



## Concepts of Public Law Dogmatics during European Law Emergence

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**Abstract:** The article is devoted to the impact of the idealistic concepts of the Antiquity made on the development of concepts of public law dogmatics during European law emergence. The current research is topical both for science (it helps to understand the conceptual framework as well as the way of thinking of those who specialize in public law) and application: the perception of the ideological grounds of public law dogma not only strengthens the relevant institutes of law regulating the public authority, but can also consolidate the legal community as the bearer of a relatively autonomous professional tradition important for the society. As in the early stages of its development dogmatics was mostly private law, the structure of public law in many ways was made of civil constructs and concepts. A new public law identity was shaped only at the end of the 19th century and the fundamental public law borrowings could be avoidable.

The article attempts to find out the way the idealistic methodology influences the perception of public law pioneers of the main elements of legal reality, considering the dichotomy of idealistic and material, private and public, positive and natural law. Special attention is paid to the interpretation of the concept of “State” by J. Bluntschli, K. Gerber, O. Gierke and various conceptual approaches to the State (as a mechanism, system, legal entity, construct, etc.) in the theory of public law and order. It is noted that as compared to the representatives of a later developed legal positivism German lawyers trace down “ethical and spiritual contents” of law. The final part of the article is dedicated to the interpretation of legal dogmas as viewed in objective idealism. To solve the tasks set in the article, historical and legal, logical, hermeneutical,

dialectical, formal and legal, sociological, theoretical and predictive as well as other methods of cognition are used.

**Keywords:** public law dogmatics; public law ontology; public law and order; legal positivism; Romano-Germanic law; Plato; Aristotle; J. Bluntschli; K. Gerber; O. Gierke

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## I. Introduction

Since the end of the 19th century the word “dogmatics” has been associated first of all with the “science of law in force” (Muromtsev, 1884). The main conceptual framework of the science is legal positivism. It is often compared to philosophical positivism that tended to be a theoretical base of a formal scientific methodology. This external view (in terms used by Herbert Hart — “*an external view*” (Hart, 1961, p. 6)) is quite disputable, as legal positivism can be viewed internally (“*an internal view*”), when it is important to take into account the fact that legal positivism as a dominant legal ideology developed from civil law (and it is the civil law that has been its framework even now). Public law representatives often borrowed civil and legal terms and constructs into public law. But not all civil categories and concepts comply with rigorous criteria of philosophical positivism. Hence, the statement that

legal and philosophical types of positivism have a genetic affinity are far from being perfect.

But this brings up the question about the etymological connection between legal dogmatics and the dogmas of religion or other social regulators. This similarity can be stressed: legal principles as well as religious dogmas are often beliefs, but not science. The tasks of both legal and religious dogmatics are mainly reduced to the interpretation of basic terms, their classification to substantiate some complicated parts of the acting law and holy texts.

Despite this similarity, legal positivism is clearly characterized as science and is contrasted not only with any religion, but also with any metaphysics. But in fact, both legal dogmatics and legal positivism make up some kind of a categorial system often based on basic principles and metaphysic (notional) concepts.

The present article deals with the mentioned principles and concepts of the period when public law dogmatics originated in European law. Thus, here is a question as to whether legal ideals, values, and principles can be recognized as constituent parts of legal reality or not. The answer to this question is sought in the doctrinal works of J.C. Bluntschli, F. Stahl, K. Gerber, O. Gierke, and other theoreticians, who had an impact on the development of public law and still influence the regulation of social relations.

The main idea of the article is looking for the methodological influence of idealistic concepts of the Antiquity on the development of public law dogmatics. To pursue this objective, the author will look into the following matters:

- 1) scrutinizing the particular features of a positivist and a natural-law approach to the basic terms of legal reality (in terms of the concept “State”);
- 2) looking into the public law doctrine of K.F. Gerber from the standpoint of the theory of eidos;
- 3) interpreting the public law doctrine of O. Gierke with regard to Plato and Aristotle;
- 4) examining the problems of comprehending the public law doctrine from the standpoint of objective idealism.

