Development of Principles in Administrative Procedural Law:

A Historical Perspective on the Principle of Ex Officio Inquiry

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I. Introduction

Since the major reform of the Austrian system of legal protection by the Act on Administrative Jurisdiction 2012 (Verwaltungsgerichtsbarkeits-Novelle 2012[1]), many questions concerning the tense relationship between the separated powers of administration and (administrative) jurisdiction have been raised yet again.[2] This

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[1] Federal Law Gazette I 2012/51. All Austrian laws, Federal Law Gazettes (FLG), and parliamentary materials are accessible via https://www.ris.bka.gv.at/ (partly in English), https://www.parlament.gv.at/ and https://alex.onb.ac.at/ (for historical texts).

[2] On the separation of powers and the rule of law in the Austrian legal system, see Jabloner, 'Administrative Procedure and Judicial Control', in della Cananea, Ferrari Zumbini and Pfersmann

University of Vienna Law Review, Vol. 9 No 1 (2025), pp. 1-19, https://doi.org/10.25365/vlr-2025-9-1-1.

paper addresses one of the determinants of that relationship: the principle of ex officio inquiry and its historical foundations. Characteristically, this principle implies that the investigation of the facts relevant to a case must be conducted by the administrative authority or the administrative court respectively, without being bound to the pleadings or offers of evidence by the parties to the case. This step is a prerequisite for the establishment of the facts of the case as the so-called state of facts without which no legal subsumption is feasible.[3] On that note, the principle of ex officio inquiry dominates most administrative proceedings and, at the same time, shall be regarded as a part of the administrative courts' powers of review – distinguishing them decisively from the civil courts.[4] Today, the principle is modified by certain rights and duties of the parties to cooperate and contribute to the proceedings as well as other subtle regulations of administrative procedural law. These include elaborate rules of evidence or different types of judicial review of administrative decisions varying between cassation and alteration.

However, this paper tries to trace the roots of the relevant provisions of the General Administrative Procedure Act 1991 (Allgemeines Verwaltungsverfahrensgesetz 1991 – AVG[5]), which are applicable in proceedings both before the administrative authorities and the courts,[6] focusing on the fact-finding principle of ex officio inquiry. The paper wants to shed light on the early case law of the Supreme Administrative Court (Verwaltungsgerichtshof) and particularly on how the doctrinal works of Friedrich Tezner regarding principles of the administrative procedure have influenced core sections of the AVG until today. Methodologically, the paper reflects that the historical perspective on the evolution of (procedural) law helps us

(eds.), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920–1970)* (Oxford, 2023) 21 (21 ff); Wiederin, 'Staat, Verwaltung und Verwaltungsrecht: Österreich', in von Bogdandy, Cassese and Huber (eds.), *Handbuch Ius Publicum Europaeum III. Verwaltungsrecht in Europa: Grundlagen* (Heidelberg, 2010) 187 (189 f, 204 ff); for an English version, see: Wiederin, 'Evolution and *Gestalt* of the Austrian State', in von Bogdandy, Huber and Cassese (eds.), *The Max Planck Handbooks in European Public Law I. The Administrative State* (Oxford, 2017) 125.

[3] On this core question of legal theory, see, among others, Jabloner, 'Der Sachverhalt im Recht' (2016) *ZÖR* 199; for an English version, see: Jabloner, 'How the Facts Enter Into the Law', in Bersier Ladavac, Bezemek and Schauer (eds.), *The Normative Force of the Factual. Legal Philosophy Between Is and Ought* (Cham, 2019) 97. See also Traußnigg, *Untersuchungsgrundsatz* 12 ff.

[4] See Traußnigg, *Untersuchungsgrundsatz* 7 ff.

[5] §§ 37 and 39 para 2 AVG, FLG 1991/51 (available in English).

[6] Cf. § 17 of the Proceedings of Administrative Courts Act (Verwaltungsgerichtsverfahrensgesetz – VwGVG), FLG I 2013/33 (available in English). Moreover, see Section IV below.

University of Vienna Law Review, Vol. 9 No 1 (2025), pp. 1-19, https://doi.org/10.25365/vlr-2025-9-1-1.

understand current and future trends both within national legal systems as well as comparatively.[7]

II. Judicial Roots of the Administrative Procedure

A. Tracing the 'Essential Forms of the Administrative Procedure'

Art 15 para 2 of the Basic Law on Judicial Power of 1867 contained the programmatic promise that if someone claimed that his rights had been violated by a decision or an order of an administrative authority, he would be free to assert his claims before a Supreme Administrative Court in public oral proceedings against a representative of the authority.[8] However, it was not until the Supreme Administrative Court Act (Verwaltungsgerichtshofgesetz – VwGG) was initially enacted in 1875 that such administrative jurisdiction was effectively established in Austria.[9] The Supreme Administrative Court's powers supplemented the previously created so-called special administrative jurisdiction of the Imperial Court (Reichsgericht), the predecessor of today's Constitutional Court (Verfassungsgerichtshof), which was – and to that extent still is today – limited to alleged violations of fundamental rights.[10] § 6 VwGG 1875 already limited the Supreme Administrative Court's powers of review in questions of fact to a mere procedural review with the power of cassation;[11] in full, the provision read:

> 'As a rule, the Supreme Administrative Court shall decide based on the facts assumed in the final administrative instance. However, if the Supreme

[7] For a stellar comparative account on the present topic, see Damaška, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process* (New Haven and London, 1986).

