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The Legal Status of a Convicted Person as a Constitutional Law Category: the Problem of Statutory Establishment of the Limits of Rights Restrictions in the Republic of Kazakhstan

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Abstract. Since 1 July 2026, the Republic of Kazakhstan has been governed by the Constitution adopted at the republican referendum of 15 March 2026. The provision on the limitation of rights and freedoms is placed in Article 41 and retains the requirement that rights may be limited only by law. For a person serving a sentence of imprisonment, this requirement carries particular weight, since such a person's legal status consists entirely of restrictions. The aim of the study is to establish whether the existing manner of laying down restrictions on convicted persons satisfies that constitutional requirement. The academic significance of the work lies in the first constitutional framing, within national doctrine, of the question of the limits of subordinate regulation of a convicted person's status. The methodology comprises a complete formal legal examination of the Criminal Executive Code of the Republic of Kazakhstan and of the Internal Regulations of the institutions of the criminal executive system, an analysis of Law No. 307-VIII of 11 June 2026 bringing the codes into conformity with the Constitution, and a comparative assessment against the German model. The study establishes that the list of non-derogable rights has been reduced by the removal of the right to personal liberty; that bringing the Criminal Executive Code into conformity with the Constitution was largely a drafting exercise which left the articles on the rights and duties of convicted persons untouched; and that the Code refers to the Internal Regulations thirty-three times, while the Regulations themselves contain two hundred and twenty paragraphs and determine the scope of restrictions down to the daily routine approved by the head of the institution. The practical value lies in proposals to amend Articles 11, 16 and 130 of the Code and to raise regime restrictions to the level of statute.

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Keywords: legal status of a convicted person, limitation of rights and freedoms, criminal executive law, internal regulations, subordinate regulation, disciplinary sanction, constitutional guarantees.

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Сотталғанның құқықтық мәртебесі конституциялық-құқықтық санат ретінде: Қазақстан Республикасында құқықтық шектеулер шегін заңнамалық бекіту мәселесі

Аңдатпа. 2026 жылғы 1 шілдеден бастап Қазақстан Республикасында 2026 жылғы 15 наурыздағы республикалық референдумда қабылданған Конституция қолданылады. Құқықтар мен бостандықтарды шектеу туралы норма 41-бапқа орналастырылған және құқықтарды тек заңдармен ғана шектеуге болады деген талапты сақтайды. Бас бостандығынан айыру түріндегі жазаны өтеп жатқан адам үшін бұл талап ерекше мәнге ие, өйткені оның құқықтық мәртебесі толығымен құқықтық шектеулерден тұрады. Зерттеудің мақсаты – сотталғандардың құқықтық шектеулерін бекітудің қолданыстағы тәртібі аталған конституциялық талапқа сай келе ме, соны анықтау. Жұмыстың ғылыми маңызы сотталғанның мәртебесін заңға тәуелді актілермен реттеу шектері туралы мәселенің отандық доктринада алғаш рет конституциялық-құқықтық тұрғыдан қойылуымен айқындалады. Әдіснама Қазақстан Республикасының Қылмыстық-атқару кодексін және қылмыстық-атқару жүйесі мекемелерінің ішкі тәртіп қағидаларын тұтас формальды-заңдық тексеруді, кодекстерді Конституцияға сәйкес келтіру туралы 2026 жылғы 11 маусымдағы № 307-VIII Заңды талдауды, сондай-ақ герман үлгісімен салыстырмалы-құқықтық салғастыруды қамтиды. Шектелмейтін құқықтар тізбесі жеке бас бостандығы құқығының есебінен қысқарғаны; Қылмыстық-атқару кодексін Конституцияға сәйкес келтіру заңдық-техникалық сипатта болып, сотталғандардың құқықтары мен міндеттері туралы баптарды қозғамағаны; ішкі тәртіп қағидаларына сілтеме Кодексте отыз үш рет кездесетіні, ал Қағидалардың өзі екі жүз жиырма тармақтан тұрып, құқықтық шектеулер көлемін мекеме бастығы бекітетін күн тәртібіне дейін айқындайтыны анықталды. Зерттеудің практикалық маңызы Кодекстің 11, 16 және 130-баптарын толықтыру және режимдік құқықтық шектеулерді заң деңгейіне көшіру жөніндегі ұсыныстарда.

Түйін сөздер: сотталғанның құқықтық мәртебесі, құқықтар мен бостандықтарды шектеу, қылмыстық-атқару құқығы, ішкі тәртіп қағидалары, заңға тәуелді реттеу, тәртіптік жаза, конституциялық кепілдіктер.

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Правовой статус осуждённого как конституционно-правовая категория: проблема законодательного закрепления пределов правоограничений в Республике Казахстан

Аннотация. С 1 июля 2026 года в Республике Казахстан действует Конституция, принятая на республиканском референдуме 15 марта 2026 года. Норма об ограничении прав и свобод помещена в статью 41 и сохраняет требование, согласно которому права могут быть ограничены только законами. Для лица, отбывающего наказание в виде лишения свободы, это требование имеет особое значение, поскольку его правовой статус целиком состоит из правоограничений. Целью исследования является установление того, отвечает ли действующий порядок закрепления правоограничений осуждённых указанному конституционному требованию. Научная значимость работы определяется первой в отечественной доктрине конституционно-правовой постановкой вопроса о пределах подзаконного регулирования статуса осуждённого. Методология включает сплошную формально-юридическую проверку Уголовно-исполнительного кодекса Республики Казахстан и Правил внутреннего распорядка учреждений уголовно-исполнительной системы, анализ Закона от 11 июня 2026 года № 307-VIII о приведении кодексов в соответствие с Конституцией, а также сравнительно-правовое сопоставление с германской моделью. Установлено, что перечень неограничиваемых прав сокращён за счёт права на личную свободу; что приведение Уголовно-исполнительного кодекса в соответствие с Конституцией носило юридико-технический характер и не затронуло статей о правах и обязанностях осуждённых; что отсылка к правилам внутреннего распорядка содержится в Кодексе тридцать три раза, а сами Правила насчитывают двести двадцать пунктов и определяют объём правоограничений вплоть до распорядка дня, утверждаемого начальником учреждения. Практическое значение состоит в предложениях по дополнению статей 11, 16 и 130 Уголовно-исполнительного кодекса и переносу режимных правоограничений на уровень закона.

