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Reforming Ukraine's Pre-Trial Custody Measures: An International Law Perspective

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ABSTRACT

This study examines how Ukraine's pre-trial custody measures can align with European Union standards, with a particular focus on addressing drug trafficking cases. By analysing theoretical, legislative, and practical aspects of pre-trial custody in serious and extremely serious drug-related crimes, the article identifies gaps in the Criminal Procedure Code of Ukraine and proposes specific reforms. The research emphasizes the international law perspective, referencing EU legal frameworks such as the European Convention on Human Rights and United Nations guidelines on pre-trial detention. Through an analysis of patterns in applying preventive measures and their impact on human rights, the study highlights the need for reforms that balance public safety and individual freedoms. Proposed reforms, including clearer criteria for applying custody, stricter regulations on alternative measures, and enhanced procedural safeguards, aim to ensure compliance with EU human rights standards while maintaining public safety. These changes are expected to improve procedural fairness, reduce arbitrariness in detention practices, and foster greater trust in Ukraine's judicial system. By addressing these issues, the reforms not only strengthen the rule of law domestically but also accelerate Ukraine's integration into the European legal and governance framework.

Keywords: custody, preventive measures, criminal law, drug trafficking, criminal proceedings.

ABSTRAK

Studi ini meneliti bagaimana tindakan penahanan praperadilan Ukraina dapat selaras dengan standar Uni Eropa, dengan fokus khusus pada penanganan kasus perdagangan narkoba. Dengan menganalisis aspek teoritis, legislatif, dan praktis dari penahanan praperadilan dalam kejahatan terkait narkoba yang serius dan sangat serius, artikel ini mengidentifikasi kesenjangan dalam Kitab Undang-Undang Hukum Acara Pidana Ukraina dan mengusulkan reformasi khusus. Penelitian ini menekankan perspektif hukum internasional, merujuk pada kerangka hukum Uni Eropa seperti Konvensi Eropa tentang Hak Asasi Manusia dan pedoman Perserikatan Bangsa-Bangsa tentang penahanan praperadilan. Melalui analisis pola dalam penerapan tindakan pencegahan dan dampaknya terhadap hak asasi manusia, studi ini menyoroti perlunya reformasi yang menyeimbangkan keselamatan publik dan kebebasan individu. Reformasi yang diusulkan, termasuk kriteria yang lebih jelas untuk menerapkan penahanan, peraturan yang lebih ketat tentang tindakan alternatif, dan perlindungan prosedural yang ditingkatkan, bertujuan untuk memastikan kepatuhan terhadap standar hak asasi manusia Uni Eropa sambil menjaga keselamatan publik. Perubahan ini diharapkan dapat meningkatkan keadilan prosedural, mengurangi kesewenang-wenangan dalam praktik penahanan, dan menumbuhkan kepercayaan yang lebih besar pada sistem peradilan Ukraina. Dengan mengatasi permasalahan ini, reformasi tidak hanya memperkuat supremasi hukum

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di dalam negeri tetapi juga mempercepat integrasi Ukraina ke dalam kerangka hukum dan tata kelola Eropa.

Kata kunci: tahanan, tindakan pencegahan, hukum pidana, perdagangan narkoba, proses pidana.

INTRODUCTION

Custody is the most severe preventive measure available within criminal justice systems, reflecting its significant implications for individual liberty and justice (Ashworth & Redmayne 2019). This study focuses on Ukraine's pre-trial custody practices, particularly their alignment with the EU standards, and addresses the critical context of drug trafficking cases. Drug trafficking not only poses severe threats to public safety and health but also undermines social stability and economic development, making it a priority issue for Ukraine as it seeks to modernize its criminal justice system.

Drug trafficking is associated with organized criminal networks that exploit legal loopholes, challenge law enforcement agencies, and contribute to transnational crime (Sobko et al., 2023b). The economic impact of drug trafficking includes increased costs for law enforcement, public health systems, and social services, while its social implications involve heightened rates of addiction, violence, and community destabilization. Legally, these crimes often require enhanced preventive measures due to the risk of recidivism, flight, and evidence tampering. Consequently, focusing on drug trafficking cases provides an opportunity to address these interconnected challenges while aligning Ukraine's practices with international legal standards.

The geographical scope of this study is Ukraine, with a legal framework grounded in both national legislation and international standards, including EU directives and the European Convention on Human Rights (ECHR). The ongoing adaptation of Ukrainian legislation to EU norms presents an opportunity to align its pre-trial detention practices with the principles of proportionality, necessity, and human rights protection emphasized in EU law.

According to part two of Article 29 of the Constitution of Ukraine (1996), remanding in custody by the motivated decision of the investigating judge corresponds to the principle of the rule of law and minimizes the risk of arbitrariness. This can be achieved by considering both the severity of the crime and the specific circumstances of the case that presuppose the need to keep a suspect in custody. At the same time, the impossibility of applying milder preventive measures should be ensured (Ablamskyi, 2015a).

Pre-trial custody practices in Ukraine are analyzed in the broader context of the country's judicial reform efforts and its integration into the European legal framework. The study identifies key gaps and inconsistencies in the application of preventive measures, particularly for serious and extremely serious crimes such as drug trafficking. The choice to focus on drug-related crimes stems from their distinct legal and social implications: these offenses frequently involve organized criminal networks and carry significant risks of recidivism, which complicates decisions on preventive measures.

To achieve a comprehensive understanding, this research integrates theoretical, legislative, and practical analyses. A range of research methods, including comparative legal analysis, statistical evaluation, and case law review, is employed. These methodologies enable a detailed examination of Ukraine's current practices, the challenges they pose, and the potential for adopting best practices from EU member states.

It is important to mention that the effective and fair functioning of justice is defined as one of the key features of the rule of law principle (Sobko et al., 2023a). From this point of view, public authorities should assist citizens in the realization of their rights and legitimate interests, especially in the field of

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criminal justice. The need to reform the criminal legislation in terms of its humanization is considered an important step towards bringing the Ukrainian legal system closer to EU legal standards (Titov, 2014).

In this regard, this study aims to evaluate the theoretical, legislative, and practical aspects of pre-trial custody in Ukraine, with a focus on serious drug trafficking crimes. It proposes actionable reforms to the Criminal Procedure Code of Ukraine (hereinafter – CPC of Ukraine) (2012) that address current gaps while promoting compliance with EU standards. These reforms are intended to strengthen procedural safeguards, enhance the fairness of the judicial process, and advance Ukraine's integration into the European legal and governance framework.

RESEARCH METHOD

This study employs a multifaceted methodological framework to examine Ukraine's pre-trial custody practices in the context of serious drug trafficking crimes, focusing on their alignment with the EU standards. The research methodology integrates normative, comparative legal, and jurisprudential methods, which support a comprehensive theoretical and legislative analysis. These approaches are employed to uncover existing gaps, propose targeted reforms, and align Ukraine's practices with international legal standards.

