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**A NOTE ON ADOLF MERKL'S THEORY
OF ADMINISTRATIVE LAW**
**On the Occasion of the 70th Anniversary of the Publication
of Merkl's "General Administrative Law"**

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Abstract. *On the occasion of the 70th anniversary of the publication of the monograph "Allgemeines Verwaltungsrecht" (General Administrative Law), authored by Adolf Merkl, an eminent representative of the Viennese School of Law, this note succinctly presents the salient determinants of his theory of administrative law, enunciated in accordance with Kelsen's principles of what is known as his pure theory of law. It is indubitable that in the history of the science of administrative law great credit indeed goes to Merkl for having clearly and precisely defined, delineated and thoroughly theoretically elaborated a standard corpus of pertinent problems which should and must be studied by this relatively young legal discipline, placing it thus, as it were, side by side with its senior paragons, in particular the science of private law.*

Key words: *General Administrative Law, Viennese School of Law, history of legal thought*

May 1997 marked the 70th anniversary of the appearance of Adolf Julius Merkl's monograph Allgemeines Verwaltungsrecht (General Administrative Law). Merkl was a distinguished representative of the Viennese school of law (Wiener Schule des Rechtspositivismus) and, along with Hans Kelsen, the main representative of formal reductionism (der formale Reduktionismus). The main principles of this school, created in the attempt to found a pure legal science, separate from philosophy of justice and sociology of law,¹ are, first of all, a strict distinction between "is and "should", differentiation between positive law and other social phenomena on the level of de facto

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¹ Hans Kelsen, "Opšta teorija prava i države", Arhiv, Beograd, 1951., p. 14.

state of affairs and the ideal state of affairs, and finally, a strict distinction between descriptions and evaluations.²

Representatives of this scientific school which had a great influence on legal theory in many European countries in the 1920s, the purity of method of legal science is achievable only by "reducing jurisprudence to a structural analysis of positive law".³ In the context of that analysis, a formal investigation and conceptual clarification through abstraction takes place. The subject of such analysis and clarification are categories such as legal norm, non-law, sanction, subjective law, legal and business competence, legal subject, legal sources, public and private law, and other legal institutes.⁴ The aim of these analyses is to reveal what is immanent to the law as a characteristic normative phenomenon, because that is what makes his true essence.

This way of thinking and reasoning about the law is based on the principle *Forma dat esse rei*, that is, the position that the problem is seen as more real if it is more formally founded,⁵ which means that this way of thinking does not directly deal with "man, man's freedom and rights, the state, society, collectivity or democracy".⁶ This philosophical conception has reached its fullest expression today in structuralism, especially in the writings of its distinguished representatives such as Michel Foucault and Claude Levi-Strauss, who claim that the humanities, or cultural sciences, are still not exact because of the human factor. The human subject, immeasurable and unique, is, in fact, the source of chaos and arbitrariness.

Structuralism, therefore, views all cultural and spiritual phenomena as systems of signs, and ignores what they really say. It concentrates on the investigation of their mutual internal relationships according to the linguistics of Ferdinand de Saussure.

The English literary theorist of Marxist conviction Terry Eagleton is therefore probably correct in saying that structuralism has followed the tendency to be exact only to fall into another trap - it almost completely disregarded the human subject.⁷

The same is, of course, the case with Kelsen's pure science of law, which was supposed to be the true science exactly because of its anti-ideological character. Undoubtedly, one must agree with Kelsen that science as knowledge "always follows an internal tendency to reveal its subject", but that political ideology hides reality, because its root is in the "will, and not in knowledge, in the emotional and not in the rational element of consciousness; it originates from certain interests or, even more so, from interests that are different from the interests of truth."⁸

However, Kelsen (like all structuralists) begins to err the moment when he attempts to reduce the subject of his investigation to the object, instead of studying it as human practice which, of course, is inconceivable without the participation of the human subject. All this still does not reduce the value and significance of the results of the pure theory of

² Ludwig. K. Adamovich - Bernd - Christian Funk, "Allgemeines Verwaltungsrecht", Springer Verlag, Vienna & New York, 1980, pp. 71-72

³ Hans Kelsen, op. cit., p. 14.

⁴ Adamovich - Funk, op. cit., p. 72.

⁵ Ljubomir Tadić, "Filozofija prava", Naprijed, Zagreb, 1983., p. 152.

⁶ Miroslav Živković, Merilo ustava, "Istraživačko-izdavački centar SSO Srbije", Beograd, 1987., p. 51.

