INITIAL INVESTIGATION ON EXCESS OF POWER: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN ITALY (1890-1910)

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1. Introduction to the methodology

This study has been carried out in accordance with a precise methodology: it examines the decisions handed down by the Fourth Chamber of the Council of State in its first twenty years of operation on the issue of excess of power.

The events that led to a dual model of administrative justice in unified Italy are quite complex and well-studied by historians[1]: judicial review by administrative tribunals had characterized Italy in its pre-unification phase, but this was abolished in 1865, and the ordinary judiciary was tasked with protecting the subjective rights of persons (*diritti soggettivi*) that may have been harmed by the public authorities. After a bitter political battle that embroiled all of Italy's ruling class, in 1889 law n. 5992 was passed: the Council of State, which up until that point had had three advisory chambers, would now have a Fourth Chamber in charge of reviewing the legality of administrative action. Specifically, its task would be to hear appeals presented by interested parties[2] and quash any acts on the part of the public administration

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[1] M. Nigro, *Giustizia amministrativa* (1983[3]) 67-113; S. Sambataro, *Il rifiuto del contenzioso amministrativo e la legge del '65,* in *Studi per il centenario della Quarta Sezione I* (1989), 51-75 and A. Quartulli, *L'istituzione della IV Sezione, tra ragioni pratiche e ideologie,* in *Studi per il centenario della Quarta Sezione I* (1989), 77-115 and for an overview see Melis Guido, *Il Consiglio di Stato*, in L. Violante (ed.), *Storia d'Italia. Annali 14. Legge Diritto Giustizia*, (1998) 821-843 especially 821-835; Id., Origine e storia del Consiglio di Stato italiano, in G. Paleologo (ed.*), I Consigli di Stato di Francia e Italia*, 71-85 especially 71-80 and P. Aimo, *La giustizia nell'amministrazione dall'Ottocento a oggi* (2000), 53-78 and Id., *Francesco Crispi e la riforma della giustizia amministrativa* in *Il Consiglio di Stato: 180 anni di storia* (2011), 153-164. See now the essays in *Storia Amministrazione Costituzione. 150° dell'unificazione amministrativa (legge 20 marzo 1865, n. 2248)*, *Annale dell'Istituto per la Scienza dell'Amministrazione Pubblica* (23/2015), especially F. Merusi, *Consiglio di Stato (all. D) e abolizione del contenzioso (all. E)*, 225-286.

[2] About the 'fuzzy' distinction between 'rights' and 'interests' see Bernardo Sordi, *Giustizia e amministrazione nell'Italia liberale. La formazione della nozione di*

that it deemed illegal.

Indeed, article 3 of law n. 5992 of 1889 on the Council of State reads as follows:

"It is the responsibility of the fourth chamber of the Council of State to decide on appeals made due to lack of jurisdiction, excess of power or violation of law …"

I chose to carry out this study from the point of view of excess of power in light of the role that the latter has been assigned by the Council of State[3].

Indeed, the Council has used its power of review over legality as a tool to impose legal rules on administrative action such that more protection can be afforded to citizens who may come into conflict with the public administration. The issue of excess of power represents both a synthesis and a demonstration of the tension that exists between the role attributed to the Fourth Chamber by lawmakers — namely, that of establishing the objective legality of administrative action, as repeatedly evidenced by its physical and conceptual association with the executive branch[4] — and the Chamber's natural inclination to interpret its jurisdiction as a meeting point of opposing interests[5], as

interesse legittimo (1985).

[3] C. Calabrò, *La discrezionalità amministrativa nella realtà d'oggi. L'evoluzione del sindacato giurisdizionale sull'eccesso di potere*, «Il Consiglio di Stato» (1992/II) 1579: " ... the essence of administrative jurisdiction, that which has characterized and confirmed the role of the Council of State, lies in its review of excess of power" and F. Merusi, *Ragionevolezza e discrezionalità amministrativa* (2011) p. 23: "[excess of power] has always been a key determinant of admistrative law". See also A. Sandulli, *L'eccesso di potere amministrativo. Il commento,* in G. Pasquini – A. Sandulli (eds.), *Le grandi decisoni del Consiglio di Stato* (2001), 47-61.

[4] One must only read the words of Silvio Spaventa in his speech *Per l'inaugurazione della IV Sezione del Consiglio di Stato* (*For the inauguration of the Fourth Chamber of the Council of State*), in B. Croce (ed.), *La politica della Destra* (1910), p. 456: "This jurisdiction is not meant to settle disputes arising from the clash of individual, homogeneous rights, but rather to verify only whether objective law has been observed. … Any individual interest that has been infringed upon is merely taken as a reason and an opportunity for the administration itself to re-examine its acts; but it is not the actual subject of the decision, which is what the re-examination refers to". On this topic, see F. Gambino, *La giustizia nell'amministrazione e l'idea di Stato in Silvio Spaventa*, in *Il Consiglio di Stato: 180 di storia*, 165-176. Regarding Silvio Spaventa's personality see the essays in S. Ricci (ed.), *Silvio Spaventa. Filosofia. Diritto, politica. Atti del Convegno, Bergamo, ex chiesa di Sant'Agostino, 26-28 aprile 1990* (1991) and in S. Ricci (ed.), *Silvio Spaventa e il diritto pubblico europeo* (1992). See also G. Melis, *Spaventa, Silvio* in G. Melis (ed.), *Il Consiglio di Stato nella storia d'Italia. Le biografie dei magistrati (1861-1948)* (2006), 265-289 and S. Marotta, *voce 'Spaventa, Silvio'* in in I. Birocchi, E. Cortese, A. Mattone e M.N. Miletti (eds.) *Dizionario Biografico dei Giuristi Italiani (XII-XX secolo)* (2013) 1899-1902.

[5] M. Mazzamuto, *Per un richiamo alla gloriosa tradizione del contenzioso amministrativo* in *Principio della domanda e poteri d'ufficio del giudice amministrativo* (2013) 265-268 and Id., *L'allegato E e l'infausto mito della*

we shall demonstrate.

Such a role shall be verified through a case study of the rulings of the Fourth Chamber, so as to document the development of this body's jurisprudence in a way that is complete from a chronological point of view as well as historically accurate[6].

2. Excess of power before the Fourth Chamber?

Excess of power has been interpreted by Italian doctrine in numerous ways, with no certain indications having been provided by lawmakers. After an examination of parliamentary records both in the Chamber of Deputies and in the Senate, no clear picture emerges of what was meant by annulment of an administrative action deemed illegal—what lawmakers called *eccesso di potere* (excess of power)[7].

Starting with Codacci Pisanelli[8], this concept was interpreted as

giurisdizione unica tra ideologia ed effettività della tutela nei confronti della pubblica amministrazione, «Diritto processuale amministrativo» (2/2017) 740-748.

[6] G. Landi, *Silvio Spaventa e il Consiglio di Stato*, «Foro Amministrativo» (1970/III) 59: "It would be worth delving into the origins of the fundamental stances of jurisprudence through the early decisions handed down by the Fourth Chamber, in order to establish how such stances came about and how they were passed down. … This would make for an interesting subject for historical study, if only this type of research, so appreciated by French jurists, attracted Italian writers in the same way". See also F. Merusi, *Sullo sviluppo giurisprudenziale del diritto amministrativo italiano* in *Legge, giudici, politica: le esperienze italiana e inglese a confronto* (1983) 121-130 and Danilo Felici, *Analisi di una maieutica giudiziale (il trentennio iniziale della Quarta Sezione del Consiglio di Stato*, in *Studi per il centenario della Quarta Sezione I* (1989), 233-304.

[7] Atti Parlamentari, Camera dei Deputati - Discussioni - Legislatura XVI - 3A sessione - tornate del 2, del 4, del 6 e del 7 febbraio 1889; Atti Parlamentari, Senato del Regno - Discussioni - Legislatura XVI - 2A sessione 1887-88 - tornate del 20, del 21e del 22 marzo 1888; Atti Parlamentari, Senato del Regno - Documenti - Progetti di legge e relazioni - Legislatura XVI - 2" sessione 1887-88 - n. 6-A (Relazione dell'Ufficio Centrale sul Progetto di legge presentato dal Presidente del Consiglio e Ministro dell'Interno Crispi su Modificazioni della legge sul Consiglio di Stato nella tornata del 22 novembre 1887) e n. 6-B (Allegati alla Relazione dell'Ufficio Centrale); Atti Parlamentari, Senato del Regno - Documenti - Progetti di legge e relazioni - Legislatura XVI - 2" sessione 1887 - n. 6 (Progetto di legge presentato dal Presidente del Consiglio e Ministro dell'Interno Crispi su Modificazioni della legge sul Consiglio di Stato nella tornata del 22 novembre 1887); Atti Parlamentari, Senato del Regno - Documenti - Progetti di legge e relazioni - Legislatura XVI - 1" sessione 1886 - n. 6-A (Relazione dell'Ufficio Centrale sul Progetto di legge presentato dal Presidente del Consiglio e Ministro dell'Interno Crispi su Riordinamento del Consiglio di Stato nella tornata del 28 giungo 1886); Atti Parlamentari, Senato del Regno - Documenti - Progetti di legge e relazioni - Legislatura XV - Sessione 1882- 83-84 - n. 93 (Progetto di legge presentato dal Presidente del Consiglio e Ministro dell'Interno Depretis su Riordinamento del Consiglio di Stato nella tornata del 18 febbraio 1884).

[8] A. Codacci Pisanelli, *L'eccesso di potere nel contenzioso amministrativo* in «Giustizia Amministrativa» (1892/IV) 1-41. In the fifty years to follow: F. Gazzilli, *L'eccesso di potere nella giurisprudenza della IV Sezione del Consiglio di*

a broader version of use of power that went beyond the scope of the body exercising it, or excess of judicial power, as provided for under article 3 of the 1877 law on conflicts of power. It was connected to the concept of *détournement de pouvoir* developed by the *Conseil d'État* in its annulment jurisdiction[9], which allowed for appeal against an administrative act if a public authority had used its power for a purpose different from that which was originally intended by the law.

Similarly, as the Fourth Chamber developed its jurisprudence on the issue, subsequent doctrine would come to be influenced by the Prussian approach. In his 1907 essay on the excess of power, Mazzeri lauded the progress made by Italian administrative jurisdiction, which had continued on the trail first blazed by French and Prussian judges[10].

Nonetheless, some constants emerge from an analysis of the decisions handed down by the Fourth Chamber of the Council of State on issues of excess of power in the first twenty years of its operation, pointing to a precise method of operation employed by the Chamber.