The normative approach serves as the foundation for analysing Ukraine's legislative framework, focusing on provisions within the CPC of Ukraine (2012) and their consistency with international legal norms, including EU directives and the ECHR. This approach facilitates the evaluation of the legal principles governing pre-trial custody and their practical implications for drug trafficking cases. In addition, it is used to identify inconsistencies and gaps within Ukraine's legislative framework for pre-trial custody.

Comparative legal approach is employed to assess the experiences of EU member states and other countries, such as Germany, Austria, the United Kingdom, and the United States, in regulating pre-trial custody. By drawing parallels between Ukraine and these jurisdictions, the study identifies best practices and evaluates their applicability to the Ukrainian legal system, particularly concerning the proportionality and necessity of custody measures. Comparative legal analysis also facilitates the exploration of alternative models and their potential adaptation to Ukraine.

Jurisprudential analysis is utilized to examine court decisions, both domestic and international, that have shaped the understanding and application of pre-trial custody. Cases from the European Court of Human Rights (ECtHR), including judgments on violations of the ECHR, provide critical insights into the procedural safeguards necessary to ensure compliance with international standards. Thus, the jurisprudential analysis bridges the theoretical and practical dimensions, offering concrete examples of how international legal standards can be effectively implemented within the national legal system.

Regarding the data sources, the study relies on both primary and secondary data to ensure a robust analysis. Primary data include legislation, such as the CPC of Ukraine (2012), constitutional provisions, and international legal instruments like the European Convention on Human Rights and EU directives. These legal texts form the basis for evaluating Ukraine's existing framework and identifying areas for improvement. Moreover, court decisions, including rulings from Ukrainian courts and key cases from the ECHR, serve as pivotal references for understanding how custody practices are applied in both national and international contexts. These sources provide a foundational understanding of the legal principles and procedural safeguards governing pre-trial custody.

Secondary data are used to contextualize and support the analysis of primary sources. These include peer-reviewed scientific journals, which offer critical insights into pre-trial detention practices,

human rights standards, and judicial reforms. Legal literature, such as textbooks, commentaries, and analytical reports, provides an in-depth exploration of Ukrainian and international criminal procedure laws. Furthermore, policy documents and reports from organizations like the Council of Europe and the United Nations contribute guidelines and recommendations that inform best practices for pre-trial detention. Together, these data sources enable a comprehensive understanding of the legal, social, and institutional dynamics of pre-trial custody in Ukraine and its alignment with EU standards.

RESULTS AND DISCUSSION

Remanding in custody: inconsistencies and gaps in the Criminal Procedure Code of Ukraine

Before proceeding to the analysis of circumstances that are taken into account when choosing a preventive measure in the form of custody for drug trafficking, it should be mentioned that international acts usually do not define the concept of such circumstances (Sobko et al., 2023b, p. 310). Thus, in accordance with the provisions of the Handbook of international standards relating to pre-trial detention, "circumstances indicating that there is no need to take a person into custody are as follows: a stable family life and a social status; employment of a person at the time of decision on preventive measures; a person's behaviour in the past, including the absence of criminal records and a positive history of observing the conditions for non-use of remanding in custody in previous proceedings". However, these circumstances cannot be applied to characterise people involved in committing criminal offenses related to drug trafficking (United Nations, 1994).

Therefore, within international law, the General comment no. 35, Article 9 (Liberty and security of person) (United Nations, 2014) generally regulates the determination of circumstances that shall be considered when choosing a preventive measure in the form of custody. This document establishes that remanding in custody as a preventive measure shall not be considered a common practice in any country. The purposes that may be pursued by taking a person into custody should be specified in the law and should not contain vague wording, such as "ensuring public safety". However, it is necessary to emphasise that drug trafficking is a threat to public safety.

Although the CPC of Ukraine (2012) has been in force for more than ten years, some of its provisions cause difficulties in application due to a significant number of changes in the criminal procedure legislation and the lack of practical experience in their implementation. This concerns the issues of remanding in custody as the preventive measure (Kunenko et al., 2022). Accordingly, the provisions of the CPC of Ukraine comply with international principles of criminal proceedings and reflect their most significant aspects, including those contained in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – Convention) (Council of Europe, 1950). In particular, this concerns the goals and grounds for keeping a suspect in custody.

The current CPC of Ukraine (2012) enshrines three standards of proof, namely: preponderance of the evidence, proof beyond a reasonable doubt, and clear and convincing evidence (Part 2 of Article 177 of the CPC of Ukraine). However, these terms do not have a clear interpretation resulting in their complicated use. According to modern legal doctrine, these terms are considered evaluative since they are not specified by the legislator and require clarification during their application. Consequently, the lack of a clear definition of these terms, the participants to the criminal proceedings assess the facts and circumstances that are important for conducting a criminal investigation independently. This, in turn, impedes a fair trial (Ablamskyi, 2015b).

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According to the CPC of Ukraine, clear and convincing evidence is used by a judge when choosing preventive measures, while proof beyond a reasonable doubt is applied when deciding on sentencing. Although the standards of proof are applied in different situations, they shall be interpreted in combination with provisions that state that "all doubts about the proof of guilt of a person are interpreted in his/her favour" (Part 4 of Art. 17 of the CPC of Ukraine). In addition, the court should evaluate the evidence, guided by an "internal conviction" (Part 1 of Art. 94 of the CPC of Ukraine) and additional factors defined in the CPC of Ukraine as mandatory in criminal proceedings (Criminal Procedure Code of Ukraine, 2012).

The full-scale aggression of the Russian Federation against Ukraine has stipulated the need to regulate numerous legal issues (Bondarenko et al., 2022). Therefore, the Ukrainian legislation has been adapted to new challenges. In particular, amendments have been made to the CPC of Ukraine 23 times since February 24, 2022. Thus, the regulation of non-alternative choice of remanding in custody during martial law. This feature is specified in parts 6 and 8 of Article 176 of the CPC of Ukraine and was introduced by the following laws (Criminal Procedure Code of Ukraine, 2012):

1) Law of Ukraine No. 2198-IX of 14 April 2022 "On amending the Criminal and Criminal Procedure Codes of Ukraine to improve responsibility for collaboration activities and specifics of applying preventive measures for committing crimes against the foundations of national and public security" (2022a) (as amended by the Law of Ukraine No. 2531-IX of 16 August 2022 and the Law of Ukraine No. 2997-IX of 21 March 2023);

2) Law of Ukraine No. 2531-IX of 16 August 2022 "On amending the Criminal Procedure Code of Ukraine regarding the selection of a preventive measure for service members who committed war crimes during martial law" (2022b) (as amended by the Law of Ukraine No. 2810-IX of 01 December 2022, 2022c).

