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JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN THE AUSTRO-HUNGARIAN EMPIRE. THE FORMATIVE YEARS (1890-1910)[1]

*Angela Ferrari Zumbini**

Abstract

The purpose of this paper is to identify the standards of judicial control over administrative activity developed by the Austrian Administrative Court between the late XIX and early XX centuries. This analysis will highlight the considerable development of administrative law as early as the end of the nineteenth century. Indeed, even at that time the Austrian Administrative Court had elaborated a series of principles for administrative action on the basis of which to carry out judicial review. For this purpose, the paper will analyze various emblematic cases decided by the *Verwaltungsgerichtshof*.

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All translations in this paper from German to English are mine; they are not official translations.

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1. Introduction

The purpose of this paper is to identify the standards of judicial control over administrative activity developed by the Austrian Administrative Court between the late XIX and early XX centuries. This analysis will highlight the considerable development of administrative law as early as the close of the nineteenth century. Indeed, even at that time the Austrian Administrative Court had elaborated a series of principles for administrative action on the basis of which to carry out judicial review.

At the time of the decisions taken into account in this paper (1890-1910) there was no general law of administrative procedure in Austria, enacted only in 1925.

Judicial review of administrative acts was made by a special Administrative Court, the *Verwaltungsgerichtshof* (from now on VwGH), established in 1875.

It was a Court of single instance[2] and had only cassatory power. Nevertheless, as will be demonstrated in this paper, even if the VwGH only had powers to annul, and neither the power to consider the merit of the administrative decisions nor the facts,

[2] This changed only in 2014, when the 2012 Reform came into force, implementing a two-step judiciary system. For a general overview of the 2012 Reform, on which there is obviously an extensive bibliography, we limit ourselves to referring to the manual edited by J. Fischer, K. Pabel, N. Raschauer, *Handbuch des Verwaltungsgerichtsbarkeit* (2014), in which the Chapter of W. Steiner, *Systemüberblick zum Modell 9+2*, 105, gives a quick overview of the Reform. Moreover, the recent volume edited by M. Holoubek, M. Lang, *Die Verwaltungsgerichtsbarkeit erster Instanz* (2013) is entirely dedicated to the courts of first instance.

and even if it could only annul on formal grounds, it developed a very well-structured system of protection of the individual.

The members of the VwGH were independent judges, not administrators and were appointed by the Emperor upon proposal by the Ministry. At least half of the judges of the VwGH had to be professional justices. They were granted autonomy and independence and had their own independent disciplinary boards. They were not bound by instructions and were subject only to the law. In addition, the office of judge of the VwGH was incompatible with any other kind of public office.

During the period in question, the Presidents of the VwGH were always politicians. The first two Presidents during the period of interest (Richard Graf Belcredi, 1881 – 1895, and Friedrich Graf Schönborn, 1895 – 1907) were members of the House of Lords, the third one (Olivier Marquis Bacquehem, 1908 – 1917) was the former President of Silesia[3].

All the original judgments in hard copy were collected each year into one or more volumes, the "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" and are stored in the library of the VwGH, in Vienna.

2. The constitutional framework

On December 21st 1867, Emperor Franz Joseph proclaimed the so-called December Constitution (*Dezemberverfassung*), which was made up of six different acts. The constitution contained a Basic Law on the General Rights of Nationals[4], which is still in force today. It also contained a Basic Law Establishing a Supreme Court of the Empire[5], a Basic Law on the Judiciary[6], a Basic Law

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[3] The names and a short biography of all the presidents of the VwGH are reported in the book W. Dorazil, B. Schimetschek, F. Lehne (eds.), *90 Jahre Verwaltungsgerichtsbarkeit in Österreich* (1966) 11.

[4] *Das Staatsgrundgesetz vom 21. Dezember 1867 über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder* (StGG-ARStB).

[5] *Das Staatsgrundgesetz vom 21. Dezember 1867 über die Einsetzung eines Reichsgerichts* (StGG-ERG).

[6] *Das Staatsgrundgesetz vom 21. Dezember 1867 über die richterliche Gewalt* (StGG-RiG).

on the Executive[7], a Basic Law on the Legislature[8], and the so-called *Delegationsgesetz* regulating the relations between the two parts of the Empire, the Cisleithanian part and the Transleithanian part[9].

The issuing of the December Constitution is usually seen as the starting point of the Constitutional era in the Augsburg monarchy (and the end of Neoabsolutismus)[10]. Various factors drove the Emperor to adopt the Constitution, including the aftermath of the revolutionary period of 1848 and the effects of defeat in the wars against Germany and Italy.

The creation of an administrative Court was stipulated by art. 15 of the Basic Law on the Judiciary [11].

The December Constitution also established the *Reichsgericht*[12] (Imperial Court). The *Reichsgericht* had the power to decide cases where citizens asserted the infringement of political rights protected by the Constitution, even when the infringement was caused by an administrative action[13]. The decisions of the *Reichsgericht* only had declaratory power, and the administration was not obliged to enforce the decision. However, the power of

[7] *Das Staatsgrundgesetz vom 21. Dezember 1867 über die Ausübung der Regierungs- und Vollzugsgewalt* (StGG-ARVG).

[8] *Das Gesetz vom 21. Dezember 1867, wodurch das Grundgesetz über die Reichsvertretung vom 26. Februar 1861 abgeändert wird* (StGG-RV), which modified the act of 1861 and attributed to the Imperial Council (*Reichsrat*) the legislative power for the Cisleithanian part of the Empire.

[9] *Das Gesetz vom 21. Dezember 1867 über die allen Ländern der österreichischen Monarchie gemeinsamen Angelegenheiten und die Art ihrer Behandlung*; the name of this act contained the old designation *österreichische Monarchie,* which was changed in November 1868 and became *österreichisch-ungarische Monarchie*.

[10] Among the most accredited manuals of Austrian constitution history, see O. Lehner, *Österreichische Verfassungs- und Verwaltungsgeschichte*, 4° ed. (2007), and E.C. Hellbling, *Österreichische Verfassungs- und Verwaltungsgeschichte: ein Lehrbuch für Studierende* (1956).

[11] *„Wenn außerdem Jemand behauptet, durch eine Entscheidung oder Verfügung einer Verwaltungsbehörde in seinen Rechten verletzt zu sein, so steht im frei, seine Ansprüche vor dem Verwaltungs-Gerichtshofe im öffentlichen mündlichen Verfahren wider einen Vertreter der Verwaltungsbehörde geltend zu machen"*.

[12] *The Staatsgrundgesetz of 21. Dezember 1867 über die Einsetzung eines Reichsgerichtes.*

[13] Art. 3, lett. b) "*Dem Reichsgerichte steht ferners die endgiltige Entscheidung zu:* [...] *b) über Beschwerden der Staatsbürger wegen Verletzung der ihnen durch die Verfassung gewährleisteten politischen Rechte nachdem die Angelegenheit im gesetzlich vorgeschriebenen administrativen Wege ausgetragen worden ist*".

moral suasion of this court was highly respected, and the administration voluntarily complied with the decisions[14] as it was considered socially reprehensible not to do so, in accordance with the principle of good administration developed within the framework of the Cameralistic[15], by then widespread in Austria too. The rulings of the *Reichsgericht* are not discussed in this paper.

3. The Law establishing the *Verwaltungsgerichtshof*

The *Verwaltugsgerichtshof* was established in 1875 by the *Gesetz vom 22 Oktober 1875, betreffend die Errichtung eines Verwaltungsgerichtshofes* (from now on VwGG). The law entered into force on April 2nd, 1876 and the first judgment was handed down on October 26th, 1876[16].

Administrative jurisdiction was established by a general clause (and not by an enumerative clause). Art. 2 VwGG states that "The VwGH has to decide in those cases in which someone claims that their rights have been infringed by an unlawful decision by an administrative authority"[17]. The choice of a general clause was made in order to be sure that no individual administrative act whose legitimacy was doubtful could escape from judicial control[18]. Therefore, the jurisdiction was general, and only some subject-matter was expressly enumerated in art. 3, excluding them from jurisdiction[19].

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[14] A. Dziadzio, *Der Begriff des "freien Ermessens" in der Rechtsprechung des österreichischen Verwaltungsgerichtshofes 1876-1918*, in Zeitschrift für Neuere Rechtsgeschichte 39 (2003).

[15] P. Schiera, *Dall'arte di governo alle scienze dello Stato. Il cameralismo e l'assolutismo tedesco* (1968).

[16] The very first decision of the VwGH was made on October 26th, 1876. It concerned a matter of State-church law and it addressed exemptions from royal burdens on the part of certain parishioners.

[17] *„Der VwGH hat in den Fällen zu erkennen, in denen Jemand durch eine gesetzwidrige Entscheidung oder Verfügung einer Verwaltungsbehörde in seinen Rechten verletzt zu sein behauptet*".

[18] This explanation of the choice in favour of the *Generalklausel* rather then the *Enumerationsmethode* is given by the Senatspräsident of the VwGH Leopold Werner in his article *Altes und Neues von der Verwaltungsgerichtsbarkeit*, in W. Dorazil, B. Schimetschek, F. Lehne (eds.), *90 Jahre Verwaltungsgerichtsbarkeit in Österreich*, cit at. 3.

[19] For a list of the cases excluded from jurisdiction, see *infra* § 6.3. let. a).

The VwGH had the power to assess the legality of administrative acts enacted by any kind of administration at any level (central and local). Art. 2.2. VwGG states that the administrative authorities whose acts could be challenged before the VwGH are all Organs of both the central State and all autonomous local administrations[20].

Regarding the kinds of acts that can be challenged, the VwGG states that the VwGH has jurisdiction regarding "*Entscheidungen und Verfügungen*", without giving a definition of either[21]. The Court interpreted this notion as inclusive of all kinds of individual acts that infringed the juridical sphere of a person[22].

