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## **PROBLEMS OF THE LEGAL FORM OF ISOLATION OF CONVICTS IN CUSTODY**

### **Annotation**

This article examines the problems of the institution of punishment prescribed in the Criminal Code of the Republic of Kazakhstan. The purpose of the article is to ensure that human rights and freedoms are respected when sentencing. The authors analyze the meaning of isolation and imprisonment in punishment from a legal point of view and draw conclusions. The article defines the legal nature of deprivation of liberty in connection with the specific legal expression of the isolation of convicts.

**Keywords:** punishment, isolation, sentence, imprisonment, human rights

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## **Проблемы правовой формы изоляции осужденных, содержащихся под стражей**

### **Аннотация.**

В данной статье исследуются проблемы института наказания, прописанного в Уголовном кодексе Республики Казахстан. Цель статьи заключается в обеспечении соблюдения прав и свобод человека при назначении наказания. Авторы анализируют значение изоляции и лишения свободы в наказании с правовой точки зрения и делают выводы. В статье определяется правовая природа лишения свободы в связи со специфическим правовым выражением изоляции осужденных.

**Ключевые слова:** наказание, изоляция, приговор, лишение свободы, права человека

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## **Бас бостандығынан айыруда сотталғандарды оқшаулаудың құқықтық көрінісінің проблемалары**

### **Аннотация**

Бұл мақалада Қазақстан Республикасының қылмыстық кодексінде бекітілген жазалау институтының мәселелері қаралады. Мақаланың мақсаты жаза тағайындауда адам құқықтары мен бостандықтарының сақталуын қамтамасыз ету болып табылады. Авторлар бас бостандығынан айыру жазасында оқшаулаудың мәні құқықтық тұрғыдан талданып, қорытындылар жасайды. Мақалада сотталғандарды оқшаулаудың нақты құқықтық көрінісі есебінен бас бостандығынан айырудың құқықтық табиғаты анықталады.

**Түйін сөздер:** жаза, оқшаулау, үкім, бас бостандығынан айыру, адам құқығы

Our state is working to gradually reduce the scope of criminal repression by expanding the conditions of exemption from criminal punishment about persons who do not pose a special public danger (minors who committed a crime through negligence, other persons - mitigating circumstances).

Concerning punishment, the legislator defined in Part 1 of Article 46 of the Criminal Code of the Republic of Kazakhstan that isolation for a certain period of imprisonment is provided by sending a convicted person to low-security institutions or placing him in medium-security institutions for the detention of minors or in a medical Correctional Institution, medium-security institutions, high-security institutions, emergency safe institutions or completely safe institutions [1].

In this regard, the isolation of prisoners sentenced to imprisonment in the modern concept of a complex of institutions of deprivation of Liberty in Kazakhstan can be understood in two meanings: firstly, it is carried out by the fact that convicts are in a certain place under the control of institutions with the lowest security, in the need to live in a hostel or their own home, or in a rented residential space, and secondly, by keeping convicts in special institutions.

Persons sentenced to imprisonment in low-security institutions are not subject to paramilitary coercion to ensure the essence of the "minimum level of isolation", a small amount of restriction of their rights. The main way to isolate them in conditions of low-security institutions is to create preventive and corrective control over them. The scope of legal restrictions for convicts who are under control in institutions with the lowest security is the lowest: they are not kept in closed and guarded buildings, they are allowed to observe freedom in the performance of all basic social functions, free interaction, and interaction, while the law is in society.

A typical form of isolation of convicts is provided by the organization of their protection by special institutions. In addition, in the institution itself, convicts are isolated in groups or in buildings (cells), which are closed with the right to walk. This type of isolation of convicts is aimed at the implementation of

punishment, and it is also combined with the use of their needs for free communication and social culture and restriction of free social organization and movement. All their social activity is under control, correctional work is carried out in combination.

The issues of the organization of isolation of convicts in special institutions of education and correction, in medical and correctional institutions, as well as in a completely safe institution have received a complete and unique description and normative name in the theory of criminal Executive law and legislation. Therefore, the general approaches to assessing the essence of the isolation of convicts performed by these institutions among scientists did not cause controversy. In our opinion, it is the attitude to the concepts of «isolation», «security», «escorting convicts», «regime», «supervision», and «law and order» that requires theoretical understanding and a normative concept.

Here we will consider the essence and meaning of this question from the point of view of issues, the implementation of which is largely related not to the isolation of convicts, such as the type of deprivation of liberty that has appeared in Soviet criminal law until now, but to the organization of supervision over them in institutions with the lowest possible security.

