THE AUSTRIAN MODEL OF ADMINISTRATIVE PROCEDURE. ORIGINS, CHARACTERISTICS, DIFFUSION AND THE IMPORTANCE OF THE PERSONAL FACTOR

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Abstract

There is one cross-jurisdictional dialogue in the interwar period to which comparative lawyers should pay more attention: the diffusion of the Austrian general law on Administrative Procedure of 1925, also thanks to its circulation by scholars and judges, including those jurists who migrated after the collapse of the Hapsburg Empire after World War I.

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1. Introduction

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The Austrian *Allgemeine Verwaltungsverfahrensgesetz*[1] of 1925 dominated the administrative law scene and its dogmatics for at least fifty years in Central Europe. However, despite the centrality of Austrian law, the importance of the AVG (in terms of influence, elaboration of a model, and diffusion) is often underestimated in recent research. The Administrative Procedure Act of 1925 codified principles, institutions, rules and forms that had been elaborated over fifty years of *Verwaltungsgerichtshof* case law. Therefore, before arguing the centrality of the AVG in *Mitteleuropa,* its roots and characteristics need to be recalled.

2. The *Verwaltungsgerichtshof* and its case law

The *Verwaltugsgerichtshof* was established in 1875 by the *Gesetz vom 22 Oktober 1875, betreffend die Errichtung eines Verwaltungsgerichtshofes*. The law entered into force on April 2nd, 1876 and the first judgment was handed down on October 26th, 1876[2].

The Austrian administrative court played a crucial role in the development of general principles of administrative action. When the law establishing the *Verwaltungsgerichtshof* (from now on VwGH) was adopted in 1875, the legislation on administrative matters was antiquated, incomplete and above all, there was no general law on administrative action[3]. The legislator granted the

[1] *Allgemeine Verwaltungsverfahrensgesetz* – AVG (BGBl 274/1925). The original German text (in gothic) is available at www.coceal.it/pdf/Legge%20del%201925%20testo.pdf

[2] K. Lemayer, *Der Begriff des Rechtsschutzes im öffentlichen Recht, (Verwaltungsgerichtsbarkeit); im Zusammenhange der Wandlungen der Staatsauffassung betrachtet; Festschrift aus Anlaß der Feier des 25jährigen Bestandes des Österreichischen Verwaltungsgerichtshofes* (1902); W. Dorazil, B. Schimetschek, F. Lehne (eds.), *90 Jahre Verwaltungsgerichtsbarkeit in Österreich* (1966); T. Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich* (1999).

[3] In the first volume collecting the first VwGH judgments (published in 1877), the editor Adam Freiherrn von Budwinski writes in the foreword that at that time there

judge the power to annul administrative acts for "lack in the essential forms of the procedure"[4] but avoided defining or listing these essential forms, leaving this task to the VwGH. Therefore, the court had to define general standards of administrative action to be used as a criterion for assessing the legitimacy of administrative acts in concrete cases. The VwGH elaborated several procedural rights that individuals could exercise against the administrative authorities[5].

In drawing up these standards, the *Verwaltungsgerichtshof* did not limit itself to establishing standards to check the objective legitimacy of administrative action, but also constructed a system of citizens' rights vis a vis public authorities[6].

The principle of due process and its first and fundamental element of the right to be heard are recognised by the judge through reference to natural law. As early as 1884[7], the *right to a hearing* is traced back to the nature of things, thus constituting a right to be protected even in the absence of an express legal provision providing for it. The right to be heard is defined as an unwritten general principle that belongs to natural law.

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was no codification of administrative law, many laws were more than one hundred years old, and the most recent laws contained *lacunae*. Therefore, it was clear that the importance and relevance of the VwGH rulings went beyond the individual case decided, as the rulings defined the rule applicable to concrete cases. Foreword to the "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes. Zusammengestellt auf dessen Veranlassung von Adam Freiherrn von Budwinski, k. k. Hofsekretär*" (1877).

[4] Art. 6 of the *Gesetz vom 22 Oktober 1875, betreffend die Errichtung eines Verwaltungsgerichtshofes.*

[5] 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.

[6] H.R. Klecatsky, *Der Verwaltungsgerichtshof und das Gesetz*, in W. Dorazil, B. Schimetschek, F. Lehne (eds.), *90 Jahre Verwaltungsgerichtsbarkeit in Österreich*, cit. at 2, pp. 46 ff., explicitly states this role of the *Verwaltungsgerichtshof.*

[7] Judgment no 2263 of 24 October 1884, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1884, pp 493-495.

