DEVELOPMENTS

Book Review – Verwaltungsrecht als Wissenschaft. Fritz Fleiner 1867-1937 (2006)

By Diana Zacharias[*]

[Roger Müller, *Verwaltungsrecht als Wissenschaft. Fritz Fleiner 1867-1937*, Verlag Vittorio Klostermann: Frankfurt am Main (2006), ISBN 3-465-03464-3, VII, pp. 465, EUR 79.00]

Administrative law in Germany has a long tradition and is, thus, highly developed. It is characterized on the one side by a strong fundament of general principles, such as the principle of legal certainty, due process of law, protection of expectations (*Vertrauensschutz*), and proportionality. On the other side, it focuses on legal terms which are used as key words naming complex concepts. Examples include the administrative action (*Verwaltungsakt*), the contract under public law (*öffentlich-rechtlicher Vertrag*), and the substitute measure (*Ersatzvornahme*). This last concept means, roughly speaking, a measure taken by the state instead, and at the expense of, a private person who, although primarily obliged, is either not willing or not able to act. Both of these sides to administrative law have been worked out and further developed, above all, by a couple of excellent legal scholars. Among these scholars are Robert von Mohl, Lorenz von Stein, Otto Mayer, Karl Kormann, Gerhard Anschütz, Walter Jellinek, and Fritz Fleiner, to whom the doctoral thesis of Roger Müller is dedicated.

Müller embeds the personal biography of Fleiner, who was born 1867 in the Swiss canton Aargau and between 1906 and 1936 taught in Zurich, Basel, Tübingen, Heidelberg and, again, in Zurich, into the broader context of the development of administrative law into an autonomous scientific discipline of public law in the second and first half of the 19th/20th century. This explains why the book's main title is "Administrative Law as Science". The book consists of five chapters that are named in accordance with certain (purportedly timeless) functions or rather manifestations of the science of administrative law. In the first chapter, "Science as Profession", Müller briefly portrays the stages of Fleiner's life, in particular his academic career and his national and international honors, e.g. the award of honory

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https://doi.org/10.1017/S207183220000585X Published online by Cambridge University Press

doctorates of Zurich and Strasbourg, the honorary admission to the Juridical Society in Ankara, and the appointment as corresponding member of the Committee for Foreign Legislation and International Law and as Vice President of the International Institute for Constitutional History in Paris. The second chapter, which forms the core of the book, addresses "Science as Discipline". It shows how administrative law, not least according to the retrospective records and explanations of Fleiner, became an autonomous branch of legal science by being differentiated from the empirically orientated and descriptive administrative doctrine (*Verwaltungslehre*), which stemmed from the old authoritarian "*Policeyrecht*", as well as from the constitutional law and constitutional doctrine that were regarded as being molded by political elements. One important step in this direction was the determining of the legal nature of the relationship between public administration and subject by adaptation and transformation of formal structures of civil law. It led to the insight that there are general legal thoughts that underlie all kinds of law and can, thus, be used to fill in gaps in the legislation concerning the administrations' activities. Furthermore, it helped emancipate administrative law from private law. It also marked a turning point in legal scholarship on the topic of the role of the state. The state was no longer accepted as being a police state which could, under the aegis of keeping public security and order, arbitrarily take measures against subjects, but should become a state in which the rule of law prevails (*Rechtsstaat*), in which, thus, state measures are foreseeable and calculable. Moreover, the subject, who is terminologically revalued to a citizen, is no longer a mere object of state infringements and charities but provided with *rights* in a liberal sense. He or she can claim that the state omits measures which are not accordance with the law and that wrongful measures which have taken place are cancelled.

In the third chapter, about "Science as Literature", Müller describes the significance of Fleiner's publications for the science of administrative law. He states thereby that the discipline of administrative law constituted itself as an autonomous system of scientific cooperation only by creating its own network of special publications. It was in the 1880s that an extraordinary amount of summary representations of the common German administrative law got published. These were mainly textbooks for the academic lessons that tried to systemize the overabundance and confusing variety of administrative law material that was steadily increasing in consequence of the intensification of the reformatory and interventionist legislation stemming from the unification of the national state and of the jurisdiction of the administrative courts, which had recently been established in some of the constituent states. The early works laid the fundament for a number of famous monographs and theses on aspects of administrative law and, moreover, for Mayer's groundbreaking *Deutsches Verwaltungsrecht* (*German Administrative Law*), which was first published in 1895/96. Fleiner became prominent with various publications in which he considered not only the German, but also the Swiss and