[8] Imperial Law Gazette 1867/144. See also para 3 leg cit on the adoption of an implementing act on competences, composition and procedure of a Supreme Administrative Court.

[9] Imperial Law Gazette 1876/36. On the evolution of the Austrian administrative jurisdiction, see, among others, Olechowski, 'Verwaltungsgerichtsbarkeit in Österreich', in von Bogdandy, Huber and Marcusson (eds.), *Handbuch Ius Publicum Europaeum VIII. Verwaltungsgerichtsbarkeit in Europa: Institutionen und Verfahren* (Heidelberg, 2019) 419.

[10] Cf. Art 3 lit b of the Basic Law on the Establishment of an Imperial Court, Imperial Law Gazette 1867/143. On the evolution of the Austrian constitutional adjudication, see Grabenwarter, 'Der österreichische Verfassungsgerichtshof', in von Bogdandy, Grabenwarter and Huber (eds.), *Handbuch Ius Publicum Europaeum VI. Verfassungsgerichtsbarkeit in Europa: Institutionen* (Heidelberg, 2016) 413; for an English version, see: Grabenwarter, 'The Austrian Constitutional Court', in von Bogdandy, Huber and Grabenwarter (eds.) *The Max Planck Handbooks in European Public Law III. Constitutional Adjudication: Institutions* (Oxford, 2020) 19.

[11] See also §§ 2 and 7 leg cit. In essence, this still applies today; cf. §§ 41 f of the Supreme Administrative Court Act 1985 (Verwaltungsgerichtshofgesetz 1985 – VwGG), FLG 1985/10 (available in English).

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> Administrative Court finds that the facts of the case have been assumed contrary to the law, or that they require supplementation in essential points, or that *essential forms of the administrative procedure* have been disregarded, it shall set aside the contested decision or order due to procedural defects and return the case to the administrative authority, which shall remedy the defects and then issue a new decision or an order.'

This provision was based on the mere assumption that a general administrative procedure existed.[12] This was particularly evident as to the vague wording concerning the judicial review of regard for the 'essential forms of the administrative procedure', on which the parliamentary materials unfortunately did not elaborate.[13] In fact, however, such procedure only consisted of a number of isolated regulations scattered over the field of administrative law. For several decades, the Supreme Administrative Court's case law was therefore directly decisive for the understanding of the administrative procedure and its 'essential forms'. The Court's precedents, which over time were condensed into an actual standard of review, were initially only observed by the administrative authorities de facto. They only underwent doctrinal elaboration and systematisation for the first time through the work of Friedrich Tezner.[14] His work subsequently served as the key foundation for the codification of the General Administrative Procedure Act (Allgemeines Verwaltungsverfahrensgesetz – AVG) in 1925.[15]

In an overall view, however, it has been found out that the extent to which the Supreme Administrative Court itself had creatively developed principles of the administrative procedure in its case law on procedural defects was in fact less than sometimes assumed, as the Court had actually quite often been able to rely on specific

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[12] See Tezner, *Handbuch des österreichischen Administrativverfahrens* (Wien, 1896) V. Further, see Olechowski, 'Die Entwicklung allgemeiner Grundsätze des Verwaltungsverfahrens', in Holoubek and Lang (eds.), *Allgemeine Grundsätze des Verwaltungs- und Abgabenverfahrens* (Wien, 2006) 13 (23 f); Olechowski, 'The History of the Administrative Procedure in Austria until 1925', in della Cananea, Ferrari Zumbini and Pfersmann (eds.), *The Austrian Codification of Administrative Procedure. Diffusion and Oblivion (1920–1970)* (Oxford, 2023) 26 (30 f); Ringhofer, 'Der Sachverhalt im verwaltungsgerichtlichen Bescheidprüfungsverfahren', in Lehne, Loebenstein and Schimetschek (eds.), *Die Entwicklung der österreichischen Verwaltungsgerichtsbarkeit. Festschrift zum 100jährigen Bestehen des österreichischen Verwaltungsgerichtshofes* (Wien and New York, 1976) 351 (352 ff).

[13] See the explanatory remarks on the government bill, RV 148 BlgHH VII. Session, 825 f.

[14] Tezner, *Handbuch*; Tezner, *Das österreichische Administrativverfahren. Systematisch dargestellt auf Grund der verwaltungsgerichtlichen Praxis*, 2nd edn. (Wien, 1925).

[15] FLG 1925/274; for an English version of the original text, see: della Cananea, Ferrari Zumbini and Pfersmann, *Administrative Procedure* xxix ff. Moreover, see Section III below.