4. Grounds for the invalidity of administrative acts

The VwGG essentially provided two reasons for the annulment of an administrative act by the VwGH.

The first was when essential forms of the administrative procedure had been disregarded (art. 6 of the VwGG)[23]. The wording of the law provided neither a definition nor a list of the essential forms. The VwGH developed several fundamental

[20] Art. 2.2. VwGG *„Die Verwaltungsbehörden, gegen deren Entscheidungen oder Verfügungen bei dem Verwaltungsgerichtshofe Beschwerde erhoben werden kann, sind sowohl die Organe der Staatsverwaltung, als die Organe der Landes-, Bezirks- und Gemeindeverwaltung"*.

[21] Since 1925, the term *Bescheid* has been introduced in the Austrian legal terminology, which includes both concepts. The term *Bescheid* was imported from Prussian legal terminology. In the general law on the administrative procedure of 1925, part III is dedicated to the *Bescheides,* and Art. 56 clarifies that this term includes both the *Entscheidungen* and the *Verfügungen*.

[22] *„durch den Verwaltungsact in eine individuelle Rechtssphäre eingegriffen wurde"*. This definition was written by the vice-president of the VwGH, Karl von Lemayer in his book celebrating the 25th anniversary of its foundation: *Der Begriff des Rechtsschutzes im öffentlichen Rechte, (Verwaltungsgerichtsbarkeit); im Zusammenhange der Wandlungen der Staatsauffassung betrachtet; Festschrift aus Anlaß der Feier des 25jährigen Bestandes des Österreichischen Verwaltungsgerichtshofes* (1902), 210.

[23] *„Findet jedoch der Verwaltungsgerichtshof, daß der Thatbestand actenwidrig angenommen wurde, oder daß derselbe in wesentlichen Punkten einer Ergänzung bedarf, oder daß wesentliche Formen des Administrativverfahrens außer Acht gelassen worden sind, so hat er di angefochtene Entscheidung oder Verfügung wegen mangelhaften Verfahrens aufzuheben und die Sache an die Verwaltungsbehörde zurückzuleiten, welche die Mängel zu beheben und hierauf eine neue Entscheidung oder Verfügung zu treffen hat"*.

principles for proceedings, defining them as essential forms. This provision gave the VwGH the power to develop a system of essential forms of proceedings that the administration had to respect.

The second was if the decision was unlawful (*gesetzwidrig*), meaning that it did not apply a relevant rule, or the administration was not competent (art. 7 of the VwGG). The VwGH interpreted the word *gesetzwidrig* (unlawful) as *rechtswidrig*, which is a broader concept because it includes the infringement not only of formal law but also other kinds of general rules (such as *Verordnungen*)[24].

In both cases, if the VwGH annulled the act and sent it back to the administration, the authority was obliged to repeat the procedure taking into account the grounds of the Court's decision. The law stated that the administration had to remove the flaw from the procedure (if annulled under art. 6) and apply the *Rechtsanschauung* of the VwGH (if annulled under art. 7).

An important difference between claims made under art. 6 (lack of procedure) and art. 7 (unlawfulness) is that in a case before the VwGH there is no oral discussion when the claim is made under art. 6. This is because it was believed that a procedural error would be clearly discernible from the records and there would be no need for an oral discussion[25].

5. The number of decisions made by the *Verwaltungsgerichtshof* between 1890 and 1910

5.1. Previous years

It is interesting to take a glance at the number of cases from the establishment of the VwGH to the period in question in order to evaluate the growth of case law.

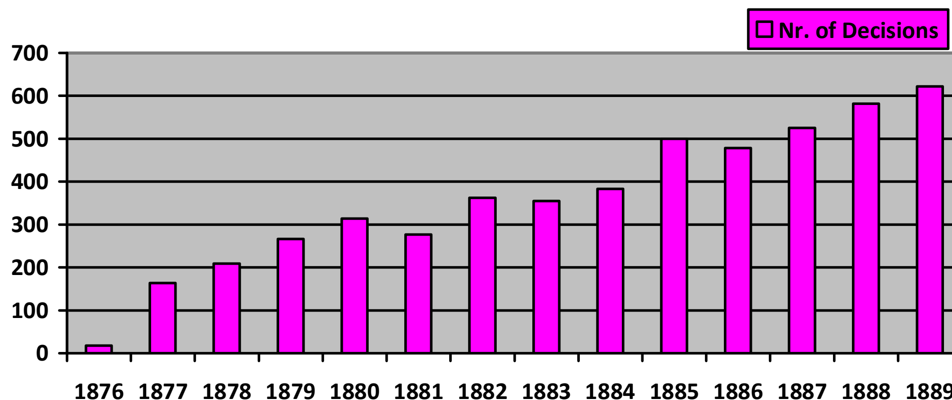
[24] T. Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich* (1999) 172 ff.

[25] From 1876 to 1890 the Budwinski collection of the VwGH decisions was published in two volumes, the main one collecting the decisions made under art. 7, and a second small book, called "*Heft*" (notebook) collecting the decisions made under art. 6. These *Hefte* are not digitalized and are only available at the VwGH library. After 1891, both sets of decisions were brought together in one single volume. In order to distinguish between them, in judgments made under art. 6 the name of the Parties were indicated only by their initials, while in the other decisions the name of the Parties was given in full.

1876: decisions nn. 1 – 18. Total decisions: **18**.
1877: decisions nn. 19 – 182. Total decisions: **164**.
1878: decisions nn. 183 – 391. Total decisions: **209**.
1879: decisions nn. 392 – 657. Total decisions: **266**.
1880: decisions nn. 658 – 971. Total decisions: **314**.
1881: decisions nn. 972 – 1248. Total decisions: **277**.
1882: decisions nn. 1249 – 1610. Total decisions: **362**.
1883: decisions nn. 1611 – 1965. Total decisions: **355**.
1884: decisions nn. 1966 – 2348. Total decisions: **383**.
1885: decisions nn. 2349 – 2848. Total decisions: **500**.
1886: decisions nn. 2849 – 3326. Total decisions: **478**.
1887: decisions nn. 3327 – 3851. Total decisions: **525**.
1888: decisions nn. 3852 – 4433. Total decisions: **582**.
1889: decisions nn. 4434 – 5055. Total decisions: **622**.

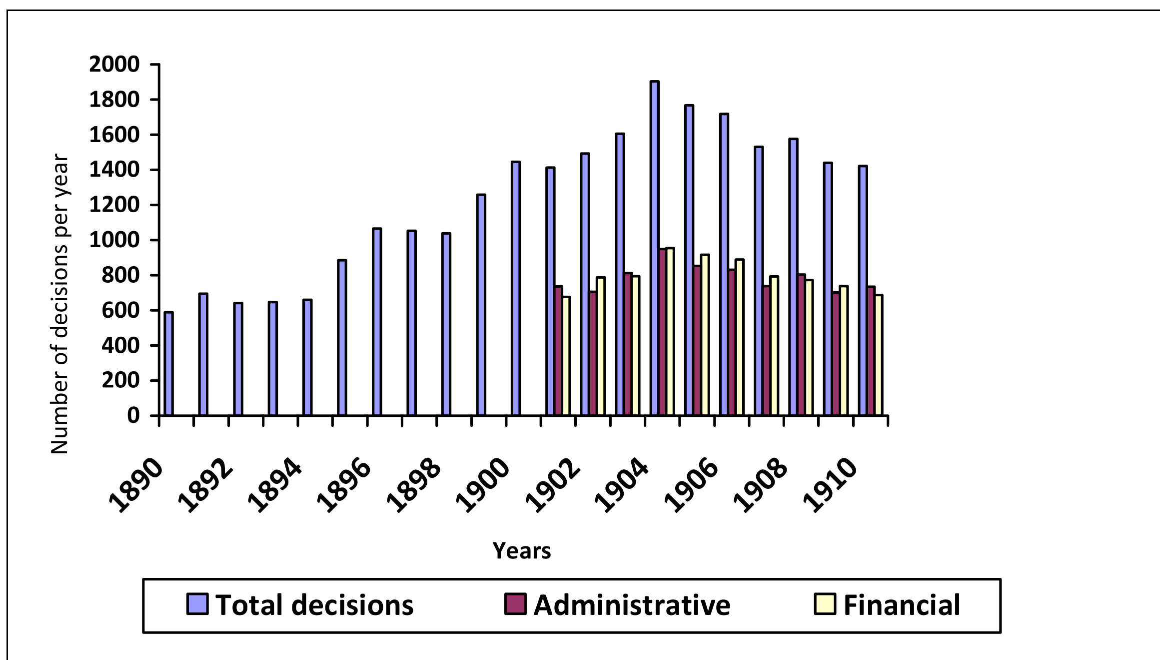
In the first 14 years of its existence, the VwGH heard 5,055 cases.

When calculating the average, we should exclude the first year (in which the VwGH was only active for two months, deciding 18 cases). Therefore, if we subtract the 18 sentences from the total 5,055, the VwGH handed down 5,037 decisions between 1877 and 1889, averaging 387 sentences per year (the first 8 years are below average, the last 5 are above average).



5.2. Number of decisions between 1890 and 1910

YEAR	NUMBER OF TOTAL DECISIONS PER YEAR
1890	590
1891	694
1892	642
1893	647
1894	660
1895	885
1896	1,065
1897	1,052
1898	1,038
1899	1,258
1900	1,445
1901	1,413
1902	1,492
1903	1,606
1904	1,903
1905	1,768
1906	1,719
1907	1,530
1908	1,576
1909	1,440
1910	1,421



5.3. Explanations of the numbers and some statistics

Between 1890 and 1900 (the first 11 years), 9,976 decisions were handed down, averaging 907 per year (the first 6 years are below average, the last 5 are above average).