In accordance with Part 1 of Article 183 of the CPC of Ukraine, remanding in custody is an exceptional preventive measure, which shall be applied only if the prosecutor proves that none of the milder measures can prevent the risks under Article 177 of the CPC of Ukraine. However, in accordance with the direct effect of Part 3 of Article 183 of the CPC of Ukraine, the investigating judge or the court is obliged to set the amount of bail in any event (the imperative action).

The provisions of Part 6 of Article 176 of the CPC of Ukraine regulate the selection of a preventive measure exclusively in the form of custody for persons suspected or accused of committing crimes under Articles 109-114-2, 258-258-6, 260, 261, 437-442 of the Criminal Code of Ukraine (hereinafter – CC of Ukraine). This rule also applies to service members suspected of committing war crimes during martial law. This requirement is set out in Part 8 of Article 176 of the CPC of Ukraine, including crimes under Articles 402-205, 407, 408, 429 of the CC of Ukraine. Therefore, considering the circumstances of each case, the investigating judge or the court cannot appoint a milder preventive measure than remanding in custody. Such a regulation is attributed to the nature of crimes and the specific features of the legal regime of martial law.

It is worth noticing that this is not the first legislative case where specific crimes presupposing mandatory custody were defined. Similar rules (Part 5 of Article 176 of the CPC of Ukraine), which regulated crimes against the foundations of national and public security of Ukraine, was removed from the legislation. The differences between these provisions consist in the period of action (martial law) and the additional categories of crimes falling under this rule (Criminal Procedure Code of Ukraine, 2012).

Nevertheless, it is important to mention that Part 5 of Article 176 of the CPC of Ukraine was recognised as unconstitutional (Decision of the Constitutional Court of Ukraine No. 7-r/2019 of 25 June 2019…, 2019). This can be exemplified by the following examples. Currently, the Constitutional Court of

Ukraine is considering the case upon the constitutional complaint of Serhii Bychkov regarding the constitutionality of Part 6 of Article 176 of the CPC of Ukraine (Ruling of the Third Collegium of Judges of the Second Senate of the Constitutional Court of Ukraine…, 2023). The applicant Bychkov claims that Part 6 of Article 176 of the CPC of Ukraine does not comply with Article 29 of the Constitution of Ukraine (1996). This complaint is grounded on the fact that Article 29 enshrines presumption of innocence, meaning that "the existence of suspicion of committing certain crimes necessitates the application of a preventive measure in the form of custody without the right to apply another preventive measure" (Ruling of the Third Collegium of Judges of the Second Senate of the Constitutional Court of Ukraine…, 2023). Therefore, in our opinion, this approach is discriminating because it places persons against whom such a preventive measure is applied into unequal conditions compared to those who are suspected or accused of committing other crimes of similar severity.

The applicant is convinced that, according to Part 6 of Article 176 of the CPC of Ukraine, "the suspect or the accused is deprived of the right to file a petition for release from custody and the application of an alternative preventive measure since, being enshrined in the current legislation, such a right in is a fiction in this category of criminal proceedings, given the prohibition of the use of alternative preventive measures". Consequently, the disputed provision of the CPC of Ukraine "does not provide the suspect or the accused with proper protection against arbitrariness and does not comply with Article 29 of the Constitution of Ukraine" (Ruling of the Third Panel of Judges of the Second Senate of the Constitutional Court of Ukraine…, 2023).

Justifying his complaint, the applicant Bychkov cites the provisions of the Constitution of Ukraine (1996) and the CPC of Ukraine (2012). He also refers to the Convention (Council of Europe, 1950), the decisions of the Constitutional Court of Ukraine, the ECtHR case law, and court decisions in his case. As a result, the constitutional complaint of Bychkov was found to meet the requirements for a constitutional complaint in accordance with Article 56 of the Law of Ukraine No. 2136-VIII of 13 July 2017 "On the Constitutional Court of Ukraine" (2017). Taking into account these circumstances, based on Articles 147, 151-1, 153 of the Constitution of Ukraine (1996), under Articles 7, 32, 37, 50, 55, 56, 58, 61, 77, 86 of the Law of Ukraine No. 2136-VIII of 13 July 2017 "On the Constitutional Court of Ukraine" (2017), the Constitutional Court of Ukraine set this complaint for the hearing.

Another example is the case of the constitutional complaints of Maryna Anatoliivna Kovtun, Nadiia Viktorivna Savchenko, Ihor Dmytrovych Kostoglodov, Valeryi Ivanovich Chornobuk regarding the compliance of the provisions of Part 5 of Article 176 of the Criminal Procedure Code of Ukraine with the Constitution of Ukraine (constitutionality) (Decision of Constitutional Court of Ukraine No. 7-r/2019 of 25 June 2019…, 2019). Justifying their complaint, the applicants refer to the Judgment in case of Korniychuk v. Ukraine, Application no. 10042/11, of 30 April 2018 (2018) by the ECtHR. In this judgment, it is emphasized that any period of custody, irrelevant of its duration, shall be convincingly justified by the authorities. In addition, the judicial authority is obliged to provide appropriate and sufficient grounds for remanding in custody in addition to clear and convincing evidence.

Furthermore, in the Judgment in case of Kharchenko v. Ukraine, Application no. 40107/02, of 10 February 2011 (2011), the ECtHR held that when considering a motion for choosing a preventive measure in the form of custody, the possibility of applying other (alternative) preventive measures shall be considered (§80). In the Judgment in case of Khayredinov v. Ukraine, Application no. 38717/04, of 14 October 2010 (2010), the ECtHR concluded that the national courts violated §1 of Article 5 of the Convention (Council of Europe, 1950) since the decision did not consider the possibility of applying a milder preventive measure than remanding in custody (§29, §31).

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In this regard, it should be noted that the suggested changes are not completely consistent with the norms of the Convention (Council of Europe, 1950) and the ECtHR case law. However, Part 2 of Article 29 of the Constitution of Ukraine (1996) states that the basis for a legitimate restriction of the right to liberty through the application of a preventive measure in the form of custody shall be properly justified by the court. On the contrary, a formal court decision negates the purpose and essence of justice, which "is recognised as such only if it meets the requirements of justice and ensures effective restoration of rights" (Item 10 of §9 of the motivation part of the Decision of Constitutional Court of Ukraine No. 3-rp/2003 of 30 January 2003…, 2003).

Consequently, the provisions of the CPC of Ukraine (2012), governing the mandatory application of custody for the certain category of persons, deprive the investigating judge and the court of the right to apply a milder preventive measure to such persons. Having analysed Part 2 of Article 29 of the Constitution of Ukraine (1996), it is observed that there are no exceptions of the grounds for applying a preventive measure in the form of custody related to the severity of the committed crime. Thus, even in cases of crimes against nation and public security of Ukraine, the motivated court decision of remanding a suspect in custody is mandatory.