Статья представлена в рамках конкурса на грантовое финансирование по научным и (или) научно-техническим проектам на 2024-2026 годы (МНВО РК) «ИРН: AP23485634 Современная трансформация казахстанской пенитенциарной системы через механизм государственно-частного партнерства».

Ключевые слова: правовой статус осуждённого, ограничение прав и свобод, уголовно-исполнительное право, правила внутреннего распорядка, подзаконное регулирование, дисциплинарное взыскание, конституционные гарантии.

Introduction

The legal status of a convicted person cannot be reduced either to constitutional law or to criminal executive law taken alone. Its foundation is constitutional: a convicted person does not

lose the quality of a human being and a citizen, retains legal personality and remains a holder of fundamental rights, and the judgment of a court deprives him not of rights as such but of the possibility of enjoying some of them to the ordinary extent. Its content belongs to criminal executive law: the regime determines what is permitted and what is forbidden. Between these two levels lies the question forming the subject of this study - at what level of the hierarchy of legal acts it is permissible to lay down the scope of the restrictions that constitute that status.

The question has acquired new significance in Kazakhstan. The Constitution adopted at the republican referendum of 15 March 2026 entered into force on 1 July 2026 [1]. The provision governing the limitation of rights and freedoms is placed in Article 41: 'The rights and freedoms of a human being and a citizen may be limited only by laws and only to the extent necessary for the protection of the foundations of the constitutional order, of the rights and freedoms of a human being and a citizen, for ensuring national security, for the protection of public order, of the health of citizens and of the morality of society.' The requirement of statutory form retains its former categorical force: limitation is permissible only by laws.

For a convicted person that requirement does not mean what it means for anyone else. An ordinary subject of law meets restrictions episodically, and the question of their source arises in particular situations. The status of a convicted person consists entirely of restrictions: they determine when he rises and when he goes to bed, what he may keep, how many visits he has in a year, how often he uses the telephone, what he reads, what he wears and where he may walk within the institution. What is a particular question for anyone else is, for a convicted person, the question of the form in which his legal status itself is laid down.

The Criminal Executive Code of 5 July 2014 No. 234-V [2] devotes two articles to the fundamental rights and duties of convicted persons. Both are framed in outline. Article 10 lists eleven rights and closes with a proviso that convicted persons also have other rights under the Code and under the legal acts establishing the procedure and conditions for executing and serving sentences. Article 11, in the first two sub-paragraphs of paragraph 1, obliges them to comply with the requirements of the Code and of other legal acts and to observe the internal regulations of the institutions executing sentences. The substantive content of the status is thus assigned to an act which is not the Code.

That act is the Internal Regulations of the Institutions of the Criminal Executive System, approved by Order of the Minister of Internal Affairs of 17 November 2014 No. 819 [3]. Those Regulations, and not the statute, determine the daily routine, movement about the institution, the range of items a convicted person may keep, correspondence, visits, telephone conversations and confinement in a disciplinary isolation cell. The relation between the constitutional requirement of statutory form and this departmental regulation of status is the problem addressed here.

Two circumstances make the study timely. First, the new Constitution created an obligation to bring sectoral legislation into conformity with it, and for criminal executive legislation that work has already been done by Law of 11 June 2026 No. 307-VIII [4]; its content shows how the legislature reads the new requirements. Second, the list of rights not subject to limitation under any conditions has been altered, and that alteration concerns convicted persons directly.

The object of the study is the social relations arising in the course of laying down and giving effect to the legal status of a convicted person in Kazakhstan. The subject of the study comprises the provisions of the Constitution and of the Criminal Executive Code which determine the legal status of a convicted person and the limits of its restriction, the subordinate acts of the authorised

body, and foreign experience of constitutional assessment of departmental regulation of the execution of sentences.

The aim is to establish whether the procedure now in force for laying down restrictions on convicted persons satisfies paragraph 1 of Article 41 of the Constitution. Five tasks followed: to identify the substantive changes in the constitutional provision and their significance for convicted persons; to establish what was amended in the Criminal Executive Code when it was brought into conformity; to examine the Code comprehensively for references to subordinate regulation of that status; to determine the volume and character of the restrictions established by departmental act; and to compare the Kazakhstani model with the German one, where an analogous question was resolved at constitutional level.

The hypothesis of the study is that bringing the Criminal Executive Code into conformity with the new Constitution was predominantly an exercise in legal drafting technique and did not touch the construction of the legal status of a convicted person, with the result that a situation persists in which the scope of the restrictions upon a person serving a sentence of imprisonment rests on an act of the authorised body and, as regards the daily routine, on an act of the head of the institution, whereas paragraph 1 of Article 41 of the Constitution permits the limitation of rights and freedoms only by laws.

The academic significance of the work lies in the first constitutional framing, within national doctrine, of the question of the limits of subordinate regulation of the status of a convicted person. Its practical significance rests on the suitability of the proposals formulated for use in the preparation of amendments to the Criminal Executive Code and in the drafting of the concept of its new version.