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regulations in certain areas of administrative law.[16] Moreover, the General Civil Code (Allgemeines Bürgerliches Gesetzbuch – ABGB[17]), namely its § 7 on analogy and principles of natural law, played a minor role; and the General Code of Courts (Allgemeine Gerichtsordnung – AGO[18]) as the predecessor of today's Code of Civil Procedure (Zivilprozessordnung – ZPO[19]) had an even smaller part.[20] Instead, the generalisation into principles of the administrative procedure based on the rule of law, which this case law ultimately experienced, was to a large extent a manifestation of Tezner's own ideas.[21]

B. Roots of the Principle of Ex Officio Inquiry

Taking a closer look, this finding is also likely to apply to the principle in question, namely the ex officio investigation and establishment of the relevant facts to a case by the administrative authorities. In this context, Tezner initially stated that the 'procedure ex officio' (i.e. the initiation of proceedings ex officio) was the procedure in which the typical nature of the 'administrative process' was most clearly expressed, even though the administrative procedure did not strictly distinguish between proceedings on application and ex officio; proceedings initiated on party application were also strongly mixed with ex officio elements as regards the determination of the course of the proceedings and the selection of the proper investigative acts.[22] The legal institution of the procedure ex officio 'to safeguard public interests' was linked

[16] See Olechowski, 'Entwicklung', 13 (27); Olechowski, 'History', 26 (32 f). On the question of the legal nature of the administrative procedure at that time, see Thaler, 'Vom Wesen und Wert der Verwaltungsverfahrensgesetze' (2009) *ZÖR* 433 (438 ff). For an overview of the older specific administrative regulations which were repealed in 1925, see Art III para 2 of the Introductory Act to the Administrative Procedure Acts (Einführungsgesetz zu den Verwaltungsverfahrensgesetzen – EGVG), FLG 1925/273.

[17] Collection of Juridical Texts 1811/946.

[18] Collection of Juridical Texts 1781/13.

[19] Imperial Law Gazette 1895/113.

[20] See Olechowski, 'Entwicklung', 13 (27). Conversely, note the subsequent AVG 1925, which was extensively oriented towards civil procedural law; see the explanatory remarks on the government bill RV 116 BlgNR II. GP, BT 3.

[21] See Olechowski, 'Entwicklung', 13 (31); Olechowski, 'History', 26 (32 f). For detailed case statistics and a case law study, see Ferrari Zumbini, 'Standards of Judicial Review in Administrative Action (1890–1910) in the Austro-Hungarian Empire', in della Cananea and Mannoni (eds.), *Administrative Justice Fin de siècle* (Oxford, 2021) 41 (45 ff, 59 ff).

[22] Tezner, *Administrativverfahren* 6 f, with reference to VwSlg A II 2507/1904. On the different versions of the historical collections of the case law of the Supreme Administrative Court, see Tezner, *Administrativverfahren* XII.

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not least to the administrative authorities' duty to assist the parties in safeguarding their rights and interests.[23] Ultimately, the Supreme Administrative Court considered it to be the duty of every authority 'to ex officio establish the facts relevant to a decision so thoroughly and comprehensively that the decision can be based on a reliably established factual basis'. Likewise, this was precisely what also every higher authority had to 'look at ex officio' when examining proceedings conducted by the lower instances.[24] Concerning the terminology, a specific use of the term state of facts ('Sachverhalt') was not yet made here. Nonetheless, a distinction was drawn between the concrete, legally significant facts and the abstract elements of the offence ('Tatbestand').[25] This far, Tezner could certainly rely on Supreme Administrative Court case law. Moving on to the so-called 'procedure without a fixed rule', which probably again referred to the authorities' discretion to determine the course of the proceedings, and the 'principle of hearing the parties', he generalised again:[26] 'Sine sollenitatibus processus, sine strepitu judicii, sola inspecta, rei veritate, ex nobili judicis officio, these are the principles that adhere to the administrative procedure in its most peculiar form. And they are still valid in the era of the rule of law.'[27]

According to the Supreme Administrative Court, one of the principles governing the administrative procedure was the 'principle of hearing the parties', which – from a positivistic standpoint – Tezner slightly relativised: He claimed that the Court was referring to 'natural law and not the law' when it said that the hearing of the parties had to take place even in the absence of an express statutory order if, according to the nature of the case, it was part of the proper determination of the facts relevant to

[23] Tezner, *Administrativverfahren* 11.

[24] Tezner, *Administrativverfahren* 13, with reference to VwSlg Budwinski 4890/1889, A II 75/1901, 506/1901, 5582/1907, 5682/1908, 6552/1909, 6635/1909, 6735/1909, 6962/1909, 7045/1909.

[25] See Tezner, *Administrativverfahren* 231. In the index, reference was made to 'Tatbestand' under 'Sachverhalt'; see Tezner, *Administrativverfahren* 899, 905. Further, note § 6 VwGG 1875: 'Thatbestand'. On that matter, see Jabloner, (2016) *ZÖR* 199 (203 footnote 16), who also points out, with reference to Ringhofer, 'Der Sachverhalt', 351 (357), that the original versions of the ZPO and the Code of Criminal Procedure (Strafprozeßordnung – StPO), Imperial Law Gazette 1873/119, already knew the term 'Sachverhalt'. In contrast, the VwGG only used it as amended by FLG 1930/153, probably following the terminology of the AVG 1925. Moreover, the term 'Sachverhalt' was already included in the original version of the Constitutional Court Act (Verfassungsgerichtshofgesetz – VfGG), FLG 1921/364.

[26] Tezner, *Administrativverfahren* 27. On that approach, see Olechowski, 'Entwicklung', 13 (28 ff).

[27] Tezner, *Administrativverfahren* 27. English (rough translation): 'Without procedural formalities, without judicial noise, the only thing inspected, the truth of the matter, deriving from the nobility of the judicial office, [...].'

