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The concept of legal representation: general provisions and prospects for their application

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5.1.3. Private Law (Civilistic) Sciences

GENERAL CHARACTERISTICS OF THE RESEARCH THESIS

The relevance of the research is predetermined by several factors.

In this context, the concept of representation is fundamental. As this work has shown, there are still many theoretical issues in the problems of representation on which there is no consensus, or even an attempt to find one, both within the framework of individual legal systems and at the universal level (in a comparative aspect). Even significant issues such as the legal nature, content, and characteristics of the powers of the representative, the constitutive element of the relations of representation, required additional analysis and, to a certain extent, revision. Additionally, there is no detailed analysis of specific groups of imperative and dispositive (discretionary) legislative provisions in Russian literature in order to study the peculiarities of the methodology of regulation of representation relationships.

This study is particularly relevant due to the absence of a fiduciary institution in Russian law. Fiduciarity, along with categories such as the conduct of someone else's business or *agency*, is not established either as a general rule in law or as a conventional concept in doctrine. The analysis demonstrates the existence of this phenomenon in Russian legal reality, which is reflected in judicial practice and is the basis for several special rules, including in the field of representation. The concept of representation, in the absence of the concept of fiduciary capacity, has taken on the role of a resource from which its general principles, necessary for solving a number of practical problems, are derived. The same may be said of the category of conflicts of interest - its regulation is not presented as a general rule in Russian legislation (unlike in some other legal systems). Expanding the interpretation of representation rules and formulating common principles of fiduciary duty to fill such gaps is certainly interesting and seems useful.

The institution of representation and its categorical toolkit thus turns out to be of much greater actual importance for several legal relationships that have structural and economic similarities to representation than is generally assumed. This work attempts to draw general conclusions about the scope of application of the rules of representation and the general provisions of the category of fiduciary relationships formulated therein, as

well as about the mechanisms and prospects for their expansion. At the same time, the historical lack of in-depth doctrinal study of these general provisions in Russian civil law (largely due to a narrow understanding of representation and relative modesty of the scope of the provisions on representation in Russian legislation) forces us to turn to an analysis of existing approaches at the comparative level, including in Anglo-American law (in particular, *agency* and agency theory).

It is expected that this study will also be useful in terms of expanding the epistemological and methodological prospects for studying some relationships similar to representation, and will also bring some additional considerations to the systematics of civil law relations.

Degree of scientific development of the issue. Proper interest in the theoretical understanding of the institution of representation is relatively recent: until the end of the 18th and the beginning of the 19th centuries, this institution was not separated from the types of contractual relations that accompanied it (mandate, commission, etc.), and the question of the admissibility of direct representation was discussed as a debate for a long time.

The breakthrough in the study of representation was made by German lawyers (G. Buchka is considered to be the first researcher of the concept of representation). Various categories and approaches were developed during this time and provided a fertile ground for theoretical research from different angles. A significant number of works on the topic of representation appeared in a relatively short period. Throughout the 19th century, German scholarship dominated the study of the relations of representation.

Pre-Soviet domestic civilists actively commented and translated the work of European (mainly German) civilists, thanks to which it can be argued that a single space for discussion was formed. During this period, many works appeared in Russia (A.O. Gordon,[1] L.N. Kazantsev,[2] N.O. Nersesov[3]).

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[1]Gordon A.O. Unauthorised representation. St. Petersburg: Tipo-lit. Yu.Ya. Riman, 1893; Gordon A.O. Representation in Civil Law. St. Petersburg: Tip. Schroeder, 1879.

[2]Kazantsev L.N. The doctrine of representation in civil law: candidate reasoning L. Kazantsev. Yaroslavl: Printing house G.V. Falk, 1878.

[3] Nersesov N.O. The concept of voluntary representation in civil law. M. : typo-lithography of I.I. Smirnov, 1878.

In the conditions of the planned economy, the interest of Soviet scientists in civil law, including representation, has significantly decreased. According to Yu.V. Baigusheva, only two dissertations on the topic of representation were defended in the Soviet period in our country: the doctoral dissertation of V.A. Ryasentsev and the candidate dissertation of E.L. Nevzgodina.[4] At least two more noteworthy works can be mentioned in addition,[5] but in general, we should agree with Yu.V. Baigusheva.

Post-Soviet Russian civilistics has increasingly focused on private law issues, and in particular on the problems of representation. Numerous articles have been published on fundamental representation issues, as well as specific aspects of regulation and law enforcement. The most comprehensive book on the subject of representation is the work of A.V. Egorov, E.A. Papchenkova and A.M. Shirvindt.[6] Among the numerous dissertations[7] on the topic of representation,[8] one noteworthy study is the doctoral dissertation by Yu.V. Baigusheva, which provides a comprehensive comparative analysis of various problems in the theory of representation. The work is based on several previously published studies conducted by Yu.V. Baigusheva, both independently and in collaboration with E.A. Krasheninnikov.

At the same time, it appears that a limited interpretation of representation and the relative modesty of the volume of rules thereon in Russian legislation have had a negative impact on the process of developing general provisions on representation in Russian private law scholarship. As a result, there are numerous gaps and unresolved controversial issues in matters of representation that are not receiving sufficient attention from researchers.

