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Incentives and penalties as a means of ensuring the regime of detention of suspects and defendants

The article deals with the incentives and penalties applied to suspects and accused persons during their detention. The author reveals the doctrinal approaches in determining the incentives and punishments, the views through the prism of historical development, efficiency. New approaches to the study of this problem can be expressed in theoretical statements proposed by the author, as well as in the system of proposals to improve the legislation.

Key words: the suspects and accused under detention, incentives and penalties, detention in custody, execution of a measure of restraint in the form of arrest.

The order and conditions of detention of suspects and defendants are provided with certain means which in scientific literature are called as a means of ensuring the regime of detention. Explanation of their meaning has not only theoretical, but also practical value.

Since there have not been any special scientific research on the given theme, we will base on the criminal and executive literature devoted to the means of ensuring the regime of serving the punishment in the form of imprisonment. There are many common features between the latter and the means of ensuring the regime of detention in custody. These differences are mainly caused by isolation from society and external similarity of detention in custody and execution of the punishment in the form of imprisonment.

In their research the authors deal with the problem of means of ensuring the regime of serving the punishment in the form of imprisonment, but they ambiguously open their contents. Most likely it is caused by the lack of accurate definition of means of ensuring the regime. Thus, N.A.Belayev writes that the regime, as a correction facility, is guaranteed by the system of incentives and penalties. In his opinion, the regime must provide the protection and isolation of all prisoners and constant surveillance over them, as well as separate placement, performance of duties, etc. [1; 125]. N.A.Struchkov considered the custody of convicts, surveillance over them, system of measures of incentives and penalties and rigidity of administration as the means of ensuring the regime [2; 80]. A.A.Novikov considering the matter, notes that the regime of serving the punishment established in correctional institutions is provided by the guard and surveillance over the convicts, measures of incentives and penalties, special security measures (handcuffs, a strait jacket, etc.), and also investigative operations [3; 42]. A.B.Skakov refers protection and supervision over the convicts, measures of incentives and penalties and security measures (in exceptional cases) to the means of ensuring the regime [4; 115]. Though the above-mentioned definitions have minor differences, nevertheless all of them include guard and surveillance over the convicts as well as measures of incentives and penalties into the means of ensuring the regime.

A number of scientists include other elements into the means of ensuring the regime in correctional institutions, with an attempt to classify them. For example, K.Sh. Sadreyev thinks that the main classification of means of ensuring the regime must be carried out by the subjects applying these means: activity of administration of CLC (correctional labour colony); the guard and supervision carried out by CLC personnel; activity of the amateur clubs for convicts; judicial control; departmental control; public prosecutor's supervision [5; 12]. A.I.Vasilyev, A.V.Maslikhin, V.A.Fefelov classified the means of ensuring the regime into three groups according to their legal nature. The first group includes the persuasive means of ensuring the regime: legal education of the convicts; agitation and propaganda activities; individual work with the convicts, use of incentives, public influence on the convicts, influence of the amateur clubs. The second group includes the coercive means of ensuring the regime which are used by the administration of CLC: the guard of the convicts, supervision of the convicts; application of measures of quick and preventive character; application of disciplinary measures; application of security measures. The third group includes the means of ensuring the regime which have the state and legal character. They are applied not by the administration of CLC, but the higher bodies, institutions and the organizations: departmental control; judicial control; public prosecutor's supervision [6; 10]. I.V.Shmarov divides all means of ensuring the regime into two groups: of general and

special character. Means of the general character are such measures of educational influence which provide the law-obedient behavior, observance of requirements of legality by subjects and participants of legal relations. Special means are the influence methods guaranteed by the criminal and executive legislation which provide prevention and control of crimes and offenses in correctional institutions [7; 327]. We shall note that the given classifications and criteria cover all kinds of means of ensuring the regime. We consider this approach to be reasonable.

We think that special means of ensuring the detention regime are as follows: application of measures of incentives and penalties; investigative activities; guard and supervision over the convicts; application of security measures. In the present article we will in detail consider such means of ensuring the regime as incentives and penalties.

