

# Institutional Positioning of the Legal Representative of a Company: A Perspective on the Revision of the Chinese Company Law

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## ABSTRACT

The legal representative system of Chinese companies originated from the reform of state-owned enterprises in the planned economy, and it has inherent flaws at both the practical and theoretical levels. In practice, the system has a strong administrative color, centralizes administrative management and company operation, ignores the balance of rights of the internal members of the company, and may lead to arbitrariness and abuse of the legal representative's authority. Theoretically, the traditional civil law perspective positions the legal representative as the external expression organ of the company, but ignores its functionality as the node of the company's business operation at the level of organizational law. The legal representative should be regarded as an intentional agent based on the support of the company's registration system, and its external effect should be gradually absorbed by the functional agent. In terms of the internal relationship of the company, the legal representative, as an important node of the company's organization and operation, should be changed in full respect of the company's internal governance order and the company's interests. Comparing with the relevant systems in Germany and Japan, the company laws of these countries do not consider that there is an essential difference between the right of representation and the right of agency, and the right of representation usually originates from the collective decision-making and authorization of the board of directors. The legal representative system should return to its functional position in corporate governance, i.e. a kind of special agent in the field of company, whose speciality lies in the credibility generated by the company registration, and at the same time, the exercise of its power and authority should safeguard the interests of the company's internal governance.

## KEYWORDS

Representation; Agency; Corporate Governance Order; Intra-Firm Relations.

## 1. THE QUESTION ARISES: THE PARADOXICAL POSITION OF THE LEGAL REPRESENTATIVE

The legal representative of a company, i.e., the representative organ of the company that represents the company in carrying out legal acts on behalf of the company externally, or the person in charge of the organ, depending on the circumstances, but ultimately a natural person must act as the legal representative. [1]The general view of China's civil and commercial law is to position the legal representative as the company's external expression/executive organ. The legal representative system of the company is a legal system of the company with Chinese local characteristics, and has long been criticized by the theoretical and practical circles. As a result of the Soviet Union's factory manager responsibility system, China in the 1980s when the reform of state-owned enterprises formed the following normative ideas: that is, each enterprise legal person must have a unique "legal representative"; in the state-owned enterprises and collective enterprises, the factory director

(manager) is the legal representative; in the "corporate" enterprises, the chairman of the board is the legal representative; in the "corporate" enterprises, the chairman is the legal representative. "The chairman of the board of directors of the enterprise is the legal representative. [2]This set of ideas in fact formed the legal only representative system, that is, in the company law, once the company organs are determined as the company's legal representative, that is, the company's legal only representative. This kind of representative system is too rigid, it is not conducive to the parties to make reasonable arrangements in accordance with their own needs, nor is it conducive to the protection of bona fide third parties.[3]

For historical reasons, the special regulation of legal representatives has had a certain degree of impact on both the internal governance of companies and their external behavior. Due to the administrative control needs of the company registration management, the legal representative in addition to the external representative of the civil and commercial acts, litigation, company registration administrative application, in the company's internal to the important rights, the meeting of the instrument of the power to sign the effective, which led to the formation of the legal representative of the company's operation process of the power of arbitrariness and abuse of power.

China's judicial litigation often appear on several types of lawsuits have legal representative related, the first type is the company license return lawsuit, the legal representative in the transfer of power in the company's management, and do not want to quit, so hold the company's seal and license, impede the company's registration and change the procedure, resulting in the normal order of the company's operations are affected, and related to the company's registration litigation, and the registration of legal representatives of polyester problems. The second category is the legal representative of ultra vires acts of the validity of the judgment disputes, such issues in the practice of long-term controversy.

From the practice problem, we can see that the legal representative's function is narrowly defined, and furthermore, we can sort out the legal basis behind the system. On the basis of the establishment of the company's legal representative of the external expression/executive organs of the basic knowledge, if the legal representative of the position of the platform of the monopoly of the right to express the meaning of the legal person, but the practice of the system, if it is really the same as the text of all the external affairs of the legal person must be the legal representative of the hands of the unit or group of legal persons as a form of organization can not be explained to operate so far. [4]On the basis of the existing theoretical knowledge, the positioning of the legal representative into the normative logic of the organization law and under the framework of the operation of corporate governance is This paper needs to be further expanded.