⁷ Terry Eagleton, "Literary theory", SNL, Zagreb, 1987, p. 135.

⁸ H. Kelsen, Op. cit., p. 15.

law, and especially the correctness of its basic orientation whose main characteristic is the support for the building of a legal science as an exact discipline.

In this context it ought to be remembered that in the first half of the last century, more precisely in 1847, German legal philosopher Kirchmann expressed doubt in the scientific value of jurisprudence because of the extremely changeable nature of its subject.

According to this author, it is enough for the law-maker to change three works for entire libraries to become outdated.⁹ This negative assessment of legal science, in its dogmatic normative form, basically holds today as well, especially given the status of the science of administrative law.

Despite important achievements of the French and German doctrine and practice of administrative law, in most countries national legislation is still characterised by too diverse and diversified norms, their technical imperfections, variability and lack of order of norms entering into the body of administrative law, which is undoubtedly a major, sometimes unsurmountable obstacle for a comprehensive and thorough understanding, timely following and critical-analytical studying of this branch of the legal system.

As Kelsen's consistent follower, Merkl was certainly forced to face the relatively underdeveloped status of the science of administrative law, and especially the diversity and flexibility of its subject. Consequently, he saw an exit from the existing difficulties in a pure theory of law, that is, its creative development and application which, in the sense of empirical base, would not be tied to any positive law of his time. This is an approach which concentrates on what is constant in the variable, general in the particular, abstract in the concrete, that is, on the investigation concerned with form, and not the content of the legal phenomenon. This approach, which has certain shortcomings, has still, in return, ensured the international affirmation for the Viennese legal school. This school is prized today in literature for a lasting contribution to legal thought and practice, and first of all for "greatly developing legal technique, freed legal science from many unnecessary fictions, and sharpened the legal sense and the spirit of lawyers, who were prone to think too much in sociological terms."¹⁰

Merkl, as a protagonist of this school, is especially well known by his theory of legal stages (*die Lehre vom Stufenbau der Rechtsordnung*) according to which the law is a system of hierarchically ordered rules, that is, a system of conditioning and conditioned norms and legal acts, whereby the conditioning norms are those that contain conditions for the creation of other norms, or acts. This hierarchical creation, manifested in the form of a regression from a higher order legal system to a lower order system, is always a process of concretisation and individualisation, and it is described as a "stairwell structure" of legal order.¹¹

⁹ See Ljubomir Tadić, "Predmet pravnih nauka", Institut društvenih nauka, Beograd, 1966. Kirchmann is the author of the book published in 1847, entitled "On the Lack of Value of Jurisprudence as a Science" (*Die Wertlosigkeit der Jurisprudenz als Wissenschaft*).

¹⁰ "Pravna enciklopedija", *Savremena administracija*, Beograd, 1985., vol. 1, p. 100.

¹¹ In this context it should be emphasised that Kelsen was under the immediate influence of Merkl's teaching about the stairwell structure of the legal order. He build his understanding of a hierarchical ladder of legal norms, on top of which is the so-called basic norm. N. Visković points out that until "Merkl-Kelsen's vertical insight" into the stairwell composition of the dynamic legal system legal norms were explicitly or implicitly, in theory, exclusively identified with general legal norms or rules, according to Ulpain's maxim: *lura non in*

Merkel has also given a significant contribution to the theory of validity of administrative acts, in his work "Die Lehre von der Rechtskraft, entwickelt aus dem Rechtsbegriff" (Leipzig, 1923),¹² and the experience he gained while writing this manuscript, as well as his "Democracy and Administration" ("Demokratie und Verwaltung"), served him well as a preparation for the conceptualisation and completion of a voluminous monograph on the theory of administrative law, which is the subject of this comment.

The mentioned monograph, which was published in 1927, and re-printed in 1969, is divided into a general and special part, and further differentiated into six sections and 25 paragraphs.

The general part (Allgemeiner Teil) includes two sections. The first one deals with the basic concepts of the science of administrative law ("Die Grundbegriffe der Verwaltungsrechtslehre"). The second one deals with the legal order of administration ("Die Rechtsordnung der Verwaltung"), while the special part ("Besonderer Teil") contains four sections dealing with the forms and content of administrative activity, and the organisation and control of administration ("Die Taetigkeitsformen der Verwaltung", "Die Taetigkeitsinhalte der Verwaltung", "Die Verwaltungsorganisation", "Die Verwaltungskontrolle").

