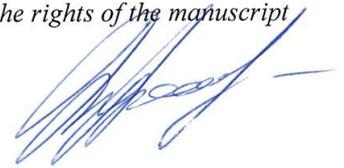


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**JUDICIAL CONTROL OVER COMPLIANCE WITH THE LAW
RIGHT TO LIBERTY AND SECURITY OF PERSON**

Specialty 12.00.15-Civil procedure; arbitration process

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ANNOTATION

Relevance of the research topic.

Human and civil rights and freedoms, their maintenance and observance, are one of the most important guidelines of the internal policy of any democratic state. In the Russian Federation, in order to implement modern trends in "humanitarian law", which addresses the priority of individual rights and freedoms, various mechanisms for effective monitoring of their compliance have been established. At the same time, the most significant, inalienable and inalienable rights of the individual, including the right to freedom and personal inviolability, are subject to state control by the court.

Judicial control over the legality of the use by the state of measures of public coercion that restrict the rights and freedoms of citizens is carried out in order to create guarantees of the inadmissibility of arbitrary interference by the state and society in the rights of the individual, and, at the same time, provides protection of public (state and public) interests in the presence of a threat of their violation.

The Code of administrative procedure of the Russian Federation, which was put into effect in 2015, established the institution of judicial control over the observance of citizens, rights and freedoms in the exercise by state bodies and other organizations and officials of their powers of public authority, which was an important step not only in creating a system of administrative legal proceedings in the Russian Federation, but also in ensuring the positive obligations of the state to respect human and civil rights and freedoms.

Special attention should be paid to the sphere of judicial control over the observance of the right to freedom and personal inviolability, which is one of the most important natural inalienable rights of the individual.

Interference with the exercise of this right by a citizen occurs when a number of measures of public coercion are applied, such as pre-school medical intervention in its various forms, educational and preventive measures in the form of placement of minors in special institutions, placement of foreign citizens and stateless persons in temporary detention centers, etc.

It should be noted that in the framework of administrative proceedings the courts are monitoring compliance with the right to freedom and personal inviolability in respect of particularly vulnerable categories of the population such as juveniles, the sick, the elderly, migrants, indicating the need for special, delicate approach to the resolution of administrative cases involving the restriction of freedom of citizens in that category, and increased level of procedural guarantees of inadmissibility of the unlawful and arbitrary curtailment of the right to freedom and personal inviolability.

At the same time, judicial control over the observance of the right to freedom and personal integrity in administrative proceedings was not the subject of a separate comprehensive study, which determines the relevance of the dissertation research.

New challenges of our time, the spread of dangerous infectious diseases pose new questions for humanity about the facets of the relationship between the individual and the state, on the balance between the interests of society and the need to respect human and civil rights and freedoms when the state applies measures of public coercion, including involuntary medical intervention, that restrict individual rights and freedoms.

Taking into account the above, it is important to systematically analyze and understand the essence of judicial control over the observance of the right to freedom and personal integrity, to understand its features in administrative proceedings, to study the totality of its legal regulation and law enforcement practice, which the author attempted in this study.

The above conditions the relevance of the topic of dissertation research. Systematic and in-depth study of the foundations of judicial control meets the challenges of the time and can contribute to the development of necessary legal regulation of issues of involuntary interference in the rights of individuals in the public interest and judicial control over its implementation.

The aim of the research is a comprehensive scientific analysis of patterns of organization and functioning of judicial control over the observance of the right to freedom and personal inviolability, as well as substantiation of the concept of judicial control over observance of this law in administrative proceedings with the determination of the optimum types of judicial control and optimum procedure for its implementation.

The object of the research is social relations that arise between citizens; actors with the authority on the application of measures of public coercion, restricting the right of citizens to freedom and personal immunity, and the court, when checking the last of the lawfulness of restrictions applied in a special procedure, administrative procedure, due to the special nature of the right to liberty and security of person, the nature and essence of social relations, resulting in its limitation.

Subject of research are the philosophical and legal-theoretical ideas about the nature of the right to free and security of person; scientific and legal position prevailing at the judicial review in various industry types of proceedings; rules of international and Russian law regulating the relations in the application of government measures restricting the right of citizens to freedom and personal integrity, and establish a mechanism of implementation of judicial control of observance of this law and the legitimacy of the application of coercive measures; the practice of international Treaty bodies and the Russian judicial practice in administrative cases related to the implementation of judicial control over the observance of the right to liberty and security of person.