A note on terminology is necessary. In accordance with the Criminal Executive Code, the term 'convicted person' is used throughout this article for a person serving a sentence of imprisonment in Kazakhstan; the fuller expression 'person serving a sentence of imprisonment' is used only where such a person must be distinguished from persons sentenced to other types of punishment. The term 'prisoner' is used only when reproducing foreign and international sources, in which it is the established term.

Literature review

The relations arising in the execution of custodial sentences are well examined in foreign scholarship, and attention there has been given precisely to the question not raised in Kazakhstani scholarship: the form in which restrictions on convicted persons are laid down.

The monograph by L. Lazarus comparing prisoners' rights in England and Germany [5] is of fundamental importance. The difference between the two legal orders lies not in the volume of what is afforded to a prisoner but in the manner of its establishment: the German model derives the prisoner's status from statute, the English model from administrative discretion corrected by judicial practice. Statutory form, the author shows, places the prisoner in a fundamentally different position vis-à-vis the administration, because it converts what is granted into what is due.

D. van Zyl Smit and S. Snacken set out the general theory of European prison law [6]. They derive the content of a prisoner's rights from the principle that imprisonment withdraws one right - the right to personal liberty - and entails no automatic diminution of the others. Every additional restriction requires an independent justification, and its legal form matters no less than its content.

Empirical confirmation that the distinction between statute and departmental prescription is a real one comes from C. Morgenstern and M. Rogan, who interviewed senior staff of German penal institutions [7]. The administration perceives the statute on the execution of sentences as a resource enabling decisions in the prisoner's favour, and ministerial prescriptions as a bureaucratic burden. The source of a restriction is thus not merely a question of legal form.

Two further studies bear on the same point. K. Nikoleishvili, examining the right to rehabilitation, contrasts a model in which the prisoner is an object of corrective influence with one in which he is the holder of an independent right, and shows that moving from the first to the second requires a change of legal construction rather than of rhetoric [8]. N. Dagan and G. Perry demonstrate that where a legal requirement is not expressed in clear and binding form, it is displaced by the staff's own professional and cultural conceptions of what is proper, so that the opportunities actually recognised as belonging to a prisoner become a variable quantity [9].

The institutional environment likewise governs whether formally established rights operate. H. Schoenfeld, K. Rhoten and M.C. Campbell show on American material that complaint procedures, inspection mechanisms and supervisory bodies do not secure protection unless their exercise aligns with the priorities of political decision-makers [10]; S. van der Valk and M. Rogan reach a similar conclusion on prison monitoring [11]. Studies of prison work [12] and of prisoners serving long sentences [13] converge: formal recognition of a right does not predetermine the conditions of its exercise, and the gap between the proclaimed and the real opens at the level of subordinate specification.

The only English-language study devoted directly to Kazakhstani criminal justice remains that of A. Trochev and G. Slade [14], who show the persistence of institutional practices of Soviet origin despite formal legislative reform, and explain by that persistence the divergence between the norms adopted and the results of their application.

In Kazakhstani scholarship, the execution of sentences is studied consistently. An independent line of research addresses the humanisation of conditions of confinement, alternatives to imprisonment, the probation service, public monitoring commissions and the national preventive mechanism, and the resocialisation of released persons. An expert assessment of the conceptual foundations of criminal executive legislation is given by E.A. Salamatov [15]. Constitutional analysis of sectoral norms in the criminal law field has been undertaken for criminal procedure legislation, both as doctrinal examination of particular institutes [16] and as a synthesis of the practice of the Constitutional Court of Kazakhstan in its first years [17]. National research in this field generally assesses existing norms for conformity with constitutional requirements and develops proposals for legislative improvement [18]; [19].

The question of the constitutionally permissible level at which restrictions on convicted persons may be laid down has not, however, been raised independently. Research has concentrated on the content of those restrictions and on the conditions of their application, not on the source from which they proceed. The conformity of departmental regulation of a convicted person's status with paragraph 1 of Article 41 of the Constitution has not been tested, which is explained in part by the fact that the constitutional provision in its current version has existed for less than three months. That determines the academic novelty of the present work.

M**aterials and methods of the study**

The normative basis comprised the Constitution in force from 1 July 2026 [1] and the Constitution of 1995 in the version in force until that date [20], the latter serving to establish

the substantive differences between the former and the current provisions on limitation. The sectoral material comprised the Criminal Executive Code as at 12 August 2026 [2] and Law of 11 June 2026 No. 307-VIII [4]; the subordinate material, the Internal Regulations [3] and the act establishing samples of clothing for convicted persons [21].

The formal legal method took the form of a comprehensive examination of the normative material. The Code was examined for references to the internal regulations and to other legal acts, and the number and distribution of such references were established. Paragraph 1 of Article 16 was examined separately for the number of rule-making powers conferred on the authorised body and the proportion concerning rules that determine the procedure and conditions for serving a sentence. Law No. 307-VIII was examined item by item: for each it was determined whether the amendment was substantive or technical and whether it touched the provisions on the rights and duties of convicted persons.

The Internal Regulations of the Institutions of the Criminal Executive System were analysed both structurally and substantively. The volume of the act, the number of its structural divisions and annexes, the range of matters assigned to its regulation, and the instances in which the Regulations in their turn refer to an act of a lower level were established. Provisions establishing prohibitions and duties not expressly provided for by the Code were identified separately. The cases of subordinate regulation so identified are generalised in Table 1 in the section 'Results and discussion'.

The comparative legal method was applied to the German model. Until 1972 restrictions on prisoners in the Federal Republic of Germany were derived from departmental prescriptions - a source functionally identical to the Kazakhstani Internal Regulations - and the question was resolved at the constitutional level [22], leading to a special statute [23]. International standards [24], [25] and the case law of the European Court of Human Rights on the quality of the legal basis of a restriction were also drawn upon. The comparison was carried out in two steps: the elements of the German model were first identified and then divided into those expressing a general constitutional principle, and therefore capable of application to the Kazakhstani system, and those conditioned by the specific features of the German constitutional and legislative system.