Regarding the paragraphs within the mentioned sections, they are dedicated to the basic and general (theoretical) questions of administrative problems, such as: the concept of administrative, administrative and legislation, administration and the judiciary, administration and the metalegal state, the main historical types of administration, administrative law, the science of administrative law, the sources of administrative law, the sources of administrative law, the subjective public law, administrative assessment, the place of administration in the stairwell structure of the legal order, administrative acts, the wrong administrative act, validity of administrative acts, the administrative procedure, administrative areas, the police, the nature of administrative penalty, administrative executive order, organs of administration, systems of organisation of administration, administration and the form of the state, self-administration, ways of administrative control and administrative judiciary.

This summary of the structure of Merkel's monograph without a doubt witnesses that what is at stake is a systematic theoretical work which, more or less, encompasses all relevant standard contents of administrative law as a branch of legislation and a scientific discipline.

In his preface Merkl's mentions that administration is dealt with as a legal function, starting from Hanns Kelsen's theory (to whom the monograph is dedicated), but at the same time he points out that he is aware that he is also indebted to the influence of other

singulas personas sed generaliter constituuntur (Dig. 1, 3, 8) (Visković, N., *Pojam prava*, second amended edition, Logos, Split, 1981., p. 233). Today the concept of legal norm, apart from the general and particular norms, are also individual norms, although one can still find in literature the position that the so-called individual norms do not belong to norms, given that they are not rules but rather individual orders (see Milijan Popović, *Prilozi teoriji prava*, Službeni list SRJ, Beograd, 1997., p. 44).

¹² Pavle Dimitrijević ("Pravosnažnost upravnih akata", *Savremena administracija*, Beograd, 1963, pp. 87-88), emphasises that Merkl's critique of "those conceptions that have tried to solve the problem of validity on the basis of contrasting constitutive and declarative acts, is without a doubt a great contribution to the legal science in this area.

distinguished authors for the results of his investigation. These authors include Admund Bernatzik, Fritz Fleiner, Rudolf Nerrenritt, Gaston Jeze, Otto Majer, Otto Sarwey, Paul Schoen, Friedrich Tezner, etc.¹³

The attribute "general", contained in the syntagm "General Administrative Law", that is, the title of the monograph, according to Merkl, is supposed to express the limitation of the subject. It is self-explanatory, he says, that in any concrete case what is at stake is not the entire administrative law which has ever been realised. What is at stake is only an extract from this law regarding the problem.¹⁴

As the general law of the state is an abstraction from concrete legal orders, administrative law should be understood on the basis of concrete partial orders concerning the administrative law. This "general administrative law" has nothing in common with "general law", propagated by the school of natural law; the problem of limitation of the subject of general administrative law can be concisely formulated by saying that it is not a natural law, but rather an abstraction from the positive law ("Kein Naturrecht, sondern Abstraktion aus positivem Recht"). Finally, the general administrative law is not a total of neopositive legal ideals demanding their realisation in the positive law, but rather a system of theoretical abstractions from the realities of the positive administrative law.¹⁵

Although Merkl's theory of administrative law is appropriately praised for original insights and constructions, it is often mentioned primarily that his work is not based on an analysis of representative comparative legal material. The basis of his considerations and generalisations is more or less the then valid Austrian positive law legal practice. Then he applied Kelsen's pure theory of law and the theories of distinguished representatives of the dominant science of administrative law, with whom he was conducting a "literary-critical discussion".

In this context, it is interesting to mention a comment on Merkl's book "General Administrative Law", by P. Dimitrijević in the textbook "Administrative law" ("Službeni list SFRJ", Beograd, 1986.), co-authored with R. Marković.

When discussing the application of the comparative method in the science of administrative law, whose broadest application facilitates the constriction of an abstract general administrative law, P. Dimitrijević concludes that such attempts, whose paradigm is Merkl's "General Administrative Law", do not lead to significant results and that they provide insights dominating legal theory of the home country of the author.¹⁶ The abstract general administrative law, on the other hand, should facilitate the study of particular "national" laws and contribute to their assessment and critique.

In another part of his textbook, P. Dimitrijević points out that Merkl's work is an attempt to constitute a general theory of administrative law, which would not be based on any positive law of the time. The work, according to P. Dimitrijević, is characterised by original ideas and constructions, but it could not have a significant influence on the

¹³ Adolf Merkl: "Allgemeines Verwaltungsrecht", Verlag von Julius Springer, Wien und Verlin, 1927 (Neudruck 1969), Vorwort, VII.

¹⁴ A. Merkl, op. cit. Vorwort, V.

¹⁵ A. Merkl, op. cit., p. 97.