Use of measures of incentives and penalties as a means of ensuring the regime represent the reaction of administration of a pre-trial detention center which can be either approval and stimulation of lawful behavior of the suspects and accused, or censure of their misconduct and coercion to strict observance of the rules of behaviour established by the law in the places of detention. In this case the reaction of administration has to cause in the violator understanding of the fact that the imposed penalty is a consequence of the violation. Subsequently, the legislator establishes that the penalty can be imposed no later than ten days from the date of violation detection. If there was an inspection in connection with this violation, the penalty is set from the date of its termination. As a rule, a penalty is applied immediately, but in some cases when there are any sufficient reasons, for example, necessity of a convict's convoy for carrying out the corresponding investigative actions, an illness of the prisoner, etc. — no later than a month from the date of imposing the penalty. We see this approach of the legislator as reasonable, as a significant gap between the violation and a penalty will probably decrease the educational value of the taken measures.

According to the Article 37 of the Republic of Kazakhstan Law «On the order and conditions of detention of persons in special establishments providing temporary isolation from society» the disciplinary measures in the form of reprimand or putting into isolation cell or a solitary confinement for non-performance of the established duties can be applied to the suspects and accused. It should be noted that in earlier existing legislation (The provision on a pre-trial detention, 1969) the list of penalty measures was much wider. Along with the disciplinary measures provided in the current legislation, such penalty measures were applied: warning, extra duty (cleaning the rooms), deprivation of the right within a month to buy food and to receive parcels. The legislator's refusal of these disciplinary measures is quite explainable. The practice showed that such disciplinary measure as the warning don't make due educational impact on the violator, and, therefore, is inefficient. However, as O.Mindadze correctly noted, «it doesn't mean that the person who is in custody can't be warned in case of violation of an established order, detention regime, and tactless behavior towards the personnel or other people in custody. From now the preventions of this sort have a different legal nature. They cannot be given in written forming, are not considered as penalties, are not subjects to any legal registration ...» [8; 35, 36]. Withdrawal of such disciplinary measure as the extra duty of room cleaning is connected with the recommendation of the Minimal standard rules of the treatment of prisoners according to which «the work on service in the correctional institution cannot be used as a disciplinary punishment to the convicts» (provision 1 of Article 28) [9; 76]. The disciplinary measure in the form of deprivation of the right within one month to buy food and to receive parcels was withdrawn for its inhumane character.

Unlike the earlier existing Provision of 1969 of the Republic of Kazakhstan Law «On the order and conditions of detention of persons in special establishments providing temporary isolation from society», Article 38 in detail regulates an order of application of disciplinary measures. According to the set general rules penalties are imposed by the head of administration of a place of detention or his assistant; imposing more than one penalty for one violation is not allowed; penalty is imposed with account of circumstances of committing a violation and behavior of a prisoner; before imposing of penalty the suspect and accused must give the written explanation, and in case of refusal to give it the correspondent act is drawn; penalty in the form of reprimand is imposed in an oral or written form, other penalties — in written form; the suspects and accused have the right to address with the appeal to the higher official, the prosecutor or the court. Also the Article 38 of the Republic of Kazakhstan Laws «On the order and conditions of detention of persons in special establishments providing temporary isolation from society» establishes the terms of imposing penalties.

It is necessary to pay attention to the toughening of such disciplinary measure as putting into isolation cell or a solitary confinement. Under the Provision of 1969 the suspects and accused could be placed in a

punishment cell up to 10 days, and minors up to 5 days, According to the current legislation incarceration or a solitary confinement is prolonged up to 15 days, for the minors up to 7 days.

