THE NEGLECTED IMPORTANCE OF THE AUSTRIAN *ALLGEMEINE VERWALTUNGSVERFAHRENSGESETZ*

*Angela Ferrari Zumbini**

TABLE OF CONTENTS

1. Introduction

I will try to respond to the many insights shared here by structuring my discourse around four main elements. Firstly, it is necessary to step back before the year 1925 to see how the adoption of the Administrative Procedure Act came about. Secondly, I would like to outline the main elements and features of what is known as the Austrian procedural model. I will then focus on the spread of the model into central Europe. Fourthly, I would like to highlight the current lack of interest in comparative studies in Austria. Lastly, I will try to put together some concluding remarks at the institutional level.

2. Dogmatic and historical background

Let us begin by stepping back in time to identify the dogmatic antecedents of the law and the factors that led to its adoption.

* Associate Professor of Administrative Law, University of Naples Federico II

2.1. The jurisprudence of the *Verwaltungsgerichtshof*

The first factor is the jurisprudence of the Administrative Court of the Austro-Hungarian Empire (called *Verwaltungsgerichtshof* – VwGH).

The law establishing the *Verwaltungsgerichtshof*, passed in 1875 contained no general provisions on administrative action. The legislature granted the court the power to annul administrative acts for "lacks regarding the essential forms of the procedure" but did not define or list them, leaving this task to the VwGH.

The court thus had to identify the general standards of administrative action, and as early as 1884, it recognized the right to be heard as inherent in the nature of things and thus to be protected even in the absence of explicit statutory provision[1].

The Austrian Administrative Procedure Act of 1925 (*Allgemeine Verwaltungsverfahrensgesetz* – AVG) would not have been possible without the jurisprudence of the VwGH, which formed the core for the emergence and development of administrative procedure and procedural safeguards as concepts. The AVG, in many respects, codified the principles developed in over fifty years of *Verwaltungsgerichtshof* case law.

2.2. The Treaty of Geneva

At this point, in addition to the jurisprudence of the VwGH there was also an external factor to consider, namely the Peace Treaties that followed in the aftermath of the First World War.

After the war, the newly formed Austrian republic had to face devastating inflation, which meant that wages were paid every 3-4 days, as their purchasing power had already halved in that time.

Finding itself in this situation, Austria sought a loan from the League of Nations, which demanded that other, more financially stable States provide guarantees before they would provide credit.

All of these factors led to the signing of the international treaty known as the *Reformbeschlüsse* in Geneva on October 4, 1922. It was agreed that the victors, i.e., England, Italy, France, and Czechoslovakia would act as guarantors for Austria so that it could

[1] On the principles developed by the VwGH see A. Ferrari Zumbini, *Standards of Judicial Review of Administrative Action (1890 – 1910) in the Austro-Hungarian Empire*, in G. della Cananea, S. Mannoni (eds), *Administrative Justice Fin de Siècle. Early Judicial Standards of Administrative Conduct in Europe (1890 – 1910*) (2021), pp. 41-72.

obtain a loan from the League of Nations, for which Austria assumed a number of obligations.

A comprehensive reform was imposed at the economic and budgetary level, with drastic cost-cutting. In the end, to achieve this goal, Austria committed to reforming its administration, simplifying and streamlining both the administration itself and its procedures.

To do so, Austria submitted a package of laws for administrative simplification to parliament in 1924 (including the General Administrative Procedure Act), which was then passed in 1925.

3. The Austrian procedural model

The regulation of administrative procedure codified in Austria in 1925 is usually described as a "court-type model" that guarantees adversarial proceedings in order to ensure the *legality* of administrative action.

It would perhaps be appropriate to re-evaluate this definition. In fact, an analysis of this law reveals a model that is certainly judicial insofar as its structure somewhat reflects that of a trial, but two fundamental purposes – efficiency and the protection of the parties' rights – stand out. On the one hand, the Geneva Treaty was a driving force for simplification, but, on the other hand, there was also codification of the principles developed by the VwGH, which hinge on the *Parteiengehör*.

One of the main purposes of the law was to establish a uniform and standardized model of administrative procedure with which all public administrations would have to comply.

In order to prevent a one-size-fits-all model by excessively restricting administrative activities, the law did not provide particularly detailed regulations, merely setting out essential rules.

The Austrian model is minimal in the sense that the "skeleton" of the procedure is clearly codified and can therefore be adopted in – and adapted to – any type of procedure.

These features make the AVG very chameleon-like, allowing for a very broad scope of application.

After recalling the genesis and the essential features of the Austrian procedural model, we move on to briefly examine how it spread, especially across *Mitteleuropa*.

4. The spread of the Austrian Administrative Procedure Act into Central Europe

The legal orders most profoundly inspired by the Austrian codification were those that had been part of the Austro-Hungarian Empire in some way. Although one might have expected the newly formed nation States that arose from the ashes of the Empire in 1918 to ignore Austrian regulations and reassert their independence, this was not the case.

Furthermore, the model was not limited to the former imperial territories.

