp. 302–303; KHARITONOVA, O. *Key grounds of gender policy in the criminal law of Ukraine and main directions of reforms on combating violence against women and domestic violence: scientific and practical guide*. Kharkiv: Human rights, 2018, p. 52.

¹² Consent – the basic requirement of new sexual offence legislation. In: *Government Offices of Sweden* [online]. 26. 4. 2018 [2019-03-27]. Available at: <<https://www.government.se/press-releases/2018/04/consent—the-basic-requirement-of-new-sexual-offence-legislation>>.

¹³ Swedish Law Now Recognizes Sex Without Consent as Rape. In: *The New York Times* [online]. 23. 5. 2018 [2019-03-27]. Available at: <<https://www.nytimes.com/2018/05/23/world/europe/sweden-rape-consent-sex.html>>.

that sexual violence has occurred can become a very hard task, since it usually comes down to one person's word against another's.¹⁴

Thus, despite the fact that part 2 of Article 36 of the Istanbul Convention provides for the definition of what form of consent should be considered voluntary (the presence of the person's free expression, received in the context of the accompanying circumstances), understanding this element can cause most difficulties, both in the process of rulemaking, and during subsequent enforcement. Taking into account the fact that the definition of the free will of the victim and hence the existence of the grounds for criminal liability depend on the context of the corresponding circumstances (as a circumstantial concept), concern is raised that in reality the definition of voluntary consent can be interpreted ambiguously.

In our opinion, the approach, adopted by the Istanbul Convention (see below for details), obliges law enforcement agency to establish that the victim's unwillingness to commit sexual acts against her was more or less expressive, explicit, convincing and in such manner that one person understood that the other did not want sexual contact. Each partner has to verify the voluntary consent of another to specific acts of sexual nature, expressed either verbally or physically.¹⁵

Traditionally, when analyzing the crime of "rape", it has been indicated in legal literature that oral denial, even certain physical opposition does not always indicate someone's real reluctance. For example, a man can perceive woman's behavior as coquetry, flirtation (an element of a sexual game) or a manifestation of shyness; this is especially true in cases, where a woman initially allows a man to undress herself, caress her breasts and sexual organs, etc., and later declares that she does not consent to sexual penetration. From a criminal point of view, it may indicate a relevant, namely, an apologetic (conscientious) factual mistake in man's actions and, accordingly, demonstrate the absence of the crime of "rape".¹⁶

¹⁴ DALY, K., BOUHOURS, B. Rape and attrition in the legal process: A comparative analysis of five countries. *Crime and justice*. 2010, Vol. 39, No. 1, pp. 565–650; GAGGIOLI, G. Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law. *International Review of the Red Cross*. 2014, Vol. 96, No. 894, p. 536.

¹⁵ KHARITONOVA, O. *Key grounds of gender policy in the criminal law of Ukraine and main directions of reforms on combating violence against women and domestic violence: scientific and practical guide*. p. 53.

¹⁶ Criminal law recognizes that the factual forgivable error occurs when the person was not able to escape the error despite his careful and honest attitude to the assessment of the actual circumstances of the offense, and, accordingly, the error in question could not be used against such person (excludes criminality of the act). On the other hand, aren't there any reasons in the situation, which we have modeled (there may be infinite number of such situations) to speak about the existence of 'careless' rape, committed under the influence of the unforgettable factual mistake? Obviously, the solution to this problem requires clear legal guidelines. Otherwise one can only dream of the predictability of court decisions, which is essential in the context of the implementation of legal certainty as one of the rule of law principles. By the way, Article 36 of the Istanbul Convention "Sexual Violence, Including Rape" emphasizes on the need to criminalize certain forms of intentional behavior. The conventional requirement for *willful* conduct is related to all elements of crime (paragraph 189 of the Explanatory Report to the Istanbul Convention).

Instead, Part 2 of Art. 153 of the Criminal Law of the Republic of Croatia provides for punishment, in particular, for sexual intercourse or an equated sexual act in case of person's mistake regarding the consent of the victim, if such mistake could be avoided. In such case, experts point to a negligent criminal act (MARSHAVELSKI, A. Progressive model of sexual crimes in the Criminal law of the Republic of Croatia. *Criminal Law*. 2014, Vol. 5, pp. 140–141).

It makes sense to recall the infamous decision of the House of Lords of England in the case of *Morgan* (1976). Morgan and his friends were found guilty of raping Morgan's wife, who had desperately resisted to rapists. The defendants challenged the verdict, citing the fact that they had believed Morgan, who had told them that his wife adored forceful coercion to sex. The House of Lords had ruled that the convicts made a sincere mistake and had no intention of committing a violent intercourse, since they believed that the woman agreed to sexual intercourse. This decision caused anger among women, who thought that in this case a group of male judges decided that in case, when, for example, a drunken sailor believed that a woman, despite her tears and resistance, wanted violent sexual intercourse, he would not be subjected to criminal liability.¹⁷ The used example can be viewed as a vivid manifestation of sexual objectification, which refers to the process of female 'denigration', the imposition of stereotypes into society like "all women love sex", "all women love a strong hand", "women seduce men".¹⁸ At the same time, as stated in paragraph 192 of the Explanatory Report to the Istanbul Convention, it is important to ensure that gender stereotypes and myths about male and female sexuality should not affect the interpretation of rape laws and judicial decision-making.¹⁹

By the way, it follows from the above mentioned definition of rape, included in the UK Sexual Offences Act 2003, that the British legislator, having affirmed the consent of the victim as a crime-forming element of rape, allows for a conscientious mistake of the accused as to such consent, which should be established in each particular case of the relevant criminal statute application (however, this does not apply to the rape of a person under the age of 13, since such offense is recognized as "strict liability" crime – it is not necessary to establish mental apprehension of its elements).