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the decision.[28] Nonetheless, Tezner himself diverged from a positivistic approach, arguing that Court was guarding the 'sacred fire of law and justice', the most important of all human rights, through the hearing of the parties. He argued that experience would teach that what was called unconscious violence – arising from haste, lack of time, superficiality or conscious administrative arbitrariness – was to a far greater extent violence 'which [was] not done to the law, but to the facts'.[29] Eventually, the hearing of the parties would encompass all other procedural principles; it would therefore come to constitute the most important procedural principle of the rule of law.[30]

However, the administrative procedure – here Tezner again relied more heavily on specific case law of the Supreme Administrative Court – was not there to provide the parties with clarifications 'which they [were] able to obtain themselves'.[31] Despite the administrative authorities' general duty to investigate and establish the facts independently from the parties' applications, specific administrative regulations allegedly contained provisions that required the parties to support their claims with evidence or even ordered an explicit transfer of the burden of proof to them. This 'peculiar interweaving of the principles of application and officiality', which was not subject to any general regulations at this time, required an 'extraordinary tact', mediating between the interest in the efficient use of the authorities' resources and the parties' need for assistance.[32] Thus, the parties had to 'in principle provide evidence' for the fulfilment of the factual prerequisites of their claims; but, at the same time, the authorities had to officially investigate the relevant facts without unduly delaying the resolution of the administrative matter, if they were in a position to do so. Ultimately, in contrast to civil procedural law (broadly speaking),[33] the parties did not have the right to the so-called 'formal or procedural [i.e. subjective] truth' in administrative proceedings, since these proceedings were rather aimed at establishing

[28] Tezner, *Administrativverfahren* 27, 29, with reference to VwSlg Budwinski 2263/1884, A I 11.393/1898.

[29] Tezner, *Administrativverfahren* 29 f.

[30] Tezner, *Administrativverfahren* 30. Cf. today Art 6 of the European Convention on Human Rights – ECHR, FLG 1958/210, and Art 47 of the EU Charter of Fundamental Rights – CFR, OJ C 326/391, which confirm the central status of the principle of hearing the parties within the rule of law. The ECHR has constitutional status in the Austrian legal system; see FLG 1964/59. The CFR may be yardstick to the Constitutional Courts' assessment of the constitutionality of laws and administrative acts under certain conditions; see VfSlg 19.632/2012.

[31] Tezner, *Administrativverfahren* 32, with reference to VwSlg A II 7182/1910.

[32] Tezner, *Administrativverfahren* 45, on the evidence procedure in general 42 ff.

[33] See Traußnigg, *Untersuchungsgrundsatz* 9 ff.

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'[material or substantive] objective truth' by the nature of the administration.[34] Then again, the parties should not have been allowed to completely rely on the obligation of the authorities to provide support. This should only have been seen as a stopgap measure depending on the circumstances; the parties had to offer what they were able to provide and what only they knew about, otherwise their position in the proceedings would be jeopardised. Obviously, this could only succeed as long as they were fully informed by the authorities about the results of the official investigations, and if they were given the opportunity to refute the evidence that was unfavourable to them – i.e. the 'opportunity to provide counter-evidence'.[35] However, the evaluation of the suitability of evidence used in the individual case to establish certainty about the relevant facts and the weighing of the reasons for and against the assumption of a fact was left to the authorities alone. This discretion of the authorities to assess evidence– the 'free evaluation of evidence' – also applied to the result of an expert opinion.[36]

If a final, reasoned decision or an order[37] was admissibly contested by means of a complaint in the appeal procedure,[38] the higher authority had to review the act of the lower instance and the proceedings carried out, whereby their decisions could regularly be made 'on the basis of the files'.[39] However, as Tezner accurately observed, in the event that the higher authority deemed it necessary that evidence was taken that had not yet been collected, the Supreme Administrative Court's case law pointed in different directions: At times the Court considered it necessary to refer a case back to the lower authority for remedying the procedural defects and issuing a new decision in view of the need for supplementation of evidence – thereby annulling the contested decision. Usually, though, the Court allowed the higher authority to

[34] For more on this matter, see Jabloner, (2016) *ZÖR* 199 (203 ff); Traußnigg, *Untersuchungsgrundsatz* 14 ff.

[35] Tezner, *Administrativverfahren* 45 f, 48 ff, with reference to, among others, VwSlg A II 986/1902, 1760/1903, 2055/1903, 2652/1904, 3139/1904, 3867/1905, 4290/1906, 6207/1908, 7183/1910, 11.203/1916, 11.272/1916, 11.273/1916.

[36] Tezner, *Administrativverfahren* 53, with reference to, among others, VwSlg Budwinski 6918/1892, 11.502/1898, A I 12.391/1899, 12.747/1899, A II 579/1901, 6641/1909, 7181/1910. On the duty to give reasons, see Tezner, *Administrativverfahren* 63.

[37] See Tezner, *Administrativverfahren* 145 ff. The term decree ('Bescheid') was not yet used at this time, since it was only introduced later as an umbrella term for the terms decision and order ('Entscheidung', 'Verfügung'); cf. the bracket term in § 56 AVG 1925, before amended by FLG I 1998/158. Also, cf. Art 144 para 1 of the Federal Constitutional Law (Bundes-Verfassungsgesetz – B-VG), FLG 1920/1, before amended by FLG 1975/302.

[38] See Tezner, *Administrativverfahren* 304 ff, on the complaint due to procedural defects 312 ff.

[39] Tezner, *Administrativverfahren* 385.