In Tezner's[8] volume on administrative procedure of 1925[9], the expression "*die Natur der Sache*" is used eight times. In particular, he clarifies that "contrary to law is not synonymous with contrary to law. The notion of contrary to law also includes everything that is contrary to the law as it results from case law, even in the absence of an exactly identifiable normative basis. Law is everything that the *Verwaltungsgerichtshof* has affirmed as such, referring to the Nature of Things or general principles"[10].

The control exercised by the VwGH was exclusively formal and was limited in several respects.

In fact, the court could only annul the act and leave it to the administration, any other type of power outside the cassatory power being precluded[11]; the court could not perform any assessment of the facts, having to decide on the basis of the facts as established in the course of the administrative investigations; any kind of investigation on the merits was also precluded, as the court could not even assess the proportionality of the administrative

[8] Professor Friedrich Tezner was the first to construe an organic systematisation of Austrian administrative procedural law based on VwGH case law. In essence, Tezner made a systematic collection, divided by subject matter, of the decisions of the VwGH, on which he then founded a dogmatic reconstruction of the institutes. Tezner was appointed to the VwGH on 1907 and became *Senatspräsident* in 1921, and his systematisation shaped the Austrian law of administrative procedure. The VwGH exercised creative power in some specific cases. Tezner's monumental work, in which he picked out some single concrete decisions and built a number of general principles on them, has been a key element in the development of the general principles of the proceedings.

[9] F. Tezner, *Die rechtsbildende Funktion der österreichischen verwaltungsgerichtlichen Rechtsprechung, IV. Das österreichische Administrativverfahren. Systhematisch dargestellt auf Grund der verwaltungsrechtlichen Praxis,* 2nd ed. (1925).

[10] F. Tezner, *Die rechtsbildende Funktion der österreichischen verwaltungsgerichtlichen Rechtsprechung, IV. Das österreichische Administrativverfahren. Systhematisch dargestellt auf Grund der verwaltungsrechtlichen Praxis,* cit. at 9, p. 305.

[11] This situation remained unchanged until 2014, when the 2012 reform came into force, which introduced the administrative courts of first instance, thus implementing a system with two levels of judgement and giving administrative judges further powers than the mere annulment of the act. For a general overview of the 2012 reform, see the handbook edited by J. Fischer, K. Pabel, N. Raschauer, *Handbuch des Verwaltungsgerichtsbarkeit* (2014), especially the chapter by W. Steiner, *Systemüberblick zum Modell 9+2*, pp. 105 ff, and the volume entirely devoted to the courts of first instance edited by M. Holoubek, M. Lang, *Die Verwaltungsgerichtsbarkeit erster Instanz* (2013).

action, or the proper pursuit of public purposes.

Thus, the VwGH could only carry out a formal check, i.e. verify that the administrative procedure had been carried out correctly, in accordance with the law. In spite of these considerable limitations, the VwGH with its case law (and thanks to the systematisation carried out by Tezner) built up a well-developed system for the protection of the rights of private individuals, which allowed for a rather intensive control of administrative action. It could be said that the restrictions imposed on its jurisdiction, which was limited to a formal type of control, caused the VwGH to focus solely on the procedure, thus establishing several fundamental principles that were later codified in the 1925 law.

However, even when the court referred to natural law, it still invoked principles of a formal nature and not those of a substantive nature. For example, in a case of the cancellation of the trade mark that took place almost twenty years after registration and for reasons that did not arise subsequently[12], the VwGH resolved the issue by referring to the nature of things and invoking the general principle of the right to be heard, while making no mention of the (albeit relevant) principle of legitimate expectation. The VwGH elaborated several principles, deduced from the natural law, from which derived numerous procedural rights that individuals could concretely exercise vis-à-vis the administrative authorities.

3. The principles elaborated by the VwGH

The first and most important principle established by Austrian administrative law is the *Parteiengehör*, according to which the person who will be affected by the administrative act must be heard before the act is issued. The principle of participation as set out by the court does not only have a defensive function, but also has a collaborative function as it is necessary for the correct reconstruction of the relevant facts[13].

[12] Judgment no 11996 of 5 October 1898, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1898, pp 999-1000.

[13] For a detailed description of the cases – here only synthetically mentioned – please refer to A. Ferrari Zumbini, *Judicial Review of Administrative Action in the Austro-Hungarian Empire. The Formative Years (1890-1910)*, in 10 IJPL 9 (2018).

The VwGH does not merely affirm the right to be heard[14], but requires that the *Gehör* is always a *rechtlicher Gehör*[15], i.e. that the private individual is guaranteed a series of rights and protections during participation.

First of all, equal treatment of all intervening parties must be ensured during participation[16]. In addition, the invitation to participate in hearings must reach the interested party well in advance in order to effectively enable him/her to participate, and must be drafted in a language that the addressee understands[17].