The problem of the dual nature of the legal recognition of the essence of isolation in imprisonment has its history, which is associated with the emergence of the theory of criminal and penitentiary law and the policy of the state in the system of correctional institutions of their new types-institutions with the lowest possible security.

The practice of improving the execution of criminal penalties in the form of imprisonment and legislative activity in the system of Labor correctional institutions of the Union republics of the former USSR in 1963-1964. a new type of colony – security is associated with the creation of mixed institutions. The decree of the Presidium of the Supreme Soviet of the RSFSR of June 26, 1963 "on the organization of institutions with mixed labor Correctional Safety and the transfer of prisoners sentenced to imprisonment, among

which they are firmly on the path of Correction" states that further improvement of work on re-education and correction of prisoners sentenced to imprisonment and approval of the results of Correction is the [2].

The emergence of institutions with mixed security in the system of correctional labor colonies gave rise to a theoretical mixed assessment of this type of "isolation" in this type of punishment, the main feature of imprisonment in their activities – the absence of isolation. The main thing that raised doubts was that, on the one hand, it determined the place and role of these types of institutions in the system of penal enforcement agencies, and on the other hand, the legal nature of criminal law coercion applied in institutions with mixed security.

In the second half of the last century, institutions with mixed security were classified as semi-open-type Labor correctional institutions, which were intended for the execution of punishment in the form of imprisonment.

Later, they were given a different assessment. The transfer of convicts from closed-type colonies to institutions (settlement colonies) with the lowest possible security was considered a form of transfer of the unserved part of the sentence to a lighter one.

In our opinion, there is no imprisonment in the form of punishment, which is carried out by low-security institutions, and low-security institutions should not belong to the type of correctional institutions:

- low-security institutions do not provide isolation of convicts with the help of armed security;

- serving a sentence there is associated only with the organization of control, the nature of restrictions is insignificant, there is no strict and complete regulation of the organization of Labor, leisure and behavior of convicts, and the living conditions;

- the legal status of those living in the territory differs from the legal status of convicts held in closed-type institutions;

- features in the procedure for their involvement in labor change the nature of the corrective effect.

To assess the organizational and legal nature of the activities of institutions with the lowest security, one should take into account not only the political and legal formalization of this decision but also the meaningful aspects of applying the results of the analysis of the essence of punishment and the corrective effect they provide.

But the creation of institutions with the lowest possible security did not eliminate important problems in places of deprivation of Liberty:

- more than a thousand people are serving their sentences there, as before;

- Material income to the penitentiary system is not significant, insufficient;

- the issue of creating jobs for convicts has not been resolved.

The emergence of these conditions of a criminal law nature has aggravated the problem of competition of institutions for the application of mandatory employment in institutions with minimum security of imprisonment and conditional conviction (parole of convicted persons from places of deprivation of Liberty). In the competitive conditions of these two institutions, the situation with their use remains in judicial practice until the last year.

In the Criminal Code of the Republic of Kazakhstan of 1997, the legislator not only left the possibility of "isolation" of convicts using imprisonment of a bilateral nature but also approved two competing types of punishment – deprivation of Liberty, the type of its serving in institutions with the lowest security and restriction of freedom (mandatory labor training of a former suspended convict) [3].

By Article 46 of the Criminal Code of the Republic of Kazakhstan, the grounds for applying such punishment as deprivation of liberty and types of imprisonment with serving in institutions with the lowest security are practically identical. Now, Persons Sentenced to imprisonment for negligent crimes and persons sentenced to imprisonment for a period of up to one year with serving sentences in colonies for intentional crimes can be sent to low-security institutions by a court sentence. This category of convicts can be sentenced to serve a sentence in the form of restriction of freedom. However, the grounds for the

application of restriction of Liberty have become a little more stringent than the conditions for establishing imprisonment in institutions with minimal security. This does not happen, because the principle of "step-by-step punishment" is violated, in which the restriction of Liberty is considered a lighter punishment than imprisonment.

Currently, the competition between the norms of restriction of liberty and the application of imprisonment and its serving in low-security institutions has become significant, as it also applies to other institutions of criminal law: it applies to the grounds for imposing these types of punishment, the application of parole (Article 72-Article 1 of the Criminal Code of the Republic of Kazakhstan), the grounds for replacing imprisonment with restriction of Liberty (Article 73-Article 2 of the Criminal Code of the Republic of Kazakhstan), as well as the transfer of convicts from institutions of general and strict discipline to institutions with the lowest security (Article 71-1 of the Criminal Code of the Republic of Kazakhstan-B. "2") on the grounds for changing the type of institution. For example, Article 72 of the Criminal Code of the Republic of Kazakhstan, was adopted on July 3, 2014. according to him, parole in the form of the death penalty does not apply to a person transferred to prison by pardon, a person convicted of a terrorist or extremist crime that caused the death of people or was associated with the commission of a particularly serious crime, a person convicted of a crime against sexual inviolability of young children, and a person convicted of a minor or medium-grave crime serving imprisonment in low-security institutions, this type of early release from serving this punishment may apply.