Between 1901 and 1910 (the last 10 years), 15,868 decisions were handed down, showing a marked and constant growth, reaching a peak in 1904. After this there was a marked and constant decrease until 1910.

The decisions were numbered in progressive order from the beginning until 1900 (following the numbering of previous years).

1890: decisions nn. 5056 – 5645. Total decisions: **590**.
1891: decisions nn. 5646 – 6339. Total decisions: **694**.
1892: decisions nn. 6340 – 6981. Total decisions: **642**.
1893: decisions nn. 6982 – 7628. Total decisions: **647**.
1894: decisions nn. 7629 – 8288. Total decisions: **660**.
1895: decisions nn. 8289 – 9173. Total decisions: **885**.
1896: decisions nn. 9174 – 10238. Total decisions: **1,065**.
1897: decisions nn. 10239 – 11290. Total decisions: **1,052**.

A law on personal direct taxation came into force on January 1st, 1898, whose application was under the jurisdiction of the VwGH. Of course, there were immediately many cases relating to this law, so from 1898 the collection of the VwGH decisions was split into two parts, an Administrative Part and a Financial Part. However, the numbering of the judgments for both parts was still progressive and shared between the two. In order to distinguish between the decisions, after the number of the decision either the initials "F.A." (*finanzrechtliche Teil*) or "A.T." (*administrativrechtliche Teil*) were added.

1898: decisions nn. 11291 – 12328. Total decisions: **1,038**.
1899: decisions nn. 12329 – 13586. Total decisions: **1,258**.
1900: decisions nn. 13587 – 15031. Total decisions: **1,445**.

After 1901 the numeration of the sentences started again from nr. 1. The numbering for administrative decisions and financial decisions was also divided, so that from then on they had distinct numbering instead of just one shared progressive numbering. Thus, in 1901 (and thereafter) there are administrative decisions nn. 1(A) – 737(A) and Financial decisions nn. 1(F) – 676(F) totaling 1,413 decisions handed down by the VwGH (737 Administrative + 676 Financial).

1901: decisions [1(A) – 737(A)] + [1(F) – 676(F)]
Total: 737(A) + 676(F) = **1,413**.
1902: decisions [738(A) – 1442(A)] + [677(F) – 1463(F)]
Total: 705(A) + 787(F) =**1,492**.
1903: decisions [1443(A) – 2254(A)] + [1464(F) – 2257(F)]
Total: 812(A) + 794(F) =**1,606**.
1904: decisions [2255(A) – 3203(A)] + [2258(F) – 3211(F)]
Total: 949(A) + 954(F) =**1,903**.
1905: decisions [3204(A) – 4055(A)] + [3212(F) – 4127(F)]
Total: 852(A) + 916(F) =**1,768**.
1906: decisions [4056(A) – 4885(A)] + [4128(F) – 5016(F)]
Total: 830(A) + 889(F) =**1,719**.

From 1907 both parts of the register of decisions (the Administrative part and the Financial part) were split into three parts:

1) Decisions (A1) (F1);

2) *Beschlüsse womit nach § 22 des Gesetzes vom 21 September 1905, RGBl. N. 149, die Beschwerde ohneweiters zurückgewiesen wurde* (A2) (F2)[26];

3) The *Plenarbeschlüsse* (Adm. and Fin.), which followed the general progressive numbering but also had different numbering starting again from nr. 1 (the *Plenarbeschlüsse* therefore had two numbers: the general progressive one and a specific numeration of the plenary decisions).

Thus, after 1907 the *Sammlung* had six parts (A1), (A2), (Adm. Plenar), (F1), (F2), (Fin. Plenar).

1907: Total: 738 (A) + 792 (F) = **1,530**.

(A1) 4886 – 5620	(F1) 5017– 5800
(A2) 5621– 5623	(F2) 5801– 5808
Of which 3 Plenary (1 – 3)	10 (1 - 10)

1908: Total: 804 (A) + 772 (F) = **1,576**.

(A1) 5624– 6422	(F1) 5809– 6572
(A2) 6423– 6427	(F2) 6573– 6580
Of which 10 Plenary (4 – 13)	19 (11 – 29)

1909: Total: 701 (A) + 739 (F) = **1,440**.

(A1) 6428– 7124	(F1) 6581 – 7311
(A2) 7125 – 7128	(F2) 7312 – 7319
Of which 11 Plenary (14 – 24)	9 (30 – 38)

1910: Total: 734 (A) + 687 (F) = **1,421**.

(A1) 7129 – 7860	(F1) 7320 – 7997
(A2) 7861 – 7862	(F2) 7998 – 8006
Of which 13 Plenary (25 – 37)	6 (39 – 44)

[26] These were cases in which the claim was clearly unfounded, so the VwGH could dismiss them very quickly.

In the monumental work of Friedrich Tezner[27], the judgments are referenced as follows:

Judgments for the years from 1876 to 1897: B (followed by the number). Example: B 8147 (the choice of the letter B is due to the fact that these sentences were collected by Budwinski).

Judgments for the years from 1898 to 1900: A I (followed by the number) for administrative decisions and F I (followed by the number) for financial decisions. Examples: A I 12327 and F I 11857.

Judgments for the years from 1901 to 1910: A II (followed by the number) for administrative decisions and F II (followed by the number) for financial decisions. Examples: A II 730 and F II 950.

Simply to see the evolution more than one hundred years later, consider that in 2016 the VwGH decided 5,546 cases and received 5,128 new petitions.

5.4. More frequently discussed subject-matter

In the period covered by the present study, the issues most frequently subject to judicial review concern the following areas: urban planning and construction law, electoral matters, expropriations, state-owned public roads, contingent orders for reasons of public security, school, public waters, railway matters.

Moreover, since tax matters were included in the jurisdiction of VwGH in 1898, the court had an ever-increasing number of appeals in this area. From 1901, when administrative decisions and financial decisions were recorded in different registers, making it possible to count each of them, the financial decisions amounted to roughly 50% of the total decisions.

6. Objective and subjective limits to judicial review

6.1. Standing. Interests subject to legal protection

The party had to claim that a subjective right had been infringed by an unlawful act. Art. 2 VwGG states that "The VwGH has to decide in those cases in which someone claims that their

[27] For an explanation of the importance of the work of F. Tezner see *infra*, §8.

rights have been infringed by an unlawful decision by an administrative authority"[28].

There had to be a violation of a subjective right. If there was no violation of a subjective right, the party had no standing and could not challenge the decision of the authority before the VwGH.

The VwGH has always interpreted the concept of subjective right very broadly in order to grant jurisdiction wherever possible[29].

A party has a subjective right if the law clearly intends to give him/her a right to obtain something. Conversely, if the law states that the administration can decide *whether* to concede something (at its discretion) there is no subjective right, as in the case of concessions.

There exists a *Dispositionsmaxime*, whereby the judge must decide on the claim as defined by the party. It is a subjective assessment defending subjective rights; there is no general objective assessment of the legitimacy of the administrative act.

6.2. Subjective restrictions.

There were no subjective restrictions.

It is interesting to note that the December Constitution contained an act called "Basic Law on General Rights of Citizens"[30], which contained a catalogue of fundamental rights that is still in force today. According to the wording of the Act, it recognized only the fundamental rights of Citizens, but from the outset the VwGH recognized them in respect of all.

6.3. Objective restrictions. Administrative acts not subject to judicial review.

As mentioned earlier, administrative jurisdiction was established by a general clause that granted judicial control in all cases in which someone claimed that their rights had been infringed by an unlawful administrative decision. However, art. 3

[28] *„Der VwGH hat in den Fällen zu erkennen, in denen Jemand durch eine gesetzwidrige Entscheidung oder Verfügung einer Verwaltungsbehörde in seinen Rechten verletzt zu sein behauptet"*.

[29] T. Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich,* cit. at 24, esp. 141 ff.

[30] *Staats Grundgesetz über die allgemeinen Rechte der Staatsbürger.*

VwGG enumerated the cases in which administrative acts were not subject to judicial review by the VwGH. Moreover, further objective limitations on judicial review could be inferred from the interpretation of other rules. Lastly, in a Plenary Assembly decision of 1909, the VwGH denied its jurisdiction over the decisions of the political authorities, which were deemed not to be challenged[31].

a) Cases of exclusion provided by art. 3 VwGG

- ✓ Cases under the jurisdiction of ordinary courts.
- ✓ Cases under the jurisdiction of the *Reichsgericht* (namely cases where citizens asserted the infringement of constitutionally protected political rights, even when the infringement was caused by an administrative action).
- ✓ Areas to be administered together in the two parts of the Empire under the *Ausgleich* Act between the Austrian and the Hungarian parts of the Empire (namely the armed forces, foreign affairs, and all budget decisions regarding these two areas).
- ✓ Matters in which – and only to the extent that – the administrative authority is entitled to act at its "free discretion" (on which see *infra*, next paragraph).
- ✓ Nominations of civil servants (this means that the recruitment system of functionaries was completely out of the control of the VwGH. Nevertheless, during the Empire the recruitment of civil servants was, as a rule, carried out according to a meritocratic principle). The only case in which the VwGH could control nominations was if an organ had the right to propose someone for nomination and this "right to propose" was violated.
- ✓ Disciplinary matters. All categories of workers (including public functionaries) had their own professional association, which had its own commissions with the power to decide on disciplinary sanctions.
- ✓ Cases where, when the administration reviewed its own decision responding to an administrative claim made by a

[31] Plenarbeschluβ 6497(A)/1909 „*Entscheidungen der politischen Behörden* […] *sind als Ablehnung des staatsbehördlichen Aufsichtsrechtes vor dem VwGH nicht anfechtbar*".

party, the commission of the administration deciding the case included a judge (the so-called *Kollegialbehörden mit richterlichem Einschlag*).