Therefore, the provision of Part 5 of Article 176 of the CPC of Ukraine (recognised as unconstitutional) allowed the application of a preventive measure in the form of custody on the basis of a purely formal court decision, which violates the rule of law. In this regard, the disputed norm justifies the need for remanding in custody by the gravity of the crime, which does not guarantee a balance between the purpose of its application in criminal proceedings and the right of a person to freedom and personal immunity.

The Constitutional Court of Ukraine has repeatedly pointed out that restrictions on the exercise of constitutional rights and freedoms cannot be arbitrary and unfair. In contrast, they shall pursue a legitimate goal, be conditioned by the public need to achieve this goal, proportionate and justified. At the same time, in case of restriction of constitutional law or freedom, the legislator is obliged to introduce such a regulation that will allow to optimally achieve a legitimate goal with minimal interference with rights and freedoms (Item 3 of subparagraph 2.1 of §2 of the motivation part of the Decision of Constitutional Court of Ukraine No. 2-rp/2016 of 01 June 2016…, 2016). However, the Constitutional Court of Ukraine held that the legislator did not comply with these requirements, having established only such a preventive measure as custody in respect of persons suspected or accused of committing crimes under Articles 109-114^{-1}, 258-258^{-5}, 260, 261 of the CC of Ukraine (2001).

Therefore, the position of the Constitutional Court of Ukraine on Part 5 of Article 176 of the CPC of Ukraine (2012), which is recognised as unconstitutional, does not differ from its position on Parts 6 and 8 of Article 176 of the CPC of Ukraine (2012). Accordingly, having analysed Part 2 of Article 29 of the Constitution of Ukraine (1996), it is obvious that there are no exceptions for the application of a preventive measure in the form of custody. However, according to Article 64 of the Constitution of Ukraine (1996), even during martial law or a state of emergency, the rights and freedoms of a person cannot be limited, in particular those described in Article 29 of the Constitution of Ukraine (1996). This raises the question of the constitutionality of the provisions providing for mandatory remanding of a suspect in custody (Parts 6 and 8 of Article 176 of the CPC of Ukraine, 2012).

Statistics on serious and extremely serious crimes of drug trafficking in Ukraine

According to the data of the Supreme Court (2022), a significant number of serious crimes of trafficking of drugs, psychotropic substances, their analogues or precursors are registered in Ukraine.

Therefore, the Ukrainian legislation provides for the possibility of applying an alternative preventive measure against suspects in drug trafficking in the form of bail, which allows them to continue illegal activities and avoid responsibility.

Thus, as the statistics of the National Police of Ukraine demonstrates (Figure 1), since the beginning of the full-scale military aggression of the Russian Federation against Ukraine the number of serious crimes of trafficking of narcotic drugs, psychotropic substances, their analogues or precursors increased by 28.6% in 2023 as compared to 2022 (from 22119 to 26593 cases). Meanwhile, the number of extremely serious crimes of drug trafficking grew by 33% in 2023 as compared to 2022 (from 14138 to 17795 cases) (Supreme Court, 2022).

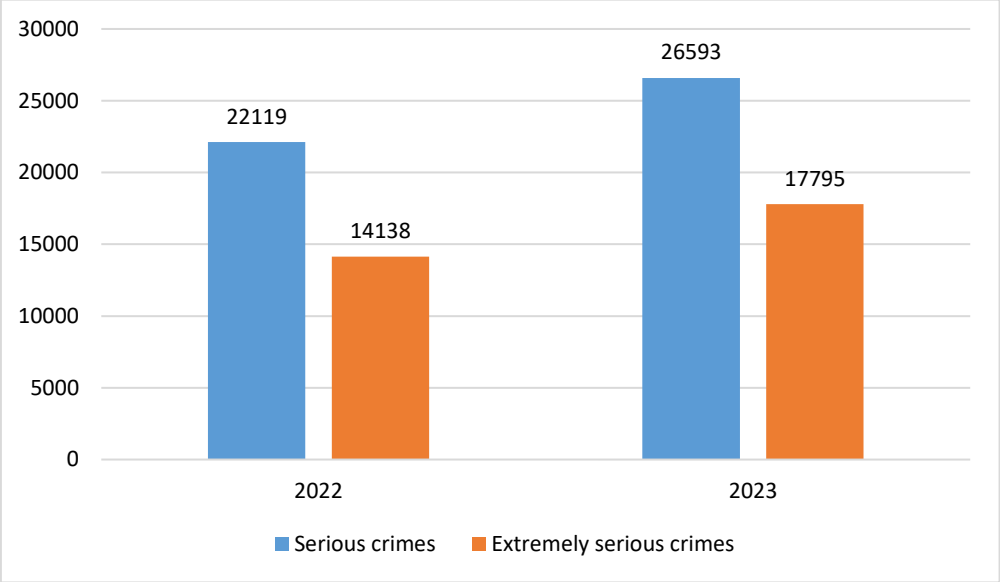

Figure 1. The number of serious and extremely serious crimes of drug trafficking

Having compared the number of serious and extremely serious crimes in the reported period, it can be observed that serious crimes are committed more frequently than extremely serious ones. Thus, in 2022 10,46% of criminal cases are classified as extremely serious crimes, while almost 90% of criminal cases are serious cries. Similarly, in 2023 9,89% of criminal cases are defined as extremely serious crimes, while 90% of cases are serious ones (Figure 1). Moreover, in 2023 the number of criminal proceedings in cases of serious crimes of drug trafficking increased by 18% as compared to 2022 (from 20018 criminal proceedings in 2022 to 23702 criminal proceedings in 2023). At the same time, the number of registered extremely serious crimes grew by 8,2 % (from 12938 criminal proceedings in 2022 to 15777 criminal proceedings in 2023) in the reported period (Supreme Court, 2022). In addition, the number of notices of suspicion for committing serious crimes in these criminal proceedings increased by 38,2 % (from 3000 notices in 2022 to 4179 notices in 2023) (Table 1).

Apart from that, the statistics shows that the court imposed a preventive measure in the form of remanding in custody for committing serious crimes of drug trafficking in 41% of criminal proceedings in 2022 and 48% of criminal proceedings in 2023 (Supreme Court, 2022). This data imply that its factual application is negligible because virtually the majority of suspects in serious crimes of drug trafficking can post bail. Even if the amount of bail is not specified at the time of choosing the preventive measure, the guarantor from among the drug traffickers can do this at any time). (Figure 2).

