

Custody: Law Enforcement Issues and Human Rights Protection

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Abstract

The purpose of this study includes the investigation and solving of a set of issues concerning custody from the standpoint of observing and protecting human rights and freedoms. The general scientific, legal, and socio-political tools for investigating public processes, judicial decisions and the practice of the Commissioner for Human Rights in Ukraine were used for a generalising analysis of the present-day realities of custodial issues in institutions of the State Penitentiary Service of Ukraine and the activities of various subjects. An in-depth study of the human rights mechanism in Ukraine upon ensuring and guaranteeing the rights and freedoms of a person in custody has determined the practical significance and originality of the materials of this paper. The subject of this study, related to the violation of the rights and freedoms of citizens during their illegal custody in pre-trial custody centres and temporary detention facilities.

Keywords: Custody; Ukraine; ECHR; OHCHR; Pre-Trial Restrictions.

Introduction

Problematic aspects related to the specification of the grounds, conditions, and circumstances for choosing special pre-trial restrictions in the form of custody in legal procedural science and their consolidation in the Criminal Procedural Code (CPC) of Ukraine No. 4651-VI dated April 13, 2012 (as amended of November 17, 2021) (Section 5, Part 1, Article 176, Articles 183, 197, 199, etc.) (Criminal Procedure Code of..., 2012), as well as issues concerning the procedure for selecting this restriction during criminal proceedings, or extending term of custody, have always presented an acute and urgent issue for practising lawyers and researchers. The incessant attention to this problem, associated with the constant application of a rather severe measure of criminal procedural restrictions – custody, is explained, inter alia, by the available inverse public need to reduce the number of prisoners. The scale and growth of the use of custody as a preventive measure constantly determines the increased interest of researchers, practitioners of law enforcement agencies, and the public in the application of this preventive measure.

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However, the constitutional legal and interethnic, international aspects of the application of this measure of custody and restrictions in the form of imprisonment and detention in a specialised institution (for example, pre-trial detention centres – PTDC), related to the temporary restriction of the rights to human inviolability, freedom of movement, personal freedom, were rarely considered. Therefore, the study of the procedure for applying custody as the key and exceptional measure of restriction of human rights and freedoms specified in the Constitution of Ukraine (Constitution of Ukraine..., 1996), the issues of legitimacy of its use in the modern period in the problem areas of the country (Donetska and Luhanska Oblasts, self-proclaimed People's Republics unrecognised in the world community), as well as the law enforcement practice of the European Court of Human Rights (ECHR) concerning the establishment of the legality of the use of this preventive measure are relevant areas of real scientific importance.

The legal status of the Commissioner for Human Rights, consolidated in a special law of Ukraine, also appears to be understudied, within the scope of their response to citizens' appeals concerning the violation of the individual's criminal procedural rights (Law of Ukraine No. 776/97-BP..., 1997).

The purpose of this study is a comprehensive analysis, research, and generalisation of the problems of protection of human and civil rights and freedoms in the application of exceptional preventive measures in the form of imprisonment and custody, considering modern principles and norms of public international law.

The practical problems and originality of this study are conditioned upon its empirical aspect and law enforcement analysis of relevant decisions and rulings of the ECHR in various cases (2019-2021), namely *Ulemek v. Croatia* (2019), complaint No. 21613/16; *Porsche v. Switzerland*, complaint No. 36391/16 (Porsche, 2019); *J.M.B. et autres c. France* (2020), complaint No. 9671/15; the use of content analysis of modern documents investigating the legal protection of Ukrainian citizens from illegal custody: the report of the Commissioner for Human Rights “On the state of observance and protection of human and civil rights and freedoms in Ukraine in 2020” (2020) and the consolidated report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) for 2014-2021 “Arbitrary detention, torture, and ill-treatment in the context of the armed conflict in the east of Ukraine” (2014-2021); etc.

Materials and Methods

Theoretical-empirical and informational-analytical research of the subject under study was performed in several stages, interconnected logically and meaningfully as follows:

1. At the first stage, upon selecting analytical and literary material, regulations concerning the subject matter, the author formulated and highlighted the key research-to-practice issues regarding the use of various preventive measures in the criminal procedure of Ukraine, considering compliance with international standards in the treatment of prisoners and arrested subjects. Furthermore, methodological tools for conducting a comprehensive study were formulated and characterised, which enabled a systematic analysis of the problematics of selected issues, followed by a generalisation of the results. The introduction provides details regarding the relevance of the subject under study in general terms, outlining the issues concerning the constant application of a rather severe measure of criminal procedural restriction – custody, and the impact of its legality on the observance of human and civil rights and freedoms in Ukraine.

