Gómez, P.C. (2021). Merkl, Adolf Julius. In: Sellers, M., Kirste, S. (eds) Encyclopedia of the Philosophy of Law and Social Philosophy. Springer, Dordrecht

DOI: 10.1007/978-94-007-6730-0_631-1

Merkl, Adolf Julius

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Introduction

Adolf Julius Merkl (1890–1970) was one of the main members of the Vienna School of Legal Theory founded by Hans Kelsen (Metall 1974 1969).

Merkl began his studies in Law in the University of Vienna in 1908, taking courses in Public Law together with Kelsen. Merkl achieved the doctor's degree in 1913 and during the course 1914–1915, with Alfred Verdross and Leonid Pitamic, participated in Kelsen's seminar on Philosophy of Law, the origin of the Vienna School.

From 1915 to 1918, he held several positions in the High Imperial Austrian Administration. After the fall of the Austro-Hungarian Monarchy, from 1918 to 1920, Merkl worked in the Chancellery of the Austrian Government playing an important role in the framing of the Federal Constitution of 1920. In 1919, he achieved his teaching habilitation in the University of Vienna. After the National Socialists came to power in Austria in 1938, Merkl was removed from his post. In 1941, he was allowed to accept a professorship in the University of Tübingen, and in 1950, he returned to the University of Vienna where he continued his academic work until 1965 (Grussman 1987; Fuertes 1998; Robles 2004).

Merkl developed innumerable contributions on several fields of law collected in a *Complete Works* edition (Merkl 1993–2009). In administra-tive law, his book *Allgemeines Verwaltungsrecht* published in 1927 is worth mentioning. However, if only one key aspect of Merkl's life and work had to be chosen, it would have to be his funda-mental contribution to the Pure Theory of Law.

On the Theory of the Hierarchical Structure

The theory of the hierarchical structure of the legal order *Stufenbaulehre* is an essential part of the Pure Theory even accepted by those who do not follow this doctrine. As Kelsen remarked in the Preface of the second edition of *Hauptprobleme der Staatsrechtslehre* (1923), this thesis was intro-duced by Merkl. Although Merkl had advanced some aspects in previous works (Merkl 1918a, 1919; Mayer 2005), the most complete develop-ment of this theory can be found in his work from 1931 *Prolegomena einer Theorie des rechtlichen Stufenbaues* (Walter 1964, 1970).

In the *Prolegomena*, Merkl rejects the monistic theory of the sources of Law, dominant at that time and assumed by Kelsen in his first contribu-tions (Kelsen 1923), that reduces Law to general norms made by the legislative power. Faced with this simplifying theory, Merkl considers that Law

has its genesis in a plurality of forms of production. From this perspective, the study of the relationships between legal norms of different origins becomes a central problem in the Pure Theory of Law.

As the title *Prolegomena* indicates, the conclusion of this analysis can be expressed as follows: the plurality of forms of legal production may be presented as a hierarchical construction of norms, and this structure constitutes the unity of the legal order. Actually, Merkl distinguishes two hierarchical constructions: one understood in terms of legal conditionality, well-known and assumed by the Pure Theory, and another one understood in terms of derogatory power.

With respect to the first, a norm is valid, because it is created according to another norm. It therefore exists only in relation to these determining norms.

As Merkl explains, the relation between these norms is not only a relation of temporal priority but is also a logic relation that shows a difference of levels and presents the law as a sequence of stages or a hierarchy of acts.

The image of the hierarchical structure emerges, thus, from the dynamic process of creation of law and reveals a very relevant peculiarity: Law regulates its own creation. Then, the relation between legal rules is a relation of the regulation of production, which includes formal and substantive dimensions, entailing that the norm regulating the creation of another norm is the superior and the norm created according to this regulation the inferior norm.

In Merkl's approach, this hierarchical construction is a formal scheme useful to describe the structure of every legal order, although the diversity of forms or production and its concrete articulation depend on positive law. In any case, the *Prolegomena* provides an explanation of a typical hierarchical structure, which may be found in all legal systems: Constitutions, as the highest level of positive law; statutes; ordinances; court decisions and administrative acts, as individual norms; and acts of factual execution, as the lowest level of the pyramid. This explanation does not include, as in Kelsen's version, any mention to the basic norm (*Grundnorm*).

