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IN THE FIELD OF GRAVITY: THE STRUCTURE AND ELEMENTS OF PUBLIC POWER

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The subject of this study includes the approaches to the definition of the category of public power, as well as variants of its structure and elements.
The goal of the article is to compare the experience of various jurisdictions, including Russia, in the construction of public power, and to establish contemporary determinants of its structure and consequences of its expansion. Comparative and formal legal methods are mainly used to produce the results of the research.
Main results. The authors notice, that in most jurisdictions legislative attempts to give a definition of the structure of public power and to indicate the circle of its subjects entail indeterminacy and the inevitable expansion of the corresponding subject composition. That, apparently, is caused by the dynamics of the functions of public power, which determines the institutional evolution. It is not a secret that since the beginning of the 20th century the volume of functions entrusted to the state, and accordingly, to its bodies of power and management, has grown significantly. Since there are plenty of tasks and functions that correspond to the public interest, the state involves in the process not only its structural units - the bodies of state power, but also private subjects. Private entities, mobile and adapted to competition and social-economic changes, are capable of more effective implementation of tasks, performance of functions and provision of services that can be administratively outsourced. In the USA, for example, this phenomenon becomes so large-scale that it sometimes referred to as "mixed administration" in academic literature. In Russia, the possible forms and limits of the involvement of private subjects in the implementation of public tasks continue to remain under question, both from a theoretical and a practical point of view.
Conclusions. Formation of the structure of public power is influenced by historical, sociocultural, and legal features of the development of states. In most jurisdictions the basis ("locus of gravity") of public power is comprised of the authorities (both of state and municipal level), in the orbit of which, depending on the need for the implementation of public functions, other subjects of law – public and private companies and even NGO's – are included. Therefore, functional unity is the main determinant of the structure of public power mechanism.

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1. The problem of the subject composition of public authority

The phenomenon of public power has been the subject of numerous scientific studies for decades. At the same time, as the British scientist Alex de Waal notes, in modern conditions all theories of political power are somehow linked to the theory of the state. With few exceptions, these theories assume a single field of gravity, with a center around which other elements revolve - such a source is the state, which can be represented both as Leviathan, the sovereign, the central source of power generation, and as the middle point of coincidence of interests of various groups [1, p.123]. No one denies that the state is the personification, producer and bearer of power *per se*, but the problem is the structural correlation of power with those elements within the state that possess it.

When, in 2020, amendments were made to the Constitution of the Russian Federation, which led to the emergence of the category called "unified system of public power," the question immediately arose about which bodies, or other holders of power, are included in this system. In the Opinion of the Constitutional Court of the Russian Federation of March 16, 2020 No. 1-Z[1], in which the court gave a constitutional and legal assessment of the category under consideration, it was emphasized that the principle of a unified system of public power did not find its literal enshrinement in the Constitution of the Russian Federation, but can be identified from a number of interrelated provisions of the Basic Law, from which it is obvious that this category functions in specific organizational forms defined by the Constitution of the Russian Federation (Articles 5, 10, 11 and 12). It should be noted that the circle of these organizational forms in the constitutional text is clearly named: the President of the Russian Federation, the Federal Assembly (Council of the Federation and the State Duma), the Government of the Russian Federation, the courts of the Russian Federation, government bodies of the Russian Federation, government bodies of the constituent entities of the Russian Federation, bodies of local government.

However, already in the very first act of current legislation, which was intended to concretize constitutional innovations - Federal Law of December 8, 2020 No. 394-FZ "On the State Council of the Russian Federation"[2], federal government bodies, public authorities of the subjects of the Russian Federation, other state bodies, local government bodies were defined as elements of the unified system of public power (Part 1, Article 2). Further, in part 2 of Art. 2 of the law it was indicated that there were other public authorities, which in addition to the President of the Russian Federation, the Government of the Russian Federation, and the State Council, were authorized to coordinate the activities of bodies included in the unified system of public authority. Such bodies, as known, formally function only in the federal territory of Sirius, and the question arises as to whether they perform any independent activities to coordinate unified system of public authority? If we are talking about other bodies classified as public authorities, what kind of bodies are they and what coordinating function do they perform? [2].

It should be noted that the problem of determining the internal structure of public authority and its constituent elements is not exclusive to Russia, in which the development of appropriate legal regulation actually outstrips the formation of related conceptual frameworks. It is also typical for many jurisdictions in both the global West and the East.