A significant part in the work was played by the method of the negative result: a number of conclusions rest not upon the discovery of a provision but upon the reliably established absence of one - the absence in the Criminal Executive Code of an exhaustive list of the duties of a convicted person, the absence in the same Code of a provision determining the limits of the delegation of rule-making powers to the authorised body, and the absence among the amendments introduced by Law No. 307-VIII of any amendment to Articles 10 and 11 of the Code.

Results and discussion

A comparison of the current provision on the limitation of rights with the provision in force until 1 July 2026 reveals two substantive changes. Paragraph 1 of Article 39 of the former Constitution [20] permitted the limitation of rights and freedoms to protect the constitutional order, the protection of public order, the rights and freedoms of a human being, and the health and morality of the population. Paragraph 1 of Article 41 of the current Constitution [1] names the protection of the foundations of the constitutional order, of the rights and freedoms of a human being and a citizen, the ensuring of national security, the protection of public order, of the health of citizens and of the morality of society. The list of legitimate aims of limitation

has been supplemented by the ensuring of national security - an aim not previously named in the provision and hitherto derived by those applying the law from the general reference to the protection of the constitutional order.

The second change concerns the list of non-derogable rights. Paragraph 3 of Article 39 of the former Constitution assigned to that category Articles 11, 13 to 15, paragraph 1 of Article 16, and Articles 17, 19, 22 and paragraph 2 of Article 26. Paragraph 3 of Article 41 names Articles 12, 14, 16, 17, 20, 22 and 25. Comparison of the corresponding provisions shows that absolute protection is retained by legal personality and judicial protection, the prohibition of extradition of a citizen, equality before the law and the court, the right to life, the inviolability of honour and dignity with the prohibition of torture, ethnic identity and native language, and freedom of conscience. Two provisions have fallen away: the right to personal liberty, formerly protected by paragraph 1 of Article 16, and the rule that no one may be deprived of property otherwise than by a decision of a court, formerly protected by paragraph 2 of Article 26.

The removal of the right to personal liberty from the category of non-derogable rights constitutes the elimination of an internal contradiction in the former construction. To declare personal liberty absolutely non-derogable sat ill with the existence of imprisonment as a form of punishment: if that right is under no circumstances subject to limitation, a punishment consisting precisely in its limitation finds itself in an insoluble contradiction with the Basic Law. The former provision overcame that contradiction only by way of interpretation, under which imprisonment imposed by a judgment of a court was not regarded as a limitation of the right within the meaning of Article 39. The current version has removed the need for such an interpretation by placing personal liberty within the general regime of Article 41.

The elimination of that contradiction raises rather than lowers what the constitutional provision demands for convicted persons. While personal liberty was non-derogable, the question of statutory form formally did not arise for it, since a non-derogable right is limited neither by statute nor by any other act. Transferred into the general regime of Article 41, it attracts the requirement of paragraph 1 in full. Imprisonment as such is established by statute - by the Criminal Code and the judgment delivered on its basis. But imprisonment is not exhausted by isolation: it unfolds into a regime, a totality of additional restrictions, each an independent intrusion into the sphere of rights and each therefore falling within paragraph 1 of Article 41.

The obligation to bring sectoral legislation into conformity with the new Constitution has been discharged in respect of the criminal law field by Law of 11 June 2026 No. 307-VIII [4]. The title of the Law expressly indicates its purpose, namely to bring the Criminal Code, the Criminal Procedure Code, the Criminal Executive Code and the Code on Administrative Offences into conformity with the Constitution. As regards the Criminal Executive Code, the Law contains twenty items of amendment, and the content of those twenty items shows how the requirement of bringing into conformity has been understood.

Eight of the twenty items merely reorder the words in enumerations of administrative and territorial units. One replaces 'foreigners' with 'foreign citizens' throughout. One substitutes the Kurultay for the Parliament, following the change in the system of representative bodies. One, in sub-paragraph 5) of paragraph 3 of Article 104, replaces 'in a republican' with 'in a nationwide', aligning the designation of a referendum with the new terminology. A further item supplements paragraph 2 of Article 110 with the words 'the foundations of the constitutional order' and 'national security', aligning the grounds for prohibiting publications with Article 41. The remaining items make substantive changes unconnected with the constitutional reform:

conditional reduction of a term of imprisonment, the position of convicted women with young children, conditions of confinement in women's institutions, and the procedure for proposing conditional reduction.

Law No. 307-VIII did not amend a single provision of Articles 10 and 11 of the Criminal Executive Code - the very articles which determine the fundamental rights and the fundamental duties of convicted persons and which therefore form the core of their legal status. Nor did it amend paragraph 1 of Article 16, which establishes the scope of the rule-making powers of the authorised body, or paragraph 1 of Article 130, which determines what is a breach of the established procedure for serving a sentence.

The amendment to paragraph 2 of Article 110 of the Code merits particular attention. The legislature supplemented the list of grounds on which a convicted person is forbidden to receive and keep publications with the words 'the foundations of the constitutional order' and 'the undermining of national security' and thereby reproduced in a prohibitory provision of the Code precisely the terminology which had appeared in paragraph 1 of Article 41 of the Constitution. It follows that the content of the revised constitutional provision on the limitation of rights was known to the legislature when Law No. 307-VIII was prepared and was taken into account. It was taken into account, however, in one direction only, namely in the widening of a ground of prohibition. The other side of the same constitutional provision, containing the requirement of statutory form for every limitation, was not taken into account when the Code was revised.