According to the Serbian author Z. Stoyanovich, when disclosing the subjective element of rape, it should be taken into account that strict and clear boundary between desirable and compulsory does not always take place – therefore, a person, who commits a sexual act, may find herself in a situation, when in which she does not realize that she has crossed the permitted limits and found herself in the realm of criminal law.²⁰

Given complexity of human communication phenomenon (in particular, such communication can be non-verbal), the uniqueness of various life situations as well as the fact that the slogan of the campaign against sexual violence (its most popular version: "No" means "No") cannot deny criminal law doctrine of guilt, we do not reject the possibility of addressing the issue of an actual mistake, when looking into actions, for example, of a man who has sexually penetrated the body of a woman who by words or by actions expressed herself against it.

Thus, the concise analysis of the Istanbul Convention from the standpoint of its influence on the European criminal law policy formation, regarding protection of sexual sphere, allows us to formulate the following conclusions.

¹⁷ FLETCHER, J., NAUMOV, A. *Basic concepts of contemporary criminal law*. Moscow: Yurist, 1998, pp. 392–395.

¹⁸ KHARITONOVA, O. *Gender accents in the methodology of sexual abuse research*. p. 302.

¹⁹ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210.

²⁰ STOYANOVICH, Z. Subjective element of rape and victim's resistance. *Criminal law*. 2014, Vol. 5, pp. 143–145.

1. The Istanbul Convention serves as an important international legal instrument, which defines, among other things, the strategy for the formation of the criminal law of the states, which have signed and / or ratified it in the field of sexual relations protection. This strategy involves the establishment of unified standards, which should determine the criminality of behavior in the researched area.

2. The implementation of this strategy for many European states involves transition from the punishment of the established (classical) acts of criminal behavior, attributed by us to the second type, which clearly demonstrates the paralyzed will of a person during sexual intercourse (physical violence, psychological coercion, underage, presence of mental or physical disabilities) to criminalization of any sexual behavior, committed in the absence of a conscious desire for it by the victim. That is, the presence of a person's voluntary consent to sexual intercourse is considered as a key factor in determining legitimacy of sexual behavior.

3. Despite the focus of the Istanbul Convention on the protection of women,²¹ its norms are equally relevant to men, who also can become victims of sexual crimes. At least, provisions of Articles 36, 40 of the Istanbul Convention do not provide for any gender exceptions.

4. SEXUAL SPHERE IN THE FOCUS OF MODERN UKRAINIAN CRIMINAL LAW POLICY

Ukraine belongs to the signatory states of the Istanbul Convention, which it has not yet ratified. However, this did not prevent the implementation of the abovementioned international legal document in the form of adopting the Law of December 6, 2017 “On Amendments to the Criminal and Criminal Procedure Codes of Ukraine in order to implement provisions of the Council of Europe Convention on the Prevention of Violence against Women and Domestic Violence and Counteracting these Abuses” (Law of December 6, 2017),²² which has triggered major changes to Section IV of the Special Part of the Criminal Code of Ukraine.²³ Such implementation is characterized by the efforts of the Ukrainian

²¹ Significantly, this international legal document is sometimes called “cold shower for men” (DRUZ, Y. Overcoming domestic violence through fear. In: *ZN* [online]. 29. 9. 2017 [2019-03-29]. Available at: <https://zn.ua/family/pre-odolenie-domashnego-nasiliya-cherez-strah-261484_.html>).

²² Law on Amendments to the Criminal and Criminal Procedural Codes of Ukraine in order to implement the provisions of the Council of Europe Convention Action against violence against women and domestic violence. In: *Verkhovna Rada (Parliament) of Ukraine* [online]. 6. 12. 2017 [2018-12-29]. Available at: <<http://zakon0.rada.gov.ua/laws/show/2227-19>>.

²³ We are aware that the crimes, statutes on which are located not in this Section of the Criminal Code of Ukraine, also affect the sexual sphere. Thus, in criminal legislation of some European countries offenses related to procurement, pimping, prostitution and pornography are classified as sexual offenses. Instead, in Ukraine such violations are considered crimes against morality in the field of sexual sphere and, therefore, criminal sanctions, provided for them are beyond the bounds of Section IV of the Special Part of the Criminal Code of Ukraine. The indicated issue deserves to become the subject of a separate scientific analyses, including the possibility of borrowing European experience in order to clarify the place of such prohibitions in the system of the Special Part of the Criminal Code of Ukraine (DUDOROV, O. *Criminal law analyses of crimes against sexual freedom and sexual integrity of a person*. pp. 7–11).

state, on the one hand, to reproduce the provisions of the Istanbul Convention as precisely as possible, and on the other hand, by the abandonment (partly unjustified) of some of its provisions, which will likely require reassessment in the event of ratification of the named document, and also with regards to the expected enforcement issues.²⁴ Next, we will cover some advantages and disadvantages of the Ukrainian approach to ‘sexual revolution’, which currently takes place in European law.