With respect to the rights that can be exercised, access to the investigative acts must be allowed[18]. Indeed, interested parties must have full knowledge of all documents that the administration uses to establish the facts and circumstances relevant to the adoption of the act[19]. Moreover, private parties must have the right to submit memoranda to comment on and refute the facts and circumstances as they emerge from the documents in the administration's possession[20].

In addition to the right to submit pleadings, the VwGH also establishes the corresponding and fundamental obligation for the administration to take the documents produced by private persons into serious consideration[21].

Participatory rights also have an impact on the effectiveness of acts. According to the VwGH, an act enacted without the involvement of the person concerned cannot produce legal effects vis-à-vis that person[22]. Therefore, the participation of the person

[14] Judgment no 2263 of 24 October 1884, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1884, pp 493-495.
[15] Judgment no 6218(A) of 22 October 1908, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1908, pp 1045-1046.
[16] Judgment no 2452 of 13 March 1885, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1885, pp 164-167.
[17] Judgment no 6837(A) of 26 June 1909, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1909, pp 780-781.
[18] Judgment no 8150 of November 10th, 1894, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1894, pp 979-980.
[19] Judgment no 8686 of May 22nd, 1895, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1895, pp 654-656.
[20] Judgment no 9441 of 14 March 1896, *Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1896, pp 457-458.
[21] Judgment no 3212(F) of 3 January 1905, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1905, pp 3-4.
[22] Judgment no. 3544(A) of 13 May 1905, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1905, pp 562-567.

concerned is an essential prerequisite for the full effectiveness of the act.

Finally, the court affirms the general principle of due process, to which every administrative procedure must conform regardless of the concrete sectoral legislation[23]. Thus, whenever the administration conducts a procedure (*Verfahren*), it must ensure that it is a fair procedure (*Rechtsverfahren*).

As many Authors recognized[24], the Austrian Administrative Procedure Act of 1925 would not have been conceivable without the case law of the VwGH as the AVG simply transposed the principles developed in the fifty years of the Administrative Court into positive law in many respects.

4. The Austrian *Allgemeine Verwaltungsverfahrensgesetz* (AVG) of 1925

The *Allgemeine Verwaltungsverfahrensgesetz* was adopted within a package of five laws, aimed at simplifying and systematising the administrative proceedings[25].

In the same official gazette (*Bundesgesetzblatt* of 14 August 1925), five laws were published on 21 July 1925, which came into force on 1 January 1926: The Law on the Introduction of Administrative Procedure Laws; the General Administrative Procedure Law; the Administrative Criminal Law; the Law on Administrative Execution; the Law on the Simplification of Administrative Laws and Other Measures for the Decongestion of Administrative Authorities.

The Introduction to the Administrative Procedure Laws (*Einführungsgesetz zu den Verwaltungsverfahrensgesetzen*, EGVG), contrary to what the title might seem, did not identify the general principles of the discipline or any transitional rules. It mainly contained the list of public authorities that were obliged to comply with the laws on administrative procedures, with a specific

[23] Judgment no 11996 of 5 October 1898, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1898, pp 999-1000.

[24] F. Becker, *Das allgemeine Verwaltungsverfahren in Theorie und Gesetzgebung. Eine rechtsvergleichende Untersuchung* (1960) p. 64; W. Antoniolli, *Allgemeines Verwaltungsrecht* (1954) p. 222; R. Herrnritt, *Das Verwaltungsverfahren: Systematische Darstellung auf Grund der Neuen Österreichischen und Ausländischen Gesetzgebung* (1932) p. 10.

[25] An early fundamental commentary on these laws can be found in E. Mannlicher, E. Coreth, *Die Gesetze zur Vereinfachung der Verwaltung* (1926).

indication of the various fields of application for each, according to the various subjects. Among the main areas excluded from the application of procedural laws were tax matters and public employment matters[26].

In any case, even for administrations included in the list, *Privatwirtschaftsverwaltung* was expressly excluded from the scope of application of the laws on administrative procedure.

With a view to an order without loopholes, the law also contained a closing rule. In fact, it set a minimum fine to be applied in cases where a substantive law, in providing for a fine for administrative violations, had omitted to indicate the amount of the fine.

The General Administrative Procedure Act (*Allgemeine Verwaltungsverfahrensgesetz*, AVG) introduced a uniform model of administrative procedure, establishing its general regulation which will be examined in detail in the following paragraphs.

The Administrative Criminal Law (*Verwaltungsstrafgesetz*, VSG) consisted of two parts, one devoted to the substantive profile of administrative criminal law, the other to procedural aspects.