The scientific novelty of the research is determined by the fact that for the first time a comprehensive systematic study of the procedure of judicial control over the observance of the right to freedom and personal integrity, implemented by courts in administrative proceedings, was carried out. The conducted research allowed to form a complete concept of judicial control over compliance with

this right and on its basis to develop proposals for optimizing the procedural form of consideration of this category of cases and the development of common principles and rules for their consideration, regardless of the grounds for limiting this right and the subject composition of material and procedural legal relations, within which this restriction is made.

In a concentrated form, the scientific novelty of the study is expressed in the following main provisions, which are submitted for defense:

1. The nature of the right to liberty and security of person determines the nature and extent of permissible limitations of this right and determines the establishment by the legislator of a limited range of grounds for the application by the state of measures necessary in a democratic society that involve interference in the exercise of this right.

2. The optimal form of state control over the observance of specified rights that protect him from undue restrictions, is judicial control, which should be done not only in respect of the right to freedom and personal inviolability, but also in relation to other important, fundamental constitutional rights of man and citizen, such as the right to health, to respect for private and family life, confidentiality of correspondence, inviolability of domicile, freedom of dissemination of information.

3. The most effective form of judicial control over the observance of the right to freedom and personal inviolability is a straight solid preliminary judicial control, providing for mandatory operational check of the grounds for limitation of the right to liberty and security of person regardless of the relationship of a person to such limit that a necessity test be applied to the face of public coercive measures and their proportionality to the protection of publicly significant interests.

At the same time, depending on the nature and degree of restriction of the right to freedom and personal integrity, preliminary judicial control in the application of certain measures of state coercion that do not affect the very essence of this right (for example, when establishing administrative supervision of persons released from places of deprivation of liberty) it can be replaced by subsequent judicial control, which will help to optimize legal proceedings.

4. The public, authoritative nature of legal relations arising from the restriction of the right of citizens to freedom and personal integrity determines the need for judicial control over the observance of this right when the state implements restrictive measures not related to criminal prosecution and bringing to administrative responsibility, in the course of administrative proceedings.

The essence of material legal relations on restricting the right to freedom and personal integrity is characterized by the absence of a legal dispute between the parties as a mandatory component of the legal relationship. The necessity of bringing a body with public powers to court is due to the procedure established by law for mandatory judicial verification of the legality применения данным of the use of a coercive measure by this body, which restricts the right to freedom and personal integrity, and obtaining a court sanction for its use. The main role of the court in this category of cases

is preventive – the court, checking the legality of application of measures of public coercion, does not allow arbitrary and unjustified violations of the rights of a particular subject to freedom and personal inviolability and prevents possible violation of the rights and legitimate interests of an indefinite circle of persons, society and state.

The analysis of the legal nature of this category of cases allows us to conclude that the optimal procedural form of judicial control over the observance of the right to freedom and personal integrity will be special proceedings as a special type of administrative proceedings, in which the court does not resolve a dispute about the right.

Special administrative procedure is offered as a generic procedure for the court to review all administrative cases on judicial review, in which the court, establishing certain facts, authorizes the actions of public authority, entailing the emergence, change or termination of public legal relations between them and private entities, regardless of whether the dispute between the parties about administrative law and any disputes under existing legal relations

The main distinguishing features of this type of legal proceedings are:

- absence of a dispute about a material right as a mandatory criterion that is the basis for initiating a case in court;
- the purpose of applying to the court is to protect a particularly important public interest (in some cases, private– public) for the state and society, which is threatened if certain measures of public coercion are not applied to a citizen.
- special functions of the court (control, sanction (permissive), law enforcement and human rights), due to the legal nature of cases on judicial control.

5. It is proposed to include in the subject of judicial control over the observance of the right to freedom and personal integrity, carried out in the framework of administrative proceedings, all types of forced medical intervention, carried out involuntarily by organizations and officials with the authority to apply them.

6. It is also proposed to make the issue of extension and early termination of the use of public enforcement measures that restrict the right of citizens to freedom and personal integrity a subject of mandatory judicial review, as well as the transfer of citizens against whom these measures have been applied to another institution in all cases related to restrictions on the right to freedom and personal integrity.

7. Taking into account the common legal nature of various categories of cases related to the exercise of judicial control over the observance of the right to freedom and personal integrity, the author comes to the conclusion that it is necessary to approve General procedural rules for their consideration and formulates the main ones.