2. Based on theoretical, methodological, analytical, and empirical material, the second stage of this study contains a content analysis of official sources and criminal procedural legislation, other regulations, a study of the generalised material of scientific sources, legal and specialised literature covering the issues of custody in present-day independent Ukraine. Selected aspects related to the statutory regulation and improvement of the criminal procedural policy in Ukraine were also covered in detail. Therewith, thanks to formal legal, comparative legal, comparative political, systemic structural analysis, the author investigated the current issues of the institutions of the State Penitentiary Service of Ukraine and their activities to protect the rights and freedoms of prisoners in custody and detained criminals. The system-structural and value-normative methods allowed analysing the compliance of modern tools for ensuring the rights of arrested and imprisoned individuals in Ukraine with the foundations of the constitutional system and the norms of legislation. Institutional analysis was used to describe individual violations of the rights of persons detained under martial law in certain territories of Ukraine.

3. To summarise the stated problems and relevant issues of this paper, the final conclusions were formulated concerning the conducted research to substantiate the author's scientific opinion. In particular, it was found that the problematics of unlawful custody are quite voluminous regarding the variety of violations of individual rights and freedoms and have different points of contact with the system of protecting inalienable human rights and freedoms in the public environment upon exercising the functions of criminal prosecution and justice by

the authorities. The study of the present-day criminal procedural policy of Ukraine regarding the protection of the rights of detainees with the study of quantitative indicators and summary of the results at the final stage determined further and subsequent vectors of development in this subject area. In addition, normative recommendations were formulated for reforming the law enforcement practice of institutions of the State Penitentiary Service of Ukraine, concerning modern vectors for improving the rights and freedoms of imprisoned and arrested subjects pursuant to international standards and regulations.

Results

The problem of observing and ensuring individual rights and freedoms in the application of measures of criminal procedural coercion and restraint remains relevant in the modern world with the expansion of the powers of law enforcement agencies as a result of the construction of a police system of control and supervision in various countries. Evidence of frequent violations of citizens' rights in the application of restrictive and coercive criminal procedural measures is the increase in the number of complaints and applications received both by the Commissioner for Human Rights in Ukraine and the European Court of Human Rights (ECHR).

In the annual reports of the Commissioner for Human Rights in Ukraine (2020), numerous violations of human and civil rights and freedoms are constantly noted when public bodies and their officials carry out criminal procedural activities related to the application of pre-trial restrictions in the form of custody to a suspect (accused). Moreover, these violations demonstrate a tendency for considerable growth.

Therefore, the Report of the Commissioner for Human Rights in Ukraine for 2020 emphasises that the state of observance of individual rights in detention facilities lacks stability, which requires further active actions by public authorities of the central government to modernise the legislative and law enforcement measures in this area.

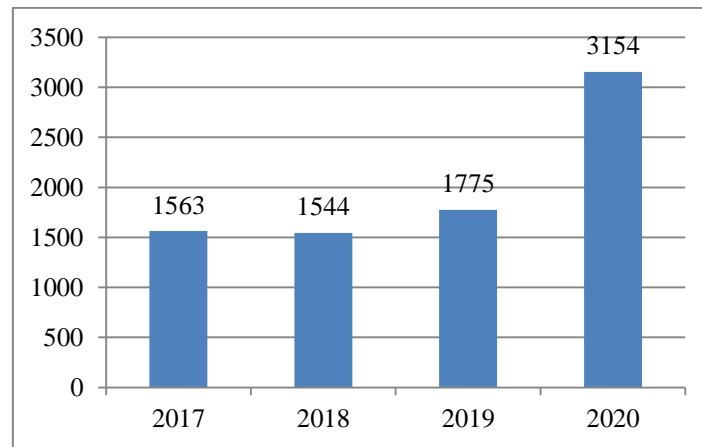
As noted in the said Report, violations of the legislation of Ukraine regarding the illegal and unjustified restriction of human rights and freedoms consolidated in the Constitution of Ukraine, the provisions of international law (according to a substantive analysis of the decisions of the ECHR), are associated with the following illegal actions of law enforcement agencies of the state:

- violation of the statutory provisions of the Criminal Procedural Code of Ukraine when documenting acts on the custody of criminals and failure to provide the services of a lawyer within the prescribed period;

- unlawful and unjustified detentions of various subjects without a lawful decision of the investigating judge or court;
- insufficient level of medical and other aid, violation of the order of custody in temporary detention facilities (TDF) and the PTDCs in Ukraine (inadequate provision of medical supplies; ignoring the requirements of public and medical organisations; non-compliance with sanitary measures for the custody of prisoners; lack of access to necessary resources, etc.) (Sukachov v. Ukraine, 2020).

Compared to 2019, in 2020, the total number of complaints and appeals of an informational nature sent to the Commissioner for Human Rights in Ukraine concerning the violation of the rights of prisoners in various institutions of the State Penitentiary Service of Ukraine almost doubled – 3.154 reports against 1.775 in 2019; therewith, in 2017-1.563 reports, and in 2018-1.544 reports (Figure 1) (Annual report of Ukrainian parliament..., 2020).

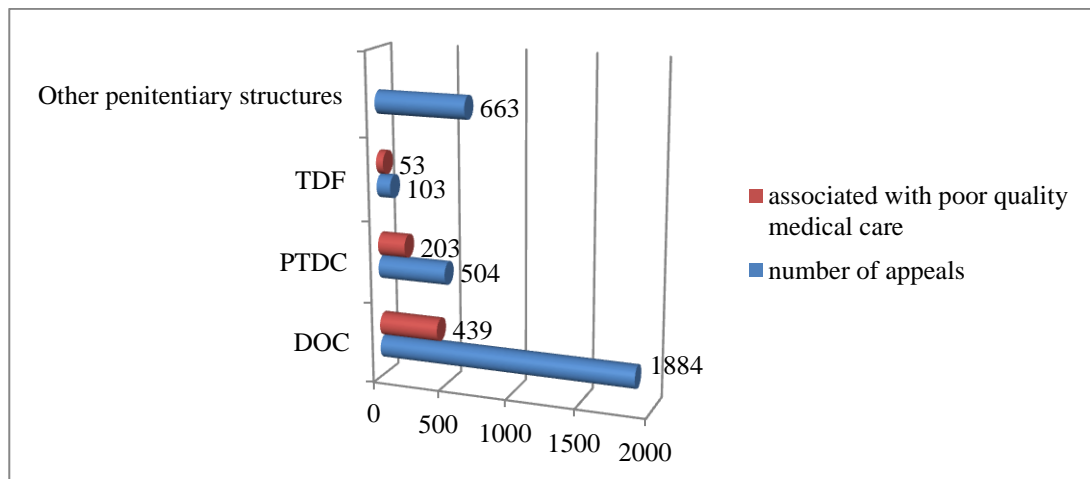
Figure 1: The number of complaints about violations of the rights of prisoners in institutions of the State Penitentiary Service addressed to the Ombudsman of Ukraine (2017-2020)



In 2020, out of these applications and complaints addressed to the Ombudsman of Ukraine, according to Figure 2, the number of appeals to ensure the implementation and violations of individual rights in penitentiary facilities (PF) amounted to 1.884 (of which the largest number is related to violations of the rights to professional medical care – 439). 504 appeals were registered on the illegality of the actions of the PTDC personnel (complaints for medical care amounted to 203); TDF personnel, – 103 (of which for medical care and health

protection, – 53); in other institutions of deprivation of liberty, – 663 complaints (Annual report of Ukrainian parliament..., 2020).

Figure 2: Comparative analysis of received complaints on the actions of personnel of various institutions of the penitentiary system of Ukraine (2020)



The number of appeals of the population of Ukraine to the Ombudsman regarding the violation of their subjective rights, interests, and personal freedoms by representatives of the National Police during 2020 considerably increased to 1814 appeals compared to 2019, where 1652 appeals were registered. Therewith, the majority of appeals addresses the unlawful actions of the police regarding restrictions of the constitutional right to freedom and inviolability of the person regarding illegal detentions by police officers of various subjects without legally established grounds and conditions (Annual report of Ukrainian parliament..., 2020).