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[4] Baigusheva Yu.V. Representation on Russian civil law: to the development of the domestic doctrine, taking into account the experience of Western European civilistics: dis.... doc. jurid. sciences. St. Petersburg, 2015. S. 12-13.

[5]Sklovsky K.I. Representation in civil law and process: questions of theory: essence, content, structure: dis.... cand. jurid. sciences. Rostov-on-Don, 1981; N.A. Subbotin Representation in Anglo-American law: author. dis.... cand. jurid. sciences. M., 1983.

[6]Egorov A.V., Papchenkova E.A., Shirvindt A.M. Representation: a study of judicial practice. - M.: Statute, 2016.

[7]For example: Tokar E.Ya. Representation in the field of entrepreneurial activity: problems of legislative regulation and law enforcement: dis.... doc. jurid. sciences. M., 2018; Korotkov D.B. Representation as a civil legal relationship: dis.... cand. jurid. sciences. Yekaterinburg, 2011; Noskova Yu.B. Representation in Russian civil law: dis.... cand. jurid. sciences. Yekaterinburg, 2004; Pantelishina O.V. Legal regulation of relations of representation in civil law: dis.... cand. jurid. sciences. Krasnodar, 2007; Muratova A.R. Concept of representation in civil law of Russia: dis.... cand. jurid. sciences. Saratov, 2013.

[8]The candidate dissertation of A.V. Egorov, carried out on the topic of mediation: Egorov A.V. The concept of mediation in civil law: dis.... cand. jurid. sciences. M., 2002.

It is worth noting that there are no specific studies on the methodology for regulating representative relations. However, it is interesting to consider the underlying considerations and patterns that govern the mechanism of legal regulation of representation relations. In Russian law, there are works devoted to the study of methods of regulating relations, with the work of E.A. Evstigneev being particularly noteworthy.[9]

Also, despite the material amount of studies devoted to certain problems of the theory of representation, in the domestic literature, there are relatively few studies devoted to its constitutive element – powers of representative[10]. The analysis of the features of this category as a subjective right is especially relevant given the development in recent years of the doctrine of subjective right.

Furthermore, the contemporary domestic doctrine does not provide an analysis of several problems related to the economic problems of relations of representation (in particular, the agency theory of representation) and the fiduciary nature of relations as a category of a more general nature. As a result, the doctrine does not address the question of whether there are common principles governing representation and structurally and economically similar relationships.

Therefore, the current level of development of the topic allows for further discussion and the exploration of more effective solutions to several issues.

The object of the dissertation study is private law relations in the field of representation, as well as other legal relations that have structural and economic features similar to the relations of the representation, for example, indirect representation, corporate relations.

The subject of the dissertation study is the rules of Russian private law on representation, as well as their analogs in foreign jurisdictions; Russian civil law rules; doctrinal legal literature characterising relations of representation; foreign legal as well as political and sociological literature characterizing agency relations in Anglo-American law. Significant attention in some parts of the work is paid to the study of judicial practice.

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[9] Evstigneev E.A. Imperative and dispositive rules in contract law. - M.: Infotropic, 2017.

[10] Nevzgodina E.L. Powers of representative: secondary or subjective right? // Vestnik OmSU. 2013. No. 1 (67); Baigusheva Yu.V., Krasheninnikov E.A. To the concept of powers // Bulletin of civil law. 2012. T. 12. No. 2. P. 61-67; Oreshin E.I. Legal nature powers of the representative//Journal of Russian law. 2007. No. 2 (122).

Goals and objectives of dissertation research. The goal of the dissertation is to develop a consistent and logically justified understanding of the modern state of the concept of representation in Russian law and the prospects for its development, proportionately and adequately correlated (*i*) with modern approaches to defining basic categories of civil law (including subjective right), (*ii*) with the peculiarities of the methodology for regulating relations of representation and (*iii*) with a broad application of representation rules to other relationships that have structural and economic similarities with it (binding relations, relations regarding property rights, hereditary, family, corporate relations, etc.).

This goal is achieved by solving the following **objectives**:

- to determine the logical scope of the category of the power of the representative, i.e. to identify and justify the characteristics and the set of features inherent in this legal phenomenon, and to highlight other basic assumptions of further research;
- to identify and critically analyse the existing approaches to determining the legal nature of the power of the representative and the representation relationship, as well as to justify the optimal approaches to them;
- to identify and characterise the peculiarities of representation relations in comparison with similar categories;
- to characterise the methodology of regulation of representation relations and the underlying objectives of such regulation (including the discovery of the most typical objectives of mandatory law intervention in the regulation of representation);
- to identify and explain common principles inherent in the relations of representation, as well as other relations that are structurally or economically similar to them;
- to critically analyse the modern systemic significance of the institution of representation in Russian civil law and to assess the prospects for expanding the scope of application of the rules of representation and the general principles of the fiduciary category.

For the avoidance of doubt, due to the complex nature of the topic and the limited scope of the study, the dissertation does not have the goal of detailing and/or characterising all issues related to representation without exception.

Research methodology and methods. The dissertation research was based on general academic methods of cognition, including methods of analysis and synthesis, deductive and inductive methods, methods of scientific abstraction, classification and analogy, as well as other general academic logical methods.

