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THE CONCEPT OF ADMINISTRATIVE MATTER OF LAW IN THE DOCTRINE OF SERBIAN ADMINISTRATIVE LAW *

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Abstract. *The administrative matter of law is an important feature of the concept of administrative act from positive law. Scholars specializing in the doctrine of administrative law do not have a single reply to the question what are the important characteristics of an administrative matter of law, which gives rise to different positions on the concept of administrative matter of law. With that regard, this paper presents the viewpoints of Serbian administrative lawyers on the concept and features of administrative matter of law. In the final part, the paper lays out the author's own view of the features of administrative matter of law.*

Key words: *Administrative matter of law, administrative act, individual legal situation, authoritativeness.*

1. INTRODUCTORY REMARKS

In 1952 the first post-war Administrative Disputes Act was passed[1]. Its text introduced for the first time the administrative matter of law as a feature of the administrative act. The legislator remained faithful to this position in subsequent regulation of the administrative act concept. The current Administrative Disputes Act of the Republic of Serbia[2] is

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[1] "In the sense of this Act, an administrative act is an act passed by a state agency in an administrative matter, which settles a dispute of a certain right or obligation of an individual or legal entity." Quoted after: V. Ivancevic, M. Ivcic, A. Lazic, Administrative Disputes Act with Commentary and Judicial Practice, Zagreb, 1958, p. 28.

[2] Administrative Disputes Act (Official Bulletin of the Federal Republic of Yugoslavia, No. 46/96) provides the following definition of the administrative act: "In the sense of this Act, the administrative act is an act by which a state agency and an enterprise or other organization carrying out public competences decides on a particular right or right or obligation of an individual or a legal entity or another party in an administrative matter".

also harmonized with it. Thus, the administrative matter of law becomes a key to the recognition and understanding of the administrative act in our positive law.

There are two positions from which the concept of administrative matter of law may be defined: that of positive law and that of legal theory. From the viewpoint of positive law, the administrative matter of law is defined as an important property of the concept of administrative act. It is a prerequisite for the harmonization of the practice of administration and administrative judiciary; likewise, it is a prerequisite for the modernization and rationalization of the overall administrative procedure. However, the legislator has not undertaken this task. In our country there have been attempts to define the administrative matter of law in legal acts[3] yet none of these has proven fruitful. With that regard, in their practice, the administration and administrative judiciary have acted hesitantly and unequally in their treatment of the administrative matter of law; indeed, there is agreement only on a few features of the administrative matter of law.[4]

As for defining the administrative matter of law in legal theory, two questions are posed. On the one hand, one should define the administrative matter of law as an element of the legal definition of the administrative act; on the other, the issue is whether the administrative matter of law is a material criterion for making decisions in administrative activity. Indeed, is it possible to use substantive criteria so as to draw a line between an administrative and a judicial matter, or is this difference merely a matter of normative regulation. Various interpretations of the administrative matter of law have emerged from the writings of scholars in administrative law. One would not exaggerate, then, if one stated that in the doctrine of administrative law there are as many views of the administrative matter of law as there are authors who have written on it. In the text that follows, we have put in some effort to systematize the positions of authors in administrative law by

[3] In 1964, the Federal Secretariat for Budget and Organization of Administration prepared materials entitled "Some Principal Questions with Regard to the Harmonization of the Law on General Administrative Procedure with the Constitution of the Socialist Federative Republic of Yugoslavia". The materials contained a definition of administrative matter: "Under 'administrative matter' this Law has in mind such a matter in which, through direct application of legal regulations, a right, obligation or legal interest of the party is settled, for which a court executing regular judicial function is not competent." After: Dragan Milkov, Administrative Matter, Annals of the Faculty of Law, Belgrade, 5/1986, p. 501.
In 1997, when the current Law on General Administrative Procedure was passed, the draft of this Law contained the following definition of the administrative matter: "An administrative matter is an individual, as a rule undisputed legal matter of public interest, i.e. a subject from an administrative domain, in which a body, directly applying regulations, settles the rights, obligations, or legal interests of a party, confirms or registers certain data, or facts, carries out administrative supervision or administrative execution". In the procedure for passing the current Law on General Administrative Procedure, an amendment was adopted which deleted the definition of the administrative matter from the text draft.
It is quite likely that the Serbian legislator will soon include a definition of the administrative matter in a legal text. Namely, in the current draft of the Administrative Disputes Act (2009), which will soon be submitted to the Serbian Parliament, there is a definition of administrative matter: "In the sense of this Act, an administrative matter is an individual undisputed situation of public interest the need of whose authoritative legal regularization emerges directly from legal regulations."

