

UDC 343.541-053.2(477)
DOI: 10.33270/01211192.26

Criminal and legal characteristics of violent crimes against sexual freedom and sexual inviolability of the child

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■ **Abstract.** The purpose of the study is to analyse the scientific opinions on the application of legislation on criminal liability for violent crimes against sexual freedom and sexual inviolability of the child in light of the implementation of the Council of Europe conventions. Methodology. The methodological tools were chosen by the purpose, specifics of the object and subject of the study. In the course of the study, the dialectical method of scientific knowledge of socio-legal phenomena in their contradictions, development and changes was used, which allows to objectively assess the distribution of sexual criminal offences against sexual freedom and sexual inviolability of the child; Aristotelian method, which identified the elements of the legal mechanism of sexual criminal offences against sexual freedom and sexual inviolability of the child; the comparative legal method was used in the analysis of current legislation and international regulations. The theoretical foundation of the publication was the works of domestic and foreign scientists devoted to the aspects of sexual criminal offences against sexual freedom and the sexual inviolability of the child. The scientific originality of the publication is that the distribution of sexual criminal offences against the sexual freedom and sexual inviolability of the child is performed and the criminal law characteristics of objective and subjective signs of violent crimes against the sexual freedom and sexual inviolability of the child (Articles 152, 153 of the CC of Ukraine) are provided. Conclusions. Established that the main object of the investigated crimes is the sexual inviolability of the child, that is, an absolute prohibition to have sexual contact with a person who is not a carrier of sexual freedom, contrary to the true will of such a person or ignoring it. The author establishes that “sexual freedom” and “sexual inviolability” are criminal law categories that have an independent character. Sexual inviolability – is the right of a person not to be subjected to sexual violence, the right to be protected from sexual abuse (passive right), while sexual freedom – is the right to choose sexual partners and not prohibited by law forms of sexual behaviour. From the subjective side, all crimes against the sexual inviolability of a child have a characteristic feature – explicit intent. Therewith, the mental attitude of the perpetrator to the age of the victim can acquire the form of careless guilt. The author emphasises the inconsistency between the qualified corpus delicti of crimes under Part 4 of Art. 152 and Part 4 of Art. 153 of the CC of Ukraine and the main corpus delicti of these crimes concerning the presence of voluntary consent of a minor and proposes criminal law ways to eliminate the identified legislative contradictions, in particular: abandonment of the sign of qualified corpus delicti under Part 4 of Art. 4 of Art. 152 and Part 4 of Art. 153 of the CC of Ukraine, defined as ‘regardless of their voluntary consent’, with the simultaneous transfer of

■ **Suggested Citation:**

Levchenko, Yu., & Loban, D. (2021). Criminal and legal characteristics of violent crimes against sexual freedom and sexual inviolability of the child. *Scientific Journal of the National Academy of Internal Affairs*, 26(2), 26-33. doi: 10.33270/01211192.26.

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■ Received: 02.05.2021; Revised: 03.17.2021; Accepted: 04.20.2021



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liability for (voluntary) sexual intercourse with a minor to Art. 155 of the CC of Ukraine; elimination of the sign of violence in the criminal legal characteristics of sexual acts under Art. 153 of the CC of Ukraine

■ **Keywords:** child; sexual freedom; sexual inviolability; sexual violence; criminalisation; criminal-legal characteristics

■ Introduction

By the National Human Rights Strategy, the strategic purpose in the field of children's rights is to ensure that the rights of children in Ukraine are secured and protected by generally accepted international, in particular European, standards; the best interests and opinions of the child are considered in decision-making concerning them. One of the problems addressed by the strategic area is the insufficient efficiency of the system for preventing and combating violations of children's rights, in particular violence against children [1].

Criminal and legal characteristics are developed based on the analysis of the signs of crimes that are important for resolving the issue of the existence of a crime, its correct qualification, and clarification of other criminal and legal issues, in particular those that have to be resolved in the process of sentencing. Criminal and legal characteristics - a description of the features that distinguish a crime from another offence, classification of crimes by type, degree of danger, etc.

To understand the criminal-legal characteristics, note that it should reflect the features of a particular type of crime, which are significant for clarifying their social and legal nature (essence), social danger, the content of the signs, criminal liability, punishment, etc.

The purpose and objectives of the publication – perform the distribution of sexual criminal offences against the sexual freedom and sexual inviolability of the child and to provide a criminal law description of objective and subjective signs of violent crimes against sexual freedom and sexual inviolability of the child.

