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MAGNANIMITAS Assn.

STRATEGIC DECISION MAKING IN A HETEROGENEOUS AND UNCERTAIN BUSINESS ENVIRONMENT: INTEGRATED MODELS FOR ANALYSIS AND FORECASTING	114
SVITLANA SUVOROVA, MAKSYM PYLYPENKO, ROMAN TOLPEZHNIKOV, OLENA KOVTUN, YANA TSEBRO	
SYNERGISTIC APPROACHES TO STRATEGIC MANAGEMENT: MODELS AND IMPACT ON THE PERFORMANCE OF ORGANIZATIONS	120
ALLA DOMYSHCHE-MEDYANYK, VIKTORIA ZELICH, MARYNA NOVIKOVA, TETIANA BIELSKA, DIANA RAIKO	
THE DUALISTIC MYTHOMODEL OF S. CHERKASENKO'S DRAMA "THE PRICE OF BLOOD", PARTICULARLY IN ITS PHILOSOPHICAL, SPATIO-TEMPORAL CHARACTERISTICS	126
MARIIA MOSHNORIZ, IRYNA ZOZULIA, NATALIYA RYMAR, SVITLANA KARPENKO, ALLA STADNII	
THE MANAGEMENT OF FINANCES IN INTERNATIONAL PROJECTS: OPTIMIZING COSTS AND ENSURING SUCCESS THROUGH GLOBAL INVESTMENTS AND FINANCIAL MANAGEMENT	131
TETIANA LOBUNETS, HALYNA VASYLEVSKA, HALYNA RIABENKO, OKSANA IVASHCHENKO, OKSANA KAZAK, SVITLANA KLIMENKO	
THE ROLE OF DIGITAL TECHNOLOGIES IN THE TRANSFORMATION OF THE TOURISM BUSINESS: PROSPECTS FOR DEVELOPMENT AND IMPACT ON THE COUNTRY'S ECONOMY	136
NATALIIA CHORNA, NATALIIA KORZH, ALLA KIZIUN, NATALIA ONYSHCHUK, KATERYNA ANTONIUK	
THE ROLE OF FINANCIAL AUDIT IN ENSURING THE RELIABILITY OF FINANCIAL STATEMENTS	141
OLENA LYSCHCHENKO, LARYSA OCHERET'KO, IRYNA LUKANOVSKA, OLENA SOBOLEVATERESHCHENKO, INNA NAZARENKO	
THE ROLE OF INTERNATIONAL TRANSPORT LOGISTICS IN OPTIMIZING TRANSPORT INFRASTRUCTURE ARCHITECTURES	146
ANATOLII BOBRÁKOV, HUANG XIAOYU, WU FEI, MYKHAILO KULIK, DMYTRO IVANENKO, OLEKSANDR GAVRYLOVSKYI	
CONTEMPORARY ENGLISH MEDIA DISCOURSE: LINGUISTIC, PRAGMATIC, SOCIAL AND DIGITAL ASPECTS	151
LIUDMYLA MIALKOVSKA, VITA STERNICHUK, VICTORIA PETRUK, KATERYNA HONCHAR, TETIANA KNYSH, VICTORIA PANCHENKO, ANZHELIKA YANOVETS	
ANALYSIS OF FINANCIAL STATEMENTS AS A BUSINESS MANAGEMENT TOOL	157
OLHA PANCHENKO, OKSANA BALAZYUK, TETIANA PORTOVARAS, VITA ANDRIEIEVA, VOLODYMYR KOTKOVSKYY	
ASSESSMENT OF THE IMPACT OF GLOBALIZATION ON THE REGIONAL DEVELOPMENT OF INNOVATION CLUSTER	162
LIUDMYLA HERMAN, OLEKSANDR FEDIRKO, YEVHENII KOSTYK, MARIANA SHKODA, INNA SOKHAN	
CURRENT ISSUES IN THE CRIMINAL LEGAL PROTECTION OF CULTURAL HERITAGE IN UKRAINE	167
MYKHAILO AKIMOV, IRYNA POKHYLENKO, INNA CHERNIKOVA, BURYK ZORIANA	
FEATURES, ATTRIBUTES AND CRITERIA OF DEMOCRATIC POLITICAL REGIMES (COMPARATIVE ANALYSIS)	171
OLEKSANDR SKRYPNIUK, OLEKSII BURIACHENKO, VALENTINA ZGURSKA, NADIYA STOVOLOS, MYROSLAV BURYK	
FOREIGN LANGUAGE COMMUNICATIVE COMPETENCE OF FUTURE AND CURRENT SPECIALISTS IN THE LEGAL SPHERE, PUBLIC ADMINISTRATION AND LAW ENFORCEMENT AGENCIES AS A COMPONENT OF GENERAL PROFESSIONAL COMPETENCE	177
OKSANA BALANAIEVA, OLENA MAMONOVA, NATALIA DYKHTA, OLENA ARDELIAN	
LIABILITY FOR VIOLATION OF FAMILY RIGHTS AND OBLIGATIONS UNDER UKRAINIAN AND THE EU LEGISLATION	181
VOLODYMYR VATRAS, ROMAN HAVRIK, MYKOLA STEFANCHUK, SERHII SABLUK, NADIJA BONDARENKO-ZELINSKA	
PERFORMANCE STYLE OF A CONTEMPORARY CHORAL CONDUCTOR IN THE CONTEXT OF THE CURRENT ARTISTIC SPACE: FROM REHEARSAL TO MEDIA PRESENTATION	185
YULIIA PUCHKO-KOLESNYK, ADRIANA SKORYK, LYUDMYLA SHUMSKA, IRYNA SHEVCHUK, INNA ANTIPINA	
POLITICAL LEADERSHIP IN THE REPRESENTATIVE POWER OF UKRAINE IN THE CONTEXT OF GLOBAL CHALLENGES	189
VALENTYNA GOSHOVSKA, LYDIIA DANYLENKO, IRYNA DUDKO, VOLODYMYR GOSHOVSKYI, IHOR REITEROVYCH	
TRAINING TEACHERS TO WORK IN THE CONDITIONS OF DIGITAL TRANSFORMATION OF EDUCATION	194
TAMARA ANDRIICHUK, IRYNA SHOSTAK, RENÁTE INDRIKA, YULIIA BOTUZOVA, NATALIJA DONII	