Finally, there followed the Administrative Enforcement Act (*Verwaltungsvollstreckungsgesetz*, VVG) and the Act on the Simplification of Administrative Laws and Other Measures for the Decongestion of Administrative Authorities (*Verwaltungsentlastungsgesetz*, VEG), which significantly opened in Article 1 with the abolition of three national holidays, reducing the relevant days to working days

a) Aims, principles and objectives of the AVG

The AVG[27] does not contain an initial listing of general principles of administrative action such as Art. 1 of Italian Law 241/1990[28]. However, it is possible to identify a number of general

[26] Art. 2(5) and (6a) EVGV.

[27] An English translation of the Austrian Act of 21 July 1925 on Administrative Procedure with a parallel alignment with the original German text can be found in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure: Diffusion and Oblivion (1920-1970)* (2023), forthcoming.

[28] The Austrian Act of 21 July 1925 on Administrative Procedure was translated into Italian by Michele La Torre and Giacomo del Carretto and published in 1928 in *Rivista di diritto pubblico*, pp. 278 ff. The translation was reprinted in 1960 in *Rivista trimestrale di diritto pubblico*, pp. 963 ff. Subsequently, the law, as amended by the 1950 novella, was translated again and published in the volume edited by

principles that form the basis on which the entire discipline is built, the objectives that the law aims to achieve, and the essential goals that the law intends to pursue.

The aims pursued by the AVG are explicitly set out in section 37, according to which "The purpose of the investigation procedure is to establish the facts relevant for the conclusion of an administrative matter and to give the parties the opportunity to assert their rights and legal interests"[29]. The purpose is thus twofold, since the intention is to ascertain the material truth (*Grundsatz der materiellen Wahrheit*) but at the same time to enable the parties to protect their rights through procedural participation.

The *Parteiengehör* provided for in Art. 37 AVG certainly constitutes a cardinal principle, around which the construction of the model is hinged. As has emerged from the foregoing analysis, the *Parteiengehör* was recognised and protected by the *Verwaltungsgerichtshof* as early as 1884 in Judgment No. 2263 as a fundamental principle pertaining to the nature of things.

The right to be heard constitutes a fundamental principle that is also clarified and reaffirmed in the various procedural steps, attributing numerous procedural rights to the parties, which will be examined in more detail in para. *c)* below. A second fundamental principle that can be deduced from the entire structure of the law is that of efficiency. Indeed, the AVG indicates the general principles by which the authority must be guided in the conduct of the entire administrative procedure and in all discretionary decisions on how to proceed with the procedure. The principles referred to are those of "expediency, speed, simplicity and cost-saving" (*Zweckmäßigkeit, Raschheit, Einfachheit und Kostenersparnis*)[30], which can be subsumed and brought back to a more general principle of efficiency.

There are various institutions and provisions in the law that can be considered means of implementing the principle of efficiency.

First of all, an administrative authority that receives an application for a matter outside its competence is obliged to

G. Pastori, *La procedura amministrativa* (1964), where, in addition to the AVG, the EGVG and excerpts of the most procedurally relevant provisions of the VSG and VVG have also been translated.

[29] "*Zweck des Ermittlungsverfahrens ist, den für die Erledigung einer Verwaltungssache maßgebenden Sachverhalt festzustellen und den Parteien Gelegenheit zur Geltendmachung ihrer Rechte und rechtlichen Interessen zu geben*".

[30] Art. 39 (2), last sentence, AVG, still in force.

transmit it "without unnecessary delay" to the competent authority (Art. 6(1) AVG). Therefore, it is not possible to simply dismiss an application received by an incompetent administration, but the authority is obliged to identify the office responsible and transmit the documents to it.

A duty of decision is also imposed on the authorities, with a time limit of six months for the issuance of the final decision (Art. 73(1) AVG). In the event of inertia, the party may appeal directly to the competent superior authority (Art. 73(2)), which will also have a time limit of six months to act, starting from the date of the party's request (Art. 73(3)).

Another application of the efficiency principle can be found in Article 18. This article is contained in the section on communication between authorities and interested parties, and contains a number of indications for the authorities.

For example, it requires them to carry out as much of the processing or instructions as possible orally or by telephone, then briefly noting the essential content on a report or other document (Art. 18(1)). In addition, officials must also make use of the occasional presence of the persons concerned in their offices to give communications or take advantage of an official trip to take care of another business (Art. 18(2)).

Finally, Articles 40 to 44 are devoted to the regulation of oral proceedings, which is indicative of a predilection for orality. The oral hearing allows for speedy progress compared to a repeated exchange of documents, and also favours the adoption of solutions shared by the authority and the parties. It also favours the adoption of shared solutions between the authority and the parties, as the latter are not only in the position of approving or refuting the solutions proposed by the administration, but can, in an oral procedure, exchange opinions and points of view in an attempt to arrive at shared solutions.