The scientific originality of the publication is that the distribution of sexual criminal offences against the sexual freedom and sexual inviolability of the child is performed and the criminal law characteristics of objective and subjective signs of violent crimes against the sexual freedom and sexual inviolability of the child (Articles 152, 153 of the CC of Ukraine) are provided.

■ Outline of the Main Material

Under Article 3 of the Constitution of Ukraine, a person, their life and health, honour and dignity, inviolability and security are considered to be the highest social value in Ukraine. According to Article 29 of the Basic Law, everyone has the right to the liberty and security of a person. The state of ensuring the implementation of the human right (of any age) to freedom and inviolability (in particular sexual) is rightly considered an indicator of the moral health of society, an indicator of its spirituality and attitude to universal human values [4].

In the structure of violent crime, one of its varieties is sexual criminal offences. Sexual criminal

offences – a complex of socially dangerous acts against sexual freedom and sexual inviolability of a person. They violate the procedure of free sexual relations between persons established by law and have a characteristic feature – significant adverse psychological consequences for victims of sexual violence. It should be considered that such crimes are designed to satisfy the sexual passion of a person both in natural and various forms of sexual perversion that go beyond the public principles of sexual morality regarding the “classical” nature and ways of satisfying sexual passion [5].

Criminal offences against sexual freedom and sexual inviolability of a person, the provisions on liability for which are united in Section IV of the Special Part of the Criminal Code of Ukraine, include:

1. rape (Article 152);
2. sexual violence (Article 153);
3. coercion to sexual intercourse (Article 154);
4. sexual intercourse with a person who has not reached sexual maturity (Article 155);
5. corruption of minors (Article 156).

Depending on whether physical and mental violence was used during the commission of such criminal offences, they can be divided into two groups:

1) crimes against sexual freedom and sexual inviolability of a person associated with using violence (Articles 152, 153, 154 of the CC of Ukraine), i. e. the so-called “violent sexual crimes”;

2) criminal offences against sexual freedom and sexual inviolability of a person, not related to using violence (Articles 155, 156 of the CC of Ukraine) – the so-called “non-violent sexual criminal offences”.

Thus, one of the factors that unite all these crimes is the generic object of encroachment. According to O.M. Ignatov and M.Y. Korzhansky, the object of sexual crimes is the relations in the sphere of sexual life that has developed in society [6; 7]. S.D. Shapchenko clarifies the object, referring to the rights, freedoms and interests of the individual in the field of sexual life [8]. Relations in the sphere of sexual life O.M. Yakovlev defines as “a set of forms of sexual communication between people that have developed at a particular stage of development of society, protected by both moral and legal provisions” [9]. As for the objects of specific sexual crimes, there are different opinions on this issue in science.

The generic object of crimes, the provisions on liability for which are united in Section IV of the Special Part of the CC of Ukraine, is sexual freedom and sexual inviolability of a person.

In the theory of criminal law, one can trace different opinions on the definition of “sexual freedom”.

Thus, P. Osipov understands the sexual freedom of a woman as the activity of a woman who is capable of self-determination in the field of sexual life to satisfy her sexual demands by the requirements of socialist morality [10]. L. Andreeva offers a similar definition. In her opinion, sexual freedom is the ability of an adult to dispose of himself in the sphere of sexual communication with other persons [11].

A completely different definition is offered by B. Blinder, who believes that sexual freedom is freedom from any coercion in the field of sexual relations [12]. Therewith, one cannot agree with B. Blinder and P. Osipov, who believe that only women have sexual freedom. Modern criminal legislation equally protects the sexual freedom of both women and men. Thus, a victim of rape under Art. 152 of the CC of Ukraine can be a person of any gender.

Sexual inviolability should be understood as social relations in the sphere of sexual life, which determine the absolute prohibition to have sexual relations with other persons. Sexually untouchable are both minors who, due to some physical or mental disabilities, are unable to exercise their sexual freedom, and minors under the age of 16 or before reaching puberty. In addition, the consent of such persons to sexual intercourse or other sexual relations has no legal force, as persons do not have the right to freely exercise their sexual urges [13; 14].