✓ Tax matters (until 1898, when the jurisdiction of the VwGH was widened to include tax matters).

b) In detail: the case of "*freies Ermessen*" – free discretion

Art. 3, let. *e*), VwGG specifically excludes "matters in which – and only to the extent that – the administrative authority is entitled to act at its free discretion" (my own translation, the original wording is "*nach freiem Ermessen*").

The law did not specify what *freies Ermessen* might mean, nor did it give any definition of the term. The notion of *freies Ermessen* has therefore been one of the most disputed concepts.

The first draft bill had simply stated that the acts adopted by *freies Ermessen* were outside the judicial control of the VwGH. In the second draft – which was then approved – Parliament added the specification "and to the extent that". This addition made the VwGH the unchallengeable arbitrator of which acts were excluded from its jurisdiction[32].

The only help that the judges received from the legislator in determining the notion of free discretion can be found in the notes to the first draft of the law[33]. It is interesting to note that in order to define free administration, the legislator refers to the French notion of *pouvoir discrétionnaire,* stating that "In the activity of the administrative organs there are two distinct functions: the '*eigentliche Verwaltung*' (*freie Verwaltung, pouvoir discrétionnaire*) and the '*Verwaltungsrechtspflege*'. The former consists in carrying out political tasks according to the requirements of opportunity, and the latter in decisions on the rights and obligations of citizens, founded on the applicable public law. The task of the

[32] The drafts of the law can be read in J. Kaserer, *Die Gesetze vom 22 Oktober 1875, betreffend die Errichtung eines Verwaltungsgerichtshofes und die Entscheidung von Competenzconflicten, mit Materialen* (1876). The same book contains the parliamentary discussions that took place during the approval of the law.

[33] *Motivenbericht zu dem 1. Gesetzentwurfe, betreffend die Errichtung eines Verwaltungsgerichtshofes, (Nr. 148 der Beilagen zu den stenographischen Protokollen des Herrenhauses, VII. Session.)*, contained in J. Kaserer, *Die Gesetze vom 22 Oktober 1875,* cit. at 32, 26 ff.

Administrative Court is concerned only with the functions of the latter kind"[34].

Basically, the VwGH identified the cases from which its jurisdiction was excluded as follows: where a norm regulating the rights and obligations of the individuals allows the authority various alternative means of execution and the authority can choose one or the other mode of execution. Therefore, when the administration has various legitimate alternatives to act (or not), free discretion is available, so the VwGH has no jurisdiction[35].

Sometimes, even if the authority is legally obliged to act in a certain way, the jurisdiction of the VwGH can nevertheless be excluded because no one is entitled to bring an action. For example, as mentioned above, there is no subjective right to obtain a concession. If the concession is not granted, the party cannot challenge the refusal before the VwGH because he or she has no standing (even if the authority did not have *freies Ermessen* in deciding his petition).

The jurisdiction of the VwGH is excluded on the ground of *freies Ermessen* also in cases of factual administrative discretion: when there is a difficulty in fitting a specific factual situation into a definition provided by a rule of public law. For example, when a rule states that an order is admissible only if it pursues the "common good" or the "public interest", or when an order is admissible as far as it constitutes a suitable or useful means for the attainment of a certain purpose. The law provides for "*Gemeinwohl*", "*öffentliche Interesse*" or many different public purposes. In these cases, it goes about bringing a specific factual situation within a definition provided by a rule of public law, and

[34] „*In der Thätigkeit der administrativen Organe sind 2 verschieden artige Functionen begriffen: die eigentliche Verwaltung (freie Verwaltung, pouvoir discrétionaire) und die Verwaltungsrechts pflege. Die erstere besteht in der Durchführung der politischen Aufgaben nach den Geboten der Zweckmäßigkeit, die letztere in der Entscheidung über die in dem geltenden öffentlichen Rechte gegründeten Befugnisse und Verbindlichkeiten der Staatsbürger. Nur auf die Functionen der letzteren Art bezieht sich die Aufgabe des Verwaltungsgerichtshofes*". J. Kaserer, *Motivenbericht zu dem 1. Gesetzentwurfe, betreffend die Errichtung eines Verwaltungsgerichtshofes*, cit. at 33, 26.

[35] F. Tezner, *Zur Lehre von dem freien Ermessen der Verwaltungsbehörden als Grund der Unzuständigkeit der Verwaltungsgerichte* (1888); F. Tezner, *Das freie Ermessen der Verwaltungsbehörden. Kritisch- Systematisch erörtert auf Grund der verwaltungsgerichtlichen Rechtsprechung* (1924).

the VwGH usually denies its jurisdiction, invoking the free discretion of the authority.

Unbestimmte Begriffe (undetermined concepts) would also exclude the jurisdiction of VwGH, because they would bring the administrative act under the umbrella of free discretion[36].

c) The case of general administrative acts

Individuals were only entitled to bring a case against an individual act that infringed his/her rights. General acts (*Verordnungen*) could only be challenged together with the applicative individual act. Furthermore, if the VwGH was called upon to verify the legality of a general act, the composition of the court was enlarged[37].

I the event that the VwGH declared a general act unlawful, this unlawfulness had effect only in that specific case (*inter partes*), while the general act had to be applied normally in all other cases. If the same general act – declared unlawful in a previous case – should be subject again to the control of the VwGH in a successive case, the VwGH was not bound by its previous decision and could declare it lawful with regard to the facts of the later case.

With the entry into force of the 1920 Constitution, the VwGH can no longer judge the legality of general acts, as since that time this control has been within the exclusive competence of the *Verfassungsgericht* – the Constitutional Court (in line with the Kelsenian *Stufenbau* theory[38]).

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[36] K. Lemayer, *Der Begriff des Rechtsschutzes im öffentlichen Rechte: (Verwaltungsgerichtsbarkeit); im Zusammenhange der Wandlungen der Staatsauffassung betrachtet; Festschrift aus Anlaß der Feier des 25jährigen Bestandes des Österreichischen Verwaltungsgerichtshofes*, cit. at 22, 900.

[37] The VwGH was normally made up of a bench of four judges and one president. If the legitimacy of a general act was challenged, than the VwGH had to decide with a bench of six judges and one president. Art. 13.1 VwGG „*Der Verwaltungsgerichtshof verhandelt und entscheidet regelmäßig in Senaten von vier Räthen und einem Vorsitzenden*"; art. 13.3 VwGG „*Entscheidungen über die Giltigkeit einer Verordnung können nur in Senaten von sechs Räthen und einem Vorsitzenden getroffen werden*".

[38] In an article of 1942, H. Kelsen clarifies that the Constitution of 1920 established that the general administrative acts (ordinances) adopted on the basis of statutes had to correspond to these statutes; therefore the violation of the statutes directly constituted the unconstitutionality of the general administrative act. Kelsen considered judicial review of the legitimacy of general administrative acts to be more important than the constitutional review

d) Other objective restrictions. The facts.

Art. 6.1. VwGG states that the VwGH "must usually decide on the basis of the facts as recognized in the last administrative instance"[39]. Therefore, it precludes the VwGH from evaluating the facts. This limitation was much criticized during the parliamentary discussion because many members of the parliament affirmed that a judge cannot decide without evaluating the facts. The Ministry Josef Unger (considered together with Karl Freiherr von Lemayer[40] – who then became the vice President of the VwGH[41] – the 'father of the law') replied that it would be impossible for only one Court to evaluate the facts of the cases for the whole Empire, and it would be appropriate to assume the facts as they emerged from the records.

Moreover, the VwGH had no opportunity to elicit proof or evidence.

All the decisions of the VwGH bear the heading of the judgment immediately followed by the "decision and its reasons", with no factual parts. Indeed, the decisions are also quite short, usually only 2-3 pages long.

6.4.) Inertia and interim reliefs

It was not possible to bring a claim for a public authority's failure to act (*inertia*)[42] nor to claim interim reliefs.

However, a claimant was entitled to ask the administrative authority itself to suspend the execution. Art. 17 VwGG, headed "Legal effect of the complaints submitted" stated that "Claims

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of laws, since "the danger that administrative organs will exceed the limits of their power of creating general legal rules is much greater than the danger of an unconstitutional statute". H. Kelsen, *Judicial Review of Legislation, A Comparative Study of the Austrian and the American Constitution,* in 4 The Journal of Politics 183 (1942), the sentence quoted is at p. 184.

[39] „*Der Verwaltungsgerichtshof hat in der Regel auf Grund des in der letzten administrativen Instanz angenommenen Tatbestand zu erkennen*".

[40] For an overview of Lemayer's life and works, see the chapter dedicated to him in the volume of W. Ogris, *Elemente europäischer Rechtskultur: Rechtshistorische Aufsätze aus den Jahren 1961-2003* (2003). Lemayer wrote both, the first draft of the law and the report on the law (*Motivenbericht*) presented at both Houses during the parliamentary discussion.

[41] Lemayer was appointed to the VwGH in 1881, became a section president in 1888 and vice president in 1894.

[42] The *Säumnisbeschwerde* (claim against inactivity of the administration) was introduced later.

before the VwGH have no suspensive effect. The complainant is, however, free to seek such a suspension from the administrative authority. The administrative authority shall grant the suspension if immediate execution is not required by the public interest and the party would incur an irretrievable disadvantage through this execution"[43].

7. The goals of judicial review

Judicial review aims only to verify the formal legitimacy of administrative action, and it is not possible to file other kinds of actions (a control on the merits is completely precluded).

The VwGH does not normally verify the adequacy of the measure for the purpose established by the law because it considers such evaluation proper and exclusive to the administration.

