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Oleksandr Bilash

DISTINGUISHING CRIMES AGAINST MORALITY AND FREEDOM OF RELIGION FROM RELATED ELEMENTS OF CRIMES IN THE CRIMINAL LEGISLATION OF UKRAINE

INTRODUCTION

The analysis of objective and subjective signs of crimes against freedom of religion (human right to freedom of religion), in particular those provided for in Article 178 “Damage of religious buildings or houses of worship” and Article 179 “Illegal retention, desecration or destruction of religious sanctities” of the Criminal Code of the Code of Ukraine¹ proves a certain similarity with other types of crimes, but at the same time highlights their fundamental difference and allows them to be quite clearly distinguished from related types of crimes [Bilash 2021, 17].

Article 178 of the CC of Ukraine establishes criminal liability for damaging religious buildings or houses of worship. The main direct object of this crime is the constitutional right of a person to freedom of conscience and religion, which in this case includes the freedom to profess any religion, to conduct individually or jointly with others religious cults and ritu-

PROF. DR. OLEKSANDR BILASH – Uzhhorod National University; correspondence address: Kapitulna street 26, 88000 Uzhhorod, Ukraine; e-mail: oleksandr.bilash@uzhnu.edu.ua; <https://orcid.org/0000-0002-1248-7798>

¹ Criminal Code of Ukraine of 5 April 2001, № 2341-III [hereinafter: the CC of Ukraine], <https://zakon.rada.gov.ua/laws/show/2341-14#Text> [accessed: 15.03.2024].

al ceremonies without hindrance, to conduct religious activities, including using religious buildings or houses of worship [Mel'nyk and Khavroniuk 2005, 399]. Of course, the violation of moral standards in the field of inter-faith relations, etc., is not excluded, but they do not form the basis of either the generic or the direct object of the crime for the Ukrainian legislator. In this case, ownership is a mandatory additional object.

In modern criminal law, the legislator has paid a lot of attention to the issue of ownership and protection of various types of property from destruction or damage. Chapter VI of the Special Part of the CC of Ukraine contains a general rule establishing criminal liability for intentional destruction or damage of property (Article 194 of the CC of Ukraine). This norm does not specify the types of property – it is defined as *someone else's*. However, the legislator provided several special norms (that is, those that contain all the signs of a general norm but, additionally, contain their own specific features). In such cases, when qualifying, criminal liability occurs under a special norm. It should be noted when distinguishing between the types of crimes provided for by Articles 178, 179, and 194 of the CC of Ukraine, the main difference is undoubtedly the object of the crime - someone else's property in the first case, and property endowed with special features – religious buildings or sanctities – in the second. It is the presence of these special peculiarities of the subject matter that serves as a criterion for distinguishing the objects of these crimes and is important for us [Bilash 2013a, 279].

Within the framework of this publication, it is of concern to identify the features that distinguish the crimes of the abovementioned articles 178, 179 from the crimes provided for by articles 161, 180, 297, and 298 of the CC of Ukraine.

1. DISTINGUISHING THE ELEMENTS OF CRIMES PROVIDED FOR IN ARTICLES 178, 179, AND ARTICLE 161 OF THE CC OF UKRAINE

The crime provided for by Article 161 of the CC of Ukraine is considered contiguous to Articles 178 and 179 of the CC of Ukraine. The specified norm establishes criminal responsibility for violating the *equality of citizens depending on their race, nationality, or religious beliefs*. The direct

object of the crime is the principle of equality of rights and freedoms enshrined in the Constitution of Ukraine before the law and the court and in the civil society of a person, individual, and citizen, regardless of gender, race, nationality, language, origin, place of residence, attitude to religion, political and other beliefs. The subject matter of the crime is the national or racial community of people, their rights, culture, religion, and traditions [Sevastyanova 2010, 68].

Such a violation lies in intentional actions aimed at inciting national, racial, or religious hostility and hatred, humiliating national honor and dignity, or *insulting the feelings of citizens due to their religious beliefs*, as well as direct or indirect restriction of rights or establishment direct or indirect privileges of citizens based on race, skin color, political, religious and other beliefs, gender, ethnic and social origin, property status, place of residence, language, or other characteristics. At the same time, insulting the feelings of citizens due to their religious beliefs involves affronting and humiliating the dignity and other feelings of representatives of certain religious communities, denominations, directions, and movements registered on the territory of Ukraine in the established order, or mocking those belonging to them, houses of worship or religious gatherings, places of pilgrimage respected in a certain religion [Sevastyanova 2010, 68].