Sexual inviolability is the main object of such crimes as the rape of a minor (Article 152(3) and (4) of the CC of Ukraine), sexual violence (Article 153(2) and (3) of the CC of Ukraine), sexual assault with a person under the age of 16 (Article 155 of the CC of Ukraine), corruption of minors (Article 156 of the CC of Ukraine).

Based on the above provisions, consider some controversial criminal law aspects of violent crimes that infringe on the sexual freedom and sexual inviolability of the child. The implementation of the international conventions of the Council of Europe resulted in the adoption of the Laws of 6 December 2017 No. 2227-VIII [15] and of 14 March 2018 No. 2334-VIII [16], which amended Section IV of the Special Part of the CC of Ukraine.

First of all, it is necessary to explain what the corruption of minors means, as most people do not understand the meaning of this crime. Objectively, the crime consists in committing depraved acts of a sexual nature that can cause physical and moral corruption of minors. Depraved actions can be both physical and intellectual. Physical molestation - is, in particular, exposure of the genitals of the perpetrator or the victim, groping, or another indecent touching that causes sexual arousal, teaching onanism, committing sexual intercourse, or act of onanism in the presence of the victim. Intellectual molestation can consist, for example, of cynical conversations with the victim on sexual subjects, telling explicit, naturalistic sexual stories, photographing victims in various sexual positions, and demonstrating pornographic objects.

Using works, images or other objects of pornographic nature in the process of committing depraved acts, and coercion to participate in their establishment requires additional qualification under the relevant part of Article 301 of the CC of Ukraine [17].

Rape is the commission of sexual acts involving vaginal, anal or oral penetration of the body of another person using genitals or any other object without the voluntary consent of the victim (rape) [18]. Compared to the previous version of Art. 152 of the CC of Ukraine, this article, stated in the version of the Law of December 6, 2017 No. 2227-VIII, significantly expanded the boundaries of the objective side of the crime of "rape", in particular:

- sexual intercourse in terms of incrimination in the previous version of Article 152 of the CC of Ukraine was considered to be only natural (heterosexual) sexual intercourse (coitus) – the insertion of a man's penis into a woman's vagina, which can cause pregnancy. Currently, not only the above-mentioned act is defined as rape (the latter, considering the terminology used in Art. 152 of the CC of Ukraine should be interpreted as vaginal penetration into the body of a woman using the genitals of a man), but other types of penetration into the vagina (female vagina), and penetration into the anus or mouth of another person (i.e. into the openings of the human body, biologically not intended for this) with both the penis or other part of the human body, and any object [19];

- previously, sexual intercourse was considered rape, provided that it was combined with using physical violence, the threat of its use or using the helpless state of the victim. One of the three alternatively specified methods as a component of purposeful criminal behaviour and a criminogenic feature served the main criminal act (sexual intercourse), committed for the sake of the latter. Therewith, the list of ways, in the presence of at least one of which natural sexual intercourse between female and male persons was defined as rape, was exhaustive.

Considering the amendments to the CC of Ukraine in recent years, which have resulted in changes to the conventional definition of "rape", expansion of the forms of coercion to have sexual intercourse, change of the title and disposition of Article 153, which now establishes liability for sexual violence (considering the provisions of the Council of Europe Convention on preventing violence against women and domestic violence of 2011 or the Istanbul Convention), the introduction of liability for entering into voluntary sexual relations with a minor, there is a necessity for a more detailed analysis of legislative initiatives on amendments and additions to the CC of Ukraine concerning violent sexual crimes [20].

Article 152 of the Criminal Code of Ukraine, stated in the version of the Law of December 6, 2017, as a criminal feature indicates (except Part 4 of this Article) not a specific method, but involuntariness - the lack of free will of the victim to penetrate one of

its three natural openings. Vaginal, anal or oral penetration into the body of another person is defined as rape both when it is combined with using physical violence, the threat of its use or using the helpless state of the victim, and in other cases of absence of their voluntary consent to such penetration [19].

According to the Law of December 6, 2017 No. 2227-VIII, serious adjustments were introduced regarding the legal assessment of natural sexual intercourse with a minor and other sexual penetration into the body of such a person. Before the entry into force of this Law, the doctrine and judicial practice relied on the fact that only the minor age of a person (under the age of 14) does not always indicate the presence of a helpless state as a sign of rape (see below for the helpless state of a person). The question of the presence or absence of helplessness of the victim and, accordingly, the qualification of the perpetrator's actions (under Art. 152 or Art. 155 of the CC) was decided in each case, considering the individual characteristics of the development and upbringing of the minor. In particular, it was noted that in modern conditions of sexual liberation, the key importance in addressing this issue should be not a specific age as a kind of presumption of helplessness, but the degree of awareness and information of a particular minor on sexuality. A similar approach was used regarding the violent gratification of sexual desire in an unnatural way (previous version of Article 153 of the CC) if the victim of this crime was a minor [19].