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Table 1. Number of notices of suspicion for committing serious crimes of trafficking of drugs, psychotropic substances, their analogues, and precursors

Serious crimes	2022	2023
Article 305	12	30
Article 306	13	75
Part 1 Article 307	356	501
Part 2 Article 307	1869	2435
Article 308	35	97
Part 3 Article 309	255	298
Part 3 Article 311	165	246
Article 313	72	118
Part 2 Article 317	192	328
Part 4 Article 321	30	38
Parts 1, 2 Article 321-1	1	13
Total	3000	4179

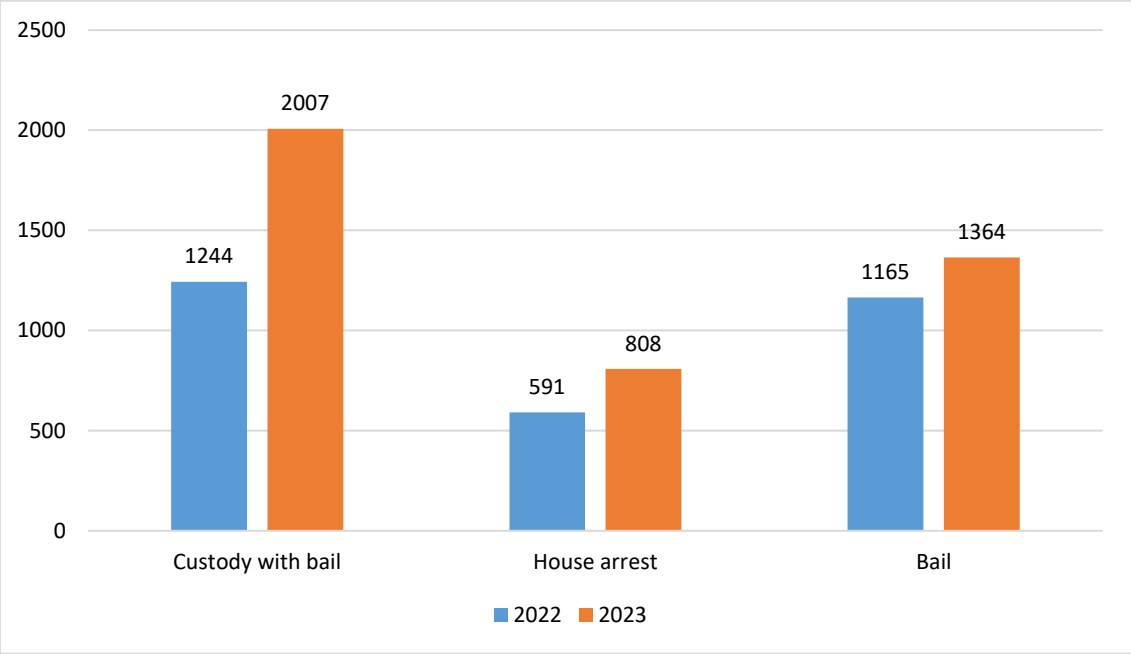

Figure 2. Preventive measures chosen in criminal proceedings for drug trafficking

Figure 2 shows that the percentage of persons against whom a preventive measure in the form of remanding in custody was chosen amounts to 41% in 2022 and 48% in 2023. However, in the rest of cases an alternative preventive measure was applied. Thus, house arrest was selected in 19,7% of cases in 2022 and 19,3% in 2023. Bail was applied 39% of cases in 2022 and 39,3% of cases in 2023 (Figure 2).

Position of the European Court of Human Rights on remanding a supect in custody

The CPC of Ukraine (2012) provides for the possibility of applying the ECtHR case law to the Ukrainian law enforcement system. In this regard, it is important to mention that when considering complaints from persons sentenced to humiliating custody conditions, the ECtHR emphasises the necessity to improve the detention conditions of persons in custody (Janis et al., 2008). This leads to regular repairs and bringing the detention centres in line with European penitentiary standards. However,

persons who are or have been in these centres are increasingly complaining about violations of international legal standards for detention, in particular, about tortures and inhumane treatment (Council of Europe, 2006).

Given these facts, it is essential to analyse the ECtHR case law regarding the application of custody in criminal cases. According to the ECtHR position, remanding in custody can be justified in each case if there are specific indications of the true interests of society, which outweigh the rule pf respect for personal freedom, despite the presumption of innocence. In this regard, any system of compulsory custody is incompatible with §3 of Article 5 of the Convention (1950). Therefore, in some decisions the ECtHR highlighted the need to consider alternative preventive measures than remanding in chosen (Judgment in case of Kharchenko v. Ukraine, Application no. 40107/02, of 10 February 2011, 2011, §80; Judgment in case of Khayredinov v. Ukraine, Application no. 38717/04, of 14 October 2010, 2010, §§ 29, 31).

Thus, in §83 of the Judgment in case of Osakovskiy v. Ukraine, Application no. 13406/06, of 17 July 2014 (2014), the ECtHR noted that "the court often found violations of §3 of Article 5 of the Convention in cases where the national courts continued to detain the applicant, referring mainly to the gravity of the charges and using a stereotypical wording, without considering specific facts or the possibility of alternative preventive measures". Therefore, the ECtHR recognised the violation of §3 of Article 5 of the Convention (1950).

However, in certain cases, the ECtHR recognised the feasibility of remanding in custody if the gravity of the case can lead to violations of public order. Thus, §51 of the Judgment in case of Letellier v. France, Application no. 12369/86, of 26 June 1991 (1991) states that due to their particular gravity and public reaction to them, some crimes can lead to violations of public order. Therefore, in such cases remanding in custody is justified. Accordingly, this preventive measure can be considered lawful as long as there is such a threat but shall not be continued only because a suspect awaits a verdict. In addition, The ECtHR emphasised that the protection of public order is important in cases involving crimes against fundamental human rights, such as war crimes. In such cases, remanding in custody is also fully justified (Judgment in case of Milanković and Bošnjak v. Croatia, Application no. 37762/12, no. 23530/13, of 12 September 2016. (2016), §154).

The ECtHR made similar decisions in a range of other cases (Judgment in case of I.A. v. France, Application no. 1/1998/904/1116, of 23 September 1998, 1998, §104; Judgment in case of Prencipe v. Monaco, Application no. 43376/06, of 16 July 2009, 2009, §79; Judgment in case of Tiron v. Romania, Application no. 17689/03, of 07 July 2009, 2009, §§41-42). These ECtHR judgments are often used in national judicial systems to justify decisions on compulsory remanding in custody for war crimes. Thus, the ECtHR decisions are often used by national courts of Ukraine to justify the choice of remanding in custody for war crimes (Ruling of Kyivskyi District Court of the city of Kharkiv of 18 July 2023, case no. 953/5872/23; Ruling of Irpin City Court of Kyiv Region of 10 April 2023, case no. 367/2115/23).

Consequently, it is important to note that contradictory issues that arise in connection with protection of human rights and freedoms are subject to interpretation by the ECtHR, whose experience dates back to the 1960s and continues to be updated (Matvieieva et al., 2022). Thus, many of the discussed issues related to the application of the CPC of Ukraine have already been considered and resolved by the ECtHR. In our opinion, the ECtHR interpretations should greatly facilitate the work of national courts. Given that the ECtHR decisions are part of the national legislation of Ukraine, they should be fully taken into account by national courts, in particular, when deciding on the application of custody (European Court of Human Rights, 2022).