First of all, the specificity, which defines the system of crimes against sexual freedom and sexual integrity of a person, should be noted. Criminal liability for the commission of the researched crimes is provided for in a separate section IV of the Special Part of the Criminal Code of Ukraine of 2001, entitled “Crimes against sexual freedom and sexual integrity of a person”. The key criterion for differentiating liability for the mentioned crimes is the lack of voluntary consent for sexual intercourse (part 1 of Article 152 of the Criminal Code of Ukraine – rape, part 1 of Article 153 of the Criminal Code of Ukraine – sexual violence, Article 154 of the Criminal Code of Ukraine – compulsion to sexual intercourse) or the existence of such an agreement, which, however, is recognized as a legal fiction (part 4 of Article 152 of the Criminal Code of Ukraine – rape of a person under the age of fourteen;²⁵ part 4 of Article 153 of the Criminal Code of Ukraine – sexual violence against a person, which has not reached the age of fourteen;²⁶ Article 155 of the Criminal Code of Ukraine – sexual intercourse with a person who has not reached the age of sixteen;²⁷ Article 156 of the Criminal Code of Ukraine – debauchery of minors). The previous version of the mentioned criminal law provisions contained a different approach, under which differentiation was made, depending on the presence or absence of coercive (including forcible) oppression of the victim’s will, and all sexual crimes in this regard could be divided, with a certain degree of conditionality, into violent and non-violent.²⁸

²⁴ The fact that Ukraine, while not ratifying the Istanbul Convention, has yet accepted its main provisions (regarding definition of the limits of criminal behavior in the sexual sphere) is, among other things, due to the influence of public opinion, which has formed, in particular, in the trend of the worldwide and locally Ukrainian movement #metoo. Talks on the issue have begun in the society – and it was important. In recent years, the institute of public opinion in Ukraine has gained much higher importance, while the dependence of politicians on the sentiment of citizens is becoming more perceptible.

²⁵ That is, in this case, the idea of legislatively specifying the age, not reaching of which obliges the law enforcement to unconditionally consider sexual penetration into the body of the person concerned as rape, is embodied. Sexual penetration into a minor’s body is recognized as rape regardless of whether such person has given consent, whether consent has been voluntary or forced, whether the minor has understood the nature and significance of the acts committed in relation to her, etc.

²⁶ The need to include the above-mentioned provisions (Part 4 of Article 152 and Part 4 of Article 153) in the Criminal Code of Ukraine, in addition to the fact that such legislative step is consistent with legal certainty as a component of the rule of law, followed from the ratification by Ukraine of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Violence of 2007. Its Article 18 contains a requirement to criminalize, among other, willful behavior in the form of engaging in sexual activity with a minor, who has not reached the age, prescribed by law for engaging in such activities.

²⁷ The Law of March 14, 2018 “On Amendments to the Criminal Code of Ukraine for the Protection of Children against Sexual Abuse and Sexual Exploitation” has implemented the idea of replacing the status of sexual immobility, introduced during the reign of the Soviet legal doctrine, into a more vivid and less practically controversial age criterion.

²⁸ DUDOROV, O. *Criminal law analyses of crimes against sexual freedom and sexual integrity of a person*. pp. 26–28.

It is worth mentioning that the Law of December 6, 2017 consolidated the gender neutral definition of rape (Article 152 of the Criminal Code of Ukraine) and distinct crime of sexual violence (Article 153 of the Criminal Code of Ukraine), within which natural biological differences between a man and a woman are not taken into account. Such approach is generally corresponding to the approach, embodied in the Istanbul Convention, and is conditioned by the desire to ensure the same criminal law protection of sexual life of persons despite their sex.

According to part 1 of Article 152 of the Criminal Code of Ukraine, as set forth in the wording of the Law of December 6, 2017, rape means committing acts of sexual nature, connected with vaginal, anal or oral penetration into another person's body, using genitals or any other subject, without the injured person's consent. These are acts of sexual nature, regardless of their hetero- or homosexual orientation, which while meaning penetration into one of the three natural openings of the victim and, accordingly, violating her bodily integrity, are able of provoking and/or satisfying male or female sexual desire.

As one may see, when describing the signs of rape, Ukrainian legislator went through the mechanical (almost literal) adoption of the provision, used in the Istanbul Convention. The difference lies in the fact that Part 1 of Article 36 of the Istanbul Convention refers to the penetration into another person's body by any organs, not just genitals. It seems that such legislative decision reveals a defect, since sexual penetration into another person's body can be committed by using not only genitals, but also other parts of human body – hand, finger, etc.²⁹ One should agree with the position of those experts, who believe that introduction of international law prohibitions on sexual violence at the national level, which is limited to literal translation of the relevant provisions of international legal acts, is inappropriate.³⁰

In view of the above, we believe that a more optimal (less controversial) option for the implementation of requirements of Article 36 of the Istanbul Convention in describing elements of rape into national legislation could be in the following statement: “an act of sexual nature, consisting of penetration into vagina, anus, or mouth of the victim by organ or object”. The proposed wording is based, in particular, on the fact that the assessment of the act as rape requires only relevant type of penetration, and not some additional sexual activity (activities), as follows from Article 152 of the Criminal Code of Ukraine, not quite successfully updated by the Law of December 6, 2017. Accordingly, it will be possible in such way to eliminate the uncertainty, inherent in the updated Article 152 of the Criminal Code of Ukraine, on the issue of whose body (the victim's, the racist's or both) should be penetrated in order to blame the act as rape.