To solve the tasks, we use general scientific (induction, deduction, analysis and synthesis) as well as special methods of cognition: historical, logical, hermeneutical, dialectical, sociological, formal, and legal.

## **II. Particular Features of Developing Public Law Dogmatics of the 19th Century and “Metaphysic” Constituents of Legal Reality**

Reviewing the fundamental concepts of European public law dogmatics should be started with the Reformation period, when the structure of public relations changed greatly at the national level under the influence of some cultural, social and religious factors. Moreover, in 1648 the Peace of Westphalia resulted in the development of a new world system of relations. The complication of legal reality gave rise to the differentiation of private and public interests and the justification of this differentiation in the terms of legal dogmatics.

As dogmatics mainly used to be private law at that time, Western European representatives of public law often used well-known private law word combinations. For example, Althusius and Bodin defined public authority as *potestatem publicam*. The terms *potestatem publicam* and *potestas privata* of private law were introduced to the private law theory on human rights (Spectorsky, 2006, p. 109). According to E.V. Spectorsky, when the pioneers developed public dogmatics, they started with the description of states, generalizing their polihistorical knowledge through metaphysical “sources” of ancient Greek philosophers, “they thought it necessary to apply to universal public law and start to research it” (Spectorsky, 2006, p. 109).

The structure of Western European public law originated mainly from civil law. For example, the State was often interpreted as some kind of a legal entity, that is as a civil construct. At the same time the State had some conventional features of a psychophysical individual, its own rights, particular power and even moral virtue.

Johann Caspar Bluntschli (1808–1881), a professor at the University of Munich, made an attempt to gloss over the impact of civil law making the following distinction, “Public law fundamentally comes from the State, while private law relies on individuals. One of them

regulates state legal relations and the other — the rights of individuals” (Bluntschli, 1868, p. 4). It is evident in Russian that there is tautology in Bluntschli’s words: public law implies the State, while private law — individuals. It is clear that this “definition” is not good enough to get into public or private law. But then J. Bluntschli points out to some “transients.” For example, in the part where the State has an exclusive property right, for tax purposes it is equal to any individual (Bluntschli, 1868, p. 5).

Instead of using the reasoning of Roman law (as Bluntschli used to do) and steady looking for the criteria to distinguish between *ius publicum* and *ius privatum*, he makes much confusion speculating on public law. Thus, Bluntschli says, “There is a rule for public law: public law is a public duty. An authorized person is required to use his right” (Bluntschli, 1868, p. 5). This rule is good indeed to distinguish between public and private law. In fact, an individual can ignore his rights. But it is noteworthy that (even if Bluntschli just makes an attempt to define the concept “power” as exercising the power) this distinction of public and private law is quite risky, because it does not make the difference between the right and statutory duty.

Bluntschli is not the representative of the theory of legal positivism (it did not exist then in the way we know it now), but he is considered to be the forerunner of legal positivism. That is why, when he reflects on public law ontology, there are principal references to the heritage of Ancient Greek philosophers in his publications, “Thus, any law may be ideal and include moral constituents. But as law it also rests on reality and therefore is material and real. The material aspect of law is ignored by abstract ideology. As a rule, it invents some notional public principle and derives a number of logical conclusions from it disregarding real State and its real relations. Plato himself in his work “Republic” made the same inaccuracy and as a consequence made the statements that contradicted individual character and needs” (Bluntschli, 1868, p. 29).

Taking into consideration the task to search for the impact the idealistic concepts made on the development of public law, this quotation is remarkable for several reasons. In contrast to full-fledged lawyers-positivists who followed Bluntschli, he himself cannot ignore “moral aspects” of law in his reviews. He starts his research with the “ideal

aspects” of law. At the same time Bluntschli cannot give up reviewing the constituents of legal reality from a materialist perspective. Among other things, he mentions the “corporeal form” (In Germ. *leibliche Gestalt*) of legal constructs. This dualism in understanding law is traced back in Bluntschli’s further discourse, when he criticizes Plato’s utopist words about the State as soon as he analyses the concept of law. It results in misunderstanding the methodological criteria of distinguishing between law and the State.