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decide directly based on the results of the fact-finding carried out by the lower authority without ordering such an annulment.[40] In doing so, however, the higher authority was never allowed to assume facts that deviated from the evidentiary findings of the lower authority if they had not (also) been subject to the hearing of the parties. In addition, the boundary was drawn that it had to 'always remain the same matter' that was decided upon by the lower and the higher authorities with regard to such 'supplementary investigations' serving to clarify the matter. This was due to the fact that any exceedance of the limit of the subject matter would have required a new decision on behalf of the lower instance in the first place.[41] Whether a specific act had to ultimately be annulled due to procedural defects depended, essentially, on whether or not it frustrated the possibility of obtaining a reliable decision that safeguarded the rights of the parties, whereby certain defects were of such nature that they 'always' had the effect of frustrating the administration of justice.[42] After all, the 'merits decision' was the decision on the substantive legality of the contested decision and the resolution of the administrative matter sensu stricto.[43] In some cases, this was limited to the 'cassation' of the act of the lower authority, while in others the annulled act also had to be replaced by another. It was the responsibility of the higher authority to replace an annulled act by itself 'if the factual basis [was] given'. Therefore, in addition to the annulment of the contested decision, its replacement by a complete or partial change of its content – in other words 'alteration' or 'reformation' – was already possible.[44]

It is already obvious from this selective but instructive excerpt from Tezner's work what was subsequently codified as the principle of ex officio inquiry (and other related procedural principles[45]) in the AVG 1925, a principle that largely still applies today:[46] In administrative proceedings, it is basically up to the administrative authorities to

[40] Tezner, *Administrativverfahren* 385, with reference to VwSlg Budwinski 4075/1888, 5075/1890, 7384/1893, 7941/1894, 10.962/1898, A II 1115/1902, 1297/1902, 1905/1903, 3415/1905, 7337/1910, 8156/1911, 8525/1911, 9029/1912.

[41] Tezner, *Administrativverfahren* 385 f, with reference to VwSlg A II 3445/1905, 6009/1908, 6150/1908, 6285/1908.

[42] Tezner, *Administrativverfahren* 386.

[43] Tezner, *Administrativverfahren* 389.

[44] Tezner, *Administrativverfahren* 390 f, on the binding effect 398 f.

[45] On the intertwining of principles of the administrative procedure, see Section IV below.

[46] Eventually, note that reference was made in the index to the term maxim of ex officio inquiry ('Untersuchungsmaxime'); see Tezner, *Administrativverfahren* 907. On the contrary, the term material or substantive truth ('materielle Wahrheit') was not expressly used here, but could already be found at this time in Ulbrich, *Lehrbuch des österreichischen Verwaltungsrechtes* (Wien, 1904) 283.

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obtain an overview of the relevant facts on their own initiative, without being bound to the pleadings or offers of evidence by the parties to the case.[47] They are free to assess the gathered evidence,[48] but must balance their fact-finding duties and their discretion to determine the course of the proceedings with the parties' right to be heard as well as their obligation to contribute to the proceedings.[49] They ultimately must aim at establishing best possible material or substantive (i.e. objective) truth, which constitutes one of the essential purposes of the administrative procedure and the evidence procedure in particular. What is more, some principles of the appeal procedure are already clearly recognizable here, too.[50]

III. The General Administrative Procedure Act 1925

A. The Codification Process in General

Certainly, neither the case law of the Supreme Administrative Court nor its intensive reprocessing by Tezner could provide a satisfactory substitute for a positive (general) administrative procedural law. Hence, the parliamentary materials to the VwGG 1875 already conceded that the increased importance which would be attached to the fact-finding duties of the administrative authorities in future according to this law would make it necessary to also enact precise laws on the administrative procedure, in particular on the evidence procedure.[51] A modest first step in that direction was taken in 1896 with legislation on the appeal procedure.[52] Even before that – in fact even before the Supreme Administrative Court commenced its work –

[47] Cf. today §§ 37 and 39 para 2 AVG.

[48] Cf. today § 45 para 2 AVG.

[49] Cf. today §§ 37, 39 para 2a and § 45 para 3 AVG.

[50] Cf. today § 66 AVG.

[51] See RV 148 BlgHH VII. Session, 826. On the Supreme Administrative Court's limited powers of review in questions of fact, see also Jabloner, 'Die "Garantien der Verwaltung" und ihre Entwicklung', in Österreichische Parlamentarische Gesellschaft (ed.), *Festschrift aus Anlaß des 75. Jahrestages der Beschlussfassung über das Bundes-Verfassungsgesetz* (Wien, 1995) 531 (534 f).

[52] Appeal Procedure Act (Gesetz, womit ergänzende, beziehungsweise abändernde Bestimmungen bezüglich des Verfahrens bei Geltendmachung der Rechtsmittel gegen Entscheidungen und Verfügungen der politischen Behörden getroffen werden), Imperial Law Gazette 1896/101. See Olechowski, 'Entwicklung', 13 (37 f); Olechowski, 'History', 26 (35). Moreover, note a preceding general administrative order issued by the Minister of the Interior on this matter (Verordnung des Ministers des Innern betreffend die Behandlung der Recurse in Angelegenheiten der politischen Verwaltung), Imperial Law Gazette 1868/124.