8. It is proposed to expand the range of participants in administrative cases on judicial control over the observance of the right to freedom and personal integrity by involving civil society institutions and state bodies in the judicial process and giving them the right to give opinions on the case, as well as persons whose rights and legitimate interests are affected by the use of restrictive measures.

9. Given the need for timely protection of public interests and a life and/or health of the citizen the possibility of adoption by the court of the studied category of cases of provisional measures of protection of public or private-public interest relating to the application against a person of measures restricting the right to liberty and security of person, for a period until the hearing on the merits.

10. In matters of judicial control over involuntary medical intervention it is proposed that subject to judicial review not only the reasonableness of these measures ("to treat or not to treat?"), but the order and timing of their application ("how to treat and how long to treat?»)this requires making appropriate changes, to both the substantive and procedural legislation.

11. The author comes to the conclusion that the purpose of judicial control over the observance of the right to freedom and personal inviolability is to harmonize private and public interest, that is, bringing them into a state of mutual matching, where the nature and extent of court-sanctioned restrictions correspond to the degree of threats to the public and the private-public interests arising in the case of non-use of measures restricting the right of citizens to freedom and personal inviolability.

The main provisions of the dissertation were reported by the author at 8 scientific and practical conferences, including:

- International scientific and practical conference on "Administrative legal proceedings: problems and prospects of development", held by the Russian state University of justice in cooperation with the Supreme Court of the Russian Federation" (Moscow, 2018);

- All-Russian scientific conference "25 years of the Constitution of the Russian Federation: traditions and innovations of state and legal development", organized by Tambov state University named after G. R. Derzhavin in October 2018;

- II International scientific conference "Tambov legal readings named after F. N. Plevako" (Tambov, 2018);

- III International scientific and practical conference "Tambov legal readings named after F. N. Plevako", organized by Tambov state University named after G. R. Derzhavin in may 2019;

In addition, to discuss the main conclusions of the study, the author held two interregional scientific and practical conferences on the basis of the Tambov regional court on the following topics: "Judicial control over the observance of the right to freedom and personal inviolability in administrative proceedings" and "Administrative proceedings: observance and protection of human rights".

A number of provisions of the dissertation research approved by the author in the working group of the Supreme Court of the Russian Federation for the preparation and discussion of the draft Federal law "On amendments to the Code of administrative procedure of the Russian Federation and the Federal law "About bases of system of prevention of neglect and offenses of minors" approved by the Resolution of Plenum of the Supreme Court of the Russian Federation No. 51 of 25.12.2018 G.¹ and submitted to the Supreme Court of the Russian Federation in the State Duma of the Federal Assembly of the Russian Federation, and pry the development of the draft resolution of the Plenum of the Supreme Court of the Russian Federation "About some questions arising by consideration and resolution by courts of administrative cases of the hospitalization of a citizen in medical anti-tuberculosis organization in involuntary".²

The results of the research were used by the author in the process of teaching. Problematic issues of the dissertation research were submitted by the author to the judges of the Tambov and Tver regions for discussion by conducting a questionnaire, the results of which were taken into account when formulating the conclusions of the work.

The main theoretical conclusions of the dissertation research, suggestions and recommendations are presented by the author in 19 publications, including:

Articles in peer-reviewed scientific publications recommended by the higher attestation Commission of the Ministry of education and science of Russia for publishing the results of PhD research

1. Burashnikova N. A. "Some aspects of judicial control over the observance of the right to freedom and personal inviolability in administrative proceedings" // Bulletin of the Tver state University. PRAVO series, 2017, no. 4.

2. Burashnikova N. A. "Judicial control over the observance of the right to freedom and personal integrity: cases on the placement of juvenile delinquents in special institutions" // Bulletin of the Tver state University. PRAVO series, 2018, no. 1.

3. Burashnikova N. A. "Order of consideration of cases on placement of minors in temporary detention centers for juvenile delinquents: problems of legal regulation" // "Russian justice", 2019, No. 1.

¹ Постановление Пленума Верховного Суда РФ от 25.12.2018 г. № 51 «О внесении в Государственную Думу Федерального Собрания Российской Федерации проекта федерального закона «О внесении изменений в Кодекс административного судопроизводства Российской Федерации и Федеральный закон "Об основах системы профилактики безнадзорности и правонарушений несовершеннолетних». Документ опубликован не был. Доступ из справ.-правовой системы «КонсультантПлюс».