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Remanding in custody as a preventive measure in common law and civil law legal systems

Considering the application of remanding a suspect in custody, it is critical to analyse the experience of foreign countries. The common law and civil law legal systems differ significantly in their foundational principles and procedural approaches. Common law, practiced in countries such as the United States and the United Kingdom, relies heavily on case law and judicial precedents. Judges play an active role in shaping the law through their decisions. In contrast, civil law systems, such as those in Germany and Austria, are codified, with comprehensive legal codes that provide detailed guidance on the application of the law. These distinctions influence the methods and criteria used to determine remand in custody, particularly for serious crimes like drug trafficking.

United States

In the United States, pre-trial detention is governed by the Bail Reform Act of 1984 (1984) . This legislation permits the remanding of individuals deemed "dangerous" or likely to flee before trial. However, the concept of "dangerousness" has been criticized for its vagueness, leading to inconsistencies in application. For instance, in cases involving drug trafficking, courts often presume dangerousness due to the organized nature of these crimes. While this approach prioritizes public safety, it risks over-reliance on detention and insufficient consideration of individual circumstances.

Alschuler (2003, p. 2) points out at the imperfection of the US legislation in terms of determining circumstances that are taken into account when choosing such a preventive measure as remanding in custody. The lack of clear criteria for taking a suspect into custody in the United States is attributed to the drawbacks of the Bail Reform Act of 1984 (2d ed.) (1993) and the position of the Supreme Court of the United States in the case United States v. Salerno, 481 U.S. 739 (1987). This Act establishes that the court may authorise remanding a person in custody if he/she is recognized as “dangerous” by the judge. However, the extreme vagueness of this term meaning is criticised (Alschuler, 2003).

Moreover, when choosing a preventive measure, the court is not obliged to establish whether evidence against the suspect or the accused is sufficient to conclude that there is a “substantial probability” of the guilt of the suspect (the accused) (Bail Reform Act of 1984 (2d ed.), 1993). In this regard, considering crimes of drug trafficking, it is observed that persons associated with drug trafficking are “dangerous”. The Supreme Court of the United States also agrees that pre-trial detention is not a punishment and, therefore, can be imposed on a person who is deemed “dangerous”. In this case, remanding in custody serves regulatory rather than punitive purposes.

Hence, it is possible to affirm that the main strength of the US legislation on pre-trial detention is that the Bail Reform Act of 1984 enables courts to detain individuals considered dangerous or a flight risk. It emphasizes public safety, particularly in organized crimes like drug trafficking. Nevertheless, the use of pre-trial detention in the United States is high. According to a 2021 report by the Prison Policy Initiative (Widra & Herring, 2021), approximately 74% of individuals held in local jails were pre-trial detainees. This raises concerns about the impact on the presumption of innocence and the financial burden on the justice system.

United Kingdom

The United Kingdom’s approach to pre-trial detention is governed by the Bail Act (1976), which establishes bail as the default option unless specific risks, such as flight, interference with witnesses, or

danger to the public, are identified. Courts in the UK are required to consider factors like the nature and severity of the crime, the accused past behaviour, and the strength of evidence. Compared to the United States, the UK system emphasizes proportionality and prioritizes alternatives to custody, such as electronic monitoring and house arrest (Wooff, 2024).

In the United Kingdom, according to the Bail Act (1976), the suspect is released on bail by default. However, the suspect can be refused bail if the court identifies one or several circumstances enshrined by the law that impede the application of bail. Hence, the court should consider the following criteria in order to decide on a preventive measure for the suspect:

1. the nature and severity of the crime;
2. a person's criminal record;
3. social relations and social environment of a person;
4. person's conduct on bail in past proceedings'
5. the materiality of evidence against a person, the risk of causing physical or mental harm to others.

Thus, the Bail Act (1976) prioritizes bail as the default option, supporting the principle of proportionality. Factors like the severity of the crime, criminal record, and social ties are systematically considered. Alternatives like electronic monitoring reduce the burden on the prison system. According to the Criminal Justice Statistics quarterly, England and Wales, year ending March 2024, published by the Ministry of Justice (2024), at Magistrates' Courts, 13% of defendants were granted bail, 4% were remanded in custody, the remaining 83% were not remanded. Meanwhile, at Crown Courts, 34% of defendants were granted bail, 38% were remanded in custody, and the remaining 28% were not remanded. These figures indicate a stronger reliance on alternative measures, reducing the financial and social costs of pre-trial detention while safeguarding individual liberty. However, a strong reliance on bail may enable recidivism, particularly for drug-related offenses.

Germany

Germany's Code of Criminal Procedure stipulates that custody may be ordered when there is a "risk of escape", a likelihood of tampering with evidence, or a threat to public safety. Unlike the United States, Germany avoids subjective terms like "dangerousness" and instead relies on clearly defined criteria. For example, a suspect's attempt to flee or past behaviour during legal proceedings is central to determining the necessity of detention (Lippke, 2014).

A separate section of the Code of Criminal Procedure (1975) is devoted to the regulation of remanding in custody, given the radicality of restricting the rights and freedoms of a person enshrined in it. The remaining preventive measures are listed in one section, which emphasises the special nature of holding a person in custody. The person is taken into custody by a written order of the judge on the arrest on the basis of the following grounds (§112 of the Code of Criminal Procedure, 1975):

1. if it is established that the suspect is hiding;
2. when assessing the circumstances of a particular case, there is a risk that the accused will avoid criminal prosecution (risk of escape);
3. the conduct of the accused gives serious reasons to believe that he/she is going to: a) destroy, modify, falsify evidence or b) influence accomplices, witnesses or experts, or c) force third parties to behave in this way, and, consequently, there may be a danger that it will be impossible to establish the truth.

The German system's strengths lie in its structured approach and emphasis on proportionality. However, its reliance on codified standards may sometimes limit judicial flexibility. In drug trafficking

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cases, this rigid framework can ensure fairness but may also delay proceedings when additional evidence is needed to meet the strict criteria for detention (Code of Criminal Procedure, 1975). However, the may weakness of the German legislation is that such a structured framework can lead to delays in proceedings when gathering additional evidence. The rigidity of codified standards may also restrict judicial flexibility in exceptional cases.

Austria

Austria's Criminal Procedure Code adopts a similar approach to Germany, emphasizing the prevention of flight, interference with evidence, and recidivism. Austria imposes strict time limits on pre-trial detention, ensuring that suspects are not held for excessive periods without trial. In cases of serious crimes like drug trafficking, remand decisions are often accompanied by rehabilitation programs, reflecting a focus on reintegration rather than punitive measures. One of Austria's notable practices is its use of suspended detention, where suspects are monitored electronically rather than physically detained. This approach balances public safety and individual freedom, reducing the financial and social costs of pre-trial custody (Skinner, 2024).