D EARTH SCIENCES

THE USE OF GIS FOR ECOLOGICAL AND LANDSCAPE LAND MANAGEMENT OF HUMAN SETTLEMENTS	200
SERHII SHEVCHUK, SVITLANA GAPON, VADYM CHUVPYLO, SVITLANA NAHORNÁ, ROMAN KURYSHKO	

CURRENT ISSUES IN THE CRIMINAL LEGAL PROTECTION OF CULTURAL HERITAGE IN UKRAINE

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Abstract: Since the preservation of cultural heritage sites is essential, their criminal legal protection remains relevant today. This study aims to provide a comprehensive examination of the norms of Ukraine's Criminal Code that, in one way or another, relate to the protection of Ukrainian cultural heritage. The research employed the methods of analysis, synthesis, scientific generalization, and formal-logical method. The paper explores Articles 178, 193, 201, 298, 307, and 316 of the Criminal Code of Ukraine. In the context of Article 178 of the Criminal Code of Ukraine, it is stated that the subject of this criminal offense - a religious building or place of worship - is much narrower than the concept of "cultural heritage." At the same time, Articles 193 and 201 of the Criminal Code of Ukraine specify that the subject can only be a tangible object associated with intangible cultural heritage objects. Part 2 of Article 298 of the Criminal Code of Ukraine directly relates to the criminal-legal protection of cultural heritage in Ukraine. The article analyzes the sanctions of Part 2 of Article 298 of the Criminal Code of Ukraine and provides recommendations for determining punishment under this part of the article. The paper also describes violations of legislative technique in constructing the composition of the criminal offense stipulated in Part 2 of Article 298 of the Criminal Code of Ukraine and offers recommendations for their elimination.

Keywords: Criminal offense, Cultural heritage, Sanctions, Punishment, Elimination, Destruction, Damage, Architecture, State register.

1 Introduction

International legal protection of cultural heritage traces its origins back to 1954 when the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted. Naturally, the issue of criminal-legal protection of cultural heritage gains particular significance in light of the full-scale invasion of the Russian Federation into the territory of Ukraine, as the risk of destruction, ruin, or damage to cultural heritage sites significantly increases during military actions. At the same time, military criminal offenses should not be equated with the system of criminal offenses where cultural heritage objects are the subject.

Furthermore, for proper qualification, it is necessary to establish what exactly is meant by "cultural heritage objects." In the process of examining the system of criminal offenses related to cultural heritage objects, violations of legislative technique rules were identified, particularly in the construction of sanctions. The paper provides suggestions for addressing such violations.

