TOWARDS AN IMPORTANT CENTENARY. THE AUSTRIAN LAW ON ADMINISTRATIVE ACTION UNDER SCRUTINY IN RESEARCH ON THE COMMON CORE OF EUROPEAN ADMINISTRATIVE LAWS[1]

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1.

The book we are presenting today is the result of a major project that has brought together wide-ranging research by a variety of scholars on the European origins of administrative procedures. A volume on an Austrian law that is nearly a century old, written in English, looking towards Europe's eastern borders and rarely the focus of comparative study, may initially seem a topic reserved for initiates and specialists.

So why are we including it in a series of lectures as a valuable addition to the education of administrative law students, albeit advanced ones? I would say there are essentially three reasons.

The first concerns the objective importance of the historic event itself. The Austrian Republic of the 1920s, situated in the reduced territorial confines of Upper and Lower Austria, was certainly far removed from the Habsburg myth and the great power which, in 1815, had orchestrated peaceful relations within the European state system in Vienna that would last for almost a century. Nevertheless, it remains a political laboratory of exceptional interest within the framework of the fragile democracies that sprang from the collapse of the Central Empires following the First World War. It embarked on a challenging constitutional journey covering everything from the form of government to federal structure, to a system of rights and protections and effective governance in line with democratic

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[1] The speech given at the presentation of the volume on 19 March 2024 in Florence is published here, retaining its oral form: G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920-1970)*, Oxford, Oxford University Press, 2023.

principles. It boasted one of the most innovative schools of law of the twentieth century and, in the context of our discussion today, emerges as the true forerunner of an institution – administrative procedure – that has increasingly become the cornerstone of the entire administrative system. Suffice it to recall Law No 241 1990 in Italy and its amendment in 2005

Secondly, we have the opportunity to participate in an important research project, as mentioned in the title, which has already proven effective and aims to identify a European Common Core beyond the usual boundaries of private and commercial law or common constitutional traditions. The project focuses on administrative law, which is uncodified and varies greatly between nations in terms of chronology, organisation, models of action, and judicial protection. It is characterised by the marked historical and institutional differences between nations, a feature that has long made comparison difficult. Today, however, having become unshackled from merely contrasting different legal traditions, it can provide substantial commonalities and unexpected convergences against a backdrop of lasting dissonances.

Thirdly, we wish to honour a Florentine tradition that has long focused on administrative procedures, dating back to figures such as Federico Cammeo and Giovanni Miele. We, students at the time, became involved in an important reform project inspired by the Austrian model led by Mario Nigro and Giorgio Berti, and continued by Umberto Allegretti. These two masters were called upon to bring to Tuscany the themes and interests of research and legislative innovation so dear to the school of Feliciano Benvenuti, and, for this reason especially, they constantly referred to the Austrian law of 1925 in their lectures.

2.

Why did Austria, in particular, assume this pioneering role? It did so long before Germany (1976) and Italy (1990); before the United States (1946); before England, which cannot be said to have had a legal system sensitive to procedural matters. And even before France, unquestionably the homeland of *droit administratif* and the Conseil d'État model, but precisely because it had founded its institutional model, since the Revolution, on a clear distinction between justice and administration, one that was strongly resistant

– until very recent measures – to accommodating non-contentious administrative procedures.

Why then did Austria become the chosen land for administrative procedures, offering, from a territory that the outcome of the First World War had suddenly rendered peripheral, such a significant contribution to a European Common Core, as we have just seen, albeit with some "negative results", as the volume honestly acknowledges?

Some answers were already known. Let me outline them quickly.

The first is the opportunity presented by certain nineteenth-century decisions when the Austrian system of administrative justice was established. The law founding the *Verwaltungsgerichtshof* (Administrative Court) in 1875 – a well-known law at the time, in Italy too, thanks to a celebrated and timely reading by Marco Minghetti – refers to a defect absent in the French tradition and in the triad which, with the Crispi Law of 1889, would soon characterise the power of review of the Fourth Section of the Council of State. In the event of failure to adhere to essential procedural requirements in administrative proceedings (*wegen mangelhaften Verfahrens*), the *VGH*, acting as a single central court, annuls and sends decisions back to the administrative authority for reasons of procedural defect.

However, these requirements were far from being established by legislation. The general principles of administrative action across Europe had not been set by lawmakers. Rather, a complex dialogue between case law and doctrine, with balances varying from country to country, was shaping them during the turning point of the late nineteenth century, when the first signs of some shared pathways among the experiences of administration in different European States began to emerge.

Austria, influenced by the *Rechtsstaat* endeavour, which here interprets administrative justice in distinctly jurisdictional terms as part of a *Justizreform*, also generated the first case law, described in our volume. And it is precisely here that concepts such as impartiality, information, the right to be heard, oral hearings, access, proceedings, reasoning, and legal certainty began to take shape. These aspects were later codified by parliament in 1925, resulting in a well-structured consolidated law, which is presented in this volume, together with the English version of the text.