The implementation of a Special Criminal Law measure in serving sentences in institutions with minimal security can be considered. In them, isolation from society is replaced by the supervision of the convicted person in a certain place.

The semi-free order there is aimed at preserving or restoring socially useful contacts of the convict, increasing the adaptation of such persons to the conditions of freedom. The main complex of restrictions is manifested in the

forced stay of convicts in a certain place, restriction of movement, accommodation mode, and participation in compulsory labor. Serving a sentence in institutions with the lowest possible security by its legal and social nature does not reflect the isolation of the convicted person in a semi-open type institution, but the restriction of freedom.

Moreover, in the absence of intentional violation of the regime, the convicted person is guaranteed to serve "imprisonment" in institutions with the lowest security without transfer to moderately safe institutions and institutions with the highest security (Article 142 of the Criminal Code of the Republic of Kazakhstan). In such a situation, the regime in the form of control over the convicted person in the conditions of low-security institutions excludes his isolation for the duration of the sentence.

In closed-type institutions for convicts: medium-safe institutions; medium-safe institutions for the detention of minors; institutions with maximum security; emergency-safe institutions; fully-safe institutions isolation-punishment has a different content than in cases of restriction and control of freedom in institutions with minimum security. Isolation in these institutions, if there is no absolute ban on the movement of a convicted person, will change his relationship with his loved ones and relatives, and will have serious restrictions on the use of spiritual and material benefits. It radically changes the legal status of the convicted person, forcing him to be in a specific institution, or squad, under constant supervision and protection at the workplace, to be a subject of strict discipline and disciplinary responsibility for serving a sentence.

The purpose of the institutions of deprivation of Liberty is to ensure the physical isolation of convicts only to the extent specified in the criminal law and court order, as well as to influence their correction. The last sign is indicated in the Criminal Code only indirectly, the isolation in imprisonment is provided by institutions with mixed security, moderately safe institutions; moderately safe institutions for the detention of minors; institutions with maximum security; emergency safe institutions; fully safe institutions.

So, a convicted person can be sentenced to imprisonment by forcibly isolating him and keeping him in an institution with the help of security.

According to this, the Russian N. R. Bessarab once established that "thus, in the legal sense, a person in the Russian Federation can be isolated only when his legal status is formally and forcibly influenced by him in combination with elements of legal isolation" [4, p.29].

Now the criminal legislation of the Republic of Kazakhstan, as an alternative to imprisonment, is indicated by such a type of punishment as restriction of freedom. In many of its social and legal parameters, it will compete with "imprisonment", in which convicts are served under supervision in institutions with the lowest possible security. Therefore, in the theory of criminal law, it is necessary to move away from the old old view that, in our opinion, a convicted person can be sentenced to imprisonment even without isolation.

The legislator focused on the broad application of criminal and penitentiary policy and judicial practice of "imprisonment" of convicts without isolation-its serving in low-security institutions. In this regard, at present, the purpose of institutions with the lowest security in the regions of the Republic of Kazakhstan has not changed. They remained a form of use of cheap labor in the size of regional subjects. Of course, they do not solve the problem of those sentenced to imprisonment who are forced to migrate.

In institutions with the lowest possible security, convicts are limited only to their freedom.

Article 143 of the Criminal Code of the Republic of Kazakhstan, Article 1 of the Criminal Code of the Republic of Kazakhstan, convicts serving sentences in low-security institutions are detained without protection, but under the supervision and supervision of the administration of the institution. The convicted person is issued by the administration of the institution a document of the established form confirming his identity. Documents certifying the identity of the convicted person are kept in their files. Convicted persons are allowed to import, use and store things and objects on the

territory of the institution, the list of which is established by the internal regulations of the institution. Convicts serving sentences in low-security institutions under normal conditions live in dormitories or cells. He has the right to live with his family in a rented or owned living space within the locality where the institution is located. At the same time, they are obliged to come to the institution for registration four times a month on the days established by the resolution of the head of the institution and stay at their place of residence from twenty to seven o'clock. The administration of institutions has the right to visit the residential premises where convicts live at any time of the day [5].

