

OLGA KUZNETSOVA

Doctor of Legal Sciences,
Professor of Perm State University

PRIVATE-PUBLIC COERCION IN CIVIL LAW

DOI:

Abstract: The article is devoted to the means of civil coercion which are applied for the interests of the individual, but on the initiative of power public authority – of the court, without statement of the interested party. It is proposed to call such sanctions as means of private and public coercion which exists in civil law along with the private coercion applied only for the benefit of the individual, but exclusively at their initiative. The conclusion is that such measures have not received appropriate normative formulation in Russian legislation, and appropriate development in legal doctrine. Their specificity lies in the presence of signs of both public and private coercion. It is proved that private and public coercive measures can be used only within protective coercion, i.e. in committing the offense as a negative reaction to it. At the same time the fault of the offender shall be recognized as a requirement for the application of private and public coercion. The assignment of such measures to the sphere of civil regulation causes action of a presumption of guilt of the offender and a possibility of application of all arsenal of the civil coercion mechanism, including a limitation period, rules of calculation of the size of sanction and a possibility of its reduction.

Keywords: legal coercion, civil coercion, private coercion, public coercion, private-public coercion, protective coercion.

The coercion is directed to make the person to commit undesirable actions, which go against their wishes, to restrict their free will in general. It is important to distinguish non-legal and legal coercion. Non-legal coercion is a form of infringement¹. In civil circulation non-legal coercion may occur, for example, in case of committing invalid

¹ SUSLOPAROV I.A. Extortion in Russian Law: retrospective analysis // Herald of Perm University – science journal. 2015. Issue 4. P. 114 (110-116).

deals or exceeding self-defense measures. In this context “coercion in civil law” and “civil coercion” are distinguished¹.

Legal coercion is exercised within the terms of law. It is no coincidence that the problem of free will and legal coercion is one of the main issues in modern jurisprudence²; the category of “coercion” has a fundamental, methodological value for legal science.

The problem of coercion is developed at rather high level in legal theory and in public sciences³. However results of the relevant researches concern only the question of public (state) coercion which is exercised by competent authorities and public officials, on their own initiative, on the basis of a power under law, and such coercion is in public interest. In general, the state coercion is an expression of authoritative activity of the state, manifestation of its public status. However, it is difficult to agree with the opinion that the monopoly for lawful coercion implementation belongs only to the state⁴. We believe that it is necessary to change a view on legal coercion as the exclusive right of competent public authorities and their public officials. The modern legislation provides a large number of coercive measures which can be applied by powerless (private) subjects. Individuals are also capable to influence the free will of other individuals legitimately within civil relationship. And in this context the issue of non-state private legal coercion existence has to be raised.

Unfortunately, the theory of civil coercion, having a high degree of branch specifics, is in the very initial state. Though, according to a fair remark by N.A. Barinov, “a coercion problem in civil law is one of the most important problems of the theory that requires due attention and corresponding development at the monographic and dissertation level and introductions in science and practice as an innovation”⁵.

First of all, it is vital to distinguish private and public coercion. At present, for example, the state registration of transfer of the rights of ownership, the state registration of legal entities and individual businessmen, licensing, the compulsory cessation of the legal entity, and the compulsory cessation of an ownership right are regarded as public elements in civil law, as civil coercion⁶.

¹ BEREZNOV R.JU. The correlation between the concepts of “coercion” and “compulsion” in civil law // Management in social and economic systems. Minsk, 2017. № 26. P. 96. (in Russian).

² BAUMGARDNER P. The Fundamental Contradiction Redux? Liberty, Coercion, and American Legal Development // Law and social inquiry-Journal of the American Bar Foundation. Sum 2017. Vol. 42. Issue. 3. P. 924-942; Force of law reaffirmed: Frederick Schauer meets the critics; ed. by C. BEZEMEK, N. LADAVAC. Series: Law and Philosophy Library. 2016. Vol. 117; TRETAKOV S. The concept of legal coercion and power-conferring legal regimes // Russian Law Journal. 2017. Vol. 1. P. 33-56.