¹⁶ Dr Pavle Dimitrijević - Dr Ratko Marković, "Upravno pravo", Službeni list SFRJ, Beograd, 1986, p. 348.

development of the science of administrative law.

P. Dimitrijević leaves it to the readers to answer the question of why Merkl's work could not have the mentioned influence, because he does not cite any arguments in support of the mentioned assessment.¹⁷ The above mentioned positions by P. Dimitrijević on Merkl's book, in our opinion, can be criticised in two directions.

First, it seems that P. Dimitrijević expresses doubt in the fruitfulness of the comparative method, and practically denies the position that a general theory of administrative law can be successfully built on normative premises.

This position, of course, is not sustainable.

The comparative understanding of the solutions contained in specific representative national forms of legislation, without a doubt, is an unavoidable way to clearly distinguish the necessary, universal, constant and important elements from the contingent, particular, transient and phenomenal characteristics. In this way, it is possible to precisely identify the degree and the dynamics by which the positive law realises the essence of the legal phenomenon, or, as Hegel would say, the idea of law, or what Roman lawyers used to call "ius" as opposed to "lex". This type of understanding also facilitates the envisaging of directions of development of legal models which are valid in particular countries, and the inevitability of their harmonisation with the existing, large legal systems of a regional or general international importance, as a picture of their future.

P. Dimitrijević's lack of faith in the possibility of a successful building of a general theory of administrative law on normative premises gained by abstracting from one or more representative forms of national legislation, is convincingly defeated by Hegel's, and Marx's, method of passing from the abstract towards the concrete. According to the Soviet Lawyer Kazimircuk, that method can only be applied when the subject under consideration is at a certain stage of development.

There is, however, no doubt that this was exactly the case with the subject of Merkl's study. He used theoretical abstraction, studies the particular from the point of view of the general, and directed his analysis at certain typical cases where, with greater or lesser diversions, the regularities and tendencies of an entire sequence of similar and akin phenomena manifested themselves most directly. This concerns the empirical material which Merkl used. That includes certain Austrian positive laws, the Austrian legal practice, results of the analysis of the current laws of other countries and the best legal literature of the time. The empirical material was subjected by Merkl to a critical consideration from the point of view of the theoretical achievements of the Vienna law school. These achievements served him as the starting and at the same time an important concluding point of a process of cognition and exploration.

An important innovation introduced by Merkl is reflected in the problem-based approach to the legal phenomena under investigation. This innovation is based on the assumption that the higher and more developed legal forms are the key to understanding the lower and more simple legal forms.

The real subject of every legal discipline, including the general theory of administrative law, as the most abstract theory of that branch of the law, is reducible to the study of normative and real. According to Kelsen, norms are not thoughts and concepts. They are

¹⁷ Dr P. Dimitrijević - Dr R. Marković, op. cit., p. 374.

meanings, relations between acts that create them, and those phenomena in the reality that are regulated by those acts.

The relation between the normative and real can be understood as a relation "problem-solution", that is, it can be translated into a relation "question-answer". Unlike the law of the natural law school, in this context the laws and other prescriptions are to be understood as manifestations of the will, commands directed at certain recipients, with the aim of forcing them to do certain things or to abstain from doing certain things. In other words, legal science would have to identify problems to be solved by legal rules first, following the logic of phenomena, but not the logic of the order.¹⁸ In this sense, one could conclude that legal rules as manifestations of the will pass, and problems stay, if there is no adequate correspondence between them, that is, if the problem is not properly stated and studied and if an appropriate "therapy" is not prescribed for its solving.

Merkl's approach to the problems of administrative law, essentially based on the stated bases, is still worth full attention today, given that it has a lot of similarities with the modern communication approach to the legal phenomenon, especially that component of the communication approach that deals with semantic investigations. It could be freely stated that Merkl has always concentrated on the essence of those real problems that are the sources of normativity, and as such regularly demand an appropriate normative ordering.

Similarly, in the history of the science of administrative law Merkl undoubtedly deserves credit for having clearly and precisely delineated the standard circle of the relevant problems to be studied by this relatively young legal discipline. In this way he almost always stood by its older examples, especially by the science of private law.

In this place one should point out Merkl's contribution to the building of the theory of procedural law. The famous French author G. Langrod points out that Merkl appeared in the science of administrative law as "the pioneer of investigations of the essence of the procedure, any procedure", finally breaking up with the stiff distinction between specific "procedural" sectors. After his study it becomes "really difficult to tie the general principles of the legal procedure exclusively to the judiciary".¹⁹ Merkl has convincingly proven that the procedure, by its nature, is possible in the areas of all functions of the state.