Stato, «Rivista italiana per le scienze giuridiche» (1900/ XXVI-II e III) 319; V. E. Tiranti, L'eccesso di potere (1906); G.G. Mazzeri, *L'eccesso di potere secondo l'art. 24 della legge 2 giugno 1889 sul Consiglio di Stato e l'art. 3, n. 3, della legge 31 marzo 1877 sui conflitti*, «Giustizia Amministrativa» (1907/IV) 23; F. Cammeo, *La competenza di legittimità della IV Sezione e l'apprezzamento dei fatti valutabili secondo criteri tecnici,* «Giurisprudenza Italiana» (1907/III) col. 275; Id., *Gli atti amministrativi e l'obbligo di motivazione*, «Giurisprudenza Italiana» (1908/III) col. 253 (sulla 'discrezionalità tecnica' di Cammeo A. Andreani, *La valutazione del fatto nel giudizio amministrativo e gli apprezzamenti tecnici della pubblica amministrazione nel pensiero di F. Cammeo,* in «Quaderni Fiorentini per la storia del pensiero giuridico moderno» 22 (1993), 476-509); E. Presutti, *Discrezionalità pura e discrezionalità tecnica*, «Giurisprudenza Italiana» (1910/IV) col. 10; Id., *I limiti del sindacato di legittimità* (1911); G. Giorgi, *La giustizia amministrativa nel Consiglio di Stato*, «Giustizia Amministrativa» (1911/IV) 1; A. Lefebvre D'Ovidio, *L'inosservanza della prassi amministrativa come vizio di eccesso di potere*, «Foro Amministrativo» (1936/I, sez. 1) col. 102; O. Ranelletti, *Le guarentigie amministrative e la giurisdizione nella giustizia dell'amministrazione* (1937); F. Rovelli, *Lo sviamento di potere*, in *Raccolta di scritti di diritto pubblico in onore di Giovanni Vacchelli*, Milano, 1938.

[9] E. Laferrière, *Traité de la jurisdiction administrative et des recours contentieux* (Tomo II), (1888) 521: "Le vice que l'expression de 'détournement de pouvoir' désigne consiste à détourner un pouvoir légal du but pour lequel il a été institué, à le faire servir à des fins auxquelles il n'est pas destiné"; Maurice Hauriou, *La jurisprudence administrative de 1892 à 1929* (1929), T. I, 565-566; T. II, 99-100, 255-257, 319-322 and especially 332-348; T. III, 772-778 especially 777; *Le Conseil d'Etat, son histoire à travers les documents d'epoque (1799-1974)*, Editions du CNRS (1974), 513; F. Burdeau, *Histoire du droit administratif (de la Révolution au début des années 1970)* (1995), 250-251.

[10] G.G. Mazzeri, *L'eccesso di potere secondo l'art. 24 della legge 2 giugno 1889*. In particular, see 72: "Thus, fundamentally, the concepts from French and Prussian law penetrated our law and were happily expanded upon, providing hope for ever greater protection and for an actual benefit to citizens and the administration". About the german experience see: D.U. Galetta, *Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo* (1998), 11-70.

Indeed, its innovative approach aimed to widen its 'sphere of control' over the activity of public administration in its relations with citizens.

To be historically accurate, the beginning of judicial review over excess of administrative power in Italy cannot be dated to article 3 of law n. 5992 of 1889 on the Council of State.

This legislative measure was actually part of an evolutionary process that had involved—albeit without much continuity—a Council of State that was already alive and operating in our system in 1831[11], and indeed it even dated back to the rudimentary but very intense organs of internal judicial review that were present in Italy's revolutionary and Napoleonic periods[12].

In any case, more continuity can be found in the period leading up to the reform of 1889. In his report on the jurisprudence produced by the Council of State in the period between the abolition of judicial review by administrative tribunals in 1865 and the institution of the Fourth Chamber in 1889, Alfredo Corpaci[13] examined the Council's work both in its role as an advisory body and in the exercise of its internal judicial review, the latter encompassing those cases which had come before the Council after the abolition of the tribunals that had previously conducted internal judicial review within the public administration.

These cases covered a wide range of issues, one of which stands out due to the sheer number brought before the Council: namely, appeals against decisions handed down by Italian Forestry Commissions on the enforcement of forestry restrictions, which could be brought before the Council of State under article 10 of law n. 3917 of 20 June 1877. More specifically, appellants sought exemption from

[11] G.S. Pene Vidari, *Il Consiglio di Stato Albertino: istituzione e realizzazione*, in *Atti del Convegno celebrativo del 150 anniversario della istituzione del Consiglio di Stato* (1983); A. Pezzana, *Le esperienze degli organi di giustizia amministrativa degli stati pre-unitari in relazione alla riforma del* 1889, in *Studi per il centenario della Quarta Sezione I* (1989), 27-50; Luca Mannori, *I contenziosi amministrativi degli Stati preunitari italiani e il modello francese. Riflessioni e spunti per un possibile studio comparato*, in Erk Volkmar Heyen (ed.), *Konfrontation und Assimilation nationalen Verwaltungsrechts in Europa (19.-20. Jh.). Confrontation et assimilation des droits administratifs nationaux en Europe (19e/20e s.)* (1990); P. Aimo, *La giustizia nell'amministrazione*, 27-52; A. Pezzana, *I Consigli di Stato nell'Italia preunitaria* in *Il Consiglio di Stato: 180 di storia* (2011) 27-36.

[12] G. Landi, *L'influenza della legislazione e della tradizione napoleonica sugli organi di giustizia amministrativa e di controllo degli stati italiani*, in Accademia Nazionale dei Lincei, *Atti del Convegno sul tema: Napoleone e l'Italia (Roma, 8-13 settembre 1969)*, 2 voll. (1973) vol. I, 155-172; P. Aimo, *Le origini della giustizia amministrativa - Consigli di Prefettura e Consiglio di Stato nell'Italia napoleonica* (1990).

[13] A. Corpaci, *La giurisprudenza del Consiglio di Stato* in *Le riforme crispine, vol. II - La giustizia amministrativa*, Archivio ISAP, n.s. 6 (1990) and A. Police, *La giurisdizione «propria» del Consiglio di Stato dagli allegati D e E della legge 20 marzo 1865, n. 2248 al c.p.a.* in *Il Consiglio di Stato: 180 di storia* (2011), 77-92. See also A. Piras, voce 'Invalidità (dir. Amministrativo)', in Enciclopedia del diritto 22, (1972) 598-612, especially 606.

or termination of the restrictions themselves, as well as permission to use restricted land for crop-growing.

The present study also focuses on the decisions handed down by the Council of State in the exercise of internal judicial review within the public administration because there was essentially no connection between that jurisdiction and the Council's post-reform jurisdiction (starting in 1889) over the use of discretion in administrative action[14].

Furthermore, it seems logical to examine this period of the Council's work because there were no substantial differences between the ways it operated as an advisory body and the ways it exercised internal judicial review, the latter of which had been defined quite 'vaguely' by the legislation. Indeed, seeing as how there was considerable uniformity in the way the Council dealt with appeals as both a jurisdictional body and an advisory body, Corpaci was able to compare the procedural norms applied by the Council of State when hearing each type of appeal. He was thus able to identify a specific purpose in the Council's activity, namely:

"the affirmation of the value of legality in administrative action, and in relation to that, of protecting the subject encumbered by such action"[15].

It must be remembered that the difference between bodies that took administrative action and bodies that reviewed administrative action could be summed up in a famous principle first seen with Napoleonic legislation, namely that *l'administration est le fait d'un seul; le jugement, celui de plusieurs*[16]. Thus, when a dispute was heard within the public administration, the appellant's claims and arguments would be ensured greater visibility, the ruling body would be better informed, and the presence of a board would protect against blatantly arbitrary decisions. On the other hand the decision-making criteria did not change when compared with the established criteria applied in active administration: the goal was simply to safeguard against arbitrary acts[17].

[14] Such was affirmed by Corpaci after a careful second reading of the bills proposed to reform the Council of State, starting with the Nicotera-Depretis bill (presented to the Chamber of Deputies during the session of 27 March 1877, AP, Cam. dei Dep., sess. 1876-77, Documenti, Disegni di legge e relaz., n. 86) up until the Crispi bill, and including the various proposals put forward by Depretis in the 1880s as well as the changes made to the latter by the 'Central Office' (*Ufficio Centrale*): "That which has been reported up to now … reaffirms our idea that the [Council's] previous jurisdiction over internal judicial review did not have any specific influence on the decision to grant it jurisdiction over the use of administrative discretion" (see Corpaci, *La giurisprudenza del Consiglio di Stato*, 87-91).

[15] Corpaci, *La giurisprudenza del Consiglio di Stato*, 92-93, especially 93 for the quotation.

[16] See P. Aimo, *Le origini della giustizia amministrativa,* 29-30 and notes 80 and 81 and F. Merusi, *Consiglio di Stato (all. D) e abolizione del contenzioso (all. E)*, 230-236 and bibliography quoted at n. 9.

[17] Based on these observations, the doctrine held that the judicial review exercised by the Council of State as a body of internal jurisdiction within the

According to Corpaci, it was not possible to exercise true administrative discretion in matters that fell under the 1877 forestry law due to the technical nature of the legislative provisions in this area. On the contrary, it was necessary to resort to rules and criteria from various technical disciplines: thus, the Council's review of this matter clearly came to take on the form of a detailed review of actual facts[18].

The decisions handed down by the Council on this issue provide numerous examples worthy of note. A quick examination suffices to reveal that any measures taken without having first carried out an inspection as required by law, or which followed improper or incomplete procedure, would be annulled on grounds of illegality. Above all, the latter applied to those cases in which the administration had failed to inform the landowner in a timely fashion of an on-site inspection: "thus, such was an omission of a substantive formality meant to protect the interests of landowners"[19]. The reference to the key concept of excess of power—in this case, infringement on the right to due process—seems clear[20].

The language used in another decision is also extremely noteworthy:

"as it is meant to guarantee a right of the interested party, this invitation (to on-site verification) is not, as this Council has stated several times, a purely statutory formality, but rather a substantive formality, the omission of which vitiates the procedure and leads to the invalidity of both the inspection and the subsequent decision"[21].

This procedural formality which aimed to guarantee the rights of the interested party went from being a formal condition to a substantive one, and thus an infringement thereof would invalidate the procedure and render the act annullable.

This marked the origin of that connection between respecting procedural formalities and guaranteeing protection to citizens.

