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LAW

YOUNG RESEARCHES

THE HISTORY OF THE FORMATION OF THE INSTITUTE OF CIVIL REPRESENTATION

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Annotation: the article is devoted to the study of the evolution of legal regulation of representation as a legal phenomenon, its place in the system of legal relations at different stages of the formation of the branch of civil law. Special attention is paid to the Russian legislation. The question of the concept and legal nature of representation and authority is one of the most debatable of all, touched upon by us in the monograph. Unlike most of the institutions of civil law, developed by Roman lawyers and borrowed by European and later Russian law, the doctrine of representation, as well as the institution of representation, developed in its own way. Historical and legal research of the Institute of representation will allow to trace tendencies of this legal phenomenon, to reveal regularities and to use the received material for further research of Institute and the answer to questions put initially about the legal nature of representation and authority.

Key words: subjectivity, representation, compulsory representation, voluntary representation, Roman law, Russian law, periodization, guardianship, contract of assignment (power of attorney).

For Roman private law in the archaic and pre-classical periods, the absolute principle was strict "subjectivity" [11, p. 117] of rights, i.e. binding legal relations represented a strictly personal relationship between the creditor and the debtor [9, p. 123] with some changes. Thus, in the initial era of civil law, the unconditional principle of independence in the legal sphere prevailed, [11, 118] i.e., every person was obliged to personally acquire rights for himself and defend them in a dispute.

Pantelishina O.V. correctly notes that the trend in the development of representation as an emerging legal institution of representation based on the law (mandatory) and developing towards free, contractual representation, and also states the development of the principle aimed at derogating from personal participation in civil turnover. [13, p. 7] So in this period of history we can only talk about mandatory representation. The law establishes guardianship, which is "the care and representation established by law for such people who cannot or cannot properly take care of their personality and their property at all … by youth, by illness, mental or physical, by

insane extravagance" [2, pp. 55-56]. There were two types of guardianship: tutela (guardianship in the proper sense), established over minors and women, and cura (guardianship) - over the insane and feeble-minded, minors (under 25 years of age), wasters and persons with physical disabilities (mute, deaf, blind). [2, 3, 14]

The acquisition of rights as a result of the actions of another person also stems from the manus - the power of the head of the family (paterfamilias) over all who are part of the familia, and the possession of a slave. Everything that was acquired by slaves and family members automatically became the property of the household owner, with the only difference that family members acted "on their own", and slaves - "on behalf of the master" [14, pp. 283, 294-295]. We cannot consider these relations as representative in the strict sense, since the former were not full-fledged subjects of law, slaves generally had the status of a thing - that is, they were an object of law. Yu. The Baron still considers them as representative. [1, c. 42].

Representation in Roman law, Yu. Baron divides into 2 types: representation in the expression of the will (the representative must bring the will of the other to the attention of a third person) and representation in the will (the representative must himself, instead of the other, compose the will and then express it to a third person). [1, c. 39].

Genesis of representation in Roman law Yu . The Baron presented as follows.

1. According to the ancient ius civile, the use of messengers was allowed (representation in the expression of will). When a person was authorized to conclude a transaction (representation in the will), the "representative" became obligated under the transaction, and in order to establish relations between the "represented" and a third person, the "representative" must cede his rights under the transaction to the "represented". [1, c. 40].

2. In the future, the practical need for direct representation for developing commodity-money relations became more and more obvious, which led to reforms of the provisions on "representation". However, Roman lawmakers have not deviated from the principle of personal participation in the transaction. Thus, the praetor law leaves in force the obligations arising between the "representative" and the third counterparty, in addition, there are also obligations between the represented and the third counterparty, the content of which is the same as the obligations between the "representative" and the third counterparty. The new obligations were implemented through a special claim. [1, c. 41].

3. According to the law of Justinian, an enforcement action for recovery from the defendant (actio iudicati) in favor of or against the representative, as a general rule, is transferred to the representative himself in the process.

So, representative relations in the sense of Roman law arose, in addition to the already mentioned grounds (for the householder - from manus and slave ownership): for the shipowner - from the actions of the ship's captain appointed by him; for the owner of the enterprise - from the actions of the institutiona (a person in charge of someone else's industrial enterprise industry, which includes the conclusion of civil transactions); [6, p. 3-4]. from the contract of assignment (mandatum).

Under the contract of assignment, the principal (mandant) assigns, and the attorney (mandatary) assumes the execution of any actions. [9, c. 156]. The mandate holder acquired rights and obligations in his person, of which he then "ceded" the first to the mandate holder, and demanded guarantees from him regarding the second." [11, p. 119]. The mandate is in many ways similar to a modern contract of assignment, but certain points require attention. The mandate is gratuitous, otherwise it is null and void. The assignment was allowed not only in the interests of the mandant, but also of a third person, which allows us to distinguish five types of assignment: 1) in the interests of the mandate holder; 2) in the interests of a third person; 3) in the common interest of the mandate holder and a third person; 4) in the common interest of the mandate holder and the mandate holder; 5) in the common interest of the mandate holder and a third person. [9, c. 156].