Within the paragraph dedicated to the administrative procedure,²⁰ Merkl considers questions relating to the essence of the procedure and procedural law more generally, and especially of the administrative procedural law. This law is seen as a set of rules that regulate the directions of formation of administrative acts, including both formal and informal administrative law, the relationship between the administrative and the judicial procedural law, the procedural law concerning orders, as well as individual administrative acts and the principles of the procedure and administrative legal means.

¹⁸ The normal as a legal solution - to use the expression of our legal theorist who lived between the two world wars, Živan Spasojević - is subjected to the logic of phenomena (no the logic of the order), or, more closely, the logic of questions and answers. To understand a text, or a normative act means, in fact, to correctly understand the question to which it is the answer.

¹⁹ G. Langrod, "Upravni postupak i upravno pravo", Zavod za javnu upravu, Beograd, 1960, p. 31.

²⁰ A. Merkl, op. cit., ch 15-"Das Verwaltungsverfahren", pp. 213-224.

"Administration is a conscious human action. In any action, however, one must distinguish between fieri and factum,²¹ or, teleologically, between the means and the end. All state functions, and especially all administrative acts, are ends, which can be achieved only by certain means. Thus the law is the end that is achievable by legislative means, judicial and administrative acts are ends achievable by judicial and administrative procedures. Essentially, all administration is the administrative procedure, and administrative acts are only the results of the administrative procedure".²²

As can be seen from this quote, Merkl identifies the administrative procedure with the being, essence of administration. In this way, in fact, he insists on the active character of administration, while the organisational problems of administration, according to him, are secondary and derivative. The function is always prior to organisation, that is, every legal function corresponds with some organisation, and the entire legal order as a functional order necessarily demands an order of legal organs.²³

The significance of Merkl's theory of administrative law, as a general model of an extremely differentiated and dynamic legal branch, is reflected, in the first instance, in the identification and correct location of the relevant problems, as well as in the detection of their essence and proposals for appropriate solutions in light of the pure science of the law.

Owing to his monograph "General Administrative Law", which undoubtedly contains numerous valuable and inspiring ideas, Merkl soon deserved the status of a classic of the general theory of administrative law in the scientific literature.²⁴ It is certain that his theoretical conceptions and positions, which have survived the test of time, can still serve both as a source for the enrichment of the legal thought and practice in the area of administration, and as an inspiration for a change in the contemporary university teaching of administrative law. This process needs to grow from a process of the professional education into a process of a primarily scientific education of lawyers, especially at the postgraduate level.²⁵

Given that the fundamental legal problems stated and processed by Merkl are the key, standard and always relevant questions of the science of administrative law, it would be undoubtedly useful and desirable if his book "General Administrative Law" were to be translated into Serbian and thus become accessible to the domestic scientific and professional public.

²¹ These forms come from the latin verb fio, fieri, factus sum, which means to be, to become, to occur, to be born.

²² Merkl, op. cit., p. 213.

²³ Merkl, op. cit., p. 309.

²⁴ If in our times the index of quotations of an author's work is taken as an indicator of the value of that work, then Merkl's work deserves the highest appraisal, given that his theoretical views on the key questions of administrative law cannot be circumvented in any serious scientific discussion.

²⁵ See Denković, D., "Savremeni problemi univerzitetske nastave upravnog prava", Zbornik radova Pravnog fakulteta u Novom Sadu, XXIII, 4, Novi Sad, 1989.

ZAPIS O TEORIJI UPRAVNOG PRAVA ADOLFA MERKLA**Zoran Jelić**

Povodom 70 godina od objavljivanja monografije "Alligemeine Verwaltungsrecht" iz pera Adolfa Merkla, istaknutog predstavnika bečke pravne škole, u ovom zapisu se izlažu, na sažet način, osnovne odrednice njegove teorije upravnog prava, izgrađene u skladu sa principima Kelsenove čiste pravne doktrine. U istoriji nauke upravnog prava Merklu, bez sumnje, pripada krupna zasluga što je jasno i precizno definisao, omeđio i temeljno teorijski obradio standardni krug relevantnih problema koje treba i mora da proučava ova relativno mlada pravna disciplina i tako je gotovo stavio uz bok sa njenim starijim uzorima, posebno naukom privatnog prava.

Ključne reči: *opšta teorija upravnog prava, Bečka pravna škola, istorija pravnog mišljenja*