2 Literature review

Blake J. (2000) wrote about understanding the definition of "cultural heritage." The researcher notes that the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict is the earliest of these modern international texts. It was mainly developed in response to the destruction and looting of monuments and works of art during World War II. However, Blake J. (2000) notes that international law related to the protection of cultural heritage began with comparatively narrow goals - the protection of cultural property during wartime.

Solis G. (2021) also spoke about the protection of cultural property in the context of the 1954 Hague Convention for the Protection of Cultural Property. Nafziger J., Paterson R., and Renteln A. (2010) devoted their research to the issues of cultural material in the context of criminal justice and dispute resolution.

Mahnad P. (2017) addressed the issue of protecting cultural property in Syria regarding opportunities for states to strengthen compliance with international law.

The paper by Cunliffe E., Muhsen N., and Lostal M. (2016) also focuses on the conflict in Syria. It is related to the legal consequences and obligations of the destruction of cultural property during the Syrian conflict. Seršić M. (1996) focused on the protection of cultural property during armed conflict. The study by Lowenthal D. (2013) refers to natural and cultural heritage.

Rizzo I. and Throsby D. (2006) wrote about economic analysis and public policy in the context of cultural heritage. Rizzo I. and Throsby D. (2006) are convinced that economic theory and public policy analysis can illuminate the decision-making process concerning cultural heritage. They argue that from an economic perspective, it is interesting to conceptualize heritage as a capital asset. According to the authors, considering heritage as a cultural capital requires consideration of sustainability aspects, along with the consideration of natural capital in economic theory. It allows a rule of sustainability to be derived from accumulating cultural wealth. Rizzo I. and Throsby D. (2006) discuss the application of cost-benefit analysis to the evaluation of heritage investments, with a particular focus on the valuation of non-market benefits. Addressing policy issues, the authors explore the ways in which governments intervene in heritage markets, with a specific focus on listing and other forms of regulation.

Holtorf, C. and Högberg, A. (2020) considered cultural heritage for the future. Gražulevičiūtė I. (2006) is the author of a research paper on cultural heritage in the context of continuous development. Vecco M. (2010) presented a comprehensive study on the definition of "cultural heritage" as it ranges from material things to non-material ones. As a result, the issue of criminal legal protection of cultural heritage was not addressed in the studies mentioned above.

3 Aims

The study aims to provide a comprehensive review of the provisions of Ukraine's Criminal Code that, in various ways, relate to the protection of Ukrainian cultural heritage.

The following tasks were set to achieve this goal:

- to describe the composition of criminal offenses related to cultural heritage to some extent. These are, in particular, Articles 178, 193, 201, 298, 307 and 316 of the Criminal Code of Ukraine;
- to analyze the text of the Criminal Code of Ukraine in part related to the protection of cultural heritage sites for compliance with the rules of legislative technique and to develop recommendations in case of their violation;
- to differentiate the concepts of "elimination," "destruction," and "damage."

4 Methods

The following methods were applied during the research:

- Analysis method (in reviewing Articles 178, 193, 201, 298, 307, and 316 of the Criminal Code of Ukraine);
- Synthesis method (for a comprehensive statement of the issues related to the rules of legislative technique violation);
- Scientific generalization method (for a systematic description of scientific sources related to the research topic);
- Formal and logical method (when distinguishing the types of punishment from the sanction of part 2 of Article 298 of the Criminal Code of Ukraine).

5 Results

The following articles of the Criminal Code of Ukraine (hereinafter referred to as the CC of Ukraine) can be identified as somehow related to the protection of cultural heritage or concepts associated with it. In particular, these are Articles 178, 193, 201, 298, 307, and 316 of the CC of Ukraine. However, not all of these articles specifically concern cultural heritage as the subject of a criminal offense. Certain legal structures related to cultural heritage appear as various elements of criminal offenses under Articles 178, 193, 201, 298, 307, and 316 of the CC of Ukraine. Let us take a closer look at them.

Article 178 of the CC of Ukraine provides for criminal liability for the damage or destruction of a religious structure or place of worship. It should be noted immediately that a place of prayer is not the same as a cultural building. A place of prayer serves religious worship needs. At the same time, religious buildings or places of worship may well constitute cultural heritage.