And there was also a degree of attention in legal scholarship unmatched in other continental contexts, where the term itself was used sparingly, with the sole exception of the Spanish scenario – thoroughly analysed by Javier Barnes in the volume – albeit less easily generalised. Even where legislative solutions existed, hidden away in the darkest corners of the legal system, such as in Article 3 of the Italian law abolishing administrative litigation in 1865, or in laws on expropriation for public utility, they were not sufficiently used to build a "procedural" institution capable of guiding administrative decision making. The traditional image of a pure administration still shrouded in the mysteries of sovereignty, or the private-law model of the sovereignty of the will, proved too ingrained for the legal importance of administrative decision-making to be acknowledged.

This scholarly attention soon culminated in a celebrated work: Friedrich Tezner's manual of administrative procedure of 1896. A future member of the *Verwaltungsgerichtshof,* he primarily focused at this time on one of the great themes of the nineteenth century: administrative discretionality, which directly impinged on the functioning of administrative justice systems and the extent of judicial review. Tezner's volume, offering the first significant systematic analysis of the various stages of procedure, was unparalleled on the continent at that time. However, it was perhaps due to this uniqueness that it received negative reviews in German legal journals, starting with that of Georg Meyer.

Alongside this internal development within the Austrian model of administrative justice, there emerged a general theoretical strand, notably represented in 1911 by Hans Kelsen's *Hauptprobleme*. Kelsen began to challenge the contrast between *Justiz* and *Verwaltung*, although his volume, in my opinion, rather overemphasises the relative incompatibility between Tezner and Kelsen. Meanwhile, even before 1914, there was, in Austria, growing institutional attention to the need for legislative regulation of administrative procedure.

This tradition remained intact until after the First World War, with some additional elements supporting the centrality of the new procedural institution (which still could not really be considered a substantive legal principle).

The establishment of the Austrian Republic, to which Hans Kelsen primarily contributed at the behest of Social Democratic Chancellor Karl Renner (promulgated on 1 October 1920), provided

further impetus. It incorporated a particularly broad version of the principle of administrative legality (the famous Article 18 in the volume appositely recalled by Dian Schefold; p. 235). It reserved the subject of administrative procedure to federal legislation and fostered important debate on the topic of administrative democracy.

Leading the way in Europe, it introduced a form of constitutional review of legislation, namely Kelsen's negative legislator, elevated to become the guardian of the constitution in particularly conflict-ridden democracies, such as those of the post-World War I era, and arbiter of its delicate federal balances. The theoretical resolution of the conflict between *Justiz* and *Verwaltung* translated into the choice of jurisdiction as the bulwark of the "regularity of execution" and the legislative will itself, also becoming the primary guarantee of constitutional normative adherence.

The Kelsenian hierarchical structure (already fully developed in the *Allgemeine Staatslehre* of 1925) would be its most famous theoretical representation, while Adolf Merkl's administrative law manual, published in 1927, would be its main administrative systemisation. Meanwhile, Carl Schmitt, relying – as is well known – on another "defender of the constitution", would brand the Viennese group with the derogatory term "jurists of jurisdiction".

3.

However, it seems to me that the book we are presenting offers another significant contribution to scholarship (especially evident in the excellent essays by Angela Ferrari Zumbini and Otto Pfersmann, which provide assessments rich in interpretative nuances). It is not simply a matter of *Auseinandersetzung*, a political-conceptual contrast. This law enacting administrative procedure was one of administrative simplification, as well as the result of a conditional loan granted to Austria by the League of Nations at a time when the Republic was reaffirming its prohibition of annexation to Germany, changing its currency by abandoning the crown for the schilling..., within the framework of the so-called *Genfer Reformbeschlüsse* (Geneva Reform Decisions) of October 1922; followed by the Locarno Pact in 1925, while the *Anschluss* would

come later, definitively dismantling the precarious order of Versailles, on the eve of the Second World War, in March 1938.

The concerns of the international creditor centred on public spending, reductions in public employment, and streamlining administration. There was no specific international commitment regarding administrative procedure. Yet, as Stefano Mannoni aptly observes, if a law on procedure was ultimately created, it was certainly due to the many internal pressures we have examined but also to the international oversight and cooperation that this first, significant, and often undervalued experiment in international organisation brought with it.

In this interplay between international pressure and domestic tradition, as Otto Pfersmann writes so eloquently, a central fact emerges: it was the young Austrian Republic itself which considered the procedural aspect an essential part of the reform, in order to streamline its administrative machinery according to international requirements (p.220).

We return, then, to the *Mitteleuropean* melting pot, at the very time when *die Welt von Gestern*, *The World of Yesterday*, had suddenly and definitively dissolved (a world to which Stefan Zweig, aptly cited in the final pages of our volume, added a subtitle that is particularly fitting in terms of the perspective of this book: *Memoirs of a European*). Yet, it was precisely this melting pot which produced the "Diffusion and Oblivion" of this great administrative reform, most commendably investigated and meticulously reconstructed in this work.

Rereading Adolf Merkl's *Allgemeines Verwaltungsrecht* written two years later, it is clear that the goal had been achieved and a new and significant journey had begun. "*Im Grund ist alle Verwaltung Verwaltungsverfahren*" – "fundamentally, all administration is always administrative procedure, just as administrative acts are simply the result of administrative procedure". Indeed, it is this procedure which also provides the same guarantees in relation to administrative relationships that the judicial process offers to the parties, prioritising legality and opening the door for citizen participation in administration.