²⁹ At the same time, the recognition of sexual penetration (and not just sexual intercourse, as was the case before, that is heterosexual intercourse) as rape correctly takes into account, among other things, the probable odds of negative consequences for the victim (for example, loss of fertility, pregnancy or ability to give birth can be caused by penetration into vagina of a woman by other, than a male penis, parts of the person's body or material objects). Sexual attack, combined with penetration, is a specific and generally more dangerous way of violating sexual autonomy (see: KHARITONOVA, O. Bread, love and fantasy, or notes on the sides of the Istanbul Convention and the Criminal Code (part 2). In: *Jurliga* [online]. 14. 1. 2019 [2019-01-28]. Available at: <https://jurliga.ligazakon.net/analytics/183309_khlb-lyubov—fantazyia-abo-notatki-na-polyakh-stambulsko-konvents-ta-kriminalnogo-kodeksu-chastina-2>).

³⁰ GAGGIOLI, G. Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law. *International Review of the Red Cross*. 2014, Vol. 96, No. 894, p. 537.

The following problem, which was in part considered above, relates to the refusal to provide guidance in Article 152 of the Criminal Code of Ukraine on a specific method of rape, connected with the indication of the absence of voluntary consent for sexual intrusion. Vaginal, anal or oral penetration into the body of another person is recognized as rape both when it is combined with the traditional use of physical violence, the threat of its use or with the use of the victim's helpless condition, and also in other cases of the absence of his or her voluntary consent to such penetration.

Due to the implementation of the Istanbul Convention provisions, need for the introduction of the “concept of consent” and/or possible coercive circumstances (in particular, regarding regulation of liability for rape) into the Criminal Code of Ukraine has been pointed out by other researchers who have stated that previous Ukrainian approach to the criminalization of sexual violence lagged behind the best international practices.³¹ Taking into account that under the updated versions of Articles 152 and 153 of the Criminal Code of Ukraine, the absence of consensus among the participants of the sexual intercourse is a key factor for establishing relevant crimes, accusations against the legislator that the previous editions of these articles have been covering all acts, mentioned in the Istanbul Convention, and, as such, there has been no need in the implementation of its relevant provisions, are deemed groundless.

At the same time, manifestation of the inconsistency of the national legislator with regard to the implementation of the Istanbul Convention provisions remains in the fact that the updated Article 154 “Compulsion to Sexual Intercourse” of the Criminal Code of Ukraine, unlike paragraph “c” of Part 1 of Article 36 of the Istanbul Convention does not contain a reservation, stating that compulsion to commit a sexual offense with a third person (other than a person who is coercing) does not constitute a crime. At the same time, under paragraph 190 of the Explanatory Report to the Istanbul Convention, the purpose of the mentioned conventional norm is seen in the coverage of scenarios where offender is not the person who enters sexual intercourse, but a person, who forces the victim to engage in sexual intercourse with a third person.³² The implementation of the “broad” approach to constructing objective element of the crime of “rape” is not connected, however, with the inclusion of the necessary reservations in Article 154 of the Criminal Code of Ukraine, which results in the conflict between the relevant criminal law norms as a potential reason for unequal application of the Criminal Code of Ukraine.

In particular, compelling a person to commit an act of sexual nature with another person, combined with the threat of destruction, damage or seizure of property, belonging to the victim or his close relatives, or threats of disclosure of information that shame her or close relatives, should be qualified under part 3 of Article 154 of the Criminal Code of Ukraine. Given that (a) the specified threat excludes voluntary consent and that (b) the

³¹ Compliance of certain laws of Ukraine with the requirements of the Council of Europe Convention on the Prevention of Violence against Women and Domestic Violence and Counteracting these Abuses. Analytical report. In: *Centre of Policy and Legal Reform* [online]. May 2015 [2019-01-29]. Available at: <http://pravo.org.ua/files/Criminal%20justice/Legislative_Assessment_Report_UA.pdf>.

³² Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210.

act of sexual nature with another person may be “vaginal, anal or oral penetration into another person’s body,” it should be noted that there are no normative criteria for distinguishing rape (as well as sexual abuse) from coercion to sexual intercourse, punishable under part 3 of Article 154 of the Criminal Code of Ukraine. Parts 1 and 2 of Article 154 of the Criminal Code of Ukraine are also in the conflict with the criminal law norms, describing rape and sexual abuse. Proposals on how to overcome these collisions have already been formulated in the legal literature,³³ but it is difficult to predict, whether they will be accepted by law enforcement officials.