However, it is evident that the concept of "cultural heritage" is broader and includes not only religious structures or places of worship. Thus, the peculiarity of Article 178 of the Criminal Code of Ukraine in terms of the study of criminal legal protection of cultural heritage concerns certain buildings that may potentially belong to cultural heritage sites. However, there are possibly some cases when temples or houses of worship are damaged or destroyed and are not classified as cultural heritage.

The Article 193 of the CC of Ukraine contains a criminal offense of misappropriation of found or accidentally obtained property or treasure belonging to someone else that has a special cultural value. In such cases, the subject of the criminal offense may be cultural heritage, but in the context of tangible property associated with intangible objects of cultural heritage (Law of Ukraine "On the protection of cultural heritage," 2000). The author would also like to note that, along with property or treasure of special cultural value, the subject of Article 193 of the Criminal Code of Ukraine includes objects of special historical, scientific, or artistic value (Criminal Code of Ukraine, 2001).

Similarly to Article 193 of the CC of Ukraine, the subject matter of the criminal offense of smuggling under Article 201 of the CC of Ukraine may be a tangible object related to intangible cultural heritage. In such a case, the aforementioned tangible object falls under the criteria of the smuggling subject "cultural valuables." The criminal offense of smuggling will be present in the case of transporting cultural property across the customs border of Ukraine beyond customs control or hidden from customs control.

In the context of our study, part 2 of Article 298 of the CC of Ukraine becomes especially important. It establishes the following criminal offense: "intentional unlawful elimination, destruction or damage to cultural heritage sites or parts thereof" (Criminal Code of Ukraine, 2001).

The authors wish to draw special attention to the sanctions of Part 2 of Article 298 of the Criminal Code of Ukraine. Indeed, this part stipulates such punishments as fines, restriction of liberty, and imprisonment. An additional penalty is also provided for in Part 2 of Article 298 of the Criminal Code of Ukraine (Chyzmar et al., 2019).

The authors are convinced that when imposing a penalty for committing a criminal offense defined in Part 2 of Article 298 of the Criminal Code of Ukraine, the court should take into account both the form of the act and the specific object of the criminal offense. For example, damage to a part of a cultural heritage site poses the least public danger. Therefore, such a form of a criminal offense may well be punishable by a fine, which is closer to the lower limit. At the same time, the destruction of a cultural heritage object represents the highest possible degree of societal danger, according to Part 2 of Article 298 of the Criminal Code of Ukraine, deserving the most severe punishment - imprisonment closer to the upper limit.

An interesting situation arises concerning the desecration of cultural heritage objects or their parts. The degree of societal danger the court considers in imposing a penalty is average, allowing for applying all three types of punishment, namely:

- a fine (closer to the upper limit);
- the restriction of liberty;
- an imprisonment (closer to the lower limit) of the guilty person.

Additionally, while studying Part 2 of Article 298 of the Criminal Code of Ukraine, the authors noticed another exciting feature of this type of criminal offense. The object of this criminal offense is formulated in the plural - "objects of cultural heritage or their parts." However, it is difficult to imagine that several objects of cultural heritage were destroyed, ruined, or damaged simultaneously. It is more likely for their part, but then the destruction, ruin, or damage of one piece of cultural heritage remains beyond legal regulation. In the authors' opinion, there is a flaw in legislative technique rules here, and this situation needs to be rectified. Part 2 of Article 298 of the Criminal Code of Ukraine should be amended to provide for the subject matter of this criminal offense in the singular - "a cultural heritage site or part thereof." Additionally, it is desirable to specify the types of such parts (tangible/intangible) for more detailed regulation.

It is interesting to note that criminal legislation does not provide for an expansive interpretation. Therefore, under a literal approach, it is impossible to hold criminally responsible a person who has destroyed, ruined, or damaged one object of cultural heritage or its part.

Let us also focus on differentiating the concepts of "destruction," "ruin," and "damage." Destruction involves such a mechanical impact on an object of cultural heritage or its part that the object or its part ceases to exist in the physical world. Ruin is similar to destruction but involves causing significant harm to the object of cultural heritage or its part, rendering it completely non-functional. The term "damage" refers to causing such material harm to an object of cultural heritage or its part that the object or its part partially loses its functionality.

In general, the legal framework of Article 298 of the Criminal Code of Ukraine is quite interesting. Parts 1 and 2 provide for two separate components of the criminal offense. At the same time, parts 3, 4, and 5 of Article 298 of the Criminal Code of Ukraine outline qualified forms of the same criminal offense stipulated in part 2 of Article 298 of the Criminal Code of Ukraine (excluding part 1 of Article 298 of the Criminal Code of Ukraine, which is not typical for the structure of the Criminal Code of Ukraine).