It verifies competence and the formal proceedings followed to achieve the decision.

It also verifies whether the administration has applied the law, but not whether it has correctly pursued the purposes set out by law.

The VwGH only had the power to quash. If the administrative act was unlawful, it could annul it and send it back to the competent administration. The administration then had to begin a new proceeding, correcting the defect in the first proceeding and adopting a new decision. The administration was therefore wholly independent, and administrative power was wholly reserved to the administration.

Separation of powers was conceived in a rigid manner. The *Staatsgrundgestez* on the Judiciary stated in art. 14 that "jurisdiction and administration are completely separated in all instances"[44].

During the parliamentary discussion for the approval of the law that would establish the VwGH, some called for the Prussian

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[43] "*Rechtswirkung der eingebrachten Beschwerden. Die Beschwerde an den Verwaltungsgerichtshof hat von Rechtswegen keine aufschiebende Wirkung. Der beschwerdeführenden Partei steht jedoch frei, um einen solchen Aufschub bei der Verwaltungsbehörde anzusuchen, welche denselben zu bewilligen hat, wenn der sofortige Vollzug durch öffentliche Rücksichten nicht geboten ist, und der Partei durch diesen Vollzug ein unwiederbringlicher Nachteil erwachsen würde*".

[44] "*Die Rechtspflege wird von der Verwaltung in allen Instanzen getrennt*".

model of administrative justice with the power to decide on the merits to be imported into the Austro-Hungarian system. Minister Josef Unger replied that importing the Prussian model was impossible due to Austria's specific characteristics, especially those regarding the autonomy of municipalities and states within the Empire[45]. The constitution envisaged only *one* Administrative Court, so this Court could have only cassatory powers.

In his speech to the *Abgeordnetenhaus* in defense of the government proposal, Minister Josef Unger also refers to the "so thoroughly misunderstood English Self-government"[46], the French *droit administratif* "so carefully elaborated theoretically and practically"[47], the "pioneering reform of the Administrative Jurisdiction in Baden"[48], "the peculiar configuration of Administrative Justice in the Kingdom of Italy"[49], and "the great reform which is currently taking place in Prussia"[50].

Finally, it is interesting to note that in a previous period, during the Theresian era, there had already been a special administrative jurisdiction which not only had cassatory powers but also powers to rule on the merits and to grant damages[51].

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[45] The speech by Minister Josef Unger, held on March 18th, 1875, is reported in P. Gautsch von Frankenthurn, *Die Gesetze vom 22. October 1875, R.G.B. Nr. 36 und 37, Jahrgang 1876 über den Verwaltungsgerichtshof: mit Materialien* (1876) at pp. 183 ff. The comparison between Austria and Prussia are made especially at p. 185 ff.

[46] "*so gründlich mißverstandene Selfgovernment in England*". All the definition provided here are in P. Gautsch von Frankenthurn, *Die Gesetze vom 22. October 1875,* cit. at 45,183.

[47] "*das theoretisch und praktisch so sorgfältig ausgearbeite droit administratif in Frankreich*".

[48] "*bahnbrechende Reform der Verwaltungsrechtspflege in Großherzogthume Baden*".

[49] "*eigentümliche Gestaltung der Administrativjustiz im Königreiche Italien*".

[50] "*das große Reformwerk, das gegenwärtig sich in Preußen vollzieht*".

[51] F. Tezner, *Die landesfürstliche Verwaltungsrechtspflege in Österreich vom Ausgang des 15. Bis zum Ausgang Ausgang des 18. Jahrhunderts* (1898). The Senatspräsident des Verwaltungsgerichtshofes Friedrich Lehne, discussing the special administrative Court during the Theresian period, compares its power to the „*recours de plein contentieux*" of the French Conseil d'Etat. F. Lehne, *Aus dem lebendigen Erbe des k.k. Verwaltungsgerichtshofes,* in Lehne, F., Loebenstein, E., Schimetschek, B., *Die Entwicklung der österreichischen Verwaltungsgerichtsbarkeit* (1976), the comparison is made at p. 4, fn. 7.

8. The creative power of the *Verwaltungsgerichtshof*

The creative power of the VwGH was put in place and recognized from the very beginning. The legislator, while adopting the law enacting the VwGH, knew that the expressions used in this law were very general and that there was no legal definition of those expressions. Above all, the legislator knew that there was no rule on "essential forms of procedure".

In the first volume collecting the decisions of the VwGH, the editor of the collection writes that there was no codification of administrative law at that time; many laws were more than one hundred years old, and the more recent laws sometimes had *lacunae*. Budwinski therefore affirmes in 1877 that it is clear that the importance of VwGH decisions goes far beyond the single case, because the rule applicable to concrete cases is determined through these decisions[52].

From the title of one of the most famous books on Austrian administrative law, it is easy to understand the great importance of VwGH case law in the development of general principles and administrative law in general: F. Tezner, *Das österreichische Administrativverfahren. Systhematisch dargestellt auf Grund der verwaltungsrechtlichen Praxis* (1925).

Professor Friedrich Tezner was the first to construe an organic systematization of Austrian administrative procedural law based on the 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.

In 1896 he published the *Handbuch des österreichischen Administrativverfahrens* in which he calls the administrative procedure a phantom for Austrian jurists[53]. He then elaborated his

[52] *„Daß den Erkenntnissen des Verwaltungsgerichtshofes schon darum eine über den speciellen Fall hinausreichende Bedeutung zuerkannt werden darf, weil durch dieselbe das auf den concreten Fall anwendbare gesetzmaterial gesichtet und der demselben innewohnende Sinn festgestellt wird"*. *Vorwort* to the first book of the collection, written by Budwinski, Wien, 31 December 1877.

[53] Tezner, F., *Das Handbuch des österreichischen Administrativverfahrens* (1896) Vorwort, V *„Wenn nun diese Gesetz auf der Voraussetzung des Bestandes eines Administrativverfahrens ruht und, wenn der österreichische Verwaltungsgerichtshof in weitem Umfange die Prüfung der Ordnungsmäßigkeit des Verfahrens vor den Verwaltungsbehörden übt, so ist es aus allen diesen Gründen für den österreichischen Juristen nicht gut möglich, ein von dem verwaltungsgerichtlichen sich scharf*

systematization still further and published *„Das österreichische Administrativverfahren, dargestellt auf Grund der verwaltungsrechtlichen Praxis"* in 1922, whose second edition, re-elaborated and enlarged, flows into his monumental work in four volumes *Die rechtsbildende Funktion der österreichischen verwaltungsgerichtlichen Rechtsprechung* (of which it constitutes the fourth and largest volume: the first three concern legal dogmatics, sources of law, and organization)[54].

Tezner became Senatspräsident[55] of the VwGH, and his systematization 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 on them some general principles, has been a key element in the development of the general principles of the proceedings.

In 1976 the Senatspräsident of the VwGH, Friedrich Lehne, stated that in many cases the legislator adopted the solutions created by case law[56].

The most important example of the legislator adopting case law is considered to be the *Parteiengehör* – the right to a hearing.

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abhebendes administratives verfahren als bloßes Phantom zu behandeln und von sich abzuweisen". My translation: "If this law [the VwGG n.d.r.] is based on the condition of the existence of an administrative procedure, and if the Austrian Administrative Court extensively examines the regularity of the proceedings before the administrative authorities, for all these reasons it not possible for the Austrian jurists to treat administrative procedure as a mere phantom and dismiss it".

[54] The monumental work *Die rechtsbildende Funktion der österreichischen verwaltungsgerichtlichen Rechtsprechung* (1925) consists of four volumes: the first one is *Rechtslogik und Rechtswirklichkeit: eine empirisch-realistische Studie*; the second one is *Die Rechtsquellen des österreichischen Verwaltungsrechtes. Für das Bedürfnis der Praxis dargestellt auf Grund der verwaltungsgerichtlichen Rechtsprechung*, the third one is *Die Ordnung der Zuständigkeiten der österreichischen Verwaltungsbehörden. Systhematisch dargestellt auf Grund der verwaltungsgerichtlichen Rechtsprechung,* and the fourth and last one is dedicated to administrative proceedings *Das österreichische Administrativverfahren. Systhematisch dargestellt auf Grund der verwaltungsrechtlichen Praxis*, 2° Auflage.

[55] Tezner was appointed to the VwGH on 1907 and became Senatspräsident in 1921.

[56] "*die Übernahme der Rechtsprechung durch das Gesetz behandelt*". F. Lehne, *Aus dem lebendigen Erbe des k.k. Verwaltungsgerichtshofes,* in Lehne, F., Loebenstein, E., Schimetschek, B., *Die Entwicklung der österreichischen Verwaltungsgerichtsbarkeit* cit. at 51, 8.

9. Emblematic cases and principles developed.

a) Judgment n. 2263/1884: The right to a hearing

The case was about the declaration of the public nature of a road that connected some other roads to the railway station. The claimants contested the choice of which road to declare public, as there were some others that were also suitable for this purpose. The VwGH dismissed the case on this point, as the choice of which road was best suited to connect the railway station was a matter for the free discretion of the authority.