It can be affirmed that the decisions handed down by the Council of State in matters of forestry focused on the ascertainment of

public administration had the same characteristics as a review of the use of discretion, meaning that it evaluated an administrative act based on its expediency and advisability for the administration. See P.G. Ponticelli, *La giurisdizione di merito del Consiglio di Stato* (1958), 75.

[18] Corpaci, *La giurisprudenza del Consiglio di Stato*, 98-99: "… although the law did not provide for its investigative powers, there were many cases in which the Council of State ordered 'a broader inquiry', commissioning teams of experts to carry out 'on-site visits' in order to verify the actual conditions of lands which were affected by the contested act", as well as notes 67 and 73.

[19] Corpaci, *La giurisprudenza del Consiglio di Stato*, notes 68, 69 and 70.

[20] See the investigation in the essay by Guido Melis *Il Consiglio di Stato: note sulla giurisprudenza,* in G. Melis, *Fare lo Stato per fare gli Italiani. Ricerche di storia delle istituzioni dell'Italia unita,* Bologna 2014, 163-230, especially 170-171 and nn. 18, 20 e 21; 174 and n. 29.

[21] AG, 27.04.889, Silvestrelli vs Com. forest. di Roma, in *Processi verbali delle AA.GG.*, cit. in Corpaci, *La giurisprudenza del Consiglio di Stato*, note 70.

facts in order to protect citizens. The Council interpreted legality as meaning coherence between an administrative act and the facts that served as a premise to such an act: it was not a judgement that regarded the discretionary powers of the administrative authorities, and thus it remained within the limits of the Council's scope of review, while at the same time providing strong protection to appellants[22].

In the exercise of internal judicial review, it is thus possible to affirm that "the period in question represents a phase in which the notion of legality was in gestation". The Council oscillated between two poles: on the one hand, it understood conformity to the law in terms of mere legality, extrinsic to the act; on the other hand, it recognized that the competent authority issuing the act possessed discretionary powers as granted by law. In its oscillation between these two poles, the Council affirmed "that legality as conformity to law does not include errors of fact (since «one considers the fact, and nothing beyond the legality, that is to say the conformity to law, of administrative measures»)[23] but also that «in the meantime, a measure is legal to the extent that it corresponds to the substantive truth of things, and not only when it is issued by the competent authority without violating forms and the law»"[24].

It was a turbulent time, but one in which it was possible to discern "an overall commitment on the part of the Council of State to establish rules of conduct upon which the public administration was to base its activity"[25].

It seems evident that there was a "coincidence of meanings and inspiration" between this phase of the Council and subsequent jurisprudence on the excess of power, although as Corpaci points out, the wording 'excess of power' was not actually used by the court[26]. The constant effort to investigate the actual premises of administrative measures was guided by a specific mindset: namely, that the source of the substantive legality of actions taken by a public authority was to be

[22] Corpaci, *La giurisprudenza del Consiglio di Stato*, 101. Corpaci believes that there was in fact no clean break between the evolution in the Council's review of forestry matters and its experience as an advisory body on appeals. Even if its access to the facts was brokered in the latter case by inquests carried out by the competent ministry, such inquiries represented a way to investigate the contested measure and the arguments put forth by appellants even further. And the fact that there were frequent cases in which the Council asked the ministry to conduct additional inquiries should not be overlooked: AG, 16.11.889, Com. di Santa Croce Camerina, in *Proc. verb. delle AA.GG.*, 1889, 2° sem., 360; cit. in Corpaci, note 75.

[23] AG, 31.05.867, Conelli, in *Proc. verb. delle AA.GG.*, 1867; cit. in Corpaci, *La giurisprudenza del Consiglio di Stato*, note 77.

[24] AG, 19.02.896, in «Giurisprudenza Italiana» XLVIII, 1896, parte III, 107; cit. in Corpaci, *La giurisprudenza del Consiglio di Stato*, note 78.

[25] Corpaci, *La giurisprudenza del Consiglio di Stato*, 101-2.

[26] Corpaci, *La giurisprudenza del Consiglio di Stato*, 103-4: "The wording 'excess of power' is never used to succinctly express the grounds for the illegality of a measure in cases such as those aforementioned".

found in the purpose for which that body had been granted such power in the first place[27].

Wording that made reference to 'sufficient motives' and 'illogicality' provide us with noteworthy indications as to the origin of judicial review of excess of power in Italy. Though results analogous to those illustrated above were also reached in France, where the judicial review model revolved around the concept of *détournement de pouvoir*, the Council of State in Italy seemed to be going down its own, autonomous path, largely free from the influence of the French model[28].

It can thus be said that in terms of substance, language and method, there was continuity between the judicial review exercised by the Council of State as a judicial and advisory body in the period following the reform of 1865 and the judicial review exercised by the Fourth Chamber over excess of power following its creation in 1889. There was no importation and imitation of French concepts in order to broaden the scope of judicial review in a vague, undefined manner; on the contrary, there was a clear, concerted effort to impose legal rules on administrative activity through the exercise of a 'jurisdiction', and to do so autonomously and innovatively. And this 'jurisdiction' would not only be a space in which to control the public administration as it implemented the law, but also one in which to mediate between opposing interests.

3. Excess of power and the Fourth Chamber

The Fourth Chamber in the relevant timeframe handed down 237 decisions involving the topic 'excess of power'. It's possible to divide them in 11 macroareas:

- Public Employment	126
- Instruction	4
- Public health	9
- Roads	6
- Railway	1
- Public Authorities	56
- Rivers and Forest	4
- Duties	5
- Banks	3
- Dispossessions	8

[27] See the decisions quoted in Corpaci, *La giurisprudenza del Consiglio di Stato*, notes 82 and 85.

[28] G. Abbamonte, *Il Consiglio di Stato italiano in sede contenziosa*, in G. Paleologo (ed.), *I Consigli di Stato di Francia e Italia* (1998), 201-232, 203: «In fact, the work was performed empirically» and 220-225.

- Elections 7
- Dissolution of city coucils 8

3.a: Just cause

This thesis offers an interesting opportunity for reflection as well as a connection to more recent ideas proposed in the doctrine on excess of power[29]. Support can be found in the decisions handed down by the Fourth Chamber of the Council of State in the period between 1890 and 1910.

Indeed, it is possible to identify the development of the Chamber's review methodology in a precise manner. The starting point can be traced[30] to its decision on the Zoppoli-Rulli appeal[31], which dealt with the expropriation of property in the public interest[32]. A brief had been filed by an organ of the public administration contesting the competence of the Fourth Chamber, arguing that it held no jurisdiction over whether a declaration of public interest issued by the ministry could be revoked. The Fourth Chamber responded by establishing that such a declaration was both the reason for and the limit on the power of the government to take such action, and thus it was a condition to be taken into account when reviewing the legality of such measures. Ascertaining the existence of public interest did not therefore mean the Chamber was reviewing the advisability of the government's decision. The law required a reason to be cited for issuing an act: if that reason was at the same time a necessary limit on that act, then the act's legality automatically came to depend on that reason. And the process to arrive at that reason depended on the discretionary power of the public authorities. Thus, the organ in charge of verifying the legality of acts of the public administration was clearly entitled to review the reasons cited by the public administration to justify the issuance of a declaration of public interest. And "if the motive for a declaration [of public interest] is found to be against the law", then such a declaration would undoubtedly warrant annulment on the grounds of excess of power.

[29] G. Sala, *L'eccesso di potere amministrativo dopo la legge 241/90: un'ipotesi di ridefinizione*, «Diritto Amministrativo» (1993), 173; A. Pubusa, *Note sulle tendenze dell'eccesso di potere alla luce della L. 7 agosto 1990, n. 241*, in *Studi in onore di V. Ottaviano,* vol. II (1993), 1095 and G. Abbamonte, *Il Consiglio di Stato italiano in sede contenziosa*, 223-224.

[30] O. Abbamonte, *L'eccesso di potere-Origine giurisdizionale del concetto nell'ordinamento italiano (1877-1892)*, «Diritto Processuale Amministrativo» (1986/1), 90 and notes 78 and 79.

[31] In «Giustizia Amministrativa» (1892/I), 430 (also in «Giurisprudenza Italiana» (1892/III) col. 244).

[32] See also Parere 31 ottobre 1877, cit. in Sabbatini, *Legge sull'espropriazione*, 261, nt. 2. About the topic of public works see A. Polsi, *Lavori pubblici (all. F),* in *Storia Amministrazione Costituzione. 150° dell'unificazione amministrativa (legge 20 marzo 1865, n. 2248)*, *Annale dell'Istituto per la Scienza dell'Amministrazione Pubblica* (23/2015), 287-346.

In this way, it was not a review of the advisability of the declaration of public interest, but rather of the existence of public interest itself as a condition of the declaration's legality. This was objectively verifiable through an examination of the motives and facts cited by the government in making their contested declaration. It was the declaration itself, together with the all of the discretionary acts that preceded it, that would prove (or disprove) the existence of public interest. Put differently, actual public interest depended on the 'validity of the decision-making process'[33].

There was another opinion issued by the Joint Chambers on Finance and the Interior in 1893[34] which reaffirms the analysis above, above all in terms of the connection between the Council's work before and after 1889. The opinion was on a matter relating to forestry legislation: specifically, it held that if the incomplete execution of a law made it impossible to achieve the law's aims, then that would be tantamount to a violation of the law. The legislative purpose of granting an organ of the public administration a given power is also a limit on the legal exercise of said power: the opinion clarified that a discretionary act could be subject to judicial review when it was to be determined whether legislative purposes were respected, and that this could be done without encroaching upon the administration's freedom to use its discretion. Indeed, in the case of the Zoppoli-Rulli appeal, the panel had highlighted the importance of the motives cited by the administration ("if the motive … is found to be against the law"). Now, in this opinion, the Chamber went more in depth with its reasoning by setting forth (albeit implicitly) a key principle: the fact that the public administration had used its power for a purpose different than the one intended by the law was proven by examining the administrative procedure that had gone into the contested measure, "not only according to the judgement of technical experts, but also in such a self-evident way that there was no need to carry out any inquiry or ascertain any facts". The panel used technical and factual criteria—or to use more current terminology, 'assessment standards'[35]—to conclude that the limit imposed by the legislative purpose had been violated, but these criteria were also inferable from an examination of the administrative procedure itself; in addition, the Council relied on an intuitive standard of self-evidence that had to be defined based on common sense, reasonableness and actual facts. The panel then added that in this case there was no need to carry out inquiries or ascertain the facts because the evidence was abundantly clear, but at the same time it left no doubt that if this had not been the case, then inquiries and ascertainment of facts would have been carried out.