The changes in the corresponding rules after the amendment of the new Company Law have already confirmed that the legal representative system is fully shifting to pay attention to the design of the norms of the organization law, and the related Judicial Interpretation of the General Principles of the Contract Law has also embodied the value choice of giving priority to the interests of the organization law within the company. Under the new rules, how to understand and interpret the relevant details of the legal representative system has also become the content of this paper needs to show.

## **2. JURISPRUDENTIAL DISPUTES**

### **2.1. Controversy between the Positive and the Fictitious Legal Person Doctrines**

The jurisprudence behind the differences in the attribution of effects is generally considered to be that of a legal person in fact and a legal person in fiction, and that of a legal representative, who is of the view that the legal representative of a legal person has the same personality as the legal person, and that the right of legal representation arises either in accordance with the provisions of the law or in accordance with the statute of the legal person, that the legal representative is an organ of the legal person, and that the legal acts which he carries out in the name of the legal person are regarded as the acts of the legal person itself, and that their legal effects are Certainly attributable to the legal person.

The agency theory adopts the fictitious theory of the legal person, according to which the legal person does not have the capacity to act, just as a natural person with insufficient capacity to act, the legal person must carry out the legal act through an agent, therefore the legal representative is the agent of the legal person, and the rules on agency should be applied to him or her.

The difference between the legal person and the legal person is said to constitute the legal basis for the uniqueness of the agency, some scholars have criticized the essence of the legal person theory has a strong subjective philosophical color and a priori characteristics, the enactment of the law can not provide the corresponding normative basis for the argumentation of this issue. As a pure civil law on the choice of interpretation, the essence of the legal person in the practical level and the design and application of civil law norms have nothing to do, in the theoretical level and the attribution of effect is not necessarily related to the theory of the attribution of effect, so the attribution of effect theory can and should be detached from the theory of the essence of the legal person to be independent of the discussion. [5]The author agrees that although Article 61 of the Civil Code and Article 11 of the Company Law stipulate that the effect of the legal representative's behavior is attributed to the company, it cannot be arbitrarily confirmed that under the theory of legal entity, there is no room for the application of the agency theory.

In recent years, theoretical and practical circles have gradually dealt with the representative rights of legal representatives on an equal footing with the functional or other agency rights of company members. Because the representative and the agency involved in the problem and the law in regulating the two on the thinking and attribution method, is essentially the same, that is, under what conditions a person in the name of another person to implement the act, the legal consequences directly by others. The fact that the term "representative" has a wider scope of application than "agent" simply means that there are special features of agency in respect of acts performed by a legal person in the name of a legal person by its organs (agency of an organization). Therefore, some scholars believe that, although the Civil Code does not explicitly provide that the act of representation without authority, which exceeds the legal limitations on the exercise of the right of representation, can be applied by reference to the provisions of article 171 of the Civil Code on the agency without authority. Article 21 of the Judicial Interpretation of the General Principles of Contracts treats the act of overstepping the authority of an agent and the act of overstepping the authority of a representative in basically the same way. The idea embodied therein is also the same, that is, there will be no difference in the level of meaning embodied by the legal representative and the functional agent, and the effect of the act of overstepping the authority of the representative and that of the powerless agent shall be the same.[6]

## **2.2. Dispute between the Agency and Representative Claims**

It is generally recognized that the legal representative, as the company's external representation and executive organ, has the sole and unique right of representation, which is a unique power that matches the special status of the legal representative. The exercise of the right of representation constitutes an act of external representation, and although it is not obvious from the perspective of the relative, the legal consequences of the act of exceeding the right of representation are obviously regulated separately in the civil law norms, i.e., the legal consequences of the legal representative's exceeding the authority are separately stipulated through Article 504 of the Civil Code, that is, the so-called whether the act of exceeding the authority of the representation can be judged as an expressive representation or not. The legal consequences of representative behavior are regulated separately in the normative design, which is different from the behavior of overstepping the authority of representation in Article 170 of the Civil Code and Article 171 of the Civil Code, and highlights the uniqueness of the right of representation in the normative order.

