Perspectives on the Development of Historiography and Contemporary Public Law

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Public Law and its Historiography from the Perspective of Contemporary Logics of Meaning-Making

Abstract. Despite its centuries-old history, public law remains one of the most enigmatic and complex phenomena for scientific understanding. Although the academic and scholarly development of public law spans several centuries, its development into a dogmatic discipline, which began in the 19th century, was accompanied by a gradual expansion of interpretations in line with the influence of related social sciences, giving rise to a plurality of concepts for understanding the disciplinary nature and explanatory possibilities of a modern theory of public law. When it comes to developing and teaching public law, one of the most acute questions arising in legal scholarship concerns the distribution of roles between jurisprudence and political science. From the perspective of a discipline's content and socio-practical significance, the theory of public law can only be effective when grounded in historically-specific logics of meaning-making, unfolding across the entirety of phenomena arising within a national culture. However, the western – primarily English-language – literature often lacks a clear historiographic basis, whose absence gives rise to epigonism and a certain carelessness in understanding well-known meanings and traditions, as well as a distorted understanding of other cultural variants of public

law. Consequently, Russian jurisprudence should increase its focus on generalising the best examples of domestic thought at the same time as studying global experience.

Keywords: legal historiography; public law; cameralism; political science; definition of meaning in law; political science; national interests

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Despite its long period of development, the theory of public law still lacks universal templates and examples. This is partly due to its formation having always been limited by national or regional traditions. For this reason, in order to truly understand the nature and cognitive potential of public law as a scientific discipline, it is necessary to rely on the results of contemporary historiographic studies of political and legal thought, which convincingly demonstrate the programmatic significance of the historiographic models that underlie it. Indeed, without considering the historiographical context and its logical-semantic framework, it is impossible not only to analyse the common and differing aspects of approaches to key problems of public law in different traditions, but even to simply consider the state of national juridical science. These most important issues of modern legal science, including an understanding of the nature and objectives of legal historiography, are developed in detail in the latest studies by Vladimir Sergeyevich Gorban and Academician Alexander Nikolayevich Savenkov (Gorban 2024a, 2024b, Savenkov 2024).

At the foundation of law as a cultural phenomenon in general, and public law in particular, lies a certain logic of meaning-making that shapes the entire national tradition of philosophy and theory of law. The significance of the types of logic of meaning-making and the possibility of its application to the field of law based on many years of research are also given in detail in the works of Smirnov and Gorban (Smirnov 2023, Gorban 2025).

On this basis, the problematic of public law as a scientific discipline turns out to be simultaneously philosophical-legal and legal-historiographic.

The division of law into public and private spheres of application has long been a feature of jurisprudential thought. The beginning of this kind of separation of spheres of law (at least in their written form) was set out the statements of Roman jurists – in particular, those of Ulpian. Nowadays, although both spheres of law are perceived as constituting quite natural phenomena, the boundary between them is not always understood as something strict and immovable. Indeed, the various ideas and institutions associated with one sphere often move quite freely into the opposite one. For example, over the last two decades, criminal law has acquired a number of "soft" (dispositive) constructs, legally speaking (e.g., in the grounds for exemption from criminal liability for economic crimes, a judicial fine as an alternative measure of a criminal-legal nature, etc.). However, the sphere of private law also tends to more easily accept imperative requirements that are traditionally more characteristic of the sphere of public law. Rapid changes in the nature of human life, the active introduction of digital technologies into everyday life, as well as the objectively changing conditions of interaction and development of regions, countries and peoples, all contribute to the fact that law and its morphology are acquiring new features and characteristics.

According to the classical understanding of jurisprudence, the division of law into public and private is a kind of initial intuition, forming an almost paradigmatic idea about the purpose of the various instruments that are certified in one area or another. In the history of legal thought up to the present day, various attempts have regularly been made to explain the nature of the general interest and the common good, on the one hand, and the nature of the private interest, at whose protection private law is aimed, on the other. Moreover, within the framework of the relationship between the general (public) and the specific (private), the content and meaning of each conceivable aspect and relevant sphere are specified quite differently. And if the nature of the private sphere is traditionally and logically easier to understand, then the nature of the public sphere – as juridical experience and the very content of this area of regulation show – is much more difficult to explain.