³ KUDIN F.M. The theoretical basis of coercion in Soviet criminal procedure: Thesis Diss. Doctor in Legal Science. Sverdlovsk, 1987; NOKHRIN D.G. State coercion in civil proceedings: Thesis Diss. Candidate in Legal Science. M., 2006; RAZGIL'DIEVA M.B. Theory of financial and legal coercion and the spheres of its application: Thesis Diss. Doctor in Legal Science. Saratov, 2012. (in Russian).

⁴ POTACS M. Does Law Without Force Exist? // Force of law reaffirmed: Frederick Schauer meets the critics; ed. by C. Bezemek, N. Ladavac. Series: Law and Philosophy Library. 2016. Vol. 117. (P. 121–128).

⁵ BARINOV N.A. The problem of coercion in civil law // Civil Law. 2012. № 1. P. 6. (in Russian).

⁶ See: NIYAZOVA A.N. Limits and Limitations of the Title to Land: Analysis of Approaches // Herald of Perm University – science journal. 2016. Issue 1. P. 208-215.

Of course, such coercion is closely connected with civil turnover, ownership relations, business activity and other traditional spheres of civil regulation. Moreover, measures of such coercion are quite often provided in civil legislation acts. However none of this cancels the public nature of such coercion as it is implemented on the initiative and in the interest of state and society in general.

Private coercion is applied in the interest of the personified, individualized person and purely on their initiative. It has to be the subject of civil science. In this regard any coercive intervention of the state as of the powerful subject in “private affairs of civil turnover participants” cannot be recognized as civil coercion¹.

The civil law is based on the principle of optionality: the citizens (natural persons) and the legal entities acquire and exercise their civil rights of their own free will and in their own interest (paragraph 1, item 2 of Art. 1, Civil Code of the Russian Federation). According to this principle subjects of civil law exercise the rights they are entitled to at their discretion, including the right of protection of these rights.

The right of defense itself, including via the application of coercive measures, can be exercised both in jurisdictional (by means of competent authorities and public officials), and in non-jurisdictional (without such assistance, independently) forms. But this coercion occurs on the initiative and in the interest of the coercing person. The majority of coercive measures are private in civil law. The civil law allows an individual to limit the will of other individual in their private interests legitimately, without leaving a freedom to choose a pattern of behavior. As V.F. Yakovlev rightly noticed, “the empowering nature of coercion has two aspects in civil law: the first one is that coercion is used generally as means of protection of the subjective rights; the second aspect is that the use of means of protection depends on the will of the injured person and represents an individual’s ability which is established by the law, i.e. his right”².

At the same time in the Russian legislation it is possible to find coercive measures which are applied by a public body (court), without will or statement of the victim – the individual, but in the private interests of that individual, and their nature is not defined in the legal doctrine.

Such coercive measures may include, for example:

a) penalty for the violation of the voluntary meeting consumer requirements (item 6 of Art. 13, Law of the Russian Federation on Consumer Rights Protection);

б) recovery of property damage by the judge simultaneously with imposition of administrative punishment (item 1 of Art. 4.7, Code of Administrative Offences of the Russian Federation);

¹ KARHALEV D.N. Civil law coercion // Bulletin of the Ufa Law Institute of the Ministry of Internal Affairs of Russia. 2014. № 1. P. 26-30. (in Russian).

² JAKOVLEV V.F. Civil-law method of regulation of public relations. Sverdlovsk, 1972. P. 117–118. *See also:* JAKOVLEV V.F. Coercion in Civil Law // Problems of modern civil law: a collection of articles. M.: Statut, 2000. P. 210–222. (in Russian).

в) elimination from civil circulation and destruction at the expense of the violator of the tool, equipment or other means which are mainly used or intended for the infringement of the exclusive right to the results of intellectual activity and the means of identification (item 5 of Art. 1252, Civil Code of the Russian Federation).

The specifics of these coercive measures are that they are implemented at the initiative of competent authorities or public officials (without will of the victim), but in the interest of the individual. Taking into account the existence of such sanctions, it is impossible to agree with the opinion that “the use of coercion in civil law ... is entirely dependent on whether the person, who was injured from tort, submitted a claim to apply it”.¹ We believe that the civil science can raise the question of existence of private and public coercive measures along with private ones.

Unfortunately, the emergence of such coercive measures considerably outstripped development of the legal theory in legislation on this matter which still does not know the answer to the question about the signs of their implementation mechanism.