It seems that different elements of legal reality using the methods of objective idealism should be distinguished after its constituents are classified. It is possible to do only if the concepts, principles, values are considered to be part of legal reality.

In terms of positivism (normativism) the world of law first of all consists of the laws, approved in due course. Despite the fact that social reality is full of norms, legal reality and the legal framework are not identical. Extralegal *ad hoc* law and equitable rules should be differentiated.

The division into public and private law involves modelling the structure of legal reality, including constitutional values and ideals, principles of law, legal norms and relations, internal links of legal phenomena. Some constituents of legal reality are of a public law nature (constitutional and legal values), while others are private law (legal relations). In this regard there is a problem to solve – whether it is possible to differentiate the public law elements considered to be basic *eidos* and the ones that just reflect the essence of law. Hence, they risk to distort it.

In view of all of the above, we can make an intermediate conclusion, saying that the algorithms of developing public law at some historical stage depend on the basic grasp of the three things:

a) are “metaphysical” constituents (ideals, values, etc.) considered to be elements of legal reality? It is obvious that Bluntschli as well as other German lawyers influenced by their fellow idealists (mainly I. Kant and G. Hegel) still review “moral aspects” of law;

b) what are the purposes of seeking for balance between individualism and collectivism in law? The answer to this question illustrates the entire “architecture” of public law dogmatics. German

lawyers had an opinion that “any study about the State that is based only on the individual, looks like private law” (Gierke, 1874, p. 82);

c) the priority of positive or natural law approach.

### **III. The Public Law Doctrine of K.F. Gerber with Regard to the Theory of Eidos**

A significant theoretical contribution to the development of public law was made by the professor of the University of Tübingen (and the Minister of the Kingdom of Saxony) Karl Friedrich Wilhelm von Gerber (1823–1891). An important remark about the origin of public law is made by K.F. Gerber, “The right to rule emerged as the right of the individual and was restricted by private law. The money to exercise this right mainly came from the princely private property... After the prince’s death his state turned into the net estate to be shared by different beneficiaries. The property was managed by the servants as agreed with the ruling person” (Gerber, 1852, p. 4).

K.F. Gerber assumed that he directly contributed to building a new public law identity without any fundamental adoption from the public law doctrinal heritage. Not all German authors easily accept the civil origin of public law. But the public law lawyers pay special attention to Gerber’s postulate that effective public law depends not on legal norms, but on the efficiency of law and order, “Public law is less dependent on fundamental objective norms, than on the proper execution of public law individual rights, which are as clear, definite and justiciable as individual rights” (Gerber, 1852, p. 29). This quotation implies that public law is made up not of legislative norms, but of judgements for people’s claims to protect public law freedoms.

Thus, professor K.F. Gerber is seen to be one of the first heralds of legal positivism in Germany. Compared to the Berlin old-schooler Friedrich Julius Stahl (1802–1861), who, taking monarchism as the basic principle of State (Stahl, 1845), made it valid for any conservative theory of state, Gerber focused on the diffuse concept of “folk” (*Volk* in German). At the same time Gerber could not ignore monarchism as the principle of his public law theory. In his work “The Basic Law for Germany” he makes an attempt to combine the liberal interpretation

of the concept of “folk” and the protective idea of the constitutional monarchy. The concept “State” in Gerber’s theory is therefore in the middle of the chain of concepts of “popular sovereignty” and “monarchist sovereignty.”

This is the way Gerber correlates the concept of “folk” and the concept of “State”: “In the State the people live according to the rule of law. They are recognized as a morally consolidated and legally empowered entity in it. They look for and find all necessary means to protect and pursue their common interests in it. They get the structure that enables them to utilize their moral strength for the common good in it. It is the State, that is a legal form for people’s cohabitation” (Gerber, 1880, p. 1). The quote form is also attractive: as can be seen, the first and the last sentence basically match up. Thus, the author of the idea of equating the State and its rule of law is not the founder of normativism H. Kelsen, but rather K. von Gerber. Kelsen, though, would hardly support the idea that the State as a legal category (i.e., as the rule of law) requires such metaphysical attributes as common good, people’s moral strength and particularly the people as a morally united entity.