The system legal method was used to justify optimal decisions regarding various aspects of the institution of representation. The author frequently relies on the regulation and doctrinal characteristics of the general principles of Russian civil law, as well as other rules of the general part of civil law. Comparative and historical methods are actively used to complete the study and substantiate most of the conclusions.

To solve the objectives of the dissertation, the author turns to doctrine. In particular, during the preparation of the study, the works of Yu.V. Baigusheva, M.I. Braginsky, V.V. Vitryansky, A.O. Gordon, A.V. Egorov, A.A. Evetsky, L.N. Kazantsev, O.C. Ioffe, E.L. Nevzgodina, N.O. Nersesov, E.A. Papchenkova, V.A. Ryasentsev, K.I. Sklovsky, S.V. Tretyakov and others were analysed. The author also turns to foreign doctrine, including German (G.F. Pukhta, L. Rosenberg, L. Ennekzerus, K. Zweigert and H. Kötz, etc.), Anglo-American (E. Abbott, W.N. Hofeld, P. Dolly, J. Lowndes, O. U Holmes et al.).

At the same time, the research methodology in individual chapters of the work has a certain specificity based on the solution of certain problems. The formal dogmatic method is widely used in Chapter 1 due to the theoretical nature of a number of problems solved there, including the question of the criteria and characteristics of the legal category of the power of representation, its comparison and differentiation with similar categories; the characteristics and peculiarities of the relations of representation. Chapter 2 required the identification of the specifics of the methods of regulation of representation relations, which led to the study and use of a considerable amount of regulatory material and empirical data (including examples from legislation and judicial practice in Russia and abroad). The analysis of these examples has enabled the identification of the relationship

between imperative and dispositive methods for regulating representation relations, and formally logical methods - to formulate the main reasons for limiting the freedom of the contract and the discretion of the participants in representation relations. Chapter 3 employs the comparative method, as well as methods of generalisation, classification and analogy. This enables the identification of general structural and economic principles underlying representation and other fiduciary relations. It also addresses the scope of the rules on representation and the potential for expansion.

Scientific novelty of the research. Within the framework of the research the results of scientific novelty have been achieved. First, the study formulates the content of the representative's power taking into account the latest major achievements of Russian doctrine in the field of subjective right theory,[11] and some peculiarities of the position of the subjects of relations of representation have been identified accordingly. Second, the study identifies consistencies in the methodology of regulation of the representation relationship - for example, it identifies the most typical (or otherwise notable) political and economic considerations for limiting the parties' freedom of contract and discretion in the representation relationship. The analysis also critically reconsiders the dominant view on the issue of apparent authority. Third, the study demonstrates the potential of the representation relationship and its rules as system-forming for a large group of other relationships. In this regard, the study reveals the prospects for expanding the scope of potential applicability of the rules of representation and the general principles of the category of fiduciary relations formulated in the study.

The dissertation study allowed the author to formulate and substantiate **the following basic provisions and conclusions** to put for defense:

1. The content of the power is the legally secured ability of the representative to carry out transactions on behalf of the principal, with direct transfer to the latter of the legal effect of such a transaction. The principal characteristic of power as a subjective

[11] Tretyakov S.V. Development of the doctrine of subjective right in foreign civilistics: dis.... doc. jurid. sciences. M., 2022. See also: Tretyakov S.V. Some aspects of the formation of basic theoretical models of the structure of subjective right // Bulletin of Civil Law, 2007. - T. 7. – No. 3. P. 242-260; Tretyakov S.V. On the problem of dogmatic qualifications "authority to dispose" // Main problems of private law: A collection of articles for the anniversary of A. L. Makovsky. M.: Statute, 2010. P. 317-344; Tretyakov S.V. Theoretical model of the right to someone else's behavior and the matter of granting right // Bulletin of Civil Law. 2019. No. 1. S. 7-27.

right is that it is not an obligation that corresponds to it, but the bindingness of the principal, which essentially consists in the undergoing and direct assumption of rights and obligations as a result of such actions. The representative has decisive authorities with regard to the power of attorney and the corresponding bindingness, i.e. the ability to determine their legal destiny, even at the stage when the power is not breached, by exercising or refraining from exercising the power of attorney. The above is consistent with the understanding of the power as subjective right in terms of modern approaches to the latter.

2. The specificity of representation relations lies in the fact that the representative can by its own expression of will create, modify or terminate the rights and obligations of the principal, but not the representative himself. This is fundamental in characterising the legal capacity (*pravosposobnost'*) and legal competence (*deesposobnost'*) of the representative and the principal in comparison with the participants in other civil law relationships. In particular:

- the principal feature of the representative is sufficient legal competence (*deesposobnost'*) for the transaction he makes. At the same time, the representative may lack the legal capacity required for the transaction in question;
- from the point of view of the characteristic of the principal, the legal capacity (*pravosposobnosot'*) of the principal is of fundamental importance, i.e. the capacity to have respective rights and obligations. Full legal capacity is not a general requirement for the principal; it can only be required in the context of a voluntary representation (for example, to grant a power of attorney).