The claimants also contested that they had not participated in hearings before the administrative authority took a decision, but there was no legal provision for any such participation. Nonetheless, the VwGH stated that the absence of a legal provision had no decisive weight, because participation belongs to the Nature of Things (*der Natur der Sache*) in order to properly determine the relevant facts for the decision in hand[57].

b) Judgment n. 2452/1885: The right to equal treatment

The case concerned an expropriation order to make way for a railway line. The authority had to make some choices, and the parties whose rights might have been infringed by the decision had been heard. However, the Court decided that the expropriation procedure for matters concerning the railway was nonetheless inadequate for a number of reasons. The first of these was that only the contrasting claims of the interested parties had been heard, but not the relevant conditions for expropriation that had been ascertained on site through official channels; in addition, the parties did not have the opportunity to consult the records[58]. The parties thus did not have specific knowledge of the factual

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[57] "*daß das Gesetz die Einvernehmung der Gemeindevorstände nicht vorschreibe, kein entscheidendes Gewicht beigemessen werden kann, weil eine solche Einvernehmung nach der Natur der Sache zur ordnungsmäßigen Feststellung des für die Entscheidung maßgebenden Tatbestandes gehört*", Judgment n. 2263 of October 24th, 1884, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1884, pp. 493-495; the sentence quoted is at p. 494.

[58] „*Das Enteignungsverfahren in Eisenbahnsachen ist mangelhaft: a) wenn die Parteien nur gegeneinender abgehört, nicht auch die für die Enteignung maßgebenden Verhältnisse an Ort und Stelle von Amtswegen erhoben werden*". Judgment n. 2452 of March 13th, 1885, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1885, pp. 164-167; the sentence quoted is at p. 164.

findings upon which the commission was deciding. Secondly, it had not been ascertained whether the expropriation of other suitable land would have led to equal economic damages due to the expropriation[59]. This kind of double check is necessary "since such an intrusion into property, like expropriation, always constitutes an exception, and therefore it is self evident that existing private rights must be safeguarded with the strongest forms of protection"[60]. Thirdly, as an infringement of the principle of equal treatment, the expert nominated by the complainants was not admitted to the hearing, while the local railway company was permitted to appoint an expert in addition to its lawyer[61].

c) Judgment n. 5805/1891: A broad interpretation of standing and subjective right

A local authority decided to build a new elementary school. A number of locals contested the decision (the law established the conditions under which a new school may be built as opposed to the conditions under which an already existing school must be divided into two). The authority claimed that locals had no standing as there was no individual right to the division of an existing school or the building of a new one. The VwGH declared in favour of the standing, stating that the locals in this case "undoubtedly have a financial interest and therefore have standing"[62].

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[59] *„wenn nicht erhoben wird, ob auch die Enteignung anderer geeigneter Grundflächen mit gleichen wirtschaftlichen Nachteilen für die Enteignung verbunden sei"*. Judgment n. 2452 of March 13th, 1885, p. 165.

[60] *„da ein solcher Eingriff in das Eigenthum wie die Expropriation stets ein Ausnahmebefugniß darstellt, bei welchem sich von selbst versteht, daß es mit thunlichster Schonung der bestehenden Privatrechte geübt werden muß"*, *Ibidem*.

[61] *„Entgegen dem Grundsatze des gleichen rechtlichen Gehörs, der von den Beschwerdeführern beigezogene Sachverständige zu der fortgesetzten Verhandlung am 16. März 1884 nicht zugelassen wurde, während der Localeisenbahn-Gesellschaft die Beiziehung eines solchen Sachverständigen neben ihrem Rechtsfreunde gestattet war"*, *Ibidem*.

[62] *„Die Gemeinden zweifellos finanziell interessiert und daher beschwerdeberechtigt erscheinen"*. Judgment n. 5805 of March 6th, 1891, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1891, pp. 217-218; the sentence quoted is at p. 217.

d) Judgment n. 8150/1894: The right to be informed

An authority ordered a company to stipulate insurance policies for all its workers. This order was issued without hearing the company.

The Court stated that there was a procedural error because "it belongs to the Nature of Things, and it is a self-evident requirement of a complete and proper procedure, that the records be communicated to all parties whose interests will be affected"[63].

e) Judgment n. 8686/1895: The right to have full knowledge of the findings

The case concerned a Cistercian convent that had been damaged due to a soil collapse, allegedly caused by the intense activity of a mining company nearby. The authority decided that the damages were due to the nature of the building and to changes in the load-bearing capacity of the subsoil. Moreover, as the future of the convent building appeared to be in no way endangered by the continued operation of the mining company, the need to impose safety rules for the mining industry was no longer necessary.

The Cistercian friars claimed that the authority's decision was based on incomplete fact finding and inconsistent findings by experts. During the survey, the authority heard the opinions of three experts (on construction, mountains and mining). These experts also went *in loco* to control the real situation.

The representative of the Abbey made an objection, questioning the impartiality of the first two mountain experts called during the surveys. Following the request by the Abbey, two more experts were called to express their opinion, and no one raised any objection to the two new experts. They examined everything from the scratch.

Therefore, the VwGH found that the procedure was not incomplete.

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[63] *„Nun ist es gewiß eine in der Natur der Sache gelegene und darum selbstverständliche Forderung eines geordneten und vollständigen Verfahrens, daß von der in einer Streitsache erfließenden Entscheidung alle Parteien, deren Interesse dadurch berührt wird, verständigt werden"*. Judgment n. 8150 of November 10th, 1894, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1894, pp. 979-980; the sentence quoted is at p. 980.

However, the Court revealed some contradictions in the findings of the experts. In fact, the experts affirmed that the damage to the convent was caused only by the nature of the soil and that there was no causal connection with activity of the mine. However, the experts affirmed that some cracks in the walls of other buildings were caused by the mining company and that some safety buttresses were necessary. The expert concluded that the cracks in the walls of the Abbey buildings and in the nearby houses were of a different nature, the first being caused only by the soil, and the second by mining work.

The Court declared that in this case the procedure was flawed "because the written reports submitted to the authority were merely communicated to the Parties. The Parties were not given the opportunity to exercise their rights in respect of the findings of the reports, while the findings of the expert reports form an integral part of the fact-finding. Therefore, the Parties must have the right to have full knowledge of the findings and to present the requests and submissions which they consider necessary for the purpose of representing their rights"[64].

Consequently, the VwGH annulled the act and sent it back to the authority for an integration of the procedure.

f) Judgment n. 9441/1896: The right to present allegations

Angela and Anton Ravanelli asked the community of Lona-Lafez in Tyrol to be allowed to use the woodland coming under the fraction of Lafez, which was a public good, despite the fact that they came under the fraction of Lona. The authority accepted them, stating that the public good had been used regularly by both communities (Lona and Lafez) since the formerly united fraction had been divided. This continuous use of the public good was demonstrated by the testimony of four witnesses. The Lafez

[64] *„Daβ das schriftliche der Behörde überreichte Gutachten lediglich den Parteien mitgetheilt, denselben aber nicht die Gelegenheit gegeben wurde, den Ergebnissen des Gutachtens gegenüber ihre Rechte wahrzunehmen, während doch die Feststellungen des Sachverständigenbefundes einen integrirenden Bestandtheil der Thatbestandserhebung bilden und den Parteien daher das Recht gewahrt bleiben muß, in voller Kenntnis dieser Feststellung diejenigen Anträge und Ausführungen anbringen zu können, welche sie zur Vertretung ihrer Rechte für nöthig erachten*". Judgment n. 8686 of May 22nd, 1895, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1895, pp. 654-656; the sentence quoted is at p. 656.

community challenged this decision. The VwGH annulled the decision because of a flaw in the essential form of the procedure.

The Court affirmed that the parties "should have had the opportunity to make their allegations during the administrative proceedings and to present them in an appropriate manner"[65], which did not happen.

g) Judgment n. 11393/1898: **The right to a hearing must be granted even when there is no positive law stating such a right**

The case was about the right of workers to have their own bed to sleep in. The local authority issued an injunction to a company forbidding them to make two people sleep in the same bed, except for married couples. Single workers hosted in families to which they had no family ties, should be kept separate from the family during the night.

The court acknowledged that such injunctions are made "in order to avoid behavior harmful to health and morality"[66].

The complainant claimed that the procedure was flawed for three reasons: 1) he was not invited to participate in the fact finding that took place before the administrative decision was taken; 2) he was not heard at all during the whole proceeding, neither formally nor informally; 3) the resulting administrative measure (deciding on his claims during an administrative review of the primary administrative act) contained neither a statement of reasons nor a reference to relevant laws[67].

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[65] „*den Streitteilen* […] *Gelegenheit gegeben werden müßte, ihre Behauptungen im Administrativverfahren zu concretiren und in geeigneter Weise darzuthun*". Judgment n. 9441 of March 14th, 1896, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1896, pp. 457-458; the sentence quoted is at p. 458.

[66] "*Die Verfügungen, welche mit der angefochtenen Entscheidung getroffen werden, haben die Abstellung gesundheits- und sittlichkeitswidriger Zustände zum Zwecke*". Judgment n. 11393 of February 5th, 1898, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1898, pp. 144-147; the sentence quoted is at p. 145.

[67] "*Die Beschwerde erhebt gegen die angefochtene Entscheidung zunächst die Einwendung der Mangelhaftigkeit des Verfahrens, weil die der Verfügung des magistratischen Bezirksamtes vorangegangene Erhebung ohne Zuziehung des Beschwerdeführers, und ohne dass derselbe in tatsächlicher oder rechtlicher Beziehung gehört wurde, vorgenommen worden und weil weder der Verfügung der erste, noch der Entscheidung der zweite Instanz eine Begründung oder die Anführung der maßgebenden Gesetze stellen beigefügt sei*". Judgment n. 11393 of 1898, p. 144.
My translation of the text is: "The appeal raises, first of all, the objection of the defectiveness of the procedure, because the survey that was made before the

Consequently, the decision of the authority was declared unlawful and annulled.

The Court stated that "It is self-evident that such orders, which create an obligation for the party, must be preceded by an examination of the remedies to the situations, and this did in fact take place in the case in hand"[68].

The VwGH decided that the respondent must have an opportunity to present objections and suggestions (either regarding the facts or the law). Moreover, the party must participate in the fact-finding procedure (that precedes the emission of the order) or must in any case be heard with regard to the results of fact-finding even when no positive law affirms such a right to participation[69].