But the aforementioned quote from Gerber’s work reveals the impact of Hegel’s concept of the three levels of law (abstraction, morals and ethics). Speaking about the moral foundation of legal reality in Hegel’s book “Philosophy of Right,” the author mentions that the outer State is “a civil society, a membership of independent, unitary in its formal universality based on their needs and with a legal structure as a means of people’s and property safety and by means of external order for their special and common interests” (Hegel, 1990, p. 208). Free personal will, according to Hegel, is made using private law constructs: through ownership, if it involves property will, and also through the right to contract, if it’s the will of others.

Then Gerber gives the final definition of the concept of “State”: “The State as a defender and the mouthpiece (*Bewahrer und Offenbarer* in German) of all people’s efforts to morally develop their cohabitation is a top level of a legal person under the rule of law” (Gerber, 1880, p. 2). As in his first quotation, Gerber differentiates the concepts of “State” and “folk,” but the logical sequence is inconsistent: at first, he says that the State and the rule of law are equivalents, then he says that the State

is equal to the top level of a legal person. The rule of law is considered to be the third “figure of speech,” distinct from the concepts of “folk” and “the top level of a legal person.”

It is obvious that by logic a legal person is associated with the rule of law. But then this brings up the question of what is primary. Either “the State — a legal person” formalizes the rule of law or the latter forms the State as a legal person. Gerber does not make it clear in his work.

The interpretation of Gerber’s concept in the view of Plato’s theory of *eidos* seems attractive. According to Wilhelm Windelband, Plato’s dialectics pretends to explore true being as it is manifested in the double meaning of the concept of “idea” (*eidos*), “Functionally and intellectually, *eidoi* are concepts and even generic concepts; but as subjects recognized and expressed in the definition of concepts, *eidos* are “gestalts” of true reality, the being itself in its meaningful definiteness” (Windelband, 1901, p. 78). There is a description of one of the paradoxes of the theory of *eidos* about the way *eidos* can develop into the things.

The problem of any idealism (both objective and subjective) is to identify and give theoretical proofs of the connection between people’s (inner) consciousness and the (outer) world of the things observed (phenomena or real objects). As it follows from Windelband’s quotation, Plato combined two concepts of *eidos* as a form and as a special content. Under Plato’s theory, a man as a sentient being deals only with intelligible objects, with the rationally cognizable things. Phenomenal world itself is just an uncoordinated stream of feelings.

This is how Martin Heidegger interprets the nature of an intelligible object, “I can identify the very thing in front of me as a book just because I have an idea of what the book is. If we did not understand it, there would not be any opportunity to see the book as a book. But there is probably some sort of a unique provisional knowledge of things which enables us to see the things as they are” (Heidegger, 2001, p. 153). Under Plato’s theory of *eidos* there are inevitably lots of intelligible objects. This fact in its turn gives rise to the problem of the balance among various intelligible objects. All intelligible objects, as it is clear from Heidegger’s book, are designed by our mind in accordance with Plato’s theory of recollection. But there are the ones among intelligible objects that are always preferred by Plato, “It is quite remarkable and

explanatory in this respect that there are never any questions just about the logs or stones, but about identical or big logs, there are also no questions just about the deeds or acts, but always about fair and nice deeds” (Auffarth, 1883, p. 14).

Public law gives particular importance not just to the perception of Plato’s theory of *eidos* with its approach to universals, but the opportunity to create a hierarchy of various elements of legal reality that make up an array of intelligible objects. Thus, under Plato’s theory of *eidos* all intelligible objects can be divided into two big categories: neutral and anthropologised objects, the latter are axiologised ones.