Rape of the victim, who is in marriage with the defendant, is now a crime under aggravating circumstances (part 2 of Article 152 of the Criminal Code of Ukraine) under the Law of December 6, 2017 provision, according to which rape, committed repeatedly, or by a person, who had previously committed any of the crimes, provided for in Articles 153–155 of the Criminal Code of Ukraine, if the rapist was the victim’s husband (wife), belonged to crimes, where criminal proceedings started only on the basis of the victim’s statement, such form of rape has been excluded from Article 477 of the Criminal Procedure Code. Such approach (including its likely impact on the institute of marriage) does not seem indisputable – of course, if we proceed from the point of view, which we consider an inadmissible gender stereotype,³⁴ that the main services provided by a woman in marriage are sex and birth of children, and thus when a woman refuses to give them to her husband, she rebels against the very essence of marriage.³⁵

On the other hand, the fact that a person, who is in marriage with a rapist, does not have the right to influence the “fate” of a criminal proceeding with respect to a crime, committed in relation to him or her, as provided for in Article 152 of the Criminal Code of Ukraine, and that “family” rape has been recognized as a qualified type of the discussed crime, can be regarded as one of the evidences of the domestic legislature’s consistency in providing a rigorous legal response to various forms of domestic violence (one of its forms is sexual violence), minimizing its latency. Moreover, paragraph 194 of the Explanatory Report to the Istanbul Convention, in the development of the provision, reflected in Part 3 of Article 36 of this international legal document, emphasizes the crucial importance of ensuring that no exceptions to the criminalization and prosecution of acts, such as sexual violence and rape committed against former or current partners or spouses, are allowed.³⁶ According to Article 43 of the Istanbul Convention, liability for the offenses, described in it, must be the same, regardless of the nature of the relationship between the victim and the offender. Also, in its decision from June 9, 2009, issued in the case of “*Opuz v. Turkey*”, the ECHR emphasized that domestic violence is not a private or family matter,

³³ DUDOROV, O. *Crimes against sexual freedom and sexual integrity of a person (main provisions of criminal law analyses): practical adviser*. Sievierodonetsk: lduvs, 2018, pp. 15–16, 58–62.

³⁴ Culture, religion, tradition, or personal causes of criminal behavior cannot be taken as justification for violence against women or domestic violence, and these grounds should not be used by the judicial system as a justification for the law interpretation (FISHER, G. *Council of Europe Convention on the Prevention of Violence against Women and Home Violence and Combating these Abuses (Istanbul Convention)*. p. 32).

³⁵ RICHARD, A. *Economic Analysis of Law*. Kharkiv: Akta, 2003, p. 298.

³⁶ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210.

but a matter that affects public interests, which, in turn, requires effective response by the state.³⁷

The above mentioned allows us to state that the improved Ukrainian criminal law in the context of liability for crimes of sexual relations is characterized by the presence of the following distinct features.

1. Ukraine is a country which, while not ratifying the Istanbul Convention, has nonetheless implemented its provisions, regarding the definition of the limits of criminal behavior in sexual sphere. Thus, Ukraine, like most other countries of continental Europe, has adopted a general European approach, which defines modern civilization standards for the punishment of the relevant category of acts.

2. At the same time, the implementation of the Istanbul Convention provisions took place, on the one hand, not completely (some provisions were not included in Ukrainian criminal law), and on the other hand, some provisions were mechanically transposed into the text of the Criminal Code of Ukraine without the desired clarification or explanation that, according to our prediction, can lead to conflicting law enforcement practices. Once again, we are convinced that a high-quality law on criminal liability may be the result of only a dedicated and careful work by professionals, whose effective involvement in law-making activities in such cases is absolutely necessary.

3. As a result of legislative changes, which took place in Ukraine, the normative basis for building a system of crimes in sexual sphere has been modernized. The limits of criminal behavior have widened, some gaps have been eliminated, the state of differentiation of criminal liability has improved, and so on. At the same time, not merely improvement of existing criminal law prohibitions (including with reference to the above-mentioned flaws), but also a well-balanced solution to the problem of sexual harassment criminalization, the need to respond to which comes from Article 40 of the Istanbul Convention,³⁸ should be recognized as a guideline for further improvement of criminal law protection in this area.

In part, sexual harassments can receive legal assessment under Article 154 of the Criminal Code of Ukraine – if they consisted of coercion to commit an act of sexual nature. However, sexual harassment, which is not related to such coercion, today does not form the basis for criminal liability. Therefore, the problem, in which way and by which means (we seriously doubt that by criminal law or at least by criminal law only) one needs to respond to the actions, described in Article 40 of the Istanbul Convention, requires its qualified solution. By the way, the fact that participating countries of the Convention have the right to independently determine, whether they will attribute sexual harassment to criminal acts or apply for such undesirable sexual behavior, which degrades human dignity, administrative or other legal sanctions, rises from this provision.

³⁷ ECtHR, *Opuz v. Turkey*, no. 33401/02 (9.06.2009).

³⁸ In Ukraine, at the legislative level, sexual harassment is understood as acts of sexual nature, expressed verbally (threats, intimidation, obscene remarks) or physically (touching, patting), which humiliate or offend persons who are in the status of labor, service, material or other subordination (Article 1 of the Law of September 8, 2005 “On Ensuring Equal Rights and Opportunities for Women and Men”).