[4] The practice of administration and administrative judiciary does not consider the following to be an administrative matter: normative matters (passing general legal acts), disputed matters in property law, matters not conducted under the rules of administrative procedure, matters in which internal acts are passed, and contractual matters. See more detail in: Z. Tomic, V. Bacic, A Commentary of the Law on General Administrative Procedure, Belgrade, pp. 23-25.

their substance. In doing this, we have separated several conceptions for defining the administrative matter of law. We add that in the paper we shall present only the positions of authors in administrative law which are representative of conceptions we shall be discussing. We end the presentation of conceptions in defining the administrative matter of law with our own position on the features of the administrative matter of law.

2. CONCEPTIONS BEHIND DEFINITIONS OF THE ADMINISTRATIVE MATTER OF LAW IN SERBIAN ADMINISTRATIVE LAW

One should first suggest the school in administrative law which does not consider the administrative matter of law a relevant feature of the administrative act. Thus, Lazo Kostic, a prominent representative of Serbian legal science, does not mention the administrative matter of law in his discussions of the administrative act. Kostic gives the following definition of the administrative act: "An administrative act is such a legal act of the administration which the administration uses to authoritatively regularize a particular case".[5] Such a way, which does not accept substantive criteria in the understanding of administrative activities, is inspired by the conception of the administrative act in German legal doctrine.[6]

Some authors attempt to single out important features of the administrative matter of law without fully defining this concept. Such a conception is embraced by Mirko Perovic[7], who lays out the following position: "An administrative matter of law is a category under so much dispute that it would be most fitting to define only its general and orientational elements, allowing for them to be sought and determined in each particular case… Therefore, to define the concept of the administrative matter of law, neither the character and property of the body proclaiming it nor the character of the proclaimed act, nor the matter in question, nor the domain in which the act is proclaimed, are solely relevant." However, in his discussion of the administrative matter of law, Perovic does not define elements he singles out as important features of the administrative matter of law (administrative activity, administrative substance, the body adopting the act), so that this position cannot tell us much about the administrative matter of law.

Further, some scholars in administrative law hold that the administrative matter of law should be observed in its formal aspect.[8] An administrative matter of law is viewed as an activity. Hence, Nikola Stjepanovic defines the administrative matter of law from the viewpoint of activity of bodies: "The administrative matter of law is such an activity of state agencies, in which, typically, bodies of administration and organizations with public authority create or determine, change, or annul administrative legal relations relevant to a particular individual or legal entity".[9] If we know that "matter" is a static concept, the question emerges whether the approach to defining the administrative matter of law

[5] Lazo Kostic, Administrative Law of the Kingdom of Yugoslavia, Belgrade, 1936, p. 49.
[6] See on this: Dragan Milkov, Administrative Act, Novi Sad, 1983, pp. 42-54.
[7] Mirko Perovic, A Commentary of the Administrative Disputes Act, Belgrade, 1979, pp. 71-72.
[8] "Directing attention to the set of practical operations to which the meaning of the corresponding term, or substance of the corresponding concept can be reduced, or with the help of which a particular matter can be identified and delineated from related phenomena in objective reality." Quoted after: Z. Jelic – B. Fatic, Guide through the Administrative Procedure, Belgrade, 1998, p. 427.
[9] Nikola Stjepanovic, The Administrative Law of SFRY, Belgrade, 1978, p. 791.

through the activity criterion is a good approach. We think not. One should explain the very matter to which the activity of bodies is directed. Thus, to resolve identity, we do not explain the activity, but the object of the activity. An administrative matter of law is not an activity, because activity is aimed at resolving the administrative matter of law. An administrative matter of law is just one of the features of the administrative act, rather than the act itself.