Obviously, the two fundamental principles of efficiency and protection of the rights of the parties may sometimes conflict. The AVG contains two interesting provisions aimed at reconciling the conflicting requirements underlying the principles of public efficiency and the protection of the private position.

Art. 42(3) provides that "if the person on whose application the proceedings were instituted fails to attend the hearing, it may either be held in his absence or postponed to another date at his expense". Therefore, in order to guarantee the expeditiousness of

the proceedings, the oral hearing may take place in the absence of the party concerned who, although summoned on time, does not appear; or the administration may decide to postpone it but the costs will be borne by the party. As in all preliminary proceedings, this decision is left to the discretion of the authority.

Article 57(1) strikes a balance between the right to be heard and the need for speed and expeditiousness in certain contexts. Certain exceptions are, in fact, established with respect to the general need for a prior procedural investigation before adopting a measure. The cases in which the authority is authorised to omit the procedural investigation, i.e. the participatory phase, are those in which "it is a matter of prescribing monetary payments according to an index established by law, statute or tariff or, in the case of imminent danger, a matter that cannot be postponed". Another general principle that pervades the AVG as a whole is the *Offizialmaxime*, according to which proceedings are commenced, continued, suspended, and concluded at the instigation of the court. For example, the authority may *ex officio* conduct an oral hearing (Art. 39(2); the authority is entitled to assess the preliminary questions arising in the investigation procedure, which would have to be decided as main questions by other administrative authorities or by the courts, according to its own view of the relevant circumstances and to base its decision on this assessment; however, it may also suspend the procedure until the preliminary question has been legally decided if the preliminary question is already the subject of pending proceedings before a competent authority or if such proceedings are pending at the same time (Art. 38); the authority may order the necessary evidence *ex officio*.

With regard to evidence, there is the further principle that the administration is free to decide whether or not a fact is to be regarded as proven (Art. 45 AVG).

As will be seen below, the main objectives pursued by the law as a whole are to standardise the administrative procedure, establishing a uniform model, and to simplify administrative action as much as possible (always respecting the rights of individuals)

b) Individuals as subjects of rights

Compared to previous ministerial instructions in which guidelines were outlined for officials to follow in carrying out

administrative procedures[31], in which the recipients were the objects of administrative activity, the AVG elevates the parties to rights holders.

The rights of individuals vis-à-vis the public authorities, as enumerated by the Administrative Court, were formalised in legislative provisions, thereby recognising individuals as subjects of protectable rights vis-à-vis the authorities also in positive law.

Article 8 contains a definition of persons interested in the proceedings. Persons interested in the proceedings are those who have submitted a request to the authority to obtain a measure and the persons to whom the activity of the administration relates. If these persons are interested in the proceedings "by virtue of a right or a legitimate interest", they are deemed to be parties[32]. The distinction between interested parties (*Beteiligten*) and parties (*Parteien*) dates back to Bernatzik[33], and was also criticised by some authors, such as Herrnritt, who considered it superfluous and confusing[34].

In any case, the definition of parties had been largely elucidated by case law, as Tezner had devoted an entire chapter of his volume to the concept of "parties"[35]. The consideration of individuals as subjects of rights rather than objects of administrative activity represents a Copernican revolution in the entire construction of the administrative procedure. Public power and public interest must balance each other and respect the rights of individuals.

Regardless of the assessment of the necessity to distinguish between interested parties and parties, and the internal consistency

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[31] Instructions of the Ministry of Education of 1876; *Kaiserliche Verordnung, wirksam für alle Kronländer, mit Ausnahme des lombardisch-venetianischen Königreiches und der Militärgränze, wodurch eine Vorschrift für die Vollstreckung der Verfügungen und Erkenntnisse der landesfürstlichen politischen und polizeilichen Behörden erlassen wird*, of 20 April 1854, RGBl 96.

[32] '*Personen, die eine Tätigkeit der Behörde in Anspruch nehmen oder auf die sich die Tätigkeit der Behörde bezieht, sind Beteiligte und, insoweit sie an der Sache vermöge eines Rechtsanspruches oder eines rechtlichen Interesses beteiligt sind, Parteien*' (Art. 8 AVG, still in force).

[33] E. Bernatzik, *Rechtsprechung und materielle Rechtskraft. Verwaltungsrechtliche Studien* (1886), pp. 181 ff.

[34] Herrnritt, R., *Das Verwaltungsverfahren: Systematische Darstellung auf Grund der Neuen Österreichischen und Ausländischen Gesetzgebung* (1932) p. 54, calls it precisely *überflüssig* and *beirrend.*

[35] Chapter XII of Tezner's volume on Administrative Procedure is devoted to the concept of "*Parteien*".

of the AVG in considering this distinction, it should be pointed out that the law attributes numerous important participatory rights only to the parties, which will be examined in the next paragraph.

c) Participation rights

The AVG, like the VwGH in its previous case-law, does not only affirm the *Parteiengehör*, but also establishes a series of rights to be guaranteed to participants.