Indeed, part 3 of Article 298 of the CC of Ukraine specifies a distinct object of this criminal offense – a monument of national significance with a more severe sanction (mandatory imprisonment and/or without additional punishment). However, this situation has its drawbacks, as the court must impose imprisonment on the guilty party in any case. Therefore, we propose supplementing the sanction of part 3 of Article 298 of the Criminal Code of Ukraine with the punishment of "restriction of liberty" or a substantial fine.

Overall, the legislator's approach (isolating a separate qualified component of the criminal offense based on the subject matter) seems logical, as the destruction, elimination, or damage to a monument of national significance is more socially dangerous than the destruction, elimination, or damage to an ordinary object of cultural heritage or its part.

The provision in part 5 of Article 298 of the Criminal Code of Ukraine is interesting, as it introduces an optional additional punishment. However, the disposition of this part of the Article provides for such a qualified type of it as committed by an official using their service position (Criminal Code of Ukraine, 2001).

Now, let us focus on distinguishing Part 2 of Article 298 of the Criminal Code of Ukraine about related criminal offenses. Article 179 of the Criminal Code of Ukraine provides criminal liability for destroying religious buildings. At the same time, Part 1 of Article 194 of the Criminal Code of Ukraine addresses intentional destruction or damage to another's property causing significant harm. The differentiation between these criminal offenses can be based on their subject matter: Article 179 concerns religious buildings, and Article 194 pertains to other people's property.

The full-scale invasion of the Russian Federation into the territory of Ukraine has not only jeopardized the lives and health of Ukrainian citizens but also raised concerns about the integrity of cultural heritage sites. Clearly, the actions of the perpetrators constitute elements of a criminal offense, as defined by Article 437 of the Criminal Code of Ukraine. However, in the case of damage to cultural heritage sites, the actions of the perpetrators must be qualified as a combination of criminal offenses (Criminal Code of Ukraine, 2001).

While Articles 307 and 316 of the Criminal Code of Ukraine do not explicitly address cultural heritage as a subject of criminal offenses, they can effectively characterize the locations where criminal offenses are committed (Criminal Code of Ukraine, 2001). It is evident, in particular, in the formulation "in places designated for cultural events."

6 Discussion

Mahnad P. (2017) notes that war has led to mass destruction and human casualties. Relying on the responsibility of third states to "respect and ensure respect" for the norms of international humanitarian law, the author examines the legal framework for the protection of cultural values and recent innovative protection measures that contribute to compliance with international law in Syria, excluding military assistance and intervention.

Cunliffe E., Muhesen N., and Lostal M. (2016) provide an overview and explanation of the national and international legal basis for protecting cultural values during the conflict involving the Syrian state and non-state actors, using practical examples from the current situation. They demonstrate that the destruction of all types of cultural values, regardless of their importance, can be considered a violation of these laws and subject to legal prosecution. The authors explore the real possibilities of such legal prosecution of the perpetrators. Overall, Cunliffe E., Muhesen N., and Lostal M. (2016) affirm a significant level of protection for cultural values in both national and international legislation regulating archaeology and cultural heritage. Criminalizing attacks on cultural values, as well as efforts to protect the country's heritage, should be considered not only as a Syrian problem but rather from a global perspective as a specific threat to contemporary and diverse societies. Targeting and destroying cultural values and heritage in Syria, according to Cunliffe E., Muhesen N., and Lostal M. (2016), can be seen as attacks on the very essence of humanity.

Seršić M. (1996) questions the adequacy of international rules to protect cultural values during armed conflicts. This article aims to explore this issue by analyzing the main international norms dedicated to the protection of cultural values in the event of an armed conflict. Lowenthal D. (2013) writes that heritage means everything we consider handed down to us from the past. Although not all heritage is equally desired, it is widely seen as a precious and irreplaceable resource necessary for personal and collective identity and self-respect. The definition of heritage is very different between peoples and across time, but its meaning is versatile. People at all levels of technology and political beliefs express this sense. Gillman D.'s (2010) work is dedicated to the ideas of cultural heritage. Silverman H. and Ruggles D. F. (2007) wrote about the relationship between cultural heritage and human rights. The topic of the study by Donders Y. (2020) is also similar.