Moreover, if we look at the examples of the latest legislative regulation in foreign countries, we can see many surprising approaches to determining the structure of public power. These approaches are most clearly revealed not in basic constitutional provisions, which may not contain information about the system of public power, and not in specialized legislation on the corresponding system, which may in principle be absent, but in acts of sectoral

[1] URL: https:// legalacts.ru/sud/zakliuchenie-konstitutsionnogo-suda-rf-ot-16032020-n-1-z/ (accessed: 14.02.2024).

[2] Sobranie zakonodatel'stva Rossiĭskoĭ Federacii. 2020. No 50. St. 8039.

legislation adopted for certain operational needs of public-power mechanism.

For example, the Indian Right to Information Act, adopted in 2005, received considerable coverage in the academic literature. This act was intended to solve a rather simple problem - to specify the procedure for the implementation of a constitutional right, which envisages the provision of information by public authorities at the request of citizens. However, in the course of determining the circle of subjects obligated to ensure the provision of relevant information, the legislator acted non-trivially, indicating, in addition to "constitutionally designated bodies" – the Parliament, the Supreme Court, other courts, the Election Commission and other state and municipal bodies, also other bodies and organizations (including non-profits) that are created, controlled or substantially funded by federal or state government authorities.

Thus, the definition of "public authority" in the context of the subject of regulation of the law in question includes both government bodies, organizations and even NGOs - if they receive government funding - and therefore carry out activities supported by the state. As Indian researcher P. Saxena notes, the Act itself does not specify the volume of such funding, however, earlier clarifications of the Central Information Commission indicated that the amount of government funding cannot be less than 2.5 million rupees and be less than 75% of the total expenses of the relevant organization [3, p.13].

In the United Kingdom, the UK Data Protection Act 2018 specifies the criterion for classifying an entity as a public body when it is "performing functions in the public interest" (s. 7(2), Part 2, Ch.2). These functions include the exercise of justice, the powers of Parliament, the powers of the Crown, a ministry or a government department. These would seem to be classic functions of government bodies. However, the list is supplemented by "the implementation of functions transferred to the subject by law or custom," as well as "the implementation of measures to develop democratic participation." The recipients of the corresponding functions, formulated very broadly, can, apparently, be other subjects other than classical authorities.

Another example of a broad interpretation of the subject composition of public authority is the norm of the US Code (US Code), relating to the construction and maintenance of roads, under which a public body is understood as a government, a federal, state, county, municipal, or other entity, having authority to finance, construct, manage, or maintain paid or unpaid infrastructure[3] (23 USC § 101(a)(22).

There are examples of the assignment of public functions to subjects not directly related to the category of public authority, but in some cases associated with it, in the Russian legal system as well. Back in 2012, the Constitutional Court of the Russian Federation, considering certain provisions of the federal law of May 2, 2006 No. 59-FZ "On the procedure for considering appeals from citizens of the Russian Federation," maintaned that establishment of an obligation to consider appeals from citizens and their associations in the same manner, as for public authorities, in relation to organizations not included in the system of public authorities is the prerogative of the legislator and is within the scope of constitutional regulation[4].

At the same time, the Constitutional Court of the Russian Federation saw a similar practice of assigning public functions to entities not directly related to the category of public authority in the numerous practice of the European Court of Human Rights when considering issues of state responsibility for the actions of non-governmental organizations in the event that such organizations perform a public function (Judgments of 23 November 1983 in Van der Mussele v. Belgium, 25 March 1993 in Costello-Roberts v. the United Kingdom, 16 June 2005 in "Storck v. Germany", etc.). On the other hand, in Russian practice there are examples when the state, represented by its authorized bodies, on the contrary, opposes the assignment of certain public functions to economic entities and officials created by it (the Russian Federation, constituent entities of

[3] US Code, https://www.law.cornell.edu/uscode/text/23/101#a_22

[4] Decisions of May 19, 1998 No. 15-P, December 23, 1999 No. 18-P, December 19, 2005 No. 12-P, Resolution of June 1, 2010 No. 782-O-O, etc.

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the Russian Federation, municipalities). For example, in 2018, the Legislative Assembly of the Chelyabinsk Region submitted to the State Duma of the Russian Federation for consideration the bill "On Amendments to Article 1.3.1 of the Code of the Russian Federation on Administrative Offences", which provides for the possibility of vesting officials of municipal institutions with the authority to draw up protocols on administrative offenses. Rejecting this bill already in the first reading, the State Duma Committee on Federal Structure and Issues of Local Self-Government, in its conclusion dated June 21, 2018, noted that in terms of their status, goals and objectives, municipal institutions are not oriented towards participation in the process of administrative proceedings, since they are participants of civil legal relations, in connection with which the assignment of powers to officials of municipal institutions to draw up protocols on administrative offenses provided for by the laws of the constituent entity of the Russian Federation seems to be an unnecessary and ineffective division of functions between subjects of administrative and civil legal relations of different status. The State Duma Committee on State Building and Legislation reflected the same position on this issue in its conclusion to the mentioned bill. Thus, the Russian legislator is very selective in the assignment of public powers and the subsequent identification of economic entities with the system of public power, even in cases where they are created to exercise state and municipal powers.