First of all, the law does not give a clear reference to the possibility of application of such civil coercion measures without the will (statement) of the injured person. Nonetheless, under the paragraph 2 of item 2 Art.1 of the Civil Code of the Russian Federation, civil rights may be restricted on the basis of the federal law and solely insofar as it is necessary for the purposes of protecting the fundamentals of the constitutional system, morality, health, rights and lawful interests of other persons, defense of the country and state security.

At present we can see the possibility of application of such coercive measures without a petition of the claimant (victim) only in the acts of judicial interpretation or in commentarial literature.

Thus, in terms of the penalty for the violation of the voluntary meeting consumer requirements, the Supreme Court of the Russian Federation clarified: “If the court grants the consumer’s claims for violation of their rights established by the Law on Consumer Rights Protection which were not satisfied voluntarily by the producer (the contractor, the seller, authorized organization or the authorized individual-entrepreneur, the importer), the court imposes a fine on the defendant in favor of the consumer regardless of whether such a claim was submitted to court or not (paragraph 6 of article 13 of the Law)”².

Regarding the elimination from civil circulation and destruction of the tool, equipment or other means which are mainly used or intended for the infringement of the exclusive right to the results of intellectual activity and the means of identification (item 5 Art. 1252 of the Civil Code of the Russian Federation), the highest judicial authority

¹ Grazhdanskoe pravo: uchebnik: v 2 t. [Civil Law: textbook: in 2 volumes] / Ed. by B.M. GONGALO. M.: Statut, 2016. Volume 1. P. 56. (in Russian).

² Resolution of the Plenum of the Supreme Court of the Russian Federation of June 28, 2012 № 17 “On consideration by courts of civil cases on disputes over protection of consumer rights” (item 46) // Bulletin of the Supreme Court of the Russian Federation. 2012. № 9.

clarified that this measure can be applied “also in the absence of the corresponding statement of the holder of the exclusive right” (Ruling of the Plenary Session of the Supreme Court of the Russian Federation No. 5, Plenary Session of the Supreme Arbitration Court of the Russian Federation No. 29 of 26th March 2009 “About some issues arising from the implementation of Part 4 of the Civil Code of the Russian Federation”). Furthermore, the view of law-enforcers on this matter is not shared by everyone in the legal doctrine. Thus, it is noted in one of commentaries to the Civil Code of the Russian Federation that the elimination from civil circulation and destruction of the tool, the equipment or other means which are mainly used or intended for the infringement of the exclusive right to the results of intellectual activity and the means of identification “are possible solely upon request from the rights holder, but not on the initiative of the court”.¹

Concerning the recovery of property damage simultaneously with imposition of administrative punishment, commentators come to the conclusion that “the decision of compensation of property damage can be made by the judge both independently and upon petition of the complainant”.²

In our opinion, taking into account the permissible orientation of civil regulation and other principles on which the private law is based, the possibility of use of civil sanctions by the state without initiative of the person, but in their private interests has to be directly and unambiguously specified in the law.

It is also necessary to note that in the court practice in most cases claimants made the statement (imposed a claim) about application of private and public coercive measures³. However, there are also cases in which the decision on application of coercive measures in favor of the claimant was made on the initiative of the court. Thus, citizen T. sued the LLC over the exaction of a forfeit for delay in a transfer of the apartment in the apartment building and for the compensation of moral damage. The court, having partially met the stated claim of the consumer, also exacted penalty for the refusal of the voluntary meeting claimant's requirements.⁴

The greatest difficulties are raised by the question of what legal principles should be used at application of private and public coercive measures. Such measures have

¹ Commentary on the Civil Code of the Russian Federation, Part Four (itemized) / Ed. by L.A. TRAHTENGERC. M.: “KONTRAKT”, “INFRA-M”, 2009. P. 191. (in Russian).

² AMELIN R.V., BEVZJUK E.A., VOLKOV Ju.V., VOROBEV N.I., VAHRUSHEVA Ju.N., ZHEREBCOV A.N., KORNEEVA O.V., MARCHENKO Ju.A., STEPANENKO O.V., TOMTOSOV A.A. Commentary on the Code of Administrative Offenses of the Russian Federation of December 30, 2001 №195-FZ (itemized) / prepared for SRS “ConsultantPlus”, 2014. (in Russian).