Now, let us turn our attention to the innovative direction taken by the Chamber in parallel with its reliance on the concept of 'limit as a condition of legality': specifically, its use of the concepts of 'just

[33] Sala, *L'eccesso di potere,* 225.

[34] Parere 31 maggio 1893, in «Giurisprudenza Italiana» (1894/III) col. 31.

[35] Sala, *L'eccesso di potere,* in many parts, including 211.

cause' and 'certain and proven facts' when reviewing motives.

In its ruling on the Delle Piane appeal of 1892[36], the panel stated as follows:

"Any act of the public authorities must be determined by a just cause in order to be legal; failing such, it is arbitrary and excessive".

On the one hand, this line of reasoning — namely that the lack of a just cause in a given measure makes it illegal — might seem to overlap with the concept of excess of power: the legislative purpose of conferring a given power on a public authority could itself be the just cause of a measure, and if a measure went beyond the bounds of that purpose, then it would be illegal. However, considering the language used, and given the clear congruities between how the Chamber was proceeding in this case and how it had handled the cases outlined above, it would seem that the Chamber was actually blazing its own, independent trail.

Indeed, its in explanation of its ruling, the Chamber continued by expounding upon the decision-making process that had led the public authority to issue the measure in question. In doing so, it could verify whether there was a lack of a just cause as claimed by the appellant. The Chamber followed precise guidelines, which also acted as self-imposed limitations on the scope of its review: if the organ of public authority had the power to do what it did in carrying out the act under examination, and it provided justification for said act within the bounds of the law and above all in a way that left no doubts as to the veracity of the reasons cited, then the Chamber did not feel authorized to carry out further investigations into the organ's reasons for acting.

This line of reasoning would be expanded upon in the Chamber's decision on the Pitarch Ciuffo[37] appeal, wherein the following was stated:

"There is excess of power when the termination of office (teacher), ordered by the Government, is not justified by certain, objective and legitimately proven facts".

The phrase "certain, objective and legitimately proven facts" thus defined the bounds of truthfulness when it came to the reasons cited by the public authorities. Such facts had to be clearly discoverable in all the steps of the administrative procedure that led up to the issuance of the measure. In this manner, the Chamber created and emphasized a concept of procedural constraint, according to which any organ of the public authorities had to take measures on the basis of a just cause, which itself had to be proven by objectively demonstrable and validly documented facts.

3.b: The search for motives

[36] In «Giustizia Amministrativa» (1892/I) 514.

[37] In «Giustizia Amministrativa» (1893/I) 610.

The principle of just cause developed hand in hand with that of 'limit as a condition of legality', and both would have the same effect on the Chamber's work when it came to excess of power: namely, the search for motives.

The Chamber searched for motives by examining the validity of the decision-making process. This led to two distinct activities carried out by the Chamber: one based on the principle of self-evidence and on establishing justified and sufficient motives, and the other based on its review of facts and on the clear contradiction between the measure under examination and the facts on record.

3.b.1: Self-evidence

The principle of self-evidence was clearly set forth in the Chamber's decision on the Municipality of Montaione[38] appeal back in 1896, and it would come to be fully applied in some decisions issued between 1903 and 1904: specifically the Cutri, Rabacchino and Cirio cases[39]. As outlined above, this principle derived in part from the methodological need to limit the scope of the Chamber's review when establishing just cause; however, these cases also clearly demonstrated how the principle of self-evidence was justified on a logical and legal basis as well. Indeed, the Chamber presumed that when an organ of the public administration exercised its discretionary power to take administrative measures, such measures were rooted in legality; the Chamber would only feel authorized to take a closer look at the decision-making process and motives behind an administrative act if an initial examination revealed an overt irregularity. This was considered a necessary requirement: if the organ was entitled to exercise the power under examination, and it justified its doing so in a logical fashion, then the Chamber did not feel it could infer an intention to elude the bounds of the law, just as it did not feel it was entitled to examine the validity of the decision-making process more closely. Clearly, it was difficult to establish with any accuracy when the initial examination ended (i.e. discovering evidence) and a more in-depth examination began (i.e. reviewing the motives); but in a by no means exhaustive attempt to simplify the distinction, it could be said that if no irregularities presented themselves prima facie in the decision-making process, then the review of motives had to cease then and there. In that regard, however, it could also be said that applying the principle of self-evidence resulted in a catch-22, because the self-evidence required to authorize a more in-depth judicial review implied carrying out an investigation before the review itself, just as the Chamber was not authorized to investigate into whether such self-evidence existed without already having established that it did.

In any case, whenever the Chamber determined that there was an overt irregularity, it felt authorized to review the motives cited by

[38] In «Giustizia Amministrativa» (1895/I) p. 176.

[39] In «Giurisprudenza Italiana» (1893/III) col. 407; in «Giustizia Amministrativa» (1904/I) 59; in «Giustizia Amministrativa» (1904/I) 597.

the public administration as justification for its actions. And if the panel found those motives to be unjustified—meaning illogical, incoherent and excessive—then it would rule that there was no just cause, and thus the measure was not legal.

The affirmations of the Chamber in this context are very similar in substance to what emerged in the doctrine when it examined excess of power after the enactment of law n. 241 of 1990 on administrative procedure. In analyzing the consequences of the aforementioned law on administrative activity, several authors have pointed out how irregularities in the decision-making process must be explicitly clear in order to distinguish between a review of legality and a review of advisability[40].

3.b.2: Sufficient and justified motives

The criterion of having justifiable motives implicitly emerges in the case of *Soc. scolastica Cesare Arici*[41]. Monsignor Faustini and Lord Brunelli, president and representative of the "Cesare Arici" Society, had petitioned the Superintendent of Brescia to open a private school in Brescia for the first three years of elementary school[42]. Their petition was denied, and the decision was subsequently upheld by the minister of Public Education. The question brought before the panel revolved around the order to uphold the denial. It was clear that given the broad scope of oversight power conferred upon the minister, it was within his limits to decide who possessed the requisites to run an elementary school and who did not. Thus, this was a matter of discretionary power, and in exercising such power the minister was to make

[40] A. Pubusa, *Note sulle tendenze dell'eccesso di potere*, 1104-5: "Self-evidence thus constitutes the distinction between verifying legality and reviewing advisability, such that even the slightest doubt as to the existence of error, illogicality or injustice (or in any case, if these are not easily and indisputably detectable through additional inquiries) shall justify throwing out the appeal". Sala, *L'eccesso di potere,* 203: "In reality, in order to determine a review of legality, the unreasonableness, disproportion and injustice must be clear ("It is stated that the illogicality or irrationality of an administrative act consists of a macroscopic unreasonableness, the contradictions of which are immediately clear", Sez. VI, 31.03.983, n. 176, in *Rass. dir. farm.,* 1984, 419, cit. in Sala, *L'eccesso di potere,* n. 111): it seems the judge is not looking so much for moderation as he is excess". T.A.R. Aosta (Valle d'Aosta) sez. I, 10 agosto 2017 n. 49: "Selection committees exercise broad technical discretion, and in that regard the scope of an administrative judge's review of legality is limited to the detection of errors leading to illegality because of a violation of procedural rules and excess of power in particular cases – this limit can be identified externally and immediately by reading the records, and could include, for example, erroneous premises, a misrepresentation of facts, clear illogicality". See the reflections by Galetta, *Principio di proporzionalità e sindacato giurisdizionale*, 153-166.

[41] In «Giustizia Amministrativa» (1892/I) p. 552.

[42] Indeed, according to articles 3 and 5 of the organic law of 13 November 1859, the Minister was in charge of overseeing private education "in order to safeguard morality, hygiene, the institutions of the State and public order".

judgements based on the advisability and administrative expediency of the measure: the legality of such judgements was unreviewable.

In any case, according to the rules that the Fourth Chamber had imposed upon itself to limit the scope of its review, in general any administrative act that was lacking a just cause was deemed illegal. More specifically, any discretionary act that had clearly come to pass for reasons that went beyond those intended or even presumed by the law — that is, in violation of the standard and the spirit of the law — was illegal on the grounds of excess of power. The law granted the minister the power to oversee education; therefore, in order to determine whether the minister's order to uphold the denial had been issued within these bounds, the panel could not simply cease investigating once it was established that such an order was an exercise of discretionary power. It had to verify whether there was any reason to suspect that the order had been issued in violation of the spirit of the law.

To that end, the Chamber analyzed the motives cited by the Superintendent and the minister to justify their actions. The panel found that said motives were not supported by the circumstances that emerged in the administrative procedure:

"In exercising its veto power over the opening of schools, the Education Authority based itself on criteria that were different than those established by the law itself; it follows that the ministerial Decree, which as a definitive measure upheld the orders of subordinate authorities, resulted in an excess of power".

This development continued with the case of Dr. Tomellini, who had been reprimanded by the hospital in which he worked in Prato, *Ospedale della Misericordia e Dolce*[43]. The panel denied that there was excess of power when the Provincial Administrative Board (*G.P.A.*) of Florence ruled that "the severe reprimand" levied upon Dr. Tomellini by the hospital was "unjustified and excessive". Article 2, n. 2 of the 1890 law that had created Provincial Administrative Boards established that the Boards would only have jurisdiction over the legality of disciplinary sanctions below the penalty of dismissal imposed upon employees of charitable institutions. The hospital had appealed against the Board's decision because it felt that by judging the reprimand imposed upon Dr. Tomellini to be "unjustified and excessive", the Board had not limited itself to judging the legality of the reprimand, but had exercised judgement "over the use of discretion, that is over the advisability of inflicting the reprimand as punishment".

A reading of the panel's reflections on the matter helps us understand their line of reasoning as they examined how far their review of legality could extend:

If in the recitals of the decision itself (author's note: that issued by the Provincial Administrative Board and contested by the hospital) it is stated that the severe reprimand imposed upon Dr. Tomellini was unjustified and

[43] In «Giustizia Amministrativa» (1904/I) 218.

excessive, it is meant to be understood that it was without reason, illegal, unreasonable and in excess of its powers, nothing more."

According to the panel, this was a review of legality and not of the use of discretion, because an administrative measure that was *without reason, lacking justified and sufficient motives* and thus lacking those characteristics that would lead one to infer that its issuance was founded upon a *just cause* was not in fact *inadvisable*, but rather *illegal*. Thus, the Provincial Administrative Board was well within its bounds to review the legality of such a measure as per article 2, n. 2.