However, this situation is typical not only for Ukraine, but also for other European countries. As the practices of the European Court of Human Rights indicate, most frequently, upon unlawful detention outside the legally established and limited terms of such custody, the authorities do not compensate for moral damage in violation of the constitutional rights of the accused (J.M.B. et autres c. France, 2020; Porsche v. Switzerland, 2019).

Furthermore, as the European Court of Human Rights has repeatedly pointed out, every state should have legal and extra-legal means of protecting the rights of prisoners, which are consolidated in law pursuant to the norms of the Constitution (Kachalova & Kachalov, 2019; Yuzheka, 2023).

However, the rules of custody of prisoners are often violated regarding the observance of their rights to timely medical care, provision of necessary sanitary and living conditions for the accused and suspects to stay in PTDFs, and the availability of means of protection against unreasonable actions of law enforcement officers (A brief analysis of the practice of the ECHR, 2019; Stróż et al., 2023).

There is also a problem in Ukraine, indicated in the Report of the United Nations Office of the High Commissioner for Human Rights (OHCHR) for 2014-2021. “Arbitrary detention, torture, and ill-treatment in the context of the armed conflict in the east of Ukraine”, related to the ongoing acts of unlawful detention and custody in the territories temporarily occupied by illegal military formations – people's republics in Donetska and Luhanska Oblasts, self-proclaimed and unrecognised in the world community (Shopina et al., 2022).

According to the generalised data of this report, the following problems are the most urgent:

- the considerably large scale of unlawful detention and custody of various subjects in the context of a national and opposing conflict using military and violent means in the east of the country by the government structures of Ukraine, as well as paramilitary groups and other entities in the territory controlled by the unrecognised republics of Donetska and Luhanska Oblasts from April 14, 2014 to April 30, 2021. Therewith, as noted in the report, according to OHCHR estimates, from 2014 to the spring of 2021, representatives of the legitimate authorities of Ukraine detained from 3.600 to 4.000 people involved in hostilities or assisting in the continuation of the armed conflict in Donetsk and Luhansk territories. At the same time, most of these detentions and custodies (55% of cases) of various subjects were accompanied by acts of sexual, physical, and psychological violence. Furthermore, most of the custodies were unjustified and arbitrary, as they did not comply with the normative standards of international guarantees of individual rights, although many norms of world and European legislation are codified in the national codes of Ukraine (Sannikov, 2017; Splytska, 2023). It is also noted that the self-proclaimed law enforcement agencies of the so-called DPR and LPR also performed unlawful custody of various representatives of government structures and opposition forces; however, due to restrictions on access to institutions of the Donetsk and Luhansk Republics, OHCHR was unable to establish the scale of these human rights violations (Report of the Office of the United Nations High Commissioner..., 2014-2021):

- forms of arbitrary detentions related to the armed conflict included secret custody without providing the necessary communication with the outside world;
- especially at the beginning of the military conflict (2014-2015), the prevalence of torture and other inhuman and cruel treatment of prisoners, including sexual harassment, reached impressive proportions (50-60% of the total number of detained and arrested citizens);
- legal remedies were practically not provided to detainees and arrested persons, and compensation for victims of repression was practically not used as compensation for suffering; compliance with constitutional rights had a low efficiency index (Report of the Office of the United Nations High Commissioner..., 2014-2021).

Currently, the practice of creating special services for prisoners by introducing paid cells in PTDCs with the most favourable conditions of custody (“with improved conditions”) is developing in the activities of the Ukrainian penitentiary authorities. The funds received from the implementation of this initiative of the Cabinet of Ministers of Ukraine within the framework of the pilot project will be used to repair ordinary custody facilities. As noted in the press, according to official data, “thanks to the implementation of the project, 108 free cells for 716 beds were repaired” (Bogdanets, 2021).

In general, the current policy of Ukraine regarding the improvement of legislation to ensure the rights of arrested and detained citizens, as well as the practice of applying the norms of criminal procedural law are far from perfect and require considerable investigation.