In terms of their correlation, the private and the public can be thought of from the point of view of the currently popular problem of identity, which in philosophical terms is connected with the idea of self-identity. Moreover, the levels of development of the meaning of self-identity can be thought of in relation both to an individual or to a group – or, for that matter, to society as a whole. The other pole is represented by an appeal to universal humanity, traditional for Russian philosophical thinking, for which law is constantly aimed at correlation with universal truth, justice, equality, etc. This gives discussions about the nature of public and private law a different philosophical meaning, one which is discerned by studying the nature of national logics of meaning-making and the mechanisms of their deployment within the entire relevant philosophical and logical framework. The public sphere of law means refers not just to the general, but also to its corresponding precise, concrete-historical, cultural and logical content. Accordingly, public law encompasses not only ideas about how the government should operate, but also the principle that the exercise of private (individual) rights must not infringe upon the interests of others; this first notion was known in late 19th-century legal terminology as the "social task of law". If Ulpian defined *jus publicum* as what benefits the Roman state, today there is no reason to assert that the idea of public law does not include its usefulness, first and foremost, for a specific society and state. In other words, the fixation of the aspect of the general in no way cancels the significance of public law as a specific phenomenon and instantiation. For example, in American political science and legal literature, the popular issue of public law is always conditioned by an assessment of its purpose as the law of the American way of political governance, the American national experience of legal construction, the functioning of democracy and human rights activities in this particular country, etc.

The German approach to the nature of public law is distinguished not only by the inherent conservatism of its terminology, which favours the German version over the Latin one, but also by its equally pronounced connection to the historical culture of national legal development. For example, the German legal scholar Bernd Rüthers generally believes that law in general and in its details is impossible without ideology. This could be the idea of freedom, types of economic development trajectory, political declarations in

the form of widespread democracy, etc. (Rüthers 2007). In this way, law is formed, transformed, and interpreted in the daily activities of jurists.

For Russia, then, the theory of public law can only be formed on the basis of the development of the entire complex of meaning-forming ideas contained in its culture. Not only do the formal characteristics of public administration institutions fall within the sphere of public law, but also fundamental legal, spiritual and moral values. Having become part of the Basic Law, traditional spiritual and moral values acquire the character of a legal requirement for the political structure, for the functions of institutions, as well as for the sphere of group and individual communication.

When discussing the nature and character of public law, the formation of its institutional structures is traditionally reproduced within the framework of the patterns that developed in Western European and Russian political and legal thought of the 19th century. This perspective is important for understanding the refraction of Roman legal constructs in European legal thinking and for analysing the dissemination of relevant ideas in Russia and other countries that have been influenced by the Western European legal tradition. However, this perspective is not exhaustive; rather, it merely illustrates a particular trajectory of inquiry that emphasises historical trends. Indeed, the problem of forming the theoretical foundations of public law from a historical, historiographical and logical-semantic point of view (the philosophical development of public law and the boundaries of this kind of knowledge) turns out to be significantly more complex and diverse than traditional ideas about it.

In the context of traditional Western European jurisprudence, the historiography of the relationship between public law and the sciences of the state and society dates back at least to the second quarter of the 17th century. This was when, after 1630, as a result of the changes brought about by the Reformation, the first chairs of *jus publicum* emerged in German universities, and subsequently, chairs of Economics, Politics and Administration were established in the territorial states (Oppermann 1967). Cameral studies, which was initially aimed at providing training for new public administration officials, gradually expanded to include economic studies, statistics, and financial sciences, which was later transformed into

a unified complex system of general state sciences. Thus, public law yielded to the study of state sciences in the formation of a layer of civil servants. Until the second half of the 19th century, *jus publicum* was enriched by theology and philosophy, especially in the areas of natural and rational (in the senses that were applied to these terms in the 18th century) law. Indeed, public law was sometimes included as a section in the disciplines of political science. It was only during the second half of the 19th century that public law acquired an independent place within the legal sciences.