³ Decree of the Court on Intellectual Rights of December 13, 2017 №C01-1011/2017 on the case №A40-2659/2017; Decree of the Court on Intellectual Rights of December 9, 2015 №C01-502/2015 on the case №A56-83807/2014; Decree of the Seventeenth Arbitration Appeal Court of June 27, 2017 №17АП-6194/2017-AK on the case №A60-62337/2016; Appeals definition of the Perm Regional Court of October 9, 2017 on the case №33-10881/2017.

⁴ Appeals definition of the Perm Regional Court of July 5, 2017 on the case № 33-6902/2017.

attributes of both public, and private law. In addition the mechanism, the order, conditions, application terms of coercion, responsibility measures included, are different in these subsystems of the right. The opinion on this matter is also formed mainly by the highest judicial bodies. However in their interpretation they try to remain within the dichotomy “private or public coercion” therefore they do not manage to create a uniform position.

For example, in item 6, article 13 of the Consumer Rights Protection Law it is provided that if the court satisfies the claim of the consumer established by law, the court exacts a fine of fifty percent of the amount awarded by the court in favor of the consumer from the manufacturer (executor, seller, authorized organization or authorized individual entrepreneur, importer) for non-compliance with the consumer’s requirements voluntarily.

Subsequently, the Supreme Court of the Russian Federation qualified this “fine as a measure of responsibility for improper performance of an obligation”: the fine provided for in article 13 of the Consumer Rights Protection Law of the Russian Federation has a civil nature and is essentially a measure of responsibility provided by law for improper performance of obligations. This means that it is a form of penalty provided for by law”¹.

Obviously, with this approach to recovering the fine, the rules on civil liability should be applied: in particular, on statute of limitations, failure to account for entrepreneur’s fault (article 401), or amount restrictions (article 333).

Another position on this issue was taken by the Constitutional Court of the Russian Federation. The Court considers this fine to be “an independent kind of responsibility”, which exists “along with civil liability”. “As the Constitutional Court of the Russian Federation repeatedly pointed out in its decisions, in view of the special social significance of consumer protection in the sphere of trade and services and the need to ensure the proper quality of goods, the legislator along with civil liability of the manufacturer (seller, authorized organization or authorized individual entrepreneur, importer) envisaged in item 6 of article 13 of the Consumer Rights Protection Law of the Russian Federation a separate type of responsibility in form of a fine for violation of the voluntary order to satisfy the consumer’s claim as less protected party of retail sale contract, that has a public character (item 2 of article 492 of the Civil Code of the Russian Federation)...”².

With this approach, the penalty in question is not a measure of civil law coercion. And since the fine is imposed in a mandatory manner by a public authority (the

¹ Definition of the Supreme Court of the Russian Federation of October 29, 2013 № 8-KG13-12.

² Definition of the Constitutional Court of the Russian Federation of October 17, 2006 № 460-O; Definition of the Constitutional Court of the Russian Federation of December 16, 2010 № 1721-O-O; Definition of the Constitutional Court of the Russian Federation of July 14, 2011 № 946-O-O; Definition of the Constitutional Court of the Russian Federation of November 21, 2013 № 1836-O; Definition of the Constitutional Court of the Russian Federation of April 22, 2014 № 981-O.

court), regardless of the will of the consumer, by its sectoral nature, it “is drawn” to the administrative law and the mechanism of bringing to administrative responsibility is applied, including such elements as the terms of [attraction – imposing liability?], guilt as compulsory condition, or circumstances, excluding, mitigating and aggravating responsibility. It should be noted that the Constitutional Court of the Russian Federation considers it necessary to take into account the fault while applying item 6, Art. 13: “... the fault is a necessary element of the general concept of the offense, the presence of this fault is a prerequisite for the imposition of legal liability is in all the branches of law, unless otherwise directly and unequivocally established by the legislator ... The item 6 of the article 13 of the Consumer Rights Protection Law does not contain any exceptions to the general requirement specified above regarding the elements of the offense”¹.