Discussion

As the materials of various publications, monographs, and thesis research demonstrate, the means of influencing the suspect or the accused at the stage of investigation of crimes and the defendant in court are special measures of procedural restraint within the framework of the general system of preventive measures in criminal proceedings, which lie in restricting the constitutional and other rights, interests, and freedoms of citizens subject to criminal prosecution, in the form of deprivation of freedom of action and movement for a certain period during custody as the most severe pre-trial restriction applied to the offender brought to criminal responsibility (Tacij et al., 2014; Bazilova et al., 2016; Aryn, 2021). The studies of various foreign specialists covering the problems of arrests and custody have a variety of subjects and scientific nature.

D. V. Z. Smith (2019), a South African lawyer, a researcher in the field of criminal law and criminology, a professor from the United Kingdom investigates the issues of imprisonment and custody in the international comparative legal aspect and the interrelation with penitentiary reform, the application of international prison standards for the treatment of prisoners. Since 2021, he has been appointed Chairman of the International Prison Reform, since his research-to-practice studies and papers have always been of applicable and law-enforcement nature, and therefore they were deservedly positively evaluated by the world community. In one of his recent publications, he investigates the application of interethnic prison standards in the field of activities of bodies that detain the accused and suspected of committing various crimes. Therewith, the researcher demonstrates how the world legal standards that consolidate the conditions and grounds for custody in places of detention, arising at the international and regional levels, are implemented (by incorporation or transformation) into national criminal procedural legislation. These international prison standards are aimed at combating substandard and degrading conditions of custody in individual correctional institutions in various countries of Europe and Asia (Tengilimoğlu & Pentassuglia, 2023).

Other, more fundamental and substantial studies of this researcher cover the issues of protecting the rights and freedoms of prisoners (van Zyl Smit & Appleton, 2019).

M. G. Martinez-Aranda (2021) raises a complex and urgent issue concerning criminal procedural relations in the United States regarding the adverse consequences of intensified immigration control for foreigners entering the country, their families and national communities associated with unlawful pre-trial restrictions such as long-term detention and custody. The author notes that the growth of “criminal migration” leads to various legal influences and prohibitions, including the custody of individuals. Prolonged isolation from society leads to a violation of the social and labour rights of migrants regarding the loss of their place of employment, the funds necessary for the existence of these subjects and their families, the constitutional rights to personal integrity and individual freedom. There is also a constant threat of deportation against foreigners, which helps the authorities influence the minds of immigrants, forcing them not to resist unlawful acts of custody and arrests (Onyshko, 2022; Miliienko, 2023). Some public lawyers are trying to protect the rights of migrants in the United States in criminal proceedings, but in practice such cases are isolated and quite rare. Generally, the legal community and citizens of the country support the policy of detaining the most suspicious foreigners to avoid various interethnic conflicts and terrorist threats to the national security. M. G. Martinez-Aranda (2021)

emphasises that “intensive” state control over the activities of immigrants in the United States creates the condition of “extended punishment”, which is present in the daily activities of law enforcement and migration structures that conduct unlawful surveillance of the behaviour of individual subjects using various electronic devices.

M. G. Martinez-Aranda (2021) thesis research raises issues in the field of deportation, unlawful custody of immigrants, as well as international regulation of the rights of migrants in criminal proceedings, since this specialist is a recognised professional in the field of ethnography and ethnic sociology, an expert in immigration legislation.

Another work by M. D. Martinez-Aranda (2020) on the persecution of immigrants in the United States raised the issue of violation of the criminal procedural rights of these subjects. This study uncovered the harm of custody associated with psychological, sexual, and physical abuse of power by police officers. Legislation on immigration reform and the responsibility of immigrants, according to this expert, has a pronounced punitive function and violates (restricts) numerous human rights and freedoms consolidated in the Constitution.

In the study by A. L. Tyler (2019), an interdisciplinary comparative legal and international historical study of the development of the legislation of the United Kingdom and the United States regarding the detention and custody of state criminals is carried out. The historical practices of the two countries demonstrate a certain politicisation of the processes of unjustified custody of participants in hostilities, which contradicts the principle of democracy and internationalism, the freedom of the judicial and law enforcement system from the pressure of the executive power in the country upon making legal decisions on custody.