In the 1870s, a discussion arose in German legal literature regarding the first dogmatic development of the theory of public law (Paul Laband, Otto von Gierke, Otto Mayer). The main question that arose concerned the possibility of constructing a theory of public law – primarily state law – from the point of view of the independence of its conceptual apparatus and language. Due to the fact that everything in the sphere of public law turned out to be merely a copy of private law structures, a need arose to determine the nature of the corresponding relationships, restrictions and meanings. Therefore, the question naturally arose concerning the need for the sphere of public law to develop its own conceptual vocabulary that would adequately reflect the nature of the relationships that develop in the sphere of public life, rather than using constructs designed solely to protect the interests of individuals. The main impetus for the discussion was Paul Laband's *State Law of the German Empire* published in three volumes (Laband 1876). His main opponent, Otto von Gierke, objected to the transfer of private law concepts into the sphere of public law, insisting on understanding the state as a special political organism having certain characteristic features and functions (Gierke 1887).

As the understanding of public law evolved in the 19th century, it became increasingly tied to an awareness of the significance of society and its principles of solidarity (Léon Duguit in France), the people and its spirit (the historical school of law in Germany), and *narodnost* (nationality) as a unity of language and other spiritual bonds (in Russian socio-political and legal thought)[1]. Almost im-

[1] The famous Russian jurist Boris Chicherin wrote that "Nationality does not consist in personal qualities, but in a common *idea*, in the recognition in others of an identical spiritual element, one in many, that is, in belonging

mediately, this shift gave rise to new insights that sought to correct and supplement the inherently atomistic Roman legal constructs, which were oriented towards discrete powers and the methods for resolving conflicts between them. The importance of collective interests, encompassing society and its national history, now came to the fore.

Russian jurists quickly joined in the discussion concerning the dogmatic development of the theory of state law (Alekseev 1897), the systematic study tasks of which had been set much earlier (Dugamel 1833: II). In terms of the depth and nature of the discussion of issues of the theory of public law, the research of Russian scholars was not inferior to the works of German and French researchers, who determined the main directions of reflection on public law. Aleksandr Alekseev wrote that the task of general state law, or *jus publicum universale*, is to study the "fundamental legal principles on which the state life of civilised peoples rests" – or "the requirements of the rule of law" (Alekseev 1897: 8-9). Aleksandr Gradovsky considered such a task to be the clarification of general ideas about the state (Gradovsky 1885).

For more than a century, the character of the theory of public law has been determined by attempts to construct it on the model of sociology or pure legal normative dogma. Thus, V.V. Ivanovsky, guided by the popular intellectual currents of the time, saw the future of state law in an alliance with sociology: "The development of state science in a sociological direction constitutes a pressing need of our time; but its successes are conditioned by the successes of sociological research methods in general, which, although significant, still do not make it possible to build a complete system of that science which could be called political sociology and which is given the more modest name of the general theory of the state" (Ivanovsky 1910: I).

Conversely, according to Vasily Savalsky, the social consideration of the state should not be sociological, but "a legal version" (Savalsky 1913: 8).

In the 1970s, the German legal scholar Helmut Schelsky correctly identified this tendency in the legal literature of the 20th

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to a common spiritual essence that connects individuals not only with each other, but with separate ancestors… Because of this, people say: *our* language, *our* history, *our* literature, *our* fatherland" (Chicherin 1900: 69).

century as connected with the formation of meaning (Shelsky 1980). In the early 20th century, political science emerged based on political sociology, which began to claim the role of a discipline that studies law, among other things, from the perspective of its own understanding of its subject and method.

The renaissance in terms of research into the character and nature of public law in Western European and Anglo-American literature that took place during the 1960s was largely influenced by political science research. Here the main concern (one that had been articulated since the 17th century) was to make the theory of public law interdisciplinary, i.e., simultaneously political science (philosophical-political) and legal in its nature. Previous approaches were criticised for their excessive dogmatism and focus on studying the history of constitutions along with the political structure of society. It was clear that public law needed to be transformed. In this regard, ideas were expressed about the need to simultaneously take into account the functional characteristics of political institutions, the socio-psychological aspects of the activities of officials, the role of law as a means of transforming reality, and the human rights factor.

In American literature, public law has traditionally been the subject of intense debate regarding its disciplinary character. Particularly indicative in this regard is Glendon Schubert's *The Future of Public Law* in which the author characterizes the discourse about the future of public law more as an attempt to decipher an anachronism. For him, the very possibility to discuss any future of public law in the form in which it previously existed is excluded. Schubert's work is informative from a historiographical perspective due to its detailed examination of the teaching of public law in the United States within the framework of legal and political disciplines. His research is based on the idea that public law, being borrowed from continental European science, is in fact somewhat alien to American juridical thinking and should therefore be encouraged to develop into a kind of interdisciplinary field where it would successfully combine both legal and political science. Here is explicitly argued that traditional discussions of public law refer only to constitutional and administrative law.

