SOME LITTLE NOTES ON ADMINISTRATIVE JUSTICE

PROMPTED BY THE READING OF
THE AUSTRIAN CODIFICATION OF ADMINISTRATIVE PROCEDURE
G. DELLA CANANEA - A. FERRARI ZUMBINI - O. PFERSMANN (EDS)

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1.

There are numerous reasons to feel enthusiastic after reading the volume edited by G. della Cananea, A. Ferrari Zumbini, and O. Pfersmann. One of the most interesting findings in this collaborative study is certainly the scaling down of the widespread belief that public law is inextricably linked to the social, political, and historical context of individual countries. This is a result that fits perfectly within the framework of an even broader comparative research project funded by the European Research Council, which focuses on the 'common core' of European administrative law.

Equally important is the emphasis on the mitigating effect that the Austrian law on administrative procedure ultimately had on authoritarianism and arbitrariness, influencing the regulation of some Eastern European countries, such as Poland and Czechoslovakia, after their experience of Soviet government.

Perhaps it is even more noteworthy that this volume has brought lesser-known legal systems into the spotlight, overturning the traditional comparative approach that usually focuses only on the legal systems of Germany, France, Spain, and the United Kingdom (to remain within the European context, of course).

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2.

I could go on. However, I would be dishonest if I did not reveal at this point that my enthusiasm for the volume is not matched by my enthusiasm for comparative studies in general. The explanation is very simple. I do not specialize in comparative law, but at the same time, I have developed a certain scepticism towards the instrumental use that is often made of the comparative method. In fact, I have heard and seen similarities or dissimilarities being casually manipulated to support a thesis, if not an ideology.

This is particularly the case when the German or Spanish administrative courts are portrayed as special courts similar to the Italian one.

The truth is that in Germany, the Basic Law (*Grundgesetz*-GG) of 1949 places administrative courts under a single jurisdiction (Article 92) and in a single judicial order[1]. Within one jurisdiction we find five principle and co-equal branches (see also Article 95 GG), namely ordinary (civil and criminal), administrative, financial, labour, and social. The Administrative Court Act (*Verwaltungsgerichtsordnung* – VwGO), moreover, applying Articles 97 of the GG, establishes that "administrative jurisdiction is exercised by independent administrative courts, separately from the administrative authorities" (para. 1).

A Spanish Law of December 27, 1956 introduced genuine jurisdictional oversight, entrusted solely to ordinary courts, albeit with specialized competence in handling disputes concerning public administration[2]. Thus, specialized[3] sections are established within the general courts of first and second instance. The Spanish Constitution of 1978, furthermore, assigns an exclusively advisory function to the *Consejo de Estado* (defined as the "supreme advisory

[1] As precisely recalled in M. Carrà, *Sindacato giurisdizionale sulla discrezionalità e principi dello Stato di diritto in Germania*, in S. Torricelli (ed.), *Eccesso di potere e altre tecniche di sindacato sulla discrezionalità* (2018); Id., *Atipicità del diritto di azione ed effettività della tutela nel processo amministrativo tedesco*, in D. Sorace (ed.), *Discipline processuali differenziate nei diritti amministrativi europei* (2009); R. Bifulco, *La giustizia amministrativa nella Repubblica Federale di Germania*, in G. Recchia (ed.), *Ordinamenti europei di giustizia amministrativa* (1996); G. Napolitano, *Introduzione al diritto amministrativo comparato* (2020).

[2] E. García de Enterría, *Le trasformazioni della giustizia amministrativa* (2007); F. Lopéz Ramón, *L'evoluzione dell'organizzazione della giustizia amministrativa in Spagna*, in S. Raimondi-R. Ursi (ed.), *La riforma della giustizia amministrativa in Italia ed in Spagna* (2002).

[3] G. Napolitano, *Introduzione*, cit. at 1.

body of the Government": Article 107) but firmly establishes the principle of jurisdictional unity and the separation of judicial power from that of the executive (Article 117, para. 1: "Justice emanates from the people and is administered on behalf of the King by Judges and Magistrates of the Judiciary who shall be independent, irremovable and liable and subject only to the rule of law." Article 117, para. 5: "The principle of jurisdictional unity is the basis of the organisation and operation of the Courts [...]"). In 1998, lastly, the *Ley de la Jurisdicción Contencioso-Administrativa* implemented the *Ley Organica del Poder Judicial* of 1985[4].