In essence, all the case law recalled previously was positivised by the 1925 Act.

The administrative court had gradually redefined the right to be heard, increasingly extending the right to be informed to the right to have full knowledge of the facts and findings of the investigation, which was outlined in detail in a 1895 judgement on a Cistercian monastery[36]. In that case, the court had annulled the act of the administration, despite an extensive preliminary investigation phase in which the monks had participated, because the monks had merely been informed of the findings of the experts, whereas the parties must be guaranteed the right to have full knowledge of the facts and documents.

The pre-trial procedure outlined by the AVG is based on the principle of *Parteienöffentlichkeit*, i.e. the publicity of the pre-trial proceedings for the parties. Furthermore, bearing in mind the dual purpose, expressed in Art. 37, of protecting the rights of the parties and ascertaining the truth of the facts, the participation of the parties concerned is structured in such a way as to fulfil not only a defensive function, but also a collaborative function[37]. The VwGH had immediately emphasised this dual function of participation in its first judgement of 1884[38], which was reiterated on this point in its judgement of 1898[39] concerning a decree imposing certain obligations on a Viennese factory towards its workers. In particular, according to the judges, the right to be heard also meets the need for

[36] Judgment no 8686 of May 22nd, 1895, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1895, pp 654-656.

[37] On the different functions - defensive, collaborative and democratic - performed by private participation, see S. Cassese, *Il privato e il procedimento amministrativo. Un'analisi della legislazione e della giurisprudenza*, in *Rivista italiana di scienze giuridiche*, 1971, pp. 25 ff.

[38] Judgment no 2263 of 24 October 1884, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1884, pp 493-495.

[39] Judgment no 11393 of 5 February 1898, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1898, pp 144-147.

a correct and adequate reconstruction of the facts relevant to the decision.

Article 17 codifies the right of access to documents for the parties (*Akteneinsicht*), which the *Verwaltungsgerichtshof* had elaborated as early as 1885 with judgment n. 2452[40], concerning an expropriation procedure for the construction of a railway. The right of access is configured from the outset as a genuine right, not conditioned by discretionary choices of the administration, since the authority must allow the parties to inspect the documents, and to have specific knowledge of the factual findings upon which the commission was deciding, as this knowledge is necessary to assert or defend their legitimate interests.

It was precisely in judgement 2452 of 1885, which annulled an expropriation order because the parties had not been granted access to the entire preparatory documentation, that the Court had also pointed out a further defect arising from the unequal treatment of the parties in the preparatory procedure. Here too, Art. 17(3) codifies the prohibition of unequal treatment by allowing access equally on request, to all parties.

Art. 45(3) AVG specifies that "the parties shall be given the opportunity to take note of and comment on the result of the taking of evidence".

Participatory rights are exercised not only through institutes that guarantee full knowledge of the preliminary investigation, but also by submitting pleadings and documents to present one's point of view. The VwGH had sanctioned the right to submit pleadings in a judgment of 1896[41] concerning the right to use a woodland, annulling an authorisation granted to two residents belonging to a different fraction because the community of the fraction concerned had not been able to submit pleadings to state its opinion.

In line with this assumption, Section 43(3) AVG gives the parties the right to comment on all issues addressed during the preliminary investigation, i.e. not only on the facts presented by the administration but also on all requests made by other parties, witnesses or experts, specifying that the parties must also be able to "prove" their views, i.e. by submitting pleadings and documents.

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[40] Judgment no 2452 of 13 March 1885, '*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1885, pp 164-167.

[41] Judgment no 9441 of 14 March 1896, *Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*' of 1896, pp 457-458.

5. The Austrian model

The discipline of administrative proceedings as codified in Austria in 1925 is usually defined as a judicial model, in which there is a guarantee of adversarial participation in order to ensure the legality of administrative action[42]. This model is often contrasted with the American *interest representation* model, in which broad participation is guaranteed in order to ensure the democratic nature of administrative action[43].

Perhaps it would be appropriate to re-evaluate this definition, in light of the fundamental characteristics of the AVG's model of proceedings that have been identified here.

A correct reconstruction of the model is an operation with its own autonomous relevance in dogmatic and structural terms; it is also a necessary preparatory operation for a twofold purpose, namely both to verify its transposition into other legal systems and to carry out comparative analyses.

In this way, it is possible to outline some fundamental characteristics of the Austrian model, which quite clearly deviate from the traditional and commonly accepted reconstructions.