5. THE OPTIMAL LEGISLATIVE MODEL OF SEXUAL CRIMES: WHAT SHOULD IT BE LIKE?

The fact that most continental European countries took a positive view on the criminal justice approach in sexual sphere protection by signing, ratifying and/or implementing provisions of the Istanbul Convention demonstrates that there is a coherent desire to unify the relevant criminal law. At the same time, it must be assumed that this international legal document, despite the overwhelming specificity of its provisions on the criminalization of some acts in sexual relations, determines only the landmarks for which these provisions should be implemented into the practice of national rulemaking, and criminal law of each country cannot fail to have its own specifics. It is obvious that one of the key issues, which members of the European community are currently trying to solve, is response to such manifestations of sexual behavior, which are capable of causing damage to basic human values and, at the same time, remain non-punishable under national law (the third type of behavior we have identified above). The solution to this issue lies in the criminalization of actions in sexual sphere, not related to the use of physical violence or mental coercion (in the narrow sense of this concept). Generally, such approach should be viewed positively, since it helps to rethink previously established normative positions regarding some acts of conduct with the ability to respond to those of them, which are truly capable of harming a person. Here, comes the search for the most optimal theoretical and, as a result, legislative model, which would allow to determine with maximum precision the range of acts in the area of research, deserving to be considered criminal. The achievements of modern criminal law science, the ignorance of which can lead to significant defects in legislation and violations of fundamental human rights during law enforcement, may and must contribute to solving this overcomplicated task.

Thus, among the most important problems, upon which successful decision on the quality of the updated criminal law and the effective practice of its application depends, is the correct formulation of the concept of voluntary consent as a key crime-creating element of offenses in sexual sphere. Legal uncertainty as a result of mechanical borrowing of the provision on voluntary consent, enshrined in part 2 of Article 36 of the Istanbul Convention, will lead to situations, when law enforcers will be either deprived of the opportunity to establish and prove offender's guilt (given that the acts in question are mostly committed in intimate setting and in the absence of proper information, confirming the fact of overcoming or neglecting victim's will) or will try to establish guilt by practically perceiving solely victim's position, who, for various reasons, may abuse such position, which in the end will result in obvious inequality of the parties in criminal proceedings.

Thus, when using the notion of voluntary consent in normative description of crimes related to sexual violence, it is worth detailing it to the most extent possible, by providing a legislative clarification, which should correspond to that provided for in part 2 of Article 36 of the Istanbul Convention. Moreover, its signatories are allowed to independently resolve issues of specific formulation of legislative provisions and factors that they consider to be the ones that do not cover voluntary consent (paragraph 193 of the Explanatory Report to the Istanbul Convention).³⁹

³⁹ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210.

We believe that criminal law could contain an exhaustive list of circumstances, which exclude victim's consent. Thus, the “voluntarily” element of consent must be unequivocally recognized as absent, if it was provided under the influence of physical violence, threats of its use, threats of other types (for example, threats to destroy or damage property of both the victim and another person, threats to restrict rights, freedoms or legitimate interests of victim or another person), use in relation to a person of its material or service dependence, helpless or vulnerable state.⁴⁰ Under such normative approach, the lack of consensus among participants in appropriate sexual communication will at least provide a clear basis for its definition, which will contribute to ensuring the unity of judicial practice, simplifying the process of proving crime, reducing the risk of prosecuting innocent persons.

As a successful example, one can refer to the Swedish experience. Its improved criminal law defines cases, when sexual relationship under no circumstances can be considered voluntary (for example, when the perpetrator commits an act of sexual behavior, while using unconsciousness, sleep, fear, intoxication or other influence of drugs, illness, physical injuries, mental illness or victim's particularly vulnerable condition).⁴¹

Given the above, we propose to consider as optimal the approximate model of crimes in sexual sphere, which, based on the modern achievements of the criminal law science and generally accepted international law approaches, would cover, to a minimum extent, a range of certain forms of actions, based on the established principle “from more to less dangerous”:

1. **Sexual abuse**, that is, any act of sexual behavior with another person in the absence of her (his) voluntary consent. At the same time, criminal liability for sexual violence should be differentiated according to the criterion of penetration / non-penetration by the person into victim's vagina, anus or mouth, using both a certain part of the guilty person's body and any object (stick, bottle, telephone, artificial phallus, etc.). As a result, we propose to distinguish between:

1.1. Sexual abuse, associated with penetration into the victim's body (rape).

1.2. Sexual violence, not related to such penetration.⁴²

Firstly, in order to ensure a well-balanced application of criminal law in this part, as already noted, a clear regulatory definition (formalization) of the concept of voluntary consent is desirable. Here, *elegantia juris* becomes extremely important. Secondly, the issue of eliminating (or preventing) the uniformity of legislative approaches to the punishment of various types of penetration into another person's body during rape is extremely complex and, nevertheless, the one, which requires its unequivocal solution. After all, for ex-

⁴⁰ As for the deception as a factor that, by influencing person's freedom of expression, may predetermine the involuntary nature of her consent to commit sexual acts against her, it is highly desirable to legislatively specify its possible form (character). Thus, penetration into one of the three natural openings of another person's body, combined with misleading it, can, in our opinion, be regarded as rape, provided that the person would not consent to it, if not for the misleading under certain circumstances (the nature or purpose of sexual penetration, the person of the actor, etc.). For example, a victimized woman wrongfully believed that the man with whom she had entered natural sexual intercourse was her own husband or a lover with whom she wished to do coitus.