Regarding the United Kingdom too, some similarities with Italian administrative justice sometimes appear artificially exaggerated: yet "the English model [...] remains firm on the point of jurisdictional unity"[5]. However, it must be considered, on the one hand, that in the UK the rule of law assigns a central role to Parliament, which is politically responsible also for implementing its will, expressed precisely through the law[6], but, on the other hand, in disputes against the public administration before the ordinary courts, there has gradually emerged a need for an at least partially differentiated procedural framework (the judicial review of administrative action according to the reform of 1977). Furthermore, a specialized section (the Administrative Court) within the High Court was established in 1999. Lastly, "the private individual can rely on very refined non-judicial remedies"[7], such as those entrusted to Administrative Tribunals. These were administrative bodies with sectoral jurisdiction, which, after the 2007 reform, not only saw a reduction in number and organized into a dual-tier system of judgment with general competence but

[4] E. García de Enterría, *Le trasformazioni*, cit. at 2; R. Briani, *Effettività della tutela tra rito ordinario e riti differenziati nella giustizia amministrativa spagnola*, in D. Sorace (ed.), *Discipline processuali*, cit. at 1.

[5] E. Balboni, *Qualche idea, antica e nuova, a favore dell'unicità della giurisdizione*, Quad. cost. 2011; E. Marotta, *La giustizia amministrativa in Inghilterra*, in G. Recchia (ed.), *Ordinamenti europei*, cit. at 1; G. Napolitano, *Introduzione*, cit. at 1.

[6] Until 2005, the *House of Lords* was the final court of appeal: see D. De Grazia, *Il sistema di giustizia amministrativa del Regno Unito: verso l'integrazione delle tutele*, in D. Sorace (ed.), *Discipline processuali*, cit. at 1.

[7] M. Macchia, *La riforma degli* Administrative Tribunals *nel Regno Unito*, Riv. Trim. Dir. Pubbl. 2009.

were endowed with guarantees of judicial[8] independence, leading to claims regarding their substantial judicialization[9] although these were not without controversy. Appeal against their decisions to the ordinary courts is permitted, however.

3.

However, a special court is indeed found in Austria. This is evident in the experience of the independent administrative panels introduced by a constitutional amendment in 1988. These served as the first stage of administrative justice[10]. Nevertheless, even after the 2012 reform of administrative jurisdiction, at least government nomination of judges[11] is not something that can be disregarded.

It is true, however, as Chiti writes in the volume[12], that this court, much like the Austrian legal system in general, is poorly studied or only examined within the broader context of Germanic legal culture. It might come as a surprise to discover that the requirement to conclude the procedure with an express decision, as stipulated in Article 2 of Law No. 241 of 1990, already existed in the Austrian law on administrative procedure of 1925[13]. Or perhaps it will be even more surprising to learn that the forerunner of the action against silence regulated by Article 31, paragraphs 1-3, of the

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[8] Even though not directly related, see R. Caranta, Administrative Tribunals *e* Courts *in Inghilterra (e Galles)*, in G. Falcon-B. Marchetti (ed.), *Verso nuovi rimedi amministrativi? Modelli giustiziali a confronto* (2015).

[9] M.P. Chiti, *La giustizia nell'amministrazione. Il curioso caso degli* Administrative Tribunals *britannici*, in G. Falcon-B. Marchetti (ed.), *Verso nuovi rimedi amministrativi?*, cit. at 8; M. D'Alberti, *Diritto amministrativo comparato* (2019); M.C. Pangallozzi, *Le trasformazioni del diritto amministrativo inglese: i "nuovi"* Administrative Tribunals, Riv. Trim. Dir. Pubbl. 2016; G. Ligugnana, *Le trasformazioni della giustizia amministrativa inglese: la riforma dei Tribunals*, Dir. Proc. Amm. 2009.

[10] Previously, the VwGH rendered decisions at a single instance.

[11] See giustiziainsieme.it/it/news/74-main/138-diritti-stranieri/3058-una-panoramica-sulla-corte-suprema-daustria.

[12] M.P. Chiti, *The Austrian 1925 General Administrative Procedure Act: A View from Italy*, in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920 -1970)* (2023) p. 181.

[13] S. Storr, *The Structure and Main Features of the Austrian General Administrative Procedure Act*, in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920 -1970)* (2023) p. 53.

Italian Code of Administrative Procedure, and thus, the action through which the aforementioned obligation is condemned in Italy in cases of non-compliance, does not stem from the German *Verpflichtungsklage* but the Austrian *Säumnisbeschwerde*. The issue is less about timing and more about rules and procedures. Whereas the German system, in the event of a judgment not being enforced by the public administration, resorts to indirect coercive measures (in the form of fines), the Austrian system, on the other hand, relies on proceedings extending to the merits, of a substitutive and executive nature, thus bearing many similarities to our compliance proceedings[14].

4.

From the perspective of a scholar of administrative justice, I can now refer to a couple of questions prompted by my reading of the volume.

On more than one occasion, the Spanish law of 1889[15] has been cited as a precedent for the Austrian Code of Administrative Procedure. At the same time, the result of the work by the Forti Commission, established in 1944 by the Bonomi Government to address the general reform of public administration, is recognized as the first official Italian document to discuss the need to regulate administrative procedure[16].