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a general administrative order was issued by the Minister of Education in 1876.[53] This order was only directed towards the educational authorities, but other authorities are said to have subsequently followed it in their administrative proceedings as well.[54] It had formulated a number of procedural principles and ordered, among other things, that 'the prevailing factual and legal circumstances be clarified ex officio' (no 5 para 1 leg cit) and that 'as the highest rule all parties involved be heard' (no 5 para 2 leg cit).

An exclusive federal competence to regulate, among other things, the administrative procedure was enacted in Art 11 para 1 no 7 of the B-VG in 1920, although it did not enter into force right away, similar to the entire distribution of competences in the federal republic.[55] The Laws Concerning the Simplification of the Administration[56] – i.e. the uniform Administrative Procedural Laws or the EGVG, AVG, VStG[57] and VVG[58] – were finally passed in 1925.[59] The federal competence to regulate this field was also 'activated' beforehand.[60] The decisive impetus for this reform was, however, ultimately not so much the superficially discussed aspects of administrative simplification and legal certainty; the reform was rather a condition of a League of Nations loan to restructure the state finances.[61]

From a constitutional law perspective, the codification took into account the principle of legality (Art 18 para 1 B-VG) in the field of administrative procedure on the one hand, but also the unwritten rule of law principle on the other. In this sense and to a

[53] Erlass des Ministers für Cultus und Unterricht an alle Länderchefs und Landesschulräthe, Verordnungsblatt 1876/20. See Olechowski, 'Entwicklung', 13 (24 f); Olechowski, 'History', 26 (31 f).

[54] See RV 116 BlgNR II. GP, AT 64.

[55] Cf. § 42 of the Provisional Law 1920 (Übergangsgesetz 1920 – ÜG), FLG 1920/2.

[56] The legislative package was given this label in the parliamentary materials; see RV 116 BlgNR II. GP, AT 63.

[57] Administrative Criminal Act (Verwaltungsstrafgesetz – VStG), FLG 1925/275.

[58] Administrative Enforcement Act (Verwaltungsvollstreckungsgesetz – VVG), FLG 1925/276.

[59] FLG 1925/273-276. Also note the Administration Relief Act (Verwaltungsentlastungsgesetz), FLG 1925/277, repealed by FLG I 2001/137.

[60] See Art I of the Federal Constitutional Law amending the Provisional Law 1920 (Bundesverfassungsgesetz zur Änderung des ÜG 1920), FLG 1925/271. Also note Art I § 5 of the Federal Constitutional Law Amendment Act 1925 (Bundes-Verfassungsnovelle 1925) read in conjunction with Art III para 3 Transition Amendment Act 1925 (Übergangsnovelle 1925), FLG 1925/268 and 1925/269 respectively. On that matter, see Lukan, 'Art 11 Abs 2 B-VG', in Kneihs and Lienbacher (eds.), *Rill-Schäffer-Kommentar Bundesverfassungsrecht*, 19. dely (Wien, 2017) Rz 2 f.

[61] Geneva Protocols (Genfer Protokolle), FLG 1922/842. On the different stages of the evolution of the uniform Administrative Procedural Laws, see Olechowski, 'Entwicklung', 13 (32 ff); Hellbling, *Kommentar zu den Verwaltungsverfahrensgesetzen I. EGVG – AVG* (Wien, 1953) 6 ff.

certain extent, administrative jurisdiction as the judicial review of the legality of individual administrative acts virtually required a 'complementary structure of administrative law'.[62] It was therefore described as the 'fundamental philosophy' of the Administrative Procedural Laws that administrative relations – like other legal relations – were subject to legislation and assessment, and that legal protection and legal equality required the application of formalised rules.[63] However, the legislative package was not only based on the level, but also on the four-part structure of the legislation on the judiciary and on specific legal institutions of civil procedural law; for example, the rules of evidence of the ZPO were adopted in the AVG.[64] Last but not least, the Administrative Procedural Laws served as a model for legislation on the administrative procedure of several other countries,[65] including the German Administrative Procedure Act (Verwaltungsverfahrensgesetz – VwVfG), which was only enacted in 1976.[66] In summary, this early codification project was labelled a legislative masterpiece in the service of the rule of law and, alongside the idea of constitutional adjudication, an important Austrian contribution to European legal culture.[67]

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[62] Jabloner, 'Garantien', 531 (536 f, 538 f). See also Jabloner, 'Administrative Procedure', 21 (23 f), with reference to Merkl, *Allgemeines Verwaltungsrecht* (Wien and Berlin, 1927). Further, see Thienel, 'Allgemeine Grundsätze des Verwaltungsverfahrens – verfassungsrechtliche, gemeinschaftsrechtliche und gesetzliche Verankerung', in Holoubek and Lang (eds.), *Allgemeine Grundsätze des Verwaltungs- und Abgabenverfahrens* (Wien, 2006) 41 (48).

[63] Schäffer, '80 Jahre Kodifikation des Verwaltungsverfahrens in Österreich' (2004) *ZÖR* 285 (318), with reference to Kelsen, *Allgemeine Staatslehre* (Berlin, 1925) 236 ff, 242.

