

A Theory of Principles of Law: The Revival of a Forgotten Conception

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Aleksandr Gorovtsov (Alexandre Gorovtzeff)—formerly a professor at the University of Perm and then privat-dotsent at the University of Petrograd, while living in exile in France—published two volumes of a book *Etudes sur la principologie du droit* in 1928.¹ This publication summarized ideas which Gorovtsov had already expressed in earlier publications.²

Gorovtsov's studies covered the following basic questions of legal theory:

- the notion of the object in law and its significance for legal theory;
- the problem of distinguishing between private and public law in the light of his new notion of the object in law;
- the classification of legal disciplines, based on this notion.

The basic elements of this theory have retained their interest until the present day. At the beginning of his work Gorovtsov remarks that the notion of the subject of law has been studied since the times of the Roman juriconsults and has occasioned a considerable number of academic works, while the notion of the object of law has been virtually ignored over the centuries, having been reduced to the well-known notion of *res* (a thing).

Taking over the notion of *res* from private law, some authors have used the term in public law, assimilating it with territory, the only seemingly plausible *res* in public law.

Of the various philosophical conceptions concerning the object of law the three most important ones may be summed up as follows:

- an object is everything outside the subject of law;
- objects are all material things;
- objects are human actions.

¹ *Etudes sur la principologie du droit; Première partie: Théorie de l'objet en droit*, Paris 1928; *Etudes sur la Principologie du droit; Deuxième Partie: Théorie du sujet de droit*, Paris 1928.

² In *Revue du droit public*, April-June, 1925; *Revue générale du droit*, April-June 1927, July-September 1927; *Revue trimestrielle de droit civil*, October-December 1926, January-March 1927.

William B. Simons, ed.

Private and Civil Law in the Russian Federation 105-122
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Gorovtsov's point of view is close to the third variety; he argues that the "natural liberty" of subjects of law is itself an authentic object of law. This concept, enigmatic at first glance, is developed in the further analysis of his work.

The roots of this theory are in the view, produced by the genius of Roman law, of law being divided into two branches: the law of persons and the law of things, the latter including the law of obligations. The interests of human beings, connected with natural liberty and its inherent limitations, are the objects of law. This also applies to public law (to be understood as constitutional and administrative law, following Lorenz von Stein) where the same natural liberty of the subject of law—in this case the state—is the object, as well as its limitations by virtue of administrative law.

The author then proceeds to the two main objectives of his work: to establish a clear distinction between the categories of private and public law, based on the notion of the object in law, and to offer a consistent and reasonable classification of legal disciplines, to replace the illogical system prevailing until then. The overarching objective is to determine a common, organic and intrinsic principle for the domains of private and public law, resulting in the construction of a kind of tree with branches representing the various legal disciplines.

Gorovtsov underlines the importance of comparative law, not only as a historical or geographical comparison of different legal systems, but also as a comparison of different legal disciplines within a unified system, in order to deduce certain common principles. Such a generalization of legal principles should lead to a renovation of legal philosophy by creating a kind of "principology" aimed at a more concrete synthesis of the philosophy of law, suffering until then of an abstract and metaphysical character.

The eminent role of the "founder of comparative law", Immanuel Kant, is seen in the approximation of the notion of the object (usually understood as a material thing previously) with the subjects (p.11). Gorovtsov recalls how Kant defined law as a set of rules of behavior of subjects, constituting the restrictions of their natural liberty. He was followed in this respect by authors like Austin, Ortolan and Ahrens. In the works of Kierulff, Gierke and Bierling this approximation became more pronounced (pp.13-25). At the same time, these authors envisaged such a partially transformed notion of the object mostly by its application to private law, leaving aside the spheres of public law and international law. Nonetheless, every logically satisfactory theory of the object should be applicable to all branches of law.

Previous conceptions of the object of law implied the understanding of the object as a material *res*. But authors such as Gierke and Bierling had already indicated that an action or non-action of a subject of law

may itself be regarded as an object, at least in such branches as public law and family law. Persons do not become objects of public or family law, but their liberty does (p.30). The real object indeed is the natural liberty of the subject itself. Thus, the person and his natural liberty are distinct things, only the latter may be an object of law.

The preceding points concern inter-individual relations. The picture is different, for instance, in international law, where persons cannot be subjects, because international law is inter-state law. Gorovtsov remarks that here too the natural liberty of the state, its sovereignty, is subject to limitations. If objects for Bierling may be material objects (*res*) and persons (human beings), for Gorovtsov, even if the object in law is understood as a complex phenomenon of natural liberty (pp.31-32), the object in public law is the natural liberty of the state with respect to individuals. Thus, natural liberty is common to all branches of law, public law, private law, and international law.