At the same time, Article 21 of the Civil Code of the Russian Federation unjustifiably limits the legal competence of an individual to the abilities to acquire and exercise civil rights, create civil obligations and fulfill them *only for himself*. Representation is an example where a person can exercise his legal competence to acquire, exercise rights and create and perform obligations for (and on behalf of) others.

3. Similarly to other private law concepts, the principles of free will, private initiative, and autonomy of the parties, as well as freedom of contract, are the default rule for the representation. Positive legislation and its mandatory rules may, to a greater or

lesser extent, restrict the free will of the parties with regard to the establishment, modification or termination of representation relationships, the regulation of the scope and limits of powers, and matters relating to the exercise of powers. However, as a general rule, they are not the source of the representation relationship and these matters are left to the discretion of the parties. At the same time, mandatory rules are of the least importance in the regulation of voluntary representation relations.

The parties' free will can be most significantly restricted in representation relations connected with powers arising from the situation and other cases of apparent authority. In such circumstances, the legal effect of the transaction carried out by the representative is mainly subject to positive regulation, and the emergence of powers is an instrument of risk distribution between the parties. The above statement does not eliminate the nature of the power as a subjective right. However, the actions of a representative, which demonstrate the presence and exercise of power, are necessary for those powers to be recognised as existing.

4. The regulation of apparent authority is constructed in the Russian legislation on the model of recognition of such type of powers as existing in the case of objective conditions: (*i*) the conduct of the representative, from which a bona fide third party may conclude that the representative has the powers; (*ii*) the conduct of the representative, from which the powers and actions on behalf of the representative follow; and (*iii*) the existence of bona fide and reasonable expectations of third parties as to the powers and manner of actions of the representative. Under this model, the law and the legal order give the actual circumstances of the legal result in the form of the existence of the power, and do not compensate for the lack of the representative's power by fiction or the prohibition of objections to the lack of power (estoppel).

5. The dissertation analyses various groups of restrictions on free will and discretion of the parties in the field of voluntary representation. It characterises the main political, legal, and economic considerations corresponding to such groups of restrictions. In particular, the prohibition of the involvement of representatives is usually found in relationships where the subsequent control of the correct expression of the will is less effective than the preliminary control (marriage, wills, consent to medical interventions).

The prohibition of the independent exercise of rights without a representative is usually aimed at rationalising the interests of the members of the group and ensuring the quality of their will. Imperative (mandatory) rules related to the scope of powers and standards of activity of representatives are usually dictated by considerations of fiduciary duties in internal relations between representative and principal and the need to protect the latter against potential conflicts of interest and information asymmetry. For example, the prohibition of transactions in relation to the representative himself and/or in relation to representative's another principal is aimed at eliminating conflicts of interest and negative consequences of the agency problem.

6. Representation relationships are characterised by structural and economic features that are common to a number of other fiduciary relationships. A comparative analysis with Anglo-American law confirms the admissibility of such a characteristic. This is supported by the practice of interpreting and applying the rules on representation by analogy to these relationships, as well as by the formulation of the thesis on the fiduciary nature of certain relationships (including representation).

However, Russian law does not establish general criteria for fiduciary relationships or the consequences of recognising them as such. The most effective solution to this problem, in our opinion, will be the provision of relevant explanations by the Plenum of the Supreme Court of the Russian Federation. Additionally, the Reviews of the practice of the Supreme Court of the Russian Federation could include specific cases that are significant for judicial practice.

7. The criteria for fiduciary relations should include (*i*) structural features, i.e. a tripartite structure where one person (the fiduciary, including a representative) acts on behalf of and/or in the interest of another (the principal) in relations with third parties; and (*ii*) economic features - the ability of the fiduciary (including the representative) to influence by its actions the rights and obligations of the principal, as well as the potential for a conflict of interest between the principal and the fiduciary (representative).

Among the optional but typical characteristics of such a relationship is the asymmetry of information (greater awareness of the fiduciary compared to the principal):

under these conditions, courts should be careful when analysing the content of the relationship and verify the existence of this optional characteristic in specific cases.

8. The recognition of fiduciary relations has consequences that primarily involve the possibility of applying representation rules to such relations by analogy or in a subsidiary manner, to the extent that this corresponds to the essence of the relationship. Furthermore, the fiduciary relationship should by default imply a higher standard of integrity for the representative (fiduciary) and the requirement for the representative (fiduciary) to disclose to the principal information about actions taken on behalf of (in the interest of) the principal.

9. Negative effects and risks arising from the conflict of interests in various situations can be reduced or mitigated (*i*) by proper disclosure of information about the conflict of interests by the representative (person acting under the conflict of interests), (*ii*) by proper and informed consent by the principal(s), (*iii*) by agreement of the parties on the rules for conducting negotiations and other parameters of relations at the pre-contractual stage, and (*iv*) by other measures of a more specific nature - for example, corporate policies and rules of conduct of professional representatives. In the absence of a general regulation of conflicts of interest in Russian law, this approach is reflected in Article 182(3) of the Civil Code of the Russian Federation, as well as in the practice of its application and in Russian and foreign doctrine.