The Austrian law of 1925 exerted a profound influence on the Central European countries[2], even before its formal adoption. In fact, the draft of the AVG was the model for the law on administrative procedure adopted in Liechtenstein as early as 1922 (*Landesverwaltungspflegegesetz*[3]). This law, albeit with some amendments, is still in force in Liechtenstein.

A clear and precise transposition of the Austrian model can be found in Poland[4], which had previously been subdivided and controlled by three different governments: the Austro-Hungarian Empire, the Russian Empire, and Prussia, making it necessary to unify its legislation after the creation of the new State. It was decided to adopt the Austrian model in order to unify and make the discipline of the newly formed nation autonomous. Moreover, the Polish case also underscores the importance of the personal factor, the movement of people.

In 1922, a Supreme Administrative Court was established. It was modelled on the *Verwaltungsgerichtshof,* and its first president, Jan Sawicki, was a former judge at the Administrative Court in Vienna. The Polish Code of Administrative Procedure was enacted on 22 March 1928.

After the Second World War, a new code was adopted in 1961, which, despite changes made to adapt the procedural model to the new Communist regime, kept the fundamental Austrian

[2] For a detailed analysis, please refer to G. della Cananea, A. Ferrari Zumbini, O. Pfersmann, (eds), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion 1920-1970* (2023). The following citations of chapters refer to the chapters in this book.

[3] See the chapter by E. Schädler, *The Austrian Model and the Codification of Administrative Procedure in Liechtenstein*, pp. 57 ff.

[4] See the chapter by W. Piątek, *The Polish Legislation on Administrative Procedure*, pp. 10 ff.

structure intact. The correspondence was, of course, exclusively formal, but it would seem important to note that the model persisted even under a non-democratic regime. Just to cite one example, citizens had rights in relation to the authorities, and the Soviet Constitution of 1952 recognized that these rights could be enforced in court. However, administrative jurisdiction was abolished (only to be re-established much later, in 1980) and the justiciability of rights granted to citizens was thus envisaged. But there was no court to exercise judicial review.

The sequence of events in Czechoslovakia[5] was very similar to that in Poland. As early as 1918, a Supreme Administrative Court was established, but it did not merely follow the model of the *Verwaltungsgerichtshof*. Indeed, among the first members of this court were two judges who, until 1918, had been judges of the *Verwaltungsgerichtshof* in Vienna. They became the first and second Presidents of the Czechoslovak Administrative Court, respectively: František Pantůček and Emil Hácha, who brought their cultural background with them. The Code of Administrative Procedure was adopted in 1928, substantially transposing the Austrian law, although the AVG's influence was disguised at the time because the new State wanted to assert its autonomy and independence from the former empire.

The Kingdom of Yugoslavia[6] also adopted a general law on administrative procedure two years later. It is unanimously recognized by scholars as having been influenced by the Austrian model. After the law was repealed in 1945 (along with all laws contrary to the new political regime), in 1956 the new People's Republic of Yugoslavia adopted a general law on administrative procedure. Despite the changes necessary to adapt the discipline to the new non-democratic regime, this law also echoes the Austrian model while tempering the guarantee of citizens' rights (provided for in theory) with preponderant public interest.

A special case in point is Hungary, which was, for obvious reasons, inseparably linked to the culture and traditions of the Habsburg Empire, at the same time claiming its own autonomy. This circumstance resulted in a substantial (albeit partial) but veiled transposition of Austrian law to Hungary. Indeed, a (non-general)

[5] See the chapter by L. Potěšil, F. Křepelka, *Administrative Procedure Legislation in Czechoslovakia*, pp. 86 ff.

[6] See the chapter by S. Lilić, M. Milenković, *Administrative Procedure in Former Yugoslavia and the Austrian Administrative Procedure Act*, pp. 119 ff.

regulation on various aspects of public administration, including procedural profiles, was adopted in 1929. It was clearly inspired by the Austrian laws of 1925 but did not mention them in any way. At the end of World War II, the administrative apparatus underwent profound changes, including the introduction of strict hierarchical control and an organization modelled on the Soviets in an institutional framework deemed incompatible with even theoretical provision for procedural rights.

After the bloody repression of 1956, the Communist regime felt confident enough in its power to reintroduce regulated administrative procedure in order to make the administration more efficient (including in terms of political control).

One final example of the diffusion of Austrian law emerged from the research. It is of great interest, but, despite its importance, has been little studied. It concerns the attempt to have an AVG-inspired administrative procedure law adopted in National Socialist Germany.

After the annexation of Austria, many legal experts suggested that Germany should adopt the AVG to standardize administrative procedures. Among the leading proponents of this hypothesis was Hans Spanner, who needed to find a way to justify the adoption of a law that contained rights for individuals in a regime where only the collective was contemplated. Procedural rights were thus interpreted and reworked from a collectivist perspective. Despite the interest this project aroused, it was not approved.

Therefore, we can conclude that the Administrative Procedure Act of 1925 dominated the administrative law scene and its dogmatics for at least fifty years in Central Europe. This brings us to my fourth point, which is the incredible Austrian lack of interest in comparative studies.