Going back to Gerber’s theory under review, it is important to mention that when relying on Plato’s theoretical and methodological approach, we can make the following logical conclusions under the theory of *eidos*. First of all, ideas as universals (e.g., the idea of common good) differ fundamentally from technical concepts (e.g., from the concept “rule of law”). The principal difference is that Plato’s idea is concurrently some value and the concept itself is just a technical element in the system of categories of any science. Hegel also thinks that the truth is that “fairness is identical with the concept” (Hegel, 1812, p. 4). Therefore, when they discuss a true State they mean that “they are the things they should be, i.e., their real nature matches their concept” (Hegel, 1812, p. 4). Secondly, ideas and values may be hierarchically related to each other. Thirdly, if it takes place, there should be the third ideal value to provide the equity and a proper balance with the first ideas and values.

Plato says that only the *eidos* “essence” (*οὐσία* in Greek) ensures the uniformity of the system of *eidos*. There is essence by definition, it is inherent in being. In the hierarchy of *eidos* of “being” is at the top. It means that essence is no less than essential, it cannot but exist. However, not all the existing things are essential. In other words, there are always values to ignore.

It makes being dependent on essence or essentiality. Being can be qualified by means of essence. Thus, there are at least two ways to show how the concepts of “essence” and “being” are related: a positive and a negative one. In the first case it is about essential and true being. The second case involves nonessential and false being, that is a pure

existence of various transient and temporary things. Along the lines of Plato's argument of the third person (Plato, 1993) there is at least the dichotomy of the idea of "being" depending on the fact whether the concept of "essence" involves "being" or not. Then there is another *eidos* of "being," which is to resolve the contradictions and bring together essential and nonessential being.

Neither of the three categories used by Gerber while trying to define the concepts of "State" — "folk," "the rule of law," or "the top level of a legal person" matches the status of the third integrating idea, even if von Gerber thinks each one of them has its own value. In this case Gerber's discourse about the State is logically and axiologically incomplete, while the main concept of public law should be complete.

But there is one more important thing in Gerber's theory: bringing the concept of "State" under the category of "the top level of a legal person" made Gerber stay away from the established tradition to regard the State as a machine. As the concept of "person" implies the will and reason, it is incompatible with the concept of "machine." But the contradiction here is that Gerber is one of the coauthors of the so-called legal constructivism. A constructive method enables a positivist lawyer to generate new legal concepts and to integrate them into the available system of categories in law. It is the dominance of Gerber's constructive method among other methods that proves that he is a mechanist (Stolleis, 2014). Indeed, there is no formal difference between the mechanistic construct of "State" and its competing personalist construct of the "State."

In the beginning of the 19th century the metaphor of "State as a machine" was not adopted by the representatives of the historical school of law founded by Friedrich Carl von Savigny (1779–1861) (Savigny, 1840). They assumed that any community has its own living history, dominates over individuals and is beyond their subjective constructivism. Political community, first of all, has the dignity that is incompatible with the idea of a rationally constructed mechanism. From their point of view, therefore, the metaphor of "State as an organism" is more acceptable (Hertwig, 1922).

The problem of advantages and disadvantages Gerber saw in the metaphors "State as a machine" and "State as an organism" still

remains unsolved. In his book “The Basic Law for Germany” Gerber says, “State authority is a willful power of a moral organism thought to be a personality. It is not a man-made mechanical summing of many wills, but it is a collective moral power of confident people” (Gerber, 1880, pp. 19–20).

However, further in the text Gerber dissociates himself from the metaphor “State as an organism,” not in favor of the concept “state — machine,” but in favor of the metaphor “State as an individual.” The point is that Gerber makes the meaning of the concept of “organism” unreasonably narrow. He does not admit the idea that the “organism” can be self-aware. Gerber explains: the concept of “organism” is acceptable as a starting point for the state legal structure. State authority, after all, operates mainly on a true social interaction. But it is possible with the introduction of the concept of “political will.” The will can be inherent only in the “top level of a legal person,” i.e., a legal construct of the State that comes from its own organic infrastructure (Gerber, 1880, p. 2).