Firstly, the discipline of the administrative procedure codified in Austria in 1925 finds its actual origin in the creation of jurisprudence, as all the fundamental institutions and the very structure of the procedure can be found in the judgments of the *Verwaltungsgerichtshof* between 1876 and the first two decades of the 20th century.

Secondly, the regulation of the administrative procedure was aimed at recognising and attributing rights to individuals vis-à-vis the administration, aiming to guarantee not only the legality of administrative action but also, and above all, subjective protection of procedural rights. In this respect, the *Verwaltungsgerichtshof* played a fundamental role, recognising the individual as a subject of rights in the proceedings and not merely as an object of administrative activity. Such a theoretical-conceptual choice, however, developed at a time when the attention of doctrine

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[42] A. Sandulli, *Il procedimento,* in *Trattato di diritto amministrativo,* edited by S. Cassese, 2nd ed., *Diritto amministrativo generale* (2003) pp. 1035 ff., spec. p. 1049.

[43] L. Torchia, *I modelli di procedimento amministrativo*, in L. Torchia (ed.), *Il procedimento amministrativo: Profili comparati* (1993) pp. 33 ff. On the Anglo-American model see also G.F. Ferrari, *Il procedimento amministrativo nell'esperienza anglo-americana*, in *Diritto processuale amministrativo*, no. 3/1993, pp. 421 ff.

and jurisprudence in other legal systems was mainly focused on the final result of the activity, the administrative act; and if anything, on the consequent right of appeal.

Thirdly, the AVG set as its main goal (next to the protection of individual rights) the simplification and thus the streamlining of administrative activities[44]. This essential objective constitutes a fundamental component to be taken into account for a correct reconstruction of the Austrian model, as it allows us to grasp the strongly characterising elements of the uniformity of the basic scheme and its simultaneous adaptability and simplicity.

Fourthly, the Austrian model was constructed on the basis of a philosophical and theoretical concept of natural law and not on the basis of Kelsenian normativist law.

Important consequences follow from this consideration.

The judicial structure of the procedure is not an effect of the assimilation of the judicial function and the administrative function, both of which are intended to execute the law. Nor does the 'processualisation' of administrative proceedings derive from a weakness or limitation of judicial review[45], which, as we have seen in para. 2 and 3, was instead rather pervasive, even if only endowed with cassatory powers.

The procedural structure of the procedure derives (at least also) from the fact that the legislature had intentionally delegated to the *Verwaltungsgerichtshof* the task of working out the essential forms - and thus the discipline - of the administrative procedure in the complete absence of any legal rules on the subject. Therefore, the positive regulation of the administrative procedure was created by the judges, who adopted a judicial model, i.e. they built a system on the substratum most familiar to them and, to a certain extent, akin to it, the sequential one.

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[44] Simplification of administrative activities was one of the conditionalities imposed on Austria from the League of Nations in order to obtain a loan and restore its economic and financial situation. On the role played by the so-called *Genfer Reformbeschlüsse* concluded in 1922 between the defeated Austria on the one hand and victorious United Kingdom, France, Italy and Czechoslovakia on the other, please refer to A. Ferrari Zumbini, *The Austrian AVG: an underestimated archetype with deep roots and external factors*, in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure: Diffusion and Oblivion (1920-1970)*, cit. at 27.

[45] F. Benvenuti, *L'attività amministrativa e la sua disciplina generale*, in G. Pastori (ed.), *La procedura amministrativa* (1964) esp. pp. 547 ff.

6. The neglected role of the Austrian AVG

Although Austria was the first country to codify a general regulation of administrative procedure[46], the importance of Austrian law (in terms of its influence and the development of a model) is often underestimated in recent research[47]. Until the 1960s, at least in continental Europe[48], the importance of the Austrian contribution was clearly recognised and highlighted, but over time its centrality 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 the more recent works on comparative administrative law, even in the most important and impressive works devoted to the codification of administrative procedures. Austria is often forgotten also in comparative studies from the English-speaking world. Frank Goodnow's first treatise on comparative administrative law, published in 1897[49], gave an overview of the national and local administrative systems of the United States, England, Germany and France, but no chapter was devoted to the Austrian Empire. 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

[46] Actually, a first law on administrative procedure had been enacted in Spain in 1889. It is the *Ley de 19 October 1889 - de Bases de Procedimiento Administrativo*, which is the first European legislative text on procedural rules for administrative action. On this subject, see. A.R. Brewer-Carias, *Etudes de droit compare* (2001). Numerous procedural rights were already provided for in the Spanish law of 1889, including the right to be heard and the right to examine administrative documents. However, the law did not introduce a directly applicable regulation of administrative procedure, but rather contained a list of general principles that administrative activity should be inspired by. Each ministry was then asked to adopt a regulation to regulate its administrative procedures. As will be seen in the next paragraph, the first general law on administrative proceedings was enacted by Lichtenstein in 1922, however, this law was drafted on the basis of Austrian legal drafts, so even though it predates them in time, it constitutes an implementation of the Austrian discipline.