[64] In addition to the ZPO and the StPO, the legislation on the judiciary has covered and continues to cover an Introductory Act to the Code of Civil Procedure (Zivilprozessordnung-Einführungsgesetz – EGZPO), and an Enforcement Code (Exekutionsordnung – EO); see RV 116 BlgNR II. GP, AT 64 and BT 3, 5 f. On that aspect, see also Jabloner, 'Garantien', 531 (539); Schäffer, 'Kodifikation', 285 (291 f); Merkl, 'Österreichisches Recht: Verwaltungsrecht', in Stier-Somlo and Elster (eds.), *Handwörterbuch der Rechtswissenschaft IV* (Berlin and Leipzig, 1927) 326 (326); Mannlicher, 'Der Weg zur rechtlichen Ebenbürtigkeit von Verwaltung und Justiz', in Österreichischer Verwaltungsgerichtshof (ed.), *90 Jahre Verwaltungsgerichtsbarkeit in Österreich* (Wien, 1966) 61 (61 ff).

[65] For an overview, see the contributions in 'Part II. The Diffusion of Administrative Procedural Legislation in Europe (1920–1970): National Reports', in della Cananea, Ferrari Zumbini and Pfersmann, *Administrative Procedure* 57 ff.

[66] See Schäffer, 'Kodifikation', 285 (287); Walter and Mayer, *Verwaltungsverfahrensrecht*, 8th edn. (Wien, 2003) Rz 27 f. On the evolution of the VwVfG, which is, to a lesser extent, oriented towards civil procedural law, see Schoch, 'Einleitung', in Schoch and Schneider (eds.), *Verwaltungsverfahrensgesetz: VwVfG*, Grundwerk (München, 2020) Rz 211 ff; Augsberg, 'The Austrian Legislation on Administrative Procedure. A View from Germany', in della Cananea, Ferrari Zumbini and Pfersmann, *Administrative Procedure* 145 (145 ff).

[67] See Wiederin, 'Staat', 187 (206), with further references.

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B. Codification of the Principle of Ex Officio Inquiry

General principles of the administrative procedure ran through the Administrative Procedural Laws 'like golden threads'.[68] Part II of the AVG ('Investigation procedures') was divided into two sections, namely 'Objective and course of the investigation procedure' and 'Evidence'. However, § 37 AVG fell under the heading 'General principles' and was limited to merely setting out the principles that should apply to every investigation procedure: the principle of objective determination of the facts and the principle of hearing the parties.[69] Until today (§ 37 first sentence AVG), the provision reads as follows:[70] 'It is the purpose of the investigation procedure to ascertain the state of facts relevant for processing an administrative matter and to enable the parties to claim their rights and legal interests.'

In other respects, however, priority was given to specific administrative regulations. In particular, a comprehensive 'Code of Administrative Procedure' comparable to the ZPO was considered 'neither desirable nor achievable', as the procedure should not be forced into a rigid form.[71] The remaining Part II of the AVG (§§ 39 to 55) therefore only contained subsidiary[72] general guidelines for the procedure in the narrower and actual sense, i.e. for the activities of the authority aimed at investigating and establishing the relevant facts by means of inquiries and taking evidence, which were intended to fill gaps in relation to the specific administrative regulations.[73] In particular, these guidelines regarded the course of the investigation procedure, the oral hearings before the authorities, and the rules of evidence. Moreover, the principle of free evaluation of evidence, which also supports the establishment of material or substantive truth, and specific statutory rules of evidence were upheld. At the same time, the parties' right to be heard already mentioned in § 37 AVG was affirmed as a 'right to contribute'. Thus, the authorities were only allowed to use the

[68] Schäffer, 'Kodifikation', 285 (293), with reference to Mannlicher and Coreth, *Die Gesetze zur Vereinfachung der Verwaltung. Verwaltungsverfahrensgesetze und Verwaltungsentlastungsgesetz* (Wien, 1926) XXXVIII. See also Storr, 'The Structure and Main Features of the Austrian General Administrative Procedure Act (AVG)', in della Cananea, Ferrari Zumbini and Pfersmann, *Administrative Procedure* 38 (41 ff).

[69] See RV 116 BlgNR II. GP, BT 5.

[70] Cf. § 38 of the government bill; see the parliamentary committee report AB 360 BlgNR II. GP, 15.

[71] RV 116 BlgNR II. GP, BT 5.

[72] The term subsidiarity ('Subsidiarität') was not expressly used in the parliamentary materials yet; but AB 360 BlgNR II. GP, 7 speaks of 'suppletorische Vorschriften'. On that matter, see also Traußnigg, *Untersuchungsgrundsatz* 75 ff.

[73] See RV 116 BlgNR II. GP, BT 5 f.

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results of evidence if the parties had the opportunity to comment on them (§ 45 paras 2 and 3 AVG[74]). Accordingly, the question of the admissibility of an appeal was also initially left to the specific administrative regulations (§ 63 para 1 AVG[75]), whereby the declared aim of the other provisions on the appeal procedure was 'to codify the applicable law sanctioned by practice and case law'.[76]

IV. Conclusion – The Intertwining of Procedural Principles

It becomes clear from this brief overview that, in the codified AVG, the principle of ex officio inquiry, which postulates that the cardinal fact-finding duties lie with the administrative authorities, was already strongly interconnected with a set of other principles of the administrative procedure. In particular, the interplay of the principle of ex officio inquiry, the principle of material or substantive truth, and the principle of free evaluation of evidence with the parties' right to be heard and their corresponding duty to contribute to the proceedings was conceptualised to guarantee an adequate fact-finding (and -establishing) process and, ultimately, well-founded administrative decisions.[77] This basic structure has remained the same until today; the structure of the AVG was subject to only marginal modifications over the years, indicating the remarkably practical and innovative approach as well as the quality of this law.[78]

Hence, the role and conduct of the parties to a case is of relevance, not that of the administrative authorities alone. This is at the core of the intertwining of procedural principles. The principle of hearing the parties, in particular, is considered both an important (fundamental) right within the rule of law and an essential asset to the authorities in their quest to establish best possible objective truth. In addition, the right to contribute may virtually be overridden by an obligation to do so, otherwise the free evaluation of evidence may result in an unfavourable procedural outcome.[79] This is notably the case in situations in which the authorities' practical capabilities are

[74] Cf. § 46 of the government bill; see AB 360 BlgNR II. GP, 16.