In the doctrine of administrative law there have been attempts to define the administrative matter of law through a negative position against the discussion of the relationship between the administration and the judiciary, and the administrative body and the court. Thus, Bogdan Majstorovic defines the administrative matter of law as a legal matter in which, through direct application of legal regulations, the issue is solved related to a right, obligation, or legal interest of a party, if the matter in question is not within the competence of a court.[10] From such a formal approach to defining the administrative matter of law it follows that the administrative matter of law is a matter from the administrative substance for which an administrative body is competent. And the other way round, judicial matters are matters for which the court is competent. Supporters of substantive criteria for distinguishing between administrative and judicial acts consider this position erroneous, holding that one must provide an answer why one matter is administrative, and the other judicial.[11]

Starting from the fact that the administrative matter of law is a static concept, some theoreticians have used the analytic method[12] in defining the administrative matter of law. There are two types of definitions in this conception for defining the administrative matter of law.

According to the first position, the administrative matter of law should be explained in terms of both its important characteristics and administrative activity. In that respect, Zoran Jelic proposes the following definition of the administrative matter of law: "an administrative matter of law is an individual, as a rule undisputed legal matter from an administrative domain, in which a body conducts an administrative procedure, directly applying regulations, decides on the right, obligation, or legal interest of a party, verifies or registers certain data or facts, carries out administrative supervision or conducts administrative execution".[13] The position promoted here is that, in terms of administrative activity, apart from authoritative decision making through an administrative act, operative and monitoring activities (administrative supervision, administrative execution) should also be considered administrative matter of laws.

Jelic's position on the administrative matter of law is accepted by Stevan Lilic.[14] He defines the meaning of the administrative matter of law in a way similar to that of Jelic. However, when explaining the concept, he stresses the following: "in the broader sense, an administrative matter of law pertains to any administrative decision making, primarily – but not limited to – individual cases. According to this position, there is an adminis-

[10] Bogdan Majstorovic, Commentary of the Law on General Administrative Procedure, Belgrade, 1977, p. 6.
[11] See: Dragan Milkov, op. cit., p. 495.
[12] "Explaining the important (general, constant, necessary) features of the term, concept, or subject which is being defined." Z. Jelic – B. Fatic, op. cit.
[13] Z. Jelic – B. Fatic, op. cit., pp. 426-428.
[14] S. Lilic – M. Markovic – P. Dimitrijevic, Administrative Law, Belgrade, 2004, p. 187.

trative matter of law not only when decisions are made on the rights, obligations, or legal interests (in the narrower sense), but also in situations related to personal conditions of citizens, or situations in which the administration proclaims its own regulations (regulation books).[15] Our position is, however, that the administrative matter of law should be differentiated from the normative matter (passing general legal acts).

Proponents of the second position view the administrative matter of law in substantive sense.

Zoran Tomic claims that "an administrative matter of law is an individual situation in life, of non-litigious character, with directly engaged public interest, which has to be authoritatively and concretely legally regulated, or whose administrative regulation has to be correctionally directed (ex officio or upon the request of a party), in accordance with the law."[16]. At this point one should pay attention to Tomic's position that a non-litigious matter should be considered an administrative matter of law in the substantive sense, and a judicial matter in the formal sense. Likewise, a non-litigious procedure should be separated from the classical adjudication process and administrative activity. In Tomic's definition of the administrative matter of law, public interest is particularly accentuated. Public interest is the dominant feature in the nature of the administrative matter of law. By its importance, public interest exceeds individual interests in an administrative procedure[17].