As can be seen, Article 161 of the CC of Ukraine provides for a rather large, undefined list of actions that can be qualified as a violation of the equality of citizens depending on their attitude to religion. Illegal actions concerning religious buildings or sanctities constitute a separate, special case of such a violation, if such damage, desecration, and other actions provided for by Articles 178, and 179 of the CC of Ukraine are committed to incite religious hostility and hatred or offend the feelings of citizens in connection with their religious beliefs.

2. DISTINGUISHING THE ELEMENTS OF CRIMES PROVIDED FOR IN ARTICLES 178, 179, AND ARTICLE 180 OF THE CC OF UKRAINE

The position is identical to Article 180 of the CC of Ukraine “Preclusion of religious ceremonies”. Impeding the performance of a religious ceremony is the creation of any obstacles that significantly complicate or make it

impossible to perform. It can be carried out through threats, the use of physical violence, deception, or in any other way and consists, in particular, of preventing believers from entering the place of a religious ceremony, knowingly false report about a threat to the life or health of its participants, unjustified refusal of a request to issue a permit for the public performance of a rite, illegal removal of cult objects that are necessary for the performance of a rite, etc. [Mel'nyk and Khavroniuk 2007, 446].

In this case, if actions aimed at disrupting or obstructing a religious rite are accompanied by damage to religious buildings or sanctities, such actions should be classified under the set of crimes provided for in Article 180 and Articles 178, 179 of the Criminal Code of Ukraine. It should be noted that according to Ukrainian legislation, among the types of religious sanctities holy places, in particular, localities, various natural formations, special sacred territories, objects of God's (or god's, deity's, spirits') residence that possess supernatural features (tracts, ravines, caves, glades, rocks, trees, springs, mounds) are considered. Quite often, such objects are recognized as objects or constituent parts of the nature reserve fund objects.

3. DISTINGUISHING THE ELEMENTS OF CRIMES PROVIDED FOR IN ARTICLES 178, 179, AND ARTICLE 297 OF THE CC OF UKRAINE

Another related composition of elements for Articles 178, 179 of the CC of Ukraine is the elements of the crime provided for in Article 297 of the CC of Ukraine "Violation of graves, any other burial place, or a corpse". The specified compositions have different generic objects – social relations in the sphere of religion and social relations in the sphere of morality. However, specific and direct objects have some similar features, because these crimes are aimed at destroying generally accepted spiritual and cultural values. The presence in the actions of a person of the elements of the crime provided for in Article 297 of the CC of Ukraine will take place only in case of infringement of one or more of its objects, which include: a grave, another place of burial, a corpse and an urn with the ashes of the deceased, as well as objects that are in the place of burial or on the corpse. A grave is understood as a pit for burying the body of the deceased, as well as a mound, and structures (cross, stele, stone) above the burial place

[Mel'nyk and Khavroniuk 2005, 754]. The grave can be both individual and collective, in particular, a mass grave, where the remains of many dead soldiers are located. The grave itself in the traditional sense can be located in a cemetery or on a separate plot of land for honorable burials, on which memorial boulevards, squares, parks, and barrows are created. The crypt, tomb, church cemetery, columbarium, plots of land designated under ethical, sanitary, and ecological requirements with cemeteries arranged on them for burying the remains of the dead, a wall of mourning for burying urns with the ashes of the dead, place of the collective burial of the once repressed, marked on the site with identifying marks, and even a ship or plane with the bodies of the dead are also suggested by legal scholars to be considered as places of burial [Honcharenko and Andrushko 2005, 120].

According to the disposition of Article 297 of the CC of Ukraine, an urn with the ashes of the deceased is also an object of grave insult. An urn with ashes can be placed in a crypt, in a wall of mourning, in a columbarium, at the home of relatives, or “buried” next to an already existing burial place [Korniyets' 2023, 49], since criminal legislation does not indicate the location of an urn with ashes of the deceased as a subject matter of the crime provided for by Article 297 of the CC of Ukraine.