[75] Cf. § 64 of the government bill; see AB 360 BlgNR II. GP, 19, also on the term appeal ('Berufung').

[76] Cf. §§ 65 f AVG (§§ 66 f of the government bill); see RV 116 BlgNR II. GP, BT 8. See also Tezner, *Administrativverfahren* 384.

[77] See Storr, 'Structure', 38 (41 ff). See also Traußnigg, *Untersuchungsgrundsatz* 90 ff.

[78] On the further evolution of the Administrative Procedural Laws in general, see Walter and Mayer, *Verwaltungsverfahrensrecht* Rz 29 ff; Kolonovits, Muzak and Stöger, *Verwaltungsverfahrensrecht*, 12th edn. (Wien, 2024) Rz 29 ff.

[79] See Traußnigg, *Untersuchungsgrundsatz* 102 ff.

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stretched to their limits, because they are, for example, dependent on information in the parties' personal spheres (non liquet). For decades, there has been such an (unwritten) general obligation of the parties to contribute to the determination of the relevant facts according to the case law of the Supreme Administrative Court. This obligation supplemented singular specific administrative regulations ordering such duties of cooperation.[80] However, the obligation of the parties to cooperate and contribute assumed by the Court has only been reflected in the wording of the AVG since 2018 as a part of an amendment aiming at the acceleration of administrative proceedings.[81] This is specified under § 39 para 2a AVG,[82] according to which '[e]very party shall submit their arguments in due time and completely so that the procedure can be conducted as fast as possible (obligation to facilitate the procedure)'. However, the parties' behaviour continues to be considered primarily in the context of the free evaluation of evidence and authorities may only refrain from further investigative steps as an exception.[83]

In essence and in Tezner's words, it is certainly still one of the essential duties of every administrative authority 'to ex officio establish the facts relevant to a decision so thoroughly and comprehensively that the decision can be based on a reliably established factual basis'.[84] This principle seems as important as ever today, given its connection not only to the legality of individual administrative acts, but as well to the public interests implied and pursued by the administration as such.

On a last note, the legality of individual administrative acts also lies at the core of the administrative jurisdiction. Independent judicial review in administrative matters is carried out by the administrative courts of first instance, which were established by the Act on Administrative Jurisdiction 2012.[85] § 17 VwGVG extends the applicability of most of the provisions of the AVG, including the provisions on the investigation procedure (also the above-mentioned § 39 para 2a) mutatis mutandis to proceedings

[80] For a detailed overview of this case law, see Wiederin, 'Untersuchungsgrundsatz und Mitwirkungspflichten im Verwaltungsverfahren', in Holoubek and Lang (eds.), *Allgemeine Grundsätze des Verwaltungs- und Abgabenverfahrens* (Wien, 2006) 125 (127 ff).

[81] See AB 227 BlgNR XXVI. GP, 1 ff.

[82] FLG I 2018/57. See Traußnigg, *Untersuchungsgrundsatz* 110 ff, for a list of specific administrative duties of cooperation 97 ff; Wiederin, 'Untersuchungsgrundsatz', 125 (138).

[83] See Traußnigg, *Untersuchungsgrundsatz* 111, with further references.

[84] Tezner, *Administrativverfahren* 13.

[85] See Section I above. Cf. also Chapter VIII ('Constitutional and Administrative Guarantees', Art 129 ff) of the B-VG.

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on complaints against decisions of administrative authorities.[86] Hence, the administrative courts' investigation procedure and rules of evidence in such proceedings are also governed by the same principles, such as the principle of ex officio inquiry. In the words of the Supreme Administrative Court, their powers of review include 'not merely [...] a supplementary competence to investigate the facts'.[87] These powers of review are laid down in §§ 27 and 28 VwGVG – in connection with the constitutionally-guaranteed priority of judicial alteration of administrative decisions (Art 130 para 4 B-VG). Therefore, due to the 'incorporation' of principles of the administrative procedure into the administrative courts' procedural law, the intertwining of principles is not a phenomenon of administrative procedural law alone anymore. Even more, a historical perspective on the evolution of procedural principles – as suggested by this paper – helps us understand the current state and functions of the procedural laws in question. More generally, it also sheds light on the present state of the separation of powers between administration and (administrative) jurisdiction as well as the rule of law in our legal system.

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[86] For a detailed overview, see Traußnigg, *Untersuchungsgrundsatz* 139 ff, 167 ff.

[87] VwSlg 18.886 A/2014.

6735/1909, 6962/1909, 7045/1909, 7181/1910, 7182/1910, 7183/1910, 7337/1910, 8156/1911, 8525/1911, 9029/1912, 11.203/1916, 11.272/1916, 11.273/1916

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