2. Functional content as a determinant of the structure of public power

In this regard, it becomes quite reasonable to ask why the attempts of a modern legislator to define the structure of public power and designate the circle of its subjects entail uncertainty and the inevitable expansion of the corresponding subject composition? The answer to it, apparently, is the dynamics of the functions of public power, which determines institutional evolution. It is no secret that since the beginning of the 20th century, the scope of functions assigned to the state, and accordingly, to its authorities and management, has grown significantly. This growth was ensured primarily by the expansion of social policies and related obligations, as well as broader participation of the state in the development of public infrastructure and regulation of economic processes.

It should be noted that not everywhere the increase in these functions took place straightforwardly and without conflict - this is especially evident in jurisdictions in which state and legal development took place in stages and evolutionarily, without drastic changes. For example, in the United States in 1936, the New York State Court of Appeals upheld the constitutionality of the previously adopted Public Housing Law, which allowed local authorities to create low-income housing construction organizations[5]. Despite the existence of earlier precedents, this decision was the first one to clearly establish that the relevant construction could be carried out by the state directly, using financial and legal instruments, and not only by private entities within the framework set by administrative and legal regulation.

As the American researcher G. Fetner noted, the decision in the case *Muller v. New York* sparked a 15-year bitter struggle between those groups who believed that low-cost housing could best be provided through economic planning, that is, through the corporate tools of the state, and those who, fearful of any form of government intervention, argued that private enterprises are equipped with everything necessary to provide the average citizen with decent living conditions. This conflict was one manifestation of the growing debate in the United States after World War I about the role of the government in housing, the promotion of interstate commerce, hydroelectric power, and whether government economic planning was a better method than regulating related private initiatives [4, p.15-16].

Despite the controversy, both in the United States and other countries, the presence of the state in various spheres of social relations under the influence of external and internal factors continued to increase. Accordingly, the state apparatus also grew, primarily that part of it that was responsible

[5] Muller v. New York City Housing Authority, 270 NY 333 (1936)

for law enforcement activities and the provision of public services. In many jurisdictions, not only new authorities appeared, but also other organizations that were entrusted with corresponding public powers.

Here, it seems, a gap has arisen between the traditional understanding of the system of public power and its deployment in new conditions. Within the framework of the classical state, the functional set of power functions was limited, reduced mainly to police, military and financial and economic tasks; accordingly, there were no problems with determining the subjects of ownership of related powers (sovereign-head of state, public authorities). With the complication and expansion of tasks, the range of subjects who can exercise individual power functions also expands.

In this new broad framework, the classical definition of power as the ability to force someone to behave, which they would not otherwise adhere to, has ceased to be exhaustive [5]. More precisely, this definition remains valid in relation to government bodies that have the ability to determine public policy and legal regulation. Bodies such as Parliament, President, Government - the status of which is determined constitutionally - become the core of the system of public power. At the same time, depending on the specifics of the legal system, government structure, and form of government, it may also include municipal bodies, state funds and corporations, and even (as the experience of legal regulation in India shows) NGOs affiliated with the state, but not related to government entities in their traditional sense. The public authorities located at the core of the system are called upon to play a coordinating role, determining the parameters for the functioning of a single mechanism of public power and the interaction of its elements.

Thus, the functional content of public power determines its external format in the form of elements and structure. It is no coincidence that in Russia, too, the Constitutional Court of the Russian Federation recognizes functional unity as the basis of a unified system of public power, which makes it possible to combine into the system both state authorities and local government bodies that are "non-sticky" in the context of Article 12 of the Russian Constitution[6].

Changes to Part 2 of Art. 132 of the Constitution of the Russian Federation in 2020 included local government bodies and state authorities into a unified system of public authority in order to carry out interaction aimed at the most effective solution of problems in the interests of the population living in the corresponding territory. The interaction of levels of public authority is associated both with the resolution of issues of local importance and with the participation of local government bodies in the performance of certain public functions and tasks of national importance in the relevant territory[7]. The basic constitutional characteristics of a unified system of public power as a union of state and municipal authorities are thus complemented by the intended purpose of this system, clearly defined by the constitutional text.