As for Russian law, we already see the beginnings of the institution of representation in the first written sources. Thus, Russian Pravda knows the contract of assignment, which has been in contact with the representative office for a long time. [8, p. 17]. Also in the rules on inheritance (article 99, A lengthy edition of the Russian Truth [15, p. 9-27].) there are provisions regulating legal representation: if after the death of the father there are young children who are unable to take care of themselves, and their mother marries, the next of kin takes them together with the estate under guardianship until adulthood. [15, p. 23]. These norms did not undergo major changes until the XIX century.

For a long period of time, the legislator paid significant attention to mandatory representation. The institute of voluntary representation received in-depth development in the XIX-XX centuries due to the complication of legal relations in general and civil law, in particular.

During this period, the main signs of representation were revealed, such as: the representative does not act for himself, but in the name of others, from the legal actions that he performs, consequences follow for the one for whom he acts [12, 15]; the

representative, when concluding a transaction on behalf of the representative, expresses his own will, and therefore must have legal capacity; [10, 12, 16] both citizens and legal entities can be represented, etc.

Jurists of the XVIII-XIX centuries noted the independence and independent development of the institution of representation in Russia, and not without reason. Volman I.S. pointed out that in Russian legislation, "legal" representation on behalf of minor children in the "Western European" sense was not established. [4, p. 30] In the Russian legislation of the late XIX - early XX century, custody of a person and custody of the property of a minor were separated. [5, p. 392] As long as at least one parent is alive, there can be no custody of a person. In property custody, parents are in the same conditions with outsiders. At the same time, the guardian is entitled to remuneration in the amount of 5% of the income of the minor annually (Article 284 of Volume X of Part 1 of the Code of Civil Laws). [5, p. 254] Guardians are liable with their property if the minor has suffered losses due to his fault (Article 290 of Volume X of Part 1 of the Code of Civil Laws).

In addition, the law provided for the establishment of guardianship over the deaf and dumb, spendthrift, over the insane. The provisions on these types of guardianship practically repeat the provisions on custody of minors.

Voluntary representation was thoroughly and comprehensively investigated by N. Nersesov in the work "The concept of voluntary representation". N. Nersesov examines in detail the relationship of representation with other related legal relations. In addition, he highlights the signs of voluntary representation: a) representation is a legal concept; b) the representative must have the will necessary at the request of the law to perform legal actions in general; c) the direct transfer of rights and obligations under the transaction made by the representative to the represented; d) the representative must have the necessary authority. He also defines the authority as a unilateral act of the will of the represented.

The grounds for voluntary representation were a contract of assignment (power of attorney), a contract of employment (Chapter 1 of the Commercial Charter), a contract of trade attorney (Article 32 of Chapter 2 of the Commercial Charter). [7, 82] On the basis of a power of attorney agreement, a letter of faith was issued (in modern legislation, a power of attorney agreement is called a contract of instruction, and a letter of faith is a power of attorney). The letter of credence was considered only as an integral part of the contract of assignment, and not as an independent document. [9, p. 562] The power of attorney is notarized. [3, c. 19] The rights and obligations of the parties under the contract of assignment, as well as the main provisions under this contract, are similar to those currently existing.

Significant changes in the regulation of representation relations were introduced by the Civil Code of the RSFSR of October 31, 1922. The provisions on representation were transferred to the general part in Chapter 4 "Transactions". There is some transformation of the terminology of the representation, the foundations have been laid for separating the power of attorney from the contract of assignment. Only three articles were devoted to representation, which reflect the main provisions on representation: transactions made by a representative on behalf of a representative are binding on the representative and generate rights and obligations directly for him; the representative may not make transactions on behalf of the represented person either in relation to himself personally or in relation to a third party, whose representative he is at the same time.

At the same time, it was established that transactions could be made through representatives (Article 38 of the Civil Code of the RSFSR). The possibility of performing other legal actions through a representative is said only in relation to the contract of instruction. From the definition contained in Article 251 of the Civil Code of the RSFSR, according to which, under the contract of assignment, one party (attorney) undertakes to perform at the expense and on behalf of the other party (principal) the actions entrusted to him by the principal, it can be concluded that the subject of the contract of assignment includes the commission by the attorney on behalf of the principal not only legal, but also actual actions. Article 264 of the Civil Code of the RSFSR established the obligation to issue a power of attorney for the attorney to perform actions on behalf of the principal. The general rule was the requirement to comply with a simple written form of power of attorney. A notarial certificate was required if: 1) actions must be committed in relation to a government body or an official; a power of attorney has been issued for the management of property (Articles 265, 266 of the Civil Code of the RSFSR). Transfer of trust was allowed if the attorney was authorized to do so by the contract of assignment or forced to do so by force of circumstances in order to protect the interests of the principal (Articles 254, 273 of the Civil Code of the RSFSR).

The Civil Code of the RSFSR of 1964 significantly expanded the regulation of the institution of representation. The rules on representation are separated into a separate chapter. In addition, the rules on power of attorney are included in this chapter. Thus, there was a complete separation of the power of attorney from the contract of assignment. This chapter also contains an article defining the consequences of concluding a transaction by an unauthorized person. Article 62 of the Civil Code of the RSFSR defined the grounds for representation: a power of attorney, an indication of the law, an administrative act. In addition, the Civil Code of the RSFSR regulated in detail the consequences of termination of the power of attorney.