What the members of Council stated here was the result of the intense work that the Chamber had carried out up to that point: it had worked hard to develop the concept of a *just cause* for an administrative act; it had sought to use the very limits imposed by the law when granting discretionary power to establish the *conditions of legality* that an act would have to respect; it had endeavored to define precise rules as to the scope of its review of legality; and it had aimed to verify the *motives* of administrative action. All of these efforts had led to the development of the *principle of self-evidence* as well as the requirement of *sufficient and justified motives*. In sum, this was a coherent system from both a methodological and a conceptual point of view—and it had been developed by the Chamber entirely on its own and through its own initiative, over the course of almost fifteen years of intense work on excess of power[44].

The Chamber referred to reasonableness and fairness in the case of Romani in 1906[45], when it annulled a regulatory provision that had resulted in a public employee being passed over for a promotion in favor of someone of lower rank and position. In this case, the Chamber ruled that the public authority had infringed upon the fundamental rules of fairness and administrative expediency and had failed to conform to the principles of legal logic. This idea of 'infringement of legal logic' captured the Chamber's attempt to evaluate the motives that had gone into such an administrative decision. Indeed, the Chamber had abided by a standard of legal justifiability, according to which the result of the subsequently overturned provision was clearly unacceptable.

While this search for the justifiability of motives was quite evident in the decisions examined thus far, it was actually implicit in all of the judicial review exercised by the Fourth Chamber (and as we have seen, by the Council prior to 1889). What's more, it extended to another aspect as well, in a way that enriched and expanded the possibilities for this organ of administrative jurisdiction to intervene: namely, the sufficiency of motives. Such can be inferred from the decisions on the Caucci appeal of 1898 and an appeal brought by the *Consorzio esattoriale di Mombaruzzo* (a tax collection consortium) in 1903[46]. In these two cases, the motives cited by the public authorities

[44] Sala, *L'eccesso di potere,* 196 et seq.

[45] In «Giustizia Amministrativa» (1906/I) 363 (also in «Giurisprudenza Italiana» (1906/III) col. 358).

[46] In «Giustizia Amministrativa» (1898/I) 51 and in «Giustizia

were justified, reasonable, based on fact and coherent, but they were not held to be sufficient. By citing its own, consolidated jurisprudence, the Chamber clearly indicated which motives could justify a Prefect in denying the conferment of a collectorship. Such criteria thus became legal standards and were incorporated into the law[47]. Indeed, in the summary of its decision, we can read as follows:

"A lower commission cannot be the exclusive standard for evaluating whether it is advisable or not to confirm tax collectors, as one must also and above all consider the exactness of the service and the ability and diligence that the tax collectors themselves have demonstrated previously, as well as their courteousness and moderation with the public. Thus, Prefectorial Decrees that have annulled the confirmation [of tax collectors] solely based on the fact that there were better offers must be considered illegal, even more so when in their Decrees they have explicitly commended the work of the incumbent tax collector".

3.b.3: The rationality of motives

The Chamber adopted a similar approach to its ruling on an issue concerning restoration work on the facade of Milan's cathedral, the Duomo[48]. A disagreement between opinions issued by two commissions had forced the ministry to withdraw authorization for the restoration work in order to submit it to a new, third commission for approval. The Chamber, however, ruled that such a disagreement was not sufficient to suspend the work indefinitely. First of all, the panel examined whether the ministry actually possessed the power to revoke such authorization, and after a subsequent survey of the facts, it decided to annul the measure taken by the ministry. Specifically, it ruled that the ministry had infringed upon rational standards by suspending the restoration work. Though such standards did not derive from formal provisions of objective law, they nonetheless established the ways to use discretionary powers in respect of the spirit and the purpose of the law—and the law had granted the government such power in order to safeguard the country's artistic heritage:

"While it is recognized that the State has the right to revoke authorization, it must at the same time recognize that this power can and must be exercised without offending those rational standards which, though they do not depend on formal provisions of objective law, derive from the general principle that a power must be exercised in conformity with the purposes for which it was granted; [in other words,] the use of power must be consistent with the spirit and the purpose of the law so as not to become arbitrary and

Amministrativa» (1903/I) 173: unfortunately only a summary of the decision was reported in the journal *Giustizia Amministrativa*.

[47] In this context, see the subtle analysis of Sala, *L'eccesso di potere*, 309: "The necessary use of such criteria does not imply their normative transubstantiation, but rather the mere subsumption of them as (elements to define) standards with which to verify acceptability in a given system".

[48] In «Giustizia Amministrativa» (1907/I) 152 (also in «Giurisprudenza Italiana» (1907/III) col. 249).

illegal".

Thus, *the spirit and the purpose of the law* represent *the purpose for which a power was granted*, and the *obligation to conform* to that purpose represents the principle from which *rational standards* are derived. Those standards, in turn, must serve as guidelines for the work of the public authorities, even if they are not contained in *formal provisions of objective law*.

The judicial review exercised by the Chamber extended to the decision-making process—that is, the administrative procedure—and to all of the acts that went into that process. And through the concept of excess of power, the legitimacy, logical coherence and acceptability[49] of that process became fundamental conditions for the legality of administrative action.

3.c: Review of facts

I have been able to highlight how by examining the act itself, the Fourth Chamber—and the Council prior to 1889—was required to exercise a review of facts. The line of reasoning outlined thus far has made this need even clearer. Above all, a common conceptual and methodological thread has emerged between the cases presented as mere excess of power and those that illustrate a misrepresentation of the facts or the contradictory nature of the administrative act. It is important to remember that among the excess of power cases, we found examples of a use of power going beyond the scope of the organ exercising it, the exercise of non-existent powers, and episodes in which the influence of the French experience was clearly noticeable, such as in the decisions on the Concetti, Giannelli and Pandozi appeals and the decision handed down by the Fifth Chamber on the Conti appeal[50].

The subject of our focus was expressed in a coherent form quite early on, specifically in the Vastarini-Cresi decision[51]:

[49] See Sala, *L'eccesso di potere*, 216, 220 and 224.

[50] In «Giustizia Amministrativa» (1897/I) 65; in «Giurisprudenza Italiana» (1905/III) col. 16; in «Giustizia Amministrativa» (1906/I) 98 (also in «Giurisprudenza Italiana» (1906/III) col. 160); in «Giustizia Amministrativa» (1910/I) 445. Among the decisions examined, some were issued by the Fifth Chamber after 1907: indeed this chamber was created by law n. 62 of 7 March 1907 with the specific function of dealing with issues that fell under article 25 of the 1889 law on the Council of State, meaning those issues in which "the Council of State also rules on the use of discretion"; obviously, those sporadic decisions were only taken into consideration when the Fifth Chamber reviewed legality, while decisions relating to any review that examined the advisability of a measure were ignored. On this topic see L. Torchia, *L'istituzione della V sezione con la legge n. 62 del 1907: la «carta giurisdizionale» del Consiglio di Stato* in *Il Consiglio di Stato: 180 di storia* (2011) 177-186.

[51] In «Giustizia Amministrativa» (1892/I) 1. See A. Sandulli, *L'eccesso di potere amministrativo. Il Commento* in G. Pasquini – A. Sandulli (eds.), *Le grandi decisioni del Consiglio di Stato*, pref. di S. Cassese (2001), 47-51.

"*the evaluation of the facts on which the measure is based must not contain anything illogical, irrational or contrary to the spirit of the law*".

In this case, the panel reviewed whether the public authority's evaluation of the facts was done in a logical manner, and not whether such an evaluation was an appropriate use of the authority's discretion. Indeed, the Chamber's very work methodology led it to carry out this review of logicality, which was simply a further specification of its review of motives (the focus of our attention up to this point).

I would like to elaborate on this: the Council felt it could verify whether the factual conditions cited in justifying the use of a power in a given case actually existed; article 37 of the Consolidating Act (*T.U.*) of 1889[52] established that the Fourth Chamber was entitled to request additional inquiries and further clarification from the administrative organ in question; and the Fourth Chamber's review of motives made it clear that its examination of an administrative act included everything that had preceded that act, meaning the whole of the procedural standards which had to be respected in order to issue an administrative measure.

The Chamber applied the principle of self-evidence when examining the whole of the administrative procedure, and by abiding by a standard of acceptability and reasonableness, it could reach a decision on the (un)justifiability and (in)sufficiency of motives. But if the public authority's irrationality was rooted in precise contradictions between the concrete, factual circumstances of the administrative procedure and the measure that was issued, how did the Chamber react?

The quest to clarify these concepts begins with the case of the imbecile Zanon, which came before the Chamber in 1892 through an appeal brought by the Municipality di Legnago[53]. In its decision, the Chamber clearly set out what it was looking for during an examination of the administrative procedure and its records, establishing the following principle:

"*if the claimed facts were deemed to be in contradiction with the facts on record, then we would have a misrepresentation of the facts, which would result in excess of power*".

The municipality of Legnago was appealing against a decision handed down by the Provincial Administrative Board of Verona,

[52] Article 37 of the Consolidating Act includes the provision contained in article 16 of the law that created the Fourth Chamber: "If the Chamber recognizes that the inquiry into the matter is incomplete, or that the facts claimed in the contested act or measure are contradictory to the facts on record, it can request further clarification and the production of documents from the administrative organ in question before deciding on the advisability [of the contested act or measure], or order the organ to carry out further checks, authorizing the parties to assist the organ and produce certain documents if needed".

[53] In «Giustizia Amministrativa» (1892/I) 521.

which had denied that a resident of Legnago—described as having a "short, retarded, irresolute mind, without complications [relating to] a mental disorder"—fell under article 203, n. 10 of the municipal and provincial law requiring the province to provide financial support to poor people who were 'insane'.

The panel examined the medical records and considered the observations made by the director of the mental institution in Legnago where the patient was institutionalized, who felt it was useless and indeed even harmful for the patient to remain in such a facility. The panel argued that the Board's conclusion that article 203 was not applicable to the case as documented on record represented an "erroneous application of the law to the facts on record".

The concept expressed in the decision on the Vastarini-Cresi appeal was developed even further here, creating a basic precedent for cases of excess of power deriving from the misrepresentation of facts:

"if the facts claimed by a decision were found to be in contradiction with the facts on record, or if in those claimed facts circumstances had been withheld that would have been essential to resolving the dispute, then we would have a misrepresentation of the facts, which would result in excess of power".

This was not a review of whether discretion had been used appropriately, because the logic of the Chamber did not concern the advisability of a decision. Rather, the Chamber ascertained the facts which had been cited as the basis of a contested measure (*a*)—either by examining the records or resorting to article 37—and then compared the resulting decision (*b*) to *a*: if it determined that *b* was logically unjustifiable, it would annul it. It did not judge the advisability of the decision, nor did it review the reasons that may have motivated the public authority to use its discretion in a given way; instead, it limited itself to ascertaining whether the method used to evaluate the facts and draw conclusions was logical.