The reference in part 4 of Art. 152 of the CC, as amended by Law No. 2227 of December 6, 2017, to "actions provided for in part 1 of this Article, committed against a person under the age of fourteen, regardless of their voluntary consent", allows asserting that sexual penetration into the body of a minor is considered rape regardless of whether such a person consented to it, whether the latter is voluntary (such consent is recognized by the legislator as a fiction) or forced, whether the minor understood the nature and significance of the actions committed against them, etc. Thus, the CC of Ukraine embodies the idea of legislative specification of the age, under which the law enforcement officer is obliged to unconditionally consider sexual penetration into the body of the person concerned as rape. Considering the informational and educational load of the analysed criminal law prohibition, the indication of a specific age of the victim, rather than the minor status of the victim, should be considered justified. The issue of criminal legal assessment of sexual violence committed against a minor (Part 4 of Art. 153 of the CC of Ukraine) is being resolved.

The concept of voluntary consent is defined in the note to Art. 152 of the CC of Ukraine. Consent is recognised voluntary if it is the result of the free will of the person, considering the accompanying circumstances. Therewith, the evaluative nature of the "accompanying circumstances" mentioned in the note is

evident. By the way, the latter does not contain a restrictive clause that the understanding of voluntary consent enshrined in it is acceptable in the process of applying only Article 152 of the CC of Ukraine.

However, as noted by K.V. Yurtayeva, in the practical guide to the qualification of sexual crimes O.O. Dudorov states that "in a broad sense, a person's consent to sexual penetration of their body cannot be considered voluntary if it was provided, in particular, under the influence of physical violence, threats of its use, threats of other content (e.g, threats of destruction or damage to the property of both the victim and another person, threats of restriction of the rights, freedoms or legitimate interests of the victim or another person), deception, use of a person's material or official dependence, helplessness or vulnerability" (Iurtaieva, 2020). In general, it can be agreed with the above position. According to the definition given in the Great Explanatory Dictionary of the Modern Ukrainian Language, the term "voluntary" means "such that is performed, acts, etc. of one's own free will, without violence, coercion; the opposite of forced" [21]. Therefore, voluntary, in the author's opinion, should be considered forms of sexual relations committed without using any form of physical or mental violence, without exploiting the helpless state of the victim, when their will (no voluntary consent) is ignored, or by deception, in which the consent of the victim appears to be voluntary, but such voluntariness is imaginary, as it is conditioned upon deception applied to the victim. Such a method of committing a crime is established for sexual violence provided for in Article 153 of the CC of Ukraine [19].

In contrast to the main corpus delicti, Part 4 of Article 152 and Part 4 of Article 153 of the CC of Ukraine establishes liability for rape and sexual violence committed against a person under the age of fourteen, regardless of their voluntary consent. According to this definition, sexual acts against minors may be violent, committed using the helpless state of the victim, using deception or even committed voluntarily, i. e. with the consent of the victim. Thus, the legislator has abandoned the practice of qualifying non-violent sexual relations with minors as rape only in cases where the person did not understand the nature and significance of the sexual acts performed with them through their mental retardation or young age, which was equated to the helpless state of the victim (para. 16 of the Resolution of the Plenum of the Supreme Court of Ukraine of 30 May 2008 No. 5 "On judicial practice in cases of crimes against sexual freedom and sexual inviolability of a person") [22]. It is by this criterion that rape in the form of non-violent sexual intercourse with minors was distinguished from the act provided for in the previous version of Art. 155 "Sexual intercourse with a person who has not reached sexual maturity". In the current version, under Part 4 of Art. 152 and Part 4 of Art. 153 of the CC of Ukraine, the presence of