In the legal literature in the 40-70s, a number of serious works on representation appeared. The greatest contribution to the consideration of representation and powers in Soviet civil law was made by V.A. Ryasentsev, V.K. Andreev and E.L. Nevzgodina. In particular, Ryasentsev V.A. wrote a dissertation for the degree of Doctor of Law "Representation in Soviet civil law" in 1948. In addition, this author has published a number of articles in periodicals. Andreev V.K. owns the work "Representation in civil law" in 1978. Nevzgodina E.L. she published a monographic work in 1980, "Representation on Soviet Civil Law". We will consider the opinions of these authors further. The study of voluntary representation, as an independent object of research, is practically not carried out.

The adoption of the Civil Code of the Russian Federation in 1994 introduced a number of new provisions on representation, although it basically repeats the norms of the Civil Code of the RSFSR in 1964. The most significant is the introduction of a new institution of commercial representation for Russian civil law (Article 184 of the Civil Code of the Russian Federation). Some provisions of the Civil Code of the RSFSR have been abolished. For example, the Civil Code of the Russian Federation does not require notarization of powers of attorney issued for actions against state, cooperative and public organizations. The wording of the contract of assignment has been clarified. The subject of this agreement can now only be the legal actions of the attorney.

In recent decades, the institution of representation has been mainly studied only in the spectrum of procedural law, artificially limited to the framework of intermediary relations or revealed in a small part. A substantial body of research on voluntary representation is devoted to its separate type - commercial (trade) representation.

In conclusion, we can say that the institute of representation has experienced several turning points. Its very emergence in Roman law, although it was gradual, marked the beginning of a new order of personal participation in legal relations.

Up to the XIX century, representation was stable in terms of its mandatory (legal) form and has a very meager set of grounds for the emergence and generally accepted norms in terms of its voluntary (contractual).

The institute of voluntary representation received in-depth development in the XIX-XX centuries. During this period, the main signs of representation were revealed.

A landmark for the institution of representation was the adoption of the Civil Code of the RSFSR on October 31, 1922. The provisions on representation were transferred to the general part in Chapter 4 "Transactions".

Since then, there have been no conceptual changes in the legal regulation of representation, the legislator expands and improves the basic concept of legal regulation of representation in an evolutionary way.

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АЗАМАТТЫҚ ҚҰҚЫҚТЫҚ ӨКІЛДІК ИНСТИТУТЫНЫҢ ҚАЛЫПТАСУ ТАРИХЫ

Түйін: Мақала құқықтық құбылыс ретінде өкілдіктің құқықтық реттелу эволюциясын, оның азаматтық құқық саласының қалыптасуының әртүрлі кезеңдеріндегі құқықтық қатынастар жүйесіндегі орнын зерттеуге арналған. Өкілдік пен өкілеттіктің түсінігі мен құқықтық табиғаты туралы мәселе мақала аясында қарастырылған ең даулы мәселелердің бірі болып табылады. Рим заңгерлері әзірлеген және еуропалық және кейінірек ресейлік құқықта орын алған азаматтық құқық институттарының көпшілігінен айырмашылығы, өкілдік институтының өзі сияқты өкілдік доктринасы да өзінше дамыды. Өкілдік институтын тарихи-құқықтық зерттеу осы құқықтық құбылыстың тенденцияларын қадағалап, заңдылықтарды анықтауға және алынған материалды одан әрі зерттеу үшін пайдалануға және өкілдік пен өкілеттіктердің құқықтық табиғаты туралы сұрақтарға жауап беруге мүмкіндік береді.

Кілт сөздер: субъективтілік, өкілдік, міндетті өкілдік, ерікті өкілдік, рим құқығы, орыс құқығы, кезеңдік, қорғаншылық, сенімхат.

ИСТОРИЯ СТАНОВЛЕНИЯ ИНСТИТУТА ГРАЖДАНСКО-ПРАВОВОГО ПРЕДСТАВИТЕЛЬСТВА

Аннотация: статья посвящена изучению эволюции правового регулирования представительства как правового явления, его места в системе правоотношений на разных этапах формирования отрасли гражданского права. Особое внимание уделено российскому законодательству. Вопрос о понятии и юридической природе представительства и полномочия является одним из наиболее дискуссионных из всех, затрагиваемых нами в рамках статьи. В отличие от большинства институтов гражданского права, разработанных еще римскими юристами и позаимствованных европейским, а впоследствии и российским правом, учение о представительстве, как и сам институт представительства, развивался по своему собственному пути. Историко-правовое исследование института представительства позволит проследить тенденции данного правового явления, выявить закономерности и использовать полученный материал для дальнейшего исследования института и ответа на поставленные изначально вопросы о правовой природе представительства и полномочия.

Ключевые слова: субъективитет, представительство, обязательное представительство, добровольное представительство, римское право, русское право, периодизация, опека, договор поручения (доверенности).