The Chamber was proceeding along a fine line of reasoning to be sure, but it was a line that existed; and by explicitly declaring and codifying this element of logic as one of the legal standards to consider when assessing legality (i.e. conformity to the law), the Chamber was able to maintain its balance, so to speak, as it walked that line.

An important step forward was taken in the decision on the Paradisi appeal of 1896[54]. Article 37 of the Consolidating Act of 1889 provided that the Chamber could request clarification and order new inquiries if it determined that the preliminary inquiries were insufficient or the claimed facts were in contradiction with the facts on record:

"*In the event that following this, it emerges that the authority has*

[54] In «Giustizia Amministrativa» (1896/I) 153 (also in «Giurisprudenza Italiana» (1896/III) col. 203. See Sandulli, *L'eccesso di potere amministrativo. Il commento,* 49.

erred in fact or has claimed unfounded facts, it can lead to annulment due to excess of power, if and to the extent that eliminating the erroneous or false premise would leave the act or provision baseless" [55].

Thus, it is not that the contradiction is the defect justifying annulment, but rather the fact that the administrative act depended on that contradiction. If a new examination of the presumed facts revealed a change in the logical connection linking the circumstances that support the administrative measure, then the measure itself would be lacking a just cause.

The key to this logic can be found in the words "if and to the extent that eliminating the erroneous or false premise would leave the act or provision baseless". Indeed, here we can see confirmation of the parallels between judicial review exercised on the basis of excess of power and that exercised based on a misrepresentation of the facts. Annulment due to excess of power was not connected to the contradictory or illogical nature of a contested measure, or to the fact that it misrepresented the facts, or however else one might describe it: rather, it was the fact that without this misrepresentation, the measure would be left baseless. To cite an unpalatable neologism (in Italian), it was due to its *immotivatezza* (baselessness)[56].

Essentially, if during its review the Chamber determined that there was a lack of justified and sufficient motives as well as a lack of facts that could justify the contested act, then the act would be considered illegal. Specifically, it would be deemed to be lacking the fundamental condition of just cause, or to go beyond the intended legislative purpose of conferring such a power on a public authority (e.g. the discretionary power of declaring an act in the public interest).

The similarities between the concepts applied in the cases of excess of power and those in cases of misrepresentation of facts are particularly clear when analyzing two appeals brought in 1905, one by the Municipality of Fluminimaggiore and the other by the Municipality of Monsammartino[57]. In both cases, the Council

[55] "Pursuant to article 24, the Fourth Chamber must consider the facts as established in the contested decision. This rule is subject to two exceptions, which are specified in article 37 of the law on the Council of State: one is if the Chamber determines that the inquiry is insufficient, while the other is if it is determined that the claimed facts are contradictory to the facts on record. In both cases, the Fourth Chamber can ask the administrative organ in question for further clarification or order new verification; if following that it should emerge that the authority has erred in fact or has claimed non-existent facts, then that may give rise to annulment due to excess of power …".

[56] The author of this important decision was Carlo Schanzer: see Zoli, *Cenni biografici dei componenti la magistratura del Consiglio di Stato*, in *Scritti in occasione del centenario del Consiglio di Stato* (1932). See G. Melis, *Schanzer, Carlo* in G. Melis (ed.), *Il Consiglio di Stato nella storia d'Italia. Le biografie dei magistrati (1861-1948),* (2006) 699-723: about this decision 707 and nn. 32-33 e Id., *voce 'Schanzer, Carlo',* in I. Birocchi, E. Cortese, A. Mattone e M.N. Miletti (eds.) *Dizionario Biografico dei Giuristi Italiani (XII-XX secolo)* (2013) 1825-1826.

[57] In «Giustizia Amministrativa» (1905/I) 657 (summary of decision): "It is a firm principle of jurisprudence that discordance between the facts claimed

examined the facts on record and determined that there was a logical discrepancy, reconnecting it to excess of power through the concept of lack of justification.

The linear nature of this reasoning can be deceptive, as it is anything but simple to identify the concepts of self-evidence and clear contradiction in the case law.

Indeed, in a decision issued on an appeal brought by the Municipality of Villanova d'Asti[58], the Chamber determined that the contested measure was erroneous and arbitrary due to a missing logical connection between cause and effect, thereby intrinsically infringing upon the law. Thus, by stating that this was a case of excess of power, the Chamber seemed to be directly connecting its illegality to a contradiction.

The contradiction in the case of the *Cav.* Corte appeal[59]—or rather, its irrationality—did not emerge from the contested measure itself, but rather from the entire procedure that the appellant had been subjected to over the course of the six months leading up to the measure. The appellant was an employee at the Ministry of War, and in 1902 he was summoned to respond to disciplinary offenses. After six months the procedure was interrupted by a decree in July of the same year, which ordered that *Cav.* Corte retire. The panel declared that this order presented a clear contradiction, such that it gave rise to an abuse or excess of power. For this reason, it invalidated the legality of the contested order:

"Even if in itself it is legal, the exercise of the full powers granted to the government in the public interest [must also serve] the interests of justice, and thus it must be such that every single act, and the fairness of the procedure, leaves not even the faintest doubt that an arbitrary act has been committed."

Therefore, in this case the excess of power was inferred from the clear irrationality of the procedure.

Over the course of ten years—namely, between 1892, year in which the company *Società anonima dei Tramways di Napoli*[60] presented

in a measure and those that actually occurred, when both the former and the latter are crucial, results in an excess of power or in a substantive flaw in reasoning, leading to the invalidity of the measure"; and in «Giustizia Amministrativa» (1905/I) 630.

[58] In «Giustizia Amministrativa» (1897/I) 390: "It is undeniable that the contested decree presents a contradiction between its factual and legal premises, which constitute both the reason for and the illegitimate aim of the measure itself; according to the jurisprudence of the Fourth Chamber, such contradiction constitutes one of the cases of excess of power, because with no logical connection between cause and effect [the measure] is erroneous and arbitrary, and thus an intrinsic violation of the law…"

[59] In «Giustizia Amministrativa» (1903/I) 82 (also in «Giurisprudenza Italiana» (1903/III) col. 386).

[60] In «Giurisprudenza Italiana» (1893/III) col. 35.

an appeal, and 1902 with the Rivera appeal[61] — the Chamber developed a concept of contradictoriness that could arise within a single measure or between successive measures. Although this concept derived from the kind of review required in cases of misrepresentation of facts, conceptually it came to more closely resemble the notion of a lack of motives.

Indeed, in the first case the Chamber annulled the ministry's decision because it was found that based on the facts of the case, the line of reasoning employed by the ministry clearly lacked any logical connection to its subsequent decision; and even if the Chamber did not explicitly state as much, it seemed to harken back to the lack of factual premises that we saw with cases of misrepresentation[62]. In the second case, however, which dealt with a series of contradictory measures issued by the Ministry of War, the Council's argument seemed to associate the contradictory nature of the measures to a lack of justified motives rather than a lack of factual premises[63].

Whether reviewing motives or reviewing facts, the Chamber reached its conclusions on the illegality of an administrative act through a method that it had developed on its own, meaning independently from any explicit provision of the law[64]: namely, it

[61] In «Giustizia Amministrativa» (1902/I) 449.

[62] The *Società anonima dei Tramways di Napoli* had appealed to the Ministry of Public Works against a prefectorial decree which had approved regulation of the use of mechanical traction systems for tramways. The company had claimed that the decree was null on the basis of clear illegalities, but the Ministry had not intervened, putting the decision to the Prefect: "it is in itself clear that the decision taken by the Ministry to refrain from adopting important measures, let alone the annulment or even suspension of the regulation, after having expressly declared that this regulation was in many parts illegal, implicates excess of power".

[63] Lieutenant Colonel Rivera was the subject of a good five orders issued by the Ministry of War over the course of just a few weeks: he had first been promoted to colonel and appointed commander of an infantry division, then his promotion and consequently his command were revoked, but following that he was reinstated to the rank of colonel, only to be placed in reserve but a week later. The Chamber had felt authorized to examine the situation more closely and had concluded that this sequence of orders "constituted a series of discordant acts, the last of which does not appear to be exactly in keeping with the promise and the aims of the law", that is, to promote the worthy and remove the untrustworthy from active service. Thus, the Chamber concluded: "the completed inquiry does not call into question facts or evaluations; rather, by accepting the facts as they truly unfolded at the hands of the administrative authority, it remains fully within the realm of objective law. It can thus be determined that the cause cited for issuing the contested order was not the one permitted by law. And this affirmation, which essentially has been deduced from the clear contrast in the acts mentioned above, reveals a most evident demonstration of excess of power".

[64] C. Calabrò, *La discrezionalità amministrativa nella realtà d'oggi*, 1571, on the subject of judicial review of discretionary power: "The logical aporia seems insurmountable: indeed, on the one hand it is claimed that there is no specific law; on the other hand it is stated that the law requires the Administration to

established a logical connection. If there were incoherencies, contradictions or shortcomings in the steps that had been taken by the public administration leading up to the issuance of the contested act, or if the procedure was found to be unacceptable or unreasonable in any other way, then the Chamber would reach the conclusion that the culmination of said procedure, that is the act in question, was illegal. In short, it would be struck down on the grounds of excess of power.

A prime example in confirmation of the above can be found in the review of the seriousness of the facts of a case, which was a type of review that by its very nature could not result in a positive or negative judgement unless specifically provided for by law. For this reason, the Chamber was theoretically forbidden from carrying out this type of review, as it was only to be a judge of legality[65].

However, in a good number of rulings, which almost always had to do with punitive measures, or disciplinary sanctions imposed upon an employee, or government intervention in the case of poor administration on a local level[66], the Chamber would follow the same course of logic it used in ruling on misrepresentation of the facts. And if through that logic it emerged that there was a clear contradiction or illogicality in the facts on record, the Chamber would then reserve itself the authority to verify whether the claimed disproportion between the facts of the situation and the administrative act was rooted in a misrepresentation of the facts. If it were to determine that that was the case, it could then rule that a measure taken as a result of misrepresented circumstances was disproportionate and thus illegal.

A comprehensive look at the Council of State's experience

comply with certain rules and criteria. ... the premise for the jurisdictional reviewability of an exercise of administrative will is that such exercise is carried out *sub lege*. It thus follows that only when a law refers—explicitly or not—to those rules and those criteria, in themselves juridically irrelevant, do they take on their proper relevance; [this occurs] in the moment when the agent acts, and, once [the criteria] are acknowledged, during the jurisdictional review. However, it must be admitted that justice is not always served through pure logic, and that … often the right solution is sought and found by adhering to widespread convictions of the social conscience, even if logically speaking they have no prescriptive force with which to support themselves".