In the legislation of Austria, custody can be imposed on a person only on the basis of the following specific facts (Austrian Criminal Procedural Code, 2014):

1. a person will try to escape justice due to the nature and degree of punishment that the person may expect or for any other reasons;
2. a person will try to influence witnesses, experts or other defendants, hide traces of the crime or prevent the establishment of the truth;
3. a person is going to commit a similar crime, which is punishable by imprisonment for a term of more than 6 months.

If the punishment for a crime does not exceed five years of imprisonment and the suspect has a permanent place of residence within the jurisdiction of the court, then such a person cannot be assigned a preventive measure in the form of remanding in custody. An exception to this rule is a situation where a person has already attempted to escape from the pre-trial investigative authorities. On the contrary, the suspect is necessarily taken into custody if the minimum punishment for a crime he/she is suspected in is imprisonment for a term of at least ten years. (Austrian Criminal Procedural Code, 2014). Therefore, the legislation of Austria prescribes strict time limits on pre-trial detention to prevent excessive confinement. The legislation uses electronic monitoring and for low-risk offenders. Moreover, the Austrian Criminal Procedural Code (2014) ensures public safety while guaranteeing individual freedoms through clearly defined criteria for detention. At the same time, mandatory detention for severe crimes may undermine the presumption of innocence. The detention for offenses with a minimum sentence of 10 years can create disproportionate restrictions.

By comparison, in Ukraine, remand is frequently applied in drug trafficking cases, with bail often seen as inadequate. The data from the National Police indicates a rising number of drug trafficking cases, with a 33% increase in extremely serious crimes reported in 2023 compared to 2022 (Sobko et al., 2023b). Despite this, the use of alternatives to custody remains limited. These discrepancies highlight the need for Ukraine to balance pre-trial custody with alternatives that align with human rights principles. Ukraine can draw on these experiences to enhance its pre-trial custody practices. For example, adopting Germany's clear criteria for remand, combined with Austria's judicial oversight, could improve procedural fairness. The use of electronic monitoring, as in Germany, could provide an alternative to custody for low-risk offenders. The UK's emphasis on bail conditions could inspire reforms to reduce unnecessary detention

while mitigating risks. Moreover, incorporating precise definitions of terms like “dangerous” or "public safety risk” from the US and German systems could reduce arbitrariness in judicial decisions. However, it is important to avoid a range of drawbacks identified in the analysed countries. Thus, the US's vague criteria for "dangerousness" and overreliance on pre-trial detention should be mitigated by precise legal definitions. Excessive rigidity in criteria, as seen in Germany and Austria, can lead to procedural delays and a lack of flexibility. By synthesizing these practices, Ukraine can refine its Criminal Procedure Code to align with European human rights standards while addressing the unique challenges posed by drug trafficking cases.

In addition, ensuring consistency with human rights principles is paramount in any system of pre-trial detention. The presumption of innocence and the right to liberty must be safeguarded, even when addressing serious crimes like drug trafficking. Inconsistent application of custody, as observed in some common law systems, risks violating these principles. Similarly, overly rigid criteria in civil law systems may infringe on individual freedoms. For example, practices in the United States, such as the overuse of detention based on vague notions of dangerousness, risk violating these principles. Similarly, delays in civil law systems can undermine the right to a speedy trial. For Ukraine, integrating human rights principles into its custody practices is essential. Adopting objective criteria, ensuring judicial accountability, and providing alternatives to custody will reduce the risk of arbitrary detention and align with European human rights standards.

Suggested amendments to the Criminal Procedure Code of Ukraine

The analysis of the dynamics of crimes of drug trafficking and foreign experience makes it possible to claim that it is essential to introduce the circumstances under which remanding into custody can be applied to a suspect into the criminal procedure law and law enforcement of Ukraine (Bandurka et al., 2012). Taking into account the positive experience of other countries in choosing a preventive measure in the form of custody, Yanovska (2016) considers it expedient to use this experience and make appropriate changes to the current CPC of Ukraine (2012). In particular, there is a need to introduce a legal mechanism for real isolation from society of persons who are suspected of committing serious crimes of trafficking drugs, psychotropic substances, their analogues or precursors. This mechanism can be enshrined in the form of the right of an investigating judge and the court when choosing a preventive measure (Uvarov, 2012).

Therefore, amendments should be made to Article 183 of the CPC of Ukraine (2012). Thus, it is suggested to supplement the list of circumstances in which the investigating judge and the court at its discretion decides on the need to grant bail (Criminal Procedure Code of Ukraine, 2012). We believe that the adoption of these changes will improve the regulation of bail, ensure the inevitability of punishment of guilty persons, and increase the effectiveness of pre-trial investigation. Moreover, it is advisable to introduce an additional article 183-1 “Measures of guardianship in relation to persons who are dependent on the arrested, and the protection of property”. Such an amendment is important because the state should ensure proper fulfilment of the rights of persons who need special care. Therefore, the initiative to appeal to the relevant guardianship and trusteeship authorities should be launched by the body that detained a person. In this case, the necessary measures will be taken promptly since information about persons in need of care or property without supervision will be received by the detainee or the arrested (Dal & Ablamskyi, 2017). In addition to these amendments, we suggest to improve the CPC of Ukraine (2012) further in terms of remanding a person in custody for committing serious and extremely serious crimes of drug trafficking by introducing the following measures:

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Criteria for Remanding in Custody

One of the primary amendments proposed is the establishment of clear, objective criteria for remanding individuals in custody. It involves introducing specific circumstances, such as a demonstrable risk of flight, evidence tampering, or the severity of the crime, that justify remanding individuals in custody. Currently, vague terms and inconsistencies in the Criminal Procedure Code create room for subjective interpretation, which can lead to arbitrary decisions. Drawing on international practices, such as Germany's reliance on "risk of escape" and "evidence tampering" (Lippke, 2014), Ukraine can define specific circumstances that justify custody. For example, these could include a suspect's prior attempts to flee, the severity of the crime, or demonstrated risks of influencing witnesses. Implementing these criteria will ensure transparency and fairness while reducing the risk of arbitrary detention. According to data from the ECHR, well-defined custody criteria significantly decrease the number of successful appeals related to pre-trial detention. This amendment enhances transparency and consistency in judicial decisions, thus reducing the potential for arbitrary detention and fostering public trust in the justice system.