consent to enter into sexual relations with a person under the age of fourteen does not affect the qualification of such actions, i. e. sexual intercourse can be both voluntary and violent, committed against the will of the victim - using their helpless state or, in some cases, deception. Considering the above, it is logical to conclude that rape and sexual violence in the form of a minor's voluntary consent to sexual relations not only loses its violent nature but, therewith, does not have signs of other forms of sexual relations without the consent of a sexual partner as a prerequisite for qualification under Part. 1 of Art. 152 and Part 1 of Art. 153 of the CC of Ukraine, and acquires the form of voluntary sexual relations between persons, one of whom (the victim, although such wording is absent in Part 4 of Art. 152 and Part 4 of Art. 153 of the CC of Ukraine) has not reached the age of fourteen. The above changes are unjustified neither from the standpoint of formal logic, since the qualified corpus delicti in the presence of the voluntary consent of the victim contradicts the main one, nor from the legal standpoint, since voluntary sexual relations with a minor are equated to the corpus delicti provided for in Article 155 of the CC of Ukraine "Sexual relations with a person under the age of sixteen", but with other age characteristics of the subject and victim of the crime [19].

Notably, the types of criminal violence are defined in the Resolution of the Plenum of the Supreme Court of Ukraine No. 2 "On judicial practice in cases of crimes against life and health of a person" dated February 7, 2003 (hereinafter – the Resolution). According to paragraph 23 of this Resolution, violence can be both physical (infliction of bodily harm or beatings, illegal deprivation of liberty, etc.) and mental (for example, threats to cause physical, moral or property damage). Thus, it allows concluding that there are two types of violence: physical and mental [23].

According to Article 153 of the CC of Ukraine, sexual violence is the commission of any violent acts of a sexual nature, not related to penetration into the body of another person, without the voluntary consent of the victim [18].

The new version of Art. 153 of the CC of Ukraine quite rightly does not use the phrase "gratification of sexual desire in an unnatural way", which is devoid of legal certainty and morally outdated. The indication of the "unnaturalness" of sexual intercourse appeared anachronistic in light of the achievements of modern sexology and sexopathology. Using the mentioned phrase in the previous wording of Article 153 of the CC caused a warning that the criminal punishability of the behaviour provided for in this Article of the CC of Ukraine is determined not by the so-called unnaturalness of the ways of satisfying sexual passion, possible homosexual orientation or immorality of actions, but by their violent nature. Thus, the Ukrainian legislator proceeds from the fact that homosexuality, which is performed on a voluntary foundation,

i.e. sexual attraction to persons of the same sex, should be considered not as an act prohibited under the threat of criminal liability, but as a special condition of the human body, atypical sexual behaviour.

Objective, subjective and qualifying (especially qualifying) signs of sexual violence coincide with the same signs of rape disclosed above, except that the objective side of the crime covers only such actions of a sexual nature that do not involve penetration into the body of another person. Thus, the disposition of Part 1 of Art. 153 of the CC of Ukraine is descriptive and referential.

Exploring the strengthening of criminal liability for sexual crimes against minors, L.I. Shekhovtsova provides the experience of individual countries in combating these crimes: in some civilized countries (USA, UK, Israel, Poland, Czech Republic) and CIS countries (Moldova, Russian Federation) for sexual crimes against minors introduced quite severe sanctions. For example, in the United States, life imprisonment or even the death penalty is imposed. In addition, some states have introduced chemical castration. In the UK, you can be imprisoned for up to 10 years just for viewing pictures of naked children. The state register of paedophiles who have undergone the procedure of chemical castration has been established. In addition, Poland has introduced chemical castration, which is compulsory for persons who raped children under the age of 15. In Israel, by court order, paedophiles are subjected to chemical castration, while providing them with psychological assistance [24].

Continuing the analysis of the state of protection of sexual inviolability of minors, noted that following the CC of Ukraine in Part 2 of Art. 22 provides for a reduced age of criminal liability – 14 years – for rape and sexual violence. Considering that in the current version of Part 4 of Art. 152 and Part 4 of Art. 153 of the CC of Ukraine provides for liability for acts of a sexual nature regardless of the voluntary consent of a person under the age of 14, i. e. both without their voluntary consent and in the form of voluntary sexual intercourse between the perpetrator and the victim, the conclusion is that the provisions of the CC of Ukraine unconditionally, according to an objective criterion, criminalise voluntary sexual relations between underage partners, one of whom has reached the age of 14 and the other – not. Therewith, according to the literal interpretation of the CC provisions, the difference in the age of the subject of the crime and the "victim" does not matter for the qualification. Considering the above, the position of O.O. Dudorov is not entirely consistent, who, on the one hand, supports the implementation of the CC of Ukraine of the idea of legislative specification of the age, the failure to achieve which should unconditionally regard sexual penetration into the body of the person concerned as rape [25], and, on the other hand, quite rightly, in the author's opinion, notes that, following Art. 18 of the Council of Europe Convention on the Protection