the French administrative law, such as *Öffentlich-rechtliche Vorteilsausgleichung* (*Compensating Benefits in Public Law*) in 1904 and *Über die Umbildung zivilrechtlicher Institute durch das öffentliche Recht* (*About the Transformation of Institutions of Civil Law by Public Law*) in 1906. However, Fleiner's main work was the *Institutionen des Deutschen Verwaltungsrechts* (*Institutions of German Administrative Law*), published first in 1911, with further editions in 1912, 1913, 1919, 1920, 1922, 1928, and, for the last time, two years after his death in 1937 by his disciple Zaccaria Giacometti. Planned as a textbook, it aimed at analyzing German administrative law down to its basic juridical terms. Since the book extensively considered, and referred to, jurisdiction, it had a large circulation, even among the personnel of the public administrations and the administrative courts. Thus, it became an important hinge between science and practice. It was the reference to the very basics in Mayer's and Fleiner's books that generated continuity in the doctrine of administrative law and, thus, made it possible that, after World War I, the pertinent science could, in principle, proceed without harsh breaks, as Mayer expressed with his famous dictum that constitutional law passes but administrative law remains.[1] However, at the end of the 1920s Mayer's work was regarded by contemporary scholars and practitioners as being no longer fully adequate for the needs of legal education because it was blamed to form only an abstract categorial system and thereby to ignore reality. The critics in particular argued that public administration was more than executing legal rules and principles; rather, the executive had the power to an independent political arrangement of its tasks, the control of which could not to its full extent be handed over to courts. Fleiner, in his new editions, tried to solve the supposed inconsistency between tradition and innovation organically. He kept in mind the basic principles and integrated the new legislation and jurisdiction in the "tried and tested" system of administrative institutions.

The fourth chapter, titled "Science as Method", explains how it was possible for the discipline of administrative law to prove itself as science, which was questioned because of the ephemeral nature of its object and the precarious relationship between theory and practice. The key was the so-called positivist legal method (*juristische Methode*), which originated from private law doctrine, and was transferred to constitutional law by Paul Laband and Carl Friedrich von Gerber. Mayer and Fleiner took up the idea for administrative law. It meant a self-descriptive level of reflection that focuses on forming a logical-formal system of law and legal terminology. Thus, the scholars examined the scattered legal elements that the present legislator has put incoherently beside the normative relicts of past phases, and tried to find common and connecting juridical principles. The positivist aspect of that approach made it possible to state that the public authorities are

[1] See MAYER, DEUTSCHES VERWALTUNGSRECHT (3rd ed. 1924), preface.

bound to the law, with the consequence that the authorities could no longer infringe the citizens' rights against the law or without legal authorization. Moreover, judges were no longer regarded as being entitled to create new law; they could find but not invent the law. This was possible because gaps in the legislative acts could be filled by the general legal thoughts. These thoughts could be distilled into the *Basics of a General Part of Public Law* (*Grundzüge eines allgemeinen Teils des öffentlichen Rechts*), which was also the title of a series of famous articles by Kormann, a talented young scholar of administrative law, who published, *inter alia*, in 1910 his *System der rechtsgeschäftlichen Staatsakte – Verwaltungs- und prozeßrechtliche Untersuchung zum allgemeinen Teil des öffentlichen Rechts* (*System of the Legal Transactive State Actions – Examination of Administrative Law and Procedural Law toward a General Part of Public Law*) and was killed already in the first days of World War I, in 1911/1912.[2]

The last chapter, "Science as Transfer", describes how Fleiner, after his return to Switzerland, implemented the broad lines of the doctrine of administrative law in Germany in the Swiss legal science, thereby stressing the universalistic approach of the common German administrative law. Furthermore, Fleiner intensively supported establishing administrative courts, such as in Germany, with far-reaching competencies to realize the idea of a state in which the rule of law prevails in Switzerland.

After all, Müller's illustratively written book gives an insight into one of the most fascinating phases in the development of administrative law in Germany and in Switzerland. Although Müller does not give much information about the content of the named publications, he explains in detail the reactions to them by contemporary scholars. Thereby, he carefully utilizes all relevant material, including private letters of and to Fleiner. Thus, the reader, gains a colourful picture of the contemporary developments, debates and theoretical advances at the time of Fleiner's writing. In particular, Müller's study provides the reader with a vivid presentation of the atmosphere at the branches of public law in the decades around the turn of the 19th century and 20th century. The book is worth the read, in particular for those wanting to understand why German administrative law has chosen a path that is in many respects so different from the administrative law in the common law states.[3]

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[2] See ANNALEN DES DEUTSCHEN RECHTS 1911, 850 and 904; 1912, 36, 114 and 195.

[3] For further information see, e.g., MICHAEL STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND, VOL. 3 (1999); OLIVER LEPSIUS, VERWALTUNGSRECHT UNTER DEM COMMON LAW (1997), who examines the American administrative law system from a German perspective.