According to Gorovtsov, the object of law in private law is the natural liberty of the individual, in public law the natural (originally total) liberty of the state with respect to the individual, and in international law the natural liberty of the state with respect to other states (p.33).

In the same vein Gorovtsov regards the subject of law not as a concrete human being or a state, but as a person or rather his will, the legal personality that represents it. This part of the study is further developed in the second volume of the work, dedicated to the problem of the subject of law.

Gorovtsov then proceeds to a differentiation between two notions of objects, the “authentic” object or natural liberty, and a “practical” object. For the latter one he proposes the term “sub-stratum”. In private law, the real object of the title to property is the natural liberty of the owner, while the sub-stratum is the object of property itself. In public law, in the case of the freedom of assembly, the real object is the natural liberty of the state, the sub-stratum the practical possibility for citizens to assemble. In international law, sovereignty is the object, the sub-stratum is the obligation to comply with international rules or to apply foreign law to foreign citizens (the latter in case of private international law) (p.38).

Sub-strata are further divided into concrete and abstract ones, the latter being interests of a physical, moral or economic type (p.39). Harmonizing these interests by introducing limitations at the level of concrete sub-strata is the essence of law.

The second part of the first volume is devoted to the problem of distinguishing between public and private law in the light of the theory of the object in law, derived from this new conception of the internal

architecture of the law. Gorovtsov points to an ultra-statist theory of the interrelation between public and private law, wherein the former totally absorbs the latter. Another conception, known as “solidarism” (not to be confused with an identically named tendency in Russian history), affirms that the notion of contract unites the entire sphere of law (Duguit).

By contrasting two opposing viewpoints, those of Jellinek and of Stammer (following Blackstone, Locke, Montesquieu and Kant), Gorovtsov is prompted to introduce two categories: public law in a material, and in a formal sense (p.44). Public law in a formal sense provides sanctions for (or approves) all other branches of law concerning private persons (from penal law to civil law) and creates what are called “constructive norms” by Duguit. Public law in a material sense, according to Gorovtsov, creates “pre-constructive” rules or principles which establish a general system of dependence.

Gorovtsov argues that the existence of law as a single system can be proved in two different ways (p.48). Firstly, the existence of law is obvious in the pre-state era, as, for instance, in a relationship between two persons. Secondly, law exists in the regulations of international law, which is not to be considered a type of supranational law; if it were, it could be identified as public law functioning as supra-law in respect of private law (in this matter the author refers to the views of Petrażycki, according to whom international law is paradoxically closer to private law in its internal construction).

In the view of Gorovtsov, the discussion on the pre-eminence of either public or private law is very similar to the discussion on the priority of objective or subjective law. It is ignored that “subjective” rights are simply the interests of subjects in law, by which “objective” rights are transformed into “subjective” ones. Both of them are dependent upon interests. If two persons agree on furthering their interests in pursuing their harmony, their interests are becoming “interests-rights”, acquiring the approval of objective law (pp.51-53). Through this approval, “interests-rights” are modified into subjective law. Analogically, the language of a single person (*homo solus*) is not a real language of communication, if there is no second person to communicate with, as “interests-rights” are not yet real law without the second person.

Private natural rights (the right to property first of all) preceded the birth of the state, because these rights are possible in relations even between two persons without any state involvement. Public “natural” rights (the freedom of movement, for example) on the other hand follow the birth of the state. Gorovtsov concludes that the discussion on the pre-eminence of either private or public law has been deformed by a mis-

conception concerning the substance (the interests), beyond the external forms of these two branches of law. He underlines their ultimate unity, adding that the really important distinction lies in the difference between public law in the formal and in the material sense.

Next, the distinction between public and private law is examined. According to Ulpian's classical formula private law concerns individual persons and public law the common good. Other authors, such as Savigny, Stahl, Jellinek, and Kavelin, criticized this understanding and offered somewhat different interpretations. In the view of Gorovtsov, the natural liberty of individuals is the object of private law and the natural liberty of the state the object of public law. This means that restrictions upon the omnipotence of the state, as well as upon individuals in their relationships with the state, constitute public law (p.70). As the individual enjoys a number of natural rights, so the state equally enjoys natural (sovereign) and "facultative" rights.