Theoretical and practical significance. The theoretical significance of the research is that it significantly develops and supplements the understanding of the concept of representation. The study develops the understanding of the representative's powers taking into account the achievements of the doctrine of subjective law, and the analysis of the peculiarities of the relations of representation corresponds to this provision. The conclusions concerning the methodology of regulation of relations of representation allow for a more holistic view of the attitude of the legal order to the concept of representation and its manifestations. In addition to supplementing and clarifying the general characterisation of the method, the study presents conclusions regarding the main political-legal and economic-legal considerations corresponding to specific groups of restrictions on the free will and discretion of the parties in the sphere of voluntary

representation. The results of the in-depth examination of the criteria and consequences of the fiduciary relationships also open perspectives for further research on the concept of representation and a number of other similar relationships.

The conclusions of the study can be used in the development of legislation, judicial practice and other law enforcement practice. In particular, the study reveals prospects for expanding the scope of potential application of rules on representation. Some provisions (such as the aforementioned reasons for limiting the freedom of will and discretion of the parties) are valuable for the interpretation, including teleological, of the rules on representation. The results of the study may have application in contractual, corporate and other business practice. In particular, the study formulates recommendations for reducing or eliminating the negative effects and risks associated with the conflict of interests of a representative, which align with the current state of development of Russian law. The study may be incorporated into the educational process.

Reliability and approbation of research results. The dissertation was completed, discussed and approved in the Department of Private Law of the Faculty of Law of the National Research University "Higher School of Economics".

Some provisions and conclusions of the dissertation research were reported and discussed at scientific events, including presentations at scientific-practical conferences (e.g., the report "Liability for another's actions: representative nature and the possibility of using the agency theory" at the international scientific-practical conference of students, postgraduates and young scientists "Evolution of Law-2021").[12] A significant part of the provisions and conclusions formulated in the dissertation study were reflected in the author's publications on the topic of the dissertation (section III of this summary). Certain provisions and conclusions of this dissertation study were reported and discussed at scientific events.

[12] Conference held: 08.10.2021; organiser: Faculty of Law, Lomonosov Moscow State University. Information about the conference, as well as the collection of conference abstracts are available at URL: https://conf.msu.ru/rus/event/6940/ (accessed: 24.05.2024).

The structure of the dissertation is predetermined by the chosen topic and the goals and objectives set therein. The study includes an introduction, three chapters divided into eight paragraphs, a conclusion and a list of references.

Chapter 1 outlines the general principles of the representation and the power of the representative as its constitutive element, examines the legal nature of the powers of the representative, and also identifies the content and main features of the powers of the representative as a subjective right. Chapter 2 analyses the methodology for regulating relations of representation, including a general description of the method, as well as a more detailed study of certain groups of imperative rules in the field of representation, which reveals the reasons for the imperative regulation of certain relations in the field of representation. Chapter 3 considers the current and potential scope of the rules of representation and the general principles of the fiduciary category (in particular, the general principles of the fiduciary category were formulated). The question of the actual significance of the institution of representation for Russian law is thus raised, a number of practical and theoretical conclusions are formulated, and the potential for the development of legislation, judicial practice and the expansion of the epistemological (methodological) prospects for the study of the concept of representation are considered.

THESIS SUMMARY

The **Introduction** reflects the relevance of the topic of the dissertation, as well as the degree of its development, sets the goals and objectives of the study, defines the object, subject and methods of the study, justifies the scientific novelty, presents the main provisions for defense, discloses the theoretical and practical significance of the work, provides information about the testing of the study, indicates the structure of the dissertation.

Chapter 1 of the dissertation (*Legal nature and key features of the powers and relations of representation*) is devoted to finding the nature of the powers of a representative as a constitutive element of the relations of representation, and its

features as a subjective right, as well as the features of the relations of representation themselves.

Paragraph 1 (*General characteristics of the representation relationship*) of Chapter 1 deals with the objective of determining the logical category of a representative's powers, which is preliminary to the above purpose. To this end, some common principles inherent in the representation relation itself and a power of the representative as a legal phenomenon are identified - in particular, it is pointed out that it is direct representation that is the subject of the analysis (i.e. the representative acts *on behalf of* the principal), and it is emphasised that relations in which the representative performs legally significant acts are relevant. It seems important to justify the representative's volitional aspect - it is shown that he acts according to his will (and, in particular, that he always has a certain margin of discretion in the destroyed stage of the relationship).

The same paragraph 1 addresses the important question of the characteristics of the legal capacity (*pravosposobnost*') and legal competence (*deesposobnost'*) of the parties to the relationship of representation. As a result, some features were revealed when characterising the legal capacity (*pravosposobnost*') and legal competence (*deesposobnost'*) of the representative and the principal in comparison with the participants in other civil law relationships:

- Thus, taking into account the volitional aspect indicated above, the principal feature of the representative is sufficient legal competence (*deesposobnost'*) for the transaction he makes. At the same time, the representative may lack the legal capacity required for the transaction in question.
- From the point of view of the characteristic of the principal, the legal capacity (*pravosposobnosot'*) of the principal is of fundamental importance, i.e. the capacity to have respective rights and obligations. Full legal capacity is not a general requirement for the principal; it can only be required in the context of a voluntary representation (for example, to grant a power of attorney).

It was also concluded that Article 21 of the Civil Code of the Russian Federation unjustifiably limits the legal competence of an individual to the abilities to acquire and exercise civil rights, create civil obligations and fulfill them *only for himself*.