This paper is interesting from the standpoint of protecting the rights of political and military prisoners who are in places of deprivation and restriction of freedom in the Donetsk Oblast (Donetsk People's Republic – DPR) and the Luhanska Oblast (Luhansk People's Republic – LPR), –unrecognised self-proclaimed “polities”. Furthermore, many violations of the constitutional rights of political prisoners are observed in Crimea and Sevastopol, according to the report of the United Nations Office of the High Commissioner for Human Rights (OHCHR) for 2014-2021. “Arbitrary detentions, torture, and ill-treatment in the context of the armed conflict in the east of Ukraine” (Report of the Office of the United Nations High Commissioner..., 2014-2021.), as well as in various PTDCs in Kyiv (Popovych, 2023; Chornous & Dulskyi, 2024).

Wilhelm Robinson touches upon an interesting issue of the development of global trends in the construction of police states in the world that exercise total control over the activities of citizens, which leads to various violations of their constitutional rights, including in the field of justice and criminal procedure. Robinson also draws parallels between unlimited power in such states and the legality of arrests among the population of the country (Robinson, 2019).

E. Abdelkader (2020) investigates the illegality of arrests against representatives of a certain category of Chinese citizens representing a particular group of national and religious minorities. This researcher emphasises the illegality of Beijing's policy within the framework of criminal law repression against Uy Muslims. A. Centanino (2021) investigates the specific issue of unlawful activities of a special unit of the Los Angeles School Police Department, which is trying to take over the functions of municipal law enforcement agencies and detain offenders to repress and exert disciplinary influence. This specialist identifies particular measures that indicate that the school police take over the functions of prisons during the temporary custody of various students and schoolchildren who have committed illegal actions. A. Centanino (2021) believes that the prison function should not be present in the powers of the school police – this is done by special institutions for the custody of juvenile delinquents.

There are also studies aimed at investigating the problems of juvenile justice and related to the observance of the rights and freedoms of adolescents during their first arrests, custody, police station drives, and detentions. Excessive cruelty towards juvenile offenders among representatives of law enforcement agencies is particularly noted. A team of researchers from San Francisco is investigating the problems of young people involved in criminal proceedings at the stage of their custody and charges of criminal activity related to the socio-psychological characteristics of childhood experiences. They describe the importance of observing the rights of adolescents, consolidated constitutionally and in the branch legislation of the country, during their arrest, attachment, custody, public supervision of behaviour (Folk et al., 2020; Tsyhanyn, 2023).

Summarising the results of the examination of theoretical, methodological, and empirical studies (dissertations and publications in journals), it can be noted that the problems of illegal custody are diverse and have different points of contact with the system of protecting inalienable human rights and freedoms in the public environment upon exercising the functions of criminal prosecution and justice by the authorities.

Conclusions

As it was established in this paper, issues concerning the observance and enforcement of individual rights and freedoms in the application of measures of criminal procedural coercion and restraint remain rather imperfect in the present-day world. Evidence of frequent violations of citizens' rights upon detentions and arrests is the increase in the number of complaints and applications received both by the Commissioner for Human Rights in Ukraine and the European Court of Human Rights (ECHR).

In summary, upon studying various official data, the report of the Commissioner for Human Rights “On the state of observance and protection of human and civil rights and freedoms in Ukraine in 2020” and the materials of the comprehensive report of the United Nations Office of the High Commissioner for Human Rights (OHCHR) for 2014-2021 “Arbitrary detention, torture, and ill-treatment in the context of the armed conflict in the east of Ukraine”, the author of this study formulated recommendations that need to be perceived by the legislators and law enforcement officers in ensuring respect for human rights and freedoms in Ukraine: ensure legal access to means of protection of prisoners and detainees pursuant to international law; strengthen responsibility of investigators and interrogators for illegal detention, especially without a special decision of the investigating judge; abolish the mandatory practice of keeping detainees incommunicado (relatives, the public and human rights defenders); reconstruct and repair the premises of the PTDCs and TDFs that do not meet the standards of treatment of prisoners; expand the practice of introducing paid cells in the PTDCs of Ukraine (Kyiv and other major cities) to ensure comfortable conditions for the stay of arrested and detained, etc.

The generalisations and conclusions made, as well as the results of the study of citizens' appeals to protect their rights from unlawful detention, addressed to European and national institutions of human rights protection, are of scientific and practical importance and constitutional legal significance, as they formulate and highlight the shortcomings of the policy concerning the creation of conditions for the legality and validity of custody in Ukraine.

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