of Children against Sexual Exploitation and Sexual Abuse, the provisions of the criminal law should not apply to the regulation of sexual relations between minors that are performed by mutual consent [25]. Considering the definition of Part 4 of Art. 152 and Part 4 of Art. 153 of the CC of Ukraine, both of these positions are mutually contradictory, and they, in the author's opinion, sufficiently reflect the unsatisfactory state of regulation by the current provisions of the CC of responsibility for sexual relations between minors [19].

■ Conclusions

The amendments introduced (Laws of 6 December 2017 No. 2227-VIII [15] and of 14 March 2018 No. 2334-VIII [18]) to the CC of Ukraine are positive and designed to protect the rights of victims of violence, as the practice of bringing rapists to justice is still insignificant. This is at a time when, according to international data, on average, one of every five women has experienced sexual violence at least once in her life.

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Кримінально-правова характеристика насильницьких злочинів проти статевої свободи та статевої недоторканості дитини

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■ **Анотація.** Метою статті є аналіз наукових поглядів щодо застосування законодавства про кримінальну відповідальність за насильницькі злочини проти статевої свободи та статевої недоторканості дитини з огляду на імплементацію конвенцій Ради Європи. Методологія. Методологічний інструментарій обрано відповідно до поставленої мети, специфіки об'єкта та предмета дослідження. У процесі дослідження використано діалектичний метод наукового пізнання соціально-правових явищ в їхніх суперечностях, розвитку та змінах, що дає змогу об'єктивно оцінити розподіл статевих кримінальних правопорушень проти статевої свободи й статевої недоторканості дитини; формально-логічний метод, завдяки якому виявлено елементи правового механізму статевих кримінальних правопорушень проти статевої свободи та статевої недоторканості дитини; порівняльно-правовий метод застосовано під час аналізу чинного законодавства й міжнародних нормативних актів. Теоретичним підґрунтям публікації стали праці вітчизняних та іноземних учених, присвячені аспектам статевих кримінальних правопорушень проти статевої свободи і статевої недоторканості дитини. Наукова новизна публікації полягає в тому, що здійснено розподіл статевих кримінальних правопорушень проти статевої свободи та статевої недоторканості дитини й надано кримінально-правову характеристику об'єктивних і суб'єктивних ознак насильницьких злочинів проти статевої свободи та статевої недоторканості дитини (ст. 152, 153 КК України). Висновки. Встановлено, що головним безпосереднім об'єктом досліджуваних злочинів є статеві недоторканість дитини, тобто абсолютна заборона вступати в сексуальні контакти з особою, яка не є носієм статевої свободи, у супереччя справжньому волевиявленню такої особи або ігноруючи його. З'ясовано, що «статева свобода» та «статева недоторканість» – кримінально-правові категорії, що мають самостійний характер. Статева недоторканість – це право особи не зазнавати сексуального насильства, право на захищеність від сексуальних посягань (пасивне право), водночас статеві свобода – це право на вибір статевих партнерів і не заборонених законом форм сексуальної поведінки. Із суб'єктивної сторони всі злочини проти статевої недоторканості дитини мають характерну ознаку – прямий умисел. Водночас психічне ставлення винного до віку потерпілого може набувати вигляду необережної форми вини. Акцентовано на невідповідності кваліфікованих складів злочинів, передбачених ч. 4 ст. 152 та ч. 4 ст. 153 КК України, основних складах цих злочинів щодо наявності добровільної згоди малолітньої особи й запропоновано кримінально-правові шляхи усунення виявлених законодавчих суперечностей, зокрема: відмова від ознаки кваліфікованих складів злочинів, передбачених ч. 4 ст. 152 та ч. 4 ст. 153 КК України, сформульованої як «незалежно від її добровільної згоди» з одночасним перенесенням відповідальності за (добровільні) статеві зносини з малолітньою особою до ст. 155 КК України; усунення ознаки насильства в кримінально-правовій характеристиці дій сексуального характеру, передбачених ст. 153 КК України.

■ **Ключові слова:** дитина; статеві свобода; статеві недоторканість; сексуальне насильство; криміналізація; кримінально-правова характеристика