Representation is an example where a person can exercise his legal competence to acquire, exercise rights and create and perform obligations for (and on behalf of) others.

Paragraph 2 of Chapter 1 of the dissertation (*Analysis of approaches to the legal nature of a representative's powers*) analyses the main theoretical approaches to explaining the nature of representation and powers as its constitutive element.

Note that at the beginning of paragraph 2 it is concluded that it is necessary to find a suitable explanation within the framework of a representative theory,[13] according to which when a transaction is concluded through a representative, only the representative is the acting person and the legal consequence of the transaction occurs directly in the principal. The task of the researcher in this case is to find the basis on which the transaction concluded by the will of the representative acquires force (direct effect) for the principal. In general, among the existing approaches to determining the nature of the representative's power, taking into account several generalisations, the following can be identified:

- theory of fiction,
- approach to power as a legal fact,
- approach to power as a manifestation of the legal capacity of the representative,
- an approach to power as an authority that is not an independent subjective right,
- an approach to powers as a subjective right. Within the framework of this approach, some researchers consider the power of the representative as a secondary right.

We prioritise the consideration of these approaches in paragraph 2 of Chapter 1 to ensure a consistent analysis and to highlight the advantages of viewing the power as a subjective right, which is the most richly justified approach in the dissertation.

In paragraph 3 (*Power of representative as a subjective right: general provisions and features*) of Chapter 1, the category of power of a representative is considered in more detail taking into account the confirmed approach thereto as a subjective right. Thus, this paragraph includes the justification of the validity of this approach (including the task

[13] Theories of partial representation, master of transaction and assistance theory have been popular in German law, but currently are not sufficient for the development of theory.

of harmonising the approach to subjective right with the presented understanding of powers).

This allows not only to take into account the place of the power in the system of civil law categories, but also to integrate into this system the identified characteristic of the content of the power as a subjective right. In order to identify the content of the power as a subjective right, its atomisation is applied in accordance with the tools of pluralistic theories.

As a result, the dissertation established that the *content* of the power is the legally secured ability of the representative to carry out transactions on behalf of the principal, with direct transfer to the latter of the legal effect of such a transaction. It is important that this behavioral opportunity belongs only to specific persons.

At the same time, taking an approach to power as a subjective right, it is necessary to understand the features inherent in power in this context. Thus, it has been established that *the principal characteristic* of power as a subjective right is that it is not an obligation that corresponds to it, but the bindingness of the principal, which essentially consists in the undergoing and direct assumption of rights and obligations as a result of such actions. Moreover, from the point of view of the modern theory of subjective right, this feature is not the basis for refusing to characterise powers as subjective right.[14] Characterising the power as a category *of sui generis* or a special kind of rights would not be beneficial in terms of its understanding and research.

It is established that the representative has decisive authorities with regard to the power of attorney and the corresponding bindingness, i.e. the ability to determine their legal destiny, even at the stage when the power is not breached, by exercising or refraining from exercising the power of attorney. The above is consistent with the understanding of the power as subjective right in terms of modern approaches to the latter.[15]

[14]See Tretyakov S.V. Development of the doctrine of subjective right in foreign civilistics.
[15]See, in particular, the approach to authority and administrative powers (power), substantiated in the dissertation of S.V. Tretyakov: Tretyakov S.V. Op. cip.

Chapter 2 (*Methodology for the regulation of representation*) consists of two paragraphs. It presents an analysis and characterization of the methodology for regulating relations of representation - both general principles and individual provisions.

In paragraph 1 of Chapter 2 *(General description of the methodology for the regulation of representation relations. The admissibility of direct representation*) several fundamental issues are considered for the study of the methodology for regulating relations of representation.

A brief historical analysis in the dissertation shows that law, under the influence of economic and other political and legal factors, gradually extended the discretion of the parties in the relations of representation. It is shown that statements about the existence of a general prohibition of representation in Roman law should be viewed critically - the use of this category as such (and thus the formulation of the question of a general prohibition) only became possible in the 19th century, when it was formulated as a doctrinal concept. Understanding this aspect is important for the perception of the methodology of regulating the relations of representation. It is therefore not correct to say that representation as a phenomenon arose on the initiative of the legislators. Such a proposition would contradict the statement of the primacy of free will, of the private initiative and autonomy of the participants in civil legal relations, of the freedom of contract and, finally, of the private legal nature of the relations of representation as such. It would be more correct to say that, as time went on, the relations of representation themselves became increasingly more manifested, and the parties' freedom of discretion was less and less restricted by law.

Within the framework of this paragraph, it was also confirmed that in modern Russian private law the free will, private initiative and autonomy of the parties, as well as the freedom of contract play the role of basic principles and general rule in the relations of representation. Positive legislation and its mandatory rules are of the least importance in the regulation of voluntary representation relations. At the same time, the analysis carried out within the framework of the study demonstrates the significant role of positive legislation, including its imperative rules, in the field of representation - especially in situations other than voluntary representation.