David Danelski, a prominent American jurist, wrote a preface for The Future of Public Law, providing us with a very characteristic attitude towards public law in American educational institutions,

where the only course in public law, according to the standards set in the political science curricula, is constitutional law. As a result of this tendency, instead of studying international law, political scientists are showing increasing interest in international politics. Here, the disappearance of administrative law from the modern political science curriculum is assessed negatively. Moreover, the reason for this situation is said to be the lack of interest among students (i.e. low attendance). Meanwhile in political science, there is an erroneous identification of administrative law with public administration. It is also noted that few political scientists are interested in teaching such courses. On the contrary, a noticeable positive trend was the inclusion in the political science curriculum of new courses on the judicial process, the Supreme Court as a political institution (or decision-making institution), and corresponding judicial behaviour (Schubert 1975: 36).

Meanwhile, if we glance at Russian political science and legal education, it will be seen that courses on public law are still lacking. With the exception of some general studies, there is virtually no developed theory of public law. At the same time, public law sciences occupy an independent place in the nomenclature of scientific specialities. While there is an understanding of the branches of law related to public law that is derived from the traditional teaching of the theory of state and law, there is no clearly generalising or conceptual interpretation of the problems of public law.

Attempts are sometimes made to solve the problem of public law theory by means of the comparative method. However, this typically only serves as material for evaluating existing approaches. Research into comparative public law was undertaken already in the early 1920s, when it was noted that there was no single criterion that could be applied universally to distinguish between public and private law (Ehrlich 1921), and therefore such a division was rather of a formative nature. It is generally acknowledged that pre-revolutionary Russian jurists made a significant contribution to the development and generalisation of the experience of developing state law in foreign countries.

In American literature, as in the Anglo-Saxon area as a whole, the formation of styles of discussing the subject problems of jurisprudence has become a typological phenomenon. This generally corresponds to the paradigmatic features of the Anglo-American logic

of meaning, in which procedurality significantly dominates over substantiality. Thus, American legal scholars are not particularly interested in the development and precision of the concept. Rather, coherence and integrity are initially formed through the constancy and regularity of actions, while changes (accidents of legal states) are thought of in terms of a change in the initiator of the action and the one undergoing it.

In the United States, on the wave of sociologisation of jurisprudence in the first decades of the 20th century, a "functionalist style" emerged in public law, which represented a direct alternative to the dominant doctrine of so-called analytical legal positivism, based on the political values of classical liberalism. The functionalist style offered a different way of solving problems of public law – from institutional reforms to alternative methods of interpretation and methods of legal argumentation. It was supported by reference to political movements such as new liberalism, social democracy, progressivism or democratic socialism. However, due to its incompatibility with certain philosophical beliefs, functionalism in public law remained a complex and ambiguous phenomenon. Therefore, it could not be identified with particular scientific schools and directions of thought, leaving the designation – which is quite traditional for the American logic of meaning – as a *style* of thought.

The main assumptions shaping the functionalist style in public law were as follows: the institutions and practice of public law can and should be used to help enhance human potential; law is not a transcendent phenomenon existing outside society and setting ideal standards by which society should be judged; as a function of society, law must evolve as society develops; society is best viewed as a particular type of organism; the primary function of public law should be to maintain a healthy political system and promote social solidarity; government exists to fulfil this core function and is subject to duties; because public law is linked to the fulfilment of these duties, lawyers should not become overly focused on advancing form (concepts) over substance (goals); public law should be interpreted purposefully (i.e. in view of its function); since freedom is not simply realised through the absence of formal restrictions but is closely tied to the realisation of human potential and objectives, the pursuit of freedom requires an active role by public authorities; freedom presupposes the performance of a person's functions;

rights should be seen as claims that are recognised and enforced only to the extent that their recognition serves the common good, as a function of the whole; to unite these elements into a coherent whole, a much broader sociological concept of public law must be adopted – one that goes beyond positive law and encompasses a certain way of life (Loughlin 2005).

