

PEDTR 2019**18th International Scientific Conference “Problems of Enterprise Development:
Theory and Practice”****STATE FUNCTIONS OUTSOURCING IN THE DEFENCE
SPHERE: LEGAL SUPPORT AND RISKS**

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Abstract

Technological development and the need to produce highly competitive products, changes in forms and methods of warfare, the gradual reduction of the state monopoly on the use of force lead to an increasingly widespread tendency to outsource a number of traditional state functions, the interaction forms between business and the state are changing too. This practice involves a number of risks, such as inefficient spending of public funds, inadequate quality of services, the risk of privatization of the state monopoly on the use of force and the risk of excessive and arbitrary use of force – for tasks that involve the implementation of this state monopoly by private individuals. All of the above requires a serious approach to the legal provision of outsourcing of public functions, which in a number of countries (for example, the UK) has been developing since the 18th-19th centuries and has a rich history. For the Russian Federation, in turn, this practice is not common – although a number of ordinary state functions are carried out through outsourcing, this approach does not still have any legal support for the defence and security sphere. The analysis of foreign experience in legal regulation of the state functions delegation in the defence and security field allows not only to identify criteria for distinguishing between functions which may be given for outsourcing and articulate the validity of this approach for Russia.

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1. Introduction

One of the global trends since the Cold War has been the transfer to private contractors of a number of traditional government functions, including those related to the defence and security sphere. This is noted in the reports of the UNO working group on the use of mercenaries, materials of human rights and humanitarian organizations, including the International Committee of the Red Cross, as well as in the works of a number of foreign and Russian researchers. This trend has had a significant impact on the development of those sectors of the economy that affect the relationship between the state and the private sector. Its results are not only a redistribution of tasks in the sphere of high-tech production, a change in the approach to the question of what constitutes exclusive state functions and the involvement of business in their implementation. Outsourcing of state functions in the defence and security sphere, first of all, is expressed in the involvement of private military and security companies to perform a wide range of tasks, from direct protection or escort, to high-tech services in the field of intelligence and cybersecurity.

2. Problem Statement

The problem of this study is to identify those legal mechanisms that establish criteria on the basis of which the possibility of state functions delegation in the defence and security field is established, taking into account risks that such delegation entails. Mixing the functions of the state and the private sector can pose a great danger to modern humanitarian values, harming both the concept of responsible business and jeopardizing the state monopoly on the use of force, as one of the most important institutions of the defence and security branch.

3. Research Questions

The study considered the following issues:

- What are the criteria for determining state functions in the defence and security field, the delegation of which is impossible?
- What are the legal mechanisms that allow the state functions delegation in the defence and security field in the Russian Federation?

4. Purpose of the Study

The purpose of this research: to study international and national regulatory legal acts, in order to identify the grounds for the demarcation of the exclusive state functions the from those whose delegation is permissible, and justify mechanisms ensuring the safety of the first (in terms of the general trend toward outsourcing) government functions. The purpose of this study also includes the comparison of existing approaches to outsourcing of state functions in the defence and security field, identification of the role of private sector in the exercise of public power, the associated risks and trends in the development of legal regulation in this area (the possibility of developing such legislation in the Russian Federation).

5. Research Methods

The following general scientific and special methods were used in the study. Among general scientific methods, it is possible to allocate the analysis, inductive, deductive methods, etc. To special methods belong comparative-legal method applicable for studying differences in the approaches of legislators to the studied issues, formal-logical method, and also historical-legal method allowing to estimate the legal regulation evolution in the state functions delegation. This study addresses not only the legal science, but also economic and sociological issues.

6. Findings

The problem of outsourcing state functions in the defence and security field is currently acute, in particular, researchers note that states can no longer support their armed forces without the use of private contractors (including private military and security companies) (Kinsey, 2014). In conditions of the weak state control, private contractors may be given functions related to the direct use of force, thus blurring the boundaries of the state powers (Leenders & Giustozzi, 2019). The solution of the problem requires a serious approach to the elimination of risks (Perlekar & Thakkar, 2019), which should be provided by the legislation regulating outsourcing of public functions. Privatization of state functions is also of great sociological importance, affecting the relations of the society and the state, methods of doing business in a socially oriented economy (Simonina & Torkunov, 2016; Swed & Crosbie, 2009).

The performance of a part of the defence and security functions (traditionally assigned to the state) by private companies raises a question of determining specific functions and tasks that can be transferred to private individuals and of what range of services they may provide. In fact, it is a question of the boundary between transferable and non-transferable functions of the state. Thus, PACE recommendation 1858 emphasizes the need to standardize principles of the state monopoly on the use of force and their conformity with the principles of democracy, respect for human rights and the rule of law (Parliamentary Assembly, 2009). PACE also recommends identifying at the international level areas of internal and external security that should remain a sovereign function of the state and that are "inherently governmental" in their nature.

The term "inherently governmental" functions was borrowed by the Venice Commission from US legislation, which developed a list of functions and services that are not integral and can be carried out not only by the state but also by private contractors (Public law 105 - 270 – oct.19, 1998 "Federal Activities Inventory Reform. Act of 1998", 1998). By "originally governmental functions" the law means functions of the state "so closely related to the public interest that they require the performance by federal public servants". In addition, "inherently public" functions include those whose exercise can "significantly affect the life, liberty and property of individuals" (Public Law 105 - 270 – oct.19, 1998 "Federal Activities Inventory Reform. Act of 1998", 1998). The functions and activities of public authorities may be outsourced under the condition that there is no explicit prohibition in the legislation, if the transfer of these functions does not limit the administrative discretion of the authority's management to determine the implementation plan for such functions, if the implementation of functions is not associated with the implementation of special powers and if there are contractors in the market capable of providing the necessary services. In addition, the delegation of state functions implies that the contractor does not determine the implementation

plan, but only prepares options and/or implements the already approved plan under the control of the Federal Agency (Svininykh, 2013).