The fundamental work of Timothy D. J. (2011) on the influence of the presence of cultural values on tourism waves is significant. Vecco M. (2010) analyzes the evolution of the concept of cultural heritage in Western European states. In the last decades of the XX century, the term "heritage," as described by Vecco M. (2010), has been characterized by expansion and semantic shifting. It led to the broadening usage of this word, often employed interchangeably with others, such as monuments and cultural assets. However, all these terms cannot encompass a single semantic field.

Beginning with reflections on the semantic evolution of the concept of cultural heritage in France, Vecco M. (2010) approaches the international definition of heritage provided by directives, charters, and international resolutions to delineate a global understanding of the meaning of heritage that is not limited to a specific national dimension. From a purely normative approach, Vecco M. (2010) has moved to a less restrictive approach based on the ability of an object to evoke specific values that have led a given society to consider it as heritage and, therefore, to the next step. Thus, heritage is no longer defined solely based on its material aspect. This elaboration also allowed the recognition of intangible cultural heritage, which has long been ignored, as a heritage that needs to be protected and preserved.

The study by Sesana E., Gagnon A. S., Ciantelli C., Cassar J., and Hughes J. J. (2021) on the impact of climate change on cultural heritage is intriguing. In their literature review, the authors state that climate changes, evidenced by gradual shifts in temperature, precipitation levels, atmospheric humidity, wind intensity, sea level rise, and extreme events, are already affecting cultural heritage objects. Accordingly, there is a rapidly growing number of studies reporting on the impact of climate factors on cultural heritage and assessing the impact of climate change on cultural heritage assets.

Baglioni M., Poggi G., Chelazzi D., and Baglioni P. (2021) have chosen an interesting research topic on the restoration practices of cultural heritage objects. The paper by Fiorucci M., Khoroshiltseva M., Pontil M., Traviglia A., Del Bue A., and James S. (2020) is dedicated to statistical approaches to cultural heritage objects.

The fundamental work of Harrison R., DeSilvey C., Holtorf C., Macdonald S., Bartolini N., Breithoff E., and Penrose S. (2020) addresses the future of heritage, specifically comparative approaches to natural and cultural heritage practices. The research by Rafiqi R. and Marsella M. (2021) is intriguing as it considers tobacco as an object of cultural heritage. Brahma K. (2020) has also researched cultural heritage.

Kim S., Whitford M., and Arcodia C. (2021) wrote about the development of intangible cultural heritage as a resource for sustainable tourism and the perspectives of practitioners on intangible cultural heritage. According to Kim S., Whitford M., and Arcodia C. (2021), authentic and intangible cultural heritage provides a unique advantage to communities in the global tourism industry. However, the commercialization of intangible cultural heritage has threatened its authenticity. Therefore, innovative approaches to sustainable tourism are necessary to achieve successful transmission and promotion of intangible cultural heritage as a sustainable tourism resource. Kim S., Whitford M., and Arcodia C. (2021) explore the priorities of intangible cultural heritage practitioners regarding developing intangible cultural heritage as a resource for sustainable tourism. In their papers, Kim S., Whitford M., and Arcodia C. (2021) used South Korea as the research region.

Król K.'s (2021) research addresses the assessment of the potential of cultural heritage in Poland. According to the author, cultural heritage is a complex and multifaceted concept that cannot be defined. Therefore, it is a difficult task to clearly assess the cultural heritage potential of a country, region, or community.

The article by Król K. (2021) defines "cultural heritage potential" and presents an example of a synthetic assessment of the potential in the Polish region. The evaluation included several normalized diagnostic variables grouped into four thematic fields. Thus, a "Synthetic Quality Index" can represent the cultural heritage potential. Consequently, very few studies have been devoted to the issue of criminal legal protection of cultural heritage.

7 Conclusions

The article presents a comprehensive review of the criminal offenses system designed to protect cultural heritage sites in Ukraine (Articles 178, 193, 201, 298, 307, and 316 of the Criminal Code of Ukraine).

Among the preceding provisions, only part 2 of Article 298 of the Criminal Code of Ukraine directly relates to the protection of cultural heritage from destruction, damage, and elimination. The author developed recommendations for the courts to impose criminal penalties for the criminal offense under Part 2 of Article 298 of the CC of Ukraine, considering such an indicator as the level of public danger.

The authors provide the criteria for distinguishing Article 298(2) of the Criminal Code of Ukraine from Articles 179, 194, and 437 thereof. The issue of criminal legal protection of cultural heritage sites in the context of military conflict may serve as a basis for further scientific research.

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