In addition to the different rules of application, the right of representation and the right of agency have the following differences: the attribution of the effects of the two are different, in the agency

path, the meaning of the expression of the issuance and acceptance of the agent by the completion of the agent, but the legal effect is borne by the person himself; in the mechanism of the representation of the natural person and the legal person is considered to be the same subject, has the same personality, the natural person's behavior is considered to be the act of the legal person, in fact, there is actually no legal effect of the attribution problem. There is no question of attribution of legal effects. In addition, the act of agency is permissive, so that the agent can only engage in legal acts within the scope of authorization; whereas the act of representation is not subject to this limitation, and acts of fact and torts are also within the scope of the act of representation.

### **3. CLARIFICATION OF THE COMPARATIVE LAW DIMENSION**

#### **3.1. The German General View**

German general opinion is that the provisions on agency in the following articles of section 164 of the German Civil Code shall apply to the expression of intent made by the board of directors of an association in the name of the association, and the corresponding legal consequences shall be borne by the association rather than by the individual members of the board of directors. It is thus clear that under German law, directors perform legal acts in the capacity of agents, and there is no question of representation. [7]The so-called external representation and the execution of external business fall within the competence of the board of directors. According to Sections 76 and 78 of the German Stock Corporation Act (AktG), business execution and external representation reside solely with the Board of Directors, which carries out its activities on a self-responsible basis. Representation thus has a very broad field of competence which is mandatorily regulated by law in accordance with the commercial law model. This is similar to the case of ordinary commercial partnerships. [8]Based on the necessities of economic life, the leadership rights of most large enterprises under the joint-stock company must be concentrated in the hands of a few competent and enthusiastic specialists in entrepreneurial activity, who can only succeed if they are able to carry out their business extensively and independently. [9]That is, the actual operation of the right of external representation under German law derives from the collective decision-making exercise of the board of directors, and the external representation of some members or individual members authorized by the board of directors can be regarded as a node for the collective decision-making act of the board of directors.

#### **3.2. The Japanese General View**

As far as Japanese law is concerned, the representative authority possessed by a representative body is essentially an agency authority. [10]According to Articles 349 and 420 of the Companies Act of Japan, the representative authority covers all litigation or extra-litigation acts related to the business of the company and is comprehensive in nature. Under Articles 590 and 599 of the Companies Act, all members of a holding company have, in principle, the right and obligation to execute the business of the company, and all members may represent the company on their own behalf. In a public company, it is not appropriate for the board of directors, which is the "main body of the meeting," to execute the business of the company or to represent the company, and therefore the authority, including the execution of the business of the company and the representation of the company to the outside world, is generally exercised by the representative director elected by the board of directors.

In other words, the company law rules of Germany and Japan do not consider that the right of representation is essentially different from the right of agency, the right of representation is broad, its specific authority generally comes from the authorization of the company's board of directors, the company members exercising the right of representation can be one or more people, the company's authorized right of representation shall not be opposed to the bona fide third party, and the exercise of the right of representation needs to be in line with the company's collective decision-making mode of conduct.

## **4. HISTORICAL DIMENSION: REPOSITIONING OF LEGAL REPRESENTATIVES**

### **4.1. The Origins of Legal Representation in China**

China's legal representative system originated in the reform of state-owned enterprises in the 1980s, but the origin of the whole system of learning comes from an earlier transplantation of the former Soviet Union's system of factory manager responsibility. This system not only has a strong control color, but also belongs to the scope of the state power system. [11]In the transition from a planned economy to a market economy, the administrative mode of enterprise internal management, in which the government is not separated from the enterprise, exists in a large number of enterprises.