The question then arises as to whether Article 3 of Annex E of Law No. 2248 of 1865 (the law abolishing administrative litigation) might warrant a mention.

It is true that this provision was never implemented and, at most, assumed a prospective or policy-oriented function to be realized through individual sector-specific laws (as happened in the case of Expropriation Law No. 2359, also from 1865, which even anticipated the current notice of rejection under Article 10-*bis* of Law No. 241 of 1990, at Article 5). However, provision was made

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[14] May I refer in this regard to L. Ferrara, *Prime riflessioni sulla disciplina del silenzio-inadempimento con attenzione alla Säuminsbeschwerde austriaca*, in G. Falcon (ed.), *La tutela dell'interesse al provvedimento* (2001) pp. 72 ff.

[15] See, for example, G. della Cananea, *Introduction*, in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920 -1970)* (2023) pp. 1 and 3.

[16] M.P. Chiti, *The Austrian 1925 General Administrative Procedure Act*, cit. at 12, pp. 179 and 182.

for the possibility for interested parties to submit written submissions and observations, which seems to presuppose not only the possibility of participating in the proceedings but also of doing so in an informed manner (as making submissions requires knowledge of the administrator's intentions). Also envisaged was the prior issuance of an opinion, i.e., the essential involvement of an advisory body capable of mitigating the political arbitrariness of both the initiating and adjudicating administration through technical assessments together with the requirement to justify the administrative measure, with the justification being expected to take into account the submissions and observations put forward by the private party. There existed, then, a genuine procedural framework or principle of profound innovative significance.

Moreover, Annex E as a whole is the result of a compromise between the protective and the efficient-authoritarian core of the liberal ideology of the nascent Italian[17] State, a compromise exactly mirrored in the representation of the intentions of the Austrian legislator of 1925, torn between the demands for uniformity[18] and the protection of rights[19].

I turn now to the second question.

There is an introductory chapter by Clemens Jabloner (President of the VwGH from 1993 to 2013), dedicated to the judicial oversight of government activities seen from the standpoint of the separation of powers[20].

One may wonder then whether there is a risk of undervaluing the opposing perspective of safeguarding subjective legality. Yet, studies generally depict the Austrian administrative justice system as being focused on safeguarding subjective (albeit public) rights from the outset, with the protection of objective law merely reflecting the defence of the rights and interests of the

[17] For those interested in further details, L. Ferrara, *Lezioni di giustizia amministrativa* (2024).
[18] G. della Cananea, *Introduction*, cit. at 15, p. 7 and S. Storr, *The Structure and Main Features*, cit. at 13, p. 39.
[19] G. della Cananea, *Introduction*, cit. at 15, p. 7 and S. Storr, *The Structure and Main Features*, cit. at 13, p. 41.
[20] C. Jabloner, *Administrative Procedure and Judicial Control*, in G. della Cananea, A. Ferrari Zumbini, O. Pfersmann (eds), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920 -1970)* (2023) pp. 21 ff.

citizen (rather than vice versa, as was the case with our original concept of legitimate interest)[21].

Moreover, the volume makes various allusions to the opposite perspective of the "rights of the individual"[22]. But already some years ago, Angela Ferrari Zumbini noted in an invaluable essay anticipating this research that the previous jurisprudence of the *Verwaltungsgerichthof* aimed to provide "subjective protection against public power"[23].

On the other hand, Jabloner's observation is of particular interest: "The separation of the judiciary and the administration has a deep historical, and somewhat contradictory, dimension. It is always surprising for students to learn that the principle of separation of judiciary and administration did not initially serve exclusively, nor even primarily, to protect the judiciary but to safeguard the administration"[24].

This is precisely the conception of separation of powers as mechanical, rigid, fundamentalist, and subjective rather than functional that still persists in the system despite the current reversal to protect the independence of the judiciary, such as when cases of the substantive jurisdiction of an administrative court are classed as exceptional scenarios where the court, standing in for the public administration, merely applies the law[25].

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[21] V. K. Ringhofer, *Der Verwaltungsgerichtshof* (1955) pp. 80 ff.; F. Koja, *Allgemeines Verwaltungsrecht* (1996) pp. 833-834.

[22] See, for example, G. della Cananea, *Introduction*, cit. at 15, p. 7.

[23] A. Ferrari Zumbini, *Alle origini delle leggi sul procedimento amministrativo: il modello austriaco* (2020).

[24] C. Jabloner, *Administrative Procedure and Judicial Control*, cit. at 20, p. 21.

[25] This is what happens when the court determines the boundaries of territorial entities, sets appropriate penalties, and even goes so far as to "correct the outcome of elections and replace candidates who have the right to be declare but were declared illegitimately" (Article 130, paragraph 9, Code of Administrative Procedure).