Gerber points out that it is possible to design public law only with a view to the legal construct of a state individual: “The idea that the state law will be able to do without this intermediate point and that the concept of “natural organism” is sufficient would be rational, if one admits that the State is a system of integrated natural bodies. Their action is controlled by some superior foreign procedure and state activities are not conscious, but are merely supplementary and functional by nature. This natural function is based on abstract and natural laws” (Gerber, 1880, p. 222).

Gerber’s doctrine interpretation with regard to the theory of *eidos* suggests that objective idealism made an impact on the development of public law (and is still important for it), because, on the one hand, it prevents from subjectivizing the law, while, on the other hand, it contradicts methodological reductionism that accepts the right to exist only for physical reality, ignoring metaphysical categories of legal values and principles. Under Plato, idealistic concepts postulate that it is an objective scale that makes the element legal, i.e., involving the idea of law independent on any opinions. Objective legal values and ideals are legal *eidos* on condition that they match the status quo, the nature of a man as a sentient and a social being.

#### **IV. The Interpretation of O. Gierke's Doctrine of Public Law with Regard to Plato and Aristotle**

If C. Gerber can be treated as one of the first heralds of legal positivism in Germany, Otto von Gierke (1841–1921) is seen as his consistent ideological opponent among German lawyers-organologists. He was a bright and distinctive representative of the historical school of law. O. Gierke blamed C. Gerber for distorting the German legal idea and even for breaking “the German spirit in German law” (Gierke, 1895, p. 92).

O. Gierke is an example of a German scientist, who is a rigorous methodologist as well as an excellent specialist. “Progressing in every science should develop its fundamental concepts in two directions. It is to clear them up and make them deeper” (Gierke, 1874, p. 1). Gierke, for example, strictly differentiates formalist and pragmatist methods in law (Gierke, 1874, p. 4). The first method ensures the visibility, transparency, and simplicity of the categories, but simultaneously loses thoroughness. The second one, on the contrary, is aimed at searching for concept implications, which, due to their frequent and formal usage, were perceived by the parties of legal relations differently.

O. Gierke blames C. Gerber and his successors for great deception, “Law is not going to deal with legal reality in the way grammar relates to the language. It is going to set up the rules, but not identify them. It is going to prevail, but not to explore life. The main thing for it is the “system” that appears to be the end in itself instead of being supportive. As a result, we have a system of inapplicable expressions <...> In contrast to this unilateralism a more pragmatic branch of law has been trying to bring to the forefront the inner vital content of law. [All this is just] to pay tribute to the essence of law as a historical expression of the spirit of the society” (Gierke, 1874, p. 8).

According to Gierke, state law, and namely the concept of “State,” turned out to be an “apple of discord” between the formalist and pragmatic schools of German law (Gierke, 1874, p. 15). There were some unresolved fundamental problems at the origins of public law. Is the State the subject or the object of public law? If it is the subject, is it the only subject or it is opposed to its own public legal capacity of its

members? What is a legal understanding of the State's public and legal identity, if any? Is this identity legally applicable just as an external or also as an internal principle of public life? (Gierke, 1874, p. 16).

O. Gierke thinks that the individualism of lawyers-positivists is definitely connected with the private law ideology and thus is separated from the public law ideology. Basically, every theory about the State, based entirely on the individual, turns to private law notions. Though in doing so it is possible to save the legal nature of state law, but in so far as state law becomes dependent on the private law idea (Gierke, 1874, p. 82).

As for legal and positivist criticism of the ancient heritage, Gierke partially accepts the criticism about Plato and does not accept the criticism about Aristotle. Thus, Gierke agrees that Plato's metaphor about the State as a "man" gave rise to the development of anthropomorphic ideas about the State. Gierke's opinion is that despite the fact that the metaphor is ambiguous and open to misuse, the core of Plato's idea about the active, i.e., organological nature of the State, is correct (Gierke, 1874, p. 52).

In our opinion, legal and positivist rejection of Plato's theory about the State is influenced by Gerber's and his successors' latent good feeling to the metaphor "State as a machine." The rejection of the organic origin of a true theory about the State, after all, implies attention to the mechanistic origin of public law dogmatics.