As discussed in more detail in paragraph 2 of Chapter 2, the free will of the parties is subject to the greatest restrictions and can be completely (or almost completely) limited in relations of representation arising from powers of situation (*polnomochiya iz obstanovki*) and other cases of apparent authority. In such conditions, the determination of the legal effect of the transaction carried out by the representative is mainly subject to positive regulation, and the emergence of powers is an instrument of risk distribution between the parties. The above does not eliminate the nature of the power as a subjective right. At the same time, the behaviour of the representative, which indicates the existence and exercise of powers, is one of the conditions for recognising the existence of the apparent authority.

In paragraph 2 of Chapter 2 (*Analysis of particular groups of rules governing representation*), an empirical-oriented analysis of various groups of mandatory (imperative) rules in the field of representation was carried out – including, in terms of resolving the issue of the existence of a representation (prohibition of the involvement of representatives and prohibition of the independent exercise of rights without a representative), as well as restrictions on the content of powers and other restrictions on the activities of the representative.

As a result, paragraph 2 of Chapter 2 identified the most typical political, legal and economic considerations corresponding to various groups of restrictions on the freedom of the contract and the discretion of the parties in the field of voluntary representation. In particular:

- prohibition of the involvement of representatives is usually found in relationships where the subsequent control of the correct expression of the will is less effective than the preliminary control (marriage, wills, consent to medical interventions);
- prohibition of the independent exercise of rights without a representative is usually aimed at rationalising the interests of the members of the group and ensuring the quality of their will;
- other imperative rules may relate to the scope of powers and standards of activity of representatives. It is noteworthy that the most typical political, legal and economic legal consideration laid down in such rules is the need to protect the principal,

and such rules themselves are often dictated by considerations about the are usually dictated by considerations of fiduciary duty. For example, the prohibition of transactions in relation to the representative himself and/or in relation to representative's another principal is aimed at eliminating conflicts of interest and negative consequences of the agency problem[16].

As stated above, paragraph 2 of Chapter 2 details the Russian legislator's approach to regulating apparent authority. It has been established that such regulation is constructed in the Russian legislation on the model of recognition of such powers as existing in the case of objective conditions: (*i*) the conduct of the representative, from which a bona fide third party may conclude that the representative has the powers; (*ii*) the conduct of the representative, from which the powers and actions on behalf of the representative follow; and (*iii*) the existence of bona fide and reasonable expectations of third parties as to the powers and manner of actions of the representative. Under this model, the law and the legal order give the actual circumstances of the legal result in the form of the existence of the power, and do not compensate for the lack of the representative’s power by fiction or the prohibition of objections to the lack of power (estoppel).

Chapter 3 of the dissertation (*Scope of representation rules and general fiduciary provisions*) consists of three paragraphs. This chapter deals with the application of the rules on representation and general provisions and patterns within the framework of this institution (as well as the general provisions of the fiduciary category developed on their basis) to relations that have structural and economic similarities with representation.

In paragraph 1 of Chapter 3 (*Application of the rules of representation to other relations: reality and prospects*), preparatory work has been carried out, i.e. examples of the application of the rules of representation and the provisions laid down in the regulation of representation to relations closely related to representation - indirect representation, corporate relations, procedural representation, the position of receiver and executor,

[16]What is noteworthy, in Russian law there is no general rule on conflicts of interest. At the same time, its role for non-representative relations is often played by the representation provisions applied by analogy (mainly Article 182(3) of the Civil Code of the Russian Federation on the prohibition of dual representation and transactions in relation to themselves), as well as the interpretation of the principle of good faith, taking into account the above provisions. It seems appropriate to consider the formulation of general rules on conflicts of interest in the Civil Code of the Russian Federation or the provision of explanations on conflicts of interest by the higher court.

management of property of another person. Moreover, it can be seen that, under certain assumptions, the rules on representation or the general provisions developed within the institution can also be applied to public-law relations (which is also the case in a comparative context, in particular in Anglo-American law).

For the avoidance of doubt, the dissertation does not state that all the relations considered in paragraph 1 of Chapter 3 are considered representational in the understanding of Russian civil law. On the contrary, regardless of the disputes about the representational nature of certain relations in the doctrine, some rules of representation apply to them. At the same time, it has been shown that the relations of representation are characterised by structural and economic features that also characterise a number of other relations.

In paragraph 2 of Chapter 3 *(General principles of the fiduciary relation*), an attempt was made to explain the fact that the relations of representation are characterized by structural and economic features that characterize a number of other relations. In addition, with this explanation, general principles (fiduciary criteria and the consequences of their detection) are formulated. This paragraph consists of two parts.

The paragraph begins by raising the question of the concept that would allow representation to be combined with other relationships to which the rules of representation and the general provisions apply. The paragraph then considers three possible explanations for the variety of relationships: fiduciary relations, agency relations, and the category of conducting someone else's business. As a general rule, Russian law does not formulate these categories or define them as a generally recognised (conventional) concept. Additionally, each of the categories considered has significant similarities. Therefore, the decision to further analyse the category of fiduciary relations is to a certain extent conditional – the key role in this case was played by the highest recognition of fiduciary relations in Russian law, as well as the position on fiduciary nature of representation, which is widely accepted in Russian legal practice and doctrine..