As putting in a punishment cell or a solitary confinement are recognized as the strictest measure of punishment, the legislator in detail regulates the order of placing into them, defines the list of violations for which these disciplinary measures are applied. These violations are: 1) oppression and insult of other suspects; 2) disobedience to legal requirements of the staff in the places of detention or other persons or their insult; 3) numerous violation of the rules of isolation; 4) storage, production and consumption of alcoholic drinks; 5) storage, production and use of other subjects, substances and food forbidden to storage and use; 6) participation in gambling; 7) small hooliganism. This list is not exhaustive. The considered penalty can be imposed for the violation of order of imprisonment which are not included in the list above, if two or more disciplinary punishments as reprimand or a placement in a solitary confinement were applied to prisoners before. In this case both penalties have to be imposed in writing, and not cancelled or removed beforehand. The severity of this disciplinary measure caused the adoption of the provision by the legislator, according to which putting in a punishment cell or in a solitary confinement is carried out on the basis of the resolution of the head of administration of a place of detention and the conclusion of the health worker about the possibility of keeping the suspect or accused in a punishment cell. The latter can be explained by the fact that severe conditions of keeping in a punishment cell or in a solitary confinement can negatively influence on the health of a sick person. This fact was taken into consideration in the provision of Article 39 part 4: «The head of administration of a place of detention has the right to delay the execution of penalty in the form of a putting in a punishment cell or a solitary confinement, to reduce the term of this penalty or to release a suspect or accused taking into account medical indications or on other bases». The other bases are: repentance and the violator's promise not to make any violations from now on; rendering the help in crime investigation, etc.

Severity of disciplinary measures in the form of putting in a punishment cell or a solitary confinement, first of all, consists in conditions of keeping in them. By the general rule, the punishment cell is always solitary which is both a punitive measure and a measure of isolation and safety, especially if the act is connected with aggressive behavior [10; 172]. In the period of the sitting in a punishment cell or a solitary confinement, the prisoners are provided with an individual bed and bedding only during a sleeping time; any correspondence, appointment (except appointments to the defender), purchase of food products or necessities, obtaining letters or parcels, use of board games, newspapers, magazines and other literature is forbidden to them. Parcels are handed to the suspect and accused after the termination of their stay in a punishment cell or a solitary confinement.

We share A.V.Maslikhin and O.N.Mindadze's opinion that «... deprivation of walk, other strict measures and rules cause additional physical sufferings to persons who have not yet been found guilty by the court can be acquitted, ... moreover, the equipment and a condition of keeping in punishment cells are identical for the persons taken into custody as a measure of restraint and for the persons serving criminal penalty in the form of imprisonment. It is obvious that this system needs a change. The citizens who are held in custody before the court have to be in more favorable conditions, than the convicts. All restrictions must be reasonable; they must not cause useless and excess sufferings, and must correspond to the legal status of a citizen who is temporarily deprived of freedom». According to these scientists it is necessary to raise a question of inexpediency of taking such a strict measure of punishment as putting in a punishment cell [11; 43].

But the last statement is disputable. If the prisoner makes malicious violations of the regime in a place of detention, the most effective and expedient disciplinary measure capable to achieve the goals (to provide normal operating conditions of places of detention and maintenance order in them; to prevent crimes committed the convicts, etc.) is putting in a punishment cell or in a solitary confinement. It is necessary to notice that when disciplinary measures are used in practice, they do not take into a consideration if such penalties were imposed before. For example, there were the facts of putting in a punishment cell for 10 days of persons who had no disciplinary punishment, for tapping to the next cell, etc.

As for the humanization of conditions of keeping, we consider that it is necessary, firstly, to change the in a punishment cell: for adults — up to 10 days, for the minors — up to 5 days. Secondly, it is necessary to remove a ban to buy food and necessities. These restrictions of rights, in our opinion, contradict the legal status of the suspects and accused and the principle of Article 4 of the Republic of Kazakhstan Law «On the order and conditions of detention of persons in special establishments providing temporary isolation from society» which says that detention shouldn't be followed by the actions aiming at causing physical or moral sufferings of the suspects and accused.

It is thought that sitting in a punishment cell, granting the bedding only during sleeping time, deprivation of the right for appointments, receiving a parcel, use of board games, newspapers, magazines and other literature can have educational impact on the violator, and on other prisoners respectively — constraining and precautionary.

Penalties as means of ensuring the regime must be considered together with incentives. Only the unity of incentives and penalties as the combination of methods of persuasion and constraint are one of the important means of strengthening the discipline among the persons in custody. «Measures of ensuring the discipline, — N.A.Struchkov writes, — are made up of the incentives urged to stimulate prisoner's good behaviour, and disciplinary measures which have to be negative reaction to prisoner's inadequate behavior and warn the against the violations in the future from violations» [12, 62]. In criminal and executive literature there is an opinion that incentives and penalties belong to the stimulating norms [13; 15].