Gierke fully agrees with Aristotle's idea that the State represents:

- 1) a natural possession, but not a man-made optional construct;
- 2) an organic union, but not a mechanistic setup of fragments;
- 3) a unity consisting of parts;
- 4) a single spiritualized living thing (Gierke, 1874, p. 52).

These statements can be rejected by the representatives of legal anthropology, because they treat the "individual" only as human beings isolated from one another. This attitude, however, contradicts modern sociology and Plato's and Aristotle's holistic theories. It turns out then that Aristotle as a state theoretician is sometimes closer to modern sociology than the German lawyers-positivists of the 19th century.

Aristotle, referring to the concept of "State," suggests we come from the fact that the man cannot be isolated, he is a political animal (ζῷον

πολιτικόν in Greek). But there is a more correct interpretation, such as “a state (policy) animal,” because then Aristotle makes it clearer, “and the one who, due to his nature, but not because of situational factors, lives out of the State is either a morally immature creature or a superman” (Aristotle, 1983). Even this interpretation will not fully express the meaning of the word that also includes social, public, moral behavior of an individual. Gierke’s organic theory of the State correlates to Aristotle’s concept and is based “on the historically fixed fact, that a man has always been dual-natured: an individual for himself and a clan member. Neither of these characteristics without the other could make a person human” (Gierke, 1874, p. 83). Parties to enter legal relations inevitably generate intersubjective abstractions as the objects of legal reality, describing it by means of formalism and objectivity.

Superficially, Gierke’s organic theory of State is dualistic, that is it implies some gap between public and private affairs. However, no matter if Gierke is a strong dualist or not, the theory mentioned admits the interpretation inspired by Plato’s and Aristotle’s dialectics. This interpretation can be important for legal ontology in terms of defining the constituents of legal reality and of a possible algorithm of their arrangement in a holistic manner.

Let us remember that in “Republic” Plato insists that musical training is of national importance (Plato, 1994, p. 162). For example, some individual of the Platonist State should learn to play the flute as much as playing the flute would have been part of his life. In this case, playing the flute on the public holiday, this individual, making music for others, makes it for himself at the same time, and vice versa. Thus, his musical excellence cannot be divided into a public and a private one, though they are seemingly related, but are disjoint. Moreover, according to Aristotle’s ethics there is a special quality or “arete” (“excellence”) of a flute player (Aristotle, 1983, p. 452). This quality wants him to be an “excellent” flute player both for himself and for others, that is to say for self-esteem as well as for people’s admiration.

There are some aspects in Gierke’s organic theory of State, which are no less attractive. To begin with, the State is not the only community, where individual lives. Moreover, the State is a rather distant community for an individual. It is usually indirect through transitional communities,

beginning with family, school, including music school, university, handicraft, parish, etc. (Gierke, 1874, pp. 87–88). Under this organic theory of State the term of “public authority” makes a clear sense. The concept of “public legal person” is just a legal center, a concentrated registration of the whole life of the State machine. Its life is exercised through the activity of its members (transitional communities) and its authorities (e.g., ministries, departments, officials) that at the same time have an isolated existence. Nevertheless, only the state mechanism is a real unity, because all the isolated existences being state constituents form groups under the idea of the integral State (Gierke, 1874, p. 88).

Gierke also rejects the dogma of classical legal positivism that the State is always primary while law is secondary. Law is equal to the State in its value. Neither the State emerges from legal reality, nor the legal reality emerges from the State. Although they are single-rooted, they grew up together “to improve on each other. Both the idea of the State and the idea of law for people are innate” (Gierke, 1874, p. 92).

Thus, public-law dogmatics develops according to the idea that law is intersubjective. It depends on the set of two and more subjects and some legal facts common to them. Objective reality losing its subjectivity during legal relations, which do not mean any individual isolation by definition, appears in the relations on some benefits. Understanding of intersubjectivity is based on some special reality combining the descriptive and the prescriptive aspects of law.