The general provisions of the fiduciary category, i.e. the criteria and consequences of recognising a relationship as fiduciary are formulated in the second part of paragraph

2 of Chapter 3. The features of fiduciary relations were revealed based on the dissertation on representation and similar relations.:

– *in terms of structure,* representation relations are characterised by the following triple structure: principal – representative – third party. In this case, the property sphere of the principal is directly affected by the actions of the representative who interacts with a third party *on behalf of and/or in the interest of the principal;*

– *from the point of view of the economic* characteristics of the internal relations between the principal and the fiduciary (including the representative and the principal), it is noted that the fiduciary (including the representative) has the ability by its actions to influence the rights and obligations of the principal – in case of representation in a narrow sense – directly; in other respects – also indirectly; and the potential for conflict of interests of the parties (briefly, agency problem) that is essential to the above model.

In paragraph 3 of Chapter 3 (*Potential application of the identified common principles of the fiduciary category*) the prospects of application of the above identified general provisions of the fiduciary category (fiduciary criteria and the consequences of their detection) for practical and epistemological (methodological) purposes were analysed. The theoretical basis developed in this analysis provides solutions to several problems.

Due to the absence of general fiduciary rules in Russian positive law, doctrine and judicial practice, there is a lack of conventional general fiduciary criteria and the consequences of recognising relationships as fiduciary. Therefore, it is recommended that the Plenum of the Supreme Court of the Russian Federation provide relevant clarifications in order to solve this problem. The Reviews of the Practice of the Supreme Court of the Russian Federation may also include specific cases of importance for the judicial practice.

It is established that:

- the criteria for fiduciary relations should include (*i*) structural features, i.e. a tripartite structure where one person (the fiduciary, including a representative) acts on behalf of and/or in the interest of another (the principal) in relations with third parties; and (*ii*) economic features - the ability of the fiduciary (including the representative) to

influence by its actions the rights and obligations of the principal, as well as the potential for a conflict of interest between the principal and the fiduciary (representative).

Among the optional but typical characteristics of such a relationship is the asymmetry of information (greater awareness of the fiduciary compared to the principal): under these conditions, courts should be careful when analysing the content of the relationship and verify the existence of this optional characteristic in specific cases;

- the consequences of recognizing fiduciary relations primarily involve the possibility of applying representation rules to such relations by analogy or in a subsidiary manner, to the extent that this corresponds to the essence of the relationship. Furthermore, the fiduciary relationship should by default imply a higher standard of integrity for the representative (fiduciary) and the requirement for the representative (fiduciary) to disclose to the principal information about actions taken on behalf of (in the interest of) the principal

The work considered an example of using this theoretical base and identified prospects for the development of general rules on conflicts of interest and the further development of this category in Russian law. In particular, it is concluded that the negative effects and risks arising from the conflict of interests in various situations can be reduced or mitigated (*i*) by proper disclosure of information about the conflict of interests by the representative (person acting under the conflict of interests), (*ii*) by proper and informed consent by the principal(s), (*iii*) by agreement of the parties on the rules for conducting negotiations and other parameters of relations at the pre-contractual stage, and (*iv*) by other measures of a more specific nature - for example, corporate policies and rules of conduct of professional representatives. In the absence of a general regulation of conflicts of interest in Russian law, this approach is reflected in Article 182(3) of the Civil Code of the Russian Federation, as well as in the practice of its application and in Russian and foreign doctrine.

Secondly, the general principles of the fiduciary category identified above can be used to expand the epistemological perspective of studying representation and other fiduciary relations. In particular, the recognition of the above general provisions as doctrinal support for the fiduciary category allows us to consciously engage with the

achievements of agency theory in Anglo-American law and to adapt doctrinal developments in relation to the category of conducting someone else's business.

The **Conclusion** sets out the results of the dissertation study, summarizes some of its results and, where applicable, comments on their interconnections with other studies, as well as on the further application of such results.

LIST OF RELEVANT PUBLICATIONS OF THE AUTHOR ON THE TOPIC OF DISSERTATION RESEARCH

On the topic of dissertation research, articles were prepared and published in leading peer-reviewed scientific journals recommended by the Higher School of Economics and/or the Higher Attestation Commission under the Ministry of Science and Higher Education of the Russian Federation for the publication of the main scientific results of dissertations for the degree of candidate of sciences (total volume 4.45 p.p.; the author's contribution is 4.45 p.p.):

Publications in the list of journals recommended
by the Higher School of Economics (list B):

1. Karimov D.A. Scope of Application of the Rules on Representation: Reality and Prospects // Statute. 2023. No. 12. P. 89-99 (1.12 p.p.);
2. Karimov D.A. Dual Representation (Agency) in Russian Law: Problems of Admissibility and Mitigation of Parties' Risks // Statute. 2023. No. 4. P. 158-171 (1.07 p.p.);
3. Karimov D.A. Responsibility for Other People's Actions: Representative Nature and the Possibility of Using Agent Theory // Statute. 2022. No. 7. P. 184-197 (1.15 p.p.).

Publications in the list of journals recommended
by the Higher Attestation Commission:

4. Karimov D.A. Limitation of the person's freedom to decide on the existence of representation (agency) // Bulletin of the Law Faculty of Southern Federal University. 2023. T. 10. No. 1. P. 96-106 (1.11 p.p.).