[65] On this topic, see the analysis in Presutti, *Discrezionalità pura e discrezionalità tecnica*, «Giurisprudenza Italiana» (1910/IV) col. 10.

[66] Ric. Marescalchi in «Giustizia Amministrativa», (1895/I) 338; ric. Golfetto in «Giustizia Amministrativa» (1902/I) 24; ric. Calabrò in «Giustizia Amministrativa» (1902/I) 57; ric. Parmigiani in «Giustizia Amministrativa» (1902/I) 414; ric. Sigismondi De Ritis in «Giustizia Amministrativa» (1904/I) 377; ric. Mazzeo in «Giustizia Amministrativa» (1904/I) 586 (also in «Giurisprudenza Italiana» (1905/III) col. 56); ric. Bona in «Giustizia Amministrativa» (1904/I) 648 (also in «Giurisprudenza Italiana» (1905/III) col. 106); ric. Orsini in «Giustizia Amministrativa» (1905/I) 627; ric. Mavella in «Giustizia Amministrativa» (1905/I) 494 and in La Legge - Repertorio Generale (1905) col. 301 (where it is cited as *Mariella ed altri*) and ric. Barone in «Giustizia Amministrativa» (1906/I) 427.

before and after 1889 provides a clear demonstration of the historical unity and conceptual continuity that characterized the work of this body in its review of legality. Above all, however, it shows just how much the evolution of the concept of excess of power after 1889 depended on concepts that had been developed in the preceding period.

In Giovanni Sala's essay, which I have cited several times, the author states that the entire concept of excess of power is captured in its function as "a tool with which to verify the acceptability of administrative decisions". It is a verification process that "revolves around the reasonableness and sufficiency of the justification"[67] cited for arriving at a given decision. And in his opinion, excess of power no longer includes those cases in which an administrative act deviates from the purposes intended by the law, as he views this as an outright violation of the law. Sala reaches these conclusions through a series of reflections which are worth examining here:

"Excess of power thus occurs when, in the exercise of a discretionary power, the administration oversteps the bounds of acceptability with its decisions in light of current assessment criteria, standards of logicality and reasonableness which are innate limits to any manifestation of public power. …perhaps due to the very general nature of the obligation to reasonableness, its source is not to be traced so much to a specific legislative provision, but rather to the principle of 'legality as justiciability' of public power; and therefore, if one does indeed want a textual reference, [it can] certainly [be traced] to article 97 but also article 113 of the Constitution, and through them, to the root of the idea itself of the legality of power – [that is, it is] legal because it is rational"[68].

The reference to the constitutional principle of impartiality can be connected to the words of the first president of the Fourth Chamber:

" … in the restrictions, just as in the favors that the administration may bestow upon individuals in the general interest, it must always maintain equal measure; that is, that of impartiality, which is the supreme idea of justice"[69].

It is striking to see the similarities between Sala's observations—which refer to the concept of excess of power in our system today—and a concept expressed by the very first president of the Fourth Chamber, not to mention the similarities with what emerged from the actual jurisprudence produced by the Council of State between 1865 and 1910. It speaks to the modernity of the Council of State and its spirit as a defender of individual rights, which it was able to express by creating excess of power as grounds for illegality.

4. Some remarks on the Council of State

The procedural requirements created by the Chamber could be

[67] Sala, *L'eccesso di potere*, 220.

[68] Sala, *L'eccesso di potere,* 203-206.

[69] Spaventa, *Per l'inaugurazione,* 453-4.

established through the formulation of principles. Such was the case with the Agazzotti[70] decision in 1903 as well as the decision in 1905 on the Mavella[71] appeal: in both instances, the Chamber focused on the need for the public administration to document the reasons for its act, and to demonstrate the logical connection between those reasons and the act, not only to guarantee its reasonableness and thus legality, but also its transparency, as we saw above in the case of *Cav.* Corte in 1903.

By specifying rules on how to document the reasoning behind an administrative act, the Council was clearly focusing its attention on procedure — the connection to the Chamber's stance on justified and sufficient motives is obvious. But the Council's focus emerged even more clearly in how it approached certain cases with particular circumstances to consider: one such example was the Bechelli-Sabatini[72] case of 1903. In this case, the Chamber was concerned about the possibility that the organ of public administration that had issued the contested measure had done so without being properly informed beforehand, due to some irregularities in the minutes of a disciplinary committee meeting. Another example was an appeal brought by the Municipality of Amalfi[73] in 1908: here, the Chamber was concerned that the procedural irregularities caused by the public administration itself might harm the interests of citizens. Thus, it established a principle that had already been set forth in the decisions handed down on the Ciccarelli appeal of 1893 and the Pensa appeal of 1896[74]: namely, that the public administration could not modify interests which had been established by a previous administrative act unless the same procedural guarantees used in the original act were also used in the new one.

Lastly, in the case of the appeal brought by the Municipality of Acquaviva d'Isernia[75] in 1909, the Chamber imposed a procedural rule on the ministry that had issued the contested provision by establishing that it (the ministry) could not reach a decision on the case without first ordering a comprehensive administrative inquiry. In this way, the Chamber directly intervened in the preliminary inquiry phase of administrative procedure, addressing what would turn out to be a precursor of a form of excess of power that has been described in contemporary doctrine as being the most «stimulating»[76] of all forms to have emerged in recent years, namely that of a flawed preliminary

[70] In «Giustizia Amministrativa» (1903/I) 106.

[71] In «Giustizia Amministrativa» (1905/I) 494.

[72] In «Giustizia Amministrativa» (1903/I) 226.

[73] In «Giustizia Amministrativa» (1908/I) 404.

[74] In «Giurisprudenza Italiana» (1893/III) col. 158 and in «Giurisprudenza Italiana» (1896/III) col. 298.

[75] In «Giustizia Amministrativa» (1909/I) 40.

[76] Sala, *L'eccesso di potere,* 183 and notes 35 and 36, as well as F. Modugno – M. Manetti, *Eccesso di potere - II) Eccesso di potere amministrativo*, in Enciclopedia Giuridica Treccani (1989) 8.

inquiry (*difetto di istruttoria*).

Again on the subject of preliminary inquiries, in the Castellani[77] appeal of 1895, the Chamber instructed a mayor how to gather information, specifically in what order it was to be gathered and what weight was to be attributed to his findings, while also telling him which primary interests he was to safeguard in the interest of the municipality. In an appeal brought by the Municipality of Sciacca[78] in 1902, the Chamber gave the Provincial Administrative Board instructions on which assessment criteria to adopt, as well as the consequent facts to take into account and in what order. However, perhaps the most indicative — and for the reader, the most amusing — instance of the Chamber's didactic approach was the decision handed down on an appeal brought by the Municipality of Pelago, wherein the Chamber felt it was necessary to formally censure a mayor for the acrimonious and unbecoming tone of a letter he had sent to the town's medical officer. Indeed, the Chamber saw no valid reason in terms of the public interest to justify such rudeness[79].

To conclude our examination of the Council of State through the lens of excess of power, we must focus our attention on what could be called the Chamber's empirical approach. Indeed, this was implicit in all of its work and was perhaps its most distinguishing trait. For example, such an approach led to the fundamental notion that the rights of citizens could be safeguarded by placing administrative procedure at the center of the effort to impose legal rules on administrative activity. This was a direct reflection of the Council's concern about the situation that was unfolding in Italy at the time, which was characterized by growing conflict between the public authorities and private citizens.

There were several examples in which the Chamber availed itself of an original concept that could be described as an inopportune use of otherwise legal authority. It started back in 1897 with an appeal brought by the Municipality of Canosa di Puglia[80]. A close examination of the records led the Chamber to conclude that a Town Council's decision to shut down an office — which it had the discretionary power to do — was reached not because it wanted to save the municipality money, but rather to rid itself of the person who held that office. Another decision handed down on an appeal brought by the Municipality of Villanova Monferrato[81] in 1899 was also a clear example of the empirical spirit mentioned above. But the concept would gradually be clarified in a series of three decisions handed

[77] In «Giurisprudenza Italiana» (1895/III) col. 241.

[78] In «Giustizia Amministrativa» (1902/I) 356.

[79] In «Giustizia Amministrativa» (1904/I) 129: "But no reason of public service nor motive of general interest certainly justifies the acrimonious and unbecoming form in which Mayor Zanobini responded to the absolutely appropriate letter addressed to him from Dr. Bandini".

[80] In «Giustizia Amministrativa» (1897/I) 517.

[81] In «Giustizia Amministrativa» (1899/I) 227.

down between 1900 and 1905[82], wherein the Chamber affirmed that while a measure taken on the basis of erroneously presumed circumstances could be annulled at any time by the organ of public administration that had enacted it (as established by the municipal and provincial law and its implementing regulation), several factors would have to be taken into account. Namely, in exercising its power of repeal, the public authorities would have to consider the amount of time that had passed, the concrete factual circumstances, the relationships that had been formed on the basis of the illegal measure and the commitments that had derived from said relationships. Furthermore, there was something of a 'statute of limitations' to consider, to borrow from the sphere of private law: when the public authorities established relations with citizens, those relations had to be stable if the general interest was to be served. In light of these factors, the Chamber concluded that if an organ of the public administration annulled its own illegal measure, it was possible that the annulment itself was illegal due to an inopportune use of otherwise legal authority.

It is clear that the Chamber was concerned with matters that went beyond a mere ascertainment of the legality — however substantive — of administrative acts: indeed, its reflections often bordered on an evaluation of fairness. Nonetheless, the Fourth Chamber would oscillate many times in its constant effort to determine its scope and direction. Two cases can be cited as evidence of such: the Municipality of Rosolina appeal in 1898, and that of the Municipality of Chiaravalle in 1900[83]. As regards the former case, based on the investigative approach employed by the Chamber in its examination of the records, it was apparent that the Chamber placed its focus on the concrete situation and its human consequences: as a result, the scope of its review probably crossed over to the use of discretion in this case. In the latter example, while the decision was essentially a bureaucratic text that read like an administrative tribunal ruling, the panel's moral indignation was apparent in certain comments that went beyond matters of legality.

As demonstrated by the two cases cited above, defining the boundary between legality and advisability when it came to the exercise of discretionary power was an inherently tense undertaking. However, there is evidence of other cases in which different forms of tension were even more pronounced, again due to the non-formalistic approach adopted by the Chamber and its focus on the concrete circumstances and legal consequences of the issues submitted to its review.