## **V. Insight into the Legal Dogmatic Concepts in Terms of Objective Idealism**

The idealistic concepts of the Antiquity are significant for the formation and the development of public law dogmatics among other things because they help to generate legal universals as independent ontological units. So, it is necessary to abstract oneself from physical reality when it comes to the State as the subject of law: it is invisible, intangible, but it is definitely an element of legal reality. The same remains true with other objects and subjects of legal relations.

But we should see the methodological difference between the concept of “individual” in everyday and legal reality. O. Gierke pointed

out that an individual as a legal concept emerged due to the abstraction of “singling out part of the reality” made by legal consciousness (Gierke, 1895, p. 268). It is no mere coincidence that in civil law the image of an average subject acting with the degree of care admitted natural for this kind of legal relations emerges when the principle of conscientiousness or intelligence is exercised. In this respect H. Kelsen pointed out that “Modern legal orders presuppose an average human being and an average set of external circumstances under which people act causally determined” (Kelsen, 1934, p. 97). An average type of a man implies idealist abstraction from a certain object, but it is part of legal reality.

The parties to the legal relations similarly recognize some public law construct and identify it. They, for example, (at least instinctively) differentiate the idea of the State from the idea of a legal entity. Though legal universals can irritate with their ephemerality, but the rate and the similarity of perceiving these ideas confirm the existence of legal reality. The materialist approach is insufficient here, because it is impossible to define some essential categories of public law without universals. People’s minds always come across the phenomena that cannot be reduced to physical notions: legal ideals, principles, values.

The problems of eidetic nature of legal dogmatic concepts are associated with the accuracy of their definition. People’s opinions are judgemental even if they refer to external characteristics. That is why it is more convenient for the party to the legal relations to use the subject matter as an abstraction. Thus, one of the time-proved approaches to the problem of a proper identity of the manifested essences is proposed by the theory of eidos. Under Plato’s theory, the world phenomena are similar to supreme ideas that are becoming the cause and the purpose of development (Plato, 1994, p. 298). As for legal phenomena, the theory of eidos suggests that subjective perception is not determinative for the essence of the legal reality constituents. Actually, objective scope, i.e., the idea of law independent of judgemental perception, makes them legal.

The ontological status of legal phenomena through the combination of timeless ideas was proved by the representatives of the German neo-Kantian law school H. Cohen (Cohen, 1902), R. Stammler (Stammler, 1928) and others. Those who criticized the independent ontologi-

cal status of legal reality referred to the transience and variability of legal relations. But one should take into account the difference between existential legal values and a set of regulations.

Universal legal ideas (*eidos*) can be treated as the meaning of public law concepts. The definition of the concept of “reality” given by P. Berger and T. Luckman is attractive. They define the reality as the possibility to exist irrespective of subjective will (Berger and Luckmann, 1991, p. 13). The very fact of a universal perception of concepts is basic for people’s social cooperation. Moreover, legal reality involves the reality of legal acts – legislative acts and those enforcing legislation. In other words, the objects of legal reality, if not used in the meaning “*existere*,” denote “*esse*” as intelligible objects perceived by the subjects of law.

The reviewed approaches are of instrumental value during the development of legal reality, because its elements are often complex abstract structures, which cannot be reduced when it is necessary to solve the main problems of public law.

## **VI. Conclusion**

If one looks into the first European concepts of public law with regard to Plato’s theory of *eidos*, it is possible to find out that the idea as a universal (e.g., the idea of common good) fundamentally differs from technical concepts (e.g., from the “rule of law” concept). The main difference is that for the Platonist the idea is always some value and the concept itself is just a technical element in the structure of the system of categories of a particular science. Meanwhile there could be some hierarchy of ideas-values. In this case it is reasonable to search for the third perfect value to ensure the ratio between the first two ideas-values.

Objective idealism is methodologically significant for public law dogmatics, because it confronts the reduction of admitting the ontological status of only the physical objects and also the diffusion of the ideas of legal relativism and polyvariability that admit the development of legal reality only in the mind of an individual.

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