The subject matter of the considered crime can be a human corpse, which in Article 297 of the CC of Ukraine was firstly recognized as a separate object of criminal assault in the CC of Ukraine of 2001, contrary to Article 212 of the CC of the Ukrainian SSR of 1960. A corpse is considered to be the body, its individual parts, or the ashes of any person after his biological death [Horb 2005b, 56]. The subject matter of the crime provided for in Article 297 of the CC of Ukraine includes objects located at the place of burial or on the corpse, which could include any things located: 1) in the grave or on it or in another place of burial: memorial tombstones of various types and elements of grave improvement (curbs, flower beds, paving slabs, lamps, vases, wreaths, coffin, etc.); 2) on a human corpse: clothes, personal items and jewelry, orders and medals, etc. [ibid., 57].

Regarding the subject matter of the crime provided for in Article 179 of the CC of Ukraine, just as in the case of the crime provided for in Article 297 of the CC of Ukraine, the place of burial and the objects in it may be recognized as religious sanctities. The objective side (*actus reus*) of these crimes also has certain differences. Violating a grave or other place of bur-

ial is manifested in their desecration (devastation, tearing, destruction or damage of tombstones, elements of grave landscaping, applying cynical and derogatory inscriptions, etc.) [Idem 2005a, 11].

While the destruction or damage of religious buildings does not necessarily have signs of desecration, although it does not exclude it.

4. DISTINGUISHING THE ELEMENTS OF CRIMES PROVIDED FOR IN ARTICLES 178, 179, AND ARTICLE 298 OF THE CC OF UKRAINE

According to the current CC of Ukraine, the subject matter of the crime provided for in Article 298 of the CC of Ukraine are monuments – objects of cultural and archaeological heritage,² while the subject matter of the crime provided for in Article 178 and Article 179 of the CC of Ukraine refer to religious buildings, religious houses and sanctities, relics. Objects of cultural heritage are characterized by the following features: a) are immovable cultural values – this is a place, building (artwork), complex (ensemble), their parts, territories or water facilities related to them, other naturally-based, naturally-anthropogenic or man-made objects regardless of the state of preservation; b) brought to our time value from an anthropological, archaeological, aesthetic, ethnographic, artistic, scientific or decorative point of view; c) have preserved their authenticity; d) taken under special protection by the state, as evidenced by the decision of the competent authority by classifying them as objects of cultural heritage of national or local importance and submitting them to the State Register of Immovable Monuments of Ukraine [Mel'nyk and Khavroniuk 2005, 699]. What concerns the issue of the “religious building” and “place of worship” content as the criminal law concepts, today it is solved in two ways.

The majority of researchers are inclined to a narrow understanding of religious buildings, houses of worship as subject matters of crimes against

² The Law “On the Protection of Cultural Heritage” contains provisions on the classification of cultural heritage objects by types and kinds of cultural heritage objects. By type, objects are divided into buildings (artworks), complexes (ensembles), landmarks. By kinds, objects of cultural heritage are divided into archaeological, historical, objects of monumental art, objects of architecture, objects of urban planning, objects of garden and park art, landscape objects, objects of science and technology (Article 2 of the law).

freedom of religion – that is, as premises intended for holding religious services, religious rites, and ceremonies. In particular, in the Scientific-Practical Commentary to the CC of Ukraine edited by Academicians Volodymyr Stashys and Vasyl Tatsii, religious buildings and houses of worship are defined as buildings of ritual purpose, which, as a rule, have an inner room [Stashys and Tatsii 2007, 481]. Such objects include “churches, mosques, synagogues, chapels, monasteries, prayer houses, other premises where church servants can be performed” [Zinchenko 2007, 66].

Another part of scientists in their works offer broader definitions of religious buildings, houses of worship. Thus, Professor Mykola Melnyk recognizes religious buildings and houses of worship as “premises for conducting or providing religious services, performing religious rites and ceremonies (churches, cathedrals, synagogues, mosques, pagodas, chapels, bell towers, minarets, prayer rooms, etc.)” [Mel’nyk and Khavroniuk 2005, 443]. As we can see, the author calls religious buildings and houses of worship not only objects where services, religious rites, and ceremonies are held but also buildings that ensure the implementation of the listed actions (for example, bell towers, minarets).