This type of deprivation of Liberty (Article 44 of the Criminal Code of the Republic of Kazakhstan) repeats the meaning of a new type of punishment with the meaning of restriction of freedom. Competition of norms of criminal and penitentiary legislation for all convicted of crimes committed by negligence, in our opinion, the Criminal Code (Article 46 of the Criminal Code of the Republic of Kazakhstan, Article 5 "1") provides for the application of the type of punishment "deprivation of liberty" and its serving in institutions with the lowest security.

At the same time, those convicted of a less serious, moderate crime can serve the remaining term of punishment in the form of restriction of freedom, as a procedure for replacing an unserved sentence with a milder one after serving 1/3 of the prescribed term of imprisonment (Article 73 of the Criminal Code of the Republic of Kazakhstan). Based on the norms of criminal executive legislation (Article 96 of the Criminal Code of the Republic of Kazakhstan, Article 1, Paragraph 2), convicted persons have the right to transfer to institutions with the lowest security after serving 1/4 of the prescribed term of imprisonment. There is practically no difference between cases of serving imprisonment in low-security institutions (Article 142, 143 of the Criminal Code of the Republic of Kazakhstan) and cases of restriction of liberty under the supervision of the Probation Service (Article 59, 66, 69 of the Criminal Code of the Republic of Kazakhstan). If so, the legislator, taking into account Article 1 of Article 44 of the Criminal Code of the Republic of Kazakhstan, states that if the

restriction of freedom without isolation from society in the conditions of supervision of convicted persons is made by special institutions, then "deprivation of Liberty" performed with the help of institutions with the lowest security should be recognized as a restriction of freedom.

Taking into account the need to define the concepts of "deprivation of liberty", "isolation from society" and "restriction of Liberty" to regulate judicial practice when imposing sentences, improve the services of colonies to prepare convicts for free life, it is necessary not only to determine the essence of these concepts at the theoretical and legal level but also to determine how fully and they reflect the essence of punishment in some form of criminal punishment. On the other hand, it is necessary to decide whether it is inappropriate for the simultaneous presence of punishments such as restriction of liberty and imprisonment to serve under supervision in institutions with the lowest security.

To improve the criminal and penitentiary legislation, judicial practice, the activities of penal institutions, and the increase of legal guarantees for compliance with the rights of convicts, in our opinion, it would be appropriate to revise the application and execution of imprisonment from criminal and penitentiary legislation and its serving in institutions with the lowest security.

In low-security institutions, all formally convicted persons are under control, serving imprisonment. But most of the norms of the Criminal Code of the Republic of Kazakhstan, which establish their legal provisions, and clarifies the essence and meaning of imprisonment, do not act with persons in low-security institutions.

In our opinion, the existence of such a type of Correctional Institution as a low-security institution is not justified by criminological, social, organizational, or other reasons. They were created in the days of the administrative-command system of the economy and were designed to solve the problem of providing useless industries with cheap labor.

The Criminal Code of the Republic of Kazakhstan enshrines a new system of punishment, which allows for a flexible

solution to the issues of transition from probation control (restriction of freedom) with elements of control to full freedom (correctional and compulsory work) with the help of replacing the institution of strict punishment with a lighter one, as well as parole, deprivation of Liberty (complete isolation from society in closed institutions). Currently, there are necessary conditions for changing low-security institutions to correctional centers, such as self-contained institutions that provide the purpose of punishment on a social, legal, and psychological basis, beyond any unreasonable sign of deprivation of freedom. Correctional centers, as it were, should be an independent intermediate chain between convicts isolated from society and freedom.

An analysis of the essence of isolation in imprisonment from a legal point of view allows us to draw the following conclusions:

1. isolation of convicts, such as a sign of deprivation of Liberty, was given two different characteristics by the legislator. It implies the detention of such persons in institutions, as well as the provision of supervision over them by institutions with the lowest possible security (Article 46-Article 5 of the Criminal Code of the Republic of Kazakhstan).

2. elimination of competition for the application of two types of punishment – restriction of liberty and serving of the sentence of imprisonment of convicts in institutions with the lowest security - allows solving theoretical, legal, and organizational issues related to the legal expression of the concepts of "deprivation of liberty", "isolation of convicts" and "restriction of Liberty".

3. determination of the legal nature of deprivation of Liberty using a clear legal expression of isolation of convicted persons makes it possible to effectively replace this type of punishment with another lighter one, as well as their parole from serving a sentence.

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