However, if this fine is considered to be a civil coercion, in item 3 of article 401 of the Civil Code the legislator established “directly and unambiguously” that persons engaged in entrepreneurial activity regardless of the existence of guilt.

It is obvious that the recognition of guilt as a mandatory condition of application of private-public coercion should become one of its particular features, since the use of such coercion is initiated by the authority – the court. This recognition of guilt as a necessary element of the offense is due precisely to the “public legal” part of the coercion under consideration.

But in public sector of law there is a presumption of innocence i.e. the guilt of the offender is proved by the forcing person. In civil law, guilt is presumed, and its absence is proved by the forced person. The presumption of guilt in civil law is explained by the fact that “the creditor does not have data on the activities of the debtor and therefore the duty to prove the guilt of the debtor would be an insurmountable obstacle to hold the latter accountable”².

A question which arises is how should the issue of proving guilt (or innocence) under private-public coercion be resolved? Especially with the fact that the application of such coercion takes place in a civil proceeding. According to part 1 of article 56 of the Code of Civil Procedure of the Russian Federation, each party must prove the circumstances to which it refers as the grounds for its claims and objections, and in private-public coercion, the court is on the claimant’s side³.

Although private-public sanctions are applied on the initiative of the court, they are implemented in the sphere of private law regulation, and they are measures of compulsory response to civil law violations. For example, it is difficult for court to prove the fault of the seller or producer in evading the voluntary order of satisfying

¹ Definition of the Constitutional Court of the Russian Federation of December 16, 2010 № 1721-O-O.

² SHEVCHENKO G.N. Guilt as a condition of civil liability in Russian Civil Law // *Modern Law*. 2017. № 3. P. 67. (in Russian).

³ KRASHENINNIKOV P.V., RUZAKOVA O.A. Commentary on the Civil Procedure Code of the Russian Federation // *Herald of civil procedure*. 2014. № 6. P. 71-120. (in Russian).

the consumer's requirements due to a number of reasons. Firstly, the circumstances that indicate the guilt or innocence are within the sphere of the activities of the forced person. Secondly, the court is not the authority that is capable of searching for such circumstances. Thirdly, the court is objectively deprived of the opportunity to prove anything during the consideration and the resolution of cases. It should also be agreed that in general "the presumption of guilt not only ensures the interests of the victim, but also distributes the burden of proving the guilt, and significantly simplifies the civil process in cases of bringing to civil liability"¹.

Therefore, in our opinion, in applying private-public coercion guilt should be presumed, and this is the effect of its "private-legal" part.

We can find confirmation of this conclusion also in legal positions of the Constitutional Court of the Russian Federation. In particular, clarifying the application of part 1 of the article 4.7 of the Code of Administrative Offenses of the Russian Federation, the Constitutional Court of the Russian Federation explained: "A person who has been brought to administrative responsibility participates in such a dispute not as a subject of public law, but as a subject of private law and can prove in civil proceedings procedure both their innocence and the damage done to them"².

It should also be noted that, in a broad sense, coercion can be both regulative and protective. For example, in civil law, such actions as control and supervision (for example, in contract agreement control over the work of the contractor), and the need to obtain approval or consent for certain transactions limits the free will of a person.

Such coercion has an exclusively regulatory nature, and it takes place outside of any offences. In this regard, it is difficult to agree with the opinion expressed in the civil literature that "coercion can be implemented only in a protective legal relationship as regulatory law is not able to protect itself: only protective law has the ability to force by which an authorized person may satisfy his interest without or against the will of another person as a result of applying coercive measures against them"³. This approach was formed under the influence of the concept of legal coercion as a measure exclusively for unlawful behavior: "the law is protected and provided primarily by the state, and in case of violation of the requirements contained in the norms of law, state coercion is applied"⁴.

¹ GODOVALOVA M.N. The concept and meaning of presumption of guilt in civil law // Herald of Perm University – science journal. 2013. № 4. P. 141 (P. 139–146). (in Russian).