Conversely, regarding the third claim (lack of reasons for the decisions and lack of reference to the relevant laws), the Court stated that in this case the lack of a statement of reasons and the lack of relevant norms does not cause a substantial defect in the procedure. This is for a twofold reason: a) there is no provision requiring a justification of such police orders; b) on grounds of

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decision of the authority was carried out without inviting the appellant to participate, and without hearing him in either a formal nor in an informal way, and because neither the decision of the first instance, nor the decision of the second instance is accompanied by a statement of reasons or the reference of the relevant laws".

[68] „*Es ist selbstverständlich, dass solchen Verfügungen, wenn durch dieselben einer Partei positive Leistungen auserlegt werden sollen, die Erhebung der Abhilfe heischende Zustände und Verhältnisse voranzugehen hat, wie es auch im vorliegenden Falle tatsächlich geschehen ist*". Judgment n. 11393 of 1898, p. 145.

[69]"*Zur ordnungsmäßigen Feststellung des Tatbestandes gehört aber dass der zu verpflichtenden Partei Gelegenheit geboten werde, tatsächliche oder rechtliche Aufklärungen und Einwendungen vorzubringen, und hat sohin die Beiziehung der Partei zu der Erhebung oder nach Umständen ihre Einvernehmung über den ausgenommenen Sachbefund auch dann stattzufinden, wenn eine positive gesetzliche Anordnung dieselbe nicht vorschreibt*". Judgment n. 11393 of 1898, p. 145. My translation of the text is: "in order to establish the facts of the case properly, it is necessary that the party to be obliged should be given the opportunity to provide factual or legal clarifications and raise objections, and so the participation of the party to the fact finding phase – or under particular circumstances his audition on the results of the fact finding – must take place even when a positive legal rule does not prescribe it".

subject-matter, because the order is based, and relies, on the actions of the sanitary and morality police[70].

h) Judgment n. 11996/1898: Any administrative decision must conform to the principles of due process

In 1877, porcelain painter Karl K. registered a trademark (an upside down stylized shield). This trademark was the one used by the famous Viennese porcelain manufactory that closed in 1864. In 1893 the Chamber of Commerce and Trade cancelled Karl K.'s trademark, affirming that the symbol was not registerable. The decision of the Chamber was taken on the basis of the sworn statements of several outstanding Viennese porcelain painters and porcelain merchants, as well as expert opinions stating that the registered trademark was in general use at that time to designate porcelain goods painted in Vienna.

The records of the proceedings provided no names of porcelain painters, porcelain merchants, or experts interviewed; nor did they provide the evidence upon which their statements were made; the claimant had no possibility to see the results and the contents of their depositions.

Moreover, the claimant issued a request to the Ministry of Commerce for access to the documents of the procedure, but the authority denied access to the files.

The trademark protection law did not regulate the procedure for the cancellation of trademarks. However, the VwGH notes that the decision to cancel a trademark is an administrative decision. "Therefore, if such a decision has been preceded by a procedure, it must also conform to certain general principles which language and jurisprudence associate with the notion of due process. One of these general principles is, first and foremost, that the person whose rights are involved should be

[70] „*Der Mangel einer Begründung der Entscheidung der I und II Instanz und der Anführung der bezüglichen Gesetzestellen aber bildet einen wesentlichen Mangel des Verfahrens deshalb nicht, weil eine Vorschrift in Betreff der an die Partei hinauszugebenden Begründung derartiger polizeilicher Verfügungen nicht besteht und übrigens durch den Hinweis auf die Sanitäts- und Sittlichkeitspolizei die Vorschriften, auf welche die getroffenen Anordnungen sich stützen, im allgemeinen angedeutet erscheinen*". Judgment n. 11393 of 1898, p. 145.

informed of the results of the investigations carried out, and be given the opportunity to protect his rights against them"[71].

Moreover, the VwGH stated that persons on whose statements the assumption of a certain fact is constructed should be named individually in the records.

i) Judgment n. 2501(A)/1904: Misapplication of the law

The claimants challenged the results of the municipal elections in Zuckmantel (Prague) because the election was not based on the original voter lists submitted but on newly-written lists. In particular, through an act taken on his own initiative in the absence of a decision by the competent commission, the mayor reintroduced seven persons to the voting list. As a matter of fact, only four of these seven reintroduced people participated in the elections, and it is undoubted that their vote could not determine the elections results. But this factual consideration was irrelevant for the Court, and it assumed that the facts were correct as presented.

The municipal election rules stipulated that the competent committee had to deliberate before people could be added to the list. The VwGG stated that "the aforementioned statutory provision is one whose unconditional and inflexible observance is essential if the right of the parties to control the legality of the electoral processes is not to become illusory"[72]. The claimants challenged the decisions, alleging a procedural error (the absence of the decision of the competent commission), while the VwGH declared it null and void because the administration did not apply

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[71] „*Es muss daher, wenn einem solchen Erkenntnisse ein Verfahren vorangegangen ist, dieses Verfahren auch gewissen allgemeinen Grundsätzen, welche der Sprachgebrauch und die Rechtswissenschaft mit dem Begriffe eines Rechtsverfahren verbindet, entsprechen, und zu diesen Grundsätzen gehört vor Allem der, dass derjenige, um dessen Rechte es sich handelt, auch Kenntnis erhält von Resultate der gepflogenen Erhebungen, und dass ihm Gelegenheit geboten wird, demselben gegenüber seine rechte zu verwahren*". Judgment n. 11996 of October 5th, 1898, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1898, pp. 999-1000; the sentence quoted is at p. 1000.

[72] „*Die erwähnte gesetzliche Bestimmung gehört aber zu jenen, deren unbedingte und ausnahmslose Einhaltung unerlässlich ist, wenn das Recht der Beteiligten auf die Kontrolle der Gesetzmäßigkeit der Wahlvorgänge nicht illusorisch werden soll*". Judgment n. 2501(A) of March 24th, 1904, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1904, pp. 459-460; the sentence quoted is at p. 460.

the law correctly. In reality, the Court stated that in all circumstances and without regard to the extent of the consequences resulting from each case, any breach of this provision would result in the voter lists being void and thus the elections being void too.

j) Judgment n. 3212(F)/1905: The duty of the administration to take into account the documents presented by the party

The Court annulled a tax assessment due to a procedural flaw and because the Tax Administration did not consider the documents presented by the tax payer.

The complaint concerns a tax assessment that the Tax authority had issued notwithstanding the documents presented by the tax payer proving that he did not earn the amount of money asserted by the authority. "The assumptions made by the tax authority are based on flawed investigations. Moreover, the proceedings are defective because the tax authority did not take into account the documents presented by the taxpayer[73].

The VwGH found that the procedure behind the contested tax assessment revealed significant deficiencies. According to § 1 of the personal tax law, tax assessments must be based on an inquiry and on the ascertainment of specific facts; when the taxpayer denies the facts and the authority nevertheless assumes the contrary to what the taxpayer states, the specific data submitted by the party must be taken into account. The contracts and the documents used by the authority to determine the tax assessments were not disclosed to him, "and therefore he was afforded no opportunity to comment on the assumptions made by the tax authority nor to disprove or refute them. The above-mentioned assessment procedure thus appears to be essentially flawed[74].

[73] „*Die Annahmen der Steuerbehörde auf mangelhaften Erhebungen beruhen und daβ das Verfahren überdies aus dem Grunde mangelhaft war, weil das Ergebnis der behördlichen Erhebungen dem Beschwerdeführer nicht vorgehalten wurde*". Judgment n. 3212(F) of January 3rd, 1905, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1905, pp. 3-4; the sentence quoted is at p. 3.

[74] „*auch keine Gelegenheit geboten, über die Annahmen der Steuerbehörde sich zu äußern, dieselben aufzuklären oder zu widerlegen. Das abgeführte Veranlagungsverfahren stellt sich sonach als wesentlich mangelhaft dar*". Judgment n. 3212(F) of 1905, p. 4.

In this case, the VwGH finds two main flaws in the proceedings: on the one hand, the authority should have taken into account the documents presented by the party; on the other hand, the party had no opportunity to comment on the assumptions of the tax authority and thus to clarify or refute them.

It is worth pointing out that the principle in question is affirmed in a ruling concerning tax matters, a sector in which even today protections safeguarding the rights of private individuals are still subject to unjustified limitations.

k) Judgment n. 3544(A)/1905: Participation and effectiveness

This case is about the withdrawal of a pharmacist's license.

The administration had re-awarded three pharmacist's licenses to the previous license holders without going to tender. A pharmacist (Anton T.) challenged this decision in an administrative Instanz (to the administration itself) and the administration recognized that the decision was unlawful. The authority therefore annulled the reassignments. One of the three previous license holders (Franz Z.) challenged this annulment decision, through which his license was withdrawn.

The VwGH annulled the withdrawal because during the withdrawal procedure (started on the initiative of Anton T., who claimed that a tenure was necessary), license holder Franz Z. was not heard, although he was undoubtedly a legally interested party or "*rechtlicher Interessent*". The Court recognized as a principle of administrative procedure that every interested party must be granted the right to be heard. If an interested party is excluded from the procedure it is null and void, and the decision taken cannot be binding on the excluded party.

Since the proceedings concerning Anton's T. request were carried out without the participation of the complainant, the decisions taken on the basis of the flawed procedure could have no legal effect on the complainant[75].

[75] „*Da das Verfahren über das Begehren des Anton T. […] ohne Zuziehung des Beschwerdeführers durchgeführt wurde, konnten auch die auf Grund derselben gefällten Entscheidungen* […] *dem Beschwerdeführer gegenüber eine Rechtswirkung nicht äußern*". Judgment n. 3544(A) of May 13th, 1905, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1905, pp. 562-567; the sentence quoted is at p. 566.