In the explanation of the Supreme Arbitration Court of Ukraine “On some issues arising from the application of the Law of Ukraine, On Freedom of Conscience and Religious Organizations”³ in paragraph 4, houses of worship and religious buildings should be understood as any houses and buildings specially designed for religious needs of citizens.

The most progressive considerations regarding the content and correlation of the criminal-law concepts of “religious building” and “house of worship” were expressed by legal scholar Sofiya Lykhova. For the first time, she made an attempt to distinguish these categories. Sofiya Lykhova defines religious houses as “various types of buildings, premises, structures that are specially designed and adapted for citizens to participate in religious services, in the performance of religious rites, ceremonies or processions (for example, churches, cathedrals, kościoły⁴, synagogues, mosques, etc.)” [Lykhova 2006, 311].

³ On Some Issues Arising in the Application of the Law of Ukraine “On Freedom of Conscience and Religious Organizations”; Explanation of the Supreme Arbitration Court of Ukraine No. 02-5/109 of 29 February 1996, https://zakon.rada.gov.ua/laws/show/v_109800-96#Text [accessed: 15.03.2024].

⁴ In this case, the author uses the term “kościol”, which is often used in Ukraine to refer to churches of the Roman Catholic Church.

In addition to houses of worship, the researcher proposes to recognize as religious buildings also “architectural constructions erected for the purpose of meeting the religious needs of a person to profess or spread the faith (for example, Orthodox or Catholic crosses built or set up, etc.)” [Lykhova 2006, 311]. One can also agree with the opinion that buildings that have an interior and specifically serve to meet the religious (spiritual) needs of people (primarily the needs for worship services, religious rites, ceremonies, and processions) should be recognized as houses of worship. The term “religious building” is broader in its scope than the term “house of worship” and covers the latter [Bilash 2013b]. However, in the criminal law sense (since these terms are used alternatively in Article 178 of the CC of Ukraine), it is appropriate to consider all other (except for houses of worship) buildings specially designed to meet the religious (spiritual) needs of people as religious buildings. Examples of such structures can be chapels, altars, statues, religious symbols (crucifixes), etc. [Markin 2008, 199].

It is inappropriate to recognize as houses of worship, religious buildings that are not specifically designed to meet religious needs (private houses, apartments, premises of enterprises, institutions, organizations), even if religious rites, ceremonies, or processions are held in such premises. The subject matter of the crime referred to in Article 178 of the CC of Ukraine, can act only after changing their purpose (for example, in the case of the conversion of a residential building into a prayer hall).

For signs of the crime provided for in Article 298 of the CC of Ukraine, the proposed definitions of religious buildings and houses of worship are quite acceptable, provided that these objects are registered, in accordance with the legislation of Ukraine, as monuments – objects of cultural heritage.

From the objective side, the crimes provided for in Articles 178 and 298 of the CC of Ukraine, are similar and emerge in the form of damage or destruction, yet destruction as a method of committing a crime is inherent only in Article 298 of the CC of Ukraine.

Thus, any intentional damage or destruction of a religious building or a house of worship entails the same responsibility under Article 178 of the CC of Ukraine, and if these objects represent a special historical or cultural value and are classified as objects of cultural heritage of national or local significance with entry into the State Register of Immovable Monuments of Ukraine, then such an act requires additional qualification under Article 298 of the CC of Ukraine.

Article 179 of the CC of Ukraine provides for responsibility for the illegal retention, desecration, or destruction of religious sanctities. The object of the crime is similar to the object of the crime provided for in Article 178 of the CC of Ukraine, as similar as its relationship with the features of the object of Article 298 of the CC of Ukraine.

The subject matter of the crime are religious sanctities. The dominant today is a broad understanding of religious sanctities, according to which the last are recognized as objects and places of religious worship revered by believers of a certain religion, as well as places of pilgrimage for believers [Mel'nyk and Khavroniuk 2005, 444-45].

At the same time, part of the researchers cite additional features of religious sanctities in their own definitions, narrowing the scope of this concept. Thus, A. Babiy believes that objects can be considered as religious sanctities if they are “recognized as such in the order established by the religious organization” [Streltsov 2005, 358]. This view is quite debatable, taking into account the fact that hardly all existing religious organizations in Ukraine provide a special procedure for recognizing certain objects as religious sanctities.