Strengthening Bail Provisions

The amendment of bail provisions is critical to balancing the need for preventive measures with respect for individual freedoms. It means expanding the use of bail as an alternative to custody, with stricter conditions and penalties for violations (Wooff, 2024). Ukraine should follow the example of the United Kingdom, where bail is the default option unless specific risks are identified. The CPC of Ukraine can be revised to establish clear guidelines for setting bail amounts, taking into account the financial status of the accused to avoid discrimination against economically disadvantaged individuals. In practice, courts should be empowered to impose conditions such as periodic check-ins, travel restrictions, or participation in rehabilitation programs for drug-related offenses. Strengthening bail provisions will also alleviate the financial and logistical burden on detention facilities, as evidenced by the UK's data showing that 69% of defendants were granted bail in 2020 (Ministry of Justice, 2024). This change would prevent overcrowding in detention facilities, ensure proportionality in preventive measures, and alleviate the social and economic burden of pre-trial detention.

Electronic Monitoring Mechanisms

Introducing electronic monitoring as an alternative to custody presupposes the use of electronic monitoring for low-risk offenders, particularly in non-violent drug trafficking cases (Hwang et al., 2021). This measure has been successfully implemented in countries such as Austria, where electronic monitoring has reduced pre-trial detention rates and costs while maintaining public safety. For example, Austria's electronic monitoring program has shown a 25% reduction in pre-trial detention over five years (Roy, 2013). In Ukraine, electronic monitoring could be overseen by the Ministry of Justice in collaboration with law enforcement agencies. Proper training and resources will be needed to ensure the effective use of this technology. Legal provisions should specify the circumstances under which electronic monitoring is appropriate, such as for non-violent offenders or individuals with strong community ties. It provides a cost-effective and humane alternative to physical detention while maintaining oversight and public safety.

Enhanced Training for Law Enforcement

Another proposed amendment focuses on improving the capacity of law enforcement personnel to handle drug trafficking cases effectively. It involves establishing specialized training on international human rights standards, investigative practices, and the proper application of preventive measures (Sobko et al., 2023a). Training programs should emphasize investigative techniques, evidence handling, and compliance with human rights standards. Drawing on international examples, such as Germany's specialized narcotics units, Ukraine could establish dedicated training modules to enhance proficiency in combating drug-related crimes. These efforts would improve the competency of law enforcement and judicial personnel, ensuring fair, and effective application of the law.

To align with EU legal frameworks and international human rights standards, the proposed changes must integrate principles such as proportionality, necessity, and the presumption of innocence. For instance, the European Convention on Human Rights emphasizes the need for judicial accountability and alternative measures to custody. Ukraine's legislative amendments should explicitly reference these principles to ensure compliance with its international obligations. Moreover, comparative analysis of EU countries' practices reveals that alternatives to custody, such as bail and electronic monitoring, are effective in reducing recidivism and maintaining judicial integrity.

Implementing these amendments will require addressing several challenges, including resource constraints and potential resistance from stakeholders. For example, the introduction of electronic monitoring will necessitate significant investment in technology and personnel training. To mitigate these issues, Ukraine could seek financial and technical support from international organizations such as the Council of Europe or the EU. Public awareness campaigns will be essential to build trust in the reformed system and ensure community cooperation. All proposed amendments prioritize human rights protections, particularly the rights to liberty and a fair trial. Measures such as electronic monitoring and revised bail provisions aim to prevent arbitrary detention while safeguarding public safety. Ensuring judicial accountability and transparency in custody decisions will further reinforce these protections. For instance, regular judicial reviews of pre-trial detention cases should be mandated to uphold the principle of proportionality.

By implementing these changes, Ukraine can improve the fairness and effectiveness of its criminal justice system, reduce the risk of human rights violations, and advance its integration into the European legal community. These reforms will not only address existing gaps but also contribute to building public trust and ensuring a more just and efficient legal framework. These reforms modernize Ukraine's approach to pre-trial custody, ensuring a balance between public safety and the protection of human rights.

CONCLUSION

This article examined the challenges in Ukraine's current framework for remanding individuals in custody, with a specific focus on drug trafficking cases. The analysis revealed significant gaps in the clarity and application of custody criteria, overreliance on detention, and limited use of alternative preventive measures. These shortcomings hinder Ukraine's ability to align its criminal procedure laws with EU standards and international human rights principles, such as proportionality, necessity, and the presumption of innocence.

The study analyzed the experiences of countries such as Germany, Austria, the United Kingdom, and the United States. It highlighted how these jurisdictions employ structured criteria, alternatives to custody, and mechanisms that safeguard human rights. For instance, Germany's reliance on specific risks, such as flight or evidence tampering, ensures objectivity in detention decisions. Austria's use of electronic

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monitoring reduces reliance on physical detention while maintaining public safety. The UK's proportionality-focused approach to bail demonstrates the value of alternatives to pre-trial detention. These practices offer valuable lessons for Ukraine, particularly in creating a legal framework that balances public safety and individual rights.

The proposed amendments to the CPC of Ukraine aim to address these issues and align the country's practices with EU norms, namely:

- establishing clear and objective criteria for remanding individuals in custody, ensuring consistency and reducing the risk of arbitrary detention;
- strengthening bail provisions to provide fair alternatives to detention, alleviate overcrowding in detention facilities, and promote proportionality;
- introducing electronic monitoring mechanisms as a cost-effective and humane alternative to physical custody, particularly for non-violent offenders;
- enhancing training for law enforcement personnel to improve investigative practices and ensure adherence to human rights standards.

Implementing these recommendations will significantly enhance human rights protections in Ukraine. Clear custody criteria and stronger bail provisions will reduce arbitrary detention and uphold the presumption of innocence. Alternatives such as electronic monitoring will mitigate the social and economic costs of pre-trial detention, while enhancing public safety. Furthermore, improved training for law enforcement will lead to more effective pre-trial investigations and ensure compliance with international human rights obligations. These changes will help build public confidence in the fairness and efficiency of Ukraine's criminal justice system.

The reforms would have a transformative impact on Ukraine's criminal justice system. By harmonizing legislation with EU standards, the reforms will advance Ukraine's integration into the European legal and governance framework. Reduced human rights violations, prevention of abuse of power, and increased transparency will strengthen public trust in the justice system. Over time, these changes will contribute to a more equitable, effective, and rights-based approach to criminal justice in Ukraine.

While these reforms present significant benefits, their implementation may face challenges, including resource constraints, the need for personnel training, and potential cultural resistance to change. For example, establishing electronic monitoring programs will require investment in technology and staff training. Similarly, revising bail provisions and custody criteria will necessitate comprehensive judicial training to ensure consistent application. To address these challenges, Ukraine can seek financial and technical support from international organizations, as well as engage in public awareness campaigns to foster trust and cooperation from stakeholders.

The proposed changes to Ukraine's Criminal Procedure Code represent a crucial step toward aligning the country's legal framework with EU norms in criminal law and human rights. By drawing on international best practices and adapting them to Ukraine's unique legal and social context, these reforms will strengthen procedural fairness, enhance human rights protections, and improve the efficiency of the criminal justice system. Ultimately, these efforts will advance Ukraine's aspirations for EU integration and create a more just and equitable legal system for its citizens.

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