3. Involving private entities in the implementation of public authority functions

The imperative in the form of the criterion of "functional unity" as the basis of the system of public power certainly entails the question of the composition and content of the public functions that determine this unity. If for Russia the main subject of controversy is the functional basis within which the unification of state authorities and local government takes place, then for many jurisdictions that include non-classical entities (companies, NGOs) in public power, the question is posed much broader - which, in principle, makes certain public functions related to the sphere of regulation and management by the state and what determines the involvement of additional actors in their implementation?

In academic literature, a seemingly simple answer to this question is often given: what makes certain functions public is the presence in their content, form of implementation, or results of public interest, that is, the interest of broad sections of society or separate but significant groups on the

[6] Opinion of the Constitutional Court of the Russian Federation dated March 16, 2020 No. 1-Z

[7] Decision of the Constitutional Court of the Russian Federation of July 18, 2018 No. 33-P

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scale of society. The simplest example is that society itself is interested in maintaining law and order and public safety, and state interest in this case completely coincides with the aspirations of the population. As defined by West's Legal Encyclopedia of American Law, the public interest is the general concern of citizens about the government and affairs of local, state, and national government. Public infrastructure is regulated in the public interest because private entities rely on it to provide vital services[8].

Yu. Tikhomirov defines public interest as "the interest of a social community recognized by the state and secured by law, the satisfaction of which serves as a guarantee of its implementation and development" [6, p.55].

V. Kulapov generally defines the main functional purpose of the state - to identify, consolidate and ensure generally significant, public interests [7, p.74]. However, the presented approaches, despite their simplicity and logic, create uncertainty about the boundaries of public interests, which may be followed by excessive government intervention in public relations. Under these conditions, the independence and initiative of both social groups and individuals who realize their private interests outside the boundaries of public legal regulation and law enforcement may be questioned, while private initiative should be considered the main driver of social and economic growth. Various studies have been devoted to this problem, including in the industry aspect, both in foreign [8, 9] and domestic literature [10].

At the same time, most authors insist on maintaining a balance between reasonable government intervention and the preservation of private interests that can be realized without such interference.

The state, acting as a guarantor of the protection and implementation of public interests, creates a related organizational and functional mechanism, represented, among other things, by an institutional element represented by subjects of public authority. Since there are quite a lot of tasks and functions corresponding to public interests, the question arises of involving in their implementation not only structural units of the state - public authorities and state-owned institutions, but also private entities.

The latter makes it possible to achieve the so-called "structural economy", in which the implementation of an additional volume of tasks does not entail excessive growth of the bureaucratic apparatus and associated costs. Private entities, more mobile and adapted to competition and changes in socio-economic conditions, are also capable of more effectively implementing tasks, performing functions and providing services that can be outsourced to administrative authorities. Thus, the "orbit" of public power in certain jurisdictions includes subjects other than state and municipal authorities.

In the USA, for example, this phenomenon is becoming so large-scale that it has received the name "mixed administration" in academic literature [11, p. 40, 52]. Analyzing the American experience of the participation of private entities in the activities of public administration, J. Freeman [12] gives examples of not only law enforcement, but also rule-making activities with their participation. Thus, in the United States, the development and adoption of various generally binding technical standards based on the so-called reg-negs - consensus decisions based on the results of negotiations with private stakeholders and companies - has gained some popularity. A normative act adopted on the basis of this procedure presupposes the mandatory achievement of an appropriate compromise with the private entities involved [13, p. 455, 462]. We should also not forget about numerous examples of self-regulation, for example, self-regulation in the chemical industry, which concerns management standards, internal audit and interaction of companies with distributors [12, p.832].

In Russia, the possible forms and limits of involving private entities in the implementation of public tasks continue to remain questionable, both from a theoretical and practical point of view, although a variety of legislation on related topics has

[8] Public Interest // West's Encyclopedia of American Law, edition 2. https://legal-dictionary.thefreedictionary.com/Public+Interest (accessed: 14.02.2024).

been adopted since the early 2000s[9].

Considering the theoretical problems of interaction between government agencies and private entities in the implementation of public tasks, it should be noted that there are constitutional restrictions on such cooperation in some interpretations of possible forms of its implementation.

As E.Gritsenko points out, tasks implemented in the public interest are under the jurisdiction of public legal entities (national, state or municipal entity), created and operating to achieve the common good. As for other participants in the free market - subjects of private law, their participation in solving public issues is also not excluded, but it is carried out taking into account the goals of such subjects and presupposes the need to combine private and public interests [14]. Public tasks as subjects of state jurisdiction and issues of local importance in themselves are not subject to transfer or delegation to private entities, although the latter may be involved in their solution.