The Criminal Executive Code refers to the internal regulations of institutions thirty-three times. Those references are not of a technical nature: they form a construction in which the Code establishes an institute while a subordinate act determines its content. Sub-paragraph 2) of Article 3 of the Code expressly defines the regime for serving a sentence as the procedure for the execution and the serving of sentences established by the Code and by other legal acts, thereby fixing the duality of the source of the regime at the level of the conceptual apparatus.

Article 11 reproduces that duality for duties. Sub-paragraph 1) of paragraph 1 obliges convicted persons to comply with the requirements of the Code, of other legal acts and of the judgment; sub-paragraph 2) obliges them to observe the internal regulations. The duty to observe a subordinate act is thus elevated to the rank of a fundamental duty, while its concrete content is not determined by the Code and is not intended to be. Paragraph 2 provides that failure to perform the duties imposed entails the liability established by law. The result is a construction in which statute provides the liability and a subordinate act provides the duty for whose breach it is incurred.

Article 104 of the Code, which deals with the rights and duties of convicted persons sentenced to imprisonment, is built upon the same pattern. Paragraph 1 enumerates six additional rights granted 'under the present Code and by the internal regulations of institutions'. Paragraph 2 enumerates nine additional duties with the same proviso. Paragraph 3 contains a list of prohibitions operating 'under the present Code and the internal regulations of institutions'. All three paragraphs therefore constitute not independent regulation but a frame for a subordinate act.

The basis for the issuing of that act is contained in paragraph 1 of Article 16 of the Code. The provision enumerates twenty-one types of act approved by the authorised body, of which sixteen are rules determining the procedure and the conditions for the execution and the serving of sentences, including the internal regulations of the institutions of the criminal executive system provided for by sub-paragraph 16). The Code sets no limits whatever upon that delegation: it names neither the matters which may not be transferred to the subordinate level, nor the

principles by which the authorised body is bound, nor the maximum degree of burden upon the convicted person which may be introduced by a departmental act.

The volume of subordinate regulation matches the breadth of the delegation. The Internal Regulations [3] number two hundred and twenty paragraphs across eleven chapters, with twenty annexes. They govern the admission of convicted persons, relations with staff, the daily routine, marshalling for work, meals, personal reception, roll-calls, movement about the institution, the purchase of foodstuffs and articles of first necessity, parcels and packages, the seizure of prohibited items, correspondence, money transfers, visits, telephone conversations, journeys outside the institution, confinement in disciplinary isolation cells, single cells and temporary isolation premises, and the particular features of life sentences.

That regulation is not of an outline character. Annex 8 to the Regulations contains an exhaustive list of the articles and items which a convicted person is permitted to keep, to receive in parcels and to purchase in the shop of the institution. The list is taken to a degree of detail at which the permissible colour of a tracksuit, the material of a comb, the form in which a deodorant may be supplied and the requirements as to the container in which perfumery may be kept are all determined. The legal significance of such a list lies in the fact that it operates as a prohibition: everything not named in it is not permitted to the convicted person. The right of property of a convicted person - a right which is not abolished by the judgment of a court - thus receives its limits from an annex to a ministerial order.

The chain of delegation, moreover, does not end with the departmental act. Paragraph 17 of the Regulations provides that in every institution a strictly regulated daily routine is organised, approved by the head of the institution. Paragraph 18 provides that the daily routine includes the time of reveille, roll-call, lights out, ablutions, physical exercise, meals, marshalling for work, presence at work, study and educational activities, the hours during which the visiting rooms operate and the hours of telephone conversations. Paragraph 19 provides that the place and the procedure for conducting mass activities are approved by an order of the head of the institution. Paragraph 20 refers, for the sample of clothing, to a separate act of the authorised body [21].

A four-tier normative sequence thus takes shape. The Constitution requires that rights be limited only by laws. The Code, being a statute, establishes a duty to observe internal regulations whose content it does not disclose. The Regulations, being a ministerial order, determine the composition of the regime requirements and refer to another ministerial order for the form of clothing and to an order of the head of the institution for the daily routine. The order of the head of the institution determines at what time a convicted person rises, eats, works and goes to bed. The daily life of a convicted person is accordingly determined by an act which stands three steps away from the Constitution in the hierarchy of legal acts and is not a normative legal act at all.

That construction acquires particular sharpness in connection with the disciplinary liability of convicted persons. Paragraph 1 of Article 130 of the Code provides that a breach of the established procedure for serving a sentence consists in the failure to comply with the requirements established by the Code and by the internal regulations of institutions. Article 131 establishes the disciplinary sanctions: a reprimand, a severe reprimand, placement in a disciplinary isolation cell for up to fifteen days, and transfer to single cells for up to four months. The relationship between those two provisions means that for failure to comply with a requirement established by a ministerial order, a convicted person may be placed in a disciplinary isolation cell for fifteen days. A subordinate act defines the disciplinary offence, while statute fixes the sanction.

The content of the sanction itself is likewise supplemented at the subordinate level. Paragraph 124 of the Regulations provides that convicted persons placed in a disciplinary isolation cell are not permitted to take with them the foodstuffs and personal effects in their possession, except tea, a towel, soap, tooth powder, toothpaste, a toothbrush, periodicals and books. Paragraph 126 provides that on admission to a disciplinary isolation cell convicted persons are subjected to a full search and are changed into clothing assigned to those premises. None of those restrictions is provided for by the Code: the statute names the sanction itself but does not determine the regime in which it is served, and that regime proves to be more burdensome than follows from the statute.