Legal scholar A. Tarasenko is convinced that only objects that “are in the state property or in the property of a religious organization” should be recognized as religious sanctities [Stashys and Tatsii 2007, 483]. Highlighting this feature seems redundant. On the one hand, the type of ownership of religious sanctities does not have any criminal-legal significance, on the other hand, today it is unlikely to find an “ownerless” religious sanctity in Ukraine, which is “nobody’s” and is not the property of a certain subject.

Taking into account the peculiarities of the physical characteristics of the investigated subject matter of the crime, two main types of religious sanctities can be distinguished – these are religious relics and holy places.

The signs that determine the criminal-legal specificity of religious sanctities as a subject matter of crimes against freedom of religion are precisely the sacred features. The essence of sacred signs of religious sanctities is that believers consider the latter as unique, extraordinary (crucially different from other religious properties) items (objects) endowed with supernatural features. For the adherents of certain religions, these are “materialized” evidence of the existence of a higher power, items (objects) that constitute a fundamental, eternal value. The reality of these

beliefs has no criminal law significance; instead, the very fact of believers' perception of this or that item (object) as a religious sanctity, their faith in its divine or supernatural origin, is significant for the state legislator [Bilash 2012].

In determining the specifically sacred features of the investigated subject matter as the element of the crime, the conclusion of the religious expert examination, the provision of which is entrusted to the State Service of Ukraine for Ethnopolitics and Freedom of Conscience, must be taken into account.

As for the objective side (*actus reus*), this crime can manifest itself in the form of: 1) retention; 2) desecration; 3) destruction of religious shrines.

The retention of religious sanctities should be understood as high-handed actions to keep under one's control items or places of religious worship, which the guilty person, according to the decision of the relevant state body, is obliged to pass on to another religious organization or release for their benefit. The illegal character of such possession lies in the fact that, acting in this way, the perpetrator unjustifiably keeps religious sanctities under their control, depriving representatives of other religious organizations of the opportunity provided by law to realize their religious needs with their help.

Desecration of religious sanctities is the commission of any actions relating to religious sanctities (obscene inscriptions, drawings, damage, other actions related to desecration of sanctities) that are offensive to the religious feelings of believers, the objects or places of religious worship of which these sanctities are recognized [Mel'nyk and Khavroniuk 2005, 400]. Actions that fall under the definition of desecration, under certain conditions, can be interpreted as damage as part of the crime of Article 298 of the CC of Ukraine. And only the concept of destruction is completely common to Articles 179 and 298 of the CC of Ukraine.

CONCLUSIONS

Distinguishing the elements of crimes provided for by Articles 178, 179, and 194 of the CC of Ukraine, it is undoubtedly necessary to take into account that religious buildings or sanctities are property, but unlike ordinary property, they are recognized as carriers of other important social

functions. The harm caused by their destruction or damage is more moral than material. First of all, relations that ensure freedom of religion are suffering, and only then – property relations. Thus, it is necessary to recognize that these crimes have different objects.

At the same time, insulting the feelings of citizens due to their religious beliefs combined with the devastation of religious buildings or houses of worship, desecration or destruction of religious sanctities should be classified as a set of crimes provided for in Article 161 and Articles 178, 179 of the CC of Ukraine. On the subjective side, the crimes provided for in Articles 297 and 178, 179 of the CC of Ukraine can only be committed intentionally and, in the latter case, it is important to gather sufficient evidence that the perpetrator knew that the object in question belonged to religious buildings or sanctities.

From the above, it can also be concluded that if religious sanctities are classified as objects of cultural heritage of national and local importance according to the legislation with entry into the State Register of Immovable Monuments of Ukraine, their desecration (damage) and destruction requires additional qualification under Article 298 of the CC of Ukraine. And although from the objective side, the crimes provided for in Articles 178, 179, and 298 of the CC of Ukraine are similar and are expressed in the form of damage, devastation, or destruction, only retention, and desecration as methods of committing a crime are inherent specifically to Article 179 of the CC of Ukraine. Moreover, unlike, for instance, Article 194 of the CC of Ukraine, in Articles 178, 179, and 298 of the Criminal Code of Ukraine, criminal liability for damage, devastation, or destruction of the subject matter of the crime is not determined by the amount of damage caused as a result of such actions. Any damage, devastation, or destruction of such items is punishable as a criminal offense.