The tendency to impose legal rules on administrative actions as a way to further protect the interests of citizens in their dealings with

[82] Ric. Monteverde in «Giurisprudenza Italiana» (1900/III) col. 287; ric. Sogno in «Giustizia Amministrativa» (1903/I) 379 and ric. Vergi in «Giustizia Amministrativa» (1905/I) 312 (also in «Giurisprudenza Italiana» (1905/III) col. 339).

[83] In «Giustizia Amministrativa» (1898/I) 81 and (1900/I) 474.

the public authorities could be seen not just in the pre-1889 period[84], but indeed as far back as the work of the organs in charge of conducting internal judicial review during the revolutionary and Napoleonic periods[85].

In other words, it can be said that ever since it began exercising its function of internal judicial review, 'administrative justice' in Italy has also sought to be a protector of individual rights.

As mentioned above, there was tension between where the sphere of legality ended and that of interpreting administrative discretion began; this also emerged in the way the Chamber itself interpreted the subject and purpose of its jurisdiction. The Chamber's evident concern for individual interests, contrasted with the interests of the administration, was a clear indication that both objective and subjective needs were informing the Chamber's work. Di Modugno argued as much in his essay on Spaventa's relationship with—and influence on—administrative jurisdiction:

" … the involvement and consideration of such interests (author's note: private interests affected when administrative power is exercised) … by definition excludes both the necessarily subordinate nature of private interests in the face of the public interest and the very possibility of safeguarding them even temporarily or indirectly" [86].

There are several valid examples of when private interests were the main focus of the Chamber's judgements. An early case dates back to an appeal brought by the Municipality of Apparizione[87] in 1894, where the panel made a clear effort to clarify the factual circumstances of the matter in order to safeguard a schoolteacher whose interests were in conflict with those of the municipality. Another example could be seen in the previously cited appeal brought by the Pensa sisters. The decision in the Le Bosfe[88] appeal was an even clearer example of safeguarding a citizen's interests, as the Chamber requested much

[84] A. Corpaci, *L'eccesso di potere*, 82-83: "... the identity of the Council of State is built and expressed through its work of juridicizing the administration, of reconstructing, interpreting and systematizing the legislation with which it is concerned. This work leads to the formulation of principles and rules that border on logical-legal schemes, from which the Council must draw inspiration and to which it must conform. … work that is applied and structured in accordance with the interests affected by the exercise of administrative action".

[85] P. Aimo, *Le origini della giustizia amministrativa*, 432: " … it has been established how in their jurisdictional practice, administrative tribunals adhered to neutral and substantially moderate judgement criteria, to principles of impartiality when considering the respective arguments, to principles of equitable and impartial evaluation of the different interests in play. In some circumstances they even demonstrated explicit favor towards the weaker party, that is the private appellant".

[86] N. Di Modugno, *Silvio Spaventa e la giurisdizione amministrativa in un discorso mai pronunciato*, «Diritto processuale amministrativo» (1991) 421.

[87] In «Giustizia Amministrativa» (1894/I) 36.

[88] In «Giustizia Amministrativa» (1900/I) 367.

stronger grounds than those that had been cited for the dismissal of an employee due to moral unworthiness. A similar approach was adopted in the Koch[89] case: although it was clear the panel did not approve of the appellant's conduct, it nonetheless decided to annul his dismissal because the facts cited as grounds for the dismissal were still being ascertained as part of a pending civil case.

I could cite many other cases, but what really interests me is the way that this concern for individual interests tended to shift the scope of the Chamber's judicial review from the administrative act itself to the relationship between the administration and the citizen whose legal sphere was affected by that act. Indeed, this created oscillations in the Chamber's jurisprudence, as in some cases it extended the scope of its review to include the entire decision-making process, while in others it limited itself exclusively to a review of the contested act[90].

Thus, another oscillation can be identified: that between a review limited to the act and one that was broadened to include everything around the act. In other words, when the public administration established a relationship with a private citizen, tension arose between the need to guarantee efficiency in government and the imperative to protect individual interests from the imposition of "greater restrictions than those that are necessarily required by the general interest"[91].

5. Conclusions

We have highlighted the fundamental developments and

[89] In «Giustizia Amministrativa» (1905/I) 234 (also in «Giurisprudenza Italiana» (1905/III) col. 316).

[90] M. Nigro, *Problemi veri e falsi della giustizia amministrativa dopo l'istituzione dei TAR*, «Rivista trimestrale di diritto pubblico» *(*1972) 1839: "In reality it is difficult to capture a precise and constant line of development or regression in the Council of State's jurisprudence: when exercising its jurisdictional review of excess of power, in the same period decisions which demonstrated total openness to the substantive facts alternated with decisions in which the review was limited exclusively to the act itself. That undeniable condition of perplexity that afflicts jurisprudence is now an indication of the tension that can be seen when it comes to excess of power—tension between the need, depending on the type of appeal, to adhere to the act, to the structure of the act or at most to the relationship between the act and other formal manifestations of administrative authority; and the need to review the entire period in which administrative power has been exercised".

[91] S. Spaventa, *Per l'inaugurazione,* 453. About the role of Romagnosi: L. Mannori, *Uno Stato per Romagnosi. I. Il progetto costituzionale* (1984); G. Cianferotti, *Storia della letteratura amministrativistica italiana I* (1998), 204-205, 223-224; F. Merusi, *Gian Domenico Romagnosi fra diritto e processo amministrativo*, «Diritto processuale amminisitrativo» 4/2011, 1222-1259; Id., *Il diritto amministrativo di G.D. Romagnosi (1814) letto da F. Benvenuti (1969)*, in «Amministrare» (1/2015) 19-29; M. Mazzamuto, *Gian Domenico Romagnosi inventore del diritto amministrativo?,* «Diritto e Società» (4/2016) 705-736;

concerns that acted as guides in the Council of State's jurisprudence in its first twenty years of existence, and what has emerged is that administrative procedure lay at the core of its jurisdiction. Essentially, the debates and legislation of recent decades have continued to revolve around this very same issue. By imposing legal rules on administrative activity, the Council has sought to protect the interests of citizens. This evolution in the Council's review of excess of power was even recognized by Corrado Calabrò, Chamber President in the Council of State. Indeed, he noted that in accordance with law n. 241 of 1990, a breach of procedural rules would now be considered a violation of law due to excess of power. This led him to the conclusion that there was a new case in which excess of power could be claimed, namely that in which:

"*an allegedly participatory interest was deemed irrelevant and thus excluded from the procedure, as well as [cases in which] there was a failure to take such interest into consideration*"[92].

The Council has provided the Italian legal system with a concept of illegality that we could call 'irregularity in the decision-making process'. It is rooted in a principle that can been summed up as follows: the legal exercise of power is such when it is based on the rationality, logicality and necessity of procedural rules, all of which must emerge in the justification of the administrative act.

Many forms of excess of power became violations of the law[93] thanks to the 1990 law on administrative procedure. In sum, it can be concluded that an analysis of the Council of State's jurisprudence from over one hundred years ago:

"*confirms the tendency of lawmakers to regulate administrative procedure by adopting stances declared praeter legem by jurisprudence and doctrine*"[94].

But if some concepts developed through jurisprudence have been adopted by lawmakers such that they have become potential violations of the law, does this not prove just how fluid these concepts are? Does this not prove how irreducible they are to a line reasoning—however broad that reasoning may be—whereby the acceptability of a measure is commensurate with standards of reasonableness?

We could propose an interpretation of excess of power whereby its substance is not to be found in the concept itself, but rather in the explanations provided by the organ that created it as it examines each individual case. Indeed, through the concept of excess of power, the Council of State has distinguished itself and confirmed its role in the following ways:

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[92] C. Calabrò, *La discrezionalità amministrativa*, 1576.

[93] F. Merusi, *Ragionevolezza e discrezionalità*, 29-30. See also Pietro Gasparri, *voce 'eccesso di potere (dir. amm.)'*, in *Enciclopedia del diritto* 14, Milano 1965, 124-135, especially 133-134 and A. Sandulli, *Il commento*.

[94] G. Sala, *L'eccesso di potere*, 183 and see also G. Paleologo, *Silvio Spaventa e la IV Sezione del Consiglio di Stato*, «Il Consiglio di Stato» (1990/II) 1222.

- by taking into account individual rights in the exercise of its jurisdiction since the very beginning (a jurisdiction which lawmakers had foreseen as a protector of objective legality[95]);

- by adopting an empirical approach which, partly through an examination of questions of fact, goes so far as to border on a review of fairness;

- by focusing on procedure and the validity of the decision-making process when exercising its judicial review and determining its methodological rules;

- by opening up new areas to consider when reviewing legality and bringing them to the attention of lawmakers.

Thus, excess of power cannot be pinned down to one single concept, nor should the continuity among its various manifestations be understood conceptually; rather it must be examined from a historical perspective on a case-by-case basis. It is there that we can see how excess of power has characterized the work of the Council of State more than any other issue over the course of its existence.

To a legal historian, this is certainly a very stimulating challenge. And it only serves to confirm that the substance of some legal concepts must be found in their concrete, historical manifestations, through a well-founded study of case law that respects the true context in which such concepts arose and developed[96].

[95] See G. Barbagallo, *Le grandi decisioni del Consiglio di Stato. Notazioni su una ricerca in corso*, «Le carte e la storia» (1999/2), 64-66, especially 64. This approach is further confirmed by the decisions handled by the Court in the late 30's on racial laws: see A. Patroni Griffi, *Il Consiglio di Stato e il regime fascista. Il commento*, in G. Pasquini – A. Sandulli (eds.), *Le grandi decisioni del Consiglio di Stato* (2001) 176-180, especially 177-179 and G. Melis, *Il Consiglio di Stato: note sulla giurisprudenza*, in G. Melis, *Fare lo Stato per fare gli italiani. Ricerche di storia delle istituzioni dell'Italia unita* (2014) 163-230, especially 194-198.

[96] A. Sandulli, *L'oracolo del diritto amministrativo: il Consiglio di stato nell'esercizio della funzione giurisdizionale*, «Le carte e la storia» (1999/2), 55-63. See the reflections by Luigi Lacchè and Massimo Meccarelli, *Introduzione* in *Storia della giustizia e storia del diritto, Prospettive europee di ricerca* (2012), 7-15 especially 7-10 and, in the same compilation of studies, P. Costa, *Di che cosa fa storia la storia della giustizia? Qualche considerazione di metodo*, 17-43.