Placement in a disciplinary isolation cell merits a constitutional assessment of its own. It constitutes isolation within isolation: a convicted person, already deprived of liberty by a judgment of a court, is additionally deprived of that degree of freedom of movement and of communication which he retains under ordinary conditions of confinement. The legal basis for such an additional restriction is not a judgment of a court but a decision of the head of the institution. The Code does not require judicial authorisation for that measure; it provides only for a copy of the decision to be sent to the prosecutor not later than the following working day. Since from 1 July 2026 the right to personal liberty falls within the general regime of Article 41 of the Constitution, any additional limitation of it is subject to the requirement of statutory form; yet, as has been shown above, the regime of such a limitation is laid down in an act of the authorised body.

The cases of subordinate regulation of the status of a convicted person identified in the course of the examination are generalised in Table 1. For each case, the table indicates the relevant provision of the Code, the subject of regulation, the level of the act by which the content of the regulation is actually determined, and the nature of the restriction established.

Table 1 – Subordinate regulation of the legal status of a convicted person under the Criminal Executive Code of the Republic of Kazakhstan

No.	Provision of the Code	Subject of regulation	Level of the act determining the content	Nature of the restriction
1	Art. 3, sub-para. 2)	Definition of the regime for serving a sentence	Code and 'other legal acts' (level not specified)	Dual source of the regime fixed in the conceptual apparatus of the Code
2	Art. 10 (closing proviso)	Rights of convicted persons	Code and legal acts establishing the procedure and conditions of serving sentences	Open-ended list of rights; their scope may be specified below the level of statute
3	Art. 11, para. 1, sub-paras. 1)-2); para. 2	Fundamental duties of convicted persons	'Other legal acts'; Internal Regulations (ministerial order)	Duty whose content is not disclosed by statute, while liability for its breach is established by law

4	Art. 16, para. 1, sub-para. 16)	Rule-making powers of the authorised body	Ministerial order	21 types of act, 16 of them on the procedure and conditions of serving sentences; no limits of delegation
5	Art. 104, paras. 1-3	Additional rights, duties and prohibitions	Code together with the Internal Regulations (ministerial order)	Statutory frame filled with prohibitions by a subordinate act
6	Arts. 11, 104 (general references)	Items a convicted person may keep, receive in parcels and purchase	Annex 8 to the Internal Regulations (ministerial order)	Exhaustive list operating as a prohibition of everything not named; limits the right of property
7	Provisions of the Code on the respective institutes, with references to the internal regulations	Correspondence, visits, telephone conversations, parcels, money transfers	Internal Regulations (ministerial order)	Procedure and conditions of exercising rights determined subordinately
8	- (Internal Regulations, paras. 17-18)	Daily routine: reveille, roll-call, meals, work, lights out, hours of visits and telephone conversations	Order of the head of the institution (not a normative legal act)	Use of time determined at the level of an individual institution
9	- (Internal Regulations, para. 19)	Place and procedure for mass activities	Order of the head of the institution	Organisational restriction set by the institution itself
10	- (Internal Regulations, para. 20)	Samples of clothing	Separate ministerial order [21]	Obligatory form of clothing
11	Art. 130, para. 1	Definition of a breach of the established procedure for serving a sentence	Code together with the Internal Regulations (ministerial order)	Disciplinary offence defined by reference to a subordinate act
12	Art. 131; Internal Regulations, paras. 124, 126	Regime of confinement in a disciplinary isolation cell	Ministerial order	Prohibition on taking foodstuffs and personal effects, full search, change of clothing - not provided for by the Code

Note: compiled by the authors on the basis of [2], [3], [21].

Table 1 shows that the cases fall into three groups. In the first (rows 1-5), the Code itself creates a construction of reference while determining neither the content nor the limits of what

is delegated. In the second (rows 6-10), the subordinate act does not merely specify statutory provisions but introduces independent restrictions - on property, on communication with the outside world, on the use of time, and on appearance - and in part transfers them further down to the head of the institution. In the third (rows 11-12) subordinate regulation enters the sphere of disciplinary liability, where the requirement of statutory form is most acute because the consequence is an additional restriction of personal liberty. The second and third groups call for transfer to the level of statute; the first calls for the Code itself to define the limits of delegation.

The German legal order resolved an analogous question more than half a century ago, from a position functionally identical to the present Kazakhstani one. Until 1972 the execution of custodial sentences in the Federal Republic of Germany was regulated predominantly by departmental prescriptions, and restrictions on prisoners were justified by the doctrine of the special power relationship, under which a person in heightened subordination to the state was treated as removed from the general guarantees of fundamental rights. By its decision of 14 March 1972, the Federal Constitutional Court rejected that doctrine [22], holding that the fundamental rights of prisoners may be limited only by statute or on the basis of a statute, and directing the legislature to enact one. The transitional period it allowed ended with the Prison Act of 1976 [23].

The principle formulated in 1972 was confirmed by the Federal Constitutional Court thirty-four years later. By its judgment of 31 May 2006 [26] the Court held to be unconstitutional a situation in which the execution of sentences in respect of juveniles was carried out without an adequate statutory basis, and stated that measures intruding into the fundamental rights of a prisoner require a statute irrespective of the category of prisoner concerned. The consistency of that approach over more than three decades indicates that what is at issue is not a particular decision but a constitutional principle.

The comparison reveals common starting points and divergent outcomes. The German doctrine of the special power relationship rested on the conception that a person placed in an institution is in a special legal condition where the general guarantees operate with exceptions and the administration determines the internal order. The Kazakhstani construction does not reproduce that doctrine dogmatically - the Criminal Executive Code expressly recognises the fundamental rights of a convicted person and prohibits degrading treatment - but it does reproduce its practical result: the administration, not statute, sets the scope of the restrictions. Germany abandoned the model as incompatible with the requirement of statutory form. Kazakhstan retains it although its Constitution is textually stricter than the German text: paragraph 1 of Article 19 of the Basic Law [27] permits a fundamental right to be limited by a statute or on the basis of a statute, whereas paragraph 1 of Article 41 speaks of limitation only by laws, without mentioning acts issued on the basis of a law.