In order to be able to classify all specific legal disciplines in the first volume of his study, Gorovtsov refers to a certain kind of commonality of the material objects (sub-strata) of all of them. Starting from the distinction between public law in a formal and a material sense, the author argues that the former plays a general role in regulating traditionally interpreted private and public law and their interrelationship. An example of this role may be seen in criminal law, which is neither public nor private law in the traditional sense of these terms, because, while mainly regulating relations between individual persons, it also protects the natural liberty of the state against anti-social elements. The special feature of criminal law is that it protects simultaneously the natural liberty of individual persons and of the state, and that it also provides the possibility of judicial remedy (pp.72-74). The conclusion must therefore be that criminal law is neither civil law, nor public law (p.75). At the same time, the sub-strata (interests) of criminal law are located in public, as well as private law. The possibility of punishing individual persons by the public power is specific of criminal law; this is an element of public law in the formal sense, exercising a function of "reparation".

The major division of law consequently is: private law and public law in a material sense on the one hand, and public law in a formal sense on the other (p.76).

Gorovtsov then examines the public-private law dichotomy in international law. He regards this branch of law as neither belonging to private, nor to public law, although the notions of public and private international law seem to suggest a division of international law according to the public-private dichotomy. If private international law determines the applicabil-

ity of national law to two or more elements of different states, it really is public law. But international law cannot be public law by itself, because there is no natural liberty which may be restricted, as ordinary national public law does. There is no single public power in international law, but a multiplicity of powers. International law is inter-public, inter-state, inter-national law (p.79) in the same way as private law is inter-individual law. International law is not public law in a genuine, material sense, but only in a formal sense.

Gorovtsov also acknowledged the phenomenon, new to his time, and identified as international administrative law, what we would nowadays call the law of international organizations (p.81). In this case individual states, together with other entities, are subjects of common rules; international law plays the role of public law in a formal sense. The direct and most important object of this type of international law is the natural liberty of its subjects (states); the sub-strata are the legislative, executive and judicial powers of the national states, which represent intermediary interests, connected with the interests of individual persons (sub-sub-strata) at the national level, both in private and in public law (p.81). The state and its powers, in other words, remain the intermediary between the economic, moral and physical interests of national populations on the one hand and international law on the other.

The last part of the first volume is devoted to the classification of the various legal disciplines on the basis of the new concept of objects in law. Human interests, according to Gorovtsov, are always the sub-strata of public, private or criminal law. But these interests are not the same for each of these branches (p.83). Property interests are always present. Certain moral interests, such as human dignity, may be the object of civil or criminal law. Public law is mainly concerned with physical interests as sub-strata. It is worth noting the the *Habeas Corpus Act*, protecting the physical liberty of persons, is an important source of public law (p.87). Physical interests also form the sub-strata of international law, especially where the regulation of military operations or of military occupation is concerned.

At the end of his first volume Gorovtsov undertakes the ambitious task to propose a general definition of law. While Kant refers to the harmonization of natural liberty, Jehring to the protection of interests, and Korkunov to the delimitation of interests, Gorovtsov sees the role of law in the unification and harmonization of interests. This leads him to the following definition: "Law is a set of rules of concordance of interests of its co-subjects by way of reciprocal limitation of their natural liberty" (p.92).

Gorovtsov's conception of the object in law involves the introduction of new notions which transfer the matter to another dimension, where interests representing concrete sub-strata are linked with abstract sub-strata (the natural liberty of persons, mainly human beings and states). This vision offers a new approach in looking at what is referred to as objects in traditional theories of law. An in-depth analysis of the infrastructure of law discovers new types of links and interdependencies between well-known elements.

If previous conceptions have been regarding the interaction between traditionally understood object and subject as, respectively, function and argument, depriving the object of its historically creative role, Gorovtsov's conception divides the traditionally understood object into a concrete and an abstract one, where the former forms the genuine sub-strata and the latter the abstract sub-strata, representing economic, moral and physical interests transplanted from social life and the social sciences.

Many decades after the publication of this conception, the discussion of the private-public dichotomy still follows the same path as in the days of Gorovtsov, encountering the same difficulties. In the meantime, life has moved on and we can now speak of the emergence of an international law above the states, a global law or world public order, and a growing impact of international organizations, despite all their deficiencies. The public law of a new world is emerging and, perhaps, a new natural liberty is beginning to appear, the liberty of mankind.

Gorovtsov's pioneering vision of the internal design of the principles of law, brilliant as it was, should now be redefined in view of the newly emerging conditions. As Mendeleev showed to way to discover new chemical elements with the help of his periodic system, so Gorovtsov's approach can help in drawing conclusions and making plans concerning the development of law. His conception retains its validity today and deserves to survive and be reborn.