Good performance of duties, observance of an established order of detention by prisoners can act as the legal grounds for incentive legal relationship. In this case the legislator, forming the reasons of incentives for suspects and accused, establishes a certain model of their lawful treatment. It is only under these conditions that incentives can be applied to certain persons.

Prisoners' good performance of duties, observance of the established order of detention, in our opinion, designate the continuous and correct observance by the suspects and accused of the detention regime, written in the internal regulations. Moreover, good performance of duties, observance of an established order by prisoners have to be based on conscious observance of regime, rules of conduct, to be steady, to turn into a habit.

The Article 36 of the Republic of Kazakhstan Law «On the order and conditions of detention of persons in special establishments providing temporary isolation from society» contains the list of measures of incentives without broad interpretation: pre-term removal of earlier imposed penalty and permission to visit the gym, and also for other forms of leisure by the minors, suspects and accused. According to provision 2 of this article, the incentives are applied by the head of administration of a place of detention or his assistant. As we see, if the penalty was earlier imposed on a full age prisoner, only one measure of incentive can be applied — early removal of earlier imposed penalty. Thus, if the person in custody had some penalties, one of them is removed, as a rule.

The article referred above doesn't include the official commendation which was provided in earlier existing Provision on a pre-trial detention (Article 14) as an incentive. The practice showed that this measure had only moral approval of a positive act but didn't make the stimulating impact, i.e. wasn't effective. The legislator didn't provide such incentive as increase of time of walk (Article 14 of Provision of 1969). Provision 11 Article 16 of the Republic of Kazakhstan Law «On the order and conditions of detention of persons in special establishments providing temporary isolation from society» provides the lower limit of the time of daily walk (not less than one hour). Therefore, the head of a place of detention has the right to establish himself the walk time for all prisoners depending on the facilities of this place, and also taking into account specific features of different categories of the suspects or accused (for example, minor, pregnant women, etc.). At the same time the increase of time of walk to such persons shouldn't be considered as incentive.

The position of the Russian legislator who, unlike the domestic legislator, provided such measure as a monetary award for the best work, deserves attention. The latter can be applied only to those prisoners who work on production in a pre-trial detention center. This incentive measure is no doubt important for prisoners, as not all of them have opportunity to have a financial support of relatives and other persons [10; 158]. It is difficult to understand why our legislator didn't establish similar incentive. Obviously, the reason is in a weak production base of the majority of pre-trial detention centers in the republic, which doesn't allow to employ a considerable part of prisoners. In our opinion, it is possible to provide this measure of incentives in the Kazakhstan legislation. Basis for its inclusion into Article 36 of the Republic of Kazakhstan Law «On the order and conditions of detention of persons in special establishments providing temporary isolation from society» is prisoners' legitimate interest in work, which according to provision 1 of Article 26 of the Law is realized in the presence of the corresponding conditions in a place of detention.

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Б.Ж.Қыздарбекова

Ынталандыру және жазалау шаралары сезіктілер мен айыпталушыларды қамауда ұстауды қамтамасыз етудің құралы ретінде

Мақалада сезіктілер мен айыптаушыларды қамауда ұстау кезінде қолданылатын ынталандыру және жазалау шаралары талданды, көтермелеу мен өндіріп алу шараларының түсініктері айқындалып, олардың қолдану тиімділігін арттыру, көтермелеу мен өндіріп алу шаралары институтының тарихи даму кезеңі арқылы қарастырылды. Осы аталған институттың құқықтық реттелу мәселелері баяндалды. Бұл мәселені зерттеудің жаңа жолдары автормен теориялық ережелерде, сондай-ақ заңнаманы жетілдіру бойынша ұсыныстар жүйесінде көрсетілді.

Б.Ж.Қыздарбекова

Меры поощрения и взыскания как средства обеспечения режима содержания под стражей подозреваемых и обвиняемых

В статье анализируются меры поощрения и взыскания, применяемые к подозреваемым и обвиняемым в период содержания их под стражей. Автор раскрывает доктринальные подходы в определении мер поощрения и взыскания, их виды через призму исторического развития, эффективность применения. Новые подходы к исследованию проблемы правового регулирования данного института выражаются в сформулированных автором теоретических положениях, а также в системе предложений по совершенствованию законодательства.

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