⁴¹ Brottsbalk (1962:700). In: *The Riksdag* [online]. [2018-12-29]. Available at: <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/brottsbalk-1962700_sfs-1962-700>.

⁴² Such universal wording, while reflecting the diversity of sexual practices, provides an opportunity to cover a wide variety of deviant forms of sexual behavior (with the exception of the sexual penetration, inherent in rape).

ample, involuntary penetration into the mouth (forced french-kissing) cannot be punished identically to the involuntary penetration by penis into anus. In order to solve this issue, it is suggested to either differentiate criminal liability in a certain manner by establishing an independent ground for such liability for different types of penetration (the relevant task should be placed before the criminal law science in order to adequately determine the proper guiltiness, based on the place and means of penetration) or to develop a criminal sanction for rape in such way, so that it envisages the possibility of applying a wide range of punishments, as well as wide boundaries of term-based types of punishments.

2. Sexual activities other than sexual abuse.

Sexual harassment and acts of sexual nature against persons, who have not reached the age of sexual freedom, should be recognized as separate forms of such criminal acts.

2.1. *Sexual harassment*, which clearly must form the basis for criminal liability in cases, involving the coercion of the victim to commission of acts of sexual nature (with a third person). The same kinds of sexual harassment, which do not pursue such purpose, do not include elements of sexual violence and consist of committing acts that otherwise humiliate or offend a person (obscene remarks and hints, touches, patches, etc.) may lead, in our opinion, to other forms of legal liability (for example, disciplinary).

The problem of sexual harassment has been given serious media attention recently. However, true level of prevalence of such claims is not completely known. The state of this phenomenon, to a certain extent, makes it possible to assess the survey on violence against women, conducted by the European Union in 2014. It was found that every second woman (55 %) in the EU had suffered sexual harassment at least once since the age of 15 years, while 45 % had experienced “the most serious” forms of sexual harassment.⁴³

The most important problem, raised in connection with the establishment of criminal liability for sexual harassment, appears to be the extreme difficulty of clear identification and correct display in the text of the criminal law of those elements of sexual harassment, which are not related to physical contact or verbal or concerted actions, not intended to force victim to commit an act of sexual nature (courtship, clinging, offering, touching, gestures, verbal comments, etc.). Difficulties, which inevitably rise in such case, are similar to those covered, while considering the issue of the lack of voluntary consent as a component of sexual violence (the risk of violating the principle of legal certainty with the possibility of criminal liability for committing acts, which are difficult to label as dangerous and which do not meet the minimum necessary standards of criminal behavior). The experience, gained in recent years by some European countries, can serve as certain proof for our doubts.

For example, under Article 198 of the Criminal Code of Switzerland (“Schweizerisches Strafgesetzbuch”), any person, who sexually harasses another physically or through the use of indecent language, is held criminally liable.⁴⁴ Although, unlike the previous wording

⁴³ PRPIC, M., SABBATI, G. Sexual harassment of women in the EU. In: *The European Parliament* [online]. 1. 3. 2018 [2018-08-17]. Available at: <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_ATA%282018%29614716>.

⁴⁴ Swiss Criminal Code of 21 December 1937. In: *The portal of the Swiss government* [online]. [2018-12-29]. Available at: <<https://www.admin.ch/opc/en/classified-compilation/19370083/index.html>>.

of this criminal prohibition, the Swiss legislator has, to a certain extent, specified on what acts may constitute harassment (before, the latter was defined as any sexual act, contrary to another's will), it is obvious that the notion of indecent language is evaluative and, accordingly, is capable of creating difficulties in practice. It also seems to refer to § 184i (Sexuelle Belästigung) of the Criminal Code of the Federal Republic of Germany ("Strafgesetzbuch – StGB"), under which anyone is held criminally liable, if he physically touches and thereby harasses another person in a sexual manner.⁴⁵

In July of 2018, the Parliament of France decided to ban sexual harassments on the streets. The initiators of the legislative changes are convinced that such changes will rightfully prohibit harassment, intimidation, threat and chasing women in public places. Instead, critics of this legislative measure believe that such prohibition will make flirtatious behavior impossible and will "kill the culture of the 'French lover'".⁴⁶

2.2. Sexual acts, committed against persons, who have not reached the age, from which they may be considered as bearers of sexual freedom. In such cases, as was shown above (including the example of Ukraine), the voluntary consent is automatically excluded, and its actual availability is legally downplayed – it is recognized as void. To date, in the world and, in particular, in the European practice, a right approach is being introduced, according to which is recommended at the legislative level to introduce the principle of presumption of guilt in the case of consent of minors, who have not yet reached the age of sexual consent, so that the accused cannot justify his actions by referral to such consent. The age of sexual consent cannot be less than sixteen years.⁴⁷ The issue of what should be the "age of sexual consent" should be solved independently by the legislator of each country.⁴⁸

⁴⁵ Strafgesetzbuch. In: *Bundesministerium der Justiz und für Verbraucherschutz* [online]. [2018-12-29]. Available at: <<https://www.gesetze-im-internet.de/stgb>>.