As said above, Merkl maintains that the hierarchical relationship between legal norms also derives from their normative capacity in such a way that a legal norm that possesses force to derogate another one should be considered a superior norm.

On the Creation, Application, and Interpretation of Law

Merkl original contribution to the Pure Theory of Law has some relevant implications on legal theory.

One of the most prominent assumptions consists on relativizing the seemingly absolute opposition between legal production and application. Setting aside two borderline cases (the highest level as absolute production of law and the lowest as purely determined legal application), every level is, at the same time, a law-creating act and a law-applying act (Merkl 1931, 1918a, 1918b).

In Merkl's view – a position not assumed by the first formulation of the Pure Theory of Law but crucial in the following versions – the intermedi-ate levels of the legal system involve legal pro-duction because, due to the open nature of legal language and to the view of every act from one level to the next as a gradual individualization and concretion, the superior norms cannot fully deter-mine the content of inferior norms (Merkl 1918a, b). Following from this, legal interpretation is central for the application of law.

Merkl considers legal interpretation as a task always required in the process of legal application implying creation of law in every case (Patrono 1987). The interpretation developed by legal organs, by Merkl called "authentic interpretation," combines both, cognitive/objective and volitive/subjective elements: the identification of the frame of possible meanings provided by the higher-level law, an act of thinking, and the discretionary decision of one of the alternatives, a value-oriented act of will (Merkl 1916, 1918a, b). However, the interpretation developed by legal science includes only the cognitive element. Legal science should not choose among the

different meanings, since it involves a political decision.

Therefore, Merkl defends a moderate skeptical theory on legal interpretation from which Kelsen was later inspired (1934, 1960a). A different issue is the question about what happens when the legal organs produce a norm exceeding the frame defined by the higher-level norms.

On Irregular Norms

Merkl admits the possibility of irregular norms created without respecting the requirements of the norms that determine their production (Merkl 1925, 1927). Following the position defended by Kelsen in 1914 and abandoned later, Merkl maintains that these norms are invalid norms. Furthermore, since it would be very disturbing that whatever defect turned an act of creation into a "legal nothing," positive law can avoid this radical consequence by declaring these acts simply voidable (Merkl 1927).

Regarding this issue, Merkl proposes the "calculation of vices." This reminds in some aspects on Kelsen's tacit alternative clause doctrine (Kelsen 1945, 1960a). "Calculation of vices" includes previsions, like the impugnment, that although allow the definitive correction of the irregular acts, declaring them null, also permit their provisional correction integrating them in the legal system, with limited validity (Merkl 1925). These measures along with the principle of res judicata mean the existence of a tacit authorization allowing the production of legal acts in contradiction with the norms that regulate their creation (Merkl 1925, 1931).

Nevertheless, unlike the view implicit in Kelsen's approach, Merkl's theory of the principle of res judicata does not allow legal decisions, in particular those made by authorities of last resort, violating the requirements of higher-level norms to be considered decisions in conformity to law. This view would imply to turn these organs into mere applicators of their own law and would prevent them from considering the legal order as a hierarchical system. The principle of res judicata works a posteriori validating irregular norms and revealing – to quote Merkl's (1918a) famous dictum – the "two faces" on Law. In cases of anomalous functioning, law appears in a different way from the point of view of the decision-making organs (the face of application) and from the point of view of the objective observer (the face of cognition). This Janus face shows a conflict between valid law, according to the hierarchical theory, and effective law that is applied and obeyed.

Conclusion

Merkl's contribution to the development of the Pure Theory was substantial, and Kelsen always acknowledged it and considered him as co-founder of this doctrine and a genius of legal thought (Kelsen 1960b).

Nevertheless, Merkl's approach has a very high value in itself since it is able to illuminate – sometimes better than Kelsen – solutions of central issues still controversial in Pure Theory of Law, for example, regarding the limits of the validity of legal interpretation and the dilemma of irregular norms (Cuenca 2014).

Cross-References

▶ Kelsen, Hans

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