The reform of state-owned enterprises (SOEs) in China in the 1980s was oriented towards the separation of ownership and management, the clarification of property rights and the expansion of enterprise autonomy, and the transformation of SOEs into companies with independent legal personality. As a response to the reform, a large number of enterprise legislations were introduced in succession, making the factory director/manager, who is the head of the administration and production management of the enterprise, the only person who can act on behalf of the enterprise within the legal framework in the form of the legal representative of the enterprise. From 1979 "Civil Procedure Law" began, the legal representative of the expression for the first time in China, the legal representative gradually highlights its important position in enterprise management, "General Principles of Civil Law" will be the legal representative of the positioning of the legal representative as "on behalf of legal persons in charge of the exercise of authority", "Regulations on the Administration of Registration of Corporate Entities" emphasizes that legal representative Regulations on the Administration of Enterprise Legal Person Registration emphasize that the legal representative is "the signatory who can exercise authority on behalf of the enterprise", and the authority of the legal representative shall not be authorized arbitrarily, and the part that can be authorized must be entrusted in writing. These laws and regulations have made the legal power of the legal representative permeate all the internal and external affairs of the company. Due to the background of the majority of enterprises did not carry out the transformation of modern corporate governance, the setup of the legal representative, so that the shareholders or directors in accordance with the specific circumstances of the company set up the company's control of the governance structure of the margins greatly narrowed, the shareholders' meeting and the board of directors of the actual role of the shareholders' meeting and the board of directors is much smaller than their role on the surface. [12]The legal representative is ultimately transformed into a monopoly of internal management and external representation, combining the functions of internal management, external representation, downward supervision and accountability to the law.

Due to the preconceived administrative coloration of the positioning, the positioning of the legal representative was not integrated into the day-to-day corporate governance order until the promulgation of the new company law in 2023. The expression of legal representative appeared for the first time in the Company Law in 1993, limiting the candidates for legal representative to the chairman of the board of directors or an executive director, and the Company Law in 2005 expanded the candidates for legal representative to be held by the chairman of the board of directors, The Company Law of 2005 expanded the legal representative candidates to the chairman, executive director or manager, because its legal positioning is still set in accordance with the General Principles of the Civil Law and other relevant laws on company administration, although the legal representative can be regarded as a part of the power operation of the board of directors of the company at the level of the organization law, but due to the over-simplified provisions of the legal representative in the Company Law, the operation mechanism of the legal representative still retains a strong administrative color, and scholars refer to the system style of legal representative as "sole representative", which is a "unique" style of legal representation. Some scholars refer to this style of legal representative system as "sole representative system", i.e., the legal representative monopolizes

the decision and expression of the meaning of the legal person, indicating that it is the legal representative rather than other people such as the competent authorities who exercise the power on behalf of the legal person.[13]

#### **4.2. The Return of the Legal Representative System as a Function of Corporate Governance**

With the deepening of modern corporate governance in the rules of the company, the legal representative has not gained any special role in the corporate governance structure, and is still counted as part of the framework of the operation of the power of the company's board of directors in terms of jurisprudence. In the current corporate governance structure, whether it is board of directors centrism, shareholders' meeting centrism or managers' centrism, the power center of the company basically focuses on the internal organization of the company, and the basic operation of the company is held in the form of a meeting, and if we consider that the chairman of the board of directors who also serves as the legal representative needs to convene a meeting, the actual role of the legal representative is only involved in the operation of the corporate governance in certain. The actual role of the legal representative only involves certain procedural nodes in the operation of corporate governance, such as the convening of meetings and signatures in company meetings.

The traditional cultural stereotype of the legal representative, which in reality manifests itself as the company's internal and external hand, may be inconsistent both internally and externally. Although the legal representative has a wide range of external representation, the legal representative's internal power is actually smaller through statutory limitations and intended limitations, resulting in a discrepancy between the legal representative's internal and external power and placing the legal representative in an awkward position. This discrepancy between the internal and external power of the legal representative is prone to induce moral hazard, which is mainly manifested in the fact that some legal representatives take advantage of their extensive external representation power to seek rent and harm the interests of the company.

The legal representative system reflects the "local cultural constraints" in the institutional and practical evolution of China's company law, and also creates a power struggle with the normalized corporate governance order. The traditional positioning of the legal representative is an extension of the legal representative in the civil law legal person system in the theory of the company, because of the lack of organizational law perspective, and obviously conflict with the collective decision-making mechanism of the company adopted in the practice of various countries.