Therefore, the VwGH stated that an administrative act cannot have effect with respect to someone who has had no opportunity to participate in the proceeding.

l) Judgment n. 4084(A)/1906: The standing of communities

The school community at the elementary school of Oftrau is consisted of the Community of Ellhotten and the Community of Oftrau. The two communities decided on a fixed percentage breakdown of school expenses between them in an oral agreement made in 1873. In the budget for school year 1902/1903 the school board decided on a different breakdown of the costs.

The Community of Ellhotten challenged this decision and the VwGH stated that the Community had standing[76].

m) Judgment n. 5622(A)/1907: The right to be fully informed of the results of fact finding

Johann Großkopf asked the authority in Neuern to be admitted into that Community. The authority accepted him after carrying out a proceeding in order to verify the existence of the legal conditions to become a member of the Community (ten-year voluntary and uninterrupted residence in Neuern). The Community of Neuern challenged this decision for the sole reason that the authority failed to inform the community of the results of the official investigations carried out in order to prove the ten-year voluntary and uninterrupted residence of Johann Grosskopf in Neuern[77].

The Court said that it is a requirement of a complete administrative procedure that the parties be aware of the findings regarding the facts of the case that served as a basis for the decision of the authorities. When parties are not fully informed, their right to express their opinion and to challenge the authority's fact-finding is infringed. In the case in hand it was necessary to

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[76] Judgment n. 4084(A) of January 12th, 1906, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1906, pp. 60-62.

[77] *„Die Beschwerde gründet sich lediglich auf dem Umstand, dass seitens der entscheidenden Behörden unterlassen wurde, die Gemeinde Neuern von dem Resultate jener amtlichen Erhebungen in Kenntnis zu setzen, welche zwecks Nachweis des zehnjährigen freiwilligen und ununterbrochenen Aufenthaltes des Johann Großkopf in Neuern gepflogen wurde*". Judgment n. 5622(A) of June 10th, 1907, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1907, p. 1304.

grant the Community of Neuern the opportunity to express its view.

n) Judgment n. 6218(A)/1908: *Rechtlicher Gehör*

The first and fundamental principle of an administrative proceeding is that all parties must be given the opportunity to express their opinion on the merits of the findings. A summons to a hearing to be held on October 24th 1907 sent to the claimant on October 21st and in a language that he did not understand did not guarantee the claimant's right to participate[78]. The act was therefore annulled on the grounds of defective procedure.

o) Judgment n. 6573(F)/1908: Lack of reasons in tax matters.

This was a financial decision concerning income tax[79]. The claimant declared an annual weekly average of 50/80 pigs and 1/2 bovine in his tax return. The tax commission established a tax of 100K. Soon after, the Commission met again and decided to increase the tax to 520K. The tax payer challenged this decision because he was not informed of the reasons for the second meeting of the Committee, hence he could not express his opinion in this regard. He was merely informed of the meeting, but no reason was given. In this case, the VwGH did not annul the act, because the lack of reasons was not considered as a substantial flaw in the proceeding. The VwGH stated no financial regulation stipulated any requirement to give reasons, so there were no grounds for deducing that this kind of right existed in the specific field of taxation (despite the existence of such a general principle).

p) Judgment n. 6837(A)/1909: Notice to participate must be sent in good time

The regional school board of Bohemia decided to build a new elementary school in Trebetin. The local school board in Běla challenged this decision, alleging that it would be much better to enlarge the school in Běla instead of building a new one in Trebetin. The claimant advanced objections on both the merits and

[78] Judgment n. 6218(A) of October 22th, 1908, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1908, pp. 1045-1046.
[79] Judgment n. 6573(F) of January 27th, 1908, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1908, pp. 1443-1444.

the procedure. The VwGH dismissed the case on the merits, invoking the free discretion of the authority. However, the Court annulled the decision because of a procedural flaw.

In fact, the local school board in Běla was notified of the hearing, but the notification was sent too late, preventing the board from sending a representative. The VwGH stated that "the absence of timely notification to the local school board as an interested party, which would have allowed its proper representation during the hearing, must be considered a major flaw in the procedure"[80].

10. Conclusions

Upon analysis, it seems that the VwGH developed a very well-structured system of guarantees protecting individuals during administrative proceedings, despite all the limitations of its jurisdiction.

In fact, the jurisdiction of the VwGH was highly restricted: it had only cassatory power, because it could only annul the act and send it back to the Administration, but it could not exercise any other kind of power: it could not assess the facts, as the VwGH had to decide on the basis of the facts as recognized in the last administrative instance, so any kind of assessment of the merits was precluded. Therefore, the VwGH could not control the proportionality of the administrative action, nor could it verify whether the administration had pursued the purposes set out by the law. The VwGH could exercise only a formal control, i.e. whether the proceeding had been carried out properly, and if the Administration had respected the law and had acted within its competence.

Despite these very strict limitations, VwGH case law (and thanks to Tezner's systematization of the case-law) established a very well-developed system of guarantees for individuals. Its formal control allowed it to focus on the proceeding, establishing several fundamental principles that were then codified in the 1925 Austrian general law on administrative procedure.

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[80] "*Musste in dem Unterbleiben der rechtzeitigen Einladung des Ortschulrates als Interessenten, welche die ordnungsmäßige Vertretung desselben bei der Verhandlung ermöglicht hatte, ein wesentlicher Mangel des Verfahrens erblickt werden*". Judgment n. 6837(A) of June 26th, 1909, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1909, pp. 780-781, the sentence quoted is at p. 781.

Since there were no general rules on administrative action at that time, and the grounds for the unlawfulness of administrative acts were not specified in the law, the VwGH had to develop the general abstract standard of judicial review mostly by itself through its case law, in order to have a general standard to apply to concrete individual acts for deciding its unlawfulness[81].

The VwGH was not competent to assess the merits of the administrative decision, but from the very beginning it stated the right of the party to be heard before a decision is taken and the right to know the reasons of a decision. By way of example, the VwGH had already stated in 1884 (judgment n. 2263) that participation belonged to the Nature of Things, so it was not decisive that the law did not explicitly provide for this requirement. This was a general unwritten principle, rooted in natural justice.

Tezner refers to the concept of "*der Natur der Sache*" eight times in his monumental work. He clarifies that "Unlawful is not synonymous with illegal. The term unlawful includes also what is in contradiction with the law as emerging from the case law without a precisely demonstrable legal basis. Law is everything which the Verwaltungsgerichtshof has brought to light with reference to the Nature of Things and general principles of law"[82].

The Austrian Administrative Court played a crucial role in drawing up the general principles of administrative action. The legislator granted the judge the power to annul administrative acts for "lack in the essential forms of the procedure" but avoided

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[81] H.R. Klecatsky, *Der Verwaltungsgerichtshof und das Gesetz*, in W. Dorazil, B. Schimetschek, F. Lehne (eds.), *90 Jahre Verwaltungsgerichtsbarkeit in Österreich*, cit. at 3. He states that the VwGH "not only controlled the objective legitimacy of administrative action, but also developed a claim of the parties to a legally regulated proceedings" (my own translation, p. 46.)

[82] "Rechtswidrig ist nicht gleichbedeutend mit Gesetzwidrig. Rechtswidrig ist auch das, was dem durch die Rechtsprechung ohne genau nachweisbare Grundlage gefundenen Recht im Wiederspruche steht. Alles, was der Verwaltungsgerichtshof unter Heranziehung der Natur der Sache, allgemeiner Rechtsgrundsätze […] zutage gefördert hat, ist Recht". F. Tezner, *Die rechtsbildende Funktion der österreichischen verwaltungsgerichtlichen Rechtsprechung, IV. Das österreichische Administrativverfahren. Systhematisch dargestellt auf Grund der verwaltungsrechtlichen Praxis*, 2° ed., cit. at 54, p. 305.

defining or listing these essential forms, leaving this task to the VwGH.

The VwGH elaborated several procedural rights that individuals could exercise against the administrative authorities.

The first and most important principle established by Austrian administrative case law is the *Parteigehör*, whereby the person who will be adversely affected by the administrative act must be heard before the act is passed. The principle of participation as stated by the Court not only has a defensive function but also a collaborative function, because it is necessary for the correct reconstruction of the relevant facts.

The VwGH does not limit itself to affirming the right to be heard but also requires that the *Gehör* must always be a *rechtlicher Gehör*, which means that private individuals are guaranteed a series of rights and protections during the proceedings.

First of all, equal treatment must be guaranteed to all the parties involved. Furthermore, notice to take part in the hearings must be received by the person concerned well in advance to allow him/her to participate effectively, and must be written in a language that the recipient understands.

With respect to exercisable rights, parties must have access to the records. Indeed, those concerned must have full knowledge of all the documents that the Administration uses to establish the facts and circumstances relevant to the adoption of the act. In addition, private individuals must have the right to submit documents to comment on and oppose the facts and circumstances as they emerge from the documents held by the administration.

In addition to the right to present documents, the VwGH also established the corresponding and fundamental obligation for the Administration to give due consideration to any documents produced by private individuals.

Participation rights also have an impact on the effectiveness of the acts. According to the VwGH, an act passed without the involvement of the person concerned cannot produce legal effects on that person. Therefore, the participation of the interested party is an essential condition for the full effectiveness of the act.

Lastly, the court affirms the general principle of due process, a principle that all administrative procedures must comply with regardless of the specific sectorial regulatory discipline. Thus, whenever the Administration carries out a

procedure (*Verfahren*) it is legally bound to ensure that it is a fair proceeding (*Rechtsverfahren*).