² Постановление Пленума Верховного Суда РФ от 26.11.2019 N 50 "О некоторых вопросах, возникающих в связи с рассмотрением судами административных дел о госпитализации гражданина в медицинскую противотуберкулезную организацию в недобровольном порядке" // "Российская газета", N 276, 06.12.2019.

4. Burashnikova N. A. "On the issue of introducing amendments to the Code of administrative legal proceedings of the Russian Federation" // Rossiiskoe pravosudstvo, 2019, No. 12.

Articles in publications recommended by the Ranepa academic Council for publishing articles on jurisprudence

1. Burashnikova N. A. "COVID-19: legal regulation of involuntary medical intervention" // Law, No. 7, 2020. P. 47.

Other articles

1. Burashnikova N. A. "Judicial practice in cases of forced hospitalization to a psychiatric hospital" // Judge, No. 3, 2017.

2. Burashnikova N. A. "Judicial authorization of involuntary medical care in the Russian Federation" // Precedents of the European Court of human rights, 2018, No. 3 (51).

3. Burashnikova N. A. "Principles of consideration of cases of forced hospitalization to a psychiatric hospital in the light of ECHR decisions" // Judge, No. 2, 2017.

4. Burashnikova N. A. "Judicial authorization of compulsory medical care of persons with tuberculosis" // Judge, 2018, no. 11.

5. Burashnikova N. A. "On the need for amendments to the Code of administrative legal proceedings of the Russian Federation and the Federal law "On the basics of the system of prevention of neglect and delinquency of minors" // Journal of administrative legal proceedings, Federal state budgetary educational institution of higher education "Voronezh state University", 2018, No. 2.

6. Burashnikova N. A. "To the question of optimal procedural form of judicial control over the observance of the right to freedom and personal integrity" // Actual problems of the state and law, Tambov state University named after G. R. Derzhavin, 2019, no. 11. T. 3.

7. Burashnikova N. A. "Involuntary medical intervention: the experience of judicial authorization" // "Actual problems of the state and law", Tambov state University named after G. R. Derzhavin, 2020, no. 14. Vol. 4.

Materials of international, all-Russian and interregional scientific and practical conferences

1. Burashnikova N. A. "Consideration by courts of cases on compulsory hospitalization of a citizen in a psychiatric hospital in accordance with the CAS of the Russian Federation" // Actual issues of development of administrative proceedings: Materials of the scientific and practical conference. Tver, 2016.

2. Burashnikova N. A. "Order of consideration of cases on placement of minors in temporary detention centers for juvenile delinquents: problems of legal regulation" // Tambov legal readings named after F. N. Plevako. Materials of the II international scientific conference. Tambov, 2018.

3. Burashnikova N. A. "Judicial control over the observance of the right to freedom and personal inviolability in administrative proceedings" // 25 years of the Constitution of the Russian Federation: traditions and innovations of state-legal development. Proceedings of the all-Russian scientific conference, Tambov, 2018.

4. Burashnikova N. A. Judicial authorization of involuntary medical assistance to persons with tuberculosis in the system of administrative cases on judicial control over compliance with the right to freedom and personal integrity // Administrative proceedings: problems and prospects of development: Collection of scientific works based on the results of the international scientific and practical conference, Moscow, RGUP, 2019

5. Burashnikova N. A. "Legal nature of administrative cases on judicial control over compliance with the right to freedom and personal integrity. Basic rules for consideration of these cases by the courts // Judicial control over the observance of the right to freedom and personal inviolability in administrative proceedings. Collection of scientific papers based on the materials of the scientific and practical conference, Tambov, 2019.

6. Burashnikova N. A. "Criteria of fairness in administrative proceedings in the consideration by the court of cases on judicial control over the observance of the right to freedom and personal integrity" // Administrative proceedings: compliance and protection of human rights. Collection of scientific papers based on the materials of the interregional scientific and practical conference, Tambov, 2019.

Monographs and textbooks.

Administrative proceedings in questions and answers : the textbook / under total. A.A. Muravyov's publishing house. - Moscow: Prospect, 2019 - 480 p. (as part of the author's team, questions 129-132).

The structure of the dissertation is determined by the logic of solving the tasks set and consists of an introduction, two chapters including seven paragraphs, a conclusion and a bibliographic list.