The position of Ratko Markovic on the administrative matter of law is similar: "An administrative matter of law is a concrete, individual, and undisputed legal situation which authorized subjects authoritatively and directly regulate through direct application of laws (legal regulations)".[18] However, in his explication of the relationship between an administrative and judicial matter, Markovic stresses that the administrative matter of law is characterized by the specification of the primary disposition of the general legal norm, while in the judicial matter the secondary disposition of the general legal norm is specified. Here Markovic obviously embraces the view of the administrative act originally offered by Radomir Lukic, that the administrative act is an individual act regulating the disposition of the general legal norm, while the judicial act regulates the sanction of the general legal norm.[19] There have been other attempts to construct the concept of administrative matter of law on these grounds. Accordingly, Dragan Milkov says: "The characteristic of the administrative matter of law lies in the fact that acts are proclaimed in an activity which does not put an end to situations under dispute, but rather specifies dispositions for the behavior of individuals."[20] Milkov views the administrative matter of law as an individual matter in which the need emerges from legal regulations for a rule of behavior to be authoritatively specified by means of primary disposition.[21] Milkov explains that the administrative activity is turned to the future, since the concrete rule of behavior for an individual has not yet been specified based on the law. Since the general legal norm is impersonal and pertains to everybody and nobody, the rule of behavior is specified only

[15] Ibidem.
[16] Zoran Tomic, Administrative Law, Belgrade, 2002, p. 274.
[17] Ibidem.
[18] Ratko Markovic, Administrative Law, Belgrade, 2002, p. 251.
[19] Radomir Lukic, Theory of State and Law, II, Belgrade, 1954, p. 142-153.
[20] Dragan Milkov, op. cit., p. 496.
[21] Ibidem.

with the adoption of the administrative act which contains primary disposition. The judicial activity, Milkov claims further, is turned to the past. It should be used to resolve a legal issue under dispute, which is done through secondary disposition.

3. CONCLUDING REMARKS

After the overview of the definitions of administrative matter of law in Serbian doctrine of administrative law, we hereby take the liberty to write a few words on the features of administrative matter of law ourselves. In the lines that follow, we shall approach the administrative matter of law from two viewpoints; the first viewpoint is based on the fact that the administrative matter of law is an important feature of the concept of administrative act from administrative law, while the second viewpoint aims to shed light on the relationship of the administrative and judicial matter.

We find that the administrative matter of law is characterized by the following:

First, an administrative matter of law is exclusively an individual legal situation. This means that the administrative matter of law is an individual case which has to be administratively regulated by an individual action, i.e. exercise of authority in the individual case. For this reason, the adoption of legal acts can be relevant solely to normative, and not administrative matter of laws.

Second, an administrative matter of law is an individual legal situation whose administrative regulation strives for the exercise of a public interest. In the words of Zoran Tomic, public interest is an essential requirement of a whole, superior in importance to the individual interests of citizens and organizations[22]. For this reason, the predominant feature of the nature of the administrative matter of law is public interest, and the exercise of individual interests must not be opposed to public interest.

Third, the regulation of administrative matter of laws in administrative law is an expression of authoritative actions of authorized subjects. The expression "authorized subjects" includes administration bodies, other state agencies and holders of public authority who apply the right of command in administrative matter of laws. Hence contractual matters[23], as a result of the coordination of wills, cannot be considered administrative matter of laws.

Fourth, the question is posed whether an administrative matter of law is a disputed legal situation. If one accepts that a disputed legal situation is characterized by the mutual opposition of two legal claims, or a principled opposition to a legal claim submitted,[24] the

[22] Zoran Tomic, op. cit.

[23] The view of the European Court of Human Rights in Strasbourg on the civil matter is very interesting. Namely, as stated by Sinisa Triva, the European Court took the position that, in order to qualify a relation as that of private law, whether in the concrete procedure the decision is made upon applying regulations from private law or public law is irrelevant; whether parties in the dispute are private individuals, or one party is government, is also irrelevant; likewise, it is also irrelevant who is competent to reach decisions on the concrete right in the national law. Quoted after: S. Triva, M. Dika, Civil Procedural Law, Zagreb, 2004, pp. 14-16. In our legal science, professor Milan Petrovic supports the position that we must abandon the assumption that private and public law make a vertical distinction between branches of law, and that we must accept the assumption that public and private law penetrate these branches diagonally. See: M. Petrovic, Zadužbina kao pravno lice i pravo svojine (Foundation as Juristic Person and Legal Ownership), Pravni život, br. 11/2009, str. 599-612.