² Definition of the Constitutional Court of the Russian Federation of June 16, 2009 № 9-P "On the case on verification of the constitutionality of a number of provisions of articles 24.5, 27.1, 27.3, 27.5 and 30.7 of the Code of Administrative Offenses of the Russian Federation, item 1 of article 1070, paragraph three of article 1100 of the Civil Code of the Russian Federation and article 60 of the Civil Procedural Code of the Russian Federation in connection with complaints of citizens M.Yu. Karelin, V.K. Rogozhkin and M.V. Filandrov" // Bulletin of the Constitutional Court of the Russian Federation. 2009. № 4.

³ TKACHEVA M.A. Coercion in Russian Civil Law: Thesis Diss. Candidate in Legal Science. Saratov, 2016. P. 80. (in Russian).

⁴ SUSLINA I.A. Philosophical-legal analysis of the correlation of concepts "right", "state", "power" and "coercion" // History of State and Law. 2014. № 6. P. 3-4. (in Russian).

However, in civil law, a compulsory action can be carried out not only within the protective legal relationship. Certainly, regulatory law is unable to defend itself, but it can ensure its smooth implementation without being disrupted, and with such provision there are also elements of coercion. This approach to coercion corresponds more also to the concept of legal socialization as “the process whereby people develop their relationship with the law via the acquisition of law-related values, attitudes, and abilities”¹, that focuses not only on the use of force and punishment, but also on building consensus in execution of the requirements of law. In this case, legal coercion can be preventive and reactive.

Private-public coercion is always protective, because it arises as a reaction to a violation of subjective law and is implemented as a sanction for the civil offense.

The legal doctrine has yet to reveal all the reasons for the emergence of private-public coercion in the legislation. However, even today it is obvious that, despite the application of such measures in the interests of a particular individual, they arouse a great public, socially significant interest (full protection of rights of the consumer as a weak party in legal relations, prevention of further use of tools, equipment or other means to commit violations of exclusive rights to the results of intellectual activity and means of individualization, procedural savings in the recovery of property damage simultaneously with the imposition of administrative penalties). Measures of private-public coercion are largely due to state paternalism, in which the authoritative subject takes care of the right to defend the plaintiff, patronizes a particular victim, while not forgetting about public interest. Certainly, such “protection”, which limits the free will of a person, must be regulated in detail by law, which expressly and unequivocally establishes the conditions for the use of private-public coercion.

In this regard, it is very important that the application of private-public coercion is possible only in court, while other jurisdictional bodies and officials, and even more non-jurisdictional institutions, should not have such competence. This is due primarily to the fact that such coercion is exercised in a situation of restriction of the freedom of an individual to exercise the right to [protection – defence ?] at their own discretion.

Apart from that, it is important to establish that, since these private-public coercive measures are types of civil coercion, they are subject to the civil-legal mechanism for the application of sanctions, including in terms of the period of application (within the period of limitation), the calculation of their amount, or the possibility of reduction. For example, in respect of the amount of fine for failure to satisfy consumer claim voluntarily, the Supreme Court of the Russian Federation explained that its reduction “is possible only in exceptional cases when the penalty payable is clearly disproportionate to the consequences of the breached obligation, at the request of the respondent, indicating the reasons for which the court believes that reducing the amount of the fine is permissible”².

¹ TRINKNER R., TYLER T.R. Legal Socialization: Coercion versus Consent in an Era of Mistrust // ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE; ed. by J. HAGAN. 2016. Vol. 12. P. 417 (417-439).

² Resolution of the Plenum of the Supreme Court of the Russian Federation of June 27, 2013 №20 “On the application by courts of legislation on voluntary insurance of property of citizens” (item 45) // Bulletin of the Supreme Court of the Russian Federation. 2013. № 8.

Thus, in conclusion, we should note that in civil law there are measures of private-public coercion, which combine the signs of both private and public coercion. Even if they are used in private interest, they are used regardless of the victim's application. By fixing such measures, the legislator must clearly and unequivocally provide for the possibility and foundation for their application by the court, regardless of the victim's application. The public component of such coercive measures does not permit their application regardless of the offender's guilt, which must be presumed through the private legal component of this type of coercion. In general, they should be subject to a mechanism for imposing civil sanctions.

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Information about the author

Olga Kuznetsova (Perm, Russia) – Doctor of Legal Sciences, Professor of Perm State University (15 Bukireva St., Perm, 614990, Russia; e-mail: grazhdanskoe.pravo@gmail.com).

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