In the United States, the possibility of delegation of functions related to the defence sphere is established in the U.S. Department of Defence Instruction No. 1100.22 of 6.04.2007 (Department of Defence, 2007). The functions for delegating include those that are not initially state or closely related to them. The latter type includes functions and activities that are not "inherently governmental" but may become so because of the manner in which they are implemented or under the influence of specific circumstances, as well as those that cannot be separated from "inherently governmental". This applies, for example, to a situation where the actions of the contractor will be indistinguishable from those of an official, or there is a great risk that the decision of the private contractor may be regarded as advice or recommendation of the official.

European States, both at the national level and at the EU level, take a more cautious approach to the issue of outsourcing traditionally state functions. As a limiting criterion, they consider primarily the need to ensure the respect for human rights, and a number of states prohibit their legal entities, for example, the provision of military security services to foreign states. In France, Germany, Italy, Portugal, Finland and the Netherlands, the military activity is considered to be exclusively a state function. Some of these states, in particular Finland, express the view that the delegation of state functions is possible only to the extent that it does not infringe on human rights and humanitarian law. The German parliament stresses that the monopoly on the use of force is the prerogative of the state and should remain so, and the privatization of basic state functions in the sphere of military and security should be avoided, which will lead to the erosion of the state monopoly on the use of force (German Bundestag & Scientific Services, 2006).

For Great Britain, the delegation of state functions in areas such as criminal justice, defence and education was characteristic in the XVIII-XIX centuries (Midgley, 2016), and in the XX century this practice reached the weapons development (Flower, 1966). The competitive procurement policy for both goods and services was introduced by the UK Ministry of Defence in 1983 (Hartley, 2011) in order to optimize and improve the efficiency of budget spending. There are currently functions in the UK that cannot be delegated under any circumstances, partially delegated and delegated. The criteria for determining functions that cannot be outsourced are based on functional roles that involve the direct participation in military operations, ensuring the observance of the military discipline, and are associated with an increase in the expenditure of the state budget.

The main reason for the spread of the trend towards the delegation of state functions – and the root of most risks in this area is the need to maintain a balance between the efficiency of different economic sectors, where the main player is usually the state, and costs. The rationalization of the defence and security sphere has largely led to the fact that the private sector is increasingly penetrating there through the implementation of government orders. At the same time, one of the most obvious risks of the state functions delegation is that service providers, being commercial legal entities, are aimed, first of all, at obtaining the maximum profit. In this case, both the real cost of the provided services and their quality are at risk. In addition, although outsourcing is aimed at reducing costs, in reality it may be cheaper to implement tasks that do not require skilled labor, while more complex ones actually become more expensive in the privatization process (Petersohn, 2010). Among the risks, connected with the transfer of inherently

governmental functions we should also name the possibility for the contractors of being involved into corruption crimes and related with them (Sukhodolov, Ivantsov, Sidorenko, & Spasennikov, 2018). Taking into consideration the fact that outsourcing of state functions is becoming a widespread practice for acting abroad on behalf of the state, criminalization of outsourcing in the defence sphere may include cryptocurrencies as a payment method and as an instrument of money-laundering (Ivantsov, Sidorenko, Spasennikov, Berezkin, & Sukhodolov, 2019).

As for the legislation of the Russian Federation, despite the spread of the delegation practice in the field of public services and services provided to the population, there is no established distinction between functions and tasks that can be transferred to private contractors and those whose performance remains the exclusive prerogative of the state. The Constitution of the Russian Federation does not prohibit the delegation of certain state tasks and functions to private organizations. According to its articles 78 (parts 2 and 3) and 132 (part 2) such transfer is possible if they do not contradict the Constitution of the Russian Federation (2001). and some federal laws, but in each individual case, it happens according to an individual scenario (Vasilyeva, 2015). As a rule, the delegation mechanism is directly established by a special regulatory legal act (for example, in the laws on state corporations, in particular – the Federal law on "Rosatom"). As for the functions delegation in the defence and security field, according to the logic of the current Russian legislation, the volume of services that could be outsourced should be established in a specialized regulatory legal act. This once again raises the question of the legal regulation of activities of private military and security companies, but attempts to introduce such bills in the State Duma, in addition to shortcomings of the texts themselves, faced such a problem as the rejection by the society of the idea of private sector intervention in the army. Such legislative initiatives affect primarily the economic and civil aspects of regulation: the creation of a market for military services, the expansion of exports, etc. (Federal law draft No. 62015-6 "On state regulation of establishment and activity of private military companies», 2014). At the same time, it should be noted that the concept of private military and security companies in legal science as a whole is formulated, and it can become the basis for further development of international legal norms.

7. Conclusion

This study examines approaches to the delegation of state functions in the defence and security field used in various countries, in particular, in the United States, Great Britain, Germany and others. It can be concluded that despite the difference in specific mechanisms, such a legislation is based on principles of preserving the exclusive right to use force for the state, despite the wide range of tasks, the implementation of which can be outsourced. Despite the absence of such aspects in the legislation of the Russian Federation, it can be concluded that the delegation of a number of state functions, including in the defence and security field in general does not contradict the legislation of the Russian Federation and in the future may find a legal framework.

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