The difference in wording is material for the assessment of the permissibility of delegation. The German construction expressly envisages the possibility of limitation on the basis of a statute and therefore permits subordinate specification provided that the essential parameters of the limitation are determined by the legislature. It was precisely that condition which underlay the decision of 1972: the Court required not the elimination of all subordinate regulation but that what is essential be decided by statute. The Kazakhstani provision contains no such proviso. It does not follow that subordinate regulation of the execution of sentences is inadmissible altogether in Kazakhstan: organisational and technical matters - the form of registers, the procedure for drawing up documents, the arrangement of premises - do not by their nature constitute a limitation of rights and may be regulated by a departmental act. But it does follow that matters going to the substance of a restriction must be decided by statute.

The German experience cannot, however, be transferred to Kazakhstan as a whole. The comparison is productive only if the elements of the German model which express a general constitutional principle are distinguished from those which are due to the specific features of the German constitutional and legislative system.

Three elements are of general significance and can be applied to the Kazakhstani system. The first is the principle itself, subsequently generalised in German doctrine as the requirement that the essential questions of the exercise of fundamental rights be decided by the legislature (the so-called essentiality doctrine, Wesentlichkeitstheorie). It rests not on features peculiar to the Basic Law, but on the requirement of statutory form as such, and since paragraph 1 of Article 41 of the Constitution of Kazakhstan formulates that requirement more strictly than the German text, the principle applies to Kazakhstan a fortiori. The second is the legislative technique of the Prison Act of 1976 [23]. The statute itself regulates visits, correspondence and telephone communication, the items a prisoner may possess, security measures, and the grounds, types and procedure of disciplinary measures. The house rules issued by the head of the institution (section 161) govern visiting hours, working time, leisure and rest periods, but they are an organisational act operating within the guarantees fixed by the statute and do not create restrictions of their own. Where the statute contains no special rule, section 4(2) permits only those restrictions which are indispensable for maintaining security or averting a serious disturbance of order in the institution. That construction - an exhaustive statutory catalogue of restrictions, house rules confined to organisation, and a narrow residual clause tied to a strict test of necessity - is directly relevant to the daily routine approved by the head of a Kazakhstani institution (Table 1, row 8) and to the recasting of Articles 11, 104 and 130 of the Criminal Executive Code. The third is the combination of a closed statutory list of disciplinary measures with procedural guarantees, including the hearing of the prisoner before a measure is imposed, and with the right to apply to a court against any measure of the administration (sections 102-106 and 109 et seq.). It is precisely this combination that the Kazakhstani regulation of placement in a disciplinary isolation cell lacks.

Other elements are due to the specifics of the German system and cannot be transferred. First, as noted above, the admissibility of subordinate specification in Germany rests on the express words of paragraph 1 of Article 19 of the Basic Law [27], which permits limitation 'by or on the basis of a statute'. The Kazakhstani provision contains no such clause, so the German degree of tolerance towards administrative regulation cannot serve as a benchmark, and even a residual clause of the type found in section 4(2) would be acceptable in Kazakhstan only as a basis for individual measures in a specific situation, not for general rule-making by the authorised body. Second, the German model is conditioned by federalism: following the constitutional reform of 2006 [32], legislative competence for the execution of sentences passed to the Länder, and the federal Prison Act has for the most part been superseded by Land statutes. For unitary Kazakhstan the relevant element is not that diversity but the level of regulation, which can be secured within the Criminal Executive Code or a single special statute. Third, the German model relies on institutions specific to German judicial organisation - the individual constitutional complaint by which the 1972 case reached the Federal Constitutional Court, and the specialised penal enforcement chambers of the regional courts which review measures of the prison administration. What can be borrowed is the function of judicial control over measures restricting the rights of a convicted person, not its institutional form, which in Kazakhstan has to be built into the existing system of courts.

Accordingly, what Kazakhstan can take from German experience is the principle and the legislative technique, not the particular constitutional wording, the federal distribution of competence or the court structure. The proposals formulated in the conclusion are built on those transferable elements, adjusted for the stricter wording of Article 41 and for the unitary structure of the state.

International standards for the treatment of prisoners lay down in this respect a requirement lower than that of the Kazakhstani Constitution. Rule 37 of the United Nations Standard Minimum Rules [24] provides that the conduct constituting a disciplinary offence, the types and duration of the sanctions that may be imposed and the authority competent to impose them shall always be subject to authorisation by law or by the regulation of the competent administrative authority. Rule 39 provides that no prisoner shall be sanctioned except under the terms of the law or regulation referred to in Rule 37. The international standard thus recognises as admissible the definition of a disciplinary offence by a departmental act.

From this follows a conclusion of importance for the assessment of the Kazakhstani model. Conformity with an international minimum standard does not release a state from compliance with its own constitutional provision where the latter lays down a higher requirement. The Nelson Mandela Rules formulate a minimum acceptable to legal orders of differing constitutional traditions, including those whose constitutions contain no reservation as to the statutory form of the limitation of rights. The Constitution of Kazakhstan does contain such a reservation, and in a version which admits of no limitation otherwise than by laws. A reference to conformity with the Nelson Mandela Rules cannot therefore serve as a justification for retaining the present construction: the international standard determines the lower boundary, whereas the constitutional provision determines the form which is obligatory for the state concerned.