Australian scholar Peter Cane writes that, for the Anglo-Saxon legal tradition, the problematic of public law is not limited to understanding it as a "sphere of law" or even as a "category of legal thinking", but is central to understanding what law is in general, for the formation of the concept of law or the theory of law (Cane 2013: 649). Contrasting it with so-called "conceptual analysis", he describes his approach to understanding the nature of law as "non-essentialist". The point of his statement is that in order to understand law, primarily through public law as its central core, it is necessary to look not for a set of conditions for the existence of law in all possible worlds (according to Hart's linguistic concept of law), but rather for the most characteristic features of existing legal systems. Thus, as this author suggests, public law theory, or law in general, is "firmly grounded in actual social and legal practice… a more detailed and less abstract theory… than Hart's approach, which is based on hypotheses about how 'law might develop'" (Cane 2013: 649).

The English legal scholar Martin Loughlin argues that public law should be recognised as an independent discipline with its own distinctive methods and objectives; as such, its understanding does not depend on any prior assumptions. In essence, public law is considered not only as a type of law, but also as a phenomenon of the theory of argumentation, for which it is important to agree in advance on the types of acceptable arguments. While this direction surely has a right to exist as a type of discourse, in terms of its practical application it typically draws harsh criticism, especially outside the Anglo-Saxon space.

From the standpoint of Loughlin's argumentative logic, it is necessary to develop the conceptual foundations of public law, including such issues as governance, politics, representation, sovereignty, constituent or constitutional power and human rights. It is asserted that the methodological approach based on these basic elements of the subject of public law can lead to a proposed new

understanding of the idea of public law (Loughlin 2004). The most important thing, according to this author, is that for a correct understanding of public law it is necessary to recognise its autonomy. Thus, the future of public law is asserted as a kind of pure theory, which means understanding it as an autonomous subject, acting according to its own distinctive method. Since, as Loughlin emphasises, the object of public law is governance, an understanding the nature of the modern state is crucial to comprehending public law. At the same time, positivism (literally, the positive theory of public law) cannot be a theory of positive law, since it explains the meaning of politics and its role from the point of view of the ever-existing possibility of conflict. It is also said that the application of public law principles to particular cases remains uncertain because public law is a form of political argumentation based on rational considerations (Loughlin 2004: 153).

Following Hans Kelsen, Loughlin explains that, when stripped of political ideology, public law can be described in purely theoretical terms (Loughlin 2004: 1-4). The author considers the managerial behaviour that arises whenever people unite with each other, whether in families, firms, schools or clubs, as the central substantive and semantic attribute of the pure theory of public law. Thus, modernisation is not associated with a change in law, but is the result of political adaptation (Loughlin 2004: 5).

Based on Max Weber's ideas about the meaning of goal-oriented rational behaviour, Loughlin tries to explain how public law shapes aspects of political practice; indeed, politics itself, according to the author, is rooted in human conflicts that arise as a result of the struggle for the realisation of various ideals of the good life (Loughlin 2004: 32). Here it is emphasised that, in modern societies, the government does not claim to govern the people; rather, the government represents the people. The importance of representation in public law is therefore obvious (Loughlin 2004: 53). Next follows sovereignty, which is conceived as the autonomy of the political and as a fundamental concept of modern public law. From the author's perspective, many of the difficulties in understanding the idea of sovereignty stem from the failure to recognise public law as a practice with its own distinctive methods and purposes. The resulting confusion stems either from the attempt to place sovereignty within a formal, analytical and positive framework, or from the attempt

to develop transcendental principles of right conduct to which all legal and political actions must be subject. Sovereignty must be socially constructed; as such, it should be used as an expression of modern legal-political discourse (Loughlin 2004: 72). The author also distinguishes between constituent power and constitutionally enshrined power. Constituent power does not lend itself to simple exposition in legal categories. The main reason for this consists in the fact that constituent power expresses the power of the masses; after all, it is the legal expression of the democratic impulse. Constituent power provides legal expression for those forces that enable the formal constitution to perform its political function (Loughlin 2004: 99). Human rights are also identified as an important change in the architecture of public law; according to Loughlin, the study of these rights should be carried out by tracing the intellectual origins of the modern human rights movement and determining its influence on modern legal and political practice. The political discourse on natural rights penetrated into legal discourse and then, through positivisation – that is, the institutionalisation of the concept of law as an expression of fundamental rights – changed the configuration of the relationship between law and power (Loughlin 2004: 114).