[47] The complex reasons explaining this phenomenon are analysed in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann, (eds.), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion 1920-1970*, cit. at 27.

[48] 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.

[49] F.J. Goodnow, *Comparative Administrative Law: An Analysis of the Administrative Systems National and Local, of the United States, England, France, and Germany* (1897).

systematised administrative law based on the concept of the administrative act, since this is the basis for judicial protection.

The main assumption here is that the AVG has played a central role as an archetype of discipline, exerting a profound influence in other legal systems, not always adequately recognised.

7. The spread of the Austrian AVG: the importance of the personal factor

The diffusion of the AVG as a model, and even as an archetype, is a very complex phenomenon, that cannot be adequately investigated and analysed here[50]. The more limited purpose of this article is to shed light on the personal factor that contributed to the spread of the Austrian law on administrative procedure. Indeed, after World War I, many scholars and judges of the Former Austro-Hungarian Empire moved to other Countries (or became citizens of other countries even remaining in the same place), becoming scholars and judges of other countries and contributing to the spread of the Austrian legal influence.

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 it would have been reasonable to assume that the nation states that emerged from the ashes of the Empire in 1918 would have disregarded the Austrian regulations in order to reassert their conquered independence, this was not the case.

Moreover, the model did not spread to the former imperial territories alone. In fact, the draft of the AVG was the model for the law on administrative procedure that was adopted in Liechtenstein as early as 1922 (*Landesverwaltungspflegegesetz)*[51].

A clear and precise transposition of the Austrian model can be found in Poland[52]. In 1922 a Supreme Administrative Court was established, modelled on the *Verwaltungsgerichtshof*, and whose first

[50] 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,* cit. at 27. The following citations of chapters, refer to the chapters of this book.

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

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

president, Jan Sawicki, had been a judge at the Administrative Court in Vienna. On 22 March 1928, the Polish Code of Administrative Procedure was enacted.

The sequence of events in Czechoslovakia[53] was very similar to that in Poland. Due to its historical membership of the empire, the new-born nation created from the ashes of the Austro-Hungarian Empire was well aware of the fundamental importance of the existence of an administrative jurisdiction. As early as 1918, a Supreme Administrative Court was therefore established, which 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 and who became the first and second Presidents of the Czechoslovak Administrative Court respectively: František Pantůček and Emil Hácha brought their cultural background with them. Czech scholarship is unanimous in its agreement that the Czechoslovak Administrative Court predominantly used the previous Viennese case law je when deciding cases (at least until the 1950s, when the new Communist regime abolished administrative jurisdiction). The Code of Administrative Procedure was adopted in 1928, substantially transposing the Austrian law.

The Kingdom of Yugoslavia[54] also adopted a general law on administrative procedure in 1930, which is unanimously recognised by scholarship as emphasising the Austrian model. Large parts of Yugoslavia were part of the Austro-Hungarian empire until its dissolution in 1919. Austrian influence was thus strongly present. Indeed, the majority of civil servants and judges in the country, especially in the pre-World War II period, were educated in the Austrian tradition.

Even in the Italian experience, where Austrian law exerted little influence, some connecting elements deriving from personal factors can be traced. Suffice it to cite a small example, representative of a more complex general context. At the end of the First World War, a provisional section of the Council of State was established in Italy to decide pending (and new) cases in the redeemed provinces. The VI Provisional Chamber performed its functions from 1919 to 1923, applying the law in force in the former

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

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

empire, pending the completion of the annexation of the territories with the extension of the Italian legal system. It was therefore necessary to appoint judges who were familiar with the law of the empire. The section was presided over first by the Istrian Francesco Salata, then by Guido de Bonfioli Cavalcabò, who had been a judge of the VwGH from 1910 to 1918 and after the fall of the empire had opted to take up service in the administration of the Kingdom of Italy. After the suppression of the provisional section, Guido de Bonfioli Cavalcabò continued to carry out his jurisdictional functions in the other Sections of the Council of State, taking with him his background in Austrian administrative law.

8. Conclusion

The *Allgemeine Verwaltungsverfahrensgesetz* codifies the discipline of the administrative procedure as outlined by a copious case law, in the vanguard of the protection of the rights of individuals, which rested on a long tradition of good Habsburg administration. The diffusion and transposition of the procedural model of the AVG highlights the fundamental contribution that Austrian legal science of the late 19th and early 20th century made to the formation of a common legal heritage of administrative law in Europe. The personal factor – intended as the circulation of scholars and judges of the former Austro-Hungarian Empire toward other countries – played an important role in this phenomenon.