The European Prison Rules [25] proceed from the position that persons deprived of liberty retain all rights of which a court has not lawfully deprived them, and that restrictions must be the minimum necessary and proportionate to the legitimate aim. The case-law of the European Court of Human Rights develops that position through the requirement as to the quality of the legal basis. A prisoner retains the Convention rights except the right to liberty lawfully withdrawn [28]; a special regime of confinement is subject to periodic review and judicial control [29]; prolonged restrictions on visits imposed in general terms without individual assessment are disproportionate [30]; applying a restriction without weighing the competing interests in the particular case is impermissible [31]. A restriction must therefore have a clear legal basis, be foreseeable and admit of review.

The significance of the form in which a restriction is laid down is not exhausted by legal dogmatics. The empirical studies cited above [7]; [9]; [10] converge in showing that in the absence of a clear statutory requirement its place is taken by the professional conceptions of the staff and by the priorities of the administration, with the result that the volume of opportunities actually recognised as belonging to a convicted person ceases to be determinate. Laying a restriction down by statute gives the status of a convicted person a stability which subordinate regulation cannot provide.

Finally, an objection which may be raised against the position set out above should be considered. It is that an exhaustive regulation of the regime for serving a sentence by statute is practically unachievable: the regime comprises a multitude of details requiring prompt alteration, and to transfer them to the level of statute would make the regulation inflexible. That objection deserves consideration but does not withstand the test of experience. As shown

above, the German Prison Act of 1976 [23] regulated the substance of the regime by statute while leaving organisational matters to house rules and to the subordinate level. The dividing line therefore runs not between the possible and the impossible but between the essential and the technical, and to draw that line is a task within the capacity of a legislature.

A second objection is that the Internal Regulations are issued on the basis of a statute - sub-paragraph 16) of paragraph 1 of Article 16 - so that paragraph 1 of Article 41 is formally complied with. That conflates the basis for issuing an act with the basis for limiting a right. A power to issue an act does not convert its content into the content of a statute. Were it otherwise, the requirement of statutory form would lose all meaning: it would suffice to provide in any statute that the procedure for exercising the right concerned is determined by the authorised body, and the constitutional guarantee would be spent. That is precisely the argument the Federal Constitutional Court rejected in 1972 [22]: a blanket power conferred on the administration is not equivalent to a legislative resolution of the question.

Conclusion

The study confirms the hypothesis and permits the following principal conclusions.

First, from 1 July 2026 the right to personal liberty was removed from the list of non-derogable rights and placed within the general regime of Article 41 of the Constitution. That change eliminated an internal contradiction in the former construction, but it also means that every additional restriction of the liberty of a convicted person beyond imprisonment itself is subject to the requirement that rights be limited only by law.

Second, bringing the Criminal Executive Code into conformity with the new Constitution was predominantly an exercise in drafting technique. The legislature took the revised constitutional provision into account selectively: it transferred the new grounds of limitation into the prohibitory provision of Article 110, but left untouched the provisions which form the core of the legal status of a convicted person and the limits of its restriction.

Third, the substantive content of that status is determined not by the Code but by subordinate acts, and the chain of delegation reaches an order of the head of the institution, which is not a normative legal act. As Table 1 shows, subordinate regulation is not confined to technical specification: it introduces independent restrictions and defines the disciplinary offence for which a convicted person may be placed in a disciplinary isolation cell by decision of the head of the institution without judicial authorisation. It is here that the discrepancy with paragraph 1 of Article 41 of the Constitution is most acute.

Fourth, German experience shows that the problem is resolvable by statute. The principle that the essential questions of restriction are decided by the legislature, the technique of an exhaustive statutory catalogue of restrictions with house rules confined to organisation, and a closed list of disciplinary measures under judicial control can be applied in Kazakhstan; the permissive wording of the Basic Law, the federal distribution of competence and the German court structure cannot. Nor does conformity with the lower international standard of Rule 37 of the Nelson Mandela Rules remove the problem, since the Constitution of Kazakhstan lays down a stricter requirement.

The following is accordingly proposed.

Paragraph 1 of Article 11 of the Code should be supplemented by an exhaustive list of the fundamental duties of a convicted person, and the reference to other legal acts should be removed

from sub-paragraph 1). The duty to observe the internal regulations may remain, but only for matters of an organisational and technical character whose range the Code itself defines.

Restrictions going to the substance of the regime should be transferred from the Internal Regulations to the Code: above all the list of prohibited items, the procedure for and frequency of correspondence, visits and telephone conversations, the grounds and procedure for restricting them, and the conditions of confinement in a disciplinary isolation cell, a single cell and a temporary isolation premises. The procedure for exercising the corresponding rights, and organisational and technical matters not amounting to an independent restriction, may remain at the subordinate level.

Paragraph 1 of Article 130 should be recast to contain an exhaustive list of the acts constituting a breach of the established procedure, with the blanket reference to the internal regulations removed. The existing paragraph 2 of the same article, listing gross breaches, shows that the Code is capable of that drafting technique.

Paragraph 1 of Article 16 should be supplemented by a provision on the limits of delegation, establishing that rules approved by the authorised body may not impose duties or prohibitions absent from the Code and may not worsen the position of a convicted person as compared with the Code.

Placement in a disciplinary isolation cell and transfer to a single cell, which additionally restrict personal liberty, should be accompanied by procedural guarantees commensurate with that character. The minimum solution is a right to challenge the decision before a court with execution suspended pending the challenge; the consistent solution is judicial authorisation of placement in a disciplinary isolation cell beyond a statutory limit.

In the longer term, the enactment of a separate statute on the execution of custodial sentences deserves consideration, regulating regime restrictions with a completeness that obviates extensive departmental rule-making. Retaining the present construction under the new constitutional provision leaves the legal status of a convicted person resting on a source which the Constitution does not intend for it.

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The contribution of authors.

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