5. The scarce interest in the Austrian scenario in comparative scholarships

Although Austria was the first country to codify a general regulation of administrative procedure and despite the centrality of Austrian law, as summarised in the previous paragraph, recent research often underestimates the importance of Austrian law in terms of its influence and the development of a model. Until the

1960s, at least in continental Europe[7], the importance of the Austrian contribution was clearly recognized and highlighted, but over time its significance gradually diminished for reasons that must also be examined in depth from the point of view of the history of ideas.

Austria is often overlooked in more recent works on comparative administrative law, even in the most important and impressive studies dedicated to the codification of administrative procedures.

In comparative studies, the German-speaking country of choice is often Germany, not only because of its undisputedly great public law tradition. However, Germany has always been bound to the legacy of Otto Mayer, who systematised administrative law based on the concept of the administrative act, since this is the basis for judicial protection.[8] Citizens' rights had long been assured by a system based on case law, so much so that Mayer considered it unnecessary to enact a procedural law. And even when the law was enacted in 1976, it was decided that procedural defects do not lead to the annulment of the act if the substantive content could not have been different, thus demonstrating that the substantive correctness of the act prevails over the formal shortcomings of the procedure.

Generally, at least until the first half of the 20th century, administrative procedure was traditionally analyzed in terms of its outcome: the administrative act. Even when the dynamic aspect of the procedure was emphasized, it was always inherently linked to its product, the decision.

Running contrary to the dominant approach, already in the late 19th and early 20th centuries, leading Austrian scholars (on the basis of the jurisprudence of the *Verwaltungsgerichtshof*) highlighted the autonomous value of the procedural dimension in comparison with the administrative act. It should be emphasised that the importance of procedure in itself, highlighted by Austrian jurists as early as the close of the 19th century, was recognized and built upon regardless of the underlying theoretical and philosophical convictions of scholars. Indeed, the emergence and conceptualization of an autonomous fundamental concept of

[7] A.M. Sandulli, *Il procedimento amministrativo* (1940); G. Pastori, *La procedura amministrativa* (1964). In Germany, see C.H. Ule, F. Becker, K. König (eds), *Verwaltungsverfahrensgesetze des Auslandes* (1967) vol I, esp 41 ff.

[8] O Mayer, *Deutsches Verwaltungsrecht* (3° ed., 1924).

procedure can be found in two Austrian authors from divergent, if not opposing, schools of thought.

Friedrich Tezner, an advocate of natural law and justice, dedicated a monograph to the concept of *Administrativverfahren* as early as 1896[9], stressing the fundamental importance of the path that the administrative decision follows as it takes shape. He introduced a clear distinction between production (meaning the production process) and product (*Erzeugungsvorgang und Erzeugnis*)[10], laying more emphasis on the former than the latter since it is *in* the process that individuals can exercise their rights before the decision is made. Similarly, the normativist Merkl, a follower of the Vienna School and pupil of Kelsen, used the allegory of the path and the target (*Weg und Ziel*)[11].

6. Concluding remarks at the institutional level

First of all, we have seen that the adoption of a law on administrative procedure does not necessarily coincide with democratic needs and purposes. Undeniably, the proceduralization of administrative activity within a democratic system brings numerous benefits and guarantees for citizens. However, we have also seen that even non-democratic regimes have adopted laws on administrative procedure (or at any rate discussed them); certainly not as a means of guaranteeing greater rights for citizens but rather for the sake of efficiency and political control over both administrative personnel and citizens in general.

From this, it can be inferred that a well-structured regulation of administrative procedure is in synergy with a well-functioning public administration, regardless of the specific purposes concretely pursued (i.e., the protection, welfare, and guarantees of citizens or their oppression).

The notion of administrative procedure emerged in Austria through the work of the Administrative Court.

This development is the exact antithesis of what occurred in France, where, as is well known, administrative law is largely jurisprudential in nature, especially in terms of general principles.

---

[9] Tezner, F., *Das Handbuch des österreichischen Administrativverfahrens* (1896).

[10] F. Tezner, *Das österreichische Administrativverfahren, dargestellt auf Grund der verwaltungsrechtlichen Praxis. Mit einer Einleitung über seine Beziehung zum Rechtsproblem* (1922) p. 145.

[11] A. Merkl, *Allgemeines Verwaltungsrecht* (1927) p. 213.

However, the Conseil d'Etat has always focused on judicial review and its procedural profiles, leaving truly procedural aspects in the background.

Consequently, in France, an identical jurisprudential matrix of administrative law, which developed in the absence of precise legislation, has led to the marginalization of procedure in the face of the overwhelming centrality of judicial review. In Austria, the opposite has happened, leading to the pre-eminence of procedure and the subsequent development of regulation.

The law-making power of the administrative court in France led to significant delays in codification, while in Austria it actually led to the *first* codification.

So, it is not necessarily true that a strong and powerful court imposes its principles in opposition to codification.

Based on the overall analysis, I conclude that the AVG constitutes a fundamental contribution by Austrian legal science to the formation of a common administrative law heritage in Europe. Not only should the AVG hold a central place in the study of the codification of administrative procedure – where it is often neglected – but it should also feature in the debate on the subject of comparative administrative law and its fundamental concepts.