[24] See on this: Predrag Dimitrijevic, Administrative Law, General Part, Volume One, Nis, 2008, pp. 256-263.

administrative matter of law is, as a rule, an undisputed legal situation; administrative matter of laws are almost always legal matters with just one party. Although positive law recognizes it, the administrative procedure with two or more parties with conflicting interests is a rare occurrence in practice; in such a situation, the administrative matter of law is a disputed legal situation by all its features.[25]

By its nature, an administrative matter of law is a regular legal matter. This means, in Milkov's words,[26] that administrative activity is turned to the future, because, a concrete rule of behavior, based on the law, has not yet been specified. Since the general legal norm is impersonal, the rule of behavior for the individual is specified only in administrative activity. On the other hand, in terms of the application of law, litigious and criminal matters are subsidiary legal matters. Settling litigious and criminal matters, as well as disputed legal situations, is achieved through the specification of the secondary disposition of the general legal norm. Settling litigious and criminal matters entails debate over the disputed legal issue, which forms the basis of their subsidiarity. On the other hand, a non-litigious matter is different from the litigious and criminal matter in that it is a regular, individual, as a rule undisputed legal situation, whose settlement is an expression of the specification of the primary and secondary disposition of the general legal norm.

Since we have determined that the administrative matter of law is a regular legal matter, the question is posed whether the concretization of general impersonal legal norms is made through the specification of the primary and secondary disposition of the general legal norm. We find the latter position to be correct. As it may be, one cannot accept the position that settling an administrative matter of law is an expression of specification of the primary disposition of a legal norm only. Let us take a look at some typical examples of administrative matter of laws. First of all, is a litigation of complete jurisdiction characterized by the exclusive specification of the primary disposition of the general legal norm. Since in the litigation of complete jurisdiction the court rescinds the administrative act replacing it by its own judgment which provides meritorious solution to the administrative matter of law, it is quite clear that the court does so by specifying both the primary disposition of the general legal norm and the sanction of the general legal norm. Furthermore, one cannot consider that the primary disposition of the general legal norm has been completed when, while reaching a decision after an appeal, the administrative body in the second instance, for example, revokes the decision or proclaims it void. After all, what is the nature of administrative matter of laws settled by the proclamation of onerous administrative acts; settlement of administrative matter of laws through proclaiming onerous administrative acts is, in all its features, an expression of the specification of both the disposition and the sanction of the general legal norm. An administrative act does not need to contain a sanction, because the fact that the sanction is prescribed in the law (enforced performance) is sufficient. The position presented here therefore supports those legal scientists who have claimed that, in terms of substantive criteria, there is no difference between administrative and judicial acts.[27]

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[25] See Article 124 of the Law on General Administrative Procedure ("Official Bulletin of the Federal Republic of Yugoslavia", No. 33/97 and 31/2001).

[26] Dragan Milkov, op. cit.

[27] See on this: Ivo Krbek, Administrative Law of Federative People's Republic of Yugoslavia, Zagreb, 1957, p. 184; The Administrative Act, Zagreb, 1957, p. 7.

Having in mind all that has been said, we end the paper by stating that the administrative matter of law, as an important feature of the legal concept of administrative act, is an individual, as a rule undisputed legal situation of public interest whose need for authoritative legal regularization emerges directly from legal regulations.

UPRAVNA STVAR U SRPSKOJ UPRAVNOPRAVNOJ DOKTRINI

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Upravna stvar je bitno obeležje pozitivnopravnog pojma upravnog akta. Na pitanje koja su to bitna obeležja upravne stvari, poslenici upravnopravne doktrine nemaju jedinstven stav, iz čega izviru različite koncepcije o pojmu upravne stvari. S tim u vezi, u ovome radu predočena su stanovišta poslenika srpske upravnopravne doktrine o pojmu i obeležjima upravne stvari. U završnom delu, rad sadrži autorovo viđenje o obeležjima upravne stvari.

Ključne reči: *upravna stvar, upravni akt, pojedinačna pravna situacija, autoritativnost.*