This paper argues that the legal representative system is a kind of special agent in the corporate field, and the difference between the legal representative identity and other company members is that it has special credibility through the company registration, and the trading counterparty can directly rely on the identity of the agent of the company embodied in the registration and the agency power accompanying the position. [14]At the same time, the legal representative is an important node in the decision-making process of the company's internal governance, and the exercise of the legal representative's authority needs to be observed at all times to safeguard the interests of the company's internal governance.

## **5. CONCLUSION**

The Chinese system of the company legal representative, a concept rooted in the nation's period of state-owned enterprise reform, presents inherent practical and theoretical deficiencies. In practice, its strong administrative undertones can lead to an over-concentration of power, potentially sidelining the balance of rights among a company's internal members and fostering arbitrary or abusive actions by the legal representative. Theoretically, the traditional civil law view of the legal representative as

merely an external signatory for the company overlooks its crucial role as a functional node within the company's operational and organizational structure.

This paper posits that the legal representative should be reconceptualized as a special agent within the corporate sphere. The distinctiveness of this role, compared to other company members, lies in the unique credibility conferred by company registration, allowing third parties to confidently rely on the registered individual's agency. Concurrently, the exercise of the legal representative's authority must be intrinsically linked to and protective of the company's internal governance interests.

Ultimately, the legal representative system ought to transition back to its functional position within corporate governance. This means acknowledging the legal representative as a specialized agent whose legitimacy is bolstered by the company registration system, while simultaneously ensuring that the deployment of their powers serves to safeguard and uphold the company's internal governance framework and overall interests. This repositioning is crucial to align the role with modern corporate governance principles and the collective decision-making mechanisms prevalent in international practice.

## REFERENCES

- [1] Li Jianwei, *Corporate Law (Fifth Edition)*, People's University of China Press, 2022, p. 90.
- [2] Fang Liufang, *Legal Status, Powers and Conflicts of Interest of Legal Representatives of State-Owned Enterprises*, *Comparative Law Studies*, No. 3 and 4, 1999, p. 420.
- [3] Wang Yuying, *The Legal Sole Representative System of Corporations: Rethinking and Changing*, *Tsinghua Law* 2022, No. 5, p. 130.
- [4] Cai Lidong, *On the Legal Status of Legal Representatives*, *Law Forum*, No. 4, 2017, p. 19.
- [5] Li Hongjian, *Acts of Representation as Special Agency Acts: Attribution of Effects and Normative Application*, *Law Review*, Vol. 4, 2022, p. 57.
- [6] Xie Hongfei, *Legal Evaluation of Contracting Behavior Beyond the Statutory Limitations on Representation*, *Journal of Law*, Vol. 6, 2024, p. 25.
- [7] Chi Ying, *Effectiveness and Liability of Ultra vires Acts of Legal Representatives*, *Tsinghua Law* 2021, No. 4, p. 124.
- [8] Christine Windbissler, translated by Yin Sheng and Wang Yang, *German Company and Partnership Law (24th ed.)*, People's University of China Press, 2023, p. 330.
- [9] Christine Windbissler, translated by Yin Sheng and Wang Yang, *German Company and Partnership Law (24th ed.)*, People's University of China Press, 2023, p. 283.
- [10] Yamamoto, translated by Zhu Daming, Chen Yu and Wang Weijie, *Japan Company Law*, Law Press, 2015 edition, p. 179.
- [11] Liu Daoyuan, *The Role of the Legal Representative of a Company, Its Institutional Sources and Its Improvement*, *Comparative Law Studies*, Vol. 4, No. 4, 2022, p. 145.
- [12] Fang Liufang, *Legal Status, Powers and Conflicts of Interest of Legal Representatives of State-Owned Enterprises*, *Comparative Law Studies*, Vol. 3, No. 4, 1999, p. 426).
- [13] Cai Lidong, *On the Legal Status of Legal Representative*, *Law Forum*, No. 4, 2017, p. 16.
- [14] Yin Qiushi, *Definition of the connotation and institutional positioning of legal representatives*, *Law*, Vol. 2, No. 27, 2017.