Interestingly, this norm has been introduced after the reform, carried out in Germany in 2016. Moreover, the reason for its implementation was not the ratification of the Istanbul Convention, which occurred later, but the incident, which had occurred on the eve of 2015 in Cologne, where dozens of women had been sexually assaulted (What do Europeans consider sexual harassment? In: *Deutsche Welle* [online]. 11. 11. 2017 [2018-09-17]. Available at: <<https://www.dw.com/en/what-do-europeans-consider-sexual-harassment/a-41346892>>).

⁴⁶ France outlaws lewd cat-calls to women in public amid attack uproar. In: *Reuters (Paris)* [online]. 2. 8. 2017 [2018-09-18]. Available at: <https://www.reuters.com/article/us-france-politics-sexcrimes/france-outlaws-lewd-cat-calls-to-women-in-public-amid-attack-uproar-idUSKBN1KN18T?utm_campaign=trueAnthem>.

⁴⁷ Guidelines on combating sexual violence and its consequences in Africa. In: *African Commission on Human and Peoples' Rights* [online]. 8-22. 5. 2017 [2018-09-19]. Available at: <http://www.achpr.org/files/instruments/combating-sexual-violence/achpr_eng_guidelines_on_combating_sexual_violence_and_its_consequences.pdf>.

⁴⁸ For example, Art. 147 of the Penal Code of Estonia provides that a person, who has not reached the age of 10 years, is deemed to be incapable of understanding the nature and significance of the acts, provided for in the Section of the Code on the crimes against sexual self-determination (Karistusseadustik of 06 June 2001. In: *Riigi Teataja* [online]. [2018-12-29]. Available at: <<https://www.riigiteataja.ee/akt/123122014016>>).

As for Ukraine, the optimality of securing the 14-year-old age as "the age of sexual consent" in the relevant provisions of the Criminal Code does not seem indisputable, given the information boom, liberalization of sexual morals, acceleration, premature psychosexual development of today's adolescents, and the sharp drop in the age limits of starting a sexual life, as well the fact that the subject of rape and sexual violence is a person, who has turned 14. A skilled solution to the marked issue (otherwise this will mean unreasonable criminalization) is impossible without conducting criminological research, taking into account the latest achievements of child psychology and early sexopathology.

In such case, criminal liability should be differentiated, based on the nature of the actions and the extent of the damage caused. Firstly, commission of any acts of sexual violence, the varieties (forms) of which are defined above. Secondly, commission of any actions, related to sexual harassment of the relevant groups of persons, will constitute crime. And, thirdly, their corruption (commission of acts of sexual behavior in their presence, demonstration of genital organs, obscene touches, which cause sexual arousal, etc.).

Each type of criminal violation of sexual relations can be characterized by the internal structure of the differentiation of criminal liability, considering both circumstances, which increase such liability (for example, in sexual violence such circumstances may include, *inter alia*, physical violence or such threat that puts the victim in a state of despair, using victim's helpless condition, obvious to the defendant,⁴⁹ commission of a crime against a woman, who was in the state of pregnancy, commission of a crime by a group of persons or causing aggravated consequences) and those circumstances, which mitigate criminal liability. In particular, presence of an impermissible actual mistake as to voluntary consent could serve as the circumstance, which constitutes a privileged crime of sexual abuse (as is the case, for example, in Croatia).

6. CONCLUSION

Strengthening globalization trends in Europe requires implementation of theoretically concerted and correctly unified standards of human rights and freedoms protection in sexual sphere, developed by the European community, into legislative and law enforcement practices. The Istanbul Convention is the important international law instrument, which defines a strategy for the formation of criminal law policy of European states in the area of sexual relations. Its provisions synthesize the experience gained, in particular, while criminalizing sexual abuse and sexual harassment. The main trend in this field of study, which has been clearly reflected in the mentioned document, which is joined by the increasing number of European countries, is the introduction of criminal liability for any sexual behavior, carried out in the absence of voluntary consent. Accordingly, normative formulation of the concept of voluntary consent as a crime-forming element of criminal violations of sexual relations is among the major prerequisites for a well-balanced law enforcement – such approach is perceived as correct and consistent with the requirement of legal certainty.

Consensual behavior in sexual communication, not related to any oppression of one participant's will by the other, as well as behavior, which makes it impossible to commit sexual acts with persons, who for various reasons are not bearers of sexual freedom, should be recognized as eligible. The article proposes optimal (as viewed by the authors) legislative model of crimes in the sexual sphere, which envisages the general structuring of such crimes, based on the current international law heritage, revealed defects and the advan-

⁴⁹ The use of physical and psychological violence can play the role of an aggravated circumstance in committing not only sexual violence, but also acts of sexual nature against a person, who has not reached the "age of sexual consent".

tages of its implementation in the national legislation and the achievements of criminal law theory. Such model (with reservations made, when describing it) can be used as a general basis for the improvement of unified criminal legislation and the pursuit of further research in this field. It includes, firstly, sexual violence, associated with penetration into the victim's body (rape), as well as sexual violence not related to such penetration, and, secondly, acts, which are distinct from sexual violence of sexual nature, among which it is proposed to recognize sexual harassment and sexual acts against persons, who have not reached the age of sexual freedom. At the same time, identification of criminal law means, aimed against sexual harassment should be recognized among the most difficult issues, faced by contemporary legal science.