The Constitutional Court of the Russian Federation has repeatedly drawn attention to the inadmissibility of the transfer and redistribution of state tasks as the most important elements of the constitutional and legal status of a public entity[10].

On the other hand, the current interpretation of the Constitution of the Russian Federation does not contain, as such, a ban on the mechanism for delegating certain public powers to the private sector. The Constitutional Court of the Russian Federation, for example, expressed support for the mechanism of self-regulatory organizations, determining that the process of denationalization of activities for the implementation of public tasks is a reflection of the processes of formation of civil society, the foundations of self-government and autonomy in the economic sphere[11]. At the same time, based on the legal position of the Court, we should take into account the presence or acquisition by the subject of the delegated tasks of public status to the extent of the delegated powers and the exclusion of the possibility of complete “privatization” of the delegated tasks.

According to the Constitutional Court of the Russian Federation, “the relevant activity... is in any case controlled by the state, which, based on the balance of constitutionally protected values, determines the legal basis and procedures for its implementation in order to exclude the possibility of violations of the rights... of other persons.”[12]

Taking this into account, in the last decade, the assignment of public functions to commercial organizations established in the form of joint-stock companies, the holder of a controlling stake in which is the state or its individual bodies, has been actively implemented. Examples include the activities of PJSC Sberbank of Russia, OJSC Russian Railways, PJSC Rosgeologia, etc. By law signed on June 29, 2018 by the President of the Russian Federation, Russian Post was also transformed into a joint-stock company, and in accordance with Part 1 of Article 9 of this law, “the powers of the sole shareholder of the Company are exercised by the federal executive body that carries out the functions of managing federal property in accordance with the procedure established by the Government of the Russian Federation” [15].

It is necessary, however, to understand that the widespread involvement of private entities in the implementation of public functions, threatening to include them in a “mixed administration”, “expanded” public power, entails significant risks for

[9] Federal Law "On public-private partnership, municipal-private partnership in the Russian Federation and amendments to certain legislative acts of the Russian Federation" dated July 13, 2015 No. 224-FZ. Sobranie zakonodatel'stva Rossijskoj Federacii. 2015. No. 29 (Part I). Art. 4350; Federal Law of July 21, 2005 No. 115-FZ “On Concession Agreements”. Sobranie zakonodatel'stva Rossijskoj Federacii. 2005. No. 30.Part II. Article 3126; Federal Law of 04/05/2013 No. 44-FZ “On the contract system in the field of procurement of goods, works, services to meet state and municipal needs”. Sobranie zakonodatel'stva Rossijskoj Federacii. 2013. No. 14. Art. 1652; Federal Law "On the procurement of goods, works, services by certain types of legal entities" dated July 18, 2011 No. 223-FZ. Sobranie zakonodatel'stva Rossijskoj Federacii. 2011. No. 30 (Part 1). Art. 4571.

[10] Decision of the Constitutional Court of the Russian Federation dated 06 July 2000 No. 10-P

[11] Decision of the Constitutional Court of the Russian Federation dated 19 December 2005 No. 10-P

[12] Ibid.

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the system of democratic governance. Private actors are not elected, and therefore, beyond oversight of the rule of law, are not sufficiently accountable in their activities. Unlike public authorities, such entities, in principle, are not created to ensure public interests, therefore, in their activities they may not be guided by the principles of openness, fairness and impartiality generally accepted in the relevant field. To avoid these risks, it is necessary to both limit administrative outsourcing by developing clear criteria for situations and conditions under which it is really necessary, and to extend the rules and principles governing the activities of public authorities to private entities - to the extent that involves the assignment of public functions to them.

4. Conclusions

Summing up the overall analysis of the volume and content of the structure of public power in various states, including the Russian Federation, it should be stated that there are currently no unified, universal approaches to the formation of the structure of public power in the world. Public power and its structure are influenced by numerous historical, sociocultural, legal features of the development of a particular state. In most jurisdictions of both the global West and the East public authorities (as state and municipal levels) are supplemented with other subjects of law, endowed with the opportunity to participate in the implementation of public functions and perform public role in certain legal relations. In Russia, direct normative reference to the structure of a unified system of public authority appeared only in 2020, so time will tell how legislation on this constitutional and legal category will develop in the future. At the same time, it can be stated with confidence that the current structure of a unified system of public authority is unlikely to be stable and permanent, as evidenced by the lack of unity between the provisions of Art. 132 of the Constitution of the Russian Federation and the norms of current federal legislation - this applies to both the core of the system of unified public power - constitutionally defined elements, and others that are in the orbit of interests and are functionally tied to this “locus of gravity”.

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