By interpreting public law from the standpoint of argumentation theory allows, within the framework of modernist concepts, it becomes possible to take a fresh look at the problems of its content and to identify, so to speak, "grey areas" in public law regulation. At the same time, the limitations of this type of approach are obvious due to their general failure to engage with other interpretations of public law. If public law is derived not from the social or normative nature of law, but from a certain scheme of arguments (even if outwardly practice-oriented), then it is obvious that such schematism ignores the dialectic of the internal (social) and external (normative) in the understanding of law. Argumentative and discursive concepts have a specific situational justification. Given the ambiguous and contradictory interpretations of human rights activity contained in contemporary literature and public space, it is hardly possible to objectively explain the nature and purpose of public law solely through the history of the human rights movement.

The peculiarity of the public law method, according to Loughlin, is explained by the tendency to conceptualise vast spheres of public life in legal terms. In the end, the method of public law

turns out to be a method of prudence analogous to the ideas of Machiavelli. However, Loughlin is far from a conceptual or categorical understanding of the logic of public law. For him, public law is a special synthesis of a limited number of political and legal arguments that are accepted more as symbolic phenomena – i.e., semiotically rather than in terms of in their substantive, semantic and cultural-civilisational content.

An attempt to combine the idea of justice and the command-and-control activity of the state in the concept of public law was undertaken by Ernest Weinrib from the University of Toronto. According to this author, a unified theory of public law becomes possible by combining the demands of power and justice into a single structure. However, for this to happen, power and justice must first be properly understood and justified. Here, it is argued that authority and justice are interrelated principles of the legal system: the right of rulers to exercise state power is always accompanied by the duty to govern justly; the right of subjects to just government presupposes the existence of institutions of public authority (Weinrib 2014: 703). Like Loughlin, Weinrib offers a rather limited perspective. The problem of the relationship between justice and the state's command and control activities has been resolved in different ways throughout the history of political and legal thought. The assumption of some a priori fairness inherent in public policy seems to function as a clear simplification.

For Russia, the search for a modern theory of public law stems from a series of historical changes over the past few decades – from the collapse of the USSR, accompanied by a sharp shift toward Western European and Anglo-American models of legal thinking, to contemporary challenges of ensuring the country's sustainable development in the context of dynamic global processes, strengthening the protection of national interests, modernising the economy, developing science and technology, and strengthening spiritual and moral values. For Western Europe and the countries of the Anglo-American region, conversely, the problem of public law is associated with the awareness of the one-sidedness of outdated interpretations, as well as the presence of systemic crises, which are described in detail in national literature, taking into account fundamental changes in the global architecture. Of course, the corresponding processes of awareness and improvement proceed differently and

not always painlessly. In this connection it is very revealing to observe how Western European and Anglo-American scholars analyse the Chinese experience of state and legal development. Against the backdrop of China's economic and scientific-technological successes, its legal institutions have attracted the close attention of Western scholars. Moreover, the western literature is characterised by a variety of assessments – from the denial of law in China as such from the point of view of "Europeanness" to admiration for the quality of its legal decisions. From the perspective of Western literature, legality and order in China are viewed solely through the lens of the predicate "authoritarian"; however, the country's effectiveness and openness to social change, along with its incorporation of the best global practices that align with national interests, create a profound dissonance in established patterns of thinking.

The historiography of public law as a scientific discipline demonstrates, through the example of selected images, the existence of a common interest in the development of issues of effective political governance and legal regulation in their unity. However, the historical path of dogmatic development of public law and its main characteristics is distinguished by a diversity of choice of means, priorities and understanding of the disciplinary nature. The conservatism of Russian and German models of jurisprudence, oriented they are towards rational dogmatics and *social* understanding of the sphere of public law, can be contrasted with the pragmatist-functional understanding of public law in the mainstream of American jurisprudence, which, based on *instrumental sociology*, gives rise to different interpretations of the prospects of public law. In any case, universal approaches and solutions remain the subject of discussions about future jurisprudence. To develop the logic of meaning-making in the sphere of public law, it is necessary to take into account that the definition of "public" is never an empty abstraction, but always has specific content in the field of national culture and the history of state building.

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