Illegal actions against religious buildings or sanctities entail responsibility under Articles 178 and 179 of the CC of Ukraine and if these objects represent a special historical or cultural value and are classified as objects of cultural heritage of national or local importance with submitting them to the State Register of Immovable Monuments of Ukraine, then such an act requires additional qualification under Article 298 of the CC of Ukraine.

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**Distinguishing Crimes against Morality and Freedom of Religion
from Related Elements of Crimes in the Criminal Legislation of Ukraine**

Abstract

The article is devoted to the study of the issue related to the qualification and distinction of crimes against morality and freedom of religion from related crimes elements of in the criminal legislation of Ukraine. The Law on Criminal Liability (Criminal Code of Ukraine) contains a number of crimes that can be related to the crime provided for in Article 178 "Damage of religious buildings or houses of worship" and 179 "Illegal retention, desecration, or destruction of religious sanctities" of the Criminal Code of Ukraine. At the same time, the ratio of adjacent elements of crimes should be distinguished from the competition of general and special norms. As part of the study, a detailed analysis of the signs established in the criminal law, in the presence of which a socially dangerous act is recognized as a crime against morality and religion in Ukrainian legislation, was conducted. By investigating objective and subjective signs, the author differentiates the elements of crimes provided for in Articles 178 and 179 of the Criminal Code of Ukraine from the elements of crimes provided for in Article 161 "Violation of equality of citizens depending on their race, nationality, regional affiliation, religious beliefs, disability, and other grounds", 180 "Preclusion of religious ceremonies", 297 "Violation of graves, any other burial place, or a corpse", 298 "Illegal conduct of search works on the archaeological heritage site, devastation, destruction, or damage to cultural heritage sites" of the Criminal Code of Ukraine.

Keywords: adjacent elements of the crime; crimes against morality; crimes against freedom of religion; qualification of crimes.

**Odróżnienie przestępstw przeciwko moralności i wolności wyznania
od powiązanych elementów przestępstw w ustawodawstwie karnym Ukrainy**

Abstrakt

Artykuł poświęcony jest badaniu kwestii związanej z kwalifikacją i rozróżnieniem przestępstw przeciwko moralności i wolności wyznania od elementów przestępstw pokrewnych w ustawodawstwie karnym Ukrainy. Ustawa o odpowiedzialności karnej (Kodeks karny Ukrainy) zawiera szereg przestępstw, które mogą być powiązane z przestępstwem przewidzianym w art. 178 „Uszkodzenie obiektów architektury religijnej lub budynków kultu religijnego” i art. 179 „Bezprawne utrzymywanie, bezczeszczenie lub niszczenie świątyń religijnych” Kodeksu karnego Ukrainy. Jednocześnie należy odróżnić stosunek sąsiadujących ze sobą elementów przestępstwa od konkurencji norm ogólnych i szczegółowych. Opracowanie zawiera szczegółową analizę znamion ustalonych w prawie karnym, w obliczu których w ustawodawstwie ukraińskim czyn społecznie niebezpieczny zostaje uznany za przestępstwo przeciwko moralności i religii. Badając obiektywne i subiektywne cechy, autor odróżnia *corpus delicti* z art. 178 i 179 Kodeksu karnego Ukrainy od *corpus delicti* przewidzianego w art. 161 „Naruszenie równości obywateli w zależności od ich rasy, narodowości, przynależności regionalnej, przekonań religijnych, niepełnosprawności i innych powodów”, art. 180 „Zakłócanie

obrzędów religijnych”, art. 297 „Zbezczeszczenie grobu, innego miejsca pochówku lub ciała zmarłego”, art. 298 „Nielegalne prowadzenie prac poszukiwawczych na terenie dziedzictwa archeologicznego, dewastacja, zniszczenie lub uszkodzenie obiektów dziedzictwa kulturowego” Kodeksu karnego Ukrainy.

Słowa kluczowe: pokrewne elementy przestępstwa; przestępstwa przeciwko moralności; przestępstwa przeciwko wolności wyznania; kwalifikacja przestępstw.

Informacje o Autorze: PROF. DR OLEKSANDR BILASH – Użhorodzki Uniwersytet Narodowy; adres do korespondencji: Kapitulna street 26, 88000 Uzhhorod, Ukraina; e-mail: oleksandr.bilash@uzhnu.edu.ua; <https://orcid.org/0000-0002-1248-7798>